M153

CYCLOPEDIA

OF

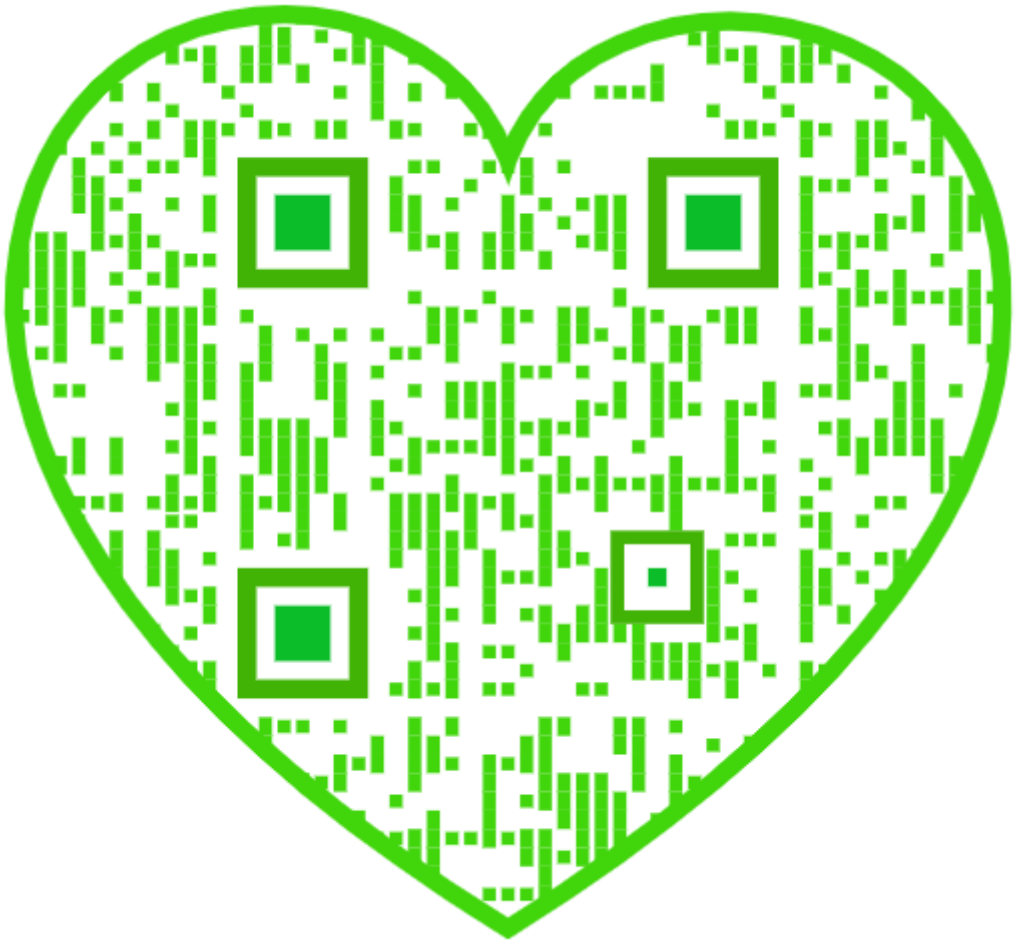
LAW AND PROCEDURE

WILLIAM MACK
EDITOR-IN-CHIEF

VOLUME XXIV

830246
29/7/07

NEW YORK
THE AMERICAN LAW BOOK COMPANY
LONDON: BUTTERWORTH & CO., 12 BELL YARD
1907



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J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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Dean of College of Law, University of Illinois *

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I. DEFINITION AND GENERAL NATURE.

A judicial sale is one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell;[1] one made by a court of competent jurisdiction, in a pending cause through its authorized agent.[2] A sale under an order or decree of court is a judicial act. The court is the vendor, and the officer conducting the sale is the mere agent of the court. The sale is a transaction between the court and the purchaser.[3] A sale is not a judicial sale, properly speaking, unless it is one made on an order of the court and subject to confirmation by the court.[4] Proceedings for judicial sales are ordinarily *in rem*.[5]

II. JURISDICTION AND POWERS OF COURTS.

In order that a judicial sale may be validly made it is necessary that the court by which it was ordered shall have had the general power to decree a sale, and that in a particular case the jurisdiction of the court over the subject-matter shall have been acquired in a proper manner.[6] A court having jurisdiction to decree a

1. Williamson *v.* Berry, 8 How. (U. S.) 495, 547, 12 L. ed. 1170 [*quoted* in Lawson *v.* De Bolt, 78 Ind. 563, 564].

A sale under a decree of court is judicial. — Chew *v.* Hyman, 7 Fed. 7, 10 Biss. 240.

2. McAllister *v.* Harman, (Va. 1902) 42 S. E. 920 [*citing* Alexander *v.* Howe, 85 Va. 198, 7 S. E. 248; Terry *v.* Coles, 80 Va. 695].

3. Dawson *v.* Litsey, 10 Bush (Ky.) 408; Bolgiano *v.* Cooke, 19 Md. 375; Glenn *v.* Clapp, 11 Gill & J. (Md.) 1; Anderson *v.* Foulke, 2 Harr. & G. (Md.) 346; Hurt *v.* Stull, 4 Md. Ch. 391; Harrison *v.* Harrison, 1 Md. Ch. 331; Sewall *v.* Costigan, 1 Md. Ch. 208; Gibbs *v.* Cunningham, 1 Md. Ch. 44; Andrews *v.* Scotton, 2 Bland (Md.) 629; Parrat *v.* Neligh, 7 Nebr. 456; Armor *v.* Cochrane, 66 Pa. St. 308.

4. *Arkansas.*— Rowland *v.* McGuire, 67 Ark. 320, 55 S. W. 16.

California.— See Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643.

Georgia.— Doyle *v.* African Methodist Church, 43 Ga. 400, holding that a sale under an agreement of the parties, which is made the judgment of the court, is not a judicial sale.

Kentucky.— Busey *v.* Hardin, 2 B. Mon. 407.

Maryland.— Harrison *v.* Harrison, 1 Md. Ch. 331; Andrews *v.* Scotton, 2 Bland 629.

New York.— Christie *v.* Gage, 71 N. Y. 189, holding that a conveyance by a religious corporation in pursuance of an order of court obtained on its application is not a judicial sale.

North Carolina.— Mason *v.* Osgood, 64 N. C. 467.

Virginia.— Ware *v.* Starkey, 80 Va. 191, holding that a sale by a debtor in his own name was not a judicial sale, although bonds for the purchase-money were made payable to commissioners appointed to make sale of the property, and the sale was approved by the court. See also McAllister *v.* Harman, (1902) 42 S. E. 920.

United States.— Williamson *v.* Berry, 8 How. 495, 12 L. ed. 1170; Smith *v.* Arnold, 22 Fed. Cas. No. 13,004, 5 Mason 414.

Where a cestui que trust contracted to sell and the court approved the contract and directed the sale to be made, it was not a judicial sale. Christian *v.* Cabell, 22 Gratt (Va.) 82.

Execution sales are not judicial sales, as they are not ordinarily required to be confirmed. Dawson *v.* Litsey, 10 Bush (Ky.) 408; Forman *v.* Hunt, 3 Dana (Ky.) 614. And see EXECUTIONS, 17 Cyc. 1233 note 76.

A sale of lands under a decree of the orphans' court is a judicial sale. Vandever *v.* Baker, 13 Pa. St. 121; Moore *v.* Shultz, 13 Pa. St. 98, 53 Am. Dec. 446.

5. Florentine *v.* Barton, 2 Wall. (U. S.) 210, 17 L. ed. 783; Beauregard *v.* New Orleans, 18 How. (U. S.) 497, 15 L. ed. 469; Grignon *v.* Astor, 2 How. (U. S.) 319, 11 L. ed. 283.

6. Chambers *v.* Jones, 72 Ill. 275; Rucker *v.* Moore, 1 Heisk. (Tenn.) 726; Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172.

Where land lies in two counties the court which first assumes jurisdiction under the Pennsylvania act of June 13, 1840, and whose mesne or final process has made the first

judicial sale has all the incidental powers necessary to accomplish its purpose.[7] The power of a court of chancery to sell the subject of litigation rests on the same foundation as the like power of maritime courts.[8] Where a sale is made by order of a court of limited jurisdiction the proceedings must show on their face that the prerequisites of the law have been strictly complied with.[9] A statute authorizing the courts to order a sale of property owned by two or more persons when a sale will promote the interests of the owners does not give them power to order a sale of property owned solely by an individual for the purpose of paying debts.[10] In Maryland the statute gives the court power to order a sale before final decree where it is satisfied that at the final hearing a sale would be ordered,[11] and in Virginia also the courts have ordered sales by interlocutory decree.[12]

III. WHAT MAY BE SOLD.

In general any legal interest in property, either real or personal, may be sold.[13] But an equitable title should not be decreed to be sold; if a sale be proper the court should first direct the legal title to be perfected and then decree a sale of that.[14] Where, in a suit to sell a debtor's land, it appears that one of the tracts of land charged with the liens of the several judgments against such debtor is also charged with a specific lien exceeding in amount the value thereof, having priority over all other liens thereon, the court may properly decree the sale of other lands of the debtor, without decreeing a sale of the tract charged with such specific lien.[15] Where land is to be sold for the payment of debts or claims only so much as is necessary for that purpose should be sold, and it is error to order a sale of the whole unless this is necessary to pay the debt, or the property is indivisible so that less than the whole cannot be sold without injury.[16] A sale of

actual seizure of the land, is not entitled to exclusive control thereof until sale and distribution of the proceeds, but another court may assume jurisdiction of proceedings for sale under another claim. Miller *v.* Lash, 4 Pa. Super. Ct. 292.

Satisfaction of debt while proceedings pending.— The fact that pending a suit to subject land to the payment of a judgment the judgment is satisfied of record does not deprive the court of further jurisdiction so as to render a decree of sale void. Oliver *v.* Riley, 92 Iowa 23, 60 N. W. 80.

7. Beatrice Paper Co. *v.* Beloit Iron Works. 46 Nebr. 900, 65 N. W. 1059; Marsh *v.* Nimocks, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715; Baker *v.* Baker, 1 Rich. Eq. (S. C.) 392.

8. Crane *v.* Ford, Hopk. (N. Y.) 114, holding that the court of chancery has power to sell the subject of litigation, although no sale is prayed in the bill, whenever a sale becomes necessary to preserve the interests of the parties.

9. Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 436.

10. Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330.

11. Cornell *v.* McCann, 37 Md. 89; Dorsey *v.* Dorsey, 30 Md. 522, 96 Am. Dec. 633; Dorsey *v.* Garey, 30 Md. 489.

12. Kelly *v.* Linkenhoger, 8 Gratt. (Va.) 104; Brockenbrough *v.* James River, etc., Canal Co., 1 Patt. & H. (Va.) 94.

Security on interlocutory decree.— It is not error in an interlocutory decree for the sale of land to fail to require bond and security from plaintiff as prescribed by law, to perform the future orders of the court, but it is a sufficient compliance with the law if this is done in the final decree. Brockenbrough *v.* James River, etc., Canal Co., 1 Patt. & H. (Va.) 94.

13. Newman *v.* Ecton, 100 Ky. 653, 21 S. W. 526, 14 Ky. L. Rep. 793 (defeasible fee); Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10 (land in which there are contingent interests in remainder); Thomas *v.* Farmers' Nat. Bank, 86 Va. 291, 9 S. E. 1122 (undivided interests).

Land which is the subject of litigation in another court may be sold if thereby the interests of the creditors will be best conserved. Fidelity Insurance, etc., Co. *v.* Roanoke Iron Co., 84 Fed. 752.

Chancery may order sale of fee simple against the will of a party interested.— Baker *v.* Baker, 1 Rich. Eq. (S. C.) 392.

Land held adversely.— A prohibition of the sale of land of which the owner is disseized does not apply to judicial sales. High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103; McGill *v.* Doe, 9 Ind. 306; Ward *v.* Edge, 100 Ky. 757, 39 S. W. 440, 19 Ky. L. Rep. 59; Smith *v.* Scholtz, 68 N. Y. 41; Stevens *v.* Hauser, 39 N. Y. 302; Doull *v.* Keefe, 34 Nova Scotia 15.

14. Goare *v.* Beuhring, 6 Leigh (Va.) 585. See also Brown *v.* Chambers, 12 Ala. 697.

15. McCleary *v.* Grantham, 29 W. Va. 301, 11 S. E. 949.

16. Holland *v.* Holman, 50 S. W. 1102, 21 Ky. L. Rep. 105.

more land than the decree directs to be sold is void,[17] as is also a sale of the undivided half of a lot under an order directing the sale of the lot.[18]

IV. When Lease Proper.

An estate ordered to be sold is under the protection of the court, and may be rented until a sale can be effected;[19] and under the statutes in some jurisdictions the property must be leased instead of being sold if the rents and profits will discharge the liens within a time limited by law.[20]

V. Prerequisites of Sale.

A. Ascertainment of Debts and Liens. In some states, before a judicial sale of land to satisfy encumbrances thereon is had, the debts and liens binding it, their amounts and priorities must be ascertained,[21] and a time given to the debtor

Indivisibility must appear by verified pleading or proof.— Holland *v.* Holman, 50 S. W. 1102, 21 Ky. L. Rep. 105.

In the case of a decree against two joint and several obligors and for the sale of their land to satisfy the decree, it should direct a sale of sufficient of the land of each to satisfy one half of the decree, if practicable, with power to sell sufficient afterward to make up any deficiency, or to sell the whole in the first instance, if it appears to be absolutely necessary. Hoye *v.* Penn, 1 Bland (Md.) 28.

It is the debtor's duty to see to the parceling out of the land directed to be sold, and if he considers that too much is offered he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that the unsold lots will be withdrawn from sale when the debt is realized, if that course is intended to be taken. Beaty *v.* Radenhurst, 3 Ch. Chamb. (U. C.) 344.

17. Blakey *v.* Abert, 1 Dana (Ky.) 185 [*followed* in Gathwright *v.* Hazard, 17 B. Mon. (Ky.) 557].

18. Wheatley *v.* Tutt, 4 Kan. 195.

19. Williams' Case, 3 Bland (Md.) 186.

If the time of year is not propitious for an advantageous sale of farm lands, the court may order them to be leased until a time when it is desirable to have the sale, the rents to be applied to the payment of the debts. Roe *v.* Wilmot, 51 Iowa 689, 2 N. W. 539.

20. Etter *v.* Scott, 90 Va. 762, 19 S. E. 776; Kennerly *v.* Swartz, 83 Va. 704, 3 S. E. 348; Muse *v.* Friedenwald, 77 Va. 57; Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102; Coal River Nav. Co. *v.* Webb, 3 W. Va. 438; Conaway *v.* Odbert, 2 W. Va. 25.

Even in the absence of statute by the practice of Virginia, which was adopted in West Virginia, the courts, in enforcing judgment liens on land, uniformly held that it would be improper to decree the sale of real estate when the debtor asked that it might be rented and it appeared that the rents and profits of the estate would pay the lien in a reasonable time, and what was a reasonable time was left to the sound legal discretion of the courts, which discretion was reviewable by the appellate court. Rose *v.* Brown, 11 W. Va. 122 [*followed* in Hill *v.* Morehead, 20 W. Va. 429].

A decree for leasing may be set aside if it subsequently appears that the rents will be inadequate to pay all the judgment liens in five years, and an order of sale entered in its stead. Kennerly *v.* Swartz, 83 Va. 704, 3 S. E. 348.

21. Lewis *v.* Baker, 1 Head (Tenn.) 385 (exact amount due must be ascertained and stated in decree); Sims *v.* Tyrer, 9 Va. 14, 30 S. E. 443; Bristol Iron, etc., Co. *v.* Caldwell, (Va. 1897) 27 S. E. 838; Redd *v.* Dyer, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Effinger *v.* Kenney, 79 Va. 551; Moran *v.* Brent, 25 Gratt. (Va.) 104; Lough *v.* Michael, 37 W. Va. 679, 17 S. E. 181, 470; Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; McCleary *v.* Grantham, 29 W. Va. 301, 11 S. E. 949; Payne *v.* Webb, 23 W. Va. 558; Trimble *v.* Herold, 20 W. Va. 602; Beard *v.* Arbuckle, 19 W. Va. 135; Scott *v.* Ludington, 14 W. Va. 387; Wiley *v.* Mahood, 10 W. Va. 206; White *v.* Drew, 9 W. Va. 695.

Resale.— Although a decree of sale is made which, from the facts then appearing, is proper, and a sale is made thereunder, it is nevertheless error for the court by a subsequent decree which sets aside such sale to order a resale of the lands if the facts then appearing in the cause show the existence of liens, the amounts and priorities of which have not been ascertained and fixed. In such case the court should set aside the former decree of sale and refer the cause to a commissioner, or otherwise determine the priorities and amounts of the liens before ordering the resale. Payne *v.* Webb, 23 W. Va. 558.

Effect of partial payment.— If the amount of a lien has been fixed a partial payment does not require the ascertainment of the balance due. Schmertz *v.* Hammond, 51 W. Va. 408, 41 S. E. 184.

The lienholder's assent to a sale does not cure an omission to make such determination of an existing lien. Beard *v.* Arbuckle, 19 W. Va. 135.

A decree which simply confirms a commissioner's report of debts and directs a sale of lands therefor in default of payment, al-

within which he can make payment of his indebtedness and thus avoid having his property sold therefor.[22]

B. Settlement of Conflicting Claims and Equities. Where there are conflicting claims to property, and the equities of the respective parties necessarily depend upon the facts which may be proven on the trial, it is right and proper that the same should be definitely settled by the decree of the court before the property is sold.[23]

C. Levy on Property. When there is a decree establishing a lien upon certain property and directing its sale for the payment thereof, there is no necessity for a levy on the property.[24]

VI. ORDER OR DECREE OF SALE.

A. Necessity. There can be no valid judicial sale without an order or decree directing the same.[25] A sale of land other than that which is directed by the

though that report specifies the debts and priorities, is erroneous, because the decree does not itself adjudicate and declare what debts are to be paid, and fix their order and priority as to the lands to be sold therefor. Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

Where it is necessary to sell all of a debtor's lands to meet his debts, he is not prejudiced by the commissioner's failure to settle the liens and their priorities on each parcel of land as directed. White *v.* Drew, 9 W. Va. 695.

Amendment in appellate court.— Where, in a suit to sell a debtor's land, there has been a commissioner's report, showing the lands owned by the debtor, and the nature and priorities of the liens thereon, which has been confirmed, and there is entered a decree that "the lands of said debtor, in said report named [shall] all be severally sold to pay the liens on the same in the order of their priority, as set out in said report," without any further statement specifying the sums to be paid to the several creditors, the parcels of land on which they are chargeable, and the order of priority in which the proceeds of the sales of the several parcels of land shall be applied, but from the commissioner's report, and the face of the decree, it can be safely amended, it will be so amended in the appellate court, and, when so amended, will be affirmed. McCleary *v.* Grantham, 29 W. Va. 301, 11 S. E. 949.

Curing error of premature decree.— A decree ordering the register to ascertain the amount due plaintiffs on a note, and at the same time directing that, upon a failure to pay the amount so ascertained, defendants' land shall be sold therefor, will not be reversed, as having prematurely ordered a sale before the amount due had been ascertained, where it appears that, after the report of the register, another decree was made, ordering the register to sell the land as directed in the former decree. Simmons *v.* Jones, 84 Ala. 354, 3 So. 895.

Failure to take further account of liens as ordered.— After the commissioner's report ascertaining liens had been confirmed without exception, and a sale ordered to satisfy the same, a further account of outstanding liens was directed. The report of the sale, afterward made, showed that the land sold for an unusually high price, and was confirmed without objection from any creditor, but no distribution was ordered. The amount of liens reported greatly exceeded the price for which the land sold. It was held that the sale was properly confirmed without a further account of liens. Utterbach *v.* Mehlenger, 86 Va. 62, 9 S. E. 479.

Compliance with this requirement may be waived by parties.— Parsons *v.* Thornburg, 17 W. Va. 356. Thus a debtor, part of whose lands are sold under a decree with his consent, has no right to object that the liens and priorities on each parcel of the land were not determined by the commissioner as directed by the decree. White *v.* Drew, 9 W. Va. 695.

Right of purchaser to object.— The error in decreeing a sale without ordering an account of liens to be taken is waived so far as the purchaser is concerned by his contract of purchase, and the objection cannot be raised by him for the first time in the appellate court after a resale of the property has been ordered because of his failure to comply with his bid. Redd *v.* Dyer, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272.

22. Lewis *v.* Baker, 1 Head (Tenn.) 385; Parsons *v.* Thornburg, 17 W. Va. 356.

23. This in order that the property may bring its full value and that the purchaser may know what he purchases at the sale. Hall *v.* English, 47 Ga. 511.

24. Ewing *v.* Hatfield, 17 Ind. 513; Smith *v.* Burnes, 8 Kan. 197; Patton *v.* Collier, 90 Tex. 115, 37 S. W. 413; Patton *v.* Collier, 13 Tex. Civ. App. 544, 38 S. W. 53.

25. *Maryland.*— Fox *v.* Reynolds, 50 Md. 564.

Nebraska.— Parrat *v.* Neligh, 7 Nebr. 456.

Ohio.— Rhonemus *v.* Corwin, 9 Ohio St. 366.

West Virginia.— Houston *v.* McCluney, 8 W. Va. 135.

United States.— Minnesota Co. *v.* St. Paul Co., 2 Wall. 609, 17 L. ed. 886; Brignardello *v.* Gray, 1 Wall. 627, 17 L. ed. 692.

decree of the court to be sold is utterly null and void and no title to the property passes thereby.[26]

B. Form and Contents. The order or decree must conform to the general requirements of law respecting the form of orders, decrees, and judgments of courts.[27] It must describe the property to be sold,[28] and specify in certain and precise language the duties to be performed by the court's officer.[29] When a sale of land is ordered to pay a debt, the exact amount due should be stated in the decree.[30]

C. Effect. Unlike a judgment at law on which execution issues, the decree

See 31 Cent. Dig. tit. "Judicial Sales," § 5 *et seq.*

Presumption that order made.— Although no order of the probate court for the sale of land appears of record, it will be presumed from the order of confirmation that it was legally made. Bartley *v.* Harris, 70 Tex. 181, 7 S. W. 797; Arnold *v.* Hodge, 20 Tex. Civ. App. 211, 49 S. W. 714.

Proceedings under a decree which is not absolute are invalid. The purchaser at a sale under such a decree was refused a vesting order, although he offered to waive all objections to the proceedings, it being considered that it was only the defendants who could waive this objection. Clariss *v.* Ellis, 6 Ont. Pr. 115.

26. Giesecke *v.* Hoffman, 15 Tex. Civ. App. 361, 40 S. W. 1034, holding that an order of sale under a judgment does not authorize the sheriff, after selling the premises described in the order, to levy upon and sell other land to satisfy a balance due on the judgment, and his deed purporting to have been executed by virtue of said order passes no title.

27. Ingram *v.* Kirby, 19 N. C. 21.

An entry on the trial docket of the court at the foot of the case of "order of sale" is not such a judgment as the law requires to be shown. Ingram *v.* Kirby, 19 N. C. 21.

An order of sale issued without the seal of the court is void, and the court has no power, after a sale is made thereunder, to allow the process to be amended by attaching the seal. Gordon *v.* Bodwell, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341.

An omission to observe a merely directory provision of a statute in regard to the form of the decree is not fatal to its validity. Spencer *v.* Credle, 102 N. C. 68, 8 S. E. 901, requirement that order of sale be signed by clerk.

Form.— An order of sale headed, "The State of Nebraska, County of Gage, to the Sheriff of Said County," etc., complies with Const. art. 6, § 24, providing: "All process shall run in the name of the state of Nebraska." Hoyt *v.* Little, 55 Nebr. 71, 75 N. W. 56.

28. Gaskill *v.* Moore, 4 Cal. 233; Ross *v.* Adams, 13 Bush (Ky.) 370; Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712; Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059.

Order of sale must describe all property made liable to sale.— Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059.

Description should be certain and specific. — Ross *v.* Adams, 13 Bush (Ky.) 370.

A decree for the sale of land should give the boundaries, a mere reference to the deed and to the book in which it is recorded not being sufficient. Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

A leasehold interest is sufficiently described where the decree refers to and describes the lease. Gaskill *v.* Moore, 4 Cal. 233.

A decree in which the land is erroneously described does not affect the title or warrant a sale. Boggs *v.* Douglass, 89 Iowa 150, 56 N. W. 412.

Error as to county in which land located.— Where an order for the sale of land spoke of the land as in a different county from that in which it really was, but the mistake did not render it impossible to ascertain its locality through the description given, it was held that the order was not void. Lindsay *v.* Jaffray, 55 Tex. 626.

29. Meyer *v.* Covington, 103 Ky. 546, 45 S. W. 769, 20 Ky. L. Rep. 239; Ross *v.* Adams, 13 Bush (Ky.) 370.

Direction as to advertisement.— It is sufficient for the judgment to direct the commissioner to advertise the sale "as sheriffs are required to do before selling land under execution," since the sheriff's duties in such case are specifically prescribed by statute. Barnes *v.* Jackson, 85 Ky. 407, 3 S. W. 601, 9 Ky. L. Rep. 33.

A direction to convey will be implied from a direction to sell and take security for the purchase-price. Peake *v.* Young, 40 S. C. 41, 18 S. E. 237.

Direction as to time of conveyance.— Although the court cannot direct a deed to be made until six months after a judicial sale, a judgment directing a sale cannot be questioned by the debtor because it directs that after the confirmation the receiver shall forthwith execute a deed, as it will not be assumed that the receiver will do so before the time authorized by law. Woodbury *v.* Nevada Southern R. Co., 120 Cal. 463, 52 Pac. 730.

30. Lewis *v.* Baker, 1 Head (Tenn.) 385.

Specifying amount of partial payment.— Where a decree of sale authorizes payment to a judgment creditor of money in the hands of a receiver in another court as a partial payment, there is no error in failing to ascertain the amount of such money in the decree. Schmertz *v.* Hammond, 51 W. Va. 408, 41 S. E. 184.

of a court of chancery is itself the authority of the officer to sell.[31] A decree fixing the rights of parties and ordering a sale is binding, while proceedings to reverse it are pending, although the sale is suspended during such proceedings.[32] An appraisement and sale under a second decree of sale in a suit to marshal liens, the first not having been vacated or set aside, is irregular.[33]

D. Validity. An order of sale made without the notice required by statute has been held void.[34] A direction that a conveyance be made without taking steps required by law renders the decree fatally erroneous.[35]

E. Recalling Order of Sale. The court may recall an order of sale issued under a decree in a case still on the docket in term-time.[36]

F. Collateral Attack. An order or decree for the sale of property is subject to collateral attack where it was made without jurisdiction,[37] but where the court had jurisdiction the order or decree is not subject to collateral attack.[38]

VII. INJUNCTION AGAINST OR STAY OF SALE.

A court of chancery may by injunction restrain the execution of a decree of sale.[39] A stay of a sale will not be granted upon an allegation that a third person is in possession of the land and an action of unlawful detainer is pending against him, which facts will cause the sale to be at a sacrifice, where the possession and suit appear to be a mere contrivance to secure delay.[40] A sale by a master under a decree, after an order staying the sale, but without notice of the order, is valid and effectual and will carry title to a *bona fide* purchaser.[41]

VIII. OFFICER TO SELL.

A. In General. The court ordering a judicial sale has power to appoint a person to make the sale,[42] and the sale should be conducted by or under the immediate direction of the person appointed for the purpose in the order or decree.[43]

31. Karnes *v.* Harper, 48 Ill. 527.

32. Ashley *v.* Hull, 18 Ohio Cir. Ct. 614, 9 Ohio Cir. Dec. 664.

33. Sauer *v.* Cox 7 Ohio S. & C. Pl. Dec. 507, 5 Ohio N. P. 460.

34. Taylor *v.* Hoyt, (Pa. 1888) 15 Atl. 892. See also Wright *v.* Wood, 23 Pa. St. 120.

Notice of application for order of sale in particular cases see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INFANTS; INSANE PERSONS; MECHANICS' LIENS; MORTGAGES; PARTITION.

35. U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890, direction that conveyance be made on payment of purchase-money without requiring that sale be first confirmed.

36. Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059, holding also that the court may set aside an appraisement of property made thereunder.

37. Stansbury *v.* Inglehart, 20 D. C. 134; Camden *v.* Haymond, 9 W. Va. 680.

38. Bland *v.* Bowie, 53 Ala. 152; Concklin *v.* Hall, 2 Barb. Ch. (N. Y.) 136; Spivey *v.* Harrell, 101 N. C. 48, 7 S. E. 693.

The truth of the record concerning matters within the jurisdiction of the court cannot be disputed collaterally. Sears *v.* Sears, 95 Ky. 173, 25 S. W. 600, 15 Ky. L. Rep. 510, 44 Am. St. Rep. 213; Boyd *v.* Wyley, 18 Fed. 355.

39. People *v.* Gilmer, 10 Ill. 242.

Matters considered on application.— In a suit to enjoin a sale of land under a decree, a contention that there is a defect in the title will not be considered when the original case was fully investigated by a referee, and his report confirmed by the circuit court, and an appeal to the supreme court dismissed. Hudson *v.* Yost, 88 Va. 347, 13 S. E. 436.

The effect of an injunction is to suspend the operation of the process until the questions raised by the action in which it issued are determined. Seligson *v.* Collins, 64 Tex. 314.

40. Brown *v.* Lawson, 86 Va. 284, 9 S. E. 1014.

41. Monell *v.* Lawrence, 12 Johns. (N. Y.) 521; Freehold Permanent Bldg. Soc. *v.* Choate, 3 Ch. Chamb. (U. C.) 440.

42. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257; Wick *v.* Mayer, 2 Ohio Dec. (Reprint) 579, 4 West. L. Month. 102.

Upon the death of the appointee before passing the act of sale the court may appoint another person to complete the execution of the decree. Covas *v.* Bertoulin, 45 La. Ann. 160, 11 So. 874.

43. Heyer *v.* Deaves, 2 Johns. Ch. (N. Y.) 154; Yates *v.* Woodruff, 4 Edw. (N. Y.) 700; Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43; Williamson *v.* Berry, 8 How. (U. S.) 495, 12 L. ed. 1170.

A sale by one deputed by a master in his absence will be set aside. Heyer *v.* Deaves, 2 Johns. Ch. (N. Y.) 154. *Compare* Swan

B. Who May Be Appointed. While it is proper and usual to appoint an officer of the court to make the sale,[44] the court may appoint any person it sees fit, even though such person be not an officer.[45] Any competent person may as a rule be appointed to make the sale;[46] but the court should not appoint a person under disability,[47] a non-resident,[48] a person who is interested in the suit or the property,[49] or a person holding an office incompatible with the trust of selling,[50] and a sale made by a person who should not have been appointed is voidable,[51] even though no fraud or actual bad faith be shown.[52]

C. Bond and Oath. Under some statutes it is required that the person appointed to make the sale shall give a bond,[53] and take a prescribed

v. Smith, 58 Miss. 875, holding that a commissioner's sale will be confirmed, if otherwise regular, although it was made by an auctioneer during the commissioner's absence from the state.

Where sheriff appointed sale may be made by deputy.— Craig *v.* Fox, 16 Ohio 563. See also U. S. National Bank *v.* Hanson, 1 Nebr. (Unoff.) 87, 95 N. W. 364.

Effect of sale by agent.— The fact that a sale under a decree of court is conducted by an agent of the commissioner authorized by the decree to make it, and in the absence of the commissioner, is not such an irregularity as impairs the jurisdiction of the court, although it vitiates the sale and authorizes the parties interested to have it set aside, if no rights of innocent purchasers have intervened. Chambers *v.* Jones, 72 Ill. 275.

Person appointed to sell may employ an auctioneer.— Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

44. Childs *v.* Alexander, 22 S. C. 169 (in counties where there is no master the court may order a sale by the sheriff); Adams *v.* Kleckley, 1 S. C. 142 (the sheriff is the proper officer but the court may appoint the clerk); Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43 (sales under decree of federal courts are usually made by the marshal of the district where the decree was entered).

The parties need not be notified of the appointment of a standing master, nor need the master who is to sell be named in the decree. If no particular master is named, the sale may be conducted by any master to whom plaintiff delivers a certified copy of the decree. Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

45. Omaha L. & T. Co. *v.* Bertrand, 51 Nebr. 508, 70 N. W. 1120; American Inv. Co. *v.* Nye, 40 Nebr. 720, 59 N. W. 355, 42 Am. St. Rep. 692; Meetze *v.* Padgett, 1 S. C. 127 [*followed* in Adams *v.* Kleckley, 1 S. C. 142].

Violation of statute.— A direction in a judgment of foreclosure that the sale should be made by a referee instead of a sheriff, as provided by N. Y. Laws (1889), c. 167, while in violation of such statute, is an irregularity, and does not affect the title of the purchaser, or entitle him to be relieved from his purchase. Sproule *v.* Davies, 171 N. Y. 277, 63 N. E. 1106 [*affirming* 69 N. Y. App. Div. 502, 75 N. Y. Suppl. 229].

46. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

Female may be appointed.— Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

47. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257, whenever the officer is required to give security, he must be someone who is not incompetent to contract.

48. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

49. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257; Smith *v.* Harrigan, 15 N. Y. Suppl. 852, 27 Abb. N. Cas. 322; Etter *v.* Scott, 90 Va. 762, 19 S. E. 776. *Compare* Teel *v.* Yancey, 23 Gratt. (Va.) 691.

50. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

51. Smith *v.* Harrigan, 15 N. Y. Suppl. 852, 27 Abb. N. Cas. 322; Etter *v.* Scott, 90 Va. 762, 19 S. E. 776.

Right of purchaser to object.— The purchaser cannot object on the ground that the attorney who prosecuted the suit to judgment acted as special commissioner in selling the property. Adkinson *v.* Randle, 93 Ky. 310, 20 S. W. 199, 14 Ky. L. Rep. 258. But *compare* Smith *v.* Harrigan, 15 N. Y. Suppl. 852, 27 Abb. N. Cas. 322, holding that the fact, undisclosed to bidders, that the auctioneer officiating at a judicial sale was a party to the action, and interested in the property sold, renders the sale voidable, at the option of the purchaser, although the auctioneer's interest was only that of tenant by the curtesy. See also Etter *v.* Scott, 90 Va. 762, 19 S. E. 776.

52. Smith *v.* Harrigan, 15 N. Y. Suppl. 852, 27 Abb. N. Cas. 322.

53. Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818; Parker *v.* Valentine, 27 W. Va. 677; Neeley *v.* Ruleys, 26 W. Va. 686. See Cooper *v.* Daugherty, 85 Va. 343, 7 S. E. 387.

Bond required on resale.— Tompkins *v.* Deyerle, 102 Va. 219, 46 S. E. 300.

Plaintiff cannot waive bond.— Neeley *v.* Ruleys, 26 W. Va. 686.

Effect of failure to require security.— Where the decree ordering a sale of land directs the commissioner to give bond and fixes the penalty of the bond, failure to require security is not reversible error, although Va. Acts (1883–1884), p. 213, provide that the commissioner shall give bond and personal security to be approved by the clerk. Cooper *v.* Daugherty, 85 Va. 343, 7 S. E. 387.

oath,[54] and even in the absence of statute the court has power to require a bond[55] or oath.[56] The sufficiency of a bond is a matter for the court.[57] And if the sale is ratified by the court the fact that the directions of the decree or the requirements of the law were not fully carried out, none of the interested parties having been injured, is not ground for vacating the sale.[58] If an oath is required, it must be presumed in the absence of any showing to the contrary that one was taken.[59] In the absence of any statute so providing or of any requirement to that effect in the order or decree, it is not necessary in order that the sale may be valid that any bond or security should be given,[60] or any oath taken.[61]

D. Removal. Where special commissioners are appointed to sell lands, and an unusual delay occurs on their part in carrying out the decree and making their report, the court will ordinarily award a rule against them, requiring them to account for the delay, before removing them and appointing other commissioners to execute the decree.[62]

E. Powers and Duties. An order or decree for the sale of property is a sufficient warrant of authority to the officer to sell,[63] and it has been held that

A sale cannot be set aside under W. Va. Code, c. 132, § 1, because the commissioners failed to give bond before making it. Sommerville *v.* Sommerville, 26 W. Va. 479.

Duty of purchaser.— The statute being imperative that a bond shall be given, it is the duty of the purchaser to see that the bond has been given before he pays his money to the commissioner; otherwise he pays at his own risk. Hess *v.* Rader, 26 Gratt. (Va.) 746.

Before whom bond given.— A decree directing a commissioner for the sale of land to give bond before the clerk of any court other than the one making the decree is erroneous, as contrary to Va. Code, § 3398; but, the decree being interlocutory, the appellate court will amend it without reversing, and order the bond to be given before the clerk of the proper court. Southwest Virginia Mineral Land Co. *v.* Chase, 95 Va. 50, 27 S. E. 826.

Liability on bond.— In a decree for sale of land, part cash and part credit, the special commissioner must, under W. Va. Code (1887), c. 132, § 1, give a bond conditioned to faithfully discharge his duties and pay over all money which may come to him by virtue of his office, and such bond binds the principal and sureties for moneys received by the commissioner, whether from the cash or deferred payments. State *v.* Wotring, 56 W. Va. 394, 49 S. E. 365.

54. Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818, requirement of bond and oath applies to all special commissioners whether selected by the parties or not.

55. Omaha L. & T. Co. *v.* Bertrand, 51 Nebr. 508, 70 N. W. 1120. It is irregular and dangerous in practice for the court to authorize its special commissioner, appointed for the purpose, to sell lands for cash in hand, in whole or in part, without requiring such commissioner, in its decree, to give bond with good personal security before receiving any money. McClaskey *v.* O'Brien, 16 W. Va. 791.

56. Omaha L. & T. Co. *v.* Bertrand, 51 Nebr. 508, 70 N. W. 1120.

57. Bolgiano *v.* Cooke, 19 Md. 375, holding that it is not competent for the purchaser to review the action of the court in approving the bond.

58. Cunningham *v.* Schley, 6 Gill (Md.) 207; Dawes *v.* Thomas, 4 Gill (Md.) 333 (bond given for less sum than required by the decree); Strayer *v.* Long, 89 Va. 471, 16 S. E. 357 (sale by two commissioners, only one of whom had given bond).

59. Toscan *v.* Devries, 57 Nebr. 276, 77 N. W. 669 [*following* Omaha L. & T. Co. *v.* Bertrand, 51 Nebr. 508, 70 N. W. 1120].

60. So held in the case of a standing master. Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218; Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

61. Elgutter *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218, holding that a standing master in chancery, who has taken and filed his oath as such, need not take an additional oath before making a sale in a case where it is not required by the decree or the state statute under which he acts.

62. Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245.

63. Parrat *v.* Neligh, 7 Nebr. 456.

Conditional order.— An order that a sheriff sell personal property, and, in case that proves insufficient to satisfy a judgment then to sell real estate, but with a condition that plaintiff is not to have the benefit of the order until he shall give bond, without evidence that the personal property was sold or was insufficient to satisfy the judgment, or that the bond was given, does not prove authority to the sheriff to sell the real estate, or at all sustain such a sale. Houston *v.* McCluney, 8 W. Va. 135.

A decree in the supreme court that the sheriff shall sell certain lands upon receiving an order for that purpose, which is sent by mandate to the common pleas for execution, gives the sheriff no authority to sell the property in question merely upon receiving from the clerk a certified copy of this decree without any order thereon. Rhonemus *v.* Corwin, 9 Ohio St. 366.

commissioners of the chancery court may under the order of court sell land lying out of their own district.[64] The officer must sell according to the order or decree;[65] but where a sale of land in satisfaction of a judgment is decreed in equity, the commissioner has discretionary power, subject to revision by the court, to determine what part of the land shall be sold to satisfy the judgment, where the whole is not needed.[66] After the sale has been ratified the trustee who made the sale cannot be allowed in any manner, of himself and without the previous authority of the court, to compromise or abandon any right in relation to the sale so made, or to relinquish the bond, bill, or note taken for the purchase-money, or to dispose of the property or purchase-money to any one or upon any ground whatever.[67] A master or commissioner in chancery has no authority to sell after the expiration of his office, although the property has been advertised by him before that time.[68]

F. Liabilities. Where a master in chancery sold land under a decree of court, giving no directions as to terms and security, and took a bond of the purchaser, and a mortgage of the land sold, he was not liable for a loss by the insolvency of the purchaser and a depreciation of the land.[69]

G. Compensation. The person making the sale is usually allowed compensation for his services in the form of a commission;[70] but it has been held that a court commissioner is not entitled to a commission for selling lands where the creditor was the purchaser, the commissioner not having received the purchase-money or disbursed it.[71]

IX. APPRAISEMENT.

A. In General. In a number of states the statutes require an appraisement of property before a judicial sale thereof,[72] and either forbid a sale for less than a

64. Bank *v.* Trapier, 2 Hill Eq. (S. C.) 25.

65. Ryan *v.* Dox, 25 Barb. (N. Y.) 440, holding that a sheriff, master, or other officer, selling property under a process, decree, or judgment of the court, cannot make a valid agreement with a purchaser to convey any other estate than such as the decree or judgment will warrant. And see *infra*, XI, A.

The master or marshal is the officer of the court, and as such his acts and proceedings are subject to the control of the court. Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43.

66. Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550.

67. Wampler *v.* Shipley, 3 Bland (Md.) 182, holding that it is not within the authority of the trustees making the sale to release the purchaser from liability on the ground of a total failure of consideration.

68. Keith *v.* Gray, Rich. Eq. Cas. (S. C.) 227 [*overruling* Hunt *v.* Elliott, Bailey Eq. (S. C.) 90, and *followed* in Lowndes *v.* Pinckney, 1 Rich. Eq. (S. C.) 155].

69. Fenwicke *v.* Gibbes, 2 Desauss. Eq. (S. C.) 629.

70. See Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

Amount.— Under La. Rev. St. § 160, fixing the commission of the auctioneer on the sale of succession property at one per cent on all sums under two thousand five hundred dollars, and on all sums over that, one half of one per cent, in case of the sale of succession property in several lots, the auctioneer is entitled to one per cent on the first two thousand five hundred dollars and one half of one per cent on the excess of the amount of the entire sales over two thousand five hundred dollars. Von Hoven's Succession, 48 La. Ann. 620, 19 So. 766. A referee appointed "to sell real property, pursuant to a judgment in an action" other than a foreclosure suit upon a mortgage, is entitled to sheriff's fees; that is, two and one-half per cent of the proceeds not exceeding two hundred and fifty dollars, and one per cent upon the residue. He is further entitled, upon distribution, to one half of an executor's commissions upon proceeds actually distributed or applied. Maher *v.* O'Conner, 61 How. Pr. (N. Y.) 103.

On a resale in chancery, the trustee is not allowed increase of commissions or any counsel fee; otherwise when, instead of resale, the purchase-money is collected by suits at law. Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350.

Where only a part of the price is collected commissions should be allowed, under Va. Code (1873), c. 174, § 6, on such part only, and an extra allowance cannot be made for extraordinary efforts in effecting the sale. Womack *v.* Paxton, 84 Va. 9, 5 S. E. 550.

71. Rountree *v.* England, 17 Ky. L. Rep. 816.

72. Doe *v.* Craft, 2 Ind. 359; Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818; McKee *v.* Stein, 91 Ky. 240, 16 S. W. 583, 13 Ky. L. Rep. 49, (1891) 15 S. W. 519; Wiles *v.* Baylor, 1 Ohio 509, holding that lands decreed by a court of chancery to be sold must be valued as upon executions at law.

An actual appraisement is necessary in cases to which the statute applies, and its

certain proportion of the appraised value[73] or give the owner the right of redemption for a certain time if a specified proportion of the appraised value is not realized at the sale.[74] Where a resale is ordered because of the failure of the purchaser to pay the purchase-money, or satisfy his sale bonds, a second appraisement is not necessary;[75] and in Nebraska but one appraisement of real estate is required in any event until the property has been twice advertised and twice offered for sale.[76]

B. Who May Act as Appraisers. It is ordinarily required that the appraisers should be freeholders[77] who are disinterested.[78]

C. Qualification of Appraisers. It is ordinarily required that the appraisers shall be sworn.[79]

D. Proceedings in Appraisement. The duty of the appraisers is to appraise the value of the property and deduct the liens thereon.[80] The appraisement must be upon such actual view as will enable the appraisers to judge fairly of the value of the land and improvements upon it.[81] Notice to the debtor of

place cannot be supplied by evidence after the sale that the property in fact sold for a fair price, or more than two thirds of any appraised value which could fairly have been placed upon it. Graves *v.* Long, 87 Ky. 441, 9 S. W. 297.

Appraisement not necessary before guardian's sale.— Wooldridge *v.* Jacobs, 79 Ky. 250.

A statute requiring land sold under an execution to be valued does not apply to land sold by a commissioner under a decree in chancery. Haggin *v.* Peck, 10 B. Mon. (Ky.) 210; Blakey *v.* Abert, 1 Dana (Ky.) 185.

Agreement for sale without appraisement — Presumption.— Where a judgment and sale without appraisement was made upon an agreement waiving the benefit of the appraisement laws, it was presumed on appeal that the consideration arose after the taking effect of Ind. Act (1843), §§ 3, 4, authorizing such agreements. Lemasters *v.* Johnson, 12 Ind. 385.

How objection available.— An objection based on the lack of an appraisal must be made on exception to the sale and cannot be pleaded as a defense by a purchaser in an action to recover the amount of the deficiency on a resale. Tyler *v.* Guthrie, 33 S. W. 934, 17 Ky. L. Rep. 1193.

In Iowa judicial sales made under judgments rendered since the code must, in accordance with its provisions, be made without appraisement. Babcock *v.* Gurney, 42 Iowa 154.

73. Wood *v.* Clark, 58 Nebr. 115, 78 N. W. 396.

A bid of a fraction of a cent less than the required two thirds should not be accepted. *In re* Specker, 5 Ohio S. & C. Pl. Dec. 586.

A deficiency in a bid cannot be offset by an excess in the bid of the same person for another parcel. *In re* Specker, 5 Ohio S. & C. Pl. Dec. 586.

74. See McKee *v.* Stein, 91 Ky. 240, 16 S. W. 583, 13 Ky. L. Rep. 49, (1891) 15 S. W. 519; Combs *v.* Combs, 82 S. W. 298, 26 Ky. L. Rep. 617. See *infra*, XVIII.

75. McKee *v.* Stein, 91 Ky. 240, 16 S. W. 583, 13 Ky. L. Rep. 49, (1891) 15 S. W. 519 (purchase by defendant); Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617.

76. Scottish-American Mortg. Co. *v.* Nye, 58 Nebr. 661, 79 N. W. 553.

There is no authority for a second appraisement unless the property remains unsold for want of bidders after having been twice advertised and twice offered for sale under the first appraisement (Kampman *v.* Nicewaner, 60 Nebr. 208, 22 N. W. 623; Beardsley *v.* Higman, 58 Nebr. 257, 78 N. W. 510), unless the first appraisement has been set aside by the court (Beardsley *v.* Higman, *supra*).

An order setting aside a sale, but retaining the appraisement made of the property, and directing an alias order of sale, is not erroneous where the property has only been once offered for sale. Beardsley *v.* Higman, 58 Nebr. 257, 78 N. W. 510.

77. See Lake Superior Iron Co. *v.* Brown, 44 Fed. 539, decided under Ohio statute.

78. See Lake Superior Iron Co. *v.* Brown, 44 Fed. 539, decided under Ohio statute.

A distant relative of one of the creditors of a corporation whose claim represents only a small portion of its aggregate indebtedness is not disqualified from acting as an appraiser on a judicial sale of its property for the benefit of all its creditors. Lake Superior Iron Co. *v.* Brown, 44 Fed. 539.

79. See Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818.

By whom oath administered.— Conceding that a special commissioner, when properly qualified, can swear the appraisers, he cannot do so if he himself has not qualified. And when the appraisement shows that the appraisers were sworn by the commissioner, the supreme court cannot presume that he swore them as an examiner from a statement to that effect in his amended report. Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818.

80. Rosenfield *v.* Chada, 10 Nebr. 421, 6 N. W. 630.

81. Miller *v.* Loving, 59 Kan. 485, 53 Pac. 476 (holding that the mere entry on one corner of a tract of two hundred and forty acres at a distance of a half mile from the house

the time of making the appraisement is not necessary.[82] In Nebraska a copy of the appraisement must be forthwith deposited in the office of the clerk of the proper court.[83]

E. Effect and Sufficiency of Appraisement. The valuation placed by appraisers upon real estate is final and conclusive unless it be overthrown and set aside because the appraisers were not legally qualified, because they acted fraudulently in making the appraisement, or for some other equally potent reason.[84]

F. Attack on and Setting Aside Appraisement. An objection to the appraisement as being too high or too low must be made by motion to vacate the appraisement[85] before the sale is made.[86] The appraisement cannot be successfully attacked after the sale except on the ground of fraud.[87] Where no attack has been made on an appraisement of property for the purpose of a judicial sale, an order setting aside such appraisement is unauthorized.[88] Defendant cannot complain of errors in the appraisement which do not prejudice him.[89] The

and outbuildings is not a sufficient view); Matter of Slane, 9 Ohio S. & C. Pl. Dec. 830 (holding that an appraisal of improved real estate, made from a view of the exterior, and without entering the buildings, is not sufficient); Mills *v.* Life Assoc. of America, 6 Ohio Dec. (Reprint) 827, 8 Am. L. Rec. 358 (holding that where the appraisers, in appraising a certain house, failed to go through it, and afterward the testimony of persons who have gone through the building establishes a higher value, the first appraisement will be set aside).

82. Iowa L. & T. Co. *v.* Stimpson, 53 Nebr. 536, 74 N. W. 38.

83. The statute is mandatory as to this requirement. Bostwick *v.* Keller, 62 Nebr. 815, 87 N. W. 1060; Walker *v.* Patch, 52 Nebr. 763, 73 N. W. 228; Burkett *v.* Clark, 46 Nebr. 466, 64 N. W. 1113; Chadron Loan, etc., Assoc. *v.* O'Linn, 2 Nebr. (Unoff.) 246, 95 N. W. 358.

Copy must be deposited before sale.— Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350.

84. Wood *v.* Clark, 58 Nebr. 115, 78 N. W. 396; Jarrett *v.* Hoover, 54 Nebr. 65, 74 N. W. 429; Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538.

85. Insurance Co. of North America *v.* Ackerman, 61 Nebr. 312, 85 N. W. 287; Scottish-American Mortg. Co. *v.* Nye, 58 Nebr. 661, 79 N. W. 553; Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538; U. S. National Bank *v.* Hanson, 1 Nebr. (Unoff.) 87, 95 N. W. 364, objection that liens were improperly deducted from gross value.

86. Harris *v.* Gunnell, 9 S. W. 376, 10 Ky. L. Rep. 419; Insurance Co. of North America *v.* Ackerman, 61 Nebr. 312, 85 N. W. 287; Scottish-American Mortg. Co. *v.* Nye, 58 Nebr. 661, 79 N. W. 553; Jarrett *v.* Hoover, 54 Nebr. 65, 74 N. W. 429; Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 410, 72 N. W. 357; Overall *v.* McShane, 49 Nebr. 64, 68 N. W. 383; Burkett *v.* Clark, 46 Nebr. 466, 64 N. W. 1113; Ecklund *v.* Willis, 42 Nebr. 737, 60 N. W. 1026; Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538; U. S. National Bank *v.* Hanson, 1 Nebr. (Unoff.) 87, 95 N. W. 364.

Objections should be filed before date fixed for sale.— Bernheimer *v.* Hamer, 59 Nebr. 733, 82 N. W. 18.

87. Insurance Co. of North America *v.* Ackerman, 61 Nebr. 312, 85 N. W. 287; Omaha L. & T. Co. *v.* Fitzpatrick, 59 Nebr. 303, 80 N. W. 907; Nelson *v.* Alling, 58 Nebr. 606, 79 N. W. 162; Michigan Mut. L. Ins. Co. *v.* Richter, 58 Nebr. 463, 78 N. W. 932; Lockwood *v.* Cook, 58 Nebr. 302, 78 N. W. 624; Ballou *v.* Sherwood, 58 Nebr. 20, 78 N. W. 383; Brown *v.* Fitzpatrick, 56 Nebr. 61, 76 N. W. 456; Mills *v.* Hamer, 55 Nebr. 445, 75 N. W. 1105; Jarrett *v.* Hoover, 54 Nebr. 65, 74 N. W. 429; Omaha Loan, etc., Co. *v.* Bertrand, 51 Nebr. 508, 70 N. W. 1120; Hamer *v.* McFeggan, 51 Nebr. 227, 70 N. W. 937; Griffith *v.* Jenkins, 50 Nebr. 719, 70 N. W. 256; Overall *v.* McShane, 49 Nebr. 64, 68 N. W. 383; Kearney Land, etc., Co. *v.* Aspinwall, 45 Nebr. 601, 63 N. W. 827; Ecklund *v.* Willis, 44 Nebr. 129, 62 N. W. 493; Smith *v.* Foxworthy, 39 Nebr. 214, 57 N. W. 994; Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538. See also Green *v.* Paul, 60 Nebr. 7, 82 N. W. 98 (holding that a judicial sale will not be vacated on the ground that the property was placed too low by the appraisers, unless the actual value so greatly exceeds the appraised value as to raise the presumption of fraud in making the appraisement); Bernheimer *v.* Hamer, 59 Nebr. 733, 82 N. W. 18.

88. Kampman *v.* Nicewaner, 60 Nebr. 208, 82 N. W. 623.

89. Miles *v.* Lyons, 50 S. W. 15, 20 Ky. L. Rep. 1727; Wood *v.* Clark, 58 Nebr. 115, 78 N. W. 396; Ballou *v.* Sherwood, 58 Nebr. 20, 78 N. W. 383; Toscan *v.* Devries, 57 Nebr. 276, 77 N. W. 669; La Selle *v.* Nicholls, 56 Nebr. 458, 76 N. W. 870; American Inv. Co. *v.* McGregor, 48 Nebr. 779, 67 N. W. 785; Smith *v.* Foxworthy, 39 Nebr. 214, 57 N. W. 994; Craig *v.* Stevenson, 15 Nebr. 362, 18 N. W. 510.

Failure to deduct liens.— A statutory provision for the deduction of prior liens in appraising lands for judicial sale is solely for the creditor's benefit, so that the failure to observe the law in that regard cannot be urged by the debtor as a ground for vacating

valuation placed on property for purposes of judicial sale by legally qualified appraisers will not be set aside because other persons differ in opinion as to the value of such property,[90] or because the appraisers afterward become dissatisfied with their valuation, unless it appears that they acted under some mistake.[91] Where, in a suit to subject certain land to the payment of liens, the commissioner sold the exact quantity of land described in the judgment, which followed the description set out in the mortgage, a motion, unaccompanied by a tender of the debts which the land was sold to pay, to set aside the sale on the ground that the appraisers had failed to appraise the entire lot, which was in fact larger than that sold, was properly denied.[92]

X. NOTICE OF SALE.[93]

A. Requirement. The aim of the law being to secure the best price that can be fairly obtained for the property,[94] it is universally required that a judicial sale shall be preceded by notice thereof,[95] given according to the provisions of the statute[96] or the directions of the court;[97] and it is the duty of the officer in giving notice to follow the directions of the decree or statute in their spirit and meaning.[98] It is not necessary to give the debtor any notice other than the general public notice, unless required by statute.[99]

the appraisement, or as an objection to the confirmation of the sale. Ballou *v.* Sherwood, 58 Nebr. 20, 78 N. W. 383.

90. Wood *v.* Clark, 58 Nebr. 115, 78 N. W. 396.

91. Spencer *v.* Carter, 4 Hen. & M. (Va.) 402.

92. Booker *v.* Louisville, 76 S. W. 18, 25 Ky. L. Rep. 497.

93. **Notice of application for order of sale** see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INFANTS; INSANE PERSONS; MECHANICS' LIENS; MORTGAGES; PARTITION.

94. Sowards *v.* Pritchett, 37 Ill. 517.

95. *Illinois.*— Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753.

Kentucky.— Clark *v.* Bell, 4 Dana 15; Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

Maryland.— Glenn *v.* Wootten, 3 Md. Ch. 514.

Minnesota.— Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449.

Pennsylvania.— Taylor *v.* Hoyt, (1888) 15 Atl. 892.

See 31 Cent. Dig. tit. "Judicial Sales," § 25.

How objection to notice made.— Objection to the master's mode of advertising a sale of land, if the mode was conformable to the statute and not in conflict with the decree, cannot be made by exception. Goddard *v.* Cox, 1 Lea (Tenn.) 112.

96. See Lawrence's Appeal, 49 Conn. 411.

Failure of the order of sale to require full compliance with the statute on the matter of publication is immaterial where the publication actually made fully complied with the statute. Lawrence's Appeal, 49 Conn. 411.

Act Cong. March 2, 1867, § 7 (14 St. 466) prescribing the manner in which the advertising for the departments of the United States government shall be done, applies only to such advertisements as are published in behalf of the government and paid for out of the federal treasury, and does not affect advertisements for sales of lands under judicial process in suits between individuals. Dunlop *v.* Zunts, 11 Wall. (U. S.) 416, 20 L. ed. 181.

97. Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589. See also Sowards *v.* Pritchett, 37 Ill. 517.

The court may direct what notice of the sale shall be given, in so far as its directions are reasonable and do not conflict with any statute on the subject. Wilson *v.* Ford, 190 Ill. 614, 60 N. E. 876; Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589; Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753; Guise *v.* Middleton, Sm. & M. Ch. (Miss.) 89.

Necessity for explicit directions.— Where the statute requires such notice as the court shall direct the order of sale should state explicitly what notice is to be given. Meyer *v.* Covington, 103 Ky. 546, 45 S. W. 769, 20 Ky. L. Rep. 239, holding that an order directing sale to be made after advertising "in both modes mentioned in rule 40 of this court" is not sufficient, as the commissioner should not be required to look beyond the order for directions.

Notice sufficiently complying with directions.— A decree for the sale of land to pay debts directed the trustees appointed therefor to give at least three weeks' previous notice of the sale by advertisement in the newspapers printed in a certain place, "and such other notice as they should think proper." The trustees offered the land for sale by advertisement in various places besides the one specified, but failed to receive a bid. It was then offered a second time and sold, but no notice was given, except in the newspapers before mentioned. It was held that the notice was sufficient, and the sale valid. Farmers' Bank *v.* Clarke, 28 Md. 145.

98. Gould *v.* Garrison, 48 Ill. 258; Williams *v.* Woodruff, 1 Duv. (Ky.) 257.

99. Springer *v.* Law, 185 Ill. 542, 57 N. E. 435; Crumpton *v.* Baldwin, 42 Ill. 165. See

B. How Notice Given. Notice of the sale is usually given by publishing the same in one or more newspapers;[1] and, in some states, by posting copies of the notice in conspicuous places[2] in the neighborhood of the land.[3] Actual personal notice of the time of the sale to persons interested is not necessary.[4]

C. Duration of Publication. The length of time before the sale during which the notice must be published is regulated by statutes varying somewhat in the different jurisdictions,[5] or prescribed by the order of sale.[6] Publication for

Cowles *v.* Hardin, 101 N. C. 388, 7 S. E. 896, 9 Am. St. Rep. 36.

1. See Parrat *v.* Neligh, 7 Nebr. 456.

Circulation of paper.— That the paper in which the notice was published was not of general circulation in the county is ground for refusing to confirm the sale. Craig *v.* Fox, 16 Ohio 563. But it is not ground for vacation of a judicial sale that the newspaper containing the sale notice, although circulated to all the subscribers, failed to reach publishers of other papers to whom it was sent in exchange. Cowles *v.* Phœnix Mut. L Ins. Co., (Kan. 1901) 65 Pac. 217.

Publication in a German paper is insufficient, although the notice be printed in English. Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401.

Publication on Sunday good.— Schenck *v.* Schenck, 52 La. Ann. 2102, 28 So. 302. *Contra,* Shaw *v.* Williams, 87 Ind. 158, 44 Am. Rep. 756.

The fact that the notice did not appear in all editions of the paper issued on the days when the notice was published is not of itself sufficient ground for setting aside the sale unless the omission was followed by injurious results. Everson *v.* Johnson, 22 Hun (N. Y.) 115.

2. Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288 (where the decree of sale required posting, as well as publication, of notices); Wilson *v.* Ford, 190 Ill. 614, 60 N. E. 876 (posting required by order of sale); Harris *v.* Gunnell, 9 S. W. 376, 10 Ky. L. Rep. 419; Goddard *v.* Cox, 1 Lea (Tenn.) 112.

Direction that notice be published by posting not satisfied by publication in newspapers.— Halleck *v.* Moss, 17 Cal. 339; Augustine *v.* Doud, 1 Ill. App. 588.

Evidence not constituting sufficient proof of posting the notices to sustain the sale see Wilson *v.* Ford, 190 Ill. 614, 60 N. E. 876.

Posting not in compliance with directions. — Where the commissioner was directed to advertise the sale of land at the court-house door and two other places in the county of Henderson, and he posted notices at the court-house door and at two other places in the city of Henderson, which was in the county of Henderson, this was held not to be a compliance with the spirit and meaning of the directions. Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550.

Posting unnecessary where notice published in newspaper printed in county.— Parrat *v.* Neligh, 7 Nebr. 456.

The Illinois statute requiring notices of an execution sale to be posted (Rev. St. c. 77, § 14) does not apply to a sale under a decree in chancery by a master, but the court may prescribe notice without complying with such condition, provided the notice is reasonable. Springer *v.* Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; Crosby *v.* Kiest, 135 Ill. 458, 26 N. E. 589.

3. Wilson *v.* Ford, 190 Ill. 614, 60 N. E. 876, holding that where the order directing a sale of land required notices of the sale to be posted in five public places in the neighborhood of the land, and one of the notices was posted at the court-house, eighteen miles from the land, and the others were posted in post-offices from five to twenty miles away from the land, but there was a village and post-office within a mile and a half of the land, and no notice was posted there, and witnesses living near the land testified that they had never seen any notices, although they were looking for them, the posting of the notices did not comply with the order, and the sale must be set aside.

4. Crumpton *v.* Baldwin, 42 Ill. 165, where a decree of foreclosure was obtained by the assignee of a mortgage and the master in chancery agreed to give the assignor, the original mortgagee, actual personal notice of the day of sale, but failed to do so, in consequence of which the land sold for less than the debt, and it was held that this furnished no ground for setting aside the sale.

5. See Cuyler *v.* Tate, 67 Nebr. 317, 93 N. W. 675, thirty days.

Issuance of paper in advance of usual time. — Where notice of the time and place of sale is advertised for thirty days before the day of sale in a weekly newspaper, it is no objection that the first number containing the notice was printed and published in advance of the day of the week on which the publication was usually made. Wilson *v.* Scott, 29 Ohio St. 636.

Notice of resale.— La. Civ. Code, § 2584, provides that in all cases of judicial sales, if the purchaser does not pay the price at the time required, the seller may at the end of ten days after the customary notice again expose the property for sale. It was held that the ten days refer exclusively to the duration of the advertisement, and not to the period at which it is commenced; and hence the fact that the advertisement of resale was published more than ten days cannot affect the sale. Duncan *v.* Armant, 3 La. Ann. 84, holding also that the second sale need not be advertised more than ten days, provided the customary notice is given within that time.

6. See Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288.

the full time required is requisite to the validity of the sale,[7] and if it be not made for such time the sale will be set aside;[8] but where the required time intervenes between the date of the first publication and the date of sale, the notice is sufficient.[9] It has been held that a requirement that notice should be published weekly for a certain number of weeks before the sale means that seven times that number of days must elapse between the first publication and the day of sale;[10] but there is also authority for the view that such a requirement is satisfied by making the specific number of publications at weekly intervals before the sale.[11] Where notice is required for a certain number of days Sundays and holidays are to be counted.[12]

D. Number of Insertions. Unless expressly required, daily insertions of the notice are not necessary, but a publication thereof once a week for the required time is held sufficient.[13] Where the statute requires notice for at least a specific number of days before the sale a single notice published that length of time before the sale is not sufficient, but the notice must be published in each successive issue of the paper up to the day of sale.[14] Under a requirement of a notice to be published "at least once a week" for several successive weeks not more than seven days should elapse between any two successive publications.[15]

E. Contents of Notice. The notice, being designed for the information of the general public, should describe the property in a reasonably accurate manner,[16]

Discretion of court.— The court may require a longer notice (Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753) but not a shorter one (Havens *v.* Sherman, 42 Barb. (N. Y.) 636) than is prescribed by statute. And giving a longer notice than is required does not invalidate the sale. Taylor *v.* Reid, 103 Ill. 349; Tooke *v.* Newman, 75 Ill. 215.

The court may allow counsel to designate the time of notice, without limiting it, taking care that it be reasonable and fair. Guise *v.* Middleton, Sm. & M. Ch. (Miss.) 89.

7. Gernon *v.* Bestick, 15 La. Ann. 697.

8. Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288, where notices were neither published nor posted for the required length of time.

9. Van Dorn *v.* Mengedoht, 41 Nebr. 525, 59 N. W. 800; Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873. See also Frothingham *v.* Marsh, 1 Mass. 247, holding that under statutes providing that notifications should be posted up thirty days previous to the sale and that printing a notification three weeks successively should be deemed equivalent to the posting up of notifications, publication for three weeks was sufficient, although not commenced thirty days previous to the sale.

10. Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288; Meredith *v.* Chancey, 59 Ind. 466; Parsons *v.* Lanning, 27 N. J. Eq. 70. See also Early *v.* Homans, 16 How. (U. S.) 610, 616, 14 L. ed. 1079, where the court held that a statute requiring notice of a tax-sale "for at least twelve successive weeks" required the first publication to be eighty-four days before the sale, but said "we do not doubt if the statute had been 'once in each week for twelve successive weeks' . . . it might very well be concluded, that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient." And see EXECUTIONS, 17 Cyc. 1246 note 42.

11. Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122 (construing a statute requiring notice to be published "three weeks successively" and relying upon the *dictum* in Early *v.* Homans, 16 How. (U. S.) 610, 14 L. ed. 1079, quoted *supra*, note 10); *Ex p.* Alexander, 35 S. C. 409, 14 S. E. 854. See also Wood *v.* Terry, 4 Lans. (N. Y.) 80. *Compare* Howard *v.* Hatch, 29 Barb. (N. Y.) 297.

12. Schenck *v.* Schenck, 52 La. Ann. 2102, 28 So. 302, where the court said that it would have been otherwise if the law had said judicial days.

13. Johnson *v.* Dorsey, 7 Gill (Md.) 269; Cuyler *v.* Tate, 67 Nebr. 317, 93 N. W. 675.

14. Whitaker *v.* Beach, 12 Kan. 492; McCurdy *v.* Baker, 11 Kan. 111; Treptow *v.* Buse, 10 Kan. 170.

15. Hernandes *v.* His Creditors, 57 Cal. 333.

16. *Kentucky.*— Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

Maryland.— Kauffman *v.* Walker, 9 Md. 229, description held insufficient.

Michigan.— Griswold *v.* Fuller, 33 Mich. 268.

Nebraska.— Morrison *v.* Lincoln Sav. Bank, (1901) 96 N. W. 230.

West Virginia.— Bradford *v.* McConihay, 15 W. Va. 732.

Canada.— Creswick *v.* Thompson, 6 Ont. Pr. 52; Bull *v.* Harper, 6 Ont. Pr. 36; Baxter *v.* Finlay, 1 Ch. Chamb. (U. C.) 230; McRoberts *v.* Durie, 1 Ch. Chamb. (U. C.) 211.

See 31 Cent. Dig. tit. "Judicial Sales," § 27.

Abbreviations which are generally understood may be used. Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344.

Failure to properly describe the property is a mere irregularity, and will not deprive the court of jurisdiction. Fitzwilliams *v.* Davie, 18 Tex. Civ. App. 81, 43 S. W. 840.

giving the boundaries,[17] and should state any important facts with reference to rights or easements appurtenant to the property[18] or improvements thereon[19] which may affect its value. But it would appear that an omission to designate an easement to which the property is subject, the existence of which is ascertainable by recourse to the public records and by actual measurement, will not avoid the sale.[20] A notice which certainly identifies the property to be sold is not vitiated by deficiencies[21] or even inaccuracies[22] in the description where these are not of a character to mislead any one.[23] The notice should state the time and place of the sale,[24] and, although it has been held not necessary,[25] it is the better and more usual practice to state the terms of sale in the notice.[26] The amount of the debt for which the land is to be sold should also be stated.[27] It has been said to be sufficient to insert the short style of the cause.[28]

F. Notice of Adjourned Sale. Unless otherwise provided by statute the notice of an adjourned sale must be the same as that required in the first instance.[29]

An advertisement which sufficiently identifies the property complies with the law. It is not necessary to describe the number of buildings or their character. Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416.

17. Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712. *Compare* Baxter *v.* Finlay, 1 Ch. Chamb. (U. C.) 230.

18. Chadwick *v.* Patterson, 2 Phila. (Pa.) 275, outlet on an alley.

The omission to state that the premises are leased advantageously will afford good ground for staying the sale, but an application for such purpose should be made promptly and before sale. McAlpine *v.* Young, 2 Ch. Chamb. (U. C.) 171.

19. Heward *v.* Ridout, 1 Ch. Chamb. (U. C.) 244.

20. Whiteman's Estate, 13 Phila. (Pa.) 249, private right of way. See also Cunningham *v.* Schley, 6 Gill (Md.) 207; Gibbs *v.* Cunningham, 1 Md. Ch. 44.

21. Wadsworth's Succession, 2 La. Ann. 966.

22. Wylly *v.* Gazan, 69 Ga. 506 (holding that a misdescription in the advertisement will not release the bidder if the advertisement is sufficient to put one of ordinary prudence on inquiry and such inquiry would disclose the true facts); New England Hospital, etc., *v.* Sohier, 115 Mass. 50 (misstatement of street number); Kotch *v.* Sieplein, 4 Ohio Dec. (Reprint) 88, 1 Clev. L. Rep. 17.

Where the notice of sale referred to papers on file in the office of the court for a more certain and full description of the interest advertised for sale, such interest passed notwithstanding an otherwise erroneous description. *In re* King, 3 Fed. 839.

23. New England Hospital, etc., *v.* Sohier, 115 Mass. 50.

Any description that correctly informs the public of the property to be sold is sufficient. Stevens *v.* Bond, 44 Md. 506; Morrison *v.* Lincoln Sav. Bank, etc., Co., (Nebr. 1901) 96 N. W. 230; Kotch *v.* Sieplein, 4 Ohio Dec. (Reprint) 88, 1 Clev. L. Rep. 17.

24. Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449; Blodgett *v.* Hitt, 29 Wis. 169. See also Sowards *v.* Pritchett, 37 Ill. 517.

Material mistakes or deficiencies in the notice as to the time or place of sale vitiate the sale. Wellman *v.* Lawrence, 15 Mass. 326; Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449.

Obvious clerical error.— The date, Jan. 9, 1996, in a notice of a judicial sale, is a mere clerical error, self-corrective, and will not affect the validity of the sale. Long *v.* Perine, 44 W. Va. 243, 28 S. E. 701.

Hour of sale.— The notice must state at what hour of the day or between what hours in the business portion of the day the sale will occur. School Tp. No. 23 *v.* Snell, 19 Ill. 156, 68 Am. Dec. 586. But where the statute fixed the hours of the day between which legal sales were to be held a notice of an execution sale which advertised the sale to occur between the "lawful hours" of the day mentioned was held sufficient. Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701. It seems that a similar rule should apply in case of a judicial sale.

25. Paine *v.* Fox, 16 Mass. 129.

26. **Misstatement as to encumbrances.**— A statement in the notice that the property will be sold free of encumbrances, whereas it is in fact subject to a private right of way, is misleading and furnishes sufficient ground to set aside the sale. Whiteman's Estate, 13 Phila. (Pa.) 249.

27. Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

In Nebraska the sale will not be set aside because the notice does not state the amount due on the decree. Dederick *v.* Gillespie, 63 Nebr. 422, 88 N. W. 659; Amoskeag Sav. Bank *v.* Robbins, 53 Nebr. 776, 74 N. W. 261; Stratton *v.* Reisdorph, 35 Nebr. 314, 53 N. W. 136.

28. Baxter *v.* Finlay, 1 Ch. Chamb. (U. C.) 230.

29. Griffin *v.* Chicago Mar. Co., 52 Ill. 130; Thornton *v.* Boyden, 31 Ill. 200; Glenn *v.* Wootten, 3 Md. Ch. 514. *Compare* Thompson *v.* Milliken, 15 Grant Ch. (U. C.) 197, holding that where a sale is put off, a note of such postponement at the foot of the old advertisement will suffice, without incurring the expense of a fresh advertisement.

In New Jersey, under Rev. St. p. 1043, § 6,

G. Effect of Failure to Give Proper Notice. The fact that proper notice of a judicial sale has not been given is always a sufficient ground for refusing to confirm or setting aside the sale;[30] but according to the weight of authority it is a mere irregularity which renders the sale voidable only and not void.[31] By appointing an appraiser, the debtor cures any defect in the advertisement of a judicial sale.[32]

XI. CONDUCT OF SALE.

A. In General. Directions as to the conduct of a judicial sale are given by general statutes covering the subject,[33] or by the order or decree of sale in the particular case,[34] and the sale must be conducted according to such directions.[35] It

notice of an adjournment is required only in case the adjournment is for a period exceeding one week. Hewitt *v.* Montclair R. Co., 25 N. J. Eq. 392. See also Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416.

30. *Illinois.*— Reynolds *v.* Wilson, 15 Ill 394, 60 Am. Dec. 753.

Kentucky.— Clark *v.* Bell, 4 Dana 15; Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712; Harris *v.* Gunnell, 9 S. W. 376, 10 Ky. L. Rep. 419.

Maryland.— Glenn *v.* Wootten, 3 Md. Ch. 514.

Minnesota.— Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449.

South Carolina.— Baily *v.* Baily, 9 Rich. Eq. 392.

See also Mobile Branch State Bank *v.* Hunt, 8 Ala. 876.

See 31 Cent. Dig. tit. "Judicial Sales," § 29.

In New Jersey, Act Feb. 16, 1891 (Pub. Laws 24), provides that judicial sales of land shall be confirmed notwithstanding irregularity in the publication of the notice of sale, when the officer making the sale certifies under oath that the sale was otherwise regular, and for a fair price, and the court is satisfied that the interests of the parties were not injuriously affected by the irregularity. This act is not a mere validating act relating to past sales only, but relates to future sales. It was not repealed by Act June 14, 1898 (Pub. Laws 535). Polhemus *v.* Priscilla, (N. J. Ch. 1903) 54 Atl. 141.

Error must be material.— Error in a notice of a judicial sale, to be fatal, must be one in a material particular, and of a character to produce injury. Dana *v.* Farrington, 4 Minn. 433. Thus the fact that land was not advertised to be sold free from dower, as provided by the decree for sale, does not affect the validity of the sale where the land does not appear to have been sold for less than its value. Strayer *v.* Long, 89 Va. 471, 16 S. E. 357.

Superfluous defective notice.— A defective notice published in one paper does not vitiate a regular and sufficient notice in another, where the statute requires but one notice, and there is no proof that any one was misled by the defective notice. Sealing *v.* Lawrence, 27 Ohio St. 441.

31. *Alabama.*— Doe *v.* Jackson, 51 Ala. 514.

Illinois.— Moffitt *v.* Moffitt, 69 Ill. 641.

Mississippi.— Hanks *v.* Neal, 44 Miss. 212; Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162; Minor *v.* Natchez, 4 Sm. & M. 602, 43 Am. Dec. 488.

Missouri.— Hobein *v.* Murphy, 20 Mo. 447, 64 Am. Dec. 194; McNair *v.* Hunt, 5 Mo. 300.

South Carolina.— *Ex p.* Alexander, 35 S. C. 409, 14 S. E. 854. *Compare* Baily *v.* Baily, 9 Rich. Eq. 392.

Texas.— Thulemeyer *v.* Jones, 37 Tex. 560.

See 31 Cent. Dig. tit. "Judicial Sales," § 29.

Compare Curley's Succession, 18 La. Ann. 728; Gernon *v.* Bestick, 15 La. Ann. 697; Thomas *v.* Le Baron, 8 Metc. (Mass.) 355; Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449; Blodgett *v.* Hitt, 29 Wis. 169.

32. Howard *v.* Schmidt, 29 La. Ann. 129.

33. Act Cong. March 3, 1893, regulating manner of sale of property under a decree, is prospective in its operation. New York Cent. Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 60 Fed. 9.

34. Bethel *v.* Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655.

35. *Alabama.*— Cruikshank *v.* Luttrell, 67 Ala. 318.

Colorado.— Filmore *v.* Reithman, 6 Colo. 120.

Illinois.— Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753.

Kentucky.— Bethel *v.* Bethel, 6 Bush 65, 99 Am. Dec. 665; Jarboe *v.* Colvin, 4 Bush 70.

Maine.— International Wood Co. *v.* National Assur. Co., 99 Me. 415, 59 Atl. 544.

United States.— Williamson *v.* Berry, 8 How. 495, 12 L. ed. 1170.

See 31 Cent. Dig. tit. "Judicial Sales," § 32.

The court will not ratify a sale conducted in a manner not authorized, unless the officer first attempts to sell in the authorized manner. Glenn *v.* Wootten, 3 Md. Ch. 514.

Unimportant and harmless variations from the directions of the decree are not ground for setting aside the sale as against innocent purchasers, where the precautions ordered to safeguard the interests of the parties have been taken, or where their omission has been immaterial. Lavender *v.* Latimer, 15 Ill. 80; Southwest Virginia Mineral Co. *v.* Chase, 95 Va. 50, 27 S. E. 826; Godchaux *v.* Morris, 121 Fed. 482, 57 C. C. A. 434.

is not, however, enough that the officer make even a literal compliance with the terms of the decree or the statute governing judicial sales, but he must conduct the sale in a manner fair and just to all, and especially to the debtor.[36] The sale must also be conducted in accordance with the announcements contained in the notice of sale.[37] In matters not regulated by statute or the decree, the sale is in general under the control of the officer conducting it, and he has considerable discretion in the actual conduct of the sale, which he must, however, exercise with a due regard to the rights of the parties.[38] The officer who makes a judicial sale of personalty which is mixed with other personalty of the same kind must separate what he sells from the mass, or the title will not pass.[39]

B. Public or Private Sale. A judicial sale is generally required to be made at public auction,[40] unless the officer is expressly authorized to dispose of the property at private sale.[41] When a public sale is required, a private sale is at least voidable, and according to some authorities void.[42]

C. Time of Sale — 1. In General. The time of sale is sometimes fixed by statute[43] or by the decree,[44] in which case such directions must be complied with;[45] but it is also frequently left to the discretion of the officer selling.[46] It is not

36. Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; King *v.* Platt, 37 N. Y. 155.

The creditor is not responsible for representations by an officer conducting the sale, unless he has either authorized such representations or acquiesced therein. Hammond *v.* Chamberlain Banking House, 58 Nebr. 445, 78 N. W. 718, 76 Am. St. Rep. 106.

37. Jarboe *v.* Colvin, 4 Bush (Ky.) 70; Hahn *v.* Pindell, 1 Bush (Ky.) 538.

38. Head *v.* Clark, 88 Ky. 362, 11 S. W. 203, 10 Ky. L. Rep. 917; Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43.

39. Stevens *v.* Eno, 10 Barb. (N. Y.) 95, sale of three tons of hay, out of the hay standing in a certain field.

40. Fambro *v.* Gantt, 12 Ala. 298; Ellet *v.* Paxson, 2 Watts & S. (Pa.) 418.

Establishing an upset price does not make the sale private, as it does not prevent any one from bidding a larger amount. Cohen *v.* Wagner, 6 Gill (Md.) 236.

41. Cox *v.* Price, (Va. 1895) 22 S. E. 512, holding that in the absence of a statutory provision requiring a public sale, the court has power to authorize either a public or a private sale.

Prerequisites to authorizing private sale.— The court will not permit a private sale unless fully informed of the value of the property and for good reasons. Bound *v.* South Carolina R. Co., 46 Fed. 315.

42. Wier *v.* Davis, 4 Ala. 442; Hutchinson *v.* Cassidy, 46 Mo. 431; Hutson *v.* Sadler, 31 W. Va. 358, 6 S. E. 920; Gaines *v.* De la Croix, 6 Wall. (U. S.) 719, 18 L. ed. 965.

That the order of court did not require a public sale is immaterial, where the statute requires the sale to be public. Hutchinson *v.* Cassidy, 46 Mo. 431.

In Maryland it is held that, although a trustee appointed to sell property is directed by the decree to make a public sale, yet if he makes an effort to do so but a public sale on the terms prescribed is impossible, and if satisfactory reasons for a private sale exist, as that a better price than that offered at public sale is obtained, and no objection sufficient to outweigh the reasons for deviating from the terms of the decree are made, he may sell at private sale, and his conduct will not be considered a substantial deviation from the decree, but only one offered from necessity. But he must first make an effort to sell in accordance with the decree. Cunningham *v.* Schley, 6 Gill (Md.) 207; Gibbs *v.* Cunningham, 1 Md. Ch. 44; Andrews *v.* Scotton, 2 Bland (Md.) 629; Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257. A private sale will not, however, be confirmed if made on less satisfactory terms than it is deemed could be obtained at public sale. Kelso *v.* Jessop, 59 Md. 114; Latrobe *v.* Herbert, 3 Md. Ch. 375.

Estoppel.— If property which should have been sold at public judicial sale is irregularly sold at private sale instead, with the acquiescence of one interested, he will thereby be estopped from questioning the validity of the proceeding. Maquoketa *v.* Willey, 35 Iowa 323.

43. Grace *v.* Garnett, 38 Tex. 156, holding that where the time of a public sale is prescribed by law, and the sheriff sells at a different time, the sale is void.

44. It should of course be so fixed when this is required by statute. Perry *v.* Seitz, 2 Duv. (Ky.) 122.

Improper direction.— It is not proper to direct that the sale shall be made "on some day fixed by law for judicial sales," where there are no such days fixed by law. But perhaps this may not be fatal to the decree. McClaskey *v.* O'Brien, 16 W. Va. 791.

Time of sale held not premature see Pewabic Min. Co. *v.* Mason, 145 U. S. 349, 12 S. Ct. 887, 36 L. ed. 732.

45. Tompkins *v.* Tompkins, 39 S. C. 537, 18 S. E. 233.

A sale before the time fixed by the decree may be allowed under special circumstances. See Porte *v.* Irwin, 8 Ont. Pr. 40.

46. Myers *v.* James, 4 Lea (Tenn.) 370, holding that the fixing of the day of sale is so much a matter within the discretion of the

necessary that the sale should be on a court day,[47] but it may be made in vacation.[48] A sale on election day is not void,[49] but may be set aside if otherwise oppressive.[50] The sale may be made after the time limited for the return.[51] If the sale is one that can be made in parcels, different parcels may be sold from time to time until all are sold.[52] A sale should not be made while it remains uncertain whether it will be necessary.[53] A second sale will not be permitted within the time allowed for redemption from a previous sale.[54]

2. Adjournment or Postponement. The officer appointed to sell has discretionary power, subject to the control of the court, and it is his duty to adjourn a sale whenever a reasonably advantageous price cannot be had and an adjournment is necessary to prevent a sacrifice of the property;[55] and where the interests of the parties require it the court will postpone the sale.[56]

D. Place of Sale. The statutes sometimes contain a general provision as to the place where judicial sales shall be held,[57] and in the absence of some such provision sale should be made at the place designated in the order or decree of sale.[58] But if the sale is actually had at a proper place, it is not invalid because the decree did not designate the place of sale.[59] The sale should of course be held at the place specified in the notices of sale.[60] The most usual places of sale are at

officer that his discretion can only be controlled in a clear case of its abuse.

Waiver of objections to day set.— Where property is offered for sale under a decree on a Saturday, the Sabbath of a party interested, who is thereby prevented from making arrangements to purchase the same, and he knew of the day fixed for several weeks before the sale took place, it was his duty to have applied to the trustee to change the day. Omitting to do this his failure must be regarded as a waiver of all objection to the day of sale as being his Sabbath, and he must abide the consequences of his omission. Cohen *v.* Wagner, 6 Gill (Md.) 236.

47. Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611.

48. Delahay *v.* McConnel, 5 Ill. 156; Grubb *v.* Crane, 5 Ill. 153.

49. King *v.* Platt, 37 N. Y. 155.

50. King *v.* Platt, 37 N. Y. 155; Banning *v.* Pendery, 7 Ohio Dec. (Reprint) 677, 4 Cinc. L. Bul. 912.

51. Southern California Lumber Co. *v.* Ocean Beach Hotel Co., 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115.

52. Hamer *v.* Cook, 118 Mo. 476, 24 S. W. 180.

53. Ashley *v.* Hull, 18 Ohio Cir. Ct. 614, 9 Ohio Cir. Dec. 664 (holding that an order confirming a sale of real estate will be set aside when the sale is made in pursuance of a judgment and while proceedings in error to reverse the same are pending); Cocke *v.* Gilpin, 1 Rob. (Va.) 20 (holding that where a sale was decreed to be made in case a defendant failed to pay the amount decreed against him, and he died, the sale ought to be suspended until it could be ascertained whether the assets of his estate would satisfy the decree).

54. Herdman *v.* Cooper, 29 Ill. App. 589.

55. Thornton *v.* Boyden, 31 Ill. 200; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Miller *v.* Law, 10 Rich. Eq. (S. C.) 320, 73 Am. Dec. 92; Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43. A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect the sale of which previous public notice was given. Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304.

Where the day of sale is appointed as a public holiday after the notice has been given, the sale should be adjourned. White *v.* Zust, 28 N. J. Eq. 107.

A sale adjourned to a different place than that named in the decree has been confirmed. Farmers' Bank *v.* Clarke, 28 Md. 145.

Trustee has no power to make agreement to delay sale.— Ward *v.* Hollins, 14 Md. 158.

56. Magwood *v.* Butler, Harp. Eq. (S. C.) 265. And see Max Meadows Land, etc., Co. *v.* McGavock, 96 Va. 131, 30 S. E. 460.

57. See Grace *v.* Garnett, 38 Tex. 156, sale at place different from that prescribed by law void.

Georgia Act of Dec. 13, 1866, to change the place of holding legal sales in the county of Muscogee, as amended by the act of Oct. 10, 1868, not being inconsistent with Const. (1877), was kept of force by art. 12, § 1, par. 4, of that instrument. Massey *v.* Bowles, 99 Ga. 216, 25 S. E. 270.

58. Talley *v.* Starke, 6 Gratt. (Va.) 339.

59. Hooper *v.* Young, 58 Ala. 585.

60. See Talley *v.* Starke, 6 Gratt. (Va.) 339.

A sale substantially at the place advertised is sufficient, as where a sale advertised to be on the premises was had not immediately thereon, but within eighty yards of the dwelling-house, within full view of it, and fifteen or twenty steps from the boundary line. Ferguson *v.* Franklin, 6 Munf. (Va.) 305.

It will not always be a valid objection to a sale, well attended and fair in other respects, that it was made a different place from that mentioned in the advertisement. Harrison *v.* Harrison, 1 Md. Ch. 331.

the court-house of the county,[61] or, in the case of real estate, upon the premises.[62] Where it appears to be for the interest of all the parties that the property should be sold in another district, and the parties agree thereto, the court will consent to such removal and sale.[63]

E. Sale in Gross or in Parcels. Whether land sold at judicial sale shall be offered in gross or in parcels is a matter regulated by statute in some states,[64] and in cases not provided for by mandatory statute the court has power to direct how the sale shall be made,[65] and may order that the property be sold either as a whole,[66] or in parcels.[67] It is sometimes even left to the discretion of the officer making the sale whether he will sell in gross or in parcels.[68] The most usual method, however, where the property to be sold is susceptible of division[69] is to offer it in

61. See Morrow *v.* McGregor, 49 Ark. 67, 4 S. W. 49 (holding that a sale by a sheriff, by order of a court of equity, of a cotton-gin and condenser, together with the gin-house, made at the court-house door, is not void because the property was not present, as the property, being a fixture, is in the nature of real estate, and may be sold as such); Godchaux *v.* Morris, 121 Fed. 482, 57 C. C. A. 434 (holding, however, that where a federal court had jurisdiction to order a sale of real estate, the fact that its decree directed that the sale be made at a place other than "the courthouse of the county, parish or city, in which the property, or the greater part thereof, is located, or upon the premises," as required by the act of March 3, 1893 (27 U. S. St. at L. 751 [U. S. Comp. St. 1901, p. 710]), did not render the sale void).

62. See Talley *v.* Starke, 6 Gratt. (Va.) 339.

63. The San Jose Indiano, 21 Fed. Cas. No. 12,323, 2 Gall. 311, but the court will protect the marshal in his right to his fees. *Compare* Phillips *v.* Sanborn, 6 L. C. Jur. 252, 12 L. C. Rep. 408.

64. McMullen *v.* Gable, 47 Ill. 67; Wright *v.* Yetts, 30 Ind. 185; Mays *v.* Carman, 66 S. W. 1019, 23 Ky. L. Rep. 2216 (sales for payment of debts); Atcheson *v.* Hutchison, 51 Tex. 223; Cook *v.* Brown, 45 Tex. 73 (constitutional provision).

Sale in violation of constitutional provision not void.— Tex. Const. (1869) art. 12, § 40, providing that all sales of landed property made under decrees of court shall be offered to bidders in lots of not less than ten or more than forty acres, except in towns, etc., did not render void a sale not actually made in lots of forty acres or less, or a decree not directing the sale to be so made. Cook *v.* Brown, 45 Tex. 73.

65. Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617. See also Gale *v.* Canadian Iron, etc., Co., 1 Montreal Super. Ct. 441, 8 Montreal Leg. N. 341.

The discretion of the chancellor in ordering a sale in parcels or as a whole will not be interfered with by the court on appeal, unless plainly erroneous. Long *v.* Weller, 29 Gratt. (Va.) 347.

Personal property.— There is no rule which requires that at judicial sales each article of personal property should in all cases be sold separately. The general rule is that unless the value of the articles, or a considerable part of it, consists in their constituting one establishment, and where there would naturally be purchasers to bid on them separately, they should be sold separately; but where their value, as constituting a whole establishment, is greater than if separated, and the articles when separated would not excite competition, they should be sold as a whole. Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

66. Nix *v.* Draughon, 56 Ark. 240, 19 S. W. 669; O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Booker *v.* Louisville, 76 S. W. 18, 25 Ky. L. Rep. 497; Johnson *v.* Evans, 1 Tenn. Ch. App. 603 (holding that the rule governing sheriffs' sales of lands, and requiring different tracts to be separately sold, does not apply to a sale of three tracts as a whole under decree of the chancery court); Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. 391; Central Trust Co. *v.* Sheffield, etc., Coal, etc., R. Co., 60 Fed. 9.

The sale of a debt under legal process is controlled by the rule that a debt cannot be divided without the consent of both debtor and creditor. Kelso *v.* Beaman, 6 La. 87.

A reference to a commissioner is not necessary to determine the best method of selling, before ordering lands to be sold as a whole, but the court may obtain the necessary information from the examination of witnesses in open court. Tallman *v.* Truesdell, 3 Wis. 443.

67. Morrisse *v.* Inglis, 46 N. J. Eq. 306, 19 Atl. 16.

Failure to comply with decree.— Under a decree authorizing a sale of lands by a commissioner "in such convenient and reasonable parcels" as in his opinion shall be most conducive to the interest of all the parties, a sale by putting up and striking off numerous and distinct tracts on one offer and bid is unwarranted. Griswold *v.* Fuller, 33 Mich. 268.

68. Wright *v.* Yetts, 30 Ind. 185; Whitbeck *v.* Rowe, 25 How. Pr. (N. Y.) 403.

69. **Presumption as to divisibility.** — The court is authorized to presume, in the absence of allegation or proof as to that matter, that a tract of thirty-four and one-half acres is divisible. Mays *v.* Carman, 66 S. W. 1019, 23 Ky. L. Rep. 2216. In the absence of evidence it will not be inferred that land de-

parcels,[70] for the reason that it is to be supposed that the highest price will be realized by selling in this manner,[71] and, when the property is sold to pay debts, for the further reason that offering the land in this manner makes it possible to sell no more than is necessary for this purpose.[72] But if a sale as a whole would be more advantageous it may properly be so made.[73] The property is sometimes offered first in parcels and then as a whole, and the highest offer obtained accepted,[74] and when the property is offered in parcels but no bidders are found it may properly be offered *en masse*.[75] The sale must in this as in other respects be in accordance with the advertisement or notice thereof.[76] The mere fact that property at public sale is sold in gross is not *per se* sufficient to avoid the sale. There must be some attendant fraud, unfair dealing, or abuse of confidence, in order to obtain the aid of a court of equity to divest title so acquired.[77] The purchaser at a judicial sale of real property cannot raise the question that two lots were sold together as a defense to a motion to compel him to take title.[78]

scribed as the "north one-third of lots 5 and 6" constitutes separate tracts, which should be sold separately. La Selle *v.* Nicholls, 56 Nebr. 458, 76 N. W. 870.

70. *Illinois.*— McMullen *v.* Gable, 47 Ill. 67.

Kentucky.— Mays *v.* Carman, 66 S. W. 1019, 23 Ky. L. Rep. 2216; Sebree *v.* Coleman, 22 S. W. 852, 15 Ky. L. Rep. 242; Skaggs *v.* Hill, 14 S. W. 363, 12 Ky. L. Rep. 382; McLaughlin *v.* Schneid, 12 S. W. 1061, 11 Ky. L. Rep. 648.

New Jersey.— Ryan *v.* Wilson, (Prerog. 1902) 52 Atl. 993.

New York.— Griffith *v.* Hadley, 10 Bosw. 587; Larkin *v.* Brouty, 15 N. Y. Suppl. 509; American Ins. Co. *v.* Oakley, 9 Paige 259; Woods *v.* Monell, 1 Johns. Ch. 505.

Pennsylvania.— Connell *v.* Hughes, 1 Phila. 225; Tate *v.* Carberry, 1 Phila. 133.

See 31 Cent. Dig. tit. "Judicial Sales," § 37.

Error without injury.— A failure to offer separately, as required by the decree, one parcel of land, of small value, where no injury resulted, will not defeat confirmation. Godchaux *v.* Morris, 121 Fed. 482, 57 C. C. A. 434.

A resale is subject to the same rule, and a creditor is not estopped from objecting to a resale of houses in a lump because he purchased them together on the first sale. Connell *v.* Hughes, 1 Phila. (Pa.) 225.

71. Ryan *v.* Wilson, (N. J. Prerog. 1902) 52 Atl. 993; Larkin *v.* Brouty, 15 N. Y. Suppl. 509.

Officer should sell in such parcels as will produce highest price.— Deleplaine *v.* Lawrence, 3 N. Y. 301; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 259.

72. McMullen *v.* Gable, 47 Ill. 67; Mays *v.* Carman, 66 S. W. 1019, 23 Ky. L. Rep. 2216; Skaggs *v.* Hill, 14 S. W. 363, 12 Ky. L. Rep. 382; McLaughlin *v.* Schneid, 12 S. W. 1061, 11 Ky. L. Rep. 648; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587.

The commissioner has a discretionary power, subject to review by the court, to determine what part shall be sold, the object being to obtain as large a price as possible from the sale of as little land as possible. Vanbussum *v.* Maloney, 2 Metc. (Ky.) 550. See also Delaplaine *v.* Lawrence, 3 N. Y. 301.

73. *Illinois.*— See McMullen *v.* Gable, 47 Ill. 67.

Kentucky.— O'Kane *v.* Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Booker *v.* Louisville, 76 S. W. 18, 25 Ky. L. Rep. 497, where allegations that the lot could not be divided without materially impairing its value were denied.

Louisiana.— McCall's Succession, 28 La. Ann. 713.

New York.— American Ins. Co. *v.* Oakley, 9 Paige 259.

United States.— Johns *v.* Slack, 13 Fed. Cas. No. 7,363, 2 Hughes 467.

See 31 Cent. Dig. tit. "Judicial Sales," § 37.

A sale of land lying in the outer part of a town may be made in lump, and not in parcels, although it be known to the commissioner for the sale that a company had been formed for its purchase in lump, which might prevent competition between bidders. Johns *v.* Slack, 13 Fed. Cas. No. 7,363, 2 Hughes 467.

74. Vanmeter *v.* Vanmeter, 88 Ky. 448, 11 S. W. 80, 289, 10 Ky. L. Rep. 906; Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712; Godchaux *v.* Morris, 121 Fed. 482, 57 C. C. A. 434. See also Cornell *v.* McCann, 48 Md. 592.

75. Van Valkenburg *v.* School Trustees, 66 Ill. 103; Martin *v.* Hargardine, 46 Ill. 322; Phelps *v.* Conover, 25 Ill. 309.

When there are three several tracts it is improper to offer them in gross, after a failure to sell them separately, without first attempting to sell two of them together. Cohen *v.* Menard, 31 Ill. App. 503 [*affirmed* in 136 Ill. 130, 24 N. E. 604].

76. Jarboe *v.* Colvin, 4 Bush (Ky.) 70.

77. Wright *v.* Yetts, 30 Ind. 185; Chase *v.* Williams, 74 Mo. 429.

Where land and slaves are sold together by the master, and no exception is presented to his report of the sale on that ground, its confirmation will not be disturbed. Lasell *v.* Powell, 7 Coldw. (Tenn.) 277.

78. Duer *v.* Dowdney, 11 N. Y. St. 301, holding further that the irregular sale of two lots together, instead of separately, is cured

F. Order of Selling. If the original debtor has conveyed part of his land, the several parts should be sold in the inverse order of alienation,[79] but it is too late after confirmation to raise the objection that the land was not sold in such order.[80] Where a particular order for selling is indicated in a decree for the sale of land, a departure from such order by the commissioner, not excepted to before confirmation, will not render such sale invalid as to *bona fide* purchasers, in the absence of fraud.[81]

G. Withdrawal of Property From Sale. It has been held that the officer or commissioner conducting the sale has the discretionary right, subject to the control of the court, to withdraw property temporarily from sale after it has been offered and even after a bid has been received and cried, where he sees that to proceed with the sale would result in a sacrifice of the property.[82] But in Canada a solicitor having the conduct of a sale cannot withdraw the property after a bid has been made.[83]

H. Terms and Conditions of Sale. In some states the terms of a judicial sale are fixed by statute either absolutely[84] or by fixing certain limits within which the court may exercise its discretion,[85] and when this is the case the sale must be on the terms so provided.[86] In the absence of statutory direction the terms of sale are entirely within the discretion of the court.[87] The sale should be on the terms prescribed in the decree,[88] although it has been held that a slight departure therefrom will not necessarily invalidate the sale if no injury has

by an order directing the purchaser to complete the sale.

79. Watt *v.* McGalliard, 67 Ill. 513.

80. Watt *v.* McGalliard, 67 Ill. 513.

81. McGavock *v.* Bell, 3 Coldw. (Tenn.) 512.

82. Miller *v.* Law, 10 Rich. Eq. (S. C.) 320, 73 Am. Dec. 92, holding that if he does so the highest and last bidder is not entitled to a conveyance, there being no contract with him.

83. McAlpine *v.* Young, 2 Ch. Chamb. (U. C.) 85, where it is said that his course would appear to be to move to open the biddings, if he has grounds for such a motion. And see O'Connor *v.* Woodward, 6 Ont. Pr. 223, holding that upon a sale without reserve, it is not open to the vendor to refuse a bid, however small.

84. Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373.

85. Williams *v.* Ewing, 31 Ark. 229; McKensie *v.* Salyer, 43 S. W. 450, 19 Ky. L. Rep. 1414.

86. Fry *v.* Street, 37 Ark. 39 (holding that where a decree ordered real property to be sold, without saying on credit, a sale for cash was meant, and the decree was therefore erroneous); McKensie *v.* Salyer, 43 S. W. 450, 19 Ky. L. Rep. 1414; Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373 (holding that where a sale is to be made by statute on a credit of six months, it is an error in a decree to direct a sale for cash, although it can be made for cash or on a longer credit if all the parties consent thereto). See also Burke *v.* His Creditors, 9 La. Ann. 1.

87. See Dazet *v.* Landry, 21 Nev. 291, 30 Pac. 1064; Walrath *v.* Abbott, 75 Hun (N. Y.) 445, 27 N. Y. Suppl. 529.

The court has power to change the terms of sale so long as it has control of the sale and the latter remains unconfirmed. Tebbs *v.* Lee, 76 Va. 744. But it will not do so when it amounts to an amendment of the decree, unless special considerations require it. Earle *v.* McCartney, 112 Fed. 372 [*affirmed* in 115 Fed. 462].

Requiring deposit.— A rule of the district court requiring purchasers at a judicial sale to deposit fifty dollars with the sheriff or master as a guarantee of good faith is reasonable. Green *v.* Diezel, 3 Nebr. (Unoff.) 818, 92 N. W. 1004.

When there are unpaid taxes encumbering the property at the time of the sale of real estate under an order of court in an equity proceeding, the court may in its discretion order a sale clear of encumbrances, if thereby the rights of none of the parties are prejudiced. Philadelphia Nat. Bank *v.* Pottstown Security Co., 14 Montg. Co. Rep. (Pa.) 106.

Variance from report of referee.— The court at special term has no authority to enter a judgment authorizing sales of real estate on credit when from the report of the referee it is to be presumed that only cash sales were contemplated. Shrady *v.* Van Kirk, 77 N. Y. App. Div. 261, 79 N. Y. Suppl. 79.

The law will not permit judicial sales to be made lotteries at the bidding, and sources of confusion and strife afterward, as where purchasers are required in substance by the terms of a sale to take the property subject to so much of the antichresis as may be due, and such of the recorded mortgages as on investigation turn out to be *bona fide*. Pickersgill *v.* Brown, 7 La. Ann. 297.

88. Cofer *v.* Miller, 7 Bush (Ky.) 545; Bethel *v.* Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655; Musgrave *v.* Parrish, 12 S. W. 709, 11 Ky. L. Rep. 573; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695; Arnold *v.* Arnold, 21 N. C. 111.

The terms cannot be changed by agreement of parties or counsel unless incorporated **into**

resulted therefrom.[89] So far as the officer's action is not controlled by the decree, he has considerable discretion as to the terms to be imposed.[90] The terms and conditions announced at the sale are binding upon the purchaser,[91] and he is chargeable with notice of the terms embraced in the order of sale.[92] Usually a credit for a certain time is allowed.[93] In Canada it has been held that where the title or the proof of it is involved in no difficulty, a condition of sale that "the vendor is not to be bound to give any evidence of title or any title-deeds or copies thereof, other than such as are in his possession, or procure any abstract," was very objectionable, and should not be sanctioned by masters even by consent.[94]

I. Bidding — 1. In General. The rule that a bid at an auction sale is merely an offer that may be withdrawn at any time before it is accepted by striking off the property to the bidder[95] applies to judicial sales.[96] Neither does the bidder acquire any rights by his bid until it is accepted.[97] A bid may be made by an agent[98] or sent in by letter.[99] Ordinarily a bidder may not put in an upset bid.[1] A bid not in conformity with the requirements of the decree or the law need not be entertained.[2] To prevent a person from baffling the court by becoming the highest bidder at a sale under a decree when he is wholly unable to comply with his contract, the court may direct that the bid of such person shall not be received, and that the trustee report the two highest bidders, so that, in case the highest bidder fails to comply with the terms of sale, the next highest bidder shall be received and considered as the purchaser.[3] Where the commissioner

the record. Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695.

Party who procures sale cannot complain of ambiguity in its terms.— Gauche *v.* Trautman, 7 La. Ann. 610.

89. Johnson *v.* Campbell, 52 Ark. 316, 12 S. W. 578, holding that the confirmation of a sale under a decree will not be disturbed, where it appears that there has been due and legal notice of time, terms, and place of sale, although it was made on a credit of three months, instead of four, as the decree directed; defendant showing no injury resulting from the departure from the direction, and the trial court being satisfied that none had resulted therefrom.

90. Especially so that puffers and fraudulent bidders may be excluded. Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

The officer may demand an immediate compliance with the terms of the sale if he doubts the good faith of a bidder. Irby *v.* Irby, 11 Lea (Tenn.) 165.

A purchaser who is not prepared to comply with the terms of a cash sale cannot complain if his bid is not accepted. U. S. *v.* The Haytian Republic, 64 Fed. 214.

91. Trichel *v.* Myers, 18 La. Ann. 567; Backen *v.* Hamilton, 18 La. Ann. 553; Cable *v.* Byrne, 38 Minn. 534, 38 N. W. 620, 8 Am. St. Rep. 696, even though the purchaser did not come on the ground until after the announcement.

92. Taylor *v.* James, 109 Ga. 327, 34 S. E. 674.

93. See Williams *v.* Ewing, 31 Ark. 229; McKensie *v.* Salyer, 43 S. W. 450, 19 Ky. L. Rep. 1414; Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373.

The purchaser must pay for the preparation (Fahner *v.* Rau, 1 Ch. Chamb. (U. C.) 246) and registration (Sweetman *v.* Sweetman, 6 Int. Pr. 83) of his mortgage.

Surety of purchaser not bound in solido with purchaser.— Dees *v.* Tildon, 2 La. Ann. 412 [*followed* in Tildon *v.* Dees, 9 La. Ann. 250].

94. McDonald *v.* Gordon, 2 Ch. Chamb. (U. C.) 125.

95. Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43; Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679.

96. Hibernia Sav., etc., Soc. *v.* Behnke, 121 Cal. 339, 53 Pac. 812; Grotenkemper *v.* Achtermeyer, 11 Bush (Ky.) 222; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695.

97. See *In re* Alger, etc., Oil Co., 21 Ont. 440. *Compare* McAlpine *v.* Young, 2 Ch. Chamb. (U. C.) 171, holding that the "highest bidder" at an auction sale is the "purchaser" under the general orders of the court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position. See *supra*, XI, G.

98. Quigley *v.* Breckenridge, 180 Ill. 627, 54 N. E. 580; Gibbs *v.* Davies, 168 Ill. 205, 48 N. E. 120; Ingalls *v.* Rowell, 149 Ill. 163, 36 N. E. 1016; Cohen *v.* Wagner, 6 Gill (Md.) 236.

99. Wenner *v.* Thornton, 98 Ill. 156.

1. Moore *v.* Triplett, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882.

When leave granted.— On a motion in chambers, liberty to have a reserved bid was granted, where accidentally omitted in settling the terms of sale, and the master's advertisements of the terms and conditions of the sale altered in accordance therewith, on payment by the plaintiff of the costs of the application. Fraser *v.* Bens, 1 Ch. Chamb. (U. C.) 71.

2. Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695.

3. Murdock's Case, 2 Bland (Md.) 461, 20 Am. Dec. 381.

refused to accept the bid of the debtor, but subsequently the chancellor granted him the privilege of giving bond, and taking the property at his bid, which he failed to do, exceptions to the commissioner's report were properly overruled, as the debtor had the full benefit of his offer.[4]

2. Puffing. The employment of puffers to enhance the bids is a fraud on honest bidders, and a genuine buyer who has been injuriously affected thereby will be relieved from his purchase.[5] But it has been held that the fact of a puffer having bid at a sale will not avoid the sale if after the bid by the puffer there is a *bona fide* bid before the bid at which the property is knocked down.[6]

3. Mistakes and Devices Preventing Attendance or Bidding at Sale. Any agreement, the object and effect of which is to chill the sale and stifle competition, is illegal, and no party to the agreement can derive a benefit from the sale,[7] for the law does not tolerate any influence likely to prevent competition at judicial sales.[8] The same rule applies when bidders are kept from attending or bidding by misinformation purposely or mistakenly given.[9] A sale tainted with such fraud will be set aside, even after confirmation and delivery of the deed to the purchaser.[10] An agreement between two or more to purchase

4. Creutz *v.* Knecht, 6 S. W. 717, 9 Ky. L. Rep. 772.

5. *New Jersey.*— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

New York.— Wolfe *v.* Luyster, 1 Hall 161.

North Carolina.— Woods *v.* Hall, 16 N. C. 411; Morehead *v.* Hunt, 16 N. C. 35.

United States.— Veazie *v.* Williams, 8 How. 134, 12 L. ed. 1018.

England.— Bexwell *v.* Christie, Cowp. 395; Thornett *v.* Haines, 15 L. J. Exch. 230, 15 M. & W. 367; Howard *v.* Castle, 6 T. R. 642, 3 Rev. Rep. 296.

See 31 Cent. Dig. tit. "Judicial Sales," § 42.

Contra.— Jenkins *v.* Hogg, 2 Treadw. (S. C.) 821.

Preventing sacrifice.— There is some authority that by-bids may be made merely to prevent a sacrifice of the property, strictly as a defensive precaution but not otherwise. Steele *v.* Ellmaker, 11 Serg. & R. (Pa.) 86; Woodward *v.* Miller, 2 Coll. 279, 9 Jur. 1003, 15 L. J. Ch. 6, 63 Eng. Reprint 734; Smith *v.* Clarke, 12 Ves. Jr. 477, 8 Rev. Rep. 359, 33 Eng. Reprint 180; Conolly *v.* Parsons, 3 Ves. Jr. 625 note, 30 Eng. Reprint 1188.

6. Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

7. Hamilton *v.* Hamilton, 2 Rich. Eq. (S. C.) 355, 46 Am. Dec. 58. And see Swofford *v.* Garmon, 51 Miss. 348.

8. Fleming *v.* Hutchinson, 36 Iowa 519; Cocks *v.* Izard, 7 Wall. (U. S.) 559, 19 L. ed. 275.

If interested parties attack the title in such a way as to deter bidders, and the property is sold for an inadequate price the sale will be set aside. Wood *v.* Drury, 56 Kan. 409, 43 Pac. 763.

Where all the parties in interest enter into an agreement to restrict the bidding, the reason for the rule does not apply, and such agreement is not against public policy and does not invalidate the sale. Neely *v.* McClure, 1 Pa. Cas. 98, 1 Atl. 719; Fairy *v.* Kennedy, 68 S. C. 250, 47 S. E. 138.

9. *Maryland.*— Hintze *v.* Stingel, 1 Md. Ch. 283.

New York.— Angel *v.* Clark, 21 N. Y. App. Div. 339, 47 N. Y. Suppl. 731.

Pennsylvania.— United Security L. Ins., etc., Co. *v.* Safford, 3 Lack. Leg. N. 51.

Wisconsin.— See Koop *v.* Burris, 95 Wis. 301, 70 N. W. 473, holding that where the sheriff had announced before the sale that bidders would not be required to make immediate cash payment in full but at the sale refused to allow bids by any persons not ready to pay cash in full and refused to adjourn the sale was invalid.

United States.— Alexandria Bank *v.* Taylor, 2 Fed. Cas. No. 854, 5 Cranch C. C. 314.

See 31 Cent. Dig. tit. "Judicial Sales," § 43.

10. *Georgia.*— Barnes *v.* Mays, 88 Ga. 696, 16 S. E. 67.

Illinois.— Ingalls *v.* Rowell, 149 Ill. 163, 36 N. E. 1016; Devine *v.* Harkness, 117 Ill. 145, 7 N. E. 52; Wilson *v.* Kellogg, 77 Ill. 47; Dutcher *v.* Leake, 44 Ill. 398.

Louisiana.— Wood *v.* Hennen, 9 La. Ann. 264.

Missouri.— Baier *v.* Berberich, 6 Mo. App. 537 [*affirmed* in 77 Mo. 413].

South Carolina.— Hamilton *v.* Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58.

See 31 Cent. Dig. tit. "Judicial Sales," § 43.

Compare Brock *v.* Saul, 2 Ch. Chamb. (U. C.) 145, holding that biddings will not be opened and a sale set aside on the ground that a party, defendant, was prevented from bidding by promises made to him by the purchaser, as such facts, if established, would constitute the purchaser a trustee for him, and would be subject for a suit.

Proof to establish fraud must be clear and unquestionable.— Crutchfield *v.* Thurman, 4 Bush (Ky.) 498.

A deed on a sale so vitiated passes no title when the purchaser combines with others to prevent competition and thus gets the prop-

property together as a common enterprise is not fraudulent and is not within the prohibition against combinations having for their object the prevention of competition.[11]

4. Withdrawal of Bids. A bid may be withdrawn at any time before it is accepted by the officer who sells, but after such acceptance the contract is so far binding on the bidder that he may not withdraw his bid except under circumstances that would justify the rescission or reformation of an ordinary contract.[12]

J. Purchasers — 1. Who May Purchase.[13] No person can become a purchaser at a judicial sale who has a duty to perform in reference thereto which is inconsistent with the character of purchaser,[14] or who is so connected with the sale that his individual interest as a purchaser might be inconsistent with his duty.[15] Thus the person who sells at a judicial sale may not become the purchaser,[16] either directly[17] or indirectly.[18] Neither can the judge who ordered the sale become the purchaser or be interested as a purchaser;[19] and under some statutes an appraiser of the property sold is prohibited from becoming the purchaser.[20] How-

erty at a sacrifice. Underwood *v.* McVeigh, 23 Gratt. (Va.) 409.

A party to a fraudulent combination to chill bidding cannot complain that he was deterred from bidding by the promises of another party to the scheme who had purchased the property. Harrell *v.* Wilson, 108 N. C. 97, 12 S. E. 889.

11. *Kentucky.*— Jolly *v.* Mutual L. Ins. Co., 65 S. W. 440, 23 Ky. L. Rep. 1508.

New Jersey.— Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

Pennsylvania.— Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761.

South Carolina.— Reagan *v.* Bishop, 25 S. C. 585; Holmes *v.* Holmes, 3 Rich. Eq. 61.

Tennessee.— McMinn *v.* Phipps, 3 Sneed 196.

See 31 Cent. Dig. tit. "Judicial Sales," § 43.

12. Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695. And see Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

13. Purchase by: Attorney, see Attorney and Client. Bankrupt at bankruptcy sale, see Bankruptcy. Committee of lunatic, see Insane Persons. Executor or administrator, see Executors and Administrators. Guardian, see Guardian and Ward; Insane Persons. Guardian *ad litem*, see Infants. Life-tenant, see Estates. Next friend, see Infants. Trustee, see Trusts.

14. McCelvey *v.* Thomson, 7 S. C. 185, purchase by solicitor in the cause.

15. Thus where a bank was bound to pay a debt for the debtor, but did not do so, and there was a foreclosure sale for such debt, it was held that the sale could not stand because the cashier of the bank was a purchaser, and this whether he bought for himself or the bank, it being a fraud on the debtor for those whose duty to him required them to pay the debt to buy at a sale caused by their own default. Torrey *v.* Orleans Bank, 9 Paige (N. Y.) 649.

Leave to a trustee to bid does not absolve him from his duty to the infant *cestui que trust*. Ricker *v.* Ricker, 7 Ont. App. 282.

16. *Alabama.*— Saltmarsh *v.* Beene, 4 Port. 283, 30 Am. Dec. 525.

Illinois.— Kruse *v.* Steffens, 47 Ill. 112; Thorp *v.* McCullum, 6 Ill. 614.

New York.— Davoue *v.* Fanning, 2 Johns. Ch. 252.

South Carolina.— McCelvey *v.* Thomson, 7 S. C. 185.

West Virginia.— Ayers *v.* Blair, 26 W. Va. 558.

United States.— Michoud *v.* Girod, 4 How. 503, 11 L. ed. 1076; Wormley *v.* Wormley, 8 Wheat. 421, 5 L. ed. 651; Prevost *v.* Gratz, 6 Wheat. 481, 5 L. ed. 311.

England.— Guest *v.* Smythe, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. Rep. N. S. 563, 18 Wkly. Rep. 742.

Canada.— Where the person having the conduct of the sale is the highest bidder, and applies to be confirmed as the purchaser, the application will not be granted if any of the parties in the suit object. Crawford *v.* Boyd, 6 Ont. Pr. 278. See also Patterson *v.* Stanton, 4 Grant Ch. (U. C.) 100.

See 31 Cent. Dig. tit. "Judicial Sales," § 40.

Solicitor of person conducting sale cannot purchase.— Guest *v.* Smythe, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. Rep. N. S. 563, 18 Wkly. Rep. 742.

Actual fraud need not be shown.— Miles *v.* Wheeler, 43 Ill. 123.

Leave to bid.— A master has no power to give leave to bid to a party conducting a sale. Application must be made to the court. McGillivray *v.* Johnson, 8 Ont. Pr. 548.

17. Thorp *v.* McCullum, 6 Ill. 614.

18. Saltmarsh *v.* Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525; Kruse *v.* Steffens, 47 Ill. 112; Miles *v.* Wheeler, 43 Ill. 123; McConnel *v.* Gibson, 12 Ill. 128; McCelvey *v.* Thomson, 7 S. C. 185; Ayers *v.* Blair, 26 W. Va. 558; Winans *v.* Winans, 22 W. Va. 678.

19. Livingston *v.* Cochran, 33 Ark. 294; Tracy *v.* Colby, 55 Cal. 67; Hoskinson *v.* Jaquess, 54 Ill. App. 59; Walton *v.* Torrey, Harr. (Mich.) 259.

20. Reno *v.* Hale, 28 Nebr. 646, 44 N. W. 996; Terrill *v.* Auchauer, 14 Ohio St. 80.

ever, a purchase by a prohibited person renders the sale not void, but voidable only.[21] In the United States either party to the suit may become the purchaser,[22] and if a judicial sale of corporate property occurs in the course of litigation between stock-holders, they stand in no such fiduciary relation to the property as to prevent them from becoming purchasers either for themselves or for others.[23] But an attorney who becomes a purchaser at a judicial sale made for the benefit of his client is not a *bona fide* purchaser without notice.[24] In England and Canada neither a party to the suit[25] nor his solicitor[26] can become the purchaser unless he has previously obtained leave of court to bid.[27]

2. RIGHTS AND LIABILITIES OF PURCHASERS. A purchaser at a judicial sale becomes from the time of his purchase in effect a party to the action so far as to be subject to the jurisdiction of the court[28] and entitled to notice in subsequent proceedings relative to the sale.[29] A bidder becomes a purchaser when the officer announces the sale to him,[30] but his title is only an inchoate one. The bid is no more than an offer to buy, subject to being accepted or rejected by the court, and the purchaser's title is not complete until the sale is confirmed.[31]

The mere fact that a brother of an appraiser bid at a judicial sale will not invalidate it. Mastin *v.* Zweigart, 72 S. W. 750, 24 Ky. L. Rep. 1920.

21. McConnel *v.* Gibson, 12 Ill. 128; Thorp *v.* McCullum, 6 Ill. 614; Reno *v.* Hale, 28 Nebr. 646, 652, 44 N. W. 996 (where it is said that "a sale to an appraiser is void as against the judgment debtor and his grantees," but a third person who has sustained no injury by the appraisement cannot object); Terrill *v.* Auchauer, 14 Ohio St. 80 (so holding, although the statute declared that the sale should "be considered fraudulent and void"); Black *v.* Childs, 14 S. C. 312.

22. Pewabic Min. Co. *v.* Mason, 145 U. S. 349, 12 S. Ct. 887, 36 L. ed. 732. See also Eby *v.* Schumacher, 29 Pa. St. 40.

23. Pewabic Min. Co. *v.* Mason, 145 U. S. 349, 12 S. Ct. 887, 36 L. ed. 732.

24. Salter *v.* Dunn, 1 Bush (Ky.) 311.

25. Guest *v.* Smythe, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. Rep. N. S. 563, 18 Wkly. Rep. 742; Elworthy *v.* Billing, 10 L. J. Ch. 176, 10 Sim. 98, 16 Eng. Ch. 98; Bowman *v.* Fox, 2 Can. L. J. N. S. 302. Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserved bidding. Phillips *v.* Conger, 1 U. C. Q. B. O. S. 583.

26. Guest *v.* Smythe, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. Rep. N. S. 563, 18 Wkly. Rep. 742.

27. Guest *v.* Smythe, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. Rep. N. S. 563, 18 Wkly. Rep. 742; Elworthy *v.* Billing, 10 L. J. Ch. 176, 10 Sim. 98, 16 Eng. Ch. 98.

28. *Kentucky.*— Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617.

Maryland.— Andrews *v.* Scotton, 2 Bland 629.

New Jersey.— Silver *v.* Campbell, 25 N. J. Eq. 465.

New York.— Requa *v.* Rea, 2 Paige 339. See also Archer *v.* Archer, 155 N. Y. 415, 50 N. E. 55, 63 Am. St. Rep. 688 [*affirming* 84 Hun 297, 32 N. Y. Suppl. 410], assignee of purchaser.

South Carolina.— *Ex p.* Qualls, 71 S. C. 87, 50 S. E. 646; Gordon *v.* Saunders, 2 McCord Eq. 151.

Tennessee.— Blackmore *v.* Barker, 2 Swan 340.

Virginia.— Hickson *v.* Rucker, 77 Va. 135; Clarkson *v.* Read, 15 Gratt. 288.

West Virginia.— Haymond *v.* Camden, 22 W. Va. 180.

United States.— Tennessee *v.* Quintard, 80 Fed. 829, 26 C. C. A. 165; Wood *v.* Mann, 30 Fed. Cas. No. 17,954, Sumn. 318.

See 31 Cent. Dig. tit. "Judicial Sales," § 90.

The jurisdiction over the purchaser continues so long as the control of the court over the case and parties remains. Dibrell *v.* Williams, 3 Coldw. (Tenn.) 528.

29. Pope *v.* Amidon, 6 Kan. App. 398, 50 Pac. 1093; Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245; Hughes *v.* Hamilton, 19 W. Va. 366; Kable *v.* Mitchell, 9 W. Va. 492.

30. Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403. *Compare* McAlpine *v.* Young, 2 Ch. Chamb. (U. C.) 171, holding that the highest bidder at an auction sale is the purchaser under the general orders of the court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position.

31. *Kentucky.*— Vanbussum *v.* Maloney, 2 Metc. 550.

Maryland.— Kauffman *v.* Walker, 9 Md. 229; Wagner *v.* Cohen, 6 Gill 97, 45 Am. Dec. 660.

Pennsylvania.— Church *v.* Bailee, 2 Leg. Rec. 169, 29 Pittsb. Leg. J. 20.

Wisconsin.— See Lupton *v.* Almy, 4 Wis. 242.

United States.— Tennessee *v.* Quintard, 80 Fed. 829, 26 C. C. A. 165.

See *infra*, XIII, A.

The rule applies equally to the cases in which it is sought to compel a purchaser to complete his purchase and to those in which the latter seeks to enforce his contract. Eakin *v.* Herbert, 4 Coldw. (Tenn.) 116; Mayhew *v.* West Virginia Oil, etc., Co., 24 Fed. 205.

3. ASSIGNMENT BY PURCHASER. A bidder to whom the property has been struck off at a judicial sale may assign his bid before the deed has been delivered, and the deed will be made directly to the assignee and pass the title to him.[32] But the assignor does not escape any of the obligations of an accepted bidder,[33] and the assignee takes the same interest that his assignor had and stands in his shoes and is subject to whatever may be ordered against the original bidder and to whatever defenses may be interposed against the latter.[34]

4. SECURITY FROM PURCHASER. In cases of sales on credit the court may and usually does require security for the payment of the purchase-price to be given by the purchaser.[35] If no security is given, or if that given is deemed insufficient, the

32. Proctor *v.* Farnam, 5 Paige (N. Y.) 614; Campbell *v.* Baker, 51 N. C. 255; Hall *v.* Hall, 12 W. Va. 1.

Facts not showing fraud in obtaining order for conveyance to person other than purchaser see Smith *v.* Wells, 73 S. W. 742, 24 Ky. L. Rep. 2166.

If the sale has been set aside an assignment of the bid is champertous and illegal, giving the assignee no standing in court. Newland *v.* Gaines, 1 Heisk. (Tenn.) 720.

In Illinois the statute makes certificates of judicial sales assignable by indorsement, and an assignment of such a certificate by written assignment on a different paper gives the assignee only an equitable title. Chytraus *v.* Smith, 141 Ill. 231, 30 N. E. 450.

33. Reynolds *v.* Timmons, 7 S. C. 486, holding that the fact that security is taken from the assignee does not discharge the bidder.

34. Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125 [*reversing* 62 Ill. App. 358]; Harwood *v.* Cox, 26 Ill. App. 374; Bagby *v.* Warren Deposit Bank, 49 S. W. 177, 20 Ky. L. Rep. 1357.

Assignee chargeable with notice when notice given or chargeable to purchaser.— Roberts *v.* Clelland, 82 Ill. 538.

Where the holder of a certificate of sale has contracted to sell it and then assigns it to another the assignee takes it subject to the contract. Chytraus *v.* Smith, 141 Ill. 231, 30 N. E. 450.

An assignee who fails to complete the purchase is not entitled to the cash partial payment made by the purchaser. Flint *v.* George, 5 Silv. Sup. (N. Y.) 314, 8 N. Y. Suppl. 221.

35. Brassfield *v.* Burgess, 10 S. W. 122, 10 Ky. L. Rep. 660.

A creditor who purchases at a sale made to satisfy his debt need not give a bond for that portion of the purchase-price due himself. Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940.

One bond may be given for the whole price of land sold in parcels. Preston *v.* Breckinridge, 86 Ky. 619, 6 S. W. 641, 10 Ky. L. Rep. 2.

Time allowed for perfecting bond.— The commissioner conducting the sale must be the judge of the length of time to be allowed the purchaser for perfecting his bond. Hughes *v.* Swope, 88 Ky. 254, 1 S. W. 394, 8 Ky. L. Rep. 256.

Waiver of right to mortgage.— Where the commissioner, under an order of court to sell and take a bond and mortgage for the price, neglected to take the mortgage, the party entitled by receiving the bond waived his right to claim a mortgage. McCauley *v.* Heriot, Riley Eq. (S. C.) 19.

If the title appears defective the court should not require the purchaser to execute his bonds; but if the title can be perfected without such delay as will result in essential damage to the purchaser it is equitable to allow a reasonable time for supplying the apparent defect in the title. Ormsby *v.* Terry, 6 Bush (Ky.) 553.

Where two trustees appointed to sell could not agree as to the security to be given by the purchaser, and each reported, and the matter in question between them was submitted to the court on such reports and the answer of the purchaser, it was not an abuse of discretion for the court to order the purchaser to give security satisfactory to, and to be approved by, only one of the trustees. Hopper *v.* Williams, 75 Md. 191, 23 Atl. 352.

Obligee.— Where a deputy sheriff was directed by a decree in chancery to sell certain property and take a bond for the purchase-money to himself as commissioner, the fact that the bond so taken ran to him as deputy sheriff did not affect the validity of the bond. Leavitt *v.* Goggin, 11 B. Mon. (Ky.) 229.

Liability on bond — Release of surety.— A purchaser of mortgaged lands at judicial sale gave bonds for a price sufficient to satisfy the mortgage and accrued taxes. Being unable to pay the bonds, he and his surety surrendered the lands into court to be resold. On the second sale the amount realized was insufficient to pay the mortgage and taxes. It was held that the mortgagee's failure to issue execution upon the bonds for the deficiency within one year after maturity did not release the surety, the delay having been at the latter's instance, to enable him to contest the claim for taxes, and he having agreed in writing to remain bound. Louisville *v.* Kaye, 8 S. W. 869, 10 Ky. L. Rep. 160.

A refusal of the court to order the cancellation of the bond of a purchaser at a judicial sale without giving reasonable time to perfect the pleadings and bring in necessary parties so as to pass a perfect title is not an error of which the purchaser can

court may refuse to confirm the sale until satisfactory security is given,[36] or may set the sale aside on exceptions.[37] It has been held that an officer selling property at judicial sale need not take security unless required to do so by statute or the decree.[38]

XII. REPORT OF SALE.

A. Necessity. A commissioner appointed by decree of court to make a sale of property is required to make a report of his proceedings under the decree by which he is appointed to the court from which he derives his authority, as a basis for the further action of the court.[39]

B. Contents. The report should show a compliance with all the requirements of law and of the decree with respect to the matters preliminary to the sale and the conduct of the sale itself, and fully inform the court as to what has been done. Thus it must show that notice of the sale was given,[40] the price received,[41] how much and what land was sold,[42] whether separate tracts were sold together or not and what each tract brought;[43] and in a proper case that the officer offered to sell less than the whole tract to pay the debt.[44] But an immaterial mistake or irregularity in the form of the report or in a recital contained in it does not affect the validity of the sale, where the sale itself was properly conducted.[45] A return that property was sold at public auction implies that it

justly complain under N. C. Code, § 297. Capel *v.* Peebles, 80 N. C. 90.

36. Reamer *v.* Judah, 13 Bush (Ky.) 206.

After the officer has accepted and attested the purchaser's bond for the payment of his bid, he has no power to demand another bond with additional security in lieu of the one thus accepted; and on the failure or refusal of the purchaser to execute another bond the officer has no right to report to the court that the purchaser has failed to comply with the terms of the sale by executing bond with approved surety. Reamer *v.* Judah, 13 Bush (Ky.) 206.

37. Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

If the purchaser was always ready and willing to furnish the security required by the order of sale, the failure of the commissioner to take it is not ground for setting the sale aside, but the purchaser will be required to comply. Young *v.* Teague, Bailey Eq. (S. C.) 13.

38. Thompson *v.* Wagner, 3 Desauss. Eq. (S. C.) 94, holding further that his advertising that security will be required does not preclude him from dispensing with it.

39. Crockett *v.* Sexton, 29 Gratt. (Va.) 46.

The purchaser will not be compelled to complete his purchase until a report of the sale has been made and confirmed. Laverty *v.* Chamberlain, 7 Blackf. (Ind.) 556; Beard *v.* Arbuckle, 19 W. Va. 135. But on the other hand the title of the purchaser cannot depend absolutely on performance by the officer of this part of his duties; so if the court is satisfied that the sale is made by its agent, although not informed in the regular way, it may approve and ratify the sale. Harrison *v.* Harrison, 1 Md. Ch. 331.

40. Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288.

A failure to so show is not remedied by a printer's affidavit showing it was so published. Evans *v.* Bushnell, 59 Kan. 160, 52 Pac. 419.

It is sufficient to state that the notice required by the decree was given, without stating what the notice was. Burke *v.* Weaver, 71 Ill. 359; Hess *v.* Voss, 52 Ill 472.

Where a postponement was had it must appear that it was deemed to be in the interests of all concerned and that legal notice thereof was given. Wilson *v.* Bucknam, 71 Me. 545.

41. Haney *v.* McClure, 88 Ky. 146, 10 S. W. 427, 10 Ky. L. Rep. 711.

Report need not state sum which was to be raised by sale.— Vissman *v.* Bryant, 21 S. W. 759, 14 Ky. L. Rep. 874.

42. Barger *v.* Buckland, 28 Gratt. (Va.) 850.

43. Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

44. Haney *v.* McClure, 88 Ky. 146, 10 S. W. 427, 10 Ky. L. Rep. 711.

45. Riley *v.* Wiley, 3 Dana (Ky.) 75 (where a decree directed the sale to be made for bank-notes and the commissioner reported that he had sold for a certain number of dollars and reference was made to the decree); Bean *v.* Meguiar, 47 S. W. 771, 20 Ky. L. Rep. 885 (where a deputy commissioner signed the report in his own name instead of that of the commissioner); Beardsley *v.* Higman, 58 Nebr. 257, 78 N. W. 510 (where the officer made a mistake in his recital in the return as to the day on which he received the order of sale). Where two commissioners joined in a second sale after a bidder on the first sale failed to comply with its terms, and one of the commissioners refused to join in the report of the second sale and himself reported in favor of the confirmation of the first sale, the validity of the second sale was not affected by the action of the commissioner who did not join in the report of it. Hildreth *v.* Turner, 89 Va. 858, 17 S. E. 471.

was disposed of to the highest bidder.[46] Where the sale is reported by three commissioners and one of them makes and signs an *addendum* to their report, such *addendum* is no part of the report or of the record; and a vendee of the purchaser is not affected by anything in such *addendum*, although notified of the suit and the proceedings.[47]

C. How Far Conclusive. The report is not absolutely conclusive, but it is evidence, and in the absence of proof to the contrary, it is presumed that the statements of the report are true.[48]

D. Amendment and Correction. If the report is in any way imperfect the officer may be required to make a further report, and if, after he has made his report, he discovers any material error, omission, or ambiguity in the report, he may by leave of the court file an amended or supplemental report, and it is his duty to do so.[49]

XIII. CONFIRMATION.

A. In General. Confirmation is the formal expression of the judicial sanction of the sale and is therefore necessary for its completion. Before confirmation the sale is not in a technical and legal sense a sale. The accepted bidder is merely a preferred proposer, and to divest the former owner's title and render valid the deed to the purchaser the sale must be confirmed.[50] The sale must be confirmed without change of its terms or confirmation must be refused. The court has no power to modify the terms of the sale and confirm the sale as modified.[51] Jurisdiction to confirm a judicial sale resides in the court by which the

46. Fraser *v.* Seeley, (Kan. 1905) 79 Pac. 1081.

47. Shirley *v.* Rice, 79 Va. 442.

48. Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617; Brown *v.* Wallace, 2 Bland (Md.) 585; Laidley *v.* Jasper, 49 W. Va. 526, 39 S. E. 169.

It is evidence against the purchasers.—Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980.

Under the Louisiana code a recital in a procès verbal that land belonged to a succession, referring to the adjudication, forms a presumption *juris et de jure*. Blanchard *v.* Allain, 5 La. Ann. 367, 52 Am. Dec. 594.

49. Crockett *v.* Sexton, 29 Gratt. (Va.) 46.

Parol evidence admissible to show mistake.—Stites *v.* Wiedner, 35 Ohio St. 555.

Where an error in the original report is corrected by an amended report so that no one is prejudiced by the error it is not an objection to the confirmation of the sale. Campbell *v.* Gawlewicz, 3 Nebr. (Unoff.) 321, 91 N. W. 569.

50. *Alabama.*— Bland *v.* Bowie, 53 Ala. 152; Witter *v.* Dudley, 42 Ala. 616; Mobile Branch Bank *v.* Hunt, 8 Ala. 876.

Arkansas.— Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179.

Kentucky.— Egard *v.* Chearnly, 1 Bush 12; Taylor *v.* Gilpin, 3 Metc. 544; Dickerson *v.* Talbot, 14 B. Mon. 60; Busey *v.* Hardin, 2 B. Mon. 407. See also Penn *v.* Fightmaster, 17 S. W. 334, 13 Ky. L. Rep. 449.

Maryland.— Wagner *v.* Cohen, 6 Gill 97, 45 Am. Dec. 660; Anderson *v.* Foulke, 2 Harr. & G. 346.

Mississippi.— Tooley *v.* Kane, Sm. & M. Ch. 518.

North Carolina.— Foushee *v.* Durham, 84 N. C. 56.

Tennessee.— Jones *v.* Hollingsworth, 10 Heisk. 653; Rogers *v.* Breen, 9 Heisk. 679; Atkison *v.* Murfree, 1 Tenn. Ch. 51; *Ex p.* Moore, 3 Head 171; Childress *v.* Hurt, 2 Swan 487.

West Virginia.— Thompson *v.* Cox, 42 W. Va. 566, 26 S. E. 189; Kable *v.* Mitchell, 9 W. Va. 492.

United States.— Mayhew *v.* West Virginia Oil, etc., Co., 24 Fed. 205.

See 31 Cent. Dig. tit. "Judicial Sales," § 59.

Compare Kimple *v.* Conway, 75 Cal. 413, 17 Pac. 546.

Court may confer on commissioner power to sell property without confirmation see Crawford *v.* Woodward, 1 Tenn. Ch. App. 274. And see further Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570.

The purchaser acquires a vested equitable title to the land from the time of his purchase until the confirmation. Hughes *v.* Swope, 88 Ky. 254, 1 S. W. 394, 8 Ky. L. Rep. 256.

The remedy of one who seeks to impeach a sale before confirmation is to oppose the confirmation of the sale. Phillips *v.* Benson, 82 Ala. 500, 2 So. 93.

The question as to the validity of the sale is distinct from that of the validity of the judgment under which it is made, and the one may stand, although the other may be reversed or vacated. Bean *v.* Hoffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. L. Rep. 739.

51. Ohio L. Ins., etc., Co. *v.* Goodin, 10 Ohio St. 557.

sale was ordered.[52] An order confirming a commissioner's sale of land made by a person acting, by agreement of parties, as special judge, is utterly void.[53]

B. Loss Pending Confirmation. The risk of loss pending confirmation is upon the vendor. If the property is accidentally destroyed after the sale and before confirmation, the purchaser will not be compelled to complete.[54]

C. Considerations Governing Confirmation or Refusal to Confirm. Whether the sale should be confirmed is a matter within the sound equitable discretion of the court;[55] but it is a discretion that must be exercised reasonably and not arbitrarily, and if abused is subject to review on appeal.[56] The sale must appear to be in all essential respects fair and proper, or it will not be confirmed,[57] and the simple fact that confirmation would sacrifice the interests of those entitled to the protection of the court is sufficient ground for a refusal to confirm.[58] The court will not, however, be astute to find objections,[59] and if there is no evidence of unfairness, deception, or impropriety the sale is properly confirmed.[60] Even though there have been irregularities, if the court can give a good title and it is

52. See Oviatt's Estate, 3 Pa. Dist. 620, holding that a sale by the sheriff on process issued out of the orphans' court cannot be confirmed in the common pleas, or in any other court but the orphans' court which awarded the writ.

In Tennessee before the creation of the Louisville law and equity court, the vice-chancellor having had jurisdiction of such matters as the chancellor of the Louisville chancery court submitted to him, an order of the chancellor, confirming a sale decreed by the vice-chancellor, was not void as *coram non judice*. Dunn *v.* German Security Bank, 3 S. W. 425, 8 Ky. L. Rep. 777.

53. Trotter *v.* Neal, 50 Ark. 340, 7 S. W. 384, such agreement imparts no judicial power.

54. *Maryland.*— Wagner *v.* Cohen, 6 Gill 97, 46 Am. Dec. 660.

New York.— Harrigan *v.* Golden, 41 N. Y. App. Div. 423, 58 N. Y. Suppl. 726.

Tennessee.— Eakin *v.* Herbert, 4 Coldw. 116.

England.— *Ex p.* Minor, 11 Ves. Jr. 559, 9 Rev. Rep. 247, 32 Eng. Reprint 1205.

Canada.— Stephenson *v.* Barn, 8 Ont. 258.

Contra.— Vance *v.* Foster, 9 Bush (Ky.) 389.

In Tennessee a distinction is made between sales of real and of personal property. On a sale of the latter the title is held to pass the purchaser when his bid is accepted by the master, and the risk of loss is on him thenceforth. Saunders *v.* Stallings, 5 Heisk. (Tenn.) 65.

Waste pending confirmation.— One interested in the proceeds of the sale may apply to the court to protect the estate from waste pending confirmation. Wagner *v.* Cohen, 6 Gill (Md.) 97, 45 Am. Dec. 660.

55. Taylor *v.* Gilpin, 3 Metc. (Ky.) 544; Owen *v.* Owen, 5 Humphr. (Tenn.) 352; Carr *v.* Carr, 88 Va. 735, 14 S. E. 368; Brock *v.* Rice, 27 Gratt. (Va.) 812; Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608.

56. *Illinois.*— Quigley *v.* Breckinridge, 180 Ill. 627, 54 N. E. 580; Ayers *v.* Baumgarten, 15 Ill. 444.

Kentucky.— Hughes *v.* Swope, 88 Ky. 254, 1 S. W. 394, 8 Ky. L. Rep. 256.

Nebraska.— Roberts *v.* Robinson, 49 Nebr. 717, 68 N. W. 1035, 59 Am. St. Rep. 567.

Virginia.— Langyher *v.* Patterson, 77 Va. 470; Brock *v.* Rice, 27 Gratt. 812.

West Virginia.— Hughes *v.* Hamilton, 19 W. Va. 366.

See 31 Cent. Dig. tit. "Judicial Sales," § 59.

57. *Illinois.*— Barling *v.* Peters, 134 Ill. 606, 25 N. E. 765.

Kentucky.— McLaughlin *v.* Schnied, 12 S. W. 1061, 11 Ky. L. Rep. 648; Vanbussum *v.* Maloney, 2 Metc. 550.

Maryland.— Tomlinson *v.* McKaig, 5 Gill 256.

Virginia.— Brock *v.* Rice, 27 Gratt. 812.

Canada.— See Thomas *v.* McCrae, 2 Ch. Chamb. (U. C.) 456.

See 31 Cent. Dig. tit. "Judicial Sales," § 63.

58. Egard *v.* Chearnly, 1 Bush (Ky.) 12. Where on appeal from confirmation the sale is set aside as to certain parcels and a confirmation as to the others may be prejudicial to a resale of the first mentioned, the sale will be set aside as to all. Talley *v.* Starke, 6 Gratt. (Va.) 339.

Agreement for setting aside.— There is nothing *per se* fraudulent in an agreement between the purchaser and a creditor under the decree, before confirmation, that the sale shall be set aside, and such agreement will be enforced in the absence of a showing of fraud. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

59. Cunningham *v.* Schley, 6 Gill (Md.) 207; Gibbs *v.* Cunningham, 1 Md. Ch. 44.

The presumption is that the officer did his duty in all respects and that the sale was properly conducted (Erwin *v.* Chaffe, 51 La. Ann. 41, 24 So. 596) and proper notice thereof given (Childress *v.* Harrison, 1 Baxt. (Tenn.) 410).

60. *Illinois.*— Le Crone *v.* Worman, 63 Ill. App. 120.

Kansas.— Condon *v.* Wood, 7 Kan. App. 577, 52 Pac. 63.

Kentucky.— Stump *v.* Martin, 9 Bush 285;

to the interest of the parties to confirm the sale, it will be confirmed, and the purchaser compelled to complete his purchase.[61] Mere lapse of time will not prevent confirmation.[62] It is not a matter of course to open the biddings upon an offer of a larger bid.[63]

D. Proceedings For Confirmation. Any interested party may move for confirmation,[64] and all parties interested are entitled to a hearing.[65] In the absence of regulation by rule of court or statute, it seems the better practice to give reasonable notice to the solicitors in the cause of a motion to confirm the sale, and upon proof of such notice to move for a decree *nisi* to be entered, to the effect that the sale will be confirmed unless cause be shown to the contrary within a stated time.[66] Confirmation may not be opposed by persons who are not parties to the proceedings under which the property was sold and who do not claim any interest in the proceeds of the sale,[67] but a judgment creditor has such an interest in the property that he may object to the confirmation of a sale of land against which his judgment is a lien.[68] Where the confirmation of a sale is opposed on the ground of there having been an unnecessary number of lots sold, the purchaser should be notified.[69] Confirmation may be postponed upon a petition mak-

Mastin *v.* Zweigart, 72 S. W. 750, 24 Ky. L. Rep. 1920.

Nebraska.— Roberts *v.* Robinson, 49 Nebr. 717, 68 N. W. 1035, 59 Am. St. Rep. 567; Fisk *v.* Gulliford, 1 Nebr. (Unoff.) 31, 95 N. W. 494.

Virginia.— Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507; Langyher *v.* Patterson, 77 Va. 470.

United States.— Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 84 Fed. 752.

See 31 Cent. Dig. tit. "Judicial Sales," § 64.

61. Swan *v.* Newman, 3 Head (Tenn.) 288; Cayley *v.* Colbert, 2 Ch. Chamb. (U. C.) 455.

Burden of proof.— N. J. Acts (1891), p. 24, § 1, providing for confirmation of a judicial sale notwithstanding defects in the advertisement of sale, provided the officer shall certify that the property sold for a fair price, throws the burden of proving that the price was fair, where the advertisement is defective, on the officer or purchaser alleging it. Polhemus *v.* Princilla, (N. J. Ch. 1904) 61 Atl. 263. When a sale has been held and the master's directions have not been followed, the vendor will have to show at his own expense that no person interested has been injured by the non-observance of the directions; otherwise the master will not confirm the sale. Royal Canadian Bank *v.* Dennis, 4 Ch. Chamb. (U. C.) 68.

62. Hazlewood *v.* Chrisman, (Tenn. Ch. App. 1901) 62 S. W. 39.

If there has been unreasonable delay without fault of the purchaser and he will be prejudiced by a confirmation of the sale, it is ground for refusing to confirm. Hyman *v.* Smith, 13 W. Va. 744.

63. Johnson *v.* Dorsey, 7 Gill (Md.) 269. See *infra*, XIV, B, 8.

Under the Mississippi act of Feb. 28, 1884, the court may refuse to confirm a sale on the ground that the price is inadequate, provided the party objecting to confirmation will give bond for the payment of costs thereby accruing, and conditioned that on the resale the property shall bring an advance of fifteen per cent exclusive of costs. One who procures a resale under this statute is to be treated as starting the bidding on the resale at the amount for which the bond is security, and if there is no better bid he is to become the purchaser and be dealt with as such. Mason *v.* Martin, 64 Miss. 572, 1 So. 756.

64. See Coltrane *v.* Baltimore Bldg., etc., Assoc., 126 Fed. 839.

Purchaser or his heirs may apply.— State *v.* Bermudez, 12 La. 352; Beale *v.* Walden, 11 Rob. (La.) 67; Hazlewood *v.* Chrisman, (Tenn. Ch. App. 1901) 62 S. W. 39; Crooks *v.* Glenn, 1 Ch. Chamb. (U. C.) 354.

65. Edwards *v.* Maupin, 7 Mackey (D. C.) 39. See also *In re* Johnson, 3 La. Ann. 656, notice to all parties by publication necessary.

Necessity for tender.— One opposing in a monition proceeding a confirmation of sale need not make an antecedent tender. *In re* Fazende, 35 La. Ann. 1145.

66. Williamson *v.* Berry, 8 How. (U. S.) 495, 12 L. ed. 1170; Coltrane *v.* Baltimore Bldg., etc., Assoc., 126 Fed. 839.

On the other hand there is authority for the practice of obtaining the order *nisi* without notice and serving the order *nisi* itself upon the counsel; and thereafter upon proof of such service, if no cause be shown against it, a decree absolute may be entered. Mobile Branch State Bank *v.* Hunt, 8 Ala. 876; Pewabic Min. Co. *v.* Mason, 145 U. S. 349, 12 S. Ct. 887, 36 L. ed. 732.

Notice to defendant's attorney of record is notice to defendant unless the law requires service of notice on defendant. Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. 391.

Purchaser entitled to notice.— Boner *v.* Boner, 6 W. Va. 377.

67. Griffith *v.* Hammond, 45 Md. 85.

68. Cochran *v.* Deakyne, 2 Marv. (Del.) 367, 43 Atl. 170.

69. Beaty *v.* Radenhurst, 3 Ch. Chamb. (U. C.) 344.

ing out a proper case and the proceedings suspended until the adjudication of the matters set up in the petition.[70] The general rule is that all objections of fact to the report of the officer must be supported by preponderating evidence sufficient to set aside the report.[71] On appeal from the order of confirmation, the appellate court will not consider objections to the confirmation that were not raised in the court below,[72] and if the evidence is conflicting the finding of the trial court will not be disturbed.[73] On affirmance of an order confirming a judicial sale, the appellate court may allow interest and damages for the detention of the property, payable out of the proceeds of the sale, without requiring the appellee to first proceed against the sureties on the appeal bond.[74]

E. Waiver of Objections. Where a party knows of any fact that might constitute an objection to the regularity of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation.[75]

F. Effect of Confirmation.[76] The order of confirmation gives to the sale the judicial sanction of the court, and when made it relates back to the time of the sale,[77] and cures all defects and irregularities,[78] except those founded on want

70. Houghton *v.* Mountain Lake Land Co., 93 Va. 149, 24 S. E. 920.

71. Bolgiano *v.* Cooke, 19 Md. 375. If the objection of gross inadequacy of price is attempted to be supported by parol proof, the proof must be very clear. Connell *v.* Wilhelm, 36 W. Va. 598, 15 S. E. 245.

In Louisiana it is held that on a petition for confirmation the burden of proving the regularity of the sale is on the petitioner when the homologation is opposed. Lamorandier *v.* Meyer, 8 Rob. 152; *Ex p.* Murray, 6 Rob. 74; Fortier *v.* Zimpel, 5 Rob. 189.

Affidavits stating that the interest of a decedent in land sold is only one half are not the best evidence of the extent of his title, but when received without objection, they will be considered. Glennon *v.* Mittenight, 86 Ala. 455, 5 So. 772.

72. Runge *v.* Brown, 29 Nebr. 116, 45 N. W. 271; Parrat *v.* Neligh, 7 Nebr. 456; Lasell *v.* Powell, 7 Coldw. (Tenn.) 277; Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431; Coles *v.* Coles, 83 Va. 525, 5 S. E. 673; Park *v.* Ulster, etc., Petroleum Co., 25 W. Va. 108; McMullen *v.* Eagan, 21 W. Va. 233; Dick *v.* Robinson, 19 W. Va. 159.

73. Creighton University *v.* Riley, 50 Nebr. 341, 69 N. W. 943.

74. Barnum *v.* Raborg, 2 Md. Ch. 516.

75. Cohen *v.* Wagner, 6 Gill (Md.) 236; Cunningham *v.* Schley, 6 Gill (Md.) 207; Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 60 Fed. 9.

An objection that the property was sold in one tract instead of in parcels cannot be interposed to the confirmation of the sale, when the decree directed the sale to be so made, and no objection was made to the decree. Nix *v.* Draughon, 56 Ark. 240, 19 S. W. 669.

76. Decree of confirmation a final decree.— McKinney *v.* Kirk, 9 W. Va. 26.

77. Tennessee Coal, etc., Co. *v.* Gardner, 131 Ala. 599, 32 So. 622; Haralson *v.* George, 56 Ala. 295; Brown *v.* Isbell, 11 Ala. 1009; Vass *v.* Arrington, 89 N. C. 10; Cale *v.* Shaw, 33 W. Va. 299, 10 S. E. 637.

The sale will be considered satisfactory to the parties where it is confirmed without objection, and the proceeds thereof received, even though one of the parties has been induced to assent by the payment of an extra bonus. Goodlett *v.* Campbell, 1 Tenn. Ch. 200.

78. *Alabama.*— Kemp *v.* Lyon, 76 Ala. 212, consent decree of confirmation.

Kentucky.— Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617.

Louisiana.— Cordeville *v.* Hosmer, 16 La. 590; Pannell *v.* Overton, 12 La. 555. *Compare* Beale *v.* Walden, 11 Rob. 67.

Maryland.— Brown *v.* Gilmor, 8 Md. 322; Anderson *v.* Foulke, 2 Harr. & G. 346; Andrews *v.* Scotton, 2 Bland 629.

Mississippi.—Henderson *v.* Herrod, 23 Miss. 434.

New York.— Duer *v.* Dowdney, 11 N. Y. St. 301. But see Bostwick *v.* Atkins, 3 N. Y. 53, holding that where an application is made to confirm a judicial sale of real estate, and a decree is made favorable to the applicant, it should confirm the sale only in respect to the defect or irregularity, to cure which the proceeding is had, and the parties interested adversely to the sale should not be precluded by the decree from contesting it on other grounds.

Virginia.— Langyher *v.* Patterson, 77 Va. 470; Thomas *v.* Davidson, 76 Va. 338.

United States.— Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. 391.

See 31 Cent. Dig. tit. "Judicial Sales," § 66.

Illustrations.— Confirmation cures defects and irregularities in the appraisement (Watson *v.* Tromble, 33 Nebr. 450, 50 N. W. 331, 29 Am. St. Rep. 492; Neligh *v.* Keene, 16 Nebr. 407, 20 N. W. 277), irregularity in publishing notice (Neligh *v.* Keene, *supra*), error in the decree in directing the manner of sale (Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. 391), failure of the decree to name the master (Mechanics' Sav., etc., Assoc. *v.* O'Conner, 29 Ohio St. 651), and the defect of the sale having been made

of jurisdiction or fraud.[79] As the contract is then complete,[80] the sale will not be set aside except for the same reasons for which equity would set aside a sale between individuals;[81] but relief will be given when such reasons do exist, as for example where there has been fraud or mutual mistake;[82] and confirmation does not validate a sale that is void from lack of jurisdiction or otherwise.[83] Some courts hold that confirmation will not validate acts of the officer for which he is given no authority by the decree,[84] while others have taken the view that confirmation makes valid any acts which the court might originally have empowered the officer to perform.[85] The report of a judicial sale and the decree confirming the sale are *prima facie* evidence that the land was actually sold.[86]

G. Ratification by Acquiescence. Acquiescence for a long time in the fact of the sale and treating it as valid may perfect the title of the purchaser.[87]

XIV. OPENING, VACATING, AND SETTING ASIDE.

A. In General. Courts of equity have a general supervision over judicial sales made under their decrees and may set aside or vacate sales for cause,[88] even after confirmation.[89]

at an improper time or place (Cargile *v.* Ragan, 65 Ala. 287), or the property having been sold *en masse* instead of in parcels (Lasell *v.* Powell, 7 Coldw. (Tenn.) 277).

Confirmation of deed.— The confirmation of a report of sale which shows that the commissioner, as required by the decree, has executed a deed to the purchaser, is in effect a confirmation of the deed. See Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

79. Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. 391.

80. Webster *v.* Hill, 3 Sneed (Tenn.) 333.

Report and ratification of same evidence of the contract.— Goldsborough *v.* Ringgold, 1 Md. Ch. 239.

81. Virginia F. & M. Ins. Co. *v.* Cottrell, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; Hickson *v.* Rucker, 77 Va. 135; Berlin *v.* Melhorn, 75 Va. 639. *Contra*, Morton *v.* Sloan, 11 Humphr. (Tenn.) 278, holding that judicial sales may be opened in cases where private sales would not be set aside.

Objections to title must be made before confirmation, as the rule of *caveat emptor* applies to judicial sales, and after the contract is completed by confirmation it is too late to complain of the title. Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648, 8 Ky. L. Rep. 384; Huber *v.* Armstrong, 7 Bush (Ky.) 590; Redd *v.* Dyer, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272; Long *v.* Weller, 29 Gratt. (Va.) 347. See *infra*, XVI, H, 2. But objections to the title on the ground of fraud may be made after confirmation. Young's Administrator *v.* McClung, 9 Gratt. (Va.) 336.

82. Kampman *v.* Nicewaner, 60 Nebr. 208, 82 N. W. 623; McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614; Stites *v.* Wiedner, 35 Ohio St. 555; Watson *v.* Hoy, 28 Gratt. (Va.) 698. See *infra*, XIV, B, 6, 7.

83. Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617; Havens *v.* Pope, 10 Kan. App. 299, 62 Pac. 538; Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172.

84. Bethel *v.* Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655; Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172. And see Minnesota Co. *v.* St. Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886; Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276.

85. Harrison *v.* Harrison, 1 Md. Ch. 331; Robertson *v.* Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; Evans *v.* Spurgin, 6 Gratt. (Va.) 107, 52 Am. Dec. 105; Klapneck *v.* Keltz, 50 W. Va. 331, 40 S. E. 570.

Where the commissioner who made the sale had been displaced and another appointed in his place, the sale was held to be validated by confirmation. Core *v.* Strickler, 24 W. Va. 689.

86. Du Hadaway *v.* Driver, (Ark. 1905) 86 S. W. 807.

87. Henderson *v.* Herrod, 23 Miss. 434; Gowan *v.* Jones, 10 Sm. & M. (Miss.) 164; Tipton *v.* Powell, 2 Coldw. (Tenn.) 19. See also Shilknecht *v.* Eastburn, 2 Gill & J. (Md.) 114, holding that where an order of confirmation *nisi* was made in 1795, and in 1803 a deed reciting the sale, its ratification, and payment of the purchase-money was executed to the purchaser, in 1826 the jury might and ought to presume the final ratification of the sale.

88. Coffey *v.* Coffey, 16 Ill. 141; Laight *v.* Peel, 1 Edw. (N. Y.) 577; Deaderick *v.* Smith, 6 Humphr. (Tenn.) 138.

This is upon the ground that the purchaser does by the act of purchase under a decree submit himself to the jurisdiction of the court as to all matters connected therewith. Casamajor *v.* Strode, 1 Sim. & St. 381, 1 Eng. Ch. 381.

The court will examine the manner of conducting the sale, and if it finds that there was unfairness it will set aside the sale. Passmore *v.* Moore, 22 S. W. 325, 15 Ky. L. Rep. 107; Mutual L. Ins. Co. *v.* Goddard, 33 N. J. Eq. 482; Roberts *v.* Roberts, 13 Gratt. (Va.) 639, 70 Am. Dec. 435; Fairfax *v.* Muse, 4 Munf. (Va.) 124.

89. Sayre *v.* Elyton Land Co., 73 Ala. 85;

B. Grounds For Vacating[90] — **1. In General.** The court has much discretion as to the sufficiency of the grounds for setting aside the sale.[91] It will not as a rule set aside the sale for mere informalities or irregularities,[92] slight, trivial, and immaterial defects in the proceedings,[93] or causes which the parties in interest might with a reasonable degree of diligence have avoided.[94] Neither is it a sufficient cause for vacating a judicial sale that only a few bidders were present.[95]

2. Defective Notice. A sale may be set aside because of defective advertisement, if the price realized was thereby lessened.[96]

3. Misconduct of Officer. Misconduct of the officer who sells, prejudicial to the interested parties, is ground for vacating the sale.[97]

Kampman *v.* Nicewaner, 60 Nebr. 208, 82 N. W. 623; King *v.* Platt, 37 N. Y. 155.

In Tennessee, the court may, during the term, set aside a sale after it has been confirmed. Mayo *v.* Harding, 3 Tenn. Ch. 237. But the county court has no jurisdiction to set aside the confirmation of a report of the sale of lands made at a former adjourned term, although the sale and proceedings therefor were fraudulent and without notice, and the property was sold at an inadequate price; but the exclusive jurisdiction to grant such relief is in the court of chancery. Jackson *v.* Gholson, (Ch. App. 1901) 62 S. W. 324.

90. Puffing at sale see *supra*, XI, I, 2.

Mistakes or devices preventing attendance or bidding at sale see *supra*, XI, I, 3.

91. Townsend *v.* Johnson, 10 Kan. App. 547, 63 Pac. 25.

Where the rights of infants are involved the court has a broad discretion in the matter of setting aside a judicial sale. Kiebel *v.* Leick, 216 Ill. 474, 75 N. E. 187.

Rights of bona fide purchasers.— The discretionary power of the court to vacate a sale should not be exercised when the rights of *bona fide* purchasers who are not made parties to the motion have intervened. Prior *v.* Prior, 41 Hun (N. Y.) 613.

92. *Kentucky.*— Gravitt *v.* Mountz, 87 S. W. 304, 27 Ky. L. Rep. 945 (failure of appraisers to fix value of land, where no exceptions filed until long after confirmation and after the purchaser had paid the purchase-money and obtained his deed); Farris *v.* Perkins, 26 S. W. 188, 16 Ky. L. Rep. 48.

Pennsylvania.— Grove's Estate, 2 Woodw. 182.

Texas.—Horne *v.* Kimbell, (Civ. App. 1897) 42 S. W. 325, holding that after eight months of unexcused delay, a sale under a judgment foreclosing a vendor's lien, at which the vendee was present and objecting, will not be set aside on the ground of an irregularity in the sheriff's advertisement.

United States.— Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560.

Canada.— *Re* Jelly, 3 Ont. L. Rep. 72, irregularity in fixing reserve bid.

See 31 Cent. Dig. tit. "Judicial Sales," § 73.

An irregularity not affecting the sale is no ground for setting it aside; as making the deed prematurely. Burke *v.* Weaver, 71 Ill. 359.

One who has acquiesced in an irregularity in the conduct of the sale cannot afterward question its validity or the ground of such irregularity. Sawyer *v.* Hentz, (Ark. 1905) 85 S. W. 775; Maquoketa *v.* Willey, 35 Iowa 323; *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809. So one who, although present at the sale, failed to request a sale in parcels, cannot later move to vacate the sale on the ground that the sale should have been in parcels. Hartshorne *v.* Reeder, 3 Ohio Dec. (Reprint) 109, 3 Wkly. L. Gaz. 245; Atcheson *v.* Hutchison, 51 Tex. 223.

93. Wilson *v.* Kellogg, 77 Ill. 47 (especially where the purchaser has made valuable improvements on the premises); National Bank of Metropolis *v.* Sprague, 20 N. J. Eq. 159; Stryker *v.* Storm, 1 Abb. Pr. N. S. (N. Y.) 424.

An erroneous direction of the court forbidding the former purchaser to bid on the resale was not ground for setting aside the resale in the absence of a showing that the purchaser had intended to bid or could have paid. Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617.

94. Kauffman *v.* Walker, 9 Md. 229.

95. Hudgins *v.* Lanier, 23 Gratt. (Va.) 494.

96. Clark *v.* Bell, 4 Dana (Ky.) 15; Kauffman *v.* Walker, 9 Md. 229; Baily *v.* Baily, 9 Rich. Eq. (S. C.) 392.

A sale on a day other than that stated in the notice of sale should be set aside. Miller *v.* Hull, 4 Den. (N. Y.) 104.

97. *Alabama.*— Hurt *v.* Nave, 49 Ala. 459.

Kentucky.— Busey *v.* Hardin, 2 B. Mon. 407.

New York.— Griffith *v.* Hadley, 10 Bosw. 587.

Virginia.— Roberts *v.* Roberts, 13 Gratt. 639, 70 Am. Dec. 435.

West Virginia.— Hilleary *v.* Thompson, 11 W. Va. 113.

Where the officer violates a promise as to matters connected with the sale, as to accept certain sureties (Passmore *v.* Moore, 22 S. W. 325, 15 Ky. L. Rep. 107) or to adjourn the sale to a future day (Mutual L. Ins. Co. *v.* Goddard, 33 N. J. Eq. 482) to the prejudice of an intending purchaser the sale will be set aside.

A sale by an officer appointed in place of another will not be set aside for the misconduct of his predecessor. Dungan *v.* Vondersmith, 49 Md. 249.

Statements as to property.— An inaccurate statement as to encumbrances on the property, injuriously misleading purchasers,

4. Erroneous or Invalid Decree.[98] Where the court has jurisdiction to order the sale,[99] and the sale is regularly made in accordance with the decree and completed by confirmation and conveyance, it will not be set aside for errors in the decree or because of the invalidity and subsequent reversal of the decree.[1]

5. Inadequate Price. Inadequacy of the price obtained on the sale, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud, or to shock the conscience of the court;[2] but when in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, or any apparent unfair-

is ground for vacating the sale (Speed *v.* Smith, 4 Md. Ch. 299; Howe's Estate, 3 Pa. Dist. 267, 14 Pa. Co. Ct. 574), but an honest statement by the commissioner of the condition of the title showing that litigation affecting the title was pending in another court was no objection to the sale (Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 84 Fed. 752).

98. Effect of reversal of judgment on purchaser's title see *infra*, XVII, A, 6.

99. The sale is of course void if the court has no jurisdiction to order it. Martin *v.* Turner, 2 Heisk. (Tenn.) 384.

1. *California.*— Barnhart *v.* Edwards, 128 Cal. 572, 61 Pac. 176.

Illinois.— Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217. *Compare* Hays *v.* Cassell, 70 Ill. 669, holding that a sale may be set aside after the reversal of the judgment under which it was made when no deed has been taken out and the judgment debtor is still in possession.

Kentucky.— Vanmeter *v.* Vanmeter, 88 Ky. 448, 11 S. W. 80, 289, 10 Ky. L. Rep. 906; Lusk *v.* Salter, 2 Bush 201; Vanbussum *v.* Maloney, 2 Metc. 550; Clark *v.* Bell, 4 Dana 15. *Compare* Baker *v.* Baker, 87 Ky. 461, 9 S. W. 382, 10 Ky. L. Rep. 793, holding that where a judgment, under which land in the hands of defendant's grantees had been sold to plaintiff, an insolvent, was reversed, and plaintiff found to be indebted to defendant the sale would be set aside.

New Jersey.— Wilson *v.* Hoffman, (Ch. 1901) 50 Atl. 592.

Utah.— Meyer *v.* Utah, etc., R. Co., 3 Utah 280, 3 Pac. 393.

Canada.— *Re* Jelly, 3 Ont. L. Rep. 72.

See 31 Cent. Dig. tit. "Judicial Sales," § 74.

If the judgment is set aside before confirmation of the sale it is proper to set aside the sale also. Thornton *v.* Thornton, 64 S. W. 524, 23 Ky. L. Rep. 930.

2. *Alabama.*— Helena Coal Co. *v.* Sibley, 132 Ala. 651, 32 So. 718. See also Cockrell *v.* Coleman, 55 Ala. 583.

Arkansas.— Nix *v.* Draughon, 56 Ark. 240, 19 S. W. 669; Fry *v.* Street, 44 Ark. 502; Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497.

Colorado.— Conway *v.* John, 14 Colo. 30, 23 Pac. 170.

Illinois.— Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288; Wilson *v.* Ford, 190 Ill. 614, 60 N. E. 876; O'Callaghan *v.* O'Callaghan, 91 Ill. 228; Duncan *v.* Sanders, 50 Ill. 475; Comstock *v.* Purple, 49 Ill. 158; McMullen *v.* Gable, 47 Ill. 67.

Indiana.— Sowle *v.* Champion, 16 Ind. 165; Benton *v.* Shreeve, 4 Ind. 66.

Kansas.— Cowles *v.* Phœnix Mut. L. Ins. Co., 63 Kan. 883, 65 Pac. 217.

Kentucky.— Booker *v.* Louisville, 76 S. W. 18, 25 Ky. L. Rep. 497; Jolly *v.* Mutual L. Ins. Co., 65 S. W. 440, 23 Ky. L. Rep. 1508; Scott *v.* O'Neil, 62 S. W. 1042, 23 Ky. L. Rep. 331; Owens *v.* Owens, 52 S. W. 822, 21 Ky. L. Rep. 625; Passmore *v.* Moore, 22 S. W. 325, 15 Ky. L. Rep. 107; Harris *v.* Gunnell, 9 S. W. 376, 10 Ky. L. Rep. 419. See also Mastin *v.* Zweigart, 72 S. W. 750, 24 Ky. L. Rep. 1920; Byrne *v.* Henderson, 13 S. W. 909, 11 Ky. L. Rep. 986.

Maryland.— Johnson *v.* Dorsey, 7 Gill 269; Cohen *v.* Wagner, 6 Gill 236; Cunningham *v.* Schley, 6 Gill 207; House *v.* Walker, 4 Md. Ch. 62; Hintze *v.* Stingel, 1 Md. Ch. 283; Gibbs *v.* Cunningham, 1 Md. Ch. 44.

Missouri.— Wagner *v.* Phillips, 51 Mo. 117.

New Jersey.— Porch *v.* Agnew Co., 66 N. J. Eq. 232, 57 Atl. 726; Morrisse *v.* Inglis, 46 N. J. Eq. 306, 19 Atl. 16; Marlatt *v.* Warwick, 18 N. J. Eq. 108; Eberhart *v.* Gilchrist, 11 N. J. Eq. 167.

New York.— Duncan *v.* Dodd, 2 Paige 99; Gardiner *v.* Schermerhorn, Clarke 101.

North Carolina.— See Ashbee *v.* Cowell, 45 N. C. 158. But *compare* Wood *v.* Parker, 63 N. C. 379.

Pennsylvania.— Carson *v.* Ambrose, 183 Pa. St. 88, 38 Atl. 508; Sipp *v.* Insurance Co. of North America, 8 Pa. Dist. 283.

South Carolina.— White *v.* Floyd, Speers Eq. 351.

Tennessee.— Myers *v.* James, 4 Lea 370; Smith *v.* Miller, (Ch. App. 1897) 42 S. W. 182.

Texas.— McKennon *v.* McGown, (1889) 11 S. W. 532; Agricultural, etc., Assoc. *v.* Brewster, 51 Tex. 257.

Virginia.— Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507; Harman *v.* Copenhaver, 89 Va. 836, 17 S. E. 482; Tucker *v.* Tucker, 86 Va. 679, 10 S. E. 980.

West Virginia.— Schmertz *v.* Hammond, 51 W. Va. 408, 41 S. E. 184; Moran *v.* Clark, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66.

United States.— Blanks *v.* Farmers' L. & T. Co., 122 Fed. 849, 59 C. C. A. 59; Fidelity Ins., etc., Co. *v.* Roanoke St. R. Co., 98 Fed. 475; Magann *v.* Segal, 92 Fed. 252, 34 C. C. A. 323; Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 84 Fed. 752; Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 54 Fed. 26;

ness or impropriety, the sale may be set aside, although such additional circumstances are slight and, if unaccompanied by inadequacy of price, would not furnish sufficient ground for vacating the sale.[3]

6. Fraud. Where fraud has been practised at a judicial sale it will be set aside,

West *v.* Davis, 29 Fed. Cas. No. 17,422, 4 McLean 241.

See 31 Cent. Dig. tit. "Judicial Sales," § 77.

Discretion of court.— The court may in its discretion either affirm or set aside the sale where it appears clearly to have been made for a greatly inadequate price. Hughes *v.* Hamilton, 19 W. Va. 366; Beaty *v.* Veon, 18 W. Va. 291; Hartley *v.* Roffe, 12 W. Va. 401; Kable *v.* Mitchell, 9 W. Va. 492.

Illustrations of inadequacy not sufficient to set aside.— Sale of land worth ninety dollars per acre for from eighty-three dollars to eighty-one dollars per acre. Quick *v.* Collins, 197 Ill. 391, 64 N. E. 288. Property of estimated value of twelve thousand three hundred dollars sold for ten thousand four hundred dollars. Quigley *v.* Breckenridge, 180 Ill. 627, 54 N. E. 580. Property of estimated value of from one thousand eight hundred and fifty dollars to four thousand dollars, sold for one thousand five hundred and ninety dollars. Booker *v.* Louisville, 76 S. W. 18, 25 Ky. L. Rep. 497. Where property sold for four thousand dollars and had been sold for one thousand five hundred and sixty dollars and two thousand six hundred and fifty dollars, respectively, in the two preceding years and the land had been offered by the last purchaser for five thousand dollars. Allison *v.* Allison, 88 Va. 328, 13 S. E. 549. Sale of land at a price but little more than eight per cent below the assessed value. Curtis *v.* Thompson, 29 Gratt. (Va.) 474.

Illustrations of gross inadequacy warranting setting aside.— Property worth one thousand dollars sold for six dollars. Lankford *v.* Jackson, 21 Ala. 650. Property worth two thousand five hundred dollars sold for fifty dollars. Daly *v.* Ely, 51 N. J. Eq. 104, 26 Atl. 263. Property worth sixteen thousand dollars sold for seven thousand dollars. Banning *v.* Pendery, 7 Ohio Dec. (Reprint) 677, 4 Cinc. L. Bul. 912. Land worth from two dollars to five dollars per acre sold for twenty-eight cents per acre. Hardin *v.* Smith, 49 Tex. 420. Sale for a half or a third of actual value. Sinnett *v.* Cralle, 4 W. Va. 600.

Security on resale.— When the sale is vacated for inadequacy alone, the applicant for a resale will be required to furnish some security that upon the resale a higher price will be realized. Porch *v.* Agnew Co., 66 N. J. Eq. 232, 57 Atl. 726; Young *v.* Teague, Bailey Eq. (S. C.) 13.

Evidence of inadequacy.— A judicial sale of property for four thousand dollars will not be set aside, on the ground of inadequacy of price, on the testimony of three persons that they valued it at five thousand dollars and were willing to pay that sum for it, where it appears that such persons were well acquainted with the property and knew it was to be in the market for sale, but failed to attend. Fiske *v.* Weigel, (N. J. Ch. 1891) 21 Atl. 452.

Admission of inadequacy.— The offer by a purchaser at a sale under a trust deed to cancel the remainder of a debt against the makers of the trust deed when the sale is confirmed, made in an answer to defendant's cross bill in ejectment against the makers, is not an admission that an allegation in the cross bill that the sale was for a grossly inadequate price is true. Smith *v.* Turner, (Tenn. Ch. App. 1898) 48 S. W. 396.

3. *Illinois.*— Sowards *v.* Pritchett, 37 Ill. 517.

Indiana.— Benton *v.* Shreeve, 4 Ind. 66.

Kentucky.— Adkinson *v.* Ransdall, 93 Ky. 310, 20 S. W. 199, 14 Ky. L. Rep. 258; Shuck *v.* Price, 60 S. W. 487, 22 Ky. L. Rep. 1261.

Maryland.— Glenn *v.* Clapp, 11 Gill & J. 1.

Mississippi.— Pattison *v.* Josselyn, 43 Miss. 373.

New Jersey.— Eberhart *v.* Gilchrist, 11 N. J. Eq. 167.

New York.— Griffith *v.* Hadley, 10 Bosw. 587; Gould *v.* Gager, 24 How. Pr. 440.

Pennsylvania.— Brotherline *v.* Swires, 31 Leg. Int. 325.

Tennessee.— Newland *v.* Gaines, 1 Heisk. 720.

Texas.— Lee *v.* Texas, etc., R. Co., 22 Tex. Civ. App. 501, 55 S. W. 976.

Wisconsin.— Pierce *v.* Kneeland, 7 Wis. 224.

United States.— Magann *v.* Segal, 92 Fed. 252, 34 C. C. A. 323. See also Hunt *v.* Fisher, 29 Fed. 801.

See 31 Cent. Dig. tit. "Judicial Sales," § 78.

The additional circumstances need be only slight.— Bean *v.* Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. L. Rep. 739; Rosenham *v.* Pottinger, 60 S. W. 370, 22 Ky. L. Rep. 1290; Schroeder *v.* Young, 161 U. S. 334, 16 S. Ct. 512, 40 L. ed. 721.

Illustrations of circumstances sufficient, in connection with inadequacy of price, to cause the setting aside of the sale: Sale *en masse* under circumstances indicating a purpose on the part of the purchaser, who was an attorney in the case, to improperly and unjustly use the process and the official sale to obtain title to the land for a small part of its value. Henderson *v.* Kibbie, 211 Ill. 556, 71 N. E. 1091. Defective return. Evans *v.* Bushnell, 59 Kan. 160, 52 Pac. 419. Doubt as to the sufficiency of the notice. B'Hymer *v.* Lund, 69 S. W. 1079, 24 Ky. L. Rep. 767. Insufficient publicity given to the sale and purchase by complainant's counsel. Busey *v.* Hardin, 2 B. Mon. (Ky.) 407. Failure to advertise sale. Conroy *v.* Carroll, 82 Md. 127, 33 Atl. 423. Selling *en masse* where it appears that

even after it has been confirmed.[4] It is not a sufficient ground for setting aside a judicial sale that the purchaser did not communicate to the vendee facts affecting the value of the property known to the purchaser but unknown to the vendor;[5] but the sale should be set aside where the purchaser has made false representations in regard to matters known to him and enhancing the value of the property,[6] and the same is true where the purchaser by fraudulent statements made at the time of the sale prevented bidding and obtained the property at a very inadequate price.[7] When it is sought to vacate a sale on the ground of fraud the burden of proof rests upon the one alleging fraud and the proof must be clear and convincing.[8] Where, in an action to set aside a judicial sale on the ground of fraud, the validity of the sale was sustained, but the purchasers were required to account for the difference between the price they bid for the land and the enhanced price at which they had sold it, they were not liable for rent.[9]

7. MISTAKE OR SURPRISE. A judicial sale may be set aside when there has been a mistake or some surprise in connection with the sale resulting in injury.[10] The

a better price might have been obtained by a sale in parcels. Ryan *v.* Wilson, (N. J. Prerog. 1902) 52 Atl. 993.

A court of chancery cannot set aside a public sale regularly made by an officer not acting under its direction, notwithstanding the price was grossly inadequate and the party chiefly interested did not know that the sale was to take place. March *v.* Ludlum, 3 Sandf. Ch. (N. Y.) 35.

4. *Alabama.*— Phillips *v.* Benson, 82 Ala. 500, 2 So. 93.

Arkansas.— Penn *v.* Tolleson, 20 Ark. 652.

Maryland.— Anderson *v.* Foulke, 2 Harr. & G. 346.

Nebraska.—McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614.

New Jersey.— Barker *v.* Richardson, 41 N. J. Eq. 656, 7 Atl. 637.

New York.— Le Fevre *v.* Laraway, 22 Barb. 167.

Pennsylvania.—Gallaher *v.* Collins, 7 Watts 552.

See 31 Cent. Dig. tit. "Judicial Sales," § 75.

False representations made to the purchaser by a defendant in the suit, misleading the purchaser as to the situation of the property, and the amount of the rental, are ground for setting the sale aside at the instance of the purchaser. American Ins. Co. *v.* Simers, 3 Ch. Sent. (N. Y.) 70.

Where an agreement was made before the sale that A should buy the property on behalf of certain other parties, and because of the agreement and of the reliance by the others on the agreement, A was enabled to obtain the property at much less than its true value and refused to carry out the agreement, which could not be enforced because of the statute of frauds, the sale was set aside. Fairy *v.* Kennedy, 68 S. C. 250, 47 S. E. 138.

5. Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403, such failure to communicate is not legal fraud.

6. Merchants' Bank *v.* Campbell, 75 Va. 455.

7. Cocks *v.* Izard, 7 Wall. (U. S.) 559, 19 L. ed. 275; Slater *v.* Maxwell, 6 Wall. (U. S.) 268, 18 L. ed. 796.

An agreement by the purchaser to pay a creditor the amount of his claim on condition that he do not bid is not such a fraud as will give rise to the nullity of the adjudication. Berard *v.* Barrette, 5 Rev. Lég. 703.

8. *Illinois.*— Quigley *v.* Breckenridge, 180 Ill. 627, 54 N. E. 580; Wilson *v.* Kellogg, 77 Ill. 47.

Kentucky.—Crutchfield *v.* Thurman, 4 Bush 498; Wood *v.* Wood, 38 S. W. 709, 18 Ky. L. Rep. 833.

Louisiana.—Schlater *v.* Brusle, 49 La. Ann. 1704, 22 So. 925.

Mississippi.— White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

North Carolina.— Adderton *v.* Surratt, 58 N. C. 119.

See 31 Cent. Dig. tit. "Judicial Sales," § 75.

That there were but two purchasers present does not prove fraud in the sale, if it was duly advertised, and there is no proof of any attempt to keep away purchasers. Mitchell *v.* Berry, 1 Metc. (Ky.) 602.

Leaving the property with the former owner is not sufficient evidence of collusion to invalidate a judicial sale. Snyder *v.* Boring, 4 Pa. Super. Ct. 196, 40 Wkly. Notes Cas. 275.

9. Mars *v.* Conner, 9 S. C. 70.

10. *Alabama.*— Branch Bank *v.* Hunt, 8 Ala. 876.

California.— Thompson *v.* San Francisco, 119 Cal. 538, 51 Pac. 863.

Maryland.— Hunting *v.* Walter, 33 Md. 60; Anderson *v.* Foulke, 2 Harr. & G. 346.

New York.— Le Fevre *v.* Laraway, 22 Barb. 167; Griffith *v.* Hadley, 10 Bosw. 587; Gould *v.* Gager, 18 Abb. Pr. 32, 24 How. Pr. 440.

South Carolina.— Howlett *v.* Central Carolina Land, etc., Co., 50 S. C. 1, 27 S. E. 533.

Texas.— Interstate Nat. Bank *v.* O'Dwyer, (Civ. App. 1896) 38 S. W. 368.

West Virginia.— Beard *v.* Arbuckle, 19 W. Va. 135.

Canada.—Rodgers *v.* Rodgers, 13 Grant Ch. (U. C.) 143. See also Lloyd *v.* Clapham, 2 Rev. de Légis. 179.

See 31 Cent. Dig. tit. "Judicial Sales," § 76.

mistake must, however, be one caused by someone connected with the sale,[11] and the sale will not be set aside unless the mistake was an injurious one.[12] A mistake of law[13] or one due to the negligence of the party complaining[14] does not furnish sufficient ground for setting aside the sale.

8. Advance on Bid. Under the old English practice, after the sale and at any time before the sale was absolutely confirmed, the court would open the biddings, that is, allow a person to offer a larger price than the property was originally sold for, and upon such offer being made, and a proportionate deposit paid in, direct a resale of the property.[15] This practice has been substantially adopted in some states in this country;[16] but it has been widely condemned as making judicial sales unstable and tending to chill the bidding, and the American courts have generally refused to adopt it, and have held that there must be some further reason arising out of the circumstances of the sale sufficient to cause a refusal of

Mere mistake or error in computing the amount of the purchase-money of land sold under an order of court is not a ground for declaring the sale a nullity, in the absence of any allegation of fraud. Cowan *v.* Anderson, 7 Coldw. (Tenn.) 284.

Error or mistake of judgment on the part of appraisers, appointed to fix the value of land to be sold at judicial sale, is no ground for setting aside the sale. Kincheloe *v.* McCane, 3 S. W. 3, 8 Ky. L. Rep. 693.

Mistake not such as to justify setting aside.— The fact that petitioner was present at the judicial sale, intending to bid, and failed to do so because he thought the bid made by another person was not *bona fide*, is not such a mistake as would justify setting aside the sale. Fiske *v.* Weigel, (N. J. Ch. 1891) 21 Atl. 452.

11. Mechanics Sav., etc., Assoc. *v.* O'Connor, 29 Ohio St. 651; Hartman *v.* Pemberton, 24 Pa. Super. Ct. 222; Young *v.* Teague, Bailey Eq. (S. C.) 13.

12. Doughty *v.* Moss, 1 Bush (Ky.) 161.

13. Hayes *v.* Stiger, 29 N. J. Eq. 196.

14. Hayes *v.* Stiger, 29 N. J. Eq. 196; Long *v.* Weller, 29 Gratt. (Va.) 347. See also Goodman *v.* Connelly, 51 S. W. 427, 21 Ky. L. Rep. 317; Radke *v.* M. Winter Lumber Co., 114 Wis. 444, 90 N. W. 454.

Where the purchaser mistook the identity of the property sold the sale was set aside. Fallis *v.* Loughhead, 9 Ohio Dec. (Reprint) 128, 9 Cinc. L. Bul. 56; Howlett *v.* Central Carolina Land, etc., Co., 50 S. C. 1, 27 S. E. 533.

15. Daniell Ch. Pr. (1st Am. ed.) 1465-1466.

The effect of opening the biddings was to entirely discharge the purchaser. Price *v.* Price, 1 L. J. Ch. O. S. 184, 1 Sim. & St. 386, 1 Eng. Ch. 386.

16. *North Carolina.*— Dula *v.* Seagle, 98 N. C. 458, 4 S. E. 549; Hinson *v.* Adrian, 92 N. C. 121. Where the sale is by a consent order an offer of an advance of ten per cent does not necessarily require the reopening of the bidding. Vaughan *v.* Gooch, 92 N. C. 524.

Pennsylvania.— Church *v.* Bailee, 2 Leg. Rec. 169, 29 Pittsb. Leg. J. 20. See also Herr's Estate, 12 Pa. Co. Ct. 622.

Tennessee.— Reese *v.* Copeland, 6 Lea 190; Wilson *v.* Shields, 3 Baxt. 65; Childress *v.* Hurt, 2 Swan 487; Atkison *v.* Murfree, 1 Tenn. Ch. 51. Previous cases to the contrary are overruled. See Johnson *v.* Quarles, 4 Coldw. 615; Coffin *v.* Corruth, 1 Coldw. 194; Houston *v.* Aycock, 5 Sneed 406, 73 Am. Dec. 131.

Virginia.— Ewald *v.* Crockett, 85 Va. 299, 7 S. E. 386; Todd *v.* Gallego Mills Mfg. Co., 84 Va. 586, 5 S. E. 676; Coles *v.* Coles, 83 Va. 525, 5 S. E. 673; Hansucker *v.* Walker, 76 Va. 753.

West Virginia.— Stewart *v.* Stewart, 27 W. Va. 167.

United States.— Blackburn *v.* Selma R. Co., 3 Fed. 689. But *compare* Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403.

See 31 Cent. Dig. tit. "Judicial Sales," § 79.

Opening of bids discretionary.— Moore *v.* Triplett, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882; Langyher *v.* Patterson, 77 Va. 470; Roudabush *v.* Miller, 32 Gratt. (Va.) 454.

Biddings may be opened a second time on an advanced bid and an excuse for not bidding before the master being offered. Church *v.* Bailee, 2 Leg. Rec. (Pa.) 169, 29 Pittsb. Leg. J. 20; Vaughn *v.* Smith, 3 Tenn. Ch. 368. *Contra*, see Atchison *v.* Murfree, 3 Tenn. Ch. 728.

The amount of the advanced bid must be brought into court or bonds or a guaranty of a higher bid furnished or a resale will not be ordered. Wilson *v.* Ford, 190 Ill. 614, 60 N. E. 876; Quigley *v.* Breckenridge, 180 Ill. 627, 54 N. E. 580. *Compare* Blackburn *v.* Selma R. Co., 3 Fed. 689.

Advanced bid must be unconditional.— Lucas *v.* Moore, 2 Lea (Tenn.) 1; Blackburn *v.* Selma R. Co., 3 Fed. 689.

First purchaser's expenses, damages, and costs must be paid.— Duncan *v.* Dodd, 2 Paige (N. Y.) 99; Church *v.* Bailee, 2 Leg. Rec. (Pa.) 169, 29 Pittsb. Leg. J. 20; Blackburn *v.* Selma R. Co., 3 Fed. 689.

Amount of advance.— The advance should be so great that it affords substantial evidence that the property has been greatly undersold. Blackburn *v.* Selma R. Co., 3 Fed. 689. In North Carolina an advanced bid of ten per cent is necessary. Dula *v.* Seagle,

confirmation, or the bids will not be reopened.[17] In England the practice of opening the biddings on an advance bid has been abolished by statute.[18]

C. Who May Apply to Vacate Sale. Any party interested may apply to have a judicial sale vacated,[19] unless by his acts or his laches he has become estopped;[20] or it may be vacated by the court on its own motion where the

98 N. C. 458, 4 S. E. 549; Vass *v.* Arrington, 89 N. C. 10; Pritchard *v.* Askew, 80 N. C. 86. In Virginia the amount of advance necessary is not fixed but must depend upon the circumstances of each case. Hansucker *v.* Walker, 76 Va. 753.

Advance bid by bidder at original sale.— Although the court looks with jealousy upon the application of one who was a bidder at a judicial sale to reopen the biddings, yet the advance price offered by him will be taken as a compensation for any loss that may have arisen from a want of competition at the sale. State *v.* Roanoke Nav. Co., 86 N. C. 408.

The first purchaser is entitled to meet the advance and claim a preference, but not on a still further advance of the bid. Blackburn *v.* Selma R. Co., 3 Fed. 689.

Bidding should be started at amount of advanced bid offered.— Marsh *v.* Nimocks, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715; Blackburn *v.* Selma R. Co., 3 Fed. 689.

In lieu of directing a resale the chancellor may in his discretion, a reviewable one, let the biddings remain open in the master's office and receive such bids as are offered and confirm the sale when reported by the master. Dupuy *v.* Gorman, 9 Lea (Tenn.) 144.

Confirming sale at advanced bid.— A court of chancery, upon the master's reporting a subsequent written bid in advance of the highest at the sale, may decree that the advanced bid be confirmed, and that, if the bidder fails to comply with the terms, the land be resold, and be charged with the deficit thereon, if any. Allen *v.* East, 4 Baxt. (Tenn.) 308. See also Harrison *v.* Patterson, 1 Ch. Chamb. (U. C.) 363, holding that the court will in a proper case and upon conditions substitute a proposed purchaser at an increased price for a party who has purchased property at a sale under a decree, instead of opening the biddings generally and directing a resale, giving the present purchaser the option to take at the increased price.

The rule applies to sales of personalty as well as to sales of realty. Blackburn *v.* Selma R. Co., 3 Fed. 689.

Sale will not be opened on advanced bid alone after confirmation.— Bradford *v.* Hamilton, 3 Tenn. Ch. 344.

17. *Arkansas.*— Penn *v.* Tolleson, 20 Ark. 652.

District of Columbia.— Auerbach *v.* Wolf, 22 App. Cas. 538.

Kentucky.— Alms, etc., Co. *v.* Shackelford, 32 S. W. 1088, 17 Ky. L. Rep. 908; Bean *v.* Johnson, 16 S. W. 140, 13 Ky. L. Rep. 36; Harris *v.* Gunnell, 9 S. W. 376, 10 Ky. L. Rep. 419. See also Lawson *v.* Hill, 11 S. W. 606, 11 Ky. L. Rep. 213.

Maryland.— Cohen *v.* Wagner, 6 Gill 236; Andrews *v.* Scotton, 2 Bland 629.

New Jersey.— Fiske *v.* Weigel, (Ch. 1891) 21 Atl. 452; Morrisse *v.* Inglis, 46 N. J. Eq. 306, 19 Atl. 16.

New York.— Le Fevre *v.* Laraway, 22 Barb. 167. See also People *v.* Bond St. Sav. Bank, 53 How. Pr. 336.

South Carolina.— Young *v.* Teague, Bailey Eq. 13.

United States.— Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403. *Compare* Blackburn *v.* Selma R. Co., 3 Fed. 689.

See 31 Cent. Dig. tit. "Judicial Sales," § 79.

In Canada the court is strongly disinclined to open biddings unless very special grounds are shown. The fact alone that a price can be obtained in advance upon that realized at the sale does not constitute such a special ground. Creswick *v.* Thompson, 6 Ont. Pr. 52. See also Mitchell *v.* Mitchell, 6 Ont. Pr. 232; McRoberts *v.* Durie, 1 Ch. Chamb. (U. C.) 211; Dickey *v.* Heron, 1 Ch. Chamb. (U. C.) 149.

18. St. 30 & 31 Vict. c. 48, § 7. Since the passage of this act, in order to entitle parties to open the biddings there must be either fraud or such misconduct as borders on fraud. Delves *v.* Delves, L. R. 20 Eq. 77, 23 Wkly. Rep. 499.

19. Springston *v.* Morris, 47 W. Va. 50, 34 S. E. 766.

Sale may be vacated at the instance of purchaser or owner.— Clayton *v.* Glover, 56 N. C. 371.

Unless the party applying is interested and injuriously affected, the sale should not be set aside. Dufour *v.* Leftwich, 33 La. Ann. 1471; Gilmer *v.* Nicholson, 21 La. Ann. 589; Stockton *v.* Downey, 6 La. Ann. 581; Klapneck *v.* Keltz, 50 W. Va. 331, 40 S. E. 570. See also Presstman *v.* Mason, 68 Md. 78, 11 Atl. 764; Watt *v.* Crawford, 11 Paige (N. Y.) 470.

One not a party to the suit may move to set aside the sale, if his rights are injuriously affected thereby. Gould *v.* Mortimer, 26 How. Pr. (N. Y.) 167.

20. *Kentucky.*— Best *v.* Vanhook, 13 S. W. 119, 11 Ky. L. Rep. 753.

Louisiana.— Thistle *v.* Irosen, 37 La. Ann. 170; Massie *v.* Brady, 41 La. Ann. 553, 6 So. 536; Mather *v.* Knox, 34 La. Ann. 410; Factors', etc., Ins. Co. *v.* De Blanc, 31 La. Ann. 100; Roubede *v.* Aymes, 29 La. Ann. 234; Tarleton *v.* Kennedy, 21 La. Ann. 500; Louisiana Bank *v.* Deluy, 2 La. Ann. 648.

Maryland.— Shartz *v.* Mountain Lake Park Assoc., 86 Ind. 335, 37 Atl. 786.

interests of infants, who are always entitled to the special protection of the court, demand it.[21]

D. Proceedings — 1. Motion to Vacate. Before confirmation a judicial sale may be vacated on motion made in the original cause;[22] and in some jurisdictions the same remedy is available even after confirmation and delivery of the deed.[23] The purchaser is entitled to notice of the motion to vacate.[24] It is not necessary on an application to vacate a sale to ask that the biddings be begun at an advance on the reported price.[25] A motion to vacate a judicial sale must be made seasonably, as if it is unreasonably delayed acquiescence in the sale will be presumed.[26]

2. Action to Vacate. After confirmation a judicial sale may be vacated by an original bill or action to vacate,[27] and by some courts this is held to be the only proper remedy.[28] An action to vacate a judicial sale is not barred by the refusal of the court to vacate it on motion.[29] The action must be brought within what is under the circumstances of the case a reasonable time;[30] and all parties to the original proceeding and all those who claim a present interest in the property

South Carolina.— Finley *v.* Robertson, 17 S. C. 435.

West Virginia.— Williamson *v.* Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

Canada.— Wallace *v.* Gray, 25 Nova Scotia 279.

See 31 Cent. Dig. tit. "Judicial Sales," § 69.

21. Le Fevre *v.* Laraway, 22 Barb. (N. Y.) 167.

22. Phillips *v.* Benson, 82 Ala. 500, 2 So. 93, holding that before confirmation a motion to vacate is the only proper remedy.

Petition.— In Childress *v.* Hurt, 2 Swan (Tenn.) 487, and Morton *v.* Sloan, 11 Humphr. (Tenn.) 278, the application to vacate, although made before confirmation, was by petition.

23. New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328; Metropolis Nat. Bank *v.* Sprague, 21 N. J. Eq. 458; Tripp *v.* Cook, 26 Wend. (N. Y.) 143; Collier *v.* Whipple, 13 Wend. (N. Y.) 224; Requa *v.* Rea, 2 Paige (N. Y.) 339; Watson *v.* Birch, 2 Ves. Jr. 51, 30 Eng. Reprint 518. But see *infra*, XIV, D, 2.

24. Thompson *v.* San Francisco, 119 Cal. 538, 51 Pac. 863; Roberts *v.* Clelland, 82 Ill. 538.

An assignee of the purchaser is not entitled to notice. Roberts *v.* Clelland, 82 Ill. 538.

25. Roberts *v.* Roberts, 13 Gratt. (Va.) 639, 70 Am. Dec. 435.

26. Ponder *v.* Cheeves, 90 Ala. 117, 7 So. 512 [*modifying* Abercrombie *v.* Conner, 10 Ala. 293]; Penn Mut. L. Ins. Co. *v.* Walton, 1 Marv. (Del.) 328, 40 Atl. 1124; Ashbee *v.* Cowell, 45 N. C. 158; Baggott *v.* Sawyer, 25 S. C. 405.

When rule not applicable.— Acquiescence will not be presumed from delay where no intervening rights have attached, and the purchaser who moves to set aside the sale was ignorant of the state of the title. Chambers *v.* Cochran, 18 Iowa 159.

27. Cocks *v.* Izard, 7 Wall. (U. S.) 559, 19 L. ed. 275; Slater *v.* Maxwell, 6 Wall. (U. S.) 268, 18 L. ed. 796. *Compare* Gould *v.* Mortimer, 26 How. Pr. (N. Y.) 167.

28. *Alabama.*— Sayre *v.* Elyton Land Co., 73 Ala. 85.

Illinois.— See Schweinfurth *v.* Poehlman, 83 Ill. App. 428, holding that an order confirming the sale and distribution of the proceeds of a judicial sale is a final order, and cannot be set aside on motion after the close of the term at which it is entered.

North Carolina.— Smith *v.* Fort, 105 N. C. 446, 10 S. E. 914.

South Carolina.— Orr *v.* Orr, 7 S. C. 381.

Tennessee.— McMinn *v.* Phipps, 3 Sneed 196.

See 31 Cent. Dig. tit. "Judicial Sales," § 80. But see *supra*, XIV, D, 1.

29. Howell *v.* Mills, 53 N. Y. 322 (holding that the court has no power on the determination of such a motion to limit the right to bring an action for relief); Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276. But see Fishback *v.* Columbia Bldg. Assoc., 47 S. W. 575, 20 Ky. L. Rep. 795, holding that one who has filed exceptions to a report of sale which have been overruled cannot thereafter maintain an action to have the sale set aside on other grounds, without alleging that he had no knowledge or information as to such grounds at the time he filed his exceptions.

30. Sayre *v.* Elyton Land Co., 73 Ala. 85; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328. See also Lockhart *v.* John, 7 Pa. St. 137.

Illustrations.— A delay of three years constitutes laches so as to bar relief. Williams *v.* Maxwell, 45 W. Va. 297, 31 S. E. 909. A delay of seventeen months while the purchaser expended large sums on the property bars the right to have the sale vacated. Rothchild *v.* Memphis, etc., R. Co., 113 Fed. 476, 51 C. C. A. 310. A delay of nearly five years under very exceptional circumstances, excusing the delay, has been held not fatal to the right to have the sale set aside. Henderson *v.* Kibbie, 211 Ill. 556, 71 N. E. 1091.

Statutes of limitations see Phelps *v.* Jackson, 31 Ark. 272 (holding that statutes of limitations on actions to recover land do not affect an action to vacate a judicial sale and for a resale); Shannon *v.* Summers, 86 Miss. 619, 38 So. 345 (construing Code (1880),

should be made parties.[31] It is sometimes required as a condition to the maintenance of a suit to set aside a judicial sale that the amount paid by the purchaser shall be tendered to him.[32]

XV. RESALE.

A. When Proper. Usually a resale of the property will be ordered whenever the sale is vacated or set aside for any cause that does not involve a want of power in the court to make the sale.[33] And when the purchaser at a judicial sale fails to comply with the terms of the sale in making payment or furnishing security therefor the court may and generally will order a resale.[34]

§ 2693); Alexander *v.* Gordon, 101 Fed. 91, 41 C. C. A. 228 (construing Sandels & H. Dig. Ark. St. (1894) § 4818). See, generally, LIMITATIONS OF ACTIONS.

31. Howse *v.* Moody, 14 Fla. 59.

The purchaser is a necessary party (Dowling *v.* Gally, 30 La. Ann. 328; Ogden *v.* Davidson, 81 Va. 757), and if he is not made a party he is not affected by a judgment vacating the order and the sale thereunder (Burks *v.* Bennett, 62 Tex. 277).

The commissioner making a sale of land under an order of court and receiving the purchase-money is not a necessary party to an action to impeach the decree. Gilbert *v.* James, 86 N. C. 244.

32. Farquhar *v.* Iles, 39 La. Ann. 874, 2 So. 791; Barelli *v.* Gauche, 24 La. Ann. 324.

Where a tender is alleged, denied, and not proved, the action must be dismissed. Farquhar *v.* Iles, 39 La. Ann. 874, 2 So. 791.

A tender of the purchase-money in the pleadings, followed by a payment into court of the money bid at the sale, and paid by the purchaser, is sufficient. Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792.

Where the sale was procured by the purchaser's fraud a tender of the amount bid by him is not necessary. Storer *v.* Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

Where a sale is made in violation of an order staying proceedings, duly served, defendant can have it set aside, even after confirmation by the court, without a tender of the amount bid by plaintiff who bought at the sale. Campbell *v.* Smith, 9 Wis. 305.

33. *Illinois.*— Coffey *v.* Coffey, 16 Ill. 141.

Kentucky.— Johnson *v.* Johnson, 88 Ky. 275, 11 S. W. 5, 10 Ky. L. Rep. 860.

Maryland.— Stephens *v.* Magruder, 31 Md. 168.

New Jersey.— Ryan *v.* Wilson, (Prerog. 1902) 52 Atl. 993.

New York.— King *v.* Platt, 37 N. Y. 155; Le Fevre *v.* Laraway, 22 Barb. 167; Brown *v.* Frost, 10 Paige 243; American Ins. Co. *v.* Oakley, 9 Paige 259.

North Carolina.— Wood *v.* Parker, 63 N. C. 379.

Pennsylvania.— Hay's Appeal, 51 Pa. St. 58.

Virginia.— Roberts *v.* Roberts, 13 Gratt. 639, 70 Am. Dec. 435.

See 31 Cent. Dig. tit. "Judicial Sales," § 87.

34. *Alabama.*— Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

Arkansas.— Phelps *v.* Jackson, 31 Ark. 272.

Georgia.— Walters *v.* Hargrove, 61 Ga. 267.

Kentucky.— Napper *v.* Mutual L. Ins. Co., 107 Ky. 134, 53 S. W. 28, 21 Ky. L. Rep. 791.

Louisiana.— Haggerty's Succession, 28 La. Ann. 87.

Maryland.— Brundige *v.* Morrison, 56 Md. 407; Stephens *v.* Magruder, 31 Md. 168.

New York.— Thompson *v.* Dimond, 3 Edw. 298.

North Carolina.— *Ex p.* Pettillo, 80 N. C. 50.

Tennessee.— Munson *v.* Payne, 9 Heisk. 672; Mosby *v.* Hunt, 9 Heisk. 675.

Virginia.— Mosby *v.* Wither, 80 Va. 82; Long *v.* Weller, 29 Gratt. 347.

West Virginia.— Hyman *v.* Smith, 13 W. Va. 744.

United States.— Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608; Hearne *v.* Barry, 11 Fed. Cas. No. 6,303, 3 Cranch C. C. 168.

See 31 Cent. Dig. tit. "Judicial Sales," § 150; and *infra*, XVI, C, 2.

The power of the court to order a resale as against the purchaser springs from the general power of the court to enforce its decrees against parties. For the purchaser is regarded as a party, and the resale is a means of enforcing the decree. When the purchaser fails to pay a part or the whole of the purchase-price the resale is regarded as the enforcement of an equitable lien on the land for the amount due. See Dean *v.* Gritton, 15 S. W. 1061, 13 Ky. L. Rep. 99; Anderson *v.* Foulke, 2 Harr. & G. (Md.) 346; Clarkson *v.* Read, 15 Gratt. (Va.) 288.

Resale is to enforce purchaser's contract. — Redd *v.* Dyer, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272.

Resale on default may be authorized by original order of sale.— Singleton *v.* Heriott, 3 Rich. (S. C.) 321.

The former sale is not set aside, but the land is resold as the land of the purchaser and at his risk. Hurt *v.* Jones, 75 Va. 341.

A surety of a defaulting purchaser may require a resale to discharge his liability. *Ex p.* Pettillo, 80 N. C. 50.

A notice of motion should be served on the purchaser that he may be ordered to pay in his purchase-money within a given time, or in default thereof that the property pur-

B. Necessity For Order. No order of resale is necessary when there has not been a sale that the court could enforce, but the officer may proceed to sell on a new advertisement under the decree.[35] Thus where the sale has proved abortive for want of bidders, the property may be advertised and put up for sale again without further order;[36] or if the purchaser, at once upon the property being struck off to him, wrongfully refuses to comply with the terms of the sale, the officer may offer the property for sale again, without an order for the resale.[37]

C. Notice of Resale. It has been held that the defaulting purchaser is entitled to notice of the resale, especially if it is sought to hold him liable for a deficiency that may occur on the resale.[38] But it has also been asserted that the purchaser is not entitled to notice, because he has by his purchase become a party to the suit and continues in court for all purposes of the action.[39] A defendant who has appeared in the suit and who has an interest in the property is entitled to notice.[40]

D. Terms of Resale. When it seems desirable the court may prescribe for

chased by him may be resold at his risk. Hill *v.* Hill, 58 Ill. 239. See also *In re* Yates, 59 N. C. 306; Baker *v.* Young, Pyke (N. C.) 22. *Compare* Thornton *v.* Fairfax, 29 Gratt. (Va.) 669. Where a sale has proved abortive by reason of the purchaser refusing to complete the contract, a resale will be granted *ex parte*, but if any relief is asked against such defaulting purchaser, notice must be served on him. Martin *v.* Purdy, 1 Ch. Chamb. (U. C.) 263.

Non-payment of the highest bid necessitates a resale.— The second highest bidder cannot thereupon be accepted. Kunkel *v.* Eby, 7 Pa. Dist. 672, 21 Pa. Co. Ct. 517, 14 Montg. Co. Rep. 201. *Compare* Houseman *v.* Potts, 40 Wkly. Notes Cas. (Pa.) 452.

Purchaser cannot enjoin resale.— Boyer *v.* Cannon, 46 La. Ann. 762, 15 So. 86; Losee *v.* Santon, 24 La. Ann. 370.

Procedure.— The master should report the sale and refusal to the court, and after confirmation of the report a notice of motion should be served on the purchaser that he may be ordered to pay in his purchase-money within a given time, or in default thereof that the property may be resold at his risk. Hill *v.* Hill, 58 Ill. 239.

Staying proceedings for resale.— After a *folle enchere* has been ordered against a purchaser, he may stay and annul the proceedings by paying the purchase-money, and the costs incurred on such *folle enchere*. Langevin *v.* Garon, 2 L. C. Rep. 125. Where a resale had been advertised and was about to take place, and the purchaser, who was a devisee and had reason to expect to receive a balance from the estate, in which he was disappointed, and had been unable to carry out his purchase sooner, applied for a stay of the resale, he was let in to complete his purchase on payment of costs and of the purchase-money into court, with subsequent interest, and of one hundred dollars to cover his share of the costs of the second sale, and of the application. Denison *v.* Denison, 4 Ch. Chamb. (U. C.) 37.

35. Hewlett *v.* Davis, 3 Edw. (N. Y.) 338.

Where the master resold pending proceedings to compel compliance with the terms of sale and without obtaining an order for the resale, the resale was invalid. *Ex p.* Knight, 28 S. C. 481, 6 S. E. 330.

36. Sherwood *v.* Campbell, 1 Ch. Chamb. (U. C.) 299.

37. Head *v.* Clark, 88 Ky. 362, 11 S. W. 203, 10 Ky. L. Rep. 917; Carter *v.* Carter, 66 S. W. 624, 23 Ky. L. Rep. 1963; Swafford *v.* Howard, 50 S. W. 43, 20 Ky. L. Rep. 1793.

Officer should reoffer property before sale closed.— Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350.

Formal resale necessary.— When there has been an enforceable sale and the purchaser has failed to complete, the officer cannot, without making a formal resale, convey to another on receiving from the latter the amount bid by the first purchaser. Vannerson *v.* Cord, Sm. & M. Ch. (Miss.) 345.

38. *Georgia.*— Green *v.* Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

North Carolina.— *In re* Yates, 59 N. C. 306.

Virginia.— Thornton *v.* Fairfax, 29 Gratt. 669.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

United States.— Bayne *v.* Brewer Pottery Co., 90 Fed. 622.

See 31 Cent. Dig. tit. "Judicial Sales," § 50.

39. Fenley *v.* Tyler, 37 S. W. 679, 18 Ky. L. Rep. 666; Simmons *v.* Redmond, (Tenn. Ch. App. 1901) 62 S. W. 366. See also Vaughn *v.* Tealey, (Tenn. Ch. App. 1896) 39 S. W. 868.

In Alabama it has been held that if the purchaser made no effort whatever to comply with his bid he was not entitled to notice but when he did partially fulfil the conditions and gave purchase-money notes, but with insufficient sureties, he was entitled to notice. Oakley *v.* Howison, 131 Ala. 505, 32 So. 644.

40. Robinson *v.* Meigs, 10 Paige (N. Y.) 41.

the resale terms different from those of the original sale;[41] but if it is sought to hold the purchaser on the first sale for any deficiency that may occur on the resale, the terms of the latter must be the same as or not more onerous than those of the first sale.[42]

E. Deficiency on Resale. When a resale is had because the successful bidder fails to comply with the terms of the sale, the resale is at his risk, and if less than the amount of his bid is realized at the second sale he will be liable for the deficiency, together with the expenses of the second sale,[43] and an action may

41. Whilden *v.* Singerly, 3 Phila. (Pa.) 218; Dickinson *v.* Clement, 87 Va. 41, 12 S. E. 105, terms of credit may be shortened.

When the biddings are opened on account of an advanced bid notes given for the advanced purchase-price should be required to be dated as of the time of the public sale that was opened, and upon the terms of the decree of sale, unless some equity controls. Mabry *v.* Churchwell, 9 Lea (Tenn.) 488.

42. *Georgia.*— Smith *v.* Roberts, 106 Ga. 409, 32 S. E. 375.

Louisiana.— Labauve *v.* McCabe, 34 La. Ann. 183.

New Jersey.— Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636.

Pennsylvania.— Weast *v.* Derrick, 100 Pa. St. 509.

Canada.— Evans *v.* Nichols, 1 L. C. Rep. 151.

Misconduct of original purchaser.— A change of the terms from credit to cash does not relieve the purchaser when it appears that there was a preconcerted plan to purchase without any intention of paying and that the first sale fell through for that reason. Whilden *v.* Singerly, 3 Phila. (Pa.) 218.

43. *Arkansas.*— Harder *v.* Sayle-Stegall Commission Co., 61 Ark. 66, 31 S. W. 979.

Georgia.— Smith *v.* Roberts, 106 Ga. 409, 32 S. E. 375; Green *v.* Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110; Sproull *v.* Seay, 74 Ga. 676; Alexander *v.* Herring, 54 Ga. 200.

Kentucky.— Napper *v.* Mutual L. Ins. Co., 107 Ky. 134, 53 S. W. 28, 21 Ky. L. Rep. 791, 92 Am. St. Rep. 340; Watson *v.* Violett, 2 Duv. 332; Tyler *v.* Guthrie, 33 S. W. 934, 17 Ky. L. Rep. 1193.

Louisiana.— Labauve *v.* McCabe, 34 La. Ann. 183.

Maryland.— Stephens *v.* McGruder, 31 Md. 168; Mullikin *v.* Mullikin, 1 Bland 541.

New Jersey.— Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636.

North Carolina.— *Ex p.* Pettillo, 80 N. C. 50.

Pennsylvania.— Hughes *v.* Miller, 186 Pa. St. 375, 40 Atl. 492; Weast *v.* Derrick, 100 Pa. St. 509; Tindle's Appeal, 77 Pa. St. 201.

South Carolina.— Haig *v.* Confiscated Estates Com., 1 Desauss. Eq. 144.

Tennessee.— Fulton *v.* Davidson, 3 Heisk. 614.

Virginia.— Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195; Virginia F. & M. Ins. Co. *v.* Cottrell, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

United States.— Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608 [*affirming* 24 Fed. 205].

See 31 Cent. Dig. tit. "Judicial Sales," § 52.

The right to resell at the purchaser's risk is a condition implied by law in every judicial sale and does not depend on any expression of the condition in the order of sale or in the terms announced at the time of the sale. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

If the same person purchases at the resale for a lower price he is nevertheless liable for the deficiency. Shirley *v.* Shewmaker, 63 S. W. 11, 23 Ky. L. Rep. 452.

The liability of the surety on a bond for the price of land sold under a decree of court cannot be enforced, on default of payment, by a rule to show cause why decree should not be entered for the difference between such price and the amount it brought under a subsequent sale, and a decree so entered is void. Anthony *v.* Kasey, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277.

Setting off against amount due for improvements.— In a suit to set aside a deed to A as fraudulent, the land was ordered to be sold, but the decree directed that certain allowances be made to A for permanent improvements, the amount so allowed to be a first charge on the proceeds. A became the purchaser at the sale, but failed to complete his purchase and an order was made in the usual terms directing a resale and the payment of any deficiency by A's administrator. The lands having realized on resale less than the sum bid by A at the previous sale, an order was granted allowing the amount of the deficiency on resale to be set off *pro tanto* against the amount found due by the report for improvements. Ontario Bank *v.* Sirr, 6 Ont. Pr. 277.

When the court refuses to confirm the first sale without fault in the purchaser the resale cannot be made at the purchaser's risk. Randall *v.* Swann, 10 Gill & J. (Md.) 313.

Relief of first purchaser.— Where a person allowed himself to be reported by the trustees appointed to make a sale under a decree as the highest bidder, but without any design to delay or baffle the proceedings, and afterward declared his inability to comply with the terms of the sale he was discharged, on payment of costs, from his liability in case

be maintained against him to recover such amount.[44] The first sale must, however be reported to and accepted by the court, in order to make it binding upon the purchaser thereat so as to hold him for the deficiency on the resale;[45] and in West Virginia, in order to hold the purchaser liable for the deficiency he must be served with a rule, awarded after the sale is reported, to show cause why he should not complete his purchase, or, in default, the property be sold at his expense and risk.[46]

F. Rights and Remedies of First Purchaser. If the purchaser has actually made payments and the sale is subsequently set aside for causes not arising through the fault of the purchaser, the latter will be secured for the payments made by him by a return of the money paid from the proceeds of the resale;[47] but if the sale is set aside for the fault of the first purchaser, he is only entitled to have instalments paid by him allowed as credits and not refunded.[48] If he has in fact paid the purchase-price his remedy to prevent a resale is to ask for the confirmation of the original sale and not an injunction against a resale.[49] It has been both asserted[50] and denied[51] that if on a resale because of the default of the first purchaser a price greater than the amount bid by him is realized he is entitled to the excess.

of a loss by a resale. Deaver *v.* Reynolds, 1 Bland (Md.) 50.

44. Sproull *v.* Seay, 74 Ga. 676; Alexander *v.* Herring, 54 Ga. 200; Tyler *v.* Guthrie, 33 S. W. 934, 17 Ky. L. Rep. 1193; Hartman *v.* Pemberton, 24 Pa. Super. Ct. 222.

Jurisdiction.— The district court has no jurisdiction in a suit against a purchaser at judicial sale for loss on resale of the property where the difference in price and the legal costs of the second sale is under one hundred dollars. Lelar *v.* Gault, 2 Phila. (Pa.) 78.

Defenses.— The invalidity of the second sale because of the misconduct of the officer is a defense to an action against the first purchaser for the deficiency. Clay *v.* Kagelmacher, 98 Ga. 149, 26 S. E. 493. But a purchaser of property at judicial sale, who fails to comply with the terms of sale, and is sued for the "deficiency of the proceeds of the second sale," cannot set up as a reason for his non-compliance that the property, a city lot, was sold by the front foot, and that he made a mental mistake as to what his bid would amount to. Alexander *v.* Herring, 54 Ga. 200.

Relief under Mansfield Dig. Ark. §§ 3058, 3059, providing that, if any person refuses to pay the amount bid for any property struck off to him, the officer may resell the same and recover the loss by summary proceedings, is obtainable, if at all, in a court of law. Harder *v.* Sayle-Stegall Commission Co., 61 Ark. 66, 31 S. W. 979.

On a rule for contrainte par corps against a *fol adjudicataire* to compel payment of the loss occasioned by a resale of the property, it was not necessary to describe the property, nor was personal service of the rule necessary, where the motion had been personally served. Delisle *v.* Souche, 26 L. C. Jur. 162.

45. Makemson *v.* Brann, 100 Ky. 88, 37 S. W. 495, 18 Ky. L. Rep. 584; Cowper *v.* Weaver, 84 S. W. 323, 27 Ky. L. Rep. 48, 69 L. R. A. 33; Campe *v.* Saucier, 68 Miss. 278, 8 So. 846, 24 Am. St. Rep. 273. And see Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

Where the terms were cash and the purchaser refused to pay, it seems that a formal confirmation was not necessary to make him liable for the deficiency on the resale; and certainly so when he was given an opportunity in open court to have the sale confirmed to him upon his complying with the terms of sale and he refused to do so. Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608.

46. Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

47. Tompkins *v.* Tompkins, 39 S. C. 537, 18 S. E. 233 (holding further that it is proper to confirm the first sale if the price realized on the second sale is no greater); Head *v.* Moore, 96 Tenn. 358, 34 S. W. 518 (holding that the purchaser is entitled to have the payment refunded when the sale is set aside because of an advanced bid, and from that time the money is his and he leaves it in the hands of the commissioner at his own risk of the insolvency of the commissioner). And see Kenaday *v.* Waggaman, 3 App. Cas. (D. C.) 412.

48. Brundige *v.* Morrison, 56 Md. 407; Tilt *v.* Knapp, 2 Can. L. T. 597, 9 Ont. Pr. 314. See further Dagg *v.* Thomas, 31 Pittsb. Leg. J. N. S. (Pa.) 210.

49. Haralson *v.* George, 56 Ala. 295.

50. Mealey *v.* Page, 41 Md. 172; Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195; Virginia F. & M. Ins. Co. *v.* Cottrell, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108, the property being sold as that of the first purchaser.

51. Chase *v.* Joiner, 88 Tenn. 761, 764, 14 S. W. 331, where it is said: "In such case the property is not sold for the benefit of the defaulting bidder, but on original terms of sale for benefit of parties interested, he to be held liable for damage . . . and not to take benefits of the resale as though it had been a

G. Costs on Resale. Where a purchaser at a judicial sale is relieved from the purchase on account of a mistake made by him, he should be charged with the costs of the resale.[52]

XVI. COMPLETION OF PURCHASE.

A. Transfer of Title in General. While it is often said that the sale is complete on confirmation, this is not true in a technical legal sense. After confirmation the purchaser has a right to have the sale to him carried out. He has an equitable title[53] and the right to have the legal title conveyed to him;[54] but he does not acquire the legal title until the deed is executed and delivered to him.[55] Under a decree which directs land to be sold for cash, the purchaser acquires no title until he pays the amount of his bid;[56] and a decree confirming a master's sale and declaring that title be vested in the purchaser "upon the payment of the purchase-money" vests no title in such purchaser until the purchase-money is paid.[57] When the sale is made on a credit, the court will see that the money is fairly paid to those entitled before the purchaser will be invested with the title.[58] In judicial sales of personal property the title passes by delivery and a bill of sale is not necessary,[59] and it has been held that the property vests in the purchaser without actual delivery, when he complies or offers to

completed one, fully complied with by him, as would be the case where a purchaser paid the cash required down and executed notes for balance, failing to pay which a sale was had for purchase-money — a wholly different case, and standing on a wholly different equity."

52. Vingut *v.* Vingut, 17 N. Y. Suppl. 159.

53. Whitlock *v.* Johnson, 87 Va. 323, 12 S. E. 614; Hurt *v.* Jones, 75 Va. 341.

54. Phillips *v.* Dawley, 1 Nebr. 320; Todd *v.* Todd, 26 N. Y. App. Div. 294, 49 N. Y. Suppl. 913; Morton *v.* Sloan, 11 Humphr. (Tenn.) 278 (unless there be such circumstances as authorize an opening of the biddings); Whitlock *v.* Johnson, 87 Va. 323, 12 S. E. 614; Hurt *v.* Jones, 75 Va. 341.

The purchaser must perform on his part all the conditions of the sale before he will be entitled to a deed. *In re* Onorato, 46 La. Ann. 73, 14 So. 299; Washburn *v.* Green, 13 La. Ann. 332; *In re* Macay, 84 N. C. 59; Hartman *v.* Pemberton, 24 Pa. Super. Ct. 222.

Deed to other than purchaser.— The right to a deed may be had and enforced by one designated by the purchaser as the person to whom the deed should be made (Gibbs *v.* Davies, 168 Ill. 205, 48 N. E. 120; Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421) or by a subpurchaser (Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758; Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490), or, when the principal is insolvent, but not otherwise, by a surety who pays the purchase-money (Dawkins *v.* Dawkins, 93 N. C. 283). But the deed to such other person is without prejudice to any rights and is subject to all equities and liens that may have vested or attached after the sale and before the assignment. Proctor *v.* Farnum, 5 Paige (N. Y.) 614.

Where the property is bought by three persons in indivision, each being entitled, by agreement among themselves, to a certain undivided portion of the property, any one of the common owners who has paid his share of the adjudicated price has a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the coproprietors is entitled to oppose the demand on the ground that the taxes on the property have not been paid. Montross *v.* Jamison, 30 La. Ann. 172.

The purchaser is not bound to pay the expense of procuring the execution of the conveyance, unless there be an express condition to that effect. Weiss *v.* Crafts, 6 Ont. Pr. 151.

55. Greenough *v.* Small, 137 Pa. St. 132, 20 Atl. 553, 21 Am. St. Rep. 859; Strange *v.* Austin, 134 Pa. St. 96, 19 Atl. 492; *In re* Biggert, 20 Pa. St. 17; Leshey *v.* Gardner, 3 Watts & S. (Pa.) 314, 38 Am. Dec. 764; Whitlock *v.* Johnson, 87 Va. 323, 12 S. E. 614; Hurt *v.* Jones, 75 Va. 341; Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827; Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403. See also Whitaker *v.* Cornett, 21 S. W. 645, 14 Ky. L. Rep. 871.

Curing failure to execute deeds.— Where, after judicial sales of real estate, other proceedings were brought, in which all right, title, and interest of the purchasers at the sales and the original holder and his heirs were divested, and the title was vested in another, the failure to execute deeds pursuant to such sales was cured. Connor *v.* Home, etc., Fund Co. Bldg. Assoc., 80 S. W. 797, 26 Ky. L. Rep. 109.

56. Phelps *v.* Jackson, 31 Ark. 272.

57. Blair *v.* Blair, (Tenn. Ch. App. 1896) 41 S. W. 1078.

58. Deaderick *v.* Watkins, 8 Humphr. (Tenn.) 520.

59. Conger *v.* Robinson, 4 Sm. & M. (Miss.) 210; Cobe *v.* Ricketts, 111 Mo. App. 105, 85 S. W. 131. *Contra*, International Wood Co. *v.* National Assur. Co., 99 Me. 415, 59 Atl. 544, 105 Am. St. Rep. 288.

comply with the terms of sale, or pays the purchase-money ;[60] but the purchaser of personalty does not acquire title until he pays the price.[61] A statute requiring bills of sale of personalty to be recorded does not apply to a judicial sale.[62]

B. Deed.[63] The deed should be executed by the officer or person appointed to sell,[64] and defendant whose property is sold need not join therein.[65] An officer ordered to execute a deed to the purchaser of land sold under order of court is not required to look up the purchaser and tender a conveyance to him, but merely to deliver a deed to the purchaser on demand.[66] Where confirmation is required[67] a deed made without confirmation is a nullity and passes no title.[68] Where a person's land is sold under order of court during his lifetime, the deed may be executed after his death without reviving the suit against his heirs.[69] A deed purporting to be executed pursuant to a decree of court for the sale of the land and a decree pursuant to such sale that the grantor convey to the grantee is good, although no other consideration is expressed.[70] It has been held not necessary that the deed should recite the proceedings at length;[71] and that a mistake in reciting the order of sale will not vitiate the deed where other parts thereof furnish of themselves obvious means of correcting the error;[72] but where a conveyance by a special commissioner under a sale under a decree is offered in evidence to pass title, it must be accompanied by enough of the record of the cause to show that the parties holding title affected by the deed, and also the land itself, were before the court, and that it was sold under a decree, and the sale confirmed, by the court and the commissioner authorized to make the conveyance.[73] The fact that the date of a judicial sale as stated in the sheriff's deed varies from the date stated in the return indorsed upon the order of sale does not render the sale

60. Scott *v.* Burch, 6 Harr. & J. (Md.) 67.

61. Lamaire *v.* Filiatrault, 16 Quebec Super. Ct. 334, holding that if he has not paid he cannot by reason of any rights acquired by his purchase oppose a resale.

62. Holloway *v.* Cabell, 3 Tex. Civ. App. 320, 22 S. W. 531.

63. A vesting order is used to pass title in Canada. See Allan *v.* Martin, 13 Can. L. J. N. S. 198; Slater *v.* Fiskin, 4 Can. L. J. 261, 1 Ch. Chamb. (U. C.) 1; Lawrason *v.* Buckley, 3 Ch. Chamb. (U. C.) 270; McNair *v.* Simpson, 1 Ch. Chamb. (U. C.) 299; Boulton *v.* Stegman, 1 Ch. Chamb. (U. C.) 199; *Re* Robertson, 22 Grant Ch. (U. C.) 449; Gordon *v.* McPhail, 32 U. C. Q. B. 480.

64. Peake *v.* Young, 40 S. C. 41, 18 S. E. 237, holding that an order directing a certain person to sell land gives him by implication the power to execute a conveyance thereof, although there is no explicit direction to that effect. See also Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

Signature.— The officer may sign the deed in his own name as such officer or in the name of the person whose title he conveys (Nesbit *v.* Gregory, 7 J. J. Marsh. (Ky.) 270), and if the recitals show the facts, the omission of any official designation from the officer's signature will not affect the validity of the deed, it appearing he had no personal interest in the property (Exum *v.* Baker, 118 N. C. 545, 24 S. E. 351).

A deed made by the successor in office of the sheriff who sold the property conveys title under Cal. Code Proc. § 700. Lone Jack Min. Co. *v.* Megginson, 82 Fed. 89, 27 C. C. A. 63.

65. Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the court. Ross *v.* Steele, 1 Ch. Chamb. (U. C.) 94.

66. Perkins *v.* Winter, 7 Ala. 855.

67. See *supra*, XIII, A.

68. *Illinois.*— Rawlings *v.* Bailey, 15 Ill. 178; Young *v.* Keogh, 11 Ill. 642.

Kentucky.— Dickerson *v.* Talbot, 14 B. Mon. 60.

Maryland.— Johnson *v.* Hines, 61 Md. 122.

Missouri.— Valle *v.* Fleming, 19 Mo. 454, 61 Am. Dec. 566.

Ohio.— Richland County Mut. Ins. Co. *v.* Sampson, 38 Ohio St. 672.

See 31 Cent. Dig. tit. "Judicial Sales," § 120.

The purchaser cannot be compelled to accept a deed before confirmation of the sale.— Polhemus *v.* Priscilla, (N. J. Ch. 1903) 54 Atl. 141.

69. Dugger *v.* Oglesby, 99 Ill. 405.

70. Porter *v.* Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153.

71. Jones *v.* Taylor, 7 Tex. 240, 56 Am. Dec. 48.

Where a statute requires that a deed of land sold by order of court should set out the order at large, it is not sufficient to set it out in substance. Doe *v.* Hileman, 2 Ill. 323.

72. Sheldon *v.* Wright, 5 N. Y. 497.

73. Ronk *v.* Higginbotham, 54 W. Va. 137, 46 S. E. 128; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

void;[74] nor will indefiniteness and discrepancies in the description of the land invalidate the deed if enough appears to show that the land sold and conveyed was comprehended in the description contained in the petition and order of sale.[75] But the deed conveys only what is described therein.[76] Errors in the deed may be corrected when intervening rights will not be prejudiced.[77] Objections to the form of the deed must be made when the deed is tendered.[78] The deed is evidence of the purchaser's title against all the world,[79] and recitals in the deed of facts supporting the validity of the decree and of other matters affecting the validity of the conveyance are sufficient *prima facie* to establish the same, jurisdiction of the subject-matter being presumed.[80] A master commissioner who sells land by order of court is not precluded by a recital of payment in full in his deed to the purchaser, and a statement in his report that he has collected the entire price, from showing otherwise, and from enforcing full payment from the purchaser.[81] Where the deed to purchasers at a judicial sale provides that such sale is "subject to certain certificates of indebtedness," such purchasers, and all persons claiming under them, are estopped by the deed from denying the lien of the certificates for the whole principal and interest due upon them.[82]

C. Payment — 1. When and How to Be Made. The manner of payment is generally regulated by the decree, and any directions of the decree in that regard are controlling.[83] When the sale is for cash, payment in cash on the day of the sale is necessary to entitle the purchaser to have the sale confirmed.[84] When the payment is to be in money it cannot be made in anything else,[85] although if a creditor

74. Temple *v.* Branch Saw Co., (Tex. Civ. App. 1905) 88 S. W. 442.

75. Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Hildebrand *v.* Bunnschu, 40 S. W. 920, 19 Ky. L. Rep. 430.

76. Bedford-Bowling Green Stone Co. *v.* Oman, 115 Ky. 369, 73 S. W. 1038, 24 Ky. L. Rep. 2274, holding that a commissioner's deed, stipulating that "that which is conveyed is the interest of F. in the cutting stone on the land aforesaid, being one-third interest," conveys only an interest in the cutting stone, and no interest in a railroad switch connecting the quarry with the line of a railroad company.

77. *In re* Nimick, 26 Pittsb. Leg. J. N. S. (Pa.) 283.

Where the mistake is in the decree, the deed being made in accordance with the decree, the deed cannot be corrected without first correcting the decree. Shankland *v.* Shankland, 115 Ill. 526, 4 N. E. 843.

Under Ala. Code (1896), § 808, a bill can only be maintained in a court of equity to correct the description of lands sold under a decree of a court of probate when it is shown by proper allegation and proof that the parties in interest had legal notice of the proceedings under which the decree was rendered; that the lands were sold for their full value, which has been fully paid to the party entitled to receive it, and therefore where a bill filed for such purpose contains no averment that the lands were sold for their full value such bill is insufficient, and subject to demurrer. Vaughan *v.* Hudson, 129 Ala. 176, 30 So. 75.

78. Stryker *v.* Vanderbilt, 27 N. J. L. 68.

79. Ryder *v.* Innerarity, 4 Stew. & P. (Ala.) 14.

80. Henderson *v.* Robinson, 76 Iowa 603, 41 N. W. 371.

81. Avritt *v.* Bricken, 38 S. W. 499, 1090, 18 Ky. L. Rep. 786.

82. Central Nat. Bank *v.* Hazard, 30 Fed. 484.

83. See Turnbull *v.* Mann, 99 Va. 41, 37 S. E. 288; Myers *v.* Nelson, 26 Gratt. (Va.) 729; Teel *v.* Yancey, 23 Gratt. (Va.) 691.

84. Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608. But a delay by the register for two days to collect the money bid on a sale under a decree will not avoid the sale if no injury resulted therefrom. Chilton *v.* Alabama Gold L. Ins. Co., 74 Ala. 290.

Forfeiture of rights.— The neglect of the purchaser for cash, at an official sale, to pay the purchase-money for any considerable time, two months in this case, is a forfeiture of his right to enforce the sale. Seymour *v.* Preston, Speers Eq. (S. C.) 481.

85. Frazier *v.* Hendren, 80 Va. 265.

Requiring payment in specie.— A resale of premises sold by a master was decreed, provided a certain sum should be bid therefor; and in pursuance of the order the premises were put up at auction and struck off to the petitioner for the sum specified in the order, whereupon the master, for the first time, in compliance with the direction of a party interested in the sale, informed the petitioner that the purchase-money must be paid in specie; and although the petitioner offered to pay the amount of his bid in current bank-bills, or by a draft upon the bank in which the money was to be deposited by the master, the premises were again put up to sale on the terms of immediate payment in specie, and, no one being able to comply with those terms, the master declared the

purchases he may make payment by applying the debt due himself in payment of his bid, so far as the purchase-money would inure to him.[86] A payment by the purchaser does not discharge him from his liability unless the court has by its order directed the collection and receipt of the funds, but if payment is made to one to whom the court might have ordered it to be paid, such payment may be afterward recognized and sanctioned.[87] When the officer selling is required to give a bond the purchaser need not pay until such bond is given, and if he does so and the officer loses or misappropriates the money the purchaser must bear the loss.[88] The failure of the adjudicatee at a judicial sale to pay the price gives the vendor the right to demand the rescission of the sale, although the property may have passed from the possession of the adjudicatee.[89]

2. How Enforced. The purchaser of property sold under order of court, by becoming such, voluntarily submits himself to the jurisdiction of the court,[90] and he may be compelled to comply with his bid by summary proceedings,[91] by

sale closed, and reported that the condition of the resale had not been complied with. It was held that the conduct of the master was unjustifiable and oppressive; and his report was set aside, and he was ordered to convey to the petitioner on payment by him of the amount of his bid. Baring *v.* Moore, 5 Paige (N. Y.) 48.

Payment in Confederate money see McNeill *v.* Shaw, 62 N. C. 91; McPherson *v.* Lynah, 14 Rich. Eq. (S. C.) 121; Sharp *v.* Harrison, 10 Heisk. (Tenn.) 573; Matthews *v.* Thompson, 2 Heisk. (Tenn.) 588; Finney *v.* Edwards, 75 Va. 44; Myers *v.* Nelson, 26 Gratt. (Va.) 729; Mead *v.* Jones, 24 Gratt. (Va.) 347; Dixon *v.* McCue, 21 Gratt. (Va.) 373.

86. Abraham *v.* New Orleans Brewing Assoc., 110 La. 1012, 35 So. 268; Campbell *v.* Gawlewicz, (Nebr. 1902) 91 N. W. 569; Clark, etc., Inv. Co. *v.* Way, 52 Nebr. 204, 71 N. W. 1021.

The court is not bound to so apply claims in payment of the purchase-money, where the sale is directed to be for cash (Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608), and it will not be done as against other and preferred creditors (Patterson *v.* Crawford, 97 Va. 661, 34 S. E. 458).

Payment of enough to meet prior liens.— On a judicial sale of real estate of a succession, a judgment creditor of the heir becoming the purchaser must pay to the sheriff as much of the amount of adjudication as may be required to meet judicial mortgages registered previous to his own, if such mortgagees have, by third opposition, duly claimed preference. In default thereof the sheriff must immediately resell; otherwise he will be held responsible for consequent loss. Dobard *v.* Bayhi, 36 La. Ann. 134.

87. Herndon *v.* Lancaster, 6 Bush (Ky.) 483.

88. Shumate *v.* Williams, (Va. 1895) 22 S. E. 808; Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195; Woods *v.* Ellis, 85 Va. 471, 7 S. E. 852; Hess *v.* Rader, 26 Gratt. (Va.) 746; Donahue *v.* Fackler, 21 W. Va. 124.

89. McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65.

90. See Wigginton *v.* Nehan, 76 S. W. 196, 25 Ky. L. Rep. 617.

Where the purchaser executes notes for the purchase-money, he becomes a quasi-party to the proceedings, and judgment may be rendered against him upon the maturity of the notes, without notice, but he has the right to appeal from such judgment. Eagan *v.* Phister, 5 Sneed (Tenn.) 298.

Prochein ami.— The chancery court has no jurisdiction to render a decree against one not a party to the suit, and connected with it merely as *prochein ami*, for the amount bid by the complainants for lands sold under order of the court and reported as paid by the register who under agreement of parties had accepted the draft of the *prochein ami* in satisfaction of the bid. Moore *v.* Randolph, 52 Ala. 530.

The fact that the purchaser was bidding for another person will not relieve him from the obligation of his contract where the bid was made in his own name. Atkinson *v.* Richardson, 14 Wis. 157.

91. *Florida.*— Allred *v.* McGahagan, 39 Fla. 118, 21 So. 802.

Maryland.— Richardson *v.* Jones, 3 Gill & J. 163, 22 Am. Dec. 293.

New Jersey.— McCarter *v.* Finch, 55 N. J. Eq. 245, 36 Atl. 937.

Tennessee.— Vanbibber *v.* Sawyers, 10 Humphr. 81, 51 Am. Dec. 694.

Virginia.— Robertson *v.* Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 708.

See 31 Cent. Dig. tit. "Judicial Sales," § 55.

The death of the purchaser at a judicial sale, or of one of the parties to the note given for the purchase-money, does not defeat the power of the court to summarily enforce payment of the purchase-money. Dibrell *v.* Williams, 3 Coldw. (Tenn.) 528.

Duration of jurisdiction.— The jurisdiction of the court to summarily enforce payment of the purchase-money which is due on a judicial sale continues until there has been a final disposition of the original cause. Vanbibber *v.* Sawyers, 10 Humphr. (Tenn.) 81, 51 Am. Dec. 694.

Under N. C. Rev. Code, c. 31, § 129, a

rule[92] or motion in the original cause,[93] or by attachment as for contempt.[94] Payment may also be enforced by reselling the property and holding the first purchaser liable for any deficiency,[95] or the officer may bring an action for the purchase-money.[96] When the purchaser executes his bond for the amount of his

summary judgment may be rendered against the purchaser of land at a judicial sale and his sureties only upon the order of the court. Mauney *v.* Pemberton, 75 N. C. 219.

It is not necessary to confirm the sale before proceeding against the purchaser. Kershaw *v.* Dyer, 6 Utah 239, 21 Pac. 1000, 24 Pac. 621 [*citing* Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608].

92. Greer *v.* M. M. Savings Assoc., 3 Ky. L. Rep. 539 (holding that a purchaser at a decretal sale failing to sue out injunction, or to deposit the amount of his sale bond in court, had no right to retain the money until another suit was decided, and was therefore properly ruled to pay the same into court); Williams *v.* Blakey, 76 Va. 254.

93. *Maryland.*— Andrews *v.* Scotton, 2 Bland 629.

New Jersey.— Silver *v.* Campbell, 25 N. J. Eq. 465.

North Carolina.— *Ex p.* Cotten, 62 N. C. 79.

South Carolina.— Gordon *v.* Saunders, 2 McCord Eq. 151.

Tennessee.— Dibrell *v.* Williams, 3 Coldw. 528; Blackmore *v.* Barker, 2 Swan 340.

Virginia.— Clarkson *v.* Read, 15 Gratt. 288.

See 31 Cent. Dig. tit. "Judicial Sales," § 55.

The only remedy for the collection of notes for the purchase-money of land sold under a decree of the probate court, the notes being secured by mortgage on the land, is by motion in such court, and not by an independent action on the notes. Hoff *v.* Crafton, 79 N. C. 592.

A judgment against sureties may be obtained by motion in the cause without notice. Whiteside *v.* Latham, 2 Coldw. (Tenn.) 91. *Contra,* Anthony *v.* Kasey, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277.

94. *Maryland.*— Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Anderson *v.* Foulke, 2 Harr. & G. 346.

New York.— Brasher *v.* Cortlandt, 2 Johns. Ch. 505.

Ohio.— Murphy *v.* Hardee, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837.

South Carolina.— Haig *v.* Confiscated Estates, 1 Desauss. Eq. 112.

Virginia.— Gross *v.* Pearcy, 2 Patt. & H. 483.

United States.— Camden *v.* Mayhew, 129 U. S. 73, 9 S. Ct. 246, 32 L. ed. 608.

See 31 Cent. Dig. tit. "Judicial Sales," § 55.

When bond is given for the purchase-price attachment will not be allowed because there is an adequate remedy at law on the bond. Richardson *v.* Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293. *Contra,* Wood *v.* Mann, 30 Fed. Cas. No. 17,954, 3 Sumn. 328, holding that the court may by attachment compel performance as against both principal and surety.

95. *Alabama.*— Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

Arkansas.— Phelps *v.* Jackson, 31 Ark. 272.

Kentucky.— Page *v.* Hughes, 9 B. Mon. 115, court should specify balance due.

Louisiana.— Haggerty's Succession, 28 La. Ann. 87.

Maryland.— Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350.

New York.— Rowley *v.* Feldman, 84 N. Y. App. Div. 400, 82 N. Y. Suppl. 679.

North Carolina.— *In re* Pettillo, 80 N. C. 50.

West Virginia.—Hyman *v.* Smith, 13 W. Va. 744.

Canada.— *Re* Heely, 1 Ch. Chamb. (U. C.) 54; Crooks *v.* Crooks, 4 Grant Ch. (U. C.) 376.

See 31 Cent. Dig. tit. "Judicial Sales," § 50; and *supra,* XV.

A rule may be made to show cause why the property should not be resold. Gross *v.* Pearcy, 2 Patt. & H. (Va.) 483. See also *In re* Yates, 59 N. C. 306.

In the absence of notice to the purchaser that the sale bond given by him would be quashed because of the insolvency of the surety, a second sale of the property is invalid. Butts *v.* Alderson, 14 S. W. 493, 12 Ky. L. Rep. 443.

Non-payment of a purchase-money note does not authorize a resale. West *v.* Thornburgh, 6 Blackf. (Ind.) 542.

Service on purchaser.— It is not necessary that the service of a rule for *folle enchere* be made personally upon the *adjudicataire,* or that the motion be served upon him. Lafond *v.* Guibord, 10 L. C. Jur. 139.

An opposing creditor can move for a *folle enchere* against a purchaser who had failed to pay his purchase-money. Guenette *v.* Blanchette, 2 L. C. Rep. 64.

96. Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350; Murphy *v.* Hardee, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837. See also Barthe *v.* Armstrong, 1 Rev. Lég. 47.

The action should be in the name of the officer appointed to sell. Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Hartman *v.* Pemberton, 24 Pa. Super. Ct. 222. But employing the name of a use plaintiff is not fatal to the action. Hartman *v.* Pemberton, *supra.*

Showing sufficient to sustain suit.— Where a commissioner who made sale of land under decree brings suit, and avers in his bill that the sale has been confirmed, and that he has been appointed commissioner to col-

bid and the same is not paid at maturity, an execution against the obligors may be issued upon the bond.[97]

D. Interest on Purchase-Price. Interest runs on deferred payments from the day of sale,[98] and also of course on unpaid bids on cash sales.[99] Failure of the purchaser to obtain possession does not affect his liability for interest.[1] In Canada it has been held that where no undue delay in investigating the title is attributed to either party, interest upon purchase-money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of the sale;[2] and that interest on purchase-money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession,[3] and a difficulty respecting the conveyance may justify his not taking possession.[4] When the conditions of sale stipulate for the payment of interest from the day of sale the purchaser is liable for interest from the time of his purchase, although delay for which he was in no way responsible takes place in perfecting the title, such delay not being caused by any fault of the vendors.[5]

E. Abatement of Price For Deficiency in Amount of Property.[6] When by mistake resulting from the actions of the court or the misrepresentations of its agents less land is sold than was bid for and supposed to have been sold, the purchaser will be allowed a proportionate abatement of the purchase-price when the property was sold by the quantity,[7] but not when it was sold in gross as a specific

lect the sale bonds, and exhibits with his bill a decree, which, although not in express terms, authorizes him to collect the sale bonds, the bill and decree will be treated as sufficient to sustain the suit. Blair *v.* Core, 29 W. Va. 477, 2 S. E. 326.

Defenses.—A purchaser of property at judicial sale, not made under compulsory process, can set up eviction by paramount title as a defense to an action for the purchase-money. Latimer *v.* Wharton, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739. In an action to recover the price bid by a purchaser at a master's sale, the buyer cannot set up fraud practised by co-lien holders, by which he was induced to bid more than the property was worth, where the sale has been confirmed, and no effort was made to have it set aside or its confirmation refused. White *v.* Raymond, 4 Ohio Dec. (Reprint) 79, 1 Clev. L. Rep. 6. A party having purchased property at probate sale during the war cannot set up in defense to the payment of his obligations that the sale was made on the basis of the value of Confederate notes at the time of the sale, and obtain a reduction of the price to that extent. Bordelon *v.* Coco, 21 La. Ann. 671. The purchaser cannot set up want of title as a defense for non-payment of the purchase-money. Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648, 8 Ky. L. Rep. 384.

97. Shotwell *v.* Webb, 23 Miss. 375.

98. Huntington *v.* Walker, 2 MacArthur (D. C.) 479; Wagner *v.* Cohen, 6 Gill (Md.) 97, 45 Am. Dec. 660.

99. Childs *v.* Frazee, 15 S. C. 612.

1. Brown *v.* Wallace, 2 Bland (Md.) 585.

2. Harrison *v.* Joseph, 8 Ont. Pr. 293.

3. Rae *v.* Geddes, 3 Ch. Chamb. (U. C.) 404. Where there is no stipulation as to interest, the general rule of the court is that the purchaser, when he completes his contract after the time mentioned in the particulars of sale, shall be considered as in possession from that time, and shall from thence pay interest on his purchase-money, taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then the court gives the vendor no interest, but leaves him in possession of the interim rents and profits. Montreal Bank *v.* Fox, 6 Ont. Pr. 217.

4. Rae *v.* Geddes, 3 Ch. Chamb. (U. C.) 404.

5. *In re* Thompson, 2 Ch. Chamb. (U. C.) 196.

6. Release of purchaser for deficiency in quantity of land sold see *infra*, XVI, H, 3.

7. *Kentucky.*— Cooper *v.* Hargis, 45 S. W. 112, 20 Ky. L. Rep. 41.

Louisiana.— Hall *v.* Nevill, 3 La. Ann. 326.

Maryland.— Carmody *v.* Brooks, 40 Md. 240; Marbury *v.* Stonestreet, 1 Md. 147; Brown *v.* Wallace, 4 Gill & J. 479. See also Weems *v.* Brewer, 2 Harr. & G. 390.

Tennessee.— Myers *v.* Lindsay, 5 Lea 331.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438.

United States.— Strodes *v.* Patton, 23 Fed. Cas. No. 13,538, 1 Brock. 228.

Canada.— Gray *v.* Todd, 3 Rev. de Légis. 476.

See 31 Cent. Dig. tit. "Judicial Sales," § 100.

Abatement may be had either before or after confirmation.— Trigg *v.* Jones, 102 Ky. 44, 42 S. W. 848, 19 Ky. L. Rep. 1009. And see cases *supra*, this note.

Abatement not a matter of right.— The purchaser is only entitled to be relieved from the consequences of the mistake, and if justice requires it vacating the sale will be the only relief allowed him. So held, even after confirmation, where another was ready to

tract.[8] So where the quantity of land to be sold is given as a stated amount "more or less" the qualification will cover any deficiency that is not so great as to indicate fraud, and no abatement will be allowed therefor.[9] If land is sold by metes and bounds under direction of court to a person who is shown the tract offered before the sale, and he is put in possession and enjoys without controversy all the land so shown to him, the title thereto being perfect, but it turns out that the boundaries set out in the deed include land not shown to the purchaser and never held or claimed by the vendor, the court may properly require the purchaser to pay the whole of the purchase-money without any abatement for the land which was not shown to him but which the boundaries specified in the deed include, and to which his title is worthless.[10]

F. Possession — 1. Right of Purchaser. Prior to confirmation of the sale the purchaser is not entitled to possession,[11] but he is entitled to possession from the time of confirmation of the sale,[12] even though there be in the decree no express direction for the delivery of possession to him.[13] The effect of redemption statutes is sometimes to allow defendant whose property is sold to remain in possession until the expiration of the redemption period.[14] The purchaser may recover compensation for being kept out of possession after he was entitled thereto.[15]

2. Proceedings to Enforce Right to Possession. So long as the court retains control over the subject-matter and the parties it has the power to place the pur-

take the land at the original purchase-price. Trigg *v.* Jones, 102 Ky. 44, 42 S. W. 848, 19 Ky. L. Rep. 1009.

When the purchaser is chargeable with knowledge of the deficiency no abatement in the price will be allowed. See Close *v.* Brown, (N. J. 1890) 20 Atl. 674; Monument Cemetery Co. *v.* Potts, 1 Phila. (Pa.) 251; Shands *v.* Triplet, 5 Rich. Eq. (S. C.) 76; Carneal *v.* Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819; Carmichael *v.* Ferris, 8 Ont. Pr. 289.

Land under water.— Where at a commissioner's sale of land by the acre the plat exhibited represented a river as running through the tract, and covering a portion of the land, which river, at a place where it ran through the tract, contained obstructions to the navigation, but was navigable for boats above and below that place, the purchaser was not entitled to a credit on his bond for the purchase-money for that portion of the land forming the bed of the river. Shands *v.* Triplet, 5 Rich. Sq. (S. C.) 76.

8. *New Jersey.*— Close *v.* Brown, (1890) 20 Atl. 674.

South Carolina.— Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829.

Tennessee.— Shields *v.* Thompson, 4 Baxt. 227; Foster *v.* Bradford, 1 Tenn. Ch. 400.

Virginia.— Grantland *v.* Wight, 2 Munf. 179.

Canada.— Melançon *v.* Hamilton, 16 L. C. Jur. 57.

See 31 Cent. Dig. tit. "Judicial Sales," § 100.

9. Wylly *v.* Gazan, 69 Ga. 506; Slothower *v.* Gordon, 23 Md. 1; Dennerlein *v.* Dennerlein, 46 Hun (N. Y.) 561.

10. Crislip *v.* Cain, 19 W. Va. 438.

11. Adler *v.* Meyer, 73 Miss. 863, 19 So. 893 (holding a decree for the sale to pay debts of land fraudulently conveyed to be erroneous in providing that the purchaser be put into possession on sale instead of after confirmation); Crotwell *v.* Boozer, 1 S. C. 271.

12. Shields *v.* Thompson, 4 Baxt. (Tenn.) 227; Hudgins *v.* Marchant, 28 Gratt. (Va.) 177.

When an appeal is taken from the decree of confirmation the purchaser is not entitled to possession, unless he has already obtained it before the appeal is perfected, in which case he may retain it until the decision on the appeal. Hudgins *v.* Marchant, 28 Gratt. (Va.) 177. But *compare* British Columbia Bank *v.* Harlow, 9 Oreg. 338, holding that the purchaser's right to possession is not affected by an appeal by the party in possession.

13. Hudgins *v.* Marchant, 28 Gratt. (Va.) 177.

14. Guy *v.* Middleton, 5 Cal. 392; Graves *v.* Long, 87 Ky. 441, 9 S. W. 297, 10 Ky. L. Rep. 414.

15. Thus where the advertisement of a judicial sale stated that the property was in possession of a tenant, who would permit the purchaser to obtain possession on November 1, but the purchaser was prevented by the tenant from taking possession till the month of January following, and about the middle of November the purchaser obtained a vesting order, it was held that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order, the failure to give possession being a breach of the representation in the advertisement, a representation on account of which it was to be assumed that the purchase-money was greater than it would otherwise have been. Barber *v.* Barber, 11 Ont. Pr. 137. See also Keefer *v.* McKay, 10 Ont. Pr. 345; Manson *v.* Manson, 10 Ont. Pr. 155.

chaser in possession of the property.[16] The appropriate remedy is an order directing the person in possession to deliver up possession, which, if it is disobeyed, will be enforced by a writ of assistance.[17] But the authority of the court to put the purchaser in possession by an order based on the petition of the purchaser is restricted to those cases in which the parties holding the possession are either parties to the proceedings or those who go into possession *pendente lite* claiming title under the parties to the bill or some of them.[18] Where, on motion for a writ of assistance, there is evidence of knowledge of a judicial sale of the land, and that the motion is resisted on the ground that the sale is void, it is unnecessary to show a deed under the sale and a demand for possession.[19] Where land is sold under order of the court, and the purchaser pays part of the price and goes into possession, but fails to pay the balance according to the terms of sale, and the land is sold to another, who has his purchase confirmed, the latter purchaser has the legal and the former the equitable title, giving equity jurisdiction to determine the ownership of the land on rule to show cause why the latter purchaser should not be put into possession.[20] It has been held that the purchaser may maintain forcible entry and detainer.[21]

G. Damages For Failure to Complete Purchase. If the purchaser will not comply with his purchase, and no resale is had, he is liable for the damages resulting from his default,[22] and in such case the measure of damages is the

16. Creighton *v.* Paine, 2 Ala. 158; Applegarth *v.* Russell, 25 Md. 317; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Planters' Bank *v.* Fowlkes, 4 Sneed (Tenn.) 461.

17. *California.*— Montgomery *v.* Tutt, 11 Cal. 190.

Maryland.— Dorsey *v.* Campbell, 1 Bland 356.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510.

New Jersey.— Beatty *v.* De Forest, 27 N. J. Eq. 482.

New York.— Lynde *v.* O'Donnell, 12 Abb. Pr. 286, 21 How. Pr. 34; Kershaw *v.* Thompson, 4 Johns. Ch. 609.

Wisconsin.— Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678.

United States.—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634.

See 31 Cent. Dig. tit. "Judicial Sales," § 95.

The purchaser must enforce his rights by motion in the suit in which the sale is made, and not by an independent suit. Long *v.* Jarratt, 94 N. C. 443.

A purchaser who is not a party to the original suit in which the decree of sale was made cannot obtain in his own name a writ of assistance from the chancellor to turn parties out of the possession of the purchased premises, and put him in. The purchaser can only proceed by getting the vendor to make application for the process. Wilson *v.* Polk, 13 Sm. & M. (Miss.) 131, 51 Am. Dec. 151. See also Boynton *v.* Jackway, 10 Paige (N. Y.) 307.

Burden of proof as to credits.— Where plaintiff purchased at a sale under a decree, and the register was ordered to execute a deed upon plaintiff's crediting the amount of the purchase-money on the decree, after the execution of the deed the burden was on defendant, resisting an application for writ of assistance, to show that the credit was not entered. Kemp *v.* Lyon, 76 Ala. 212.

Grantee of purchaser.— The court will not order a rule and attachment to compel a defendant to deliver possession to the grantee of a purchaser at the commissioner's sale. Meng *v.* Houser, 13 Rich. Eq. (S. C.) 210.

Return of sheriff.— To obtain an order for a writ of possession by an *adjudicataire* there must be a return by the sheriff that he has not and cannot put him into possession. Reinhart *v.* Hausseman, 3 Rev. de Lég. 473.

Expulsion of lessee.— The judicial sale of an immovable dissolves a lease of the property so sold, and the *adjudicataire* is entitled to a writ of possession on summary petition to expel the lessee. McLaren *v.* Kirkwood, 25 L. C. Jur. 107; Desjardins *v.* Gravel, 25 L. C. Jur. 105.

18. Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158; Oliver *v.* Caton, 2 Md. Ch. 297. See also Wright *v.* Carr, 41 S. W. 23, 19 Ky. L. Rep. 469, holding that one who is in possession of land, claiming paramount title under deed, cannot be dispossessed under a writ of possession issued in favor of the purchaser at a sale made under decree rendered in a suit to which he was not a party, although he has purchased from defendant in that suit since the decree was rendered, as he is entitled to notice, and to be heard upon proceedings to dispossess him.

19. Murchison *v.* Miller, 64 S. C. 425, 42 S. E. 177.

20. *Ex p.* Qualls, 71 S. C. 87, 50 S. E. 646.

21. Rucker *v.* Wheeler, 39 Ill. 436; Jackson *v.* Warren, 32 Ill. 331; Barto *v.* Abbe, 16 Ohio 408. *Contra*, Hatfield *v.* Wallace, 7 Mo. 112.

22. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

difference between the amount of the purchaser's bid and the market value of the property.[23]

H. Release of Purchaser[24] — **1. In General.** In general it may be said that any cause that renders it unjust or unconscientious to insist upon the performance of the contract will excuse the purchaser from completing.[25] Thus if the purchaser before paying the purchase-price discovers defects rendering the proceedings void so that the title held by the parties to the suit will not be conveyed to him, he will be excused from completing the purchase, and may successfully resist an action for the purchase-price.[26] But defects or irregularities in the proceedings which do not affect the purchaser are no ground for objection by him to the sale.[27]

2. Defects in or Failure of Title. It is a well settled principle that the doctrine of *caveat emptor* applies to judicial sales. The purchaser obtains just

23. Howison *v.* Oakley, 113 Ala. 215, 23 So. 810.

24. Loss pending confirmation see *supra*, XIII, B.

25. Veeder *v.* Fonda, 3 Paige (N. Y.) 94; Laight *v.* Pell, 1 Edw. (N. Y.) 577.

That the sale is illegal and the proceedings unauthorized excuses the purchaser. Dumestre's Succession, 40 La. Ann. 571, 4 So. 328.

Unreasonable delay in carrying out the sale excuses the purchaser. Arnett *v.* Anderson, 15 S. W. 855, 12 Ky. L. Rep. 897; Remsen *v.* Reese, 72 Hun (N. Y.) 370, 25 N. Y. Suppl. 350.

A mistake as to the quantity of land sold is no excuse to a purchaser from completing his purchase where there has been no fraud, misrepresentation, or concealment. But where there has been fraud or concealment, or anything beyond a mere mistake, on both sides, as to the quantity, the contract will not be enforced against a purchaser who has been deceived. So, where the decree and advertisement described the land as containing one hundred and ninety-eight acres and it in fact contained only twenty-seven and three-quarter acres, the purchaser was released from his bid. Pope *v.* Erdman, 17 S. W. 145, 13 Ky. L. Rep. 315. And where the decree described the land as "containing about twenty acres, be the same more or less" and it actually contained less than thirteen acres, the purchaser was not compelled to complete. Veeder *v.* Fonda, 3 Paige (N. Y.) 94.

If the purchaser was misled or deceived by some apparent adjudication of the court, and it is inequitable to enforce his contract of purchase against him, he is entitled to relief. Podesta *v.* Binns, (N. J. Ch. 1905) 60 Atl. 815.

Encumbrances.— Where the terms of a sale by a master were that the land was sold free from encumbrances, and that all taxes and assessments thereon should be paid out of the purchase-money, it was held that the purchaser could not be compelled to take the land subject to an assessment for a street, laid out and used by the public prior to the sale, although the assessment had not been formally confirmed until afterward, it appearing that the purchaser supposed such assessment included in the terms of sale, and a resale was ordered. Post *v.* Leet, 8 Paige (N. Y.) 337.

26. *Alabama.*— Boykin *v.* Cook, 61 Ala. 472; Riddle *v.* Hill, 51 Ala. 224.

Kentucky.— Todd *v.* Dowd, 1 Metc. 281; Barrett *v.* Churchill, 18 B. Mon. 387.

Mississippi.—Short *v.* Porter, 44 Miss. 533; Washington *v.* McCaughan, 34 Miss. 304; Campbell *v.* Brown, 6 How. 230.

Missouri.— Goode *v.* Crow, 51 Mo. 212.

New York.— Dodd *v.* Neilson, 90 N. Y. 243; Verdin *v.* Slocum, 71 N. Y. 345.

Tennessee.— Bartee *v.* Tompkins, 4 Sneed 623.

Texas.— Burns *v.* Ledbetter, 56 Tex. 282.

When chargeable with notice.— Purchasers at a judicial sale pursuant to an arbitration and award were charged with notice of the invalidity of the sale, where it appeared that the arbitration, award, and judgment were entered by consent of parties who appeared from the record to be infants, and consequently incapable of consenting by themselves, their next friend, or their attorney. Millsaps *v.* Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 134 N. C. 486, 46 S. E. 988.

A failure to make unknown persons parties will not excuse the purchaser from completing his purchase where there were no unknown persons who were necessary parties to the action. Lenehan *v.* St. Francis Xavier College, 51 N. Y. App. Div. 535, 64 N. Y. Suppl. 868 [*affirming* 30 Misc. 378, 63 N. Y. Suppl. 1033].

A petition for relief from a purchase of land at a judicial sale, alleging that at the time the suit was brought, and "for some time afterwards," one of the parties, a married woman, was a minor, and that the process was not served on her by an officer, but that she was in court by the acknowledgment of the service of process, is insufficient, as at the time of the acknowledgment of service she may have been of age. Ward *v.* West, (Tenn. Ch. App. 1895) 35 S. W. 563.

27. Bland *v.* Bowie, 53 Ala. 152; Cox *v.* Cox, 7 Mackey (D. C.) 1; Sirmans *v.* Sirmans, 74 Ga. 541; Shultz *v.* Houck, 29 Md. 24; Brown *v.* Wallace, 4 Gill & J. (Md.) 479, 2 Bland 585.

the title that the debtor had;[28] and it has been held that in the absence of fraud, excusable mistake, or misrepresentations respecting the title which have misled him, he will not be relieved from his purchase because the title to the property has failed, where the proceedings would pass the title if the debtor had had it.[29] But there is also authority for the view that a *bona fide* purchaser is entitled to a marketable title free from reasonable doubt, on the theory that the purchaser bids on the assumption that there are no undisclosed defects, and that the consideration given and received is regulated in view of the implied condition, and if there is a defect in the title the purchaser may be relieved from his purchase,[30]

28. *Alabama.*— Ezzell *v.* Brown, 121 Ala. 150, 25 So. 832; Lindsay *v.* Cooper, 94 Ala. 170, 11 So. 325, 23 Am. St. Rep. 105, 16 L. R. A. 813; Fore *v.* McKenzie, 58 Ala. 115; Bland *v.* Bowie, 53 Ala. 152.

Arkansas.— Black *v.* Walton, 32 Ark. 321; Guynn *v.* McCauley, 32 Ark. 97.

Illinois.— Borders *v.* Hodges, 154 Ill. 498, 39 N. E. 597; Tilley *v.* Bridges, 105 Ill. 336 [*affirming* 11 Ill. App. 353]; Wing *v.* Dodge, 80 Ill. 564; Holmes *v.* Shaver, 78 Ill. 578. See also McCully *v.* Hardy, 13 Ill. App. 631.

Kentucky.— Williams *v.* Glenn, 87 Ky. 87, 7 S. W. 610, 9 Ky. L. Rep. 941, 12 Am. St. Rep. 461; Farmers' Bank *v.* Peter, 13 Bush 591; Fox *v.* McGoodwin, 56 S. W. 515, 21 Ky. L. Rep. 1776.

Louisiana.— Gould *v.* Bridgers, 3 Mart. N. S. 692; Abat *v.* Casteres, 3 Mart. N. S. 220; Boissier *v.* Belair, 3 Mart. N. S. 29.

Maryland.— Slothower *v.* Gordon, 23 Md. 1; Bolgiano *v.* Cooke, 19 Md. 375; Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Brown *v.* Wallace, 4 Gill & J. 479, 2 Bland 585; Anderson *v.* Foulke, 2 Harr. & G. 346.

Nebraska.—Hammond *v.* Chamberlain Banking House, 58 Nebr. 445, 78 N. W. 718, 76 Am. St. Rep. 106; Buchanan *v.* Edmisten, 1 Nebr. (Unoff.) 429, 436, 95 N. W. 620.

New Jersey.— Brady *v.* Carteret Realty Co., 67 N. J. Eq. 641, 60 Atl. 938; Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456.

New York.— Mott *v.* Mott, 68 N. Y. 246.

Pennsylvania.— Freeman *v.* Caldwell, 10 Watts 9.

Tennessee.— Hously *v.* Lindsay, 10 Heisk. 651. See also Thompson *v.* Speck, 2 Tenn. Ch. App. 759.

Utah.— Kimball *v.* Salisbury, 19 Utah 161, 56 Pac. 973.

Virginia.— Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681; Smith *v.* Wortham, 82 Va. 937, 1 S. E. 331; Long *v.* Weller, 29 Gratt. 347; Stone *v.* Pointer, 5 Munf. 287.

West Virginia.— Calvert *v.* Ash, 47 W. Va. 480, 35 S. E. 887; Capehart *v.* Dowery, 10 W. Va. 130.

See 31 Cent. Dig. tit. "Judicial Sales," § 97.

The purchaser is bound to take such title as an examination of the proceedings will show that he will get. Podesta *v.* Binns, (N. J. Ch. 1905) 60 Atl. 815.

Easement.— A purchaser at judicial sale is conclusively presumed to know of the open possession by a railroad of an easement consisting of a right of way across the land at the time of the sale, and of the extent thereof. *Ex p.* Alexander, 122 N. C. 727, 30 S. E. 336.

The rule does not apply to secret defects but only as to open ones. Banks *v.* Ammon, 27 Pa. St. 172.

In Canada the purchaser at a sale under a decree, except under special circumstances, will not be compelled to pay his purchase-money into court until he has accepted or approved of the title or the master has reported that the vendor can make a good title. McDermid *v.* McDermid, 8 Ont. Pr. 28.

29. Wampler *v.* Shipley, 3 Bland (Md.) 182; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523. And see *supra*, note 28.

After confirmation it is conclusively presumed that the sale was made and the bid made for such interest as the owner or supposed owner had, although defects in title may be a ground for refusing confirmation. It seems the only way the purchaser can obtain relief for failure of title is by resisting confirmation. Farmers' Bank *v.* Peter, 13 Bush (Ky.) 591; Threlkelds *v.* Campbell, 2 Gratt. (Va.) 198, 44 Am. Dec. 384.

30. *District of Columbia.*— McCaffrey *v.* Little, 20 App. Cas. 116.

Florida.— Myers *v.* Nourse, 5 Fla. 516.

Kentucky.— See Schlosser *v.* Murnan, 49 S. W. 421, 20 Ky. L. Rep. 1468 (attachment lien on property of which purchaser had no notice); Bird *v.* Smith, 101 Ky. 205, 40 S. W. 571, 19 Ky. L. Rep. 377.

Louisiana.— Getman *v.* Harrison, 112 La. 435, 36 So. 486; Rogge's Succession, 49 La. Ann. 37, 21 So. 170; Nash's Succession, 48 La. Ann. 1573, 21 So. 254; Roberts *v.* Bauer, 35 La. Ann. 453. See also Hernandez *v.* His Creditors, 14 La. Ann. 337. But where the adjudicatee is tendered a title valid on its face, strengthened by judicial proceedings, and accompanied by undisturbed possession as owner for eighteen years, she is bound to accept it. Abraham *v.* Mieding, 108 La. 510, 32 So. 329.

Maryland.— Bolgiano *v.* Cooke, 19 Md. 375.

New York.— New York Security, etc., Co. *v.* Schoenberg, 177 N. Y. 556, 69 N. E. 1128 [*affirming* 87 N. Y. App. Div. 262, 84 N. Y. Suppl. 1137]; Crouter *v.* Crouter, 133 N. Y. 55, 30 N. E. 726; Cambrelleng *v.* Purton, 125 N. Y. 610, 26 N. E. 907; Miller *v.*

provided the defect is substantial and the objection to the title not merely captious.[31] Certainly where the purchaser buys under the assurance that he is to receive a perfect title, he will not be compelled to complete, if such a title cannot

Wright, 109 N. Y 194, 16 N. E. 205; Fleming *v.* Burnham, 100 N. Y. 1, 2 N. E. 905; Matter of Fales, 33 N. Y. App. Div. 611, 53 N. Y. Suppl. 1046 [*affirmed* in 157 N. Y. 705, 52 N. E. 1124]; Wronkow *v.* Oakley, 64 Hun 217, 19 N. Y. Suppl. 51; People *v.* Globe Mut. L. Ins. Co., 33 Hun 393; Merges *v.* Ringler, 24 Misc. 317, 53 N. Y. Suppl. 674 [*affirmed* in 158 N. Y. 701, 53 N. E. 1128]. See also Stephens *v.* Flammer, 40 Misc. 278, 81 N. Y. Suppl. 1064; Ray *v.* Adams, 28 Misc. 644, 59 N. Y. Suppl. 1047.

North Carolina.— The purchaser is not obliged to take an imperfect title unless he was informed of the true state of the title (Eccles *v.* Timmons, 95 N. C. 540), or the sale was expressly of a less interest than the entire title (Edney *v.* Edney, 80 N. C. 81; Shields *v.* Allen, 77 N. C. 375).

Pennsylvania.— Morgan's Estate, 9 Pa. Co. Ct. 119

United States.— Dunscomb *v.* Holst, 13 Fed. 11.

Canada.— See Street *v.* Hallett, 6 Ont. Pr. 312; Aldwell *v.* Aldwell, 6 Ont. Pr. 183; Micheltree *v.* Irwin, 13 Grant Ch. (U. C.) 537.

See 31 Cent. Dig. tit. "Judicial Sales," § 97.

Objection to title must be made before confirmation.— Hickson *v.* Rucker, 77 Va. 135; Boyce *v.* Strother, 76 Va. 862; Thomas *v.* Davidson, 76 Va. 338; Long *v.* Weller, 29 Gratt. (Va.) 347; Young *v.* McClung, 9 Gratt. (Va.) 336. *Compare* Morrow *v.* Wessell, (Ky. 1886) 2 S. W. 251, 1 S. W. 439, 8 Ky. L. Rep. 261.

Title by adverse possession.— A purchaser at a judicial sale should not be compelled to accept a title based solely on a claim of adverse possession for the requisite length of time, where the mere fact of possession without color of title is all that exists to show that the possession was hostile, and it will be necessary to resort to parol evidence to establish the title. Gorman *v.* Gorman, 40 N. Y. App. Div. 225, 57 N. Y. Suppl. 1069 [*affirmed* in 159 N. Y. 571, 54 N. E. 1092]. *Compare* Cox *v.* Cox, 7 Mackey (D. C.) 1.

A purchaser with knowledge of the defect will not be relieved from his purchase and has no rights based upon the existence of such defects. Stewart *v.* Devries, 81 Md. 525, 32 Atl. 285; Shields *v.* Harrison, 77 N. C. 115; Chambers *v.* Brigman, 75 N. C. 487; Snyder *v.* McLanahan, 203 Pa. St. 55, 52 Atl. 7.

Title dependent upon death of absentee.— A purchaser is not obliged to accept a title depending for its validity upon the death of a person where the only proof of his death is his absence for seven years without his having been heard of. McDermot *v.* McDermot, 3 Abb. Pr. N. S. (N. Y.) 451.

Waiver of objections to title see Goddin *v.* Vaughn, 14 Gratt. (Va.) 102.

A purchaser who has received the rents and profits for several years, and paid a part of the price, cannot, upon being afterward sued for the price, defend on the ground that he did not get a good title, where he made no tender of the amount he really owed after the allowance of a counter-claim which he pleaded. Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877.

The surety on notes given for land bought at a judicial sale cannot maintain a suit in equity to avoid the sale, on the ground of a defect of title. Lillard *v.* Puckett, 9 Baxt. (Tenn.) 568.

In Canada on receiving an abstract of title the purchaser has seven days to object to the completeness of the abstract, and after any question of its completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days to object to the title. If, however, he takes his objections to the title in the first instance, the master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title. No objections other than those specifically taken will be entertained by the master. McManus *v.* Little, 3 Ch. Chamb. (U. C.) 263.

Acceptance of title.— Where, after a sale under decree of the court, an abstract had not been demanded, and no steps had been taken by the purchaser, or his representatives for twenty-three months after the confirmation of the report, a reference as to title was refused, and the purchaser held to have accepted the title. Ontario Bank *v.* Sirr, 6 Ont. Pr. 216. So also a purchaser who enters into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title unless the sanction of the court has been obtained to his entering into possession without waiving his right to call for a good title. Patterson *v.* Robb, 6 Ont. Pr. 114. And a purchaser by taking a conveyance or vesting order waives all objections to the title. Bull *v.* Harper, 6 Ont. Pr. 36.

31. Southwick *v.* Greuzenbach, (Ky. 1890) 14 S. W. 344; Woolverton *v.* Stevenson, 52 La. Ann. 1147, 27 So. 674; Weems *v.* Brewer, 2 Harr. & G. (Md.) 390; Fleming *v.* Burnham, 100 N. Y. 1, 2 N. E. 905; Spring *v.* Sandford, 7 Paige (N. Y.) 550; Dunham *v.* Minard, 4 Paige (N. Y.) 441; Matter of Browning, 2 Paige (N. Y.) 64.

A slight encroachment on adjoining property or on the street will not entitle the purchaser to be released, where for many years there has been no interference with the enjoyment of the property. But a part of the purchase-price may be reserved for

be given;[32] and if fraud has been practised upon the purchaser, or if there has been a mutual mistake, not the result of the negligence of the purchaser, the doctrine of *caveat emptor* does not apply, and the purchaser will be relieved from his purchase.[33] But if the sale is expressly made of only the interest of the supposed owner, the purchaser has no ground of relief if he does not receive a perfect title,[34] and a purchaser will not be relieved on account of defects in the property or the title thereto, of which he had notice and in reference to which he made his bid,[35] although purchasing with knowledge of one or more defects in the title does not require the purchaser to accept a title with defects unknown to him at the time.[36] That one purchasing at partition sale is bound, as a party, by the proceedings, and the final judgment confirming the sale, does not bar his questioning the title as a purchaser.[37]

3. Defects or Deficiencies in Property Sold.[38] Where a commissioner of the court of equity, at his sale of personal property, gives notice that there is no warranty of the soundness of the property, the rule *caveat emptor* applies, and the purchaser will be bound to pay, although the property should prove unsound.[39] The purchaser of a lot having a certain front cannot claim that he was deceived because he subsequently discovers that one of the side lines runs obliquely so as to make the back line considerably shorter than the front, when such back line was stated in the advertisement to be a certain number of feet "more or less," the number stated being less than the measurement of the front line.[40] Where lots were sold by special agreement in lump, and it appeared that the numbers of the lots had been given in the advertisement to sell, although transposed, the

necessary removals and repairs on account of such encroachment. Merges *v.* Ringler, 24 Misc. (N. Y.) 317, 53 N. Y. Suppl. 674 [*affirmed* in 34 N. Y. App. Div. 415, 54 N. Y. Suppl. 280 (*affirmed* in 158 N. Y. 701, 53 N. E. 1128)]. See also Carneal *v.* Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St Rep. 819.

Where an alleged outstanding title is but a mere possibility the court may compel the purchaser to complete his purchase. Lenehan *v.* St. Francis Xavier College, 30 Misc. (N. Y.) 378, 63 N. Y. Suppl. 1033 [*affirmed* in 51 N. Y. App. Div. 535, 64 N. Y. Suppl. 868].

Objection to evidence of title.— A purchaser at a partition sale cannot refuse to take title because the evidence given on the trial of the partition suit did not warrant the conclusion that the parties were owners in fee of the whole property. Casey *v.* Casey, 19 Misc. (N. Y.) 272, 44 N. Y. Suppl. 254.

Previous tax-sale.— The fact that land sold at a chancery sale has been previously sold at a tax-sale, and bought in by the state or city, does not entitle the purchaser at the chancery sale to be relieved from his purchase, if the state or city is not proceeding upon the sale, but is treating it merely as a means of securing the taxes. Kirk *v.* Jones, 8 Heisk. (Tenn.) 829.

Petition for relief.— Where a purchaser of land at a chancery sale has received a deed, a petition by him alleging that within the limits of the land conveyed, "as he is informed and believes," there is a certain number of acres in adverse possession of another and in litigation, but which does not allege that the title acquired by him is invalid, shows no ground for equitable relief. Foster *v.* Bradford, 1 Tenn. Ch. 400.

32. Akin *v.* Underwood, 12 S. W. 1061, 11 Ky. L. Rep. 757; Morris *v.* Mowatt, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; Coster *v.* Clarke, 3 Edw. (N. Y.) 428.

33. Norton *v.* Nebraska L. & T. Co., 35 Nebr. 466, 53 N. W. 481, 37 Am. St. Rep. 441, 18 L. R. A. 88; Redd *v.* Dyer, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272.

This is true even after confirmation in case of fraud. Hickson *v.* Rucker, 77 Va. 135. And see Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456.

34. Brown *v.* Wallace, 4 Gill & J. (Md.) 479; Mott *v.* Mott, 68 N. Y. 246; Shields *v.* Allen, 77 N. C. 375.

35. Riggs *v.* Pursell, 66 N. Y. 193 [*followed* in Blanck *v.* Sadlier, 5 N. Y. App. Div. 81, 38 N. Y. Suppl. 817].

Presumption of knowledge of defect.— The presumption that a mortgagee, purchasing the property at partition sale, knew of any defects in the title, may be rebutted, and does not prevent his questioning the referee's ability to give good title. Mahoney *v.* Allen, 18 Misc. (N. Y.) 134, 42 N. Y. Suppl. 11.

36. Matter of Fales, 33 N. Y. App. Div. 611, 53 N. Y. Suppl. 1046 [*affirmed* in (1898) 52 N. E. 1124].

37. Mahoney *v.* Allen, 18 Misc. (N. Y.) 134, 42 N. Y. Suppl. 11.

38. **Abatement of price** for deficiency in amount of property see *supra*, XVI, E.

39. Parker *v.* Partlow, 12 Rich. (S. C.) 679.

40. Williams *v.* Duncan, 92 Ky. 125, 17 S. W. 330, 13 Ky. L. Rep. 389.

sale will not be set aside, although there were three or four lots less than advertised.[41]

4. Outstanding Liens.[42] It has been held that where the terms of sale do not provide that the property be sold subject to liens, a purchaser should be released from his bid, on discovery of a mortgage not discharged of record.[43] Where the terms of sale provide that existing encumbrances will be allowed to the purchaser out of the purchase-money on his producing vouchers therefor, the existence of encumbrances which he might have thus paid off is no reason for refusing to fulfil his purchase.[44]

5. Insolvency of Purchaser. In some cases the purchaser has been discharged on his becoming insolvent and unable to complete his purchase.[45]

XVII. Effect of Sale.

A. Title and Rights of Purchaser — 1. In General. The decree and deed convey all the title had by those who are parties to the suit,[46] and all the title of those who have derived their interest from any parties to the action during the pendency thereof.[47] The deed, however, can convey only the land and interests therein which are directed by the decree to be sold,[48] and which actually are sold.[49] Easements appurtenant to the property sold pass with it to the purchaser.[50] The purchaser of land at judicial sale obtains no right to the deeds constituting the chain of title to the land in the hands of the former owner,[51] or to certified copies of registered or other documents procured at the expense of the vendor.[52] After the purchaser has obtained title to the land and paid the purchase-price, he is not affected by subsequent proceedings in the cause in which the sale was ordered.[53]

41. Monument Cemetery Co. *v.* Potts, 1 Phila. (Pa.) 251.

42. Effect of sale on liens and encumbrances see *infra*, XVII, A, 2.

43. Mahoney *v.* Allen, 18 Misc. (N. Y.) 134, 42 N. Y. Suppl. 11.

44. Lenihan *v.* Hamann, 14 Abb. Pr. N. S. (N. Y.) 274.

45. Hodder *v.* Ruffin, 1 Ves. & B. 544, 35 Eng. Reprint 212; *Re* Heely, 1 Ch. Chamb. (U. C.) 54.

46. Logan *v.* Steele, 7 T. B. Mon. (Ky.) 101; Wallace *v.* Berdell, 105 N. Y. 7, 11 N. E. 274. See also *In re* Haaf, 52 La. Ann. 249, 26 So. 834; *In re* Field, 131 N. Y. 184, 30 N. E. 48 [*affirming* 17 N. Y. Suppl. 19].

Where some of the owners are bound by the decree and others not the sale will convey the interests of those bound. Loeb *v.* Struck, 42 S. W. 401, 19 Ky. L. Rep. 935; Whitley *v.* Davis, 1 Swan (Tenn.) 333.

Sale does not convey interest of one not a party.— Simonton *v.* Brown, 72 N. C. 46. See also Peck *v.* Chambers, 44 W. Va. 270, 28 S. E. 706.

The right to a share of growing crops reserved as rent passes to the purchaser. Burns *v.* Cooper, 31 Pa. St. 426.

Sale of undivided interest in dower.— Where one has purchased a dower interest in land, and already owns an undivided interest in the remainder dependent thereon, a sale under a decree of "his undivided interest in the dower" passes his remainder. Gill *v.* Buckner, 13 S. W. 908, 12 Ky. L. Rep. 511.

A public sale in gross of notes due a decedent having been decreed, which notes, with a list thereof, were in court, and the master commissioner having sold unreservedly without reading the list, the purchaser was entitled to all of the notes as against the administrator, who, after decree, but before sale, abstracted one of them without authority of court, and without notice to commissioner or bidders. Henderson *v.* Worthington, 38 S. W. 1086, 18 Ky. L. Rep. 1003.

47. Harryman *v.* Starr, 56 Md. 63; Applegarth *v.* Russell, 25 Md. 317. See also Cleveland *v.* Boerum, 27 Barb. (N. Y.) 252.

48. Mason *v.* Patterson, 74 Ill. 191; Moss *v.* Scott, 2 Dana (Ky.) 271; Ryan *v.* Dox, 25 Barb. (N. Y.) 440.

Where property excepted from the sale by the terms of the decree was sold no title passed. Braddock First Nat. Bank *v.* Hyer, 46 W. Va. 13, 32 S. E. 1000.

49. Hull *v.* Calkins, 137 Cal. 84, 69 Pac. 838; Jarboe *v.* Colvin, 4 Bush (Ky.) 70.

Where the tract contains more acres than was supposed by either party at the time of sale, but it was sold in bulk for a lump sum. the vendor is not obliged to make compensation for the excess. Cottingham *v.* Cottingham, 11 Ont. App. 624 [*reversing* 5 Ont. 704]. See also Sea *v.* McLean, 14 Can. Sup. Ct. 632.

50. Morgan *v.* Mason, 20 Ohio 401, 55 Am. Dec. 464, although not expressly mentioned.

51. Gay *v.* Warren, 115 Ga. 733, 42 S. E. 86, 90 Am. St. Rep. 151.

52. Harrison *v.* Joseph, 8 Ont. Pr. 293.

53. Greenlaw *v.* Greenlaw, 16 Lea (Tenn.) 435; Warren *v.* Farquaharson, 4 Baxt. (Tenn.) 484.

One purchasing property on sale under a judgment void as to creditors acquires no title as against them, whether or not he obtains actual possession.[54]

2. Liens and Encumbrances. The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances existed thereon at the time of the attaching of the lien under which the property is sold, and cannot have the proceeds of the sale applied to discharge such liens;[55] but liens attaching subsequently are cut off by the sale.[56] In some states taxes and assessments due on the property sold are to be paid out of the proceeds of the sale,[57] and the lien of the taxes on

54. Pincus *v.* Reynolds, 19 Mont. 564, 49 Pac. 145.

55. *Illinois.*— Roberts *v.* Hughes, 81 Ill. 130, 25 Am. Rep. 270.

Louisiana.— See Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666, holding that where a tutor holding an undivided interest in real estate purchases the entire property at a judicial sale made in partition proceedings, a tutorship mortgage affecting at the time of the sale the tutor's undivided interest in the property remains unaffected by the sale.

Maryland.— Sansbury *v.* Belt, 53 Md. 324; Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Duvall *v.* Speed, 1 Md. Ch. 229.

Nebraska.— Vaughn *v.* Clark, 5 Nebr. 238.

North Carolina.— See Durant *v.* Crowell, 97 N. C. 367, 2 S. E. 541, holding the purchaser chargeable with notice of the mortgage.

Pennsylvania.— *In re* McKenzey, 3 Pa. St. 156; Wylie's Estate, 7 Pa. Dist. 748; Inland Ins., etc., Co. *v.* Burrows, 2 Lanc. Bar 1106; Terry's Estate, 13 Phila. 298.

See 31 Cent. Dig. tit. "Judicial Sales," § 92.

Compare Tétu *v.* Chinic, 14 L. C. Rep. 147.

Encumbrances might be ground for refusing confirmation, but after confirmation there is no relief. Farmers' Bank *v.* Peter, 13 Bush (Ky.) 591.

In Louisiana the effect of the sale is to transfer private mortgages and privileges to the proceeds for satisfaction. Girardey's Succession, 42 La. Ann. 497, 2 So. 673.

Mortgage of interest of cotenant.— Where, after the commencement of proceedings in partition, one of the cotenants, who was a defendant, mortgaged his undivided interest, the lien of the mortgage was discharged by a sale of the premises under an order in the partition proceedings, notwithstanding the provision of the Pennsylvania act of March 23, 1867, that the lien of a first mortgage should not be destroyed "by any judicial or other sale whatever," for that statute referred to such a sale as would transfer the title to the special and particular estate mortgaged. Wright *v.* Vickers, 81 Pa. St. 122.

The judicial sale of land charged with a legacy, payable in annual instalments, divests it of the lien of the instalments not due and payable at the time of the sale. *In re* Lobach, 6 Watts (Pa.) 167.

A judicial sale of "a water craft," under the statute authorizing proceedings against the same by name, vests in the purchaser the title, divested of all liability to be again proceeded against under the statute for a claim existing at the time of the sale. Jones *v.* The Commerce, 14 Ohio 408.

A judicial sale divests all liens except such as are saved by statute or are incapable of being reduced to a sum certain in money by mere calculation. Reilly *v.* Elliott, 1 Del. Co. (Pa.) 77.

Claim of purchase without notice of lien. — The purchaser cannot complain of the enforcement of a lien thereon against him, on the ground that he purchased without notice of the lien, where the deed filed in the case showed that there were lien notes on the land which had never been released. Branham *v.* Long, 6 Ky. L. Rep. 451.

In New Jersey the act authorizing the chancellor to direct land limited over to be sold in fee does not authorize a sale free from encumbrances. Cool *v.* Higgins, 23 N. J. Eq. 308.

56. De Give *v.* Meador, 51 Ga. 160; Theard *v.* Prieur, 1 La. Ann. 16; Osterberg *v.* Union Trust Co., 93 U. S. 424, 23 L. ed. 964.

When junior lien not cut off.— Where a lien junior to that foreclosed was by the appraisers erroneously treated as a senior lien, and its amount deducted from the value of the property in making the appraisement, the purchaser bidding only two thirds of the appraised value after deducting such lien, and the holder of such junior lien not being a party to the suit, such purchaser cannot be heard, in a subsequent suit to foreclose such lien, to say that it was junior to that under which he bought. Hence the holder of what was the junior lien is entitled to foreclosure, and is not compelled to redeem. Nye, etc., Co. *v.* Fahrenholz, 49 Nebr. 276, 68 N. W. 498, 59 Am. St. Rep. 540.

57. Kerr *v.* Hoskinson, 5 Kan. App. 193, 47 Pac. 172; Tuck *v.* Calvert, 33 Md. 209; Provident Bldg., etc., Assoc. *v.* Flanagan, 6 Pa. Dist. 439 (decided under the Pennsylvania act of May 22, 1895); Rogers *v.* Rogers, 101 Tenn. 428, 47 S. W. 701 (holding that under Shannon Tenn. Code, § 969, taxes accruing after the sale but before confirmation should be paid out of the proceeds).

The Ohio statute providing that when real estate is sold at judicial sale the court shall order the taxes and penalties and the interest thereon against such land to be discharged out of the proceeds of sale, relates only to such taxes and penalties as stand unsatisfied on the tax duplicate, and the proceeds cannot, without the consent of defendant, be applied

the land is divested by the sale;[58] but in other states tax liens are not transferred from the property to the proceeds, and the sale has no effect to relieve the property sold therefrom.[59] The court may provide for the payment of outstanding liens out of the purchase-money,[60] but in such case the purchaser cannot insist upon a discharge of the encumbrances before the purchase is completed.[61] If the property is sold subject to liens and encumbrances, tax liens are of course not divested or transferred to the proceeds;[62] and it has been held that a sale of land

in discharge of the claim of a prior purchaser of the same premises at a tax-sale, when such purchaser is a stranger to the decree or order under which the judicial sale is made. Ketcham *v.* Fitch, 13 Ohio St. 201.

An order of the court that the sheriff shall pay taxes that are a lien on the property sold at sheriff's sale does not impose an extra-official duty, and a purchaser who has been compelled to pay the taxes may recover from the sheriff the amount. Springmeier *v.* Blackwell, 6 Ohio Dec. (Reprint) 705, 7 Am. L. Rec. 477.

The amount of a street assessment confirmed between the date of a referee's auction sale and the delivery of his deed cannot be deducted from the purchase-price of the property under a provision of the terms of sale that "all taxes and assessments, duly confirmed and payable, which at the time of their sale are liens or incumbrances on said premises, will be allowed by the referee out of the purchase money," since the "sale" referred to means the auction sale. Ainslie *v.* Hicks, 13 N. Y. App. Div. 388, 43 N. Y. Suppl. 47.

Rights fixed by date of sale.— The rights of a purchaser at a judicial sale as to the payment of taxes out of the proceeds are fixed by the date of the sale, and, after confirmation, refer back to that date. Scheid *v.* Scheid, 5 Ohio S. & C. Pl. Dec. 559, 7 Ohio N. P. 538.

Redemption from tax-sale.— When, after a purchaser of land sold under a decree had accepted a vesting order, he ascertained that the land had been sold for taxes he was entitled to payment out of the money in court of the amount required to redeem. Turrill *v.* Turrill, 7 Ont. Pr. 142.

Where the purchaser accepted a vesting order without requiring the taxes to be paid off an application to have the taxes paid off out of the purchase-money remaining in court was refused because too late, although the land was sold free from taxes. Kincaid *v.* Kincaid, 6 Ont. Pr. 93 [*following* Thomas *v.* Powell, 2 Cox Ch. 374, 30 Eng. Reprint 182; Miller *v.* Pridden, 3 Jur. N. S. 78, 26 L. J. Ch. 183, 5 Wkly. Rep. 171].

58. Shaw *v.* Allegheny, 115 Pa. St. 46, 7 Atl. 770 (decided under the Pennsylvania act of Feb. 27, 1860); Allegheny City's Appeal, 41 Pa. St. 60 (decided under the Pennsylvania act of April 5, 1844); Provident Bldg., etc., Assoc. *v.* Flanagan, 6 Pa. Dist. 439 (decided under the Pennsylvania act of May 22, 1895); South Chester *v.* Weigand, 1 Del. Co. (Pa.) 64; Janney *v.* Harlan, 5 Pa. L. J. 116 (decided under the Pennsylvania act of Feb. 3, 1824). See also Taylor *v.* Bowling, 5 Pa. Super. Ct. 225.

Ascertainment of amount due.— Real estate sold under decree of court in a proceeding to which the state or other tax creditor is not a party is not thereby exonerated in the hands of the purchaser from an existing lien for unpaid taxes due thereon unless there has been, as required by the Tennessee act of 1871, chapter 68, an ascertainment by proper reference of the amount of taxes due at the date of the sale and an order directing their payment out of the proceeds realized from such sale. State *v.* Hill, 87 Tenn. 638, 11 S. W. 610.

59. Girardey's Succession, 42 La. Ann. 497, 7 So. 673.

In Tennessee the purchaser may look to the owner for taxes due, but cannot abate the price agreed to be paid for the benefit of creditors by unpaid taxes; nor will the fact that the decree of sale was consented to make any difference. Staunton *v.* Harris, 9 Heisk. 579. See also Kirk *v.* Jones, 8 Heisk. 829.

60. See Yost *v.* Porter, 80 Va. 855, holding that the court will not decree the sale of land which is encumbered for the purchase-money due without providing for the discharge of such encumbrances.

Estoppel to deny lien.— One who buys land which is subject to a mortgage at a sale under an order directing it to be sold clear and discharged of all liens, but who nevertheless pays only the amount of his bid in excess of the mortgage and accepts a deed reciting that fact and that the conveyance is subject to the payment of the mortgage debt, is estopped from denying that he took title subject to the mortgage. Gibson *v.* Lyon, 115 U. S. 439, 6 S. Ct. 129, 29 L. ed. 440.

61. Sears *v.* Hyer, 1 Paige (N. Y.) 483.

62. State *v.* Vincent, 78 Ala. 233; George *v.* St. Louis Cable, etc., R. Co., 44 Fed. 117.

A purchaser is bound by the terms imposed by the sheriff as to payment of liens, although the sheriff was not authorized by order of court to make the sale upon such terms. Nowry's Estate, 20 Pa. Co. Ct. 76.

Purchasers at a sale subject to receiver's certificates previously issued have no interest in the trust fund represented by the certificates, and therefore cannot resist the payment on the ground that the receiver negotiated them collusively. Central Nat. Bank *v.* Hazard, 30 Fed. 484.

under a decree will not divest the lien of a stranger upon the land, although the decree provides for the payment of his encumbrance, if the amount due is not actually paid.[63] Where the creditors at whose instance a judicial sale is obtained had no notice of a lien on the property, the purchaser at such sale will not be affected by such lien even though he had notice thereof.[64] Where a purchaser has paid taxes which should have been paid out of the proceeds of sale, he is entitled to have a corresponding abatement of the purchase-money,[65] or may recover the amount so paid from the former owner in assumpsit.[66] Even though a purchaser may hold the property subject to liens thereon, he is not personally liable for the amount of such liens.[67]

3. Effect of Misapplication of Proceeds. A purchaser at a judicial sale is not bound in any case to see to the application of the purchase-money. That is under the control of the court, and the title of the purchaser is not affected, however unwise or illegal may be the disposition of the money by the court,[68] or by the officer to whom the money is paid.[69] But the purchaser is not protected in paying to an officer who has no authority to receive payment, and if payment is made to such a one and the money is lost the purchaser will be bound to pay it again.[70]

4. Right to Rents and Profits.[71] When the sale is duly confirmed the purchaser is generally held entitled to the rents and profits from the time of the sale.[72] Rent reserved, but not accrued, under a lease, passes with a conveyance

Estoppel to dispute validity of taxes.— Where realty is sold under a judgment directing sale subject to all taxes and assessments which have become liens subsequent to a certain date, the purchaser in an action against the county to compel the determination of a claim to the realty for taxes becoming liens on the premises subsequently to such date is estopped from questioning their validity. Cottle *v.* Erie County, 57 N. Y. App. Div. 443, 67 N. Y. Suppl. 996 [*affirmed* in 173 N. Y. 591, 65 N. E. 1115].

Departure from directions of decree.— If a referee, selling property under a decree, irregularly sells it free from a lien which he promises to pay off out of the proceeds, instead of selling it subject to the lien, as directed by the decree, the purchasers cannot be compelled to pay into court the amount of the lien in addition to their bid; but, if the terms of sale were prejudicial to any party, the remedy is by an application for a resale. Hotchkiss *v.* Clifton Air Cure, 2 Abb. Dec. (N. Y.) 406, 4 Keyes 170.

63. Jackson *v.* Edwards, 7 Paige (N. Y.) 386.

64. Case *v.* Woolley, 6 Dana (Ky.) 17, 32 Am. Dec. 54, [*following* Helm *v.* Logan, 4 Bibb (Ky.) 78]; Herring *v.* Cannon, 21 S. C. 212, 53 Am. Rep. 661 [*following* McKnight *v.* Gordon, 13 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164].

65. Brown *v.* Timmons, 110 Tenn. 148, 72 S. W. 958. See also Springmeier *v.* Blackwell, 6 Ohio Dec. (Reprint) 705, 7 Am. L. Rec. 477; Williams *v.* Whitmore, 9 Lea (Tenn.) 262.

66. Childress *v.* Vance, 1 Baxt. (Tenn.) 406.

67. Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1897) 41 S. W. 157.

68. O'Neal *v.* Bannon, 4 Bush (Ky.) 23; Coombs *v.* Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Knotts *v.* Stearns, 91 U. S. 638, 23 L. ed. 252. And see Wilkinson *v.* Brinn, 124 N. C. 723, 32 S. E. 966.

69. Marshall *v.* Wheeler, 7 Mackey (D. C.) 414, unless the purchaser is a party to a scheme for the illegal disposition of the money. See also Pulliam *v.* Tompkins, 99 Va. 602, 39 S. E. 221.

70. Tyler *v.* Toms, 75 Va. 116.

71. **Emblements.**—A person having become purchaser of land under a sale in chancery, and having received possession on condition that he allowed the wheat and straw there to be removed, does not acquire any legal right to the straw as emblements under such purchase. O'Dell *v.* Coyne, 4 U. C. C. P. 452.

72. Huntington *v.* Walker, 2 MacArthur (D. C.) 479; Wagner *v.* Cohen, 6 Gill (Md.) 97, 45 Am. Dec. 660; Jashenosky *v.* Volrath, 59 Ohio St. 540, 53 N. E. 46, 69 Am. St. Rep. 786; Taylor *v.* Cooper, 10 Leigh (Va.) 317, 34 Am. Dec. 737. *Contra*, Brown *v.* Berkley, 3 Ky. L. Rep. 469; Elliott *v.* Bush, 3 Ky. L. Rep. 466; Latta *v.* Pierce, 11 Lea (Tenn.) 267; Shields *v.* Thompson, 4 Baxt. (Tenn.) 227; Armstrong *v.* McClure, 4 Heisk. (Tenn.) 80; Hyder *v.* O'Brien, (Tenn. Ch. App. 1898) 48 S. W. 262. And see Argo *v.* Oberschlake, 48 Ill. App. 289.

In Canada the rule has been laid down that "where a person purchases property, from the time that he becomes such purchaser he is entitled to all rents and profits that may be derived from the estate which accrue due subsequent thereto." Brady *v.* Keenan, 6 Ont. Pr. 262, 263. *Compare* Liscombe *v.* Gross, 6 Ont. Pr. 271.

Estoppel.— Land was sold under a decree in equity, and the trustee reported to the court that he sold the same "subject to the right of the tenant to cut and secure the growing crop." The sale, as reported, was

of the premises, and a purchaser thereof at judicial sale becomes entitled to such rent.[73] Where rent has been paid in advance for a term which does not expire until after the completion of the purchase, the purchaser is entitled to a *pro rata* portion thereof.[74]

5. Effect of Invalidity of Decree.[75] A sale made under a decree wholly void by reason of jurisdictional defects confers no title on the purchaser;[76] but if the court had jurisdiction of the parties and subject-matter the title of a *bona fide* purchaser is good notwithstanding there may have been errors or irregularities in the proceedings which render the decree invalid.[77]

6. Effect of Reversal or Vacation of Decree.[78] The reversal or vacation for

ratified by the court. The purchasers and the tenant were parties to the proceedings for the sale of the land. The tenant cut and sold the crop of wheat which was growing at the time of the sale, and received the money therefor. In an action by the purchasers against the tenant to recover the value of the crop which he had sold, it was held that plaintiffs were estopped from claiming the crop of wheat or its value. Bruner *v.* Ramsburg, 43 Md. 560.

73. Townsend *v.* Isenberger, 45 Iowa 670.

74. Liscombe *v.* Gross, 6 Ont. Pr. 271.

75. **Invalidity of decree as ground for setting aside sale** see *supra*, XIV, B, 4.

76. *California.*— McMinn *v.* Whelan, 27 Cal. 300.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134.

Illinois.— Buckmaster *v.* Carlin, 4 Ill. 104.

Kentucky.— Grigsby *v.* Barr, 14 Bush 330.

Louisiana.— Walworth *v.* Stevenson, 24 La. Ann. 251.

Michigan.— Griswold *v.* Fuller, 33 Mich. 268.

Mississippi.— See Cable *v.* Martin, 1 How. 558.

Texas.— Bowers *v.* Chaney, 21 Tex. 363.

See 31 Cent. Dig. tit. "Judicial Sales," § 105.

77. *Alabama.*— Dunklin *v.* Wilson, 64 Ala. 162.

Georgia.— Walker *v.* Morris, 14 Ga. 323.

Illinois.— Wing *v.* Dodge, 80 Ill. 564; Buckmaster *v.* Carlin, 4 Ill. 104.

Indiana.— Taylor *v.* Parker, Smith 225.

Kentucky.— See Hildebrand *v.* Bunnschu, 40 S. W. 920, 19 Ky. L. Rep. 430.

Louisiana.— Wisdom *v.* Parker, 31 La. Ann. 52; Brosnaham *v.* Turner, 16 La. 433. See also Porter *v.* Hornsby, 32 La. Ann. 337; Donaldson *v.* Dorsey, 7 Mart. N. S. 376.

Maryland.— See Shartzer *v.* Mountain Lake Park Assoc., 86 Md. 335, 37 Atl. 786.

Michigan.— See Browning *v.* Howard, 19 Mich. 323, holding that where the sale was valid under the public law, but a special statute had been passed regulating the particular sale, the provisions of which were not observed, a purchaser having no notice of the special statute took a good title.

Missouri.— Pattee *v.* Thomas, 58 Mo. 163. See also Jones *v.* Talbot, 9 Mo. 121.

Nebraska.— See J. T. Robinson Notion Co. *v.* Foot, 42 Nebr. 156, 60 N. W. 316, fraud in transfer of decree.

New York.— Sproule *v.* Davies, 171 N. Y. 277, 63 N. E. 1106; Clark *v.* Davenport, 1 Bosw. 95. And see Monell *v.* Lawrence, 12 Johns. 521.

North Carolina.— Millsaps *v.* Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 134 N. C. 486, 46 S. E. 988.

Pennsylvania.— Morrison *v.* Nellis, 115 Pa. St. 41, 7 Atl. 768; Milleisen *v.* Senseman, 4 Pa. Super. Ct. 455 [*affirming* 5 Pa. Dist. 723].

South Carolina.— Tederall *v.* Bouknight, 25 S. C. 275.

Texas.— Stegall *v.* Huff, 54 Tex. 193; Bowers *v.* Chaney, 21 Tex. 363; Huckins *v.* Kapf, (App. 1889) 14 S. W. 1016. See also Edwards *v.* Halbert, 64 Tex. 667.

United States.— Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283; Godchaux *v.* Morris, 121 Fed. 482, 57 C. C. A. 434; U. S. Bank *v.* Voorhees, 2 Fed. Cas. No. 939, 1 McLean 221 [*affirmed* in 10 Pet. 449, 9 L. ed. 490].

Canada.— Dickey *v.* Heron, 1 Ch. Chamb. (U. C.) 149.

See 31 Cent. Dig. tit. "Judicial Sales," § 105.

Purchaser not bound to look beyond decree to ascertain its necessity.— Weil *v.* Schwartz, 51 La. Ann. 1547, 26 So. 475; Munday *v.* Kaufman, 48 La. Ann. 591, 19 So. 619; Massie *v.* Brady, 41 La. Ann. 553, 6 So. 536.

The purchaser cannot question the regularity of the proceedings had before the decree of sale was entered. Cox *v.* Cox, 7 Mackey (D. C.) 1.

The purchaser cannot dispute the truth of the record as to matters within the jurisdiction of the court. Theze's Succession, 44 La. Ann. 46, 10 So. 412; Stegall *v.* Huff, 54 Tex. 193.

Purchaser may refuse to comply with bid where proceedings and order unauthorized.— Dumestre's Succession, 40 La. Ann. 571, 4 So. 328.

Notification that sale illegal.— One may be a *bona fide* purchaser of property sold under order of court, although he is notified that it is being sold illegally and that whoever buys it will get with it "a first-class lawsuit," this being a mere matter of opinion. Wilson *v.* Garrick, 72 Ga. 660.

A trustee purchasing for the benefit of complainants who irregularly obtained the decree of sale acquires no title. Goff *v.* Robins, 33 Miss. 153.

78. **Reversal of decree as ground for setting aside sale** see *supra*, XIV, B, 4.

irregularity or error of the decree under which a judicial sale was had does not invalidate the title of a purchaser who bought in good faith at a sale had while the decree was in force.[79] But the rule is otherwise where the purchaser was a party to the suit in which the sale was ordered,[80] or the attorney of a party.[81]

7. REGISTRY ACTS. Purchasers at judicial sales are held to be "purchasers" as the word is used in the registry acts, and entitled to their protection.[82]

Rule as to grantee of purchaser see *infra*, XVII, B.

79. *Alabama.*— Phillips *v.* Benson, 85 Ala. 416, 5 So. 78. See also Leslie *v.* Richardson, 60 Ala. 563.

Arkansas.— Moore *v.* Woodall, 40 Ark. 42.

California.— Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Loring *v.* Illsley, 1 Cal. 24.

Florida.— Garvin *v.* Watkins, 29 Fla. 151, 10 So. 818.

Illinois.— Barlow *v.* Stanford, 82 Ill. 298; Hobson *v.* Ewan, 62 Ill. 146.

Indiana.— Doe *v.* Swiggett, 5 Blackf. 328.

Kentucky.— Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723; Shackleford *v.* Hunt, 4 B. Mon. 262; Clarey *v.* Marshall, 4 Dana 95; Clark *v.* Bell, 4 Dana 15; Parker *v.* Anderson, 5 T. B. Mon. 445; Talbott *v.* Campbell, 67 S. W. 53, 23 Ky. L. Rep. 2198; May *v.* Ball, 60 S. W. 722, 22 Ky. L. Rep. 1681. See also Taylor *v.* Fitzsimmons, 41 S. W. 263, 19 Ky. L. Rep. 583.

Maryland.— Benson *v.* Yellott, 76 Md. 159, 24 Atl. 451; Garritee *v.* Papplein, 73 Md. 322, 20 Atl. 1070; Newbold *v.* Schlens, 66 Md. 585, 9 Atl. 849; Lenderking *v.* Rosenthal, 63 Md. 28; Ward *v.* Hollins, 14 Md. 158.

Minnesota.— Branley *v.* Dambly, 69 Minn. 282, 71 N. W. 1026.

Mississippi.— Doe *v.* Natchez Ins. Co., 8 Sm. & M. 197.

Missouri.— Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368.

New York.— Holden *v.* Sackett, 12 Abb. Pr. 473.

North Carolina.— Morris *v.* Gentry, 89 N. C. 248; Sutton *v.* Schonwald, 86 N. C. 198, 41 Am. Rep. 455. See also Harrison *v.* Hargrove, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781.

Ohio.— McBride *v.* Longworth, 14 Ohio St. 349, 84 Am. Dec. 383.

Pennsylvania.— See *In re* Markle, 182 Pa. St. 393, 38 Atl. 620.

Tennessee.— Micou *v.* Davis, 16 Lea 257; Lewis *v.* Baker, 1 Head 385.

Texas.— Huckins *v.* Kapf, (App. 1889) 14 S. W. 1016.

West Virginia.— Klapneck *v.* Keltz, 50 W. Va. 331, 40 S. E. 570; Frederick *v.* Cox, 47 W. Va. 14, 34 S. E. 958.

United States.— Brignardello *v.* Gray, 1 Wall. 627, 17 L. ed. 692.

See 31 Cent. Dig. tit. "Judicial Sales," §§ 108, 109.

Compare Ritson *v.* Dodge, 33 Mich. 463.

When an appeal is perfected before the sale is fully completed, the purchaser is not without notice and upon a reversal of the decree the sale will be set aside. Miller *v.* Hall, 1 Bush (Ky.) 229; Chesapeake Bank *v.* McClelland, 1 Md. Ch. 328.

Failure to join necessary parties.— A purchaser at a judicial sale, upon reversal of the decree, is not protected by W. Va. Code. c. 132, § 8, providing that such reversal shall not affect such purchaser, when the record shows that necessary parties interested in the land, having liens thereon, were not parties when the sale was ordered and confirmed. Turk *v.* Skiles, 38 W. Va. 404, 18 S. E. 561; Underwood *v.* Pack, 23 W. Va. 704.

80. *Alabama.*— Phillips *v.* Benson, 85 Ala. 416, 5 So. 78; McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358. See also Ivie *v.* Stingfellow, 82 Ala. 545, 2 So. 22, purchase by complainant's wife.

Arkansas.— Millington *v.* Hill, 54 Ark. 239, 15 S. W. 606; Fishback *v.* Weaver, 34 Ark. 569.

California.— Purser *v.* Cady, 120 Cal. 214, 52 Pac. 489; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

Illinois.— Hay *v.* Bennett, 153 Ill. 271, 38 N. E. 645; Smith *v.* Brittenham, 109 Ill. 540.

Kansas.— Hubbard *v.* Ogden, 22 Kan. 671.

New York.— Wambaugh *v.* Gates, 8 N. Y. 138.

Tennessee.— Welcker *v.* Staples, 88 Tenn. 49, 12 S. W. 340, 17 Am. St. Rep. 869.

Texas.— Adams *v.* Odom, 74 Tex. 206, 12 S. W. 34, 15 Am. St. Rep. 827.

Virginia.— Buchanan *v.* Clark, 10 Gratt. 164.

West Virginia.— Frederick *v.* Cox, 47 W. Va. 14, 34 S. E. 958; Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102.

United States.— See Central Trust Co. *v.* Hubinger, 87 Fed. 3.

See 31 Cent. Dig. tit. "Judicial Sales," § 108.

In Kentucky reversal of the decree does not vacate the sale, although the complainant is the purchaser. Yocum *v.* Foreman, 14 Bush 494; Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723; Blake *v.* Wolfe, 64 S. W. 910, 23 Ky. L. Rep. 1143; Dunn *v.* German Security Bank, 3 S. W. 425, 8 Ky. L. Rep. 777; Stewart *v.* Hoskins, 3 S. W. 124, 8 Ky. L. Rep. 696.

81. Phillips *v.* Benson, 85 Ala. 416, 5 So. 78; Smith *v.* Brittenham, 109 Ill. 540; Salter *v.* Dunn, 1 Bush (Ky.) 311; Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

82. *Alabama.*— Tennessee Coal, etc., Co. *v.* Gardner, 131 Ala. 599, 32 So. 622.

Georgia.— Ousley *v.* Bailey, 111 Ga. 783, 36 S. E. 750.

B. Rights of Grantee of Purchaser. A *bona fide* grantee for value from a purchaser at a judicial sale is not affected by irregularities,[83] mistakes,[84] or fraud,[85] of which he did not have notice, although the sale was liable to be set aside as to his grantor; and on the other hand a *bona fide* purchaser at a judicial sale can transfer to his grantee the standing and all the rights of a *bona fide* purchaser, although such grantee has notice of fraud sufficient to avoid the sale.[86] The purchaser's grantee is chargeable with notice of all jurisdictional defects,[87] but his title is not defeated by a subsequent reversal or vacation of the judgment for error or irregularity.[88] The first purchaser at a judicial sale cannot repudiate the title he gives his grantee.[89] A sale by the purchaser at a judicial sale to another person, who assumes the payment of the balance of the purchase-price, is not a judicial sale, although it is confirmed and entry thereof made in the record of the case pending.[90] Where a commissioner appointed by the court sells personal property on credit and the purchasers afterward resell the property and leave the state without paying their bid, the purchasers' vendees are not subject to an order to either pay the bid of their vendors or surrender the property to the commissioner, because they were not parties to the original suit, but if the vendees have no title because the bidders had none, the commissioner's remedy is by action for a surrender of the property.[91] The vendee of a purchaser of land, sold under a decree directing that a lien be reserved for the payment of the purchase-money, cannot defeat the lien by pleading the statute of limitations.[92] Where a purchaser at a judicial sale conveys the land to another, who has notice that the purchase-money was unpaid, the lien on the land in favor of the original owners still subsists against the property in the hands of such vendee.[93] Persons acquiring title through the purchasers at a judicial sale of property subject to certain receiver's certificates previously issued have no interest in the trust fund represented by the certificates, and therefore cannot resist their payment on the ground that the receiver negotiated them collusively.[94] A purchaser with notice from one who bid off lands at a judicial sale, but failed to comply with his bid and received no deed, cannot hold them as against a subsequent purchaser thereof at a resale duly ordered in the original action.[95] Where a sheriff's deed was acknowledged before the purchase-money was paid but the deed was not delivered, and, the purchase-money not having been paid, the acknowledgment was set aside, but the purchaser in the meantime procured a loan from a building association, of which he was the solicitor, on the premises in question, and, as solicitor, passed upon the title, the building association was affected with knowledge of the transaction, and had no standing to move for a decree revoking the decree in which the confirmation was set aside.[96]

Iowa.— Koch *v.* West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394.

Louisiana.— Cotton *v.* Stacker, 5 La. Ann. 677.

New York.— Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

United States.— McNitt *v.* Turner, 16 Wall. 352, 21 L. ed. 341.

83. Davis *v.* Watson, 54 Miss. 679.

84. Jennings *v.* Monk, 4 Metc. (Ky.) 103.

85. Vaughn *v.* Hann, 6 B. Mon. (Ky.) 338; Fowler *v.* Poor, 93 N. C. 466.

86. Wilson *v.* Hoffman, (N. J. Ch. 1901) 50 Atl. 592. See also Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60.

87. Albers *v.* Kozeluh, (Nebr. 1903) 94 N. W. 521; Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Hoback *v.* Miller, 44 W. Va. 635, 29 S. E. 1014.

88. McCormick *v.* McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441; Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412; Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603.

Rule as to purchaser see *supra*, XVII, A, 6.

89. Poultney *v.* Cecil, 8 La. 321.

90. Aymett *v.* Citizens' Nat. Bank, (Tenn. Ch. App. 1901), 64 S. W. 302, holding accordingly that such sale was within the registration laws.

91. Weaver *v.* Nelson, (Miss. 1893) 12 So. 597.

92. *Ex p.* Spence, 6 Lea (Tenn.) 391.

93. Barnes *v.* Morris, 39 N. C. 22.

94. Central Nat. Bank *v.* Hazard, 30 Fed. 484.

95. Jones *v.* Cathcart Co., 17 S. C. 592.

96. Mutual Bldg., etc., Assoc. *v.* Ambrose, 7 Pa. Dist. 526.

XVIII. REDEMPTION.[97]

There is no general right of redemption from judicial sales, but when such right exists it is by statute,[98] and the right extends only to cases coming within the statute,[99] is governed by the statute in force at the time of the sale,[1] and must be exercised in pursuance of the statute, otherwise it will be ineffective.[2] To entitle one to redeem from a judicial sale of realty, the right must be exercised within the time prescribed;[3] but a debtor may be allowed to complete the redemption after the expiration of the time allowed therefor, where he attempted in good faith to redeem it in due time, but by mistake deposited a few dollars less than the amount due.[4] A grantee by deed from the judgment debtor after foreclosure sale is a successor in interest, and is entitled to all the rights of redemption given by the statute to his grantor, to be exercised in the same manner.[5] The court cannot bar the right of redemption when it is given by statute.[6] Although a court of equity may decree that redemption may be made in certain cases,[7] the general rule in equity is that where all the parties are before the court and a sale is made pursuant to its decree, and by an officer appointed by it for the purpose, the right of redemption will not be allowed except by command of

97. See also *supra*, IX, A.

98. Conway *v.* John, 14 Colo. 30, 23 Pac. 170; Littler *v.* People, 43 Ill. 188; West *v.* Flemming, 18 Ill. 248, 68 Am. Dec. 539; Farnsworth *v.* Strasler, 12 Ill. 482; Gosmount *v.* Gloe, 55 Nebr. 709, 76 N. W. 424.

99. Owen *v.* Kilpatrick, 96 Ala. 421, 11 So. 476; White *v.* Bates, 89 Tenn. 570, 15 S. W. 651.

In Tennessee, since the act of 1833, c. 47, § 2, the right of redemption exists in all cases when land is sold on a credit by order of the chancery court unless the credit is given upon application of the complainant and that fact appears in the decree, and the specific land to be sold be set forth in the decree also. In addition thereto it should appear in the decree in explicit terms that the chancellor in ordering the sale intended that no right of redemption should exist. Burrow *v.* Henson, 2 Sneed 658.

1. Moor *v.* Seaton, 31 Ind. 11.

2. Littler *v.* People, 43 Ill. 188.

To whom payment made.— Thomson & St. Code Tenn. § 2136, as amended by Tenn. Acts (1889), c. 83, § 2, providing that, when the purchaser of land subject to redemption resides out of the county where the land lies, the party entitled to redeem may pay the redemption money to the clerk of the circuit court of the county in which the land lies, to be held for the person entitled thereto, applies to sales under a decree of the chancery court. Maupin *v.* Blanton, 93 Tenn. 422, 25 S. W. 99.

3. Traeger *v.* Chicago Mut. Bldg., etc., Assoc., 63 Ill. App. 286.

Amount uncertain.— Where, under a decree for alimony authorizing a sale of a life-estate in certain premises, and thereafter a sale of the remainder, the life-estate was sold and on application to sell the remainder the decree for alimony was modified, from which an appeal was prosecuted, and during its pendency the statutory redemption period from the sale of the life-estate expired, it was held that the pendency of the appeal had not rendered the amount which was necessary in order to redeem uncertain, so as to authorize a redemption of the property by suit in equity after the expiration of the redemption period. Henderson *v.* Craig, 179 Ill. 395, 53 N. E. 736.

4. Moore *v.* Bishop, 49 S. W. 957, 20 Ky. L. Rep. 1622.

5. Phillips *v.* Hazard, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369.

6. Fitch *v.* Wetherbee, 110 Ill. 475, holding that a clause in a decree for the sale of land declaring that such sale shall be made absolute does not bar the statutory right of a judgment creditor to redeem. See also Hall *v.* Bond, 68 N. Y. App. Div. 293, 74 N. Y. Suppl. 5.

Under the Tennessee statutes providing that in certain cases the court may sell land on credit and without the right of redemption, if the court requires the payment of a material proportion of the value of the land in cash, the equity of redemption will not be barred. McBee *v.* McBee, 1 Heisk. (Tenn.) 558.

7. Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046 [*modifying* 55 Hun 143, 8 N. Y. Suppl. 593]; Casserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000; Taggart *v.* Rogers, 49 Hun (N. Y.) 265, 1 N. Y. Suppl. 900; Crane *v.* McDonald, 2 N. Y. St. 150; Strayer *v.* Long, 89 Va. 471, 16 S. E. 357. See also Watt *v.* McGalliard, 67 Ill. 513.

Equity may allow redemption after statutory period has expired.— Howard *v.* Milwaukee, etc., R. Co., 12 Fed. Cas. No. 6,761, 7 Biss. 73 [*affirmed* in 101 U. S. 837, 25 L. ed. 1081].

In decreeing a sale of realty to satisfy a lien defendant should be given a day to redeem the property by paying the amount charged upon it. Pecks *v.* Chambers, 8 W. Va. 210 [*following* Kyles *v.* Tait, 6 Gratt.

the statute.[8] An agreement by the purchaser on the sale that he will allow the owner to redeem, even though it be oral, will be enforced.[9] Where the purchaser of an entire tract of land at a judicial sale afterward assigns an undivided interest therein there can be no legal redemption of the undivided interest thus assigned.[10] An assignment of the certificate of purchase to one entitled to redeem does not constitute a redemption or prevent redemption by others entitled to redeem.[11] A tender of money to redeem before confirmation of the sale is premature and does not authorize a decree for the redemption of the property.[12] Redemption from a judicial sale may be made in paper currency issued by authority of the United States, whether legal tender or not, unless the officer whose duty it is to receive the money objects to receiving anything but legal tender.[13] A bill to redeem which does not allege that the complainant has paid or tendered the redemption money to any one authorized to receive it is demurrable.[14] Where a bill is filed to redeem real estate sold at a chancery sale on the ground of a tender of the redemption money and refusal, the bill should tender the money; and it should appear to the court, before any decree for redemption is made, that the money has been paid into court subject to the order of defendant.[15] A chancery court has no power to vest the title in a complainant who has filed his bill for the redemption of land from a chancery sale, on the ground of tender and refusal, and order the land to be sold, if the redemption money be not paid at a given time.[16] A sale of real estate barring the equity of redemption cannot be decreed when the bill contains no application to bar redemption.[17] The failure of the holder of a subsequent lien to redeem from a sale made on a second lien on land cuts off his right to redeem from a sale made on the first lien.[18] Where the purchaser of real estate at a judicial sale was the assignee of the judgment under which the sale was made, and bid the amount of the judgment, and added to his bid the amount of several judgments in his hands for collection, but paid no cash on his bid, a grantee of the judgment debtor who was not a party to the proceedings was permitted to redeem on payment of the amount of the judgment under which the property was sold.[19] When land is redeemed the purchaser is entitled to have the purchase-money refunded,[20] and may claim the value of improvements

(Va.) 44, and *followed* in Wiley *v.* Mahood, 10 W. Va. 206].

8. Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046 [*modifying* 55 Hun 143, 8 N. Y. Suppl. 593].

9. Fishback *v.* Green, 87 Ky. 107, 7 S. W. 881, 9 Ky. L. Rep. 959; Haywood *v.* Ensley, 8 Humphr. (Tenn.) 460.

The purchaser may give the former owner further time in which to redeem and may properly impose his own terms. Ross *v.* Sutherland, 81 Ill. 275.

Fraud.— The fact that a debtor whose land was being sold under decree induced other persons not to bid against C, who had agreed to buy the land and permit him to redeem, does not preclude him from enforcing the agreement against C, as the fraud upon creditors, if any, could only be considered by way of objection to the confirmation of the report of sale. Crane *v.* Arnold, 57 S. W. 11, 22 Ky. L. Rep. 273.

In an action to enforce an agreement by the purchaser at decretal sale to allow the owner to redeem, it is sufficient to make a subsequent purchaser a defendant, that he may have his rights adjudicated, without alleging that he purchased with notice of the agreement, as he must establish his claim affirmatively. Sebree *v.* Green, 41 S. W. 290, 19 Ky. L. Rep. 479.

10. Groves *v.* Maghee, 72 Ill. 526 [*citing* Titsworth *v.* Stout, 49 Ill. 78, 95 Am. Dec. 577].

11. Boynton *v.* Pierce, 49 Ill. App. 497 [*affirmed* in 151 Ill. 197, 37 N. E. 1024].

12. Wood *v.* Morgan, 4 Humphr. (Tenn.) 371.

13. Rogers *v.* Rogers, (Tenn. Ch. App. 1895) 35 S. W. 890.

A payment for redemption in the bills of a specie-paying bank, current at the place of redemption, is good. Angur *v.* Winslow, Clarke (N. Y.) 258.

14. Hyman *v.* Bogue, 135 Ill. 9, 26 N. E. 40.

15. Simmons *v.* Marable, 11 Humphr. (Tenn.) 436.

16. Simmons *v.* Marable, 11 Humphr. (Tenn.) 436.

17. Turner *v.* Argo, 89 Tenn. 443, 14 S. W. 930.

18. White *v.* Rathbone, 73 Minn. 236, 75 N. W. 1046.

19. Campbell *v.* Atwood, (Tenn. Ch. App. 1897) 47 S. W. 168.

20. This right is the highest equity. Smith *v.* Knoebel, 82 Ill. 392.

put by him on the land with the consent of the owner of the equity of redemption,[21] so far as the value of the land has been permanently enhanced by the improvements,[22] subject to account for rents and profits.[23]

XIX. EQUITABLE RELIEF.

Where grounds exist which would authorize the interposition of a court of equity in case of a private sale, it is not a sufficient reason for withholding relief that the mistake occurred and the unconscious advantage was obtained by the purchaser at a judicial sale.[24]

XX. DEFECTIVE, VOID, AND VOIDABLE SALES.

A. In General. A judgment valid upon its face is *prima facie* sufficient to support a judicial sale made under it,[25] for the presumption is in favor of the validity of judicial sales;[26] it is the policy of the law to sustain them, regardless of slight and minute defects, and all intendments are made in their favor.[27] Where the court possesses jurisdiction of the subject-matter and of the parties in proceedings for a judicial sale of property, its decree cannot be held void as to a purchaser at such sale.[28] Invalidity of a judicial sale may be cured by ratification.[29]

B. Rights of Defeated Purchaser. It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase-money paid by him,[30] and to be reimbursed for money expended by him

21. Paul *v.* Williams, 12 Lea (Tenn.) 215.

He will be given a lien on the premises for the amount due him because of improvements. Gamble *v.* Branch, (Tenn. Ch. App. 1898) 52 S. W. 897.

22. Paul *v.* Williams, 12 Lea (Tenn.) 215.

23. Paul *v.* Williams, 12 Lea (Tenn.) 215. *Compare* Freeland *v.* Harris, 3 Sneed (Tenn.) 264.

24. Miller *v.* Craig, 83 Ky. 623, 4 Am. St. Rep. 179, holding that where a tract containing one hundred and twenty-eight acres was by mistake sold as forty acres, equity would compel the purchaser to elect from which portion of the tract he would take the forty acres or allow him to take the whole by paying therefor at the rate of his bid for forty acres.

25. Woolen *v.* Rockafeller, 81 Ind. 208 [*overruling* Glidewell *v.* Spaugh, 26 Ind. 319]; Turner *v.* Madison First Nat. Bank, 78 Ind. 19; Rucker *v.* Steelman, 73 Ind. 396; Shipley *v.* Shook, 72 Ind. 511; Splahn *v.* Gillespie, 48 Ind. 397.

26. Whitman *v.* Fisher, 74 Ill. 147 (especially after the lapse of a long time, in this case over twenty years); Puckett *v.* Jenkins, 2 Baxt. (Tenn.) 484; Baker *v.* Coe, 20 Tex. 429.

27. *Kentucky.*— Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10, 16 Ky. L. Rep. 812; Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423; Thornton *v.* McGrath, 1 Duv. 349; Benningfield *v.* Reed, 8 B. Mon. 102.

Maryland.— Wilson *v.* Miller, 30 Md. 82, 96 Am. Dec. 568.

Missouri.— Lewis *v.* Morrow, 89 Mo. 174, 1 S. W. 93.

Pennsylvania.— Craig's Appeal, 77 Pa. St. 448.

Texas.— Hughes *v.* Driver, 50 Tex. 175.

See 31 Cent. Dig. tit. "Judicial Sales," § 68.

Where there is no defendant in the suit in which the judgment is rendered, a sale thereunder is a nullity without being so pronounced judicially. Morris *v.* Covington, 2 La. Ann. 259.

28. Winchester *v.* Winchester, 1 Head (Tenn.) 460.

29. Podesta *v.* Binns, (N. J. Ch. 1905) 60 Atl. 815. See also Munnell *v.* Orear, 84 Ky. 452, 1 S. W. 725, 8 Ky. L. Rep. 669, holding that where a title in fee simple is sold in an equitable proceeding, and it appears that the court had no power to direct such sale, if the owner elects to tender a conveyance to the purchaser, the sale will be ratified.

A want of title to land, arising from the fact that a sale thereof made by a probate judge while in office was authenticated by him after he ceased to hold office, cannot be cured by acts of the parties tending to show a ratification of the sale. Bradford *v.* Cook, 4 La. Ann. 229.

Lack of jurisdiction.— Where the purchaser of land at a sale under the order of the orphans' court, which had no jurisdiction to direct such sale, goes into possession, and so remains for two years, exercising ownership by cultivation, etc., he cannot rescind the contract of sale, unless the heirs are unable or unwilling to give a good title. Lamkin *v.* Reese, 7 Ala. 170.

30. *Georgia.*— Askew *v.* Patterson, 53 Ga. 209.

Kentucky.— Forst *v.* Davis, 101 Ky. 343, 41 S. W. 27, 19 Ky. L. Rep. 558; Hall *v.* Dineen, 83 S. W. 120, 26 Ky. L. Rep. 1017.

for taxes and on repairs and improvements that have increased the value of the land.[31] By the prevailing view, when the purchase-money paid on a judicial sale, void because of defects in the proceedings, has been applied to the discharge of debts that were liens upon the property or payable out of an estate, a *bona fide* purchaser will be subrogated to the rights of creditors to the payment of whose claims the purchase-money was applied; and if he has obtained possession of the property he will be entitled to retain it until he has been reimbursed, or if the owner recovers a judgment at law for its possession the defeated purchaser may maintain a bill compelling the owner to make reimbursement before he will be allowed to take possession under his judgment.[32] Where commissioners assumed

Louisiana.— Dumestre's Succession, 40 La. Ann. 571, 4 So. 328.

North Carolina.— Etheridge *v.* Vernoy, 80 N. C. 78; Smith *v.* Brittain, 38 N. C. 347, 42 Am. Dec. 175.

Ohio.— Dowell *v.* Goode, 25 Ohio St. 390.

Tennessee.— Read *v.* Fite, 8 Humphr. 328.

Texas.— See Macmanus *v.* Orkney, (Civ. App. 1897) 39 S. W. 614.

But *compare* U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523, holding that the purchaser's only remedy, if any, is against the judgment debtor.

Resale not enjoined because purchase-money not refunded.— Where a party, at whose instance a sale of real estate has been set aside, fully complies with the terms imposed by the court as conditions to setting aside the sale, it is error to enjoin a resale of the property under the judgment, merely because the officer to whom the purchaser paid the amount of his bid has made an unauthorized application of a portion of the money to the payment of taxes and costs, and refuses, for that reason, to pay to the purchaser the whole sum bid on demand. Chapin *v.* Pyle, 58 Kan. 566, 50 Pac. 499.

Good faith.— Under Miss. Act, Feb. 11, 1873, providing that a purchaser of land at a sale made under a void or voidable decree of the probate court shall have a lien on the land for the repayment of his purchase-money "paid in good faith," the term, "good faith," means that the purchase-money shall have been genuinely paid, without any knowledge or suspicion of fraud on the part of the purchaser. Cole *v.* Johnson, 53 Miss. 94 [*followed* in Gaines *v.* Kennedy, 53 Miss. 103].

Remedy is at law and not in equity.— Abernathy *v.* Phillips, 82 Va. 769, 1 S. E. 113.

Parties to action to recover purchase-money see Abernathy *v.* Phillips, 82 Va. 769, 1 S. E. 113.

A sale by the purchaser at judicial sale of a part of the land for more than the amount bid by him for the whole is a bar to his rights to the purchase-money paid by him, on setting aside the sale to him. Storer *v.* Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

A purchaser notifying the vendor that he will not pay the balance of the purchase-money, nor accept the property at his bid, cannot recover the down money paid by him because of the vendor's failure to thereafter obtain a confirmation of the sale, and to tender a deed. Schmidt *v.* Ransay, 6 Pa. Dist. 584, 20 Pa. Co. Ct. 180.

31. *Kentucky.*— Hall *v.* Dineen, 83 S. W. 120, 26 Ky. L. Rep. 1017; Thompson *v.* Buckner, 40 S. W. 915, 19 Ky. L. Rep. 431.

Maryland.— Long *v.* Long, 62 Md. 33.

South Carolina.— Howlett *v.* Central Carolina Land, etc., Co., 50 S. C. 1, 27 S. E. 533.

Texas.— French *v.* Grenet, 57 Tex. 273.

West Virginia.— Haymond *v.* Camden, 22 W. Va. 180.

The heir of the purchaser is entitled to compensation for expenditures and improvements made by him. Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

When occupying claimant statutes not applicable.— Statutes relating to allowances for improvements and betterments to good-faith occupying claimants of property purchased at judicial sales have no application in an action *in personam* to recover the value of property purchased at judicial sale, and alleged to have been so changed pending appeal as to be practically destroyed. Central Trust Co. *v.* Hubinger, 87 Fed. 3.

When the purchaser had notice of the defects there is no such right. Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

32. *California.*— Haynes *v.* Meeks, 10 Cal. 110, 70 Am. Dec. 703.

Illinois.— Kinney *v.* Knoebel, 51 Ill. 112. But *compare* Chambers *v.* Jones, 72 Ill. 275; Bishop *v.* O'Conner, 69 Ill. 431.

Kansas.— Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

Louisiana.— Dufour *v.* Camfranc, 11 Mart. 607, 13 Am. Dec. 360.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

Mississippi.— Short *v.* Porter, 44 Miss. 533.

Missouri.— Valle *v.* Fleming, 29 Mo. 152, 77 Am. Dec. 557.

North Carolina.— Scott *v.* Dunn, 21 N. C. 425, 30 Am. Dec. 174.

Oregon.— Levy *v.* Riley, 4 Oreg. 392.

South Carolina.— Cathcart *v.* Sugenheimer, 18 S. C. 123.

Tennessee.— Isham *v.* Sienknecht, (Ch. App. 1900) 59 S. W. 779.

Texas.— French *v.* Grenet, 57 Tex. 273.

Virginia.— Hudgin *v.* Hudgin, 6 Gratt. 320, 52 Am. Dec. 124.

West Virginia.— Hull *v.* Hull, 35 W. Va.

to sell certain lands under a decree in a creditor's bill pending appeal, and such sale was not confirmed, and the decree was subsequently annulled, the purchasers at such sale, who went into possession thereunder, cannot be treated as receivers, and allowed the commissions of the sale, or the expenses of, or compensation for, the management of the lands.[33]

C. Liabilities of Defeated Purchaser. The purchaser at a void judicial sale who has taken possession of the premises is liable for the rents and profits received by him and for the rental value of the property during the time of his possession, but he will be allowed on the accounting for whatever sums may be due him in respect to the property.[34]

D. Rights of Former Owner. If the proceedings are wholly void so that no title passes to the purchaser, the owner may of course recover his property from whoever is in possession.[35] When the decree is reversed but title has already passed to the purchaser so that the former owner cannot recover his property, he may recover the purchase-money from the person to whom it has been paid,[36] and such recovery may be enforced by a rule[37] or an action for damages.[38] The original owner cannot object that the purchaser will receive an invalid title because of defects in the proceedings, as he is not interested unless the defects adversely affect the bidding.[39]

E. Collateral Attack. If the court decreeing a judicial sale was without power to entertain the proceedings, the proceedings are a nullity; no rights can be based upon them, and they are subject to collateral attack in any other proceeding.[40] So too if the sale is void for any reason it may be collaterally attacked.[41] If, however, the sale is not wholly void, but only voidable, it cannot be attacked collaterally. Where the court had jurisdiction, errors and irregularities in the proceedings leading up to the order of sale or in the sale can be made a ground of attack only by some direct proceeding, either before the same court or in an appellate court.[42] In the determination of the question whether the sale is open

155, 13 S. E. 49, 29 Am. St. Rep. 800; Haymond *v.* Camden, 22 W. Va. 180.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169.

United States.— Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 4 Fed. Cas. No. 1,876, 2 Story 605.

Contra.— Richmond *v.* Marston, 15 Ind. 134; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390; Beall *v.* Price, 13 Ohio 368, 42 Am. Dec. 204; Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640. But the rule in Ohio is now otherwise by statute.

33. Strayer *v.* Long, 83 Va. 715, 3 S. E. 372.

34. Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Forst *v.* Davis, 101 Ky. 343, 41 S. W. 27, 19 Ky. L. Rep. 558; Hall *v.* Dineen, 83 S. W. 120, 26 Ky. L. Rep. 1017; Hendrix *v.* Nesbitt, 49 S. W. 963, 20 Ky. L. Rep. 1666; Walworth *v.* Stevenson, 24 La. Ann. 251; Howlett *v.* Garner, 50 S. C. 1, 27 S. E. 533.

35. He would have an action at law for the possession of the property, and it seems his rights could be enforced by an order in the original action. Hays *v.* Griffith, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306.

36. Sturm *v.* Fleming, 31 W. Va. 701, 8 S. E. 263.

37. Kane *v.* Pilcher, 7 B. Mon. (Ky.) 651.

38. Hays *v.* Griffith, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306.

39. Wilson *v.* Scott, 29 Ohio St. 636.

40. Stansbury *v.* Inglehart, 20 D. C. 134; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Morris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243; Camden *v.* Haymond, 9 W. Va. 680; Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157, 7 L. ed. 381.

41. Thus, when the sale was held to be void for lack of a notice, it was impeached in an action to recover the land sold. Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447. And see Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

42. *Alabama.*— Bland *v.* Bowie, 53 Ala. 152. See also Seelye *v.* Smith, 85 Ala. 25, 4 So. 664.

Illinois.— Miller *v.* McMannis, 104 Ill. 421.

Kentucky.— Sears *v.* Sears, 95 Ky. 173, 25 S. W. 600, 15 Ky. L. Rep. 510, 44 Am. St. Rep. 213.

Louisiana.— O'Hara *v.* Booth, 29 La. Ann. 817. See also Fontelieu's Succession, 28 La. Ann. 638.

Maryland.— Cockey *v.* Cole, 28 Md. 276, 92 Am. Dec. 684.

New York.— See Conklin *v.* Hall, 2 Barb. Ch. 136.

North Carolina.— Spivey *v.* Harrell, 101 N. C. 48, 7 S. E. 693.

Tennessee.— Winchester *v.* Winchester, 1 Head 460; Johnson *v.* Evan, 1 Tenn. Ch. App.

to collateral attack, the rule is that the record is conclusive of the truth of the matters therein contained,[43] and as to all matters within the jurisdiction of the court the truth of the record cannot be disputed collaterally.[44] In support of the sale, when collaterally examined, it is presumed, so far as is consistent with the record, that all steps necessary to the regularity of the proceedings were taken.[45] It has been said in a case of collateral attack that there are but two grounds on which a judicial sale can be held invalid, either a want of jurisdiction in the court ordering it or fraud practised in effecting it.[46]

XXI. PROCEEDS.

A. In General. The officer making the sale is usually authorized to collect the proceeds,[47] including deferred payments in case of a sale on credit,[48] and in such case he is the custodian of the fund from the time of collection until confirmation of the sale,[49] and upon confirmation it is his duty to pay over the proceeds to the persons entitled thereto.[50] It is sometimes directed that the proceeds

603; Killough *v.* Warren, (Ch. App. 1899) 58 S. W. 898.

Texas.— Bowers *v.* Chaney, 21 Tex. 363; Fitzwilliams *v.* Davie, (Civ. App. 1898) 43 S. W. 840.

United States.—Fisher *v.* Lefferts, 105 Fed. 711; Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212. See also Boyd *v.* Wyley, 18 Fed. 355. And see U. S. cases cited *supra*, note 40.

See 31 Cent. Dig. tit. "Judicial Sales," §§ 13, 89.

43. Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Cockey *v.* Cole, 28 Md. 276, 92 Am. Dec. 684; Wilcher *v.* Robertson, 78 Va. 602; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157, 7 L. ed. 381.

Record imports absolute verity.— Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172; Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490.

44. Sears *v.* Sears, 95 Ky. 173, 25 S. W. 600, 15 Ky. L. Rep. 510, 44 Am. St. Rep. 213; Killough *v.* Warren, (Tenn. Ch. App. 1899) 58 S. W. 898; Boyd *v.* Wyley, 18 Fed. 355.

45. Cockey *v.* Cole, 28 Md. 276, 92 Am. Dec. 684. The court is presumed to have had before it and passed upon all matters necessary to the making of the order. Clark *v.* Costello, 59 N. J. L. 234, 36 Atl. 271.

The regularity of the appointment of the officer to sell is presumed. Eaton *v.* White, 18 Wis. 517.

The proper exercise of the commissioner's power is presumed. Riley *v.* Pool, 5 Tex. Civ. App. 346, 24 S. W. 85.

46. Gallaher *v.* Collins, 7 Watts (Pa.) 552.

47. Craw *v.* Abrams, (Nebr. 1903) 94 N. W. 639.

48. McPherson *v.* Lynah, 14 Rich. Eq. (S. C.) 121 (holding that an additional order was not necessary to give the master power to receive payment of the bonds given for the purchase-money under the original order); Wallis *v.* Thornton, 29 Fed. Cas. No. 17,111, 2 Brock. 422 (holding that where a decree directs an officer of the court to sell property and empowers him to sell on credit, and where the bonds for deferred portions of the purchase-money are made payable to such officer, he has a right to collect them and will be considered, as a trustee for the parties, entitled to the proceeds of the sale; but he has no right to discount legal interest and receive only a part of the money in discharge of the debt).

49. Craw *v.* Abrams, (Nebr. 1903) 94 N. W. 639.

If the sheriff pays the money to the clerk of the court, in violation of the statute making him sole custodian of the fund derived from the judicial sale until its confirmation, this cannot impose obligations on the clerk, as such, foreign to the duties of his office. Craw *v.* Abrams, (Nebr. 1903) 94 N. W. 639.

50. Craw *v.* Abrams, (Nebr. 1903) 94 N. W. 639; Philadelphia Fire Assoc. *v.* Ruby, 49 Nebr. 584, 68 N. W. 939. *Compare* Dent *v.* Maddox, 4 Md. 522 (holding that the fact that a decree appointing a trustee to sell property contained no direction that he should bring the proceeds of the sale into court cannot be construed as granting authority to him to disburse the fund); Mackubin *v.* Brown, 1 Bland (Md.) 410 (holding that a trustee cannot be permitted to apply a part of the proceeds without any authority of the court and then come in and have it allowed as a set-off against the claim of the party to whom it was paid).

Payment to clerk of court insufficient.— Philadelphia Fire Assoc. *v.* Ruby, 49 Nebr. 584, 68 N. W. 939.

Motion to compel payment.— A special commissioner for the sale of lands gave bond to the state for the use of ten beneficiaries named therein, and the guardian of two of them made a motion upon notice in the court appointing the special commissioner, although not in the case then pending for the sale of the lands, for the share of money due to her wards from sales made by the commissioner, there having been no decree or order of the court ascertaining the amount of shares due said wards. It was held that

be brought into court,[51] and in such case the officer making the sale cannot be allowed in any manner to dispose of the proceeds without the express sanction of the court.[52] A party may apply to the court in the first instance to correct an error by the master in paying over the proceeds of a sale by him.[53] An order of the court directing that the proceeds of property sold under a decree in one cause be held subject to the orders of the court in another cause is void.[54] Under a statute providing that in a suit in equity to enforce against real estate a judgment lien no decree for the distribution of the proceeds of such real estate shall be made until a notice to all persons holding liens on the real estate of the judgment debtor be posted and published under a decree of the court, the notice is not required before a sale is ordered, but it is sufficient if it is given before the distribution of the proceeds.[55]

B. Distribution. When property is sold for the payment of debts or liens the proceeds must of course be applied to the discharge thereof.[56] The surplus, after paying a lien under which real estate is sold, belongs in equity to the next subsequent lien in the order of priority of several liens thereon.[57] Where the judgment of sale does not settle finally the priority of liens, and particularly when no issue is made as to priority, the court may, in the distribution of the proceeds, disregard the judgment, in so far as it attempts to determine the question of priority.[58] When the property of a tutrix is sold at judicial sale, and adjudicated to the heir holding the ranking mortgage, the proceeds must be attributed thereto, and any other imputation, with the consent of the adjudicatee, will not bind a third possessor of another portion of the property mortgaged, who is proceeded against in an hypothecary action.[59] It is sometimes required that taxes due shall be first paid out of the proceeds.[60] A trustee in equity for the sale of property has

the motion would not lie, although had the motion been for all the beneficiaries in the bond it would have been a proper remedy, or if the share due each beneficiary had been ascertained and decreed each one might have made his separate motion for his share of the proceeds of sales against the commissioner on his bond. Somerville *v.* Somerville, 5 Heisk. (Tenn.) 160.

51. See Tilly *v.* Tilly, 2 Bland (Md.) 436; Wallis *v.* Thornton, 29 Fed. Cas. No. 17,111, 2 Brock. 422. Where the party having the conduct of a sale neglects to pay into court the deposit paid to him by the purchaser at the time of sale, the court will, on application of the purchaser, order him to do so. Crooks *v.* Glenn, 1 Ch. Chamb. (U. C.) 354.

Bonds given for the payment of instalments of purchase-money on a sale on credit are the immediate proceeds of sale; and the creditor may require that they shall be brought into court. Wallis *v.* Thornton, 29 Fed. Cas. No. 17,111, 2 Brock. 422.

N. Y. Laws (1890), c. 276, authorizing the supreme court to sell certain real estate in the city of New York, conveyed by B for life and in remainder, and providing that the proceeds of the sale shall be brought into court, and shall retain the legal character of real estate, and be held by the court for the determination of the rights of all persons entitled, fully protects the possible and contingent interests of persons not in being, who shall at any time have or claim an interest in said property. *In re* Field, 131 N. Y. 184, 30 N. E. 48 [*affirming* 17 N. Y. Suppl. 19].

A motion to dispense with payment of the purchase-money into court, and for a vesting order, in favor of a purchaser under a decree, who is also one of plaintiffs, requires notice to be served on the mortgagor where he has appeared by solicitor. McMaster *v.* Kempshall, 1 Ch. Chamb. (U. C.) 329.

52. Tilly *v.* Tilly, 2 Bland (Md.) 436.

53. Lawrence *v.* Murray, 3 Paige (N. Y.) 400.

54. Mayo *v.* Harding, 3 Tenn. Ch. 237.

55. McNeel *v.* Auldridge, 34 W. Va. 748, 13 S. E. 851.

56. Russell *v.* Metzgar, 2 Ind. 345, holding that where neither party, before a trial in which the question is involved, has made application of the proceeds of a judicial sale, the court will direct them to be applied *pro rata* to the debts for which the sales were made.

Where one not a party holds two distinct and separate claims against property sold, the fact that he presents them for allowance against the fund realized from such property at different times does not constitute a splitting of a single demand, which should debar him from the right to prove his second claim. Central Trust Co. *v.* Richmond, etc., R. Co., 105 Fed. 803, 45 C. C. A. 60.

57. Abbe *v.* Justus, 60 Mo. App. 300.

58. Kentucky Bank *v.* Allen, 8 Ky. L. Rep. 36.

59. Smith *v.* Lewis, 45 La. Ann. 1457, 14 So. 221.

60. See Perkins *v.* Gaither, 70 Md. 134, 16 Atl. 531, holding that Md. Act (1874),

no right to retain the share of the proceeds awarded to a distributee, for the payment of a simple contract debt due to him by the distributee, in the absence of a special assignment or assent to such appropriation.[61] Persons who are not parties to a suit, but who have claims against property which must be sold therein, may properly be permitted to come in at any time before the proceeds of such property have been distributed.[62] Where real estate has been sold under a judgment, and the surplus, after satisfying plaintiff's claim, has been paid into court, a person who claims to be entitled to a portion of the surplus may move, at the foot of the judgment, for the appointment of a referee to determine his interest.[63] In New York the rule as to the application of payments voluntarily made does not apply to money derived from a judicial sale of property securing several debts, but such payment, being made by operation of law, is to be applied, in the absence of directions in the security, *pro rata* upon the debts secured, without regard to priority of date, or to the fact that other securities are held for some of the debts.[64]

C. Investment. Where real estate is sold under order of the court for the benefit of the owners the decree must provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests.[65] In case of a sale made after the passage of an act regulating the investment of the proceeds of such sales, but under a decree made before the passage, the act controls.[66] A special commissioner for the sale of lands cannot lend out funds in his hands without an order of the court directing him to do so.[67] Where land was sold by order of a court, and the price paid to the master commissioner, and one of the parties entitled to a share of the proceeds failing to call for his share, it was, by order of the court, lent to the purchaser, who gave the master commissioner his indorsed note as security, the master commissioner acquired no lien on the land.[68]

D. Liability of Officer. A trustee under a decree for the sale of property who fails to bring into court or to account for the proceeds of sale, or the bonds and notes taken by him to secure the payment of the purchase-money, may be charged with the whole amount of the proceeds according to his report of sale.[69] A rule against a master to show cause why he has not paid over the proceeds of property sold by him cannot be sustained where there was no order of court authorizing him to make the sale, as in such case the act was done in his individual capacity.[70] In North Carolina it seems that there is no way of holding a

c. 483, § 63, which provides that, where a sale of property has been made by any ministerial officer under judicial process, all sums in arrear for taxes from the party whose property is sold shall first be paid, does not deprive one whose property has been sold by trustees appointed by the court of the right to resist, on the distribution, the payment of a tax levied more than four years before the sale, section 81 of the said act providing that taxes levied and not collected for four years shall be barred. See *supra*, XVII, A, 2.

61. Poe *v.* Snowden, 70 Md. 383, 17 Atl. 377.

62. Central Trust Co. *v.* Richmond, etc., R. Co., 105 Fed. 803, 45 C. C. A. 60, holding further that such a person should not be charged with laches to defeat his claim because it is not filed until after an interlocutory decree for sale of the property has been entered, where no prejudice has resulted to other parties by reason of the delay; nor should one be denied the right to establish his claim because such decree undertook to adjudge certain fixed amounts to be paid from the fund to parties then before the court, since such decree was not final in respect to the matter of distribution, but remained subject to such modifications as might be necessary to permit other legitimate claims to be asserted at any time before actual distribution.

63. Toch *v.* Toch, 8 N. Y. App. Div. 299, 40 N. Y. Suppl. 952.

64. Armstrong *v.* McLean, 153 N. Y. 490, 47 N. E. 912 [*reversing* 92 Hun 397, 36 N. Y. Suppl. 764].

65. Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116.

66. Gill *v.* Wells, 59 Md. 492.

67. Somerville *v.* Somerville, 5 Heisk. (Tenn.) 160.

68. Lilly *v.* Northern Bank, 29 S. W. 736, 16 Ky. L. Rep. 740.

69. Mackubin *v.* Brown, 1 Bland (Md.) 410.

70. *Ex p.* Perry, Harp. Eq. (S. C.) 50.

commissioner appointed to make a judicial sale pecuniarily responsible for the money collected by him, except by an action instituted by the parties entitled to such money.[71]

XXII. COMPENSATION OF OFFICER MAKING SALE.

In some jurisdictions the compensation of the officer making the sale is regulated by statute.[72] In North Carolina commissioners appointed to sell lands under an order of the court are not entitled to a commission on the sale, but they will be allowed what is, under all the circumstances, a reasonable compensation for services, time, and expenses.[73]

JUDICIAL SEPARATION. See DIVORCE.

71. Smith *v.* Moore, 79 N. C. 82.

72. **In Kentucky,** under St. (1899) § 1740, the commissioner is entitled to a fee of ten dollars where the sale amounts to more than two thousand and does not exceed five thousand dollars. Russell *v.* Avritt, 39 S. W. 699, 41 S. W. 769, 19 Ky. L. Rep. 202. Where more than one tract is sold he is entitled to an allowance not exceeding five dollars for each additional tract. Weller *v.* Hull, 74 S. W. 172, 24 Ky. L. Rep. 2185; Russell *v.* Avritt, *supra.* Where the sale is made away from the county-seat, the commissioner is entitled to his actual expenses in attending it, and five dollars in addition to his legal fee. Russell *v.* Avritt, *supra.* He is not entitled to an allowance for appraisement of the land, or for advertising the sale, where he was not ordered so to do by the court (Russell *v.* Avritt, *supra*), or to compensation for extra services in preparing and mailing advertisements of a sale, for making which he has been allowed the fee prescribed by statute, or for "work" done after making a sale of property, in the absence of anything to show of what it consisted, except that he "was in court" (Wathen *v.* England, 102 Ky. 537, 44 S. W. 92, 19 Ky. L. Rep. 1601). The fact that bonds are made payable to the receiver or commissioner does not entitle him to a commission where he does not in fact receive the money. Wathen *v.* England, *supra.* Allowances made to a commissioner prior to the enactment of this statute will not be disturbed, although they exceed the fees fixed by the statute. Russell *v.* Avritt, *supra.*

In Tennessee under Milliken & V. Code, § 5301, subs. 62, as amended by Acts (1893), c. 4, where a clerk and master sold land under a decree, and took notes for the price, but nothing was collected by him, and his successor obtained judgment on the notes, and sold the land to satisfy the same, for cash and without redemption, the commissions should be divided between the two clerks, the second sale being but supplementary to the first. McReynolds *v.* Rudolph, (Ch. App. 1897) 39 S. W. 891, holding that the outgoing clerk and master should receive ten per cent of the commissions, and his successor the remainder. A clerk and master who sells land under a decree is not entitled to any fee for making a report of sale. McReynolds *v.* Rudolph, *supra.*

In New York Code Civ. Proc. § 3297, providing that the fees of a referee appointed to sell real property are the same as those allowed to a sheriff, and that commissions shall not be allowed to him on the sum bid by the party and applied on the party's demand as fixed by the judgment without being paid to the referee so appointed, except to the amount of ten dollars, a referee is not entitled to more than ten dollars for commissions, where the sum bid was paid on the judgment without passing through the hands of the referee. Kant *v.* Bergman, 97 N. Y. App. Div. 118, 89 N. Y. Suppl. 593. Code Civ. Proc. § 3307, subd. 11, provides that a sheriff shall receive for posting and publishing notice of sale, selling, and conveying real estate in pursuance of a judgment the same fees as for the same services on a sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage the sheriff's entire compensation cannot exceed fifty dollars. Subd. 6 provides that for receiving an execution against property entered in his books searching for property, and postage on the return when made through the post-office, the sheriff shall receive fifty cents. Under these provisions a referee appointed to sell real estate is entitled only to the fees specified by subd. 11, which impliedly excludes a fee of fifty cents for receiving a judgment under subd. 6. Kant *v.* Bergman, 97 N. Y. App. Div. 118, 89 N. Y. Suppl. 593. The fees of a referee in New York city for selling real property are governed by N. Y. Laws (1890), c. 523, § 17, subd. 7. Schierloh *v.* Schierloh, 22 Misc. (N. Y.) 637, 49 N. Y. Suppl. 1062. N. Y. Laws (1876), c. 439, relating to the expenses of judicial sales in the county of Kings, was not unconstitutional, as violative of the prohibition against increasing the fees of public officers during their terms, since it did not in terms apply to the sheriff then in office, and must be presumed to have been intended to apply only to future officers. Kerrigan *v.* Force, 68 N. Y. 381 [*affirming* 9 Hun 185].

73. Smith *v.* Frazier, 119 N. C. 157, 25 S. E. 866.

JUDICIAL SETTLEMENT. As applied to an account, a term which signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute.[1] (See, generally, EXECUTORS AND ADMINISTRATORS.)

JUDICIAL SUBDIVISION. An organized county, or an organized county and such unorganized county or counties, or other territory or parts of the state, as are by law, attached to such organized county for judicial purposes.[2]

JUDICIAL TRIAL. A fair trial,[3] the purpose of which is to truly ascertain the material facts in issue.[4] (See, generally, JURIES; TRIAL.)

JUDICIAL TRIBUNAL. A court.[5] (See, generally, COURTS; JUDGES; JUSTICES OF THE PEACE.)

JUDICIAL WRIT.[6] In English practice, such writs as issue under the private seal of the courts, and not under the great seal of England, and are tested or witnessed not in the king's name, but in the name of the chief judge of the court out of which they issue.[7] (See, generally, PROCESS.)

JUDICIARY. A term applied to a co-ordinate department of the government,[8] which construes and applies the laws.[9] (See, generally, COURTS; JUDGES; JUSTICES OF THE PEACE.)

JUDICIA SUNT TANQUAM JURIS DICTA, ET PRO VERITATE ACCIPIUNTUR. A maxim meaning "Judgments are, as it were, the sayings of the law, and are received as truth."[10]

JUDICIIS POSTERIORIBUS FIDES EST ADHIBENDA. A maxim meaning "Credit is to be taken to the later decisions."[11]

JUDICI OFFICIUM SUUM EXCEDENTI NON PARETUR. A maxim meaning "A judge exceeding his office is not to be obeyed."[12]

JUDICIOUSLY. To act skillfully with discretion or wisdom — prudently.[13] (See JUDICIALLY.)

JUDICI SATIS PÆNA EST, QUOD DEUM HABET ULTOREM. A maxim meaning "It is punishment enough for a judge that he has God as his avenger."[14]

JUDICIS EST IN PRONUNTIANDO SEQUI REGULAM, EXCEPTIONE NON PROBATA. A maxim meaning "The judge in his decision ought to follow the rule, when the exception is not proved."[15]

JUDICIS EST JUS DICERE, NON DARE. A maxim meaning "It is the province of a judge to declare the law, not to give it."[16]

1. N. Y. Code Civ. Proc. § 514, subs. 8 [*quoted* in *In re* Willard, 9 N. Y. Suppl. 555, 557, 2 Connoly Surr. 112].

2. N. D. Rev. Codes (1899), § 8511.

3. Baldwin *v.* Grand Trunk R. Co., 64 N. H. 596, 598, 15 Atl. 411.

4. Hudson *v.* Jordan, 108 N. C. 10, 15, 12 S. E. 1029.

5. State *v.* New Haven, etc., Co., 43 Conn. 351, 382, holding that the term as ordinarily used does not include a state board of railroad commissioners.

A board of arbitrators is not a "court," or "judicial tribunal," in any proper sense of those terms. It has none of the powers that appertain to courts to regulate their proceedings or enforce their decisions. Blood *v.* Bates, 31 Vt. 147, 150.

6. Distinguished from original writs see Converse *v.* Damariscotta Bank, 15 Me. 431, 433; Brown L. Dict.

7. Brown L. Dict. See also 3 Blackstone Comm. 282.

"Judicial writ" includes scire facias see Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790, 792.

8. Little *v.* State, 90 Ind. 338, 339, 46 Am. Rep. 224 [*quoted* in Edwards *v.* Dykeman, 95 Ind. 509, 518].

9. *In re* Davies, 168 N. Y. 89, 101, 61 N. E. 118, 56 L. R. A. 855, where the terms "legislative" and "executive departments" are also defined.

"Judiciary powers" is used to designate with clearness that department of government which it was intended should interpret and administer the law. Cooley Const. Lim. 92 [*quoted* in State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424].

10. Black L. Dict. [*citing* 2 Inst. 537].

11. Wharton L. Lex.

12. Burrill L. Dict. [*citing* Jenkins Cent. 139, case 84].

13. Webster Dict. [*cited* in Cotes *v.* Davenport, 9 Iowa 227, 236], where the term is compared with "prudent."

14. Burrill L. Dict.

Applied in Lynn's Case, 1 Leon. 295.

15. Bouvier L. Dict.

16. Burrill L. Dict. [*citing* Lofft Appendix 42].

Applied in State *v.* Post, 20 N. J. L. 368, 386; Smith *v.* McEachern, 9 Nova Scotia 35, 37.

JUDICIS [NOSTRUM] EST JUDICARE SECUNDUM ALLEGATA ET PROBATA. A maxim meaning "It is the duty of a judge to determine according to what is alleged and proved." [17]

JUDICIS OFFICIUM EST OPUS DIEI IN DIE SUO PERFICERE. A maxim meaning "It is the duty of a judge to finish the work of each day within that day." [18]

JUDICIS OFFICIUM EST UT RES, ITA TEMPORA RERUM QUÆRERE. A maxim meaning "It is the duty of a judge to inquire into the times of things, as well as into things themselves." [19]

JUDICIUM. A proceeding before a judex or judge; [20] a court or judicial tribunal. [21]

JUDICIUM A NON SUO JUDICE DATUM NULLIUS EST MOMENTI. A maxim meaning "A judgment given by one who is not the proper judge is of no force." [22]

JUDICIUM EST IIS QUÆ PRO RELIGIONE FACIANT FAVERI, ETSI VERBA DESINT. A maxim meaning "It is right to favor those things which make for religion, though words be wanting." [23]

JUDICIUM EST JURIS DICTUM, ET PER JUDICIUM JUS EST NOVITUR REVELATUM QUOD DIU FUIT VELATUM. A maxim meaning "Adjudication is the utterance of the law, and by it the law which was for long time hidden is newly revealed." [24]

JUDICIUM EST QUASI JURIS DICTUM. A maxim meaning "Judgment is as it were a saying of the law." [25]

JUDICIUM NON DEBET ESSE ILLUSORIUM; SUUM EFFECTUM HABERE DEBET. A maxim meaning "A judgment ought not to be illusory; it ought to have its proper effect." [26]

JUDICIUM REDDITUR IN INVITUM. A maxim meaning "Judgment is given against one, whether he will or not." [27]

JUDICIUM SEMPER PRO VERITATE ACCIPITUR. A maxim meaning "A judgment is always accepted as true." [28]

JUGGLER. One who practices or exhibits tricks by sleight of hand; one who makes sport by tricks which make a false show of extraordinary dexterity. [29] (See, generally, THEATERS AND SHOWS.)

JULKUR. A term sometimes applied to "water-rights." [30] (See, generally, WATERS.)

JUMP. To spring; to bound; to leap. [31] (Jump: Bail, see BAIL.)

JUMPING-NET. A device suitable for breaking the fall of a person jumping from an upper story of a building. [32]

JUNCTA JUVANT. A maxim meaning "Things joined have effect." [33]

JUNCTION. [34] In the ordinary acceptation as applied to railroads, a term which is frequently employed to designate the point or locality where two or more

17. Burrill L. Dict. See also Bury *v.* Bokenham, Dyer 7, 12*a*.
18. Bouvier L. Dict.
19. Burrill L. Dict. [*citing* Coke Litt. 171].
20. Burrill L. Dict. [*quoted* in State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424].
21. Burrill L. Dict.
22. Black L. Dict.
Applied in Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 394, 20 Am. Rep. 50 [*citing* Taylor *v.* Clemson, 2 Q. B. 978, 42 E. C. L. 1005].
23. Morgan Leg. Max.
24. Morgan Leg. Max.
25. Bouvier L. Dict.
26. Black L. Dict.
27. Rapalje & L. L. Dict. [*citing* Coke Litt. 248*b*].
28. Trayner Leg. Max.
Applied in Minor *v.* Walter, 17 Mass. 237, 738; Campbell *v.* Kent, 3 Penr. & W. (Pa.) 72, 77.
29. Thurber *v.* Sharp, 13 Barb. (N. Y.) 627, 628.
30. Amriteswari Debi *v.* State Secretary, L. R. 24 Indian App. 33, 44.
31. Webster Int. Dict.
"Jump off quick" see Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 33 N. E. 469, 471, 51 Am. St. Rep. 303 [*cited* in Vimont *v.* Chicago, etc., R. Co., 71 Iowa 58, 60, 32 N. W. 100].
32. Mass. Pub. St. Sup. (1882–1888) 719.
33. Bouvier L. Dict.
Applied in Dobie *v.* Temporalities Fund, 51 L. J. P. C. 26, 35.
34. "Junction of Gold Street and Fiske Avenue" see Wood *v.* Stafford Springs, 74 Conn. 437, 440, 51 Atl. 129.

lines of railway meet.[35] (See Cross; Crossing; Intersect; Intersection; and, generally, Railroads.)

JUNE. The sixth month of the year.[36]

JUNIOR.[37] A word meaning younger, later born, later in office or rank;[38] an addition or description used to designate the individual referred to;[39] an addition to distinguish between two or more persons bearing the same name,[40] or intended only to designate between different persons of the same name;[41] a character used to distinguish a man from an elder man of the same name and place;[42] usually adopted to designate the son where the father bears the same christian name as well as the family name;[43] a mere description of the person;[44] a casual and temporary designation that may exist one day and cease the next.[45] (Junior: Attachment, see Attachment. Execution, see Executions. Garnishment, see Garnishment. Judgment, see Judgments. Lien, see Liens, and the Particular Lien Titles. Mortgage, see Chattel Mortgages; Mortgages. Writ or Process, see Process. See also Jr.; and, generally, Names.)

JUNK. A word of nautical origin, which originally meant old or condemned cable and cordage cut into small pieces, which, when untwisted, were used for various purposes on the ship; and afterwards the word came to mean, worn-out and discarded material in general that may be turned to some use;[46] especially, old rope, chain, iron, copper, parts of machinery and bottles, gathered or bought up by tradesmen, called junk dealers; hence, rubbish of any kind; odds and ends.[47]

JUNK BUSINESS. The business of purchasing old rope, chain, iron, copper, parts of machinery, etc.,[48] old iron, brass, bottles, and things of that sort, and selling them again.[49]

JUNK DEALER. A dealer in junk,[50] a person who deals in old metals, ropes, rags, etc.[51]

JUNKET. A word recognized in the English language as meaning a sweetmeat or cream cheese, or a delicacy made of curds, flavored and served with cream; also a drink made of cream, rennet, spice, and spirits.[52]

JUNK-SHOP. A place where junk is bought and sold;[53] a place where odds

35. U. S. *v.* Oregon, etc., R. Co., 164 U. S. 526, 540, 17 S. Ct. 165, 41 L. ed. 541.

36. Century Dict.

"June loading" see Stumore *v.* Shaw, 68 Md. 11, 18, 11 Atl. 360, 6 Am. St. Rep. 412.

37. Compared with the term "second" see Cobb *v.* Lucas, 15 Pick. (Mass.) 7, 9.

38. Goodwin *v.* State, 102 Ala. 87, 96, 15 So. 571.

"Junior title" see Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 403, 12 S. W. 80.

39. Cobb *v.* Lucas, 15 Pick. (Mass.) 7, 9.

40. Johnson *v.* Ellison, 4 T. B. Mon. (Ky.) 526, 527, 16 Am. Dec. 163; People *v.* Collins, 7 Johns. (N. Y.) 549, 553.

41. People *v.* Collins, 7 Johns. (N. Y.) 549, 552.

42. Jameson *v.* Isaacs, 12 Vt. 611, 613.

43. Padgett *v.* Lawrence, 10 Paige (N. Y.) 170, 177, 40 Am. Dec. 232.

44. *Alabama.*— Goodwin *v.* State, 102 Ala. 87, 96, 15 So. 571.

Illinois.— Davids *v.* People, 192 Ill. 176, 184, 61 N. E. 537; Bonardo *v.* People, 182 Ill. 411, 424, 55 N. E. 519.

Massachusetts.— Simpson *v.* Dix, 131 Mass. 179, 184.

New York.— People *v.* Collins, 7 Johns. 549, 552; Padgett *v.* Lawrence, 10 Paige 170, 177, 40 Am. Dec. 232.

Texas.— Windom *v.* State, 44 Tex. Cr. 514, 519, 72 S. W. 193.

45. Carleton *v.* Townsend, 28 Cal. 219, 222; People *v.* Collins, 7 Johns. (N. Y.) 549, 552.

46. Duluth *v.* Bloom, 55 Minn. 97, 100, 56 N. W. 580, 21 L. R. A. 689.

47. Duluth *v.* Bloom, 55 Minn. 97, 100, 56 N. W. 580, 21 L. R. A. 689; Carberry *v.* U. S., 116 Fed. 773, 774 [*quoting* Century Dict., and *distinguishing* Cadwalader *v.* Jessup, etc., Paper Co., 149 U. S. 350, 354, 13 S. Ct. 875, 37 L. ed. 764], where it was held that the term does not include second-hand bottles.

48. Pitts *v.* Vicksburg, 72 Miss. 181, 183, 16 So. 418.

49. Henningberg *v.* State, (Tex. Cr. App. 1903) 72 S. W. 176, 177.

50. Duluth *v.* Bloom, 55 Minn. 97, 101, 56 N. W. 580, 21 L. R. A. 689; Carberry *v.* U. S., 116 Fed. 773 [*quoting* Century Dict.].

51. Com. *v.* Ringold, 182 Mass. 308, 309, 65 N. E. 374 [*citing* Duluth *v.* Bloom, 55 Minn. 97, 100, 56 S. W. 580, 21 L. R. A. 689; Charleston *v.* Goldsmith, 12 Rich. (S. C.), 470].

52. Century Dict. [*cited* in Hansen *v.* Siegel-Cooper Co., 106 Fed. 691, 692, construing the words "junket tablets"].

53. Charleston *v.* Goldsmith, 12 Rich. (S. C.) 470, 473 [*cited* in Duluth *v.* Bloom, 55 Minn. 97, 100, 56 N. W. 580, 31 L. R. A. 689].

and ends are purchased and sold;[54] a place where old metals, ropes, rags, etc., are bought and sold.[55]

JUNK STORE. A term which appears to be an American equivalent for second-hand shop — a place where odds and ends are purchased and sold.[56]

JURA DEBET ESSE OMNI EXCEPTIONE MAJOR. A maxim meaning "Laws should be greater than any exception."[57]

JURA ECCLESIASTICA LIMITATA SUNT INFRA LIMITES SEPARATOS. A maxim meaning "Ecclesiastical laws are limited within separate bounds."[58]

JURA EODEM MODO DESTRUUNTUR QUO CONSTRUUNTUR. A maxim meaning "Laws are abrogated by the same means as those by which they are made."[59]

JURA IN PERSONAM. Rights primarily available against specific persons.[60] (See JURA IN REM.)

JURA IN REM. Rights which are available only against the world at large.[61] (See JURA IN PERSONAM.)

JURA MAJESTATIS. A term used in the civil law to designate certain rights which belong to each and every sovereignty, and which are deemed essential to its existence.[62]

JURAMENTUM EST INDIVISIBILE, ET NON EST ADMITTENDUM IN PARTE VERUM ET IN PARTE FALSUM. A maxim meaning "An oath is indivisible; it is not to be held partly true and partly false."[63]

JURA NATURÆ SUNT IMMUTABILIA. A maxim meaning "The laws of nature are unchangeable."[64]

JURA PUBLICA ANTEFERENDA PRIVATIS. A maxim meaning "Public rights are to be preferred to private.[65]

JURA PUBLICA EX PRIVATO PROMISCUE DECIDI NON DEBENT. A maxim meaning "Public rights ought not to be promiscuously determined in analogy to a private right."[66]

JURARE EST DEUM IN TESTEM VOCARE, ET EST ACTUS DIVINI CULTUS. A maxim meaning "To swear is to call God to witness, and is an act of religion."[67]

JURA REGIS SPECIALIA NON CONCEDUNTUR PER GENERALIA. A maxim meaning "The special rights of the king are not granted by general words."[68]

JURA SANGUINIS NULLO JURE CIVILI DIRIMI POSSUNT. A maxim meaning "Rights of blood cannot be destroyed by the provision of the civil law."[69]

JURAT. A term which means that the affiant swore before the officer taking the affidavit;[70] a certificate of the officer who administered the oath that the affiant had subscribed and sworn before him;[71] that part of an affidavit where the

54. Duluth *v.* Bloom, 55 Minn. 97, 100, 56 S. W. 580, 21 L. R. A. 689.

55. Com. *v.* Ringold, 182 Mass. 308, 309, 65 N. E. 374 [*citing* Duluth *v.* Bloom, 55 Minn. 97, 100, 56 N. W. 580, 21 L. R. A. 689; Charleston *v.* Goldsmith, 12 Rich. (S. C.) 470].

56. Reg. *v.* Levy, 30 Ont. 403, 404.

57. Peloubet Leg. Max.

58. Bouvier L. Dict.

Applied in Burrowes *v.* High Commission Ct., 3 Bulstr. 49, 53.

59. Wharton L. Lex.

60. Cross *v.* Armstrong, 44 Ohio St. 613, 623, 10 N. E. 160.

61. Cross *v.* Armstrong, 44 Ohio St. 613, 623, 10 N. E. 160.

62. Gilmer *v.* Lime Point, 18 Cal. 229, 250 [*citing* Wheaton Elem. Int. L. pt. 1, c. 2].

63. Bouvier L. Dict. [*citing* 4 Inst. 274].

64. Wharton L. Lex.

Applied in State *v.* Crane, 36 N. J. L. 394, 402; Schroder *v.* Ehlers, 31 N. J. L. 44, 50; Peck *v.* Essex County, 20 N. J. L. 457, 469; White *v.* Connelly, 105 N. C. 65, 70, 11 S. E. 177.

65. Wharton L. Lex. [*citing* Coke Litt. 130].

66. Wharton L. Lex. [*citing* Coke Litt. 181*b*].

67. Black L. Dict. [*citing* Inst. 165].

68. Bouvier L. Dict. [*citing* Jenkins Cent. 103].

69. Trayner Leg. Max.

70. Hanson *v.* Cochran, 9 Houst. (Del.) 184, 192, 31 Atl. 880.

The primary meaning of the word is "sworn," but the derivative signification is "proved." Cochran *v.* Linville Imp. Co., 127 N. C. 386, 396, 37 S. E. 496; Starke *v.* Etheridge, 71 N. C. 240, 246.

71. U. S. *v.* McDermott, 140 U. S. 151, 153, 11 S. Ct. 746, 35 L. ed. 391.

The "jurat" is not a certificate to a deposition in the ordinary sense of the term, but a certificate of the fact that the witness appeared before the commissioner and was sworn to the truth of what he had stated.

officer certifies that it was sworn before him.[72] (See, generally, Affidavits; Oaths and Affirmations.)

JURATO CREDITUR IN JUDICIO. A maxim meaning "He who makes oath is to be believed in judgment."[73]

JURATORES DEBENT ESSE VICINI, SUFFICIENTES, ET MINUS SUSPECTI. A maxim meaning "Jurors ought to be neighbors, of sufficient estate, and free from suspicion."[74]

JURATORES SUNT JUDICES FACTI. A maxim meaning "Juries are the judges of fact.[75]

JURATS. Sworn men; officers of certain municipal corporations in England, in the nature of aldermen or assistants;[76] officers in the island of Jersey, of whom there are twelve, members of the royal court, and elected for life.[77]

JURE BELLI. By the right, or law of war.[78]

JURE NATURÆ. By or according to the law of nature[79]

JURE NATURÆ ÆQUUM EST NEMINEM CUM ALTERIUS DETRIMENTO ET INJURIA FIERI LOCUPLETIOREM. A maxim meaning "By the law of nature it is not just that any one should be enriched by the detriment or injury of another."[80]

JURI DE ALTERIUS DETRAHENDUM POTIUS QUAM SUUM CUIQUE INCOMMODUM FERENDUM EST. A maxim meaning "Rather let every man bear his own grievance than abridge the rights of another."[81]

JURIDICAL. Relating to the dispensation of justice;[82] belonging to the office of a judge.[83] (See Judicial.)

JURIDICAL EVIDENCE. Evidence of mutable phenomena through human agency addressed to a human tribunal.[84] (See, generally, Evidence.)

U. S. *v.* Julian, 162 U. S. 324, 325, 16 S. Ct. 801, 40 L. ed. 984.

72. Bouvier L. Dict. [*quoted* in Theobald *v.* Chicago, etc., R. Co., 75 Ill. App. 208, 213].

73. Black L. Dict. [*citing* 3 Inst. 79].

74. Black L. Dict. [*citing* Jenkins Cent. 141].

75. Black L. Dict. [*citing* Jenkins. Cent. 61].

76. Cyclopedic L. Dict. [*citing* Cowell Int.].

77. Bouvier L. Dict. [*citing* 1 Stephen Comm. (11th ed.) 103]. See also Matter of Jersey Jurats, L. R. 1 P. C. 94, 99, 111, where it is said: "The Jurats, besides being members of the Royal Court, were also members of the States or Legislative Assembly of the Island [of Jersey]."

78. Burrill L. Dict. [*citing* 1 Kent Comm. 126]. See also The Copenhagen, 1 C. Rob. 289, 291. And see 12 Cyc. 985.

79. Burrill L. Dict. See also Lake Superior Land Co. *v.* Emerson, 38 Minn. 406, 408, 38 N. W. 200, 8 Am. St. Rep. 679, 680, in opinion of Gilfillan, C. J.

80. Black L. Dict. [*citing* Dig. 50, 17, 206].

Applied in Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478.

81. Morgan Leg. Max.

82. Worcester Dict. [*quoted* in Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 626].

83. Burrill L. Dict.

84. Mead *v.* Husted, 52 Conn. 53, 57, 52 Am. Rep. 554.

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* Author of "Estates," 16 Cyc. 595; "Ferries," 19 Cyc. 491; and joint author of "Easements," 14 Cyc. 1134; "Forcible Entry and Detainer," 19 Cyc. 1108.

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Misconduct of or Affecting as Constituting:
Bribery, see Bribery.
Contempt, see Contempt.
Embracery, see Embracery.
Ground For New Trial, see Criminal Law; New Trial.
Ground For Reversal, see Appeal and Error; Criminal Law.
Polling, see Criminal Law; Trial.
Practice in Trial of Special Issues by, see Trial.
Presence of During Argument, see Criminal Law.
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Refusal to Allow Challenge Affecting Former Jeopardy, see Criminal Law.
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Sheriffs, see Attachment; Damages; Execution.
To Determine Pregnancy, see Criminal Law.
Verdict of:
Generally, see Criminal Law; Trial.
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Jury Trial:
Constitutional Guaranties as to, see Constitutional Law.
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Questions of Fact For Jury, see Criminal Law; Trial.
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Sheriff's Jury:
To Assess Damages, see Damages.
To Determine Claims of Third Persons, see Attachment; Execution.
View:
In Civil Action, see Trial.
In Criminal Prosecution, see Criminal Law; Homicide.

I. Definition.

A jury is a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them.[1]

II. Classes and Constitution of Juries.[2]

A. Classes — 1. Petit or Traverse Jury. A petit or traverse jury is a jury

1. Bouvier L. Dict. [*quoted* in State *v.* Voorhies, 12 Wash. 53, 55, 40 Pac. 620].

Other definitions are: "A body of men summoned and sworn to decide upon the facts in issue at the trial." Hunnel *v.* State, 86 Ind. 431, 434 [*citing* Abbott L. Dict.].

"A body of twelve citizens, duly qualified to serve on juries, empanelled and sworn to try one or more issues of facts submitted to them, and to give a judgment respecting the same called a verdict." State *v.* Cox, 8 Ark. 436, 446; Norval *v.* Rice, 2 Wis. 22, 28.

"A tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties." Lamb *v.* Lane, 4 Ohio St. 167, 179.

2. **Coroner's jury** see Coroners, 9 Cyc. 987.

Grand jury see Grand Juries.

Jury of matrons see Criminal Law, 12 Cyc. 772.

Sheriff's jury: To determine claims of third persons in execution see Executions, 17 Cyc. 1209. To assess damages on writ of inquiry see Damages, 13 Cyc. 225.

who try the question in issue and pass finally upon the truth of the facts in dispute. The term "jury" is ordinarily applied to this body distinctively.[3]

2. Mixed Jury. A mixed jury is a jury composed partly of white men and partly of negroes,[4] or one consisting partly of citizens and partly of aliens.[5]

3. Foreign Jury. A foreign jury is one drawn from a county other than that in which issue is joined.[6] A foreign jury is properly granted where it appears that on account of local prejudice or other cause a fair and impartial jury cannot be obtained in the county where the action is pending,[7] and in some jurisdictions there are express statutory provisions to this effect.[8] In allowing such juries much must necessarily be left to the discretion of the trial judge.[9] An order for a foreign jury should not be made until an effort has been made to obtain an impartial jury from the regular venire,[10] and the application should be denied where it does not appear essential in order to secure a fair and impartial trial.[11]

4. Jury De Medietate Linguae. A jury *de medietate linguae* is one composed half of aliens and half of denizens.[12] In England this jury was first allowed by statute[13] in cases where one of the parties was a foreign merchant,[14] and by a later statute[15] in both civil and criminal cases where the party demanding it was an alien born;[16] but the right has now been abolished by statute.[17] In this country the right to such a jury has been recognized in a few cases,[18] and in one state at

3. Bouvier L. Dict.

A petit jury is otherwise defined as follows: "The ordinary jury of twelve men for the trial of a civil or criminal action. So called to distinguish it from the grand jury." Black L. Dict.

"A body of twelve men, who are sworn to try the facts of a case, as they are presented in the evidence placed before them." Cooley Const. Lim. 319 [*quoted* in Harris *v.* People, 128 Ill. 585, 593, 21 N. E. 563, 15 Am. St. Rep. 153].

A trial jury is "a body of twelve men, possessing the requisite qualifications, duly summoned, and sworn to well and truly try the questions of fact submitted to them by the court, and a true verdict render, according to the law and the evidence." People *v.* Hopt, 3 Utah 396, 401, 4 Pac. 250.

4. Bouvier L. Dict.

5. Bouvier L. Dict.

A mixed jury of this class is also known as a jury *de medietate linguæ*. See *infra*, II, A, 4.

6. Bouvier L. Dict.

7. Brafford *v.* Com., 16 S. W. 710, 13 Ky. L. Rep. 154; Bell *v.* Van Riper, 3 N. J. L. 510; Stryker *v.* Turnbull, 3 Cai. (N. Y.) 103; Craft *v.* Com., 24 Gratt. (Va.) 602; Sands *v.* Com., 21 Gratt. (Va.) 871; Chahoon *v.* Com., 21 Gratt. (Va.) 822; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

Where a town contributes to pay the expenses of a suit it is sufficient ground for moving for a foreign jury to be taken from another county. Stryker *v.* Turnbull, 3 Cai. (N. Y.) 103.

A corporation court has authority to order a foreign jury. Craft *v.* Com., 24 Gratt. (Va.) 602; Chahoon *v.* Com., 21 Gratt. (Va.) 822.

Jurors from two counties may be summoned at the same time. Wormeley *v.* Com., 10 Gratt. (Va.) 658.

8. Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845, 15 Ky. L. Rep. 341; Massie *v.* Com., 36 S. W. 550, 18 Ky. L. Rep. 367; Brafford *v.* Com., 16 S. W. 710, 13 Ky. L. Rep. 154; Clark *v.* Com., 90 Va. 360, 18 S. E. 440; Craft *v.* Com., 24 Gratt. (Va.) 602; Chahoon *v.* Com., 21 Gratt. (Va.) 822.

9. Chahoon *v.* Com., 21 Gratt. (Va.) 822, holding that the judgment will not be reversed for error in this regard unless it clearly appears that this discretion was abused.

10. Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845, 15 Ky. L. Rep. 341; Brown *v.* Com., 49 S. W. 545, 20 Ky. L. Rep. 1552; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

Where the regular venire has been exhausted without obtaining an unbiased jury and the court is of the opinion that such a jury could not be obtained it is not necessary to summon another venire from the same county before making an order for a foreign jury. Wormeley *v.* Com., 10 Gratt. (Va.) 658.

11. Patchin *v.* Sands, 10 Wend. (N. Y.) 570.

12. Bouvier L. Dict.

13. St. 27 Edw. III, c. 8.

14. See Richards *v.* Com., 11 Leigh (Va.) 690.

15. St. 28 Edw. III, c. 13.

16. 2 Hale P. C. 271. See also State *v.* Fuentes, 5 La. Ann. 427; State *v.* Antonio, 11 N. C. 200; Richards *v.* Com., 11 Leigh (Va.) 690.

In trials for treason the right to a jury *de medietate linguæ* was repealed by 1 & 2 Phil. & M. c. 10, requiring such trials to be according to the common law. 2 Hale P. C. 271; 2 Hawkins P. C. 420.

17. Thompson & M. Jur. § 17 [*citing* 33 Vict. c. 14, § 5].

18. People *v.* McLean, 2 Johns. (N. Y.) 381; Respublica *v.* Mesca, 1 Dall. (Pa.) 73, 1 L. ed. 42.

least by express statutory provision.[19] In others the right is not recognized,[20] and it is impliedly denied where foreigners are disqualified by statute from serving as jurors.[21] In Canada an alien cannot demand a jury *de medietate linguae*,[22] but both the French and English languages are officially recognized and defendant is entitled to a jury of at least one half of persons skilled in the language of the defense.[23]

5. Common Jury. A common jury is one drawn in the usual and regular manner.[24]

6. Special or Struck Jury — a. Definition and Nature. A special jury is a jury ordered by the court, on the motion of either party, in cases of unusual importance or intricacy.[25] A struck jury is a special jury,[26] and is so called because constituted by striking out a number of names from a prepared list.[27] Special juries were familiar in the administration of justice from the earliest period of the common law,[28] and were originally introduced in trials where the causes were of too great nicety for the discussion of ordinary freeholders.[29]

b. When Granted — (1) *In General.* Special or struck juries, although of common-law origin, have been expressly recognized by statute in England,[30] Canada,[31] and a number of jurisdictions in this country.[32] In some jurisdictions a

19. Brown *v.* Com., 11 Leigh (Va.) 711; Richards *v.* Com., 11 Leigh (Va.) 690; U. S. *v.* Carnot, 25 Fed. Cas. No. 14,726, 2 Cranch C. C. 469.

Construction of statute.—The Virginia statute providing that the court may order such a jury is not mandatory. Richards *v.* Com., 11 Leigh (Va.) 690.

20. People *v.* Chin Mook Sow, 51 Cal. 597; State *v.* Fuentes, 5 La. Ann. 427; State *v.* Antonio, 11 N. C. 200; U. S. *v.* McMahon, 26 Fed. Cas. No. 15,699, 4 Cranch C. C. 573. See Aliens, 2 Cyc. 107.

21. People *v.* Chin Mook Sow, 51 Cal. 597; State *v.* Fuentes, 5 La. Ann. 427.

22. Reg. *v.* Burdell, 5 Nova Scotia 126.

23. Reg. *v.* Plante, 7 Manitoba 537; Reg. *v.* Leveque, 3 Manitoba 582.

24. Bouvier L. Dict.

25. Black L. Dict.

A special or struck jury is otherwise defined as "one selected by the assistance of the parties." Bouvier L. Dict.

The term "special jury" under the authorities bears with it as an inevitable concomitant, the idea of selection, of choice, of the exercise of judgment and discretion, by the jury commissioner, not the blind turning of a wheel. State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.

26. Black L. Dict.; Bouvier L. Dict.

27. Black L. Dict.

Mode of selecting jury see *infra*, IX, B, 2, c.

28. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; Rex *v.* Edmonds, 4 B. & Ald. 471, 3 Cox C. C. 517, 6 E. C. L. 564.

29. State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348; 3 Blackstone Comm. 357.

The object of a special jury is to obtain the return of persons of a somewhat higher station in society than those who are ordinarily summoned to attend as jurymen at *nisi prius*. Rex *v.* Edmonds, 4 B. & Ald. 471, 3 Cox C. C. 517, 6 E. C. L. 564.

30. Rex *v.* Edmonds, 4 B. & Ald. 471, 3 Cox C. C. 517, 6 E. C. L. 564; 3 Blackstone Comm. 358; 3 Geo. II, c. 25.

31. Molson's Bank *v.* Robertson, 5 Manitoba 343.

32. *Alabama.*— Birmingham Union St. R. Co. *v.* Ralph, 92 Ala. 273, 9 So. 222; McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

Indiana.— Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290.

Louisiana.— State *v.* Carey, 28 La. Ann. 49.

Minnesota.— Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; O'Brien *v.* Minneapolis, 22 Minn. 378.

Missouri.— State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.

New Jersey.— Fowler *v.* State, 58 N. J. L. 423, 34 Atl. 682.

New York.— People *v.* Hall, 169 N. Y. 184, 62 N. E. 170; Adams *v.* Morgan, 21 N. Y. Suppl. 1057; Nesmith *v.* Atlantic Ins. Co., 8 Abb. Pr. 423.

Ohio.— Hulse *v.* State, 35 Ohio St. 421; Whitehead *v.* State, 10 Ohio St. 449; Sutton *v.* State, 9 Ohio 133.

Pennsylvania.— *In re* Calling Jurors, 1 Pa. Co. Ct. 644.

Tennessee.— McDaniel *v.* Nashville, etc., R. Co., 88 Tenn. 542, 13 S. W. 76.

Virginia.— Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348.

West Virginia.— State *v.* Pearis, 35 W. Va. 320, 13 S. E. 1006; State *v.* Miller, 6 W. Va. 600.

United States.— Gulf, etc., R. Co. *v.* Shane, 157 U. S. 348, 15 S. Ct. 641, 39 L. ed. 727.

See 31 Cent. Dig. tit. "Jury," § 10.

special jury is a matter of absolute right if demanded,[33] but at common law[34] and under some of the statutes[35] the right is not absolute but is within the discretion of the court. In New York the statute provides for the granting of a struck jury in cases where it shall appear to the court that it is essential to a fair and impartial trial or that the importance or intricacy of the case requires such a jury.[36] A special jury is proper where an intelligent understanding of the facts involved necessitates having persons possessed of a particular skill or knowledge with respect to such matters,[37] but should be denied where no such facts are in dispute and the case turns upon a mere question of law,[38] or where no reason appears why the case could not be properly disposed of by a jury selected in the ordinary way.[39]

(II) *IN CRIMINAL PROSECUTIONS.* The statutes authorizing special or struck juries have in some cases been construed as applying to criminal as well as civil cases,[40] but under the English statute and the statutes of some of the states in this

In Ohio the law relating to struck juries was repealed by the act of May 18, 1894, but the act does not apply to cases pending at the date of its passage. McDonald *v.* Lane, 5 Ohio S. & C. Pl. Dec. 37.

33. Birmingham Union St. R. Co. *v.* Ralph, 92 Ala. 273, 9 So. 222; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; Gulf, etc., R. Co. *v.* Shane, 157 U. S. 348, 15 S. Ct. 641, 39 L. ed. 727; Gulf, etc., R. Co. *v.* Martin, 49 Fed. 359, 1 C. C. A. 298; Gulf, etc., R. Co. *v.* Campbell, 49 Fed. 354, 1 C. C. A. 293; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286; Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53; Molson's Bank *v.* Robertson, 5 Manitoba 343.

34. State *v.* Slover, 134 Mo. 607, 36 S. W. 50; Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348.

35. Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; Clingan *v.* East Tennessee, etc., R. Co., 2 Lea (Tenn.) 726; Southern R. Co. *v.* Oliver, 102 Va. 710. 47 S. E. 862; Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504; Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348. See also McDaniel *v.* Nashville, etc., R. Co., 88 Tenn. 542, 13 S. W. 76.

The court may therefore vacate an order for a special or struck jury and order the case to be tried by an ordinary jury. Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; Bruce *v.* Beal, 100 Tenn. 573, 47 S. W. 204.

This discretion is not arbitrary, but is a sound judicial discretion to be governed by settled principles and is reviewable on appeal; but the decision of the trial court will not be reviewed unless it appears that such discretion was abused. Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348.

36. Adams *v.* Morgan, 21 N. Y. Suppl. 1057; Industrial, etc., Trust Co. *v.* Tod, 46 Misc. (N. Y.) 492, 95 N. Y. Suppl. 44; Nesmith *v.* Atlantic Ins. Co., 8 Abb. Pr. (N. Y.) 423.

It is only in extreme cases that a special jury will be granted (Walsh *v.* Sun Mut. Ins. Co., 2 Bosw. (N. Y.) 646, 17 Abb. Pr. 356; People *v.* McGuire, 43 How. Pr. (N. Y.) 67), and an examination of the cases shows that the courts have generally refused to grant the application (People *v.* McGuire, *supra*).

Circumstances insufficient to authorize the granting of a struck jury see Murphy *v.* Kipp, 1 Duer (N. Y.) 659; Poucher *v.* Livingston, 2 Wend. (N. Y.) 296; Wright *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 211; Anonymous, 1 Johns. (N. Y.) 314.

The fact that the government of the United States is interested in a cause does not make it of such importance as to warrant the granting of a struck jury. Hartshorn *v.* Gelston, 3 Cai. (N. Y.) 84.

Questions affecting the public as where a person makes a highway across his land for the purpose of avoiding a turnpike and defrauding its owners are important in their consequences and authorize the granting of a special jury. New Windsor Turnpike Co. *v.* Ellison, 1 Johns. (N. Y.) 141.

An action by a public officer for libel is of sufficient importance to warrant a struck jury under the statute where the libel is in regard to his official capacity (Thomas *v.* Rumsey, 4 Johns. (N. Y.) 482; Livingston *v.* Cheetham, 1 Johns. (N. Y.) 61); but not where it does not relate to his official capacity (Thomas *v.* Croswell, 4 Johns. (N. Y.) 491; Van Vechten *v.* Hopkins, 2 Johns. (N. Y.) 373), or where it relates to a remote transaction and he is no longer in office (Genet *v.* Mitchell, 4 Johns. (N. Y.) 186).

The jury may be granted on the affidavit of counsel stating that in his opinion the case is one of importance and that a large sum of money is involved. Livingston *v.* Smith, 1 Johns. (N. Y.) 141.

37. Kellogg *v.* Clinton, 28 La. Ann. 674.

38. Emerson *v.* McCullough, 2 Mart (La.) 297; Weyms *v.* Greenwood, 2 C. & P. 483, 12 E. C. L. 688.

39. Walsh *v.* Sun Mut. Ins. Co., 2 Rob. (N. Y.) 646, 17 Abb. Pr. 356; Ives *v.* Ranger, 20 N. Y. Suppl. 32; Hartshorn *v.* Gelston, 3 Cai. (N. Y.) 84.

40. Hulse *v.* State, 35 Ohio St. 421; Whitehead *v.* State, 10 Ohio St. 449; Sutton *v.* State, 9 Ohio 133; Quigley *v.* State, 5 Ohio Cir. Ct. 638, 3 Ohio Cir. Dec. 310; Reg. *v.* Kerr, 26 U. C. C. P. 214.

The right is absolute in all cases to which

country it is held that such a jury cannot be demanded in criminal cases or at least in prosecutions for felonies.[41]

B. Constitution of Juries — 1. In General. Trial by jury means something more than a trial by twelve men;[42] the term imports a trial by twelve men possessing the requisite qualifications for jury duty, impartial between the parties, living within the jurisdictional limits of the court, drawn and selected by impartial and disinterested officers, duly impaneled under the direction of a competent court and sworn to render an impartial verdict according to the law and the evidence;[43] and proceeding in their deliberations in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and except on acquittal of a criminal charge, to set aside their verdict if in his opinion it is against the law and the evidence.[44] But a party has no right to insist that persons of his particular religious faith shall be upon the jury,[45] nor has a negro any constitutional right to demand that the jury summoned to try him shall consist in part of persons of his own race,[46] his only right being that in the selection of the jury persons of his race shall not be discriminated against or excluded on that account.[47]

2. Number of Jurors. The term "jury" when used without any qualification, addition, or prefix imports a body of twelve men.[48] This was the meaning of the term at common law,[49] and constitutional provisions guaranteeing or preserving the right to trial by jury have uniformly been construed as contemplating a jury of this number.[50] In some jurisdictions the constitutions expressly provide that

the statute applies. Whitehead *v.* State, 10 Ohio St. 449.

Police courts.— The Ohio statute is construed as not being applicable to trials in police courts. State *v.* Ermston, 4 Ohio Cir. Ct. 81, 2 Ohio Cir. Dec. 431.

In New Jersey and New York the constitutions expressly provide for special or struck juries in criminal cases. State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284; People *v.* Hall, 169 N. Y. 184, 62 N. E. 170; People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247.

41. *In re* Calling Jurors, 1 Pa. Co. Ct. 644; State *v.* Pearis, 35 W. Va. 320, 13 S. E. 1006; State *v.* Miller, 6 W. Va. 600; Reg. *v.* Mayne, 32 Wkly. Rep. 95. *Compare* Com. *v.* Carling, 1 Lehigh Val. L. Rep. (Pa.) 110.

42. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873.

43. State *v.* McClear, 11 Nev. 39; *In re* Opinion of Justices, 41 N. H. 550; Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873. See also People *v.* Hopt, 3 Utah 396, 4 Pac. 250.

44. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873. See also Dennee *v.* McCoy, 4 Indian Terr. 233, 69 S. W. 858; Smith *v.* Atlantic, etc., R. Co., 25 Ohio St. 91.

A jury properly speaking is an appendage of a court, a tribunal auxiliary to the administration of justice in a court, implying a presiding law tribunal, the conjunction of the two being the peculiar and valuable feature of the jury trial; from which it follows that a mere commission, although composed of twelve men, cannot properly be regarded as a jury. Lamb *v.* Lane, 4 Ohio St. 167. See also Willyard *v.* Hamilton, 7 Ohio, Pt. II, 111, 30 Am. Dec. 195.

45. People *v.* Hampton, 4 Utah 258, 9 Pac. 508. See also Smith *v.* S. of G. S., 87 S. W. 1083, 27 Ky. L. Rep. 1107.

46. *Kentucky.*— Smith *v.* Com., 33 S. W. 825, 17 Ky. L. Rep. 1162; Mullins *v.* Com., 3 Ky. L. Rep. 686; Hicks *v.* Com., 3 Ky. L. Rep. 87.

North Carolina.— State *v.* Sloan, 97 N. C. 499, 2 S. E. 666.

Texas.— Williams *v.* State, 44 Tex. 34; Cavitt *v.* State, 15 Tex. App. 190.

Virginia.— Lawrence *v.* Com., 81 Va. 484.

United States.— *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

See 31 Cent. Dig. tit. "Jury," § 226. See also Constitutional Law, 8 Cyc. 1073, 1074.

47. Com. *v.* Johnson, 78 Ky. 509; Smith *v.* Com., 33 S. W. 825, 17 Ky. L. Rep. 1162; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

Exclusion from jury duty on account of race or color see Constitutional Law, 8 Cyc. 1048, 1073.

48. Bibel *v.* People, 67 Ill. 172; Lamb *v.* Lane, 4 Ohio St. 167.

49. *Arizona.*— Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499.

Arkansas.— State *v.* Cox, 8 Ark. 436.

Indiana.— Brown *v.* State, 16 Ind. 496.

Iowa.— Eshelman *v.* Chicago, etc., R. Co., 67 Iowa 296, 25 N. W. 251.

Missouri.— Vaughn *v.* Scade, 30 Mo. 600.

New Mexico.— Territory *v.* Ortiz, 8 N. M. 154, 42 Pac. 87.

New York.— People *v.* Lane, 6 Abb. Pr. N. S. 105.

Oklahoma.— Bradford *v.* Territory, 1 Okla. 366, 34 Pac. 66.

England.— Rex *v.* St. Michael, 2 W. Bl. 718.

See 31 Cent. Dig. tit. "Jury," § 4 *et seq.*

50. *Alabama.*— Collins *v.* State, 88 Ala. 212, 7 So. 260.

the jury must in certain cases consist of twelve persons.[51] In other jurisdictions the constitutions provide for a jury of less than twelve in certain cases,[52] or certain courts,[53] or provide that the legislature may enact laws regulating the number of jurors,[54] or may make such regulations with respect to certain courts;[55] but except in cases where this number has been changed by statute under the authority of such a provision or waived by the parties it cannot be denied in any case where a jury trial is a constitutional right.[56]

3. Selection From Vicinage, County, or District. At common law the right to trial by jury included the right to a trial by jury of the vicinage or neighborhood,[57] and while some of the constitutions expressly provide for a trial by a jury

Arkansas.— State *v.* Cox, 8 Ark. 436.

Indian Territory.— Dennee *v.* McCoy, 4 Indian Terr. 233, 69 S. W. 858.

Iowa.— Eshelman *v.* Chicago, etc., R. Co., 67 Iowa 296, 25 N. W. 251.

Michigan.— McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750; People *v.* Luby, 56 Mich. 551, 23 N. W. 218.

Minnesota.— State *v.* Everett, 14 Minn. 439.

Missouri.— Henning *v.* Hannibal, etc., R. Co., 35 Mo. 408; Aka *v.* Anderson, 34 Mo. 74; Vaughn *v.* Scade, 30 Mo. 600.

New Hampshire.— *In re* Opinion of Justices, 41 N. H. 550.

New York.— People *v.* Justices Ct. Spec. Sess., 74 N. Y. 406.

Ohio.— Lamb *v.* Lane, 4 Ohio St. 167.

Pennsylvania.— Com. *v.* Byers, 5 Pa. Co. Ct. 295.

Vermont.— State *v.* Peterson, 41 Vt. 504.

Wisconsin.— May *v.* Milwaukee, etc., R. Co., 3 Wis. 219; Norval *v.* Rice, 2 Wis. 22.

United States.— Thompson *v.* Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. ed. 1061.

See 31 Cent. Dig. tit. "Jury," § 4 *et seq.*

"Trial by jury as heretofore used."—A constitutional provision preserving the right of trial by jury "as heretofore used" contemplates a common-law jury of twelve in all classes of cases tried by such a jury prior to the adoption of the constitution (People *v.* Kennedy, 2 Park. Cr. (N. Y.) 312), but authorizes a less number in cases where a less number was previously used (Knight *v.* Campbell, 62 Barb. (N. Y.) 16; People *v.* Lane, 6 Abb. Pr. N. S. (N. Y.) 105); and it has been held under such a provision that the legislature may enlarge the jurisdiction of a justice of the peace and transfer a class of cases from courts of record where juries are composed of twelve to a justice's court having only a jury of six (Knight *v.* Campbell, *supra* [*distinguishing* Wynehamer *v.* People, 13 N. Y. 378]).

In condemnation proceedings where the constitution provides for an assessment by a jury, a jury of twelve is contemplated. Clark *v.* Utica, 18 Barb. (N. Y.) 451; Lamb *v.* Lane, 4 Ohio St. 167.

51. Downing *v.* State, 66 Ga. 110.

In West Virginia the bill of rights provides that "trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men." State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

In condemnation proceedings the constitutions in some jurisdictions expressly provide for a jury of twelve. Faust *v.* Huntsville, 83 Ala. 279, 3 So. 771; Whitehead *v.* Arkansas Cent. R. Co., 28 Ark. 460; Jacksonville, etc., R. Co. *v.* Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272; Campau *v.* Detroit, 14 Mich. 276.

52. State *v.* Sinegal, 51 La. Ann. 932, 25 So. 957; State *v.* Campbell, 24 Utah 103, 66 Pac. 771; State *v.* Imlay, 22 Utah 156, 61 Pac. 557; *In re* Maxwell, 19 Utah 495, 57 Pac. 412; State *v.* Hart, 19 Utah 438, 57 Pac. 415; State *v.* Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33.

53. Jackson *v.* Coates, (Tex. Civ. App. 1897) 43 S. W. 24.

54. Florida Fertilizer Mfg. Co. *v.* Boswell, 45 Fla. 301, 34 So. 241; Gibson *v.* State, 16 Fla. 291; McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750; State *v.* Starling, 15 Rich. (S. C.) 120.

55. *Georgia.*— Downing *v.* State, 66 Ga. 110.

Illinois.— Hermanek *v.* Guthmann, 179 Ill. 563, 53 N. E. 966 [*affirming* 72 Ill. App. 370]; McManus *v.* McDonough, 107 Ill. 95.

Iowa.— Higgins *v.* Farmers' Ins. Co., 60 Iowa 50, 14 N. W. 118; Bryan *v.* State, 4 Iowa 349.

Missouri.— State *v.* Allen, 45 Mo. App. 551.

Nebraska.— Moise *v.* Powell, 40 Nebr. 671, 59 N. W. 79.

Washington.— State *v.* Ellis, 22 Wash. 129, 60 Pac. 136.

Wyoming.— Rock Springs First Nat. Bank *v.* Foster, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056, 54 L. R. A. 549.

See 31 Cent. Dig. tit. "Jury," § 4 *et seq.*

In South Carolina the constitution of 1868 does not contain the provision found in the constitution of 1865, authorizing the legislature to regulate the number of jurors in the inferior and district courts, but as it contains no express prohibition it is construed as contemplating the continuance of this right. State *v.* Williams, 40 S. C. 373, 19 S. E. 5.

56. See *infra*, V, E.

57. People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; Buckrice *v.* People, 110 Ill. 29; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; State *v.* Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

of the county or district,[58] it is held that the right is secured by provisions which merely guarantee in general terms the right to a jury trial.[59] The right, however, is one which may be waived,[60] and is waived where defendant himself applies for or consents to a change of venue.[61] Ordinarily the jury should also be selected from the whole body of the county or district and not from any particular part.[62]

III. RIGHT TO TRIAL BY JURY.

A. Origin and Development. Trial by jury is of ancient and somewhat doubtful origin,[63] it being as now practised the result of long process of development, during which the nature and functions of the jury have been materially changed;[64] although previously regarded as a right,[65] it was in England first

The reason of this rule at common law was that jurors selected from the immediate neighborhood were supposed to be more intimately acquainted with the merits of the case and better able to do justice between the parties. Shaffer *v.* State, 1 How. (Miss.) 238; Taylor *v.* Gardiner, 11 R. I. 182; Zanone *v.* State, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556.

58. *Arkansas.*— Osborn *v.* State, 24 Ark. 629.

Illinois.— Buckrice *v.* People, 110 Ill. 29.

Nebraska.— Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

Ohio.— State *v.* Voris, 10 Ohio S. & C. Pl. Dec. 451, 8 Ohio N. P. 16.

Tennessee.— Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500.

Wisconsin.— Wheeler *v.* State, 24 Wis. 52.

See 31 Cent. Dig. tit. "Jury," §§ 8, 229.

The chief object of these provisions is that the accused may have the benefit of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witnesses who give evidence before them. Olive *v.* State, 11 Nebr. 1, 7 N. W. 444. See also State *v.* Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

The term "district" in constitutional provisions guaranteeing a trial by a jury of the county or district in which the offense is alleged to have been committed means that portion of territory or division of the state over which a court at any particular sitting may exercise jurisdiction (Olive *v.* State, 11 Nebr. 1, 7 N. W. 444); but ordinarily it means no more than the term "county" and cannot be applied to the judicial circuits into which a state is divided (Weyrich *v.* People, 89 Ill. 90; Armstrong *v.* State, 1 Coldw. (Tenn.) 338).

In the district courts of the United States there is no right to a trial by a jury of the particular county of the district in which the offense is alleged to have been committed. Beery *v.* U. S., 2 Colo. 186; U. S. *v.* Mays, 1 Ida. 763; U. S. *v.* Chaires, 40 Fed. 820.

A jury need not be taken from the particular municipality where the offense is committed, although it is a statutory offense that can be committed only in a particular municipality, but may be selected from the whole county of which such municipality is a part. Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571.

59. People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; State *v.* Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130. *Compare* Taylor *v.* Gardiner, 11 R. I. 182.

What constitutes an infringement of this right see *infra*, V, F, 4.

60. Weyrich *v.* People, 89 Ill. 90; Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

61. Weyrich *v.* People, 89 Ill. 90; Dula *v.* State, 8 Yerg. (Tenn.) 511; Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26. See also Armstrong *v.* State, 1 Coldw. (Tenn.) 338.

62. *Michigan.*— Houghton Common Council *v.* Huron Copper Min. Co., 57 Mich. 547, 24 N. W. 820; People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

Mississippi.— Shaffer *v.* State, 1 How. 238.

Ohio.— State *v.* Voris, 10 S. & C. Pl. Dec. 451, 8 Ohio N. P. 16.

Pennsylvania.— Hartshorne *v.* Patten, 2 Dall. 252, 1 L. ed. 369.

Tennessee.— Zanone *v.* State, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556; Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

See 31 Cent. Dig. tit. "Jury," §§ 8, 229.

What constitutes an infringement of this rule see *infra*, V, F, 4.

In Iowa the statute expressly requires that the jury shall be selected from the body of the county. State *v.* Arthur, 39 Iowa 631.

63. *Colorado.*— Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

Michigan.— McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750.

Montana.—Kleinschmidt *v.* Dunphy, 1 Mont. 118.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

Ohio.— Work *v.* State, 2 Ohio St. 296, 69 Am. Dec. 671.

See also 3 Blackstone Comm. 349.

64. Proffatt Jury Tr. c. 1, §§ 30, 34, 35. See also Brittle *v.* People, 2 Nebr. 198; Smith *v.* Times Pub. Co., 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819.

65. See People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95.

guaranteed as such by the Magna Charta.[66] It was introduced into this country by the English colonists who considered it a right under the English law,[67] and has, since the organization of our government, been incorporated in the form of express guaranties in all of the constitutions, both state and federal.[68] It is a right which has always been very highly esteemed and carefully guarded against infringement,[69] particularly in criminal cases.[70]

B. Constitutional Provisions[71] — **1. Terms of Provisions.** The provisions of the various state constitutions are somewhat differently worded but may be divided into three classes as follows: In some it is merely provided that the right of trial by jury shall be inviolate;[72] in others that the right shall remain inviolate;[73] and in others that the right as heretofore used or enjoyed shall remain inviolate.[74]

2. Construction and Application. The provisions of the state constitutions, however worded, are uniformly construed as not conferring a right to a trial by jury in all classes of cases;[75] but merely as guaranteeing the continuance of the right unchanged as it existed either at common law or by statute in the particular

66. 4 Blackstone Comm. 349. See also Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

The right was not guaranteed in express terms by Magna Charta but the provision that no freeman should be hurt in either his person or property unless by the lawful judgment of his peers or by the law of the land was so construed. Proffatt Jury Tr. § 24.

67. Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403; McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750; State *v.* Holt, 90 N. C. 749, 47 Am. Rep. 544; Work *v.* State, 2 Ohio St. 296, 59 Am. Dec. 671.

68. See *infra*, III, B.

69. Sharp *v.* New York, 18 How. Pr. (N. Y.) 213; State *v.* Holt, 90 N. C. 749, 47 Am. Rep. 544; Work *v.* State, 2 Ohio St. 296, 59 Am. Dec. 671.

Denial or infringement of right see *infra*, V.

70. 4 Blackstone Comm. 349. See also Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

71. Provisions relating specifically to civil cases see *infra*, III, E, 1, b.

Provisions relating specifically to criminal cases see *infra*, III, E, 6, a.

72. Kimball *v.* Connor, 3 Kan. 414; Salt Creek Valley Turnpike Co. *v.* Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769; Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

73. *Alabama.*— Collins *v.* State, 88 Ala. 212, 7 So. 260; Tims *v.* State, 26 Ala. 165.

California.— Koppikus *v.* State Capitol Com'rs, 16 Cal. 248.

Florida.— Blanchard *v.* Raines, 20 Fla. 467; Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 48 Am. Dec. 178.

Indiana.— Anderson *v.* Caldwell, 91 Ind. 451, 46 Am. Rep. 613; Reynolds *v.* State, 61 Ind. 392; Allen *v.* Anderson, 57 Ind. 388.

Iowa.— *In re* Bresee, 82 Iowa 573, 48 N. W. 991.

Minnesota.— Whallon *v.* Bancroft, 4 Minn. 109.

Mississippi.— Isom *v.* Mississippi Cent. R. Co., 36 Miss. 300.

Nevada.— State *v.* McClear, 11 Nev. 39.

New Jersey.— Raphael *v.* Lane, 56 N. J. L. 108, 28 Atl. 421; State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

Rhode Island.— Crandall *v.* James, 6 R. I. 144.

South Dakota.— Belatti *v.* Pierce, 8 S. D. 456, 66 N. W. 1088.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Texas.— Cockrill *v.* Cox, 65 Tex. 669.

Wisconsin.— Norval *v.* Rice, 2 Wis. 22.

See 31 Cent. Dig. tit. "Jury," § 16.

74. *Delaware.*—Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. 389, 44 Am. Dec. 593.

Georgia.— Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248; Rouse *v.* State, 4 Ga. 136.

Illinois.— Gage *v.* Ewing, 107 Ill. 11; Seavey *v.* Seavey, 30 Ill. App. 625.

Missouri.— State *v.* Allen, 45 Mo. App. 515.

New York.— Devine *v.* People, 20 Hun 98; People *v.* Fisher, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402; People *v.* McCarthy, 45 How. Pr. 97.

Pennsylvania.— Byers *v.* Com., 42 Pa. St. 89.

South Carolina.— Charleston *v.* Stelges, 10 Rich. 438; State *v.* Simons, 2 Speers 761; White *v.* Kendrick, 1 Brev. 469.

See 31 Cent. Dig. tit. "Jury," § 16.

In Illinois the constitution formerly provided that "the right of trial by jury shall remain inviolate" (see Bullock *v.* Geomble, 45 Ill. 218; Ross *v.* Irving, 14 Ill. 171); the phrase "as heretofore enjoyed" being added by the constitution of 1870 (Gage *v.* Ewing, 107 Ill. 11).

75. Camp Phosphate Co. *v.* Anderson, (Fla. 1904) 37 So. 722; Blanchard *v.* Raines, 20 Fla. 467; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248; Kimball *v.* Connor, 3 Kan. 414.

state at the time of the adoption of the constitution.[76] In cases where the right existed prior to the constitution, it cannot be denied,[77] and this applies to cases of a similar character arising under statutes enacted subsequently to the adoption of the constitution.[78] There were, however, prior to the constitutions certain classes of cases which were triable without a jury;[79] and all cases previously triable without a jury may still be so tried;[80] and it is furthermore competent for the legislature to provide for a trial without a jury in cases similar to those in which such a trial was in use prior to the constitution.[81]

76. *Florida.*— Camp Phosphate Co. *v.* Anderson, (1904) 37 So. 722.

Georgia.— Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois.— Ross *v.* Irving, 14 Ill. 171; Mahoney *v.* People, 98 Ill. App. 241.

Indiana.— Baltimore, etc., R. Co. *v.* Ketring, 122 Ind. 5, 23 N. E. 527; Anderson *v.* Caldwell, 91 Ind. 451, 46 Am. Rep. 613; Allen *v.* Anderson, 57 Ind. 388.

Kansas.— Swarz *v.* Ramala, 63 Kan. 633, 66 Pac. 649.

Minnesota.— Whallon *v.* Bancroft, 4 Minn. 109.

New Jersey.— State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

New York.— People *v.* Fisher, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

Pennsylvania.— Byers *v.* Com., 42 Pa. St. 89.

South Carolina.— Charleston *v.* Stelges, 10 Rich. 438.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Wisconsin.— Gaston *v.* Babcock, 6 Wis. 503; Norval *v.* Rice, 2 Wis. 22.

See 31 Cent. Dig. tit. "Jury," § 16.

77. *Florida.*— Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 48 Am. Dec. 178.

Georgia.— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

Indiana.— Reynolds *v.* State, 61 Ind. 392.

Iowa.— Reed *v.* Wright, 2 Greene 15.

Kentucky.— Carson *v.* Com., 1 A. K. Marsh. 290; Stidger *v.* Rogers, Ky. Dec. 52.

New Hampshire.— East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

New Jersey.— Raphael *v.* Lane, 56 N. J. L. 108, 28 Atl. 421.

New York.— Kinne *v.* Kinne, 2 Thomps. & C. 393.

Pennsylvania.— Rhines *v.* Clark, 51 Pa. St. 96.

South Carolina.— White *v.* Kendrick, 1 Brev. 469.

Texas.— Cockrill *v.* Cox, 65 Tex. 669.

See 31 Cent. Dig. tit. "Jury," § 16.

The existence of a mere local law providing for a jury trial in a particular class of cases at the time of the adoption of the constitution does not prevent the legislature from subsequently passing a general law applicable to the whole state providing for the trial of such cases without a jury. Riggs *v.* Shannon, 16 N. Y. Suppl. 939, 21 N. Y. Civ. Proc. 434, 27 Abb. N. Cas. 456.

78. Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611; Colon *v.* Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; New York Fire Dept. *v.* Harrison, 2 Hilt. (N. Y.) 455, 9 Abb. Pr. 1, 17 How. Pr. 273, 18 How. Pr. 181; Plimpton *v.* Somerset, 33 Vt. 283.

79. *Arkansas.*— State *v.* Johnson, 26 Ark. 281.

New York.— Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108].

Oklahoma.— Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075.

Rhode Island.— Crandall *v.* James, 6 R. I. 144.

Texas.— Janes *v.* Reynolds, 2 Tex. 250.

See 31 Cent. Dig. tit. "Jury," § 16.

80. *Arkansas.*— Williams *v.* Citizens, 40 Ark. 290.

Florida.— Blanchard *v.* Raines, 20 Fla. 467.

Illinois.— Ross *v.* Irving, 14 Ill. 171.

Indiana.— Allen *v.* Anderson, 57 Ind. 388.

Kentucky.— Caldwell *v.* Com., Ky. Dec. 129.

Maine.— Coffin *v.* Coffin, 55 Me. 361.

Massachusetts.— Bigelow *v.* Bigelow, 120 Mass. 320; Shirley *v.* Lunenburgh, 11 Mass. 379.

Minnesota.— Whallon *v.* Bancroft, 4 Minn. 109.

New Jersey.— State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

New York.— Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; People *v.* Fisher, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

Pennsylvania.— Byers *v.* Com., 42 Pa. St. 89.

South Carolina.— Charleston *v.* Stelges, 10 Rich. 438; New Town Cut *v.* Seabrook, 2 Strobh. 560.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Vermont.— Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

Virginia.— Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 52 Am. St. Rep. 804.

See 31 Cent. Dig. tit. "Jury," § 16.

81. *Illinois.*— Frost *v.* People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; People

3. Application of Federal Constitution. The provisions of the federal constitution apply only to the federal courts,[82] and to common-law actions as distinguished from equity and admiralty.[83] The provisions do not prohibit the several states from regulating and restricting the right of trial by jury in the state courts as they may deem proper.[84] A trial by jury in a state court is not a privilege or immunity which the states are forbidden to abridge,[85] nor does the provision that a person cannot be deprived of his property without due process of law imply that all trials in state courts must be by a jury.[86] This requirement is met if the trial is had according to the settled course of judicial proceedings as regulated by the law of the state.[87]

C. Persons Entitled. The constitutional provisions guaranteeing the right of trial by jury do not extend the right to any class of persons not so entitled prior to the adoption of the constitutions,[88] nor do they confer upon municipal corporations the right to claim a jury trial;[89] but the legislature may extend the

v. Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634.

Kentucky.— Harris *v.* Wood, 6 T. B. Mon. 641.

New Jersey.— Carter *v.* Camden Dist. Ct., 49 N. J. L. 600, 10 Atl. 108.

New York.— Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108].

South Carolina.— Frazee *v.* Beattie, 26 S. C. 348, 2 S. E. 125.

See 31 Cent. Dig. tit. "Jury," § 16.

The constitution does not refer to particular cases but to classes of cases. Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108].

82. See *infra*, III, D, 4.

83. Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 100 Fed. 681; Motte *v.* Bennett, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642.

84. *Alabama.*— Boring *v.* Williams, 17 Ala. 510.

Connecticut.— Colt *v.* Eves, 12 Conn. 243.

Illinois.— Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692.

Louisiana.— State *v.* Kennard, 25 La. Ann. 238.

New York.— *In re* Newcomb, 18 N. Y. Suppl. 16; Jackson *v.* Wood, 2 Cow. 819; Murphy *v.* People, 2 Cow. 815.

Rhode Island.— Shaw *v.* Silverstein, 21 R. I. 500, 44 Atl. 931; *In re* New State House, 19 R. I. 326, 33 Atl. 448; State *v.* Paul, 5 R. I. 185.

Utah.— *In re* McKee, 19 Utah 231, 57 Pac. 23.

Vermont.— Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

West Virginia.— *Ex p.* McNeeley, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

United States.— Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Edwards *v.* Elliott, 21 Wall. 532, 22 L. ed. 487; Williams *v.* Hert, 110 Fed. 166.

See 31 Cent. Dig. tit. "Jury," § 23.

85. Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678.

86. Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678.

87. Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678.

88. Harris *v.* Wood, 6 T. B. Mon. (Ky.) 641; Caldwell *v.* Com., Ky. Dec. 129; State *v.* Dick, 4 La. Ann. 182; Dowell *v.* Boyd, 3 Sm. & M. (Miss.) 592.

The state has no constitutional right to a jury trial in condemnation proceedings where no such right existed at the adoption of the constitution. *In re* New State House, 19 R. I. 326, 33 Atl. 448.

89. *Massachusetts.*— Stone *v.* Charlestown, 114 Mass. 214.

New Hampshire.— Kimball *v.* Bridgewater, 62 N. H. 694; Wooster *v.* Plymouth, 62 N. H. 193.

New Jersey.— State *v.* Jersey City, 38 N. J. L. 259.

New York.— Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352. But see Baldwin *v.* New York, 45 Barb. 359 [*affirming* 42 Barb. 549]; People *v.* Haws, 37 Barb. 440, 15 Abb. Pr. 115.

Ohio.— See Champaign County Com'rs *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 73 Am. St. Rep. 718, 48 L. R. A. 738.

Pennsylvania.— Dunmore's Appeal, 52 Pa. St. 374.

See 31 Cent. Dig. tit. "Jury," § 17.

Where municipal corporations are divided or their boundaries changed the legislature may provide for the apportionment of the property or indebtedness of such municipal corporations among the new divisions without provision for a trial by jury. Stone *v.* Charlestown, 114 Mass. 214; Dunmore's Appeal, 52 Pa. St. 374.

Adjustment of claims against municipal corporation.— It has been held that the legislature may provide for the adjustment of claims against a municipal corporation by commissioners or arbitrators without allowing the municipality a jury trial (State *v.* Jersey City, 38 N. J. L. 259; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352; Dunmore's Appeal, 52 Pa. St.

right to cases where it could not otherwise be claimed.[90] A person who is made a party by a petition of intervention has the same right to demand a jury trial as the original plaintiff or defendant.[91]

D. Right in Particular Courts — 1. In General. A trial by jury may be had in all courts of record proceeding according to the course of the common law;[92] but the constitutional provisions preserving the right of trial by jury do not affect those tribunals which at the time the provisions were adopted were accustomed to proceed without the intervention of a jury;[93] and a jury trial cannot be had unless by a jury of less than twelve in justices' and similar inferior courts,[94] except where a trial by a common-law jury in such courts is provided for by statute;[95] nor can a jury trial be had before a board of arbitration or other body not constituting a court within the constitutional and common-law sense of such a tribunal.[96]

2. Probate Courts.[97] A trial by jury cannot be had in a probate court unless expressly authorized by statute,[98] since such courts having always proceeded without the intervention of a jury are not within the application of the constitutional provisions relating to jury trial;[99] but in some jurisdictions the right to a jury trial has been conferred by statute.[1]

374. But see Baldwin *v.* New York, 42 Barb. (N. Y.) 549; People *v.* Haws, 37 Barb. (N. Y.) 440, 15 Abb. Pr. 115); but it seems that private parties interested in such claims could not be compelled to submit to the decision of such a tribunal (see Darlington *v.* New York, *supra*).

90. See *In re* New State House, 19 R. I. 326, 33 Atl. 448.

91. Lacroix *v.* Menard, 3 Mart. N. S. (La.) 339, 15 Am. Dec. 161.

92. Vaughn *v.* Scade, 30 Mo. 600.

93. Seavey *v.* Seavey, 30 Ill. App. 625; Wood *v.* Tallman, 1 N. J. L. 153; New Town Cut *v.* Seabrook, 2 Strobh. (S. C.) 560.

Courts of admiralty see Admiralty, 1 Cyc. 887.

Courts of equity see *infra*, III, E, 2, b; and Equity, 16 Cyc. 413.

Probate courts see *infra*, III, D, 2.

94. *Connecticut.*— Goddard *v.* State, 12 Conn. 448.

Maryland.— State *v.* Glenn, 54 Md. 572.

New York.— People *v.* Justices Ct. Spec. Sess., 74 N. Y. 406; Knight *v.* Campbell, 62 Barb. 16.

Ohio.— Inwood *v.* State, 42 Ohio St. 186.

Pennsylvania.— Byers *v.* Com., 42 Pa. St. 89.

See 31 Cent. Dig. tit. "Jury," § 19.

In North Carolina the acts of 1846, 1844, 1820, entirely abolished trials by jury in certain county courts and conferred exclusive jurisdiction upon the superior courts of actions where the intervention of a jury was necessary. Harriss *v.* Hampton, 52 N. C. 597; Thompson *v.* Floyd, 47 N. C. 313.

95. Ward *v.* Edmunds, 110 Mass. 340; MacKenzie *v.* Gilbert, 69 N. J. L. 184, 54 Atl. 524; State *v.* Nash, 51 S. C. 319, 28 S. E. 946; State *v.* Larkins, 44 S. C. 362, 22 S. E. 409; Beaufort *v.* Ohlandt, 24 S. C. 158.

96. Barker *v.* Jackson, 2 Fed. Cas. No. 989, 1 Paine 559.

97. Right on appeal see *infra*, III, E, 7, c.

98. *Alabama.*— Reynolds *v.* Reynolds, 11 Ala. 1023; Willis *v.* Willis, 9 Ala. 330.

California.— Moore's Estate, 72 Cal. 335, 13 Pac. 880.

Florida.— Lavey *v.* Doig, 25 Fla. 611, 6 So. 259.

Illinois.— Moody *v.* Found, 208 Ill. 78, 69 N. E. 831; Seavey *v.* Seavey, 30 Ill. App. 625.

Iowa.— Duffield *v.* Walden, 102 Iowa 676, 72 N. W. 278.

Kentucky.— Wills *v.* Lochnane, 9 Bush 547.

Maine.— Bradstreet *v.* Bradstreet, 64 Me. 204.

Massachusetts.— Fay *v.* Vanderford, 154 Mass. 498, 28 N. E. 681.

Missouri.— Bradley *v.* Woerner, 46 Mo. App. 371.

New Jersey.— Wood *v.* Tallman, 1 N. J. L. 153.

Vermont.— *In re* Welch, 69 Vt. 127, 37 Atl. 250.

United States.— Esterly *v.* Rua, 122 Fed. 609, 58 C. C. A. 548.

See 31 Cent. Dig. tit. "Jury," § 20.

99. Moore's Estate, 72 Cal. 335, 13 Pac. 880; Lavey *v.* Doig, 25 Fla. 611, 6 So. 259; Seavey *v.* Seavey, 30 Ill. App. 625; Wood *v.* Tallman, 1 N. J. L. 153.

1. *In re* Atwood, 2 App. Cas. (D. C.) 74; Mascall *v.* Drainage Dist. Com'rs, 122 Ill. 620, 14 N. E. 47; Clem *v.* Durham, 14 Ind. 263; Pegg *v.* Warford, 4 Md. 385; Barroll *v.* Reading, 5 Harr. & J. (Md.) 175.

In Alabama and Missouri a jury trial cannot be had except as to certain specified matters. Reynolds *v.* Reynolds, 11 Ala. 1023; Bradley *v.* Woerner, 46 Mo. App. 371.

In Indiana a jury trial of an issue of fact in a probate court is a matter of right. Clem *v.* Durham, 14 Ind. 263.

In Iowa the act giving the circuit court jurisdiction in probate matters provided for a jury trial in the establishment of claims against an estate (Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82); but a later statute

3. Military Tribunals.[2] It was not the intention of the constitutions to deprive the legislature of the power of constituting military tribunals for the trial of military offenses,[3] and a jury trial cannot be demanded in a trial by a court-martial for a military offense.[4]

4. Courts Within Application of Federal Constitution. The provisions of the federal constitution with regard to trial by jury have no application to trials or proceedings in the state courts, but relate only to proceedings in the courts of the United States,[5] which, however, include the courts of the District of Columbia[6] and of the territories.[7] The provisions do not apply to trials of American citizens before consular tribunals of the United States for offenses committed in a foreign country.[8] On the removal of cases from state to federal courts the parties have the same rights as to trial by jury as in cases brought originally in those courts.[9]

E. Right in Particular Actions or Proceedings[10] **— 1. In Civil Actions Generally — a. In General.** In the absence of express constitutional or statutory provision a jury trial may be demanded in all ordinary actions at law where issues of fact arise upon the pleadings,[11] or where the action is to recover a money judg-

providing only for a jury trial where the probate of a will is contested is construed as intending to confine the right to the case specified and not to include cases of disputed claims (Duffield *v.* Walden, 102 Iowa 676, 72 N. W. 278).

On an appeal to the county court at a probate term from a decision of drainage commissioners a jury trial may be had. Mascall *v.* Drainage Dist. Com'rs, 122 Ill. 620, 14 N. E. 47.

Where the court is authorized to submit issues to a jury only in certain cases or under certain circumstances, the facts must be set out in the record so as to show the propriety of the order and enable an appellate court to revise it. Reynolds *v.* Reynolds, 11 Ala. 1023; Willis *v.* Willis, 9 Ala. 330.

2. **Courts-martial** generally see Army and Navy, 3 Cyc. 843 *et seq.*

3. Merriman *v.* Bryant, 14 Conn. 200, holding further that a statute exempting military officers from actions at law for imposing fines for neglect of military duties is not unconstitutional as impairing the right of trial by jury.

4. Rawson *v.* Brown, 18 Me. 216; State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

5. *Alabama.*— Boring *v.* Williams, 17 Ala. 510.

Colorado.— Huston *v.* Wadsworth, 5 Colo. 213.

Connecticut.— Colt *v.* Eves, 12 Conn. 243.

Georgia.— Foster *v.* Jackson, 57 Ga. 206.

Indiana.— Baker *v.* Gordon, 23 Ind. 204.

Louisiana.— Joseph *v.* Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; State *v.* Carro, 26 La. Ann. 377; Woodruff *v.* Lobdell, 25 La. Ann. 658; State *v.* Kennard, 25 La. Ann. 238; Maurin *v.* Martinez, 5 Mart. 432; Territory *v.* Hattick, 2 Mart. 87.

New Mexico.— Walker *v.* New Mexico, etc., R. Co., 7 N. M. 282, 34 Pac. 43.

New York.— *In re* Newcomb, 18 N. Y. Suppl. 16; Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622; Jackson *v.* Wood, 2 Cow. 819; Murphy *v.* People, 2 Cow. 815.

Rhode Island.— *In re* New State House, 19 R. I. 326, 33 Atl. 448.

Utah.— *In re* Maxwell, 19 Utah 495, 57 Pac. 412.

Vermont.— Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

United States.— Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Edwards *v.* Elliott, 21 Wall. 532, 22 L. ed. 487; Williams *v.* Hert, 110 Fed. 166; *In re* King, 51 Fed. 434; Kansas *v.* Bradley, 26 Fed. 289.

See 31 Cent. Dig. tit. "Jury," §§ 21, 23.

6. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873; Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223. *Compare* Matter of Fry, 3 Mackey (D. C.) 135.

7. People *v.* Havird, 2 Ida. (Hasb.) 531, 25 Pac. 294; Bradford *v.* Territory, 1 Okla. 366, 34 Pac. 66; Thompson *v.* Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. ed. 1061; Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 761. *Compare* Walker *v.* New Mexico, etc., R. Co., 7 N. M. 282, 34 Pac. 43.

In the island of Porto Rico upon its cession to the United States by Spain the constitution of the United States, including the right of trial by jury, became the supreme law of the land as soon as the cession was complete. *Ex p.* Ortiz, 100 Fed. 955, holding, however, that prior to the time when the treaty went into effect and while a state of war existed in the island, or in other words until the exchange of ratifications of the treaty, a trial by a military tribunal was valid.

8. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185].

9. See Phillips *v.* Moore, 100 U. S. 208, 25 L. ed. 603.

10. In suits for divorce see Divorce, 15 Cyc. 704.

In admiralty see Admiralty, 1 Cyc. 887.

11. *California.*— Taylor *v.* Ford, 92 Cal. 419, 28 Pac. 441, (1890) 24 Pac. 942.

Nebraska.— Lett *v.* Hammond, 59 Nebr. 339, 80 N. W. 1042.

ment and no equitable relief is asked or necessary.[12] This rule applies only to what are properly actions at law as distinguished from equitable actions[13] and special proceedings,[14] and applies only where issues of fact arise upon the pleadings.[15] The rule does not apply where the only issues are issues of law,[16] or issues to be determined by an inspection of the record,[17] nor to proceedings after judgment,[18] or to the hearing of motions,[19] exceptions,[20] and many other proceedings arising in and incidental to the determination of civil actions.[21]

North Carolina.— Andrews *v.* Pritchett, 66 N. C. 387.

Ohio.— Clarke *v.* Huff, 6 Ohio Dec. (Reprint) 771, 8 Am. L. Rec. 26.

Pennsylvania.— Glone *v.* Arleth, 162 Pa. St. 550, 29 Atl. 862.

South Carolina.— Gregory *v.* Ducker, 31 S. C. 141, 9 S. E. 780.

Washington.— Johnson *v.* Goodtime, 1 Wash. Terr. 484.

See 31 Cent. Dig. tit. "Jury," § 27 *et seq.*

In particular actions.— A jury trial may be demanded in actions of claim and delivery (Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499), actions on penal bonds (Galway *v.* State, 93 Ind. 161), injunction bonds (Parker *v.* Slaughter, 24 Iowa 252), actions for contribution by one surety against his cosurety (Michael *v.* Allbright, 126 Ind. 172, 25 N. E. 902), actions by an assignee of a chose in action where the right to sue does not depend upon principles of equity but upon statutory provisions (McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208), actions for rent against a party claiming no title to the premises (Bardwell *v.* Clare, 47 Iowa 297), actions for trespass on real property (Kentucky Land, etc., Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743), and where matter is pleaded in bar to a petition for an assignment of dower (Righton *v.* Righton, 1 Mill (S. C. 130).

12. *Arkansas.*— Weaver *v.* Arkansas Nat. Bank, 73 Ark. 462, 84 S. W. 510.

California.— Platt *v.* Havens, 119 Cal. 244, 51 Pac. 342.

Minnesota.— Nordeen *v.* Buck, 79 Minn. 352, 82 N. W. 644.

Nebraska.— Lett *v.* Hammond, 59 Nebr. 339, 80 N. W. 1042.

South Carolina.— Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

Wisconsin.— South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82.

See 31 Cent. Dig. tit. "Jury," § 27 *et seq.*

13. See *infra*, III, E, 2, a.

14. Koppikus *v.* State Capitol Com'rs, 16 Cal. 248; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

Civil proceedings other than actions see *infra*, III, E, 4.

15. People *v.* Blake, 19 Cal. 579; Koppikus *v.* State Capitol Com'rs, 16 Cal. 248.

16. Harrison *v.* Chiles, 3 Litt. (Ky.) 194; Wilson *v.* Forsyth, 16 How. Pr. (N. Y.) 448; Scranton School Dist. *v.* Simpson, 133 Pa. St. 202, 19 Atl. 359. See also Averill *v.* Chadwick, 153 Mass. 171, 26 N. E. 441.

Where the parties state to the court that the only matters in issue are the priorities of certain alleged liens, the refusal of a jury trial is not error, although the issues joined by the pleadings would require a jury trial on demand. Wiscomb *v.* Cubberly, 51 Kan. 580, 33 Pac. 320.

17. Johnston *v.* Atwood, 2 Stew. (Ala.) 225; State *v.* Martin, 38 W. Va. 568, 18 S. E. 748; Amory *v.* Amory, 26 Wis. 152.

18. Banning *v.* Taylor, 24 Pa. St. 289.

On rule to show cause whether a fieri facias pluries should not be issued there is no right to a jury trial. Hobson *v.* Bein, 2 Rob. (La.) 109.

19. *Indiana.*— Logansport, etc., R. Co. *v.* Patton, 51 Ind. 487.

Maryland.— Gittings *v.* State, 33 Md. 458.

Missouri.— Hensley *v.* Baker, 10 Mo. 157; Schaeffer *v.* Phœnix Brewery Co., 4 Mo. App. 115.

New York.— McLean *v.* Tompkins, 18 Abb. Pr. 24.

North Carolina.— Pasour *v.* Lineberger, 90 N. C. 159.

Pennsylvania.— Banning *v.* Taylor, 24 Pa. St. 289.

Wisconsin.— Amory *v.* Amory, 26 Wis. 152.

See 31 Cent. Dig. tit. "Jury," § 27 *et seq.*

But see Drea *v.* Carrington, 32 Ohio St. 595, holding that where material averments of the petition in a cause of action triable by jury are put in issue by a motion to dismiss the action as to certain of defendants, the issues of fact arising on such motion are triable by jury.

Particular motions.— There is no right to a jury trial of the facts involved on a motion to set aside a judgment by default (Quick *v.* Lawrence Nat. Bank, 10 Ind. App. 523, 38 N. E. 73), or a motion for a new trial (Houston *v.* Bruner, 59 Ind. 25; Carpenter *v.* Brown, 50 Iowa 451), or a motion to discharge an order of arrest in arrest and bail proceedings (Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075).

On a motion for execution against a stockholder under the Missouri statute, after the return of an execution unsatisfied against the corporation, there is no right to a jury trial. Erskine *v.* Lowenstein, 11 Mo. App. 595; Schaeffer *v.* Phœnix Brewery Co., 4 Mo. App. 115.

The court may in its discretion submit questions to a jury where the motion involves matters of difficulty and importance. McLean *v.* Tompkins, 18 Abb. Pr. (N. Y.) 24.

20. McGehee *v.* Brown, 3 La. Ann. 272.

21. See *infra*, III, E, 5.

b. Constitutional Provisions. In addition to the general constitutional provisions previously stated,[22] there are in some jurisdictions constitutional provisions providing for a jury trial in "all civil cases,"[23] or in "all cases at law without regard to the amount in controversy."[24] These provisions do not extend the right to all cases which are not criminal;[25] but merely guarantee the continuance of the right as it previously existed in what were regarded as civil actions and triable by jury at the time of the adoption of the constitution.[26]

c. Statutory Provisions. Since the constitutional guaranties relating to jury trial are merely restrictive,[27] the legislature may provide for a jury trial in cases where it could not otherwise be claimed as a constitutional right;[28] and in many jurisdictions there are statutes providing expressly in what actions or with regard to what issues a jury trial may be demanded as a matter of right.[29] In cases where the right to a jury trial is governed by statutory provision the right is determined by the law in force when the action is commenced, and is not affected by a subsequent change in the statute.[30]

d. Amount or Value in Controversy. The federal constitution provides for a trial by jury where the value in controversy is over twenty dollars,[31] but the provision applies only to actions at common law as distinguished from suits in equity and admiralty,[32] and has no application to actions in state courts.[33] There are also in a number of the states constitutional or statutory provisions regulating the right of trial by jury according to the amount in controversy, the amounts varying in the different jurisdictions.[34]

22. See *supra*, III, B.

23. Anderson *v.* Caldwell, 91 Ind. 451, 46 Am. Rep. 613; Reynolds *v.* State, 61 Ind. 392; Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

24. *Arkansas.*— State *v.* Johnson, 26 Ark. 281.

Illinois.— Whitehurst *v.* Coleen, 53 Ill. 247; Bullock *v.* Geomble, 45 Ill. 218.

Minnesota.— Whallon *v.* Bancroft, 4 Minn. 109.

South Dakota.— Belatti *v.* Pierce, 8 S. D. 456, 66 N. W. 1088.

Wisconsin.— Mead *v.* Walker, 17 Wis. 189.

See 31 Cent. Dig. tit. "Jury," § 27½.

25. Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558.

26. *Arkansas.*— State *v.* Johnson, 26 Ark. 281.

Illinois.— Whitehurst *v.* Coleen, 53 Ill. 247.

Indiana.— Wright *v.* Fultz, 138 Ind. 594, 38 N. E. 175.

Minnesota.— Whallon *v.* Bancroft, 4 Minn. 109.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 4 Pac. 158.

Wisconsin.— Mead *v.* Walker, 17 Wis. 189.

See 31 Cent. Dig. tit. "Jury," § 27½.

27. See *supra*, III, B, 2.

28. Redinbo *v.* Fretz, 99 Ind. 458; Hopkins *v.* Greenburg, etc., Turnpike Co., 46 Ind. 187; Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558; Gunsaullus *v.* Pettit, 46 Ohio St. 27, 17 N. E. 231.

29. *Kansas.*— Smith *v.* Wise, 44 Kan. 742, 25 Pac. 204; McCardell *v.* McNay, 17 Kan. 433.

Kentucky.— Smith *v.* Moberly, 15 B. Mon. 70.

Minnesota.— Schmidt *v.* Schmidt, 47 Minn. 451, 50 N. W. 598.

New York.— Clark *v.* Blumenthal, 52 N. Y. Super. Ct. 355.

Ohio.— Gunsaullus *v.* Pettit, 46 Ohio St. 27, 17 N. E. 231.

South Carolina.— Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 781; Rollin *v.* Whipper, 17 S. C. 32.

See 31 Cent. Dig. tit. "Jury," § 28 *et seq.*

Statutory provisions as to actions for recovery of money only or specific real or personal property see *infra*, III, E, 1, h.

30. Wormley *v.* Hamburg, 46 Iowa 144; Wadsworth *v.* Wadsworth, 40 Iowa 448.

31. Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499; Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732; Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 761; Motte *v.* Bennett, 17 Fed. Cas. No. 9,884; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,440, 3 McLean 539.

The phrase "common law" found in this clause is used in contradistinction to equity, admiralty, and maritime jurisdiction, and may in a just sense be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever particular form they may assume to settle legal rights. Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732.

Suits against the government are not suits at common law within the meaning of this provision. McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189.

32. Motte *v.* Bennett, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642.

33. Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692. See also *supra*, III, D, 4.

34. *Alabama.*— Lehman *v.* Hudmon, 79 Ala. 532; Witherington *v.* Brantley, 18 Ala. 197.

e. Actions Sounding in Tort. Actions sounding in tort were triable by jury at common law and are within the application of the constitutional provisions,[35] and in such cases a compulsory reference cannot be ordered.[36]

f. Actions to Enforce Penalties and Forfeitures.[37] Actions to enforce penalties and forfeitures are ordinarily triable by jury.[38] On informations in the United States courts to enforce the forfeiture of property or vessels seized for violation of the internal revenue laws, or laws of impost, navigation, and trade, the case is a common-law action and triable by jury where the seizure is made on land,[39] or on non-navigable waters;[40] but if the seizure is made on navigable waters, the case belongs to the admiralty or maritime jurisdiction and is triable by the court without a jury.[41] The two jurisdictions, although vested in the same court, are distinct and separate,[42] and depend upon the place of seizure.[43] On a libel or information to enforce a statutory penalty for a violation of the revenue laws, if it is brought against the vessel alone no jury is necessary;[44] but to enforce such

Maryland.— Capron *v.* Devries, 83 Md. 220, 34 Atl. 251.

Massachusetts.— Trees *v.* Rushworth, 9 Gray 47.

New Hampshire.— Lee *v.* Dow, 71 N. H. 326, 51 Atl. 1072.

New Jersey.— Raphael *v.* Lane, 56 N. J. L. 108, 28 Atl. 421.

South Carolina.— Charleston *v.* Stelges, 10 Rich. 438.

Texas.— Davis *v.* Davis, 34 Tex. 15.

United States.— Miles *v.* James, 17 Fed. Cas. No. 9,543*a*, Hempst. 98.

See 31 Cent. Dig. tit. "Jury," § 25.

The amount is determined by the *ad damnum* of the writ. Trees *v.* Rushworth, 9 Gray (Mass.) 47.

If the amount is increased by accruing interest to above the limit prescribed by statute pending an appeal from the judgment of a justice, the trial should be by jury. McGrew *v.* Adams, 2 Stew. (Ala.) 502.

35. Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194; People *v.* Wood, 54 Hun (N. Y.) 438, 7 N. Y. Suppl. 712; Lewis *v.* Varnum, 12 Abb. Pr. (N. Y.) 305; Plimpton *v.* Somerset, 33 Vt. 283.

An action for damages for breach of warranty is triable by jury. Harrisburg Car Mfg. Co. *v.* Sloan, 120 Ind. 156, 21 N. E. 1088.

Where one of defendants is charged with aiding or abetting the other in the commission of the wrong or injury he has the right to demand a trial by jury. Fonda *v.* Broom, 12 La. Ann. 768.

36. People *v.* Wood, 54 Hun (N. Y.) 438, 7 N. Y. Suppl. 712; Plimpton *v.* Somerset, 33 Vt. 283.

Compulsory reference as infringement of right to jury trial see *infra*, V, B, 1, e.

37. **Summary proceedings** see *infra*, III, E, 4, v.

38. Harman *v.* State Bd. of Pharmacy, 67 N. J. L. 117, 50 Atl. 662; Colon *v.* Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609.

In a suit brought by a mortgagor to recover the statutory penalty for failing to discharge of record a mortgage which has been fully satisfied, either party has an absolute right to a trial by jury. Stevens *v.* Home Sav., etc., Assoc., 5 Ida. 741, 51 Pac. 779, 986.

Seizures under fishery laws.— It has been held that a statute providing for the seizure and sale of a boat or vessel used by one person in interfering with the oysters or shell-fish of another without a jury trial is unconstitutional. Colon *v.* Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609. But See The Ann, 8 Fed. 923, 5 Hughes 292, holding that a statute providing for the forfeiture and sale of a vessel used in dredging for oysters without a license, upon failure of the owner to pay a fine imposed by a justice without a jury, is not unconstitutional.

39. Garnhart *v.* U. S., 16 Wall. (U. S.) 162, 21 L. ed. 275; The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644; U. S. *v.* One Hundred and Thirty Barrels of Whiskey, 27 Fed. Cas. No. 15,938, 1 Bond 587.

Property used in aid of rebellion.— On an information to enforce a seizure of real and personal property used in aid of rebellion the case is to be tried by a jury. U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344.

40. See U. S. *v.* One Hundred and Thirty Barrels of Whiskey, 27 Fed. Cas. No. 15,938, 1 Bond 587.

41. U. S. *v.* La Vengeance, 3 Dall. (Pa.) 297, 1 L. ed. 610; The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125; Whelan *v.* U. S., 7 Cranch (U. S.) 112, 3 L. ed. 286; U. S. *v.* The Betsey & Charlotte, 4 Cranch (U. S.) 443, 2 L. ed. 673.

42. The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644.

43. U. S. *v.* The Betsey & Charlotte, 4 Cranch (U. S.) 443, 2 L. ed. 673. But see Clark *v.* U. S., 5 Fed. Cas. No. 2,837, 2 Wash. 519, holding that if the entire transaction out of which the cause of forfeiture arises is at sea it is a case exclusively of admiralty jurisdiction regardless of the place of seizure.

44. The Paolina S., 11 Fed. 171, 18 Blatchf. 315; U. S. *v.* The Queen, 27 Fed. Cas. No. 16,107, 4 Ben. 237 [*affirmed* in 27 Fed. Cas. No. 16,108, 11 Blatchf. 416].

a penalty against the master of the vessel there must be a trial by jury, the action being a "suit at common law" within the application of the federal constitution.[45]

g. Actions Involving Title to Land. While courts of equity have jurisdiction to protect and enforce equitable titles,[46] and may in certain cases try suits to quiet title or remove cloud without the intervention of a jury,[47] questions as to the legal title to land are of right triable by jury,[48] and this right cannot be abrogated by statute[49] or avoided by bringing an action which is in effect an action of ejectment in the form of a suit in equity.[50]

h. Actions For Recovery of Money Only or of Specific Real or Personal Property. In a number of states there are statutes providing that issues of fact in actions for recovery of money only or specific real or personal property are triable by jury.[51] The application of these statutes must be determined from the essen-

45. U. S. *v.* The Queen, 27 Fed. Cas. No. 16,107, 4 Ben. 237 [*affirmed* in 27 Fed. Cas. No. 16,108, 11 Blatchf. 416].

46. See EQUITY, 16 Cyc. 88, 89.

47. See *infra*, III, E, 2, l.

48. *Arkansas.*— Cole *v.* Mettee, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945.

California.— Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

Michigan.— Tabor *v.* Cook, 15 Mich. 322.

Nevada.— Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

New York.— Meigs *v.* Willis, 66 How. Pr. 466.

Pennsylvania.— Haines' Appeal, 73 Pa. St. 169; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530.

South Carolina.— Marshall *v.* Pitts, 39 S. C. 390, 17 S. E. 831; St. Philips Church *v.* Zion Presb. Church, 23 S. C. 297; De Walt *v.* Kinard, 19 S. C. 286.

South Dakota.— Nelson *v.* Jordeth, 15 S. D. 46, 87 N. W. 140.

United States.— Coles *v.* Northrup, 66 Fed. 831, 14 C. C. A. 138.

See 31 Cent. Dig. tit. "Jury," § 42.

In an action to foreclose a mortgage where a person claiming a paramount adverse legal title is made a defendant, he is entitled to have such title tried by jury. Meigs *v.* Willis, 66 How. Pr. (N. Y.) 466; Sale *v.* Meggett, 25 S. C. 72.

49. Tabor *v.* Cook, 15 Mich. 322; Haines' Appeal, 73 Pa. St. 169; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530.

50. Haggin *v.* Kelly, 136 Cal. 481, 69 Pac. 140; Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Chandler *v.* Graham, 123 Mich. 327, 82 N. W. 814; Marshall *v.* Pitts, 39 S. C. 390, 17 S. E. 831; Coles *v.* Northrup, 66 Fed. 831, 14 C. C. A. 138.

A defendant in possession and claiming title cannot be divested of that possession without a jury trial. Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

In an equity case, if defendant's title, as alleged is inferior to that of plaintiff, so that as a matter of law it would not if established as alleged by the verdict of the jury defeat plaintiff's claim, the question of title cannot be said to be involved so as to make its determination by a jury a matter of right. See Sale *v.* Meggett, 25 S. C. 72.

51. *California.*— Newman *v.* Duane, 89 Cal. 597, 27 Pac. 66.

Kentucky.— Smith *v.* Moberly, 15 B. Mon. 70.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.

Missouri.— Benoist *v.* Thomas, 121 Mo. 660, 27 S. W. 609; Ragan *v.* McCoy, 29 Mo. 356; New Harmony Lodge No. 71, I. O. O. F. *v.* Kansas City, etc., R. Co., 100 Mo. App. 407, 74 S. W. 5; Routt *v.* Milner, 57 Mo. App. 50; Donovan *v.* Barnett, 27 Mo. App. 460.

Nebraska.— Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066; Dohle *v.* Omaha Foundry, etc., Co., 15 Nebr. 436, 19 N. W. 644.

New York.— Glenn *v.* Lancaster, 109 N. Y. 641, 16 N. E. 484, 21 Abb. N. Cas. 272; King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547; Bowery Bank *v.* Martin, 16 N. Y. Suppl. 73; Wood *v.* Simonson, 12 N. Y. St. 512; Rockwell *v.* Hartford F. Ins. Co., 4 Abb. Pr. 179.

North Dakota.— Avery Mfg. Co. *v.* Smith, (1905) 103 N. W. 410.

Ohio.— Gunsaullus *v.* Pettit, 46 Ohio St. 27, 17 N. E. 231; Chapman *v.* Lee, 45 Ohio St. 356, 13 N. E. 736; Maginnis *v.* Schwab, 24 Ohio St. 336; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Riddle *v.* McBeth, 2 Ohio Dec. (Reprint) 606, 4 West. L. Month. 153.

Oklahoma.— Sherman *v.* Randolph, 13 Okla. 224, 74 Pac. 102.

South Carolina.— Osborne *v.* Osborne, 41 S. C. 195, 19 S. E. 494; Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711.

Washington.— *In re* Murphy, 30 Wash. 9, 70 Pac. 109; *In re* Gorkow, 28 Wash. 65, 68 Pac. 174.

Wyoming.— Friend *v.* Oggshaw, 3 Wyo. 59, 31 Pac. 1047.

See 31 Cent. Dig. tit. "Jury," § 67.

New York Code Civ. Proc. § 968, provides for a jury trial unless waived or a reference ordered in: (1) An action in which the complaint demands judgment for a sum of money only; (2) an action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel. Clark *v.* Blumenthal, 52 N. Y. Super. Ct. 355.

tial character of the action and not alone by the prayer for relief or the form in which the action is brought.[52] If the issues are purely legal and no equitable relief is asked for the statutes of course apply,[53] and if the action is primarily for one of the purposes mentioned it is triable by jury notwithstanding the complaint also asks for equitable relief,[54] or the right of action is based upon equitable principles;[55] but if the suit is primarily for equitable relief and the money judgment or other legal relief demanded is merely incidental to and dependent upon the granting of the equitable relief asked for, the statutes do not apply.[56] Illustrations of the application of these principles to particular causes of action are given in the notes.[57]

i. Actions By or Against the United States. In an action against the United

It is error to submit only a part of the issues to the jury and reserve the remainder for the determination of the court in an action for the recovery of money only. Ragan *v.* McCoy, 29 Mo. 356.

52. Newman *v.* Duane, 89 Cal. 597, 27 Pac. 66; New Harmony Lodge No. 71, I. O. O. F. *v.* Kansas City, etc., R. Co., 100 Mo. App. 407, 74 S. W. 5; Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; New York L. Ins., etc., Co. *v.* New York, 6 N. Y. St. 656; Gunsaullus *v.* Pettit, 46 Ohio St. 27, 17 N. E. 231; Riddle *v.* McBeth, 2 Ohio Dec. (Reprint) 606, 4 West. L. Month. 153.

53. Donovan *v.* Barnett, 27 Mo. App. 460; Glenn *v.* Lancaster, 109 N. Y. 641, 16 N. E. 484, 21 Abb. N. Cas. 272; Stern *v.* Mayer, 99 N. Y. App. Div. 427, 91 N. Y. Suppl. 292; Hutton *v.* Metropolitan El. R. Co., 19 N. Y. App. Div. 243, 46 N. Y. Suppl. 169; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

54. Yager *v.* Hastings Exch. Nat. Bank, 52 Nebr. 321, 72 N. W. 211; Baylis *v.* Bullock Electric Mfg. Co., 59 N. Y. App. Div. 576, 69 N. Y. Suppl. 693 [*reversing* 32 Misc. 218, 66 N. Y. Suppl. 253]; Bennett *v.* Bosch, 26 N. Y. App. Div. 311, 49 N. Y. Suppl. 802; Chapman *v.* Lee, 45 Ohio St. 356, 13 N. E. 736; Brundridge *v.* Goodlove, 30 Ohio 374; Heintz *v.* Anthony, 26 Ohio Cir. Ct. 380; Sherman *v.* Randolph, 13 Okla. 224, 74 Pac. 102.

55. Doney *v.* Clark, 55 Ohio St. 294, 45 N. E. 316; Gunsaullus *v.* Pettit, 46 Ohio St. 27, 17 N. E. 231. See also Yager *v.* Hastings Exch. Nat. Bank, 52 Nebr. 321, 72 N. W. 211.

56. Churchill *v.* Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; McLaughlin *v.* Del Re, 64 Cal. 472, 2 Pac. 244; Merrill *v.* Prescott, 67 Kan. 767, 74 Pac. 259; Moss *v.* Burnham, 50 N. Y. App. Div. 301, 63 N. Y. Suppl. 947; Clark *v.* Blumenthal, 52 N. Y. Super. Ct. 355; Krenzle *v.* Miller, 10 N. Y. Suppl. 635; Converse *v.* Hawkins, 31 Ohio St. 209; Rowland *v.* Entrekin, 27 Ohio St. 47.

57. The statutes have been held to apply and a jury trial to be a matter of right in actions to determine adverse claims to real property where plaintiff is out of possession (Newman *v.* Duane, 89 Cal. 597, 27 Pac. 66), actions for partition where the title is in dispute (Benoist *v.* Thomas, 121 Mo. 660, 27 S. W. 609; Osborne *v.* Osborne, 41 S. C. 195, 19 S. E. 494; Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711), actions of replevin (Blackman *v.* Wheaton, 13 Minn. 326), actions by the assignee of an insolvent debtor to recover money paid to certain creditors giving an unlawful preference over others (Tripp *v.* Northwestern Nat. Bank, 45 Minn. 383, 48 N. W. 4), actions to recover assessments for unpaid stock subscriptions (Glenn *v.* Lancaster, 109 N. Y. 641, 16 N. E. 484, 21 Abb. N. Cas. 272), and actions against the personal representative of a deceased partner to recover a partnership debt where the other partners are insolvent (Bowery Bank *v.* Martin, 16 N. Y. Suppl. 73).

The statutes have been held not to apply in actions to quiet title (Larkin *v.* Wilson, 28 Kan. 513), actions to set aside a conveyance on the ground of fraud as to creditors and to subject land to the payment of a judgment debt (McCardell *v.* McNay, 17 Kan. 433), actions to set aside a deed and to compel a reconveyance (Bray *v.* Thatcher, 28 Mo. 129), actions to determine adverse claims to real property where plaintiff is in possession (Ellithorpe *v.* Buck, 17 Ohio St. 72), actions to set aside an assignment of an insurance policy and to compel its return (Windhorst *v.* Wilhelms, 1 Ohio Cir. Ct. 28, 1 Ohio Cir. Dec. 17), actions to set aside a sheriff's deed on the ground that the property sold did not belong to the judgment debtor but was held by him in trust (Price *v.* Brown, 4 S. C. 144), actions to set aside a sheriff's deed on the ground that the judgment and sale thereunder constitute an unlawful preference in favor of certain creditors (Yanish *v.* Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198), actions to enforce mechanics' liens (Gull River Lumber Co. *v.* Keefe, 6 Dak. 160, 41 N. W. 743; Sumner *v.* Jones, 27 Minn. 312, 7 N. W. 265; Dohle *v.* Omaha Foundry, etc., Co., 15 Nebr. 436, 19 N. W. 644), suits for an accounting which are of equitable jurisdiction (Black *v.* Boyd, 50 Ohio St. 46, 33 N. E. 207), actions between partners for the dissolution and settlement of the partnership affairs (O'Brien *v.* Bowes, 4 Bosw. (N. Y.) 657), suits for a specific performance of a contract to convey land (Hull *v.* Bell, 54 Ohio St. 228, 43 N. E. 584), and attachment proceedings (Bennett *v.* Wolverton, 24 Kan. 284; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703).

States plaintiff has no right to a trial by jury, such suits not being suits at common law within the provision of the federal constitution;[58] and this rule applies to the trial of any set-off or counter-claim which the government may set up in an action brought against it.[59]

2. Equitable Actions and Proceedings[60] — a. In General. In the absence of express constitutional or statutory provision there is no right to a jury trial in suits in equity.[61] It has always been the province of the court in equity to determine issues of fact as well as of law,[62] and while the court may submit questions of fact to the jury, this is purely a matter of discretion,[63] and the verdict in such cases is merely advisory.[64] The court may also without the intervention of a jury make such orders and decrees as may be necessary to carry its judgment into effect.[65] Even where the formal distinctions between law and equity have been

58. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674 [*affirming* 30 Fed. 360]; McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189 [*affirming* 12 Ct. Cl. 312].

The government cannot be sued except by its consent and consequently has the right to prescribe the manner in which it will be sued. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674.

59. McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189 [*affirming* 12 Ct. Cl. 312].

60. See, generally, Equity, 16 Cyc. 413.

61. *Arizona.*— Cole *v.* Bean, 1 Ariz. 377, 25 Pac. 538.

California.— Still *v.* Saunders, 8 Cal. 281; Walker *v.* Sedgwick, 5 Cal. 192.

Florida.— Smith *v.* Croom, 7 Fla. 180.

Idaho.— Brady *v.* Yost, 6 Ida. 273, 55 Pac. 542.

Kentucky.—Bailey *v.* Nichols, 8 Ky. L. Rep. 64.

Massachusetts.—Ross *v.* New England Mut. Ins. Co., 120 Mass. 113.

Missouri.— Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171; Gay *v.* Ihm, 69 Mo. 584; Weil *v.* Kume, 49 Mo. 158.

New York.— Magnolia Metal Co. *v.* Drew, 68 N. Y. App. Div. 47, 74 N. Y. Suppl. 34; Marshall *v.* De Cordova, 26 N. Y. App. Div. 615, 50 N. Y. Suppl. 294; O'Beirne *v.* Bullis, 2 N. Y. App. Div. 545, 38 N. Y. Suppl. 4; Moffat *v.* Moffat, 10 Bosw. 468, 17 Abb. Pr. 4; Titman *v.* Twelfth Ward Bank, 12 N. Y. Suppl. 634; McCarty *v.* Edwards, 24 How. Pr. 236; Smith *v.* Carll, 5 Johns. Ch. 118.

Pennsylvania.— Frank's Appeal, 59 Pa. St. 190; Genet *v.* Delaware, etc., Canal Co., 6 Luz. Leg. Reg. 73.

South Carolina.— Brock *v.* Kirkpatrick, 69 S. C. 231, 48 S. E. 72.

Washington.— Wintermute *v.* Carner, 8 Wash. 585, 36 Pac. 490.

Canada.— Clairmonte *v.* Prince, 30 Nova Scotia 258; Fox *v.* Fox, 17 Ont. Pr. 161; Baldwin *v.* McGuire, 15 Ont. Pr. 305.

See 31 Cent. Dig. tit. "Jury," §§ 35–39.

62. *Arkansas.*— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Illinois.— Flaherty *v.* McCormick, 113 Ill. 538.

Nebraska.— Sharmer *v.* McIntosh, 43 Nebr. 509, 61 N. W. 727.

New York.— Rathbun *v.* Rathbun, 3 How. Pr. 139.

South Carolina.— Lucken *v.* Wichman, 5 S. C. 411.

Wisconsin.— Stilwell *v.* Kellogg, 14 Wis. 461.

United States.— Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

See 31 Cent. Dig. tit. "Jury," §§ 35–39.

There were two exceptions at common law to this rule: (1) Where the object of the suit was to divest an heir of a freehold estate of which his ancestor died seized; and (2) where the common-law right of the rector of a parish to tithes was drawn in question. In these cases an issue to a jury was a matter of right. Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

63. *Alabama.*— Alexander *v.* Alexander, 5 Ala. 517.

Arkansas.— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Florida.— Smith *v.* Croom, 7 Fla. 180.

Indiana.— Helm *v.* Huntington First Nat. Bank, 91 Ind. 44.

Kentucky.— Bailey *v.* Nichols, 8 Ky. L. Rep. 64.

Missouri.— Weil *v.* Kume, 49 Mo. 158.

New York.— Cantoni *v.* Forster, 12 Misc. 343, 33 N. Y. Suppl. 565; Smith *v.* Carll, 5 Johns. Ch. 118.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

United States.— Herdsman *v.* Lewis, 9 Fed. 853, 20 Blatchf. 266; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

See 31 Cent. Dig. tit. "Jury," §§ 35–39.

64. *Arkansas.*— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Idaho.— Brady *v.* Yost, 6 Ida. 273, 55 Pac. 542.

Illinois.— Gaby *v.* Hankins, 86 Ill. App. 529.

Missouri.— Gay *v.* Ihm, 69 Mo. 584.

United States.— Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

See 31 Cent. Dig. tit. "Jury," §§ 35–39.

65. Capron *v.* Devries, 83 Md. 220, 34 Atl. 251; Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; *Ex p.* Cotten, 62 N. C. 79.

abolished and a single form of action substituted, the essential differences remain and the right to a jury trial depends upon whether the cause of action is essentially legal or equitable;[66] and in Indiana it is expressly provided by a recent statute that issues of fact in cases which prior to 1852 were of exclusive equitable jurisdiction shall be tried by the court, and in all other cases as the same are now triable,[67] while in case of the joinder of causes of action or defenses which were formerly of equitable jurisdiction with those formerly triable by jury, the former shall be tried by the court and the latter by a jury unless waived.[68] A similar provision is made by statute in Canada as to the trial of causes of action formerly of legal or equitable cognizance.[69] In other jurisdictions the right to have issues of fact in equitable actions submitted to a jury has been conferred by statute either generally[70] or with regard to particular issues or proceedings.[71]

b. Application of Constitutional Provisions. The constitutional provisions relating to jury trial, unless expressly referring to equity,[72] do not apply to a trial of issues of fact in equitable actions,[73] and this is true whether the equitable cause

66. *California.*— Smith *v.* Rowe, 4 Cal. 6.
Colorado.— Rice *v.* Goodwin, 2 Colo. App. 267, 30 Pac. 330.
Minnesota.— Berkey *v.* Judd, 14 Minn. 394.
Montana.— Gallagher *v.* Basey, 1 Mont. 457.
New York.— Toplitz *v.* Bauer, 26 N. Y. App. Div. 125, 49 N. Y. Suppl. 840; Wheeler *v.* Falconer, 7 Rob. 45; Church *v.* Freeman, 16 How. Pr. 294.
South Carolina.— Price *v.* Brown, 4 S. C. 144.
Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.
United States.— Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Basey *v.* Gallagher, 20 Wall. 670, 22 L. ed. 452.
See 31 Cent. Dig. tit. "Jury," §§ 35–39.
But the court may submit issues to a jury in an equitable action under the code practice as formerly in suits in chancery. Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30.
An action to compel a transfer of stock on books of the corporation is purely of equitable cognizance and triable without a jury. Cushman *v.* Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315 [*affirming* 7 Daly 330].
In North Carolina under the present system of civil procedure issues of fact as distinguished from questions of fact arising in equitable actions as well as like issues arising in actions at law are to be tried by the jury. Ely *v.* Early, 94 N. C. 1; Worthy *v.* Shields, 90 N. C. 192 [*disapproving* Goldsborough *v.* Turner, 67 N. C. 403]. See also Taylor *v.* Person, 9 N. C. 298; Marshall *v.* Marshall, 4 N. C. 318.

67. Blair *v.* Curry, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; Wright *v.* Fultz, 138 Ind. 594, 38 N. E. 175; Monnett *v.* Turpie, 132 Ind. 482, 32 N. E. 328; Puterbaugh *v.* Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341; Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763; Lamb *v.* Lamb, 105 Ind. 456, 5 N. E. 171; Helm *v.* Huntington First Nat. Bank, 91 Ind. 44.
The nature of the cause of action must be determined from the substantive facts therein pleaded and not from the prayer for relief nor from the name given to the action by the pleader. Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763.
The court may submit issues to the jury under this statute in actions formerly of exclusively equitable jurisdiction as under former equity practice. Helm *v.* Huntington First Nat. Bank, 91 Ind. 44.

68. Field *v.* Brown, 146 Ind. 293, 45 N. E. 464; Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763.

69. Clairmonte *v.* Prince, 30 Nova Scotia 258; Sawyer *v.* Robertson, 19 Ont. Pr. 172.

70. Call *v.* Perkins, 65 Me. 439.

71. McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55; Druse *v.* Horter, 57 Wis. 644, 16 N. W. 14.
In Iowa equitable actions were formerly divided into two classes triable by different methods and in those tried by the "second method" a jury might be demanded (see Benedict *v.* Hunt, 32 Iowa 27); but this distinction was abolished by the code of 1873 (Wormley *v.* Hamburg, 46 Iowa 144), and all equitable actions are now triable by the court unless referred (Wadsworth *v.* Wadsworth, 40 Iowa 448).

72. **In Texas** the constitution of 1869 provides that "in all cases of law or equity, when the matter in controversy shall be valued at or exceed ten dollars, the right of trial by jury shall be preserved, unless the same shall be waived by the parties or their attorneys." Cockrill *v.* Cox, 65 Tex. 669; Davis *v.* Davis, 34 Tex. 15, 24.

73. *Arkansas.*— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.
California.— Pacific R. Co. *v.* Wade, 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.
Florida.— Wiggins *v.* Williams, 36 Fla. 637, 18 So. 859, 30 L. R. A. 754.
Idaho.— Christensen *v.* Hollingsworth, 6 Ida. 87, 53 Pac. 211, 96 Am. St. Rep. 56.
Illinois.— Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692; Maynard *v.* Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145 [*affirming* 61 Ill. App. 336]; Flaherty *v.* McCormick, 113 Ill. 538; Heacock *v.* Hosmer,

of action existed at the time of the constitution or was created subsequently by statute.[74]

c. Joinder of Legal and Equitable Issues. Where a case presents both equitable and legal issues the former are ordinarily triable by the court and the latter by the jury,[75] unless they are so blended as to make the entire action properly an

109 Ill. 245; Ward *v.* Farwell, 97 Ill. 593; Gilliam *v.* Baldwin, 96 Ill. App. 323.

Indiana.— McBride *v.* Stradley, 103 Ind. 465, 2 N. E. 358; Helm *v.* Huntington First Nat. Bank, 91 Ind. 44.

Iowa.— State *v.* Jordan, 72 Iowa 377, 34 N. W. 285; State *v.* Orwig, 25 Iowa 280.

Kansas.— Kimball *v.* Connor, 3 Kan. 414.

Kentucky.— Watts *v.* Griffin, Litt. Sel. Cas. 244.

Massachusetts.— Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401; Hamilton Mut. Ins. Co. *v.* Parker, 11 Allen 574. *Compare* Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

Minnesota.— State *v.* Kingsley, 85 Minn. 215, 88 N. W. 742.

Missouri.— Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. 113; Grand Lodge O. of H.-S. *v.* Elsner, 26 Mo. App. 108.

Nebraska.— Sharmer *v.* McIntosh, 43 Nebr. 509, 61 N. W. 727.

New Hampshire.— Bellows *v.* Bellows, 58 N. H. 60; Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194 [*disapproving* Hoitt *v.* Burleigh, 18 N. H. 389; Marston *v.* Brackett, 9 N. H. 336].

New York.— Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108]; Cantoni *v.* Forster, 12 Misc. 343, 33 N. Y. Suppl. 565; Nichols *v.* Romaine, 3 Abb. Pr. 122; Rathbun *v.* Rathbun, 3 How. Pr. 139.

Oregon.— Raymond *v.* Flavel, 27 Oreg. 219, 40 Pac. 158.

South Carolina.— Lucken *v.* Wichman, 5 S. C. 411.

Wisconsin.— Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425; Stilwell *v.* Kellogg, 14 Wis. 461.

United States.— Buford *v.* Holley, 28 Fed. 680; Herdsman *v.* Lewis, 9 Fed. 853, 20 Blatchf. 266; Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499.

See 31 Cent. Dig. tit. "Jury," §§ 35–39.

The provisions of the federal constitution do not apply to suits in equity but only to what are properly actions at law. Shields *v.* Thomas, 18 How. (U. S.) 253, 15 L. ed. 368; Buford *v.* Holley, 28 Fed. 680; Motte *v.* Bennett, 17 Fed. Cas. No. 9,884.

Cases where courts of equity were formerly accustomed to award issues are not triable by jury as a matter of right under the constitution. Moffat *v.* Moffat, 10 Bosw. (N. Y.) 468, 17 Abb. Pr. 4; Nichols *v.* Romaine, 3 Abb. Pr. (N. Y.) 122.

The question of lunacy may be decided by the court without the intervention of a jury. Alexander *v.* Alexander, 5 Ala. 517; Smith *v.* Carll, 5 Johns. Ch. (N. Y.) 118.

No matter how contradictory the proof may be the court may decide the facts without a jury. Alexander *v.* Alexander, 5 Ala. 517.

In Georgia it was held in an early case that a jury trial in an equitable action was a constitutional right by virtue of a statute conferring the right in such cases which was enacted prior to the adoption of the constitution (Mounce *v.* Byars, 11 Ga. 180. See also Brown *v.* Burke, 22 Ga. 574. But see McGowan *v.* Jones, R. M. Charlt. 184); but in a number of recent cases it has been expressly held that there is no constitutional right to a jury trial in an equitable action (Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958; Bemis *v.* Armour Packing Co., 105 Ga. 293, 31 S. E. 173; Hearn *v.* Laird, 103 Ga. 271, 29 S. E. 973).

Where the court of appeals has decided that a complaint states a cause of action in equity on a second trial defendants are not entitled as a constitutional right to a jury trial, although the evidence may show a right to recover at law. Porter *v.* International Bridge Co., 79 N. Y. App. Div. 358, 79 N. Y. Suppl. 434 [*affirmed* in 175 N. Y. 467, 67 N. E. 1089].

74. Hathorne *v.* Panama Park Co., 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138; Parmelee *v.* Price, 208 Ill. 544, 70 N. E. 725 [*affirming* 105 Ill. App. 271]; Ward *v.* Farwell, 97 Ill. 593; Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Where a new class of cases is directed by statute to be tried in chancery the right of trial by jury is not infringed if when tested by the general principles of equity it appears that such cases are of an equitable nature and can be more appropriately tried in a court of equity than a court of law. Parmelee *v.* Price, 208 Ill. 544, 70 N. E. 725.

75. *California.*— Hughes *v.* Dunlap, 91 Cal. 385, 27 Pac. 642.

New York.— Sternberger *v.* McGovern, 56 N. Y. 12; Sommer *v.* New York El. R. Co., 60 Hun 148, 14 N. Y. Suppl. 619; Brady *v.* Cochran, 23 Hun 274; Hennequin *v.* Butterfield, 43 N. Y. Super. Ct. 411.

Ohio.— Clippenger *v.* Ross, 2 Ohio Dec. (Reprint) 562, 3 West. L. Month. 645.

South Carolina.— Reams *v.* Spann, 28 S. C. 530, 6 S. E. 325.

Canada.— Sawyer *v.* Robertson, 19 Ont. Pr. 172.

See 31 Cent. Dig. tit. "Jury," § 52.

In Indiana the statute of 1881 expressly provides that in case of the joinder of actions which were formerly of exclusive equitable jurisdiction with causes of action which were formerly designated as actions at law and were triable by a jury, the former shall

equitable one.[76] The rights of plaintiff and defendant with regard to a jury trial in such case are not, however, always the same,[77] for while it is held that plaintiff by voluntarily joining a legal with an equitable cause of action thereby waives the right to have either tried by a jury,[78] it is well settled that he cannot by such action deprive defendant of his right to have the purely legal issues in the case tried by a jury.[79] Where, however, in such a case, defendant's motion is to submit the entire case to a jury, a denial of the motion is not error.[80]

d. Interpleader and Intervention. An intervention merely adds new parties for the purpose of determining all conflicting claims to the matter in controversy and does not affect the nature of the action, so that plaintiff in an action at law is not deprived of his right to a jury trial by an intervention praying for equitable relief;[81] while on the other hand if the case is properly triable by jury a jury may be demanded by the intervener, although it has not been demanded by either of the original parties;[82] but on a bill in the nature of a bill of interpleader the proceeding is purely equitable and neither party is entitled to a jury as a matter of right,[83] and an action at law becomes by interpleader proceedings an equitable action in which neither party can demand a jury trial.[84] The court may, however, as in other equity cases, direct an issue to the jury.[85]

e. Accounting and Settlement. While courts of equity have jurisdiction of matters of account the jurisdiction is not exercised where there is an adequate remedy at law and the case presents no special ground of equitable jurisdiction.[86] The right to a jury trial in such cases depends upon whether the case is properly one of equitable cognizance.[87] The case is of equitable cognizance and triable without a jury where it involves the examination and settlement of mutual

be triable by the court and the latter by a jury. Abernathy *v.* Allen, 132 Ind. 84, 31 N. E. 534.

76. Kortjohn *v.* Seimers, 29 Mo. App. 271. See also Twogood *v.* Allee, 125 Iowa 59, 99 N. W. 288.

77. Cogswell *v.* New York, etc., R. Co., 105 N. Y. 319, 11 N. E. 518 [*reversing* 54 N. Y. Super. Ct. 92]; Davison *v.* Jersey Co., 71 N. Y. 333.

78. See *infra*, IV, C, 6.

79. *New York.*— Wheelock *v.* Lee, 74 N. Y. 495; Davison *v.* Jersey Co., 71 N. Y. 333; Bradley *v.* Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; Ackerman *v.* True, 56 N. Y. App. Div. 54, 66 N. Y. Suppl. 6; Van Deventer *v.* Van Deventer, 32 N. Y. App. Div. 578, 53 N. Y. Suppl. 236; Sommer *v.* New York El. R. Co., 60 Hun 148, 14 N. Y. Suppl. 619; Libmann *v.* Manhattan R. Co., 59 Hun 428, 13 N. Y. Suppl. 378; Brady *v.* Cochran, 23 Hun 274; Siefke *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 444, 14 N. Y. Suppl. 763.

South Carolina.— Wilson *v.* York Tp., 43 S. C. 299, 21 S. E. 82.

Washington.— McCoy *v.* Cook, 13 Wash. 158, 42 Pac. 546.

United States.— Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358.

Canada.— Clairmonte *v.* Prince, 30 Nova Scotia 258.

See 31 Cent. Dig. tit. "Jury," § 52.

80. Greenville *v.* Ormand, 44 S. C. 119, 21 S. E. 642.

Conversely it is not error to deny a motion to submit all the issues to the court (Jennings *v.* Moon, 135 Ind. 168, 34 N. E. 996) or to overrule an objection to a jury trial which relates to all the issues both legal and equitable (Ross *v.* Hobson, 131 Ind. 166, 26 N. E. 775).

81. Reay *v.* Butler, (Cal. 1885) 7 Pac. 669.

Conversely, where an intervening petition is filed to enforce an equitable lien on a fund in a court of chancery, defendant by answering to the merits submits the issue to the court and cannot demand a jury trial. South Park Com'rs *v.* Phillips, 27 Ill. App. 380.

82. Lacroix *v.* Menard, 3 Mart. N. S. (La.) 339, 15 Am. Dec. 161.

83. Grand Lodge O. of H.-S. *v.* Elsner, 26 Mo. App. 108; Clark *v.* Mosher, 107 N. Y. 118, 14 N. E. 96, 1 Am. St. Rep. 798.

84. Clark *v.* Mosher, 107 N. Y. 118, 14 N. E. 96, 1 Am. Rep. 198; Dinley *v.* McCullagh, 92 Hun (N. Y.) 454, 36 N. Y. Suppl. 1007. See also Bridge *v.* Martin, 2 Ohio Dec. (Reprint) 410, 3 West. L. Month. 20.

85. Bridge *v.* Martin, 2 Ohio Dec. (Reprint) 410, 3 West. L. Month. 20.

Where defendants appear and petition for a trial by jury it is the duty of the court to frame the particular questions to be submitted to the jury; and the verdict should be a direct answer to these questions and not a general verdict. Hazleton Nat. Bank *v.* Hunter, 10 Kulp (Pa.) 96.

86. Lamaster *v.* Scofield, 5 Nebr. 148; Smith *v.* Bryce, 17 S. C. 538. See also O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. L. Rep. 244.

87. *Iowa.*— Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910; McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

Minnesota.— Shipley *v.* Bolduc, 93 Minn. 414, 101 N. W. 952.

accounts,[88] or an accounting where there is a fiduciary relation between the parties,[89] or an examination of accounts which are so complicated that a trial by jury would be impracticable,[90] and also where a discovery is necessary,[91] unless by statutory provision a discovery can be had in an action at law and the case presents no other ground of equitable jurisdiction.[92] But if the action is merely to enforce a legal demand and presents no special ground of equity jurisdiction it is triable by jury,[93] even though it involves the examination of a long account,[94] unless the practice in the particular state was otherwise prior to the adoption of the constitution.[95]

New York.— Whiton *v.* Spring, 74 N. Y. 169; Brigham *v.* Gott, 3 N. Y. Suppl. 518.

Ohio.— Black *v.* Boyd, 50 Ohio St. 46, 33 N. E. 207.

South Carolina.— Smith *v.* Bryce, 17 S. C. 538.

See 31 Cent. Dig. tit. "Jury," § 68.

In Indiana under the statutes in force prior to the act of 1881, issues of fact were triable by jury in equity as well as at law and there was no distinction between legal and equitable actions involving accounts. Redinbo *v.* Fretz, 99 Ind. 458.

88. *Iowa.*— Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910.

Kentucky.— O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. L. Rep. 244.

Minnesota.— Garner *v.* Reis, 25 Minn. 475; Berkey *v.* Judd, 14 Minn. 394.

New Hampshire.— Davis *v.* Dyer, 62 N. H. 231.

Ohio.— Black *v.* Boyd, 50 Ohio St. 46, 33 N. E. 207.

See 31 Cent. Dig. tit. "Jury," § 68.

89. O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. L. Rep. 244; Judd *v.* Dike, 30 Minn. 380, 15 N. W. 672; Pendergast *v.* Greenfield, 127 N. Y. 23, 27 N. E. 388 [*reversing* 7 N. Y. Suppl. 829]; Brinckerhoff *v.* Bostwick, 105 N. Y. 567, 12 N. E. 58 [*reversing* 43 Hun 458]; Laufer *v.* Sayles, 5 N. Y. App. Div. 582, 39 N. Y. Suppl. 377; Empire State Tel., etc., Co. *v.* Bickford, 72 Hun (N. Y.) 580, 25 N. Y. Suppl. 283.

A suit for an accounting between partners is triable by the court without a jury. McBride *v.* Stradley, 103 Ind. 465, 2 N. E. 358; Shipley *v.* Bolduc, 93 Minn. 414, 101 N. W. 952; King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332. *Compare* Gridley *v.* Conner, 4 Rob. (La.) 445.

90. *Iowa* — Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910.

Kentucky.— O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983, 16 Ky. L. Rep. 244.

New Hampshire.— Davis *v.* Dyer, 62 N. H. 231.

New York.— Hamilton *v.* Piza. 8 N. Y. App. Div. 617, 40 N. Y. Suppl. 930; Rutty *v.* Person, 12 Abb. N. Cas. 352.

Ohio.— Black *v.* Boyd, 50 Ohio St. 46, 33 N. E. 207.

See 31 Cent. Dig. tit. "Jury," § 68.

91. See Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910; McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

92. Lamaster *v.* Scofield, 5 Nebr. 148; Chapman *v.* Lee, 45 Ohio St. 356, 13 N. E. 736.

93. Hoosier Constr. Co. *v.* National Bank of Commerce, (Ind. App. 1905) 73 N. E. 1006; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Dec. 334; Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066.

An action to recover a balance due on an account stated where the parties have themselves cast up the items and agreed upon the balance and the correctness of the computation is not questioned and is triable by jury. Silver *v.* St. Louis, etc., R. Co., 72 Mo. 194 [*affirming* 5 Mo. App. 381]; Smith *v.* Bryce, 17 S. C. 538.

If the account is all on one side and no discovery is asked the case is not of equitable jurisdiction and is triable by jury. McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

If an accounting is not necessary and the action is merely to recover a sum of money, the fact that an accounting is asked does not make the case triable without a jury. Chapman *v.* Lee, 45 Ohio St. 356, 13 N. E. 736.

94. St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334. See also Hoosier Constr. Co. *v.* National Bank of Commerce, (Ind. App. 1904) 72 N. E. 473, (1905) 73 N. E. 1006.

95. See cases cited *infra*, this note.

Compulsory references were in some of the states authorized by statute prior to the adoption of the several constitutions in cases involving the examination of long accounts (Edwardson *v.* Garr'art, 56 Mo. 81; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Shephard *v.* Scovell, 2 N. Y. Suppl. 534, 15 N. Y. Civ. Proc. 403; Dane County *v.* Dunning, 20 Wis. 210); but in New York a compulsory reference may be ordered only in cases arising on contract and involving the examination of a long account (People *v.* Wood, 54 Hun (N. Y.) 438, 7 N. Y. Suppl. 712; Williard *v.* Doran, etc., Co., 48 Hun (N. Y.) 402, 1 N. Y. Suppl. 345, 588; Townsend *v.* Hendricks, 2 Sweeny (N. Y.) 503, 40 How. Pr. 143); which must be an account in the ordinary acceptation of the term (Untermyer *v.* Beihauer, 105 N. Y. 521, 11 N. E. 847; Williard *v.* Doran, etc., Co., *supra*); and not merely a case involving numerous items of damages (Untermyer *v.* Beihauer, *supra*).

f. Establishment and Foreclosure of Liens. Suits to enforce liens are of an equitable nature and are not of right triable by jury.[96] This rule applies to vendors' liens,[97] mechanics' liens,[98] attorneys' liens,[99] liens for taxes,[1] or assessments for public improvements,[2] and liens upon property held in pledge.[3]

g. Foreclosure of Mortgages. Suits to foreclose mortgages are equitable and are triable by the court without a jury.[4] Where suit is brought both to recover

In Vermont an action on a book-account was by statute triable without a jury prior to the adoption of the constitution and consequently there is no constitutional right to a jury trial in such cases. Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

96. Tomlinson *v.* Bainaka, 163 Ind. 112, 70 N. E. 155; Brighton *v.* White, 128 Ind. 320, 27 N. E. 620; Burck *v.* Davis, (Ind. App. 1905) 73 N. E. 192; Sheppard *v.* Steele, 43 N. Y. 52, 3 Am. Rep. 660.

97. Hassler *v.* Hefele, 151 Ind. 391, 50 N. E. 361; Coleman *v.* Floyd, 131 Ind. 330, 31 N. E. 75; Bronson *v.* Wanzer, 86 Mo. 408.

98. *California.*— Curnow *v.* Happy Valley Blue Gravel, etc., Co., 68 Cal. 262, 9 Pac. 149.

Dakota.— Gull River Lumber Co. *v.* Keefe, 6 Dak. 160, 41 N. W. 743.

Florida.— Hathorne *v.* Panama Park Co., 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Minnesota.— Sumner *v.* Jones, 27 Minn. 312, 7 N. W. 265.

Nebraska.— Dohle *v.* Omaha Foundry, etc., Co., 15 Nebr. 436, 19 N. W. 644.

New York.—Schillinger Fire-Proof Cement, etc., Co. *v.* Arnott, 152 N. Y. 584, 46 N. E. 956 [*affirming* 86 Hun 182, 33 N. Y. Suppl. 343]; Kenney *v.* Apgar, 93 N. Y. 539; Smith *v.* Fleischman, 23 N. Y. App. Div. 355, 48 N. Y. Suppl. 234.

Ohio.— Clippenger *v.* Ross, 2 Ohio Dec. (Reprint) 562, 3 West. L. Month. 645.

Virginia.— Pairo *v.* Bethell, 75 Va. 825.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

See 31 Cent. Dig. tit. "Jury," §§ 46, 69.

But if it appears from an inspection of the complaint that no lien existed or could exist at the time the suit was commenced, but that it is an action only to recover on contract, a jury trial may be demanded, although the action is in form to foreclose a mechanic's lien. Johnson *v.* Alexander, 23 N. Y. App. Div. 538, 48 N. Y. Suppl. 541.

In Iowa the code expressly provides that "the action for mechanic's lien shall be prosecuted by equitable proceedings," and there is no right to a jury trial in such actions. Frost *v.* Clark, 82 Iowa 298, 48 N. W. 82.

The New York Mechanic's Lien Law of 1885 providing that the procedure "shall be the same as in actions for the foreclosure of mortgages upon real property," there being no right to a jury trial in such actions, is not unconstitutional (Schillinger Fire-Proof Cement, etc., Co. *v.* Arnott, 152 N. Y. 584, 46 N. E. 956 [*affirming* 86 Hun 182, 33 N. Y. Suppl. 343]; Riggs *v.* Shannon, 16 N. Y. Suppl. 939, 21 N. Y. Civ. Proc. 434, 27 Abb. N. Cas. 456); and the further provision of Code Civ. Proc. § 3412, that, although the lienor fails to establish a valid lien, he may recover a personal judgment in the action for the amount due him is not unconstitutional, since defendant may preserve his right to a jury trial by a motion made at the proper time to have the issue settled for trial by jury or by trying the issue as to the validity of the lien with the understanding that if the lien be declared invalid an interlocutory judgment to that effect shall be entered and the issues upon which the personal judgment depends be sent to the trial term (Steuerwald *v.* Gill, 85 N. Y. App. Div. 605, 83 N. Y. Suppl. 396; Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794).

In Wisconsin it is provided by statute that in an action to foreclose a mechanic's lien, "any issue of fact in such action shall, on demand of either party, be tried by a jury." Druse *v.* Horter, 57 Wis. 644, 16 N. W. 14.

99. South Park Com'rs *v.* Phillips, 27 Ill. App. 380; Crissman *v.* McDuff, 114 Iowa 83, 86 N. W. 50; Fenwick *v.* Mitchell, 34 Misc. (N. Y.) 617, 70 N. Y. Suppl. 667; Canary *v.* Russell, 10 Misc. (N. Y.) 597, 31 N. Y. Suppl. 291, 24 N. Y. Civ. Proc. 109.

In Kentucky under the statute providing that "in an equitable action . . . either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial," if in an action to enforce an attorney's lien the alleged value of his services is denied the issue as to the value of the services must be first submitted to the jury. Hill *v.* Phillips, 87 Ky. 169, 7 S. W. 917, 10 Ky. L. Rep. 31.

If defendant files a bond releasing the lien after an action is begun in equity to foreclose the same, he is not entitled to demand a jury on the ground that the action is reduced to a mere money demand. Crissman *v.* McDuff, 114 Iowa 83, 86 N. W. 50.

1. *In re* Tax Sale, 54 Mich. 417, 23 N. W. 189; State *v.* Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493; Woodrough *v.* Douglas County, (Nebr. 1904) 98 N. W. 1092.

2. Santa Cruz Rock Pavement Co. *v.* Bowie, 104 Cal. 286, 37 Pac. 934; Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042.

3. Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991; Wilson *v.* Johnson, 74 Wis. 337, 43 N. W. 148.

4. *Indiana.*— Brown *v.* Russell, 105 Ind. 46, 4 N. E. 428.

Iowa.— Leach *v.* Kundson, 97 Iowa 643, 66 N. E. 913; Clough *v.* Seay, 49 Iowa 111.

judgment for the mortgage debt and to foreclose a mortgage securing the same, it has been held in some states that the suit is primarily for the recovery of a money judgment and that a jury trial may be demanded,[5] unless the pleadings admit the right to recover on the debt and the only issue is as to the right to foreclose which is purely equitable;[6] but in other states it is held that the issue as to the debt and the proceeding to foreclose constitute but one controversy which is in equity and triable by the court without a jury.[7] So also where a single suit is brought to foreclose and to recover possession of the mortgaged property it has been held that the whole case may be tried by the court,[8] while on the contrary it has been held that the right to recover possession is a legal right and triable by jury if put in issue by the pleadings.[9]

h. Enforcement and Administration of Trusts. Suits for the enforcement and administration of trusts are of an equitable nature and are triable by the court without a jury.[10]

i. Cancellation and Reformation of Instruments. Suits for the cancellation or reformation of instruments belong to the jurisdiction of equity and are triable by the court without a jury,[11] although a money judgment is also demanded which

Kansas.— Morgan *v.* Field, 35 Kan. 162, 10 Pac. 448.

Minnesota.— Brown *v.* Lawler, 21 Minn. 327

Missouri.— Long *v.* Long, 141 Mo. 352, 44 S. W. 341.

Nebraska.— Daniels *v.* Mutual Ben. Ins. Co., (1905) 102 N. W. 458.

New York.— Knickerbocker L. Ins. Co. *v.* Nelson, 8 Hun 21; Guaranty Trust Co. *v.* Robinson, 31 Misc. 277, 64 N. Y. Suppl. 366; Stephens *v.* Humphreys, 10 N. Y. Suppl. 455.

North Dakota.— Avery Mfg. Co. *v.* Smith, (1905) 103 N. W. 410.

Ohio.— C. S., etc., Assoc. *v.* Kreitz, 41 Ohio St. 143; Brigel *v.* Creed, 10 Ohio S. & C. Pl. Dec. 214, 8 Ohio N. P. 456.

See 31 Cent. Dig. tit. "Jury," §§ 46, 69.

Where a paramount adverse legal title is set up by a person who has been made a party to a suit to foreclose a mortgage, the issue as to such title is triable by jury. Busenbark *v.* Park, 6 Kan. App. 1, 49 Pac. 682; Meigs *v.* Willis, 66 How. Pr. (N. Y.) 466; Loan, etc., Bank *v.* Peterkin, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900; Sale *v.* Meggett, 25 S. C. 72.

5. Clemenson *v.* Chandler, 4 Kan. 558; Myers *v.* Knabe, 4 Kan. App. 484, 46 Pac. 472; Keller *v.* Wenzell, 23 Ohio St. 579.

Where the execution of the note is denied it has been held that this issue is triable by jury. State Journal Co. *v.* Commission Co., 43 Kan. 93, 22 Pac. 982. *Contra*, Downing *v.* Le Du, 82 Cal. 471, 23 Pac. 202.

6. Morgan *v.* Field, 35 Kan. 162, 10 Pac. 448; Spartanburg Bank *v.* Chickasaw Soap Co., 70 S. C. 253, 49 S. E. 845.

7. Downing *v.* Le Du, 82 Cal. 471, 23 Pac. 202; Carmichael *v.* Adams, 91 Ind. 526; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Stilwell *v.* Kellogg, 14 Wis. 461.

A personal judgment for any deficiency in a foreclosure suit may be rendered by the court without the intervention of the jury. Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109.

In Iowa the statute provides that "the action on a note, together with a mortgage or deed of trust for the foreclosure of the same, shall be by equitable proceedings," and this provision is not unconstitutional. Clough *v.* Seay, 49 Iowa 111.

8. Middletown Sav. Bank *v.* Bacharach, 46 Conn. 513.

9. Clark *v.* Baker, 6 Mont. 153, 9 Pac. 911.

10. *California.*— Cauhape *v.* Security Sav. Bank, 127 Cal. 197, 59 Pac. 589.

Indiana.— Sherwood *v.* Thomasson, 124 Ind. 541, 24 N. E. 334.

Minnesota.— Judd *v.* Dike, 30 Minn. 380, 15 N. W. 672.

New York.— Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108]; Reade *v.* Continental Trust Co., 49 N. Y. App. Div. 400, 63 N. Y. Suppl. 395 [*modifying* 28 Misc. 721, 60 N. Y. Suppl. 258]; Currie *v.* Cowles, 9 Bosw. 642; Burke *v.* Burke, 5 Misc. 312, 26 N. Y. Suppl. 55, 31 Abb. N. Cas. 63; Krenzle *v.* Miller, 10 N. Y. Suppl. 635.

Ohio.— Carlisle *v.* Foster, 10 Ohio St. 198.

South Carolina.— Knobeloch *v.* Germania Sav. Bank, 43 S. C. 233, 21 S. E. 13; Featherston *v.* Norris, 7 S. C. 472; Price *v.* Brown, 4 S. C. 144.

See 31 Cent. Dig. tit. "Jury," § 70.

The fact that the complaint asks for a money judgment does not necessarily show that the case is one for trial by jury. Burke *v.* Burke, 5 Misc. (N. Y.) 312, 26 N. Y. Suppl. 55, 31 Abb. N. Cas. 63.

11. *California.*— Angus *v.* Craven, 132 Cal. 691, 64 Pac. 1091; Ashton *v.* Heggerty, 130 Cal. 516, 62 Pac. 934; Loftus *v.* Fischer, 113 Cal. 286, 45 Pac. 328; Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317.

Colorado.— Kyle *v.* Shore, 18 Colo. App. 355, 71 Pac. 895.

Indiana.— Monnett *v.* Turpie, 132 Ind. 482, 32 N. E. 328; Johnson *v.* Johnson, 115 Ind. 112, 17 N. E. 111.

Iowa.— Twogood *v.* Allee, (1904) 99 N. W. 288.

Kentucky.— Jones *v.* Wood, 70 S. W. 45. 24 Ky. L. Rep. 840.

is merely incidental to and dependent upon the granting by the court of the equitable relief demanded.[12]

j. Establishment of Lost or Destroyed Instruments. There is no right to a trial by jury in suits to establish instruments or records which have been lost or destroyed,[13] such proceedings being of an equitable nature and not triable by jury at common law.[14]

k. Creditors' Suits and Suits to Set Aside Fraudulent Conveyances. Suits to set aside sales and conveyances of property on the ground that they were made for the purpose of defrauding creditors are ordinarily held to belong to the jurisdiction of equity and to be triable by the court without a jury.[15] Of the same

Maryland.— Stewart *v.* Iglehart, 7 Gill & J. 132, 38 Am. Dec. 202.

Massachusetts.— Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401; Ross *v.* New England Mut. Ins. Co., 120 Mass. 113.

Missouri.— Bray *v.* Thatcher, 28 Mo. 129.

New York.— Stone *v.* Weiller, 128 N. Y. 655, 28 N. E. 653 [*affirming* 57 Hun 588, 10 N. Y. Suppl. 828]; Flanigan *v.* Skelly, 89 N. Y. App. Div. 108, 85 N. Y. Suppl. 4; Hayes *v.* Bainbridge, 79 Hun 611, 30 N. Y. Suppl. 148; New York Ice Co. *v.* Northwestern Ins. Co., 31 Barb. 72, 10 Abb. Pr. 34, 20 How. Pr. 424; Clark *v.* Blumenthal, 52 N. Y. Super Ct. 355; Ferris *v.* Crawford, 2 Den. 595.

Ohio.— Commercial Nat. Bank *v.* Wheelock, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738; Ellsworth *v.* Holcomb, 28 Ohio St. 66; Windhorst *v.* Wilhelms, 1 Ohio Cir. Ct. 28, 1 Ohio Cir. Dec. 17.

South Carolina.— Price *v.* Brown, 4 S. C. 144.

Utah.— Morrison *v.* Snow, 26 Utah 247, 72 Pac. 924.

Wisconsin.— Harrison *v.* Juneau Bank, 17 Wis. 340.

See 31 Cent. Dig. tit. "Jury," §§ 47, 71.

12. Keith *v.* Henkleman, 68 Ill. App. 623; Dykman *v.* U. S. Life Ins. Co., 176 N. Y. 299, 68 N. E. 362 [*affirming* 81 N. Y. Suppl. 1125]; Imperial Shale Brick Co. *v.* Jewett, 169 N. Y. 143, 62 N. E. 167; Clark *v.* Blumenthal, 52 N. Y. Super. Ct. 355; Ellsworth *v.* Holcomb, 28 Ohio St. 66. But see Harrison *v.* Juneau Bank, 17 Wis. 340.

A suit to set aside a deed on the ground of fraud and undue influence and to recover possession of the property is triable by the court without a jury. Carpenter *v.* Willard Library, 26 Ind. App. 619, 60 N. E. 365.

In an action to annul a contract to purchase land and to recover money paid thereunder on the ground that the contract was procured by fraud, where the answer denies merely the fraud and not the amount paid, defendant is not entitled to a jury trial. Mesenburg *v.* Dunn, 125 Cal. 222, 57 Pac. 887.

13. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Culver *v.* Colehour, 115 Ill. 558, 5 N. E. 89; Heacock *v.* Hosmer, 109 Ill. 245; Heacock *v.* Lubuke, 107 Ill. 396; Wright *v.* Fultz, 138 Ind. 594, 38 N. E. 175; Kimball *v.* Connor, 3 Kan. 414; Weil *v.* Kume, 49 Mo. 158.

The Illinois "Burnt Records Act" is not unconstitutional for not providing for a jury trial, and it is immaterial that the effect of a decree confirming title under the act may be the same as the effect of a judgment obtained in an action of ejectment. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

14. Heacock *v.* Hosmer, 109 Ill. 245; Wright *v.* Fultz, 138 Ind. 594, 38 N. E. 175; Weil *v.* Kume, 49 Mo. 158.

15. *Indiana.*— Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811; Stix *v.* Sadler, 109 Ind. 254, 9 N. E. 905; Lake *v.* Lake, 99 Ind. 339; Evans *v.* Nealis, 87 Ind. 262.

Iowa.— Buckham *v.* Grape, 65 Iowa 535, 17 N. W. 755, 22 N. W. 664.

Kansas.— McCardell *v.* McNay, 17 Kan. 433.

Nebraska.— Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983.

New Mexico.— Early Times Distillery Co. *v.* Zeiger, 9 N. M. 31, 49 Pac. 723.

New York.— Mandeville *v.* Avery, 3 N. Y. Suppl. 745.

South Carolina.— Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 781.

United States.— Buford *v.* Holley, 28 Fed. 680.

See 31 Cent. Dig. tit. "Jury," §§ 48, 73.

In Minnesota the statute relating to fraudulent conveyances which provides that the question of fraud shall be deemed a question of fact and not of law is construed as requiring that every question of fraudulent intent must be submitted to the jury unless the instrument carries on its face evidence of the fraud. Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522.

Where defendant denies any indebtedness to plaintiff and there is no judgment at law establishing the debt, the issue as to such indebtedness is triable by jury. Powers *v.* Raymond, 137 Mass. 483.

In an action at law if a creditor attacks a conveyance on the ground of fraud, he cannot be deprived of his right to have this issue determined by jury. Marriott *v.* Givens, 8 Ala. 694.

Where a third party intervenes in an attachment suit claiming by virtue of a mortgage the property levied on, and plaintiff answers alleging the mortgage to have been executed for the purpose of defrauding creditors, the answer presents a purely legal defense and the issue is triable by jury. Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865.

character are suits to set aside fraudulent assignments for the benefit of creditors,[16] composition deeds and releases executed by creditors which they were induced to sign through fraudulent representations as to the debtor's assets and liabilities,[17] suits to enforce contracts made by a debtor with one creditor for the benefit of himself and other creditors and to compel this creditor to account for property of the debtor received under the contract,[18] and suits by a creditor of a deceased person for the benefit of himself and other creditors for a discovery of property of the decedent alleged to have been fraudulently concealed or converted by defendants.[19]

1. Quieting Title and Determination of Adverse Claims. Suits to quiet title or remove cloud belong to the jurisdiction of equity and are not of right triable by jury,[20] unless the right is conferred by statute.[21] In some cases it is held generally that actions brought under statutory provisions for the determination of adverse claims are of the same nature and triable by the court without a jury;[22]

16. Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 781; Talley *v.* Curtain, 54 Fed. 43, 4 C. C. A. 177.

17. Blunt *v.* Hibbard, 3 N. Y. Suppl. 121. But see Merchants' Nat. Bank *v.* Moulton, 143 Mass. 543, 10 N. E. 251, holding that a suit in equity to set aside a compromise made by defendant with creditors on the ground that plaintiff's consent thereto was obtained by fraud and that other creditors were unlawfully preferred is substantially an action at law to recover the balance of the debt and that while the statute gives plaintiff a right to proceed in equity for the purpose of obtaining an equitable attachment, it cannot deprive defendant of the right to a jury trial and that issues as to the fraudulent representations and fraudulent preference should be submitted to a jury.

18. Hendricks *v.* Frank, 86 Ind. 278.

19. Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273.

20. *Idaho.*— Shields *v.* Johnson, 10 Ida. 476, 79 Pac. 391.

Kansas.— Larkin *v.* Wilson, 28 Kan. 513.

Montana.— Hickey *v.* Anaconda Copper Min. Co., (1905) 81 Pac. 806.

Nebraska.— Roggencamp *v.* Converse, 15 Nebr. 105, 17 N. W. 361; Harral *v.* Gray, 10 Nebr. 186, 4 N. W. 1040.

Oregon.— McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491.

Washington.— Maggs *v.* Morgan, 30 Wash. 604, 71 Pac. 188.

United States.— Grand Rapids, etc., R. Co. *v.* Sparrow, 36 Fed. 210, 1 L. R. A. 480.

See 31 Cent. Dig. tit. "Jury," §§ 45, 75.

A proceeding to prevent the unlawful occupancy of public land under the acts of congress of 1885 is not a common-law action but a summary proceeding in the nature of a suit in equity in which a jury trial cannot be demanded as a matter of right. Cameron *v.* U. S., 148 U. S. 301, 13 S. Ct. 595, 37 L. ed. 459.

In New Jersey the statute providing that any person in possession of land whose title is disputed may bring a suit in chancery to determine the adverse claim also provides that on the application of either party an issue at law shall be directed to try the validity of such claim. Powell *v.* Mayo, 24 N. J. Eq. 178.

21. Puterbaugh *v.* Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341 [*distinguishing* Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763]; Johnson *v.* Taylor, 106 Ind. 89, 5 N. E. 732; Trittipo *v.* Morgan, 99 Ind. 269.

22. *Colorado.*— Rice *v.* Goodwin, 2 Colo. App. 267, 30 Pac. 330.

Massachusetts.— Crocker *v.* Cotting, 173 Mass. 68, 53 N. E. 158.

Minnesota.— Johnson *v.* Peterson, 90 Minn. 503, 97 N. W. 384; Roussain *v.* Patten, 46 Minn. 308, 48 N. W. 1122.

Montana.— Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 70 Pac. 1114.

Ohio.— Ellithorpe *v.* Buck, 17 Ohio St. 72.

United States.— Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Book *v.* Justice Min. Co., 58 Fed. 827; Grand Rapids, etc., R. Co. *v.* Sparrow, 36 Fed. 210, 1 L. R. A. 480.

See 31 Cent. Dig. tit. "Jury," §§ 45, 75.

The United States courts of equity have jurisdiction of bills to quiet title where plaintiff is in possession and also where plaintiff is out of possessior if local legislation gives the remedy in such cases, and defendant is not thereby deprived of his right to jury trial according to the course of common law. Grand Rapids, etc., R. Co. *v.* Sparrow, 36 Fed. 210, 1 L. R. A. 480.

The Connecticut statute relating to shell fisheries providing that when any oyster bed is designated contrary to that chapter, the superior court as a court of equity, on petition, shall appoint a committee who shall hear and report the facts to the court which may order the removal of the stakes, is not unconstitutional as denying the claimant a jury trial, since the case is an equitable one in the nature of a suit to remove a cloud on title and the act merely requires the court to do what in other suits is left to its discretion. Clinton *v.* Bacon, 56 Conn. 508, 16 Atl. 548.

An action to determine the right to possession of mining lands as between adverse claimants, under U. S. Rev. St. §§ 2325,

but in others a distinction is made between issues arising in such actions which are of a legal nature and those which are purely equitable,[23] it being held that as to the former a jury is a matter of right[24] but not as to the latter.[25]

m. Winding Up Insolvent Corporations and Receiverships.[26] Proceedings for winding up and settling the affairs of insolvent corporations belong to the jurisdiction of equity and there is no right to a jury trial in such proceedings,[27] and being of this nature it is no infringement of the right of trial by jury to order a compulsory reference.[28] So also where a receiver has been appointed the appointment draws into the jurisdiction of equity all litigation concerning the receivership, and the parties to actions by or against the receiver cannot claim a jury trial as a matter of right.[29] In the absence of statute the receiver cannot sue or be sued in any court without the consent of the court appointing him and this court may determine where and in what manner the action shall be brought;[30] but in an action by a receiver where the only relief sought is a money judgment and there are no equitable rights to be adjusted, defendant cannot object to a jury trial where the court so directs.[31]

n. Partition. Although the jurisdiction of equity is not exclusive,[32] partition has always been a subject of equity jurisdiction,[33] especially where the case involves the settlement of questions peculiarly cognizable in courts of equity,[34]

2326, has been held to be an action at law and triable by jury. Burke *v.* McDonald, 2 Ida. 339, 13 Pac. 351.

23. See Crocker *v.* Carpenter, 98 Cal. 418, 33 Pac. 271; Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55, and cases cited *infra*, notes 24, 25.

24. Gillespie *v.* Gouly, 120 Cal. 515, 52 Pac. 816; Newman *v.* Duane, 89 Cal. 597, 27 Pac. 66; Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101; Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55. See o Gage *v.* Ewing, 107 Ill. 11.

If plaintiff is out of possession and defendant is in possession and claiming title either party is entitled to a jury trial as a matter of right. Gillespie *v.* Gouly, 120 Cal. 515, 52 Pac. 816.

Any legislation authorizing parties out of possession to bring suit for the purpose of quieting title or determining adverse claims to real property must be construed with reference to the right of the party in possession and claiming title to have such title determined by a jury. Tabor *v.* Cook, 15 Mich. 322.

25. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Crocker *v.* Carpenter, 98 Cal. 418, 33 Pac. 271; Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55.

26. Insolvency proceedings other than actions see *infra*, III, E, 4, k.

27. Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108]; U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199; Mechanics' F. Ins. Co.'s Case, 5 Abb. Pr. (N. Y.) 444.

28. Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108]; U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199; Sands *v.* Harvey, 4 Abb. Dec. (N. Y.) 147, 19 Abb. Pr. 248; Crosby *v.* Day, 16 Hun (N. Y.) 291; Sands *v.* Tillinghast, 24 How. Pr. (N. Y.) 435.

The rule applies generally to this class of proceedings and is not confined to the particular cases in which it was used prior to the adoption of the constitution. Sands *v.* Kimbark, 27 N. Y. 147 [*affirming* 39 Barb. 108].

29. Ross-Meehan Brake-Shoe Foundry Co. *v.* Southern Malleable Iron Co., 72 Fed. 957; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704.

Exceptions to receiver's account.— The receiver when called upon by the court to account for funds in his hands cannot demand a jury to pass upon such accounts in the first instance (Akers *v.* Veal, 66 Ga. 302); but where objections are filed to the report if the court refers such objections to an auditor or master, it has been held that the proceeding becomes in effect an action between the receiver and the objecting party and that the receiver is entitled to a jury trial on such objections (Hamm *v.* J. Stone, etc., Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427. See also Akers *v.* Veal, *supra*. But see New York Cent. Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141).

30. Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815; Ross-Meehan Brake-Shoe Foundry Co. *v.* Southern Malleable Iron Co., 72 Fed. 957; Thompson *v.* Scott, 23 Fed. Cas. No. 13,975, 4 Dill. 508. See also, generally, RECEIVERS.

31. Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546 [*affirming* 59 How. Pr. 426].

32. Kitts *v.* Willson, 106 Ind. 147, 5 N. E. 400.

33. Flaherty *v.* McCormick, 113 Ill. 538; Wilkin *v.* Wilkin, 1 Johns. Ch. (N. Y.) 111; Linton *v.* Laycock, 33 Ohio St. 128; 4 Kent Comm. 364.

34. Linton *v.* Laycock, 33 Ohio St. 128.

An action for an accounting of property held in trust and also for a partition of a part of such property is an equitable action and properly triable by the court without a jury. Judd *v.* Dike, 30 Minn. 380, 15 N. W. 672.

and such suits are triable by the court without a jury,[35] unless otherwise provided by statute.[36] In some jurisdictions it is now held that the court may without the intervention of the jury try questions of title as well as other issues;[37] but under the chancery practice a bill for partition would not be entertained where the title to the property was doubtful or disputed;[38] and it is held in most jurisdictions that in actions for partition if the title to the property is disputed the question of title must be submitted to a jury,[39] but this rule is held not to apply to other questions such as advancements and allowances for improvements.[40]

o. Injunction — (i) *In General.* Suits for injunctions belong to the jurisdiction of equity and there is no right to a jury trial in such cases,[41] unless the

A bill for partition and for an accounting of rents and profits is triable without a jury and the jurisdiction of equity is not ousted by a denial of plaintiff's title. Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

35. Camp Phosphate Co. *v.* Anderson, (Fla. 1904) 37 So. 722; Flaherty *v.* McCormick, 113 Ill. 538; Linton *v.* Laycock, 33 Ohio St. 128; Barr *v.* Chapman, 11 Ohio Dec. (Reprint) 862, 30 Cinc. L. Bul. 264; Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

On exceptions to the report of the commissioners in partition proceedings the petitioner is not entitled to a jury trial. McMillan *v.* McMillan, 123 N. C. 577, 31 S. E. 729.

36. Under the Indiana statute it is held that since suits for partition were not of conclusive equitable jurisdiction prior to 1852, the issues in such actions must be tried by a jury. Abernathy *v.* Allen, 132 Ind. 84, 31 N. E. 534; Kitts *v.* Willson, 106 Ind. 147, 5 N. E. 400.

In New York, Code Civ. Proc. § 1544, provides that in actions for partition "an issue of fact joined in the action is triable by a jury" (Bowen *v.* Sweeney, 143 N. Y. 349, 38 N. E. 271; Brown *v.* Brown, 52 Hun 532, 5 N. Y. Suppl. 893; Mellen *v.* Mellen, 16 N. Y. Suppl. 191, 21 N. Y. Civ. Proc. 301, 27 Abb. N. Cas. 99. See also Larder *v.* Granger, 21 N. Y. Suppl. 1107); but this provision has been construed as applying only to such issues as involve the maintenance of the action, as where a defense, such as the denial of plaintiff's title, is interposed, which if successful would prevent any partition at all (Brown *v.* Brown, *supra*).

37. *Florida.*— Camp Phosphate Co. *v.* Anderson, (1904) 37 So. 722.

Illinois.— Flaherty *v.* McCormick, 113 Ill. 538.

Ohio.— Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Barr *v.* Chapman, 11 Ohio Dec. (Reprint) 862, 30 Cinc. L. Bul. 264.

Virginia.— Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

West Virginia.— Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

See 31 Cent. Dig. tit. "Jury," §§ 44, 76.

38. Wilkin *v.* Wilkin, 1 Johns. Ch. (N. Y.) 111; Martin *v.* Smith, Harp. Eq. (S. C.) 106; 4 Kent Comm. 364.

The proper practice in such cases was held to be not to dismiss the suit but to retain the same for a reasonable time until the question of title could be established by an action at law. Wilkin *v.* Wilkin, 1 Johns. Ch. (N. Y.) 111.

39. *Maine.*— Allen *v.* Hall, 50 Me. 253.

Missouri.— Benoist *v.* Thomas, 121 Mo. 660, 27 S. W. 609.

New York.— Hewlett *v.* Wood, 62 N. Y. 75; Ward *v.* Ward, 23 Hun 431; Hewlett *v.* Wood, 1 Hun 478; Cassedy *v.* Wallace, 61 How. Pr. 240.

North Carolina.— Covington *v.* Covington, 73 N. C. 168.

Pennsylvania.— Harding *v.* Devitt, 10 Phila. 95.

South Carolina.— Osborne *v.* Osborne, 41 S. C. 195, 19 S. E. 494; Capell *v.* Moses, 36 S. E. 559, 15 S. E. 711; Reams *v.* Spouse, 28 S. C. 530, 6 S. E. 325.

See 31 Cent. Dig. tit. "Jury," §§ 44, 76.

In South Carolina it is held that the question of title must be tried in a court of law and the court cannot direct an issue out of chancery to a jury. Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711.

40. Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654; Brown *v.* Brown, 52 Hun (N. Y.) 532, 5 N. Y. Suppl. 893.

41. Davis *v.* Cleveland, etc., R. Co., 140 Ind. 468, 39 N. E. 495; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Helm *v.* Huntington First Nat. Bank, 91 Ind. 144; Brandis *v.* Grissom, 26 Ind. App. 661, 60 N. E. 455; Emporia *v.* Soder, 25 Kan. 588, 37 Am. Rep. 265; Gallagher *v.* Basey, 1 Mont. 457; Grether *v.* Wright, 75 Fed. 742, 23 C. C. A. 498; U. S. *v.* Debs, 64 Fed. 724; Ely *v.* Monson, etc., Mtg. Co., 8 Fed. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 3 Woodb. & M. 135, 2 Robb Pat. Cas. 625.

Corporate acts and proceedings.— There is no right to a jury trial in a suit to enjoin an insolvent insurance company from doing business and to dissolve the company (Ward *v.* Farwell, 97 Ill. 593), or in a suit by stockholders of a corporation to enjoin its trustees from paying over money, voted to themselves (MacNaughton *v.* Osgood, 114 N. Y. 574, 21 N. E. 1044), or in suits to restrain corporations from abuse of their franchises or violations of law (Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425).

To enforce building regulations.— A statute is not unconstitutional which gives the court of equity power to enjoin the use and

right is given by statute.[42] The court may also without the intervention of a jury punish the violation of an injunction as a contempt,[43] even where the act constituting the violation is also a criminal offense.[44]

(II) *To Abate Nuisances.* Courts of equity have jurisdiction to restrain by means of injunction the maintenance of a nuisance and such cases are triable without a jury.[45] It is also competent for the legislature to declare buildings used for certain illegal purposes to be nuisances and abatable in equity without a jury trial,[46] even where the maintenance of the nuisance is also a criminal offense,[47] and although defendant may thereby be deprived of the use of his property, such proceedings are due process at law.[48]

(III) *Injunction and Damages.* In a suit for an injunction where damages are also claimed, if the suit is primarily for the injunction and the right to dam-

occupation of buildings not provided with fire-escapes. Such proceedings do not deprive defendant of the use of his property without due process of law. Cincinnati *v.* Steinkamp, 54 Ohio St. 284, 43 N. E. 490 [*reversing* on this point 9 Ohio Cir. Ct. 178, 6 Ohio Cir. Dec. 384, but holding the particular statute in question to be unconstitutional on other grounds].

A suit to enjoin actions of replevin for attached property is triable without a jury. National Park Bank *v.* Goddard, 62 Hun (N. Y.) 31, 16 N. Y. Suppl. 343.

42. Edwards *v.* Applegate, 70 Ind. 325; Cumming *v.* Rapides Police Jury, 5 La. Ann. 634.

In Indiana under the statutes in force prior to the act of 1881, a jury trial was a matter of right (Edwards *v.* Applegate, 70 Ind. 325; Hopkins *v.* Greenburg, etc., Turnpike Co., 46 Ind. 187), but under the act of 1881 such cases are triable by the court without a jury (Helm *v.* Huntington First Nat. Bank, 91 Ind. 44).

In Louisiana in suits to enjoin sale under execution a jury trial is a matter of right in cases where security is required (Cumming *v.* Rapides Police Jury, 5 La. Ann. 634), but not in other cases (McCracken *v.* Wells, 26 La. Ann. 31; Amacker *v.* Smith, 16 La. Ann. 361; Dabbs *v.* Hemken, 3 Rob. (La.) 123; King *v.* Gayoso, 8 Mart. N. S. (La.) 370).

43. *Iowa.*— State *v.* Jordan, 72 Iowa 377, 34 N. W. 285; Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551.

Kansas.— State *v.* Durein, 46 Kan. 695, 27 Pac. 148; State *v.* Linker, 5 Kan. App. 264, 47 Pac. 570.

North Dakota.—State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

South Carolina.— *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678.

South Dakota.— State *v.* Mitchell, 3 S. D. 223, 52 N. W. 1052.

Vermont.— State *v.* Murphy, (1898) 41 Atl. 1037.

United States.— U. S. *v.* Sweeney, 95 Fed. 434; U. S. *v.* Debs, 64 Fed. 724.

See 31 Cent. Dig. tit. "Jury," § 77.

44. Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551; State *v.* Markuson, 5 N. D. 147, 64 N. W. 934; U. S. *v.* Debs, 64 Fed. 724.

45. *Indiana.*— Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193.

Iowa.— State *v.* Jordan, 72 Iowa 377, 34 N. W. 285; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

Kansas.— Cowdery *v.* State, (1905) 80 Pac. 953.

New York.— Miller *v.* Edison Electric Illuminating Co., 78 N. Y. App. Div. 390, 80 N. Y. Suppl. 319.

Ohio.— McClung *v.* North Bend Coal, etc., Co., 31 Cinc. L. Bul. 9.

Oklahoma.— Reaves *v.* Territory, 13 Okla. 396, 74 Pac. 951.

Pennsylvania.— New Castle City *v.* Raney, 6 Pa. Co. Ct. 87; Wishart *v.* Newell, 4 Pa. Co. Ct. 141.

Washington.— Smith *v.* Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858.

See 31 Cent. Dig. tit. "Jury," § 78.

But in an action to enjoin the obstruction of a highway as a public nuisance, where the landowner denies the existence of any right of way across his land, the issue must be tried by a jury if demanded before the obstruction can be enjoined. Lipscomb *v.* Littlejohn, 63 S. C. 38, 40 S. E. 1023.

46. *Iowa.*— State *v.* Jordan, 72 Iowa 377, 34 N. W. 285; Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244; Schermerhorn *v.* Webber, 67 Iowa 278, 25 N. W. 160; Pontius *v.* Bowman, 66 Iowa 88, 23 N. W. 277; Pontius *v.* Winebrenner, 65 Iowa 591, 22 N. W. 646; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

New Hampshire.— State *v.* Currier, 66 N. H. 622, 19 Atl. 1000; State *v.* Saunders, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646.

North Dakota.—State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

Pennsylvania.— Wishart *v.* Newell, 4 Pa. Co. Ct. 141.

South Carolina.— *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678.

See 31 Cent. Dig. tit. "Jury," § 78.

47. Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

48. State *v.* Jordan, 72 Iowa 377, 34 N. W. 285; McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327. *Compare* Ronayne *v.* Loranger, 66 Mich. 373, 33 N. W. 840.

ages is merely incidental to and dependent upon plaintiff's right to the injunction, the court may without the intervention of the jury assess the damages already sustained;[49] but an action brought primarily for the recovery of a money judgment is triable by jury notwithstanding plaintiff also asks for an injunction against a further violation of his rights,[50] or an injunction *pendente lite*;[51] and if it appears that plaintiff is not entitled to an injunction but is entitled to damages the action becomes one for damages only in which defendant may demand a jury trial.[52]

p. Specific Performance. There is no right to a jury trial in suits for specific performance.[53] Such suits belong exclusively to the jurisdiction of chancery and

49. McLaughlin *v.* Del Re, 64 Cal. 472, 2 Pac. 244; Rhoades *v.* McNamara, 135 Mich. 644, 98 N. W. 392; Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400; Herold *v.* Metropolitan El. R. Co., 129 N. Y. 636, 29 N. E. 319; Lynch *v.* Metropolitan El. R. Co., 129 N. Y. 274, 29 N. E. 315, 26 Am. St. Rep. 523, 15 L. R. A. 287; Watson *v.* Manhattan R. Co., 53 N. Y. Super. Ct. 137, 17 Abb. N. Cas. 289; Klipstein *v.* New York El. R. Co., 8 Misc. (N. Y.) 457, 28 N. Y. Suppl. 683; Converse *v.* Hawkins, 31 Ohio St. 209. See also Jefferson *v.* New York El. R. Co., 11 N. Y. Suppl. 488; Maggs *v.* Morgan, 30 Wash. 604, 71 Pac. 188; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

The fact that a claim for past damages has been acquired by assignment from a former owner of the premises to plaintiff does not make the issue as to such damages one which must be tried by a jury. Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400; Klipstein *v.* New York El. R. Co., 8 Misc. (N. Y.) 457, 28 N. Y. Suppl. 683. *Contra*, Sommer *v.* New York El. R. Co., 60 Hun (N. Y.) 148, 14 N. Y. Suppl. 619; Siefke *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 444, 14 N. Y. Suppl. 763.

Injunction to abate nuisance and damages. — In New York, Code Civ. Proc. § 968, provides that issues of fact in actions for a nuisance must be tried by a jury unless a jury is waived (People *v.* Metropolitan Tel., etc., Co., 31 Hun (N. Y.) 596; Cornell *v.* New York El. R. Co., 13 N. Y. Suppl. 511); and such actions were triable by jury prior to the enactment of this section (Hudson *v.* Caryl, 44 N. Y. 553; Dorr *v.* Dansville Gas Light Co., 18 Hun (N. Y.) 274); but this provision applies only to actions on the case for damages or actions to abate a nuisance and not to suits to enjoin a nuisance and to recover the damages sustained thereby (Cogswell *v.* New York, etc., R. Co., 105 N. Y. 319, 11 N. E. 518 [*reversing* 54 N. Y. Super. Ct. 92]; Miller *v.* Edison Electric Illuminating Co., 78 N. Y. App. Div. 390, 80 N. Y. Suppl. 319; Goldsmith *v.* New York Steam Co., 7 N. Y. App. Div. 317, 40 N. Y. Suppl. 169; Olmstead *v.* Rich, 3 Silv. Sup. (N. Y.) 447, 6 N. Y. Suppl. 826; Johnston *v.* Manhattan R. Co., 16 N. Y. Suppl. 434 [*affirmed* in 60 N. Y. Super. Ct. 494, 17 N. Y. Suppl. 953]. See also Bach *v.* New York El. R. Co., 60 Hun (N. Y.) 128, 14 N. Y. Suppl. 620).

50. Muncie Pulp Co. *v.* Martin, 164 Ind. 30, 72 N. E. 882; Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254; Brundridge *v.* Goodlove, 30 Ohio St. 374; State *v.* Hart, 26 Utah 229, 72 Pac. 938. See also Hughes *v.* Dunlap, 91 Cal. 385, 27 Pac. 642; Finch *v.* Green, 16 Minn. 355; Colman *v.* Dixon, 50 N. Y. 572.

51. Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350.

52. McNulty *v.* Mt. Morris Electric Light Co., 172 N. Y. 410, 65 N. E. 196 [*modifying* 56 N. Y. App. Div. 9, 67 N. Y. Suppl. 395]. But see Tucker *v.* Edison Electric Illuminating Co., 100 N. Y. App. Div. 407, 91 N. Y. Suppl. 439, holding that where a trial is necessary to determine plaintiff's right to the equitable relief demanded, the court may retain jurisdiction and assess the damages, although plaintiff does not prove a case entitling him to the injunction.

If plaintiff disposes of the property after suit is instituted to enjoin the operation of a railway thereon and thereby deprives himself of the right to the equitable relief demanded, defendant may demand a jury trial on the issue of damages. Saxton *v.* New York El. R. Co., 12 N. Y. App. Div. 263, 42 N. Y. Suppl. 508.

53. *Idaho.*— Brady *v.* Yost, 6 Ida. 273, 55 Pac. 542.

Massachusetts.— Shapira *v.* D'Arcy, 180 Mass. 377, 62 N. E. 412.

Missouri.— McCullough *v.* McCullough, 31 Mo. 226.

New York.— O'Beirne *v.* Bullis, 158 N. Y. 466, 53 N. E. 211; Wurster *v.* Armfield, 98 N. Y. App. Div. 298, 90 N. Y. Suppl. 699, 34 N. Y. Civ. Proc. 167.

Ohio.— Pierce *v.* Stewart, 61 Ohio St. 422, 56 N. E. 201; Hull *v.* Bell, 54 Ohio St. 228, 43 N. E. 584; Moore *v.* Moulton, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466.

See 31 Cent. Dig. tit. "Jury." §§ 51, 80.

In an action to determine an adverse claim to real property, under the code, if defendant bases his claim upon a contract to convey the land and asks for specific performance he is not entitled to a jury to try the issues thus presented. Crocker *v.* Carpenter, 98 Cal. 418, 33 Pac. 271.

If the title to the land appears doubtful, and the doubt arises from questions of fact, an issue to a jury is the best method of ascertaining the truth of such facts. Seymour *v.* De Lancey, Hopk. (N. Y.) 436, 14 Am. Dec. 552.

are still triable by the court without a jury under the codes of procedure.[54] Where, however, specific performance cannot be decreed, the court cannot proceed to adjudicate upon the question of damages resulting from the breach of contract which is a strictly legal claim and triable by jury.[55]

q. Opening or Setting Aside Judgments or Decrees. A suit to set aside a judgment or decree on the ground of fraud or collusion is for equitable relief and is triable by the court without a jury;[56] but a proceeding to revive a dormant judgment is in the nature of a civil action, and where defendant pleads facts amounting to payment or satisfaction and issue is joined on such plea a jury trial may be demanded.[57]

r. Enforcement of Judgments or Awards. A jury trial may be claimed as a matter of right in an action upon a common-law award,[58] but not in proceedings to enforce performance of an award in a statutory arbitration.[59]

s. Property Rights of Married Women. A suit to subject the separate estate of a married woman to the payment of debts contracted by her is an equitable proceeding and triable by the court without a jury,[60] unless by statute a judgment may be entered and enforced against a married woman in the same manner as if she were single, in which case an action for the recovery of a money judgment is triable by jury;[61] and a married woman who is the owner of personal property of which by statute she has the full legal title and absolute control may sue at law for its conversion and the case is triable by jury.[62]

t. Assessment of Damages in Equity. The general rule is that damages as such will not be ascertained in equity.[63] If, however, a suit is properly instituted for equitable relief the court may, without the intervention of a jury, dispose of the entire case and assess such damages as are incidental to the equitable relief granted;[64] but the court cannot assess damages where the complaint states no

54. Hull *v.* Bell, 54 Ohio St. 228, 43 N. E. 584.

55. Sternberger *v.* McGovern, 56 N. Y. 12; Stevenson *v.* Buxton, 37 Barb. (N. Y.) 13, 15 Abb. Pr. 352 [*reversing* 8 Abb. Pr. 414]; Willis *v.* Bellamy, 52 N. Y. Super. Ct. 373.

The suit need not be dismissed and a separate action at law brought to recover the damages where the code allows the uniting of legal and equitable causes of action growing out of the same transaction but the court may retain the case and submit the issue as to damages to a jury. Sternburger *v.* McGovern, 56 N. Y. 12.

In an action for specific performance and for an injunction until performance is made, the court may render a judgment for damages instead of the injunction without allowing defendant a jury trial. Dunnell *v.* Ketcltas, 16 Abb. Pr. (N. Y.) 205.

56. Whittlesey *v.* Delaney, 73 N. Y. 571; Ellensohn *v.* Keyes, 6 N. Y. App. Div. 601, 39 N. Y. Suppl. 774.

57. Farak *v.* Schuyler First Nat. Bank, 67 Nebr. 463, 93 N. W. 682; McCormick *v.* Carey, 62 Nebr. 494, 87 N. W. 172.

58. Goodwine *v.* Miller, 32 Ind. 419; Grant Dist. Tp. *v.* Bulles, 69 Iowa 525, 29 N. W. 439; Williamstown Bank *v.* Webb, 33 S. W. 1109, 17 Ky. L. Rep. 1184.

59. Milner *v.* Noel, 43 Ind. 324.

Right to jury trial in statutory proceedings to set aside award see ARBITRATION AND AWARD, 3 Cyc. 764.

60. Gay *v.* Ihm, 69 Mo. 584; Cheseborough *v.* House, 5 Duer (N. Y.) 125.

61. Litchfield *v.* Dezendorf, 11 Hun (N. Y.) 358.

62. Alt *v.* Meyer, 8 Mo. App. 198.

63. Palys *v.* Jewett, 32 N. J. Eq. 302.

64. *California.*— McLaughlin *v.* Del Re, 64 Cal. 472, 2 Pac. 244.

Kentucky.— Baltzell *v.* Hall, 1 Litt. 97; Semon *v.* Freitay, 29 S. W. 320, 16 Ky. L. Rep. 524.

Michigan.— Rhoades *v.* McNamara, 135 Mich. 644, 98 N. W. 392.

New York.— Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400; Lynch *v.* Metropolitan El. R. Co., 129 N. Y. 274, 29 N. E. 315, 26 Am. St. Rep. 523, 15 L. R. A. 287.

Ohio.— Converse *v.* Hawkins, 31 Ohio St. 209.

Washington.— Murray *v.* Okanogan Live Stock, etc., Co., 12 Wash. 259, 40 Pac. 942; Wintermute *v.* Carner, 8 Wash. 585, 36 Pac. 490.

See 31 Cent. Dig. tit. "Jury," § 43.

The New York statute of 1891, amending Code Civ. Proc. § 970, and providing for submitting issues to a jury "where one or more questions arise on the pleadings as to the value of property, or as to the damages which a party may be entitled to recover" does not apply to equitable actions where the damages are merely incidental to the granting of the equitable relief. Livingston *v.* Manhattan R. Co., 131 N. Y. 600, 30 N. E. 189; Shepard *v.* Manhattan R. Co., 131 N. Y. 215, 30 N. E. 187. *Compare* Eggers *v.* Manhattan R. Co., 18 N. Y. Suppl. 181, 21 N. Y. Civ. Proc.

ground for a specific decree in equity,[65] where the equitable relief demanded cannot be granted,[66] or where, notwithstanding the complaint contains a prayer for some equitable relief, the case is primarily an action for the recovery of damages.[67]

3. Particular Pleas and Defenses — a. In General. The right to a jury trial is ordinarily determined by the cause of action stated and not by the defense interposed thereto.[68] Generally speaking, whenever in an action at law a defense is interposed which raises a disputed question of fact, a jury trial is a matter of right;[69] and conversely a jury trial may be denied wherever the answer raises only an issue of law,[70] or where it does not constitute any proper defense to the cause of action stated in the complaint.[71]

b. Equitable Defense to Legal Action. The interposition of an equitable defense to a legal cause of action does not convert the case into suit in equity so as to deprive plaintiff of his right to a jury trial,[72] nor does defendant by setting up an equitable defense lose his right to have any legal issues arising upon plaintiff's claim tried by jury.[73] This rule, however, applies only to mere matters of equitable defense,[74] for if the answer contains not merely a technical defense but an independent equitable cause of action constituting a cross demand in favor of defendant, the effect of which, if established, would extinguish plaintiff's cause

403, 27 Abb. N. Cas. 463; Underhill *v.* Manhattan R. Co., 18 N. Y. Suppl. 43, 21 N. Y. Civ. Proc. 441, 27 Abb. N. Cas. 478.

Although as to one defendant the suit is substantially one for damages, yet if as against the other defendants it was properly brought in equity, and the relation of this defendant to the subject-matter of the suit is such as to make him a proper party defendant, he cannot demand a jury trial. Murray *v.* Okanogan Live Stock, etc., Co., 12 Wash. 259, 40 Pac. 942.

Where the right to damages is established and the amount admitted or not disputed, there can be no necessity for an action at law or for the court directing an issue to be tried by a jury. Schmid *v.* Lisiewski, 53 N. J. Eq. 670, 31 Atl. 603.

65. Robertson *v.* McPherson, 4 Ind. App. 595, 31 N. E. 478.

66. Wiggins *v.* Williams, 36 Fla. 637, 18 So. 859, 30 L. R. A. 754; Sternberger *v.* McGovern, 56 N. Y. 12; Stevenson *v.* Buxton, 37 Barb. (N. Y.) 13, 15 Abb. Pr. 352 [*reversing* 8 Abb. Pr. 414]; Willis *v.* Bellamy, 52 N. Y. Super. Ct. 373.

67. Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350; Brundridge *v.* Goodlove, 30 Ohio St. 374.

68. Smith *v.* St. Louis Beef Canning Co., 14 Mo. App. 522.

69. Clarke *v.* Huff, 6 Ohio Dec. (Reprint) 771, 8 Am. L. Rec. 26; Riter *v.* Reed, 2 Phila. (Pa.) 342. See also Lippincott *v.* Lippincott, 1 Phila. (Pa.) 396.

In an action on a due-bill signed by an agent of defendant, if the affidavit of defendant expressly denies the authority of the agent, defendant is entitled to a jury trial, although a partial payment may be indorsed on the instrument. Hunter *v.* Reilly, 36 Pa. St. 509.

A denial of plaintiff's legal capacity to sue where defect does not appear upon the face of the complaint and the objection is taken by answer raises an issue which is triable by jury. Gallipolis First Presb. Soc. *v.* Smithers, 12 Ohio St. 248.

70. Packer *v.* Packer, 24 Iowa 20; Richardson *v.* Ellett, 10 Tex. 190.

71. Goodacre *v.* Skinner, 47 Kan. 575, 28 Pac. 705; Shrader *v.* State, 30 Tex. 386.

72. Tufts *v.* Norris, 115 Iowa 250, 88 N. W. 367; Grayson *v.* Weddle, 80 Mo. 39; Smith *v.* St. Louis Beef Canning Co., 14 Mo. App. 522; Wolff *v.* Schaeffer, 4 Mo. App. 367 [*affirmed* in 74 Mo. 154]. See also *In re* Foley, 76 Fed. 390.

Where both legal and equitable defenses are relied on the issues arising upon the former are triable by jury and the latter by the court. Petty *v.* Malier, 15 B. Mon. (Ky.) 591; Brownlee *v.* Martin, 21 S. C. 392. See also Greenville *v.* Ormand, 44 S. C. 116, 21 S. E. 641.

Where the complaint states two legal causes of action the only defense to one of which is a general denial, plaintiff is, as to that issue at least, entitled to a jury trial, although an equitable defense is interposed to the other causes of action. Beary *v.* Hoster, 6 N. Y. Suppl. 330.

Examination of long account — compulsory reference.— If the cause of action disclosed by the complaint is triable by jury, the fact that the answer or counter-claim involves the examination of a long account does not make the entire case referable. The character of the action is determined by the complaint and the answer cannot change it so as to authorize a reference. Untermyer *v.* Beihauer, 105 N. Y. 521, 11 N. E. 847; Chu Pawn *v.* Irwin, 73 Hun (N. Y.) 182, 25 N. Y. Suppl. 871; Fiero *v.* Paulding, 53 Hun (N. Y.) 633, 6 N. Y. Suppl. 122.

73. Moline Plow Co. *v.* Hartman, 84 Mo. 610; Smith *v.* Bryce, 17 S. C. 538.

74. Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 N. W. 1007; Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991.

of action, the issue taken thereon is triable by the court and not of right by a jury,[75] and this is so whether issue is taken on the averments of the complaint or not.[76] The issues arising on the cross demand should be determined by the court in the first instance, since if established they dispose of the entire controversy;[77] but if not established,[78] or if insufficient entirely to defeat plaintiff's cause of action,[79] the issues arising on the original complaint should be submitted to a jury if a jury trial is demanded.

c. Legal Defense to Equitable Action. The fact that defendant sets up a legal defense to an equitable cause of action does not change the character of the proceedings or entitle him to demand a jury trial.[80]

d. Plea of Nul Tiel Record. A plea of *nul tiel record* is triable only by an inspection of the record itself which is to be made by the court and there is no right to a jury trial,[81] except where the record of a foreign court is denied by this plea and the existence of the record to be inspected must first be established by

75. Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Bodley *v.* Ferguson, 30 Cal. 511; Marling *v.* Burlington, etc., R. Co., 67 Iowa 331, 25 N. W. 268; Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1007; Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991; Buckner *v.* Mear, 26 Ohio St. 514 [*explaining* Smith *v.* Anderson, 20 Ohio St. 76]; Massie *v.* Stradford, 17 Ohio St. 596.

In ejectment where defendant alleges that the instrument under which plaintiff claims was in fact intended as a mortgage, the fact that the answer closed with a prayer that it be "adjudged that plaintiff is not the owner of . . . the property described," does not render the defense an independent claim for affirmative equitable relief so as to make the issues triable without a jury. Locke *v.* Moulton, 108 Cal. 49, 41 Pac. 28.

76. Buckner *v.* Mear, 26 Ohio St. 514.

If defendant admits plaintiff's legal right but seeks to avoid it by setting up an equitable defense asking for affirmative relief, the case becomes exclusively one in equity in which a jury trial cannot be demanded. O'Day *v.* Conn, 131 Mo. 321, 32 S. W. 1109.

77. Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Massie *v.* Stradford, 17 Ohio St. 596. See also Hotaling *v.* Tecumseh Nat. Bank, 55 Nebr. 5, 75 N. W. 242; Peterson *v.* Philadelphia Mortg., etc., Co., 33 Wash. 464, 74 Pac. 585.

78. See Buckner *v.* Mear, 26 Ohio St. 514.

79. Smith *v.* Moberly, 15 B. Mon. (Ky.) 70; Cincinnati, etc., R. Co. *v.* Morris, 10 Ohio Cir. Ct. 502, 6 Ohio Cir. Dec. 640.

80. *California.*— Angus *v.* Craven, 132 Cal. 691, 64 Pac. 1091.

Indiana.— Reichert *v.* Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

Iowa.— Crissman *v.* McDuff, 114 Iowa 83, 86 N. W. 50; Leach *v.* Kundson, 97 Iowa 643, 66 N. W. 913; Ryman *v.* Lynch, 76 Iowa 587, 41 N. W. 320.

Kansas.— Larkin *v.* Wilson, 28 Kan. 513.

Nebraska.— Daniels *v.* Mutual Ben. Ins. Co., (1905) 102 N. W. 458; Morrissey *v.* Broomal, 37 Nebr. 766, 56 N. W. 383.

New York.— New York Guaranty Trust Co. *v.* Robinson, 31 Misc. 277, 64 N. Y. Suppl. 366.

Virginia.— New York L. Ins. Co. *v.* Davis, 94 Va. 427, 26 S. E. 941.

Washington.— Installment Bldg., etc., Co. *v.* Wentworth, 1 Wash. 467, 25 Pac. 298.

See 31 Cent. Dig. tit. "Jury," § 54 *et seq.*

Where usury is pleaded as a defense in an equitable action there is no right to a jury trial (Clough *v.* Seay, 49 Iowa 111; Knickerbocker L. Ins. Co. *v.* Nelson, 8 Hun (N. Y.) 21; McLaurin *v.* Hodges, 43 S. C. 187, 20 S. E. 991); but in such cases the court may properly in its discretion submit issues to a jury (New Orleans Gas Light, etc., Co. *v.* Dudley, 8 Paige (N. Y.) 452).

In Kentucky it is provided by statute that either party to an equitable action may have the case transferred on motion to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial, but that either party may require the equitable issues to be first disposed of. Carder *v.* Weisenburgh, 95 Ky. 135, 23 S. W. 964, 15 Ky. L. Rep. 497, holding that if the equitable right depends upon the decision of legal issues raised by the defense pleaded a transfer cannot be denied.

81. *Georgia.*— Davidson *v.* Carter, 9 Ga. 501.

Kentucky.— Carson *v.* Pearl, 4 J. J. Marsh. 92.

Massachusetts.— Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Missouri.— Simpson *v.* Watson, 15 Mo. App. 425.

Pennsylvania.— Oliver *v.* Foster, 3 Pa. L. J. Rep. 388.

Rhode Island.— State *v.* Sutcliffe, 16 R. I. 410, 16 Atl. 710.

United States.— Bassett *v.* U. S., 9 Wall. 38, 19 L. ed. 548.

See 31 Cent. Dig. tit. "Jury," § 32.

In New York it has been held that the issue arising upon a plea of *nul tiel record* is a question of fact triable by jury within the application of a statute providing that "all issues of fact joined in any court proceeding according to the course of common law shall be tried by a jury except where a reference shall be ordered." Fasnacht *v.* Stehn, 53 Barb. 650, 5 Abb. Pr. N. S. 338. See also Trotter *v.* Mills, 6 Wend. 512.

proof which it may be necessary to submit to a jury, in which case a jury trial of the issue may be demanded.[82]

e. Payment. In an action at law a plea of payment raises an issue of fact which is triable by jury,[83] but does not in an equitable action entitle defendant to demand a jury.[84]

f. Statute of Limitations. In an action at law a plea of the statute of limitations raises an issue triable by jury,[85] but it may be interposed in equity as well as in an action at law without changing the character of the action and does not entitle defendant to a jury trial.[86]

g. Fraud. While actual fraud is a question of fact, it does not follow that it must always be determined by jury.[87] Both courts of law and courts of equity have in proper cases jurisdiction of fraud,[88] and where the facts constituting the fraud and the relief sought are cognizable in a court of law, the parties are entitled to a jury trial;[89] but where the case made by the pleadings involves the application of the doctrines of equity and the granting of relief which can be obtained only in a court of equity, the parties are not entitled to a jury trial.[90] So where fraud is pleaded as a defense in an action at law the issue is triable by the jury,[91] and in a suit in equity by the court.[92]

h. Counter-Claim. In the absence of statute a defendant who pleads a counter-claim in an equitable action is not entitled to a jury trial of the issues arising thereon,[93] notwithstanding the cross demand constitutes an independent cause

82. Bassett *v.* U. S., 9 Wall. (U. S.) 38, 19 L. ed. 548.

The judgment of a court of another state of the United States is not a foreign record within the application of this rule. Hall *v.* Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356.

83. *Iowa.*— McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

New York.— Kennagh *v.* McColgan, 3 Silv. Sup. 134, 6 N. Y. Suppl. 244, 17 N. Y. Civ. Proc. 287.

North Carolina.— Isler *v.* Murphy, 71 N. C. 436; Eubanks *v.* Mitchell, 67 N. C. 34.

South Carolina.— Gregory *v.* Ducker, 31 S. C. 141, 9 S. E. 780.

Texas.— Mullaly *v.* Goggan, (Civ. App. 1894) 25 S. W. 666.

See 31 Cent. Dig. tit. "Jury," §§ 33, 56.

84. Leach *v.* Kundson, 97 Iowa 643, 66 N. W. 913; Gregory *v.* Perry, 66 S. C. 455, 45 S. E. 4.

85. McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

86. Hancock *v.* Plummer, 66 Cal. 337, 5 Pac. 514; Leach *v.* Kundson, 97 Iowa 643, 66 N. W. 913.

87. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630. *Compare* Cormier *v.* Soye, 28 La. Ann. 543; Stewart *v.* Scudder, 10 La. Ann. 216; Louisiana Bank *v.* Delery, 2 La. Ann. 648.

88. Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Rutherford *v.* Williams, 42 Mo. 18.

Upon the general subject of fraud courts of equity have concurrent jurisdiction with courts of law, but in some causes of action involving fraud the jurisdiction of equity is exclusive. Hendricks *v.* Frank, 86 Ind. 278.

89. Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Blackman *v.* Wheaton, 13 Minn. 326; Routt *v.* Milner, 57 Mo. App. 50.

90. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454; Hendricks *v.* Frank, 86 Ind. 278; Stewart *v.* Iglehart, 7 Gill & J. (Md.) 132, 38 Am. Dec. 202; King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332; Ferris *v.* Crawford, 2 Den. (N. Y.) 595.

91. Kern *v.* Supreme Council A. L. of H., 167 Mo. 471, 67 S. W. 252; Schuermann *v.* Union Cent. L. Ins. Co., 165 Mo. 641, 65 S. W. 723; Earl *v.* Hart, 89 Mo. 263, 1 S. W. 238; Routt *v.* Milner, 57 Mo. App. 50.

92. Knickerbocker L. Ins. Co. *v.* Nelson, 8 Hun (N. Y.) 21; Stephens *v.* Humphries, 10 N. Y. Suppl. 455.

93. *Indiana.*— Whitcomb *v.* Stringer, (App. 1902) 63 N. E. 582, 64 N. E. 636; Reichert *v.* Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

Iowa.— Gatch *v.* Garretson, 100 Iowa 252, 69 N. W. 550; Ryman *v.* Lynch, 76 Iowa 587, 41 N. W. 320.

Kansas.— Larkin *v.* Wilson, 28 Kan. 513.

Minnesota.— Johnson *v.* Peterson, 90 Minn. 503, 97 N. W. 384.

Nebraska.— Morrissey *v.* Broomal, 37 Nebr. 766, 56 N. W. 383; Dohle *v.* Omaha Foundry, etc., Co., 15 Nebr. 436, 19 N. W. 644. *Compare* Larabee *v.* Given, 65 Nebr. 701, 91 N. W. 504.

South Carolina.— Pratt *v.* Timmerman, 69 S. C. 186, 48 S. E. 255; Sullivan Hardware Co. *v.* Washington, 47 S. C. 187, 25 S. E. 45; McLaurin *v.* Hodges, 43 S. C. 187, 20 S. E. 991.

Washington.— Installment Bldg., etc., Co. *v.* Wentworth, 1 Wash. 467, 25 Pac. 298.

Wisconsin.— Wilson *v.* Johnson, 74 Wis. 337, 43 N. W. 148.

See 31 Cent. Dig. tit. "Jury," §§ 34, 40, 55.

of action upon which a separate action might have been brought and a jury trial demanded.[94]

i. Plea in Abatement. An issue of fact joined on a plea in abatement in a civil action is triable by jury,[95] unless it is one which must be determined by an inspection of the record.[96]

j. Plea in Bar to Indictment. Where defendant pleads a former conviction, acquittal, or pardon in bar to an indictment, a jury trial may be demanded.[97]

4. Civil Proceedings Other Than Actions[98] — a. In General. The right to trial by jury, unless extended by statute, applies only to actions according to the course of the common law and not to special proceedings of a summary character.[99] The right is also confined to proceedings in courts of justice and does not apply to proceedings taken by corporations for the removal of members for offenses against the corporation.[1] The legislature cannot, however, authorize a summary pro-

Compare Robertson *v.* Moore, 10 Ida. 115, 77 Pac. 218.

In New York, Code Civ. Proc. § 974, provides that where defendant interposes a counter-claim demanding an affirmative judgment against plaintiff, the issues of fact arising thereon are triable in the same manner as in an action by defendant against plaintiff for the cause of action stated in the counter-claim and demanding the same judgment (Herb *v.* Metropolitan Hospital, etc., 80 N. Y. App. Div. 145, 80 N. Y. Suppl. 552; Roslyn Heights Land, etc., Co. *v.* Burrowes, 76 Hun 62, 27 N. Y. Suppl. 622); but the provision applies only where the counter-claim sets up matter for which a separate action might have been maintained (City Real Estate Co. *v.* Foster, 44 N. Y. App. Div. 114, 60 N. Y. Suppl. 577. See also Cook *v.* Jenkins, 79 N. Y. 575); and where the claim is not for one of the causes of action specified in section 968, an application must, under section 970, be made for an order directing the issues to be stated for trial (Mackellar *v.* Rogers, 109 N. Y. 468, 17 N. E. 350 [*affirming* 52 N. Y. Super. Ct. 468]); but if such application be properly made a jury trial cannot be denied (Deeves *v.* Metropolitan Realty Co., 6 Misc. 91, 26 N. Y. Suppl. 23 [*affirmed* in 141 N. Y. 587, 36 N. E. 739]); the right of defendant to a jury trial, however, is subject to the right of plaintiff to have the issues referred, if the trial would require the examination of a long account (Roslyn Heights Land, etc., Co. *v.* Burrowes, 22 N. Y. App. Div. 540, 48 N. Y. Suppl. 15); and also where defendant joins with his legal demand equitable defenses to defeat the equitable complaint, he waives the right to a jury trial (Guaranty Trust Co. *v.* Robinson, 31 Misc. 277, 64 N. Y. Suppl. 366).

Under a Kentucky statute where the equitable right depends upon the legal issues raised by defendant's counter-claim he is entitled as a matter of right on motion to have such legal issues transferred to the ordinary docket and tried by a jury. Carder *v.* Weisenburgh, 95 Ky. 135, 23 S. W. 964, 15 Ky. L. Rep. 497.

94. Reichert *v.* Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835; Morrissey *v.* Broomal, 37 Nebr. 766, 56 N. W. 383; Installment Bldg., etc., Co. *v.* Wentworth, 1 Wash. 467, 25 Pac. 298. But see Sallady *v.* Webb, 2 Ohio Cir. Ct. 553, 1 Ohio Cir. Dec. 638.

95. *Maine.*— State *v.* Marston, 31 Me. 292.

Maryland.— Tyler *v.* Murray, 57 Md. 418.

Massachusetts.— O'Loughlin *v.* Bird, 128 Mass. 600.

Tennessee.— Bacon *v.* Parker, 2 Overt. 55.

Texas.—Robertson *v.* Ephraim, 18 Tex. 118; Howeth *v.* Clark, (App. 1892) 19 S. W. 433.

See 31 Cent. Dig. tit. "Jury," § 88.

96. Dickinson *v.* Noland, 7 Ark. 25; State *v.* Martin, 38 W. Va. 568, 18 S. E. 748.

Reference to master.— In equity where the only question raised by a plea in abatement is whether another suit is pending between the same parties involving the same equity, the proper practice has been held to be to refer the matter to a master to be determined by an examination of the proceeding in the former suit. McEwen *v.* Broadhead, 11 N. J. Eq. 129.

97. Bush *v.* State, 55 Nebr. 195, 75 N. W. 542; Arnold *v.* State, 38 Nebr. 752, 57 N. W. 378.

98. **Bastardy proceedings** see Bastardy, 5 Cyc. 666.

Election contests see Elections, 15 Cyc. 432.

99. *California.*— Koppikus *v.* State Capitol Com'rs, 16 Cal. 248.

New York.— Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; *In re* Newcomb, 18 N. Y. Suppl. 16.

North Carolina.— Porter *v.* Armstrong, 134 N. C. 447, 46 S. E. 997.

Oklahoma.— Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075.

Pennsylvania.— *In re* Pennsylvania Hall, 5 Pa. St. 204.

Texas.— Janes *v.* Reynolds, 2 Tex. 250.

Wyoming.— Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

United States.— *In re* Chow Goo Pooi, 25 Fed. 77.

See 31 Cent. Dig. tit. "Jury," § 104.

In the allotment of property exempt from execution questions of fact arising in the proceedings before the commissioners are not issues as to which a jury trial can be demanded. Beavans *v.* Goodrich, 98 N. C. 217, 3 S. E. 516.

1. People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271.

cedure in controversies properly triable by jury at common law or according to the practice of the particular jurisdiction prior to the adoption of the constitution.[2]

b. Quo Warranto. The authorities are conflicting as to whether there is any constitutional right to have issues of fact submitted to a jury in quo warranto proceedings or proceedings in the nature of quo warranto.[3] In some jurisdictions it is held that a jury trial in such cases is a constitutional right,[4] while in others it is held that the facts may be determined by the court without the intervention of a jury.[5] In others a distinction is made between proceedings to try title to a public office and proceedings affecting a charter, franchise, or other property right, it being held that a jury trial is a right in the latter but not in the former.[6] It is competent, however, for the court to refer questions of fact to a jury for determination.[7] Where jurisdiction of the proceeding is vested in the supreme court by the constitution of the state, it is held to be a constitutional recognition that the facts shall be determined by the court without the intervention of a jury.[8]

c. Mandamus.[9] At common law there was no right to a jury trial of issues of fact in mandamus proceedings;[10] but in England it was provided by the statute of Anne that an issue might be joined on the return to an alternative writ, which was triable by jury.[11] In this country it has been held in a few jurisdictions that a jury trial in such cases is a constitutional right,[12] but in most of the states the

2. *Alabama.*— Powell *v.* Sammons, 31 Ala. 552.
Florida.— Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 48 Am. Dec. 178.
Missouri.— State Bank *v.* Anderson, 1 Mo. 244.
Pennsylvania.— Linderman *v.* Reber, 1 Woodw. 82.
Washington.— Dacres *v.* Oregon R., etc., Co., 1 Wash. 525, 20 Pac. 601.
See 31 Cent. Dig. tit. "Jury," § 104.

3. See People *v.* Havird, 2 Ida. (Hasb.) 531, 25 Pac. 294; Reynolds *v.* State, 61 Ind. 392; State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253, where the conflicting authorities are reviewed and discussed.

4. *Florida.*— Van Dorn *v.* State, 34 Fla. 62, 15 So. 701; Buckman *v.* State, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806.
Idaho.— People *v.* Havird, 2 Ida. (Hasb.) 531, 25 Pac. 294.
Indiana.— Reynolds *v.* State, 61 Ind. 392.
Michigan.— People *v.* Doesburg, 16 Mich. 133.
New York.— People *v.* Albany, etc., R. Co., 57 N. Y. 161 [*reversing* 1 Lans. 308, 55 Barb. 344, 7 Abb. Pr. N. S. 265, 38 How. Pr. 228].
Wisconsin.—See State *v.* Messmore, 14 Wis. 115.
See 31 Cent. Dig. tit. "Jury," § 105.
But until an issue of fact is tendered by respondent in quo warranto proceedings he cannot demand a jury trial. State *v.* Gleason, 12 Fla. 190.

5. *Alabama.*— Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125.
Arkansas.— Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; State *v.* Johnson, 26 Ark. 281.
Connecticut.— State *v.* Lewis, 51 Conn. 113.
Kansas.— Wheeler *v.* Caldwell, 68 Kan. 776, 75 Pac. 1031.
Massachusetts.—Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.
Minnesota.— State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.
Missouri.— State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253; State *v.* Vail, 53 Mo. 97. See also State *v.* Towns, 153 Mo. 91, 54 S. W. 552.
Nebraska.— State *v.* Moores, 56 Nebr. 1, 76 N. W. 530.
Ohio.— Mason *v.* State, 58 Ohio St. 30, 50 N. E. 6, 41 L. R. A. 291.
Washington.— State *v.* Fawcett, (1897) 49 Pac. 346; State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.
See 31 Cent. Dig. tit. "Jury," § 105.
In England the right to a jury trial was conferred by 3 Geo. II, c. 25, as to informations in the nature of quo warranto but did not exist prior to this statute. Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125; State *v.* Johnson, 26 Ark. 281.

6. Louisiana, etc., R. Co. *v.* State, (Ark. 1905) 88 S. W. 559. See also Mason *v.* State, 58 Ohio St. 30, 50 N. E. 6, 41 L. R. A. 291; Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. 605.

7. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

8. Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125; State *v.* Johnson, 26 Ark. 281; State *v.* Vail, 53 Mo. 97. But see State *v.* Messmore, 14 Wis. 115.

9. Mandamus generally see MANDAMUS.

10. Castle *v.* Lawlor, 47 Conn. 340; State *v.* Suwannee County Com'rs, 21 Fla. 1; Chumasero *v.* Potts, 2 Mont. 242.

11. See Castle *v.* Lawlor, 47 Conn. 340; State *v.* Suwannee County Com'rs, 21 Fla. 1; Chumasero *v.* Potts, 2 Mont. 242.

12. Territory *v.* Chicago, etc., R. Co., 2 Okla. 108, 39 Pac. 389; Chamberlain *v.* Warburton, 1 Utah 267.
Where the application is made in vacation if a jury is demanded the proceeding should either be dismissed or adjourned to a term

right to a jury trial is denied.[13] There are, however, in some of the states statutes expressly providing for a jury trial,[14] or providing that the court may in its discretion submit issues of fact to a jury.[15]

d. Habeas Corpus. A petitioner for a writ of habeas corpus is not entitled to a jury to try issues of fact.[16]

e. Scire Facias. The right to a jury trial in a proceeding by scire facias depends upon whether the particular proceeding is to be considered as an original action or as a mere continuation of some other action and ancillary thereto.[17]

f. Enforcement of Health Regulations. The control of questions relating to public health were ordinarily before the adoption of the constitutions vested in boards or officers who were authorized to proceed in a summary manner without the intervention of a jury.[18] It is therefore competent for the legislature to invest boards of health with jurisdiction to proceed summarily in the abatement of nuisances calculated to endanger the public health,[19] and in the isolation of persons affected with or exposed to contagious or infectious diseases.[20]

g. Administration of Estates of Decedents.[21] There is no right to a jury to try exceptions to the account of a personal representative in a probate court,[22]

when a jury can be had. Chamberlain *v.* Warburton, 1 Utah 267.

13. *California.*— People *v.* Judge Tenth Judicial Dist., 9 Cal. 19.

Connecticut.— Castle *v.* Lawlor, 47 Conn. 340.

Florida.—State *v.* Suwannee County Com'rs, 21 Fla. 1.

Minnesota.— State *v.* Lake City, 25 Minn. 404; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

Missouri.— State *v.* Goodfellow, 1 Mo. App. 495.

Montana.— Chumasero *v.* Potts, 2 Mont. 242.

Nebraska.— Mayer *v.* State, 52 Nebr. 764, 73 N. W. 214.

Ohio.— Dutten *v.* Hanover, 42 Ohio St. 215.

See 31 Cent. Dig. tit. "Jury," § 106.

Where the supreme court has original jurisdiction under the constitution this has been held to imply that no jury could be demanded. State *v.* Suwannee County Com'rs, 21 Fla. 1; State *v.* Lake City, 25 Minn. 404. But see People *v.* Young, 40 Ill. 87.

Where the only issue made by the answer to a mandamus *nisi* is the fact that a bill in equity has been filed asking that a judgment plaintiff who applied for the mandamus be enjoined so that the sole question is as to the equity of the bill, the court may determine such question without a jury. Brunswick *v.* Dure, 60 Ga. 457.

Where the material facts are admitted by the pleadings a jury trial is unnecessary and a refusal thereof is not error. Marion County *v.* Coler, 75 Fed. 352, 21 C. C. A. 392.

14. Mott *v.* State, 145 Ind. 353, 44 N. E. 548; State *v.* Burnsville Turnpike Co., 97 Ind. 416; People *v.* O. of A. S., 53 N. Y. Super. Ct. 66; People *v.* Woodman, 15 Daly (N. Y.) 20, 1 N. Y. Suppl. 335, 4 N. Y. Suppl. 554 [*affirmed* in 123 N. Y. 634, 25 N. E. 953].

15. People *v.* Grand County, 6 Colo. 202; Chumasero *v.* Potts, 2 Mont. 242.

16. Orr *v.* Miller, 98 Ind. 436; Baker *v.* Gordon, 23 Ind. 204.

17. State *v.* Hoeffner, 124 Mo. 488, 28 S. W. 1.

To enforce a forfeited recognizance.— A proceeding by scire facias upon a forfeited recognizance in a criminal case is a mere continuation of the original proceeding and a jury trial cannot be demanded. State *v.* Murmann, 124 Mo. 502, 28 S. W. 2; State *v.* Hoeffner, 124 Mo. 488, 28 S. W. 1.

To revive judgment.— It has been held in Missouri that a scire facias to revive a judgment is a new suit and that therefore a jury trial is necessary (Simpson *v.* Watson, 15 Mo. App. 425; Wolff *v.* Schaeffer, 4 Mo. App. 367), but in a later case in which the right to a jury trial was not in issue these cases were expressly overruled as to the nature of the proceeding upon which ground the right to a jury was based (Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052).

To enforce municipal lien.— Where to a scire facias to enforce a municipal lien for street assessments, defendant filed an affidavit of defense alleging that the assessment was illegal and the proceedings fraudulent it was held that defendant was entitled to a jury trial. Allegheny *v.* McCaffrey, 131 Pa. St. 137, 18 Atl. 1001.

18. Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Matter of Smith, 84 Hun (N. Y.) 465, 32 N. Y. Suppl. 317.

19. Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282. *Compare* Sawyer *v.* State Bd. of Health, 125 Mass. 182, holding that a person prohibited by a board of health from carrying on a certain business on the ground that it is a nuisance and dangerous to the public health is entitled to a jury trial of the question whether the business is dangerous to health.

20. Matter of Smith, 84 Hun (N. Y.) 465, 32 N. Y. Suppl. 317.

21. See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1.

22. *California.*— Sanderson's Estate, 74 Cal. 199, 15 Pac. 753; Moore's Estate, 72 Cal. 335, 13 Pac. 880.

except where a jury trial is provided for by statute;[23] but the court may for its own satisfaction submit issues to a jury whose verdict will be merely advisory.[24] Statutes have also been held constitutional which provide a summary procedure in probate courts for compelling a representative to account,[25] and for compelling a discovery of property of the estate in the hands of other persons;[26] but a statute providing for a summary trial and rendition of judgment against persons alleged to have concealed, embezzled, or carried away property of the estate has been held to be constitutional only so far as it applies to cases where defendant does not controvert the truth of the complaint.[27] Where probate courts are by statute given jurisdiction to try disputed claims against the estate,[28] the trial is also without a jury[29] unless otherwise provided by statute.[30]

h. Probate and Contest of Wills.[31] The probate of a will was not a case triable by jury at common law,[32] and while the right to a jury to try issues of fact in such proceedings has in some cases been conferred by statute,[33] it is held in most jurisdictions that where the probate of a will is contested in a probate court a jury trial cannot be demanded as a matter of right,[34] and that if one has been granted the court may set aside the jury's finding of fact.[35] Such proceedings, however, are to be distinguished from direct actions in a court of general jurisdiction to contest or set aside a will in which a jury trial may ordinarily be demanded.[36]

i. Guardianship of Infants and Incompetents.[37] A jury trial cannot be

Illinois.— Clifford *v.* Gridley, 113 Ill. App. 164; Boyd *v.* Swallows, 59 Ill. App. 635.

Indiana.— Taylor *v.* Wright, 93 Ind. 121.

Louisiana.—Bozant's Succession, 5 La. Ann. 709.

Pennsylvania.— Sharp's Appeal, 3 Grant 260.

See 31 Cent. Dig. tit. "Juries," § 110.

The constitutional provisions relating to trial by jury do not apply to these proceedings. Boyd *v.* Swallows, 59 Ill. App. 635; and cases cited *supra*, III, B.

23. *In re* Atwood, 2 App. Cas. (D. C.) 74.

24. Moore's Estate, 72 Cal. 335, 13 Pac. 880.

25. Davis *v.* Harper, 54 Ga. 180.

26. Martin *v.* Martin, 170 Ill. 18, 48 N. E. 694 [*reversing* 68 Ill. App. 169]; Mahoney *v.* People, 98 Ill. App. 241; Martin *v.* Martin, 74 Ill. App. 215; Seavey *v.* Seavey, 30 Ill. App. 625.

27. Howell *v.* Fry, 19 Ohio St. 556, holding that if defendant denies the charge he cannot be deprived of his constitutional right to a jury trial.

28. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 225.

29. Devall *v.* Watterston, 18 La. Ann. 136; Bradley *v.* Woerner, 46 Mo. App. 371; Kates' Appeal, 148 Pa. St. 471, 24 Atl. 77; Esterly *v.* Rua, 122 Fed. 609, 58 C. C. A. 548.

30. Clouser *v.* Ruckman, 89 Ind. 65; Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82.

In Alabama the code provides that in the trial of contested claims against an estate in the probate court the issues "must be tried as in an action of law against an administrator, if required," but if a jury trial is not demanded it is not error for the court to try the case without a jury. Blankenship *v.* Nimmo, 50 Ala. 506.

In Indiana the circuit courts which by statute are also courts of probate have jurisdiction of claims against the estate (Noble *v.* McGinnis, 55 Ind. 528) and the trial is by jury (Sanders *v.* Weelburg, 107 Ind. 266, 7 N. E. 573; Hubbard *v.* Hubbard, 16 Ind. 25).

An application for an order on an administrator as to the distribution of the estate is not a case where a jury can be demanded. Duffy *v.* Duffy, 114 Iowa 581, 87 N. W. 500.

31. See, generally, WILLS.

32. Wills *v.* Lochnane, 9 Bush (Ky.) 547.

33. Humes *v.* Shillington, 22 Md. 346; Pegg *v.* Warford, 4 Md. 385; Barroll *v.* Reading, 5 Harr. & J. (Md.) 175.

34. *Florida.*— Lavey *v.* Doig, 25 Fla. 611, 6 So. 259.

Illinois.— Moody *v.* Found, 208 Ill. 78, 69 N. E. 831.

Iowa.— Gilruth *v.* Gilruth, 40 Iowa 346.

Kentucky.—Wills *v.* Lochnane, 9 Bush 547.

Minnesota.— Schmidt *v.* Schmidt, 47 Minn. 451, 50 N. W. 598.

Vermont.— *In re* Welch, 69 Vt. 127, 37 Atl. 250.

See 31 Cent. Dig. tit. "Jury," § 111.

In Texas where the constitution gives the district court exclusive jurisdiction of probate matters and also provides for a jury trial in all cases in that court, it is held that the parties have a constitutional right to a jury trial. Cockrill *v.* Cox, 65 Tex. 669; Davis *v.* Davis, 34 Tex. 15.

35. Gilruth *v.* Gilruth, 40 Iowa 346.

36. Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458; Lamb *v.* Lamb, 105 Ind. 456, 5 N. E. 171. See also Gilruth *v.* Gilruth, 40 Iowa 346. But see Rich *v.* Bowker, 25 Kan. 7.

In Missouri the statutory proceeding for testing wills in a circuit court is regarded as an action at law and is triable by jury. Garland *v.* Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836.

37. See, generally, DRUNKARDS, 14 Cyc. 1089; GUARDIAN AND WARD, 21 Cyc. 1.

demanded as a constitutional right in proceedings for the appointment of guardians for infants, or for inebriates and other incompetents,[38] nor can it be demanded in the case of exceptions to a guardian's account,[39] or in the trial of any matter connected with the administration of the trust, unless there is some statutory provision therefor.[40]

j. Inquisitions of Lunacy.[41] It has been held that there is no right to a jury trial in proceedings to determine the question of a person's sanity,[42] except where, as in some jurisdictions, the right is conferred by statute;[43] but on the contrary it has been held that a person cannot constitutionally be deprived of his liberty or the control of his property on the ground of insanity unless this fact is judicially ascertained by the verdict of the jury.[44]

k. Insolvency and Bankruptcy Proceedings.[45] It is held in most jurisdictions that insolvency proceedings are not proceedings according to the course of the common law, but are of a special nature corresponding more nearly to proceedings in a court of equity, and that they are not within the application of the constitutional provisions securing the right of trial by jury.[46] Proceedings under the

38. Hagany *v.* Cohnen, 29 Ohio St. 82 [*affirming* 7 Ohio Dec. (Reprint) 88, 1 Cinc. L. Bul. 104]; Shroyer *v.* Richmond, 16 Ohio St. 455; Gaston *v.* Babcock, 6 Wis. 503.

Giving the custody and earnings of children to the mother where the father from drunkenness or other cause neglects to provide for them, without a trial by jury, is not in violation of the constitutional provision that the right to trial by jury as heretofore shall remain inviolate. Van Billiard *v.* Van Billiard, 6 Pa. Co. Ct. 333.

39. Crow *v.* Reed, 38 Ark. 482; Glidewell *v.* Snyder, 72 Ind. 528; Ferry *v.* McGowan, 68 Mo. App. 612.

40. Glidewell *v.* Snyder, 72 Ind. 528.

41. See, generally, INSANE PERSONS.

42. *In re* Bresee, 82 Iowa 573, 48 N. W. 991; Black Hawk County *v.* Springer, 58 Iowa 417, 10 N. W. 791; State *v.* Judge Eighth Judicial Dist., 48 La. Ann. 503, 19 So. 475; *In re* Blewitt, 138 N. Y. 148, 33 N. E. 820.

In Wisconsin it is held that there is no right to a jury trial in proceedings to appoint a guardian for an insane person, jurisdiction having been conferred upon judges of probate to make such appointment by a statute enacted prior to the adoption of the constitution. Gaston *v.* Babcock, 6 Wis. 503.

The constitutional provisions relating to trial by jury do not apply, the proceeding being neither a civil action nor a criminal prosecution. *In re* Bresee, 82 Iowa 573, 48 N. W. 991.

43. Jones *v.* Learned, 17 Colo. App. 76, 66 Pac. 1071; State *v.* Baird, 47 Mo. 301; Kiehne *v.* Wessell, 53 Mo. App. 667; *In re* Crompe, L. R. 4 Ch. 653.

In Vermont the statute allows a jury trial on an appeal from the findings of the inquisition. Shumway *v.* Shumway, 2 Vt. 339.

44. *In re* Bryant, 3 Mackey (D. C.) 489; Smith *v.* People, 65 Ill. 375; Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. L. Rep. 478, 1 L. R. A. 610. See also Hamilton *v.* Traber, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258.

45. Proceedings to wind up and settle insolvent corporations and actions by and against receivers of such corporations see *supra*, III, E, 2, m.

46. *Illinois.*— Weil *v.* Jaeger, 174 Ill. 133, 51 N. E. 196 [*affirming* 73 Ill. App. 271]; Holnback *v.* Wilson, 159 Ill. 148, 42 N. E. 169.

Minnesota.— *In re* Howes, 38 Minn. 403, 38 N. W. 104; Wendell *v.* Lebon, 30 Minn. 234, 15 N. W. 109.

Ohio.— Meader *v.* Root, 11 Ohio Cir. Ct. 81, 5 Ohio Cir. Dec. 61 [*affirming* 11 Ohio Dec. (Reprint) 747, 29 Cinc. L. Bul. 51]; Merchants' Nat. Bank *v.* Little, 4 Ohio Cir. Ct. 195, 2 Ohio Cir. Dec. 496.

Rhode Island.— Merrill *v.* Bowler, 20 R. I. 226, 38 Atl. 114.

Vermont.— Crampton *v.* Hollister, 70 Vt. 633, 41 Atl. 588.

Wisconsin.— Rider-Wallis Co. *v.* Fogo, 102 Wis. 536, 78 N. W. 767.

See 31 Cent. Dig. tit. "Jury," § 114.

But see Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611, holding that the Michigan Assignment Law of 1883 is unconstitutional as impairing the right of trial by jury.

The proceeding is in its nature preliminary and an act is not unconstitutional which authorizes the issuing of a warrant to take possession of a debtor's property on the petition of a creditor without a trial by jury of the facts alleged in the petition, since it does not finally determine the question of indebtedness or deprive the debtor of his property but merely takes it into the custody of the law for the security of his creditors. O'Neil *v.* Glover, 5 Gray (Mass.) 144. *Contra*, Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611.

Proceedings against the assignee of an insolvent for the allowance of plaintiff's claim in the settlement of his trust is of an equitable character and a jury cannot be demanded. Meader *v.* Root, 11 Ohio Cir. Ct. 81, 5 Ohio Cir. Dec. 61 [*affirming* 11 Ohio Dec. (Reprint) 747, 29 Cinc. L. Bul. 51].

bankruptcy act are also of equitable cognizance and not within the application of the provisions of the federal constitution relating to trial by jury.[47]

l. Proceedings For Assessments For Public Improvements. Assessments for public improvements are regarded as a species of taxation,[48] and property-owners are not entitled to have the assessment made by a jury.[49]

m. Condemnation Proceedings.[50] The general constitutional provisions relating to trial by jury do not apply to proceedings to condemn lands under the power of eminent domain,[51] and this rule applies both to the determination of

On a petition by the assignee of an insolvent to sell lands for the benefit of creditors, where the insolvent claims a homestead the question as to what property vests in the assignee is for the court and the insolvent cannot claim a jury trial. Holnback *v.* Wilson, 159 Ill. 148, 42 N. E. 169.

Where an assignee for the benefit of creditors is summoned as a trustee, plaintiff is not entitled to a trial by jury to try the validity of the assignment. Hawes *v.* Langton, 8 Pick. (Mass.) 67.

In Louisiana where the settlement of an insolvent estate is made through syndics elected by a meeting of the insolvent's creditors (see Romano *v.* Creditors, 46 La. Ann. 1176, 15 So. 395), where the interest of a creditor which determines his voting capacity in the election of the syndic is disputed by other creditors, they have a right to demand a jury trial of the facts in issue (Planters' Bank *v.* Lanusse, 10 Mart. 690); but on the homologation of the deliberations of the creditors the court may try any opposition thereto summarily without a jury (Guion *v.* Guion, 19 La. Ann. 81). On a rule to show cause why syndics should not be ordered to pay a sum claimed they may demand that the facts they suggest in opposition to the claim shall be tried by a jury (Meeker *v.* Williamson, 7 Mart. 315); and where certain creditors oppose the syndic's account on the ground of fraud in the insolvent's schedule the insolvent is entitled to a jury trial on the issue of fraud (Romano *v.* Creditors, 46 La. Ann. 1176, 15 So. 395).

47. *In re* Rude, 101 Fed. 805; *In re* Christensen, 101 Fed. 243.

48. Howe *v.* Cambridge, 114 Mass. 388; Bishop *v.* Tripp, 15 R. I. 466, 8 Atl. 692.

49. *Illinois.*— Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114; Briggs *v.* Union Drainage Dist. No. 1, 140 Ill. 53, 29 N. E. 721; Hosmer *v.* Hunt Drainage Dist. 135 Ill. 51, 26 N. E. 587.

Massachusetts.— Chapin *v.* Worcester, 124 Mass. 464; Howe *v.* Cambridge, 114 Mass. 388.

Missouri.— Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190.

Rhode Island.— Bishop *v.* Tripp, 15 R. I. 466, 8 Atl. 692.

South Carolina.—Cruikshanks *v.* City Council, 1 McCord 360.

See 31 Cent. Dig. tit. "Jury," § 115.

Before the adoption of the constitution such proceedings were of a summary character and are therefore not within the application of the provisions relating to trial by jury. Cruikshanks *v.* City Council, 1 McCord (S. C.) 360.

In Illinois a distinction is made between the cases where money is raised for a local improvement by a special assessment against all owners whose property may be benefited and where the proceeding is by special taxation of contiguous property, a jury being allowed in the former cases but not in the latter. Davis *v.* Litchfield, 155 Ill. 384, 40 N. E. 354.

50. See, generally, EMINENT DOMAIN, 15 Cyc. 543.

Right to jury on appeal from original assessment see EMINENT DOMAIN, 15 Cyc. 874, 967.

51. *California.*— People *v.* Blake, 19 Cal. 579.

Illinois.— Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Maine.— Kennebec Water Dist. *v.* Waterville, 96 Me. 234, 52 Atl. 774.

Michigan.— Wixom *v.* Bixby, 127 Mich. 479, 86 N. W. 1001.

Minnesota.— Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241.

Missouri.— Louisiana, etc., Plankroad Co. *v.* Pickett, 25 Mo. 535.

New Hampshire.— Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

New Jersey.— Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622.

Oregon.— Kendall *v.* Post, 8 Oreg. 141.

South Carolina.— Gilmer *v.* Hunnicutt, 57 S. C. 166, 35 S. E. 521.

Texas.— Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

See 31 Cent. Dig. tit. "Jury," §§ 116–119.

In proceedings to change the grade of a street a property-owner has no constitutional right to a jury trial. Genois *v.* St. Paul, 35 Minn. 330, 29 N. W. 129.

The Indiana drainage act which provides that in proceedings thereunder "questions of fact shall be tried by the court, without a jury" is not in conflict with the constitutional provision that "in all civil cases the right of trial by jury shall remain inviolate." Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Indianapolis, etc., Gravel Road Co. *v.* Christian, 93 Ind. 360; Anderson *v.* Caldwell, 91 Ind. 451, 46 Am. Rep. 613. See also Baltimore, etc., R. Co. *v.* Ketring, 122 Ind. 5, 23 N. E. 527; Laverty *v.* State, 109 Ind. 217, 9 N. E. 774.

the necessity for the appropriation[52] and to the assessment of compensation;[53] but there are in some of the constitutions express provisions for a jury in such proceedings.[54]

n. Proceedings Against Public Officers. Unless expressly prohibited by the

52. People *v.* Smith, 21 N. Y. 595; Vornholt *v.* Gordon, 4 Ohio S. & C. Pl. Dec. 498, 30 Cinc. L. Bul. 33; U. S. *v.* Engerman, 46 Fed. 176.

53. *Arkansas.*— Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

California.— People *v.* Blake, 19 Cal. 579; Koppikus *v.* State Capitol Com'rs, 16 Cal. 248.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. 389, 44 Am. Dec. 593.

Illinois.— Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Indiana.— Dronberger *v.* Reed, 11 Ind. 420.

Maine.— Ingram *v.* Maine Water Co., 98 Me. 566, 57 Atl. 893; Kennebec Water Dist. *v.* Waterville, 96 Me. 234, 52 Atl. 774.

Minnesota.— Bruggerman *v.* True, 25 Minn. 123; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241.

Missouri.— Louisiana, etc., Plankroad Co. *v.* Pickett, 25 Mo. 535.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134; Dalton *v.* North Hampton, 19 N. H. 362; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

New Jersey.— State *v.* Heppenheimer, 54 N. J. L. 268, 23 Atl. 664; *In re* Lower Chatham, 35 N. J. L. 497; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622; Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45, 22 Am. Dec. 679 note.

North Carolina.— Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

Ohio.— Willyard *v.* Hamilton, 7 Ohio, Pt. II, 111, 30 Am. Dec. 195.

Oregon.— Kendall *v.* Post, 8 Oreg. 141.

Pennsylvania.— Pennsylvania R. Co. *v.* First German Lutheran Cong., 53 Pa. St. 445.

Texas.— Houston Tap, etc., R. Co. *v.* Milburn, 34 Tex. 224; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

United States.— Great Falls Mfg. Co. *v.* Garland, 25 Fed. 521; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

See 31 Cent. Dig. tit. "Jury," §§ 116–119.

54. *Arkansas.*— Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

California.— Weber *v.* Santa Clara County, 59 Cal. 265.

Illinois.— Juvinall *v.* Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440; Kine *v.* Defenbaugh, 64 Ill. 291; People *v.* McRoberts, 62 Ill. 38.

Maryland.— Baltimore Belt R. Co. *v.* Baltzell, 75 Md. 94, 23 Atl. 74.

Michigan.— Detroit Park, etc., Com'rs *v.* Moesta, 91 Mich. 149, 51 N. W. 903; Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; People *v.* Richards, 38 Mich. 214; Campau *v.* Detroit, 14 Mich. 276.

Ohio.— King *v.* Greenwood Cemetery Assoc., 67 Ohio St. 240, 65 N. E. 882; Hendershot *v.* State, 44 Ohio St. 208, 6 N. E. 245; *In re* Wells County Road, 7 Ohio St. 16; Shaver *v.* Starrett, 4 Ohio St. 494; Lamb *v.* McKee, 4 Ohio St. 167; Cincinnati *v.* Hamilton County, 1 Disn. 4, 12 Ohio Dec. (Reprint) 451.

Washington.— Seanor *v.* Whatcom County, 13 Wash. 48, 42 Pac. 552.

West Virginia.— Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

Wisconsin.— Seifert *v.* Brooks, 34 Wis. 443; Hood *v.* Finch, 8 Wis. 381.

See 31 Cent. Dig. tit. "Jury," §§ 116–119.

Assessment of damages by jury see EMINENT DOMAIN, 15 Cyc. 872 *et seq.*

The Alabama constitution of 1868 provides that the assessment shall be made by a jury of twelve men in a court of record. Faust *v.* Huntsville, 83 Ala. 279, 3 So. 771.

The Michigan constitution provides that both the necessity for the appropriation and the compensation to be made therefor shall be ascertained by a jury. Detroit Park, etc., Com'rs *v.* Moesta, 91 Mich. 149, 51 N. W. 903.

The Missouri constitution provides that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right" (Chicago, etc., R. Co. *v.* Miller, 106 Mo. 458, 460, 17 S. W. 499; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203); but the term "incorporated company" does not include municipal corporations nor does the fact that certain of the defendants are incorporated companies give the other defendants the right to demand a jury trial (*In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Kansas City *v.* Vineyard, 128 Mo. 75, 30 S. W. 326).

The New York constitution of 1846 provides that where private property shall be taken for any public use the assessment of damages shall be by a jury or by not less than three commissioners appointed by a court of record. Clark *v.* Utica, 18 Barb. 451; House *v.* Rochester, 15 Barb. 517.

The Wisconsin constitution provides that "no municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being first established by the verdict of a jury," but towns organized for the purpose of township government are not municipal corporations within the meaning of this provision. Norton *v.* Peck, 3 Wis. 714.

constitution, the legislature may without violating the right to trial by jury provide a summary mode of procedure for the removal of public officers for incompetency or misconduct in office,[55] and in some of the states the constitutions expressly provide that certain officers may be removed summarily,[56] or in such manner as the legislature may provide;[57] but in any case for which the legislature has expressly provided a jury trial it cannot be denied.[58] A summary proceeding is also permissible against defaulting tax-collectors or other collectors of public revenue to compel the payment into the public treasury of moneys collected by them,[59] such having been the practice both in England and in this country prior to the adoption of the constitutions;[60] but this summary mode of trial cannot be extended to persons who are merely indebted to the state or county in a private or non-official capacity,[61] and even in the case of official collectors if the legislature has provided for a trial by jury it cannot be denied.[62]

o. Enforcement of Bonds and Recognizances. It has been stated as a general rule that in the enforcement of bonds, except appeal-bonds, recognizances and the like, where the breach is known to the court as a matter of record, a jury trial may be demanded.[63] It has been held, however, that the right of trial by jury is not infringed by statutes providing for the summary enforcement of bonds given in judicial proceedings,[64] bonds declared by statute to have upon forfeiture the force and effect of judgments,[65] and bonds of defaulting tax-collectors or other collectors of the public revenue.[66] It has also been held that statutory proceedings are constitutional which provide for the rendition of a judgment on motion against a sheriff and the sureties on his bond for failure to return an execution,[67] or allow sureties to recover judgment on motion against their principal for money paid for the principal.[68]

p. Revocation or Cancellation of Licenses and Permits. Statutes are not unconstitutional which provide for the revocation of liquor licenses by boards or

55. Rankin *v.* Jauman, 4 Ida. 53, 36 Pac. 502; People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. See also Woods *v.* Varnum, 85 Cal. 639, 24 Pac. 843. *Compare* Honey *v.* Graham, 39 Tex. 1.

A public office is not property nor are the prospective fees of an office the property of its incumbent, and a law authorizing the removal of public officers for misconduct without a jury trial is not unconstitutional. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775.

56. Davis *v.* State, 35 Tex. 118.

57. Woods *v.* Varnum, 85 Cal. 639, 24 Pac. 843; People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644.

58. Callahan *v.* State, 2 Stew. & P. (Ala.) 379.

59. *Alabama.*— Boring *v.* Williams, 17 Ala. 510.

Georgia.— Scofield *v.* Perkerson, 46 Ga. 325, 350; Tift *v.* Griffin, 5 Ga. 185.

Kentucky.— Rodes *v.* Com., 6 B. Mon. 359.

Pennsylvania.— Duquesne School Dist. *v.* Pitts, 184 Pa. St. 156, 39 Atl. 64.

Vermont.— *In re* Hackett, 53 Vt. 354.

See 31 Cent. Dig. tit. "Jury," §§ 120, 121.

But see Buchanan *v.* McKenzie, 53 N. C. 91, holding that defendant cannot be deprived of the right of putting in issue such questions of fact as the execution of the bond, the amount received by the sheriff, the amount which he may have paid over, and the balance due, and have these matters of fact tried by a jury.

60. Tift *v.* Griffin, 5 Ga. 185; *In re* Hackett, 53 Vt. 354.

61. Tift *v.* Griffin, 5 Ga. 185.

62. Miller *v.* Moore, 2 Humphr. (Tenn.) 421.

63. Whitley *v.* Gaylord, 48 N. C. 286.

64. See *infra*, III, E, 5, f.

65. *Ex p.* Reardon, 9 Ark. 450; Janes *v.* Reynolds, 2 Tex. 250. But see Whitley *v.* Gaylord, 48 N. C. 286.

66. Boring *v.* Williams, 17 Ala. 510; Scofield *v.* Perkerson, 46 Ga. 325, 350. *Compare* Buchanan *v.* McKenzie, 53 N. C. 91.

In Tennessee the statute provides that on a motion for execution on the bond of a defaulting tax-collector a jury shall be impaneled if demanded. Miller *v.* Moore, 2 Humphr. 421.

67. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27; Wells *v.* Caldwell, 1 A. K. Marsh. (Ky.) 441. But see Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

68. Creighton *v.* Johnson, Litt. Sel. Cas. (Ky.) 240; McCord *v.* Johnson, 4 Bibb (Ky.) 531; Woodward *v.* May, 4 How. (Miss.) 389 [in effect *overruling* Smith *v.* Smith, 1 How. (Miss.) 102]. See also Schlicker *v.* Gordon, 74 Mo. 534. But see Scott *v.* Nichols, 27 Miss. 94, 51 Am. Dec. 503, holding that the statute authorizing the summary proceedings is not unconstitutional, but that in practice it is nevertheless the duty of the court to

commissioners without a trial by jury,[69] and the same has been held with regard to the revocation of other licenses and permits.[70]

q. Establishment of Boundaries.[71] In statutory proceedings to establish boundaries by commissioners or processioners,[72] it is held in some cases that if their report is objected to and its correctness denied an issue of fact is raised which the parties have a constitutional right to have submitted to a jury,[73] while in others it is held that the court may pass upon the issues raised by the objection without the intervention of a jury.[74]

r. Collection and Abatement of Taxes. There is no right under the general constitutional provisions to a jury trial in proceedings for the collection,[75] or abatement of taxes,[76] or in proceedings to correct a tax assessment.[77] So also penalties by way of increased taxation may be enforced in a summary manner for failing to list property for taxation,[78] for returning false or fraudulent lists,[79] or for

submit controverted questions in fact to a jury if the parties demand it.

69. La Croix *v.* Fairfield County Com'rs, 49 Conn. 591; State *v.* Schmidtz, 65 Iowa 556, 22 N. W. 673; Voight *v.* Newark Excise Com'rs, 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292; People *v.* Brooklyn Police, etc., Com'rs, 50 N. Y. 92; People *v.* Wright, 3 Hun (N. Y.) 306.

The license is not a contract between the licensee and the state nor is it property in the constitutional sense; it is a mere privilege the regulation of which is a part of the police system of the state. La Croix *v.* Fairfield County Com'rs, 49 Conn. 591; People *v.* Wright, 3 Hun (N. Y.) 306.

70. Low *v.* Pilotage Com'rs, R. M. Charlt. (Ga.) 302, holding that a pilot's license may be revoked by the commissioners of pilotage without a jury trial, such having been the practice prior to the adoption of the constitution.

License to practise medicine.— A statute is not unconstitutional which authorizes boards of health to revoke licenses to practice medicine on the ground of grossly unprofessional conduct. State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

71. See, generally, BOUNDARIES, 5 Cyc. 861.

72. See BOUNDARIES, 5 Cyc. 945.

73. Atkins *v.* Huston, 106 Ill. 492 [*reversing* 5 Ill. App. 326]; Huston *v.* Atkins, 74 Ill. 474; Townsend *v.* Radcliffe, 63 Ill. 9.

74. Caldwell *v.* Nash, 68 Iowa 658, 27 N. W. 812; Coombs *v.* Quinn, 66 Iowa 469, 23 N. W. 928; Gates *v.* Brooks, 59 Iowa 510, 6 N. W. 595, 13 N. W. 640. See also Cloud County *v.* Morgan, 7 Kan. App. 213, 52 Pac. 896.

75. *Georgia.*— Harper *v.* Elberton, 23 Ga. 566.

Illinois.— Mix *v.* People, 86 Ill. 312. See also Scott *v.* People, 142 Ill. 291, 33 N. E. 180.

Kentucky.— Portland Dry Dock, etc., Co. *v.* Portland, 12 B. Mon. 77.

Louisiana.— New Orleans *v.* Cassidy, 27 La. Ann. 704.

North Carolina.— Cowles *v.* Brittain, 9 N. C. 204.

Tennessee.— McCarrol *v.* Weeks, 5 Hayw. 246.

United States.— Murray *v.* Hoboken Land, etc., Co., 18 How. 272, 15 L. ed. 372.

See 31 Cent. Dig. tit. "Jury," § 125.

But see Galusha *v.* Wendt, 114 Iowa 597, 87 N. W. 512.

A subscription to a fund for a public improvement is in the nature of a voluntary tax and may be collected in the same manner as other taxes without the intervention of a jury. Harris *v.* Wood, 6 T. B. Mon. (Ky.) 641. See also Ewing *v.* Penitentiary, Hard. (Ky.) 5.

A penalty which is not a tax but is imposed by law for doing a prohibited act cannot be enforced in the manner in which taxes are collected simply because it is termed "a tax" in the statute. State *v.* Allen, 2 McCord (S. C.) 55.

In Minnesota it is held on the ground of the practice prior to the constitution that the questions whether the property is exempt from taxation and whether the tax has been paid are triable by jury but that these are the only issues to which the right applies. Mille Lacs County *v.* Morrison, 22 Minn. 178.

76. Cocheco Mfg. Co. *v.* Strafford, 51 N. H. 455. See also Mille Lacs County *v.* Morrison, 22 Minn. 178.

The International Revenue Act of 1866, as amended in 1867, providing that no suit to restrain the assessment or collection of any tax authorized under the act shall be maintained in any court, is not constitutional as infringing the right of trial by jury. Pullan *v.* Kinsinger, 20 Fed. Cas. No. 11,463, 2 Abb. 94.

77. Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 8 N. W. 443; Davis *v.* Clinton, 55 Iowa 549, 8 N. W. 423; Ross *v.* Crawford County Com'rs, 16 Kan. 411; State *v.* Fleming, (Nebr. 1903) 97 N. W. 1063.

78. Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321.

79. State *v.* Moss, 69 Mo. 495.

In Kentucky a statute authorizing the county court without the intervention of a jury to impose a fine and treble tax for giving in a false and fraudulent list of taxable property was held unconstitutional on the ground that prior to the constitution a jury trial was expressly allowed by statute in this particular case. Carson *v.* Com., 1 A. K. Marsh. 290.

failing to pay taxes when due[80] without violating or infringing any constitutional right of the taxpayer.

s. Disbarment and Other Proceedings Against Attorneys.[81] There is no constitutional right to a jury trial in proceedings to disbar an attorney,[82] nor, unless so provided by statute,[83] can a jury trial be demanded in a summary proceeding to compel an attorney to pay over money collected for a client,[84] even where the attorney claims a lien upon the fund in question.[85]

t. Summary Proceedings to Recover Possession of Land. Statutes providing summary proceedings without a jury to recover possession of land, as in the case of tenants holding over or failing to pay rent, are not unconstitutional,[86] such proceedings having generally been without a jury prior to the adoption of the constitutions;[87] but in some jurisdictions juries are in such cases specially provided for by statute.[88] The legislature may also provide that the court may put the purchaser under a tax deed in possession of the premises by a writ of assistance.[89]

u. Distress For Rent. It has been held that statutes providing a summary proceeding by warrant of distress to recover claims for rent are not unconstitutional under the provisions relating to trial by jury.[90]

v. Seizures, Penalties, and Forfeitures.[91] Penalties may be enforced in a summary manner without a jury trial for the infringement of laws which are in the nature of police regulations,[92] or for conducting certain businesses without a

80. Myers *v.* Park, 8 Heisk. (Tenn.) 550.

81. **Suspension or disbarment** generally see ATTORNEY AND CLIENT, 4 Cyc. 905.

Summary remedies of client generally see ATTORNEY AND CLIENT, 4 Cyc. 975.

82. *Indiana.*— *Ex p.* Robinson, 3 Ind. 52.

Kansas.— *In re* Norris, 60 Kan. 649, 57 Pac. 528.

Louisiana.— State *v.* Fourchy, 106 La. 743, 31 So. 325.

Michigan.— *In re* Shepard, 109 Mich. 631, 67 N. W. 971.

New York.— *Ex p.* Burr, 1 Wheel. Cr. 503.

Oklahoma.— Dean *v.* Stone, 2 Okla. 13, 35 Pac. 578.

Tennessee.— State *v.* Davis, 92 Tenn. 634, 23 S. W. 59; Smith *v.* State, 1 Yerg. 228.

United States.— *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552.

See 31 Cent. Dig. tit. "Jury," § 126.

It is not a criminal proceeding to punish the attorney, but is intended to protect the court from the ministrations of persons unfit to practice as attorneys. State *v.* Davis, 92 Tenn. 634, 23 S. W. 59; *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552.

In Indiana the right to a jury trial has been conferred by statute. Reilly *v.* Cavanaugh, 32 Ind. 214.

83. Smith *v.* Bush, 58 Ga. 121, holding that under the Georgia code, where a rule to show cause is granted against an attorney for failure to pay over money collected for a client, his answer to the rule is traversable, and the issue thus formed is triable by jury.

84. West *v.* Carleton, 8 La. 253; Bowling Green Sav. Bank *v.* Todd, 52 N. Y. 489; Matter of Fincke, 6 Daly (N. Y.) 111; Grant's Case, 8 Abb. Pr. (N. Y.) 357; People *v.* Smith, 3 Cai. (N. Y.) 221.

85. Matter of Fincke, 6 Daly (N. Y.) 111.

A reference may be ordered in such cases to determine the amount due the attorney, and he will then be ordered to pay over the balance. Grant's Case, 8 Abb. Pr. (N. Y.) 357.

86. Pesant *v.* Heartt, 22 La. Ann. 292; Wallace *v.* Smith, 8 La. Ann. 376; State *v.* Allen, 45 Mo. App. 551; Swygert *v.* Goodwin, 32 S. C. 146, 10 S. E. 933; Frazee *v.* Beattie, 26 S. C. 348, 2 S. E. 125.

Removal of intruders on Indian lands.— A statute providing for the summary removal of intruders upon Indian lands to which under the statutes and treaties no person other than an Indian can acquire any title or right of occupancy is not unconstitutional under the provisions relating to trial by jury. People *v.* Dibble, 16 N. Y. 203, 18 Barb. 412 [*affirmed* in 21 How. (U. S.) 366, 16 L. ed. 149].

87. Frazee *v.* Beattie, 26 S. C. 348, 2 S. E. 125.

88. Fry *v.* Myers, 56 N. J. L. 115, 28 Atl. 425; Benjamin *v.* Benjamin, 5 N. Y. 383; Bloom *v.* Huyck, 71 Hun (N. Y.) 252, 25 N. Y. Suppl. 7.

A judgment debtor who continues in possession of land after a sale on execution against him has a right to a jury trial in summary proceedings, under 2 N. Y. Rev. St. p. 512, to remove tenants. Spraker *v.* Cook, 16 N. Y. 567.

89. Youngs *v.* Peters, 118 Mich. 45, 76 N. W. 138; Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130.

90. Jones *v.* Fox, 23 Fla. 454, 2 So. 700; Blanchard *v.* Raines, 20 Fla. 467; Burket *v.* Boude, 3 Dana (Ky.) 209. But see Dalgleish *v.* Grandy, 1 N. C. 161, where it is said that the common and statute law of England relative to distress for rent was never adopted in North Carolina and that such proceedings would be unconstitutional.

91. **Actions to enforce** penalties and forfeitures see *supra*, III, E, 1, f.

92. Carter *v.* Camden Dist. Ct., 49 N. J. L. 600, 10 Atl. 108.

license,[93] or for making false and fraudulent returns of property for taxation or failing to pay taxes when due.[94] Statutes are also constitutional which provide for a summary seizure and confiscation of gambling implements and devices,[95] or intoxicating liquors kept for sale contrary to the law;[96] but municipal ordinances authorizing the seizure and sale of stock found running at large, without allowing the owner a jury trial, have been held to be unconstitutional.[97]

5. Particular Proceedings in Civil Actions — a. Supplementary Proceedings. A jury trial cannot ordinarily be demanded in proceedings supplementary to execution,[98] such proceedings not being actions at law but special statutory proceedings in the nature of a creditor's bill in equity;[99] nor is the enforcement of orders made in such proceedings by attachment and imprisonment, as for contempt, a violation of the right to a trial by jury.[1] Where, however, conflicting claims to the property in question on the part of third persons not parties to the original judgment may be tried and determined in the proceeding, it has been held that the proceeding where such rights are involved is in the nature of a civil action in which the jury trial may be demanded.[2]

b. Attachment. In proceedings to dissolve, quash, or vacate an attachment, where the proceeding is by motion or rule to show cause, there is no right to a jury trial;[3] but the issue on a plea in abatement or traverse of the grounds of attachment is triable by jury.[4] It is provided by statute in some states that conflicting claims of third persons to the property attached are triable by jury,[5] but in the absence of statutory provision it has been held on an interplea alleging title to land taken on attachment that the proceeding was in the nature of an action to quiet title and that a jury trial could not be demanded.[6]

c. Garnishment.[7] In some of the decisions it has been held that a jury may be demanded as a matter of right in garnishment proceedings;[8] but in others the

93. Cowles *v.* Brittain, 9 N. C. 204.

94. See *supra*, III, E, 4, r.

95. Furth *v.* State, 72 Ark. 161, 78 S. W. 759; Kite *v.* People, 32 Colo. 5, 74 Pac. 886; Frost *v.* People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352.

96. Kirkland *v.* State, 72 Ark. 171, 78 S. W. 770, 105 Am. St. Rep. 25; State *v.* Intoxicating Liquor, 55 Vt. 82.

97. Bullock *v.* Geomble, 45 Ill. 218; Donovan *v.* Vicksburg, 29 Miss. 247, 64 Am. Dec. 143.

98. *Iowa.*— Marriage *v.* Woodruff, 77 Iowa 291, 42 N. W. 198; Farmer *v.* Hoffman, 67 Iowa 678, 25 N. W. 848; Eikenberry *v.* Edwards, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360 [*distinguishing Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529].

Kansas.— *In re* Burrows, 33 Kan. 675, 7 Pac. 148.

Louisiana.— Savage *v.* Jeter, 13 La. Ann. 239.

South Carolina.— Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

Washington.— Murne *v.* Schwabacher, 2 Wash. Terr. 130, 3 Pac. 899.

See 31 Cent. Dig. tit. "Jury," § 89.

An action by a judgment creditor to subject property fraudulently conveyed to the payment of a judgment is not a proceeding supplementary to execution, and plaintiff is entitled to demand a jury trial. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

99. Eikenberry *v.* Edwards, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360; *In re* Burrows, 33 Kan. 675, 7 Pac. 148.

1. *Iowa.*— Eikenberry *v.* Edwards, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360 [*distinguishing Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529].

Kansas.— *In re* Burrows, 33 Kan. 675, 7 Pac. 148.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Ohio.— See Rochester Union Bank *v.* Sandusky Union Bank, 6 Ohio St. 254.

South Carolina.— Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

Washington.— Murne *v.* Schwabacher, 2 Wash. Terr. 130, 3 Pac. 899.

See 31 Cent. Dig. tit. "Jury," § 89.

2. American White Bronze Co. *v.* Clark, 123 Ind. 230, 23 N. E. 855; McMahan *v.* Works, 72 Ind. 19. See also Welsh *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

3. See Attachment, 4 Cyc. 794.

4. See Attachment, 4 Cyc. 805.

5. Schell *v.* Husenstine, 15 Nebr. 9, 16 N. W. 758 [*distinguishing* State *v.* Powell, 10 Nebr. 48, 4 N. W. 317]; Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

Province of court and jury see Attachment, 4 Cyc. 750.

6. Bennett *v.* Wolverton, 24 Kan. 284.

7. See, generally, Garnishment.

8. Cahoon *v.* Levy, 5 Cal. 294; Denouvion *v.* McNight, 26 La. Ann. 74; Samory *v.* Hebrard, 17 La. 555. See also Numbers *v.* Shelly, 3 Lanc. Bar (Pa.) April 20, 1872.

In Iowa the statute provides that in the event of the answer of a garnishee being controverted an issue may be joined which

right has been expressly denied,[9] on the ground that the proceeding is essentially in the nature of a creditor's bill in equity.[10] So also in proceedings by a foreign attachment or trustee process, it has been held that a jury trial could not be demanded,[11] except where it was so provided by statute.[12]

d. Rights of Occupying Claimants. Statutes providing for an assessment by commissioners of damages for the value of the improvements upon the ouster of occupying claimants are not unconstitutional as infringing the right of trial by jury,[13] unless the right to such trial is expressly guaranteed in all civil cases where the value in controversy exceeds a certain amount.[14] The fact that by reason of such provisions the statutory mode of assessment cannot be followed does not affect the right to the value of such improvements.[15]

e. Compensation and Lien of Attorneys. An attorney's lien for services may be enforced by a motion in the original action as well as by a direct action,[16] and the amount may ordinarily be determined by the court[17] or by a reference without the intervention of a jury.[18] But the court cannot enforce by a summary order a compromise stipulation by which one party agrees to discharge the lien of the attorney of the other,[19] and also where it is provided by statute that in an action for damages plaintiff if successful may recover a reasonable attorney's fee, the amount of such fee must be determined by a jury.[20]

f. Enforcement of Bonds Given in Judicial Proceedings. Statutes are not unconstitutional as being in derogation of the right of trial by jury which provide

"shall be tried in the usual manner" which is construed as authorizing a trial by jury. Neff *v.* Manuel, 121 Iowa 706, 97 N. W. 73.

Questions for jury see GARNISHMENT, 20 Cyc. 1104.

9. *Kentucky.*— Kennedy *v.* Aldridge, 5 B. Mon. 141.

Minnesota.— Weibeler *v.* Ford, 61 Minn. 398, 63 N. E. 1075.

Missouri.— Barnard, etc., Mfg. Co. *v.* Monett Milling Co., 79 Mo. App. 153.

New Mexico.— New Mexico Nat. Bank *v.* Brooks, 9 N. M. 113, 49 Pac. 947.

Washington.— Gaffney *v.* Megrath, 23 Wash. 476, 63 Pac. 520.

Wisconsin.— Delaney *v.* Hartwig, 91 Wis. 412, 64 N. W. 1035; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153. *Compare* Beck *v.* Cole, 16 Wis. 95.

See 31 Cent. Dig. tit. "Jury," § 90.

The question of the right of property to exemption from garnishment may be tried by the court without a jury in the absence of any statute prescribing the procedure. New Mexico Nat. Bank *v.* Brooks, 9 N. M. 113, 49 Pac. 947.

10. Weibeler *v.* Ford, 61 Minn. 398, 63 N. E. 1075; La Crosse Nat. Bank *v.* Wilson, 74 Wis. 391, 43 N. W. 153. But see Cahoon *v.* Levy, 5 Cal. 294, where the court said: "The doctrine of garnishment is part of the common law derived from the custom of London, and although it is here partially regulated by statute, it is not the less a common law proceeding."

11. Huntington *v.* Bishop, 5 Vt. 186.

12. Wiggim *v.* Lewis, 16 N. H. 52.

13. Ross *v.* Irving, 14 Ill. 171; Hunt *v.* McMahan, 5 Ohio 132.

Assessment by the court.— In an action of ejectment where a jury trial is not demanded the court may dispose of the entire case and assess the damages for improvements. Rawson *v.* Parsons, 6 Mich. 401.

14. Armstrong *v.* Jackson, 1 Blackf. (Ind.) 374; Uhl *v.* Grissom, 12 Okla. 322, 72 Pac. 372; Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496.

15. Armstrong *v.* Jackson, 1 Blackf. (Ind.) 374; Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496; Griswold *v.* Bragg, 48 Fed. 519, 18 Blatchf. 202.

16. Canary *v.* Russell, 10 Misc. (N. Y.) 597, 31 N. Y. Suppl. 291, 24 N. Y. Civ. Proc. 109. And, see, generally, ATTORNEY AND CLIENT, 4 Cyc. 1021.

Actions to recover compensation see ATTORNEY AND CLIENT, 4 Cyc. 997.

17. Canary *v.* Russell, 10 Misc. (N. Y.) 597, 31 N. Y. Suppl. 291, 24 N. Y. Civ. Proc. 109. See also Weller *v.* Hawes, 49 Iowa 45.

18. Matter of Fincke, 6 Daly (N. Y.) 111; Ackerman *v.* Ackerman, 14 Abb. Pr. (N. Y.) 229 [*disapproving* Haight *v.* Holcomb, 7 Abb. Pr. (N. Y.) 210, 16 How. Pr. 409]; Grant's Case, 8 Abb. Pr. (N. Y.) 357. *Contra*, Fox *v.* Fox, 24 How. Pr. (N. Y.) 409.

19. Pilkington *v.* Brooklyn Heights R. Co., 49 N. Y. App. Div. 22, 63 N. Y. Suppl. 211; Schriever *v.* Brooklyn Heights R. Co., 30 Misc. (N. Y.) 145, 61 N. Y. Suppl. 644, 890, 30 N. Y. Civ. Proc. 67 [*modified* in 49 N. Y. App. Div. 629, 63 N. Y. Suppl. 217].

20. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618.

The fee in such cases is in the nature of a penalty or exemplary damages, and the fact that it is called an attorney's fee and the amount taxed as costs does not change its real character or authorize the amount to be determined without the intervention of a jury. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32.

for a summary enforcement of bonds given in the course of judicial proceedings, such as appeal-bonds, attachment, replevin, injunction bonds, and the like.[21]

g. Proceedings Against Sheriffs and Constables. In some jurisdictions the statutes provide for summary proceedings against sheriffs and constables or their sureties for failure of the former to return or levy executions or to pay over money collected thereunder.[22] Such proceedings, although without a jury, have been held to be constitutional when against the officer alone,[23] on the ground that the proceeding is in the nature of a punishment for contempt.[24] It has also been held that they were constitutional as to proceedings against the sureties,[25] but in other cases where the sureties were made parties it has been held that a jury trial could not be denied.[26]

h. Trial of Exceptions to Auditor's Report. Under a statute authorizing a reference to an auditor, the parties have a constitutional right to a jury trial upon exceptions of fact to the auditor's report if the action is one at law;[27] but if the action is equitable the court may overrule the exceptions and enter judgment without submitting the exceptions to the jury.[28]

i. Entry of Judgment and Assessment of Damages.[29] While an action at law to recover damages is of right triable by jury where an issue of fact arises upon

21. Young *v.* Wise, 45 Ga. 81; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35; Jaynes *v.* Reynolds, 2 Tex. 250; Booth *v.* Ableman, 20 Wis. 602; Pratt *v.* Donovan, 10 Wis. 378.

In Kentucky the contrary has been expressly held (Gullion *v.* Bowlware, Ky. Dec. 76, 2 Am. Dec. 708); but in a later case, although following the former decision, the court expresses a doubt as to its correctness (Hughes *v.* Hughes, 4 T. B. Mon. 42).

In proceedings against bail to recover the amount of a judgment rendered against the principal in a civil action, although a statutory proceeding instituted by motion, it has been held that a jury trial could not be denied (Labarre *v.* Fry, 9 Mart. (La.) 381; Gale *v.* Quick, 2 La. 348); but the contrary has been held with regard to the enforcement of a forfeited recognizance in a criminal case (Gildersleeve *v.* People, 10 Barb. (N. Y.) 35).

22. See cases cited *infra*, notes 23–26.

In Alabama the code provides that in a statutory proceeding by motion against a sheriff for failure to collect money under an execution "the court must hear and determine the motion, and render judgment upon the evidence, without a jury, unless an issue is tendered, and a jury trial demanded." Under this statute if no jury is demanded it is not error for the court to hear and determine the motion without a jury. Andrews *v.* Keep, 38 Ala. 315.

23. Johnson *v.* Price, 47 Fla. 265, 36 So. 1031; Wells *v.* Caldwell, 1 A. K. Marsh. (Ky.) 441; Lewis *v.* Garrett, 5 How. (Miss.) 434; Hart *v.* Robinett, 5 Mo. 11. See also Holmes *v.* Dunn, 13 La. Ann. 153. *Compare* Pope *v.* Stout, 1 Stew. (Ala.) 375.

24. Wells *v.* Caldwell, 1 A. K. Marsh. (Ky.) 441; Lewis *v.* Garrett, 5 How. (Miss.) 434; Hart *v.* Robinett, 5 Mo. 11.

25. Lewis *v.* Fellows, 6 How. (Miss.) 261; Lewis *v.* Garrett, 5 How. (Miss.) 434.

A surety acting with knowledge of the statute and agreeing to be liable for the principal's acts impliedly submits to the provisions as to its enforcement and is as much bound to submit to the remedy as to the liability. Lewis *v.* Garrett, 5 How. (Miss.) 434.

26. Evans *v.* State Bank, 15 Ala. 81; Dawson *v.* Shaver, 1 Blackf. (Ind.) 204; Holmes *v.* Dunn, 13 La. Ann. 153.

If a jury trial is not demanded it is not error either to submit the case to a jury (Condry *v.* Henley, 4 Stew & P. (Ala.) 9), or for the court to determine the facts without a jury (Evans *v.* State Bank, 15 Ala. 81).

27. Hudson *v.* Hudson, 98 Ga. 147, 26 S. E. 482; Poullain *v.* Brown, 80 Ga. 27, 5 S. E. 107. See also Hearn *v.* Laird, 103 Ga. 271, 29 S. E. 973.

On an exception based upon the ground that certain testimony was omitted from the auditor's report, there is no right to a jury trial to determine whether any evidence was omitted, but in the absence of statute it is discretionary with the court as to how the question shall be determined. Faircloth *v.* Stubbs, 94 Ga. 126, 21 S. E. 282.

If the report is not excepted to the court may enter judgment without the intervention of a jury. Cook *v.* Houston County Com'rs, 62 Ga. 223.

28. Hogan *v.* Walsh, 122 Ga. 283, 50 S. E. 84; Bemis *v.* Armour Packing Co., 105 Ga. 293, 31 S. E. 173; Hearn *v.* Laird, 103 Ga. 271, 29 S. E. 973.

Under the former Georgia statute it was provided that "when any question of fact is involved, the same shall be decided by a jury," but by the acts of 1894, 1895, a distinction was made as to actions of an equitable nature (Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958; Hearn *v.* Laird, 103 Ga. 271, 29 S. E. 973), which acts are not unconstitutional since there is no constitutional right to a jury trial in equitable actions (Hearn *v.* Laird, *supra*).

29. **Generally** see DAMAGES, 13 Cyc. 221 *et seq.*

Proceedings for assessment by jury see DAMAGES, 13 Cyc. 224.

the pleading,[30] it is ordinarily held that in the absence of statute a jury cannot be demanded for the purpose of assessing damages upon a judgment by default[31] or failure to plead after the overruling of a demurrer;[32] some of the decisions being based upon the ground that the constitutional provisions apply only to issues of fact arising upon the pleadings, and that in such cases the cause of action being admitted the question of damages is not an issue to which the right applies,[33] and that an assessment by a jury where it is allowed being a mere matter of practice[34] may be changed by the legislature and conferred upon the court without violating any constitutional right,[35] while in other cases it is held that defendant by suffering a default waives any right which he might have to demand a jury.[36] In some jurisdictions, however, the party not in default may demand an assessment by jury.[37] The question is in most jurisdictions regulated by express constitutional or statutory provisions,[38] and the United States courts usually follow the practice

30. Palys *v.* Jewett, 32 N. J. Eq. 302; Lewis *v.* Varnum, 12 Abb. Pr. (N. Y.) 305. See also Waterbury *v.* Platt, 76 Conn. 435, 56 Atl. 856.

31. *Connecticut.*— Seeley *v.* Bridgeport, 53 Conn. 1, 22 Atl. 1017.

Iowa.— Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352; Armstrong *v.* Catlin, 17 Iowa 581; Carleton *v.* Byington, 17 Iowa 579; Mann *v.* Howe, 9 Iowa 546.

Maine.— Hanley *v.* Sutherland, 74 Me. 212.

Missouri.— Burnham *v.* Tillery, 85 Mo. App. 453.

Oregon.— Deane *v.* Willamette Bridge Co., 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614.

Vermont.— Brown *v.* Irwin, 21 Vt. 68.

United States.— Raymond *v.* Danbury, etc., R. Co., 20 Fed. Cas. No. 11,593, 14 Blatchf. 133, 43 Conn. 596.

See 31 Cent. Dig. tit. "Jury," §§ 30, 85.

Where plaintiff has dismissed his action in a replevin suit and the case is retained or reinstated by defendant for the purpose of assessing defendant's damages, plaintiff cannot require an assessment by jury. Wilkins *v.* Treynor, 14 Iowa 391; Lamy *v.* Remson, 2 N. M. 245.

32. Hopkins *v.* Ladd, 35 Ill. 178; Phipps *v.* Addison, 7 Blackf (Ind.) 375; Cincinnati, etc., R. Co. *v.* Cook, 37 Ohio St. 265. *Compare* Wells *v.* Com., 8 B. Mon. (Ky.) 459.

33. Seeley *v.* Bridgeport, 53 Conn. 1, 22 Atl. 1017; Hopkins *v.* Ladd, 35 Ill. 178; Campbell *v.* Head, 13 Ill. 122; Deane *v.* Willamette Bridge Co., 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614; Raymond *v.* Danbury, etc., R. Co., 20 Fed. Cas. No. 11,593, 14 Blatchf. 133, 43 Conn. 596.

34. Deane *v.* Willamette Bridge Co., 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614; Raymond *v.* Danbury, etc., R. Co., 20 Fed. Cas. No. 11,593, 14 Blatchf. 133, 43 Conn. 596.

35. Hopkins *v.* Ladd, 35 Ill. 178; Campbell *v.* Head, 13 Ill. 122; Lamy *v.* Remuson, 2 N. M. 245; Deane *v.* Willamette Bridge Co., 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614.

36. Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352; Wilkins *v.* Treynor, 14 Iowa 391; Hanley *v.* Sutherland, 74 Me. 212.

37. Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352; Hanley *v.* Sutherland, 74 Me. 212.

38. See cases cited *infra*, this note.

In Alabama the court may render a judgment final by default without the intervention of a jury where the action is on an "instrument of writing ascertaining the plaintiff's demand" (Wood *v.* Winship Mach. Co., 83 Ala. 424, 3 So. 757, 3 Am. St. Rep. 754; Burns *v.* Howard, 68 Ala. 352; McKenzie *v.* Clanton, 33 Ala. 528); but not in actions which are not on written instruments (Warwick *v.* Brooks, 67 Ala. 252; Porter *v.* Burleson, 38 Ala. 343; Connoly *v.* Alabama, etc., R. Co., 29 Ala. 373); or where the writing does not furnish all the data necessary to ascertain the amount (Martin *v.* Woodall, 1 Stew. & P. 244).

In Arkansas it is provided that where an interlocutory judgment is rendered by default or upon demurrer in any suit founded upon any instrument of writing and the demand is ascertained by such instrument, the court shall assess the damages and render final judgment thereon, and in all other cases the assessment shall be by a jury. Wallace *v.* Henry, 5 Ark. 105.

In Georgia the constitution provides that "the court shall render judgment without the intervention of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under oath or affirmation (Stansell *v.* Corley, 81 Ga. 453, 3 S. E. 868; Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283; Tift *v.* Keaton, 78 Ga. 235, 2 S. E. 690; Taylor *v.* Bell, 62 Ga. 158; Mehring *v.* Charles, 58 Ga. 377); and the requirement is held to be mandatory (Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 475); but the provision is not retroactive (Walker *v.* Bivins, 57 Ga. 322; Birdsong *v.* Woodward, 57 Ga. 354); nor does it apply to cases where an issuable defense is filed (Erambert *v.* Scarborough, 46 Ga. 398); or where the contract sued on is not unconditional (Howard *v.* Wellham, 114 Ga. 934, 41 S. E. 62; Thornton *v.* Mutual Bldg., etc., Assoc., 113 Ga. 1141, 39 S. E. 481; Rodgers *v.* Caldwell, 112 Ga. 635, 37 S. E. 865; Everett *v.* Westmoreland, 92 Ga. 670, 19 S. E. 37; Dye *v.* Garrett, 78 Ga. 471, 3 S. E. 692); but if the contract is unconditional as to a certain amount judgment may be rendered for that amount, although upon certain conditions

of the state in which the court is held [39] with regard to the assessment of damages in such cases.

6. Criminal Prosecutions and Proceedings — a. Constitutional Provisions. In many of the constitutions there are in addition to the general provisions previously stated [40] express provisions with regard to the right to trial by jury in criminal cases.[41] The federal constitution provides that the trial of all crimes, except in cases of impeachment, shall be by jury,[42] and by the sixth amendment it is declared that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.[43] Some of the state constitutions provide generally that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury;[44] while in others the right is guaranteed only in prosecutions on indictment, presentment, or information;[45] and in a few

a larger amount would be due thereon (Knox *v.* Yow, 91 Ga. 367, 17 S. E. 654).

In Louisiana Code Civ. Proc. art. 313, relating to assessment of damages in the case of default is construed as requiring an assessment by jury only where the amount is uncertain or a matter of opinion. Brander *v.* Goodin, 6 La. Ann. 521.

In Maryland the act of 1864 provides that the court may assess the damages on a judgment by default. Knickerbocker L. Ins. Co. *v.* Hoeske, 32 Md. 317, holding, however, that this provision applies only where defendant is not in court and is in default, and not where he pleads and his plea is stricken out for want of proper verification.

39. Raymond *v.* Danbury, etc., R. Co., 20 Fed. Cas. No. 11,593, 14 Blatchf. 133, 43 Conn. 596, where the court said: "The practice of the United States courts, in the different circuits, has not been uniform. The more common method has been to assess damages by a jury, upon a writ of inquiry, but it is believed that the practice has conformed to the usages of the state in which the circuit court was held."

40. See *supra*, III, B.

41. See Proffatt Jury Tr. § 85; and cases cited *infra*, notes 42 *et seq.*

42. Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223; *In re* Dana, 6 Fed. Cas. No. 3,554, 7 Ben. 1.

43. Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223; U. S. *v.* Taylor, 11 Fed. 470.

44. *Illinois.*—Harris *v.* People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153.

Indiana.— Murphy *v.* State, 97 Ind. 579.

Iowa.— State *v.* Douglass, 96 Iowa 308, 65 N. W. 151; *In re* Bresee, 82 Iowa 573, 48 N. W. 991.

Kansas.— State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *In re* Rolfs, 30 Kan. 758, 1 Pac. 523.

Louisiana.— State *v.* Robinson, 43 La. Ann. 383, 8 So. 937; State *v.* Noble, 20 La. Ann. 325.

Maryland.— State *v.* Glenn, 54 Md. 572.

Michigan.— Grand Rapids *v.* Bateman, 93 Mich. 135, 53 N. W. 6; Brimingstool *v.* People, 1 Mich. N. P. 266.

Minnesota.— State *v.* Woodling, 53 Minn. 142, 54 N. W. 1068; State *v.* Becht, 23 Minn. 411.

New Jersey.— Edwards *v.* State, 45 N. J. L. 419.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149; Hoffner *v.* Oberlin, 8 Ohio Dec. (Reprint) 710, 9 Cinc. L. Bul. 239.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

South Dakota.— Belatti *v.* Pierce, 8 S. D. 456, 66 N. W. 1088.

Texas.— Glavecke *v.* State, 44 Tex. 137; Moore *v.* State, 22 Tex. Cr. 117, 2 S. W. 634.

Vermont.— State *v.* Peterson, 41 Vt. 504.

Virginia.— *Ex p.* Marx, 86 Va. 40, 9 S. E. 475; Mays *v.* Com., 82 Va. 550.

See 31 Cent Dig. tit. "Jury," § 134 *et seq.*

In North Carolina the constitution provides that "no person shall be convicted of any crime but by the unanimous verdict of a jury." State *v.* Holt, 90 N. C. 749, 47 Am. Rep. 544; State *v.* Stewart, 89 N. C. 563; State *v.* Moss, 47 N. C. 66.

In Vermont there is a further constitutional provision that "when any issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury which ought to be held sacred," which is held to apply to criminal as well as to civil cases. State *v.* Peterson, 41 Vt. 504.

In West Virginia the constitution provides that "trial of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men." State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428.

45. *Alabama.*— Reeves *v.* State, 96 Ala. 33, 11 So. 296; Collins *v.* State, 88 Ala. 212, 7 So. 260; State *v.* Buckley, 54 Ala. 599; Tims *v.* State, 26 Ala. 165.

Connecticut.— Goddard *v.* State, 12 Conn. 448.

Kentucky.— Doram *v.* Com., 1 Dana 331.

Missouri.— State *v.* Ledford, 3 Mo. 102.

Tennessee.— Dula *v.* State, 8 Yerg. 511.

Wisconsin.— *In re* Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285; State *v.* Main, 16 Wis. 398.

See 31 Cent. Dig. tit. "Jury," § 134 *et seq.*

there are no provisions relating expressly to criminal cases.[46] The Massachusetts constitution provides that the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.[47] The constitutional provisions guaranteeing a trial by jury in all criminal prosecutions are applied according to the principles which at common law determined whether the accused in a given class of cases was entitled to be tried by a jury,[48] and are not to be construed as relating only to felonies or to offenses punishable by confinement in the penitentiary.[49] Where the guaranty relates only to cases on indictment or information the accused is not entitled to a jury trial in any other case unless the right is secured by some other clause of the constitution;[50] while in cases governed only by the general provisions that the right to trial by jury or the right as before used shall remain inviolate, the question is determined according to the practice prior to the adoption of the constitution.[51]

b. Statutory Offenses. There are few cases in which it has been held that the constitutional provisions relating to trial by jury do not apply to new offenses created by statute since the adoption of the constitutions,[52] but this doctrine has been expressly disapproved in other jurisdictions;[53] and what is apprehended to be the sounder rule and supported by the weight of authority is that the right should be determined according to the class of cases to which the particular offense belongs.[54] If the statutory offense belongs to a class of cases previously triable

46. Proffatt Jury Tr. § 85.

47. Jones *v.* Robins, 8 Gray (Mass.) 329. Where the power of imposing punishment is expressly limited to fine and imprisonment in the jail or house of correction, excluding the state prison, the constitutional provision does not apply. Lewis *v.* Robbins, 13 Allen (Mass.) 552.

A sentence to the state prison for any term is an infamous punishment within the application of this provision. Jones *v.* Robbins, 8 Gray (Mass.) 329.

48. Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223. See also State *v.* Peterson, 41 Vt. 504.

Particular offenses which have been held to be triable by jury are assault and battery (*In re* Robinson, 20 D. C. 570; State *v.* Moss, 47 N. C. 66); petit larceny (*In re* Fauldan, 20 D. C. 433); receiving stolen goods knowing them to have been stolen (U. S. *v.* Jackson, 20 D. C. 424); and the offense of gaming as defined by acts of congress providing a punishment by imprisonment for not more than one year and by fine not exceeding five hundred dollars (U. S. *v.* Herzog, 20 D. C. 430).

An information to remove a public officer from office is not a criminal prosecution within the meaning of the constitution. Glavecke *v.* State, 44 Tex. 137. But see Wilson *v.* State, 38 Tex. 548.

The imprisonment of a debtor who has disposed of his property with intent to defraud his creditors is not a criminal prosecution within the meaning of constitutional provision guaranteeing the right of trial by jury in all criminal cases. Johnson *v.* Maxon, 23 Mich. 129.

A proceeding to compel a defendant to give security to keep the peace is not within the application of the constitutional provisions conferring the right to a jury trial either generally or in criminal prosecutions. State *v.* Kennie, 24 Mont. 45, 60 Pac. 589.

49. Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223.

50. State *v.* Buckley, 54 Ala. 599.

51. People *v.* Justices Ct. Spec. Sess., 74 N. Y. 406; Wynehamer *v.* People, 13 N. Y. 378; People *v.* Baird, 11 Hun (N. Y.) 289; Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186; Duffy *v.* People, 6 Hill (N. Y.) 75; Warren *v.* People, 3 Park. Cr. (N. Y.) 544; People *v.* Kennedy, 2 Park. Cr. (N. Y.) 312; Terry *v.* State, 24 Ohio Cir. Ct. 111.

The state as well as defendant may insist upon a jury trial where the constitution merely provides that in criminal cases the right of trial by jury shall remain inviolate. State *v.* Mead, 4 Blackf. (Ind.) 309, 30 Am. Dec. 661.

52. Tims *v.* State, 26 Ala. 165; Van Swartow *v.* Com., 24 Pa. St. 131. See also State *v.* Ledford, 3 Mo. 102; Com. *v.* Andrews, 211 Pa. St. 110, 60 Atl. 554.

There is nothing to forbid the legislature from creating a new offense and prescribing what mode they please of ascertaining the guilt of those who are charged with it. Van Swartow *v.* Com., 24 Pa. St. 131. See also Com. *v.* Andrews, 24 Pa. Super. Ct. 571.

53. *Ex p.* Wong You Ting, 106 Cal. 296, 39 Pac. 627; McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; People *v.* Kennedy, 2 Park. Cr. (N. Y.) 312.

54. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Wynehamer *v.* People, 13 N. Y. 378; Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; Warren *v.* People, 3 Park. Cr. (N. Y.) 544; People *v.* Kennedy, 2 Park. Cr. (N. Y.) 312.

by jury the constitutional provisions apply,[55] but if it belongs to a class previously triable without a jury a jury trial may be denied.[56] Under this rule the legislature may add new cases to certain classes of offenses previously triable without a jury, such as vagrancy,[57] or disorderly conduct,[58] provided the act constituting the offense is of a similar character, grade, or class; but cannot by merely changing the name of an offense make an act triable in a summary manner which was indictable at common law,[59] or triable by jury prior to the constitution.[60]

c. Minor Offenses — (I) *In General.* There was prior to the adoption of the various constitutions a large class of minor or petty offenses which had been made punishable in a summary manner before justices and other inferior officers, and to these cases the constitutional provisions relating to trial by jury do not apply.[61] To this class of offenses belong violations of Sunday laws,[62] vagrancy,[63] disorderly conduct,[64] drunkenness,[65] disturbance of religious meetings,[66] violations of municipal ordinances,[67] and generally such new cases falling within these classes or such new offenses of a similar character as the legislature may from time to time create.[68] There is necessarily, however, much lack of uniformity in the different jurisdictions as to the particular offenses which may be punished summarily owing to the difference in the practice prior to the adoption of the several constitutions.[69] As this summary mode of trial is in derogation of the common law it should be carefully guarded against extension to cases to which the constitutional provisions were intended to apply.[70] In some of the states the constitu-

55. *Ex p.* Wong You Ting, 106 Cal. 296, 39 Pac. 627; State *v.* Hamey, (Mo. 1901) 65 S. W. 946; Wynehamer *v.* People, 13 N. Y. 378; Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; People *v.* Kennedy, 2 Park. Cr. (N. Y.) 312; State *v.* Peterson, 41 Vt. 504.

56. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; State *v.* Jackson, 69 N. H. 511, 43 Atl. 749; Duffy *v.* People, 6 Hill (N. Y.) 75; People *v.* Fisher, 11 How. Pr. (N. Y.) 554.

Failure to work public roads may be made punishable summarily without trial by jury. Haney *v.* Bartow County, 91 Ga. 770, 18 S. E. 28.

In trials for offenses punishable by fine only and which are purely statutory and not known to or punishable at common law, defendant is not entitled to a jury trial. Ward *v.* State, 5 Ohio S. & C. Pl. Dec. 230, 5 Ohio N. P. 81.

57. State *v.* Maxcy, 1 McMull. (S. C.) 501.

58. People *v.* McCarthy, 45 How. Pr. (N. Y.) 97; Duffy *v.* People, 6 Hill (N. Y.) 75.

59. Warren *v.* People, 3 Park. Cr. (N. Y.) 544.

60. People *v.* Baird, 11 Hun (N. Y.) 289.

61. *Connecticut.*— Goddard *v.* State, 12 Conn. 448.

Kentucky.— Mt. Sterling *v.* Holly, 108 Ky. 621, 57 S. W. 491, 22 Ky. L. Rep. 358.

Maryland.— State *v.* Glenn, 54 Md. 572.

New York.— People *v.* Clark, 23 Hun 374; People *v.* Van Houten, 13 Misc. 603, 35 N. Y. Suppl. 186; Matter of Morris, 2 Edm. Sel. Cas. 381.

Ohio.— Inwood *v.* State, 42 Ohio St. 186; Fletcher *v.* State, 18 Ohio Cir. Ct. 674, 7 Ohio Cir. Dec. 316.

Pennsylvania.— Byers *v.* Com., 42 Pa. St. 89.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Vermont.— State *v.* Conlin, 27 Vt. 318. See also *In re* Powers, 25 Vt. 261.

Virginia.— *Ex p.* Marx, 86 Va. 40, 9 S. E. 475.

Washington.— State *v.* Kennan, 25 Wash. 621, 66 Pac. 62.

See 31 Cent. Dig. tit. "Jury," § 146.

This jurisdiction in the United States has been exercised sometimes under English statutes in force here, but more generally under statutes passed by the colonial and state legislatures. State *v.* Glenn, 54 Md. 572.

62. Goddard *v.* State, 12 Conn. 448; Com. *v.* Waldman, 140 Pa. St. 89, 21 Atl. 248, 11 L. R. A. 563; *Ex p.* Marx, 86 Va. 40, 9 S. E. 475. See also Erbe *v.* Monteverde, 13 Misc. (N. Y.) 404, 35 N. Y. Suppl. 102.

63. State *v.* Noble, 20 La. Ann. 325; Byers *v.* Com., 42 Pa. St. 89; State *v.* Maxcy, 1 McMull. (S. C.) 501.

If there is no statutory provision for a summary trial for vagrancy it is error to deny a jury if demanded, although it would be competent for the legislature to provide for a summary trial in such cases. *In re* Fife, 110 Cal. 8, 42 Pac. 299.

64. Mt. Sterling *v.* Holly, 108 Ky. 621, 57 S. W. 491, 22 Ky. L. Rep. 358; *In re* Glenn, 54 Md. 572; People *v.* Iverson, 46 N. Y. App. Div. 301, 61 N. Y. Suppl. 220, 14 N. Y. Cr. 155; People *v.* McCarthy, 45 How. Pr. (N.Y.) 97; Duffy *v.* People, 6 Hill (N. Y.) 75. See also Bassette *v.* State, 51 N. J. L. 502, 18 Atl. 354.

65. Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382.

66. People *v.* Clark, 23 Hun (N. Y.) 374; Inwood *v.* State, 42 Ohio St. 186.

67. See *infra*, III, E, 6, c, (II).

68. See *supra*, III, E, 6, b.

69. Proffatt Jury Tr. § 95.

70. *Ex p.* Wong You Ting, 106 Cal. 296, 39 Pac. 627; State *v.* Peterson, 41 Vt. 504;

tions expressly provide that certain classes of offenses shall be tried without a jury,[71] or authorize the legislature to make such provision.[72]

(II) *Violations of Municipal Ordinances.* Violations of municipal ordinances belong to that class of minor offenses which were in general triable in a summary manner prior to the adoption of the several constitutions,[73] and the denial of a jury trial in such cases is not a violation of the general constitutional provisions,[74] nor are such cases within the special provisions of some of the constitutions which guarantee a jury trial in all criminal prosecutions.[75] In some cases this rule has been held to apply even where the act constituting the violation of the ordinance is also indictable as a public offense, the decisions being based upon the ground that the offense against the municipality is distinct and separate from that against the state;[76] but other cases, while conceding that a

Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223.

71. Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264.

72. State *v.* New Orleans First Recorder's Ct., 30 La. Ann. 450; State of Gutierrez, 15 La. Ann. 190; *Ex p.* Wooten, 62 Miss. 174; State *v.* Whitaker, 114 N. C. 818, 19 S. E. 376; State *v.* Powell, 97 N. C. 417, 1 S. E. 482; State *v.* Crook, 91 N. C. 536. See also Augusti *v.* Louisiana Lottery Co., 34 La. Ann. 504.

73. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305; People *v.* Van Houten, 13 Misc. (N. Y.) 603, 35 N. Y. Suppl. 186; Natal *v.* Louisiana, 139 U. S. 621, 11 S. Ct. 636, 35 L. ed. 288 [*affirming* 39 La. Ann. 439, 1 So. 923], and cases cited *infra*, note 74.

74. *Alabama.*— Bray *v.* State, 140 Ala. 172, 37 So. 250.

Colorado.— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214; Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234.

Georgia.— Little *v.* Ft. Valley, 123 Ga. 503, 51 S. E. 501; Floyd *v.* Eatonton, 14 Ga. 354, 58 Am. Dec. 559; Williams *v.* Augusta, 4 Ga. 509.

Kansas.— *In re* Kinsel, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475; State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

Kentucky.— Stone *v.* Paducah, 86 S. W. 531, 27 Ky. L. Rep. 717.

Louisiana.— Opelousas *v.* Giron, 46 La. Ann. 1364, 16 So. 190; State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249; Monroe *v.* Meuer, 35 La. Ann. 1192.

Minnesota.— State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531; Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305.

Missouri.— Delaney *v.* Kansas City Police Ct., 167 Mo. 667, 67 S. W. 589; Marshall *v.* Standard, 24 Mo. App. 192.

Nebraska.— Liberman *v.* State, 26 Nebr. 464, 42 N. W. 419, 18 Am. St. Rep. 791.

Nevada.— State *v.* Ruhe, 24 Nev. 251, 52 Pac. 274.

New Jersey.— Unger *v.* Fanwood, 69 N. J. L. 548, 55 Atl. 42; State *v.* Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352; Howe *v.* Plainfield, 37 N. J. L. 145.

New York.— People *v.* Van Houten, 13 Misc. 603, 35 N. Y. Suppl. 186.

Oregon.— Cranor *v.* Albany, 43 Oreg. 144, 71 Pac. 1042; Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632; *Ex p.* Schmidt, 24 S. C. 363.

Tennessee.— Trigally *v.* Memphis, 6 Coldw. 382.

Washington.— State *v.* Kennan, 25 Wash. 621, 66 Pac. 62.

See 31 Cent. Dig. tit. "Jury," §§ 152, 153.

The provision of the Iowa constitution that offenses less than felony and in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days shall be tried summarily before a justice or other officer authorized by law on information under oath, without indictment, applies to trials in a police court for the violation of municipal ordinances and in such cases a jury is not necessary. Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264.

In Texas where the constitution provides that in all cases where justices or other judicial officers of inferior tribunals shall have jurisdiction in the trial of cases where the penalty is fine or imprisonment the accused shall have the right to a trial by jury, a municipal ordinance providing that violations thereof shall be punished by fine or imprisonment in a summary manner before the mayor is unconstitutional. Smith *v.* San Antonio, 17 Tex. 643; Burns *v.* La Grange, 17 Tex. 415.

Under special charter provisions of certain cities as to the jurisdiction of trials for violations of its ordinances a jury trial can be demanded. Greely *v.* Passaic, 42 N. J. L. 429; People *v.* Cox, 76 N. Y. 47 [*affirming* 9 Hun 146].

75. Bowles *v.* District of Columbia, 22 App. Cas. (D. C.) 321; State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; State *v.* Grimes, 83 Minn. 460, 86 N. W. 449; Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305; Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295. See also Floyd *v.* Eatonton, 14 Ga. 354, 58 Am. Dec. 559. *Contra*, Belatti *v.* Pierce, 8 S. D. 456, 66 N. W. 1088.

76. *Colorado.*— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

summary trial may be had where the offense is against a mere municipal regulation, hold that if it is also an indictable offense at common law or under the penal laws of the state a jury trial cannot be denied.[77]

d. Particular Proceedings in Criminal Actions. A jury cannot be demanded in a proceeding which is merely to require the accused to recognize for his appearance in a higher court,[78] or to determine the sanity of a person already convicted and under sentence of death,[79] or where a person has been arrested for the alleged breach of a conditional pardon, unless he pleads that he is not the person originally convicted.[80] Where in a trial for the crime of murder defendant pleads guilty the determination of the degree of the crime is not a trial and he has no constitutional right to have that question determined by a jury,[81] unless it is expressly so provided by statute;[82] nor is there any constitutional right upon conviction to have the punishment assessed or the term of imprisonment fixed by a jury.[83]

e. Contempt Proceedings.[84] A respondent in contempt proceedings is not entitled to a trial by jury[85] except where a jury trial is expressly provided for by

District of Columbia.— Bowles *v.* District of Columbia, 22 App. Cas. 321.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214.

Georgia.— Littlejohn *v.* Stells, 123 Ga. 427, 51 S. E. 390.

Louisiana.— Amite City *v.* Holly, 50 La. Ann. 627, 23 So. 746; Opelousas *v.* Giron, 46 La. Ann. 1364, 16 So. 190.

New Jersey.— Howe *v.* Plainfield, 37 N. J. L. 145.

Oregon.— Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

Wisconsin.— Ogden *v.* Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506.

See 31 Cent. Dig. tit. "Jury," §§ 152, 153.

Where an act prohibited by a city ordinance is afterward made a public offense triable by jury it may still be tried as a violation of the ordinance by a police court without a jury. State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.

77. Taylor *v.* Reynolds, 92 Cal. 573, 28 Pac. 688; *In re* Jahn, 55 Kan. 694, 41 Pac. 956; Hoffner *v.* Oberlin, 8 Ohio Dec. (Reprint) 710, 9 Cinc. L. Bul. 239.

In New Jersey a distinction is made between cases where the act constituting a violation of the ordinance is indictable under a statute and where it is indictable at common law, it being held that in the former case a jury is not necessary but that if the act is indictable at common law a jury trial cannot be denied. State *v.* Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352; State *v.* Anderson, 40 N. J. L. 224.

A police justice acting as a court of special sessions is governed by the statutory provisions applicable to those courts generally and must allow a jury trial in cases ordinarily triable by jury in such courts. People *v.* James, 16 Hun (N. Y.) 426.

78. State *v.* Thompson, 20 N. H. 250.

79. State *v.* Judge Eighth Judicial Dict., 48 La. Ann. 503, 19 So. 475. See also CRIMINAL LAW, 12 Cyc. 772.

80. State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582. 19 L. R. A. 783.

81. People *v.* Noll, 20 Cal. 164; State *v.* Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744; Craig *v.* State, 49 Ohio St. 415, 30 N. E. 1120, 16 L. R. A. 358. See also CRIMINAL LAW, 12 Cyc. 771, 772.

82. Wartner *v.* State, 102 Ind. 51, 1 N. E. 65.

83. George *v.* People, 167 Ill. 447, 47 N. E. 741; Skelton *v.* State, 149 Ind. 641, 49 N. E. 901; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; State *v.* Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846.

84. Punishment of violation of injunction as to contempt see *supra*, III, E, 2, o, (I).

85. *Arkansas.*— Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Connecticut.— *In re* Clayton, 59 Conn. 510, 21 Atl. 1005, 21 Am. St. Rep. 128, 13 L. R. A. 66.

Illinois.— People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; O'Neil *v.* People, 113 Ill. App. 195.

Indiana.— Garrigus *v.* State, 93 Ind. 239.

Iowa.— Drady *v.* Polk County, 126 Iowa 345, 102 N. W. 115; McDonnell *v.* Henderson, 74 Iowa 619, 38 N. W. 512; Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551; Eikenbery *v.* Edwards, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Missouri.— State *v.* Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

Nebraska.— Gandy *v.* State, 13 Nebr. 445, 14 N. W. 143.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New Jersey.— State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

New York.— See Rutherford *v.* Holmes, 5 Hun 317 [*affirmed* in 66 N. Y. 368].

North Carolina.— In re Deaton, 105 N. C. 59, 11 S. E. 244; Baker *v.* Cordon, 86 N. C. 116, 41 Am. Rep. 448.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

statute,[86] and then only in the particular cases to which the statute applies.[87] The fact that the act constituting the contempt may also be an indictable offense does not affect the rule where the proceeding is not by indictment.[88] The power of the court to punish summarily for contempt has existed from the earliest period of the common law,[89] and is not within the application of constitutional provision guaranteeing a trial by jury[90] or providing against depriving persons of their liberty without due process of law.[91] The legislature cannot, however, make an act punishable summarily as a contempt which from its nature cannot be a contempt of the authority imposing the punishment.[92]

f. Commitment to Industrial Schools or Reformatories. The commitment of infants to industrial schools, reformatories, or houses of refuge by a judge or justice without a jury trial is not in violation of the constitutional provisions relating to trial by jury.[93] Such institutions are not prisons,[94] and the proceeding is not a criminal prosecution.[95] The object of the commitment is not punishment but the reformation and education of the infant,[96] and is based upon the power of the

Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Texas.— Crow *v.* State, 24 Tex. 12.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 14 S. Ct. 1125, 38 L. ed. 1047, 155 U. S. 3, 15 S. Ct. 19, 39 L. ed. 49; Eilenbecker *v.* Plymouth County, 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801; King *v.* Ohio, etc., R. Co., 14 Fed. Cas. No. 7,800, 7 Biss. 529; U. S. *v.* Duane, 25 Fed. Cas. No. 14,997, Wall. St. 102.

See 31 Cent. Dig. tit. "Jury," § 139.

The judge may avail himself of a jury to determine doubtful matters of fact in such proceedings but this is a matter of discretion. See Baker *v.* Cordon, 86 N. C. 116, 41 Am. Rep. 448.

86. See Lee *v.* Lee, 97 Ga. 736, 25 S. E. 174; Kingsbery *v.* Ryan, 92 Ga. 108, 17 S. E. 689.

87. Lee *v.* Lee, 97 Ga. 736, 25 S. E. 174 See also Briesnick *v.* Briesnick, 100 Ga. 57, 28 S. E. 154.

88. O'Neil *v.* People, 113 Ill. App. 195; Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551.

89. Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; State *v.* Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

90. *Arkansas.*— Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Connecticut.— *In re* Clayton, 59 Conn. 510, 21 Atl. 1005, 21 Am. St. Rep. 128, 13 L. R. A. 66.

Kansas.— State *v.* Durein, 46 Kan. 695, 27 Pac. 148.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Nebraska.— Gandy *v.* State, 13 Nebr. 445, 14 N. W. 143.

New Jersey.— State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

North Dakota.— State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

South Dakota.— State *v.* Mitchell, 3 S. D. 223, 52 N. W. 1052.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

See 31 Cent. Dig. tit. "Jury," § 139.

91. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Eilenbecker *v.* Plymouth County Dist. Ct., 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801.

92. Puterbaugh *v.* Smith, 131 Ill. 199, 23 N. E. 428, 19 Am. St. Rep. 30.

93. *California.*— *Ex p.* Ah Peen, 51 Cal. 280. But see *Ex p.* Becknell, 119 Cal. 496, 51 Pac. 692.

Illinois.— *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10 [*distinguishing* People *v.* Turner, 55 Ill. 280, 8 Am. Rep. 645, where it was held under a different statute that a commitment without a jury trial to a reformatory which was regarded as a place of imprisonment and for punishment was in violation of the constitutional provision].

Maryland.— Roth *v.* House of Refuge, 31 Md. 329.

Massachusetts.— Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452.

Minnesota.— State *v.* Brown, 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691.

Ohio.— Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

Pennsylvania.— *Ex p.* Crouse, 4 Whart. 9. See also Com. *v.* Fisher, 27 Pa. Super. Ct. 175.

Wisconsin.— Wisconsin Industrial School *v.* Clark County, 103 Wis. 651, 79 N. W. 422; Milwaukee Industrial School *v.* Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702.

See 31 Cent. Dig. tit. "Jury," § 138.

94. Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388; *Ex p.* Crouse, 4 Whart. (Pa.) 9; Milwaukee Industrial School *v.* Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702.

95. *Ex p.* Ah Peen, 51 Cal. 280; Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

96. *Ex p.* Ah Peen, 51 Cal. 280; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452; *Ex p.* Crouse, 4 Whart. (Pa.) 9;

state to act as *parens patriæ* where the parent or natural guardian is unable, unwilling, or an improper person to do so [97]

7. Right on Appeal or Other Proceedings For Review [98] — a. In General. In controversies to which the constitutional right of trial by jury applies, if a trial is provided for in the first instance, without a jury with a right of appeal to a court of ordinary jurisdiction, the parties have a right to demand a jury upon the appeal;[99] but in proceedings not within the application of the constitutional provisions the fact that an appeal is allowed does not entitle the parties to demand a jury,[1] unless the statute so provides,[2] or in other words no constitutional objection can be sustained to the denial of a jury trial on appeal in any case where the appeal itself might be denied.[3] Supreme courts ordinarily exercise only appellate jurisdiction and are without authority to impanel a jury.[4]

b. Appeals From Justices of the Peace. On an appeal from the judgment of a justice of the peace to a court of ordinary jurisdiction the case is tried *de novo*,[5] and the right to a jury trial is determined according to the nature of the controversy as if the action had originated in that court.[6]

c. Appeals From Probate Courts. While in some states it is provided that on an appeal from a judgment or decree of a probate court the court may submit issues of fact to a jury,[7] there is no absolute right to a jury trial on such appeals,[8]

Wisconsin Industrial School *v.* Clark County, 103 Wis. 651, 79 N. W. 422.

97. *California.*— *Ex p.* Ah Peen, 51 Cal. 280. But see *Ex p.* Becknell, 119 Cal. 496, 51 Pac. 692.

Illinois.— *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10.

Massachusetts.— Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452.

Pennsylvania.— *Ex p.* Crouse, 4 Whart. 9.

Wisconsin.— Milwaukee Industrial School *v.* Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702.

See 31 Cent. Dig. tit. "Jury," § 138.

98. In condemnation proceedings see Eminent Domain, 15 Cyc. 874, 967.

99. O'Loughlin *v.* Bird, 128 Mass. 600. See also Collins *v.* State, 88 Ala. 212, 7 So. 260; Creston *v.* Nye, 74 Iowa 369, 37 N. W. 777.

Allowance of appeal to jury as preserving constitutional right see *infra*, V, H, 2.

1. Sisson *v.* Buena Vista County, 128 Iowa 442, 104 N. W. 454; Davis *v.* Clinton, 55 Iowa 549, 8 N. W. 423.

There is no right to a jury trial on an appeal from a board of equalization to correct a tax assessment (Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 8 N. W. 443; Davis *v.* Clinton, 55 Iowa 549, 8 N. W. 423; State *v.* Fleming, (Nebr. 1903) 97 N. W. 1063) or to review the report of commissioners in partitioning land (Allen *v.* Anderson, 57 Ind. 388); or on an appeal from the finding of a board of county supervisors as to the sufficiency of a statement of consent of the voters of a county to the sale of intoxicating liquors (Porter *v.* Butterfield, 116 Iowa 725, 89 N. W. 199; Green *v.* Smith, 111 Iowa 183, 82 N. W. 448); or on an appeal from the order of a board of supervisors establishing a drainage district (Sisson *v.* Buena Vista County, 218 Iowa 442, 104 N. W. 454).

2. Mascall *v.* Drainage Dist. Com'rs, 122 Ill. 620, 14 N. E. 47.

3. State *v.* Fleming, (Nebr. 1903) 97 N. W. 1063.

4. Brooks *v.* Weyman, 3 Mart. (La.) 9; Kearns *v.* Thomas, 37 Wis. 118.

But if a supreme court has original as well as appellate jurisdiction it may when necessary issue a venire for a jury to try a question of fact in that court or it may be sent to a court of ordinary jurisdiction for trial. Teller *v.* Wetherell, 6 Mich. 46.

5. See Justices of the Peace.

6. Young *v.* Bride, 25 N. H. 482; Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366. But see State *v.* Read, 50 La. Ann. 445, 23 So. 715.

7. *Delaware.*— Hall *v.* Dougherty, 5 Houst. 435.

Maine.— Withee *v.* Rowe, 45 Me. 571.

Massachusetts.— Higbee *v.* Bacon, 11 Pick. 423.

New Hampshire.— Patrick *v.* Cowles, 45 N. H. 553.

South Carolina.— Hughes *v.* Kirkpatrick, 37 S. C. 161, 15 S. E. 912; Shaw *v.* Cunningham, 9 S. C. 271.

See 31 Cent. Dig. tit. "Jury," § 97.

The only questions which the court would be inclined to send to a jury are as to the capacity of a testator and fraud in the procurement of a will. Baker *v.* Goodrich, 1 Aik. (Vt.) 395.

In Delaware it is held that the discretion of the register of wills in refusing to direct an issue to be tried by jury is reviewable, and that on an appeal to the superior court from an order refusing to direct an issue, the superior court may order such issue to be tried before a jury in that court on the trial of the appeal. Hall *v.* Dougherty, 5 Houst. 435.

8. *Connecticut.*— Weed's Appeal, 35 Conn. 452.

Illinois.— Moody *v.* Found, 208 Ill. 78, 69 N. E. 831; Coffey *v.* Coffey, 179 Ill. 283, 53 N. E. 590 [*affirming* 74 Ill. App. 241].

except in jurisdictions where the right to demand a jury on the trial of the appeal is expressly conferred by statute.[9]

IV. LOSS AND WAIVER OF RIGHT.

A. Right to Waive Jury Trial — 1. In Civil Cases. The constitutional right to a jury trial in civil cases is a mere privilege intended solely for the benefit of the parties litigant and may be waived by them.[10] The same rule applies

Kansas.— Gallon *v.* Haas, 67 Kan. 225, 72 Pac. 770.

Louisiana.— Penny *v.* Weston, 4 Rob. 165.

Maine.— Bradstreet *v.* Bradstreet, 64 Me. 204.

Massachusetts.— Higbee *v.* Bacon, 11 Pick. 423.

Minnesota.— Schmidt *v.* Schmidt, 47 Minn. 451, 50 N. W. 598.

Missouri.— Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. 113; Schooler *v.* Stark, 73 Mo. App. 301.

New Hampshire.— Patrick *v.* Cowles, 45 N. H. 553.

New York.— Devin *v.* Patchin, 26 N. Y. 441.

South Carolina.— Hughes *v.* Kirkpatrick, 37 S. C. 161, 15 S. E. 912; *Ex p.* Apeler, 35 S. C. 417, 14 S. E. 931; Rollin *v.* Whipper, 17 S. C. 32.

Vermont.— *In re* Weatherhead, 53 Vt. 653; Baker *v.* Goodrich, 1 Aik. 395.

See 31 Cent. Dig. tit. "Jury," § 97.

In Texas it is held that on an appeal from the county court in probate matters to the district court the case is to be tried as other cases in that court and that a jury trial may be demanded. Stone *v.* Byars, 32 Tex. Civ. App. 154, 73 S. W. 1086.

On an appeal from an order admitting a will to probate there is no right to a jury trial. Moody *v.* Found, 208 Ill. 78, 69 N. E. 831; Wills *v.* Lochnane, 9 Bush (Ky.) 547; *In re* Welch, 69 Vt. 127, 37 Atl. 250.

On a motion to dismiss a probate appeal there is no right to a jury trial of issues of fact arising on the motion, although the court may in its discretion submit issues to the jury. Amory *v.* Amory, 26 Wis. 152.

In a proceeding to enforce a claim against a decedent's estate, which is instituted in the probate court but might have been enforced by direct action against the representative in a court of law where a jury trial might have been demanded, it has been held that the fact that the proceeding was instituted in the probate court will not deprive the claimant of the right to a jury trial on an appeal (Lewis *v.* Baca, 5 N. M. 289, 21 Pac. 343), but on the contrary it has been held that if the claimant elects to submit the adjudication of his claim to the probate court he cannot claim a jury trial on an appeal to the circuit court (Hughes *v.* Kirkpatrick, 37 S. C. 161, 15 S. E. 912).

9. Nowland *v.* Rice, 138 Mich. 146, 101 N. W. 214; *In re* Stebbin, 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345; Grovier *v.* Hall, 23 Mich. 7; Sheedy *v.* Sheedy, 36 Nebr. 373, 54 N. W. 560.

In Colorado the statute regulating appeals from probate proceedings is construed as entitling the party to a jury trial. Clough *v.* Clough, 27 Colo. 97, 59 Pac. 736 [*affirming* 10 Colo. App. 433, 51 Pac. 513].

10. *Alabama.*— Johnston *v.* Atwood, 2 Stew. 225.

Arkansas.— *Ex p.* Reardon, 9 Ark. 450.

Colorado.— Leahy *v.* Dunlap, 6 Colo. 552.

Illinois.— Claussenius *v.* Claussenius, 179 Ill. 545, 53 N. E. 1006; Chicago, etc., R. Co. *v.* Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562; Chicago, etc., R. Co. *v.* Hock, 118 Ill. 587, 9 N. E. 205.

Indiana.— Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558; Whitestown Milling Co. *v.* Zahn, 9 Ind. App. 270, 36 N. E. 653.

Iowa.— Wilkins *v.* Treynor, 14 Iowa 391.

Massachusetts.— Citizens Gas Light Co. *v.* Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832.

Michigan.— Borgman *v.* Detroit, 102 Mich. 261, 60 N. W. 696.

Mississippi.— Lewis *v.* Garrett, 5 How. 434.

Missouri.— O'Day *v.* Conn, 131 Mo. 321, 32 S. W. 1109; Merrill *v.* St. Louis, 83 Mo. 244, 53 Am. Rep. 576 [*affirming* 12 Mo. App. 466]; Monett Bank *v.* Howell, 79 Mo. App. 318.

Nebraska.— Gregory *v.* Lincoln, 13 Nebr. 352, 14 N. W. 423.

New Jersey.— Joy *v.* Blum, 55 N. J. L. 518, 26 Atl. 861.

New York.— Baird *v.* New York, 74 N. Y. 382; Akin *v.* Amsterdam Water Com'rs, 82 Hun 265, 31 N. Y. Suppl. 254; Hagaman *v.* Burr, 41 N. Y. Super. Ct. 423; Chase *v.* Chase, 19 N. Y. Suppl. 268; Lee *v.* Tillotson, 24 Wend. 337, 35 Am. Dec. 624. *Compare* Cowen *v.* Bush, 3 Cow. 343.

North Carolina.— Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427.

South Carolina.— Aultman *v.* Salinas, 44 S. C. 299, 22 S. E. 465.

Wisconsin.— Home Ins. Co. *v.* Security Ins. Co., 23 Wis. 171.

United States.— Columbia Bank *v.* Okely, 4 Wheat. 235, 4 L. ed. 559; North British, etc., Ins. Co. *v.* Lathrop, 63 Fed. 508; U. S. *v.* Rathbone, 27 Fed. Cas. No. 16,121, 2 Paine 578.

See 31 Cent. Dig. tit. "Jury," § 178.

Statutes authorizing other modes of trial by consent of the parties, as by a reference, are not unconstitutional, since a jury trial may be waived without legislative authority. Home Ins. Co. *v.* Security Ins. Co., 23 Wis. 171.

where the right to a jury trial is conferred by statute,[11] even where the statute is in terms mandatory.[12] The right to waive a jury trial in civil cases is, however, in a number of jurisdictions expressly recognized by constitutional[13] or statutory provisions,[14] and when secured by the constitution it cannot be denied by the legislature.[15] The right to waive a jury trial extends to civil proceedings of a quasi-criminal character, such as bastardy proceedings.[16]

2. In Criminal Cases — a. In General. As a general rule defendant cannot waive a jury trial in a criminal prosecution,[17] or at least in prosecutions where a

11. Marsh *v.* Brown, 57 N. H. 173; King *v.* Hutchins, 26 N. H. 139.

12. Whipple *v.* Eddy, 161 Ill. 114, 43 N. E. 789; Kanorowski *v.* People, 113 Ill. App. 468.

A statutory provision that the jury shall consist of a certain number in a certain case does not prevent the parties from waiving a jury trial altogether. Kreuchi *v.* Dehler, 50 Ill. 176.

13. *California.*— Gillespie *v.* Benson, 18 Cal. 409.

Maryland.— Lanahan *v.* Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759.

Minnesota.— St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334.

New York.— Hosford *v.* Carter, 10 Abb. Pr. 452.

North Carolina.— Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427; Nissen *v.* Genesee Gold Min. Co., 104 N. C. 309, 10 S. E. 512; Perry *v.* Tupper, 77 N. C. 413.

Pennsylvania.—Lummis *v.* Big Sandy Land, etc., Co., 188 Pa. St. 27, 41 Atl. 319; Campbell *v.* Fayette County, 6 Pa. Co. Ct. 132.

See 31 Cent. Dig. tit. "Jury," § 178.

14. *Arkansas.*— Chapline *v.* Robertson, 44 Ark. 202.

California.— Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199.

Colorado.— Leahy *v.* Dunlap, 6 Colo. 552.

Illinois.— Chicago, etc., R. Co. *v.* Hock, 118 Ill. 587, 9 N. E. 205.

Indiana.—Fountain County *v.* Loeb, 68 Ind. 29.

Kentucky.— Burgess *v.* Jacobs, 14 B. Mon. 517.

Missouri.— Tower *v.* Tower, 52 Mo. 118.

Nebraska.— Baker *v.* Daily, 6 Nebr. 464.

New York.— Mackellar *v.* Rogers, 109 N. Y. 468, 17 N. E. 350 [*affirming* 52 N. Y. Super. Ct. 468]; Clark *v.* Mosher, 5 N. Y. St. 84.

North Carolina.— Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427.

Ohio.— Bonewitz *v.* Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671.

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Canada.— Wycott *v.* Campbell, 31 U. C. Q. B. 584.

See 31 Cent. Dig. tit. "Jury," § 178.

The United States statute (Act Cong. March 3, 1865) provides that issues of fact in civil actions in any circuit court of the United States may be tried and determined by the court without the intervention of a jury whenever the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving a jury (Flanders *v.* Tweed, 9 Wall. (U. S.) 425, 19 L. ed. 678, 680; Norris *v.* Jackson, 9 Wall. (U. S.) 125, 19 L. ed. 608); but this provision applies exclusively to the circuit courts and not to district courts (Cunkee *v.* Heald, 6 Mackey (D. C.) 485; Blair *v.* Allen, 3 Fed. Cas. No. 1,483, 3 Dill. 101).

Waiver "with the assent of the court."— In a few jurisdictions the statutes provide that in certain cases the parties may waive a jury trial and in others that they may do so "with the assent of the court" (Leahy *v.* Dunlap, 6 Colo. 552; Baker *v.* Daily, 6 Nebr. 464); but the assent of the court will be presumed from the fact that it proceeded to try the case (Baker *v.* Daily, *supra*).

15. Lummis *v.* Big Sandy Land, etc., Co., 188 Pa. St. 27, 41 Atl. 319; Campbell *v.* Fayette County, 6 Pa. Co. Ct. 132, each holding that in so far as Pa. Acts (1874), providing for the submission of cases to the decision of the court, expressly excepts parties "acting in a fiduciary capacity," it is in violation of the constitution which expressly authorizes the waiver of a jury trial in civil cases.

16. Kanorowski *v.* People, 113 Ill. App. 468; Davis *v.* Carpenter, 172 Mass. 167, 51 N. E. 530; Jerdee *v.* State, 36 Wis. 170.

17. *Arkansas.*— Bond *v.* State, 17 Ark. 290; Wilson *v.* State, 16 Ark. 601.

Connecticut.—State *v.* Maine, 27 Conn. 281.

District of Columbia.— U. S. *v.* Jackson, 20 D. C. 424.

Illinois.— Morgan *v.* People, 136 Ill. 161, 26 N. E. 651; Harris *v.* People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153.

Iowa.— State *v.* Rea, 126 Iowa 65, 101 N. W. 507; State *v.* Douglass, 96 Iowa 308, 65 N. W. 151; State *v.* Larrigan, 66 Iowa 426, 23 N. W. 907; State *v.* Carman, 63 Iowa 130, 18 N. W. 691, 50 Am. Rep. 741.

Louisiana.— State *v.* Thompson, 104 La. 167, 28 So. 882.

Michigan.— People *v.* Smith, 9 Mich. 193; Brimingstool *v.* People, 1 Mich. N. P. 260.

Missouri.— Neales *v.* State, 10 Mo. 498.

Nebraska.— Michaelson *v.* Beemer, (1904) 101 N. W. 1007.

North Carolina.— State *v.* Holt, 90 N. C. 749, 47 Am. Rep. 544; State *v.* Stewart, 89 N. C. 563.

Ohio.— Williams *v.* State, 12 Ohio St. 622.

Virginia.— Ford *v.* Com., 82 Va. 553; Mays *v.* Com., 82 Va. 550.

United States.— U. S. *v.* Taylor, 11 Fed. 470, 3 McCrary 500.

See 31 Cent. Dig. tit. "Jury," §§ 197, 198.

In Kansas the waiver of a jury trial in felony cases is expressly prohibited by stat-

jury is an essential part of the court having jurisdiction to try the offense charged;[18] but the authorities show a radical difference of opinion by the different courts as to the grounds upon which the rule is based.[19] A few of the decisions are based in whole or in part upon grounds of public policy,[20] and others were decided under constitutional provisions which were in terms mandatory;[21] but most of the constitutions merely provide that the accused shall enjoy the right to a jury trial,[22] and most of the decisions seem to be based not upon the question of whether the constitutional provisions may be waived, but upon the ground that the court is without jurisdiction, which cannot be conferred by consent, to proceed without a jury in the absence of statutory authority,[23] or where the statutes expressly provide that the trial shall be conducted according to the course of the common law,[24] or that issues of fact must be submitted to a jury.[25] Accordingly it is uniformly held that where the legislature so provides a jury trial may be waived and the case tried by the court,[26] and under such provisions expressly

ute. State *v.* Simons, 61 Kan. 752, 60 Pac. 1052.

The constitutional right to be tried in the county or district where the offense was committed may be waived by defendant. Dula *v.* State, 8 Yerg. (Tenn.) 511; Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

18. Paulsen *v.* People, 195 Ill. 507, 63 N. E. 144; Harris *v.* People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153.

At common law a jury was an essential part of any court which had jurisdiction to try persons charged by indictment, and in the absence of constitutional or statutory provision is an essential part of any tribunal empowered to try offenses which are presentable only on indictment found by a grand jury. Paulsen *v.* People, 195 Ill. 507, 63 N. E. 144.

19. *In re* Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285, per Lyon, J.

The reason for this conflict is a difference of opinion as to whether the constitutional guarantee is merely a privilege intended for the benefit of defendant or whether it is one which also affects the public as well, or goes to the jurisdiction of the court of which it was intended that the jury should be an essential part. State *v.* Woodling, 53 Minn. 142, 54 N. W. 1068.

20. State *v.* Lockwood, 43 Wis. 403. See also Hill *v.* People, 16 Mich. 351; Cancemi *v.* People, 18 N. Y. 128, 7 Abb. Pr. 271. But see State *v.* Woodling, 53 Minn. 142, 54 N. W. 1068, where this doctrine is expressly disapproved.

21. State *v.* Jackson, 106 La. 189, 30 So. 309; State *v.* Holt, 90 N. C. 749, 47 Am. Rep. 544; State *v.* Stewart, 89 N. C. 563.

In Louisiana the constitution of 1898 provides that in cases where the punishment is necessarily at hard labor the trial must be by jury, and in such cases a jury trial cannot be waived. State *v.* Jackson, 106 La. 189, 30 So. 309.

22. See *supra*, III, E, 6, a.

23. State *v.* Maine, 27 Conn. 281; Harris *v.* People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153; Michaelson *v.* Beemer, (Nebr. 1904) 101 N. W. 1007; Ford *v.* Com., 82 Va. 553; Mays *v.* Com., 82 Va. 550.

24. Harris *v.* People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153. See also Morgan *v.* People, 136 Ill. 161, 26 N. E. 651.

25. State *v.* Douglass, 96 Iowa 308, 65 N. W. 151; State *v.* Carman, 63 Iowa 130, 18 N. W. 691, 50 Am. Rep. 741; People *v.* Smith, 9 Mich. 193.

On a plea of former jeopardy the Nebraska statute expressly requires that the issues joined thereon shall be tried by a jury, and this mode of trial cannot be waived by defendant. Arnold *v.* State, 38 Nebr. 752, 57 N. W. 378 [*disapproving* State *v.* Priebnow, 16 Nebr. 131, 19 N. W. 628].

26. *Connecticut.*— State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27.

District of Columbia.— Belt *v.* U. S., 4 App. Cas. 25.

Illinois.— Brewster *v.* People, 183 Ill. 143, 55 N. E. 640.

Indiana.— Murphy *v.* State, 97 Ind. 579.

Louisiana.— State *v.* Robinson, 43 La. Ann. 383, 8 So. 937; State *v.* Askins, 33 La. Ann. 1253; State *v.* White, 33 La. Ann. 1218.

Michigan.— Ward *v.* People, 30 Mich. 116. *Compare* Brimingstool *v.* People, 1 Mich. N. P. 260.

Minnesota.— State *v.* Woodling, 53 Minn. 142, 54 N. W. 1068.

New Jersey.—Edwards *v.* State, 45 N. J. L. 419.

Ohio.— Billigheimer *v.* State, 32 Ohio St. 435; Dailey *v.* State, 4 Ohio St. 57.

Texas.— Moore *v.* State, 22 Tex. App. 117, 2 S. W. 634.

West Virginia.— State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740; State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428, opinions of Snyder and Green, JJ.

Wisconsin.— *In re* Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285.

United States.— Hallinger *v.* Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. ed. 986.

See 31 Cent. Dig. tit. "Jury," §§ 197, 198.

The weight of authority seems to be that in the absence of express statutory authority no accused person can waive the right of trial by jury in a criminal case, it being maintained that nothing can be waived which is jurisdictional or fundamental or the ob-

authorizing a trial by the court, no distinction as to the right of waiver is made between prosecutions for felonies and for lesser offenses.[27]

b. In Trials For Misdemeanors and Minor Offenses. In some cases it is held that the rule that a jury trial cannot be waived in criminal cases applies to trials for misdemeanors as well as felonies,[28] but in others it is held that in trials for misdemeanors a jury trial may be waived.[29] In a few states there is a distinction based upon statutory provisions which in terms permit a waiver in the case of misdemeanors[30] or in trials before justices or in certain courts of inferior jurisdiction.[31]

3. Right to Waive Legal Number of Jurors — a. In Civil Cases. In a civil action the parties may waive a trial by a jury of twelve men as contemplated by the constitution,[32] or the number provided for by statute in particular

servance of which is required by public policy; but if authorized by statute the right to such trial may be waived. Belt *v.* U. S., 4 App. Cas. (D. C.) 25.

Where the constitution does not expressly require that the trial shall be by jury but merely gives defendant a right to a jury trial, this right may be waived in criminal as well as civil cases; and a trial by the court without a jury may be authorized by statute. State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27.

In cases not within the application of the statutes a jury trial cannot be waived. Frazier *v.* State, 106 Ind. 562, 7 N. E. 378, holding that under the Indiana statute a jury trial cannot be waived in a capital felony.

In Alabama the constitutional provision that in the case of misdemeanors the legislature may dispense with the grand jury and provide for a trial before a justice of the peace or other inferior court is construed as contemplating that in such cases the trial may be without a jury and that a waiver may be authorized. Connelly *v.* State, 60 Ala. 89, 31 Am. Rep. 34.

A statute authorizing a change of venue in criminal cases is not unconstitutional under a provision that the accused shall have the right to be tried by a jury " in the county or district in which the crime shall have been committed." Dula *v.* State, 8 Yerg. (Tenn.) 511.

27. State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27; Hallinger *v.* Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. ed. 986.

28. State *v.* Tucker, 96 Iowa 276, 65 N. W. 152; State *v.* Lockwood, 43 Wis. 403.

29. Brewster *v.* People, 183 Ill. 143, 55 N. E. 640; Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301; Dallman *v.* People, 113 Ill. App. 507; Hamel *v.* People, 97 Ill. App. 527; Austin *v.* People, 63 Ill. App. 298; Levi *v.* State, 4 Baxt. (Tenn.) 289; State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350. See also Schick *v.* U. S., 195 U. S. 65, 24 S. Ct. 826, 49 L. ed. 99.

A person accused of vagrancy may waive a jury trial. Hollis *v.* State, 118 Ga. 760, 45 S. E. 617.

The misdemeanors which may be tried without a jury are such as may under the statutes be presented otherwise than by indictment. Paulsen *v.* People, 195 Ill. 507, 63 N. E. 144.

Where the state joins with the defense in waiving a jury it thereby impliedly abandons all allegations of the indictment which render the charge a felony and reduces the same to a charge of misdemeanor, where the charge contained in the indictment is not inconsistent with such an implied abandonment. Dallman *v.* People, 113 Ill. App. 507.

30. *Illinois.*— Brewster *v.* People, 183 Ill. 143, 55 N. E. 640.

Kansas.— State *v.* Wells, 69 Kan. 792, 77 Pac. 547.

Louisiana.— See State *v.* Jackson, 106 La. 189, 30 So. 309.

Missouri.— State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317; State *v.* Moody, 24 Mo. 560; State *v.* Wiley, 82 Mo. App. 61.

Ohio.— Ickes *v.* State, 63 Ohio St. 549, 59 N. E. 233.

Texas.— Otto *v.* State, (Cr. App. 1905) 87 S. W. 698; Moore *v.* State, 22 Tex. App. 117, 2 S. W. 634.

West Virginia.— State *v.* Snider, 34 W. Va. 83, 11 S. E. 742; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740.

See 31 Cent. Dig. tit. " Jury," § 199.

31. *Georgia.*— Logan *v.* State, 86 Ga. 266, 12 S. E. 406.

Iowa.— State *v.* Ill, 74 Iowa 441, 38 N. W. 143. See also Lovilia *v.* Cobb, (1905) 102 N. W. 496.

Maryland.—Lancaster *v.* State, 90 Md. 211, 44 Atl. 1039.

Michigan.— Ward *v.* People, 30 Mich. 116.

Minnesota.— State *v.* Bannock, 53 Minn. 419, 55 N. W. 558; State *v.* Woodling, 53 Minn. 142, 54 N. W. 1068.

Missouri.— St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878.

Ohio.— Billigheimer *v.* State, 32 Ohio St. 435; Dailey *v.* State, 4 Ohio St. 57; Evans *v.* State, 23 Ohio Cir. Ct. 103.

See 31 Cent. Dig. tit. " Jury," § 199.

32. *Indiana.*— Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129; Durham *v.* Hudson, 4 Ind. 501.

Iowa.— See Cowles *v.* Buckman, 6 Iowa 161.

Kentucky.— Cravens *v.* Gant, 2 T. B. Mon. 117.

Michigan.— Borgman *v.* Detroit, 102 Mich. 261, 60 N. W. 696.

Missouri.— *In re* Essex Ave., 121 Mo. 98, 25 S. W. 891. See also Vaughn *v.* Scade, 30 Mo. 600.

cases;[33] and such waiver will be implied from a failure to object to a jury of a different number,[34] unless the party was ignorant of the defect.[35] The parties may consent to a trial by a number greater as well as less than twelve jurors,[36] and the right of waiver applies to civil proceedings of a quasi-criminal character.[37] The right to waive the legal number of jurors has in some cases been expressly recognized by statute.[38] In the absence of any waiver express or implied it is a fatal defect that the verdict was rendered by a jury of less than the proper number.[39]

b. In Criminal Cases. The authorities are conflicting as to whether the common-law number of twelve jurors can be waived in a criminal case,[40] it having been held as a general rule in some cases without express reference to different classes of crime that it could not,[41] and in others that it could.[42] Other cases

South Dakota.— Huron *v.* Carter, 5 S. D. 4, 57 N. W. 947.

Virginia.— Roach *v.* Blakey, 89 Va. 767, 17 S. E. 228.

Wisconsin.— See Millett *v.* Hayford, 1 Wis. 401.

See 31 Cent. Dig. tit. "Jury," § 189.

Contra.— Mitten *v.* Smock, 3 N. J. L. 911, where the court said: "The parties cannot by consent, change the legal mode of trial, and dispense at their pleasure with the law; they might have legally left their cause to the reference of six, or any other number of men. But this was not done. It was a trial by jury; the legal number of jurymen cannot be dispensed with, even by consent."

Where a juror is excused for providential cause a party consenting that the trial may proceed before the remaining eleven jurors cannot complain that before giving such consent the court had overruled a motion for a mistrial, the right to make such complaint not having been reserved. Raleigh, etc., R. Co. *v.* Bradshaw, 113 Ga. 862, 39 S. E. 555.

33. Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741; Kreuchi *v.* Dehler, 50 Ill. 176.

Time of agreement.— An agreement by the parties in a justice's court for a trial by jury of less than six jurors is good, although not made until after the return of the venire and when the jury is drawn, if the parties proceed to trial pursuant to such agreement. Carman *v.* Newell, 1 Den. (N. Y.) 25.

34. Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741; Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129; Mitchell *v.* Stephens, 23 Ind. 466; Durham *v.* Hudson, 4 Ind. 501; Berry *v.* Kenney, 5 B. Mon. (Ky.) 120; Ross *v.* Neal, 7 T. B. Mon. (Ky.) 407. See also Williams *v.* Mudgett, 2 Tex. Unrep. Cas. 254.

The absence of a party from the trial, while it may constitute a waiver of the right to a jury trial (Gillespie *v.* Benson, 18 Cal. 409), cannot be construed as a consent to a trial by less than the legal number of jurors (Gillespie *v.* Benson, *supra*; Ayres *v.* Barr, 5 J. J. Marsh. (Ky.) 286).

35. Cowles *v.* Buckman, 6 Iowa 161.

36. Berry *v.* Kenney, 5 B. Mon. (Ky.) 120. See also Ross *v.* Meal, 7 T. B. Mon. (Ky.) 407.

37. Rindskopf *v.* State, 34 Wis. 217.

38. **Statutory provisions.**— In California the statute provides that the jury shall consist of twelve persons unless the parties consent to a less number, but that they may consent to any number not less than three. Gillespie *v.* Benson, 18 Cal. 409. In New York, 2 Rev. St. 243, provides that in a trial before a justice the parties may agree to any number of jurors less than six. Carman *v.* Newell, 1 Den. (N. Y.) 25.

39. Gillespie *v.* Benson, 18 Cal. 409; Cowles *v.* Buckman, 6 Iowa 161; Oldham *v.* Hill, 5 J. J. Marsh. (Ky.) 300; Ayres *v.* Barr, 5 J. J. Marsh. (Ky.) 286; Scott *v.* Russell, 39 Mo. 407; Vaughn *v.* Scade, 30 Mo. 600.

40. See State *v.* Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148, where the conflicting authorities are reviewed and discussed.

Reasons for conflict.— In support of the view that a waiver should not be allowed it has been said that the constitution contemplates a jury of twelve men and that a waiver would allow the parties to create a new tribunal unknown to the law, which would be a dangerous practice and contrary to public policy (Hill *v.* People, 16 Mich. 351; State *v.* Mansfield, 41 Mo. 470; Territory *v.* Ortiz, 8 N. M. 154, 42 Pac. 87; Cancemi *v.* People, 18 N. Y. 128, 7 Abb. Pr. 271); and furthermore that the principle, if recognized, would permit a waiver of any number or all of the jury (State *v.* Mansfield, *supra*; Cancemi *v.* People, *supra*); but in other cases it is expressly denied that such a procedure is contrary to public policy (State *v.* Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148; State *v.* Sackett, 39 Minn. 69, 38 N. W. 773); and the argument that any number of jurors might be waived is answered by the statement that the whole matter is under the control of the court, who would protect against any abuse in this regard (Com. *v.* Dailey, 12 Cush. (Mass.) 80; State *v.* Sackett, *supra*).

41. *Alabama.*— Bell *v.* State, 44 Ala. 393.
California.— People *v.* O'Neil, 48 Cal. 257.
Indiana.—Allen *v.* State, 54 Ind. 461.
Michigan.— Hill *v.* People, 16 Mich. 351.
Missouri.— State *v.* Mansfield, 41 Mo. 470.
New York.— Cancemi *v.* People, 18 N. Y. 128, 7 Abb. Pr. 271.
Washington.— State *v.* Ellis, 22 Wash. 129, 60 Pac. 136.

See 31 Cent. Dig. tit. "Jury," § 201.

42. State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541; State *v.* Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148; Com. *v.* Dailey,

merely hold that the number of jurors cannot be waived in trials for felonies,[43] or that it may in trials for misdemeanors;[44] while in others it has been expressly held that the number may be waived even in trials for felonies,[45] and also where because of statutory provisions defendant cannot entirely waive a trial by jury.[46] In a few jurisdictions there are statutes authorizing a trial by less than twelve jurors in certain cases if this number is waived, and such provisions are constitutional,[47] and where a statute authorizes a waiver of a jury trial defendant may waive the right to a full jury of twelve men.[48]

4. Right to Waive Special or Struck Jury. The right to a special or struck jury may be waived by a party entitled thereto.[49]

B. Necessity For Waiver. In cases where it is provided that the trial shall be by jury unless a jury is waived, the court has no authority, in the absence of any waiver, to try the case,[50] even where no evidence is introduced and the case is tried on the pleadings,[51] or on a written stipulation of the parties.[52] A party who has demanded a jury trial cannot be deprived of his right by the refusal of an officer to serve the summons on the persons selected as jurors,[53] or by an error of the clerk having charge of the record.[54]

C. How Jury May Be Waived — 1. In General. The general rule is that the right to a jury trial may be waived by any conduct or acquiescence inconsistent with an intention or expectation to insist upon it,[55] but it will not be presumed that the party intends to waive a constitutional right and he should not be concluded by his conduct where it is not inconsistent with such an intention.[56] If,

12 Cush. (Mass.) 80; State *v.* Sackett, 39 Minn. 69, 38 N. W. 773; Com. *v.* Sweet, 4 Pa. Dist. 136, 16 Pa. Co. Ct. 198 [*disapproving* Com. *v.* Byers, 5 Pa. Co. Ct. 295; Com. *v.* Shaw, 1 Pittsb. (Pa.) 492].

43. *Kansas.*— State *v.* Simons, 61 Kan. 752, 60 Pac. 1052.

Mississippi.— Hunt *v.* State, 61 Miss. 577.

Montana.— Territory *v.* Ah Wah, 4 Mont. 149, 1 Pac. 732, 47 Am. Rep. 341.

New Mexico.— Territory *v.* Ortiz, 8 N. M. 154, 42 Pac. 87.

Oklahoma.— Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324 [*affirmed* in 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175].

See 31 Cent. Dig. tit. "Jury," § 201.

44. Tyra *v.* Com., 2 Metc. (Ky.) 1; Murphy *v.* Com., 1 Metc. (Ky.) 365; State *v.* Borowsky, 11 Nev. 119.

45. State *v.* Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148.

46. State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541.

47. Warwick *v.* State, 47 Ark. 568, 2 S. W. 335; Lavery *v.* Com., 101 Pa. St. 560.

48. State *v.* Wells, 69 Kan. 792, 77 Pac. 547.

49. Whitehead *v.* State, 10 Ohio St. 449.

Waiver by failure to make demand see *infra*, IV, C, 10, a, (III).

50. McCanless *v.* Flinchum, 98 N. C. 358, 4 S. E. 359; Chasteen *v.* Martin, 81 N. C. 51; American Mortg. Co. *v.* Hutchinson, 19 Oreg. 334, 24 Pac. 515. See also Ware *v.* Nottinger, 35 Ill. 375; Mahan *v.* Sherman, 7 Blackf. (Ind.) 378.

Under a constitutional provision that "the parties to any cause may submit the same to the court for determination, without the aid of a jury," the court is not authorized to try the case without such consent, which should appear from the record. Desche *v.* Gies, 56 Md. 135.

51. Chasteen *v.* Martin, 81 N. C. 51.

52. American Mortg. Co. *v.* Hutchinson, 19 Oreg. 334, 24 Pac. 515, holding that the proper practice in such cases is not to dispense with the jury but to direct a verdict.

53. Moriarity *v.* Devine, 1 Ohio Cir. Ct. 82, 1 Ohio Cir. Dec. 49. See also Sebring *v.* Wheedon, 8 Johns. (N. Y.) 460.

54. Ihmsen *v.* Monongahela Nav. Co., 27 Pa. St. 267.

55. Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832; Schumacher *v.* Crane-Churchill Co., 66 Nebr. 440, 92 N. W. 609; Mackellar *v.* Rogers, 109 N. Y. 468, 17 N. E. 350 [*affirming* 52 N. Y. Super. Ct. 468]; Boyd *v.* Boyd, 12 Misc. (N. Y.) 119, 33 N. Y. Suppl. 74, 2 N. Y. Annot. Cas. 30; Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427.

56. *Alabama.*— Stedham *v.* Stedham, 32 Ala. 525.

California.— Platt *v.* Havens, 119 Cal. 244, 51 Pac. 342.

Georgia.— Hudson *v.* Hudson, 98 Ga. 147, 26 S. E. 482.

Minnesota.— Poppitz *v.* German Ins. Co., 85 Minn. 118, 88 N. W. 438; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334.

Pennsylvania.— Pusey's Appeal, 83 Pa. St. 67.

Rhode Island.— Allworth *v.* Interstate Consol. R. Co., 27 R. I. 106, 60 Atl. 834.

United States.— U. S. *v.* Rathbone, 27 Fed. Cas. No. 16,121, 2 Paine 578.

See 31 Cent. Dig. tit. "Jury," § 180.

Thus a jury trial is not waived by plaintiff's admission of the facts upon which a motion to dismiss is founded (Moore *v.* Helms, 74 Ala. 368), by obtaining leave to

however, a party, although expressly demanding a jury trial, by his own acts prevents it, he will not be allowed to draw any advantage from his own misconduct and cannot complain that the court proceeded to try the case without a jury.[57]

2. STATUTORY PROVISIONS. In most jurisdictions it is provided by statute that a jury trial may be waived in three ways, as follows: (1) By failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk; and (3) by oral consent in open court entered on the record.[58] In some jurisdictions it is held that these provisions are exclusive and that the jury trial cannot be waived in any other way,[59] while in others it is expressly held that such pro-

answer to the merits after a plea in abatement is overruled, although at the time the jury for the term may have been discharged (Tricou *v.* Bayon, 4 Mart. (La.) 169), or by a party procuring the discharge of a jury on the ground that it was not a legal jury, although the discharge was erroneous (Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90). Participation in the proceedings under a probate court for the probate of a will, without demanding a jury, is not a waiver of the right to a jury to try title to the land devised (Corley *v.* McElmeel, 149 N. Y. 228, 43 N. E. 628 [*affirming* 87 Hun 23, 33 N. Y. Suppl. 862]), and in proceedings for laying out a road, where a party is entitled to a jury to review the demand of the commissioners, either as to the location or the assessment of damages, his acquiescence in the location is not a waiver of the right to a jury as to the damages (*In re* Endicott, 24 Pick. (Mass.) 339); nor is the failure of a party to see that the venire is served after a jury has been demanded in a justice's court a waiver of the right to a jury, since it is not the duty of a party to see to such service (Morelander *v.* Hays, 2 N. J. L. 161), unless the party voluntarily agrees to do so and fails to comply with his agreement (Daniels *v.* Scott, 12 N. J. L. 27; Coon *v.* Snyder, 19 Johns. (N. Y.) 384).

Where a justice of the peace is not able to certify positively that no jury was demanded at the time provided by statute, a jury trial should be allowed. Pontiac, etc., Plank-Road Co. *v.* Hopkinson, 69 Mich. 10, 36 N. W. 797.

57. Daniels *v.* Scott, 12 N. J. L. 27; Coon *v.* Snyder, 19 Johns. (N. Y.) 384.

Where a juror is taken sick on a trial before a justice and a party refuses to proceed with five jurors or to have a talesman called or to have a new venire issued, but insists upon a full jury at a future day, his conduct will be held to constitute a waiver of his right to a jury trial. Babcock *v.* Hill, 35 Barb. (N. Y.) 52.

In an action where a county was a party defendant and challenged every juror on the ground of interest in the controversy and stated that every other juror from that county would be challenged, and also refused a change of venue, it was held that since a jury was demanded in a way that made it impossible for the court to grant it it was not error for the court to try the case without a jury. Fountain County *v.* Loeb, 68 Ind. 29. See also Orange County *v.* Hon, 87 Ind. 356.

58. *Arkansas.*— Chapline *v.* Robertson, 44 Ark. 202.

California.— Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199; Biggs *v.* Lloyd, 70 Cal. 447, 11 Pac. 831.

Colorado.— Leahy *v.* Dunlap, 6 Colo. 552.

Indiana.—Fountain County *v.* Loeb, 68 Ind. 29; Hauser *v.* Roth, 37 Ind. 89; Shaw *v.* Kent, 11 Ind. 80; Whitestown Milling Co. *v.* Zahn, 9 Ind. App. 270, 36 N. E. 653.

Indian Territory.— Warwick *v.* Kingman, 2 Indian Terr. 435, 51 S. W. 1076.

Kentucky.— Burgess *v.* Jacobs, 14 B. Mon. 517.

Missouri.— Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; Tower *v.* Moore, 52 Mo. 118.

Montana.—Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254.

Nebraska.— Baker *v.* Daily, 6 Nebr. 464.

North Carolina.— Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427; Armfield *v.* Brown, 70 N. C. 27.

Ohio.— Bonewitz *v.* Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671; Longstreth, etc., Mfg. Co. *v.* Halsey, 4 Ohio Cir. Ct. 307, 2 Ohio Cir. Dec. 563.

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; Sale *v.* Meggett, 25 S. C. 72.

See 31 Cent. Dig. tit. "Jury," § 180.

In New York Code Civ. Proc. § 1009, provides in addition to the three modes of waiver stated in the text that a jury trial may be waived "by moving the trial of the action without a jury, or if the adverse party so moves it by failing to claim a trial by jury, before the production of any evidence upon the trial." Kenney *v.* Apgar, 93 N. Y. 539; Hartman *v.* Manhattan R. Co., 82 Hun 531, 31 N. Y. Suppl. 498, 64 N. Y. St. 96; Hubbard *v.* Gilbert, 25 Hun 596.

The oral consent in open court may be made by the attorneys and will be binding on the parties whom they represent. Whitestown Milling Co. *v.* Zahn, 9 Ind. App. 270, 36 N. E. 653.

The consent in open court may be oral and need not be in writing. Gregory *v.* Lincoln, 13 Nebr. 352, 14 N. W. 423.

59. *California.*— Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199; Swasey *v.* Adair, 88 Cal. 179, 25 Pac. 1119; Biggs *v.* Lloyd, 70 Cal. 447, 11 Pac. 831.

Indiana.— Shaw *v.* Kent, 11 Ind. 80. See

visions are not exclusive.[60] It is in some jurisdictions provided that the waiver must be by written stipulation.[61]

3. Submitting Case to Court. A jury trial is waived by voluntarily submitting a controversy to the determination of the court[62] or by permitting the court without any objection or demand for a jury trial to proceed to hear and determine it.[63]

also Whitestown Milling Co. *v.* Zahn, 9 Ind. App. 270, 36 N. E. 653.

Montana.— Chessman *v.* Hale, 31 Mont. 577, 79 Pac. 254.

South Carolina.— Sale *v.* Meggett, 25 S. C. 72.

South Dakota.—Albien *v.* Smith, (1905) 103 N. W. 655.

West Virginia.— Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670.

See 31 Cent. Dig. tit. "Jury," § 180.

Estoppel to deny regularity of waiver.— It has been held even in jurisdictions above mentioned that while the other party might object, the party at whose instance a case is withdrawn from the jury and submitted to the court cannot afterward object that the waiver was not in the manner prescribed by statute (Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134); and that a party who, in order to secure a delay, consents to a waiver proposed by the other party, is estopped after receiving the benefit of his agreement to object that his consent thereto was not entered on the minutes as prescribed by statute (Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116).

The court has no power to make rules contrary to the statutory provisions as to what shall be deemed a waiver of the right to a jury trial. Biggs *v.* Lloyd, 70 Cal. 447, 11 Pac. 831; Exline *v.* Smith, 5 Cal. 112; Hinchly *v.* Machine, 15 N. J. L. 476.

60. Schumacker *v.* Crane-Churchill Co., 66 Nebr. 440, 92 N. W. 609; Mackellar *v.* Rogers, 109 N. Y. 468, 17 N. E. 350 [*affirming* 52 N. Y. Super. Ct. 468]; Baird *v.* New York, 74 N. Y. 382; Boyd *v.* Boyd, 12 Misc. (N. Y.) 119, 33 N. Y. Suppl. 74, 2 N. Y. Annot. Cas. 30; Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427; Whitworth *v.* Steers, 12 Ohio Cir. Ct. 272, 4 Ohio Cir. Dec. 556.

61. Wayne County *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486; Anglo-American Land, etc., Co. *v.* Lombard, 132 Fed. 721, 68 C. C. A. 89.

A stipulation in writing that the case shall be tried by the court is equivalent to "a stipulation in writing waiving a jury" as provided for by the statute. Bamberger *v.* Terry, 103 U. S. 40, 26 L. ed. 317; Wayne County *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486. *Compare* Kelly *v.* Milan, 21 Fed. 842.

It will be presumed where the record states that a jury trial was waived that the waiver was in writing where the statutes so require. Kanorowski *v.* People, 113 Ill. App. 468.

62. *Alabama.*— Moore *v.* Crosthwait, 135 Ala. 272, 33 So. 28.

Illinois.— Pike *v.* Pike, 112 Ill. App. 243.

Maryland.— Lanahan *v.* Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759; Howard *v.* Oppenheimer, 25 Md. 350.

Massachusetts.— Bass *v.* Haverhill Mut. F. Ins. Co., 10 Gray 400.

New Hampshire.— Beebe *v.* Dudley, 30 N. H. 34.

New Mexico.— Territory *v.* Bernalillo County, 4 N. M. 204, 16 Pac. 855.

New York.— Bensen *v.* Manhattan R. Co., 14 N. Y. App. Div. 442, 43 N. Y. Suppl. 914 [*affirmed* in 164 N. Y. 559, 58 N. E. 1085].

North Carolina.— Pasour *v.* Lineberger, 90 N. C. 159; Crump *v.* Thomas, 85 N. C. 272.

Pennsylvania.— Gilmore *v.* Connellsville Water Co., 2 Pa. Super. Ct. 99, 38 Wkly. Notes Cas. 509.

United States.— Wayne County *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486; Bamberger *v.* Terry, 103 U. S. 40, 26 L. ed. 317.

See 31 Cent. Dig. tit. "Jury," § 181.

Where a party moves the court to direct a verdict in his favor he submits the case to the decision of the court and waives the right to a jury trial. Howell *v.* Wright, 122 N. Y. 667, 25 N. E. 912; Grigsby *v.* Western Union Tel. Co., 5 S. D. 561, 59 N. W. 734.

A motion by defendant for a nonsuit assumes that there are no disputed facts to be submitted to the jury and he cannot, in the absence of a specified request for a jury, object to the action of the court in directing a verdict for plaintiff on overruling the motion for nonsuit. Winchell *v.* Hicks, 18 N. Y. 558; Barnes *v.* Perine, 12 N. Y. 18.

Where plaintiff does not object to peremptory nonsuit but merely asks the court to give his opinion in writing and objects to such opinion, he waives the right to have the case submitted to the jury. Hayes *v.* Grier, 4 Binn. (Pa.) 80.

Where defendant demurs to plaintiff's evidence and the demurrer is overruled, he cannot insist that plaintiff's right to recover be submitted to a jury. Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066.

A request to submit a particular question of fact to a jury is a waiver of the right to a jury to try the case generally. Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726.

On the filing of an auditor's report a party waives the right to a jury trial by submitting the questions raised by the report to the decision of the court without reserving the right to a jury trial. Plummer *v.* Meserve, 54 N. H. 166.

63. *Arkansas.*— Love *v.* Bryson, 57 Ark. 589, 22 S. W. 341.

Illinois.— Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653 [*affirming* 34 Ill. App. 658]; Chicago, etc., R. Co. *v.*

4. Submitting Case to Arbitration. By submitting to an arbitration a party waives the right to a jury trial of the controversy submitted,[64] and also of all questions of fact involved in the inquiry as to whether the award should be accepted, rejected, or recommitted;[65] but the right is not waived by an uncertain agreement to submit prospective disputes to arbitration which contains no submission that can be enforced according to its terms.[66]

5. Consenting to Reference. The right to a jury trial is waived by consenting to a reference of the matter in controversy[67] which consent need not be express

Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562; Burgwin *v.* Babcock, 11 Ill. 28.

Minnesota.— Banning *v.* Hall, 70 Minn. 89, 72 N. W. 817; Smith *v.* Barclay, 54 Minn. 47, 55 N. W. 827; Peterson *v.* Ruhnke, 46 Minn. 115, 48 N. W. 768.

Mississippi.— Lewis *v.* Garrett, 5 How. 434.

Missouri.— Pike *v.* Martindale, 91 Mo. 268, 1 S. W. 858.

Nebraska.— Schumacher *v.* Crane-Churchill Co., 66 Nebr. 440, 92 N. W. 609.

New Jersey.— Joy *v.* Blum, 55 N. J. L. 518, 26 Atl. 861.

New York.— Barnes *v.* Perine, 12 N. Y. 18; Rogers *v.* Straub, 75 Hun 264, 26 N. Y. Suppl. 1066; Black *v.* White, 37 N. Y. Super. Ct. 320.

Ohio.— Bonewitz *v.* Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671; Ellithorpe *v.* Buck, 17 Ohio St. 72.

Virginia.— Claflin *v.* Steenbock, 18 Gratt. 842.

Wisconsin.— Baumbach Co. *v.* Hobkirk, 104 Wis. 488, 80 N. W. 740.

Canada.— McKenzie *v.* Ross, 33 Nova Scotia 252.

See 31 Cent. Dig. tit. "Jury," § 181.

Where a jury is discharged by the court after being impaneled and the parties make no objection and proceed with the trial before the court, such acquiescence is a waiver of the right to a jury trial. Eysaman *v.* Small, 15 N. Y. Suppl. 288.

64. Spencer *v.* Curtis, 57 Ind. 221; Boyden *v.* Lamb, 152 Mass. 416, 25 N. E. 609. See also Strong *v.* Barbour, 1 Mackey (D. C.) 209.

Where a party denies that he assented to a submission to arbitration he is entitled to a jury trial on this issue. Boyden *v.* Lamb, 152 Mass. 416, 25 N. E. 609.

65. Boyden *v.* Lamb, 152 Mass. 416, 25 N. E. 609; Koerner *v.* Leathe, 149 Mo. 361, 51 S. W. 96.

66. Rogers *v.* Davidson, 4 Pennyp. (Pa.) 472.

67. *Florida.*— Rivas *v.* Summers, 33 Fla. 539, 15 So. 319.

Indiana.— Goodwin *v.* Hedrick, 24 Ind. 121.

Indian Territory.— Walsh *v.* Tyler, 2 Indian Terr. 52, 47 S. W. 308.

Iowa.— *In re* Hooker, 75 Iowa 377, 39 N. W. 652; Hewitt *v.* Egbert, 34 Iowa 485.

Kansas.— Smith *v.* Burlingham, 44 Kan. 487, 24 Pac. 947.

Louisiana.— Hatch *v.* Watkins, 1 Mart. N. S. 154.

Minnesota.— Deering *v.* McCarthy, 36 Minn. 302, 30 N. W. 813.

New Hampshire.— Hills *v.* Smith, 28 N. H. 369. But see *infra*, this note as to rule under reference law 1874.

New Jersey.— Beattie *v.* David, 40 N. J. L. 102.

New York.— Brooklyn Heights R. Co. *v.* Brooklyn R. Co., 105 N. Y. App. Div. 88, 93 N. Y. Suppl. 849; Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. 130; Chase *v.* Chase, 19 N. Y. Suppl. 268; Derham *v.* Lee, 60 How. Pr. 334; Lee *v.* Tillotson, 24 Wend. 337, 35 Am. Dec. 624.

North Carolina.— Collins *v.* Young, 118 N. C. 265, 23 S. E. 1005; Carr *v.* Askew, 94 N. C. 194; Grant *v.* Reese, 82 N. C. 72; Atkinson *v.* Whitehead, 77 N. C. 418; Perry *v.* Tupper, 77 N. C. 413; Armfield *v.* Brown, 73 N. C. 81, 70 N. C. 27.

Ohio.— Butler *v.* Lee, 2 Cinc. Super. Ct. 5.

South Carolina.— Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619; Gregory *v.* Cohen, 50 S. C. 502, 27 S. E. 920; Rhodes *v.* Russell, 32 S. C. 585, 10 S. E. 828; Trenholm *v.* Morgan, 28 S. C. 268, 5 S. E. 721; Calvert *v.* Nickles, 26 S. C. 304, 2 S. E. 116; Martin *v.* Martin, 24 S. C. 446.

Washington.— Park *v.* Mighell, 7 Wash. 304, 35 Pac. 63.

See 31 Cent. Dig. tit. "Jury," § 188.

The reason for this rule is that a party will not be permitted to proceed without objection before the referee, taking the chance of a favorable decision and then if the decision be unfavorable insist that the trial should have been by jury. Garrity *v.* Hamburger Co., (Ill. 1891) 28 N. E. 743, 139 Ill. 499, 27 N. E. 111; Chase *v.* Chase, 19 N. Y. Suppl. 268; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Although a jury trial has been demanded and the demand overruled, if the party subsequently expressly consents to the appointment of a referee, he will be held to have abandoned his original demand and have waived the right to insist upon the error in originally denying a jury trial. Smith *v.* Burlingham, 44 Kan. 487, 24 Pac. 947.

Consenting to a reference to take testimony and report the same to the court is a waiver of the right to a jury trial under a statute providing that "when the reference is to report the facts, the report shall have the effect of a special verdict." Griffith *v.* Cromley, 58 S. C. 448, 36 S. E. 738.

Where a referee fails to find upon all the issues on a reference by consent and the case is reversed on this ground and sent back to the same referee with directions to make findings on these issues, the hearing to be

but will be implied from acquiescence, as by failing to object to the appointment of the referee[68] or by participating without objection in the proceedings before him;[69] but where the reference is not general and the case is referred only in part and is an action at law, either party is still entitled to demand a jury trial as to such issues as were not referred.[70]

6. Invoking or Submitting to Jurisdiction of Equity. A jury trial is waived by a party directly invoking the jurisdiction of equity,[71] or by stating in his complaint a cause of action of a distinctly equitable character,[72] although upon the evidence he may be entitled to either legal or equitable relief;[73] and by joining with an equitable cause of action a legal cause of action as to which a jury trial could be demanded if sued on alone, he waives the right to a jury trial as to either cause of action.[74] Defendant, while he cannot by such action on the part

upon the testimony already taken, the original waiver holds good and a jury trial cannot be demanded. Park *v.* Mighell, 7 Wash. 304, 35 Pac. 63. See also State *v.* Pacific Guano Co., 28 S. C. 63, 5 S. E. 167, where the same rule was applied in a case where the parties agreed that the trial should be by the court upon testimony taken and reported by a referee.

In New Hampshire under the reference law of 1874, it is held that merely consenting to a reference is not a waiver of the right to a jury trial provided for in that act (Smith *v.* Fellows, 58 N. H. 169); but the parties may expressly stipulate to waive a jury trial and will be bound by such agreement (Marsh *v.* Brown, 57 N. H. 173); and a stipulation that the report shall be final and that judgment shall be entered thereon as of the term at which the case was referred will be construed as such a waiver (Carroll *v.* Locke, 58 N. H. 163).

Compulsory reference — North Carolina. The code of civil procedure which authorizes compulsory references in certain cases, expressly provides that such reference shall not deprive either party of his right to a trial of the issues of fact arising on the pleadings by a jury (Carr *v.* Askew, 94 N. C. 194. See also Wilson *v.* Featherstone, 120 N. C. 446, 27 S. E. 124); but this right applies only to issues of fact raised by the pleadings (Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427); and to secure it a party must, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall be so determined (Taylor *v.* Smith, 118 N. C. 127, 24 S. E. 792; Yelverton *v.* Coley, 101 N. C. 248, 7 S. E. 672); if no objection or opposition is made to the order of reference it will be deemed a reference by consent and a waiver of the right (Kerr *v.* Hicks, 129 N. C. 141, 39 S. E. 797; Grant *v.* Hughes, 96 N. C. 177, 2 S. E. 339); but where an order for a reference by consent is stricken out without objection and at the next term the case is again referred against the exception of the party, it will be deemed compulsory reference (McDaniel *v.* Scurlock, 115 N. C. 295, 20 S. E. 451).

68. Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427; Smith *v.* Hicks, 108 N. C. 248, 12 S. E. 1035; Nissen *v.* Genesee Gold Min. Co., 104 N. C. 309, 10 S. E. 512; Grant *v.* Hughes, 96 N. C. 177, 2 S. E. 339; Harris *v.* Shaffer, 92 N. C. 30.

In California a consent to a reference in order to constitute a waiver must be in writing or entered on the minutes of the court. Smith *v.* Pollock, 2 Cal. 92.

69. *Illinois.*— Garrity *v.* Hamburger Co., (1891) 28 N. E. 743, 136 Ill. 499, 27 N. E. 11 [*affirming* 35 Ill. App. 309].

Indiana.— Hauser *v.* Roth, 37 Ind. 89.

Kentucky.— Blanton *v.* Howard, 76 S. W. 511, 25 Ky. L. Rep. 929.

New York.— Baird *v.* New York, 74 N. Y. 382.

Ohio.— Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

South Carolina.— Montague *v.* Best, 65 S. C. 455, 43 S. E. 963.

United States.— Kelly *v.* Smith, 14 Fed. Cas. No. 7,675, 1 Blatchf. 290.

See 31 Cent. Dig. tit. "Jury," § 188.

70. Tinsley *v.* Kemery, 170 Mo. 310, 70 S. W. 691.

71. Southern Development Co. *v.* Silva, 89 Fed. 418; North British, etc., Ins. Co. *v.* Lathrop, 63 Fed. 508; Book *v.* Justice Min. Co., 58 Fed. 827. *Compare* Ward *v.* Hill, 4 Gray (Mass.) 593, holding that plaintiff, by electing to proceed in equity instead of at law, under Mass. Rev. St. c. 35, § 3, to recover threefold the amount of usurious interest paid to defendant, does not thereby waive his right to a jury trial.

A party who elects to intervene in a suit in equity and assert a right which might have been enforced by an action at law cannot complain that it was determined without the intervention of the jury. Furrer *v.* Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. ed. 649; Flippin *v.* Kimball, 87 Fed. 258, 31 C. C. A. 282.

Not a waiver of legal cause of action. Where, on motion of plaintiff, the court erroneously proceeds to try without a jury a case which should be tried by one, it will not operate as a waiver of any right of recovery upon strictly legal grounds, and plaintiff, on failing to show he is entitled to equitable relief, may still have his claim tried by a jury. Davis *v.* Morris, 36 N. Y. 569.

72. Nelson *v.* Betts, 21 Mo. App. 219; Davison *v.* Jersey Co., 71 N. Y. 333.

73. Davison *v.* Jersey Co., 71 N. Y. 333.

74. Cogswell *v.* New York, etc., R. Co., 105

of plaintiff be deprived of his right to a jury trial,[75] will be held to have waived the right where he allows the trial to proceed as a suit in equity without objection,[76] or where in an action where the complaint contains allegations appropriate to both legal and equitable relief, he answers and goes to trial without asking to compel plaintiff to elect or amend.[77]

7. Failure to Appear or Participate in Trial. The failure to appear at the trial is a waiver of the right to a trial by jury,[78] it being in a number of jurisdictions expressly so provided by statute,[79] and the mere filing of an answer is not an appearance within the application of this rule.[80] So also if a party refuses to take part in the trial he will be deemed to be absent and cannot object that the trial is without a jury.[81] Where, however, a party has demanded a jury trial the mere fact that he is absent when his case is reached and called for trial is not a waiver or forfeiture of his right,[82] nor does the fact that one party is absent affect the right of the other party to demand a jury.[83]

8. Noticing Case For Non-Jury Docket or Term. A jury trial is waived by setting a case down for trial by the court;[84] by noticing it for trial at a term where

N. Y. 319, 11 N. E. 518 [*reversing* 54 N. Y. Super. Ct. 92]; Davison *v.* Jersey Co., 71 N. Y. 333; Moffat *v.* Moffat, 10 Bosw. (N. Y.) 468, 17 Abb. Pr. 4; Shenfield *v.* Bernheimer, 17 N. Y. Suppl. 881; Bergman *v.* Manhattan R. Co., 14 N. Y. Suppl. 384. *Compare* Hughes *v.* Dunlap, 91 Cal. 385, 27 Pac. 642.

75. See *supra*, III, E, 2, c.

76. Peterson *v.* Ruhnke, 46 Minn. 115, 48 N. W. 768; Pegram *v.* New York El. R. Co., 147 N. Y. 135, 41 N. E. 424; Frye *v.* Hill, 14 Wash. 83, 43 Pac. 1097.

But if only one cause of action is stated in the complaint and it an equitable one, defendant does not, by failing to request a jury trial, waive the right to have any separate and distinct legal cause of action arising out of the same transaction, which was not before the court and could not be tried under the pleadings in the case submitted, tried by a jury. Marshall *v.* Gilman, 47 Minn. 131, 49 N. W. 688.

Where a party states in open court that it is immaterial to him whether the case is tried as a proceeding at law or in equity, he cannot afterward object that the trial was without a jury. Lothian *v.* Lothian, 88 Iowa 396, 55 N. W. 465.

77. Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 31 N. Y. 91, 3 Abb. Dec. 470, 1 Keyes 72; Barrett *v.* Manhattan R. Co., 18 N. Y. Suppl. 71.

78. *California.*— Towle *v.* Clunie, (1890) 23 Pac. 314; McGuire *v.* Drew, 83 Cal. 225, 23 Pac. 312; Waltham *v.* Carson, 10 Cal. 178; Zane *v.* Crowe, 4 Cal. 112.

Colorado.— Leahy *v.* Dunlap, 6 Colo. 552; Frank *v.* Bauer, 19 Colo. App. 445, 75 Pac. 930; Cerussite Min. Co. *v.* Anderson, 19 Colo. App. 307, 75 Pac. 158.

Indiana.— Love *v.* Hall, 76 Ind. 326; Willets *v.* Ridgway, 9 Ind. 367; Langdon *v.* Bullock, 8 Ind. 341; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217.

Iowa.— Chute *v.* Hazleton, 51 Iowa 355, 1 N. W. 672.

Kansas.— Weems *v.* McDavitt, 49 Kan. 260, 30 Pac. 481.

Kentucky.— See Burgess *v.* Jacobs, 14 B. Mon. 517.

Missouri.— Tower *v.* Moore, 52 Mo. 118.

New York.— Hendricks *v.* Carpenter, 4 Rob. 665; Giberton *v.* Fleischel, 5 Duer 652.

Ohio.— Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961.

Texas.— Harris *v.* Kellum, etc., Inv. Co., (Civ. App. 1898) 43 S. W. 1027.

See 31 Cent. Dig. tit. "Jury," § 184.

In New Hampshire a failure to appear before a referee in a case referred without the consent of the parties under the reference law of 1874 is held not to be a waiver of the right to a jury trial after the report of the referee has been made as provided for by that act. Kelley *v.* Simonds, 57 N. H. 308; Ray *v.* Austin, 56 N. H. 36.

In Texas the statute provides that when one party has applied for a jury trial he cannot withdraw such application without the consent of the parties adversely interested; and if plaintiff nas demanded a jury trial the subsequent failure of defendant to appear does not authorize a trial without a jury. Jones *v.* Hamby, (Civ. App. 1895) 29 S. W. 75.

79. See cases cited *supra*, note 78; and, generally, *supra*, IV, C, 2.

80. Zane *v.* Crowe, 4 Cal. 112; Love *v.* Hall, 76 Ind. 326 [*overruling* Terrell *v.* State, 68 Ind. 155]. *Compare* Haskins *v.* Wilson, 5 Wis. 106.

81. Tower *v.* Moore, 52 Mo. 118.

Conversely where a defendant, although present, refuses to take part in the trial, he cannot complain that the trial should have been by the court instead of by jury. Lymburner *v.* Jenkinson, 50 Mich. 488, 15 N. W. 562.

82. Fitzgerald *v.* Wygal, 24 Tex. Civ. App. 372, 59 S. W. 621; Burrows *v.* Rust, (Tex. Civ. App. 1898) 44 S. W. 1019; Lacroix *v.* Evans, 1 Tex. App. Civ. Cas. § 749. See also Boatz *v.* Berg, 51 Mich. 8, 16 N. W. 184.

83. Hendricks *v.* Carpenter, 4 Rob. (N. Y.) 665.

84. *Michigan.*— Hudson *v.* Roos, 72 Mich. 363, 40 N. W. 467.

a jury forms no part of the court,[85] or at a part of the term after which the jury for that term will have been discharged;[86] by consenting to transfer the entire case from the law to the equity docket,[87] or by failing to object to such transfer;[88] by failing to move to transfer the case if already on the non-jury or equity docket to the law docket;[89] or by failing to make such motion within the time prescribed by statute.[90] After such waiver it is discretionary with the court to impanel a jury on the trial before him.[91]

9. CHOICE OF REMEDIES. A party who voluntarily chooses or acquiesces in some other tribunal or method of determining a controversy cannot afterward object that it should have been tried by a jury, but must be held to have waived his right to that mode of trial.[92] He cannot be permitted to take the chance of a favorable

Minnesota.— St. Paul Distilling Co. *v.* Pratt, 45 Minn. 215, 47 N. W. 789.

South Dakota.— Webster *v.* White, 8 S. D. 479, 66 N. W. 1145.

Vermont.— Briggs *v.* Gleason, 32 Vt. 472.

Canada.— Alexander *v.* Baker, 30 Nova Scotia 443.

See 31 Cent. Dig. tit. "Jury," § 183.

85. Mackellar *v.* Rogers, 109 N. Y. 468, 17 N. E. 350 [*affirming* 52 N. Y. Super. Ct. 468]; Boyd *v.* Boyd, 12 Misc. (N. Y.) 119, 33 N. Y. Suppl. 74, 2 N. Y. Annot. Cas. 30; Collins *v.* Collins, 13 N. Y. Suppl. 28 [*affirmed* in 131 N. Y. 648, 30 N. E. 863]; Plass *v.* Tucker, 1 N. Y. L. Rec. 249. *Compare* Brown *v.* Brown, 52 Hun (N. Y.) 532, 5 N. Y. Suppl. 893.

Conversely, where a case is placed on the circuit calendar and noticed for trial by both parties it is a waiver of the right to have it transferred to special term; and a motion to that effect which is not promptly made may properly be denied. Tubbs *v.* Embree, 89 Hun (N. Y.) 475, 35 N. Y. Suppl. 220.

Where defendant asks that a case go over to a future term and agrees as a condition that it may be tried at a special term, he waives his right to a jury trial at such term. Malone Third Nat. Bank *v.* Shields, 55 Hun (N. Y.) 274, 8 N. Y. Suppl. 298.

Where plaintiff has joined an equitable with a legal cause of action defendant does not waive his right to a trial by jury by consenting that the case be placed on the special term calendar and noticing the case for trial at that term. Baylis *v.* Bullock Electric Mfg. Co., 59 N. Y. App. Div. 576, 69 N. Y. Suppl. 693 [*reversing* 32 Misc. 218, 66 N. Y. Suppl. 253]; Wheelock *v.* Lee, 74 N. Y. 495.

Where a case is noticed for trial at special term by plaintiff only, defendant does not waive his right to demand a jury trial, where he moves to have the case transferred before it is reached for trial. Bradley, etc., Co. *v.* Herter, 30 N. Y. Suppl. 270, 23 N. Y. Civ. Proc. 408.

86. Cole *v.* Terrell, 71 Tex. 549, 9 S. W. 668.

87. Smith *v.* Moberly, 15 B. Mon. (Ky.) 70.

Where the parties do not object to the transfer of the case to the equity docket by the court of its own motion, they will be deemed to have waived the right to a jury trial. Tabler *v.* Anglo-American Assoc., 32 S. W. 602, 17 Ky. L. Rep. 815.

Where a transfer to the equity docket is necessary that a case at law may be heard with a pending equitable action, a party, by consenting to a transfer, does not waive his right to a jury but is entitled to have the legal issue submitted to the jury. Betz *v.* Newport Provision Market Assoc., 6 Ky. L. Rep. 222.

88. Blankenship *v.* Parsons, 113 Ala. 275, 21 So. 71; Vincent *v.* German Ins. Co., 120 Iowa 272, 94 N. W. 458.

Where a case is transferred after demand for a jury to the equity docket, the court stating that the question as to the right to a jury trial may be preserved by a motion in the equity court to remand the case for a jury trial, the right to such trial is waived where the party makes no objection to the transfer or a subsequent motion to remand. Zilke *v.* Woodley, 36 Wash. 84, 78 Pac. 299.

89. Gerstle *v.* Vandergriff, 72 Ark. 261, 79 S. W. 776; Goble *v.* Swobe, 64 Nebr. 838, 90 N. W. 919.

After the case is reached for trial it is too late to move to have it transferred to a jury docket. Stevens *v.* McDonald, 173 Mass. 382, 53 N. E. 885, 73 Am. St. Rep. 300.

90. Gibbs *v.* Coonrod, 54 Iowa 736, 7 N. W. 146; Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422; Coulter *v.* Weed Sewing Mach. Co., 3 Lea (Tenn.) 115. See also Camp *v.* Carroll, 73 Conn. 247, 47 Atl. 122.

Where a motion to transfer is made but not called to the court's attention and not ruled on until after the trial, the party having made no objection to the mode of trial, he cannot then object that the action was tried as a suit in equity. Donahue *v.* McCush, 81 Iowa 296, 46 N. W. 1008.

Where a case was placed on the "jury waived" list, although by a mistake of the clerk, a failure to move to transfer the case to the jury docket is a waiver of the right to a jury trial. Walcott *v.* O'Connor, 163 Mass. 21, 39 N. E. 345.

91. Boyd *v.* Boyd, 12 Misc. (N. Y.) 119, 33 N. Y. Suppl. 74, 2 N. Y. Annot. Cas. 30. *Compare* Clark *v.* Mosher, 5 N. Y. St. 84.

92. *Illinois* — Garrity *v.* Hamburger Co., (1891) 28 N. E. 743, 136 Ill. 499, 27 N. E. 1106; Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653 [*affirming* 34 Ill. App. 658].

Massachusetts.— Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832.

decision in a tribunal of his own selection and then, if the decision be unfavorable, be heard to question its authority or the regularity of the proceedings.[93]

10. Failure to Demand Jury — a. Necessity For Demand — (i) *In Civil Cases.* In order to secure a trial by jury in a civil action it must be demanded, and a party who fails to make such demand will be held to have waived his right and cannot afterward object that the case was tried without a jury.[94] It is in some cases

New Hampshire.— Plummer *v.* Meserve, 54 N. H. 166.

New Jersey.— Beattie *v.* David, 40 N. J. L. 102.

New York.— Akin *v.* Amsterdam Water Com'rs, 82 Hun 265, 31 N. Y. Suppl. 254; Chase *v.* Chase, 19 N. Y. Suppl. 268.

North Carolina.— Pasour *v.* Lineberger, 90 N. C. 159; Armfield *v.* Brown, 73 N. C. 81, 70 N. C. 27.

Ohio.— Bonewitz *v.* Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Ellithorpe *v.* Buck, 17 Ohio St. 72.

Pennsylvania.— Wilkes-Barre Second Nat. Bank *v.* Pennsylvania Anthracite Coal Co., 140 Pa. St. 628, 21 Atl. 412.

Canada.— Alexander *v.* Baker, 30 Nova Scotia 443.

See 31 Cent. Dig. tit. "Jury," § 186.

Where a method other than trial by jury is prescribed by statute for the determination of a particular controversy, a party who comes in voluntarily under the provision of such a statute waives the right to demand a jury trial. Citizens' Gas Light Co. *v.* Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457. See also Russell *v.* Elliott, 2 Cal. 245; State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

Trial by superintendent of public instruction.— Under a statute providing that a person aggrieved by a decision of the trustees of a school-district may appeal to the superintendent of public instruction whose decision upon the matter shall be final, if the trustees acquiesce in the jurisdiction of the superintendent claimed by the party appealing and submit the case to him for decision, they cannot afterward complain that the controversy should have been tried by a jury. People *v.* Eckler, 19 Hun (N. Y.) 609.

A party invoking the action of a justice of the peace upon a motion to dismiss an attachment waives any right he might otherwise have to a trial by jury. Strauss *v.* Cooch, 47 Ohio St. 115, 24 N. E. 1071.

In a partition proceeding before the clerk where one party desires an actual partition and the other a sale, a jury trial, if a right, is waived if not demanded until after the clerk has made his decision. Albemarle Steam Nav. Co. *v.* Worrell, 133 N. C. 93, 45 S. E. 466.

93. *New Hampshire.*— Plummer *v.* Meserve, 54 N. H. 166.

New York.— Akin *v.* Amsterdam Water Com'rs, 82 Hun 365, 31 N. Y. Suppl. 254.

North Carolina.— Pasour *v.* Lineberger, 90 N. C. 159.

Ohio.— Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Whitworth *v.* Steers, 12 Ohio Cir. Ct. 272, 4 Ohio Cir. Dec. 556.

Pennsylvania.— Gilmore *v.* Connellsville Water Co., 2 Pa. Super. Ct. 99, 38 Wkly. Notes Cas. 509.

Canada.— Alexander *v.* Baker, 30 Nova Scotia 443.

See 31 Cent. Dig. tit. "Jury," § 186.

It would be trifling with justice to allow such a claim to be made for the first time after a decision had been rendered by the other tribunal. Bonewitz *v.* Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671.

94. *Alabama.*— Evans *v.* State Bank, 15 Ala. 81; Armstrong *v.* State, Minor 160.

California.— Ferrea *v.* Chabot, 121 Cal. 233, 53 Pac. 689, 1092; Boston Tunnel Co. *v.* McKenzie, 67 Cal. 485, 8 Pac. 22. See also McGuire *v.* Drew, 83 Cal. 225, 23 Pac. 312.

Georgia.— Waterman *v.* Glisson, 115 Ga. 773, 42 S. E. 95; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois.— Heacock *v.* Hosmer, 109 Ill. 245; Chicago Driving Park *v.* West, 35 Ill. App. 496.

Indiana.— Sheets *v.* Bray, 125 Ind. 33, 24 N. E. 357; Sprague *v.* Pritchard, 108 Ind. 491, 9 N. E. 416; Burgess *v.* Matlock, 12 Ind. 357; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217; Minton *v.* Moore, 4 Blackf. 315.

Louisiana.— Foulhouze *v.* Gaines, 26 La. Ann. 84; Bouquevalte *v.* Young, 5 Rob. 162.

Maine.— Davis *v.* Auld, 96 Me. 559, 53 Atl. 118.

Maryland.— Chappell Chemical, etc., Co. *v.* Sulphur Mines Co., 85 Md. 684, 36 Atl. 712; Howard *v.* Oppenheimer, 25 Md. 350.

Michigan.— Roberts *v.* Tremayne, 61 Mich. 264, 28 N. W. 113.

Minnesota.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Gibbens *v.* Thompson, 21 Minn. 389.

Missouri.— Chicago, etc., R. Co. *v.* Randolph Town Site Co., 103 Mo. 451, 15 S. W. 437; Pike *v.* Martindale, 91 Mo. 268, 1 S. W. 858; Brown *v.* Home Sav. Bank, 5 Mo. App. 1.

Nebraska.— Horton *v.* Simon, 5 Nebr. (Unoff.) 172, 97 N. W. 604.

Nevada.— Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

New Jersey.— Joy, etc., Co. *v.* Blum, 55 N. J. L. 518, 26 Atl. 861.

New York.— Pegram *v.* New York El. R. Co., 147 N. Y. 135, 41 N. E. 424; Stono *v.* Weiller, 128 N. Y. 655, 28 N. E. 653; Mackellar *v.* Rogers, 109 N. Y. 468, 17 N. E. 350 [*affirming* 52 N. Y. Super. Ct. 468]; Whittlesey *v.* Delaney, 73 N. Y. 571; West Point Iron Co. *v.* Reymert, 45 N. Y. 703; Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co.,

expressly provided by statute that the failure to demand a jury shall be deemed a waiver,[95] or that the trial shall be without a jury unless a jury is demanded;[96] and a statute which provides that the trial shall be by jury if demanded impliedly authorizes a trial without a jury if no demand is made.[97]

(II) *In Criminal Cases.* In criminal cases where a jury trial may be waived,[98] it may be waived as in a civil case by failing to make a demand therefor and going to trial before the court without objection.[99]

(III) *For Special or Struck Jury.* In cases where the parties are entitled to a special or struck jury the court need not order it of its own motion but the parties must make a demand therefor,[1] nor has the court any right, in the absence of a demand, to order a special jury against the objection of one of the parties.[2]

b. Excuses For Failure to Make Demand. It is no excuse for failing to demand a jury trial that the party failed to do so because he thought his notice of demand for a jury had not been filed,[3] nor is his ignorance of the law as to the time within which such demand must be made any excuse for failure to make the demand within the time prescribed;[4] but it is a sufficient excuse for failing to demand a jury that the court had no authority to impanel a jury,[5] or for failing to demand a jury on the first day of the term that there was at the time no judge competent to receive the demand and enter the order.[6]

c. Notice of Demand. It is sometimes provided by statute or a rule of court

31 N. Y. 91, 3 Abb. Dec. 470, 1 Keyes 72; Barlow *v.* Scott, 24 N. Y. 40; Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794; Hartman *v.* Manhattan R. Co., 82 Hun 531, 31 N. Y. Suppl. 498; Wilklow *v.* Lane, 37 Barb. 244; Flower *v.* Allen, 5 Cow. 654; Blanchard *v.* Richly, 7 Johns. 198.

Ohio.— Ellithorpe *v.* Buck, 17 Ohio St. 72.

South Carolina.— See Marshall *v.* Marshall, 42 S. C. 436, 20 S. E. 298. But see De Walt *v.* Kinard, 19 S. C. 286.

Texas.— Brooks *v.* Pegg, (1888) 8 S. W. 595; Dyches *v.* State, 24 Tex. 266; Miller *v.* Miller, 10 Tex. 319; Burnett *v.* Gunter, 1 Tex. App. Civ. Cas. § 664.

Washington.— Stetson, etc., Mill Co. *v.* McDonald, 5 Wash. 496, 32 Pac. 108; Washington Iron-Works *v.* Jensen, 3 Wash. 584, 28 Pac. 1019.

Wisconsin.— Leonard *v.* Rogan, 20 Wis. 540.

United States.— Perego *v.* Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113; Deadrick *v.* Harrington, 7 Fed. Cas. No. 3,694*b*, Hempst. 50.

See 31 Cent. Dig. tit. "Jury," § 155.

95. *Ex p.* Ansley, 107 Ala. 613, 18 So. 242; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217.

96. Andrews *v.* Keep, 38 Ala. 315; Miller *v.* Georgia R. Bank, 120 Ga. 17, 47 S. E. 525; Chappell Chemical, etc., Co. *v.* Sulphur Mines Co., 85 Md. 684, 36 Atl. 712.

Limitation of rule.— It has been held that a statute authorizing courts to try issues of fact where neither party requires a jury applies only where both parties are present and are in a situation to make an election. Sutton *v.* Clark, 9 Mo. 559.

The Alabama statute 1894–1895, providing that a civil action brought in the Dothan division of the circuit court of Henry county shall be tried by the court without a jury unless plaintiff demands a jury, does not apply to an action commenced in a justice's court and removed by appeal into the circuit court. Alabama Midland R. Co. *v.* Thompson, 134 Ala. 232, 32 So. 672.

97. Blankenship *v.* Nimmo, 50 Ala. 506; Gibbens *v.* Thompson, 21 Minn. 398.

98. Waiver in criminal cases see *supra*, IV, A, 2.

99. State *v.* Wiley, 82 Mo. App. 61; State *v.* Mills, 39 N. J. L. 587; Clinton *v.* Leake, 71 S. C. 22, 50 S. E. 541.

N. Y. Code Cr. Proc., relating to proceedings in courts of special session, provides that if defendant does not demand a trial by jury the court must proceed to try the issue. People *v.* Cook, 45 Hun 34.

If the court has no authority to impanel a jury, as in the case of a trial before the mayor of a city, so that any demand for a jury trial would be nugatory, and the case is one where the accused has a constitutional right to a jury trial, a failure to make a demand therefor is not a waiver of the right. Smith *v.* San Antonio, 17 Tex. 643.

1. McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

In Pennsylvania it is not necessary to make a formal motion to the court, but the jury will be granted as a matter of course on filing an application therefor in the office of the prothonotary. Brown *v.* O'Brien, 4 Pa. L. J. 541.

2. McDaniel *v.* Nashville, etc., R. Co., 88 Tenn. 542, 13 S. W. 76.

3. Walcott *v.* O'Connor, 163 Mass. 21, 39 N. E. 345.

4. Coulter *v.* Weed Sewing Mach. Co., 3 Lea (Tenn.) 115.

5. Smith *v.* San Antonio, 17 Tex. 643.

6. Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895, where the special judge appointed to try the case did not qualify until the second day of the term.

that a party desiring a jury trial must file a notice to the effect that a jury will be demanded a certain number of days before the commencement of the term at which the case is to be tried[7] or before the parties are at issue or within a certain time thereafter,[8] and a failure to do so is a waiver of the right to a jury trial.[9] A party failing to file the notice also takes the risk of any amendment that may thereafter be allowed by the court.[10] The party applying for special or struck jury need not give any notice of such application to the adverse party unless required to do so by a statute or rule of court.[11]

d. Time For Making Demand — (i) *In General.* Where the time for demanding a jury trial is regulated by statute the right to a jury is lost if not demanded within the time prescribed.[12] In some cases it is provided that a jury must be demanded when causes are assigned for trial,[13] with the last pleading,[14] at or before the time of joining issue,[15] after issue is joined and before an inquiry

7. Doll *v.* Anderson, 27 Cal. 248.

8. McGivern *v.* Wilson, 160 Mass. 370, 35 N. E. 864; Cleverly *v.* O'Connell, 156 Mass. 88, 30 N. E. 88; Vitrified Wheel, etc., Co. *v.* Edwards, 135 Mass. 591; Bailey *v.* Joy, 132 Mass. 356; Clairmonte *v.* Prince, 30 Nova Scotia 258.

When parties are at issue.— Where by consent of counsel an answer was filed in which the right to file an amended answer was reserved, but defendant afterward gave plaintiff notice that he would not file one, it was held that the parties were then at issue (Bailey *v.* Joy, 132 Mass. 356); but where plaintiff died before an answer was filed it was held that "the parties" could not be said to be at issue where only one was before the court and that the time did not begin to run until decedent's personal representative was substituted as a party (McGivern *v.* Wilson, 160 Mass. 370, 35 N. E. 864).

In New York, Gen. Rule Pr. 31, providing that a party desiring a jury trial shall within ten days after issue joined give notice of a special motion to be made therefor, applies only to cases where the trial of issues of fact is not provided for by the code. Bradley, etc., Co. *v.* Herter, 30 N. Y. Suppl. 270, 23 N. Y. Civ. Proc. 408. See also Eggers *v.* Manhattan R. Co., 18 N. Y. Suppl. 181, 21 N. Y. Civ. Proc. 403, 27 Abb. N. Cas. 463.

9. Doll *v.* Anderson, 27 Cal. 248; Graham *v.* Lord, 170 Mass. 1, 48 N. E. 778; Vitrified Wheel, etc., Co. *v.* Edwards, 135 Mass. 591.

10. Cleverly *v.* O'Connell, 156 Mass. 88, 30 N. E. 88, holding that it is discretionary with the court to allow an amendment and refuse the right to thereafter file the notice required by statute.

11. Den *v.* Fuller, 20 N. J. L. 61.

In New York the statute requires five days' notice of the demand for a special jury to be given but the notice may be served upon the attorney instead of upon the party personally. People *v.* Hall, 169 N. Y. 184, 62 N. E. 170.

After notice has been given of a motion for a struck jury it is irregular for the other parties to proceed and notice the case for trial. Franklin *v.* Nore, Col. Cas. (N. Y.) 52.

A notice of the time for striking a jury must be given under the Ohio statute, but may be waived by the party entitled to receive the notice, and he alone can object to a trial by a struck jury on the ground that a proper notice was not given. Sutton *v.* State, 9 Ohio 133.

12. *Alabama.*— McClellan *v.* State, (1898) 23 So. 732.

Connecticut.— Camp *v.* Carroll, 73 Conn. 247, 47 Atl. 122.

Georgia.— Heard *v.* Kennedy, 116 Ga. 36, 42 S. E. 509.

Iowa.— Waterman *v.* Randlett, (1900) 84 N. W. 680.

Louisiana.— Wheeless *v.* Fisk, 28 La. Ann. 731; Wood *v.* Lyle, 4 La. Ann. 145; Menefee *v.* Johnson, 2 Rob. 274; Morgan *v.* Pointe Coupe Police Jury, 11 La. 157.

Massachusetts.— Vitrified Wheel, etc., Co. *v.* Edwards, 135 Mass. 591.

New York.— Arnot *v.* Nevins, 44 N. Y. App. Div. 61, 60 N. Y. Suppl. 401, 30 N. Y. Civ. Proc. 239; Mason *v* Campbell, 1 Hilt. 291; Dempsey *v.* Paige, 4 E. D. Smith 218; People *v.* Halwig, 41 Misc. 227, 84 N. Y. Suppl. 221; Gale *v.* Barnes, 1 Cow. 235.

Rhode Island.— White *v.* Eddy, 19 R. I. 108, 31 Atl. 823.

Tennessee.— McGuire *v.* North Carolina, etc., R. Co., 95 Tenn. 707, 33 S. W. 724.

Texas.— Petri *v.* Lincoln Nat. Bank, 84 Tex. 153, 19 S. W. 379; Denton Lumber Co. *v.* Fond du Lac First Nat. Bank, (1892) 18 S. W. 962; Petri *v.* Fond du Lac First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657; McFaddin *v.* Preston, 54 Tex. 403; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210; Cruger *v.* McCracken, (Civ. App. 1894) 26 S. W. 282; Fields *v.* Crescent Ins. Co., 3 Tex. App. Civ. Cas. § 125.

Canada.— Synge *v.* Aldwell, 5 Ont. Pr. 94; Quebec Bank *v.* Gray, 5 Ont. Pr. 31.

See 31 Cent. Dig. tit. "Jury," § 159 *et seq.*

13. Waterman *v.* Randlett, (Iowa 1900) 84 N. W. 680.

14. Cluxton *v.* Dickson, 12 Can. L. J. N. S. 310.

15. See Hall *v.* Chicago, etc., R. Co., 65 Iowa 258, 21 N. W. 596; Reese *v.* Baum, 83 N. Y. App. Div. 550, 82 N. Y. Suppl. 157.

The "time for joining issue" does not expire until all questions relating to the plead-

into the merits of the case,[16] before an order is made for an adjournment,[17] that it must be made before the case is set for trial,[18] on the first day of the term,[19] within the first three days of the term,[20] on appearance day,[21] when the case is called for trial,[22] before the production of any evidence if the case was moved for trial without a jury by the adverse party.[23] The court may in its discretion allow a demand for a jury trial after the time prescribed by statute where no delay or prejudice to the adverse party would be occasioned,[24] and should do so in such

ings are settled. Hall *v.* Chicago, etc., R. Co., 65 Iowa 258, 21 N. W. 596.

Where a default is opened and an answer allowed to be filed issue is not joined until the filing of the answer, and a demand for a jury then made is in time, under N. Y. Mun. Ct. Act, § 231. Levy *v.* Roossin, 93 N. Y. App. Div. 387, 87 N. Y. Suppl. 707.

Where the issue is changed by the allowance of amended pleadings, the right to a jury trial on such new issues is not waived by failing to demand a jury trial on joining the original issue. Reese *v.* Baum, 83 N. Y. App. Div. 550, 82 N. Y. Suppl. 157.

16. Gale *v.* Barnes, 1 Cow. (N. Y.) 235; Bayless *v.* Crany, 1 Cow. (N. Y.) 86; Hill *v.* Hollister, 8 Ohio Dec. (Reprint) 116, 5 Cinc. L. Bul. 757. See also Bonham *v.* Mills, 39 Ohio St. 534.

An inquiry into the merits has not commenced where the justice has merely taken up and inspected a note upon which the action is based. Olney *v.* Bacon, 1 Johns. (N. Y.) 142.

17. Dempsey *v.* Paige, 4 E. D. Smith (N. Y.) 218; Mason *v.* Campbell, 1 Hilt. (N. Y.) 291.

Where the adjournment is to a later hour of the same day a demand for a jury made on that day, at the time of making an application for a further adjournment, is not too late. Bayless *v.* Crany, 1 Cow. (N. Y.) 86.

If an adjournment is ordered before issue is joined, an application for a jury may be made after issue is joined upon the adjourned day. Meech *v.* Brown, 1 Hilt. (N. Y.) 257, 4 Abb. Pr. 19; Mead *v.* Darragh, 1 Hilt. (N. Y.) 395.

18. Wood *v.* Lyle, 4 La. Ann. 145; Morgan *v.* Pointe Coupe Police Jury, 11 La. 157; Menefee *v.* Johnson, 2 Rob. (La.) 274.

In Louisiana the application is in time if made at any time before the case is set for trial (Simpson *v.* Richardson, 18 La. Ann. 121; Wilson *v.* Alabama State Bank, 3 La. Ann. 196; Reynold *v.* Mahle, 12 La. 424); or if at the time the application is made the case is not actually set for trial, although it has been previously set for trial and continued (Gallagher *v.* Hebrew Cong., 34 La. Ann. 526; Louisiana State Bank *v.* Duplessis, 2 La. Ann. 651); but where the case is continued "by preference," which is to a fixed day, it is considered as set for trial, and an application for a jury cannot be made (Wheeless *v.* Fisk, 28 La. Ann. 731).

19. McGuire *v.* North Carolina, etc., R. Co., 95 Tenn. 707, 33 S. W. 724; Arlington Ins. Co. *v.* Caldwell, 88 Tenn. 758, 14 S. W. 221; Griffith *v.* Griffith, (Tenn. Ch. App. 1898) 46 S. W. 340; Petri *v.* Lincoln Nat. Bank, 84 Tex. 153, 19 S. W. 379; McFaddin *v.* Preston, 54 Tex. 403; Denton Lumber Co. *v.* Fond du Lac First Nat. Bank, (Tex. 1892) 18 S. W. 962; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210.

In Michigan circuit court rule 61 provides that the party desiring a jury "shall make his demand therefor in writing and file the same with the clerk on or before the first day of the term for which the cause is noticed for trial, and at or before the first call of the calendar." Odell *v.* Reynolds, 40 Mich. 21, 23.

In Tennessee the act of 1875 was amended by the act of 1899, which provides that a jury may be demanded upon the first day of any term at which the suit stands for trial. Swink *v.* McKnight, 88 Tenn. 765, 14 S. W. 311.

20. East Tennessee, etc., R. Co. *v.* Martin, 85 Tenn. 134, 2 S. W. 381; Coulter *v.* Weed Sewing Mach. Co., 3 Lea (Tenn.) 115. But see the Tennessee cases cited *supra*, note 19.

21. Cruger *v.* McCracken, (Tex. Civ. App. 1894) 26 S. W. 282; Fields *v.* Crescent Ins. Co., 3 Tex. App. Civ. Cas. § 125.

In Texas a demand for a jury trial in an appearance case must be made on the appearance day and in other cases on the first day of the term. Cruger *v.* McCracken, (Civ. App. 1894) 26 S. W. 282.

The demand need not be made at a particular hour on the appearance day, and it is error to deny a demand for a jury made on that day after the overruling of motion for a continuance, where the jury has not been discharged. Cook *v.* Cook, 5 Tex. Civ. App. 30, 23 S. W. 927.

22. **In Wisconsin** the statute, as amended in 1880, provides that a jury trial shall be waived if not demanded when the action shall be called for trial, or if the trial of an action is set down for a particular day then at the time the same is set down for trial. State *v.* Clark, 67 Wis. 229, 30 N. W. 122, holding, however, that a case is not "called for trial" by a mere calling of the docket on the first day of the term to ascertain what cases are for trial at that term.

23. See Herb *v.* Metropolitan Hospital, etc., 80 N. Y. App. Div. 145, 80 N. Y. Suppl. 552.

24. Hoffman *v.* Western Mar., etc., Ins. Co., 1 La. Ann. 216; Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318; Wood *v.* Rio Grande Western R. Co., 28 Utah 351, 79 Pac. 182; Knapp *v.* O. of P., 36 Wash. 601, 79 Pac. 209. See also Petri *v.* Lincoln Nat. Bank, 84 Tex. 153, 19 S. W. 379; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210.

case where it appears that the delay was without any fault on the part of the party making the demand;[25] but a demand is too late after the jury for the term has been discharged,[26] or after the trial before the court has been commenced,[27] or where the delay is such that to grant the demand would prejudice the adverse party or interfere with the ordinary business of the court;[28] and where, on a trial before a justice, a party has a right to demand a jury of twelve instead of six, it is too late to demand a jury of this number after the venire for six has been issued.[29] In the absence of any statutory provision to the contrary, it is not too late to demand a jury on the day of trial.[30]

(II) *For Special or Struck Jury.* Where the time for demanding a special or struck jury is regulated by statute, such a jury cannot be claimed as a matter of right unless the requirements of the statute are complied with.[31] In the absence of any statutory limitation the court may in its discretion entertain such a demand at any time;[32] but it has been held that a demand was properly denied when not made until the day of trial,[33] or after a motion for a continuance had been made and denied.[34] A demand is also too late after the regular jury has been

25. Scott *v.* Rowland, 14 Tex. Civ. App. 370, 37 S. W. 380.

26. Petri *v.* Lincoln Nat. Bank, 84 Tex. 153, 19 S. W. 379; Petri *v.* Fond du Lac First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657; Cushman *v.* Flanagan, 50 Tex. 389; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210. *Compare* Miller *v.* Moore, 2 Humphr. (Tenn.) 421.

27. *California.*— Maddux *v.* Walthall, 141 Cal. 412, 74 Pac. 1026.

Indiana.— Whitcomb *v.* Stringer, 160 Ind. 82, 66 N. E. 443.

New York.— Koehler *v.* New York El. R. Co., 159 N. Y. 218, 53 N. E. 1114 [*affirming* 9 N. Y. App. Div. 449, 41 N. Y. Suppl. 209]; Marshall *v.* De Cordova, 26 N. Y. App. Div. 615, 50 N. Y. Suppl. 294; Rogers *v.* Straub, 75 Hun 264, 26 N. Y. Suppl. 1066; McKeon *v.* See, 4 Rob. 449.

Ohio.— Terry *v.* State, 22 Ohio Cir. Ct. 16, 12 Ohio Cir. Dec. 274.

South Carolina.— State *v.* Mays, 24 S. C. 190.

South Dakota.— Webster *v.* White, 8 S. D. 479, 66 N. W. 1145.

See 31 Cent. Dig. tit. "Jury," § 163½.

It is error for the court after a case is partly tried to award a venire and proceed to try it by jury. Tilton *v.* Brand, 4 N. J. L. 289; O'Brien *v.* Bowes, 4 Bosw. (N. Y.) 657.

On a motion for a new trial it is too late to demand a jury. Bouquevalte *v.* Young, 5 Rob. (La.) 162.

Where nothing remains but the assessment of damages it is too late to object to a trial of the case without a jury, although under the statute either party may have the damages assessed by a jury if application therefor is made in apt time. Meilinger *v.* People, 83 Ill. App. 436.

28. Petri *v.* Fond du Lac First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657; Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 279, 44 S. W. 402.

29. Strong *v.* Beardslee, 18 Johns. (N. Y.) 130.

30. Woods *v.* Tanquary, 3 Colo. App. 515, 34 Pac. 737; Field *v.* Ten Eyck, 18 N. J. L. 195; Poyer *v.* New York Cent., etc., R. Co., 7 Abb. N. Cas. (N. Y.) 371.

If a jury is demanded at the first opportunity at which it could be granted and at which the party demanding it could save his exceptions to a refusal of his demand, the application is in time. Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203.

31. State *v.* Carey, 28 La. Ann. 49; Mark *v* St. Paul, etc., R. Co., 32 Minn. 208, 20 N. W. 131; O'Brien *v.* Minneapolis, 22 Minn. 378; Basham *v.* Hammond Packing Co., 107 Mo. App. 542, 81 S. W. 1227; Rives *v.* Columbia, 80 Mo. App. 173; Clandinan *v.* Dickson, 8 U. C. Q. B. 281.

Statutory provisions.— In Louisiana the time for demanding a special or struck jury is regulated by the general provisions of Code Pr. arts. 494, 495, which require the demand to be made before the suit is set down for trial (State *v.* Carey, 28 La. Ann. 49); and in Minnesota the demand must be made so as to allow the jury to be struck at least six days prior to the term of court at which the action or proceeding is to be tried (O'Brien *v.* Minneapolis, 22 Minn. 378).

If the jury is not demanded within the time prescribed it is discretionary with the court as to whether it shall be granted. State *v.* Leabo, 89 Mo. 247, 1 S. W. 288.

Where a rule of court is repealed on the same day that a jury is struck under the rule and the requisite number of struck jurors was not obtained, it is not error to call a regular jury without reference to the struck list. Powel *v.* Whitaker, 4 Pa. Cas. 550, 7 Atl. 597.

32. Neff *v.* Neff, 1 Binn. (Pa.) 350.

33. State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; Hutchins *v.* Wick, 4 Ohio Dec. (Reprint) 170, 1 Clev. L. Rep. 89.

Where there is not sufficient time between the finding of an indictment and the day of the trial for the party to procure a struck jury he should be allowed to make demand therefor upon the day of trial. Whitehead *v.* State, 10 Ohio St. 449.

34. Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504.

impaneled,[35] or even after its organization had been begun.[36] It has also been held that placing a case on the calendar to be tried by a general jury fixes the status of the case which will not be changed except by the consent of both parties.[37]

(III) *For Submission of Particular Issues to Jury.* In an equitable action where the granting of issues to a jury is not an absolute right but discretionary with the court, an application for a jury is properly denied when made before the evidence is in, so that the court cannot tell whether the case will be proper for a jury;[38] but where the case may involve questions which the parties will have a right to have submitted to a jury, a premature demand for a jury should not be denied absolutely, but with leave to renew.[39] The demand must, however, be made before the trial by the court is begun,[40] or where the issue is to be tried by a master or referee before the case is referred;[41] and while the court may in its discretion order an issue after the coming in of the report,[42] it should not be done except for special reasons and never merely because the party is dissatisfied with the report.[43]

e. Form and Sufficiency of Demand — (I) *In General.* If the manner for making the demand for a jury trial is prescribed by statute, the party cannot insist upon a jury trial unless the demand is made in the manner prescribed.[44] The demand for a jury trial must be a specific demand,[45] and should be made directly to the court and not to the clerk or by a mere entry upon the minutes.[46] The demand need not be in writing[47] unless the statute so requires,[48] and need not be made by the party personally but may be made by an attorney in the party's absence;[49] but if made in the absence of the adverse party it should be called to his attention before the trial.[50] If the right to a jury is conditional the demand must show the existence of the condition entitling him to make the demand;[51] and where only part of the issues in the case are triable by jury the demand must specify the particular issues which the party desires to have so tried,[52] and a gen-

35. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

36. McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

37. Rauche *v.* Blumenthal, 4 Pennew. (Del.) 521, 57 Atl. 368.

38. Chase *v.* Winans, 59 Md. 475.

39. Eggers *v.* Manhattan R. Co., 18 N. Y. Suppl. 181, 21 N. Y. Civ. Proc. 403, 27 Abb. N. Cas. 463.

40. Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71.

41. Atlanta Mills *v.* Mason, 120 Mass. 244; Smith *v.* Baer, 166 Mo. 392, 66 S. W. 166; Patrick *v.* Cowles, 45 N. H. 553.

42. See Atlanta Mills *v.* Mason, 120 Mass. 244.

43. Atlanta Mills *v.* Mason, 120 Mass. 244; Patrick *v.* Cowles, 45 N. H. 553.

44. *Ex p.* Ansley, 107 Ala. 613, 18 So. 242; McGuire *v.* North Carolina, etc., R. Co., 95 Tenn. 707, 33 S. W. 724.

45. Goble *v.* Swobe, 64 Nebr. 838, 90 N. W. 919; Little *v.* Webster, 1 N. Y. Suppl. 315 [*affirmed* in 122 N. Y. 670, 26 N. E. 755]; Gleaves *v.* Davidson, 85 Tenn. 380, 3 S. W. 348.

A motion to compel plaintiff to elect as to whether he will proceed on the ground that defendant's acts constituted a continuing trespass or a continuing nuisance, the motion not being accompanied by any specific demand for a jury trial, cannot be construed as such a demand. Hartman *v.* Manhattan R. Co., 82 Hun (N. Y.) 531, 31 N. Y. Suppl. 498.

46. Halsey *v.* Paulison, 36 N. J. L. 406; East Tennessee, etc., R. Co. *v.* Martin, 85 Tenn. 134, 2 S. W. 381. *Compare* Louisville, etc., R. Co. *v.* Gross, 16 Lea (Tenn.) 720.

47. Kansas City, etc., R. Co. *v.* Cox, 41 Mo. App. 499.

48. *Ex p.* Ansley, 107 Ala. 613, 18 So. 242. See also Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

An indorsement on an appeal-bond filed with a justice demanding a jury, which bond is transmitted by the justice as a part of the record of the case, is a sufficient demand in writing. Freeman *v.* Bridges, 123 Ala. 287, 26 So. 512.

In Maryland under Baltimore city supreme bench, rule 50, requiring that a party desiring a jury trial shall file a written election for such trial, the demand must be evidenced by a separate writing and cannot be embodied in the pleadings (Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161); but an indorsement on the outside cover of a pleading which consisted of a separate sheet notifying the clerk to mark the case for a jury is sufficient (Condon *v.* Gore, 89 Md. 230, 42 Atl. 900).

49. Alley *v.* State, 76 Ind. 94.

50. Shannon *v.* Kennedy, 1 E. D. Smith (N. Y.) 346.

51. Beehler's Estate, 3 Phila. (Pa.) 254.

52. Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Chadbourne *v.* Zilsdorf, 34 Minn. 43, 24 N. W. 308.

eral demand for a jury trial of all the issues is properly denied.[53] Where a party does not make a general demand for a jury trial but bases his demand upon a particular ground which does not entitle him to a jury, it is not error to deny the demand.[54]

(II) *Allegations in and Verification of Pleading.* The statutes in some cases provide that the demand for a jury must be indorsed upon the summons[55] or made in the pleadings,[56] and if not so made a jury cannot be claimed as a matter of right,[57] unless from the nature of the case the statute could not be complied with.[58] The court may in its discretion allow an amended pleading to be filed, including a demand for a jury where it would not delay the trial or prejudice the adverse party;[59] but it is proper to refuse to do so where at the time of the application the jury for the term has been discharged and the trial would thereby be delayed.[60] In Louisiana it is further provided with regard to certain causes of action that defendant to obtain a jury must also make affidavit as to the truth of the allegations in his answer or the character of his defense.[61]

Where an exception to a referee's report reserving a jury trial fails to specifically demand the right on an issue of fact raised by the pleadings and passed on by the referee in the findings excepted to and to specify the precise issue on which the testimony will be offered, the right to a jury trial will be forfeited. Taylor *v.* Smith, 118 N. C. 127, 24 S. E. 792.

53. Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Lace *v.* Fixen, 39 Minn. 46, 38 N. W. 762; Chadbourne *v.* Zilsdorf, 34 Minn. 43, 24 N. W. 308; Greenleaf *v.* Egan, 30 Minn. 316, 15 N. W. 254.

On exceptions to the findings of a referee where a part of the referee's findings relate to questions of fact not in issue under the pleadings, a demand at the end of the exceptions for a jury trial on all the issues raised thereby is too general to entitle the party to such right. Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427.

54. McKeon *v.* See, 51 N. Y. 300, 10 Am. Rep. 659, holding that the party, by selecting a particular theory and calling the attention of the court to that and that only, limits himself to that theory.

55. *Ex p.* Ansley, 107 Ala. 613, 18 So. 242.

56. *Ex p.* Ansley, 107 Ala. 613, 18 So. 242; Gleaves *v.* Davidson, 85 Tenn. 380, 3 S. W. 348; Franklin *v.* McCorkle, 11 Lea (Tenn.) 190.

After defendant's demurrer is overruled he is entitled to a jury trial if he then files a plea with an indorsement thereon demanding a jury. Gasdden First Nat. Bank *v.* Denson, 124 Ala. 336, 27 So. 2.

Under a rule of court requiring respondent to divorce proceedings, if he desires a jury, to make demand therefor in his answer, the right is waived unless the demand is made in this manner. Johnson *v.* Johnson, 4 Pa. Dist. 460, 16 Pa. Co. Ct. 427.

In Tennessee the act of 1875 provided that in suits originally instituted by courts of record the demand should be made in the first pleading tendering an issue (Franklin *v.* McCorkle, 11 Lea 190), and other suits within the first three days of the trial term (East Tennessee, etc., R. Co. *v.* Martin, 85 Tenn. 134, 2 S. W. 381); but this act was amended by the act of 1889, which provides that the demand may be made upon the first day of any trial term, but the demand may still be made in the pleadings, and if so made need not be repeated on the first day of the term (Arlington Ins. Co. *v.* Caldwell, 88 Tenn. 758, 14 S. W. 221).

The ordinary conclusion to the country in a plea is not sufficient demand for a jury trial. Gleaves *v.* Davidson, 85 Tenn. 380, 3 S. W. 348.

57. See cases cited *supra*, note 56.

58. Nixon *v.* Killian, 90 Ala. 484, 7 So. 761, holding that a statutory requirement that the demand for a jury must be made by indorsing such demand in writing on the summons, complaint, plea, or demurrer, does not apply to a suit before a justice where no summons issues and no complaint is required.

59. Davis *v.* Prevost, 6 Mart. N. S. (La.) 265. See also State *v.* Gilmore, 23 La. Ann. 606. *Compare* Franklin *v.* McCorkle, 11 Lea (Tenn.) 190.

In Louisiana pleadings may be amended so as to demand a jury at any time before the suit is set for trial. Reynold *v.* Mahle, 12 La. 424.

60. Hooper *v.* Hyams, 1 Rob. (La.) 90. See also Green *v.* Boudurant, 7 Mart. N. S. (La.) 229.

61. Meyer *v.* Weil, 37 La. Ann. 160; Gallot *v.* McCluskey, 18 La. Ann. 259; Letten *v.* Durbridge, 18 La. Ann. 129; Foster *v.* Levinson, 10 La. Ann. 584; Hennen *v.* Bourgeat, 12 Rob. (La.) 522; Kennard *v.* Gustine, 9 Rob. (La.) 170; Amado *v.* Breda, 16 La. 257.

It is sufficient for a party who is sued on a promissory note to obtain a trial by jury to swear that all the allegations in his answer are true, where want or failure of consideration is substantially set forth in the answer (Frellson *v.* McDonald, 15 La. Ann. 536); but an affidavit by defendant in such an action that the facts set forth in the answer are true to the best of his knowledge and belief, and that he believes it essential to his rights that the case should be tried by a jury,

f. Effect of Demand — (I) *In General.* Where a case is triable by jury as a matter of right, it is reversible error for the court to try it without a jury where a demand for a jury trial has been properly made.[62] But on the other hand if a case is properly triable without a jury the court should exercise its discretion as to whether the case is proper for a jury, and should not allow a jury trial merely to relieve himself of the responsibility, where the law contemplates that the duty shall be discharged by himself.[63]

(II) *Effect of Demand at Previous Trial or Term.* A demand for a jury has reference only to the time and term of court at which it is made,[64] and to entitle a party to a jury trial he must make a new demand therefor on a new trial,[65] or at another term where the case is not tried but continued after demand,[66] or dismissed on motion and subsequently reinstated.[67]

11. Failure to Advance or Deposit Jury-Fee. Where it is provided by statute or a rule of court that a party desiring a jury trial shall advance or deposit a jury-fee, his failure or refusal to do so is a waiver of the right to a jury trial, and the court may try the case without a jury,[68] unless the requirement is obviated by

is not sufficient (Williams *v.* Boozeman, 18 La. Ann. 532).

An affidavit by one of two defendants severally liable who are sued on a note does not inure to the benefit of the other defendant. Mulhollan *v.* Henderson, 3 Rob. (La.) 297; Smith *v.* Scott, 3 Rob. (La.) 258.

62. *Colorado.*— Woods *v.* Tanquary, 3 Colo. App. 515, 34 Pac. 737.

Indian Territory.— Warwick *v.* Kingman, 2 Indian Terr. 435, 51 S. W. 1076.

Louisiana.— Fellows *v.* Reid, 6 La. Ann. 724.

New Jersey.— Clayton *v.* Clark, 55 N. J. L. 539, 26 Atl. 795.

North Dakota.— Hanson *v.* Carlblom, (1904) 100 N. W. 1084.

Texas.— Burrows *v.* Rust, (Civ. App. 1898) 44 S. W. 1019.

See 31 Cent. Dig. tit. "Jury," § 154 *et seq.*

If only one party demands a jury the error of the court in denying the demand is not available to the other party if he made no objection at the time of the trial. Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

A justice has no authority to set aside a verdict of acquittal found by a jury and render judgment against defendant. Dupont *v.* Downing, 6 Iowa 172.

63. Morris *v.* Morris, 28 Mo. 114.

64. Davidson *v.* Wright, 46 Iowa 383.

65. White *v.* Hathaway, 50 N. J. L. 119, 11 Atl. 343; Ellis *v.* Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687. See also *In re* Heaton, (Cal. 1903) 73 Pac. 186. *Compare* Bayon *v.* Rivet, 2 Mart. (La.) 148.

In New York, under Code Civ. Proc. § 2990, providing for a demand of a jury trial when issue is joined, but making no provisions as to when a demand for a second jury must be made in the event of a disagreement of the first, it is held that in such case a demand made at the time of joining issue relates to any subsequent trial unless the demand is waived. Hartmann *v.* Hoffman, 65 N. Y. App. Div. 443, 72 N. Y. Suppl. 982.

66. Blair *v.* Curry, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; Davidson *v.* Wight, 46 Iowa 383.

67. Ward *v.* Lemon, (Ariz. 1890) 73 Pac. 443.

68. *California.*— Naphtaly *v.* Rovegno, 130 Cal. 639, 63 Pac. 66, 621; Adams *v.* Crawford, 116 Cal. 495, 48 Pac. 488; Conneau *v.* Geis, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785.

Maine.— Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Michigan.— Roberts *v.* Tremayne, 61 Mich. 264, 28 N. W. 113; McGraw *v.* Sturgeon, 29 Mich. 426; People *v.* Hoffman, 3 Mich. 248.

Minnesota.— Rollins *v.* Nolting, 53 Minn 232, 54 N. W. 1118.

Missouri.— Delaney *v.* Kansas City Police Ct., 167 Mo. 667, 67 S. W. 589.

Texas.— Wood *v.* Gamble, (Civ. App. 1895) 32 S. W. 368.

Washington.— State *v.* Neterer, 33 Wash. 535, 74 Pac. 668.

See 31 Cent. Dig. tit. "Jury," § 174.

The Colorado statute relating to the advancing of jury-fees is held not to apply to the impaneling of a regular jury which is in attendance, but only where there is no jury for the term or for some reason it is necessary to summon the special jury to try the case. Pitkin County *v.* Aspen First Nat. Bank, 6 Colo. App. 423, 4 Pac. 894, holding further that the act of 1891, amending the general statutes on this subject, is unconstitutional in that it discriminates between the courts of certain counties as to this requirement.

The Iowa statute providing that "the jury fee required by law must be paid in advance, unless ample security is given," is construed as applying only to plaintiff, and where defendant demands a jury trial he cannot be required to advance a jury-fee. Hine *v.* Sweney, 3 Greene (Iowa) 511.

Where a jury fails to agree on a trial before a justice and the jury is discharged, a party is not entitled to a jury on a second trial before the justice unless he pays a second jury-fee. Roberts *v.* Tremayne, 61 Mich. 264, 28 N. W. 113; McGraw *v.* Stur-

the party filing an affidavit of his inability to do so under statutes so providing.[69] But the court has no right to impose this condition in the absence of such a provision,[70] or in a case where the statute expressly provides that the prepayment of a jury-fee shall not be necessary,[71] or where it merely provides that jurors shall not be obliged to serve without the previous payment or tender of their fees.[72] Where the statute provides that the party demanding the jury shall deposit the fees to which they will be entitled, the court cannot require any deposit from the other party,[73] nor in any case can the court require the payment of a larger amount than the fee prescribed by statute.[74] Statutes prescribing the particular time for paying the fee are ordinarily construed as being merely directory,[75] and the court may in its discretion allow such payment to be made later,[76] and it is error for it to refuse to do so where no delay or prejudice to the rights of the adverse party would be occasioned thereby;[77] but where the payment is delayed for such a time that the allowance of the jury trial would materially affect the rights of the adverse party or interfere with the orderly conduct of the business of the court, it ought not to be allowed.[78] It is not essential to the validity of the

geon, 29 Mich. 426; Rollins *v.* Nolting, 53 Minn. 232, 54 N. W. 1118.

Where a case is transferred from one court to another after a jury-fee has been paid on account of the disqualification of the judge to try the case, it is not necessary to pay a second jury-fee. Warner *v.* Crosby, 75 Tex. 295, 12 S. W. 745.

If the party voluntarily withdraws a jury-fee previously deposited by him he thereby waives the right to a jury trial (Harris *v.* Kellum, etc., Inv. Co., (Tex. Civ. App. 1898) 43 S. W. 1027); and if the case is dismissed on motion after the deposit of a jury-fee and reinstated at a subsequent term, the denial of a jury trial cannot be held error where the record fails to show whether the deposit was withdrawn after the dismissal (Ward *v.* Lemon, (Ariz. 1890) 73 Pac. 443).

Debt for a forfeiture incurred by a violation of a law prohibiting the sale of intoxicating drinks is not such a criminal prosecution as entitles defendant to a jury trial without paying the jury-fee. People *v.* Hoffman, 3 Mich. 248.

69. Toltec Ranch Co. *v.* Babcock, 24 Utah 183, 66 Pac. 876.

70. *Idaho.*— Randall *v.* Kelsey, 7 Ida. 168, 61 Pac. 515.

Illinois.— Condit *v.* Lee, 83 Ill. App. 537.

Missouri.— Scott *v.* Young, 113 Mo. App. 46, 87 S. W. 544.

New Jersey.— Story *v.* Walker, 71 N. J. L. 256, 58 Atl. 349; MacKenzie *v.* Gilbert, 69 N. J. L. 184, 54 Atl. 524; Clayton *v.* Clark, 55 N. J. L. 539, 26 Atl. 795.

South Carolina.— Pinckney *v.* Green, 67 S. C. 309, 45 S. E. 202.

See 31 Cent. Dig. tit. "Jury," §§ 174, 175.

71. Woods *v.* Tanquary, 3 Colo. App. 515, 34 Pac. 737; Condit *v.* Lee, 83 Ill. App. 537.

72. Belappi *v.* Hovey, 90 Hun (N. Y.) 135, 35 N. Y. Suppl. 624; Powens *v.* Jones, 10 Abb. N. Cas. (N. Y.) 458, each construing N. Y. Code Civ. Proc. § 3328, and holding that the right to demand such payment is merely personal to jurors which they must demand in their own behalf, and that a justice has no right to demand such payment as a prerequisite to issuing the venire.

73. People *v.* Van Tassel, 13 Utah 9, 43 Pac. 625.

Under the New Jersey statute when plaintiff brings his action in the district court he may be compelled to prepay the jury-fee where the demand for a jury trial is made by defendant. Condon *v.* Royce, 68 N. J. L. 222, 52 Atl. 630.

74. Powens *v.* Jones, 10 Abb. N. Cas. (N. Y.) 458.

75. Wilson *v.* Alabama State Bank, 3 La. Ann. 196; Allen *v.* Plummer, 71 Tex. 546, 9 S. W. 672; Gallagher *v.* Goldfrank, 63 Tex. 473.

76. Equitable Gaslight Co. *v.* French, 10 Misc. (N. Y.) 749, 31 N. Y. Suppl. 812; Hardin *v.* Blackshear, 60 Tex. 132.

77. Allen *v.* Plummer, 71 Tex. 546, 9 S. W. 672; Allyn *v.* Willis, 65 Tex. 65; Gallagher *v.* Goldfrank, 63 Tex. 473; Berry *v.* Texas, etc., R. Co., 60 Tex. 654; Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90. See also Wilson *v.* Alabama State Bank, 3 La. Ann. 196.

78. Cabell *v.* Hamilton-Brown Shoe Co., 81 Tex. 104, 16 S. W. 811; Wood *v.* Kieschbaum, (Tex. Civ. App. 1895) 31 S. W. 326.

Where a case has been transferred to the court docket because of the failure to pay the jury-fee and has been taken up as a court case, it is too late at the moment of trial to tender the fee and move for a retransfer. Daniels *v.* Andrews, 7 Rob. (La.) 160.

Where a fee was not paid until it was too late to issue the venire for the jury, the subsequent payment of the fee will not entitle a party to an adjournment. Kilpatrick *v.* Carr, 3 Abb. Pr. (N. Y.) 117.

Where the fee is not paid until after the jury docket is disposed of for the term, so that to allow a trial by jury would require a continuance over the term, the right to a jury is lost. Wood *v.* Kieschbaum, (Tex. Civ. App. 1895) 31 S. W. 326.

demand for a jury that the jury-fee should be paid at the same time,[79] nor will it affect the validity of the judgment that the court allowed a jury trial without requiring the prepayment of any jury-fee whatever.[80]

12. Waiver in Criminal Cases.[81] To sustain a conviction by the court without a jury it must clearly and affirmatively appear that defendant expressly waived his right to a jury trial,[82] unless the conviction is under a statute providing that unless a jury is demanded the court shall proceed to try the case.[83] The waiver should be by defendant personally or with his knowledge and consent,[84] but need not be in writing,[85] except in cases where the statute so provides.[86]

13. Waiver at Trial De Novo on Appeal. Where the right to a jury on a trial *de novo* on appeal is secured by constitutional or statutory provisions, the right will be waived by failing to appeal within the time prescribed by statute,[87] or by failing to demand a jury on the trial *de novo* and submitting the case without objection to the court;[88] but a waiver of a jury on the former trial is not a waiver of the right to a jury on the trial of the appeal,[89] unless the right on appeal is expressly given only in cases where a demand upon the former trial was made;[90] and if the appeal is regularly taken within the time prescribed and a jury demanded a waiver will not be presumed and a jury cannot be denied on the ground of the previous conduct of the parties unless in a very clear case.[91] An express waiver of the jury trial upon a trial *de novo* in a court where a jury could have been demanded cures any error in refusing a jury of the proper number on the former trial.[92]

D. Record of Waiver. Where a jury trial is waived it is the better practice either to require the parties to sign a written stipulation to that effect or to let the record show an express waiver, but it is not absolutely necessary.[93] It is sufficient

79. Pontiac, etc., Plank-Road Co. *v.* Hopkinson, 69 Mich. 10, 36 N. W. 797; Odell *v.* Reynolds, 40 Mich. 21.

80. Pitkin County *v.* Brown, 2 Colo. App. 473, 31 Pac. 525.

81. Plea of guilty as waiver of right to jury trial see Criminal Law, 12 Cyc. 353 note 38.

82. People *v.* Mallon, 39 How. Pr. (N. Y.) 454, holding that it is insufficient merely to ask defendant if he elects to be tried by the court of special sessions, as he may reasonably suppose that a jury trial might be had in that court.

Facts insufficient to show waiver.— A statement by defendant that he does not desire a jury trial on the hearing of a motion, it being a stage of the proceedings where a jury could take no part, is not sufficient to constitute a waiver as to the trial of the case. Baurose *v.* State, 1 Iowa 374.

Facts sufficient to show waiver.— A writing which recites that defendant "waives arraignment and a trial by jury, pleads not guilty and puts himself upon the country," sufficiently shows a waiver, and the words "puts himself upon the country" will be disregarded as surplusage. Logan *v.* State, 86 Ga. 266, 12 S. E. 406. Where defendant, on being asked if he desires a jury, replied by his attorney that the court could do as it chose about the jury as he should put in no defense, it was held that a jury trial was waived. People *v.* Weeks, 99 Mich. 86, 57 N. W. 1091.

A demurrer to an indictment for a misdemeanor is not a waiver of a jury trial but defendant is entitled to plead over and demand a trial by jury. State *v.* Barden, 64 S. C. 206, 41 S. E. 959.

In Arkansas where the statute provides that cases other than felony may, by agreement of the parties, be tried by a jury of less than twelve men, it has been held that to constitute a waiver there must be an express agreement, and that a mere failure to object will not constitute a waiver. Warwick *v.* State, 47 Ark. 568, 2 S. W. 335.

83. Billigheimer *v.* State, 32 Ohio St. 435, holding that in such cases a jury trial may be impliedly waived by failure to make demand therefor, and that where the court proceeded to try the case it will be presumed that no demand for a jury trial was made.

84. Brown *v.* State, 16 Ind. 496, holding that a waiver by defendant's attorney, where defendant was not consulted and did not know that he could object to the act of the attorney, was not binding.

85. Sloncen *v.* People, 58 Ill. App. 315; Martindale *v.* State, 2 Ohio Cir. Ct. 2, 1 Ohio Cir. Dec. 328.

86. Swan *v.* Mulherin, 67 Ill. App. 77.

87. Steuart *v.* Baltimore, 7 Md. 500.

88. Moore *v.* Crosthwait, 135 Ala. 272, 33 So. 28.

89. Dennee *v.* McCoy, 4 Indian Terr. 233, 69 S. W. 858.

90. Wanser *v.* Atkinson, 43 N. J. L. 571.

91. Pusey's Appeal, 83 Pa. St. 67. See also Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523.

92. *In re* Essex Ave., 121 Mo. 98, 25 S. W. 891.

93. Chapline *v.* Robertson, 44 Ark. 202. But see Hahn *v.* Brinson, 133 N. C. 7, 45

if the record states that neither party demanded a jury,[94] and in the absence of an affirmative showing in the bill of exceptions that a jury was demanded and refused, a judgment will not be reversed because the record fails to show an express waiver.[95] Even under the statutes providing for a waiver by consent entered on the record, the record need not expressly state that the parties consented to waive a jury trial; but it is sufficient if it shows conduct on the part of the party equivalent to such consent,[96] as where it shows that they submitted the case to the determination of the court,[97] or a referee.[98] Where the statute requires a record of the waiver to be entered the record may be amended and the entry made *nunc pro tunc* from the judge's notes.[99]

E. Operation and Effect of Waiver — 1. In Civil Cases Generally. The waiver of a jury trial in effect substitutes the court in the place of a jury and submits all questions of fact to the determination of the presiding judge.[1] The waiver makes it immaterial whether the cause of action was legal or equitable[2] or what kind of relief may be awarded on the trial,[3] and is a waiver of any irregularity in originally placing the case upon the wrong calendar.[4] Where the parties have expressly consented to waive a jury trial neither can thereafter withdraw such consent,[5] although it has been held that the court may in its discretion permit it,[6]

S. E. 359, holding that where a judgment was rendered by the court out of term, containing a recital that "a jury trial is waived and, by consent, the Court allowed to find the facts," the judgment should be set aside in the absence of any written stipulation or oral waiver entered on the minutes, and that the appellate court would not consider conflicting affidavits as to whether a jury trial was in fact waived.

94. Chapline *v.* Robertson, 44 Ark. 202; Powell *v.* Bosard, 79 Mo. App. 627; King *v.* Burdett, 12 W. Va. 688.

95. *Arkansas.*— Chapline *v.* Robertson, 44 Ark. 202.

Illinois.— Burgwin *v.* Babcock, 11 Ill. 28.

Missouri.— Monett Bank *v.* Howell, 79 Mo. App. 318.

New York.— Eysaman *v.* Small, 15 N. Y. Suppl. 288.

Ohio.— Evans *v.* State, 23 Ohio Cir. Ct. 103.

See 31 Cent. Dig. tit. "Jury," § 193.

But see Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670.

It is the proper practice, however, to have the fact that a jury trial was waived entered upon the record. Evans *v.* State, 23 Ohio Cir. Ct. 103.

It is too late after the hearing to object for the first time that the waiver was not entered on the record. Phillips *v.* Preston, 5 How. (U. S.) 278, 12 L. ed. 152.

96. Goodwin *v.* Hedrick, 24 Ind. 121. But see Lipscomb *v.* Condin, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670.

97. Montgomery *v.* Sayre, (Cal. 1891) 25 Pac. 552; Bonewitz *v.* Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671; King *v.* Burdett, 12 W. Va. 688.

98. Goodwin *v.* Hedrick, 24 Ind. 121.

99. Wycott *v.* Campbell, 31 U. C. Q. B. 584.

1. Loring *v.* Whittemore, 13 Gray (Mass.) 228; Hagaman *v.* Burr, 41 N. Y. Super. Ct. 423; Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

A consent to trial by the court means the whole case and neither party can require particular issues to be submitted to the jury. State *v.* Pacific Guano Co., 28 S. C. 63, 5 S. E. 167.

2. Smith *v.* Brannan, 13 Cal. 107.

3. Phelps *v.* New York, 61 Hun (N. Y.) 521, 16 N. Y. Suppl. 321.

4. Belford *v.* Beatty, 145 Ill. 414, 34 N. E. 254 [*affirming* 46 Ill. App. 539]; Jensen *v.* Fricke, 133 Ill. 171, 24 N. E. 515.

5. *Maryland.*— Lanahan *v.* Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759.

Massachusetts.— Thompson *v.* King, 173 Mass. 439, 53 N. E. 910.

New York.— Tracy *v.* Falvey, 102 N. Y. App. Div. 585, 92 N. Y. Suppl. 625.

North Carolina.— Collins *v.* Young, 118 N. C. 265, 23 S. E. 1105; Keystone Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427; Perry *v.* Tupper, 77 N. C. 413.

Ohio.— Hauser *v.* Metzger, 1 Cinc. Super. Ct. 164.

See 31 Cent. Dig. tit. "Jury," § 194.

Such consent is a contract, and the relinquishment of a constitutional right is a sufficient consideration to support it. Lanahan *v.* Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 739. *Compare* Ferrea *v.* Chabot, 121 Cal. 233, 53 Pac. 689, 1092.

6. Ferrea *v.* Chabot, 121 Cal. 233, 53 Pac. 689, 1092; Hartford F. Ins. Co. *v.* Redding, 47 Fla. 228, 37 So. 62, 67 L. R. A. 518; Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141. But see Perry *v.* Tupper, 77 N. C. 413.

It is discretionary with the court to discharge an agreement waiving a trial by jury and no exception lies to a refusal to do so. Dennie *v.* Williams, 135 Mass. 28.

After the evidence is all in it is not error to refuse a motion for a jury trial where an order has been entered by stipulation for a

or may disregard the waiver and submit the case to a jury.[7] The waiver of a jury when the case is called for trial is a waiver only as to the issues then formed and does not apply to new and different issues that may thereafter be formed under amended pleadings,[8] but mere formal amendments that do not materially change the issues will not entitle a party to demand a jury.[9] So also where a case is by consent submitted to the court after evidence is introduced and each party has rested his case, the waiver applies only to the evidence as it then stands, and it is error to allow one party to introduce new evidence and deny the other a jury trial as to the new facts put in issue.[10] While an express agreement to waive a jury trial does not apply to a second trial,[11] it is not restricted to a trial before the judge sitting at the time of the waiver but applies to whatever judge is on the bench at the time the case comes to trial,[12] and where the case is not tried but continued such waiver holds good for the term at which the case is tried,[13] unless the issues have in the meanwhile been changed by amendment.[14] But where after a stipulation to try a case by the court it is by consent consolidated with another case between the same parties, the stipulation is not binding upon the parties.[15] The fact that a jury trial has been waived does not prevent the court from submitting issues of fact to the jury.[16] Where a jury trial has been waived on the trial an appellate court may on appeal not only reverse but may render final judgment without remanding the case for a new trial where it can be ascertained from the facts found what judgment ought to have been rendered.[17]

2. In Criminal Cases. In cases where a jury trial may be waived in a criminal case, a waiver once voluntarily made cannot afterward be withdrawn on the trial,[18] nor can defendant after conviction insist that he had no right to consent

jury trial by the court without a jury. Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61, 64 N. E. 332 [*affirming* 96 Ill. App. 86.]

7. Wittenberg *v.* Onsard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141; Hart *v.* Cascade Timber Co., 39 Wash. 279, 81 Pac. 738.

8. Gage *v.* Commercial Nat. Bank, 86 Ill. 371; McGeagh *v.* Nordberg, 53 Minn. 235, 55 N. W. 117; Reese *v.* Baum, 83 N. Y. App. Div. 550, 82 N. Y. Suppl. 157. But see Thompson *v.* King, 173 Mass. 439, 53 N. E. 910, holding that a waiver in writing of a trial by jury applies to all issues of fact in the case whether then existing or raised by subsequent pleadings.

9. Hanchett *v.* Ives, 171 Ill. 122, 49 N. E. 206 [*affirming* 69 Ill. App. 83]; Foster *v.* Hinson, 76 Iowa 714, 39 N. W. 682.

10. Hewitt *v.* Week, 51 Wis. 368, 8 N. W. 269.

11. See *infra*, IV, E, 3.

12. Lanahan *v.* Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759.

13. Heacock *v.* Lubukee, 108 Ill. 641; Trainor *v.* Heath, 67 N. H. 384, 29 Atl. 846. See also Boslow *v.* Shenberger, 52 Nebr. 164, 71 N. W. 1012, 66 Am. St. Rep. 487.

A mere failure to demand a jury at the term when the case is continued will not prevent a party from claiming a jury at the term when it comes to trial. Dean *v.* Sweeney, 51 Tex. 242; Brown *v.* Chenoworth, 51 Tex. 469.

14. Gage *v.* Commercial Nat. Bank, 86 Ill. 371; McGeagh *v.* Nordberg, 53 Minn. 235, 55 N. W. 117. See also Heacock *v.* Lubukee, 108 Ill. 641.

15. Rogers *v.* Morton, 51 Iowa 709, 2 N. W. 262.

Consolidation with proceeding not triable by jury.— Plaintiff, by merely agreeing that a civil action triable by jury be consolidated with a habeas corpus proceeding, does not waive the right to demand at the trial that his civil action be tried by a jury. Orr *v.* Miller, 98 Ind. 436.

16. Doll *v.* Anderson, 27 Cal. 248.

17. Everts *v.* Lawther, 165 Ill. 487, 46 N. E. 233; Manistee Lumber Co. *v.* Union Nat. Bank, 143 Ill. 490, 32 N. E. 449.

18. McClellan *v.* State, 118 Ala. 122, 23 So. 732; State *v.* Bannock, 53 Minn. 419, 55 N. W. 558; Edwards *v.* State, 45 N. J. L. 419; People *v.* Riley, 5 Park. Cr. (N. Y.) 401. But see People *v.* Molinet, 13 Misc. (N. Y.) 301, 34 N. Y. Suppl. 1114, holding that under a statute providing that defendant might demand a jury before the hearing of any testimony, a waiver at the time of arraignment is not necessary and if made will not deprive defendant of the right to demand a jury on the trial before the hearing of any testimony.

If application is seasonably made so that permitting the withdrawal of a waiver would not prejudice the state or delay or impede the cause of justice, the court should allow it (Cain *v.* State, 102 Ga. 610, 29 S. E. 426; Butler *v.* State, 97 Ga. 404, 23 S. E. 822); but it is too late to make such application after a trial before the court pursuant to a previous waiver of a jury trial has been begun (Logan *v.* State, 86 Ga. 266, 12 S. E. 406).

to such waiver.[19] This rule applies, however, only to the particular trial at which the waiver is made,[20] and on a new trial the waiver may be withdrawn and a jury trial demanded,[21] provided the application therefor is seasonably made.[22] The waiver of a jury trial does not prevent the court from submitting the case to a jury,[23] unless the statute gives defendant the right to select the mode of trial.[24] Where a jury trial may be and is waived the finding of the court has the force and effect of a verdict.[25]

3. Effect on Right to Jury at Subsequent Trial. The waiver of a jury on one trial is expended by that trial and does not affect the right of either party to demand a jury upon a second trial after the case is remanded from an appellate court.[26] The same rule applies where the first trial is before a referee instead of by the court.[27]

4. Effect of Waiver After Demand. The right to a jury trial once acquired inures to the benefit of both parties and cannot thereafter be waived except by mutual consent, whether awarded at the instance of one party only[28] or by the

19. Logan *v.* State, 86 Ga. 266, 12 S. E. 406.

20. Cross *v.* State, 78 Ala. 430.

21. Brown *v.* State, 89 Ga. 340, 15 S. E. 462; State *v.* Touchet, 33 La. Ann. 1154.

22. State *v.* Touchet, 33 La. Ann. 1154, holding that the only limitation on the right to revoke a waiver on a new trial is that the application shall be so timely as not substantially to delay or impede the course of justice.

23. Grand Rapids *v.* Bateman, 93 Mich. 135, 53 N. W. 6; Ickes *v.* State, 63 Ohio St. 549, 59 N. E. 233 [*affirming* 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442]. *Compare* Moore *v.* State, 22 Tex. App. 117, 2 S. W. 634.

24. People *v.* Steele, 94 Mich. 437, 54 N. W. 171.

25. Bell *v.* State, 75 Ala. 25; State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317; State *v.* Moody, 24 Mo. 560.

26. *Illinois.*— Osgood *v.* Skinner, 186 Ill. 491, 57 N. E. 1041 [*reversing* 83 Ill. App. 454]; Guyer *v.* Caldwell, 98 Ill. App. 232; Carthage *v.* Buckner, 8 Ill. App. 152.

Michigan.— Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39.

Minnesota.—Cochran *v.* Stewart, 66 Minn. 152, 68 N. W. 972.

Nebraska.—Schumacher *v.* Crane-Churchill Co., 66 Nebr. 440, 92 N. W. 609 [*distinguishing* Boslow *v.* Shenberger, 52 Nebr. 164, 71 N. W. 1012, 66 Am. St. Rep. 487].

New York.— New York Small Stock Co. *v.* Third Ave. R. Co., 16 Misc. 64, 37 N. Y. Suppl. 637; Freidfeld *v.* Sire, 84 N. Y. Suppl. 144, 13 N. Y. Annot. Cas. 359.

North Carolina.— Benbow *v.* Robbins, 72 N. C. 422.

Tennessee.— Worthington *v.* Nashville, etc., R. Co., 114 Tenn. 177, 86 S. W. 307.

Texas.— Dunlap *v.* Brooks, 3 Tex. App. Civ. Cas. § 357.

United States.—Burnham *v.* North Chicago St. R. Co., 88 Fed. 627, 32 C. C. A. 64 [*reversing* 78 Fed. 101, 23 C. C. A. 677].

See 31 Cent Dig. tit. "Jury," § 195.

Conversely, a failure to object to a jury on the first trial does not waive the right to demand that the case be tried by the court on a second trial, where the pleadings have been so amended that the issues are properly triable by the court. Nashville, etc., R. Co. *v.* Foster, 10 Lea (Tenn.) 351.

The effect of a reversal is to remand the case for trial as though no previous trial had been had (Dunlap *v.* Brooks, 3 Tex. App. Civ. Cas. § 357), and each party is entitled to as many juries as there are trials (Carthage *v.* Buckner, 8 Ill. App. 152).

In Alabama under the act of 1894–1895, a waiver once made holds good throughout the life of the case and cannot be demanded on a new trial after a case has been reversed and remanded on an appeal to the supreme court. Brock *v.* Louisville, etc., R. Co., 122 Ala. 172, 26 So. 335.

27. Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39, holding that where the parties agree to a reference on the first trial the case does not go back to the referee but to the court to be tried in the customary manner.

28. Lewis *v.* Klotz, 39 La. Ann. 259, 1 So. 539; Livaudais *v.* Spear, 10 La. Ann. 24; Sweeny *v.* Barbin, 2 Mart. (La.) 47; Kelly *v.* Barbin, 2 Mart. (La.) 47; Sherwood *v.* New York Tel. Co., 46 Misc. (N. Y.) 102, 91 N. Y. Suppl. 387; Warren *v.* Scudder-Gale Grocery Co., 96 Tenn. 574, 36 S. W. 383; Allworth *v.* Interstate Consol. R. Co., 27 R. I. 106, 60 Atl. 834. See also Westerfield's Estate, 96 Cal. 113, 30 Pac. 1104. *Compare* Fall River R. Co. *v.* Chase, 125 Mass. 483.

It is not necessary for both parties to demand a jury in order to secure the rights of both thereto, and one party cannot deprive the other of the right by demanding a jury and subsequently waiving a jury trial after the time for demanding a jury has expired. Sherwood *v.* New York Tel. Co., 46 Misc. (N. Y.) 102, 91 N. Y. Suppl. 387.

But if no objection is made by the other party at the time a demand for a jury is withdrawn by the party who made such a demand the right to object to the withdrawal will be held to be waived. Knight *v.* Farrell, 113 Ala. 258, 20 So. 974; Taylor *v.* Sledge, 108 Tenn. 719, 69 S. W. 266.

In Texas it is provided by statute that when one party has applied for a jury trial he shall not be permitted to withdraw such

court of its own motion.[29] After a party has demanded a struck jury and appeared for the purpose of striking the jury he cannot after examining the list of jurors withdraw his demand and insist on a trial of the regular panel.[30]

F. Effect of Participation in Proceedings After Grant or Refusal of Jury. In a case where a jury trial may be demanded as a right and such demand has been made and refused, the error is not waived by the party subsequently appearing and participating in the trial before the court,[31] or before the referee where the case is referred;[32] nor is the error in denying a demand for a jury of twelve waived by participating in the trial before a jury of a different number.[33] Conversely, where the court has erroneously decided that the case is one at law and submitted it to the jury the party objecting does not waive any right by going to trial before the jury.[34] If, however, the demand for a jury is not expressly denied but the court reserves its decision on the demand, the right is waived by the party failing to insist on a ruling on the question reserved and proceeding without objection to the completion of the trial before the court,[35] and if demanded by only one party and denied the error is not available to the other party if he subsequently participates in the proceedings without objection to such denial.[36]

G. Objection to Submitting Case to Jury. In a case not of right triable by jury a party cannot complain that the case was so tried if he did not object to that mode of trial,[37] or if he failed to object until after a jury was sworn and impaneled to try the case;[38] and even where the party has an absolute right to have certain issues tried by the court, the right may be waived and is waived by proceeding to trial before the jury without any protest or objection.[39] So also where only part of the issues are triable by the court, it is not error to overrule an objection to a jury trial which is made to the entire case.[40]

application without the consent of the parties adversely interested. Jones *v.* Hamby, (Civ. App. 1895) 29 S. W. 75.

29. Livaudais *v.* Spear, 10 La. Ann. 24.

30. Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290.

31. *In re* Robinson, 106 Cal. 493, 39 Pac. 862; Hinchly *v.* Machine, 15 N. J. L. 476. *Compare* Wallace *v.* Smith, 8 La. Ann. 376; Le Blanc *v.* Johns, 4 Mart. N. S. (La.) 635.

An application for a jury trial need not be repeated after it has been denied but will be held to be a continual refusal to waive it. Swasey *v.* Adair, 88 Cal. 179, 25 Pac. 1119.

The fact that a party excepts to findings of fact and conclusions of law by the judge is not a waiver of his right to a jury trial. Fasnacht *v.* Stehn, 53 Barb. (N. Y.) 650, 5 Abb. Pr. N. S. 338.

32. St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334; Brink *v.* Republic F. Ins. Co., 2 Thomps. & C. (N. Y.) 550.

If a party expressly consents to the appointment of a referee after a demand for a jury trial has been denied, he will be deemed to have abandoned his original demand and to have waived the right to insist upon the error in denying it. Smith *v.* Burlingham, 44 Kan. 487, 24 Pac. 947.

Merely participating in the selection of a referee after a compulsory reference has been ordered against the consent of a party is not a consent to the order of reference or a waiver of the right to a jury trial. U. S. *v.* Rathbone, 27 Fed. Cas. No. 16,121, 2 Paine 578.

33. Eshelman *v.* Chicago, etc., R. Co., 67 Iowa 296, 25 N. W. 251.

34. Fraedrich *v.* Flieth, 64 Wis. 184, 25 N. W. 28.

35. Hand *v.* Kennedy, 83 N. Y. 149.

36. Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

37. *Alabama.*— McGrew *v.* Adams, 2 Stew. 502.

Georgia.— Taffe *v.* State, 90 Ga. 459, 16 S. E. 204.

Minnesota.— Brown *v.* Lawler, 21 Minn. 327; Finch *v.* Green, 16 Minn. 355.

Nebraska.— State *v.* Powell, 10 Nebr. 48, 4 N. W. 317.

New York.— Dayharsh *v.* Enos, 5 N. Y. 531.

North Carolina.— Leggett *v.* Leggett, 88 N. C. 108.

Washington.— Weigle *v.* Cascade F. & M. Ins. Co., 12 Wash. 449, 41 Pac. 53.

See 31 Cent. Dig. tit. "Jury," § 172.

38. Brown *v.* Nagel, 21 Minn. 415; Brown *v.* Lawler, 21 Minn. 327.

Where the complaint is for both legal and equitable relief, so that plaintiff by waiving his right to equitable relief might have been entitled to a jury trial, it is not too late for defendant to object to a jury trial after the opening of the case, if he does so as soon as it is developed by the opening of the case that the equitable relief demanded by plaintiff will be insisted on. Watson *v.* Manhattan R. Co., 53 N. Y. Super. Ct. 137, 17 Abb. N. Cas. 289.

39. Danziger *v.* Metropolitan El. R. Co., 81 Hun (N. Y.) 5, 30 N. Y. Suppl. 580. See also Leggett *v.* Leggett, 88 N. C. 108.

40. Lindley *v.* Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361.

V. Denial or Infringement of Right.

A. In General. The right of trial by a jury is one which should be carefully guarded against infringement;[41] and the constitutional provisions are uniformly construed to the effect that it cannot be denied in cases where it existed at the time of the adoption of the constitution or in similar classes of cases arising under statutes subsequently enacted;[42] nor can the exercise of the right be made subject to such conditions and restrictions as unreasonably to impair it.[43] Also a denial of any one of the essential elements or incidents of a jury trial is a denial of the right to that mode of trial.[44] On the other hand, it is competent for the legislature to make any reasonable regulations and conditions as to how the right shall be exercised so long as it is not denied or materially impaired.[45] It is in

41. *New York.*— Sharp *v.* New York, 18 How. Pr. 213.

Pennsylvania.— North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530.

Tennessee.— State Bank *v.* Cooper, 2 Yerg. 599, 24 Am. Dec. 517.

Vermont.— Plimpton *v.* Somerset, 33 Vt. 283.

United States.— Parsons *v.* Bedford, 3 Pet. 433, 7 L. ed. 732.

See 31 Cent. Dig. tit. "Jury," § 204 *et seq.*

The right cannot be too faithfully preserved; and any legislative provision tampering with it should at least be very strictly construed. Sharp *v.* New York, 18 How. Pr. (N. Y.) 213. See also Bradley *v.* Albemarle Fertilizing Co., 2 N. Y. Civ. Proc. 50.

An act making the assessment of appraisers conclusive evidence of the value of stock killed by a railroad company is unconstitutional in that by denying the right of appeal from such finding it deprives the railroad company of the right of trial by jury. Graves *v.* Northern Pac. R. Co., 5 Mont. 556, 6 Pac. 16, 51 Am. St. Rep. 81.

42. See *supra*, III, B, 2.

43. Saco *v.* Wentworth, 37 Me. 165, 58 Am. Dec. 786; Work *v.* State, 2 Ohio St. 296, 69 Am. Dec. 671.

A trial by jury means a trial by a body of twelve men, described as upright, well qualified, and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them. *In re* Opinion of Justices, 41 N. H. 550.

Trial by jury means something more than a trial by twelve men; it means a trial by men who are competent, disinterested, and unprejudiced for or against either party, and an act which would prevent the procurement of such a jury is unconstitutional. State *v.* McClear, 11 Nev. 39.

44. *Illinois.*— Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679.

Michigan.— Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635.

New Hampshire.— East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

North Carolina.— State *v.* Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

South Carolina.— Wilson *v.* York Tp., 43 S. C. 299, 21 S. E. 82.

See 31 Cent. Dig. tit. "Jury," § 204 *et seq.*

The essential and substantive elements of a jury trial are and always have been, number, impartiality, and unanimity; the jury must consist of twelve, they must be impartial and indifferent between the parties, and their verdict must be unanimous. Lommen *v.* Minnesota Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; State *v.* Slover, 134 Mo. 607, 36 S. W. 50; Work *v.* State, 2 Ohio St. 296, 69 Am. Dec. 671.

That the testimony shall be taken in the presence of the jury so that they may observe the conduct of the witnesses and be better able to determine the weight which should be given to their testimony is an essential element of a jury trial. Wilson *v.* York Tp., 43 S. C. 299, 21 S. E. 82.

45. *California.*— Conneau *v.* Geis, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785.

Colorado.— Venine *v.* Archibald, 3 Colo. 163.

Connecticut.— McKay *v.* Fair Haven, etc., R. Co., 75 Conn. 608, 54 Atl. 923; Beers *v.* Beers, 4 Conn. 535, 10 Am. Dec. 186.

District of Columbia.— Simmons *v.* Morrison, 13 App. Cas. 161.

Florida.— Blanchard *v.* Raines, 20 Fla. 467.

Georgia.— Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248; Boon *v.* State, 1 Ga. 618.

Massachusetts.— Foster *v.* Morse, 132 Mass. 354, 42 Am. Rep. 438; Com. *v.* Whitney, 108 Mass. 5. See also Mountfort *v.* Hall, 1 Mass. 443.

New Jersey.— Edwards *v.* Elliott, 36 N. J. L. 449, 13 Am. Rep. 463.

some cases difficult to draw the line between legislative acts which merely regulate and which, under the pretense of regulating, materially impair the right,[46] and it has been said that no definite rule can be laid down on this question but that each case must be determined upon its own circumstances,[47] the chief considerations being the conditions existing at the time of the adoption of the constitutions[48] and the reasonableness under the existing conditions of the particular restriction or qualification.[49] Where a party has claimed his constitutional right to a jury trial and it has been denied, the judgment will be reversed notwithstanding it appears that the case was fairly tried by the court and full and ample justice done with reference to the merits.[50]

B. Practice and Procedure — 1. In Civil Cases — a. In General. The legislature may make any reasonable regulations as to the practice and procedure in civil cases so long as the right to a jury trial is not materially impaired.[51]

New York.— People *v.* Webb, 16 Hun 42.

North Carolina.— Keddie *v.* Moore, 6 N. C. 41, 5 Am. Dec. 518.

Pennsylvania.— Smith *v.* Times Pub. Co., 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819; Haines *v.* Levin, 51 Pa. St. 412; Warren *v.* Com., 37 Pa. St. 45.

Rhode Island.— Mathews *v.* Tripp, 12 R. I. 256.

South Carolina.— State *v.* Wyse, 32 S. C. 45, 10 S. E. 612.

Tennessee.— Garrison *v.* Hollis, 2 Lea 684.

See 31 Cent. Dig. tit. "Jury," § 204 *et seq.*

The great purpose of the constitution in preserving the right of trial by jury inviolate was not to contract the power to furnish modes of civil procedure in courts of justice, but to secure the right of trial by jury in its accustomed form before the rights of person or property should be finally decided. The right of trial is secured and the trial itself protected from innovations which might destroy its utility, but beyond this point there is no limitation upon the legislative power in constructing modes of redress for civil wrongs and regulating their provisions. Haines *v.* Levin, 51 Pa. St. 412.

An act which merely postpones but does not take away the right of trial by jury is not unconstitutional. Grimball *v.* Ross, T. U. P. Charlt. (Ga.) 175.

Limiting number of new trials.— An act is not unconstitutional which limits the number of new trials which may be granted on the ground that the court is of the opinion that the evidence is insufficient to sustain the verdict. East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652, holding, however, that the statute should be construed as not applying to cases where there is no evidence to support the verdict.

A statute providing a summary proceeding by warrant of distress for securing rents is not unconstitutional, since the tenant may have the matters in dispute tried by a jury on his replevying the property and tendering an issue. Blanchard *v.* Raines, 20 Fla. 467.

The mere failure to provide for a jury trial in an act creating a particular cause of action does not render the act unconstitutional, as the right exists in all proper cases without express grant. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32.

Separate jury trials.— Where several stockholders in a corporation are summoned to answer in a suit against the corporation, pursuant to the statute requiring such service, in order that execution may issue against the corporation, and they severally deny their liability, they are not entitled to separate trials by different juries. Holyoke Bank *v.* Goodman Paper Mfg. Co., 9 Cush. (Mass.) 576.

46. State *v.* Griffin, 66 N. H. 326, 29 Atl. 414.

47. *In re* Marron, 60 Vt. 199, 12 Atl. 523.

The general rule is that any act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional. Plimpton *v.* Somerset, 33 Vt. 283.

48. Perkins *v.* Towle, 58 N. H. 425; Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194.

49. Guile *v.* Brown, 38 Conn. 237.

Such conditions and regulations as are demanded by the public good and have for their object the promotion of the cause of justice and the general convenience do not amount to an infringement of the right. Curtis *v.* Gill, 34 Conn. 49.

The mode of obtaining a jury trial may be made somewhat more inconvenient than it was at the time of the adoption of the constitution. In this respect some discretion must be allowed the legislature which must be so far abused as clearly to violate the substantive right before the act will be declared unconstitutional. Norton *v.* McLeary, 8 Ohio St. 205.

50. Shaw *v.* Kent, 11 Ind. 80; Treadway *v.* Wilder, 12 Nev. 108.

In Mississippi the contrary has been held under a special provision of the constitution of 1890. Scott *v.* Vandegrift Shoe Co., (1891) 10 So. 455.

51. Knee *v.* Baltimore City Pass. R. Co., 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363; Hunt *v.* Lucas, 99 Mass. 404; Haines *v.* Levin, 51 Pa. St. 412.

The parties must submit to and comply with all reasonable and proper rules and orders of the court as to making up the issues

b. Verification of Pleadings and Affidavit of Defense. The right of trial by jury is not infringed by requiring a party to verify his pleading or file an affidavit of defense,[52] and such a requirement may be made by a rule of court.[53]

c. Demand and Waiver. The legislature may make any reasonable regulation as to what acts of a party shall be deemed a waiver of the right to a jury trial,[54] and may authorize a waiver in criminal cases.[55] It may provide that to entitle a party to a jury trial he must make a demand therefor,[56] and may prescribe at what stage of the proceedings[57] and in what manner the demand shall be made,[58] and may also require him to file within a certain time a notice that a

and preparing the case for trial. U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483.

An act authorizing the commencement of actions by attachment against fraudulent debtors is not unconstitutional as infringing the right of trial by jury. White *v.* Thielens, 106 Pa. St. 173.

In actions for malicious prosecution a rule of court requiring a copy of the indictment in cases of felony, to be obtained by order of the judge who tried it before the action for malicious prosecution shall be commenced, does not infringe the right of trial by jury as practised prior to the constitution. Burton *v.* Watkins, 2 Hill (S. C.) 674.

In an action for possession of leased premises a statute requiring defendant claiming a jury trial to give bond to pay all rents, damages, and costs is not an unreasonable restriction upon the right of trial by jury. Mathewson *v.* Ham, 21 R. I. 311, 43 Atl. 848.

An act authorizing a stay of proceedings after a new trial has been ordered on appeal until the costs of the appeal and the former trial have been paid by the party adjudged to pay the same is not unconstitutional. Knee *v.* Baltimore City Pass. R. Co., 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363, 83 Md. 77, 34 Atl. 252.

52. *District of Columbia.*—Cropley *v.* Vogeler, 2 App. Cas. 28; National Metropolitan Bank *v.* Hitz, 1 MacArthur & M. 198.

Georgia.—Dortic *v.* Lockwood, 61 Ga. 293; Redd *v.* Davis, 59 Ga. 823.

Massachusetts.— Hunt *v.* Lucas, 99 Mass. 404.

Mississippi.— Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

Pennsylvania.— Randall *v.* Weld, 86 Pa. St. 357; Lawrence *v.* Borm, 86 Pa. St. 225; Bishop *v.* Denormandie, 1 Pittsb. 145.

Vermont.— Jones *v.* Spear, 21 Vt. 426.

United States.— Maryland Fidelity, etc., Co. *v.* U. S., 187 U. S. 315, 23 S. Ct. 120, 47 L. ed. 194 [*affirming* 20 App. Cas. (D. C.) 376].

See 31 Cent. Dig. tit. "Jury," § 209.

The object of this requirement is merely to prevent an abuse of the right of trial by jury and to prevent fraud and delay where there is no *bona fide* defense and no honest issue to be tried by a jury, and it does not have the effect of depriving any party who has a valid defense of the right to submit it to a jury. Cropley *v.* Vogeler, 2 App. Cas. (D. C.) 28; Hunt *v.* Lucas, 99 Mass. 404; Lawrence *v.* Borm, 86 Pa. St. 225.

53. Cropley *v.* Vogeler, 2 App. Cas. (D. C.) 28; National Metropolitan Bank *v.* Hitz, 1 MacArthur & M. (D. C.) 198; Jones *v.* Spear, 21 Vt. 426; Fidelity, etc., Co. *v.* U. S., 187 U. S. 315, 23 S. Ct. 120, 47 L. ed. 194 [*affirming* 20 App. Cas. (D. C.) 376].

54. Foster *v.* Morse, 132 Mass. 354, 42 Am. Rep. 438; Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961; Garrison *v.* Hollis, 2 Lea (Tenn.) 684.

Failure to appear at trial.— A statute providing that a jury trial shall be waived by a party failing to appear by himself or attorney at the trial does not impair the right of trial by jury. Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961.

Failure to appear at trial on appeal.— A rule of court providing that on appeals from the judgment of a magistrate, if appellant does not appear when the case is called judgment may be rendered against him, does not infringe the right of trial by jury. Lloyd *v.* Toudy, 4 Wkly. Notes Cas. (Pa.) 225.

55. *Alabama.*— Connelly *v.* State, 60 Ala. 89, 31 Am. Rep. 34.

Connecticut.— State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27.

District of Columbia.— Belt *v.* U. S., 4 App. Cas. 25.

Indiana.— Murphy *v.* State, 97 Ind. 579.

Louisiana.—State *v.* Robinson, 43 La. Ann. 383, 8 So. 937; State *v.* White, 33 La. Ann. 1218.

Michigan.— Ward *v.* People, 30 Mich. 116.

New Jersey.— Edwards *v.* State, 45 N. J. L. 419.

Wisconsin.— *In re* Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285.

United States.— Hallinger *v.* Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. ed. 986.

See 31 Cent. Dig. tit. "Jury," §§ 198, 199.

56. Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217; McGuire *v.* North Carolina, etc., R. Co., 95 Tenn. 707, 33 S. W. 724.

57. Ward *v.* Lemon, (Ariz. 1890) 73 Pac. 443; McGuire *v.* North Carolina, etc., R. Co., 95 Tenn. 707, 33 S. W. 724; Garrison *v.* Hollins, 2 Lea (Tenn.) 684; State *v.* Cherry, 22 Utah 1, 60 Pac. 1103.

58. Travis *v.* Louisville, etc., R. Co., 9 Lea (Tenn.) 231; Garrison *v.* Hollins, 2 Lea (Tenn.) 684; State *v.* Cherry, 22 Utah 1, 60 Pac. 1103.

But an amendment of the statutes taking effect before trial does not affect the right to a jury trial acquired by a compliance with the former statute prior to the time when

jury trial will be demanded;[59] but the court cannot make any rules to this effect which are in contravention of the express provisions of the statute.[60]

d. Costs and Jury-Fees.[61] The constitutions in guaranteeing the right of trial by jury do not guarantee the right to litigate without expense,[62] but merely protect the parties against the imposition of terms so unreasonable as materially to impair the right;[63] and it is no infringement of the right to require as a condition of obtaining a jury trial the payment or deposit of a jury-fee[64] or the giving of a bond for costs;[65] and it has also been held that statutes providing that the jury-fees shall be taxed as a part of the costs against the losing party are not unconstitutional.[66]

e. Compulsory Reference. A compulsory reference is not an infringement of the right to a jury trial where the cause of action is of equitable cognizance,[67] or where, although of a legal nature, a compulsory reference was authorized prior to the adoption of the constitution;[68] but unless so authorized the reference of a

the latter statute took effect. Brown *v.* Black, 21 Nova Scotia 349.

59. Foster *v.* Morse, 132 Mass. 354, 42 Am. Rep. 438.

60. Ten Eyck *v.* Farlee, 16 N. J. L. 348; Hinchly *v.* Machine, 15 N. J. L. 476; Conderman *v.* Conderman, 44 Hun (N. Y.) 181; State *v.* Cherry, 22 Utah 1, 60 Pac. 1103.

61. **As a restriction on the right of appeal** see *infra*, V, B, 1, f; V, B, 2, c.

62. Venine *v.* Archibald, 3 Colo. 163; Conners *v.* Burlington, etc., R. Co., 74 Iowa 383, 37 N. W. 966; Adae *v.* Zangs, 41 Iowa 536; Adams *v.* Corriston, 7 Minn. 456.

The constitutional provisions that justice shall be administered without sale relate only to the taking of bribes and extorting of illegal fees and not to the payment of lawful compensation for acts done by the ministerial officers of a court in the progress of litigation. Vierling *v.* Stifel Brewing Co., 15 Mo. App. 125.

Costs of special or struck jury.— An act is not unconstitutional which requires that a party desiring a special or struck jury instead of a regular jury shall pay the costs of such jury. Vierling *v.* Stifel Brewing Co., 15 Mo. App. 125.

Additional expense for jury of twelve.— An act is not unconstitutional which provides that in a court where a trial by a jury of six may be had a party desiring a jury of twelve must pay the additional expense of such jury. Conners *v.* Burlington, etc., R. Co., 74 Iowa 383, 37 N. W. 966.

63. Adams *v.* Corriston, 7 Minn. 456.

64. *California.*— Lassen County Bank *v.* Sherer, 108 Cal. 513, 41 Pac. 415; Conneau *v.* Geis, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785.

Colorado.— Venine *v.* Archibald, 3 Colo. 163.

Maine.— Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Minnesota.— Adams *v.* Corriston, 7 Minn. 456.

New Jersey.— Humphrey *v.* Eakley, (1905) 60 Atl. 1097.

Washington.— State *v.* Neterer, 33 Wash. 535, 74 Pac. 668.

See 31 Cent. Dig. tit. "Jury," § 213.

The amount of the jury-fee which a party demanding a trial by jury may be required to pay is a matter within the discretion of the legislature, with which the courts will not interfere unless the fee fixed amounts to a practical prohibition of the right. Venine *v.* Archibald, 3 Colo. 163.

The rule applies to either plaintiff or defendant who desires a jury trial and it is no more unconstitutional to require it of one than of the other. Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Where a jury trial is not a right the court may as a condition of granting a request of one party to submit issues to a jury require the payment of a jury-fee. Hudson *v.* Hudson, 129 Cal. 141, 61 Pac. 773.

65. Miller *v.* Lampson, 66 Conn. 432, 34 Atl. 79.

Bond for costs on change of venue.— It is no infringement of the right to a trial by jury to require a party applying for a change of venue to give bond for costs. Barkwell *v.* Chatterton, 4 Wyo. 307, 33 Pac. 940.

66. Little *v.* McGuire, 43 Iowa 447; Adae *v.* Zangs, 41 Iowa 536. *Contra*, Gribble *v.* Wilson, 101 Tenn. 612, 49 S. W. 736; Neely *v.* State, 4 Baxt. (Tenn.) 174, holding that such a provision is unconstitutional as tending to impair the impartiality of the jury in cases where one of the parties is solvent and the other is not.

67. *Georgia.*— Mahan *v.* Cavender, 77 Ga. 118.

Iowa.— Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910.

Minnesota.— Berkey *v.* Judd, 14 Minn. 394.

New Hampshire.— Davis *v.* Dyer, 62 N. H. 231.

New York.— Empire State Tel., etc., Co. *v.* Bickford, 72 Hun 580, 25 N. Y. Suppl. 283.

Oklahoma.— Brewer *v.* Asher, 8 Okla. 231, 56 Pac. 714; Grant County *v.* McKinley, 8 Okla. 128, 56 Pac. 1044.

See 31 Cent. Dig. tit. "Jury," § 215.

68. Creve Cœur Lake Ice Co. *v.* Tamm, 138 Mo. 385, 39 S. W. 791; Edwardson *v.* Garnhart, 56 Mo. 81; Shepard *v.* Missouri Bank, 15 Mo. 143; Townsend *v.* Hendricks, 2 Sweeny (N. Y.) 503, 40 How. Pr. 143; Shepard *v.* Eddy, 2 N. Y. Suppl. 534, 15 N. Y.

purely legal cause of action against the consent of the parties is an infringement of the right of trial by jury,[69] even where it involves the examination of a long account;[70] and statutes providing generally for a compulsory reference in any action or in any action involving the examination of a long account are to be construed in connection with the constitutional provisions and limited in their operation to cases of equitable cognizance,[71] or to the particular cases in which a reference was authorized prior to the constitution.[72]

f. Restrictions on Right of Appeal. Where the right of trial by jury in civil cases is secured by allowing an appeal to a court where a jury trial can be had, the exercise of the right cannot be unreasonably impaired or restricted;[73] but subject to this limitation the legislature may prescribe the conditions and regulations as to how the appeal shall be taken.[74] It is not an unreasonable restriction to require that appellant shall pay the accrued costs,[75] or give a bond to procure his appeal,[76] or a bond to pay such costs as may be awarded against him,[77] or to require him to make oath that he believes injustice to have been done him and that the appeal is not taken for the purpose of delay,[78] or even to enter into an undertaking with surety to pay the final judgment of the appellate court.[79] There is some conflict

Civ. Proc. 403; Dane County *v.* Dunning, 20 Wis. 210; Norton *v.* Rooker, 1 Pinn. (Wis.) 195. See also Mead *v.* Walker, 17 Wis. 189.

In New York the statute providing that the court may direct a reference where the trial will require the examination of a long account on either side and will not require the decision of difficult questions of law (see Robinson *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 152; Coy *v.* Rowland, 40 How. Pr. 385; and the following cases) is constitutional because this practice was authorized by statute prior to the adoption of the constitution (Schermerhorn *v.* Wood, 4 Daly 158; Shepard *v.* Eddy, 2 N. Y. Suppl. 534, 15 N. Y. Civ. Proc. 403).

69. *California.*— Grim *v.* Norris, 19 Cal. 140, 79 Am. Dec. 206.

Iowa.— McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

Minnesota.— St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334.

Missouri.— Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865.

Nebraska.— Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066; Kinkaid *v.* Hiatt, 24 Nebr. 562, 39 N. W. 600; Lamaster *v.* Scofield, 5 Nebr. 148.

New York.— Untermyer *v.* Beihauer, 105 N. Y. 521, 11 N. E. 847; L'Amoureux *v.* Erie R. Co., 62 N. Y. App. Div. 505, 71 N. Y. Suppl. 70; Allentown Rolling Mills *v.* Dwyer, 26 N. Y. App. Div. 101, 49 N. Y. Suppl. 624; Townsend *v.* Hendricks, 40 How. Pr. 143 [*reversing* 2 Sweeny 503].

North Carolina.— Bernheim *v.* Waring, 79 N. C. 56.

Oregon.—Mitchell *v.* Oregon Women's Flax-Fiber Assoc., 38 Oreg. 503, 63 Pac. 881.

Pennsylvania.— Cutler *v.* Richley, 151 Pa. St. 195, 25 Atl. 96.

South Carolina.— Wilson *v.* York Tp., 43 S. C. 299, 21 S. E. 82; Smith *v.* Bryce, 17 S. C. 538.

Texas.— See Pfeiffer *v.* Maltby, 38 Tex. 523.

United States.— U. S. *v.* Rathbone, 27 Fed. Cas. No. 16,121, 2 Paine 578.

See 31 Cent. Dig. tit. "Jury," § 215.

A compulsory reference in the first instance where either party is given the right to demand a jury in case he is dissatisfied with the report of the referee is not an infringement of the right of trial by jury. Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194.

70. Grim *v.* Norris, 19 Cal. 140, 79 Am. Dec. 206; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334.

71. Grim *v.* Norris, 19 Cal. 140, 79 Am. Dec. 206; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334; Smith *v.* Bryce, 17 S. C. 538.

72. Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143 [*reversing* 2 Sweeny 503]; Sharp *v.* New York, 18 How. Pr. (N. Y.) 213.

The New York statute authorizing a compulsory reference where the trial will require the examination of a long account on either side is limited by the practice prior to the constitution to cases arising on contract and involving the examination of a long account (People *v.* Wood, 54 Hun 438, 7 N. Y. Suppl. 712; Evans *v.* Kalbfleisch, 16 Abb. Pr. N. S. 13; Townsend *v.* Hendricks, 40 How. Pr. 143 [*reversing* 2 Sweeny 503]), which must be an account in the ordinary acceptation of the term (Untermyer *v.* Beihauer, 105 N. Y. 521, 11 N. E. 847; Willard *v.* Doran, etc., Co., 48 Hun 402, 1 N. Y. Suppl. 345, 588; Sharp *v.* New York, 18 How. Pr. 213).

73. St. Louis, etc., R. Co. *v.* Williams, 49 Ark. 492, 5 S. W. 883; Perkins *v.* Towle, 58 N. H. 425; People *v.* Haverstraw, 151 N. Y. 75, 45 N. E. 384.

74. Reckner *v.* Warner, 22 Ohio St. 275; Haines *v.* Levin, 51 Pa. St. 412.

75. McDonald *v.* Schell, 6 Serg. & R. (Pa.) 240.

76. Hapgood *v.* Doherty, 8 Gray (Mass.) 373.

77. Hapgood *v.* Doherty, 8 Gray (Mass.) 373; Reckner *v.* Warner, 22 Ohio St. 275.

78. Biddle *v.* Com., 13 Serg. & R. (Pa.) 405.

79. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873.

of authority as to whether the legislature may alter the law in force at the time of the adoption of the constitution as to the amount in controversy which will entitle a party to appeal from the judgment of a justice to a jury, it having been held that the amount cannot be increased,[80] while other cases hold that the legislature may within reasonable limits increase the amount, although the effect will be to deny the right of appeal in certain cases where it previously existed.[81] Where the constitution guarantees the right to a jury trial, where the amount in controversy is over a certain amount, a statute allowing an appeal only when the the judgment rendered is over this amount, regardless of the amount in controversy, is unconstitutional.[82] Where the conditions for exercising the right of appeal are regulated by statute the court cannot impose any other and harder conditions than the statute prescribes.[83]

g. Splitting up Single Cause of Action. Defendant cannot be deprived of the right to a jury trial by plaintiff splitting up a single indebtedness into several amounts within the jurisdiction of a justice of the peace.[84]

2. In Criminal Cases — a. In General. While the legislature cannot take away the right of trial by jury in criminal cases or impose such conditions upon its exercise as unreasonably or unnecessarily to impair it,[85] it may make any regulations as to the practice and procedure in such cases which will not operate to prevent a fair and impartial trial.[86] An act is not unconstitutional which merely confers upon the court jurisdiction to try criminal cases without a jury where no jury is demanded;[87] but it has been held that an act requiring that defendant, in order to secure a jury trial, must make a formal affirmative demand therefor, is an infringement of the right of trial by jury.[88] It is no infringment of defendant's rights to permit a juror to be examined as a witness[89] or to act as an interpreter;[90] and since the assessment of punishment or fixing the term of imprisonment was not within the province of the jury at common law, the legislature may change the practice notwithstanding at the time of the adoption of the constitution this was by statute within the province of the jury.[91]

80. McGinty *v.* Carter, 48 N. J. L. 113, 3 Atl. 78.

81. Guile *v.* Brown, 38 Conn. 237; Curtis *v.* Gill, 34 Conn. 49.

82. Missouri, etc., R. Co. *v.* Phelps, 4 Indian Terr. 706, 76 S. W. 285; Dennee *v.* McCoy, 4 Indian Terr. 233, 69 S. W. 858; Luce *v.* Garrett, 4 Indian Terr. 54, 64 S. W. 613. See also Archard *v.* Farris, 4 Indian Terr. 123, 69 S. W. 821.

83. Haines *v.* Levin, 51 Pa. St. 412.

84. James *v.* Stokes, 77 Va. 225.

85. Saco *v.* Wentworth, 37 Me. 165, 58 Am. Dec. 786.

No definite rule can be laid down applicable to all cases as to what will amount to an impairment of the right, but each case must be determined upon its own circumstances. *In re* Marron, 60 Vt. 199, 12 Atl. 523.

86. People *v.* King, 28 Cal. 265; Johnson *v.* State, 42 Tex. Cr. 103, 58 S. W. 69; *In re* Marron, 60 Vt. 199, 12 Atl. 523; Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

The right is not impaired by statutory provisions requiring the accused in criminal cases to plead specially any special defense, such as insanity at the time that the offense was committed (Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26), requiring that after the jury has found on the special issue that defendant was not insane at the time of the commission of the offense his trial on the plea of not guilty shall proceed before the same jury (Schissler *v.* State, 122 Wis. 365, 99 N. W. 593), requiring that after a change of venue he shall be tried on a certified copy of the indictment (Bramlett *v.* State, 31 Ala. 376), providing that where a demurrer to an indictment is overruled and the accused being given an opportunity to plead does not do so, judgment shall be pronounced against him (People *v.* King, 28 Cal. 265), allowing the court power to amend, without changing the nature of the offense, the justice's warrant on which the accused is to be tried, where it is defective in form or substance (State *v.* Crook, 91 N. C. 536), authorizing the court to determine the degree of crime upon a plea of guilty (People *v.* Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88; Hallinger *v.* Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. ed. 986), or giving the trial judge discretionary power to refuse continuances and new trials (Lillard *v.* State, 17 Tex. App. 114).

87. Dillingham *v.* State, 5 Ohio St. 280; Dailey *v.* State, 4 Ohio St. 57.

88. Mansfield's Case, 22 Pa. Super. Ct. 224.

89. Howser *v.* Com., 51 Pa. St. 332; People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

90. People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

91. George *v.* People, 167 Ill. 447, 47 N. E.

b. Requirement or Denial of Bail. A statute is not unconstitutional as infringing the right of trial by jury which requires defendant on demanding the jury trial to give bail for his appearance at a jury term of the court in which he is arraigned,[92] or which authorizes a magistrate or police justice to require defendant to give bail to appear before a higher court if in his opinion the punishment which he is authorized to assess is inadequate;[93] but a law is unconstitutional which deprives defendant, on being arraigned before a magistrate, of the right to elect to be tried before a higher court having a constitutional jury and give bail for his appearance in that court in any case where such right existed at the time of the adoption of the constitution.[94]

c. Restrictions on Right of Appeal. Where the right of trial by jury in criminal cases is secured by allowing an appeal to a court where a jury trial can be had, the right of appeal cannot be restricted by conditions which materially impair the right;[95] but the legislature may regulate how the appeal shall be taken and prescribe any conditions so long as they are reasonable,[96] and a failure to comply with such a regulation is a waiver of the right to a jury trial.[97] It is not an unreasonable restriction on the right of appeal to require defendant to give a recognizance for his appearance in the appellate court,[98] or to pay the necessary fees for taking and perfecting the appeal,[99] to procure at his own expense copies of the proceedings necessary for taking the appeal,[1] to pay the accrued costs,[2] or to give a bond for such costs as may be adjudged against him;[3] but it is an unreasonable restriction to require him to also give a bond conditioned for the payment of whatever judgment may finally be rendered against him in the appellate court,[4] or to give a bond not to further violate, pending the appeal, the law under which he is accused,[5] and a provision that if the conviction is sustained the penalty shall be increased is also unconstitutional.[6]

C. Extending Jurisdiction of Particular Courts — 1. Justices' and Other Inferior Courts. The legislature cannot extend the jurisdiction of justices or other inferior courts not having a jury of twelve so as to include causes of action or amounts in controversy which prior to the adoption of the constitution were of right triable by common-law jury,[7] or so as to authorize the trial, without

741; State *v.* Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846.

92. Howard *v.* State, 128 Ala. 43, 29 So. 580.

93. Stevens *v.* Anderson, 145 Ind. 304, 44 N. E. 460; State *v.* McCory, 2 Blackf. (Ind.) 5.

94. People *v.* Carroll, 3 Park. Cr. (N. Y.) 22.

95. Reeves *v.* State, 96 Ala. 33, 11 So. 296; *In re* Jahn, 55 Kan. 694, 41 Pac. 956; State *v.* Gurney, 37 Me. 156, 58 Am. Rep. 782; State *v.* Everett, 14 Minn. 439.

96. State *v.* Griffin, 66 N. H. 326, 29 Atl. 414; In re McSoley, 15 R. I. 608, 10 Atl. 659; Littlefield *v.* Peckham, 1 R. I. 500.

97. Com. *v.* Whitney, 108 Mass. 5, holding that a statute providing that if defendant fails to prosecute his appeal he shall be defaulted on his recognizance and sentence awarded against him for the offense of which he was convicted, in the same manner as if he had been convicted by a jury in the appellate court, is constitutional.

98. State *v.* Beneke, 9 Iowa 203; Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29; *In re* Kinsel, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475; *In re* McSoley, 15 R. I. 608, 10 Atl. 659; Beasley *v.* Beckley, 28 W. Va. 81.

If defendant is denied the alternative of being committed in the event of his being unable to give the recognizance, the requirement is an unreasonable restriction. State *v.* Everett, 14 Minn. 439.

The amount of the recognizance may be regulated by the legislature so long as the amount is not unreasonable. *In re* McSoley, 15 R. I. 608, 10 Atl. 659.

99. State *v.* Griffin, 66 N. H. 326, 29 Atl. 414.

1. *In re* Marron, 60 Vt. 199, 12 Atl. 523.

2. Littlefield *v.* Peckham, 1 R. I. 500.

3. State *v.* Brennan, 25 Conn. 278.

4. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; State *v.* Beneke, 9 Iowa 203; *In re* Jahn, 55 Kan. 694, 41 Pac. 956; Greene *v.* Briggs, 10 Fed. Cas. No. 5,764, 1 Curt. 311. *Compare* Jelly *v.* Dils, 27 W. Va. 267.

5. Saco *v.* Woodsum, 39 Me. 258; Saco *v.* Wentworth, 37 Me. 165, 58 Am. Dec. 786; *In re* McSoley, 15 R. I. 608, 10 Atl. 659.

6. State *v.* Gurney, 37 Me. 156, 58 Am. Dec. 782, holding that such a provision is unconstitutional on the ground that it in effect imposes an additional punishment for exercising the right of appeal.

7. Thomas *v.* Bibb, 44 Ala. 721; Enderman *v.* Ashby, Ky. Dec. 53; Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. 605; White *v.* Kendrick, 1 Brev. (S. C.) 469. *Contra,* Knight *v.* Campbell, 62 Barb. (N. Y.) 16

defendant's consent, of criminal cases previously triable by such a jury,[8] unless in either case a right of appeal is given without any unreasonable restrictions to a court where a trial by a constitutional jury can be had,[9] or unless such regulation is expressly authorized by a constitutional provision.[10]

2. COURTS OF EQUITY. The legislature cannot convert a legal into an equitable cause of action,[11] or confer upon courts of equity jurisdiction of purely legal controversies which otherwise would be properly cognizable only in courts of law.[12] It has been held that an act which merely confers jurisdiction in such cases upon courts of equity but does not expressly deny the right to a jury is not unconstitutional,[13] but this doctrine has been expressly disapproved,[14] and the cases supporting the general rule previously stated do not recognize such a distinction.[15] An act is not unconstitutional, however, if in conferring jurisdiction upon a court of equity it makes express provision securing the right to a jury if either party shall demand it,[16] and it is not an infringement of the right of trial by jury for the court, in a case properly cognizable in equity, to retain jurisdiction for the purpose of affording complete relief, although in so doing it becomes necessary to determine questions of purely legal cognizance.[17] Neither do the consti-

[*disapproving* Baxter *v.* Putney, 37 How. Pr. (N. Y.) 140]; Dawson *v.* Horan, 51 Barb. (N. Y.) 459.

8. State *v.* Gerry, 68 N. H. 495, 38 Atl. 272, 38 L. R. A. 228; Wynehamer *v.* People, 13 N. Y. 378; Com. *v.* Saal, 10 Phila. (Pa.) 496; Com. *v.* Seamans, 3 L. T. N. S. (Pa.) 133. See also Danner *v.* State, 89 Md. 220, 42 Atl. 965.

An act which confers final jurisdiction without the right of appeal upon a city recorder's court, of any offense properly triable by jury, is unconstitutional. State *v.* Peterson, 41 Vt. 504.

9. See *infra*, V, H, 2.

10. People *v.* Dutcher, 20 Hun (N. Y.) 241; Devine *v.* People, 20 Hun (N. Y.) 98; People *v.* Rawson, 61 Barb. (N. Y.) 619 [*distinguishing* People *v.* Toynbee, 13 N. Y. 378].

The New York constitution, as amended in 1870, provides that "Courts of Special Sessions shall have such jurisdiction of offences of the grade of misdemeanors as may be prescribed by law," and under this provision an act is not unconstitutional which confers upon such courts jurisdiction of misdemeanors which were formerly triable by a jury of twelve men (Devine *v.* People, 20 Hun 98. See also People *v.* Wolf, 24 Misc. 94, 53 N. Y. Suppl. 296, 13 N. Y. Cr. 261; People *v.* Levy, 24 Misc. 469, 53 N. Y. Suppl. 643, 13 N. Y. Cr. 269); but the charter of Greater New York provides that such courts may be divested of jurisdiction where a justice of the supreme court shall certify that it is reasonable that the charge should be prosecuted by indictment (People *v.* Cornyn, 36 Misc. 135, 72 N. Y. Suppl. 1088; People *v.* Levy, *supra*); the term "reasonable" being construed as applying to cases where there are exceptional features in the case making it proper that the action should be tried by a jury rather than by a justice of the special sessions (People *v.* Cornyn, *supra*).

11. Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530.

12. *California.*— Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

Florida.— McMillan *v.* Wiley, 45 Fla. 487, 33 So. 993; Hughes *v.* Hannah, 39 Fla. 365, 22 So. 613; Wiggins *v.* Williams, 36 Fla. 637, 18 So. 859, 30 L. R. A. 754.

Kentucky.—Watts *v.* Griffin, Litt. Sel. Cas. 244.

Maryland.— McCoy *v.* Johnson, 70 Md. 490, 17 Atl. 387.

Michigan.— Tabor *v.* Cook, 15 Mich. 322.

Pennsylvania.— Haines' Appeal, 73 Pa. St. 169; Norris' Appeal, 64 Pa. St. 275; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530; Pennsylvania Canal Co. *v.* Middletown, etc., Turnpike Co., 1 Pa. Dist. 663, 11 Pa. Co. Ct. 582.

Tennessee.— State Bank *v.* Cooper, 2 Yerg. 599, 24 Am. Dec. 517.

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557. See also State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

See 31 Cent. Dig. tit. "Jury," § 207.

13. Gage *v.* Ewing, 107 Ill. 11. See also Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; Ward *v.* Farwell, 97 Ill. 593.

The ground upon which this doctrine is based is that since the court may submit issues to a jury, if it refuses to do so in a proper case the objection is to the action of the court in the particular case and not to the constitutionality of the statute. Gage *v.* Ewing, 107 Ill. 11.

14. Tabor *v.* Cook, 15 Mich. 322; Haines' Appeal, 73 Pa. St. 169.

15. See cases cited *supra*, notes 11, 12.

16. McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55; Wakeley *v.* Mohr, 15 Wis. 609. See also Charles River Bridge *v.* Warren Bridge, 6 Pick. (Mass.) 376; Janesville Cotton Mfg. Co. *v.* Ford, 55 Wis. 197, 12 N. W. 377.

17. Cook *v.* Schmidt, 100 Ala. 582, 13 So. 686; Montgomery, etc., R. Co. *v.* McKenzie, 85 Ala. 546, 5 So. 322, 96 Ala. 465, 11 So.

tutional provisions affect the right of the court to proceed without a jury in any case of which jurisdiction was conferred by statute prior to the adoption of the constitution.[18] It has also been held that the legislature cannot so change the system by jurisprudence as to confer upon juries the sole power of determining purely equitable controversies;[19] but an act is not unconstitutional which does not deprive a court of equity of jurisdiction of any cause of action previously cognizable in equity, but merely provides that in such actions certain issues of fact arising on the pleadings shall be submitted to a jury.[20]

D. Reëxamination or Review of Facts Tried by a Jury. The seventh amendment of the federal constitution provides that no fact once tried by a jury shall be otherwise reëxaminable in any court of the United States than according to the rules of the common law.[21] This provision not only prevents the retrial by a jury in a United States circuit court of facts tried by a jury in a district court,[22] but also deprives congress of the power to authorize a reëxamination in any federal court of facts which have been tried and determined by a jury in a state court.[23]

E. Number of Jurors[24] **— 1. Jury of Less Than Twelve.** A jury of less than twelve is not a constitutional jury,[25] and a denial of this number in a case triable by jury is an infringement of a constitutional right.[26] So wherever there

367; Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110. See also Cook *v.* New York Condensed Milk Co., 100 Ala. 580, 13 So. 685; Norman *v.* Goetter, 96 Ala. 468, 11 So. 368; Norris' Appeal, 64 Pa. St. 275.

18. *Florida.*— Camp Phosphate Co. *v.* Anderson, (1904) 37 So. 722.

Kentucky.—Watts *v.* Griffin, Litt. Sel. Cas. 244.

Maryland.— Capron *v.* Devries, 83 Md. 220, 34 Atl. 251.

West Virginia.— Cecil *v.* Clark, 43 W. Va. 659, 30 S. E. 216.

Wisconsin.— Stilwell *v.* Kellogg, 14 Wis. 461. See also Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

19. Brown *v.* Kalamazoo Cir. Judge, 75 Mich. 274, 284, 42 N. W. 827, 13 Am. St. Rep. 438, 5 L. R. A. 226, where the court said: "The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. . . . The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore."

20. Eggers *v.* Manhattan R. Co., 18 N. Y. Suppl. 181, 21 N. Y. Civ. Proc. 403, 27 Abb. N. Cas. 463.

21. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873; Crim *v.* Handley, 94 U. S. 652, 24 L. ed. 216; Knickerbocker Ins. Co. *v.* Comstock, 16 Wall. (U. S.) 258, 21 L. ed. 493; Justices New York Sup. Ct. *v.* U. S., 9 Wall. (U. S.) 274, 19 L. ed. 658; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732; Hughey *v.* Sullivan, 80 Fed. 72.

The only methods known to the common law for reëxamining facts once tried by a jury are the granting of a new trial, either by the court where the issue was tried or to which the record was properly returnable, or on the award of a venire facias *de novo* by an appellate court for some error of law in the proceedings. Crim *v.* Handley, 94 U. S 652, 24 L. ed. 216; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732.

Requiring a remittitur of a part of the amount of a verdict as a condition of refusing a new trial is not a reëxamination by the court of facts found by a jury, within the application of this provision. Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854.

In an action against a bankrupt, where defendant's liability has been fixed by the verdict of a jury before the adjudication of bankruptcy, such liability cannot be retried in the bankruptcy court since this would not be a reëxamination according to the rules of the common law. Rosenthal *v.* Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

22. U. S. *v.* Wonson, 30 Fed. Cas. No. 16,750, 1 Gall. 5.

23. Wetherbee *v.* Johnson, 14 Mass. 412; Patrie *v.* Murray, 43 Barb. (N. Y.) 323, 29 How. Pr. 312; Justices New York Sup. Ct. *v.* U. S., 9 Wall. (U. S.) 274, 19 L. ed. 658.

24. Right to jury of twelve on appeal as a preservation of the constitutional right to trial by jury see *infra*, V, H, 2.

25. Collins *v.* State, 88 Ala. 212, 7 So. 260; Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194; Territory *v.* Ortiz, 8 N. M. 154, 42 Pac. 87.

Construction of constitutional provisions as to number of jurors see *supra*, II, B, 2.

26. May *v.* Milwaukee, etc., R. Co., 3 Wis. 219.

Diminishing the number impairs the right, lessens the security of the accused, and increases the danger of conviction. Work *v.* State, 2 Ohio St. 296, 69 Am. Dec. 671.

Permitting a juror to act as a witness or an interpreter does not reduce the number of jurors, as in so acting he does not lose his identity as a member of the jury. People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

is a constitutional right to a jury trial, a trial by a jury of less than twelve is erroneous in either civil[27] or criminal cases,[28] unless a jury of this number has been waived by the parties,[29] or unless such lesser number was authorized by a constitutional provision,[30] or a statute enacted pursuant to authority conferred by such a provision.[31] Any legislation reducing the number of jurors to less than twelve in cases where a jury trial is a right is unconstitutional,[32] unless expressly authorized by a constitutional provision,[33] and even where a constitution authorizes the legislature to provide for a trial by less than twelve jurors, it cannot delegate this power to any court or other tribunal.[34] The rule that the number of jurors cannot be reduced has no application, however, to cases where a jury trial is not a matter of right,[35] nor does it require, even in cases where a jury trial is a

27. *Florida.*— Florida Fertilizer, etc., Co., *v.* Boswell, 45 Fla. 301, 34 So. 241.
Mississippi.— Dixon *v.* Richards, 2 How. 771.
Missouri.— Foster *v.* Kirby, 31 Mo. 496.
New Jersey.— Ashcroft *v.* Clark, 5 N. J. L. 577; Briant *v.* Russell, 2 N. J. L. 146.
Washington.— Thomas *v.* Hilton, 3 Wash. Terr. 365, 17 Pac. 882.
Wisconsin.—May *v.* Milwaukee, etc., R. Co., 3 Wis. 219.
See 31 Cent. Dig. tit. "Jury," § 222.

28. *Indiana.*— Moore *v.* State, 72 Ind. 358; Allen *v.* State, 54 Ind. 461; Brown *v.* State, 16 Ind. 496; Brown *v.* State, 9 Blackf. 561.
Kentucky.— Helvenstine *v.* Yantis, 88 Ky. 695, 11 S. W. 811, 11 Ky. L. Rep. 208.
Minnesota.—State *v.* Everett, 14 Minn. 439.
Mississippi.— Jones *v.* State, (1900) 27 So. 382; Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649.
New Mexico.— Territory *v.* Ortiz, 8 N. M. 154, 42 Pac. 87.
Tennessee.— Bowles *v.* State, 5 Sneed 360.
Texas.— Jester *v.* State, 26 Tex. App. 369, 9 S. W. 616.
United States.— Thompson *v.* Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. ed. 1061.
See 31 Cent. Dig. tit. "Jury," § 222.

Such a trial is not a mere irregularity but a fatal defect affecting the jurisdiction of the court and may be inquired into and relief awarded on habeas corpus. Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649.

Where the record sets out the names of the jurors and upon examination there is a less number than twelve, it will not be presumed that the trial was by a jury of twelve (Huebner *v.* State, 3 Tex. App. 458; Rich *v.* State, 1 Tex. App. 206); and unless the record shows that a less number than twelve was accepted by both parties or that one or more of the jury were excused under some special provision of law, it is fatal to the judgment (Huebner *v.* State, *supra*).

29. **Waiver of number of jurors** see *supra*, IV, A. 3.

30. State *v.* Duggan, 104 La. 626, 29 So. 278; State *v.* Sinegal, 51 La. Ann. 932, 25 So. 957; People *v.* Lane, 124 Mich. 271, 82 N. W. 896; State *v.* Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33.

31. Hermanek *v.* Guthmann, 179 Ill. 563, 53 N. E. 966; Moise *v.* Powell, 40 Nebr. 671, 59 N. W. 79.

If the legislature has made no provision for a trial by less than twelve men, although authorized by the constitution to do so, the trial must be by this number. State *v.* Ellis, 22 Wash. 129, 60 Pac. 136.

The statute in force at the time of the trial governs as to the number of jurors, although at the time the jury was summoned a statute prescribing a different number was in force. Warner *v.* Baltimore, etc., R. Co., 31 Ohio St. 265.

32. *Alabama.*— Collins *v.* State, 88 Ala. 212, 7 So. 260.
Arkansas.— Whitehead *v.* Arkansas Cent. R. Co., 28 Ark. 460.
Michigan.— Campau *v.* Detroit, 14 Mich. 276.
Missouri.— Vaughn *v.* Scade, 30 Mo. 600.
New Hampshire.— *In re* Opinion of Justices, 41 N. H. 550.
Ohio.— Work *v.* State, 2 Ohio St. 296, 69 Am. Dec. 671.
Washington.— Thomas *v.* Hilton, 3 Wash. Terr. 365, 17 Pac. 882.
West Virginia.— Lovings *v.* Norfolk, etc., R. Co., 47 W. Va. 582, 35 S. E. 962.
Wisconsin.— Norval *v.* Rice, 2 Wis. 22.
See 31 Cent. Dig. tit. "Jury," § 222.

The number may be reduced to twelve in a proceeding where a larger number has previously been provided for by statute, since the constitution guarantees no right to any more than twelve. De Hart *v.* Condit, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545; *In re* Lindsley, 46 N. J. Eq. 358, 19 Atl. 726.

33. *Florida.*— Gibson *v.* State, 16 Fla. 291.
Illinois.— McManus *v.* McDonough, 107 Ill. 95.
Iowa.— Bryan *v.* State, 4 Iowa 349.
Nebraska.— Moise *v.* Powell, 40 Nebr. 671, 59 N. W. 79.
South Carolina.— State *v.* Starling, 15 Rich. 120.
See 31 Cent. Dig. tit. "Jury," § 222.

Constitutional provisions authorizing legislative regulation of number of jurors see *supra*, II, B, 2.

34. McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750.

35. Fant *v.* Buchanan, (Miss. 1895) 17 So. 371.

matter of right, that trial by a jury of twelve must always be had in the first instance.[36]

2. Decrease in Number Pending Trial. The court has no right to excuse a juror during the trial on account of sickness and proceed with less than the legal number,[37] and although a juror was not excused the verdict will be considered as a verdict of only eleven men if a juror was too sick to deliberate,[38] or became insane before the verdict was rendered.[39] Statutes authorizing less than the legal number of jurors to render a verdict where the number is reduced during the trial by death, sickness, or other cause are unconstitutional;[40] and even where the constitution provides that the legislature may authorize a trial by a less number than twelve, it cannot delegate to the court the power of excusing jurors in such cases.[41] Permitting one of the jurors to be placed on the witness' stand and examined is not, however, objectionable as reducing the number of jurors.[42]

3. Jury of More Than Twelve. A jury consisting of more than twelve men is not a legal constitutional jury,[43] and a trial by such a jury is erroneous and no valid judgment can be rendered on the verdict in either civil[44] or criminal cases,[45] unless the objection was waived by the parties.[46] If, however, a juror improperly included in the panel can be identified he may be excluded by the court if this is done before the jurors have had an opportunity to converse among themselves, and the trial may proceed with the remaining legal number.[47]

4. Concurrence of Less Than Whole Number. It is an essential attribute of a valid jury trial that the members constituting the jury shall be unanimous in the verdict rendered,[48] and any juror may dissent from a verdict to which he has previously agreed at any time before it is recorded,[49] whether the verdict be written or oral or whether the jury be polled or not.[50] It follows that any legislation

In trials before justices and other inferior courts not of record and not proceeding according to the course of the common law, the number of jurors may, in cases where a jury of twelve was not a right prior to the constitution, be reduced by the legislature. Vaughn *v.* Scade, 30 Mo. 600; People *v.* Fisher, 20 Barb. (N. Y.) 652, 11 How. Pr. 554; Warner *v.* Baltimore, etc., R. Co., 31 Ohio St. 265.

A jury of six in a justice's court in the trial of cases in which prior to the constitution there was no right to a jury of twelve is as much a jury "as heretofore used" as a jury of twelve in a court of record. People *v* Clark, 23 Hun (N. Y.) 374.

36. See *infra*, V, H, 2.

37. Com. *v.* Byers, 5 Pa. Co. Ct. 295; Jackson *v.* Coates, (Tex. Civ. App. 1897) 43 S. W. 24.

38. Denman *v.* Baldwin, 3 N. J. L. 945.

39. Norvell *v.* Deval, 50 Mo. 272, 11 Am. Rep. 413.

40. Kelsh *v.* Dyersville, 68 Iowa 137, 26 N. W. 38; Eshelman *v.* Chicago, etc., R. Co., 67 Iowa 296, 25 N. W. 251; McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750. *Compare* Gindrat *v.* State, 3 Tex. App. 573.

41. McRae *v.* Grand Rapids, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750.

42. State *v.* Cavanaugh, 98 Iowa 688, 68 N. W. 452.

43. Wolfe *v.* Martin, 1 How. (Miss.) 30.

44. Wolfe *v.* Martin, 1 How. (Miss.) 30; Whitehurst *v.* Davis, 3 N. C. 113. *Contra*, Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520, where the court said that a verdict by a jury of less than twelve would be void but held that a verdict by a greater number was not.

45. Bullard *v.* State, 38 Tex. 504, 19 Am. Rep. 30; State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

46. **Right to waive legal number of jurors** see *supra*, IV, A, 3.

47. Davis *v.* State, 9 Tex. App. 634.

If more than the legal number of jurors are permitted to deliberate on the verdict, the verdict should be set aside. See Bullard *v.* State, 38 Tex. 504, 19 Am. Rep. 30.

48. *Arkansas.*— Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499.

Missouri.— Girdner *v.* Bryan, 94 Mo. App. 27, 67 S. W. 699.

Montana.— Kleinschmidt *v.* Dunphy, 1 Mont. 118.

New Hampshire.— Opinion of Justices, 41 N. H. 550.

Pennsylvania.— Scott *v.* Scott, 110 Pa. St. 387, 2 Atl. 531.

Wyoming.— Rock Springs First Nat. Bank *v.* Foster, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056.

England.— Winsor *v.* Reg., L. R. 1 Q. B. 289, 6 B. & S. 143, 35 L. J. M. C. 121, 12 Jur. N. S. 91, 14 L. T. N. S. 195, 14 Wkly. Rep. 423, 118 E. C. L. 143.

See 31 Cent. Dig. tit. "Jury," § 224.

49. Lawrence *v.* Stearns, 11 Pick. (Mass.) 501; Scott *v.* Scott, 110 Pa. St. 387, 2 Atl. 531; State *v.* Austin, 6 Wis. 205.

50. Scott *v.* Scott, 110 Pa. St. 387, 2 Atl. 531.

authorizing a verdict by less than the whole number of jurors in any case where a jury trial is a matter of right is unconstitutional,[51] unless such legislation is expressly authorized by a constitutional provision.[52] This rule does not, however, apply to cases of an equitable nature[53] or other proceedings where there is no constitutional right to a jury trial.[54] In Canada in the province of Manitoba it is provided by statute that in civil cases nine jurors concurring may render a verdict.[55]

F. Constitution and Selection of Jury — 1. In General. The preliminary proceedings for procuring a jury are not properly speaking a part of the trial,[56] and it is not necessary in order to preserve the right of trial by jury inviolate to continue the particular method of selecting jurors in force at the time the constitution was adopted.[57] On the contrary the legislature has full power to regulate

51. *Arizona.*— Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499.

Colorado.— Clough *v.* McKay, 31 Colo. 300, 73 Pac. 30; Denver *v.* Hyatt, 28 Colo. 129, 63 Pac. 403.

Florida.— Jacksonville, etc., R. Co. *v.* Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272.

Montana.— Aylesworth *v.* Reece, 1 Mont. 200; Kleinschmidt *v.* Dunphy, 1 Mont. 118.

New Hampshire.— Opinion of Justices, 41 N. H. 550.

Oklahoma.— Bradford *v.* Territory, 1 Okla. 366, 34 Pac. 66.

Wyoming.— Rock Springs First Nat. Bank *v.* Foster, 9 Wyo. 157, 61 Pac. 466, 54 L. R. A. 549.

See 31 Cent. Dig. tit. "Jury," § 224.

In Utah the contrary has been held in a number of cases (Pratt *v.* Parsons, 13 Utah 31, 43 Pac. 620; Smith *v.* Salt Lake City R. Co., 13 Utah 33, 43 Pac. 919; Leedom *v.* Earls Furniture, etc., Co., 12 Utah 172, 42 Pac. 208; Mackey *v.* Enzensperger, 11 Utah 154, 39 Pac. 541; American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259; Wolff Co. *v.* Salt Lake City Brewing Co., 10 Utah 179, 37 Pac. 262; Riley *v.* Salt Lake Rapid Transit Co., 10 Utah 428, 37 Pac. 681; Hess *v.* White, 9 Utah 61, 33 Pac. 343, 24 L. R. A. 277); but on appeal from one of the above cases the United States supreme court reversed the decision and held the law to be unconstitutional as in violation of the constitution and laws of the United States, which are expressly declared to be in force in the territory of Utah (American Pub. Co. *v.* Fisher, 166 U. S. 464, 17 S. Ct. 618, 41 L. ed. 1079).

In eminent domain proceedings it has been held in New York that the term "jury" as used with reference to such proceedings did not mean a jury acting in the ordinary sense, and that a statute providing that only a majority need concur in the appraisement was constitutional (Cruger *v.* Hudson River R. Co., 12 N. Y. 190); but in Florida where the constitution expressly provides that in such proceedings the compensation shall be assessed by a jury of twelve men in a court of competent jurisdiction, it has been held that a statute authorizing a majority of the jury to determine all matters before them was unconstitutional and void (Jacksonville, etc., R. Co. *v.* Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272).

52. Taussig *v.* St. Louis, etc., R. Co., 186 Mo. 269, 85 S. W. 378. See Smith *v.* Sovereign Camp W. of W., 179 Mo. 119, 77 S. W. 862; Gabbert *v.* Chicago, etc., R. Co., 171 Mo. 84, 70 S. W. 891; Girdner *v.* Bryan, 94 Mo. App. 27, 67 S. W. 699.

It is not a violation of the constitution of the United States for a state constitution to be amended so as to authorize a verdict by less than the full number of jurors. Franklin *v.* St. Louis, etc., R. Co., 188 Mo. 533, 87 S. W. 930.

In Texas the constitution of 1876 provided that in the trial of civil cases and criminal cases below the grade of felony in the district courts nine members of the jury concurring might render a verdict, but this rule was subsequently changed by the legislature. Bowen *v.* Davis, 48 Tex. 101.

In Louisiana the constitution of 1898 provides that in cases triable by a jury of five all must concur, but that in cases triable by a jury of twelve nine may render a verdict except in capital cases. See State *v.* Sinegal, 51 La. Ann. 932, 25 So. 957.

A constitutional provision authorizing a jury of less than twelve does not authorize the legislature to dispense with the requirement of unanimity in the verdict. Rock Springs First Nat. Bank *v.* Foster, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056, 54 L. R. A. 549.

53. Providence Gold Min. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641.

As a jury is not a matter of right in equity, an act providing that three fourths of a jury may render a verdict is not unconstitutional in so far as it applies to suits in equity. Kleinschmidt *v.* Dunphy, 1 Mont. 118.

54. Thomas *v.* Clark County, 5 Ohio S. & C. Pl. Dec. 510, 5 Ohio N. P. 453; Emig *v.* Clark County, 5 Ohio S. & C. Pl. Dec. 459, 5 Ohio N. P. 471.

55. Robertson *v.* McMeans, 1 Manitoba 348, holding further that the statute applies to special as well as to common juries.

56. People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; State *v.* Wilson, 48 N. H. 398; State *v.* Boatwright, 10 Rich. (S. C.) 407; Cregier *v.* Bunton, 2 Strobh. (S. C.) 487.

57. Saginaw *v.* Campau, 102 Mich. 594, 61 N. W. 65; Lommen *v.* Minneapolis Gaslight

and change the method of selecting jurors so long as the essential elements of the jury trial are preserved,[58] and it is not an essential element that the selection of the persons to compose the panel shall be made by lot.[59] The legislature may increase or decrease the number of the panel from which the trial jury is to be selected,[60] may change the law as to the persons or officers by whom the list of jurors is to be selected,[61] and prescribe the qualifications of such persons or officers.[62] Statutes providing that either party may demand a special or struck jury are not in violation of the constitutional provisions that the right of trial by jury shall remain inviolate,[63] since a trial by such a jury preserves all of the essential requisites of a jury trial.[64] While the legislature may provide how the jury shall be selected, the parties, after such provision is made, have a right to insist that the law as established shall be substantially complied with.[65]

2. Qualifications and Exemptions. So long as the essential requisites of trial by jury are preserved it is competent for the legislature to prescribe the necessary qualifications of jurors[66] and to exempt certain classes of persons from jury

Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; State *v.* Boatwright, 10 Rich. (S. C.) 407.

It was not the intention of the constitution to prohibit the legislature from making changes in the manner of selecting the jury. Saginaw *v.* Campau, 102 Mich. 594, 61 N. W. 65; Perry *v.* State, 9 Wis. 19.

58. *Georgia.*—Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Conyers *v.* Graham, 81 Ga. 615, 8 S. E. 521.

Kentucky.— Beatty *v.* Com., 91 Ky. 313, 15 S. W. 856.

Michigan.— People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95.

Minnesota.— Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437.

Mississippi.—Cooper *v.* State, 59 Miss. 267; Dowling *v.* State, 5 Sm. & M. 664.

Missouri.— Eckrich *v.* St. Louis Transit Co., 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911; State *v.* Slover, 134 Mo. 607, 36 S. W. 50.

New Hampshire.— State *v.* Wilson, 48 N. H. 398.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York.— People *v.* Meyer, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Cr. 487; Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

Virginia.— Perry *v.* Com., 3 Gratt. 632.

Wisconsin.— Perry *v.* State, 9 Wis. 19.

See 31 Cent. Dig. tit. "Jury," §§ 226, 230.

But the right to participate in the selection of the jury and to interpose challenges for cause is universally recognized as an indispensable element of this mode of trial which cannot be denied. Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679.

59. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 53 L. R. A. 437; Eckrich *v.* St. Louis Transit Co., 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911; Perry *v.* State, 9 Wis. 19.

60. Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Conyers *v.* Graham, 81 Ga. 615, 8 S. E. 521.

61. People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; People *v.* Anderson, 53 Misc. 60, 18 N. W. 561.

The right of challenging the array which is an essential incident of a jury trial is a sufficient safeguard against any partiality or default on the part of the officer who selects or summons the panel. People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95.

62. Smith *v.* Com., 33 S. W. 825, 17 Ky. L. Rep. 1162, holding that on the trial of a negro it is no ground of objection that no person of his race was on the jury commission where the persons composing the commission had all of the qualifications prescribed by statute.

63. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 53 L. R. A. 437; State *v.* Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670; Eckrich *v.* St. Louis Transit Co., 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Slover, 134 Mo. 607, 36 S. W. 50; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; Fowler *v.* State, 58 N. J. L. 423, 34 Atl. 682; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; People *v.* Hall, 169 N. Y. 184, 62 N. E. 170.

64. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247.

65. Hewitt *v.* Saginaw Cir. Judge, 71 Mich. 287, 39 N. W. 56. See also Com. *v.* Baranowski, 6 Pa. Co. Ct. 157.

66. Saginaw *v.* Campau, 102 Mich. 594, 61 N. W. 65; People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; State *v.* Slover, 134 Mo. 607, 36 S. W. 50; State *v.* Welsor, 117 Mo. 570, 21 S. W. 443. *Contra*, Reece *v.* Knott, 3 Utah 451, 24 Pac. 757, holding that for the legislature to prescribe any qualifications for jury duty other than those prescribed at

duty.[67] But the legislature cannot pass any law as to the qualification of jurors which would prevent the procurement of a fair and impartial jury.[68] A party has a constitutional right to object to being tried by jurors having any disability that would prevent a fair and impartial trial, although the particular disability is not made a disqualification by statute;[69] and a trial before a jury, all or part of whom cannot speak or understand the English language, where the proceedings are conducted in English, is an infringement of this right.[70]

3. Competency For Trial of Cause. While an impartial jury is a constitutional right[71] which the legislature cannot impair,[72] it may, so long as this requirement is not infringed, provide as to the competency of jurors in particular cases.[73] The legislature may provide that a juror shall not be rendered incompetent by reason of having formed an opinion based upon rumor or newspaper reports, provided he states on oath that he believes that he can render an impartial verdict according to the law and the evidence, and the court is satisfied of the truth of his statement,[74] and the same rule has been followed in the absence of statute and held to be no infringement of the right to an impartial jury;[75] but there are cases where by reason of a juror's relation to the case he should be held incompetent, although he states that he can render an impartial verdict.[76] The legislature may also provide that a remote or insignificant pecuniary interest shall not

common law is restricting and impairing the right of trial by jury, and that a statute providing that only taxpayers shall be eligible for jury duty is unconstitutional.

The legislature may add to the qualifications previously required for jury duty (Jenkins *v.* State, 99 Tenn. 569, 42 S. W. 263), even where certain qualifications are prescribed by a constitutional provision (Saginaw *v.* Campau, 102 Mich. 594, 61 N. W. 65).

Ability to read and write English.— It is competent for the legislature to disqualify persons from serving as jurors because of their inability to read and write the English language. State *v.* Welsor, 117 Mo. 570, 21 S. W. 443.

67. Hall *v.* Judge Grand Rapids Super. Ct., 88 Mich. 438, 50 N. W. 289.

68. Gibbs *v.* State, 3 Heisk. (Tenn.) 72, holding an act to be unconstitutional which required jurors to be registered voters, where a large part of the population had been excluded from the right of suffrage as a result of the Civil war, since it was establishing a qualification based upon partisan and political considerations tending to deprive persons of one political party of the right to an impartial jury.

69. McCampbell *v.* State, 9 Tex. App. 124, 35 Am. Rep. 726.

70. Lyles *v.* State, 41 Tex. 172, 19 Am. Rep. 38; McCampbell *v.* State, 9 Tex. App. 124, 35 Am. Rep. 726. See also Nolen *v.* State, 9 Tex. App. 419. But see Territory *v.* Romine, 2 N. M. 114, holding that a trial before a jury of Mexicans who could not understand the English language was not an infringement of the right of trial by jury where all the proceedings were interpreted to them.

71. Reynolds *v.* State, 1 Ga. 222; State *v.* Duncan, 47 La. Ann. 1025, 17 So. 482; State *v.* Defee, 47 La. Ann. 193, 16 So. 734; State *v.* McClear, 11 Nev. 39; Eason *v.* State, 6 Baxt. (Tenn.) 466.

72. State *v.* McClear, 11 Nev. 39; State *v.* Johnson, 11 Nev. 148.

73. Rafe *v.* State, 20 Ga. 60; Greenley *v.* State, 60 Ind. 141.

74. *Colorado.*—Jones *v.* People, 2 Colo. 351.

Georgia.— Rafe *v.* State, 20 Ga. 60.

Illinois.— Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Indiana.— Stout *v.* State, 90 Ind. 1.

Montana.— State *v.* Mott, 29 Mont. 292, 74 Pac. 728; Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147.

New York.— Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

Ohio.— Palmer *v.* State, 42 Ohio St. 596; McHugh *v.* State, 42 Ohio St. 154; Cooper *v.* State, 16 Ohio St. 328.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

United States.— *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 31 L. ed. 80.

See 31 Cent. Dig. tit. "Jury," § 228.

But see Eason *v.* State, 6 Baxt. (Tenn.) 466.

The discretion of the court is not absolute but is a sound legal discretion which may be reviewed. Palmer *v.* State, 42 Ohio St. 596.

The design of these statutes is to obviate the difficulty experienced in practice of obtaining jurors in criminal cases from the better informed class of citizens who are the persons most apt to have read or heard about the case. Cooper *v.* State, 16 Ohio St. 328.

75. U. S. *v.* Schneider, 21 D. C. 381; State *v.* Johnson, Walk. (Miss.) 392; State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831.

76. State *v.* Defee, 47 La. Ann. 193, 16 So. 734.

render a juror incompetent,[77] such as the interest of a resident of a town or county in an action for a fine or penalty under a public statute,[78] or in a civil action to which a city or county is a party.[79] The legislature may also provide that a juror shall be incompetent in a capital case who has conscientious scruples against the infliction of the death penalty,[80] even though under the constitution the jury may in their discretion substitute therefor imprisonment for life.[81]

4. Selection From Vicinage.[82] The common-law right to a jury of the vicinage or of the county or district where an offense was committed is an essential incident of a jury trial.[83] It has accordingly been held that statutes are unconstitutional as violating this right which authorize a change of venue upon the application of the prosecuting attorney without defendant's consent,[84] or which provide for the trial of a defendant by a jury of a county other than that in which the offense is alleged to have been committed,[85] or authorize trials for offenses committed within a certain distance of a county line by a jury of either county;[86] but the legislature may make such provision for the trial of offenses not wholly committed in any one county,[87] or may authorize the summoning of jurors from another county where the court is of the opinion, after making a fair effort in good faith, that an impartial jury cannot be obtained in the county where the prosecution is pending.[88] Jurors should also be selected from the whole body of the county or district and not from any particular part.[89] This, however, means merely from the county or district at large and does not render it necessary that in selecting the jury-list every township within the county shall be represented,[90] or every locality within the district,[91] unless the statute

77. Com. *v.* Brown, 150 Mass. 334, 23 N. E. 98; Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620; Com. *v.* Reed, 1 Gray (Mass.) 472.

78. Com. *v.* Reed, 1 Gray (Mass.) 472; Com. *v.* Worcester, 3 Pick. (Mass.) 462.

79. Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; McClure *v.* Red Wing, 28 Minn. 186, 9 N. W. 767.

80. Greenley *v.* State, 60 Ind. 141.

81. Caldwell *v.* State, 41 Tex. 86.

82. Venue in criminal cases see Criminal Law, 12 Cyc. 229 *et seq.*

83. Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; State *v.* Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

84. Osborn *v.* State, 24 Ark. 629; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; State *v.* Denton, 6 Coldw. (Tenn.) 539; Whaller *v.* State, 24 Wis. 52. *Contra*, Barry *v.* Truax, (N. D. 1904) 99 N. W. 769, 65 L. R. A. 762.

In Louisiana the rule is otherwise, it being held that the constitutional provision guaranteeing a trial by a jury of the parish "unless the venue be changed," leaves the legislature entirely free to declare when and how the venue may be changed, and that a statute authorizing a change of venue on the application of the district attorney alone is constitutional. State *v.* McCoy, 29 La. Ann. 593.

85. Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635.

86. Buckrice *v.* People, 110 Ill. 29; Armstrong *v.* State, 1 Coldw. (Tenn.) 338. *Compare* State *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. St. Rep. 388.

In Iowa the rule is otherwise by virtue of the fact that such was the law at the time the constitution was adopted. State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

87. Com. *v.* Jones, 118 Ky. 889, 82 S. W. 643, 26 Ky. L. Rep. 867; Com. *v.* Parker, 2 Pick. (Mass.) 550.

88. Moseley *v.* Com., 84 S. W. 748, 27 Ky. L. Rep. 214.

89. See *supra*, II, B, 3.

90. *Iowa.*— State *v.* Arthur, 39 Iowa 631.

Kansas.— State *v.* Frazier, 54 Kan. 719, 39 Pac. 819.

Massachusetts.— Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115. See also Com. *v.* Best, 180 Mass. 492, 62 N. E. 748.

Michigan.— People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72; Convers *v.* Grand Rapids, etc., R. Co., 18 Mich. 459.

New Hampshire.— State *v.* Moore, 69 N. H. 102, 40 Atl. 702.

See 31 Cent. Dig. tit. "Jury," § 229.

The failure to return any jury-list from one township of a county is no ground for challenging the array. People *v.* Coffman, 59 Mich. 1, 26 N. W. 207; Thomas *v.* People, 39 Mich. 309.

In condemnation proceedings it is not necessary that the jurors should be taken from the township where the land lies (Convers *v.* Grand Rapids, etc., R. Co., 18 Mich. 459), or that any of them should be taken from that township (Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115); but on the contrary it has been held ground for challenging the array where all of the jurors were taken from such township (Houghton Common Council *v.* Huron Copper Min. Co., 57 Mich. 547, 24 N. W. 820).

91. U. S. *v.* Peuschel, 116 Fed. 642.

expressly so requires;[92] but the court cannot direct that in selecting the jury persons of a certain township or part of the county shall be excluded.[93] The legislature may create judicial districts comprising less than the whole county and provide that the jury be selected from that portion of the county only over which the court has jurisdiction,[94] or that the jurors for city courts shall be summoned from the city and not from the whole body of the county,[95] or may create trial districts including more territory than a single county, provided provision is made by which jurors can be called from the whole body of such district;[96] but the territory over which a court is given jurisdiction must be coextensive with and cannot be extended beyond that from which the jurors to serve in such court are to be selected.[97]

5. EXAMINATION. The right to a fair trial by an impartial jury is not impaired by a statute prescribing what questions may be asked a juror on his *voir dire* to test his impartiality, where the accused is allowed to offer evidence before the judge to show that any of the answers are untrue.[98]

6. CHALLENGES AND OBJECTIONS. The question of challenges and objections to jurors is within the regulation and control of the legislature,[99] subject only to the qualification that the law cannot be such as to defeat or materially impair the right to a jury trial.[1] The legislature may accordingly extend the right of peremptory challenges to civil cases,[2] allow the state peremptory challenges in criminal cases,[3] reduce the number of peremptory challenges previously allowed,[4]

92. Clark *v.* Saline County, 9 Nebr. 516, 4 N. W. 246.

In Nebraska the statute providing that the county commissioners in selecting the list of jurors shall select "as nearly as may be a proportionate number from each precinct in the county" is held to be mandatory (Clark *v.* Saline County, 9 Nebr. 516, 4 N. W. 246); and where unorganized territory is annexed to a county for judicial purposes the commissioners in selecting jurors must draw from such unorganized territory according to its proportion (State *v.* Page, 12 Nebr. 386, 11 N. W. 495; *Ex p.* Crawford, 12 Nebr. 379, 11 N. W. 494).

93. Hartshorne *v.* Patton, 2 Dall. (Pa.) 252, 1 L. ed. 369; Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

94. *Iowa.*— Trimble *v.* State, 2 Greene 404.

Louisiana.— State *v.* Jones, 8 Rob. 573.

New York.— People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684.

Tennessee.— Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500.

Wisconsin.— Shaffel *v.* State, 97 Wis. 377, 72 N. W. 888.

See 31 Cent. Dig. tit. "Jury," §§ 8, 129.

95. Colt *v.* Eves, 12 Conn. 243; State *v.* Kemp, 34 Minn. 61, 24 N. W. 349.

Jurors to supply deficiency in regular panel. — The legislature may provide for summoning jurors to supply a deficiency in the panel from the town or city where the court is held. Gardiner *v.* People, 6 Park. Cr. (N. Y.) 155.

96. Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

97. State *v.* Voris, 10 Ohio S. & C. Pl. Dec. 451, 8 Ohio N. P. 16.

98. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Boon *v.* State, 1 Ga. 618.

99. Com. *v.* Dorsey, 103 Mass. 412; State *v.* Wilson, 48 N. H. 398; Walter *v.* People, 32 N. Y. 147; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

The act of challenging always precedes the trial and is not properly a part of the trial. Warren *v.* Com., 37 Pa. St. 45.

1. State *v.* Wilson, 48 N. H. 398; State *v.* McClear, 11 Nev. 39; Warren *v.* Com., 37 Pa. St. 45.

The right to challenge jurors for cause cannot be denied. Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679.

2. Cregier *v.* Bunton, 2 Strobh. (S. C.) 487.

3. *Georgia.*— Boon *v.* State, 1 Ga. 618; Jones *v.* State, 1 Ga. 610.

Massachusetts.— Com *v.* Dorsey, 103 Mass. 412.

New Hampshire.— State *v.* Wilson, 48 N. H. 398.

New York.— Walter *v.* People, 32 N. Y. 147 [*affirming* 18 Abb. Pr. 147, 6 Park. Cr. 15].

Pennsylvania.— Hartzell *v.* Com., 40 Pa. St. 462; Warren *v.* Com., 37 Pa. St. 45.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

See 31 Cent. Dig. tit. "Jury," § 232.

Even though the exercise of this right exhausts the panel and necessitates the calling and impaneling of talesmen the right of trial by jury is not infringed. Hartzell *v.* Com., 40 Pa. St. 462.

4. Dowling *v.* State, 5 Sm. & M. (Miss.) 664; Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; State *v.* Wyse, 32 S. C. 45, 10 S. E. 612.

The right of peremptory challenge is not an essential element of a jury trial but merely one of the means of securing the element of impartiality. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 53 L. R. A. 437.

regulate the time at which the right of challenging must be exercised,[5] the manner in which jurors shall be presented for challenge,[6] and the manner in which the challenges shall be tried.[7] It may also abolish certain grounds of challenge,[8] but cannot do so where the operation of the law would prevent the procuring of an impartial jury.[9] It is the duty of the court to see that a fair and impartial jury is impaneled,[10] and no right of the parties is infringed by the court discharging an incompetent juror, although not challenged by either party,[11] at any time before evidence is given.[12] In cases where the accused is entitled to be furnished with a list of the panel, the improper sustaining of challenges by the state is an infringement of his right, if the list furnished is thereby exhausted and a resort to talesmen made necessary.[13]

G. Restriction or Invasion of Functions of Jury — 1. In General. The respective functions of the court and jury in the trial of causes is well settled and any usurpation on the part of the court without the consent of the parties of any of the proper and ordinary functions of the jury is an infringement of the constitutional right to that mode of trial,[14] and any legislation authorizing such an infringement is unconstitutional;[15] but an act is not unconstitutional on this ground which authorizes the court to amend a record so as to make it conform to what was tried before the jury and found by the verdict,[16] or which provides for special verdicts,[17] or authorizes the court to require in addition to a general verdict specific answers to special interrogatories, and where a conflict

5. People *v.* Mack, 35 N. Y. App. Div. 114, 54 N. Y. Suppl. 698; Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432; St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

6. State *v.* Clayton, 11 Rich. (S. C.) 581; State *v.* Boatwright, 10 Rich. (S. C.) 407; State *v.* Price, 10 Rich. (S. C.) 351.

7. Weston *v.* People, 6 Hun (N. Y.) 140; Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

8. People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933, holding that a law abolishing challenge for implied bias on the ground that the juror has formed or expressed an unqualified opinion as to the guilt of the accused is not unconstitutional as taking away one of the essential constituents of the right of trial by jury.

9. State *v.* McClear, 11 Nev. 39, holding that an act which denies the right of challenge for actual bias is unconstitutional as depriving the accused of the means of procuring an unprejudiced jury.

10. McCarty *v.* State, 26 Miss. 299; Lewis *v.* State, 9 Sm. & M. (Miss.) 115. See also Gilliam *v.* Brown, 43 Miss. 641.

11. McGuire *v.* State, 37 Miss. 369; Lewis *v.* State, 9 Sm. & M. (Miss.) 115. See also *infra*, XIII, D.

12. McGuire *v.* State, 37 Miss. 369; People *v.* Damon, 13 Wend. (N. Y.) 351.

13. Stratton *v.* People, 5 Colo. 276. See also Atkins *v.* State, 16 Ark. 568.

Right of accused to list of jury panel see Criminal Law, 12 Cyc. 518.

14. Baylis *v.* Travelers' Ins. Co., 113 U. S. 316, 5 S. Ct. 494, 28 L. ed. 989. See also Gansberg *v.* Sagemohl, 67 N. Y. App. Div. 554, 73 N. Y. Suppl. 984.

Entering remittitur.—Where the trial court is of the opinion that the jury has returned a proper verdict upon the issues of fact but has assessed excessive damages, it may, instead of setting aside the verdict, enter a remittitur and if it is paid allow the verdict to stand (Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868); but the court cannot substitute its judgment as to the proper amount for the judgment of the jury and compel a party to submit thereto (Heimlich *v.* Tabor, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669).

Striking out allegations of a substantive defense as sham upon affidavits is an infringement of defendant's right to have such defense submitted to a jury, where the allegations are verified even upon information and belief. Belsena Coal Min. Co. *v.* Liberty Dredging Co., 27 Misc. (N. Y.) 191, 57 N. Y. Suppl. 739 [*affirming* 55 N. Y. Suppl. 747].

15. Haines' Appeal, 73 Pa. St. 169. See also *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649.

In condemnation proceedings under a constitution providing that the damages shall be assessed by a jury or by commissioners appointed by a court of record, a statute authorizing the court to increase or decrease the amount of the award is unconstitutional. Rochester Water Works Co. *v.* Wood, 60 Barb. (N. Y.) 137. *Compare* St. Louis *v.* Lawton, 189 Mo. 474, 88 S. W. 80.

A statute prescribing a minimum penalty to be recovered by the party aggrieved, against a railroad for overcharging for transportation, is not unconstitutional as invading the province of the jury, since such penalty is in the nature of a punishment, rather than compensation for the damages actually sustained. Cincinnati, etc., R. Co. *v.* Cook, 37 Ohio St. 265.

16. Parks *v.* Boynton, 98 Pa. St. 370.

17. Udell *v.* Citizens' St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336.

is found between the two to render such judgment as the answers to the special interrogatories require.[18]

2. Weight and Sufficiency of Evidence.[19] The legislature may, without infringing upon the constitutional right of trial by jury, regulate or alter the rules of evidence,[20] prescribe the effect of evidence,[21] and the competency of witnesses,[22] and legislation to this effect will be sustained so long as it is impartial and uniform and does not prevent a party from exhibiting his rights.[23] The legislature may therefore provide that proof of certain facts shall be sufficient to establish a *prima facie* case in either criminal or civil cases,[24] for a *prima facie* case does not overcome the presumption of innocence or change the burden of proof,[25] or require the jury to convict, unless they are satisfied from all the evidence, of the guilt of the accused beyond a reasonable doubt.[26] This rule, however, is subject to the limitation that the fact relied on as establishing the *prima facie* case must have some fair relation to or connection with the main fact, and that the accused must have an opportunity to make his defense and submit the whole case to the

18. Walker *v.* New Mexico, etc., R. Co., 165 U. S. 593, 17 S. Ct. 421, 41 L. ed. 837.

19. **Rules of evidence not a vested right** see Constitutional Law, 8 Cyc. 924 *et seq.*

Rules of evidence as relating to due process of law in criminal cases see Constitutional Law, 8 Cyc. 1090.

20. *Maine.*— State *v.* Hurley, 54 Me. 562.

Massachusetts.— Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381.

Missouri.— State *v.* Buck, 120 Mo. 479, 25 S. W. 573.

New York.— Auburn Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705.

Tennessee.— State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

Texas.— Floeck *v.* State, 34 Tex. Cr. 314, 30 S. W. 794.

See 31 Cent. Dig. tit. "Jury," § 234.

21. Com. *v.* Williams, 6 Gray (Mass.) 1; Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481; Tilley *v.* Savannah, etc., R. Co., 5 Fed. 641, 4 Woods 427.

22. Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744. See also Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381.

The legislature may remove a disability which excluded a person as a witness at the time of the adoption of the constitution. Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

23. State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656. See also State *v.* Buck, 120 Mo. 479, 25 S. W. 573; Auburn Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705.

24. *Illinois.*— Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176.

Maine.— State *v.* Hurley, 54 Me. 562.

Massachusetts.— Com. *v.* Williams, 6 Gray 1.

Missouri.— State *v.* Buck, 120 Mo. 479, 25 S. W. 573; State *v.* Kingsley, 108 Mo. 135, 18 S. W. 924.

Nebraska.— Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

New York.— People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; Auburn Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705 [in effect *overruling* People *v.* Lyon, 27 Hun 180].

Rhode Island.— State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note.

Tennessee.— State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

Texas.— Floeck *v.* State, 34 Tex. Cr. 314, 30 S. W. 794.

See 31 Cent Dig. tit. "Jury," § 234.

Report of referee or auditor as prima facie evidence.— The cases are conflicting as to whether statutes making the report of a referee or auditor *prima facie* evidence of the matters contained therein are constitutional, it having been held in some cases that they were (Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381; Perkins *v.* Scott, 57 N. H. 55); and in others that they were not (King *v.* Hopkins, 57 N. H. 334; Francis *v.* Baker, 11 R. I. 103, 23 Am. Rep. 424; Plimpton *v.* Somerset, 33 Vt. 283); it being argued in support of the latter view that the report being in the nature of a judgment is calculated to unduly influence the jury, and furthermore that it deprives the party against whom the report is made of the benefit of having the jury hear the evidence and observe the conduct of the witnesses upon whose testimony the report was based (Plimpton *v.* Somerset, *supra*. See also Francis *v.* Baker, *supra*).

25. Com. *v.* Williams, 6 Gray (Mass.) 1; State *v.* Buck, 120 Mo. 479, 25 S. W. 573; People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; Auburn Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

26. Com. *v.* Williams, 6 Gray (Mass.) 1; People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; Floeck *v.* State, 34 Tex. Cr. 314, 30 S. W. 794.

The effect of the prima facie case is merely to call upon the accused for some explanation. If none be given the jury may still refuse to convict, but if they do convict the verdict will be upheld as founded upon sufficient evidence. People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668.

jury;[27] and it is not competent for the legislature to create presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime of which defendant is accused.[28] The court cannot, without the consent of the parties, substitute itself for the jury and pass upon the effect of evidence and find the facts involved inthe issue;[29] but where there is a species of evidence which by the known and established rules of law is conclusive, it is the duty of the court to pronounce it so.[30] Since an ultimate right of trial by jury remains it is no infringement of such right for the court to set aside a verdict as against the weight of evidence.[31] Statutes have also been held to be constitutional which authorize an appellate court to review cases upon the facts and to award new trials upon the ground that the verdict is excessive or against the weight of evidence,[32] or to reverse an order of the trial court denying a motion for a new trial based on such grounds,[33] or to suggest to an appellee the amount to which it deems a judgment to be excessive where it is not reversible on other grounds and to affirm the judgment upon the filing of a remittitur;[34] and in Illinois an appellate court may review judgments upon the facts and reverse and enter final judgment without remanding,[35] but this practice was authorized in that jurisdiction prior to the adoption of the constitution.[36]

3. Nonsuit, Demurrer to Evidence, or Directing Verdict.[37] Where the evidence given on the trial with all the inferences which the jury might reasonably draw therefrom is insufficient to support a verdict for plaintiff, so that such a verdict if found would be set aside, it is no infringement of the right to trial by jury for the court to order a compulsory nonsuit,[38] or sustain a demurrer to the evidence,[39] or to direct a verdict;[40] and statutes authorizing such practices are consti-

27. People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668. See also State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note; Floeck *v.* State, 34 Tex. Cr. 314, 30 S. W. 794.

28. State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26.

29. Gansberg *v.* Sagemohl, 67 N. Y. App. Div. 554, 73 N. Y. Suppl. 984; Hanson *v.* Carlblom, (N. D. 1904) 100 N. W. 1084; Baylis *v.* Travelers' Ins. Co., 113 U. S. 316, 5 S. Ct. 494, 28 L. ed. 989.

30. Baxter *v.* New England Mar. Ins. Co., 7 Mass. 275.

The judgment of a foreign court of admiralty condemning a vessel for a breach of blockade is conclusive evidence of the breach, and a party has no right in an action on an insurance policy to introduce parol evidence to the contrary. Baxter *v.* New England Mar. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125.

31. Ingraham *v.* Weidler, 139 Cal. 588, 73 Pac. 415; Serwer *v.* Serwer, 71 N. Y. App. Div. 415, 75 N. Y. Suppl. 842.

32. Hintz *v.* Michigan Cent. R. Co., 132 Mich. 305, 93 N. W. 634; Nugent *v.* Philadelphia Traction Co., 183 Pa. St. 142, 38 Atl. 587; Smith *v.* Times Pub. Co., 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819; Gunn *v.* Union R. Co., 23 R. I. 289, 49 Atl. 999.

33. Hintz *v.* Michigan Cent. R. Co., 132 Mich. 305, 93 N. W. 634.

34. Texas, etc., R. Co. *v.* Syfan, 91 Tex. 562, 44 S. W. 1064.

35. Borg *v* Chicago, etc., R. Co., 162 Ill. 348, 44 N. E. 722; Spring Valley Coal Co. *v.* Spring Valley, 72 Ill. App. 629. See also Neer *v.* Illinois Cent. R. Co., 151 Ill. 141, 37 N. E. 700.

36. Borg *v.* Chicago, etc., R. Co., 162 Ill. 348, 44 N. E. 722.

37. Practice in general see Trial.

38. *California.*— Ringgold *v.* Haven, 1 Cal. 108.

Connecticut.— Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468.

Maine.— Perley *v.* Little, 3 Me. 97.

New York.— Stuart *v.* Simpson, 1 Wend. 376.

Pennsylvania.—Munn *v.* Pittsburgh, 40 Pa. St. 364.

See 31 Cent. Dig. tit. "Jury," § 235.

A contrary rule prevails in the United States courts, it being held that in these courts the court cannot in any case direct a nonsuit against plaintiff's consent (Schuchardt *v.* Allens, 1 Wall. (U. S.) 359, 17 L. ed. 642; Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424; Silsby *v.* Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Crane *v.* Morris, 6 Pet. (U. S.) 598, 8 L. ed. 514; De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227; Elmore *v.* Grymes, 1 Pet. (U. S.) 469, 7 L. ed. 224); but the practice of directing a verdict in these courts is well established (see cases cited *infra*, note 40).

39. Hopkins *v.* Nashville, etc., R. Co., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354. See also Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

Demurrer to evidence in criminal cases see Criminal Law, 12 Cyc. 594.

40. Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; Morris *v.* Louisville, etc., R. Co., 61 S. W. 41, 22 Ky. L. Rep. 1593; Henry *v.* Thomas, (Tex. Civ. App. 1903) 74 S. W. 599; Henry *v.* McNew, 28 Tex. Civ. App. 288,

tutional;[41] and if the action is of a purely equitable character, there being no constitutional right to a jury trial in such cases, the court may direct a verdict, although the evidence is conflicting.[42] In a criminal case, however, where defendant pleads not guilty and demands a jury he has an absolute right to a jury trial, and the court cannot direct a verdict of conviction no matter what the state of the evidence may be.[43]

H. Effect of Provision For Other Remedy — 1. In General. An act is not unconstitutional which authorizes a trial without a jury or before a jury of less than twelve men, where it merely provides a choice of remedies which neither party is compelled to resort to.[44]

2. Appeal to Court Where Jury May Be Had — a. In Civil Cases. The constitutional guarantee of a trial by jury does not mean that a party is always entitled to a jury trial in the first instance, but the right is secured if there is a right of appeal without any unreasonable restrictions to a court in which a jury trial can be had,[45] and where such right of appeal is secured a statute is not unconstitutional which provides for a trial in the first instance without a jury or before a jury of less than twelve.[46] Accordingly a statute is not unconstitutional which increases the jurisdiction of a justice of the peace so as to include an amount not cognizable by the justice at the time of the adoption of the constitution, provided

69 S. W. 213; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003; Bowditch *v* Boston, 101 U. S. 16, 25 L. ed. 980; Herbert *v.* Butler, 97 U. S. 319, 24 L. ed. 958. See also Baylis *v.* Travelers' Ins. Co., 113 U. S. 316, 5 S. Ct. 494, 28 L. ed. 989.

This practice has largely superseded that of demurring to the evidence and answers the same purpose and should be tested by the same rules. Pleasants *v.* Fant, 22 Wall. (U. S.) 116, 22 L. ed. 780.

A trial by the court is not error in a case where it would have been proper to direct a verdict. Garretson *v.* Ferrall, 92 Iowa 728, 61 N. W. 251.

Judgment notwithstanding verdict.— A statute providing that where a party was entitled on the trial to have the verdict directed in his favor and duly moved for the same, the court may on a motion for a new trial or on an appeal in such motion, order judgment in his favor notwithstanding that it is not unconstitutional as infringing the right of trial by jury. Kernan *v.* St. Paul City R. Co., 64 Minn. 312, 67 N. W. 71.

A court cannot direct a verdict for plaintiff where defendant pleads the general issue which puts upon plaintiff the necessity of establishing the facts going to make up his cause of action which it is the province of the jury and not of the court to find. Greenwich Ins. Co. *v.* Raab, 11 Ill. App. 636.

41. Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219.

42. Yancey *v.* People's Bank, 101 Mo. App. 605, 74 S. W. 117; Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

43. See Criminal Law, 12 Cyc. 595.

44. *Alabama.*— Lewis *v.* State, 123 Ala. 84, 26 So. 516.

New Jersey.— Berry *v.* Chamberlain, 53 N. J. L. 463, 23 Atl. 115.

New York.— People *v.* Justices Ct. Spec. Sess., 74 N. Y. 406; Baxter *v.* Putney, 37 How. Pr. 140.

Ohio.— Dillingham *v.* State, 5 Ohio St. 280; Daily *v.* State, 4 Ohio St. 57.

Pennsylvania.— Lavery *v.* Com., 101 Pa. St. 560.

See 31 Cent. Dig. tit. "Jury," § 236.

Choice of remedies as a waiver of the right to a jury trial see *supra*, IV, C, 9.

45. Tharp *v.* Witham, 65 Iowa 566, 22 N. W. 677; Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264; Weaver *v.* Sturtevant, 12 R. I. 537.

46. *Georgia.*—Hobbs *v.* Dougherty County, 98 Ga. 574, 25 S. E. 579; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Kansas.— Stahl *v.* Lee, (1905) 80 Pac. 983.

Maryland.— Steuart *v.* Baltimore, 7 Md. 500.

Massachusetts.— Hapgood *v.* Doherty, 8 Gray 373.

Missouri.— State *v.* Allen, 45 Mo. App. 551.

New Hampshire.— Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194.

Ohio.— Norton *v.* McLeary, 8 Ohio St. 205.

Pennsylvania.— Haines *v.* Levin, 51 Pa. St. 412; Biddle *v.* Com., 13 Serg. & R. 405; Kinley *v.* McFillen, 6 Phila. 35.

Rhode Island.— Weaver *v.* Sturtevant, 12 R. I. 537.

South Carolina.— Faust *v.* Bailey, 5 Rich. 107.

Tennessee.— Morford *v.* Barnes, 8 Yerg. 444.

United States.— Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873.

See 31 Cent. Dig. tit. "Jury," §§ 236–238.

One trial by jury is all that it guaranteed by the constitution and that is preserved by allowing an appeal to court where a jury trial may be had. Tharp *v.* Witham, 65 Iowa 566, 22 N. W. 677.

such an appeal is allowed.[47] A statute, however, is unconstitutional as impairing the right to trial by jury if the right of appeal is unreasonably restricted,[48] or if the only appeal allowed is directly to an appellate court not having a jury,[49] or to a court where the constitutional number of twelve jurors cannot be had.[50]

b. In Condemnation Proceedings. An act is not unconstitutional which provides for an assessment of damages in condemnation proceedings in the first instance by commissioners, viewers, or appraisers, where a right of appeal is secured to a court where a jury trial may be had;[51] and this rule applies even where a jury trial in such proceedings is expressly guaranteed by the constitution,[52] but the appeal allowed must be to a court where the jury of twelve can be had.[53]

c. In Criminal Cases. The constitutional right to a jury trial does not require that in every case of a criminal character the trial must be in the first instance by a constitutional jury;[54] and the legislature may provide for the trial of certain offenses before justices, police courts, and other inferior tribunals, provided an appeal is allowed without any unreasonable restrictions to a court in which a trial by a constitutional jury may be had.[55] This rule, however, has been held not to apply to trials for felonies and the higher degrees of crime where the punishment

An act providing for a compulsory reference in certain cases, but providing that if either party is dissatisfied he may afterward have a hearing before the jury, is not unconstitutional. Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194.

47. *Connecticut.*— Beers *v.* Beers, 4 Conn. 535, 10 Am. Dec. 186.

North Carolina.— Wilson *v.* Simonton, 8 N. C. 482; Richmond *v.* Boman, 6 N. C. 46; Keddie *v.* Moore, 6 N. C. 41, 5 Am. Dec. 518.

Ohio.— Norton *v.* McLeary, 8 Ohio St. 205.

Pennsylvania.— Emerick *v.* Harris, 1 Binn. 416.

Tennessee.— Morford *v.* Barnes, 8 Yerg. 444.

United States.— Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873.

See 31 Cent. Dig. tit. "Jury," § 238.

48. See *supra*, V, B, 1, f; V, B, 2, c.

49. Postal Tel. Cable Co. *v.* Alabama Great Southern R. Co., 92 Ala. 331, 9 So. 555; Collins *v.* State, 88 Ala. 212, 7 So. 260. See also Alabama Midland R. Co. *v.* Newton, 94 Ala. 443, 10 So. 89.

50. Lamb *v.* Lane, 4 Ohio St. 167.

51. *Indiana.*— Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53.

Iowa.— Tharp *v.* Witham, 65 Iowa 566, 22 N. W. 677.

Maryland.— Steuart *v.* Baltimore, 7 Md. 500.

Mississippi.— New Orleans, etc., R. Co. *v.* Drake, 60 Miss. 621.

Missouri.— Rothan *v.* St. Louis, etc., R. Co., 113 Mo. 132, 20 S. W. 892.

New York.— People *v.* Haverstraw, 80 Hun 385, 30 N. Y. Suppl. 325.

Ohio.— Reckner *v.* Warner, 22 Ohio St. 275.

South Dakota.— Dell Rapids *v.* Irving, 7 S. D. 310, 64 N. W. 149, 29 L. R. A. 861.

See 31 Cent. Dig. tit. "Jury," § 239.

In New York where the constitution provides that compensation shall be ascertained by a jury or by not less than three commissioners appointed by a court of record, an act is not unconstitutional which provides for an assessment in the first instance by a jury of six selected by the trustees of a village, where an appeal is allowed to a county court where an assessment can be had in the manner provided for by the constitution. People *v.* Haverstraw, 80 Hun 385, 30 N. Y. Suppl. 325.

Right to separate jury trials.— Under a statute securing by way of an appeal from the decision of the commissioners "to every such owner . . . the right . . . to have decided by a jury trial whether any damage has been caused, or any benefit has accrued to them," each owner has the right to a separate jury trial if he demands it and it is error to consolidate the appeals of several owners over their objection. Friedenwald *v.* Baltimore, 74 Md. 116, 21 Atl. 555.

52. Rothan *v.* St. Louis, etc., R. Co., 113 Mo. 132, 20 S. W. 892; Dell Rapids *v.* Irving, 7 S. D. 310, 64 N. W. 149, 29 L. R. A. 861. *Compare In re* Smith, 9 Wash. 85, 37 Pac. 311.

A failure to appeal is a waiver of the right to a trial by jury. Tharp *v.* Witham, 65 Iowa 566, 22 N. W. 677.

53. Postal Tel. Cable Co. *v.* Alabama Great Southern R. Co., 92 Ala. 331, 9 So. 555; Lamb *v.* Lane, 4 Ohio St. 167. See also Alabama Midland R. Co. *v.* Newton, 94 Ala. 443, 10 So. 89.

54. State *v.* Beneke, 9 Iowa 203.

55. *Connecticut.*— State *v.* Brennan, 25 Conn. 278.

Iowa.— State *v.* Beneke, 9 Iowa 203.

Kansas.—Emporia *v.* Volmer, 12 Kan. 622.

Massachusetts.— Com. *v.* Bowden, Thach. Cr. Cas. 9. See also Jones *v.* Robbins, 8 Gray 329.

Missouri.— Marshall *v.* Standard, 24 Mo. App. 192.

North Carolina.— State *v.* Lytle, 138 N. C. 738, 51 S. E. 66; State *v.* Crook, 91 N. C. 536.

Oklahoma.— Collier *v.* Territory, 2 Okla. 444, 37 Pac. 819.

is capital or infamous.[56] To secure the right of trial by jury the appeal allowed must be to the court in which a trial by jury can be had.[57]

VI. Qualifications of Jurors and Exemptions.

A. Qualifications — 1. In General. In most jurisdictions the qualifications of jurors are expressly prescribed by statute,[58] and a statute prescribing the qualifications of jurors may be made applicable to cases pending at the time of its enactment.[59] Where a statute specifies certain qualifications it necessarily excludes all persons who do not possess the qualifications specified;[60] but a statute providing that certain classes of persons shall not be capable of serving on juries does not mean that all persons except such as are expressly excluded are qualified to serve.[61] In the absence of statute a person is not disqualified as a juror because he is the holder of public office,[62] or because of race or color.[63] Women were not at common law qualified to serve as jurors,[64] except in the case of writs de ventre inspiciendo.[65] It will be presumed that persons selected as jurors are qualified, and the burden of proving the existence of a disqualification is upon the party alleging it.[66]

2. Physical Capacity. A person is not qualified to sit on a jury who is physi-

Rhode Island.— *In re* McSoley, 15 R. I. 608, 10 Atl. 659; Littlefield *v.* Peckham, 1 R. I. 500.

South Carolina.— State *v.* Williams, 40 S. C. 373, 19 S. E. 5.

Virginia.— Brown *v.* Epps, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676 [*overruling* Miller *v.* Com., 88 Va. 618, 14 S. E. 161, 15 L. R. A. 441].

West Virginia.— Beasley *v.* Beckley, 28 W. Va. 81; Jelly *v.* Dils, 27 W. Va. 267; Moundsville *v.* Fountain, 27 W. Va. 182.

See 31 Cent. Dig. tit. "Jury," § 241.

In North Carolina the present constitution provides that the legislature may provide other means than a trial by jury for the trial of petty misdemeanors with the right of appeal (State *v.* Whittaker, 114 N. C. 818, 19 S. E. 376; State *v.* Powell, 97 N. C. 417, 1 S. E. 482; State *v.* Crook, 91 N. C. 536); but the rule was otherwise under the former constitution (State *v.* Moss, 47 N. C. 66).

A failure to appeal is a waiver of the right to a jury trial. Com. *v.* Bowden, Thach. Cr. Cas. (Mass.) 9.

A statute authorizing a magistrate to enter a judgment for costs against complainant on determining that a criminal complaint is wilful, malicious, and without probable cause and allowing an appeal from such judgment is not unconstitutional. State *v.* Smith, 65 Wis. 93, 26 N. W. 258.

56. Danner *v.* State, 89 Md. 220, 42 Atl. 965; Jones *v.* Robbins, 8 Gray (Mass.) 329; Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223.

Under the United States constitution, which provides that the trial of all crimes except impeachment shall be by jury, it is held that all crimes which were triable by jury at common law or prior to the constitution must be so tried in the first instance, and that an act providing otherwise is unconstitutional, even though an appeal be provided for to a court in which a constitutional jury may be had. Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223; *In re* Dana, 6 Fed. Cas. No. 3,554, 7 Ben. 1.

57. Creston *v.* Nye, 74 Iowa 369, 37 N. W. 777.

58. See the statutes of the several states; and the following cases:

Illinois.— Guykowski *v.* People, 2 Ill. 476.

Indiana.— McDonel *v.* State, 90 Ind. 320.

Kentucky.— Beatty *v.* Com., 91 Ky. 313, 15 S. W. 856, 12 Ky. L. Rep. 898.

Louisiana.— State *v.* Nicholas, 109 La. 84, 33 So. 92; State *v.* Tazwell, 30 La. Ann. 884.

Missouri.— State *v.* France, 76 Mo. 681.

Nebraska.— Russell *v.* State, 62 Nebr. 512, 87 N. W. 344.

Rhode Island.— State *v.* Davis, 12 R. I. 492, 34 Am. Rep. 704.

Utah.— Conway *v.* Clinton, 1 Utah 215.

See 31 Cent. Dig. tit. "Jury," § 244.

Where a statute provides that certain persons shall be "liable" to serve as jurors, the word "liable" is equivalent to "qualified" and the statute defines the qualifications as well as the liability to serve. State *v.* Davis, 12 R. I. 492, 34 Am. Rep. 704.

Where a qualification is prescribed by a constitutional provision, it cannot be done away with by the legislature. Moses *v.* State, 60 Ga. 138.

59. Bailey *v.* State, 20 Ga. 742; Reid *v.* State, 20 Ga. 681.

60. Guykowski *v.* People, 2 Ill. 476.

61. Byrd *v.* State, 1 How. (Miss.) 163.

62. Ellis *v.* State, 25 Fla. 702, 6 So. 768.

County commissioners are expressly disqualified by the Florida statute of 1877. Ladd *v.* State, 17 Fla. 215.

63. Osborn *v.* Com., 20 S. W. 223, 14 Ky. L. Rep. 246; Proffatt Jury Tr. § 116.

64. 3 Blackstone Comm. 362. See also Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453 [*overruling* Rosencrantz *v.* Territory, 2 Wash. Terr. 267, 3 Pac. 305].

65. 3 Blackstone Comm. 362.

66. State *v.* Weaver, 58 S. C. 106, 36 S. E.

cally unfit properly to discharge the duties of a juror,[67] as where his eyesight is so defective that he cannot see the expression on the faces of the witnesses and observe their deportment and demeanor while testifying,[68] or where his hearing is so defective that he cannot fully understand the proceedings.[69]

3. Age. In some jurisdictions a juror is disqualified if under twenty-one,[70] or over a certain age;[71] but being over the age at which the juror may claim an exemption is not a disqualification if this is under the age prescribed as a disqualification by the statute.[72]

4. Intelligence and Education. In the absence of constitutional or statutory provision a juror is not necessarily disqualified merely because he is ignorant,[73] or lacking in education,[74] or unfamiliar with the meaning of legal terms and expressions;[75] and while it is in some states provided that jurors shall be "intelligent" persons,[76] the statutes do not attempt to prescribe the requisite degree of intelligence,[77] which must necessarily vary in different cases according to the nature and difficulty of the matters to be considered,[78] and is always to be determined by the court in the exercise of a sound discretion.[79] Inability to read and write is not a disqualification to act as a juror,[80]

499; San Antonio, etc., R. Co. *v.* Lester, (Tex. Civ. App. 1904) 84 S. W. 401.

67. State *v.* Hatfield, (W. Va. 1900) 37 S. E. 626, holding that a person addicted to the use of morphine is not qualified to serve as a juror.

68. Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

69. Atlas Min. Co. *v.* Johnston, 23 Mich. 36; Mitchell *v.* State, (Tex. Cr. App. 1895) 33 S. W. 367.

Where the judge personally examines the juror as to his hearing capacity by asking him questions from the bench and is satisfied as to his competency, a judgment will not be reversed because of the refusal of the court to set the juror aside. Sullivan *v.* State, (Ga. 1897) 29 S. E. 16.

70. *Alabama.*— Williams *v.* State, 67 Ala. 183.

Massachusetts.— Wassum *v.* Feeney, 121 Mass. 93, 23 Am. Rep. 258.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

New Jersey.— Sutton *v.* Petty, 5 N. J. L. 594.

United States.— Brewer *v.* Jacobs, 22 Fed. 217.

See 31 Cent. Dig. tit. "Jury," § 246.

71. *Alabama.*— Williams *v.* State, 67 Ala. 183.

District of Columbia.— Funk *v.* U. S., 16 App. Cas. 478.

Illinois.— North Chicago Electric R. Co. *v.* Moosman, 82 Ill. App. 172.

Mississippi.— Williams *v.* State, 37 Miss. 407.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

New Jersey.— Sutton *v.* Petty, 5 N. J. L. 594.

New Mexico.— U. S. *v.* Folsom, 7 N. M. 532, 38 Pac. 70.

See 31 Cent. Dig. tit. "Jury," § 246.

Where the age limit is attained during the trial the juror is not disqualified, but if he was qualified when sworn his competency continues throughout the trial. Funk *v.* U. S., 16 App. Cas. (D. C.) 478.

72. Williams *v.* State, 67 Ala. 183.

Age as a ground of exemption see *infra*, VI, B, 1.

73. State *v.* Lewis, 28 La. Ann. 84.

In Texas the statute provides that it shall be a ground of challenge that a juror has such mental defect as renders him unfit for jury services, the term "mental defect" meaning either such imbecility or gross ignorance as practically disqualifies a person from performing his duties as a juror. Caldwell *v.* State, 41 Tex. 86.

74. American L. Ins. Co. *v.* Mahone, 56 Miss. 180.

75. San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1900) 59 S. W. 607.

76. Moses *v.* State, 60 Ga. 138; State *v.* Chase, 37 La. Ann. 165; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005; Com. *v.* Winnemore, 2 Brewst. (Pa.) 378.

77. State *v.* Casey, 44 La. Ann. 969, 11 So. 583; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005; Com. *v.* Winnemore, 2 Brewst. (Pa.) 378.

78. People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

79. State *v.* Casey, 44 La. Ann. 969, 11 So. 583; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

The inability of a juror to state his age does not show such a lack of intelligence as to disqualify him. Com. *v.* Winnemore, 2 Brewst. (Pa.) 378 [*affirming* 1 Brewst. 356].

Defendant in a criminal case cannot complain of the action of the court in discharging a juror on the ground of want of understanding or intelligence. State *v.* Rountree, 32 La. Ann. 1144.

80. State *v.* Casey, 44 La. Ann. 969, 11 So. 583; American L. Ins. Co. *v.* Mahone, 56 Miss. 180; Com. *v.* Winnemore, 2 Brewst. (Pa.) 378.

It is not necessary that the juror should be a scholar, and it is sufficient if he is con-

except where it has been expressly made so by a constitutional or statutory provision as has been done in several jurisdictions..[81]

5. KNOWLEDGE OF LANGUAGE. While in some states there are statutes making ignorance of the English language a disqualification for jury duty,[82] it is held in most jurisdictions to be a disqualification whether expressly so provided or not,[83] and the court may of its own motion reject a juror for this cause, although the juror was not objected to by the parties.[84] Whether a juror has a sufficient knowledge of English to render him competent is a question for the determination of the trial judge.[85] In Canada where the French language as well as English is officially recognized, ignorance of English is not a disqualification or ground of challenge.[86]

6. CONVICTION OF OR PROSECUTION FOR CRIME.[87] At common law a conviction of a felony was a disqualification to serve as a juror;[88] and under the statutes in some

versant with the English language and can understand the testimony of the witnesses and the arguments of counsel. State *v.* Casey, 44 La. Ann. 969, 11 So. 583.

81. Mabry *v.* State, 71 Miss. 716, 14 So. 267; Parman *v.* Kansas City, (Mo. App. 1904) 78 S. W. 1046; Campbell *v.* State, 30 Tex. App. 645, 18 S. W. 409.

In Florida the act of 1877 provides that when the nature of any case requires that a knowledge of reading, writing, or arithmetic is necessary to enable a juror to understand the evidence to be offered on the trial, it shall be a cause of challenge if he does not possess such qualification, which fact is to be determined by the trial judge. Jefferson County *v.* Lewis, 20 Fla. 980.

In Texas the criminal code provides that it shall be a ground of challenge that a juror cannot read or write unless it shall appear to the court that the requisite number of jurors who can read and write are not to be found in the county (Garcia *v.* State, 12 Tex. App. 335; Nolen *v.* State, 9 Tex. App. 419); and the court cannot dispense with the reading and writing test on the ground that the county is sparsely populated (Garcia *v.* State, *supra*).

Ability to write his name is not sufficient to satisfy the requirements of the statute. Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252.

Ability to read and write English.— The Texas statute providing that jurors must be able to "read and write" is construed as meaning able to read and write the English language. Wright *v.* State, 12 Tex. App. 163.

Ability to read the constitution.— Miss. Const. (1890) § 264, requires that a juror must be able to read and write and also be a qualified elector, and since under section 244, in order to be a qualified elector, he must be able to read any section of the constitution, the words "able to read" in section 264 are construed as meaning ability to read the constitution. Mabry *v.* State, 71 Miss. 716, 14 So. 267.

The fact that a juror signed the verdict by making his mark is not sufficient to establish that he was unable to read and write. Parman *v.* Kansas City, 105 Mo. App. 691, 78 S. W. 1046.

82. See People *v.* Arceo, 32 Cal. 40; State *v.* Williams, 34 La. Ann. 959.

83. State *v.* Marshall, 8 Ala. 302; State *v.* Push, 23 La. Ann. 14; Fisher *v.* Philadelphia, 4 Brewst. (Pa.) 395; Lyles *v.* State, 41 Tex. 172, 19 Am. Rep. 38; Etheridge *v.* State, 8 Tex. App. 133. *Contra*, Gay *v.* Ardry, 14 La. 288.

In criminal cases a juror who cannot understand the language in which the trial is conducted is necessarily disqualified, since he could never be satisfied beyond a reasonable doubt of the guilt of the accused. State *v.* Push, 23 La. Ann. 14.

In Colorado the contrary has been held on the ground that in many counties of that state it would be practically impossible to obtain an English-speaking jury, and that the right to a fair and impartial trial can be preserved by the use of an interpreter (Trinidad *v.* Simpson, 5 Colo. 65); and since the above decision it has been expressly provided by statute that a juror otherwise qualified shall not be subject to challenge because he speaks the Spanish or Mexican language and is not able to understand English (*In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790).

84. State *v.* Marshall, 8 Ala. 302; Atlas Min. Co. *v.* Johnston, 23 Mich. 36; Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

Rejection on court's own motion see *infra*, XIII, D.

85. People *v.* Davis, (Cal. 1894) 36 Pac. 96; State *v.* Tazwell, 30 La. Ann. 884; People *v.* Spiegel, 75 Hun (N. Y.) 161, 26 N. Y. Suppl. 1041.

It is not necessary that the juror should be a scholar or understand the definition of all the words and legal terms used in the trial, but it is sufficient if he has such knowledge of the English language as to understand in substance the argument of counsel and the testimony of the witnesses. State *v.* Ford, 42 La. Ann. 255, 7 So. 696; State *v.* Dent, 41 La. Ann. 1082, 7 So. 694; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

86. Reg. *v.* Earl, 10 Manitoba 303.

87. **Privilege of jurors on examination** see *infra*, XIII, G, 7, b.

88. Com. *v.* Wong Chung, 186 Mass. 231,

jurisdictions a juror is disqualified if he has been convicted of certain crimes,[89] is at the time under indictment,[90] or has within a certain time been indicted for an offense of the same character as that charged against the accused.[91] The disqualification applies, although the conviction was prior to the enactment of the provisions making it a disqualification;[92] but unless the statute so provides a conviction in one state does not disqualify a person to serve as a juror in another.[93] An absolute pardon removes the disqualification to act as a juror imposed by statutes providing that persons convicted of certain crimes shall be disqualified.[94]

7. Bigamist or Polygamist. Under the United States statutes a bigamist or polygamist is disqualified as a juror and subject to challenge in any prosecution for bigamy or polygamy,[95] and under a statute requiring jurors to be electors and providing that electors must not be members of any organization which teaches its adherents to commit the crimes of bigamy or polygamy, a member of the Mormon church cannot be a juror;[96] but a polygamist is not disqualified as a juror under a statute providing that no polygamist shall be entitled to vote or hold any office or place of public trust, honor, or emolument.[97]

8. Disloyalty. An avowed present disloyalty to the government is a disqualification to act as a juror;[98] and it is provided by federal statute[99] that having participated in or adhered to any insurrection against the United States shall be a disqualification and ground of challenge.[1]

9. Citizenship. Alienage is a disqualification to act as a juror,[2] and was such

71 N. E. 292; Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324.

89. Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324; Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70; Easterwood *v.* State, 34 Tex. Cr. 400, 31 S. W. 294.

In Massachusetts if a person whose name has been put in the jury-box is convicted of a scandalous crime his name shall be withdrawn therefrom (Com. *v.* Wong Chung, 186 Mass. 231, 71 N. E. 292); but the fact that a person was at some previous time convicted of crime does not prevent the board of commissioners from placing his name on the jury-list if they consider him to be of good moral character (Com. *v.* Wong Chung, *supra*); but where it appears that a person returned as a juror has been frequently and also recently convicted it is proper for the court to reject him on the ground that he is not of good moral character (Manning *v.* Boston El. R. Co., 187 Mass. 496, 73 N. E. 645).

Proof of conviction must be made by a production of the record. Goad *v.* State, 106 Tenn. 175, 61 S. W. 79.

90. Ellis *v.* State, 25 Fla. 702, 6 So. 768; State *v.* Tazwell, 30 La. Ann. 884.

91. Charleston *v.* State, 133 Ala. 118, 32 So. 259; Crockett *v.* State, 38 Ala. 387.

An assault with intent to commit murder is "an offense of the same character" as murder within the meaning of the statute. Charleston *v.* State, 133 Ala. 118, 32 So. 259.

92. Garrett *v.* Weinberg, (S. C. 1898) 31 S. E. 341.

93. Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324.

94. Easterwood *v.* State, 34 Tex. Cr. 400, 31 S. W. 294; U. S. *v.* Bassett, 5 Utah 131, 13 Pac. 237; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

95. See People *v.* Hopt, 3 Utah 396, 4 Pac. 250.

96. Territory *v.* Evans, 2 Ida. (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646.

97. People *v.* Hopt, 3 Utah 396, 4 Pac. 250.

98. Klinger *v.* Missouri, 13 Wall. (U. S.) 257, 20 L. ed. 635.

One who has not taken an oath of allegiance is not qualified to serve as a juror. Shane *v.* Clarke, 3 Harr. & M. (Md.) 101.

99. U. S. Rev. St. (1878) § 820, repealed by 21 U. S. St. at L. 43, 23 U. S. St. at L. 21 [U. S. Comp. St. (1901) p. 630].

1. U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457; U. S. Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

A form of oath which may be tendered to the panel by the district attorney concerning such qualification is prescribed by U. S. Rev. St. (1878) § 821, repealed by 21 U. S. St. at L. 438, 23 U. S. St. at L. 21 [U. S. Comp. St. (1901) p. 630]. See Atwood *v.* Weems, 99 U. S. 183, 25 L. ed. 471.

2. *Alabama.*— Judson *v.* Eslava, Minor 2.
Florida.— Keech *v.* State, 15 Fla. 591.
Illinois.— Stone *v.* People, 3 Ill. 326; Guykowski *v.* People, 2 Ill. 476.
Indiana.— McDonel *v.* State, 90 Ind. 320.
Iowa.— Foreman *v.* Hunter, 59 Iowa 550, 13 N. W. 659.
Kentucky.— Siller *v.* Cooper, 4 Bibb 90.
Montana.— Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.
Nevada.— State *v.* Salge, 1 Nev. 455.
New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.
New York.— Borst *v.* Beecker, 6 Johns. 332.
South Carolina.— State *v.* Quarrel, 2 Bay 150, 1 Am. Dec. 637.
Vermont.— Richards *v.* Moore, 60 Vt. 449, 15 Atl. 119.

at common law,[3] but is one which the parties may waive.[4] If the juror has declared his intention, in conformity with the naturalization laws, of becoming a citizen of the United States, he is qualified as a juror, although he has not taken out his final papers of naturalization.[5]

10. Residence in State or County. It is generally required that a juror must be a citizen [6] or resident of the state,[7] and a resident of the county in which he is called upon to serve as a juror.[8] No particular length of residence is necessary [9] unless required by statute.[10] It is said that there is no technical definition as to what constitutes a "residence," [11] but that it is chiefly a question of intent;[12]

Wisconsin.— Schumaker *v.* State, 5 Wis. 324.

See 31 Cent. Dig. tit. "Jury," § 252.

The term "alien" as used in the Indiana statute of 1881, providing that it shall be a ground for challenge that a juror is an "alien," is construed as referring only to being a citizen of the state, and it is held that a citizen of the state is a qualified juror although he is not a citizen of the United States. McDonel *v.* State, 90 Ind. 320.

Aliens, although freeholders and inhabitants of a town, are not qualified. Borst *v.* Beecker, 6 Johns. (N. Y.) 332.

3. Siller *v.* Cooper, 4 Bibb (Ky.) 90; Schumaker *v.* State, 5 Wis. 324; 3 Blackstone Comm. 362.

4. Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

5. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408.

Naturalization pending trial.— Where during the progress of a trial it is discovered that one of the jurors is an alien, it is not error to permit him to take out naturalization papers, and proceed with the trial. Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

6. State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

It is not necessary that the juror should be qualified to vote or to hold office in order to be a citizen, but it is sufficient if he has moved into the state with the intention of making it his permanent home. Anderson *v.* State, 5 Ark. 444; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895.

7. State *v.* Groome, 10 Iowa 308; State *v.* Kennedy, 8 Rob. (La.) 590.

In the District of Columbia jurors must be residents of the District. See U. S. *v.* Nardello, 4 Mackey (D. C.) 503.

8. See the following cases:

Alabama.— Jackson *v.* State, 131 Ala. 21, 31 So. 380; Amos *v.* State, 96 Ala. 120, 11 So. 424.

California.— People *v.* Stonecifer, 6 Cal. 405.

Georgia.— Thomas *v.* State, 27 Ga. 287.

Iowa.— State *v.* Wart, 51 Iowa 587, 2 N. W. 405.

Michigan.— People *v.* Johnson, 81 Mich. 573, 45 N. W. 1119.

Missouri.— State *v.* France, 76 Mo. 681.

North Carolina.— State *v.* Bullock, 63 N. C. 570.

See 31 Cent. Dig. tit. "Jury," § 254.

A person living near a county line but who is uncertain as to which county he lives in is a qualified juror in the county which he claims as his residence and in which he votes. Amos *v.* State, 96 Ala. 120, 11 So. 424; State *v.* Gonsoulin, 38 La. Ann. 459.

Where an unorganized county is attached to an organized county for judicial purposes, the two counties are for such purpose one and the same, and a resident of the unorganized county is a competent juror in the organized county to which it is attached. Groom *v.* State, 23 Tex. App. 82, 3 S. W. 668.

The state may challenge a juror in a criminal case upon the ground of his being a nonresident of the county. State *v.* Bullock, 63 N. C. 570.

Where a person is living in another county at the time of trial but swears that he is there only on a temporary visit and intends to return, he is not disqualified to serve as a juror. Sikes *v.* State, 116 Ga. 182, 42 S. E. 346.

9. *Arkansas.*— Anderson *v.* State, 5 Ark. 444.

California.— Thompson *v.* Paige, 16 Cal. 77.

Georgia.— Thomas *v.* State, 27 Ga. 287.

Mississippi.— Byrd *v.* State, 1 How. 163.

Missouri.— State *v.* France, 76 Mo. 681.

See 31 Cent. Dig. tit. "Jury," § 254.

10. State *v.* Kennedy, 8 Rob. (La.) 590. See also Russell *v.* State, 62 Nebr. 512, 87 N. W. 344.

Where a person must be qualified to vote in order to be a juror he must have a residence for the length of time necessary to qualify him as a voter. Sampson *v.* Schaffer, 3 Cal. 107; Epps *v.* State, 19 Ga. 102; Hart *v.* State, 14 Nebr. 572, 16 N. W. 905. See also Lask *v.* U. S., 1 Pinn. (Wis.) 77.

A person's residence begins only from the date at which he determines to make a particular place his residence, although he may actually have been in the place for some time previous thereto (State *v.* Kennedy, 8 Rob. (La.) 590); but if he resides in a place for any length of time with the intention of making it his home and then removes to another state or county with the intention of returning, and actually does return, his residence dates from his first arrival and not from his return (People *v.* Stonecifer, 6 Cal. 405).

11. U. S. *v.* Nardello, 4 Mackey (D. C.) 503.

12. People *v.* Johnson, 81 Mich. 573, 45 N. W. 1119; Lask *v.* U. S., 1 Pinn. (Wis.) 77. See also State *v.* Burke, 107 Iowa 659,

but the legislature of one state may provide that persons residing for a part of the time in that state, although actually domiciled elsewhere, shall be deemed to be residents for the purpose of jury duty and compel them to serve.[13]

11. Property Qualifications — a. In General. In England a property qualification for jury duty was required by statute at a very early date,[14] and similar statutes have from time to time been enacted in many of the states in this country.[15] The statutes usually relate only to the ownership of real property,[16] but in some cases require the ownership of personal property of a certain value.[17] A number of the older statutes have been repealed and there has been a growing tendency to do away with the property qualifications formerly required, so that for the present law in any jurisdiction the statutes should be consulted.[18] Where a property qualification is required it must exist at the time of the trial and it is not sufficient that the juror was qualified at the time the jury-list was made out.[19]

b. Ownership or Occupancy of Real Estate. In England it was required by an early statute that jurors should be freeholders,[20] and in this country statutes have been enacted in a number of jurisdictions requiring as necessary qualifications for service that a juror must be an owner of real estate,[21] a freeholder,[22] or a

78 N. W. 677; Hughes *v.* State, 109 Wis. 397, 85 N. W. 333. See also Domicile, 14 Cyc. 840.

Where a person moves into a particular state or county he becomes qualified to serve as a juror in that state or county if he comes there with the intention of making it his permanent place of residence (State *v.* France, 76 Mo. 681), or with the intention of residing there indefinitely and of returning only in the event of contingencies which may never happen in his lifetime (U. S. *v.* Nardello, 4 Mackey (D. C.) 503); and at the same time he ceases to be qualified in the state or county from which he removed (State *v.* Groome, 10 Iowa 308), and if he afterward returns to his old home it must appear, to qualify him as a juror there, that he did so with the intention of remaining (State *v.* Taylor, 134 Mo. 109, 35 S. W. 92).

The residence of a married man is usually where his family resides (State *v.* Groome, 10 Iowa 308), but not necessarily so (People *v.* Johnson, 81 Mich. 573, 45 N. W. 1119; Lask *v.* U. S., 1 Pinn. (Wis.) 77).

13. People *v.* Plimley, 8 N. Y. App. Div. 323, 17 Misc. 457, 41 N. Y. Suppl. 365, 1128.

14. 3 Blackstone Comm. 362.

15. Proffatt Jury Tr. § 115.

16. See *infra*, VI, A, 11, b.

17. Young *v.* Marine Ins. Co., 30 Fed. Cas. No. 18,162, 1 Cranch C. C. 238.

In New York it was provided by 2 Rev. St. 411, that jurors must be the owners of an estate of freehold or of personal property to the value of two hundred and fifty dollars. Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Valton *v.* National Loan Fund L. Assur. Soc., 17 Abb. Pr. 268.

In Utah the act of 1859 provided that a person should not serve as a juror unless he was the owner of "taxable property." Conway *v.* Clinton, 1 Utah 215.

Talesmen.— The South Carolina statute of 1769 did not require any property qualification in the case of talesmen. State *v.* Williams, 2 Hill (S. C.) 381.

18. Proffatt Jury Tr. § 115.

In Mississippi the constitution now provides that no property qualification shall ever be required of any person to become a juror. Nelson *v.* State, 57 Miss. 286, 34 Am. Rep. 444.

In South Carolina the property qualification was abolished by the constitutional amendment of 1810. State *v.* Jennings, 15 Rich. 42.

In Virginia the statute requiring jurors in cases of felony to own real or personal property of the value of one hundred dollars was repealed by the act of 1853. Wash *v.* Com., 16 Gratt. 530.

Repeal of statutes relating to ownership of real property see *infra*, VI, A, 11, b.

19. Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Conway *v.* Clinton, 1 Utah 215.

It is a good cause of challenge that a juror has not the proper property qualifications and not merely a personal exemption from jury duty. Fenwick *v.* Parker, 3 Code Rep. (N. Y.) 254.

20. 3 Blackstone Comm. 362. See also Kerwin *v.* People, 96 Ill. 206; Byrd *v.* State, 1 How. (Miss.) 163.

21. Territory *v.* Young, 2 N. M. 93, holding, however, that the statute should not be construed as requiring a juror to be an absolute owner of land in fee simple, but that it is sufficient if he is in possession of or has a qualified interest in real estate.

22. Dowdy *v.* Com., 9 Gratt. (Va.) 727, 60 Am. Dec. 314; Day *v.* Com., 3 Gratt. (Va.) 629; U. S. *v.* Johnston, 26 Fed. Cas. No. 15,490, 1 Cranch C. C. 237.

In North Carolina the freehold qualification does not apply to jurors of the original panel. State *v.* Wincroft, 76 N. C. 38. See also State *v.* Freeman, 100 N. C. 429, 5 S. E. 921; State *v.* Mills, 91 N. C. 581.

In the city of New York jurors were not required under the act of 1847 to be the owners of real estate. Friery *v.* People, 2 Abb. Dec. 215 [*affirming* 54 Barb. 319].

In South Carolina, under the act of 1799, a juror was required to be a freeholder or to

householder,[23] or that he must be either a freeholder or a householder.[24] In some jurisdictions where such qualifications were formerly required the statutes have been repealed,[25] but in others the statutes are still in force.[26] The property which a juror must own to be qualified should be located within the state,[27] but not necessarily within the county[28] unless the statutes so provide.[29]

12. Assessment For or Payment of Taxes. In some jurisdictions it is required that a juror must be a person whose name is on the assessment rolls as a taxpayer,[30]

have paid a tax the preceding year of three shillings. State *v.* Massey, 2 Hill 379.

A tenant by the curtesy initiate is a freeholder in the sense of that term as applicable to the qualifications of jurors. State *v.* Mills, 91 N. C. 581.

A license to lay off an oyster bed in the waters of the state does not constitute a freehold interest in land within the application of the statutes. State *v.* Young, 138 N. C. 571, 50 S. E. 213.

23. Brown *v.* State, 57 Miss. 424; Nelson *v.* State, 57 Miss. 286, 34 Am. Rep. 444; State *v.* Lattin, (Wash. 1898) 52 Pac. 314.

The term "householder" means a person who has a family, which he keeps together and provides for, and of which he is the head or master. He need not be a father or a husband, but he must occupy the position toward others of head or chief of a domestic establishment. Nelson *v.* State, 57 Miss. 286, 34 Am. Rep. 444.

In Louisiana the act of 1805 provided that a juror must be a "housekeeper" (Parmele's Case, 2 Mart. 313); but it seems that this requirement was dispensed with by the act of 1831 (see Rondeau *v.* New Orleans Imp., etc., Co., 15 La. 160, as cited in Hennen Dig. La. p. 770).

Head of a family.— In New Mexico the statute requires that a juror shall be the "head of a family." Territory *v.* Lopez, (N. M. 1884) 2 Pac. 364, holding that the term must be understood and applied in its ordinary acceptation.

24. Davis *v.* State, 131 Ala. 10, 31 So. 569; Williams *v.* State, 109 Ala. 64, 19 So. 530; Parker *v.* State, 102 Ala. 128, 15 So. 819 [*overruling* Ezell *v.* State, 102 Ala. 101, 15 So. 810]; Sylvester *v.* State, 72 Ala. 201; Iverson *v.* State, 52 Ala. 170; Aaron *v.* State, 37 Ala. 106; Lamphier *v.* State, 70 Ind. 317; McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847; Maines *v.* State, 35 Tex. Cr. 109, 31 S. W. 667; Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463; Robles *v.* State, 5 Tex. App. 346; Lester *v.* State, 2 Tex. App. 432.

In Indiana prior to the act of 1873 jurors were required to be householders (Bradford *v.* State, 15 Ind. 347; Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246; Carpenter *v.* Dame, 10 Ind. 125), but under this statute a juror is qualified if either a householder or freeholder (Lamphier *v.* State, 70 Ind. 317).

In Tennessee the act of 1835 provides that jurors shall be either freeholders, owners of an occupancy, or householders. State *v.* Bryant, 10 Yerg. 527.

In Texas it was held that the statute of 1856 requiring jurors to be freeholders or householders was superseded by the constitution of 1869–1870, which provided that all qualified voters should be qualified to sit as jurors (Wilson *v.* State, 35 Tex. 365; Maloy *v.* State, 33 Tex. 599); but this qualification is expressly required by the later statute of 1876 (Lester *v.* State, 2 Tex. App. 432).

What constitutes a householder.—A householder is one who is the head or master of a family; a person who occupies a house and has charge of and provides for a family therein. Lane *v.* State, 29 Tex. App. 310, 5 S. W. 827. The term implies the idea of a domestic establishment — the management of a household, and means something more than the mere occupancy of a room or house. Aaron *v.* State, 37 Ala. 106. A person who merely rents land is not a freeholder or householder within the meaning of the statute (Iverson *v.* State, 52 Ala. 170); but a man who resides with his wife and family whom he supports is a householder, although the title to the property is in his wife's name (Sylvester *v.* State, 72 Ala. 201); and a person living with his sister and her children in a part of the house used by him as a store, he paying the rent and furnishing the supplies, is a householder and a competent juror (Hall *v.* State, 6 Baxt. (Tenn.) 522).

25. Proffatt Jury Tr. § 115.

In Connecticut it was formerly necessary that a juror should be a freeholder (State *v.* Doan, 2 Root 451); but this qualification was dispensed with by the act of 1837 (Ladd *v.* Prentice, 14 Conn. 109).

In Illinois jurors were required to be freeholders until the act of 1827 which omitted this qualification. Kerwin *v.* People, 96 Ill. 206.

In Mississippi jurors were formerly required to be freeholders or householders (Byrd *v.* State, 1 How. 163), but the constitution now provides that no property qualification shall be required (Nelson *v.* State, 57 Miss. 286, 34 Am. Rep. 444, holding, however, that the requirement that a juror shall be a "householder" refers merely to his civil status and is not a property qualification).

26. Proffatt Jury Tr. § 115. See also cases cited *supra*, notes 21–24.

27. Sheepshanks *v.* Jones, 9 N. C. 211.

28. State *v.* Bryant, 10 Yerg. (Tenn.) 527.

29. Day *v.* Com., 3 Gratt. (Va.) 629.

30. People *v.* Thompson, 34 Cal. 671; State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; State *v.* Arnstein, 9 Kan. App.

and in other jurisdictions that he must have paid his taxes[31] or must have paid his poll-tax.[32]

13. Qualification as Voter. In some jurisdictions a juror must be a qualified elector.[33] This does not mean, however, that the juror must have registered or voted but only that he should have the constitutional qualifications of a voter.[34]

14. Prior Service as Juror.[35] In some jurisdictions it is provided by statute that it shall be a disqualification or ground of challenge that a person called as a

697, 59 Pac. 602; People *v.* Thacker, 108 Mich. 652, 66 N. W. 562; Schlacker *v.* Ashland Iron Min. Co., 89 Mich. 253, 50 N. W. 839; U. S. *v.* Hackett, 29 Fed. 848.

A juror assessed as a member of a firm is qualified. People *v.* Owens, 123 Cal. 482, 56 Pac. 251.

The failure of an assessor to enter the name on the assessment roll of a person who has been duly assessed and whose name should have been entered does not disqualify such person as a juror. State *v.* Lowe, 56 Kan. 594, 44 Pac. 20.

The fact that the property is assessed in the name of another person by mistake does not disqualify a juror if he is the owner of the property and pays the taxes thereon. U. S. *v.* Hackett, 29 Fed. 848.

If it is not the juror's fault that he was not assessed and if he is the owner of taxable property and ready and willing to pay his taxes if allowed to do so, he is not disqualified. U. S. *v.* Reynolds, 1 Utah 226.

Talesmen are not required to be on the assessment roll under the Michigan statute. Stewart *v.* People, 23 Mich. 63, 9 Am. Rep. 78. See also Schlacker *v.* Ashland Iron Min. Co., 89 Mich. 253, 50 N. W. 839; Reed *v.* Peacock, 123 Mich. 244, 82 N. W. 53, 81 Am. St. Rep. 194, 49 L. R. A. 423.

31. State *v.* Haywood, 94 N. C. 847. See also State *v.* Sherman, 115 N. C. 773, 20 S. E. 711.

In Mississippi the constitution of 1890 provides that no one shall be a juror unless a qualified elector, and to be a qualified elector he must have paid his taxes for the two preceding years. Nail *v.* State, 70 Miss. 32, 11 So. 793.

Time of payment under North Carolina statute.— Under the North Carolina statute the juror is qualified if he has paid his taxes for the year preceding the time when his name was placed on the jury-list, although he may not have paid his taxes for the year preceding the time of the trial (State *v.* Gardner, 104 N. C. 739, 10 S. E. 146; Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917. See also State *v.* Davis, 109 N. C. 780, 14 S. E. 55); and this rule applies under the act of 1889, requiring the jury-list to be revised every four years instead of annually (State *v.* Sherman, 115 N. C. 773, 20 S. E. 711).

Jurors summoned on a special venire are not within the application of the North Carolina statute requiring the payment of taxes; the only requirement prescribed for such jurors being that they shall be freeholders of the county. State *v.* Kilgore, 93 N. C. 533; State *v.* Carland, 90 N. C. 668.

Where the sheriff has been enjoined from collecting taxes a juror is not disqualified for not having paid them. State *v.* Heaton, 77 N. C. 505.

32. Collins *v.* State, 31 Fla. 574, 12 So. 906; Taylor *v.* State, (Tex. Cr. App. 1904) 81 S. W. 933; Carter *v.* State, 45 Tex. Cr. 430, 76 S. W. 437.

Time of payment.— It is held under the Florida statute that the non-payment of a capitation tax which has been assessed but which is not due and payable does not disqualify a juror (Smith *v.* State, 29 Fla. 408, 10 So. 894), and that the disqualification for non-payment does not attach until after the time has elapsed during which the taxpayer is allowed to pay his taxes without coercion (Collins *v.* State, 31 Fla. 574, 12 So. 906).

Under the Texas statute the court may dispense with the requirement of the payment of poll-taxes if the requisite number of jurors who have paid their poll-taxes cannot be found within the county (San Antonio, etc., R. Co. *v.* Lester, (Civ. App. 1904) 84 S. W. 401), but not otherwise (Taylor *v.* State, (Cr. App. 1904) 81 S. W. 933).

33. *California.*— People *v.* Peralta, 4 Cal. 175; Sampson *v.* Schaffer, 3 Cal. 107.

Idaho.— Territory *v.* Evans, 2 Ida. (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646.

Michigan.— People *v.* Considine, 105 Mich. 149, 63 N. W. 196; People *v.* Scott, 56 Mich. 154, 22 N. W. 274.

Mississippi.— Nail *v.* State, 70 Miss. 32, 11 So. 793.

Nebraska.— Hart *v.* State, 14 Nebr. 572, 16 N. W. 905.

Nevada.— State *v.* Salge, 1 Nev. 455.

Texas.— Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408.

Virginia.— Craft *v.* Com., 24 Gratt. 602.

See 31 Cent. Dig. tit. "Jury," § 258.

A person who has declared his intention to become a citizen is in some jurisdictions entitled to vote and in such cases is qualified to serve as a juror. People *v.* Rosevear, 56 Mich. 158, 22 N. W. 276; People *v.* Scott, 56 Mich. 154, 22 N. W. 274; Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408.

A juror by moving from one township to another in the same county does not lose his qualification as an elector. People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

34. Territory *v.* Evans, 2 Ida. (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646; Dixon *v.* State, 74 Miss. 271, 20 So. 839; Craft *v.* Com., 24 Gratt. (Va.) 602. *Compare* State *v.* Salge, 1 Nev. 455.

35. Prior service as a ground of exemption see *infra*, VI, B, 1.

juror has previously served in that capacity within a certain period,[36] or that he has within a certain time served as a talesman.[37] Some of the statutes, however, apply only to jurors who are called to serve as talesmen.[38] Services rendered in prior cases at the same term by jurors belonging to the regular panel are not within the contemplation of the statutes.[39]

15. Qualifications in Particular Courts or Proceedings. The federal statutes provide that the qualifications of jurors in the United States courts shall be governed by the laws of the state in which the court is held.[40] There are also in

36. *Georgia.*— Jordan *v.* State, 119 Ga. 443, 46 S. E. 679.

Indiana.— Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Barker *v.* Hine, 54 Ind. 542; Christie *v.* State, 44 Ind. 408; Brooks *v.* Jennings County Agricultural Joint-Stock Assoc., 35 Ind. App. 221, 73 N. E. 951.

Kansas.— State *v.* Lowe, 56 Kan. 594, 44 Pac. 20; Kansas City *v.* Kirkham, 9 Kan. App. 236, 59 Pac. 675; Atchison, etc., R. Co. *v.* Snedeger, 5 Kan. App. 700, 49 Pac. 103.

Massachusetts.— Brewer *v.* Tyringham, 14 Pick. 196.

Michigan.— People *v.* Thacker, 108 Mich. 652, 66 N. W. 562; Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811.

Nebraska.— Coil *v.* State, 62 Nebr. 15, 86 N. W. 925; Wiseman *v.* Bruns, 36 Nebr. 467, 54 N. W. 858.

Tennessee.— Smith *v.* State, 102 Tenn. 721, 52 S. W. 182.

Texas.— Monk *v.* State, 27 Tex. App. 450, 11 S. W. 460; Welch *v.* State, 3 Tex. App. 413.

Washington.— State *v.* Hall, 24 Wash. 255, 64 Pac. 153.

Wisconsin.— Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

United States.— Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

See 31 Cent. Dig. tit. "Jury," § 259.

U. S. Rev. St. (1878) § 812 [U. S. Comp. St. (1901) p. 627], which provides that no person shall be summoned as a juror more than once in two years, does not contemplate that twenty-four months must elapse between the close of the term at which a juror is summoned and served and the beginning of the next term at which he is competent to serve. U. S. *v.* Reeves, 27 Fed. Cas. No. 16,139, 3 Woods 199.

In Texas a juror is not disqualified unless his prior service within the prescribed time was for as much as six days (Monk *v.* State, 27 Tex. App. 450, 11 S. W. 460; Thompson *v.* State, 19 Tex. App. 593; Welsh *v.* State, 3 Tex. App. 413), and the statute does not apply to the criminal cases (Hunter *v.* State, 30 Tex. App. 314, 17 S. W. 414).

The object of these statutes is to get rid of an objectionable class of persons known as professional jurors. Bissell *v.* Ryan, 23 Ill. 566; Burden *v.* People, 26 Mich. 162.

To constitute serving as a juror the juror must have actually sat in the trial of a case and not merely have been summoned (State *v.* Lowe, 56 Kan. 594, 44 Pac. 20; State *v.* Thorne, 81 N. C. 555); and he must have served in a trial in some court as distinguished from serving upon a jury of assessment in condemnation proceedings (Brewer *v.* Tyringham, 14 Pick. (Mass.) 196. *Compare* Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811); but a juror who has actually sat in the trial of a case may be challenged, although the jury was discharged without a verdict (Famulener *v.* Anderson, 15 Ohio St. 473).

The statute applies to talesmen as well as regular jurors who have served within the time prescribed. Figg *v.* Donahoo, (Nebr. 1903) 95 N. W. 1020.

37. Taylor *v.* State, 36 Ohio St. 212; Famulener *v.* Anderson, 15 Ohio St. 473; Irwin *v.* Irwin, 3 Okla. 184, 41 Pac. 383.

38. Dill *v.* People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254; State *v.* Standley, 76 Iowa 215, 40 N. W. 815; Louisville, etc., R. Co. *v.* Mask, 64 Miss. 738, 2 So. 360; Newby *v.* Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

In Illinois it was formerly a ground of challenge to any juror that he had been sworn as a juror at any term within a year (see Brooks *v.* Bruyn, 35 Ill. 392; Bissell *v.* Ryan, 23 Ill. 517); but under the act of 1874 the right of challenge was restricted to a juror who is "not of the regular panel" (Mueller *v.* Rebhan, 94 Ill. 142. See also Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575).

A member of the regular panel who has been discharged is still a regular juror and is not disqualified if subsequently called as a talesman. Newby *v.* Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

39. Michigan City *v.* Phillips, (Ind. 1904) 71 N. E. 205; Smith *v.* State, (Ind. App. 1900) 57 N. E. 572; Burden *v.* People, 26 Mich. 162; Randolph *v.* State, (Nebr. 1902) 91 N. W. 356; Garcia *v.* State, 5 Tex. App. 337.

Where the court discharges the jury for the term under a misapprehension that they will not be further needed and afterward directs the sheriff to recall them, they are not subject to challenge because of their prior services at the same term. Smith *v.* State, (Ind. App. 1900) 57 N. E. 572.

Prior service as a talesman at the same term is not a disqualification under a statute making it a ground of challenge that a person has been summoned as a juror at any term of court within two years prior to said challenge. Carlson *v.* Holm, (Nebr. 1901) 95 N. W. 1125.

40. U. S. *v.* Kilpatrick, 16 Fed. 765; U. S.

some of the states statutes prescribing particular qualifications for jury service in particular courts or proceedings.[41]

B. Exemptions — 1. Grounds. There are in probably all of the states certain classes of persons who are exempt by statute from serving on juries.[42] These exemptions usually include public officers of the state or United States,[43] judges and officers of the court,[44] attorneys,[45] sheriffs,[46] constables,[47] coroners,[48] physicians,[49] ministers,[50] postmasters,[51] members of fire companies,[52] military companies,[53]

v. Collins, 25 Fed. Cas. No. 14,837, 1 Woods 499.

In Alaska there is no law on this subject and the qualifications of jurors are regulated according to the law of Oregon, under the act of 1884 providing that the general laws of Oregon shall be the law in Alaska so far as applicable and not in conflict with the laws of the United States. Kie *v.* U. S., 27 Fed. 351.

Where a particular qualification is provided for by a federal statute this statute and not the law of the state controls as to this qualification. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

41. See cases cited *infra*, this note.

In condemnation proceedings.— It is provided in some states that the jurors shall be freeholders. Colorado Cent. R. Co. *v.* Humphrey, 16 Colo. 34, 26 Pac. 165; Owosso *v.* Richfield, 80 Mich. 328, 45 N. W. 129; New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

In proceedings to oust a tenant the Pennsylvania statute of 1872 provided that the inquest should be by a jury of freeholders. Rhoads *v.* Wesner, 1 Woodw. (Pa.) 79.

On the trial of an insolvent debtor the South Carolina statute of 1833 provided that the trial should be by a jury of "neighboring freeholders." Rice *v.* Sims, 3 Hill (S. C.) 5.

In Illinois the provision of the constitution, continuing the recorder's court under the name of the criminal court of Cook county, and investing it with the same jurisdiction as a circuit court, had the effect of repealing the earlier law requiring that jurors in that court should be selected from the taxpayers of the city, and authorizes them to be selected from the body of the county as in the circuit court. Peri *v.* People, 65 Ill. 17.

Jurors in a justice's court, under 2 N. Y. Rev. St. 242, were required to be freeholders of the town where the case was to be tried. Streeter *v.* Harsey, 11 Johns. (N. Y.) 168.

On a writ of inquiry to assess damages it is not necessary that the sheriff should summon only such persons as the commissioners of jurors may have selected or designated. Jennings *v.* Asten, 12 N. Y. Super. Ct. 695, 3 Abb. Pr. 373.

42. See the statutes of the several states; and cases cited *infra*, notes 43–57.

43. U. S. *v.* Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; State *v.* Tulin, 9 Kan. App. 454, 60 Pac. 659; State *v.* Quimby, 51 Me. 395.

But all employees and agents of the government are **not officers** in the proper sense of the term. U. S. *v.* Barber, 21 D. C. 456, holding that a person employed by the United States to sell stamps at a small yearly salary is not a "salaried officer of the government of the United States" so as to render him exempt from jury duty.

An assessor of taxes for a city or town is not by reason of such office exempt from jury duty. Ellis *v.* State, 25 Fla. 702, 6 So. 768.

44. State *v.* Newton, 28 La. Ann. 65, holding that the assistant clerk of the court is an "officer" of the court within the meaning of this exemption.

45. *In re* Swett, 20 Pick. (Mass.) 1.

Under a statute exempting "practising attorneys" a person having a license to practise law but who does not follow the profession of the law as his avocation or calling is not exempt. Wheatley *v.* State, 11 Lea (Tenn.) 262.

46. Burns *v.* State, 12 Tex. App. 269.

47. Moebs *v.* Wolffsohn, 143 Mass. 130, 8 N. E. 892; State *v.* Cosgrove, 16 R. I. 411, 16 Atl. 900; State *v.* O'Brien, 14 R. I. 266.

48. Jackson *v.* State, 74 Ala. 26; State *v.* Wright, 53 Me. 328.

49. State *v.* Fisher, 119 Mo. 344, 24 S. W. 167, 22 L. R. A. 799.

A dentist is not a "practitioner of medicine" within the application of the statute. State *v.* Fisher, 119 Mo. 344, 24 S. W. 167, 22 L. R. A. 799 [in effect *overruling* State *v.* Fisher, (Mo. 1893) 21 S. W. 446, 593].

50. State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659; Com. *v.* Buzzell, 16 Pick. (Mass.) 153; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

51. State *v.* Williams, 18 N. C. 372.

52. Phillips *v.* State, 68 Ala. 469; State *v.* Willard, 79 N. C. 660; State *v.* Whitford, 34 N. C. 99; Beamish *v.* State, 6 Baxt. (Tenn.) 530; *Ex p.* House, 36 Tex. 83; *Ex p.* Krupp, (Tex. Cr. App. 1899) 54 S. W. 590.

Only active members are exempt under the Illinois statute of 1874. Scranton's Appeal, 74 Ill. 161.

In Georgia the exemption of members of fire companies from jury duty was repealed by the act of 1869. *Ex p.* Rust, 43 Ga. 209.

53. Jarvis *v.* State, (Ala. 1903) 34 So. 1025; King *v.* State, 90 Ala. 612, 8 So. 856; *Ex p.* Will, 61 Cal. 121; Dunne *v.* People, 94 Ill. 120, 34 Am. Rep. 213; Hall *v.* Judge Grand Rapids Super. Ct., 88 Mich. 438, 50 N. W. 389.

Honorary members.— In Georgia honorary members of military companies are not exempt from jury duty (Stewart *v.* State, 23 Ga. 181), but under the Maryland statute an honorary member is exempt from one year from the date of his certificate of membership, provided the same be filed with the clerk

persons over a certain age,[54] persons having previously served as jurors within a certain time,[55] or constituting the standing grand jury of a county for the year,[56] and such others as the statutes of the particular state may provide for.[57]

2. NATURE OF EXEMPTION. An exemption from jury duty is not a disqualification to act as a juror but is a mere personal privilege which the juror may claim or waive,[58] and if he does not claim his privilege the parties have no right to object to him on this account.[59] The fact that jurors who are exempt are summoned on the panel is no ground for a challenge to the array,[60] or a motion to

of the court before the drawing of the jury (Albert *v.* White, 33 Md. 297).

In the absence of statute an officer of the United States navy is not exempt from jury service. State *v.* Ingraham, 1 Cheves (S. C.) 78.

54. *Alabama.*— Williams *v.* State, 67 Ala. 183.

Illinois.— Murphy *v.* People, 37 Ill. 447.

Indiana.— State *v.* Miller, 2 Blackf. 35.

Kansas.— Moore *v.* Cass, 10 Kan. 288.

Maine.— State *v.* Day, 79 Me. 120, 8 Atl. 544.

Maryland.— Green *v.* State, 59 Md. 123, 43 Am. Rep. 542.

Massachusetts.— Munroe *v.* Brigham, 19 Pick. 368.

Michigan.— People *v.* Rawn, 90 Mich. 377, 51 N. W. 522.

Nebraska.— Keeler *v.* State, (1905) 103 N. W. 64.

See 31 Cent. Dig. tit. "Jury," § 261.

Age as a disqualification see *supra*, VI, A, 3.

55. Blount *v.* State, 30 Fla. 287, 11 So. 547; *In re* Swan, 16 Mass. 220; Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. St. Rep. 825; State *v.* Godwin, 13 Lea (Tenn.) 268.

56. *In re* Reed, Quincy (Mass.) 331.

57. See Proffatt Jury Tr. § 119. See also State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659; People *v.* Rawn, 90 Mich. 377, 51 N. W. 522; Hall *v.* Burlingame, 88 Mich. 438, 50 N. W. 289; Wheatley *v.* State, 11 Lea (Tenn.) 262.

Officers of the penitentiary are exempt under the Georgia statute, but the president of a company of lessees of penitentiary convicts is not an officer of the penitentiary within the meaning of the exemption. Lockett *v.* State, 61 Ga. 44.

Persons engaged in certain manufactures. —In New York, 2 Rev. St. p. 415, exempted from jury duty persons engaged in certain manufactures. People *v.* Holdridge, 4 Lans. (N. Y.) 511, holding, however, that the exemption of persons employed by any "iron manufacturing company" applies only to companies engaged in manufacturing iron and not to companies engaged in making articles from the iron manufactured.

In Louisiana the jury law of 1873, allowing the members of a parish police jury to be drawn as talesmen in criminal trials, abolishes previous exemptions in that regard. State *v.* Daniel, 31 La. Ann. 91.

58. *Alabama.*— Jackson *v.* State, 74 Ala. 26; Williams *v.* State, 67 Ala. 183.

California.— People *v.* Owens, 123 Cal. 482, 56 Pac. 251.

District of Columbia.— U. S. *v.* Lee, 4 Mackey 489, 54 Am. Rep. 293.

Florida.— Yates *v.* State, 43 Fla. 177, 29 So. 965; Lambright *v.* State, 34 Fla. 564, 16 So. 582; Blount *v.* State, 30 Fla. 287, 11 So. 547.

Illinois.— Murphy *v.* People, 37 Ill. 447; Davis *v.* People, 19 Ill. 74.

Indiana.— State *v.* Miller, 2 Blackf. 35.

Kansas.— Moore *v.* Cass, 10 Kan. 288.

Louisiana.— State *v.* Forbes, 111 La. 473, 35 So. 710; State *v.* Jackson, 42 La. Ann. 1170, 8 So. 297; State *v.* Morningstar, 23 La. Ann. 8.

Maine.— State *v.* Day, 79 Me. 120, 8 Atl. 544; State *v.* Wright, 53 Me. 328; State *v.* Quimby, 51 Me. 395.

Maryland.— Green *v.* State, 59 Md. 123, 43 Am. Rep. 542.

Michigan.— People *v.* Lange, 90 Mich. 454, 51 N. W. 534; People *v.* Rawn, 90 Mich. 377, 51 N. W. 522 [*disapproving* People *v.* Baumann, 52 Mich. 584, 18 N. W. 369].

New Hampshire.— State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

New Jersey.—Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

Ohio.— Glassinger *v.* State, 24 Ohio St. 206.

Rhode Island.— State *v.* Cosgrove, 16 R. I. 411, 16 Atl. 900; State *v.* O'Brien, 14 R. I. 266.

South Carolina.— State *v.* Toland, 36 S. C. 515, 15 S. E. 599; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Texas.— Breeding *v.* State, 11 Tex. 257; Burns *v.* State, 12 Tex. App. 269.

Washington.— State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

Wisconsin.— Conkey *v.* Northern Bank, 6 Wis. 447.

See 31 Cent. Dig. tit. "Jury," § 264.

The word "exemption" is defined as an "immunity"; a "privilege." A person exempt is one freed or released from some duty, but is not necessarily disqualified. People *v.* Rawn, 90 Mich. 377, 51 N. W. 522.

59. State *v.* Miller, 2 Blackf. (Ind.) 35; Moore *v.* Cass, 10 Kan. 288; State *v.* Day, 79 Me. 120, 8 Atl. 544; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

60. State *v.* Barker, (N. J. Sup. 1902) 52 Atl. 284; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619; Conkey *v.* Northern Bank, 6 Wis. 447.

quash the venire;[61] nor is the exemption any ground of challenge to a particular juror.[62] Neither does the fact that jurors who are exempt but otherwise qualified served upon the jury in any way affect the validity of the proceedings,[63] or furnish any ground for setting aside the verdict,[64] granting a new trial,[65] or arresting judgment.[66] A person who is exempt by law from serving on juries cannot be required to serve on a special venire,[67] but may be required to serve as a talesman.[68]

3. Evidence of Exemption. The question whether a person drawn as a juror comes within an exemption is for the determination of the court,[69] and in its determination the usual practice is to examine the person claiming it on his *voir dire* and to receive his own statement as *prima facie* evidence which if not controverted is usually regarded as sufficient to justify his discharge;[70] but the person claiming the exemption must show all the facts necessary to bring him within the provisions of the statute.[71]

4. Power of Legislature to Repeal Exemption Laws.[72] An exemption from jury duty is not a contract between the state and the person exempt but is a mere gratuity which the law-making power may withdraw at its pleasure,[73] yet where

61. Lambright *v.* State, 34 Fla. 564, 16 So. 582.

62. *Alabama.*— Jackson *v.* State, 74 Ala. 26.

Florida.— Brown *v.* State, 40 Fla. 459, 25 So. 63.

Illinois.— Murphy *v.* People, 37 Ill. 447.

Kansas.— State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659.

Michigan.— People *v.* Lange, 90 Mich. 454, 51 N. W. 534; People *v.* Rawn, 90 Mich. 377, 51 N. W. 522 [*disapproving* People *v.* Baumann, 52 Mich. 584, 18 N. W. 369].

Nebraska.— Keeler *v.* State, (1905) 103 N. W. 64.

Rhode Island.— State *v.* O'Brien, 14 R. I. 266.

Texas.— Burns *v.* State, 12 Tex. App. 269.

Washington.— State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

See 31 Cent. Dig. tit. "Jury," § 264.

63. Moore *v.* Cass, 10 Kan. 288; State *v.* Morningstar, 23 La. Ann. 8; State *v.* Wright, 53 Me. 328; Green *v.* State, 59 Md. 123, 43 Am. Rep. 542.

64. State *v.* York, 7 Kan. App. 291, 53 Pac. 838; Munroe *v.* Brigham, 19 Pick. (Mass.) 368; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

65. *District of Columbia.*— U. S. *v.* Lee, 4 Mackey 489, 54 Am. Dec. 293.

Florida.— Blount *v.* State, 30 Fla. 287, 11 So. 547.

Maine.— State *v.* Day, 79 Me. 120, 8 Atl. 544.

Massachusetts.— Moebs *v.* Wolffsohn, 143 Mass. 130, 8 N. E. 892.

New Hampshire.— State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

See 31 Cent. Dig. tit. "Jury," § 264.

66. State *v.* Wright, 53 Me. 328; Green *v.* State, 59 Md. 123, 43 Am. Rep. 542; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

67. State *v.* Whitford, 34 N. C. 99.

68. State *v.* Willard, 79 N. C. 660; State *v.* Hogg, 6 N. C. 319. See also State *v.* Williams, 18 N. C. 372.

The reason for this rule is that the object of the exemption is to permit the person exempted to exercise certain other duties without interruption, and that as talesmen are taken only from the bystanders, the fact of the person being a bystander shows that his other employment does not at the time require his attention. State *v.* Willard, 79 N. C. 660; State *v.* Hogg, 6 N. C. 319.

69. King *v.* State, 90 Ala. 612, 8 So. 856.

In Missouri under the act of 1857, applicable to St. Louis county, the jury commissioner is constituted a court for passing upon all claims for exemption and the trial court has no right to consider such claims except on appeal from the decision of the commissioner. State *v.* Primm, 50 Mo. 87.

70. King *v.* State, 90 Ala. 612, 8 So. 856, holding further that the certificate of membership in an organization whose members are exempt, although the statute provides that it "shall prove such exemption in any court," is not the exclusive means of such proof.

71. Phillips *v.* State, 68 Ala. 469, holding that the mere statement of a juror that he is "a fireman" is insufficient to bring him within an exemption of "members of incorporated fire companies," there being no evidence that he was a member of an incorporated company. See also Simon *v.* State, 108 Ala. 27, 18 So. 731, holding that the statement of a juror that he is a member of a certain military company, without additional proof that such company is a part of the state troops, does not authorize the court to excuse the juror, under a statute exempting members of the "state troops."

72. Exemption not a vested right see Constitutional Law, 8 Cyc. 896 note 53.

73. Dunlap *v.* State, 76 Ala. 460; Bragg *v.* People, 78 Ill. 328; Scranton's Appeal, 74 Ill. 161. See also Constitutional Law, 8 Cyc. 937.

One legislature cannot grant a perpetual exemption which will be binding upon subsequent legislatures and prevent a withdrawal of the privilege. Bragg *v.* People, 78 Ill. 328.

persons have been exempt from jury duty the exemption continues and they cannot be required to serve until it is so revoked.[74]

C. Who May Raise Question of Qualification or Exemption. Objections which go to the fitness of jurors to serve may be urged by the parties to be affected by their finding but those which are matter of privilege or exemption can be urged only by the juror himself.[75] A juror cannot himself insist upon a disqualification as a ground of exemption,[76] nor can the parties object to a juror on the ground that he is exempt if he is otherwise qualified;[77] but the court may of its own motion reject a juror who is not qualified, although not challenged or objected to by either party.[78] Disqualification for disloyalty, under the federal statute,[79] inures to the benefit of all parties in all cases,[80] but the right of tendering the oath prescribed[81] is limited to the district attorney.[82]

VII. THE JURY-LIST.

A. In General. The first step in the organization of a jury is the selection from the general public of the names of those from whom the panel for a particular term or terms of court is to be drawn.[83]

B. At Common Law. At common law there was no prior selection of a jury-list by persons other than the summoning officer, but the sheriff or other officer selected as he summoned.[84] The practice led to many abuses,[85] and has now to a considerable extent been modified by statute in England,[86] and practically done away with in this country.[87]

C. Under Statutory Provisions. Under the statutes in this country the selection of jurors is taken out of the hands of the summoning officer and vested in certain boards or officers who select and prepare at certain intervals a general jury-list from which the panels for particular terms of court are drawn,[88] the object being as far as possible to obviate the possibility of packing juries or selecting them with reference to particular cases,[89] and also to equalize the burden of serving on juries among all the persons of the county qualified therefor.[90] A similar system is in force in Canada.[91] In some jurisdictions the statutes provide that the selection of the jury-list shall be made by the county commissioners,[92]

74. Beamish *v.* State, 6 Baxt. (Tenn.) 530.

75. Breeding *v.* State, 11 Tex. 257.

76. *In re* Carnes, 31 Fed. 397; Lingan *v.* Marbury, 15 Fed. Cas. No. 8,371, 1 Cranch C. C. 365.

77. See *supra*, VI, B, 2.

78. See *infra*, XIII, D, 1, a.

79. U. S. Rev. St. (1878) § 820, repealed by 21 U. S. St. at L. 43, 23 U. S. St. at L. 21 [U. S. Comp. St. (1901) p. 630].

80. U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

81. U. S. Rev. St. (1878) § 821, repealed by 21 U. S. St. at L. 438, 23 U. S. St. at L. 21 [U. S. Comp. St. (1901) p. 630].

82. Atwood *v.* Weems, 99 U. S. 183, 25 L. ed. 471.

83. Thompson & M. Jur. § 43.

This process is termed the making or selection of the general jury-list and consists in the making by the officers designated by statute of a list of the names of those liable to do jury duty in the county or jurisdiction within a given period. Thompson & M. Jur. § 43.

84. Thompson & M. Jur. § 44. See also U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505; Gott *v.* Brigham, 45 Mich. 424, 8 N. W. 41.

85. Thompson & M. Jur. § 44.

86. Thompson & M. Jur. § 127 [*citing* 6 Geo. IV, c. 50].

87. See *infra*, VII, C.

88. Johnson *v.* State, 102 Ala. 1, 16 So. 99; State *v.* Brooks, 9 Ala. 9; Jones *v.* State, 3 Blackf. (Ind.) 37.

In the absence of any statutory provision as to how a jury shall be selected it may be selected as at common law. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

89. Johnson *v.* State, 102 Ala. 1, 16 So. 99.

90. Rafe *v.* State, 20 Ga. 60; Sumrall *v.* State, 29 Miss. 202.

91. Harris *v.* McKenzie, 3 Nova Scotia 242.

92. *Alabama.*—Linnehan *v.* State, 116 Ala. 471, 22 So. 662.

Florida.— Reeves *v.* State, 29 Fla. 527, 10 So. 901; White *v.* State, 26 Fla. 602, 7 So. 857; Gladden *v.* State, 13 Fla. 623.

Idaho.— Heitman *v.* Morgan, 10 Ida. 562, 79 Pac. 225.

Minnesota.— State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; State *v.* Schumm, 47 Minn. 373, 50 N. W. 362.

Nebraska.— Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604.

county supervisors,[93] the judge and county assessors,[94] or by the township authorities or city officials;[95] but in most jurisdictions the list is selected by jury commissioners specially appointed for this purpose,[96] in some cases the clerk[97] or judge[98] or some other county official acting *ex officio* as a member of the commission.[99] In New Jersey the selection of the list is made by the sheriff, but in the presence of the county clerk and before the court of common pleas.[1] In Texas the statute provides that if the jury commissioners have not been appointed at the proper time or have failed to select jurors, or the panel selected has been lost or set aside, the court shall proceed to supply jurors for the term and may appoint commissioners for that purpose.[2] It is competent for the legislature at any time to change the general law previously in force as to how the jury-list shall be

Washington.— State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

See 31 Cent. Dig. tit. "Jury," § 268 *et seq.*

In Alabama the jury-list is made by the county commissioners (Linnehan *v.* State, 116 Ala. 471, 22 So. 662), who are, however, in the performance of such duties, termed "jury commissioners" (see Johnson *v.* State, 102 Ala. 1, 16 So. 99).

In Wyoming the jury-list is made out by the chairman of the board of county commissioners, the county treasurer, and the county clerk. State *v.* Bolen, 10 Wyo. 439, 70 Pac. 1.

93. Ubillos *v.* Territory, (Ariz. 1905) 80 Pac. 363; People *v.* Crowey, 56 Cal. 36.

94. State *v.* Squaires, 2 Nev. 226.

95. *Connecticut.*— McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376.

Kansas.— State *v.* Jenkins, 32 Kan. 477, 4 Pac. 809.

Massachusetts.— Page *v.* Danvers, 7 Metc. 326.

Michigan.— Smaltz *v.* Boyce, 109 Mich. 382, 69 N. W. 21; Hewitt *v.* Saginaw Cir. Judge, 71 Mich. 287, 39 N. W. 56; People *v.* Reilly, 53 Mich. 260, 18 N. W. 849; Thomas *v.* People, 39 Mich. 309.

New York.— People *v.* Wennerholm, 166 N. Y. 567, 6 N. E. 259, 15 N. Y. Cr. 398.

See 31 Cent. Dig. tit. "Jury," § 268 *et seq.*

96. *Georgia.*— Roby *v.* State, 74 Ga. 812; McLain *v.* State, 71 Ga. 279.

Illinois.— People *v.* Onahan, 170 Ill. 449, 48 N. E. 1003.

Kentucky.— Risner *v.* Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. L. Rep. 84.

Louisiana.—State *v.* Williams, 30 La. Ann. 1028.

Montana.— State *v.* Osnes, 14 Mont. 553, 37 Pac. 13; State *v.* McHatton, 10 Mont. 370, 25 Pac. 1046.

New York.— People *v.* Walker, 23 Barb. 304, 2 Abb. Pr. 421.

Ohio.— State *v.* Barlow, 70 Ohio St. 363, 71 N. E. 726.

Pennsylvania.— Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274; Com. *v.* Baranowski, 5 Pa. Co. Ct. 642.

South Carolina.— State *v.* Lee, 35 S. C. 192, 14 S. E. 395.

Tennessee.— Turner *v.* State, 111 Tenn. 593, 69 S. W. 774.

Texas.— Veramendi *v.* Hutchins, 56 Tex. 414.

West Virginia.— State *v.* Scott, 36 W. Va. 704, 15 S. E. 405; State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 234.

Wisconsin.— Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

See 31 Cent. Dig. tit. "Jury," § 268 *et seq.*

In Louisiana under the former statute of 1868, the jury-list was selected by the sheriff, parish judge, and the clerk of the district court, together with two qualified electors. Compton *v.* Legras, 24 La. Ann. 259.

In Pennsylvania prior to the act of 1867 the jury-list was selected by the sheriff and county commissioners. Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274; Com. *v.* Lippard, 6 Serg. & R. 395.

In Wisconsin the jury-list was formerly made out by the town supervisors (see Burlingame *v.* Burlingame, 18 Wis. 285); but under the present statute it is made out by jury commissioners (Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

In Ohio the act of 1902 changes the number of jury commissioners from three to four. See State *v.* Barlow, 70 Ohio St. 363, 71 N. E. 726.

97. State *v.* Johnson, 47 La. Ann. 1092, 17 So. 480; State *v.* Claude, 35 La. Ann. 71; State *v.* Williams, 30 La. Ann. 1028.

98. Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

99. In Montana the jury commission consists of three persons appointed by the court, the judge of probate, and the county clerk. State *v.* McHatton, 10 Mont. 370, 25 Pac. 1046.

In South Carolina the jury commission consists of one jury commissioner, the county auditor, and the chairman of the board of county commissioners. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619; State *v.* McQuaige, 5 S. C. 429.

1. Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30; Poulson *v.* Union Nat. Bank, 40 N. J. L. 563.

2. Williams *v.* State, 24 Tex. App. 32, 5 S. W. 658; O'Bryan *v.* State, 12 Tex. App. 118.

The provision that the court may appoint commissioners is not mandatory and the court may, instead of appointing commission-

selected,[3] or it may make a special provision as to the selection of the jury-list in particular counties.[4] In the federal courts under the act of 1879 the list is made up by a jury commissioner appointed by the court acting with the clerk of the court.[5]

D. Jury Commissioners — 1. Appointment. Jury commissioners are ordinarily appointed by the court,[6] and are not judicial officers within the application of a constitutional provision requiring that judicial officers shall be elected;[7] but in one jurisdiction at least it is provided by statute that they shall be elected by the qualified voters of the county in the manner provided for the election of county officers.[8] The statutes fixing the time for the appointment of jury commissioners are merely directory.[9]

2. Qualifications. The statutes in some cases provide certain qualifications for jury commissioners,[10] but these provisions have been held not to be manda-

ers in such cases, direct the sheriff to summon a jury. Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

3. Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

4. Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128.

5. U. S. *v.* Chaires, 40 Fed. 820.

Under the former act of 1840 the selection was made so far as practicable according to the law of the state in which the court was held (U. S. *v.* Collins, 25 Fed. Cas. No. 14,837, 1 Woods 499; U. S. *v.* Woodruff, 28 Fed. Cas. No. 16,758, 4 McLean 105. See also U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153); but a substantial compliance with the state law was all that was required (U. S. *v.* Collins, *supra*).

6. See the following cases:

Illinois.— People *v.* Onahan, 170 Ill. 449, 48 N. E. 1003.

Kentucky.— Risner *v.* Com., 95 Ky. 539, 26 S. E. 388, 16 Ky. L. Rep. 84.

Montana.— State *v.* McHatton, 10 Mont. 370, 25 Pac. 1046.

Texas.— Veramendi *v.* Hutchins, 56 Tex. 414.

West Virginia.— State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

United States.— U. S. *v.* Chaires, 40 Fed. 820.

See 31 Cent. Dig. tit. "Jury," § 268.

The New York statute of 1901 providing for the appointment of a commissioner of jurors in each county of the state having a population of one million or more, who shall be appointed by the justices of the appellate division of the supreme court, is constitutional as to the county of New York, since as to this county it creates a new office after the adoption of the constitution which may be filled in such manner as the legislature shall direct (Allison *v.* Welde, 172 N. Y. 421, 65 N. E. 263); but is unconstitutional as to the county of Kings, since the office of jury commissioner in that county was, at the time of the adoption of the present constitution, a county office, and the statute changes the power of appointment from a county to a state authority (*In re* Brenner, 170 N. Y. 185, 63 N. E. 133 [*affirming* 67 N. Y. App. Div. 375, 73 N. Y. Suppl. 689 (*reversing* 35 Misc. 212, 70 N. Y. Suppl. 744)]).

A jury commissioner is not a state officer within the application of a constitutional provision requiring that such officers shall be appointed by the governor. State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

In Louisiana, under the act of 1874 which provided for jury commissioners, the appointment of the commissioners was made by the governor. State *v.* Newhouse, 29 La. Ann. 824.

A statute requiring the order of appointment to be recorded in the minutes of the court is directory only and a failure to make such record will not invalidate the appointment. State *v.* Taylor, 44 La. Ann. 783, 11 So. 132. See also State *v.* Hall, 44 La. Ann. 976, 11 So. 574.

Where the appointment is vested in a number of judges and city officials acting together, a majority of them, if notice has been given, may act in making the appointment. People *v.* Walker, 23 Barb. (N. Y.) 304, 2 Abb. Pr. 421.

7. People *v.* Reilly, 53 Mich. 260, 18 N. W. 849.

8. *In re* Bucks County Jurors, 20 Pa. Co. Ct. 36.

9. Nelson *v.* Southern Pac. Co., 18 Utah 244, 55 Pac. 364.

10. *Georgia.*— McLain *v.* State, 71 Ga. 279.

Montana.— State *v.* McHatton, 10 Mont. 370, 25 Pac. 1040.

Tennessee.— Turner *v.* State, (1902) 69 S. W. 774.

Texas.— Veramendi *v.* Hutchins, 56 Tex. 414; McCamant *v.* State, (Cr. App. 1896) 34 S. W. 610.

West Virginia.— State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

See 31 Cent. Dig. tit. "Jury," § 268.

In Georgia the jury commissioners must be discreet persons and not county officers. McLain *v.* State, 71 Ga. 279, holding, however, that a county school commissioner is not a county officer within the application of the statute, and that an appointment to that office is not a disqualification to act as a jury commissioner.

tory.[11] Where the jury commissioners are required to take an oath before entering upon the discharge of their duties, they are not qualified to act until they have done so,[12] and where the clerk is *ex officio* a member of the commission it has been held that his oath of office as clerk is not sufficient;[13] but on the contrary it has been held that where the judge is *ex officio* a member of the commission his oath of office is sufficient and that he need not take the oath prescribed for the jury commissioners.[14] A jury commissioner is disqualified to serve in selecting jurors for a murder trial where he is a near relative of deceased,[15] or in a criminal case where he has previously taken an active part in securing defendant's arrest;[16] but in the absence of a showing of any unfairness or partiality it is no ground of challenge to the array that a jury commissioner has an action pending which will be determined by a jury drawn from the list selected by him,[17] nor is such an interest as the members of a municipality may have in a prosecution for an offense against its property sufficient to disqualify the officers of the municipality to act in making up the jury-list.[18] So also it has been held that on a trial for arson the fact that the owner of the burned building was a member of the jury commission was not ground for quashing the venire in the absence of a showing that he actually participated in drawing the jury for that particular trial.[19]

3. Term of Office. The term of office of jury commissioners is regulated by statute and varies in different jurisdictions.[20] In some a new commission is appointed at each term of court to select jurors for the succeeding term,[21] in others they hold office at the will of the court appointing them;[22] while in others

In Louisiana the statute provides that no person holding any office under the state or any parish or municipality therein shall be competent to hold the office of jury commissioner (State *v.* Fuselier, 51 La. Ann. 1317, 26 So. 264); but it is held that a person by accepting the office of jury commissioner and qualifying as such thereby vacates any other office previously held incompatible therewith and becomes a competent jury commissioner (State *v.* Fuselier, *supra*; State *v.* Scott, 110 La. 369, 34 So. 479).

In Texas, although the statute provides that jury commissioners shall have no suit in court requiring the intervention of a jury, it is held that the fact that one of the commissioners was interested in a pending suit is not ground for challenge to the array. Whittle *v.* State, (Cr. App. 1902) 66 S. W. 771.

In federal courts.— Acts of congress of 1879 provide that the court shall appoint a jury commissioner who shall be a citizen of good standing and shall reside in the district in which the court is held and who shall be a well known member of the principal political party in the district opposing that to which the clerk belongs. U. S. *v.* Chaires, 40 Fed. 820. See also U. S. *v.* Paxton, 40 Fed. 136.

11. U. S. *v.* Chaires, 40 Fed. 820.

Judgment will not be arrested for want of qualification in the jury commissioners. State *v.* Miles, 31 La. Ann. 825.

12. State *v.* Flint, 52 La. Ann. 62, 26 So. 913; State *v.* Williams, 30 La. Ann. 1028. See also State *v.* Lee, 35 S. C. 192, 14 S. E. 395. *Compare* Linnehan *v.* State, 116 Ala. 471, 22 So. 662.

13. State *v.* Thompson, 32 La Ann. 879; State *v.* Vance, 31 La. Ann. 398; State *v.* Williams, 30 La. Ann. 1028. *Contra*, State *v.* Starr, 52 La. Ann. 610, 26 So. 998.

The clerk need only take the oath as commissioner once during his term and need not take it at each drawing of the jury (State *v.* Revells, 31 La. Ann. 387); or where the court removes the other commissioners and appoints new ones in their places (State *v.* Riley, 41 La. Ann. 693, 6 So. 730; State *v.* Nockum, 41 La. Ann. 689, 6 So. 729).

14. Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274; Com. *v.* Shew, 8 Pa. Dist. 484; Com. *v.* Smith, 16 Pa. Co. Ct. 577.

15. State *v.* McQuaige, 5 S. C. 429.

16. State *v.* Duncan, 47 La. Ann. 1025, 17 So. 482.

17. Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604.

In Texas the statute of 1876 provides that the court shall appoint as commissioners persons having no suit in the county requiring the intervention of a jury. Veramendi *v.* Hutchins, 56 Tex. 414, holding, however, that a jury commissioner is not disqualified because he is the son of a party to a pending suit.

18. Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

19. Prater *v.* State, 107 Ala. 26, 18 So. 238.

20. See the statutes of the several states; and cases cited *infra*, notes 21–25.

21. O'Bryan *v.* State, 12 Tex. App. 118.

22. State *v.* Jean, 42 La. Ann. 946, 8 So. 480.

One judge may set aside the appointment made by his predecessor at any time and appoint a new jury commission. State *v.* Hingle, 48 La. Ann. 1542, 20 So. 886.

they are appointed to serve for a definite length of time;[23] but a commissioner whose term of office has expired may act until his successor is duly appointed and qualified,[24] and if a vacancy occurs during the term of office the court may appoint a successor for the unexpired term.[25]

4. COMPENSATION. Jury commissioners are entitled to compensation for their services in making up the jury-list, the amount of which is regulated by statute.[26]

E. Preparation of List — 1. IN GENERAL. While the statutes vary as to certain details the essential steps in making up the jury-list consist in: (1) A selection by the proper officers of a list of names of those persons within the county qualified to serve as jurors; (2) the signing, certification, and return of this list to the clerk of the court, to be filed or recorded by him; and (3) the copying of the names contained on the list upon separate slips or ballots which are deposited in the jury box or wheel from which the panel is subsequently to be drawn.[27] Until all of these steps have been completed a jury panel cannot legally be drawn from the box.[28]

2. WHO MAY OR MUST ACT — a. In General. The jury commissioners appointed to make the selection cannot delegate that duty to any other person but must themselves make the selection,[29] and they cannot by subsequently ratifying a selection made by some other person render the selection valid.[30] A majority, however, of the commissioners are competent to act,[31] even where the absent

Where a judge is appointed to fill a vacancy during a recess of the legislature and he appoints jury commissioners, the fact that his appointment is subsequently sent to and ratified by the senate does not necessitate the reappointment of jury commissioners. State *v.* Claude, 35 La. Ann. 71.

23. See McLain *v.* State, 71 Ga. 279; State *v.* Scott, 36 W. Va. 704, 15 S. E. 405; State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

24. Roby *v.* State, 74 Ga. 812; State *v.* Lee, 35 S. C. 192, 14 S. E. 395; State *v.* McJunkin, 7 S. C. 21.

This rule does not apply to cases where the office of jury commissioner is absolutely vacated by the commissioner accepting and entering upon the duties of another public office which under the constitution he cannot hold at the same time with his office of jury commissioner. State *v.* Newhouse, 29 La. Ann. 824.

Where a jury commissioner removes from the county but not from the state his office is not vacated under the Georgia statute until the fact is judicially ascertained. Channell *v.* State, (Ga. 1899) 34 S. E. 353.

25. See State *v.* Scott, 36 W. Va. 704, 15 S. E. 405.

26. Fees *v.* Lebanon County, 1 Pa. Co. Ct. 428. See also State *v.* Newhouse, 29 La. Ann. 824; State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 234.

Under the Pennsylvania statute of 1867 providing that each jury commissioner shall receive "two dollars and fifty cents per day and four cents per mile circular from the residence of the commissioners to the court-house" each commissioner is entitled to his *per diem* allowance for the time he is occupied in going about the county investigating as to who are proper persons to be on the jury-list, but is only entitled to mileage for going to the court-house to fill the jury wheel or draw names from it. Fees *v.* Lebanon County, 1 Pa. Co. Ct. 428.

27. *Alabama.*— Johnson *v.* State, 102 Ala. 1, 16 So. 99.

California.— People *v.* Crowey, 56 Cal. 36.

Florida.— Keech *v.* State, 15 Fla. 591.

Louisiana.—State *v.* Newhouse, 29 La. Ann. 824.

Mississippi.— Sumrall *v.* State, 29 Miss. 202.

Nebraska.— Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604.

New Jersey.— Poulson *v.* Union Nat. Bank, 40 N. J. L. 563.

Pennsylvania.— Com. *v.* Baranowski, 5 Pa. Co. Ct. 642.

Tennessee.— Turner *v.* State, (1902) 69 S. W. 774.

Wyoming.— State *v.* Bolln, (1902) 70 Pac. 1.

See 31 Cent. Dig. tit. "Jury," §§ 275, 276.

28. Johnson *v.* State, 102 Ala. 1, 16 So. 99.

29. State *v.* Newhouse, 29 La. Ann. 824; Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274.

30. State *v.* Newhouse, 29 La. Ann. 824. But see Rhodes *v.* Southern R. Co., 68 S. C. 494, 47 S. E. 689.

31. State *v.* Osnes, 14 Mont. 553, 37 Pac. 13; Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

All of the jury commissioners must have qualified as required by law and be in a position to act, and if some of them have not qualified the court may set aside a venire drawn from a list selected by a majority who were duly qualified. State *v.* Kellogg, 104 La. 580, 29 So. 285.

The temporary absence from the room of one member during the selection does not invalidate the list. Com. *v.* Lippard, 6 Serg. & R. (Pa.) 395.

member is the judge[32] or clerk,[33] who in some jurisdictions are members of the jury commission.

b. De Facto Officer. The selection of a jury-list by a *de facto* jury commissioner is as regular as a selection by a commissioner *de jure*,[34] and is no ground for a challenge to the array.[35] It is not competent in this collateral manner to question the commissioner's title to his office,[36] or the validity of the law under which he was appointed.[37]

3. Selection of Names — a. In General. The commissioners in selecting the names to compose the jury-list have full power to decide as to who are fit to serve as jurors or whether certain persons possess the qualifications prescribed by the statutes,[38] and in the absence of any showing of fraud or corruption their decision will not be interfered with;[39] but the list must be selected without distinction from all the persons of the county qualified to serve as jurors,[40] and where the statute specifically prescribes the class of persons from whom the list is to be selected, a failure to select the list from this class is a fatal irregularity.[41] It does not invalidate the list or furnish any ground of challenge to the array that the commissioners by accident and without fraudulent design returned on the list

32. Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

33. State *v.* Osnes, 14 Mont. 553, 37 Pac. 13.

The assistant clerk may officiate in the absence of the chief. Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

34. Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405; State *v.* Lee, 35 S. C. 192, 14 S. E. 395 [*distinguishing* State *v.* Bryce, 11 S. C. 342]; Palmer *v.* Charlotte, etc., R. Co., 3 S. C. 580, 16 Am. Rep. 750.

Where a commissioner's term of office has expired his acts are valid as a *de facto* commissioner until his successor has been appointed and qualified to act (State *v.* Lee, 35 S. C. 192, 14 S. E. 395; State *v.* McJunkin, 7 S. C. 21); but he has no authority to act after his successor has been duly qualified (State *v.* Bryce, 11 S. C. 342).

35. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76; Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; Carpenter *v.* People, 64 N. Y. 483; Thompson *v.* People, 6 Hun (N. Y.) 135; State *v.* McJunkin, 7 S. C. 21; Palmer *v.* Charlotte, etc., R. Co., 3 S. C. 580, 16 Am. Rep. 750.

36. Com. *v.* Clemmer, 190 Pa. St. 202, 42 Atl. 675; Palmer *v.* Charlotte, etc., R. Co., 3 S. C. 580, 16 Am. Rep. 750.

37. Carpenter *v.* People, 64 N. Y. 483; Thompson *v.* People, 6 Hun (N. Y.) 135.

38. *Florida.* — Reeves *v.* State, 29 Fla. 527, 10 So. 901.

Louisiana. — State *v.* Chase, 37 La. Ann. 165.

North Carolina. — State *v.* Daniels, (1904) 46 S. E. 743.

South Carolina. — State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Wyoming. — State *v.* Bolln, (1902) 70 Pac. 1.

See 31 Cent. Dig. tit. "Jury," § 275.

The commissioners may accept names found in the box selected by their predecessors if upon examination they are found to be names of qualified persons and may add thereto sufficient names to make up the requisite number, in the absence of any statutory provision to the contrary. State *v.* Mangrum, 35 La. Ann. 619.

The commissioners cannot be required to disclose to the parties litigant what names were considered by them and rejected in selecting the list. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

39. Reeves *v.* State, 29 Fla. 527, 10 So. 901.

40. State *v.* Newhouse, 29 La. Ann. 824; Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274; Com. *v.* Baranowski, 6 Pa. Co. Ct. 157.

In California the statute provides that the names shall be selected from the wards and townships of the county in proportion to the inhabitants thereof as near as may be estimated by the board of supervisors. People *v.* Searcey, (1898) 53 Pac. 359.

In Pennsylvania the statute provides that in making up the list the commissioners shall "select alternately from the whole qualified electors of the county" (Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274); but this statute does not prevent the commissioners from each preparing in advance a list to aid him in making his selection (Klemmer *v.* Mt. Penn Gravity R. Co., *supra*); Com. *v.* Rentz, 20 Pa. Co. Ct. 568. But see *In re* Bucks County Jurors, 20 Pa. Co. Ct. 36).

The fact that the list was selected from the qualified voters does not show that any particular class of persons qualified to serve as jurors was excluded (State *v.* Green, 43 La. Ann. 402, 9 So. 42); nor is it a valid objection to the list that it was selected from the list of registered voters in the absence of a showing that the list of registered voters did not comprise the names of all the qualified voters (State *v.* Thomas, 35 La. Ann. 24).

41. State *v.* Jenkins, 32 Kan. 477, 4 Pac. 809. See also State *v.* Morgan, 20 La. Ann.

more than the proper number of names,[42] or that some of the names were of persons disqualified[43] or exempt from jury duty.[44] The fact that the commissioners occupied an unnecessarily long time in preparing the list does not affect its validity,[45] but merely renders them liable to punishment for failing to exercise due diligence.[46] Where the list is made out in the first instance by the selectmen and then reported to a meeting of the town, the town may adopt it in whole or only in part and substitute other names in the place of those rejected.[47] In the federal courts the list is selected by the commissioner and the clerk, each selecting alternately the name of a person having the prescribed qualifications until a list of not less than three hundred is made up.[48]

b. Time and Place of Selection. The statutes prescribing the time for selecting the jury-list are held to be merely directory, and if the list is at a later date properly selected and returned the delay furnishes no ground of objection to the panel.[49] Under the Louisiana statute the place of meeting for selecting the jury-list may be at any convenient point within the parish which the clerk may designate.[50]

4. Certification and Return of List. The list after being made out is to be signed, certified, and returned to the office of the clerk to be filed or recorded.[51] The provisions as to the time for returning the list are merely directory and a delay

442; State *v.* Da Rocha, 20 La. Ann. 356; State *v.* Pratt, 15 Rich. (S. C.) 47; State *v.* Jennings, 15 Rich. (S. C.) 42.

42. People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865; Hewett *v.* Saginaw Cir. Judge, 71 Mich. 287, 39 N. W. 56; Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520. *Contra*, Gladden *v.* State, 13 Fla. 623.

This irregularity may be corrected by striking from the list the names in excess of the proper number. People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865; Hewitt *v.* Saginaw Cir. Judge, 71 Mich. 287, 39 N. W. 56.

43. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; People *v.* Young, 108 Cal. 8, 41 Pac. 281; State *v.* Foster, 32 La. Ann. 34; Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240.

44. State *v.* Brooks, 9 Ala. 9.

45. Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404; Com. *v.* Lippard, 6 Serg. & R. (Pa.) 395.

46. See Com. *v.* Lippard, 6 Serg. & R. (Pa.) 395.

47. Page *v.* Danvers, 7 Metc. (Mass.) 326

48. U. S. *v.* Chaires, 40 Fed. 820.

49. *Alabama.*— Childs *v.* State, 97 Ala. 49, 12 So. 441.

Connecticut.— Colt *v.* Eves, 12 Conn. 243.

Florida.— Reeves *v.* State, 29 Fla. 527, 10 So. 901.

Michigan.—People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865; Thomas *v.* People, 39 Mich. 309.

Missouri.— State *v.* Pitts, 58 Mo. 556.

New York.— People *v.* Wennerholm, 166 N. Y. 567, 60 N. E. 259, 15 N. Y. Cr. 398.

Pennsylvania.— Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

South Carolina.— State *v.* Lee, 35 S. C. 192, 14 S. E. 395.

Utah.— Kennedy *v.* Oregon Short Line R. Co., 18 Utah 325, 54 Pac. 988.

Wisconsin.—Burlingame *v.* Burlingame, 18 Wis. 285.

Wyoming.— State *v.* Bolln, 10 Wyo. 439, 70 Pac. 1.

See 31 Cent. Dig. tit. "Jury," § 274.

Compare Buhol *v.* Boudousquie, 8 Mart. N. S. (La.) 425.

The selection may be made at an adjourned meeting of the board in the absence of any statutory requirement that it must be made at a regular meeting (People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186); but it has been held that if the commissioners have met at the proper time and selected the jury-list but have failed to do so in the manner required by law, they cannot at a later date call a special meeting merely for the purpose of correcting errors or mistakes made at the regular meeting (Wells *v.* State, 94 Ala. 1, 10 So. 656).

50. State *v.* Johnson, 47 La. Ann. 1092, 17 So. 480.

51. McLain *v.* State, 71 Ga. 279; Carter *v.* State, 56 Ga. 463; State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; State *v.* Schumm, 47 Minn. 373, 50 N. W. 362; State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

Where the county commissioners constitute the jury commission the validity of the list is not affected by the fact that it is signed by them as county commissioners instead of jury commissioners. Linnehan *v.* State, 116 Ala. 471, 22 So. 662.

It is not necessary for the certificate to specify the particulars of the proceedings, but it is sufficient to specify generally that the jurors were selected in all respects according to the provisions of the statute. Poulson *v.* Union Nat. Bank, 40 N. J. L. 563.

Form of certificate held sufficient see Carter *v.* State, 56 Ga. 463; State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; State *v.* Lee, 35 S. C. 192, 14 S. E. 395.

The record of the list, under the Florida statute, is to be made in the minutes of the county commissioners and not in the minutes

in making the return is not a material irregularity.[52] It is a material irregularity and ground for challenge to the array if the list returned is not signed and certified,[53] or that it was not filed in the office of the clerk as required by law;[54] but mere irregularities in the form of the certificate do not invalidate the list.[55]

F. The Jury Wheel or Box — 1. Copying and Depositing Names. When the list is made out, certified, and returned the names returned are to be written on separate slips or ballots and placed in the jury wheel or box,[56] the names of those who are to serve as grand and petit jurors being put in the same box,[57] or in different boxes as the statute may direct;[58] and until all the names are placed in

of the court (White *v.* State, 26 Fla. 602, 7 So. 857); and it has been held that the failure of the clerk to make such record is not prejudicial error (Keech *v.* State, 15 Fla. 591).

The fact that no list was returned from one township is no ground for a challenge to the array, where the statute provides that in such cases the old list may be used. Thomas *v.* People, 39 Mich. 309.

52. State *v.* Gut, 13 Minn. 341.

The fact that an order of the court is necessary to compel the return of the list does not affect its validity; it being immaterial whether it is returned voluntarily or by order of the court. People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865.

Return by successors in office.— Where the officers whose duty it is to return the list to the clerk go out of the office after the selection of the list and before its return, the return may be made by their successors. McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376.

53. State *v.* Schumm, 47 Minn. 373, 50 N. W. 362. See also State *v.* Greenman, 23 Minn. 209; Poulson *v.* Union Nat. Bank, 40 N. J. L. 563. *Contra*, Coker *v.* State, 7 Tex. App. 83, under a statutory provision that the only ground of challenge to the array shall be that the officer summoning the jury acted corruptly.

Where the county clerk and the clerk of the board is the same person so that all facts are within the knowledge of the person having the custody of the list, the absence of the certificate will not invalidate the list and it may be attached at the time of the trial; but if there were any doubt as to the identity of the list a challenge to the array would be sustained. State *v.* Young, 108 Cal. 8, 41 Pac. 281.

It is not necessary to dismiss the action where the jury is drawn from an uncertified list, but the court may set aside the venire and cause a new jury to be drawn from a legally certified list. Woodcock *v.* Gladdings, 75 N. Y. App. Div. 199, 77 N. Y. Suppl. 955.

54. Com. *v.* Haines, 27 Pa. Co. Ct. 81.

It is not necessary to mark the list as "filed" after filing it. It would not be improper to do so but the law does not require it. Brinkley *v.* State, 54 Ga. 371.

55. State *v.* Brooks, 9 Ala. 9.

56. Johnson *v.* State, 102 Ala. 1, 16 So. 99; People *v.* Crowey, 56 Cal. 36; McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376; Stevens *v.* Richer, 1 How. (Miss.) 522.

The names on the slips may be typewritten instead of being written with pen and ink. Com. *v.* Haines, 27 Pa. Co. Ct. 81.

A barrel is a "box" within the purpose and requirements of the statute. Com. *v.* Bacon, 135 Mass. 521.

Where a parish is divided into two parishes a separate box must be provided for each, and it is a fatal irregularity if all the names from both divisions are put in one box. Auzan's Case, 2 Mart. (La.) 124.

In Pike county, Alabama, the act of 1888–1889 provides that the names shall be placed in fifteen boxes, one for each precinct, instead of in one box as under the general law, and in drawing the jury one name should be drawn from each box in rotation. Hornsby *v.* State, 94 Ala. 55, 10 So. 522.

In North Carolina the statute providing that the jury-box shall have two divisions "marked numbers 1 and 2," is merely directory, and it is a sufficient compliance with the statute where the compartments are marked "jurors drawn" and "jurors not drawn." State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

Additional boxes for jurors of city or town.— In New York the statute of 1861 required an additional box to be provided, containing the names of jurors residing in the city or town where the courts were to be held, from which jurors were to be drawn to supply deficiencies in the regular panel (People *v.* McGeery, 6 Park. Cr. (N. Y.) 653; Gardiner *v.* People, 6 Park. Cr. (N. Y.) 155); and in Iowa the statute provides that the names of each alternative juror on the list from cities and towns where courts are held shall be put in a box to be known as the talesmen's box (Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488).

In federal courts under the jury law of 1879, requiring that in districts where there is a clerk for each place of holding United States courts there shall be as many jury boxes as there are clerks, it has been held that in a district where there was but one clerk of the circuit court but that court was held in three places in each of which there was a clerk of the district court, the circuit court should use three jury-boxes instead of one, all being supplied with names by the clerk of the circuit court in conjunction with the general jury commissioner. U. S. *v.* Munford, 16 Fed. 164.

57. People *v.* Crowey, 56 Cal. 36.

58. Atkinson *v.* Morse, 63 Mich. 276, 29 N. W. 711.

the box a jury panel cannot be drawn therefrom.[59] The names need not be actually written by the clerk of the court or commissioners, as prescribed by the statute, if it is done by their direction by some other person employed by them in their presence and under their supervision.[60]

2. Form and Requisites of Ballots. Some of the statutes provide that the separate slips or ballots on which the names are written shall state the juror's residence,[61] or his occupation,[62] and that the slips on being put into the jury wheel or box shall be rolled up or folded.[63] It is a material irregularity and ground for challenge to the array that the ballots were not rolled or folded,[64] but not that a few of the ballots did not show the juror's residence [65] or that some of the jurors were designated by their initials instead of by their christian names.[66]

3. Custody and Fastenings. After the names are placed in the jury-box or wheel it should be locked and sealed,[67] and as an additional precaution it is sometimes required that the box and the key shall be kept in the custody of different officers.[68] Where the statute provides that the box shall be kept in the custody of the commissioners it is sufficient if it is kept in a vault of one of the public offices where only they have access to it [69] or it may by consent of all the commissioners be kept by one of them at his home.[70] Any neglect of duty as to the proper fastenings, care, and custody of the box is highly reprehensible,[71] and is sometimes made the subject of a heavy penalty.[72] It has been held to be a ground of challenge to the array that the jury-box was not sealed,[73] that it did not have the proper number of seals,[74] or that the key and the box were not kept in the custody of the separate officers as required by law,[75] although there was no evidence of the box having been tampered with;[76] while on the other hand it has been

59. Johnson *v.* State, 102 Ala. 1, 16 So. 99.

60. State *v.* McCarthy, 44 La. Ann. 323, 10 So. 673; Com. *v.* Lippard, 6 Serg. & R. (Pa.) 395; Ullman *v.* State, 124 Wis. 602, 103 N. W. 6.

Where the statute requires the names to be written by the clerk it is no ground of challenge to the array that some of the names were written by one of the commissioners in the presence of the clerk and of the other commissioners. State *v.* White, 46 La. Ann. 1273, 15 So. 623.

61. Wilkinson *v.* State, 106 Ala. 23, 17 So. 458; State *v.* White, 46 La. Ann. 1273, 15 So. 623.

The residence of a juror is sufficiently designated by a number opposite his name indicating the precinct or ward in which he lives (Jones *v.* State, 104 Ala. 30, 16 So. 135; State *v.* White, 46 La. Ann. 1273, 15 So. 623), although it would be better that the address should be written out (Jones *v.* State, *supra*).

62. Com. *v.* Bacon, 135 Mass. 521; Quigley *v.* Com., 84 Pa. St. 18.

It is a sufficient designation of a juror's occupation as a dealer in liquors to write the word "liquors" after his name on the ballot. Com. *v.* Bacon, 135 Mass. 521.

63. McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376; Pringle *v.* Huse, 1 Cow. (N. Y.) 432.

The object of this requirement is to prevent the person drawing the panel from seeing the names and so to make it impossible for him to exercise any partiality. McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376.

64. McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376.

65. Thompson *v.* State, 122 Ala. 12, 26 So. 141; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458.

66. Com. *v.* Scouton, 20 Pa. Super. Ct. 503.

67. Kittanning Ins. Co. *v.* Adams, 110 Pa. St. 553, 1 Atl. 443; Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740; Com. *v.* Shew, 8 Pa. Dist. 484.

68. Smith *v.* Com., 108 Ky. 53, 55 S. W. 718, 21 Ky. L. Rep. 1470; Kittanning Ins. Co. *v.* Adams, 110 Pa. St. 553, 1 Atl. 443.

69. Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405; Curley *v.* Com., 84 Pa. St. 151; Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758.

70. Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274.

71. State *v.* Hensley, 94 N. C. 1021.

72. Kittanning Ins. Co. *v.* Adams, 110 Pa. St. 553, 1 Atl. 443.

73. Com. *v.* Shew, 8 Pa. Dist. 484.

74. Kittanning Ins. Co. *v.* Adams, 110 Pa. St. 553, 1 Atl. 443; Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740.

The reason for requiring separate seals for the different officers is to avoid tampering with the wheel, since if only one seal is used the person having the custody of that seal might break and replace it. Curley *v.* Com., 84 Pa. St. 151.

75. Smith *v.* Com., 108 Ky. 53, 55 S. W. 718, 21 Ky. L. Rep. 1470; Kittanning Ins. Co. *v.* Adams, 110 Pa. St. 553, 1 Atl. 443.

76. Kittanning Ins. Co. *v.* Adams, 110 Pa. St. 553, 1 Atl. 443.

held that the fact that the box was not kept locked is no ground of challenge to the array in the absence of any showing of fraud or prejudice to the parties.[77]

G. Correction and Revision of List. It is the duty of the commissioners to revise the jury-list as often as is required by the statute,[78] but a failure to do so is not ground for challenging the array or quashing a venire drawn from the original list.[79] In some cases the statutes provide that the jury-box must be exhausted before another box is filled,[80] while in others it is provided that a new list shall be made annually which entirely supersedes the old list, and any names remaining in the box from the preceding year are not carried forward but taken out and destroyed.[81] In Louisiana the list of names in the box must be supplemented every six months or oftener if the court so directs so as to bring the number of names in the box up to three hundred.[82] When a panel has been quashed and a new selection ordered because of irregularities in the making up of the list or custody of the jury-box, the commissioners should not undertake to purge the list already in the box and select the new list entirely therefrom,[83] but should make the selection from all of the qualified jurors of the county, in which selection, however, the names of persons on the original list should not be absolutely excluded.[84]

H. Errors and Irregularities — 1. Presumptions. In the absence of evidence to the contrary it will be presumed that the proceedings in selecting and making up the jury-list were regular and that the statutes were complied with.[85]

2. Effect. The statutory provisions with regard to making up the jury-list are ordinarily held to be merely directory,[86] and errors and irregularities in failing

77. State *v.* Curtis, 44 La. Ann. 320, 10 So. 784; State *v.* Hensley, 94 N. C. 1021.

78. State *v.* Hensley, 94 N. C. 1021.

No order of court is necessary for the refilling of the jury-box. West *v.* State, 118 Ala. 100, 24 So. 48.

79. State *v.* Teachey, 138 N. C. 587, 50 S. E. 232; State *v.* Dixon, 131 N. C. 808, 42 S. E. 944; State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536; State *v.* Hensley, 94 N. C. 1021; State *v.* Smarr, (N. C. 1897) 28 S. E. 549; State *v.* Massey, 2 Hill (S. C.) 379.

80. Steele *v.* State, 111 Ala. 32, 20 So. 648.

In Louisiana this was formerly the rule (Gettwerth *v.* Teutonic Ins. Co., 29 La. Ann. 30; State *v.* Petrie, 25 La. Ann. 386); but under the present statute the number of names in the box must be kept up to three hundred (State *v.* Love, 106 La. 658, 31 So. 289).

81. State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

82. State *v.* Batson, 108 La. 479, 32 So. 478.

If the list is not supplemented by adding the proper number of names it is ground for challenging the array drawn from a box containing a deficient number (State *v.* Love, 106 La. 658, 31 So. 289), except, however, when the list is supplemented the box need not contain the full number of names, but it should at all times, barring accidents and oversights, contain that number less the number drawn since it was last supplemented (State *v.* Batson, 108 La. 479, 32 So. 478).

If the names of jurors who are absent, disqualified, or dead have been allowed to accumulate in the box so as to reduce the number of qualified jurors, it is competent for the jury commissioners to empty the box and place therein the proper number of names of qualified jurors. State *v.* Nockum, 41 La. Ann. 689, 6 So. 729; State *v.* Riley, 41 La. Ann. 693, 6 So. 730.

83. Kell *v.* Brillinger, 84 Pa. St. 276.

84. Com. *v.* Baranowski, 6 Pa. Co. Ct. 157.

85. *Alabama.*— Childs *v.* State, 97 Ala. 49, 12 So. 441.

California.— People *v.* Sowell, 145 Cal. 292, 78 Pac. 717.

Florida.— Reeves *v.* State, 29 Fla. 527, 10 So. 901.

Minnesota.— State *v.* Gut, 13 Minn. 341.

New York.— Gardiner *v.* People, 6 Park. Cr. 155.

Pennsylvania.— Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405; Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758; Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

Washington.— State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

See 31 Cent. Dig. tit. "Jury," § 281.

Where no jurors are selected from one small township it will be presumed that there were no qualified jurors therein. People *v.* Sowell, 145 Cal. 292, 78 Pac. 717.

86. *Alabama.*— Wilkinson *v.* State, 106 Ala. 23, 17 So. 458; Childs *v.* State, 97 Ala. 49, 12 So. 441; Sale *v.* State, 68 Ala. 530.

Nevada.— State *v.* Squaires, 2 Nev. 226.

New Jersey.— Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30; Poulson *v.* Union Nat. Bank, 40 N. J. L. 563.

North Carolina.—State *v.* Hensley, 94 N. C. 1021.

Pennsylvania.— Com. *v.* Zillafrow, 207 Pa. St. 274, 56 Atl. 539.

South Carolina.— State *v.* Massey, 2 Hill 379.

Texas.— Coker *v.* State, 7 Tex. App. 83.

to comply strictly with their provisions which are not prejudicial to the parties do not invalidate the list or furnish any ground for challenging the array;[87] but a substantial compliance with the law is necessary,[88] and a disregard of the material provisions which make up the essential features of the system and are designed to secure and preserve a fair and impartial trial is not a mere irregularity and is ground for challenging the array,[89] even though it does not affirmatively appear that any injury has resulted therefrom.[90] Where it appears that the jury list is invalid, the court may of its own motion declare it to be so,[91] and may require the commissioners to make out a new list.[92]

VIII. THE JURY PANEL.

A. The Regular Panel — 1. Drawing or Selection of Panel — a. In General. The manner in which the jury panel shall be drawn is regulated in the different jurisdictions by statutory provisions,[93] which are in most respects merely

Washington.— State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

See 31 Cent. Dig. tit. "Jury," § 282.

87. *Alabama.*— Childress *v.* State, (1899) 26 So. 162; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458; Childs *v.* State, 97 Ala. 49, 12 So. 441.

California.— People *v.* Sowell, 145 Cal. 292, 78 Pac. 717.

Kansas.— State *v.* Whisner, 35 Kan. 271, 10 Pac. 852.

Louisiana.— State *v.* White, 46 La. Ann. 1273, 15 So. 623; State *v.* McCarthy, 44 La. Ann. 323, 10 So. 673; State *v.* Curtis, 44 La. Ann. 320, 10 So. 784.

Michigan.— Wise *v.* Otter Creek Lumber Co., 86 Mich. 40, 48 N. W. 695; Thomas *v.* People, 39 Mich. 309.

Montana.— State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

Nevada.— State *v.* Squaires, 2 Nev. 226.

New Jersey.— Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30.

New Mexico.— Territory *v.* McFarlane, (1894) 37 Pac. 1111.

North Carolina.—State *v.* Hensley, 94 N. C. 1021.

South Carolina.— Rhodes *v.* Southern R. Co., 68 S. C. 494, 47 S. E. 689; State *v.* Massey, 2 Hill 379.

Texas.— Coker *v.* State, 7 Tex. App. 83.

Washington.— State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

Wisconsin.—Ullman *v.* State, 124 Wis. 602, 103 N. W. 6; Burlingame *v.* Burlingame, 18 Wis. 285.

See 31 Cent. Dig. tit. "Jury," § 282.

Contra.— Gladden *v.* State, 13 Fla. 623, holding that irregularities, however slight, which show a departure from the requirements of the statute are ground for challenge to the array.

In Minnesota the statute expressly provides that a challenge to the array will not be allowed except for a "material departure" from the forms prescribed by law. State *v.* Gut, 13 Minn. 341.

It is only essential that there should be a fair and impartial jury composed of eligible men. State *v.* Hensley, 94 N. C. 1021.

The fact that the list was selected from the assessment roll of the year preceding that which should have been used is not ground for challenging the array. Niles *v.* Schoolcraft, 102 Mich. 328, 60 N. W. 771.

An intentional omission of persons who are exempt but otherwise qualified to serve in making up the jury-list is an irregularity but not ground for challenge to the array. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

88. Hewitt *v.* Saginaw, 71 Mich. 287, 39 N. W. 56; State *v.* Bolln, (Wyo. 1902) 70 Pac. 1; Seaman *v.* Campbell, 2 Nova Scotia 94.

89. *Kansas.*— State *v.* Jenkins, 32 Kan. 477, 4 Pac. 809.

Kentucky.— Risner *v.* Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. L. Rep. 84.

Louisiana.— State *v.* Love, 106 La. 658, 31 So. 289.

Michigan.— Hewitt *v.* Saginaw, 71 Mich. 287, 39 N. W. 56.

Pennsylvania.— Kell *v.* Brillinger, 84 Pa. St. 276.

Canada.— Grose *v.* Holmes Electric Protection Co., 9 Quebec Super. Ct. 374.

See 31 Cent. Dig. tit. "Jury," § 282.

90. Hewitt *v.* Saginaw, 71 Mich. 287, 39 N. W. 56. See also Risner *v.* Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. L. Rep. 84.

91. Smaltz *v.* Boyce, 109 Mich. 382, 69 N. W. 21.

92. Smaltz *v.* Boyce, 109 Mich. 382, 69 N. W. 21; State *v.* Bolln, (Wyo. 1902) 70 Pac. 1.

93. See the following cases:

Alabama.— Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2.

Louisiana.— State *v.* Conway, 35 La. Ann. 350.

Missouri.— State *v.* Austin, 183 Mo. 478, 82 S. W. 5.

Montana.— Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

Nebraska.— Neal *v.* State, 32 Nebr. 120, 49 N. W. 174.

New York.— People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130; Friery *v.* People, 2 Abb. Dec. 215, 2 Keyes 424.

North Carolina.— Moore *v.* Navassa Guano

directory,[94] but which as to their material provisions, designed for securing a fair and impartial jury, must be substantially complied with.[95] The proceeding as conducted in most jurisdictions consists in a drawing from the box or wheel by the proper officers of a sufficient number of names to make up the panel, a record of the proceedings being kept which is afterward signed and filed in the office of the clerk, and the making of a list of the names drawn which is signed and certified and delivered to the sheriff.[96] If in drawing the jury the names of persons are drawn who are dead or have removed from the county, these names should be excluded and others drawn to complete the panel,[97] and it has been held that the same course should be pursued as to persons disqualified.[98] Where at the time for drawing the jury a new list has been prepared but not filed, the jury is properly drawn from the last list filed.[99] In the absence of statute the drawing need not be public,[1] nor have the parties or their attorneys any right to be present.[2] The most important requirement is that the panel shall be drawn and not arbitrarily selected, and any act of this character on the part of the clerk or other officers is ground for challenge to the array.[3]

b. Who May or Must Act. In most jurisdictions the drawing of the jury panel is done by the clerk,[4] and in the absence of the regular clerk the deputy

Co., 130 N. C. 229, 41 S. E. 293; People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

Pennsylvania.— Com. *v.* Smith, 16 Pa. Co. Ct. 577; Com *v.* Baranowski, 5 Pa. Co. Ct. 642.

South Carolina.— State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Washington.— State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

Canada.—Matter of Poussett, 22 U. C. Q. B. 412.

See 31 Cent. Dig. tit. "Jury," § 283.

94. *Kansas.*— State *v.* Yordi, 30 Kan. 221, 2 Pac. 161.

Missouri.— State *v.* Jackson, 167 Mo. 291, 66 S. W. 938; State *v.* Gleason, 88 Mo. 582; State *v.* Knight, 61 Mo. 373.

New York— Friery *v.* State, 2 Abb. Dec. 215, 2 Keyes 424 [*affirming* 54 Barb. 319]; People *v.* Ferris, 1 Abb. Pr. N. S. 193.

Ohio.— State *v.* Barlow, 70 Ohio St. 363, 71 N. E. 726.

West Virginia.— State *v.* Clark, 51 W. Va. 457, 41 S. E. 204.

See 31 Cent. Dig. tit. "Jury," § 283.

95. People *v.* Wong Bin, 139 Cal. 60, 72 Pac. 505; Nealon *v.* People, 39 Ill. App. 481; State *v.* Austin, 183 Mo. 478, 82 S. W. 5; Moore *v.* Navassa Guano Co., 130 N. C. 229, 41 S. E. 293. See also Steele *v.* State, 111 Ala. 32, 20 So. 648.

The statutory provisions cannot be entirely disregarded and the panel selected in a manner other than that which the statutes provide. Shackleford *v.* State, 2 Tex. App. 385.

96. Thompson & M. Jur. §§ 55, 56, 57. See also State *v.* Conway, 35 La. Ann. 350; Friery *v.* People, 2 Abb. Dec. (N. Y.) 215, 2 Keyes 424.

97. Jones *v.* State, 1 Ohio Dec. (Reprint) 390, 8 West. L. J. 508; Anonymous, 1 Browne (Pa.) 121; Thompson & M. Jur. § 57. See also Marlow *v.* State, (Fla. 1905) 38 So. 653.

98. Lindley *v.* Kindall, 4 Blackf. (Ind.) 189. *Contra,* Anonymous, 1 Browne (Pa.) 121.

99. Cargain *v.* Everett, 16 N. Y. Suppl. 668.

1. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

In South Carolina it is now provided by act of 1898 that the drawing of jurors shall be public and no person excluded who desires to be present. State *v.* Turner, 63 S. C. 548, 41 S. E. 778.

2. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

3. Jones *v.* State, 3 Blackf. (Ind.) 37; McCloskey *v.* People, 5 Park. Cr. (N. Y.) 308; Moore *v.* Navassa Guano Co., 130 N. C. 229, 41 S. E. 293; U. S. *v.* Coit, 25 Fed. Cas. No. 14,829.

4. *Illinois.*— Mapes *v.* People, 69 Ill. 523.

Indiana.— Doolittle *v.* State, 93 Ind. 272; Jones *v.* State, 3 Blackf. 37.

Kansas.— State *v.* Bohan, 19 Kan. 28.

Michigan.— Fornia *v.* Frazer, 140 Mich. 631, 104 N. W. 147; People *v.* Labadie, 66 Mich. 702, 33 N. W. 806.

Washington.— State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

See 31 Cent. Dig. tit. "Jury," § 284.

A de facto clerk may act in drawing a jury panel. Mapes *v.* People, 69 Ill. 523.

Drawing by sheriff.— Where the act of drawing the names from the box was performed by the sheriff and the clerk announced the names drawn and wrote them down, it has been held a ground for challenge to the array. People *v.* Labadie, 66 Mich. 702, 33 N. W. 806. *Contra,* Pratt *v.* Grappe, 12 La. 451.

In Montana the drawing is done by the county commissioners. See Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

In North Carolina the names are drawn from the box by a child not over ten years of age under the supervision of the county commissioners. If the commissioners fail to act the panel is drawn by the sheriff and the

clerk may act.[5] In one jurisdiction at least the panel may be drawn by the clerk alone without the presence or assistance of any other officer,[6] but in most jurisdictions the drawing must be in the presence of or with the assistance of certain other officers.[7] Ordinarily a majority of those required to be present are authorized to act,[8] but the clerk is a necessary member of that majority.[9] If those officers are present which the statute requires, the presence of some other officer not by law required to be present will not invalidate the drawing;[10] but the rule is otherwise if this officer is an interested party and participates in the proceedings.[11] Where the panel is drawn by jury commissioners a *de facto* jury commissioner is competent to act.[12] In proceedings where the sheriff selects as well as summons the jury the duty cannot be delegated to a deputy.[13]

c. Notice of Drawing. Where the statutes require that notice of the drawing shall be given,[14] it is not necessary, if a public notice is required, to give notice by publication in a newspaper but any public notice is sufficient;[15] and if the officers required to be notified are actually present at the drawing the fact that no notice was given them is immaterial.[16]

d. Time and Place. The drawing of the jury is usually required to be made a certain number of days before the term at which they are to serve,[17] or upon the order of the court.[18] Under other statutes the panel for each term is drawn at the preceding term,[19] and under others not until the sitting of the court.[20] Where

clerk of the commissioners in the presence of and assisted by two justices of the peace, but the sheriff is not authorized to act except in such cases. People *v.* Tague, 106 N. C. 576, 11 S. E. 665.

5. People *v.* Fuller, 2 Park. Cr. (N. Y.) 16; U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*b*.

6. Doolittle *v.* State, 93 Ind. 272.

7. State *v.* Bohan, 19 Kan. 28; State *v.* Hornsby, 33 La. Ann. 1110; State *v.* Payne, 6 Wash. 563, 34 Pac. 317; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Where the sheriff is required to be present at the time of the drawing his absence is ground for challenge to the array (Com. *v.* Baranowski, 5 Pa. Co. Ct. 642), and he cannot delegate his duties in this regard to his deputy (State *v.* Payne, 6 Wash. 563, 34 Pac. 317. *Contra*, State *v.* Aspara, 113 La. 940, 37 So. 883).

A deputy recorder may participate in the drawing of the jury in the absence of the recorder. State *v.* Turner, 114 Iowa 426, 87 N. W. 287.

The fact that the sheriff is a witness for the state does not disqualify him to act as a member of the commission in drawing the jury. People *v.* Summers, 115 Mich. 537, 73 N. W. 818.

8. State *v.* Bohan, 19 Kan. 28; State *v.* Thomas, 50 La. Ann. 148, 23 So. 250; State *v.* Magee, 48 La. Ann. 901, 19 So. 933; State *v.* Wells, 33 La. Ann. 1407; State *v.* Hornsby, 33 La. Ann. 1110; State *v.* Arata, 32 La. Ann. 193; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

If all the commissioners have been notified, the fact that some of them are absent is immaterial if a majority is present. State *v.* Thomas, 50 La. Ann. 148, 23 So. 250.

9. State *v.* Conway, 35 La. Ann. 350.

If the clerk has not taken the oath as a member of the jury commission at the time of the drawing he is not qualified to act and the other members of the commission cannot proceed without him. State *v.* Williams, 30 La. Ann. 1028.

10. State *v.* Bohan, 19 Kan. 28; State *v.* Aspara, 113 La. 940, 37 So. 883; Hunt *v.* Mayo, 27 La. Ann. 197.

11. People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

12. People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624. See also Spraggins *v.* State, 139 Ala. 93, 35 So. 1000.

13. Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445.

14. See cases cited *infra*, notes 15, 16.

15. U. S. *v.* Reynolds, 1 Utah 319.

16. People *v.* Gallagher, 55 Cal. 462; State *v.* Yordi, 30 Kan. 221, 2 Pac. 161; State *v.* Powers, 59 S. C. 200, 37 S. E. 690; Williams *v.* State, (Tex. Cr. App. 1903) 75 S. W. 859.

17. Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; State *v.* Red, 32 La. Ann. 819; Lyon *v.* Commercial Ins. Co., 2 Rob. (La.) 266; Powell *v.* People, 5 Hun (N. Y.) 169; Crane *v.* Dygert, 4 Wend. (N. Y.) 675.

The object in requiring the drawing to be in advance of the term is to allow the parties sufficient time for examination of the list, and for inquiry as to the character and qualifications and possible bias. Powell *v.* People, 5 Hun (N. Y.) 169.

18. Thompson & M. Jur. § 55. See also New York *v.* Mason, 4 E. D. Smith (N. Y.) 142, 1 Abb. Pr. 344.

In condemnation proceedings under the Michigan statute of 1864, the jury must be drawn in the presence of the judge and at the time the order therefor is made. Convers *v.* Grand Rapids, etc., R. Co., 18 Mich. 459.

19. State *v.* Pratt, 15 Rich. (S. C.) 47.

20. Stevens *v.* Richer, 1 How. (Miss.) 522.

the drawing is required to be at least a certain number of days before the term it is a ground of challenge to the array if made within a less time;[21] but they need not be drawn exactly that number of days before the term, and it is no ground of challenge to the array if they are drawn more than this number of days before the term.[22] Where the statute requires the drawing to be in the clerk's office it is a sufficient compliance where the drawing is in an adjoining room opening into and constituting a part of the main office.[23]

e. Size of Panel. The statutes usually prescribe a particular number of jurors to be drawn on the panel[24] or provide that a certain number shall be drawn unless the court otherwise orders.[25] It is a ground of challenge to the array if the panel consists of less than the number prescribed by statute,[26] but not where it is larger than the statute requires;[27] but in the absence of statute the sheriff has no authority to add to the number regularly drawn.[28] If between the time of selecting the panel and the beginning of the trial the law be changed so as to require a larger panel the parties have the right to demand the larger panel.[29]

f. Necessity of Separate Drawings For Different Panels. In the absence of

21. Powell *v.* People, 5 Hun (N. Y.) 169. See also Crane *v.* Dygert, 4 Wend. (N. Y.) 675. *Compare* Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Where the legislature provides for a special term to be held within such time after the passage of the act as will not allow the full term for drawing the panel required by the general law, it suspends the general law as to such term. State *v.* Red, 32 La. Ann. 819.

22. Crane *v.* Dygert, 4 Wend. (N. Y.) 675, holding that in this regard some discretion must be allowed the clerk, as in some counties a longer time would be highly expedient if not necessary.

23. State *v.* Green, 43 La. Ann. 402, 9 So. 42.

24. *Alabama.*— Evans *v.* State, 109 Ala. 11, 19 So. 535.

Georgia.— Grant *v.* State, 89 Ga. 393, 15 S. E. 488.

Iowa.— Fifield *v.* Chick, 39 Iowa 651; Baker *v.* Milwaukee, 14 Iowa 214.

Kentucky.— Stone *v.* Saunders, 106 Ky. 904, 51 S. W. 788, 21 Ky. L. Rep. 534.

Montana.— Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

New Jersey.— Evans *v.* State, 52 N. J. L. 261, 19 Atl. 254.

South Carolina.— State *v.* Clyburn, 16 S. C. 375.

Texas.— Burfey *v.* State, 3 Tex. App. 519.

Virginia.— Drier *v.* Com., 89 Va. 529, 16 S. E. 672; Spurgeon *v.* Com., 86 Va. 652, 10 S. E. 979.

See 31 Cent. Dig. tit. "Jury," § 290.

In the absence of statutory provision as to the number of jurors the court may direct the number to be drawn and summoned. U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,187; U. S. *v.* Insurgents, 26 Fed. Cas. No. 15,443.

Where the statute provides that not more than a certain number shall be drawn this number merely prescribes the maximum and not the minimum number, and the parties have no right to insist that this number shall be drawn. State *v.* Clyburn, 16 S. C. 375.

Where a trial is transferred from the superior to the county court the size of the panel is governed by the statutes relating to the county court. Grant *v.* State, 89 Ga. 393, 15 S. E. 488.

On an inquisition for forcible entry and detainer before a justice, under the Tennessee statute, twenty jurors are to be summoned and any number between twelve and twenty may take the inquisition. Clements *v.* Clinton, Mart. & Y. (Tenn.) 198.

25. See Fifield *v.* Chick, 39 Iowa 651; State *v.* Clyburn, 16 S. C. 375.

In the absence of statute the court has no authority to order that more than the number prescribed by statute shall be drawn. Jones *v.* State, 3 Tex. App. 575; Burfey *v.* State, 3 Tex. App. 519.

26. Baker *v.* Milwaukee, 14 Iowa 214; Flower *v.* Livingston, 12 Mart. (La.) 681; Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21; Spurgeon *v.* Com., 86 Va. 652, 10 S. E. 979. But see Evans *v.* State, 109 Ala. 11, 19 So. 535, holding that where the statute provides that the court after organizing two full juries may excuse any of the panel over that number who may be in attendance, the failure to draw the full number prescribed by statute is not a material irregularity where a sufficient number to make up the two juries was drawn and is in attendance.

27. *Illinois.*— Yunker *v.* Marshall, 65 Ill. App. 667.

Louisiana.— Prall *v.* Peet, 3 La. 274; Debuys *v.* Mollere, 2 Mart. N. S. 625; Ramos *v.* Bringier, 2 Mart. N. S. 192.

New Jersey.—Adams *v.* Decker, 11 N. J. L. 84.

North Carolina.— State *v.* Watson, 104 N. C. 735, 10 S. E. 705.

Rhode Island.— Barber *v.* James, 18 R. I. 798, 31 Atl. 264.

Virginia.— Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Drier *v.* Com., 89 Va. 529, 16 S. E. 672.

See 31 Cent. Dig. tit. "Jury," § 290.

28. Evans *v.* State, 52 N. J. L. 261, 19 Atl. 254.

29. Kennon *v.* Gilmer, 4 Mont. 133, 2 Pac. 21. *Compare* Fifield *v.* Chick, 39 Iowa 651.

any statutory provision to the contrary the panels for the grand and petit juries may be drawn at the same time.[30] So also two sets of jurors for two different courts may be drawn at the same time if they are kept separate and a distinct panel of each is given to the sheriff;[31] but if the clerk merely draws the number necessary for both courts and then selects from this list the jurors for each court it is ground for challenging the array.[32]

g. Record and Certification of List Drawn. The list drawn to constitute a panel should be signed and certified,[33] which in the absence of the clerk may be done by the deputy clerk.[34] The statutes also in some cases require that the list drawn shall be filed in the clerk's office subject to inspection[35] or published,[36] or that the clerk shall make and keep a record of the names drawn.[37]

h. Interference With Drawing or Selection. Any participation or interference by one of the parties in the drawing or selection of the jury panel is ground for challenge to the array;[38] and where the officer selects as well as summons the panel, as under the English practice, it is also ground for challenge to the array if any jurors are selected upon the nomination or request of a party or his counsel.[39]

2. Summoning the Panel — a. In General. The mode of summoning the jurors drawn to constitute the panel is ordinarily regulated by statutory provisions;[40] but these provisions are held to be merely directory,[41] and a substantial compliance therewith is sufficient.[42]

b. Necessity For Venire or Other Writ. At common law a writ of venire facias was essential for summoning jurors.[43] In some of the older cases in this country it has been held that the writ was not abolished and that its use was

30. Forney *v.* State, 98 Ala. 19, 13 So. 540; Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2. See also Malone *v.* State, 8 Ga. 408.

31. Crane *v.* Dygert, 4 Wend. (N. Y.) 675 [*distinguishing* Gardner *v.* Turner, 9 Johns. (N. Y.) 260].

32. Gardner *v.* Turner, 9 Johns. (N. Y.) 260.

33. See Friery *v.* People, 2 Abb. Dec. (N. Y.) 215, 2 Keyes 424; State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

Form of certificate.— The certificate of the officers who conducted the drawing should state how it was actually done and not merely that it was conducted as provided by law. State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

34. State *v.* Fuller, 2 Park. Cr. (N. Y.) 16; U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*b*.

35. State *v.* Vegas, 19 La. Ann. 105.

If the list is deposited but not actually filed in the clerk's office it is an irregularity but not necessarily ground for setting aside the venire. State *v.* Hall, 44 La. Ann. 976, 11 So. 574.

36. State *v.* Winters, 109 La. 3, 33 So. 47, holding, however, that the act of 1898, providing for the publication of the list drawn, does not apply to jurors drawn for special sessions or to additional jurors for regular sessions.

The Louisiana act of 1880 providing for the selection of jurors at terms other than regular jury terms did not require any publication of the list drawn. State *v.* Wright, 45 La. Ann. 57, 12 So. 129.

37. Mitchell *v.* Denbo, 3 Blackf. (Ind.) 259; Mitchell *v.* Likens, 3 Blackf. (Ind.) 258.

38. McDonald *v.* Shaw, 1 N. J. L. 6, holding further that in such cases no discrimination will be made between such interference as might be harmless or injurious but that every species of interference by the parties must be prevented.

Where the sheriff is an interested party his participation in drawing the jury panel is ground for challenge to the array, although no actual fraud is shown. People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

If the prosecuting attorney participates in selecting the panel on the trial of a criminal case it is ground for challenging the array. Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701.

39. See Quinebaugh Bank *v.* Tarbox, 20 Conn. 510.

40. See the statutes of the several states; and cases cited *infra*, notes 41, 42.

41. State *v.* Jackson, 167 Mo. 291, 66 S. W. 938; State *v.* Matthews, 88 Mo. 121; Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450; Galveston, etc., R. Co. *v.* Jessee, 2 Tex. App. Civ. Cas. § 403; Ross *v.* British Columbia Electric R. Co., 7 Brit. Col. 394.

42. Galveston, etc., R. Co. *v.* Jessee, 2 Tex. App. Civ. Cas. § 403.

43. Bird *v.* State, 14 Ga. 43; People *v.* Ferris, 1 Abb. Pr. N. S. (N. Y.) 193; People *v.* McKay, 18 Johns. (N. Y.) 212.

The importance of the writ at common law was due to the fact that the sheriff selected as well as summoned and his return to the writ was the only means of identifying the jurors impaneled as the ones who were summoned. Bird *v.* State, 14 Ga. 43.

proper,[44] but that if the jury was properly drawn and was summoned, the fact that no writ was issued did not affect the validity of the proceedings.[45] In most jurisdictions the writ has been expressly abolished,[46] or it is held that it is not necessary but that any order or direction to the sheriff is sufficient,[47] for under the statutory system of summoning jurors, where the sheriff summons from a list furnished by the clerk and acts merely in a ministerial capacity, the absence of a writ of venire facias cannot operate to the prejudice of the parties.[48] Although the term "venire facias" is still used in some jurisdictions it does not contemplate the common-law writ but merely process.[49] In many of the states when the drawing is concluded the clerk merely makes a copy of the names of the jurors drawn which he delivers to the sheriff and which *per se* constitutes the order and authority of the sheriff to summon.[50] In Virginia a venire facias is indispensable for summoning a jury in a felony case,[51] and a failure of the record in such cases to show that there was a venire facias is a fatal defect;[52] and while the statute provides that no irregularity in any writ of venire facias shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless the objection was made before the swearing of the jury,[53] this provision applies only to irregularities in the writ and not to cases where no writ was issued.[54]

c. Time For Issuance of Process. Statutes as to the time for issuing process for the summoning of jurors are ordinarily held to be merely directory, and a failure strictly to comply therewith is not a material irregularity.[55]

44. Bird *v.* State, 14 Ga. 43; People *v.* McKay, 18 Johns. (N. Y.) 212; State *v.* Crosby, Harp. (S. C.) 90.

A general venire for the term is sufficient and it is not necessary to issue a separate venire for each case. People *v.* Herkimer County Gen. Sess., 20 Johns. (N. Y.) 310.

If a venire is lost or mislaid the court may issue another. Day *v.* Wilber, 2 Cai. (N. Y.) 134.

45. Bird *v.* State, 14 Ga. 43; State *v.* Crosby, Harp. (S. C.) 90. *Contra*, People *v.* McKay, 18 Johns. (N. Y.) 212, where a new trial was granted because the jury were summoned without a writ of venire facias, although the court admitted that they were "not able to perceive much use in continuing it."

46. People *v.* Ferris, 1 Abb. Pr. N. S. (N. Y.) 193; People *v.* Cummings, 3 Park. Cr. (N. Y.) 343.

47. State *v.* Folke, 2 La. Ann. 744; Lyon *v.* Commercial Ins. Co., 2 Rob. (La.) 266; Samuels *v.* State, 3 Mo. 68; Proffatt Jury Tr. § 132.

A general precept to the sheriff containing a clause of venire facias is sufficient. Com. *v.* Smith, 2 Serg. & R. (Pa.) 300.

No record of the order or direction to the sheriff is necessary. Samuels *v.* State, 3 Mo. 68.

48. Bird *v.* State, 14 Ga. 43.

49. Proffatt Jury Tr. § 132; Thompson & M. Jur. § 69.

50. Thompson & M. Jur. § 69.

51. Myers *v.* Com., 90 Va. 785, 20 S. E. 152; Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

Where more than one defendant is to be tried a separate venire should be issued for each. McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196. See also Prince *v.* Com., 89 Va. 330, 15 S. E. 863.

What court may issue writ.— Under Va. Code (1887), providing that "any court in which a person accused of felony is to be tried" may issue the writ of venire facias, where a defendant indicted in the county court elects to be tried in a circuit court, the writ is properly issued by the circuit court. Wilson *v.* Com., 86 Va. 666, 10 S. E. 1007.

52. Barker *v.* Com., 90 Va. 820, 20 S. E. 776; Myers *v.* Com., 90 Va. 785, 20 S. E. 152.

This rule was changed by the act of 1893–1894 which provides that the failure of the record to show that there was a venire facias shall not be ground for reversal unless made a ground of exception before the jury was sworn, but the act is not retrospective. See Myers *v.* Com., 90 Va. 785, 20 S. E. 152.

53. Vawter *v.* Com., 87 Va. 245, 12 S. E. 339; Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

This statute originally applied only to civil cases but was afterward extended to misdemeanors and later to all cases criminal as well as civil. Vawter *v.* Com., 87 Va. 245, 12 S. E. 339.

54. Myers *v.* Com., 90 Va. 785, 20 S. E. 152; Vawter *v.* Com., 87 Va. 245, 12 S. E. 339; Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

55. Wash *v.* Com., 16 Gratt. (Va.) 530. See also People *v.* Rodriguez, 10 Cal. 50; State *v.* McElmurray, 3 Strobh. (S. C.) 33.

All that a party can require is that the writ shall be issued and executed in such time that the trial may be had at the proper term and that a list of the jurors may be furnished to defendant in cases where he is entitled to such list. Wash *v.* Com., 16 Gratt. (Va.) 530.

That the venire was issued before the indictment was found is not error where the

d. Contents and Requisites of Writ — (i) *In General.* The ordinary form of a writ of venire facias is an order to the sheriff that on a certain day he cause to come before the court a certain number of good and lawful men of the county to act as jurors.[56] The writ should be issued in the name of the state,[57] and directed to the sheriff of the county,[58] and in the absence of statute may be made returnable at such time as the court may direct.[59] A venire for a petty jury should not contain a panel for a grand jury also; they are distinct bodies and should be separately summoned.[60] The writ need not set out the qualifications of the jurors,[61] a direction to summon good and lawful men being sufficient;[62] nor is it necessary or proper that the writ should go into details as to how the sheriff should proceed in the performance of his duty.[63] It is not necessary that the officers who drew the jury should certify on the venire as to what names were drawn,[64] or that the names of the jurors to be summoned should be embodied in the writ.[65] The venire need not refer to the order of court under which it was issued,[66] or to any special pleas or issues to be decided,[67] and in a joint action against two defendants where only one has pleaded and joined issue the venire need not mention the other defendant.[68] Mere irregularities or technical defects in the form of the venire are immaterial and furnish no ground for quashing the

panel was drawn not for that particular case but for the trial of all cases pending at the term. U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91.

In New Jersey under a statute providing that a justice should not issue jury process until appearance of defendant, it has been held ground for reversal where the venire was issued before his appearance (Sutton *v.* Coleman, 2 N. J. L. 134); but where defendant failed to appear at all and the justice dismissed the jury and proceeded, as he was authorized to do, to try the case without a jury, it was held that the irregularity was without prejudice to defendant (Wills *v.* McDole, 5 N. J. L. 501).

In Pennsylvania under the statute of 1836 providing for trials in the supreme court, it was held that criminal cases pending in the supreme court ought to be brought to issue before issuing process to summon jurors to try them (Com. *v.* Simpson, 2 Grant 438); but the act of 1876 provides that each venire shall issue at least thirty days before the first day on which the jurors to be summoned under it shall be called to attend (see Stamey *v.* Barkley, 211 Pa. St. 313, 60 Atl. 991).

56. White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

57. White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443, holding, however, that no particular order or arrangement of words is necessary so long as it appears that the command is given in the name of the state. See also State *v.* Hill, 19 S. C. 435.

The addition of the name of the county after that of the state will not affect the validity of the writ and the words may be disregarded as surplusage. State *v.* Hill, 19 S. C. 435.

58. State *v.* Stedman, 7 Port. (Ala.) 495.

59. Woodsides *v.* State, 2 How. (Miss.) 655.

A venire may be made returnable on the same day that it is issued or on any day during the term. Shaffer *v.* State, 1 How. (Miss.) 238.

Returnable "forthwith." — Under a statute providing that the venire shall be made returnable "forthwith" it is sufficient if made returnable on the following day. Palmer *v.* Highway Com'r, 49 Mich. 45, 12 N. W. 903.

Where the legislature has changed the date of the commencement of the term after the venire issued but has declared the venire good for the altered date, no objection based upon the non-correspondence of the dates of the venire and the session can be made. Potter *v.* Shackleford, 3 Brev. (S. C.) 487.

60. Forsythe *v.* State, 6 Ohio 19.

61. Cox *v.* Haines, 3 N. J. L. 687; Sharp *v.* Hendrickson, 3 N. J. L. 685; State *v.* Alderson, 10 Yerg. (Tenn.) 523.

If the writ does specify the qualifications of the jurors to be summoned and the qualifications specified will exclude a class of persons qualified by law to serve as jurors, such a limitation of the range of selection is ground for quashing the venire. Wash *v.* Com., 16 Gratt. (Va.) 530.

62. Sharp *v.* Hendrickson, 3 N. J. L. 685; State *v.* Alderson, 10 Yerg. (Tenn.) 523.

An order to summon "sober and judicious persons" is a sufficient equivalent. White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

63. White *v.* Com., 6 Binn. (Pa.) 179, 185, 6 Am. Dec. 443, where the court said: "Entering into details is dangerous, because something may be omitted, and it is unnecessary, because the sheriff must be supposed to know his duty, and is bound to perform it."

64. Com. *v.* Besse, 143 Mass. 80, 8 N. E. 878.

65. State *v.* McElmurray, 3 Strobh. (S. C.) 33.

66. State *v.* Cole, 9 Humphr. (Tenn.) 626.

67. Roosevelt *v.* Fulton, 6 Cow. (N. Y.) 48.

68. Hutchins *v.* Fitch, 4 Johns. (N. Y.) 222.

venire,[69] or for arresting judgment or awarding new trial.[70] In some cases it has been held that the absence of a seal is not a mere irregularity but renders the venire void,[71] but in others it is held that a seal is not necessary.[72]

(II) *Alteration and Amendment.* Mere irregularities in the jury process may be amended.[73]

e. Who May Summon — (I) *In General.* Jurors should ordinarily be summoned by the sheriff of the county,[74] unless he be for some reason disqualified to

69. *Alabama.*— Peters *v.* State, 100 Ala. 10, 14 So. 896.

Minnesota.— State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

Mississippi.— Thomas *v.* State, 5 How. 20.

Pennsylvania.— Com. *v.* Miller, 4 Phila. 210.

Virginia.— Poindexter *v.* Com., 33 Gratt. 766.

See 31 Cent. Dig. tit. "Jury," § 295.

It is not a material irregularity that the venire describes the action as civil instead of criminal where no prejudice is shown (State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321), that the clerk in signing the venire fails to designate himself as clerk (State *v.* Cole, 9 Humphr. (Tenn.) 626), that the sheriff failed to indorse on the venire the fact of entry in his office (State *v.* Clayton, 11 Rich. (S. C.) 581), that the venire reads "I command you to summon" instead of "You are hereby commanded to summon" (State *v.* Cole, *supra*), or that the date of issue is not indorsed on the venire if it appears that it was issued within the proper time (State *v.* Stedman, 7 Port. (Ala.) 495).

70. *Michigan.*— People *v.* Jones, 24 Mich. 215.

Mississippi.— Woodsides *v.* State, 2 How. 655.

New Jersey.— Caldwell *v.* West, 21 N. J. L. 411.

New York.— Haight *v.* Holley, 3 Wend. 258; People *v.* Herkimer County Gen. Sess., 20 Johns. 310.

Pennsylvania.— Com. *v.* Smith, 16 Pa. Co. Ct. 568, 577.

South Carolina.—State *v.* Clayton, 11 Rich. 581; State *v.* McElmurray, 3 Strobh. 33.

Tennessee.— State *v.* Cole, 9 Humphr. 626.

See 31 Cent. Dig. tit. "Jury," § 295.

A venire, although a judicial process, is a mere precept to the sheriff directing him to summon into court the jurors drawn, and having answered that purpose it cannot be assailed on account of a mere irregularity not affecting substantial justice. State *v.* Clayton, 11 Rich. (S. C.) 581.

An objection to the venire is too late after a party has pleaded and gone to trial. State *v.* Cole, 9 Humphr. (Tenn.) 626.

In Pennsylvania it was expressly provided by the statute of 1814 that defects in the venire should not be ground for a reversal or arrest of judgment or new trial, but that pleading or going to trial should be deemed a waiver of such defects. Com. *v.* Smith, 2 Serg. & R. 300.

71. Howell *v.* Robertson, 6 N. J. L. 142; People *v.* McKay, 18 Johns. (N. Y.) 212; State *v.* Williams, 1 Rich. (S. C.) 188; State *v.* Dozier, 2 Speers (S. C.) 211.

It is not necessary that the impression of the device should be manifest on the seal but only that it should be recognized and admitted as the seal of the court. State *v.* McElmurray, 3 Strobh. (S. C.) 33.

A piece of paper stuck on with a wafer over the clerk's name is a sufficient seal, the clerk having verified it by his signature. State *v.* Thayer, 4 Strobh. (S. C.) 286.

72. Powell *v.* State, 25 Ala. 21; State *v.* Marshall, 36 Mo. 400; State *v.* Bradford, 57 N. H. 188; Bennett *v.* State, Mart. & Y. (Tenn.) 133.

73. Hale *v.* State, 72 Miss. 140, 16 So. 387; Caldwell *v.* West, 21 N. J. L. 411; Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 509; People *v.* Herkimer County Gen. Sess., 20 Johns. (N. Y.) 310.

A clerical error in failing to write the word "jury" before the word "commissioners" in the writ may be corrected by amendment. Com. *v.* Smith, 16 Pa. Co. Ct. 568, 577.

A venire may be amended after the term by adding a seal and filing a sheriff's return thereto *nunc pro tunc.* Jackson *v.* Brown, 4 Cow. (N. Y.) 550.

In summoning a jury for a justice's court it is the duty of the constable to procure an impartial jury and he may for this purpose, before he has returned the venire, strike out the name of a juror that he has placed on the panel and insert another (Boyles *v.* McCowen, 3 N. J. L. 677); or if one of the jurors summoned fails to appear he may substitute the name of some other qualified person in the place of that of the defaulting juror (Mullins' Appeal, 2 Pa. Cas. 158, 5 Atl. 738. *Contra*, Lyon *v.* Tharp, 3 N. J. L. 463).

74. *Georgia.*— Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184.

Michigan.— Dickson *v.* Phelan, 136 Mich. 479, 99 N. W. 405.

Missouri.— State *v.* Matthews, 88 Mo. 121.

New Jersey.—Hugg *v.* Kille, 7 N. J. L. 435.

New York.— Cooper *v.* Bissell, 16 Johns. 146.

See 31 Cent. Dig. tit. "Jury," § 298.

Where there has been a change of venue the jury should be summoned by the sheriff of the county where the trial is to be had. Vance *v.* Com., 2 Va. Cas. 162.

In territorial courts where no provision has been made by the territorial legislature for summoning jurors in cases where the United States is a party or where the case arises under the constitution or laws of the United States, the court has common-law

act;[75] and it has been held to be reversible error where in the absence of any suggestion of such disqualification the venire was directed to and executed by an officer other than the sheriff.[76] The deputy sheriff may, however, act in the place of the sheriff.[77] In justices' courts where the jury is summoned by a constable it must be done by the constable of the township where the trial is to be held,[78] and it is reversible error to deliver a venire to a deputy sheriff for service instead of to the constable if objection to such action is duly made.[79]

(II) *Bias or Interest of Officer as Disqualification.* It is essential to the fair and impartial administration of justice that the jury shall be selected and summoned by officers having no interest in the matters to be decided by them.[80] An officer is not qualified to act in summoning a jury if he is a party to the action,[81] a relative,[82] an attorney of one of the parties,[83] or if he is interested in the event of the action, although not a party of record;[84] but a very remote or contingent interest will not disqualify.[85] Where a jury is summoned by an officer who is disqualified for such reasons as above stated, it is ground for challenge to the array,[86] and this rule applies even under the statutory system of procuring

power to issue the venire to the marshal of the United States. U. S. *v.* Kuntze, 2 Ida. (Hasb.) 480, 21 Pac. 407.

In Kings county, New York, the act of 1858 provided that jurors for Kings county should thereafter be summoned by the commissioner of jurors and that the method of summoning provided in the act should be exclusive. Kenny *v.* People, 31 N. Y. 330.

75. See *infra*, VIII, A, 2, e, (II).

76. See Hugg *v.* Kille, 7 N. J. L. 435; Cooper *v.* Bissell, 16 Johns. (N. Y.) 146. But see Westmoreland *v.* State, 45 Ga. 225.

77. Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184; Kelly *v.* State, 3 Sm. & M. (Miss.) 518.

A de facto deputy sheriff may act in summoning the jury. State *v.* McGraw, 35 S. C. 283, 14 S. E. 630.

The sheriff may direct bailiffs to summon a jury as they then become his deputies for that purpose (Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184; McGuffie *v.* State, 17 Ga. 497); but it has been held that a deputy sheriff could not delegate his duty in summoning juries to a constable (McMasters *v.* Carothers, 1 Pa. St. 324).

In a proceeding where the sheriff selects as well as summons the jury, the act is in its nature judicial, requiring judgment and discretion, and cannot be delegated by him to a deputy. Ayers *v.* Novinger, 8 Pa. St. 412; McMullen *v.* Orr, 8 Phila. (Pa.) 342.

The deputies need not be formally appointed in writing by the sheriff to summon jurors (Gillum *v.* State, 62 Miss. 547), nor is it necessary that there should be any indorsement of such appointment on the writ (State *v.* Toland, 36 S. C. 515, 15 S. E. 599).

78. Louw *v.* Davis, 13 Johns. (N. Y.) 227.

79. People *v.* Whitney, 22 Misc. (N. Y.) 224, 49 N. Y. Suppl. 589, 27 N. Y. Civ. Proc. 150.

80. Quinebaug Bank *v.* Tarbox, 20 Conn. 510; People *v.* Felker, 61 Mich. 114, 28 N. W. 83; Munshower *v.* Patton, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678.

Right to opportunity to object to officer.— Where a statute provides that a justice issuing a venire shall deliver it to a constable who is disinterested between the parties "and against whom no reasonable objection shall have been made by either party," it implies that the parties must be given an opportunity to object, and if the venire is issued at the request of one party in the absence of and without notice to the other it is ground for setting aside the panel so summoned. Rice *v.* Buchanan, 41 Barb. (N. Y.) 147; Becker *v.* Sitterly, 58 How. Pr. (N. Y.) 38.

81. Cowgill *v.* Wooden, 2 Blackf. (Ind.) 332; Woods *v.* Rowan, 5 Johns. (N. Y.) 133. But see Harris *v.* McKenzie, 3 Nova Scotia 242.

82. Vanauken *v.* Beemer, 4 N. J. L. 364; Munshower *v.* Patton, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678; Wetmore *v.* Levy, 10 N. Brunsw. 180.

The party to whom the sheriff is related may challenge upon the ground of such relationship. Wetmore *v.* Levy, 10 N. Brunsw. 180.

83. Baylis *v.* Lucas, Cowp. 112.

Appearance as advocate for party in justice's court.— It has been held not to be a ground of challenge to the array that the constable who summoned the jury in a justice's court had previously appeared and pleaded for one of the parties and employed at the party's request an attorney to appear at the trial, the constable himself being prohibited by statute from appearing as an attorney at the trial. Miles *v.* Pulver, 3 Den. (N. Y.) 84 [*distinguishing* Watkins *v.* Weaver, 10 Johns. (N. Y.) 107].

84. People *v.* Felker, 61 Mich. 114, 28 N. W. 83; People *v.* Tweed, 50 How. Pr. (N. Y.) 286.

85. Peck *v.* Essex County, 20 N. J. L. 457, holding that in an action against a defaulting county tax-collector, the fact that the sheriff who summoned the jury was a resident and owner of taxable property in the county was too remote an interest to disqualify and furnished no ground for challenge to the array.

86. Cowgill *v.* Wooden, 2 Blackf. (Ind.) 332; Woods *v.* Rowan, 5 Johns. (N. Y.) 133;

jurors where the sheriff does not select the panel but summons from a list drawn by other officers, for it would still be possible for him to gain an advantage by neglecting to summon such of the jurors drawn as he might consider unfavorable to his interests.[87] It is not, however, necessarily a ground of challenge that the officer who summoned the jury is a witness,[88] a relative of the prosecuting attorney,[89] a relative of a person who is security for costs,[90] or that he furnished the information on which the warrant of arrest was issued;[91] nor is it a ground for challenge to the array that the clerk who had nothing to do with drawing the jury but who issued the venire to the officer is a party[92] or an attorney of one of the parties.[93] A party who expressly consents that the jury may be summoned by an officer, who if objected to would be disqualified, cannot afterward challenge the array on this ground.[94]

(III) *Appointment of Substitute For Disqualified Officer.* If the sheriff is disqualified to act the jury should be summoned by the coroner[95] or by such other disinterested person as the court may appoint.[96] The court may properly appoint an elisor if there is no coroner[97] or if the coroner is also disqualified,[98] but in a case where the sheriff is disqualified it is error for the court to appoint one of his deputies to summon the jury.[99] The appointment of some other person to act where the sheriff is disqualified may be made at the instance of either party[1] or by the court of its own motion.[2] The court may base its decision as to the sheriff's interest or prejudice upon *ex parte* affidavits,[3] but is not bound to take the affidavit of a party that the sheriff is prejudiced against him as conclusive, and his discretion in ruling such a motion unless clearly abused will not be interfered with.[4]

Vanauken *v.* Beemer, 4 N. J. L. 364; Munshower *v.* Patten, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678.

The fact that an action is pending against the sheriff by the husband of defendant for an assault committed on defendant is ground for challenge to the array. Reg. *v.* Milne, 20 N. Brunsw. 394.

In an action against a municipality it is a ground of challenge to the array that the sheriff is a taxpayer of the municipality. Mellon *v.* Kings, 33 N. Brunsw. 8.

87. Cowgill *v.* Wooden, 2 Blackf. (Ind.) 332; Munshower *v.* Patten, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678. See also Woods *v.* Rowan, 5 Johns. (N. Y.) 133. *Compare* Prince *v.* State, 3 Stew. & P. (Ala.) 253; Harris *v.* McKenzie, 3 Nova Scotia 242.

88. Hodge *v.* State, 26 Fla. 11, 7 So. 593.

89. State *v.* Cameron, 2 Pinn. (Wis.) 490, 2 Chandl. 172.

90. Murchison *v.* Marsh, 4 N. Brunsw. 608.

91. Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795.

92. Hart *v.* Tallmadge, 2 Day (Conn.) 381, 2 Am. Dec. 105.

93. Wakeman *v.* Sprague, 7 Cow. (N. Y.) 720.

94. Watkins *v.* Weaver, 10 Johns. (N. Y.) 107.

95. *Colorado.*— Litch *v.* People, 19 Colo. 433, 75 Pac. 1083.

Iowa.— Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48; State *v.* Hardin, 46 Iowa 623, 26 Am. Rep. 174.

Massachusetts.— Barre Turnpike Corp. *v.* Appleton, 2 Pick. 430.

New Jersey.— De Wit *v.* Decker, 9 N. J. L. 148.

New York.— People *v.* Tweed, 50 How. Pr. 286.

See 31 Cent. Dig. tit. "Jury," §§ 300, 301.

The rule applies to either criminal or civil cases where the sheriff is disqualified. State *v.* Hardin, 46 Iowa 623, 26 Am. Rep. 174.

96. Phillips *v.* State, 29 Ga. 105; Forman *v.* Com., 86 Ky. 605, 6 S. W. 579, 9 Ky. L. Rep. 759.

The authority of the person appointed in the place of the sheriff is the same as that of the sheriff himself and he may appoint an assistant whenever the court shall in its discretion deem it necessary. Forman *v.* Com., 86 Ky. 605, 6 S. W. 579, 9 Ky. L. Rep. 759.

97. Pacheco *v.* Hunsecker, 14 Cal. 120; State *v.* Bodly, 7 Blackf. (Ind.) 355.

98. State *v.* Hultz, 106 Mo. 41, 16 S. W. 940.

Where a party requests the court to appoint an elisor on the ground of disqualification of the sheriff, he sufficiently manifests by implication an objection to the coroner also and the appointment of an elisor instead of the coroner is not error. Harriman *v.* State, 2 Greene (Iowa) 270.

99. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48; Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214.

If one deputy sheriff is an interested party the jury cannot be summoned by another deputy sheriff of the same county. Barre Turnpike Corp. *v.* Appleton, 2 Pick. (Mass.) 430.

1. Johns *v.* Com., (Ky. 1887) 3 S. W. 369.

2. Allen *v.* Com., 12 S. W. 582, 11 Ky. L. Rep. 555.

3. State *v.* Hultz, 106 Mo. 41, 16 S. W. 940.

4. State *v.* Mathews, 98 Mo. 119, 10 S. W.

f. Service of Writ or Process. The statutes in some cases provide how the writ or process shall be served upon the individual jurors;[5] but a failure to comply with such provisions is available only to the juror in proceedings against him for non-attendance, and does not affect his competency, and if he was regularly drawn and attends, the parties cannot object to the irregularity;[6] but the rule is otherwise where the jurors were not legally summoned and in consequence failed to attend.[7]

g. Return — (I) *In General.* Statutory provisions as to the time for returning the venire or other process are merely directory,[8] and irregularities in this regard if not prejudicial are not ground for challenge to the array.[9] So also grammatical errors or mere technical irregularities in the form of the return are immaterial,[10] it being sufficient if the meaning is clear and it appears that the proceedings were according to law.[11] In a proceeding where the officer selects the jury and is required by law to summon persons having certain qualifications his return must show that the persons summoned have the qualifications prescribed;[12] and where a precept issues to the sheriff and commissioners to draw a jury the return must show that the jurors summoned were previously drawn as directed.[13]

(II) *Amendment of Return.*[14] Irregularities and omissions in the sheriff's return to a venire may if objected to be cured by an amendment,[15] which may properly be allowed at any time during the term;[16] and such amendments are admissible in criminal as well as civil cases.[17]

3. Errors and Irregularities — a. Presumptions. In the absence of any showing to the contrary it will be presumed that the panel was regularly drawn[18]

30, 11 S. W. 1136; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; H. T. Simon-Gregory Dry Goods Co. *v.* McMahan, 61 Mo. App. 499.

5. Judge *v.* State, 8 Ga. 173; People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; State *v.* Toland, 36 S. C. 515, 15 S. E. 599; Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370.

6. Judge *v.* State, 8 Ga. 173; People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91. See also State *v.* Gut, 13 Minn. 341.

It will always be presumed in the absence of evidence to the contrary that the jurors were served in the proper manner. State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

7. Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370.

8. Mowry *v.* Starbuck, 4 Cal. 274; State *v.* Squaires, 2 Nev. 226.

9. State *v.* Squaires, 2 Nev. 226.

A return on the day before the court meets instead of at the opening is an immaterial irregularity and not ground for challenge to the array. State *v.* Gut, 13 Minn. 341.

It will be presumed in the absence of evidence to the contrary that the return was made within the time prescribed. State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

10. Maples *v.* Park, 17 Conn. 333; Fellows' Case, 5 Me. 333; State *v.* Gut, 13 Minn. 341; State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

It is not a material irregularity that the return was not dated where the time for making the return is stated in the writ and the return states that the officer proceeded "as above directed," or that the officer signed his return as "constable of the town" without stating the name of the town. Fellows' Case, 5 Me. 333.

11. Maples *v.* Park, 17 Conn. 333; State *v.* Gut, 13 Minn. 341.

12. People *v.* Brighton, 20 Mich. 57.

13. Eaton *v.* Com., 6 Binn. (Pa.) 447.

14. Amendment or return to special venire see *infra*, VIII, B, 6, b, (II).

15. Gray *v.* State, 55 Ala. 86; Hill *v.* Hill, 1 N. J. L. 302, 1 Am. Dec. 206; State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; Com. *v.* Seybert, 4 Pa. Co. Ct. 152; Com. *v.* Chauncey, 2 Ashm. (Pa.) 90.

Thus a venire may be amended to show that a copy of the panel was served on defendant (Gray *v.* State, 55 Ala. 86), or the day on which the jurors were summoned (Anonymous, 1 Pick. (Mass.) 196), or the reason why certain jurors were not summoned (State *v.* Whitt, 113 N. C. 716, 18 S. E. 715), or by adding the signature of the officer (O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752; Com. *v.* Chauncey, 2 Ashm. (Pa.) 90), or oath of the officer (Com. *v.* Miller, 4 Phila. (Pa.) 210), or by adding the name of a juror who was actually summoned but omitted from the panel (*In re* Patterson, 6 Mass. 486; Berry *v.* Williams, 21 N. J. L. 423).

16. Gray *v.* State, 55 Ala. 86.

17. Com. *v.* Chauncey, 2 Ashm. (Pa.) 90.

18. *Alabama.*— Smith *v.* State, 88 Ala. 73, 7 So. 52.

Illinois.— People *v.* Madison County, 125 Ill. 334, 17 N. E. 802.

Louisiana.— State *v.* Hornsby, 33 La. Ann. 1110.

and properly summoned;[19] and whoever complains of any irregularity, unless it be the omission of some duty which should and yet does not appear of record, takes upon himself the burden of proving the irregularity.[20]

b. Effect — (i) *In General.* Irregularities in drawing the jury panel, unless of a character prejudicial to the parties, are immaterial and furnish no ground for a challenge to the array,[21] or for arresting judgment or awarding a new trial;[22] but any substantial and material departure from the methods prescribed by statute, such as would probably produce a change in the panel or present a list of names different from that which would be produced by compliance with the law, is ground for challenge to the array.[23] The same rule applies to the summoning of the jury and mere irregularities are not material,[24] for if the jurors are regularly drawn and appear, their competency is not affected by the fact that they were not regularly summoned,[25] or that they appeared without any summons

Texas.— Davis *v.* State, 9 Tex. App. 634; Burfey *v.* State, 3 Tex. App. 519.

Wisconsin.— Osgood *v.* State, 64 Wis. 472, 25 N. W. 529.

See 31 Cent. Dig. tit. "Jury," § 306.

19. Smith *v.* State, 88 Ala. 73, 7 So. 52; State *v.* Toland, 36 S. C. 515, 15 S. E. 599; State *v.* McGraw, 35 S. C. 283, 14 S. E. 630; Osgood *v.* State, 64 Wis. 472, 25 N. W. 529.

20. Smith *v.* State, 88 Ala. 73, 7 So. 52.

21. *California.*— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Davis, 73 Cal. 355, 15 Pac. 8.

Illinois.— People *v.* Madison County, 125 Ill. 334, 17 N. E. 802; Wilhelm *v.* People, 72 Ill. 468; Mapes *v.* People, 69 Ill. 523. See also Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18.

Kansas.— Atchison, etc., R. Co. *v.* Davis, 34 Kan. 199, 8 Pac. 146; State *v.* Yordi, 30 Kan. 221, 2 Pac. 161.

Louisiana.— State *v.* Batson, 108 La. 479, 32 So. 478; State *v.* Thompson, 104 La. 167, 28 So. 882; State *v.* Taylor, 44 La. Ann. 785, 11 So. 132; State *v.* McCarthy, 44 La. Ann. 323, 10 So. 673; State *v.* Sandoz, 37 La. Ann. 376; State *v.* Smith, 33 La. Ann. 1414; State *v.* Miller, 26 La. Ann. 579.

New York.— Friery *v.* People, 2 Abb. Dec. 215, 4 Keyes 424 [*affirming* 54 Barb. 319]; People *v.* Ferris, 1 Abb. Pr. N. S. 193.

Ohio.— Forsyth *v.* State, 6 Ohio 19.

Oklahoma.— Harmon *v.* Territory, 9 Okla. 313, 60 Pac. 115.

Pennsylvania.— Com. *v.* Immell, 6 Binn. 403; Com. *v.* Haines, 27 Pa. Co. Ct. 81.

See 31 Cent. Dig. tit. "Jury," § 307.

It is difficult to lay down a rule which will indicate in every case as the question arises what is or is not a sufficient compliance with the statute, but if there is no material departure such as is calculated to interfere with the procuring of a fair and impartial jury a challenge to the array will not be sustained. People *v.* Davis, 73 Cal. 355, 15 Pac. 8.

22. *Kentucky.*— Miller *v.* South Covington, etc., St. R. Co., 74 S. W. 747, 25 Ky. L. Rep. 207; Central Kentucky Insane Asylum *v.* Hauns, 50 S. W. 978, 21 Ky. L. Rep. 22.

Massachusetts.— Amherst *v.* Hadley, 1 Pick. 38.

New Jersey.— Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373.

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636.

South Carolina.— State *v.* Johnson, 66 S. C. 23, 44 S. E. 58.

See 31 Cent. Dig. tit. "Jury," § 307.

23. *California.*— People *v.* Wong Bin, 139 Cal. 60, 72 Pac. 505.

Illinois.— Healy *v.* People, 177 Ill. 306, 52 N. E. 426; Nealon *v.* People, 39 Ill. App. 481.

Iowa.— Baker *v.* Milwaukee, 14 Iowa 214.

Kentucky.— South Covington, etc., St. R. Co. *v.* Schilling, 80 S. W. 510, 26 Ky. L. Rep. 1; Covington, etc., Bridge Co. *v.* Smith, 80 S. W. 440, 25 Ky. L. Rep. 2292 [*distinguishing* Curtis *v.* Com., 62 S. W. 886, 23 Ky. L. Rep. 267].

Louisiana.— State *v.* Love, 106 La. 658, 31 So. 289.

Missouri.— State *v.* Austin, 183 Mo. 478, 82 S. W. 5.

Montana.— State *v.* Landry, 29 Mont. 218, 74 Pac. 418.

North Carolina.— Moore *v.* Navassa Guano Co., 130 N. C. 229, 41 S. E. 293.

See 31 Cent. Dig. tit. "Jury," § 307.

24. *Colorado.*— Peck *v.* Farnham, (1897) 49 Pac. 364.

Kentucky.— Vicaro *v.* Com., 5 Dana 504.

Michigan.— People *v.* Williams, 24 Mich. 156, 9 Am. Rep. 119.

Missouri.— State *v.* Riddle, 179 Mo. 287, 78 S. W. 606.

New York.— People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; Haight *v.* Holley, 3 Wend. 258.

Ohio.— Hurley *v.* State, 6 Ohio 399.

South Carolina.— State *v.* McElmurray, 3 Strobh. 33.

Texas.— Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450.

United States.— U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91.

Canada.— Ross *v.* British Columbia, etc., R. Co., 7 Brit. Col. 394.

See 31 Cent. Dig. tit. "Jury," § 307.

25. Judge *v.* State, 8 Ga. 173; People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; U. S.

whatever.[26] Objections on account of irregularities in drawing or summoning the jury should be made before the jury is impaneled and sworn,[27] and if not so made are not ordinarily available after verdict on a motion in arrest or for a new trial.[28]

(II) *Summoning Jurors Not Drawn.* It is not ground for challenge to the array that through a mistake as to the identity of a juror a different person is summoned from the one drawn,[29] and this juror may be excused and the one who was drawn summoned and placed upon the panel;[30] but it is reversible error to compel a party against his consent to accept as one of the panel a juror who was not drawn.[31]

(III) *Mistakes in Names of Jurors.* It is no ground for challenge to the array or for quashing the venire that the name of a juror was not correctly stated on the panel,[32] or on the list served upon defendant in a criminal case,[33] where the parties have not been misled;[34] or that the initials of the juror's christian name instead of his full name were used;[35] nor, in the absence of any doubt as to the identity of the jurors as the ones summoned, is a variance between the names as sworn and as they appeared on the panel any ground for an arrest of judgment or new trial.[36]

B. Special Venires — 1. Grounds For Ordering — a. No Regular Panel in Attendance. Where for any reason there is no regular panel in attendance and there are cases to be tried which require the intervention of a jury, the court has power to order a special venire.[37] This is a common-law power,[38] but there are in

v. Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91.

26. Fellows' Case, 5 Me. 333; U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91.

27. Harriman *v.* State, 2 Greene (Iowa) 270; Fellows' Case, 5 Me. 333; Hurley *v.* State, 6 Ohio 399.

In Louisiana the statute requires that objections on account of defects in drawing the jury must be made on the first day of the term. State *v.* Desroche, 47 La. Ann. 651, 17 So. 209.

28. *Iowa.*— Harriman *v.* State, 2 Greene 270.

Louisiana.— State *v.* Dickerson, 48 La. Ann. 308, 19 So. 140.

Maine.— Fellows' Case, 5 Me. 333.

New York.— Bergman *v.* Wolff, 11 N. Y. Suppl. 591.

Ohio.— Hurley *v.* State, 6 Ohio 399.

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636.

See 31 Cent. Dig. tit. "Jury," § 307.

29. Gregory *v.* State, 140 Ala. 16, 37 So. 259.

30. Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Colt *v.* Eves, 12 Conn. 243.

31. Goodwin *v.* State, 102 Ala. 87, 15 So. 571.

32. Kimbrell *v.* State, 130 Ala. 40, 30 So. 454; Walker *v.* State, 91 Ala. 76, 9 So. 87; McKee *v.* State, 82 Ala. 32, 2 So. 451; Hall *v.* State, 51 Ala. 9; Bill *v.* State, 29 Ala. 34; Judge *v.* State, 8 Ga. 173; Clawson *v.* State, 59 N. J. L. 434, 36 Atl. 886; Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433. *Compare* U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

In Alabama it is now provided by statute that a mistake in the name of a juror shall not be ground for quashing the venire "unless the court, in its discretion, is of the opinion that the ends of justice so require." Jackson *v.* State, 76 Ala. 26.

33. Stewart *v.* State, 137 Ala. 33, 34 So. 818; Cawley *v.* State, 133 Ala. 128, 32 So. 227; Kimbrell *v.* State, 130 Ala. 40, 30 So. 454; Jones *v.* State, 104 Ala. 30, 16 So. 135; Roberts *v.* State, 68 Ala. 156; Hall *v.* State, 51 Ala. 9; State *v.* Black, (N. J. Sup. 1890) 20 Atl. 255 [*affirmed* in 53 N. J. L. 462, 23 Atl. 1081].

34. See Aikin *v.* State, 35 Ala. 399; Bill *v.* State, 29 Ala. 34.

35. Hall *v.* State, 130 Ala. 45, 30 So. 422; Brown *v.* State, 124 Ala. 12, 29 So. 200; Fields *v.* State, 52 Ala. 348; Aikin *v.* State, 35 Ala. 399; Bill *v.* State, 29 Ala. 34. *Compare* U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*a*.

36. *California.*— People *v.* O'Brien, 88 Cal. 483, 26 Pac. 362.

Georgia.— Williams *v.* State, 69 Ga. 11.

Maryland.— Munshower *v.* State, 56 Md. 514; Horsey *v.* State, 3 Harr. & J. 2.

Nevada.— State *v.* McNamara, 3 Nev. 70.

North Carolina.— State *v.* Mills, 91 N. C. 581.

Pennsylvania.— Swope *v.* Donnelly, 7 Pa. Dist. 448, 21 Pa. Co. Ct. 167.

See 31 Cent. Dig. tit. "Jury," § 309.

37. Rockford Ins. Co. *v.* Nelson, 75 Ill. 548; Bennett *v.* Tintic Iron Co., 9 Utah 291, 34 Pac. 61; Proffatt Jury Tr. § 138.

A lack of jurors may arise from a variety of causes, as by a neglect of duty on the part of the officers charged with the selection, drawing, and summoning of the jury, or the loss or destruction of the list of jurors, or the array may have been successfully challenged and the panel quashed. Thompson & M. Jur. § 81.

38. Rockford Ins. Co. *v.* Nelson, 75 Ill. 548; Proffatt Jury Tr. § 138.

many jurisdictions statutory provisions authorizing the ordering of a special venire in such cases.[39] So a special venire may be ordered where the jury-list has been lost or destroyed,[40] where through the neglect of the officers charged with such duty no regular panel has been drawn or summoned,[41] or where the panel was summoned to serve for a definite period which expires before the business of the term is completed.[42] But where a regular panel has been summoned the court cannot order and impanel a special venire on the ground that no regular panel is in attendance before the day for which the regular panel has been summoned to appear.[43]

b. Discharge of Regular Panel. A special venire may be ordered where the defect of jurors is caused by a discharge by the court of the regular panel previously in attendance,[44] provided the action of the court in discharging this panel

39. *Alabama.*— Taylor *v.* State, 48 Ala. 180; Levy *v.* State, 48 Ala. 171.
California.— People *v.* Stuart, 4 Cal. 218.
Georgia.— Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.
Illinois.— Fanning *v.* People, 10 Ill. App. 70.
Indiana.— Heyl *v.* State, 109 Ind. 589, 10 N. E. 916; Merrick *v.* State, 63 Ind. 327; Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812.
Iowa.— State *v.* Arthur, 39 Iowa 631; Claussen *v.* La Franz, 1 Iowa 226.
Kentucky.— Hunt *v.* Scobie, 6 B. Mon. 469.
Louisiana.— State *v.* Wright, 41 La. Ann. 600, 6 So. 135.
Minnesota.— State *v.* McCartey, 17 Minn. 76.
Missouri.— State *v.* Stuckey, 98 Mo. App. 664, 73 S. W. 735.
Montana.— O'Donnell *v.* Bennett, 12 Mont. 242, 29 Pac. 1044.
Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445; Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368; Barney *v.* State, 49 Nebr. 515, 68 N. W. 636.
North Carolina.— Leach *v.* Linde, 108 N. C. 547, 13 S. E. 212; Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.
Ohio.— Reed *v.* State, 15 Ohio 217.
Oklahoma.— Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330.
Oregon.— Mosseau *v.* Veeder, 2 Oreg. 113.
Pennsylvania.— Williams *v.* Com., 91 Pa. St. 493.
Texas.— Pauska *v.* Daus, 31 Tex. 67; Cole *v.* State, (Cr. App. 1897) 39 S. W. 573; Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.
West Virginia.— State *v.* Miller, 6 W. Va. 600.
Wisconsin.— Jenness *v.* State, 103 Wis. 553, 79 N. W. 759.
See 31 Cent. Dig. tit. "Jury," § 310.
It cannot be permitted that circumstances, such as the neglect of the officers charged with the duty of drawing or selecting the jury or the disqualification of the panel selected, should deprive the court of the necessary machinery for the transaction of its business, and it is the purpose of these statutes to provide for such emergencies. Heyl *v.* State, 109 Ind. 589, 10 N. E. 916; State *v.* Arthur, 39 Iowa 631.
The statutes cover any and all possible reasons for which at any term of the court there may be no panel of jurors present for the trial of cases. Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939.

40. State *v.* Arthur, 39 Iowa 631.

41. *Alabama.*— Levy *v.* State, 48 Ala. 171. See also Curry *v.* State, 120 Ala. 366, 25 So. 237.
California.— People *v.* Vance, 21 Cal. 400; People *v.* Stuart, 4 Cal. 218.
Illinois.— Fanning *v.* People, 10 Ill. App. 70.
Indiana.— Heyl *v.* State, 109 Ind. 589, 10 N. E. 916.
Texas.— Lucas *v.* Johnson, (Civ. App. 1901) 64 S. W. 823; Texas, etc., R. Co. *v.* Fambrough, (Civ. App. 1900) 55 S. W. 188; Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90; Lenert *v.* State, (Cr. App. 1901) 63 S. W. 563; Sanchez *v.* State, 39 Tex. Cr. 389, 46 S. W. 249; Castro *v.* State, (Cr. App. 1898) 46 S. W. 239; Thomson *v.* State, (Cr. App. 1898) 44 S. W. 837.
See 31 Cent. Dig. tit. "Jury," § 310.
Where no jury commissioners have been appointed the court may order jurors to be summoned by special venire. Houston, etc., R. Co. *v.* Vinson, (Tex. Civ. App. 1896) 38 S. W. 540.

42. Rockford Ins. Co. *v.* Nelson, 75 Ill. 548; State *v.* Wright, 41 La. Ann. 600, 6 So. 135; Leach *v.* Linde, 108 N. C. 547, 13 S. E. 212.
Where a case is set for trial by consent at a week after the regular jury will have been discharged, which fact is known to the parties, they cannot object to the action of the court in summoning a special venire to try the case. International, etc., R. Co. *v.* Foster, 26 Tex. Civ. App. 497, 63 S. W. 952.

43. Wilson *v.* State, 42 Ind. 224.
In a summary proceeding where a jury is demanded and allowed by the court a special venire may be issued without waiting for the regular panel for the term. State *v.* Trimbell, 12 Wash. 440, 41 Pac. 183.

44. *Georgia.*— Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.
Idaho.— Simmons *v.* Cunningham, 4 Ida. 426, 39 Pac. 1109.
Indiana.— Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 30 N. E. 812.

and summoning another was in good faith and not for the purpose of evading a trial by the regular jury.[45]

c. Invalidity of Regular Panel. Where a challenge to the array has been sustained or the entire panel quashed for material irregularities in procuring the jury the court may order a special venire.[46]

d. Regular Panel Otherwise Engaged. It has been held under the statutory provisions above referred to,[47] that when the jurors selected from the regular panel are absent considering their verdict in another case the court may order a second jury to be summoned on a special venire,[48] but in other cases the right to summon such a second jury has been denied.[49]

e. Deficiency of Regular Jurors — (i) *In General.* There are in most jurisdictions statutes providing for the drawing or summoning of additional jurors whenever necessary to supply a deficiency of jurors of the regular panel,[50] as

Kentucky.— Hunt *v.* Scobie, 6 B. Mon. 469.

Minnesota.— State *v.* McCartey, 17 Minn. 76; Steele *v.* Malony, 1 Minn. 347.

Nebraska.— Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050; Fanton *v.* State, 50 Nebr. 351, 69 N. W. 953, 36 L. R. A. 158.

New York.— People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54; Vanderwerker *v.* People, 5 Wend. 530.

Ohio.— Reed *v.* State, 15 Ohio 217.

Texas.— Wyatt *v.* State, 38 Tex. Cr. 256, 42 S. W. 598.

United States.—St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

See 31 Cent. Dig. tit. "Jury," § 311.

Contra.— Mosseau *v.* Veeder, 2 Oreg. 113.

Where an indictment is found after the discharge of the regular panel for the term a special venire may be ordered for the trial. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

Under the Texas statute the court may in its discretion in such cases appoint jury commissioners to select the jury. Lang *v.* Henke, 22 Tex. Civ. App. 490, 55 S. W. 374.

45. See Simmons *v.* Cunningham, 4 Ida. 426, 39 Pac. 1109; Hunt *v.* Scobie, 6 B. Mon. (Ky.) 469; Bates *v.* State, 19 Tex. 122.

The court cannot capriciously break up the regular panel and require the parties to submit their controversies to jurors summoned on a special venire; but in the absence of any bad faith a special venire may be ordered when for any reason there is no regular jury in attendance and there is a case which has been regularly set and is ready for trial. Bennett *v.* Tintic Iron Co., 9 Utah 291, 34 Pac. 61.

If a jury trial has been demanded and the jury-fee deposited, it is error for the court thereafter, without the consent of the parties, to discharge the jury for the term and when the case is called for trial summon a special venire. Texas, etc., R. Co. *v.* Pullen, 33 Tex. Civ. App. 143, 75 S. W. 1084.

46. *Alabama.*— Harper *v.* State, 113 Ala. 91, 21 So. 354; Steele *v.* State, 111 Ala. 32, 20 So. 648.

California.— People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093; People *v.* Devine, 46 Cal. 45.

Florida.— Waldron *v.* State, 41 Fla. 265, 26 So. 701.

Kentucky.— Risner *v.* Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. L. Rep. 84.

Louisiana.— State *v.* Anderson, 49 La. Ann. 1576, 22 So. 817.

Michigan.— Atkinson *v.* Morse, 63 Mich. 276, 29 N. W. 711.

Minnesota.— Dayton *v.* Warren, 10 Minn. 233.

Mississippi.— Purvis *v.* State, 71 Miss. 706, 14 So. 268.

Nebraska.— Fanton *v.* State, 50 Nebr. 351, 69 N. W. 953, 36 L. R. A. 158; Barney *v.* State, 49 Nebr. 515, 68 N. W. 636.

North Carolina.— Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; State *v.* McCurry, 63 N. C. 33; State *v.* Owen, 61 N. C. 425.

Pennsylvania.— Com. *v.* Shew, 8 Pa. Dist. 484.

See 31 Cent. Dig. tit. "Jury," § 313.

Under the Pennsylvania statute authorizing a special venire in civil cases where a challenge to the array has been sustained and in criminal cases "whenever a challenge to the array shall be made by the defendant and sustained," it has been held that a special venire cannot be ordered in a criminal case where the challenge to the array is made by the state. Williams *v.* Com., 91 Pa. St. 493.

47. See *supra*, VIII, B, 1, a.

48. Winsett *v.* State, 57 Ind. 26; Evarts *v.* State, 48 Ind. 422; State *v.* Jones, 61 Mo. 232; O'Donnell *v.* Bennett, 12 Mont. 242, 29 Pac. 1044.

In a busy term of court where one trial follows another at once, if each trial must await the return in the court of the jury that may be out deliberating on a case, the court would often find itself without occupation for long periods of time and this is just such a condition as the statutes were intended to remedy. O'Donnell *v.* Bennett, 12 Mont. 242, 29 Pac. 1044.

49. Bates *v.* State, 19 Tex. 122. See also Dean *v.* State, 100 Ala. 102, 14 So. 762.

50. *Arizona.*— Elias *v.* Territory, (1904) 76 Pac. 605.

Colorado.— Housh *v.* People, 24 Colo. 262, 50 Pac. 1036; Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267.

where there are vacancies in the regular panel,[51] or where in making up the trial jury the regular panel becomes exhausted before procuring a full jury.[52] Jurors drawn and summoned to supply a deficiency in the regular panel are not, properly speaking, talesmen,[53] although they are frequently so called,[54] the distinction between them and talesmen properly so called being that the latter are always summoned only for the trial of a particular case.[55]

(II) *Vacancies in Regular Panel.* Where there are vacancies in the regular panel the court may order additional jurors to be summoned and supply the deficiency,[56] as where some of the panel have removed from the county,[57] were not summoned,[58] were excused from attendance,[59] or failed to appear.[60] If, however, a part of the regular panel appear they cannot be discharged and an entirely new venire substituted.[61]

(III) *Exhaustion of Regular Panel.* If all the regular panel has been exhausted without procuring a jury the court may order a special venire,[62] not-

Idaho.— Simmons *v.* Cunningham, 4 Ida. 426, 39 Pac. 1109.

Illinois.— Lincoln *v.* Stowell, 73 Ill. 246.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1057.

Kansas.— State *v.* Davis, (1903) 73 Pac. 87; Trembly *v.* State, 20 Kan. 116.

Louisiana.— State *v.* Thibodaux, 49 La. Ann. 15, 21 So. 127; State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

Michigan.— People *v.* Considine, 105 Mich. 149, 63 N. W. 196.

Missouri.— State *v.* May, 172 Mo. 630, 72 S. W. 918; State *v.* Sansone, 116 Mo. 1, 22 S. W. 617.

Montana.— Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

Nebraska.— Barney *v.* State, 49 Nebr. 515, 68 N. W. 636; Dodge *v.* People, 4 Nebr. 220.

Nevada.— State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.

New York.— People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130 [*affirming* 3 N. Y. Cr. 247]; Kenny *v.* People, 31 N. Y. 330.

Texas.— Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

Utah.— U. S. *v.* Clawson, 4 Utah 34, 5 Pac. 689.

Wisconsin.— Emery *v.* State, (1899) 78 N. W. 145.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

See 31 Cent. Dig. tit. "Jury," §§ 314, 316.

51. See *infra*, VIII, B, 1, e, (II).

52. See *infra*, VIII, B, 1, e, (III).

53. Clawson *v.* U. S., 114 U. S. 477, 5 S. Ct. 949, 29 L. ed. 179.

54. See Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; Collins *v.* State, 31 Fla. 574, 12 So. 906; State *v.* Chambers, 45 La. Ann. 36, 11 So. 944; State *v.* Alphonse, 34 La. Ann. 9; McHugh *v.* State, 38 Ohio St. 153.

55. Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

56. *Alabama.*— Adams *v.* Thornton, 82 Ala. 260, 3 So. 20.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; Watson *v.* State, 63 Ind. 548.

Kansas.— Trembly *v.* State, 20 Kan. 116.

Louisiana.— State *v.* Ferray, 22 La. Ann. 423.

Montana.— Wykoff *v.* Loeber, 5 Mont. 535, 6 Pac. 363.

Nebraska.— Dodge *v.* People, 4 Nebr. 220.

Ohio.— Lindsay *v.* State, 24 Ohio Cir. Ct. 1.

Virginia.— Short *v.* Com., 90 Va. 96, 17 S. E. 786.

United States.— U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*b*.

See 31 Cent. Dig. tit. "Jury," § 314.

The cause of the deficiency is immaterial, and whenever for any cause the contingency occurs the court is clothed with authority to provide a competent jury. Wykoff *v.* Loeber, 5 Mont. 535, 6 Pac. 363.

Where some of the regular panel are serving on the grand jury they are not in attendance within the meaning of the statute and additional jurors may be summoned to complete the panel. Short *v.* Com., 90 Va. 96, 17 S. E. 786.

In Alabama under the act of 1887 providing that if at the time appointed for the trial of a capital case a jury should not be made from those who are summoned and have appeared the court shall draw a sufficient number of names to complete the jury, it is held that such drawing is not to be made merely to supply a vacancy in the regular panel but only after all those who have appeared have been exhausted without procuring a full jury. Ezell *v.* State, 102 Ala. 101, 15 So. 810.

57. Davis *v.* State, 25 Ohio St. 369.

58. State *v.* Ferray, 22 La. Ann. 423.

59. Watson *v.* State, 63 Ind. 548; Trembly *v.* State, 20 Kan. 116; State *v.* Ferray, 22 La. Ann. 423; Dodge *v.* People, 4 Nebr. 220.

60. Adams *v.* Thornton, 82 Ala. 260, 3 So. 20; Lindsay *v.* State, 24 Ohio Cir. Ct. 1.

61. Latimer *v.* Woodward, 2 Dougl. (Mich.) 368.

62. *California.*— People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495.

Florida.— Lambright *v.* State, 34 Fla. 564, 16 So. 582.

Georgia.— Revel *v.* State, 26 Ga. 275.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Missouri.— State *v.* Jones, 61 Mo. 232.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

withstanding there was not a full regular panel in attendance in the first instance.[63] Where one special venire for additional jurors is exhausted without obtaining a jury the court may order another, but all the jurors of each venire should be exhausted before recourse is had to the next.[64]

(iv) *Summoning in Advance.* The court may order a special venire for additional jurors to be summoned in advance in anticipation of the exhaustion of the regular panel,[65] but it is error to require the selection of a jury from such a venire where the original panel has been neither exhausted nor discharged.[66]

f. In Criminal Cases. The statutes in some jurisdictions provide that a special venire may be demanded for the trial of capital felonies,[67] but these statutes do not apply where in the particular case the death penalty could not be inflicted,[68] although if defendant demands a special venire in such cases and the court grants it it is not an error of which he can complain.[69] In North Carolina the granting of a special venire in a capital case is within the discretion of the court.[70]

2. Application and Order. A party need not request an order for a special venire for additional jurors until the regular panel has been called and the list of competent jurors exhausted,[71] and the court may order such a venire of its own

New Mexico.— Territory *v.* McGinnis, (1900) 61 Pac. 208.

New York.— Kenny *v.* People, 31 N. Y. 330.

Pennsylvania.—Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433.

See 31 Cent. Dig. tit. "Jury," § 316.

It is error to postpone the trial to another week to be tried by a regular jury of that week where the regular panel is exhausted, but the court should order a new venire for additional jurors. State *v.* Briggs, 27 S. C. 80, 2 S. E. 854.

63. Lambright *v.* State, 34 Fla. 564, 16 So. 582; State *v.* Brown, 12 Minn. 538.

64. Collins *v.* State, 31 Fla. 574, 12 So. 906.

65. *Arizona.*— Elias *v.* Territory, (1904) 76 Pac. 605.

California.— People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Florida.— Lambright *v.* State, 34 Fla. 564, 16 So. 582; O'Connor *v.* State, 9 Fla. 215.

Iowa.— State *v.* Ryan, 70 Iowa 154, 30 N. W. 397.

New York.— Foster's Case, 13 Abb. Pr. N. S. 372 note.

See 31 Cent. Dig. tit. "Jury," § 317.

Compare Sharpe *v.* State, 17 Tex. App. 486.

66. Hall *v.* State, 28 Tex. App. 146, 12 S. W. 739.

67. Jackson *v.* State, 78 Ala. 471; De Arman *v.* State, 77 Ala. 10; Cavanah *v.* State, 56 Miss. 299; Farrar *v.* State, 44 Tex. Cr. 236, 70 S. W. 209; Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450; Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771.

Special venire at special term.— Under the Alabama statute if a special term is called for the disposal of business generally, at which a capital case is to be tried, the special venire must include the regular jury as at regular terms, but if called only for the trial of a capital case a special venire of fifty jurors is to be summoned and if this be exhausted the jury is to be completed from talesmen. Ward *v.* State, 78 Ala. 441; Marton *v.* State, 77 Ala. 1.

Where several capital cases stand for trial the court must, under the present Alabama statute, draw a separate venire for each case. Hunt *v.* State, 135 Ala. 1, 33 So. 329; Adams *v.* State, 133 Ala. 166, 31 So. 851 [*distinguishing* Chamblee *v.* State, 78 Ala. 466]; Cook *v.* State, 134 Ala. 137, 32 So. 696; Rambo *v.* State, 134 Ala. 71, 32 So. 650.

68. De Arman *v.* State, 77 Ala. 10; Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860.

So a special venire cannot be demanded on a second trial for murder where defendant previously had been convicted of murder in the second degree, which is not a capital offense, if the previous conviction is pleaded as an acquittal of murder in the first degree (Jackson *v.* State, 78 Ala. 471; De Arman *v.* State, 77 Ala. 10); and where the statute provides that defendants under a certain age shall not be punishable by death, a special venire cannot be demanded where the prosecuting attorney admits that defendant is under that age (Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860); but if defendant does not on the second trial plead his former conviction of murder in the second degree as an acquittal of murder in the first degree it is error not to summon a special venire (Linnehan *v.* State, 116 Ala. 471, 22 So. 662).

The prosecuting attorney cannot waive capital punishment where the statute provides that the jury shall determine the degree of the offense and the punishment to be inflicted, and such waiver cannot deprive defendant of his right to a special venire in a case where capital punishment might be inflicted. Bankhead *v.* State, 124 Ala. 14, 26 So. 979.

69. De Arman *v.* State, 77 Ala. 10.

70. State *v.* Brogden, 111 N. C. 656, 16 S. E. 170.

71. Fulweiler *v.* St. Louis, 61 Mo. 479.

motion without any formal application therefor.[72] Where the statute provides that the judge shall enter an order on the minutes for the drawing of additional jurors it need not be written by the court in person but may be entered by the clerk.[73]

3. DRAWING OR SELECTION — a. In Criminal Cases. Special venires for the trial of criminal cases are in some jurisdictions drawn from the jury-box,[74] and in others are selected by the court[75] or by the sheriff.[76] It is not necessary that defendant should be present when the order for the special venire is made,[77] or when the jury is drawn,[78] although it is said to be the safer and better practice.[79] Where the venire is selected by the sheriff from the body of the county the only limitation upon his mode of selection is that he shall act impartially.[80]

b. Additional Jurors. The method of drawing or selecting additional jurors to supply a deficiency of those of the regular panel is regulated by the statutes.[81] In some cases the statutes provide for the drawing of such jurors from the jury-box,[82] or from a special box containing the names of jurors residing in the vicinity

72. People *v.* Considine, 105 Mich. 149, 63 N. W. 196.

73. State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811.

74. Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; State *v.* Maben, 45 Minn. 56, 47 N. W. 306; Pocket *v.* State, 5 Tex. App. 552.

In Alabama the drawing must be done by the judge who cannot authorize another to do it for him under his supervision. Scott *v.* State, 141 Ala. 39, 37 So. 366.

It is not necessary to call out the names as they are drawn and if the drawing is done publicly and the list of those drawn is furnished defendant cannot complain. Parnell *v.* State, 129 Ala. 6, 29 So. 860.

In North Carolina the drawing of a special venire from the jury-box is authorized by statute and the practice is favored but the statute is not mandatory. State *v.* Smarr, 121 N. C. 669, 28 S. E. 549; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Brogden, 111 N. C. 656, 16 S. E. 170.

75. Eason *v.* State, 6 Baxt. (Tenn.) 431.

76. Cavanah *v.* State, 56 Miss. 299.

77. Hall *v.* State, 40 Ala. 698.

78. Ragland *v.* State, 125 Ala. 12, 27 So. 983; Stoball *v.* State, 116 Ala. 454, 23 So. 162; Hurd *v.* State, 116 Ala. 440, 22 So. 993; Pocket *v.* State, 5 Tex. App. 552. See also Jones *v.* State, 116 Ala. 468, 23 So. 135; Frazier *v.* State, 116 Ala. 442, 23 So. 134.

79. Hall *v.* State, 40 Ala. 698; Henry *v.* State, 33 Ala. 389; Pocket *v.* State, 5 Tex. App. 552.

80. West *v.* State, 80 Miss. 710, 32 So. 298; Cavanah *v.* State, 56 Miss. 299.

The sheriff is not bound to select indiscriminately such persons as he may meet but may prepare in advance a list of those whom he intends to summon. Cavanah *v.* State, 56 Miss. 299.

Where jurors are to be summoned from a different county on account of local prejudice it is not error for the sheriff in selecting the venire to inquire of those best qualified to know as to what persons of that county are best qualified to serve as jurors. Brafford *v.* Com., 16 S. W. 710, 13 Ky. L. Rep. 154.

81. *Alabama.*— Edson *v.* State, 134 Ala. 50, 32 So. 308.

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— Jenkins *v.* State, 25 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267.

Idaho.— Simmons *v.* Cunningham, 4 Ida. 426, 39 Pac. 1109.

Illinois.— Lincoln *v.* Stowell, 73 Ill. 246.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.

Iowa.— State *v.* John, 124 Iowa 230, 100 N. W. 193, (1903) 93 N. W. 61.

Kansas.— State *v.* Edwards, 64 Kan. 455, 67 Pac. 834.

Louisiana.— State *v.* Chambers, 45 La. Ann. 36, 11 So. 944; State *v.* Waggner, 42 La. Ann. 54, 8 So. 209.

Michigan.— People *v.* Jones, 24 Mich. 215.

Missouri.— State *v.* May, 172 Mo. 630, 72 S. W. 918.

Montana.— Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

Nebraska.— Dodge *v.* People, 4 Nebr. 220.

Nevada.— State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.

New York.— People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130 [*affirming* 3 N. Y. Cr. 247].

Ohio.— Bach *v.* State, 38 Ohio St. 664.

Texas.— Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

Utah.— U. S. *v.* Clawson, 4 Utah 34, 5 Pac. 689.

Virginia.— Waller *v.* Com., 84 Va. 492, 5 S. E. 364.

Wisconsin.— Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

See 31 Cent. Dig. tit. "Jury," §§ 324, 325.

In Missouri under the act of 1891 jurors to supply a deficiency in the regular panel are in counties having over a certain number of inhabitants summoned from a list made out by the court, and in other counties the duty devolves entirely upon the sheriff. State *v.* Sansone, 116 Mo. 1, 22 S. W. 617.

82. *Louisiana.*— State *v.* Chambers, 45 La.

of the court;[83] but if in drawing such jurors the names in the jury-box are exhausted without completing the jury, the court may order additional jurors to be summoned from the body of the county.[84] In some cases the additional jurors are selected by the sheriff either from the bystanders or from the body of the county as the statute may direct,[85] while some of the statutes expressly make it discretionary with the court whether they shall be drawn from the jury-box or elected by the sheriff in this manner.[86] In other jurisdictions the additional jurors are not drawn but are either selected by the sheriff or summoned from a list furnished by the court.[87] A few of the statutes make a distinction between additional jurors to supply vacancies in the regular panel and those ordered to complete a trial jury after the regular panel has become exhausted, and provide that the former shall be drawn and the latter summoned by the sheriff.[88] Where the jurors are selected by the sheriff the court may direct him to summon only good and lawful men,[89] but cannot in any way control the sheriff as to what persons shall be selected[90] or direct him to discriminate for or against any class of citizens eligible for jury duty.[91]

c. Size of Panel. In the case of special venires for criminal trials the statutes usually specify the number to be summoned.[92] Where the statute merely pre-

Ann. 36, 11 So. 944; State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811; State *v.* Waggner, 42 La. Ann. 54, 8 So. 209; State *v.* Alphonse, 34 La. Ann. 9.

New York.— People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130 [*affirming* 3 N. Y. Cr. 247]; Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524.

Utah.— U. S. *v.* Clawson, 4 Utah 34, 5 Pac. 689.

Washington.— State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

See 31 Cent. Dig. tit. "Jury," §§ 324, 325.

Under the Kansas statute additional jurors must be drawn from the jury-box if either party so requests. State *v.* Edwards, 64 Kan. 455, 67 Pac. 834; State *v.* Simons, 61 Kan. 752, 60 Pac. 1052 [*distinguishing* Trembly *v.* State, 20 Kan. 116].

83. People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130 [*affirming* 3 N. Y. Cr. 247]; State *v.* Briggs, 27 S. C. 80, 2 S. E. 854.

The New York statute of 1870 providing that the court may cause additional jurors to be drawn from the county box does not repeal the act of 1861 under which the court may order the additional jurors to be drawn from the city box. Bennett *v.* Matthews, 40 How. Pr. 428.

84. U. S. *v.* Clawson, 4 Utah 34, 5 Pac. 689; Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443; Clawson *v.* U. S., 114 U. S. 477, 5 S. Ct. 949, 29 L. ed. 179.

85. Territory *v.* Clanton, 3 Ariz. 1, 20 Pac. 94; Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; Dodge *v.* People, 4 Nebr. 220.

86. *California.*— People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267.

Idaho.— Simmons *v.* Cunningham, 4 Ida. 426, 39 Pac. 1109.

Iowa.— State *v.* John, 124 Iowa 230, 100 N. W. 193, (1903) 93 N. W. 61.

Louisiana.— State *v.* Revells, 35 La. Ann. 302.

Michigan.— People *v.* Jones, 24 Mich. 215.

Nevada.— State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.

Texas.— Western Union Tel. Co. *v.* Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90; Smith *v.* Bates, (Civ. App. 1894) 28 S. W. 64, 27 S. W. 1044 [*overruling* in effect Lewis *v.* Merchant, (App. 1890) 16 S. W. 173].

See 31 Cent. Dig. tit. "Jury," §§ 324, 325.

In Georgia the act of 1881 provides that in trials for offenses punishable by death or imprisonment in the penitentiary the judge may in his discretion have the additional jurors drawn from the jury-boxes of the county. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

87. Bach *v.* State, 38 Ohio St. 664; McHugh *v.* State, 38 Ohio St. 153; Dayton *v.* State, 19 Ohio St. 584; Robinson *v.* Com., 88 Va. 900, 14 S. E. 627; Waller *v.* Com., 84 Va. 492, 5 S. E. 364.

The list need not be signed by the judge where the jurors are summoned from such list. Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

88. Healy *v.* People, 177 Ill. 306, 52 N. E. 426; Borrelli *v.* People, 164 Ill. 549, 45 N. E. 1024; Lincoln *v.* Stowell, 73 Ill. 246; Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925; Wykoff *v.* Loeber, 5 Mont. 535, 6 Pac. 363; Territory *v.* Reed, 5 Mont. 92, 1 Pac. 717; Emery *v.* State, 101 Wis. 627, 78 N. W. 145. See also French *v.* State, 98 Wis. 341, 73 N. W. 991.

89. See Babcock *v.* State, 13 Colo. 515, 22 Pac. 817.

90. Hamlin *v.* Fletcher, 64 Ga. 549.

91. Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

92. Hunt *v.* State, 135 Ala. 1, 33 So. 329; Clarke *v.* State, 87 Ala. 71, 6 So. 368; Hubbard *v.* State, 72 Ala. 164; Blevins *v.*

scribes a maximum and a minimum limit to the number the court cannot disregard such limits;[93] but within the prescribed limits may determine and direct the number to be summoned,[94] and if the court directs a certain number and the clerk issues the venire for a less number it is ground for quashing the venire.[95] It is discretionary with the court as to the number to be summoned on a special venire where no regular jury has been drawn and summoned,[96] or where additional jurors are summoned to supply a deficiency in the regular panel.[97]

4. QUALIFICATIONS OF SPECIAL VENIREMEN.[98] A juror is not disqualified to serve on a special venire by having been a member of the original panel which was quashed or set aside merely because of some irregularity in drawing or summoning them.[99] In North Carolina special veniremen are only required to be freeholders,[1] and need not have paid their taxes as in the case of regular jurors,[2] and are not disqualified by reason of prior service as jurors within two years, as in the case of talesmen.[3]

5. FORM AND REQUISITES OF VENIRE. A special venire need not be entitled as of the case pending,[4] or show for what particular case it is ordered,[5] although it is not error for the court to specify the case or cases to be tried;[6] and where the jurors are to be selected from the body of the county it is only necessary to specify the number to be summoned.[7] The venire should be addressed to the sheriff,[8] but a substantial compliance with the forms prescribed by statute is sufficient,[9] and formal defects may be amended.[10] Where a case is continued a special venire may be ordered returnable to the term to which the case is continued.[11] The Alabama statute provides that special venires in capital cases shall

State, 68 Ala. 92; Hall *v.* State, 28 Tex. App. 146, 12 S. W. 739; Harrison *v.* State, 3 Tex. App. 558; Jones *v.* Com., 100 Va. 842, 41 S. E. 951; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

In North Carolina the number of jurors to be summoned on a special venire in a capital case is within the discretion of the court. State *v.* Brogden, 111 N. C. 656, 16 S. E. 170.

Size of list.— Where the statute provides that a certain number shall be summoned from the list furnished by the judge but does not limit the size of the list, the list need not contain any more names than the number required to be summoned (Mitchell *v.* Com., 33 Gratt. (Va.) 845); but it is not error for the court to furnish a list containing a greater number (Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238).

Where two defendants elect to be tried together and the statutes provide that in such cases they shall join in their challenges they are entitled only to a panel of the same size as where one defendant is to be tried. State *v.* Phillips, 24 Mo. 475.

Virginia statute mandatory.— The present Virginia statute requiring that a writ of venire facias in a case of felony shall command the officer to summon sixteen persons is imperative and a writ directing a greater number to be summoned is invalid. Jones *v.* Com., 100 Va. 842, 41 S. E. 951.

93. Harrison *v.* State, 3 Tex. App. 558.

94. Clarke *v.* State, 87 Ala. 71, 6 So. 368; Hubbard *v.* State, 72 Ala. 164; Blevins *v.* State, 68 Ala. 92; Hall *v.* State, 28 Tex. App. 146, 12 S. W. 739.

95. Hunter *v.* State, 34 Tex. Cr. 599, 31 S. W. 674. See also Wilkins *v.* State, 112 Ala. 55, 21 So. 56.

96. People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72.

97. Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017; Colt *v.* People, 1 Park. Cr. (N. Y.) 611; Dayton *v.* State, 19 Ohio St. 584; Com. *v.* Twitchell, 1 Brewst. (Pa.) 551. See also Lewis *v.* State, 3 Head (Tenn.) 127.

98. Qualifications of jurors see, generally, *supra*, VI, A.

99. State *v.* Yordi, 30 Kan. 221, 2 Pac. 161; State *v.* Degonia, 69 Mo. 485; Smith *v.* State, 4 Nebr. 277. *Compare* Combs *v.* Slaughter, Hard. (Ky.) 62.

1. State *v.* Kilgore, 93 N. C. 533; State *v.* Carland, 90 N. C. 668.

2. State *v.* Kilgore, 93 N. C. 533; State *v.* Carland, 90 N. C. 668.

3. State *v.* Starnes, 94 N. C. 973; State *v.* Kilgore, 93 N. C. 533; State *v.* Whitfield, 92 N. C. 831.

4. Loeffner *v.* State, 10 Ohio St. 598.

5. State *v.* Murph, 60 N. C. 129.

6. State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

7. State *v.* Stokely, 16 Minn. 282.

8. Healy *v.* People, 177 Ill. 306, 52 N. E. 426. See also State *v.* Albright, 144 Mo. 638, 46 S. W. 620.

A writ directed to the "sheriff or any constable" instead of to the sheriff is irregular, but the irregularity is not material where it appears that it was executed by the sheriff. Jackson *v.* State, 30 Tex. App. 664, 18 S. W. 643; Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458.

9. Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104.

10. Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458.

11. Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450.

include those summoned on the regular juries for the week,[12] but is construed as including only those summoned who have appeared and who constitute the regular jurors in fact.[13]

6. Summoning Venire — a. In General. Special venires, as in the case of regular juries, are to be summoned by the sheriff unless he is disqualified,[14] and usually the general provisions apply as to the grounds of disqualification,[15] and the appointment of substitutes.[16] In a few jurisdictions the statutes provide that a challenge to the panel may be made on account of any bias of the summoning officer which would be a ground of challenge to a juror;[17] but it is held not to be proper for the court of its own motion and against defendant's objection to examine the sheriff as to his bias.[18] The sheriff is disqualified if he is the prosecuting witness in the case,[19] but not merely because he has been subpœnaed as a witness [20] or because he has some knowledge of the facts and is liable to be called as a witness where no actual bias or prejudice is shown.[21] Where the statute requires a special oath to be administered where jurors not regularly drawn are to be summoned, a failure to administer such oath, if excepted to, is ground for reversal.[22] The sheriff must exercise diligence to find and serve all of the jurors named in the venire;[23] but if in the exercise of due diligence he is unable to do so the fact that all were not summoned is not ground for challenge to the array,[24]

12. Floyd *v.* State, 55 Ala. 61.

13. Cotton *v.* State, 87 Ala. 75, 6 So. 396; Dick *v.* State, 87 Ala. 61, 6 So. 395; Posey *v.* State, 73 Ala. 490; Lee *v.* State, 55 Ala. 259; Floyd *v.* State, 55 Ala. 61.

The venire should therefore exclude any of the regular panel who are not summoned (Posey *v.* State, 73 Ala. 490) or who were summoned but failed to appear or were afterward excused from attendance (Jackson *v.* State, 77 Ala. 18; Lee *v.* State, 55 Ala. 259; Floyd *v.* State, 55 Ala. 61).

Where the trial is set for a subsequent week so that it is not ascertainable what number of those summoned will be in attendance the statute is complied with by making those summoned for the particular week a part of the venire. Mitchell *v.* State, (Ala. 1901) 30 So. 348; Baker *v.* State, (Ala. 1899) 26 So. 194; Dick *v.* State, 87 Ala. 61, 6 So. 391.

14. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135; Healy *v.* People, 177 Ill. 306, 52 N. E. 426.

Under the Iowa statute, the duty devolves upon the sheriff, but the deputy sheriff may act, and the sheriff may appoint special constables to assist in summoning the jury. State *v.* Arthur, 39 Iowa 631.

15. People *v.* Coyodo, 40 Cal. 586.

In case of regular panel see *supra*, VIII, A, 2, e, (II).

16. People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845, 15 Ky. L. Rep. 341. See also Londoner *v.* People, 15 Colo. 557, 26 Pac. 135, holding that where the sheriff is a party the court may of its own motion issue a special venire to the coroner.

If the sheriff is disqualified to act the jury should be summoned by the coroner, and it is erroneous to appoint an elisor for this purpose unless it appears that the coroner is also disqualified. People *v.* Fellows, (Cal. 1898) 54 Pac. 830.

17. People *v.* Coyodo, 40 Cal. 586; State *v.* Hall, (S. D. 1902) 91 N. W. 325.

A sheriff is not disqualified to summon a special venire, where he testifies that he has no actual bias against defendant, because he was examined as a witness for the state upon the preliminary examination of defendant (People *v.* Slater, 119 Cal. 620, 51 Pac. 957), or because he heard a former trial at which defendant was convicted (State *v.* Hall, (S. D. 1902) 91 N. W. 325), or because in a murder case he has formed an opinion as to who did the killing but not as to defendant's guilt, there being no dispute in the case as to who did the killing but merely as to whether it was justifiable (People *v.* Ryan, 108 Cal. 581, 41 Pac. 451); but if the sheriff has formed and expressed an unqualified opinion as to defendant's guilt, it is ground for challenge to the panel returned by him on a special venire (People *v.* Coyodo, 40 Cal. 586).

18. People *v.* Welch, 49 Cal. 174.

19. State *v.* Powers, 136 Mo. 194, 37 S. W. 936.

20. Com. *v.* Zillafrow, 207 Pa. St. 274, 56 Atl. 539. See also Webster *v.* State, (Fla. 1904) 36 So. 584.

21. Sullivan *v.* State, 75 Wis. 650, 44 N. W. 647.

22. Wyers *v.* State, 22 Tex. App. 258, 2 S. W. 722.

The oath need not be repeated where a second special venire for additional jurors is issued. Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001.

23. Brown *v.* State, (Tex. Cr. App. 1901) 65 S. W. 912.

If the sheriff goes to the place where the juror is supposed to live and is unable to find him he exercises all the diligence required. Beard *v.* State, (Tex. Cr. App. 1899) 53 S. W. 348.

24. Davis *v.* State, 126 Ala. 44, 28 So. 617; Caddell *v.* State, (Ala. 1901) 30 So. 76;

or for awarding a new trial.[25] A failure to summon the jurors in the manner provided by statute is immaterial if they appear,[26] but otherwise if in consequence of such failure they do not.[27]

b. Return of Officer — (i) *In General.* The return of the sheriff on a special venire should show what jurors were summoned,[28] the manner in which they were served,[29] and if any of the list furnished were not summoned the reasons for his failing to do so,[30] and the diligence used by him in his efforts to summon them;[31] but omissions of this character may be cured by amendment.[32] Where a list of those summoned on a special venire is required to be served on defendant, it is error for the court to begin to impanel the jury before the sheriff has made his return, since the return is the only authentic evidence as to who have been summoned;[33] but a failure to make the return at the time the writ was returnable is no ground of objection if the list was in fact served upon defendant the proper length of time before the trial,[34] and in the absence of such requirement it is no ground of challenge to a special venire that the return was not made until after the trial was begun.[35]

(ii) *Amendment of Return.* The court may permit the sheriff to amend his return to a special venire.[36]

7. Errors and Irregularities — a. Presumptions. Where a special venire has been ordered it will be presumed, in the absence of evidence to the contrary, that the circumstances authorizing the order existed,[37] that such order as the law requires was made and entered,[38] and that the proceedings thereunder in drawing, selecting, and summoning the jurors were regular.[39]

b. Effect. The statutory provisions as to selecting and summoning special venires are ordinarily held to be directory only,[40] and mere irregularities or failures strictly to comply therewith are not material unless shown to be actually preju-

Daughdrill *v.* State, (Ala. 1897) 21 So. 378; Renfro *v.* State, (Tex. Cr. App. 1900) 56 S. W. 1013; Parker *v.* State, 33 Tex. Cr. 111, 21 S. W. 604, 25 S. W. 967.

25. Taylor *v.* State, (Miss. 1901) 30 So. 657.

26. Judge *v.* State, 8 Ga. 173.

27. Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370.

28. State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

29. Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643.

30. State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; Parker *v.* State, 33 Tex. Cr. 111, 21 S. W. 604, 25 S. W. 967; Gay *v.* State, (Tex. Cr. App. 1899) 49 S. W. 612; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255.

31. Brown *v.* State, (Tex. Cr. App. 1901) 65 S. W. 912; Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370.

If the return states that some of the jurors were absent from the county at the time the writ was issued and continuously thereafter, it is sufficient and need not set out any acts of diligence on the part of the officer to summon them. Coleman *v.* State, (Tex. Cr. App. 1905) 88 S. W. 238.

32. See *infra*, VIII, B, 6, b, (II).

33. Collins *v.* State, 31 Fla. 574, 12 So. 906.

34. Ryan *v.* State, (Tex. Cr. App. 1896) 35 S. W. 288.

35. State *v.* Payne, 6 Wash. 563, 34 Pac. 317. See also People *v.* Lammerts, 164 N. Y. 137, 58 N. E. 22, 15 N. Y. Cr. 158 [*affirming* 64 N. Y. Suppl. 1145].

36. State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; Renfro *v.* State, (Tex. Cr. 1900) 56 S. W. 1013; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643; Williams *v.* State, 29 Tex. App. 89, 14 S. W. 388; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104. See also Furlow *v.* State, (Tex. Cr. App. 1899) 51 S. W. 938.

The return may be amended to show in what manner the jurors were served (Franklin *v.* State, 34 Tex. App. 625, 31 S. W. 643), or why certain names on the venire were stricken out (Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104), or why some of the jurors of the list furnished were not summoned (State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153).

37. Story *v.* State, 68 Miss. 609, 10 So. 47; State *v.* Gleason, 88 Mo. 582; Pauska *v.* Daus, 31 Tex. 67. *Compare* Dupont *v.* McAdow, 6 Mont. 226, 9 Pac. 925.

38. Williams *v.* State, 29 Tex. App. 89, 14 S. W. 388 [*overruling* Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771].

39. State *v.* Degonia, 69 Mo. 485; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

40. Bales *v.* State, 63 Ala. 30; Baker *v.* State, (Ala. 1899) 26 So. 194; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643; Jackson *v.* State, 30 Tex. App. 664, 18 S. W. 643.

dicial.[41] Such irregularities are not ground for challenge to the array or for quashing the venire,[42] and it is too late, on a motion for a new trial, to object to an irregularity to which no exception was previously taken.[43] Those provisions of the statutes, however, which constitute the essential features of the system must be substantially complied with and no material departure therefrom is permissible.[44]

c. Amendment of Record. Where it is necessary to make an entry on the minutes of the order or any of the proceedings in procuring a special venire, it is within the power of the court to correct the record in accordance with the facts,[45] which may be done after the return of the venire.[46]

C. Talesmen — 1. When Proper — a. In General. Where a sufficient number of jurors of the regular panel fail to appear or the number is subsequently reduced by challenges or otherwise so that a full jury cannot be obtained, the court may order a sufficient number to be summoned forthwith from the bystanders or others as the statute may direct, in order to make up the deficiency.[47] Those summoned in this manner are sometimes known as a *tales de circumstantibus*, or

41. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302; Bales *v.* State, 63 Ala. 30.

New York.— People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130.

South Carolina.— State *v.* Cardoza, 11 S. C. 195.

Texas.— Roundtree *v.* Gilroy, 57 Tex. 176; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643; Jackson *v.* State, 30 Tex. App. 664, 18 S. W. 643; Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450; Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522; Pocket *v.* State, 5 Tex. App. 552.

Washington.— Blanton *v.* State, 1 Wash. 265, 24 Pac. 439.

See 31 Cent. Dig. tit. "Jury," § 331.

42. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130; Roberts *v.* State, 30 Tex. App. 291, 17 S. W. 450; Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522.

A mistake in the name of a juror summoned upon a special venire is not ground for questioning the venire. Collins *v.* State, 137 Ala. 50, 34 So. 403; Bell *v.* State, (Ala. 1897) 22 So. 526.

A delay of the clerk in writing up the minutes so that strictly speaking there was at the time of the trial no record of the order for the special venire cannot prejudice defendant and is not ground for quashing the array. Hawes *v.* State, 88 Ala. 37, 7 So. 302.

Interrogating juror as to bias or opinion.— The sheriff ought not to interrogate jurors as to their opinions or bias when summoning them on a special venire, but the fact that he did so is not ground for a challenge to the panel under a statute providing that such a challenge "can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the jury." State *v.* McCartey, 17 Minn. 76.

43. State *v.* Sansone, 116 Mo. 1, 22 S. W. 617.

44. People *v.* Enwright, 134 Cal. 527, 66 Pac. 726; Risner *v.* Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. L. Rep. 84; Oates *v.* State, (Tex. Cr. App. 1905) 86 S. W. 769; Perry *v.* Smith, (Tex. Cr. App. 1898) 45 S. W. 566.

Directory and mandatory provisions.— The provisions constituting the essential features of the system provided and which are designed for procuring a fair and impartial jury must be complied with, and a failure to do so is ground for reversal (Risner *v.* Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. L. Rep. 84); but those provisions which are designed chiefly with a view to the orderly and prompt conduct of the business of the court, and compliance with which is a matter of convenience rather than substance, are merely directory (Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104).

45. English *v.* State, 34 Tex. Cr. 190, 30 S. W. 233; Rodriquez *v.* State, 32 Tex. Cr. 259, 22 S. W. 978. See also People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

46. See English *v.* State, 34 Tex. Cr. 190, 30 S. W. 233.

47. *Alabama.*— Morrison *v.* State, 84 Ala. 405, 4 So. 402.

Colorado.— Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Connecticut.— State *v.* Allen, 47 Conn. 121.

Florida.— Green *v.* State, 17 Fla. 669; O'Connor *v.* State, 9 Fla. 215.

Georgia.— Bird *v.* State, 14 Ga. 43.

Illinois.— Gropp *v.* People, 67 Ill. 154.

Indiana.— Bradley *v.* Bradley, 45 Ind. 67; Shaw *v.* Wood, 8 Ind. 518.

Iowa.— Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605; State *v.* Harris, 64 Iowa, 287, 20 N. W. 439.

Kansas.— State *v.* Geary, 58 Kan. 502, 49 Pac. 596.

Kentucky.— McClernand *v.* Com., 12 S. W. 148, 11 Ky. L. Rep. 301.

Louisiana.— State *v.* Riggs, 110 La. 509, 34 So. 655; State *v.* Ferray, 22 La. Ann. 423; Barthet *v.* Estebene, 5 La. Ann. 315; Rondeau *v.* New Orleans Imp., etc., Co., 15 La. 160.

Maine.— Wallace *v.* Columbia, 48 Me. 436.

Maryland.— Burk *v.* State, 2 Harr. & J. 426.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Nebraska.—Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094.

New Jersey.— O'Hagan *v.* Crossman, 50

more commonly as talesmen.[48] A jury might be completed from talesmen at common law,[49] but the practice was at a very early date authorized by statute.[50] Talesmen may be called in criminal as well as civil cases,[51] and to complete a special or struck jury,[52] or a jury summoned on a special venire as well as the regular panel.[53] Talesmen may also be called where the court has excused jurors of the regular panel and a complete jury cannot be made up from those remaining,[54] and where a part of the regular panel is engaged in another case the court may make up a second jury by calling talesmen to complete it after exhausting the remainder of the regular panel who are in attendance.[55]

b. Necessity to Be Avoided. The necessity of impaneling talesmen should be avoided if possible,[56] since a competent and impartial jury is more apt to be

N. J. L. 516, 14 Atl. 752; Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

North Carolina.— State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536; Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

Ohio.— Harmonia Lodge, etc. *v.* Schaffer, 5 Ohio Dec. (Reprint) 335, 4 Am. L. Rec. 670.

Pennsylvania.— Com. *v.* Eaton, 8 Phila. 428.

South Carolina.— State *v.* Anderson, 26 S. C. 599, 2 S. E. 699; State *v.* Williams, 2 Hill 381.

Texas.— Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001.

Washington.— State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

United States.— St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; Lovejoy *v.* U. S., 128 U. S. 171, 9 S. Ct. 57, 32 L. ed. 389; U. S. *v.* Munford, 16 Fed. 164; U. S. *v.* Rose, 6 Fed. 136.

England.— Rex *v.* Dolby, 2 B. & C. 104, 3 D. & R. 311, 1 L. J. K. B. O. S. 241, 24 Rev. Rep. 647, 9 E. C. L. 54.

See 31 Cent. Dig. tit. "Jury," § 333.

A tales is defined as "a supply of such men as are summoned upon the first panel, in order to make up the deficiency." 3 Blackstone Comm. 364 [*quoted* in O'Connor *v.* State, 9 Fla. 215, 225; Boyer *v.* Teague, 106 N. C. 576, 621, 11 S. E. 665, 19 Am. St. Rep. 547].

In any proceeding where a jury trial is allowed by statute, the right to fill vacancies in the panel by summoned talesmen is necessarily implied and need not be expressly granted, it being an inseparable incident of the jury system. O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

The federal statute of 1879 providing for the drawing of jurors from the box does not affect the power of the court to summon talesmen from bystanders where the regular panel is exhausted. Lovejoy *v.* U. S., 128 U. S. 171, 9 S. Ct. 57, 32 L. ed. 389; U. S. *v.* Munford, 16 Fed. 164; U. S. *v.* Rose, 6 Fed. 136.

48. Proffatt Jury Tr. § 141.

49. Com. *v.* Eaton, 8 Phila. (Pa.) 428; 3 Blackstone Comm. 364.

50. O'Connor *v.* State, 9 Fla. 215; Burk *v.* State, 2 Harr. & J. (Md.) 426; 3 Blackstone Comm. 364.

The first statutory provision on this subject was 35 Hen. VIII, c. 6, authorizing a tales at the assizes or *nisi prius*. By 4 & 5 Phil. & M. c. 7, the same rule was extended to criminal trials. The practice in England is now regulated by 6 George IV, c. 50. Proffatt Jury Tr. § 141.

51. State *v.* Williams, 2 Hill (S. C.) 381.

Statute requiring the service of a list of jurors on defendant in a criminal case do not apply to those called as talesmen. State *v.* Bunger, 14 La. Ann. 461; State *v.* Reeves, 11 La. Ann. 685. See also CRIMINAL LAW, 12 Cyc. 519.

52. *Georgia.*— Driver *v.* State, 112 Ga. 229, 37 S. E. 400.

New Jersey.— Lee *v.* Evaul, 1 N. J. L. 283.

New York.— People *v.* Tweed, 50 How. Pr. 286.

Pennsylvania.— Atlee *v.* Shaw, 4 Yeates 236.

England.— Rex *v.* Perry, 5 T. R. 453.

See 31 Cent. Dig. tit. "Jury," § 333.

53. State *v.* Brown, 12 Minn. 538; State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536; Brotherton *v.* State, 30 Tex. App. 369, 17 S. W. 932; Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001; Roberts *v.* State, 5 Tex. App. 141; St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936.

54. State *v.* Laughlin, 73 Iowa 351, 35 N. W. 448; Trembly *v.* State, 20 Kan. 116; State *v.* Somnier, 33 La. Ann. 237.

55. *Alabama.*— Redd *v.* State, 69 Ala. 255.

Indiana.— Bradley *v.* Bradley, 45 Ind. 67.

Kentucky.— McClernand *v.* Com., 12 S. W. 148, 11 Ky. L. Rep. 301.

Louisiana.— Rondeau *v.* New Orleans Imp., etc., Co., 15 La. 160.

Mississippi.—Barnes *v.* State, 60 Miss. 355.

Missouri.— State *v.* Pitts, 58 Mo. 556.

Texas.— Little *v.* State, 42 Tex. Cr. 551, 61 S. W. 483; Leslie *v.* State, (Cr. App. 1898) 47 S. W. 367. But see Thurston *v.* State, 18 Tex. App. 26.

See 31 Cent. Dig. tit. "Jury," § 333.

If the regular jurors come into court from the consideration of another case after a talesman has been called and examined but before he is sworn, he may be stood aside and one of the regular jurors impaneled. Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399.

56. State *v.* Ross, 30 La. Ann. 1154; Lambertson *v.* People, 5 Park. Cr. (N. Y.) 200;

obtained from jurors regularly selected and drawn than from those hastily selected by the sheriff,[57] and they should not be resorted to until the regular panel is exhausted.[58] It has accordingly been held not to be error where separate regular panels have been drawn and summoned to take jurors from one panel to supply a deficiency in the other instead of calling talesmen,[59] but the court is not obliged to do so;[60] and it has been held erroneous where there was a deficiency of jurors to transfer jurors from another court,[61] or from another division or department of the same court.[62] Nor is it necessary for the court before summoning talesmen to have the absent members of the regular panel called at the court-house door[63] or to send an officer after them[64] unless it is so provided by statute,[65] and even where an attachment has been issued for absent jurors the court is not obliged to delay the trial to await the return of the attachment.[66] Talesmen can be taken from the bystanders only for the trial of a particular case and not for the term,[67] and if the occasion for talesmen recurs they must be summoned and sworn again as before.[68]

c. Entire Jury From Talesmen. A tales implies the making up of a deficiency,[69] and is not granted where there is an entire default of regular jurors,[70] as

Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129.

Continuing case.— Where the number of regular jurors who appear when a case is called is not sufficient to complete the jury, it is not error for the court to continue the case until the next day and complete the jury from the regular panel instead of calling talesmen. Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488.

57. State *v.* Ross, 30 La. Ann. 1154; Lambertson *v.* People, 5 Park. Cr. (N. Y.) 200.

58. Morrison *v.* State, 84 Ala. 405, 4 So. 402; Barker *v.* Bell, 49 Ala. 284; Clough *v.* State, 7 Nebr. 320.

A party is not entitled to talesmen until he has passed upon all of the regular panel presented to him for challenge. He cannot have talesmen called to see how he likes them before exercising his right of challenge to the other jurors present. Barker *v.* Bell, 49 Ala. 284.

Where an order has been made by mistake for the summoning of talesmen, the court, thinking that the regular panel has been exhausted, may revoke the order and after exhausting the rest of the regular panel issue a second order for talesmen. State *v.* Anderson, 26 S. C. 599, 2 S. E. 699.

59. Lambertson *v.* People, 5 Park. Cr. (N. Y.) 200. See also Wilson *v.* State, 31 Ala. 371.

60. Smith *v.* State, 55 Ala. 1; Wallace *v.* Columbia, 48 Me. 436.

So where a special venire has been exhausted which was summoned from the trial of a murder case, it is not necessary to call and exhaust the regular jury for the week before directing the sheriff to summon talesmen (Thompson *v.* State, 33 Tex. Cr. 217, 26 S. W. 198; Weathersby *v.* State, 20 Tex. App. 278, 15 S. W. 823 [*overruling* Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Weaver *v.* State, 19 Tex. App. 547, 53 Am. Rep. 389]), and it has been held erroneous for the court to do so (Riley *v.* State, (Tex. Cr. App. 1904) 81 S. W. 711; Bates *v.* State, 43 Tex. Cr. 589, 67 S. W. 504), unless the right to have the jury completed from talesmen is waived (Newman *v.* State, (Tex. Cr. App. 1902) 70 S. W. 951).

61. Gulf, etc., R. Co. *v.* Gilvin, (Tex. Civ. App. 1900) 55 S. W. 985.

62. People *v.* Wong Bin, 139 Cal. 60, 72 Pac. 505; People *v.* Compton, 132 Cal. 484, 64 Pac. 849. *Contra*, Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748.

63. Waller *v.* State, 40 Ala. 325; Lingo *v.* State, 29 Ga. 470. *Contra*, State *v.* Ross, 30 La. Ann. 1154.

It is not error, although unnecessary, for the court to have the names of jurors of the regular panel who had failed to answer recalled before ordering talesmen. State *v.* Brown, 12 Minn. 538.

64. Waller *v.* State, 40 Ala. 325.

65. See State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388.

The right to have an attachment issued is waived unless demanded at the time prescribed by statute. State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

66. State *v.* Harris, 64 Iowa 287, 20 N. W. 439; Barthet *v.* Estebene, 5 La. Ann. 315; Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001.

It is discretionary with the court as to how long a delay shall be allowed for the return of an attachment for absent jurors. Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388.

Where the court learns that a juror is sick for whom an attachment has been issued, it is proper to proceed to complete the jury from talesmen without waiting for a return of the attachment. Deon *v.* State, 37 Tex. Cr. 506, 40 S. W. 266.

67. Wallace *v.* Columbia, 48 Me. 436; Shields *v.* Niagara Sav. Bank, 3 Hun (N. Y.) 477, 5 Thomps. & C. 585.

68. Wallace *v.* Columbia, 48 Me. 436.

69. Williams *v.* Com., 91 Pa. St. 493.

70. Wright *v.* Stuart, 5 Blackf. (Ind.) 120;

where none are drawn or summoned or none of those summoned appear;[71] but if any number of regular jurors, however small, is present the jury may be completed from talesmen;[72] and if in selecting the trial jury the entire regular panel is exhausted without obtaining a single juror a jury may be made up entirely of talesmen.[73] It has been held in some states that the jury might be made up entirely of talesmen where all of the regular panel had been discharged,[74] or were engaged on another case,[75] or a challenge to the array had been sustained;[76] but the right to make up an entire jury from talesmen in such cases has been expressly denied,[77] and it seems to be the usual practice in such cases to issue a new venire.[78]

d. Summoning in Advance. In order to avoid delay the court may properly, in anticipation of a deficiency in the regular panel, order additional jurors to be summoned in advance to be called as talesmen if needed,[79] and it is not unusual in practice or improper for the sheriff to summon such jurors of his own motion;[80] but such jurors are not to be resorted to until the regular panel is exhausted.[81]

2. Courts That May Call Talesmen. The power of ordering talesmen to complete a jury is incident to all courts of record and essential to their proceed-

Williams *v.* Com., 91 Pa. St. 493; Proffatt Jury Tr. § 142; Thompson & M. Jur. § 93.

71. Wright *v.* Stuart, 5 Blackf. (Ind.) 120; Fuller *v.* State, 1 Blackf. (Ind.) 63.

72. Fuller *v.* State, 1 Blackf. (Ind.) 63; Emerick *v.* Sloan, 18 Iowa 139; Barnes *v.* State, 60 Miss. 355.

73. State *v.* Desmouchet, 32 La. Ann. 1241; State *v.* Reeves, 11 La. Ann. 685.

The true doctrine on this subject has been stated to be as follows: "Where none of the jury summoned upon the first panel appear, a new venire ought to issue; but if one of the jurors only attend the Court, in obedience to the first summons, and he be challenged and rejected, there may be twelve tales-men sworn to determine the issue." Fuller *v.* State, 1 Blackf. (Ind.) 63, 65.

74. Shaw *v.* Wood, 8 Ind. 518.

75. Winsett *v.* State, 57 Ind. 26. See also Bradley *v.* Bradley, 45 Ind. 67.

In Indiana prior to the statute of 1873 which provides that the court shall have power to order the impaneling of a special jury "when the business thereof requires it" (see Evarts *v.* State, 48 Ind. 422), it was held that a second jury could not be summoned from bystanders where there was a regular jury in attendance and engaged in considering their verdict in another case (Rogers *v.* State, 33 Ind. 543).

76. People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

77. Williams *v.* Com., 91 Pa. St. 493, holding that where the array of regular jurors has been successfully challenged there is no jury and that talesmen should not be summoned but a new venire issued as in cases where no regular jury was drawn or summoned.

78. See *supra*, VIII, B, 1.

79. *Arkansas.*— Mabry *v.* State, 50 Ark. 492, 8 S. W. 823.

Connecticut.— State *v.* Allen, 47 Conn. 121.

Florida.— O'Connor *v.* State, 9 Fla. 215.

Georgia.— Cobb *v.* State, 27 Ga. 648; Bird *v.* State, 14 Ga. 43.

Louisiana.— State *v.* Watkins, 106 La. 380, 31 So. 10; State *v.* Moncla, 39 La. Ann. 868, 2 So. 814.

Nebraska.— Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094.

New Jersey.— Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

North Carolina.— State *v.* McDowell, 123 N. C. 764, 31 S. E. 839.

See 31 Cent. Dig. tit. "Jury," § 339.

The practice is to be commended, for it tends to expedite the business of the court and is in no way calculated to prejudice the parties, but on the contrary is better calculated to secure an impartial jury than summoning talesmen from bystanders at the time of the trial (Bird *v.* State, 14 Ga. 43), and the trial court should be allowed a large measure of discretion in such matters (Mabry *v.* State, 50 Ark. 492, 8 S. W. 823).

It is within the general power which every court has to arrange the order of business and provide for the probable necessities which may arise. Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

The court is not obliged to summon talesmen in advance of the trial at the request of a party, and a refusal to do so being a matter of discretion will not be interfered with by an appellate court. State *v.* Green, 43 La. Ann. 402, 9 So. 42.

Talesmen for an adjourned session may be drawn during the first week of the regular term. Buchanan *v.* State, 118 Ga. 751, 45 S. E. 607; Cribb *v.* State, 118 Ga. 316, 45 S. E. 396.

80. State *v.* Allen, 47 Conn. 121; Rex *v.* Dolby, 2 B. & C. 104, 3 D. & R. 311, 1 L. J. K. B. O. S. 241, 24 Rev. Rep. 647, 9 E. C. L. 54. See also Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354, holding that where the sheriff in summoning a special venire also summoned of his own motion a number of persons as talesmen and afterward when ordered to summon talesmen brought in the persons previously summoned, there was no error in the absence of any showing of any corrupt motive on the part of the sheriff.

81. See State *v.* Moncla, 39 La. Ann. 868, 2 So. 814.

ings;[82] but it has been held that a justice cannot order the summoning of talesmen,[83] except where such power is conferred by statute.[84]

3. Qualifications. Tales jurors are ordinarily required to have the same qualifications as regular jurors,[85] and are subject to the same challenges;[86] but in one jurisdiction at least they must not only have all the qualifications of regular jurors,[87] but in addition must also be freeholders.[88] Whether, however, a talesman is qualified is to be determined as of the time when he is called upon to serve,[89] and if he is otherwise qualified at the time, it is not necessary that his name should be in the jury-box,[90] or on the jury-list.[91] Statutes making prior service as a juror within a certain period a ground of challenge ordinarily apply to jurors called as talesmen.[92] The fact that a person called as a talesman is on the grand jury-list does not render him subject to challenge where he was not a member of the panel which found the indictment.[93]

4. Order For Summoning. It is not necessary for the court to issue a formal venire facias for the summoning of talesmen,[94] nor is it necessary for the sheriff or other officer to make and sign a written return.[95] The order for summoning talesmen may be made either orally[96] or in writing.[97] The order is not a part of the trial and may in a criminal case be made in defendant's absence,[98] or by a single judge, although two judges are required by law to be present at the trial.[99] The order need not be entered of record,[1] and need not be made returnable on the same day that it is issued.[2] Where the statute provides that talesmen may be summoned either from the bystanders or from the county at large, the court may make the order in the alternative form in the language of the statute.[3]

5. Selection. At common law talesmen were always selected by the sheriff,[4]

82. Zeely *v.* Yansen, 2 Johns. (N. Y.) 386.

83. Russel *v.* McClain, 3 N. J. L. 649; Robson *v.* Archer, 2 N. J. L. 107; Miner *v.* Burling, 32 Barb. (N. Y.) 540. But see O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

84. Zeely *v.* Yansen, 2 Johns. (N. Y.) 386.

In a summary proceeding before a justice by a landlord against his tenant, a justice cannot call talesmen, since the statute applies only to "the trial of an issue of fact in an action pending in said court." Miner *v.* Burling, 32 Barb. (N. Y.) 540.

85. Green *v.* State, 17 Fla. 669; O'Connor *v.* State, 9 Fla. 215; State *v.* Courtney, 28 La. Ann. 789; Proffatt Jury Tr. § 144.

86. Green *v.* State, 17 Fla. 669; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

87. State *v.* Hargrave, 100 N. C. 484, 6 S. E. 185; State *v.* Whitley, 88 N. C. 691.

88. State *v.* Cooper, 83 N. C. 671. See also State *v.* Hargrave, 100 N. C. 484, 6 S. E. 185; State *v.* Whitley, 88 N. C. 691.

A mortgagor in possession is a freeholder within the application of the statute relating to the qualifications of tales jurors. State *v.* Ragland, 75 N. C. 12.

89. McGuffie *v.* State, 17 Ga. 497; State *v.* Williams, 2 Hill (S. C.) 381.

90. McGuffie *v.* State, 17 Ga. 497; State *v.* Wright, 53 Me. 328. *Compare* Com. *v.* Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

91. Lee *v.* Lee, 71 N. C. 139.

92. Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Wiseman *v.* Bruns, 36 Nebr. 467, 54 N. W. 858.

Prior service as a disqualification see *supra*, VI, A, 14.

In Vermont the statute making prior service as a juror within a certain period a disqualification is construed as applying only to jurors regularly drawn and not to talesmen. Plattsburg First Nat. Bank *v.* Post, 66 Vt. 237, 28 Atl. 989.

A juror must have acted or served as such in order to be disqualified, and if he has merely been summoned and discharged without serving he is not disqualified to act as a talesman. State *v.* Thorne, 81 N. C. 555.

93. McLain *v.* State, 71 Ga. 279.

94. *Florida.*— Green *v.* State, 17 Fla. 669.
Kansas.— Trembly *v.* State, 20 Kan. 116.
Missouri.— State *v.* Jones, 61 Mo. 232.
Nebraska.— Dodge *v.* People, 4 Nebr. 220.
South Carolina.— State *v.* Hill, 19 S. C. 435; State *v.* Stephens, 11 S. C. 319.
West Virginia.— State *v.* Mills, 33 W. Va. 455, 10 S. E. 808.
See 31 Cent. Dig. tit. "Jury," § 337.

It is not error to issue a venire where a mere verbal order would have been sufficient. State *v.* Coleman, 8 S. C. 237.

95. Green *v.* State, 17 Fla. 669.

96. Morrison *v.* State, 84 Ala. 405, 4 So. 402; State *v.* Allen, 47 Conn. 121.

97. State *v.* Allen, 47 Conn. 121.

98. Mabry *v.* State, 50 Ark. 492, 8 S. W. 823; State *v.* Allen, 47 Conn. 121.

99. State *v.* Allen, 47 Conn. 121.

1. Morrison *v.* State, 84 Ala. 405, 4 So. 402.

2. State *v.* Lamon, 10 N. C. 175.

3. Keech *v.* State, 15 Fla. 591.

4. Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267; Rex *v.* Dolby, 2 B. & C. 104, 3 D. & R. 311, 1 L. J. K. B. 241, 24 Rev. Rep. 647, 9 E. C. L. 54.

which is still the practice unless modified by statute,[5] and were taken from the bystanders or persons actually present.[6] They need not, however, be taken from persons accidentally present, but may be from persons whose presence the court or sheriff has taken previous means to obtain,[7] nor is it necessary that they should have been actually present at the time the order for summoning talesmen was made;[8] and if a jury cannot be completed from the bystanders recourse may be had to other persons not within the presence of the court.[9] The former system was found to be objectionable as encouraging the attendance of a class of persons commonly known as "professional jurors," who attended for the express purpose of getting themselves selected as talesmen, and in some jurisdictions statutes have been enacted with a view to correcting this evil.[10] Thus in some jurisdictions the range of selection is extended so as not to be confined to bystanders,[11] while in others bystanders are expressly excluded.[12] In Texas the statute provides that they shall not be selected from persons within the court-house or yard if they can be had elsewhere.[13] In other jurisdictions the selection is taken out of the hands of the sheriff, and if either party so demands the selection of the persons to be summoned must be made by the court[14] or the talesmen are drawn from the general jury-list,[15] or from a special tales box containing the names of qualified persons residing in the vicinity of the different courts.[16]

5. *Georgia.*— Boon *v.* State, 1 Ga. 631.
Louisiana.— State *v.* Smith, 26 La. Ann. 62.
New York.— People *v.* Cummings, 3 Park. Cr. 343.
North Carolina.— Capehart *v.* Stewart, 80 N. C. 101.
Texas.— Locklin *v.* State, (Cr. App. 1903) 75 S. W. 305.
See 31 Cent. Dig. tit. "Jury," § 340.
Talesmen are not regular jurors and are not to be drawn and summoned as such. They are necessarily to be summoned without observing the formality of drawing and summoning the regular panel. State *v.* Smith, 26 La. Ann. 62.
The sheriff is not restricted as to the mode of selection except that the persons selected must be qualified to serve. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

6. Bird *v.* State, 14 Ga. 43; State *v.* Bunger, 14 La. Ann. 461; Rex *v.* Dolby, 2 B. & C. 104, 3 D. & R. 311, 1 L. J. K. B. O. S. 241, 24 Rev. Rep. 647, 9 E. C. L. 54.
In England since 7 & 8 Wm. III, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the bystanders. Rex *v.* Hill, 1 C. & P. 667, 12 E. C. L. 378.

7. Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449; State *v.* McDowell, 123 N. C. 764, 31 S. E. 839; Rex *v.* Dolby, 2 B. & C. 104, 3 D. & R. 311, 1 L. J. K. B. O. S. 241, 24 Rev. Rep. 647, 9 E. C. L. 54.
Summoning talesmen in advance see *supra*, VIII, C, 1, d.

8. U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267.
A person becomes a bystander and competent to be called as a talesman whenever he appears in court, although he may have been summoned on the outside (State *v.* Lamon, 10 N. C. 175; U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267); but it seems doubtful whether the court could punish a juror so summoned in case he failed to attend (see State *v.* Lamon, *supra*).
"Person present."— Under a statute providing for the summoning of "persons present" it has been held not to be necessary to summon persons actually present in the court-room, but that persons on the outside and in the vicinity of the court-house might be summoned. Barthet *v.* Estebene, 5 La. Ann. 515.

9. State *v.* Gallagher, 26 La. Ann. 46; State *v.* Bunger, 14 La. Ann. 461; Gibson *v.* Com., 2 Va. Cas. 111. See also U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267.

10. Shields *v.* Niagara Bank, 3 Hun (N. Y.) 477, 5 Thomps. & C. 585; Matthews *v.* State, 6 Tex. App. 23.

11. Bird *v.* State, 14 Ga. 43; Trembly *v.* State, 20 Kan. 116; State *v.* Revells, 35 La. Ann. 302; Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.
In Pennsylvania the statute formerly limited the selection of talesmen to bystanders (Philips *v.* Gratz, 2 Penr. & W. 412, 23 Am. Dec. 33); but by the act of 1834 it was provided that they might also be taken from the body of the county (Brown *v.* Com., 76 Pa. St. 319).

12. Thompson & M. Jur. § 102.

13. Matthews *v.* State, 6 Tex. App. 23; Baker *v.* State, 4 Tex. App. 223.
A person who was present when the order was made for summoning talesmen but who was not within the court-house or yard when summoned is not within the prohibition of the statute. Johnson *v.* State, 4 Tex. App. 268.

14. Trembly *v.* State, 20 Kan. 116; Rogam *v.* Maley, 8 Ohio Dec. (Reprint) 16, 5 Cinc. L. Bul. 51.

15. See Gropp *v.* People, 67 Ill. 154.

16. Shields *v.* Niagara Sav. Bank, 3 Hun (N. Y.) 477, 5 Thomps. & C. 585; State *v.* Anderson, 26 S. C. 599, 2 S. E. 699; State *v.* Williams, 2 Hill (S. C.) 381.

6. Number to Be Summoned. In the absence of any statutory provision to the contrary the number of persons to be summoned as talesmen is within the discretion of the court,[17] or of the sheriff in case the court makes no direction as to the number.[18] The court may order only so many as with those already sworn will be sufficient to complete the number necessary for a trial jury,[19] or on the contrary may order a number larger than the original panel.[20] If the jury is not completed from the talesmen first summoned the court may make such successive orders as may be necessary to complete the jury.[21]

7. Summoning — a. Who May Summon. Talesmen should properly be summoned by the sheriff unless he is absent or disqualified.[22] In case of absence or disqualification the statutes in some cases provide that they shall be summoned by some other attending officer,[23] the coroner,[24] or some suitable person to be appointed by the court.[25] The sheriff should not be allowed to summon talesmen in an action where one of his deputies is a party,[26] but it is not sufficient to disqualify the sheriff that defendant was in his custody on a particular charge and that the sheriff made the affidavit upon which he was thereafter held for a different offense;[27] nor is the mere fact that the officer who summoned talesmen was afterward called as a witness for the successful party assignable as error.[28]

b. Oath of Officer. Where it is required that a special oath shall be administered to the sheriff before summoning talesmen,[29] it is not necessary after he has

17. *Georgia.*— McGuffie *v.* State, 17 Ga. 497.

Maryland.— Burk *v.* State, 2 Harr. & J. 426.

Missouri.— State *v.* Buckner, 25 Mo. 167.

New York.— Colt *v.* People, 1 Park. Cr. 611 [*affirmed* in 3 Hill 432].

North Carolina.— State *v.* Lamon, 10 N. C. 175.

Ohio.— Dayton *v.* State, 19 Ohio St. 584.

Pennsylvania.— Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489; Com. *v.* Twitchell, 1 Brewst. 551; Com. *v.* Eaton, 8 Phila. 428.

See 31 Cent. Dig. tit. "Jury," § 343.

The number which should be summoned depends largely upon the state of public sentiment and other like circumstances of which the trial court is the best judge (People *v.* Colt, 3 Hill (N. Y.) 432); and when from the nature or notoriety of the case it is probable that many of the talesmen will be disqualified, it is very proper that a large number should be ordered in the first instance (State *v.* Lamon, 10 N. C. 175).

Allowance for peremptory challenges.— A party cannot require that such a number shall be summoned as would leave enough to complete the jury after exhausting the remaining peremptory challenges. Burk *v.* State, 2 Harr. & J. (Md.) 426.

Under the Illinois statute it is held that if some of the original panel fail to appear when the case is first called for trial, the court may order the panel filled from the bystanders, but if after the selection of the jury has begun this number becomes reduced, the court need not order so many as would be necessary to make up the full number of the original panel. Nealon *v.* People, 39 Ill. App. 481.

18. State *v.* Lamon, 10 N. C. 175.

19. Burk *v.* State, 2 Harr. & J. (Md.) 426.

20. Com. *v.* Eaton, 8 Phila. (Pa.) 428.

21. State *v.* Somnier, 33 La. Ann. 237; Burk *v.* State, 2 Harr. & J. (Md.) 426.

22. Meeker *v.* Gardella, 1 Wash. 139, 23 Pac. 837.

In Louisiana constables may act for the sheriff in summoning talesmen throughout the extent of their respective parishes. State *v.* Devall, 51 La. Ann. 497, 25 So. 384.

23. State *v.* Monk, 3 Ala. 415, holding under a statute providing that the court should direct some other "attending officer" to summon talesmen in case of the sheriff's absence or inability to serve, that the term "attending officer" meant some deputy sheriff or constable in attendance and not the coroner.

24. People *v.* Tweed, 50 How. Pr. (N. Y.) 286.

25. Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

The Pennsylvania statute of 1834 provides that "if the case requires it" the court may appoint two citizens to summon talesmen. Com. *v.* Garson, 3 Phila. (Pa.) 219, holding that such appointment is not confined to cases where the sheriff and coroner are disqualified by bias but is proper where the sheriff is engaged as a witness and the coroner is absent.

26. Walker *v.* Green, 3 Me. 215, holding, however, that if the juror so summoned is not challenged the objection will be deemed to be waived and is not ground for a new trial.

27. Mabry *v.* State, 50 Ark. 492, 8 S. W. 823, where defendant was in the sheriff's custody on a charge of assault at the time the person assaulted died of his wounds and the sheriff made the affidavit upon which he was held for murder.

28. Felsch *v.* Babb, (Nebr. 1904) 101 N. W. 1011.

29. See Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001.

been once sworn with reference to summoning talesmen that he should be resworn whenever additional talesmen are to be summoned.[30]

8. Errors and Irregularities — a. Presumptions. Where talesmen have been ordered and impaneled in the trial of a case it will be presumed, in the absence of evidence to the contrary, that the circumstances authorizing the calling of such jurors existed,[31] and that the proceedings were in all respects regular and according to law.[32]

b. Effect. Errors and irregularities in failing to strictly comply with the statutory provisions as to the summoning of talesmen will be regarded as immaterial where no actual prejudice is shown;[33] but the court cannot disregard the provisions of the statutes and adopt an entirely different method from that prescribed for selecting and summoning such jurors.[34]

IX. THE TRIAL JURY.

A. Ordinary Juries — 1. Drawing or Selection of Jury — a. Drawing Jury. A trial jury is ordinarily selected by placing the names of those composing the panel for the term or trial in a box and drawing them out one at a time until a sufficient number for a jury is obtained,[35] which must be done in open court[36] and by the particular officer designated by statute,[37] and in criminal cases in the presence of defendant.[38] The names of additional jurors summoned for the term

30. Blanton *v.* Mayes, 72 Tex. 417, 10 S. W. 452; Chism *v.* State, (Tex. Cr. App. 1904) 78 S. W. 949; Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354; Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588; Deon *v.* State, (Tex. Cr. App. 1897) 40 S. W. 266.

31. State *v.* Laughlin, 73 Iowa 351, 35 N. W. 448; State *v.* Jones, 61 Mo. 232; State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

32. State *v.* Laughlin, 73 Iowa 351, 25 N. W. 448; State *v.* Gallagher, 26 La. Ann. 46; State *v.* Bunger, 14 La. Ann. 461; Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094.

33. Green *v.* State, 17 Fla. 669; State *v.* Pruett, 49 La. Ann. 283, 21 So. 842; Matthews *v.* State, 6 Tex. App. 23; Meeker *v.* Gardella, 1 Wash. 139, 23 Pac. 837.

34. Bridges *v.* State, (Ga. 1897) 29 S. E. 859; Territory *v.* Carmody, (N. M. 1896) 45 Pac. 881.

35. *Alabama.*— Brazier *v.* State, 44 Ala. 387.

California.— Taylor *v.* Western Pac. R. Co., 45 Cal. 323.

Illinois.— Walker *v.* Collier, 37 Ill. 362.

South Carolina.— State *v.* Sims, 2 Bailey 29.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117.

See 31 Cent. Dig. tit. "Jury," § 349.

All of the names must be put in the box from which the jury is drawn and a failure to do so is error (Brazier *v.* State, 44 Ala. 387), unless the names of those omitted are those of jurors who could not be found and were therefore not summoned (Sanders *v.* State, (Ala. 1902) 32 So. 654), which should not be put in the box, but the fact that they are put in is not a material irregularity where they were not in attendance and none of them were put upon defendant. (Kimbrell *v.* State, 130 Ala. 40, 30 So. 454).

If the name has been inadvertently omitted it may be placed in the box after some of the jurors have been drawn. Stone *v.* State, 137 Ala. 1, 34 So. 629; State *v.* Campbell, 35 S. C. 28, 14 S. E. 292.

In impaneling a sheriff's jury in condemnation proceedings the names of the jurors summoned need not be placed in the box and drawn as in the case of ordinary juries. Davis *v.* Bangor, etc., R. Co., 60 Me. 303.

In a justice's court where the jury is composed of six persons only six names must be drawn in the first instance, who if not challenged are sworn, and if any are challenged then only are others to be drawn. It is error in such a case to draw twelve jurors in the first instance. Becker *v.* Sitterly, 58 How. Pr. (N. Y.) 38.

In Virginia in selecting jurors for the trial of capital cases a panel of twenty-four is first summoned from which a panel of sixteen qualified jurors is selected, additional jurors being summoned if necessary to make up this number, and from the panel of sixteen the accused strikes out four, leaving the remaining twelve to constitute the jury (Honesty *v.* Com., 81 Va. 283; Richards *v.* Com., 81 Va. 110); and no drawing is resorted to unless the accused fails to strike off the four, in which case a jury of twelve is selected from the panel of sixteen by lot (Honesty *v.* Com., *supra*).

36. State *v.* Millain, 3 Nev. 409, holding, however, that a jury drawn in the presence of the court and its officers while the court is in session is a jury drawn in open court, although not drawn in the room where the court usually sits.

37. Brogden *v.* State, (Tex. Cr. App. 1904) 80 S. W. 378, holding that under a statute providing that the clerk shall draw the jury, it is error to permit the sheriff or his deputies to do so.

38. See State *v.* Cardoza, 11 S. C. 195.

to supply vacancies in the regular panel should be placed in the box and drawn in the same manner as the regular panel,[39] but this is not necessary in the case of additional jurors summoned to complete a jury in a particular case.[40] The form of box used, unless particularly designated by statute, is not material,[41] and if the statute is silent as to the manner in which jurors are to be drawn it is sufficient if the drawing is fortuitous.[42]

b. Calling Names From List. In a few jurisdictions in the case of special venires for the trial of capital cases it is the practice, instead of drawing the names from a box, to call them in order from the list of the venire summoned.[43]

c. Order of Calling Jurors. In the case of ordinary juries the first twelve drawn if present are called into the box for examination;[44] but if any juror drawn is not present the proceedings are not delayed to procure his attendance but another is drawn in his place,[45] and if the absent juror subsequently appears it is not necessary that he should be called into the box before the rest of the regular panel are drawn and exhausted.[46] Where in the case of special venires the names are not drawn but called from the list the usual practice is to call them in the order in which they stand upon the list,[47] and in Texas the statute expressly so provides;[48] but in the absence of statute it is not necessary to begin calling from the top of the list,[49] nor if a juror fails to appear when called is it necessary to delay the proceedings to procure his attendance.[50] Where jurors have been stood aside when first called and the rest of the panel exhausted the court may either have

Under a city ordinance providing for the drawing of jurors in police courts, which provides that the jury shall be drawn in the presence of any person interested who desires to be present, but provides further that jurors drawn for any cause may be required to serve as jurors in any other cause during the term, defendant cannot object that any jurors so required to serve were not drawn in his presence but can only demand that any additional jurors that may be necessary shall be so drawn. Molitor *v.* State, 6 Ohio Cir. Ct. 263 [*affirming* 10 Ohio Dec. (Reprint) 324, 20 Cinc. L. Bul. 323].

39. State *v.* Green, 20 Iowa 424; State *v.* Brooks, 36 La. Ann. 334.

40. State *v.* Wolf, (Iowa 1900) 84 N. W. 536; State *v.* Ryan, 70 Iowa 154, 30 N. W. 397; State *v.* Green, 20 Iowa 424; State *v.* Bordelon, 113 La. 690, 37 So. 603; State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26.

41. Pocket *v.* State, 5 Tex. App. 552.

The use of a hat as a substitute for a box is not a material irregularity, although it is the proper practice to use a box. Birchard *v.* Booth, 4 Wis. 67.

42. Benaway *v.* Conyne, 3 Pinn. (Wis.) 196, 3 Chandl. 214, holding that in the absence of statute a trial jury may be drawn by the clerk holding a bunch of slips of paper with the names of the jurors written thereon in one hand and drawing out with the other.

43. State *v.* Woodson, 43 La. Ann. 905, 9 So. 903; State *v.* Kennedy, 11 La. Ann. 479; Garza *v.* State, 3 Tex. App. 286; Taylor *v.* State, 3 Tex. App. 169. See also Clark *v.* State, 8 Tex. App. 350.

In Texas this practice is expressly provided for by statute. Taylor *v.* State, 3 Tex. App. 169.

44. Thompson & M. Jur. § 267. See also Taylor *v.* Western Pac. R. Co., 45 Cal. 323; Munday *v.* Com., 81 Ky. 233; Lamb *v.* State, 36 Wis. 424.

45. People *v.* Collins, 105 Cal. 504, 39 Pac. 16; Johns *v.* State, 55 Md. 350.

46. People *v.* Vermilyea, 7 Cow. (N. Y.) 369.

But if a juror's name has been accidentally left out of the box it should be placed in the box and drawn before drawing the names of jurors who have returned from considering another case. Stone *v.* State, 137 Ala. 1, 34 So. 629.

47. State *v.* Kennedy, 11 La. Ann. 479.

48. Horbach *v.* State, 43 Tex. 242; Osborne *v.* State, 23 Tex. App. 431, 5 S. W. 251; Clark *v.* State, 8 Tex. App. 350; Taylor *v.* State, 3 Tex. App. 169.

49. State *v.* Kennedy, 11 La. Ann. 479.

50. Greer *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1075; Stephens *v.* State, 31 Tex. Cr. 365, 20 S. W. 826; Jones *v.* State, 31 Tex. Cr. 177, 20 S. W. 354; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388.

Under the Texas statute either party has a right to demand that an attachment shall be issued for an absent special venireman (Sinclair *v.* State, 35 Tex. Cr. 130, 32 S. W. 531; Hudson *v.* State, 28 Tex. App. 323, 3 S. W. 388); but the right is waived unless the attachment is demanded at the time the juror is called and found to be absent (Sinclair *v.* State, *supra*); and even when properly demanded and granted the court is not obliged to delay proceedings to await the return of the attachment (Hudson *v.* State, *supra*); and it is also held that if the state challenges peremptorily all of the jurors who are absent a failure of the court to issue attachments for them is not error of which defendant can complain (Miller *v.* People, (Tex. Cr. App. 1904) 83 S. W. 393).

their names placed in the box and drawn again or may have them called in the order in which they were stood aside.[51]

d. Calling Jurors Not Available When First Called. Jurors do not cease to be members of the regular panel because they do not appear and answer when first called,[52] and it is not error for the court to order their names placed in the box and drawn if before the jury is completed they appear voluntarily or otherwise,[53] or where they come in from considering another case on which they were engaged when first called,[54] although they may come in after the rest of the regular panel has been exhausted and talesmen have been summoned;[55] on the contrary, the parties have a right to insist that such jurors shall be presented before resorting to jurors not of the regular panel.[56] It is said not to be the usual practice for the court to order the names recalled to see if they are present,[57] but it is not error for the court to do so.[58]

e. Number to Be Drawn Before Parties Must Examine. The common-law practice was to present the jurors one at a time for acceptance,[59] but according to the usual practice in this country twelve jurors must be drawn and placed in the box before a party is required to examine any of the jurors.[60] Each party may then examine and challenge for cause and if such challenges are sustained the vacancies are filled by drawing additional jurors and the process repeated until twelve qualified jurors are obtained;[61] but this does not mean that the place of each juror challenged for cause must be filled before another is to be examined,[62] or that the vacancies caused by the challenges of one party must be filled before requiring the other party to examine the remaining jurors then in the box,[63]

51. State *v.* Utley, 132 N. C. 1022, 43 S. E. 820.

52. People *v.* Collins, 105 Cal. 504, 39 Pac. 16; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

53. People *v.* Collins, 105 Cal. 504, 39 Pac. 16; State *v.* Forbes, 111 La. 473, 35 So. 710; People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

In the case of successive venires for additional jurors each venire must be exhausted before another is resorted to, and if a juror summoned on one venire does not appear until after that venire has been declared exhausted and the selection from the next begun, he cannot be called as a juror. Collins *v.* State, 31 Fla. 574, 12 So. 906.

54. Thomas *v.* State, 134 Ala. 126, 33 So. 130; State *v.* Creech, 38 La. Ann. 480; State *v.* Houghton, (Oreg. 1904) 75 Pac. 887; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

55. State *v.* Creech, 38 La. Ann. 480.

56. See *infra*, IX, A, 3.

57. State *v.* Brown, 12 Minn. 538.

58. State *v.* Brown, 12 Minn. 538; People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370.

59. Lamb *v.* State, 36 Wis. 424; Thompson & M. Jur. § 269.

60. People *v.* Scoggins, 37 Cal. 676; Sterling Bridge Co. *v.* Pearl, 80 Ill. 251; Strehmann *v.* Chicago, 93 Ill. App. 206; Lamb *v.* State, 36 Wis. 424.

In Texas in the case of special venires for the trial of capital cases the jurors are called in order from the list and if present each must be examined and passed upon as presented. Horbach *v.* State, 43 Tex. 242; Garza *v.* State, 3 Tex. App. 286; Taylor *v.* State, 3 Tex. App. 169.

In Texas county courts the jury is composed of six men which is formed by drawing from the box twelve jurors "or so many as there may be," and if there are only six regular jurors, it is not error to require the parties to pass upon them without filling up the panel to twelve. Goforth *v.* State, 22 Tex. App. 405, 3 S. W. 332.

61. People *v.* Scoggins, 37 Cal. 676; Lamb *v.* State, 36 Wis. 424.

Acceptance in panels of four.— In Illinois the statute provides that after twelve jurors are drawn and placed in the box they shall be passed upon in panels of four commencing with plaintiff, but when any one juror is challenged his place must be at once filled and another juror added to the panel of four being passed upon. After each panel of four is accepted by both parties they become a part of the jury and another panel of four is called up and the process repeated. Sterling Bridge Co. *v.* Pearl, 80 Ill. 251 [*distinguishing* Walker *v.* Collier, 37 Ill. 362]. Under this statute it has been held that a party may waive the right of having the jurors presented in panels of four, and having done so the court may present any number and require the party to pass upon them. Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465.

The order of presenting jurors for challenge is ordinarily that in which they were drawn and not in the order in which they stood upon the venire. State *v.* Sims, 2 Bailey (S. C.) 29. See also State *v.* Slack, 1 Bailey (S. C.) 330; State *v.* Brown, 3 Strobh. (S. C.) 508.

62. Gammons *v.* State, (Miss. 1905) 37 So. 609.

63. Allen *v.* State, (Ala. 1902) 32 So. 318.

unless the statute expressly provides that there shall be twelve jurors in the box before either party shall be required to examine.[64]

f. Number to Be Presented Before Making Peremptory Challenges. At common law in criminal cases the jurors were presented for challenge one at a time and peremptory challenges as well as for cause were required to be made as each juror was presented.[65] This is the rule in criminal cases in a few jurisdictions,[66] but the rule in most jurisdictions is that a party cannot be required to exercise his right of peremptory challenge until there are in the jury-box twelve competent persons unchallenged for cause;[67] and when this number is lessened by the challenges of either party the panel must again be filled to twelve before passed upon and so on until the jury is complete.[68] When, however, twelve qualified jurors

64. Sterling Bridge Co. *v.* Pearl, 80 Ill. 251 [*distinguishing* Walker *v.* Collier, 37 Ill. 362], holding that where the statute provides that "before either party" shall be required to examine any of the jurors there shall be twelve jurors in the box, it is not sufficient that there should be twelve in the first instance; but if one party on examination reduces the number the other party is entitled to have the vacancies filled before examining.

65. Thompson & M. Jur. § 269.

66. People *v.* Kuok Wah Choi, 2 Ida. (Hasb.) 90, 6 Pac. 112; Com. *v.* Conroy, 207 Pa. St. 212, 56 Atl. 427; Com. *v.* Brown, 23 Pa. Super. Ct. 470.

In Ohio in capital cases it is the practice to require peremptory challenges to be made to each juror as called. Schufflin *v.* State, 20 Ohio St. 233; Thurman *v.* State, 2 Ohio Cir. Dec. 466.

In Texas in the case of special venires for the trial of capital cases the jurors are called in order from the list and peremptory challenges, as well as for cause, must be made as each juror is presented. Horbach *v.* State, 43 Tex. 242; Drake *v.* State, 5 Tex. App. 649; Baker *v.* State, 3 Tex. App. 525; Taylor *v.* State, 3 Tex. App. 169.

67. *California.*— Taylor *v.* Western Pac. R. Co., 45 Cal. 323.

Illinois.— Sterling Bridge Co. *v.* Pearl, 80 Ill. 251; Chicago R. Co. *v.* Fetzer, 113 Ill. App. 280.

Kentucky.— Munday *v.* Com., 81 Ky. 233; Wilson *v.* Com., (1887) 4 S. W. 818, 9 Ky. L. Rep. 274; Smith *v.* Com., 50 S. W. 241, 20 Ky. L. Rep. 1848; Jenkins *v.* Com., 4 S. W. 816, 9 Ky. L. Rep. 254.

Mississippi.— State *v.* Mitchel, (1893) 12 So. 710; Gibson *v.* State, 70 Miss. 554, 12 So. 582.

Nebraska.— Rutherford *v.* State, 32 Nebr. 714, 49 N. W. 701.

New Mexico.— Territory *v.* Lermo, (1896) 46 Pac. 16.

Texas.— Cooley *v.* State, 38 Tex. 636.

Wisconsin.— Lamb *v.* State, 36 Wis. 424.

See 31 Cent. Dig. tit. "Jury," § 357.

All challenges for cause must be exhausted before any peremptory challenges are required to be made. Cooley *v.* State, 38 Tex. 636.

The reason for the rule is that it would materially impair the value of the right of peremptory challenge to require a party to exercise it where only one or a small number of jurors is before him and he has no knowledge of what jurors will be next presented. Taylor *v.* Western Pac. R. Co., 45 Cal. 323; Thompson *v.* State, 58 Miss. 62.

In California in civil cases the rule as stated in the text is followed and twelve jurors unchallenged for cause must be presented before any peremptory challenge is required, and no juror is sworn until the jury is complete (Taylor *v.* Western Pac. R. Co., 45 Cal. 323); and in criminal cases twelve jurors must be first drawn and defendant may examine each separately and exhaust his challenges for cause before making any peremptory challenge, but he must then challenge peremptorily any jurors remaining unchallenged, and those not challenged peremptorily are then sworn, after which sufficient additional names are drawn to fill up the vacancies and the same process repeated until the jury becomes complete (People *v.* Iams, 57 Cal. 115; People *v.* Russell, 46 Cal. 121; People *v.* Scoggins, 37 Cal. 676. See also to same effect People *v.* Riley, 65 Cal. 107, 3 Pac. 413).

In Idaho the rule as stated in the text is followed in civil cases, but in criminal cases defendant may be required to exercise his right to peremptory challenge as each juror is presented and before another is called. People *v.* Kuok Wah Choi, 2 Ida. (Hasb.) 90, 6 Pac. 112.

In Mississippi the rule formerly was to allow a full jury of twelve before requiring peremptory challenges in all cases other than capital felonies (Thompson *v.* State, 58 Miss. 62), but not in capital cases (Smith *v.* State, 61 Miss. 754); but under the code of 1892 the right to a full jury before challenging peremptorily is granted in all cases (Gibson *v.* State, 70 Miss. 554, 12 So. 582).

If a party voluntarily challenges a juror peremptorily during the examination for challenges for cause, with knowledge that he is not required to do so, he cannot afterward complain that there was not at the time a full panel present. Gammons *v.* State, (Miss. 1905) 37 So. 609.

68. Munday *v.* Com., 81 Ky. 233; Jenkins *v.* Com., 4 S. W. 816, 9 Ky. L. Rep. 254; Gibson *v.* State, 70 Miss. 554, 12 So. 582; Cooley *v.* State, 38 Tex. 636.

are presented the parties must then either accept or challenge,[69] and cannot require that the rest of the panel for the term shall be first drawn from the box,[70] or that the list of the panel shall be called over,[71] or additional jurors summoned;[72] nor need the vacancies caused by the peremptory challenges of one party be filled before requiring the other to exercise his right of challenge as to those then remaining in the box.[73] The parties should also, when a full panel is presented, be required to challenge peremptorily all of the jurors then in the box that they desire so to challenge and thereafter be restricted in their challenges to the new jurors added to supply the vacancies.[74]

2. Right to Particular Juror or Jury. The parties have no right to a trial by any particular juror or jurors,[75] but only to a trial by a competent and impartial jury,[76] and cannot therefore have the proceedings delayed to procure the attendance of any particular juror who is absent when called.[77] Nor in cases where there are two regular juries in attendance has a party any right to claim that his case shall be tried by a particular jury, but the court may in its discretion send it to either,[78] or may at any time break up such juries and rearrange them by transferring jurors from one to the other.[79]

3. Right to Jury of Original Panel. While the parties have no right to delay the proceedings where some of the regular panel fail to appear or are engaged on another case,[80] they have a right to a jury of the original panel in so far as it is practicable to procure it.[81] They therefore have a right to demand before being required to pass upon jurors not of the original panel that all of the original panel present shall be exhausted,[82] and that any jurors shall be called and pre-

69. Munday *v.* Com., 81 Ky. 233; Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129.

70. Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129.

71. State *v.* Hallback, 40 S. C. 298, 18 S. E. 919.

72. State *v.* Wright, 15 S. D. 628, 91 N. W. 311.

73. Crittenden *v.* State, (Ala. 1902) 32 So. 273; Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687.

74. Munday *v.* Com., 81 Ky. 233; Tatum *v.* Preston, 53 Miss. 654.

It is not proper to permit experimenting by challenging one juror at a time and waiting to see who is called in his place before challenging other jurors who were in the box first. See Thompson *v.* State, 58 Miss. 62.

75. *California.*— Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777.

Maryland.— Johns *v.* State, 55 Md. 350.

Michigan.— McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955.

Mississippi.— Shubert *v.* State, 66 Miss. 446, 6 So. 238.

Missouri.— State *v.* Reynolds, 171 Mo. 552, 72 S. W. 39.

New Hampshire.— Walker *v.* Kennison, 34 N. H. 257; Watson *v.* Walker, 33 N. H. 131.

North Carolina.— State *v.* Jones, 97 N. C. 469, 1 S. E. 680.

United States.— U. S. *v.* Byrne, 7 Fed. 455, 19 Blatchf. 259.

England.— Mansell *v.* Reg., 8 E. & B. 54, Dears. & B. 375, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 54.

See 31 Cent. Dig. tit. "Jury," § 355.

It is not until a prisoner has been given in charge to the jury that he acquires any right to be tried by particular jurors. Mansell *v.* Reg., Dears. & B. 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 54.

76. Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777; Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121; Johns *v.* State, 55 Md. 350; State *v.* Reynolds, 171 Mo. 552, 72 S. W. 39.

It is therefore not a ground of exception where the procuring of such a jury was not prevented that the court excused a juror who was competent to serve (Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777), or sustained a challenge by one party for insufficient cause (McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955).

77. People *v.* Collins, 105 Cal. 504, 39 Pac. 16; Johns *v.* State, 55 Md. 350.

78. Watson *v.* Walker, 33 N. H. 131; Durant *v.* Ashmore, 2 Rich. (S. C.) 184.

79. Watson *v.* Walker, 33 N. H. 131.

80. See *infra*, IX, A, 4, d, f.

81. State *v.* Atkinson, 29 La. Ann. 543; Boles *v.* State, 24 Miss. 445; State *v.* Washington, 90 N. C. 664; State *v.* Lytle, 27 N. C. 58.

82. State *v.* Atkinson, 29 La. Ann. 543.

Where additional jurors have been summoned in advance they should be kept separate from the regular panel until the latter is exhausted (State *v.* Benton, 19 N. C. 196); but the fact that this was not done is not ground for reversal where no objection was made and it appears that all of the regular jurors were in fact tendered to defendant before the jury was completed and before his peremptory challenges were exhausted (State *v.* Lytle, 27 N. C. 58).

sented who on the first call were stood aside[83] or who were not available when first called but come in before the jury is completed.[84] So also the court has no right to discharge the regular panel without cause and summon another for the trial of a particular case.[85]

4. Right to Full Panel to Select From — a. In General. In the absence of statute it is not essential that there should be a full panel of the number required to be drawn and summoned present to select from when the impaneling of the trial jury is begun,[86] but the court may order additional jurors to be summoned to fill vacancies in the panel.[87]

b. Failure to Summon Full Venire. It is not essential that every juror drawn upon a venire shall be summoned,[88] but only that the venire shall be issued for the proper number,[89] and that the sheriff shall exercise reasonable diligence to summon them.[90] So in the absence of any fraud or culpable neglect, it is not a ground of challenge to the array that all of the jurors were not summoned,[91] as

83. State *v.* Washington, 90 N. C. 664; State *v.* Shaw, 25 N. C. 532.

84. People *v.* Edwards, 101 Cal. 543, 36 Pac. 7; State *v.* Atkinson, 29 La. Ann. 543. See also State *v.* Creech, 38 La. Ann. 480. But see Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724; Texas, etc., R. Co. *v.* Wright, 31 Tex. Civ. App. 249, 71 S. W. 760, each holding that where a part of the regular panel who were engaged on another case when first called come into court after the rest of the regular panel is exhausted and talesmen have been summoned and examined as to their qualifications, the court may in such a case require the jury to be completed from the talesmen instead of from such members of the regular panel.

85. Judge *v.* State, 8 Ga. 173.

Where the court sets aside a jury without authority for a cause which would have been sufficient if the motion had been made within the time prescribed by statute and summons another jury, the parties to a case subsequently called may object to going to trial before the jury thus summoned. Hight *v.* Langdon, 53 Ind. 81.

86. *Alabama.*— Johnson *v.* State, 94 Ala. 35, 10 So. 667.

California.— People *v.* Lee, 17 Cal. 76.

Louisiana.— State *v.* Hoozer, 26 La. Ann. 599.

Mississippi.— Hale *v.* State, 72 Miss. 140, 16 So. 387.

New Jersey.— Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

South Carolina.— State *v.* Hallback, 40 S. C. 298, 18 S. E. 919; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769; State *v.* Stephens, 13 S. C. 285.

Texas.— Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456; Stephens *v.* State, 31 Tex. Cr. 365, 20 S. W. 826.

See 31 Cent. Dig. tit. "Jury," §§ 360–366.

If there are a sufficient number present to form a jury it is proper to proceed with the impaneling. State *v.* Hoozer, 26 La. Ann. 599.

In Montana under a statute providing that if the panel is not full at the opening of the court or at any time during the term a sufficient number must be drawn to fill the panel, it is held that a party has a right to a full panel to select from and that if it is not full additional jurors must be drawn to fill it. Dupon *v.* McAdow, 6 Mont. 226, 9 Pac. 925; Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

In Missouri under a statute providing that in every criminal case there shall be summoned and returned a number of qualified jurors equal to the number of peremptory challenges and twelve in addition, it is held that defendant is entitled to the full panel to select from (State *v.* Davis, 66 Mo. 684, 27 Am. Rep. 387; State *v.* Waters, 62 Mo. 196; State *v.* McCarron, 51 Mo. 27); and that he cannot waive the right (State *v.* Davis, *supra*. But see State *v.* Waters, *supra*).

87. See *supra*, VIII, B, 1, e, (II).

88. McElroy *v.* State, 75 Ala. 9; Showers *v.* Com., 120 Pa. St. 573, 14 Atl. 401; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255.

89. Showers *v.* Com., 120 Pa. St. 573, 14 Atl. 401.

A venire must be issued for the full number required by statute. Donaldson *v.* Com., 95 Pa. St. 21.

90. Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255.

91. *Louisiana.*— State *v.* Dozier, 33 La. Ann. 1362.

Mississippi.— Logan *v.* State, 53 Miss. 431.

North Carolina.— State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536; State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

Pennsylvania.— Showers *v.* Com., 120 Pa. St. 573, 14 Atl. 401.

Texas.— Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255.

See 31 Cent. Dig. tit. "Jury," § 360.

The accidental omission of a name in copying the list in consequence of which a juror is not summoned is not ground for challenge to the array. State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

Where it appears that jurors were dead or absent from the county when drawn it is not a ground of challenge to the array where this fact was unknown to the officers who drew the jury and it does not appear that

where some of the panel have died,[92] have removed from the county,[93] or cannot be found;[94] but it is ground for challenge to the array if the failure to draw or summon a full venire is due to any improper or corrupt practices on the part of the officers charged with such duties.[95] Where any of the venire could not be found it is not necessary for the court to supply their places before the rest of the venire is exhausted.[96]

c. Summoning Disqualified, Incompetent, or Exempt Jurors. In the absence of any showing of partiality or corruption[97] it is not ground for challenge to the array that some of the jurors summoned upon the panel are disqualified,[98] or are incompetent to serve as jurors in the particular case for which they are summoned,[99]

they were negligent in the performance of their duties. Showers *v.* Com., 120 Pa. St. 573, 14 Atl. 401; Rolland *v.* Com., 82 Pa. St. 306, 22 Am. St. Rep. 758. But see Jones *v.* State, 1 Ohio Dec. (Reprint) 390, 8 West. L. J. 508.

Duplication of names on list to be summoned.— In Alabama in the case of special venires for the trial of capital cases it is held to be ground for quashing the venire where the full number ordered by the court is not summoned on account of the repetition of the same name on the list of the special venire (Roberts *v.* State, 68 Ala. 515. But see McKee *v.* State, 82 Ala. 32, 2 So. 451), or where one of the names upon the list of the special venire is that of one of the regular panel (McQueen *v.* State, 94 Ala. 50, 10 So. 433; Darby *v.* State, 92 Ala. 9, 9 So. 429).

92. *Alabama.*— Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; State *v.* Hensley, 94 N. C. 1021; State *v.* Speaks, 94 N. C. 865.

Pennsylvania.— Com. *v.* Seybert, 4 Pa. Co. Ct. 152.

Texas.— Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

United States.— Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326.

See 31 Cent. Dig. tit. "Jury," § 360.

93. *Alabama.*— Webb *v.* State, 100 Ala. 47, 14 So. 865.

North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; State *v.* Hensley, 94 N. C. 1021.

Pennsylvania.— Showers *v.* Com., 120 Pa. St. 573, 14 Atl. 401; Com. *v.* Seybert, 4 Pa. Co. Ct. 152.

South Carolina.— State *v.* Derrick, 44 S. C. 344, 22 S. E. 337.

Texas.— Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

See 31 Cent. Dig. tit. "Jury," § 360.

94. Ezell *v.* State, 103 Ala. 8, 15 So. 818; Webb *v.* State, 100 Ala. 47, 14 So. 865; Jackson *v.* State, 76 Ala. 26; McElroy *v.* State, 75 Ala. 9; Logan *v.* State, 53 Miss. 431; State *v.* Speaks, 94 N. C. 865.

95. See Showers *v.* Com., 120 Pa. St. 573, 14 Atl. 401.

96. Davis *v.* State, 126 Ala. 44, 28 So. 617.

97. See Durrah *v.* State, 44 Miss. 789; Boles *v.* State, 24 Miss. 445.

It will not be presumed that disqualified jurors were intentionally summoned. Gray *v.* State, 55 Ala. 86.

98. *Alabama.*— Arp *v.* State, 97 Ala. 5, 12 So. 301, 38 Am. St. Rep. 137, 19 L. R. A. 357; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Roberts *v.* State, 68 Ala. 515; Gray *v.* State, 55 Ala. 86; Fields *v.* State, 52 Ala. 348; Hall *v.* State, 40 Ala. 698. See also Jones *v.* State, 104 Ala. 30, 16 So. 135.

Michigan.— *In re* First St., 58 Mich. 641, 26 N. W. 159.

Mississippi.— Durrah *v.* State, 44 Miss. 789; Boles *v.* State, 24 Miss. 445; Woodsides *v.* State, 2 How. 655.

Nevada.— State *v.* Squaires, 2 Nev. 226.

Pennsylvania.— Foust *v.* Com., 33 Pa. St. 338; McPhilliamy *v.* Com., 4 Pa. Cas. 10, 6 Atl. 704.

Texas.— Mitchell *v.* State, 43 Tex. 512.

See 31 Cent. Dig. tit. "Jury," § 362.

The summoning of such persons must sometimes occur from the inadvertence or ignorance of the facts on the part of the officer charged with this duty, and it is no ground for setting aside the venire. Fields *v.* State, 52 Ala. 348.

If a large number of disqualified jurors are returned so that it might prevent the selection of a fair and impartial jury, the court may quash the panel and cause a new venire to be issued, but objections of this kind are addressed to the discretion of the court. Mitchell *v.* State, 43 Tex. 512.

99. Woodley *v.* State, 103 Ala. 23, 15 So. 820; Wesley *v.* State, 61 Ala. 282; Jones *v.* State, 90 Ga. 616, 16 S. E. 380; Veramendi *v.* Hutchins, 56 Tex. 414; Anderson *v.* State, 34 Tex. Cr. 96, 29 S. W. 384; Staley *v.* State, (Tex. Cr. App. 1895) 29 S. W. 272; Prince *v.* Com., 89 Va. 330, 15 S. E. 863; Lawrence *v.* Com., 81 Va. 484.

Where one venire has been challenged for bias of the summoning officer, it is not a ground of challenge to the array that some of the same names are returned upon the second venire. People *v.* Vincent, 95 Cal. 425, 30 Pac. 581.

Where all but two of the jurors are incompetent by reason of having acted as jurors at a former trial against the same defendant, involving the same evidence, it has been held error for the court to refuse to order a new panel. Apperson *v.* Logwood, 12 Heisk. (Tenn.) 262.

or that some of them are exempt from jury duty.[1] Objections for disqualification or incompetency are available only by way of challenge to the individual juror,[2] and an exemption is not a disqualification but a mere privilege which the juror may claim or waive.[3]

d. Full Panel Not Present Although Summoned. Where some of the jurors summoned fail to appear it is not necessary, in the absence of statute, for the court to delay the impaneling of the jury or postpone the trial,[4] nor is it necessary for the court to have other jurors summoned to fill the places of those who are absent,[5] or to issue attachments for the absent jurors.[6]

e. Part of Panel Excused.[7] Where the court has excused some of the panel for cause, it is not necessary to fill their places before proceeding with the selection of the trial jury and before it appears that additional jurors will be necessary.[8] This is sometimes done,[9] but not in the absence of statute as a matter of right.[10]

f. Part of Panel Engaged on Another Case. Where some of the panel are engaged on another case the court may proceed to organize the jury in the absence of such jurors.[11] The court need not either delay the trial until the jurors are

1. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619; Conkey *v.* Northern Bank, 6 Wis. 447.

2. *Alabama.*— Roberts *v.* State, 68 Ala. 515; Hall *v.* State, 40 Ala. 698.

California.— People *v.* Vincent, 95 Cal. 425, 30 Pac. 581.

Georgia.— Brown *v.* State, 97 Ga. 215, 22 S. E. 403; Schnell *v.* State, 92 Ga. 459, 17 S. E. 966; Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

Mississippi.— Durrah *v.* State, 44 Miss. 789.

New York.— Bloomingdale *v.* Adler, 7 Misc. 182, 27 N. Y. Suppl. 321.

Virginia.— Prince *v.* Com., 89 Va. 330, 15 S. E. 863; Lawrence *v.* Com., 81 Va. 484.

See 31 Cent. Dig. tit. "Jury," § 362.

3. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619; Conkey *v.* Northern Bank, 6 Wis. 447.

Nature of exemption see *supra*, VI, B, 2.

4. *Alabama.*— Johnson *v.* State, 47 Ala. 9.

Louisiana.— State *v.* Hoozer, 26 La. Ann. 599.

New Jersey.— Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

South Carolina.— State *v.* Stephens, 13 S. C. 285.

Texas.— Stephens *v.* State, 31 Tex. Cr. 365, 20 S. W. 826.

See 31 Cent. Dig. tit. "Jury," § 364.

It is not necessary to have jurors called at the court-house door but the court may in its discretion have them called from the clerk's desk, and if they fail to answer may proceed with the impaneling. Hall *v.* State, 51 Ala. 9.

Even where attachments are issued for the absent jurors, the court is not obliged to delay the impaneling until the return of the attachments. State *v.* Rountree, 32 La. Ann. 1144; Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588; Stephens *v.* State, 31 Tex. Cr. 365, 20 S. W. 826.

Where additional jurors are summoned to complete a trial jury it is not necessary to wait until all of those summoned have appeared before any of them are drawn and presented. State *v.* Kelley, 46 S. C. 55, 24 S. E. 60. *Compare* Collins *v.* State, 31 Fla. 574, 12 So. 906.

5. Johnson *v.* State, 94 Ala. 35, 10 So. 667; State *v.* Hallback, 40 S. C. 298, 18 S. E. 919; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

In Missouri defendant in a criminal case has the right to have the panel filled before proceeding to impanel the jury if the full number summoned do not appear. State *v.* Davis, 66 Mo. 684, 27 Am. Rep. 387.

6. See *infra*, X, A, 1.

7. Power of court to excuse jurors see *infra*, X, B, 1.

8. Clough *v.* State, 7 Nebr. 320; Martin *v.* State, 16 Ohio 364. See also People *v.* Lee, 17 Cal. 76.

In the case of a special or struck jury if some of the panel are excused for cause, it is not necessary to supply their places before striking unless the number qualified is reduced below twelve. Odom *v.* Gill, 59 Ga. 180.

If the number is reduced to less than twelve it is proper to fill up the panel, but the additional jurors need not be drawn in the manner provided for regular jurors. Trembly *v.* State, 20 Kan. 116.

9. Martin *v.* State, 16 Ohio 364.

Summoning additional jurors to fill vacancies in regular panel see *supra*, VIII, B, 1, e, (II).

10. Martin *v.* State, 16 Ohio 364.

11. *Alabama.*— Thomas *v.* State, 134 Ala. 126, 33 So. 130; Simmons *v.* State, (1901) 29 So. 929; Goodwin *v.* State, 106 Ala. 670, 18 So. 694; Cole *v.* State, 105 Ala. 76, 16 So. 762 [*distinguishing* Evans *v.* State, 80 Ala. 4]; Kimbrough *v.* State, 62 Ala. 248.

District of Columbia.— U. S. *v.* Bowen, 3 MacArthur 64.

Louisiana.— State *v.* Cannon, (1894) 15 So. 626.

Michigan.— People *v.* Craig, 48 Mich. 502, 12 N. W. 675.

South Carolina.— State *v.* Campbell, 35 S. C. 28, 14 S. E. 292; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

discharged in the other case,[12] or have them brought in to be passed upon;[13] but may order that such names shall be set aside and the drawing proceed,[14] and although the remainder of the panel is exhausted without completing the jury it is not necessary to await the return of the regular jurors, but the jury may be completed by summoning additional jurors from the bystanders or others as the statutes may direct,[15] or by calling the jurors previously stood aside.[16]

5. Effect of Errors and Irregularities. A plain disregard of the statutory provisions with regard to the formation of the trial jury or a departure therefrom by which a party is deprived of a substantial right is ground for reversal,[17] but mere irregularities are not in the absence of any showing of prejudice resulting therefrom.[18] Objections for irregularities in the mode of selecting the jury must be made at the time and if not so objected to are not available after verdict.[19]

B. Special or Struck Juries[20] — 1. Qualifications. At common law special or struck jurors were selected from the freeholders' book,[21] but in this country a freehold qualification is not necessary when not required for regular jurors.[22] Special or struck jurors must, however, in addition to those special qualifications for which they are selected for a particular case, have all of the qualifications required by statute for ordinary jurors;[23] but it has been held that they are not within the application of the statutes making prior service as a juror within a certain period a ground of challenge.[24]

Texas.— Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699; Thurmond *v.* State, 37 Tex. Cr. 422, 35 S. W. 965.

Utah.— Connor *v.* Salt Lake City, (1904) 78 Pac. 479.

See 31 Cent. Dig. tit. "Jury," § 365.

In Texas in the case of a special venire for the trial of a capital case it has been held that if any of the special venire have been impaneled and are engaged upon another case the court cannot impanel the jury in their absence, but must have them brought in and passed upon or postpone the trial until they are regularly discharged from the case which they are considering (Moody *v.* State, (Tex. Cr. 1901) 63 S. W. 641; Thuston *v.* State, 18 Tex. App. 26); but a refusal to have them brought in or to suspend proceedings at the time their names are first called is not error if they appear and are put upon the panel and called before the jury is completed (Stephens *v.* State, 31 Tex. App. 365, 20 S. W. 826).

12. Kimbrough *v.* State, 62 Ala. 248; People *v.* Craig, 48 Mich. 502, 12 N. W. 675; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769; Thurmond *v.* State, 37 Tex. Cr. 422, 35 S. W. 965.

13. Jarvis *v.* State, (Ala. 1903) 34 So. 1025; Handy *v.* State, (Ala. 1899) 25 So. 1023; Prater *v.* State, 107 Ala. 26, 18 So. 238; Shelton *v.* State, 73 Ala. 5; Kimbrough *v.* State, 62 Ala. 248.

14. Dorsey *v.* State, 107 Ala. 157, 18 So. 199 [*distinguishing* Evans *v.* State, 80 Ala. 4]; Kimbrough *v.* State, 62 Ala. 248.

15. Kimbrough *v.* State, 62 Ala. 248; U. S. *v.* Bowen, 3 MacArthur (D. C.) 64; State *v.* Riggs, (La. 1903) 34 So. 655.

16. Com. *v.* Weber, 167 Pa. St. 153, 31 Atl. 481.

17. *California.*— Taylor *v.* Western Pac. R. Co., 45 Cal. 323; People *v.* Scoggins, 37 Cal. 676.

Illinois.— Sterling Bridge Co. *v.* Pearl, 80 Ill. 251.

Kentucky.— Jenkins *v.* Com., 4 S. W. 816, 9 Ky. L. Rep. 254.

Mississippi.— Gibson *v.* State, 70 Miss. 554, 12 So. 582.

New York.— Becker *v.* Sitterly, 58 How. Pr. 38.

Texas.— Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, 11 S. W. 1117.

Wisconsin.— Lamb *v.* State, 36 Wis. 424.

See 31 Cent. Dig. tit. "Jury," § 359.

18. *Alabama.*— Levy *v.* State, 49 Ala. 390.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Louisiana.— State *v.* Kennedy, 11 La. Ann. 479.

Minnesota.— State *v.* Brown, 12 Minn. 538.

New York.— People *v.* Rogers, 13 Abb. Pr. N. S. 370.

North Carolina.— State *v.* Nash, 30 N. C. 35.

Texas.— Goforth *v.* State, 22 Tex. App. 405, 3 S. W. 332; Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104; Charles *v.* State, 13 Tex. App. 658.

See 31 Cent. Dig. tit. "Jury," § 359.

19. Bristow *v.* Com., 15 Gratt. (Va.) 634; Birchard *v.* Booth, 4 Wis. 67. See also State *v.* Slack, 1 Bailey (S. C.) 330.

20. Provision for special or struck jury not an infringement of constitutional right to trial by jury see *supra*, V, F, 1.

Waiver of right to special or struck jury see *supra*, IV, A, 4.

Peremptory challenges in the case of special or struck juries see *infra*, XIII, H, 1, e.

21. 3 Blackstone Comm. 357. See also McDermott *v.* Hoffman, 70 Pa. St. 31.

22. McDermott *v.* Hoffman, 70 Pa. St. 31.

23. Golding *v.* Petit, 27 La. Ann. 86.

24. Moschell *v.* State, 53 N. J. L. 498, 22 Atl. 50 [*affirmed* in 54 N. J. L. 390, 25 Atl. 964].

2. Procedure For Procuring — a. In General. The procedure for procuring a special or struck jury consists in a selection by the court or other officers of a list of qualified and competent persons from which the parties or their attorneys strike off a certain number of names and the remaining jurors constitute the panel from which the trial jury is made up.[25]

b. Selection of List. The object of a special or struck jury is to procure a jury of persons of more than ordinary ability or having qualifications peculiarly adapted to the determination of a particular controversy,[26] so that the list is not ordinarily drawn or selected by chance as in the case of regular juries but is selected by the court or some other officer in the exercise of judgment and discretion;[27] the selection being made according as the statutes may provide, by the court,[28] clerk,[29] jury commissioner,[30] or some other designated officers;[31] or in case of their absence or disqualification by some suitable disinterested person appointed by the court.[32] It is competent, however, for the legislature to change the method of selecting the jury.[33] The number to be selected is regulated by statute and varies in the different jurisdictions.[34] The presence of defendant in a criminal

25. State *v.* Barker, (N. J. Sup. 1902) 52 Atl. 284; People *v.* Tweed, 50 How. Pr. (N. Y.) 273; 3 Blackstone Comm. 357, 358; Proffatt Jury Tr. § 73.

26. State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; People *v.* Tweed, 50 How. Pr. (N. Y.) 262; Nashville *v.* Shepherd, 3 Baxt. (Tenn.) 373; Rex *v.* Edmonds, 4 B. & Ald. 471, 23 Rev. Rep. 350, 6 E. C. L. 564.

The jurors should not be selected with reference to race or color but only with reference to their superior competency or peculiar fitness for the particular case. Nashville *v.* Shepherd, 3 Baxt. (Tenn.) 373.

27. State *v.* Lehman, 175 Mo. 619, 75 S. W. 139; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43. But see State *v.* Slover, 134 Mo. 607, 36 S. W. 50.

In Georgia a special jury may be struck from a list composed of the regular panels of traverse jurors. Maddox *v.* Cunningham, 68 Ga. 431, 45 Am. Rep. 500.

Who may object to mode of selection.— Where only one party demands a struck jury the other cannot complain that the jury was drawn in the manner provided for ordinary juries. Sublett *v.* Simmons Hardware Co., (Mo. 1899) 49 S. W. 993.

28. State *v.* Young, 69 N. J. L. 592, 55 Atl. 91; Moschell *v.* State, 53 N. J. L. 498, 22 Atl. 50; Clingan *v.* East Tennessee, etc., R. Co., 2 Lea (Tenn.) 726.

Alteration of list.— It is not ground for challenge to the array that the court after selecting the list but before the striking altered it upon the suggestion of one of the parties that the names of some of the persons thereon were incompetent to try the case. Inskeep *v.* Lecony, 1 N. J. L. 39.

Struck foreign jury.— A struck jury cannot be selected by the court from a different county from that in which the trial was had under a statute providing that a struck jury is to be selected "from the persons qualified to serve as jurors in and for the county in which the indictment was found" and that a foreign jury shall be selected "in the same manner as the general panel of jurors." State *v.* Young, 69 N. J. L. 592, 55 Atl. 91.

29. People *v.* Tweed, 50 How. Pr. (N. Y.) 262.

30. State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; People *v.* Hall, 169 N. Y. 184, 62 N. E. 170.

31. In Ohio the selection is made by the clerk of the court, county auditor, and recorder. Hulse *v.* State, 35 Ohio St. 421; Webb *v.* State, 29 Ohio St. 351.

A deputy clerk or deputy auditor cannot act in the place of his principal, and in case of the latter's absence or disqualification some other person must be appointed by the court. Hulse *v.* State, 35 Ohio St. 421.

32. Hulse *v.* State, 35 Ohio St. 421.

It is not a disqualification that the clerk was formerly an attorney for one of the parties if the relation is terminated before the commencement of the action and he has no interest in the result of the case (Beatty *v.* Hatcher, 13 Ohio St. 115), nor is the formation or expression of an opinion as to the merits of the case a disqualification as in the case of a juror (Webb *v.* State, 29 Ohio St. 351).

33. State *v.* Slover, 134 Mo. 607, 36 S. W. 50; State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284.

34. *Alabama.*— Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

Georgia.— Hathcock *v.* McGouirk, 119 Ga. 973, 47 S. E. 563.

Maryland.— Hamlin *v.* State, 67 Md. 333, 10 Atl. 214, 301.

New Jersey.— State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284.

New York.— State *v.* Tweed, 50 How. Pr. 273.

Ohio.— Hulse *v.* State, 35 Ohio St. 421.

See 31 Cent. Dig. tit. "Jury," §§ 369, 370.

Where each of two defendants demands a struck jury they are not entitled to any larger panel than in the case of one defendant. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

case at the selection of the list is not essential if he has been notified of the time and place of selection and fails to attend.[35]

c. Striking Jury — (i) *Right to Full Panel to Strike From.* Each party has the right to demand a list of the full number prescribed by statute before the process of striking is entered upon,[36] which must consist of persons against whom no cause of challenge can be established, and he may before striking challenge any of the list for cause,[37] and if for this or any other reason there is a deficiency in such list the court should order it to be filled to the proper number before the striking is commenced.[38] If the court discharges any of the jurors on the list after the striking is begun it is not proper merely to supply the place of the jurors discharged but a full panel should be made up and the striking begin anew.[39]

(ii) *Mode of Striking.* The jury is ordinarily struck by each party striking alternately from the list one name until each has struck a certain number,[40] the number being regulated by statute and varying in different jurisdictions.[41] For the purpose of striking there are always but two parties,[42] and if there are several plaintiffs or defendants they are not separately entitled to the full number but must unite in striking,[43] and if they cannot agree as to what names shall be struck the court may order each to strike one name alternately.[44] If a party fails or refuses to strike the clerk may strike for him,[45] or the court may appoint some suitable disinterested person to do so.[46] Where the statute provides that each party shall be furnished a copy of the list from which each shall strike a certain number, neither is entitled to wait until the other has struck and inspect his list before striking from his own.[47] Where the regular number of strikes has been exceeded, the court may order the last name stricken to be restored to the list.[48] A notice of the time and place of striking should be given.[49]

35. Fowler *v.* State, 58 N. J. L. 423, 34 Atl. 682.

36. Smith *v.* Kaufman, 100 Ala. 408, 14 So. 111.

37. Lee *v.* Peter, 6 Gill & J. (Md.) 447.

38. Birmingham Union St. R. Co. *v.* Ralph, 92 Ala. 273, 9 So. 222; Kansas City, etc., R. Co. *v.* Smith, 90 Ala. 25, 8 So. 43, 24 Am. St. Rep. 753; Adams *v.* Thornton, 82 Ala. 260, 3 So. 20; State *v.* Baber, 74 Mo. 292, 41 Am. Rep. 314. *Compare* Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553, 8 S. W. 129; Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699; Morvey *v.* Maynard, 4 U. C. Q. B. O. S. 323.

Completion from regular jurors or talesmen.— Where there is a regular jury in attendance and engaged upon another case and talesmen have been summoned to complete a struck jury and sworn as to their qualifications, it is not error for the court to refuse to set aside the talesmen and complete the jury from the regular jurors after they have returned to the court-room (Citizens' Nat. Bank *v.* Durrill, 61 Mo. App. 543; Prince *v.* State, (Tex. Cr. App. 1892) 20 S. W. 582), although the regular jurors came in before the striking of any of the talesmen (Prince *v.* State, *supra*).

39. Smith *v.* Kaufman, 100 Ala. 408, 14 So. 111.

40. People *v.* Tweed, 50 How. Pr. (N. Y.) 273.

41. Hamlin *v.* State, 67 Md. 333, 10 Atl. 214, 301; State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284; People *v.* Tweed, 50 How. Pr. (N. Y.) 273.

42. Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72; Hamlin *v.* State, 67 Md. 333, 10 Atl. 214, 301.

43. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495; Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52; Hamlin *v.* State, 67 Md. 333, 10 Atl. 214, 301.

44. Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

45. See People *v.* Tweed, 50 How. Pr. (N. Y.) 273.

46. Gallagher *v.* State, 26 Wis. 423, holding under a statute providing that if a party refuses to strike, the court shall direct some suitable disinterested person to do so, that the judge himself cannot act in striking the jury.

47. Vernon *v.* State, (Tex. Cr. App. 1895) 33 S. W. 364; Phillips *v.* State, 6 Tex. App. 44. *Compare* St. Louis, etc., R. Co. *v.* Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147, holding, however, that if defendant is entitled to inspect the list struck by the state before striking from his own, a refusal by the court to allow him to do so is without prejudice where it appears that different names were struck from the different lists.

48. Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52.

49. Sutton *v.* State, 9 Ohio 133 (holding, however, that the right to such notice or a notice of the length provided by statute may be waived); Bell *v.* Flintoft, 3 U. C. Q. B. 122.

d. Filling Vacancies After Striking. If after the jury has been struck some of those constituting the remaining panel from which the trial jury is to be made up do not appear or the number is otherwise reduced so that a full trial jury cannot be obtained therefrom, the mode of trial is not defeated,[50] but talesmen may be called to complete the jury as in other cases.[51]

e. Summoning Panel. The general statutory provisions as to the mode of summoning petit jurors are equally applicable to struck juries,[52] and no special venire is necessary.[53]

3. Excusing Special or Struck Jurors. The court may for good cause excuse a special or struck juror from serving as in the case of ordinary jurors.[54]

4. Errors and Irregularities. The rule as to errors and irregularities is more strict in the case of special or struck juries than in the case of ordinary juries.[55] The established mode of procedure must be strictly followed,[56] and the court cannot by any rule or practice vary the express provisions of the statutes as to how the jury shall be selected.[57] The proper mode of objecting to irregularities in selecting or striking the jury is by a challenge to the array,[58] but a party may avail himself of such error on appeal if an exception was properly taken at the time, although he did not challenge the array.[59] It is ground for challenge to the array if the list was not selected from the proper source,[60] or by the proper officers,[61] or that the list included the name of a juror who was not in fact selected;[62] but it is not a sufficient ground of challenge that one of the jurors selected was exempt,[63] was dead,[64] was a non-resident of the county,[65] that the name of one was not correctly written where the parties were not misled as to his identity,[66] or that some of the panel were not summoned provided a sufficient number attend to try the case.[67] Where irregularities have occurred in the selection or striking of the jury the court may order the jury to be set aside and discharged and a

50. People *v.* Tweed, 50 How. Pr. (N. Y.) 286.

51. *Missouri.*— Barr *v.* Kansas City, 121 Mo. 22, 25 S. W. 562.

New Jersey.— Lee *v.* Evaul, 1 N. J. L. 283.

New York.— People *v.* Tweed, 50 How. Pr. 286.

Ohio.— Hulse *v.* State, 35 Ohio St. 421.

Pennsylvania.— Atlee *v.* Shaw, 4 Yeates 236; Carter *v.* Ramsey, 1 Del. Co. 423.

United States.— Anonymous, 2 Dall. 382, 1 L. ed. 425, 1 Fed. Cas. No. 443.

See 31 Cent. Dig. tit. "Jury," § 377.

But see Birmingham Union St. R. Co. *v.* Ralph, 92 Ala. 273, 9 So. 222, holding that where after the jury had been struck and a panel of twelve obtained, the court excused one of the jurors on account of sickness, a complete new list should have been made up and a new jury struck therefrom.

It is error to recall jurors previously struck off to fill vacancies in the panel. *In re* Detroit, etc., R. Co., 2 Dougl. (Mich.) 367.

52. Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545.

Under the Canadian statute a special or struck jury should not be summoned by the coroner, but in case the sheriff is disqualified should be summoned by some indifferent person appointed by the court. Claudinan *v.* Dickson, 8 U. C. Q. B. 281.

53. McDermott *v.* Hoffman, 70 Pa. St. 31.

54. Stewart *v.* State, 1 Ohio St. 66.

55. Industrial, etc., Trust *v.* Tod, 104 N. Y. App. Div. 517, 93 N. Y. Suppl. 725, 34 N. Y. Civ. Proc. 287; People *v.* Tweed, 50 How. Pr. (N. Y.) 262.

56. Industrial, etc., Trust *v.* Tod, 104 N. Y. App. Div. 517, 93 N. Y. Suppl. 725, 34 N. Y. Civ. Proc. 287; People *v.* Tweed, 50 How. Pr. (N. Y.) 262; Gallagher *v.* State, 26 Wis. 423; Gulf, etc., R. Co. *v.* Shane, 157 U. S. 348, 15 S. Ct. 641, 39 L. ed. 727; Proffatt Jury Tr. § 74.

57. State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; Gulf, etc., R. Co. *v.* Shane, 157 U. S. 348, 15 S. Ct. 641, 39 L. ed. 727.

58. McDermott *v.* Hoffman, 70 Pa. St. 31.

59. Gallagher *v.* State, 26 Wis. 423.

60. People *v.* Tweed, 50 How. Pr. (N. Y.) 262.

61. Hulse *v.* State, 35 Ohio St. 421.

62. People *v.* Tweed, 50 How. Pr. 262.

The court cannot substitute upon the panel after the jury has been struck the name of the juror who was in fact selected in the place of one who was erroneously placed upon the list. People *v.* Tweed, 50 How. Pr. (N. Y.) 273.

63. Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255; People *v.* Tweed, 50 How. Pr. (N. Y.) 280.

64. Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255.

65. People *v.* Tweed, 50 How. Pr. (N. Y.) 280.

66. People *v.* Tweed, 50 How. Pr. (N. Y.) 280.

67. State *v.* Woods, 66 N. J. L. 458, 49

new jury to be struck,[68] and if, after the striking, the panel of those to be summoned is lost the court may order a new panel to be struck from the original list.[69]

X. CONTROL OF COURT OVER JURORS.

A. Compelling Attendance — 1. Right to Attachment For Absent Jurors. In the absence of statute the court is not bound to issue attachments to compel the attendance of any of the jurors who were summoned but failed to appear,[70] or whom the sheriff in the exercise of due diligence was unable to summon.[71] Even where the issuing of attachment is authorized the application must be made as soon as the jury is called and it appears that any are absent and will not be granted if delayed until after the trial has begun,[72] and although the application is properly made the granting of an attachment is discretionary with the court where there are sufficient jurors in attendance to make up the panel.[73]

2. Punishment For Failure to Attend. A failure to appear as a juror after being duly summoned is a contempt[74] unless the juror is exempt,[75] and the statutes provide for the imposition of fines, which vary in amount in the different jurisdictions, for such default where no reasonable excuse is shown.[76] The proceedings for enforcing such fines are always summary,[77] and need not be instituted while the suit for which the juror should have appeared is pending.[78] The juror must be given an opportunity to show cause why he should not be fined,[79] and where the statute provides that he shall be present and have an opportunity of being heard the court may issue an attachment to compel his presence.[80] If the fine is not paid execution may issue against the goods and chattels of the defaulting juror,[81] but not against his person where the statute does not so provide.[82] The court may remit a fine imposed for non-attendance where it is satisfactorily shown that the juror was not in default.[83]

Atl. 716; Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255.

68. Industrial, etc., Trust *v.* Tod, 104 N. Y. App. Div. 517, 93 N. Y. Suppl. 725, 34 N. Y. Civ. Proc. 287; People *v.* Dillon, 17 Hun (N. Y.) 1.

69. Hall *v.* Perott, 11 Fed. Cas. No. 5,942, Baldw. 123.

70. Johnson *v.* State, 47 Ala. 9; Custis *v.* Com., 87 Va. 589, 13 S. E. 73.

In Mississippi under Code (1892), § 2368, requiring the jury to be impaneled from those "summoned and in attendance" it is not error to refuse to issue an attachment for a special venireman who was summoned but failed to appear. Hale *v.* State, 72 Miss. 140, 16 So. 387 [*distinguishing* Boles *v.* State, 24 Miss. 445].

If it appears that a juror has removed from the county it is not error for the court to refuse to issue an attachment. Furlow *v.* State, 41 Tex. Cr. 12, 51 S. W. 938.

71. Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255. See also Osborne *v.* State, 23 Tex. App. 431, 5 S. W. 251.

72. State *v.* Washington, 37 La. Ann. 828; State *v.* Saunders, 37 La. Ann. 389; Jackson *v.* State, 30 Tex. App. 664, 18 S. W. 643; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388.

73. State *v.* Farrer, 35 La. Ann. 315; State *v.* Breaux, 32 La. Ann. 222; State *v.* Shonhausen, 26 La. Ann. 421; State *v.* Ballerio, 11 La. Ann. 81; State *v.* Lovenstein, 9 La. Ann. 313.

Default after appearance.—No distinction is made in the application of this rule between the default of a juror who has not appeared and one who after appearing has absented himself. State *v.* Lovenstein, 9 La. Ann. 313.

74. Robbins *v.* Gorham, 25 N. Y. 588 [*affirming* 26 Barb. 586].

75. Miller *v.* Com., 80 Va. 33, holding that a juror who is exempt is not in contempt if after being summoned he does not attend to claim his exemption.

76. Thompson & M. Jur. § 83. See the statutes of the several states. See also State *v.* Hollingshead, 16 N. J. L. 539; Robbins *v.* Gorham, 25 N. Y. 588 [*affirming* 26 Barb. 586]; Cannon *v.* Whitthorne, 7 Heisk. (Tenn.) 557; *Ex p.* Clarges, 1 Y. & J. 399, 30 Rev. Rep. 811.

77. Robbins *v.* Gorham, 25 N. Y. 588 [*affirming* 26 Barb. 586].

78. Robbins *v.* Gorham, 25 N. Y. 588 [*affirming* 26 Barb. 586], holding that such proceedings, although summary, may be had after the termination of the action and at any time before the penalty is barred by the statute of limitations.

79. State *v.* Hollinshead, 16 N. J. L. 539.

80. Robbins *v.* Gorham, 25 N. Y. 588 [*affirming* 26 Barb. 586].

81. State *v.* Hollinshead, 16 N. J. L. 539; Robbins *v.* Gorham, 25 N. Y. 588 [*affirming* 26 Barb. 586].

82. State *v.* Hollinshead, 16 N. J. L. 539.

83. *Ex p.* Ford, 1 Y. & J. 401, 30 Rev. Rep.

B. Excusing Jurors[84] — **1. Power to Excuse.** It is well settled that the court may, for reasons which in the exercise of its discretion it deems sufficient, excuse jurors who have been summoned from serving,[85] although such action may necessitate the resort to talesmen or additional jurors to complete the panel,[86] and while the right is in some cases recognized by statute,[87] no express statutory authority for this purpose is necessary.[88] The court alone, however, is authorized to excuse jurors,[89] and the fact that the sheriff knows that some of the panel are sick, disqualified, or exempt is no excuse for failing to summon them;[90] nor can the sheriff, even in a proceeding where he selects as well as summons the jury, excuse a juror after he has been summoned and substitute another in his place.[91]

2. Grounds — a. In General. The court may in the exercise of its discretion excuse jurors for reasons which constitute no legal ground of disqualification or

812; *Ex p.* Brown, 1 Y. & J. 401, 30 Rev. Rep. 812.

It is not the practice to hear counsel in behalf of a juror who has been fined, but the court will consider affidavits stating circumstances in extenuation of his conduct. Carne *v.* Nicoll, 3 Dowl. P. C. 115.

Where the summons was left at the wrong house the fine may be remitted upon the affidavit of the summoning officer showing this fact. *Ex p.* Brown, 1 Y. & J. 401, 30 Rev. Rep. 812.

Failure to enter order remitting fine.— Where a juror is fined for non-attendance and at the same term presents a sufficient excuse and the court orders the fine to be struck out but the clerk neglects to enter such order, the court may at a subsequent term, on proper affidavits of such fact, order the fine to be struck out. U. S. *v.* Smith, 27 Fed. Cas. No. 16,324, 1 Cranch C. C. 127.

84. **Excusing struck jurors** see *supra*, IX, B, 3.

Discharge of juror pending trial see *infra*, XIV, A, 5.

Rejection of discharge on court's own motion see *infra*, XIII, D.

Excusing jurors temporarily during trial see Trial.

85. *California.*— People *v.* Searcey, (1898) 53 Pac. 359; People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; People *v.* Lee, 17 Cal. 76.

Florida.— Williams *v.* State, (1903) 34 So. 279; John *v.* State, 16 Fla. 554.

Georgia.— Ellis *v.* State, 114 Ga. 36, 39 S. E. 881. See also Chelsey *v.* State, 121 Ga. 340, 49 S. E. 258.

Kentucky.— Barnes *v.* Com., 70 S. W. 827, 24 Ky. L. Rep. 1143.

Louisiana.— State *v.* Aspara, 113 La. 940, 37 So. 883; State *v.* Somnier, 33 La. Ann. 237.

Massachusetts.— Com. *v.* Walton, 17 Pick. 403.

Michigan.— People *v.* Carrier, 46 Mich. 442, 9 N. W. 487.

Missouri.— King *v.* State, 1 Mo. 717.

New Jersey.— Aarnson *v.* State, 56 N. J. L. 9, 27 Atl. 937; Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

New York.— Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347.

North Carolina.— Perry *v.* Western, etc., R. Co., 129 N. C. 333, 40 S. E. 191; State *v.* Barber, 113 N. C. 711, 18 S. E. 515; State *v.* Craton, 28 N. C. 164.

Ohio.— Stewart *v.* State, 1 Ohio St. 66.

Pennsylvania.— Jewell *v.* Com., 22 Pa. St. 94.

South Carolina.— State *v.* Gill, 14 S. C. 410.

Texas.— Martin *v.* State, (Cr. App. 1897) 43 S. W. 352.

Utah.— Anderson *v.* Wasatch, etc., R. Co., 2 Utah 518.

West Virginia.— State *v.* Emblem, (1899) 33 S. E. 223.

See 31 Cent. Dig. tit. "Jury," § 385.

It is not a ground of challenge to the array that the court excuses some of the panel from serving during the term. People *v.* Packenham, 115 N. Y. 200, 21 N. E. 1035.

The court may excuse additional jurors which have been drawn or summoned to serve either as regular jurors or talesmen where from subsequent events or the state of the docket it appears to the court that their services will not be necessary. State *v.* West, 35 La. Ann. 28.

Excusing jurors for particular week.— Where separate juries are drawn for different weeks of the term the court may excuse jurors from serving at the week for which they were drawn and stand them over to serve at a different week during the term. Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201.

86. People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347.

87. Pierson *v.* State, 99 Ala. 148, 13 So. 550; U. S. *v.* Heath, 20 D. C. 272; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54.

Additional jurors.— The Alabama statute of 1887 provides that where additional jurors are drawn to complete a panel, if any juror so drawn resides more than two miles from the court-house the court may in its discretion excuse him from attendance. Ezell *v.* State, 102 Ala. 101, 15 So. 810.

88. Stewart *v.* State, 1 Ohio St. 66.

89. Ayers *v.* Metcalf, 39 Ill. 307; Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47.

90. Ezell *v.* State, 102 Ala. 101, 15 So. 810; Gay *v.* State, (Tex. Cr. App. 1899) 49 S. W. 612.

91. Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47.

exemption;[92] but which are purely personal to the juror,[93] such as the illness of the juror,[94] illness in his family,[95] where his family is without protection and needs his presence,[96] or where his business interests would be materially injured.[97] The court may also properly excuse a juror who is a witness in another case,[98] who has a case at issue to be tried at the same term,[99] or who was not regularly summoned.[1] It does not follow, however, that because certain causes have been declared to be sufficient to justify the court in excusing jurors that the sufficiency of excuses in general must be considered a matter of law;[2] but on the contrary the reasons are so numerous that they cannot be specified beforehand or reduced to any set rule but must be left to the court to dispose of as they arise,[3] so that it is uniformly held that whether a juror shall be excused is a matter resting within the sound discretion of the court,[4] the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party.[5]

b. Conflicting Public Duties. The court may properly excuse a person summoned as a juror where such service might conflict with the performance of other public duties,[6] and may do so although such office or duties do not consti-

92. People *v.* Lee, 1 Cal. App. 169, 81 Pac. 969; Edwards *v.* State, 39 Fla. 753, 23 So. 537; Ellis *v.* State, 25 Fla. 702, 6 So. 768; Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201; Com. *v.* Walton, 17 Pick. (Mass.) 403.

93. John *v.* State, 16 Fla. 554; People *v.* Thacker, 108 Mich. 652, 66 N. W. 562; People *v.* Carrier, 46 Mich. 442, 9 N. W. 487; Brown *v.* State, (Miss. 1905) 38 So. 316.

The contrary has been held with regard to jurors summoned on special venires for trials of criminal cases where a list of the panel is served upon defendant (Boles *v.* State, 13 Sm. & M. (Miss.) 398; Hill *v.* State, 10 Tex. App. 618); but the reasoning of these cases has been expressly disapproved (U. S. *v.* Heath, 20 D. C. 272); and elsewhere it has been held that no distinction exists as to such cases (Aarnson *v.* State, 56 N. J. L. 9, 27 Atl. 937), and it will be observed that while the point was not expressly raised, many of the cases in which the action of the court in excusing jurors was sustained were of this character (see cases cited in the following notes).

94. Thomas *v.* State, (Ala. 1900) 27 So. 315; Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247; Hanvey *v.* State, 68 Ga. 612; State *v.* Voorhies, (La. 1905) 38 So. 964; Collins *v.* State, (Tex. Cr. App. 1904) 83 S. W. 806; Goodall *v.* State, (Tex. Cr. App. 1898) 47 S. W. 359.

95. King *v.* State, 1 Mo. 717. But see Hill *v.* State, 10 Tex. App. 618.

96. U. S. *v.* Heath, 20 D. C. 272.

97. U. S. *v.* Heath, 20 D. C. 272; People *v.* Thacker, 108 Mich. 652, 66 N. W. 562. *Compare* Ellis *v.* State, 114 Ga. 36, 39 S. E. 881.

98. Barnes *v.* Com., 70 S. W. 827, 24 Ky. L. Rep. 1143; People *v.* Carrier, 46 Mich. 442, 9 N. W. 487.

The fact that the juror is not called as a witness after being excused does not show that the action of the court was improper. Barnes *v.* Com., 70 S. W. 827, 24 Ky. L. Rep. 1143.

99. *In re* Claggett, 5 Fed. Cas. No. 2,779, 2 Cranch C. C. 247.

1. *In re* Auzan, 2 Mart. (La.) 124.

2. Thompson & M. Jur. § 259. See also State *v.* Ward, 39 Vt. 225.

3. Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489.

4. *California.*— People *v.* Hickman, 113 Cal. 80, 45 Pac. 175.

Florida.— Peaden *v.* State, (1903) 35 So. 204.

Kentucky.— Barnes *v.* Com., 70 S. W. 827, 24 Ky. L. Rep. 1143.

Louisiana.— State *v.* Michel, 111 La. 434, 35 So. 629.

New York.— Cotton *v.* New York, etc., R. Co., 20 N. Y. Suppl. 347; People *v.* Ferris, 1 Abb. Pr. N. S. 193.

Pennsylvania.— Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489; Jewell *v.* Com., 22 Pa. St. 94.

South Carolina.— State *v.* Whitman, 14 Rich. 113.

Utah.— Anderson *v.* Wasatch, etc., R. Co., 2 Utah 518.

Vermont.— State *v.* Ward, 39 Vt. 225.

See 31 Cent. Dig. tit. "Jury," §§ 384, 385.

5. Peadon *v.* State, 46 Fla. 124, 35 So. 204; Williams *v.* State, 45 Fla. 128, 34 So. 279; John *v.* State, 16 Fla. 554; State *v.* Michel, 111 La. 434, 35 So. 629; Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

There is a wide distinction between the retention of an incompetent juror and the excusing of one who is competent. In the former case the law presumes prejudice to the complaining party, but in the latter it will be presumed that the jurors who tried the case possessed all of the necessary qualifications and that the action of the court if erroneous was without prejudice. Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

6. *Alabama.*—Pierson *v.* State, 99 Ala. 148, 13 So. 550.

Florida.— Edwards *v.* State, 39 Fla. 753,

tute a ground of disqualification or entitle the juror to claim an exemption from jury duty.[7]

3. Application, Order, and Proceedings. Jurors should ordinarily be excused publicly in open court,[8] and an entry of the fact and the reasons therefor made upon the minutes;[9] but it has been held that the court may in its discretion excuse jurors in advance of the trial for which they are summoned,[10] even in the case of special venires for capital cases where a list of the panel is served upon defendant,[11] and in the absence of defendant[12] and without his knowledge or consent.[13] Jurors should not ordinarily be excused unless they appear and present their excuses in person and under oath,[14] except by consent of both parties;[15] but this rule is subject to exception, as where on account of sickness, bodily infirmity, or other unavoidable reason over which the juror has no control, he is unable to appear and present his excuse in person,[16] in which cases the juror may send his excuse by another and the court may pass upon it in his absence,[17] and if either party is dissatisfied or desires to test the truth of the grounds of excuse, he must apply for an attachment to have the juror brought before the court.[18] The court may excuse a juror on the ground of sickness without the testimony of

23 So. 537; Ellis *v.* State, 25 Fla. 702, 6 So. 768.

New Jersey.— Aarnson *v.* State, 56 N. J. L. 9, 27 Atl. 937.

Ohio.— Stewart *v.* State, 1 Ohio St. 66.

Vermont.— State *v.* Ward, 39 Vt. 225.

See 31 Cent. Dig. tit. "Jury," § 386.

Application of rule.— Under this rule it has been held proper to excuse a juror who is a policeman (Pierson *v.* State, 99 Ala. 148, 13 So. 550), jailer (Hale *v.* State, 72 Miss. 140, 16 So. 387), justice of the peace (Michigan Condensed Milk Co. *v.* Wilcox, 78 Mich. 431, 44 N. W. 281), tax assessor (Ellis *v.* State, 25 Fla. 702, 6 So. 768), postmaster (Stewart *v.* State, 1 Ohio St. 66), member of the legislature while the legislature is in session (Com. *v.* Walton, 17 Pick. (Mass.) 403), or in any case where the juror is the holder of a public trust the duties of which cannot be performed by a deputy (*In re* Piper, 2 Browne (Pa.) 59); but not where the trust is of a private nature or one in which a deputy may act (*In re* Piper, *supra*).

7. Ellis *v.* State, 25 Fla. 702, 6 So. 768; Com. *v.* Walton, 17 Pick. (Mass.) 403.

8. State *v.* Whitman, 14 Rich. (S. C.) 113. But see State *v.* Bates, 25 Utah 1, 69 Pac. 70, holding that under the Utah statute the court may excuse jurors at chambers and cause the order to be entered at the beginning of the term.

9. State *v.* Whitman, 14 Rich. (S. C.) 113.

10. Fariss *v.* State, 85 Ala. 1, 4 So. 679 [*overruling* Parsons *v.* State, 22 Ala. 50]; Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489; State *v.* Bates, 25 Utah 1, 69 Pac. 70.

But where jurors are excused in advance of the trial the fact and the reasons therefor should be stated in open court so that the fact that the excuse was judicially passed upon and found to be sufficient may appear of record. Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489.

11. Maxwell *v.* State, 89 Ala. 150, 7 So. 824; Fariss *v.* State, 85 Ala. 1, 4 So. 679 [*overruling* Parsons *v.* State, 22 Ala. 50]. *Contra*, Thuston *v.* State, 18 Tex. App. 26; Foster *v.* State, 8 Tex. App. 248; Robles *v.* State, 5 Tex. App. 346.

It is the safer practice, however, not to excuse a juror in a criminal case in advance of the trial. Sylvester *v.* State, 71 Ala. 17.

12. Thomas *v.* State, 124 Ala. 48, 27 So. 315; Maxwell *v.* State, 89 Ala. 150, 7 So. 824; People *v.* Thacker, 108 Mich. 652, 66 N. W. 562. *Contra*, Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370.

13. Fariss *v.* State, 85 Ala. 1, 4 So. 679 [*overruling* Parsons *v.* State, 22 Ala. 50]; Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489.

14. See also Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552; Thompson *v.* State, 19 Tex. App. 593.

15. See Thompson *v.* State, 19 Tex. App. 593.

16. Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552; Thompson *v.* State, 19 Tex. App. 593. See also Beard *v.* State, 41 Tex. Cr. 173, 53 S. W. 348.

It would be an unreasonable hardship to require that a juror who is seriously ill should be brought into court merely for the purpose of being excused. Com. *v.* Payne, 205 Pa. St. 101, 54 Atl. 489.

Where the juror is a public officer who cannot leave his office without injuring the public service, he may be excused without appearing personally. Kennedy *v.* State, 19 Tex. App. 618.

17. Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552; Kennedy *v.* State, 19 Tex. App. 618.

The court may excuse a juror upon the receipt of a telegram from a reliable person stating that the juror is too sick to attend, in the absence of any evidence that the juror is not sick. Houston City St. R. Co. *v.* Ross, (Tex. Civ. App. 1894) 28 S. W. 254.

18. Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552; Kennedy *v.* State, 19 Tex. App. 618.

a physician,[19] or for reasons made known to the court by the juror outside of the court-house.[20]

4. Liability of Excused Juror to Be Recalled. Where the juror has been excused or discharged he ceases to be a juror and cannot be recalled,[21] even as a talesman in the same panel from which he was discharged,[22] nor if he consents to serve can the parties be required to accept him as a juror.[23]

5. Presumption of Regularity. Where the court has excused jurors from attendance it will be presumed that such action was based upon sufficient grounds,[24] and that the court acted advisedly as to the facts necessarily involved.[25]

XI. Term of Service and Compensation.

A. Term of Service. Formerly, in England, the court was for many purposes presumed to be open in the presence of the judge who might carry a jury with him from county to county and keep them together until they responded to the issue;[26] but in this country where the courts are local and their terms limited by law a final adjournment for the term operates as a legal discharge of the jury and terminates their functions as such,[27] and if they do not return with a verdict before the end of the term another jury may be impaneled at the succeeding term.[28] A statutory provision that jurors shall not be allowed to serve more than a certain number of weeks in a year applies to a calendar year,[29] and a provision that they shall not serve more than a certain number of days at any one term applies to days in which the court is in session and on which the jurors could be called upon to serve.[30] Where the statute provides that no person serving for a certain length of time shall be eligible for further service during the term, only actual service for that time will disqualify.[31] The Georgia statute providing for the summoning of separate panels for different weeks where the term is for more than one week[32] does not apply to an adjourned or extra session but only to

19. Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247; Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321.

20. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

21. State *v.* Whitman, 14 Rich. (S. C.) 113; Isaac *v.* State, 2 Head (Tenn.) 458; Anderson *v.* Wasatch, etc., R. Co., 2 Utah 518. But see Telford *v.* Wilson, 71 Ind. 555, holding that when the court has discharged the entire panel for the term it may order the recall of the panel at any time during the same term.

The effect of the discharge of a juror as respects the power of the court over him is to place him in exactly the same position as if he had never been selected as juror. Isaac *v.* State, 2 Head (Tenn.) 458.

22. Golding *v.* The Castro, 20 La. Ann. 458.

23. Isaac *v.* State, 2 Head (Tenn.) 458.

24. Moseley *v.* State, 107 Ala. 74, 17 So. 932; Fariss *v.* State, 85 Ala. 1, 4 So. 679 [*overruling* Parsons *v.* State, 22 Ala. 50]; State *v.* Breaux, 32 La. Ann. 222; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; State *v.* Whitman, 14 Rich. (S. C.) 113.

A party must require the judge to state the grounds of his action if he desires an appellate court to review it. State *v.* Breaux, 32 La. Ann. 222.

25. Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; State *v.* Gill, 14 S. C. 410.

It will be presumed that the court required affidavits where the statute so provides. State *v.* Gill, 14 S. C. 410.

26. Shearer *v.* Clay, 1 Litt. (Ky.) 260.

27. Ashbaugh *v.* Edgecomb, 13 Ind. 466; Shearer *v.* Clay, 1 Litt. (Ky.) 260.

Where jurors have been summoned for an "extra court" which is not held on account of a subsequent extension of the regular term, the extra court stands as if adjourned *sine die* and the jurors discharged, and such jurors cannot be impaneled as the jury for the extended regular term. State *v.* Harden, 2 Rich. (S. C.) 533.

28. Ashbaugh *v.* Edgecomb, 13 Ind. 466; Shearer *v.* Clay, 1 Litt. (Ky.) 260.

29. Atlanta, etc., Air Line R. Co. *v.* Ray, 70 Ga. 674, holding, under a statute providing that a juror shall not be allowed to serve more than four weeks in any one year, that where a term begins in December and continues into January of the following year a juror may serve more than four weeks in succession if there is not more than four weeks' service in the same calendar year.

30. Provident Sav. Inst. *v.* Burnham, 128 Mass. 458, holding under a statute providing that no person shall serve as a juror more than thirty days at any one term, that it is not ground of challenge that more than thirty days have elapsed since the jurors had begun to serve, if during that time the court had been in session less than thirty days.

31. Humphrey *v.* State, (Ark. 1905) 86 S. W. 431.

32. See Cribb *v.* State, 118 Ga. 316, 45 S. E. 396; Brinkley *v.* State, 54 Ga. 371; McAfee *v.* State, 31 Ga. 411.

regular terms and to counties where by law the court sits more than one week.[33] A jury regularly drawn continues in existence as a lawfully selected jury for the time or term for which it was drawn notwithstanding a subsequent change in the law as to the method of drawing,[34] but such jurors have no certain term of office and may be superseded by jurors drawn under the new law.[35]

B. Compensation — 1. Right to Compensation — a. In General. Compensation for service as a juror is not a common-law right,[36] but is purely statutory, and in the absence of statute cannot be recovered;[37] and it is further competent for the legislature to require such services and expressly provide that no compensation shall be allowed.[38] Provision for such payment is, however, very generally made by statute,[39] but the general statutes relating to juror's fees do not apply to jurors in coroner's courts,[40] or upon inquisitions of lunacy.[41] A juror summoned on a special venire has the same right to compensation for the time necessarily in attendance as a member of the regular panel,[42] and as to service actually rendered there is ordinarily no distinction between regular jurors and those summoned from the bystanders;[43] but a juror has no right to compensation for attendance

The statute does not disqualify a juror who has served for one week but merely gives him the privilege of an exemption which he may waive. McAfee *v.* State, 31 Ga. 411.

33. Brinkley *v.* State, 54 Ga. 371.

At other terms the judge may adjourn the court from week to week and require the attendance of the same panel during the adjourned session. Buchanan *v.* State, 118 Ga. 751, 45 S. E. 607; Cribb *v.* State, 118 Ga. 316, 45 S. E. 396.

34. McCrory *v.* Anderson, 103 Ind. 12, 2 N. E. 211; Welty *v.* Lake Superior Terminal, etc., R. Co., 100 Wis. 128, 75 N. W. 1022; Ray *v.* Lake Superior Terminal, etc., R. Co., 99 Wis. 617, 75 N. W. 420. *Contra*, State *v.* Judge Superior Dist. Ct., 30 La. Ann. 603.

35. State *v.* Bradley, 48 Conn. 535.

36. Neely *v.* State, 4 Baxt. (Tenn.) 174.

37. Birch *v.* Phelan, 127 Cal. 49, 59 Pac. 209; Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784.

38. Phillips *v.* Eureka County, 19 Nev. 348, 11 Pac. 32.

39. *California.*— Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167; Mason *v.* Culbert, 108 Cal. 247, 41 Pac. 464.

Illinois.— Moseley *v.* Turner, 95 Ill. App. 215.

Indiana.— Monroe *v.* State, 157 Ind. 45, 60 N. E. 708.

Iowa.— Venett *v.* Jordan, 111 Iowa 409, 82 N. W. 953.

Kentucky.— Stone *v.* Saunders, 106 Ky. 904, 51 S. W. 788, 21 Ky. L. Rep. 534.

Michigan.— Emmer *v.* Bostock, 130 Mich. 341, 89 N. W. 964.

Minnesota.— State *v.* Sullivan, 62 Minn. 283, 64 N. W. 813.

Nevada.— Thornburg *v.* Hermann, 1 Nev. 473.

New York.— Matter of Sanford, 61 Hun 33, 15 N. Y. Suppl. 291.

North Carolina.— Young *v.* Buncombe County Com'rs, 76 N. C. 316.

Ohio.— State *v.* Aikins, 18 Ohio Cir. Ct. 19, 9 Ohio Cir. Dec. 373.

Oregon.— Bloch *v.* Multnomah County, 25 Oreg. 169, 35 Pac. 30.

South Carolina.— Cleary *v.* Wells, 2 Nott & M. 442.

Virginia.— Souther *v.* Com., 7 Gratt. 673.

Washington.— State *v.* Lamping, 25 Wash. 278, 65 Pac. 537.

United States.— Edwards *v.* Bond, 8 Fed. Cas. No. 4,294, 5 McLean 300.

Canada.— Taylor *v.* Drake, 9 Brit. Col. 54.

See 31 Cent. Dig. tit. "Jury," § 393.

Attendance in different capacities.— Under the federal statute which provides a certain *per diem* allowance and mileage for jurors and makes the same allowance for witnesses, if a juror is subpœnaed as a witness by the United States, he is entitled to full compensation in both capacities. Edwards *v.* Bond, 8 Fed. Cas. No. 4,294, 5 McLean 300.

40. *In re* Coroners' Inquests, 1 Pa. Co. Ct. 14.

41. Com. *v.* Henderson, 1 Pa. Co. Ct. 679; Com. *v.* Roberts, 1 Chest. Co. Rep. (Pa.) 18.

In New York, Code Civ. Proc. § 2333, provides that jurors on an inquisition of insanity "are entitled to the same compensation, as jurors upon the trial of an issue in an action in the same court," but this provision is construed as applying only to a trial fee of twenty-five cents allowed by section 3313, and not to the *per diem* allowance provided for in section 3314 (Matter of Sanford, 61 Hun (N. Y.) 33, 15 N. Y. Suppl. 291), and prior to the code the only allowance in such cases was a fee of twelve and a half cents to each juror sworn (Matter of Root, 8 Paige (N. Y.) 625. See also Matter of Sanford, *supra*).

42. Moseley *v.* Turner, 95 Ill. App. 215; Bloch *v.* Multnomah County, 25 Oreg. 169, 35 Pac. 30.

43. Stone *v.* Saunders, 106 Ky. 904, 51 S. W. 788, 21 Ky. L. Rep. 534.

Talesmen under the Tennessee statute are not entitled to compensation unless they serve for more than one day, but a talesman remaining undischarged is entitled to full pay up to the time of his discharge, although

upon a court held at a time and place unauthorized by law.[44] Mandamus will lie to compel the issuance of a certificate for services as a juror,[45] and where a trial fee is allowed the jury have a right to withhold their verdict from the record until it is paid.[46]

b. What Services Compensated. A juror is entitled to his *per diem* allowance for all the time that he is necessarily in attendance upon the court, whether during all of this time he is actually serving as a juror or not,[47] or until discharged, although he is not called upon to serve at all.[48] It has also been held that he is entitled to full pay, although on certain days he was excused from attendance,[49] or for the time during an adjournment if he lives at a distance and is not allowed mileage;[50] but under statutes providing a certain rate per day "for attendance" upon the court, it is held that if a juror is excused from attending for a definite period he is not entitled to compensation for such period,[51] although it was too short to permit him to go to his home and return.[52]

2. Amount. Jurors are ordinarily compensated by way of a *per diem* allowance for the time for which they serve or are in attendance, the amount of which varies in the different jurisdictions,[53] to which is usually added an allowance for

during this time he did not at any time serve for two days consecutively. Cannon *v.* Whitthorne, 7 Heisk. (Tenn.) 557.

44. Coulter *v.* Routt County, 9 Colo. 258, 11 Pac. 199.

45. Matter of Woffenden, 1 Ariz. 237, 25 Pac. 647; West *v.* Hancock County, 103 Ga. 737, 30 S. E. 573; Moseley *v.* Turner, 95 Ill. App. 215.

Form of certificate.— The certificate of the clerk should state the length and character of the service rendered and not merely the amount to which the juror is entitled. State *v.* Cappeller, 8 Ohio Dec. (Reprint) 59, 5 Cinc. L. Bul. 363.

46. Cleary *v.* Wells, 2 Nott & M. (S. C.) 442.

47. *California.*— Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167.

Illinois.— Moseley *v.* Turner, 95 Ill. App. 215.

Nevada.— Thornburg *v.* Hermann, 1 Nev. 473.

Tennessee.— Cannon *v.* Whitthorne, 7 Heisk. 557.

Canada.— Taylor *v.* Drake, 9 Brit. Col. 54. See 31 Cent. Dig. tit. "Jury," § 394.

A jury-fee is not in the nature of a salary but rather as a compensation for the time during which the juror is withdrawn from his ordinary vocation and in actual attendance upon the court. Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167; Mason *v.* Culbert, 108 Cal. 247, 41 Pac. 464.

48. Moseley *v.* Turner, 95 Ill. App. 215; Bloch *v.* Multnomah County, 25 Oreg. 169, 35 Pac. 30.

In Nevada in criminal cases the statute only allows a *per diem* compensation to the jurors who are accepted and sworn to try a case. Phillips *v.* Eureka County, 19 Nev. 348, 4 Pac. 32.

49. Matter of Woffenden, 1 Ariz. 237, 25 Pac. 647.

50. Parker *v.* Kempton, 18 Fed. Cas. No. 10,741, 1 Wall. Jr. 344.

51. Mason *v.* Culbert, 108 Cal. 247, 41 Pac. 464; Jacobs *v.* Elliott, 104 Cal. 318, 37 Pac. 942; Venett *v.* Jordan, 111 Iowa 409, 82 N. W. 953; Emmer *v.* Bostock, 131 Mich. 341, 89 N. W. 964; State *v.* Lamping, 25 Wash. 278, 65 Pac. 537.

52. State *v.* Lamping, 25 Wash. 278, 65 Pac. 537.

53. *California.*— Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167; Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784; Jacobs *v.* Elliott, 104 Cal. 318, 37 Pac. 942.

Illinois.— Moseley *v.* Turner, 95 Ill. App. 215.

Indiana.— Monroe *v.* State, 157 Ind. 45, 60 N. E. 708.

Iowa.— Venett *v.* Jordan, (1900) 82 N. W. 953.

Michigan.— Emmer *v.* Bostock, 130 Mich. 341, 89 N. W. 964.

Minnesota.— State *v.* Sullivan, 62 Minn. 283, 64 N. W. 813.

Nevada.— Thornburg *v.* Hermann, 1 Nev. 473.

New York.— *In re* Sanford, 61 Hun 33, 15 N. Y. Suppl. 291.

North Carolina.— Young *v.* Buncombe County Com'rs, 76 N. C. 316.

Ohio.— State *v.* Akins, 18 Ohio Cir. Ct. 19, 9 Ohio Cir Dec. 373.

Oregon.— Bloch *v.* Multnomah County, 25 Oreg. 169, 35 Pac. 30.

Pennsylvania.— Com. *v.* Henderson, 1 Pa. Co. Ct. 679.

South Carolina.— Cleary *v.* Wells, 2 Nott & M. 442.

Virginia.— Souther *v.* Com., 7 Gratt. 673.

United States.— *Ex p.* Lewis, 4 Cranch 433, 2 L. ed. 670; Edwards *v.* Bond, 8 Fed. Cas. No. 4,294, 5 McLean 300.

Canada.— Taylor *v.* Drake, 9 Brit. Col. 54. See 31 Cent. Dig. tit. "Jury," § 395.

Fixing rate.— In Georgia the statute allows the grand jury to fix the compensation of jurors for the succeeding year (Tanner *v.* Rosser, 89 Ga. 811, 15 S. E. 750); and in North Carolina the rate is fixed by the county commissioners, which, however, must not exceed one dollar and fifty cents per day (Young *v.* Buncombe County Com'rs, 76 N. C. 316).

mileage,[54] and in some cases a trial fee for each case in which they are impaneled or for each verdict rendered,[55] while in New York an extra allowance may be made in trials occupying over a certain number of days.[56] The legislature has full power to determine the rate of compensation,[57] and no greater amount than that so fixed can be recovered[58] or allowed by the court.[59] The *per diem* allowance contemplates a day of twenty-four hours and jurors are not entitled to any additional compensation where they are not allowed to separate over night.[60]

3. Liability For Payment — a. Jury-Fees. A county is not, in the absence of statute, liable for the payment of jury-fees.[61] There are, however, in many jurisdictions, statutes imposing such liability,[62] while in others jury-fees may be taxed as costs.[63] There are also, as previously noted, statutes in some jurisdictions requiring that a party demanding a jury trial must pay a jury-fee in advance,[64] and such statutes are not unconstitutional.[65]

b. Expenses of Jurors in Criminal Cases. Where in the trial of criminal

Talesmen under the Ohio statute are paid at a different rate from regular jurors, the latter receiving two dollars per day and the former only one dollar. State *v.* Cappeller, 8 Ohio Dec. (Reprint) 59, 5 Cinc. L. Bul. 363.

54. *California.*— Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167; Jacobs *v.* Elliott, 104 Cal. 318, 37 Pac. 942.

Illinois.— Moseley *v.* Turner, 95 Ill. App. 215.

Michigan.— Emmer *v.* Bostock, 130 Mich. 341, 89 N. W. 964.

United States.— Edwards *v.* Bond, 8 Fed. Cas. No. 4,294, 5 McLean 300.

Canada.— Taylor *v.* Drake, 9 Brit. Col. 54.

See 31 Cent. Dig. tit. "Jury," § 395.

In Virginia the allowance for mileage applies only to jurors summoned from a county other than that in which the trial is held. Souther *v.* Com., 7 Gratt. 673.

55. *In re* Sanford, 61 Hun (N. Y.) 33, 15 N. Y. Suppl. 291; Cleary *v.* Wells, 2 Nott & M. (S. C.) 442.

56. De Wolf *v.* Day, 39 Hun (N. Y.) 484, holding, however, under the statute providing for such extra compensation "when the trial occupies more than thirty days," that it is not allowable unless the jurors are actually engaged upon the trial for this number of days, including the time spent in deliberating on the verdict, but excluding all days on which the case was not heard, such as Saturdays, Sundays, and during adjournments.

57. Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784; Monroe *v.* State, 157 Ind. 45, 60 N. E. 708.

58. Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784.

59. Monroe *v.* State, 157 Ind. 45, 60 N. E. 708; Young *v.* Buncombe County Com'rs, 76 N. C. 316.

60. Monroe *v.* State, 157 Ind. 45, 60 N. E. 708.

61. Birch *v.* Phelan, 127 Cal. 49, 59 Pac. 209; Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784.

An act authorizing payment for past services out of the public treasury, which services were rendered at a time when there was no law imposing any liability for payment upon the county, is unconstitutional, under a constitutional provision that the legislature shall have no power to make or authorize any gift of any public money to any individual. Powell *v.* Phelan, 138 Cal. 271, 71 Pac. 335.

62. See the statutes of the several states; and the following cases:

California.—Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167.

Colorado.— Pitkin County *v.* Aspen First Nat. Bank, 6 Colo. App. 423, 40 Pac. 894.

Georgia.—West *v.* Hancock County, (1898) 30 S. E. 573.

Illinois.— Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; People *v.* Stookey, 98 Ill. 537.

Indiana.— Monroe *v.* State, 157 Ind. 45, 60 N. E. 708.

Michigan.— Emmer *v.* Bostock, 130 Mich. 341, 89 N. W. 964; People *v.* Wayne, 40 Mich. 62; People *v.* Kent County, 36 Mich. 332.

See 31 Cent. Dig. tit. "Jury," § 397.

In condemnation proceedings in county courts the fees of jurors are payable out of the county treasury. Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575. See also Penobscot County *v.* Bangor, 70 Me. 497.

Jury-fees in city courts are, under the Illinois statute of 1874, payable out of the city treasury, and this statute is not repealed by the act of 1879 providing for the payment of jurors "attending courts of record including the county courts" out of the county treasury (People *v.* Stookey, 98 Ill. 537); but in Michigan the statute making fees of jurors in courts of records having a seal payable out of the county treasury is held to apply to city courts (People *v.* Wayne, 40 Mich. 62).

The mere failure or refusal of a party to pay jury-fees when ordered by the court to do so does not, in the absence of proof that he is unable to pay the same, authorize the court to order the clerk to issue certificates for such payments out of the county treasury. *Ex p.* Makinney, (Cal. 1884) 3 Pac. 253.

63. See Costs, 11 Cyc. 104, 279.

Constitutionality of statutes providing for taxing of jury-fees as costs see *supra*, V, B, 1, d.

64. See *supra*, IV, C, 11.

65. See *supra*, V, B, 1, d.

cases the jurors are not allowed to separate but are confined and kept together, it has been held that the expense of their board and lodging during such confinement cannot, in the absence of statute, be charged either against the state[66] or the county,[67] but the contrary has been held in a number of cases,[68] notwithstanding the jurors were receiving a *per diem* allowance.[69]

XII. COMPETENCY FOR TRIAL OF CAUSE.

A. In General. The term "competency" as applied to jurors and as used in the following sections relates to their fitness to act as such in a particular case as distinguished from the qualifications necessary for jury duty in general.[70] A juror may possess all the qualifications necessary for jury duty and yet by reason of interest or some particular relation to one of the parties or the subject-matter of the controversy be incompetent to serve in a particular case,[71] or he may be incompetent in one case to be tried and competent in another.[72] The causes which may render a juror incompetent are so numerous that no attempt to enumerate them could be entirely successful,[73] and the fact that certain grounds are specified by statute does not prevent the exclusion of jurors on other grounds of incompetency.[74] Competency under the statute is a question of law,[75] but in other cases is a question of fact to be determined by the trial court in the exercise of a sound discretion,[76] and its decision will not be interfered with unless clearly

66. State *v.* Walker, 80 Mo. 610; State *v.* Clark, 57 Mo. 25.

67. Justices Richmond County Inferior Ct. *v.* State, 24 Ga. 82; Person *v.* Ozark County, 82 Mo. 491; State *v.* Walker, 80 Mo. 610; Bright *v.* Pike County, 69 Mo. 519; Young *v.* Buncombe County Com'rs, 76 N. C. 316. See also *In re* Jurors, Quincy (Mass.) 382.

In Missouri the act of 1883 now expressly provides for the allowance of such expenses unless in the case of conviction the same cannot be made out of defendant (State *v.* Walker, 80 Mo. 610. See also Person *v.* Ozark County, 82 Mo. 491); but the statute does not apply to such expenses incurred prior to the time at which the act took effect (State *v.* Walker, *supra*).

68. *Arkansas.*— Bates *v.* Independence County, 23 Ark. 722.

Maryland.— See Allegheny County Com'rs *v.* Howard County Com'rs, 57 Md. 393.

Michigan.—Stowell *v.* Jackson County, 57 Mich. 31, 23 N. W. 557.

Missouri.—Watson *v.* Moniteau County, 53 Mo. 133.

Ohio.— State *v.* Armstrong, 19 Ohio 116.

Pennsylvania.— Lycoming County Com'rs *v.* Hall, 7 Watts 290.

Wisconsin.—Fernekes *v.* Milwaukee County Sup'rs, 43 Wis. 303.

See 31 Cent. Dig. tit. "Jury," § 398.

The ground of these decisions is that a juror should not be required to pay his own expenses except when he is left free to select his mode of living, and that where by the exigencies of the case he is deprived of this privilege and compelled to live at the discretion of the court, such expenses become incidental to the administration of justice, and like the other incidental expenses of the court should be chargeable against the county. Bates *v.* Independence County, 23 Ark. 722; Stowell *v.* Jackson County, 57 Mich. 31, 23 N. W. 557; Com'rs *v.* Hall, 7 Watts (Pa.) 290.

Such expenses are like light and fuel used in the court-room, a part of the contingent expenses of the court. Com'rs *v.* Hall, 7 Watts (Pa.) 290.

69. Bates *v.* Independence County, 23 Ark. 722; Stowell *v.* Jackson County, 57 Mich. 31, 23 N. W. 557; Lycoming County Com'rs *v.* Hall, 7 Watts (Pa.) 290.

The juror's daily compensation is not intended to meet contingencies but only ordinary expenses incurred upon individual credit. Lycoming County Com'rs *v.* Hall, 7 Watts (Pa.) 290.

70. See Block *v.* State, 100 Ind. 357; and cases cited *infra*, notes 71 *et seq.*

Qualifications for jury duty in general see *supra*, VI, A.

71. Watson *v.* Tripp, 11 R. I. 98, 33 Am. Rep. 420.

72. State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; Watson *v.* Tripp, 11 R. I. 98, 33 Am. Rep. 420.

73. Block *v.* State, 100 Ind. 357 [*quoting* Thompson & M. Jur. § 175].

74. State *v.* Marshall, 8 Ala. 302; Gaff *v.* State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235; Block *v.* State, 100 Ind. 357; State *v.* Miller, 156 Mo. 76, 56 S. W. 907; State *v.* West, 69 Mo. 401, 33 Am. Rep. 506; Coppersmith *v.* Mound City R. Co., 51 Mo. App. 357.

The legislature's omission of grounds which clearly render a juror incompetent will not be allowed to impair the constitutional right to an impartial jury. Gaff *v.* State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235.

75. Coppersmith *v.* Mound City R. Co., 51 Mo. App. 357.

76. Block *v.* State, 100 Ind. 357; McCarthy *v.* Cass Ave., etc., R. Co., 92 Mo. 536, 4 S. W. 516; Coppersmith *v.* Mound City R. Co., 51 Mo. App. 357.

shown to have been abused.[77] It is the duty of the court to see that a jury of fair and impartial persons is impaneled,[78] and where it appears to the court that a juror is not such it is proper to exclude him.[79]

B. Witness in Case. While a juror may be examined as a witness,[80] it does not follow that a witness is always a competent juror;[81] and by the weight of authority either party may challenge a juror for cause who has been summoned as a witness by the other,[82] or who, although not summoned, is attending for the purpose of serving as a witness,[83] or whose name is indorsed upon an information as a witness for the state.[84] It has been held, however, that a juror is not incompetent merely because summoned as a witness if he has no knowledge of any of the material facts in issue,[85] or because he was called to testify on a motion for a change of venue;[86] nor will a party be permitted to summon persons as witnesses who have no knowledge of any of the material facts in the case and then challenge them merely because he himself has summoned them.[87]

C. Official Position. While public officials are generally exempt from jury duty,[88] they are not necessarily incompetent to serve as jurors.[89] So in an action against a city or municipal corporation a person is not incompetent as a juror

77. *Indiana.*— Tipton Light, etc., Co. *v.* Newcomer, 33 Ind. App. 42, 67 N. E. 548.

Missouri.— McCarthy *v.* Cass Ave., etc., R. Co., 92 Mo. 536, 4 S. W. 516.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789.

Ohio.— Dew *v.* McDivitt, 31 Ohio St. 139; Thompson *v.* Cleveland, etc., R. Co., 9 Ohio Dec. (Reprint) 209, 11 Cinc. L. Bul. 211.

Oklahoma.— Bradford *v.* Territory, 2 Okla. 228, 37 Pac. 1061.

See 31 Cent. Dig. tit. "Jury," § 400.

78. McCarty *v.* State, 26 Miss. 299; Bradford *v.* Territory, 2 Okla. 228, 37 Pac. 1061.

79. Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229; Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789.

A greater latitude of discretion is allowed when exercised in excusing jurors as to whose competency the court is in doubt than in their retention. Rhea *v.* State, 64 Nebr. 461, 88 N. W. 789.

A juror is incompetent and properly excluded who has formerly acted as an arbitrator in the same cause (Lloyd *v.* Nourse, 2 Rawle (Pa.) 49); or has grossly misbehaved upon the trial of a prior case (McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308).

80. White *v.* State, 73 Miss. 50, 19 So. 97; State *v.* Vari, 35 S. C. 175, 14 S. E. 392. See also, generally, WITNESSES.

81. Com. *v.* Joliffe, 7 Watts (Pa.) 585; State *v.* Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807.

There is a presumption of bias on the part of a witness in favor of the party calling him. Atkins *v.* State, 60 Ala. 45; Com. *v.* Joliffe, 7 Watts (Pa.) 585. *Compare* Rankin *v.* Nelson, 10 N. Y. St. 337.

But it is not ground for a new trial that a person served as a juror who was a witness on a former trial where no objection was made to him on this account. Fellow's Case, 5 Me. 333.

82. Baldwin *v.* State, 111 Ala. 11, 20 So. 528; Atkins *v.* State, 60 Ala. 45; Commander *v.* State, 60 Ala. 1; State *v.* Barber, 113 N. C. 711, 18 S. E. 515; Com. *v.* Joliffe, 7 Watts (Pa.) 585; State *v.* Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807. *Compare* Bell *v.* State, 44 Ala. 393; Rondeau *v.* New Orleans Imp., etc., Co., 15 La. 160; *In re* Fellows, 5 Me. 333; Rankin *v.* Nelson, 10 N. Y. St. 337.

In Texas it is provided by statute that a witness in the case may be challenged for cause, but the mere fact that a person has been summoned as a witness who has no knowledge of any material facts in the case does not make him a witness within the meaning of the statute. Seals *v.* State, 35 Tex. Cr. 138, 32 S. W. 545. See also East Line, etc., R. Co. *v.* Brinker, 68 Tex. 500, 3 S. W. 99.

If a juror is summoned by both sides either party may challenge. Baldwin *v.* State, 111 Ala. 11, 20 So. 528.

The fact that the juror is not called as a witness is immaterial and does not affect the error in overruling the challenge. Atkins *v.* State, 60 Ala. 45. *Compare* Rankin *v.* Nelson, 10 N. Y. St. 337.

83. State *v.* Barber, 113 N. C. 711, 18 S. E. 515.

84. State *v.* Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807.

85. Rankin *v.* Nelson, 10 N. Y. St. 337; Seals *v.* State, 35 Tex. Cr. 138, 32 S. W. 545. *Compare* State *v.* Barber, 113 N. C. 711, 18 S. E. 515.

86. State *v.* Wisdom, 84 Mo. 177; Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607.

87. Seals *v.* State, 35 Tex. Cr. 138, 32 S. W. 545.

88. See *supra*, VI, B, 1.

89. Page *v.* Lewis, 26 Me. 360; State *v.* Cosgrove, 16 R. I. 411, 16 Atl. 900; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

The bailiff of a grand jury is not incompetent as a juror on the trial of an indictment returned by them if he was not present at their deliberations and has no knowledge of the case. Spittorff *v.* State, 108 Ind. 171, 8 N. E. 911.

merely because he is an officer thereof;[90] but he is incompetent if he belongs to that branch of the municipal government which directly represents the municipality in actions by or against it,[91] or if he has already officially passed upon the particular claim in controversy,[92] or presided at a former trial of the case.[93]

D. Pecuniary Interest — 1. In General. It is well settled that a person is incompetent to serve as a juror in any case where he has a direct pecuniary interest in the result of the action,[94] regardless of the amount,[95] or in property the title to which is liable to be affected by the decision of the case,[96] or where he has a similar claim against defendant growing out of the same transaction or depending upon the same state of facts.[97]

2. Surety or Bail. A person is incompetent to serve as a juror upon the trial of a case where he is bail for defendant's appearance,[98] is surety for the costs of the action,[99] or is surety for one of the parties who is insolvent on an obligation which the result of the verdict might affect his ability to pay;[1] but being the

90. Scranton City *v.* Gore, 124 Pa. St. 595, 17 Atl. 144.

91. Boston *v.* Baldwin, 139 Mass. 315, 1 N. E. 417.

92. Lancaster County *v.* Lancaster City, 170 Pa. St. 108, 32 Atl. 567.

93. Anderson *v.* Fowler, 48 S. C. 8, 25 S. E. 900, holding that an alderman who as acting mayor presided at a trial for a violation of a city ordinance is incompetent to act as a juror on the trial of an appeal from the conviction.

94. *Illinois.*— Essex *v.* McPherson, 64 Ill. 349.

Indiana.— Zimmerman *v.* State, 115 Ind. 129, 17 N. E. 258.

Michigan.— Michigan Air Line R. Co. *v.* Barnes, 40 Mich. 383.

New Hampshire.— Page *v.* Contoocook Valley R. Co., 21 N. H. 438.

South Carolina.— Lynch *v.* Horry, 1 Bay 229.

Vermont.— Phelps *v.* Hall, 2 Tyler 401.

England.— Hesketh *v.* Braddock, 3 Burr. 1847.

See 31 Cent. Dig. tit. "Jury," § 407.

Judgment will be arrested if one of the jurors was interested in the question in controversy and the verdict is in favor of his interest, the losing party being ignorant of such interest at the time the jury were impaneled. Talmadge *v.* Northrop, 1 Root (Conn.) 454.

In a trial for murder where it appears that one of the jurors had stated that he would convict defendant and that there was money in it for him, a new trial will be granted. Doyal *v.* State, 73 Ga. 72.

An employee of a person pecuniarily interested in the result of the action is also incompetent. Gaff *v.* State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235; Zimmerman *v.* State, 115 Ind. 129, 17 N. E. 258.

An interest as executor of the estate of a deceased creditor will render a juror incompetent in an action the result of which will affect the assets of the estate of an insolvent debtor. Smull *v.* Jones, 6 Watts & S. (Pa.) 122.

A juror is incompetent who has a bet on the result of the case (Essex *v.* McPherson, 64 Ill. 349; Cluverious *v.* Com., 81 Va. 787), or a bet on some matter which will be determined by the result of the case (Seaton *v.* Swem, 58 Iowa 41, 11 N. W. 726).

Release of interest pending suit.— It has been held where it appears after the jury is impaneled that one of them is interested in the property in controversy, his incompetency may be restored by his executing a deed of release of such interest. Isaac *v.* Clarke, 2 Gill (Md.) 1.

95. *Illinois.*— Essex *v.* McPherson, 64 Ill. 349.

Iowa.— Seaton *v.* Swem, 58 Iowa 41, 11 N. W. 726.

New Hampshire.— Page *v.* Contoocook Valley R. Co., 21 N. H. 438.

South Carolina.— Lynch *v.* Horry, 1 Bay 229.

England.— Hesketh *v.* Braddock, 3 Burr. 1847.

See 31 Cent. Dig. tit. "Jury," § 407.

96. Jefferson County *v.* Lewis, 20 Fla. 980, holding that a person who is the holder of municipal bonds is incompetent as a juror in an action involving the liability of the municipality on other bonds of the same issue.

If the juror's title depends on different principles from those to be decided in the case at bar, he is not incompetent in an action of ejectment, although interested in other land claimed by plaintiff under the same title. Gratz *v.* Benner, 13 Serg. & R. (Pa.) 110.

97. Talmadge *v.* Northrop, 1 Root (Conn.) 454; Flagg *v.* Worcester, 8 Cush. (Mass.) 69; Davis *v.* Allen, 11 Pick. (Mass.) 466, 22 Am. Dec. 386.

98. Brazleton *v.* State, 66 Ala. 96; Anderson *v.* State, 63 Ga. 675; People *v.* McCollister, 1 Wheel. Cr. (N. Y.) 391; State *v.* Prater, 26 S. C. 198, 613, 2 S. E. 108.

99. Bradshaw *v.* Hubbard, 6 Ill. 390; Phelps *v.* Hall, 2 Tyler (Vt.) 401.

Although a juror is discharged from his liability and a new surety taken such preëxisting interest has been held to be a sufficient cause for challenge. Phelps *v.* Hall, 2 Tyler (Vt.) 401.

1. Ferriday *v.* Selser, 4 How. (Miss.) 506.

surety of a person not a party on a bond given in relation to the subject-matter of the suit, the liability upon which is in no way dependent upon the result of the suit, will not render a juror incompetent.[2]

3. Stock-Holder in Corporation. A person who is a stock-holder in a corporation is incompetent to act as a juror in an action in which the corporation is a party,[3] or has any pecuniary interest,[4] or where he is a stock-holder of a corporation which owns stock in another corporation which is a party;[5] and where by statute a stock-holder is personally liable for his proportion of the debts and liabilities of the corporation contracted or incurred while a member, he is incompetent if he was a member at the time the action was commenced, although not at the time of the trial;[6] but a juror is not incompetent because he and one of the parties are both stock-holders in the same corporation, where the corporation is in no way concerned in the action,[7] and where one corporation leases its property and franchises to another the stock-holders of the lessee company are not incompetent to serve as jurors in an action against the lessor company for a liability incurred prior to the lease, where the lessee company is in no way interested in the result of the trial.[8]

4. Member of Mutual Assessment Company, Church, or Order. In an action against a mutual insurance company a member thereof liable to be assessed to pay losses incurred by the company is incompetent to act as a juror;[9] and in an action between the trustees of two churches involving the right to the possession of certain property, the members of each church are incompetent.[10] In an action against a particular lodge of a purely eleemosynary or charitable order, such as Masons or Odd Fellows, the members of the particular lodge are incompetent to act as jurors,[11] but the rule does not apply to members of other lodges of the same order.[12]

5. Contributor to Fund or Member of Society For Prosecution of Offense. A juror is not incompetent to serve on a trial for a particular offense on the ground of pecuniary interest because he has contributed to the fund for the prosecution of that class of offenses,[13] or for the prosecution of a particular offense.[14] It has been held, however, that a person is not competent as a juror on a trial for a particular offense if he is a member of, and under obligation to contribute to, a society

2. Daniel *v.* Guy, 23 Ark. 50.

3. Peninsula R. Co. *v.* Howard, 20 Mich. 18; Fleeson *v.* Savage Silver Min. Co., 3 Nev. 157.

4. Page *v.* Contoocook Valley R. Co., 21 N. H. 438. But see Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25, holding that in proceedings to assess the damages severally sustained by two railroad corporations, for the taking of their lands lying contiguous to each other by a third railroad corporation for the road of the latter, a juror is not incompetent to sit in the case first tried because he is a stock-holder in the other corporation petitioning, whose case is to be tried immediately after.

If the corporation is not in any event liable by reason of the result of the action, the stock-holders thereof are not incompetent. Williams *v.* Smith, 6 Cow. (N. Y.) 166, holding that in an action for a penalty against a toll-gatherer of a turnpike company, the stock-holders of the company are not incompetent to act as jurors if the company is not in any event liable for the payment of the penalty.

5. McLaughlin *v.* Louisville Electric Light Co., 100 Ky. 173, 37 S. W. 851, 18 Ky. L. Rep. 693, 34 L. R. A. 812.

6. Fleeson *v.* Savage Silver Min. Co., 3 Nev. 157.

7. Brittain *v.* Allen, 13 N. C. 120.

8. Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420.

9. Martin *v.* Farmers' Mut. F. Ins. Co., 139 Mich. 148, 102 N. W. 656.

10. Cleage *v.* Hyden, 6 Heisk. (Tenn.) 73, holding, however, that such incompetency arises entirely out of the pecuniary interest in the result of the action and not by reason of membership in the same religious denomination.

11. Delaware Lodge No. 1, I. O. O. F. *v.* Allmon, 1 Pennew. (Del.) 160, 39 Atl. 1098.

12. Burdine *v.* Grand Lodge, 37 Ala. 478; Delaware Lodge No. 1, I. O. O. F. *v.* Allmon, 1 Pennew. (Del.) 160, 39 Atl. 1098.

13. State *v.* Hoxie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

14. Heacock *v.* State, 13 Tex. App. 97, holding that the incompetency, if any, in such cases does not arise out of the mere fact that he contributed money, which may have been done without any knowledge of defendant or opinion as to his guilt, but only where it appeared that it was due to prejudice against defendant or an opinion that he was guilty.

organized for the prosecution of such offenses,[15] or if he is one of a committee who caused defendant to be arrested and imprisoned without a warrant and who have agreed to indemnify each other against any prosecution for such action.[16]

6. Interest as Resident or Taxpayer — a. In General. While the decisions are by no means uniform, the weight of authority is that in the absence of any statutory provision to the contrary, a person who is a resident and taxpayer of a city or municipal corporation is not a competent juror in an action against the municipality,[17] or in which it is directly pecuniarily interested,[18] or in an action by the municipality to recover money due it,[19] or to recover a penalty which inures to the benefit of the municipality.[20] It has also been held that the same rule

15. State *v.* Moore, 48 La. Ann. 380, 19 So. 285; Com. *v.* Moore, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128; Com. *v.* Eagan, 4 Gray (Mass.) 18; State *v.* Fullerton, 90 Mo. App. 411; Jackson *v.* Sandman, 18 N. Y. Suppl. 894. But see Guy *v.* State, 96 Md. 692, 54 Atl. 879; Com. *v.* O'Neil, 6 Gray (Mass.) 343.

The cases are unsatisfactory on this point (Thompson & M. Jur. § 181), and seem to be based largely upon the ground that the fact of a person binding himself to pay money for such purposes raises a presumption that he is so biased with regard to the offense that he could not act impartially in the particular case (see Com. *v.* Moore, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128; Com. *v.* Eagan, 4 Gray (Mass.) 18; State *v.* Fullerton, 90 Mo. App. 411); for as said in a well considered case, there can be no direct pecuniary interest in the result of the action since neither the conviction nor acquittal of defendant would restore the contribution already made or relieve the obligation to pay a promised one (Guy *v.* State, 96 Md. 692, 54 Atl. 879).

16. Pierson *v.* State, 11 Ind. 341; Fleming *v.* State, 11 Ind. 234.

17. *Connecticut.*— Bailey *v.* Trumbull, 31 Conn. 581.

Delaware.— Robinson *v.* Wilmington, 8 Houst. 409, 32 Atl. 347.

Georgia.— Johnson *v.* Americus, 46 Ga. 80; Columbus *v.* Goetchius, 7 Ga. 139.

Indiana.— Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Hearn *v.* Greensburgh, 51 Ind. 119.

Iowa.— Cason *v.* Ottumwa, 102 Iowa 99, 71 N. W. 192; Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833; McGinty *v.* Keokuk, 66 Iowa 725, 24 N. W. 506; Cramer *v.* Burlington, 42 Iowa 315; Dively *v.* Cedar Falls, 21 Iowa 565; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Kansas.— Gibson *v.* Wyandotte, 20 Kan. 156; Kansas City *v.* Kirkham, 9 Kan. App. 236, 59 Pac. 675.

Missouri.— Fulweiler *v.* St. Louis, 61 Mo. 479.

New York.— Diveny *v.* Elmira, 51 N. Y. 506.

Oklahoma.— Guthrie *v.* Shaffer, (1898) 54 Pac. 698; Oklahoma City *v.* Meyers, 4 Okla. 686, 46 Pac. 552.

Oregon.— Portland *v.* Kamm, 5 Oreg. 362; Garrison *v.* Portland, 2 Oreg. 123.

Rhode Island.— Watson *v.* Tripp, 11 R. I. 98, 33 Am. Rep. 420.

Wisconsin.— See Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813.

See 31 Cent. Dig. tit. "Jury," § 411.

A contrary rule obtains in the following jurisdictions:

Kentucky.— Kemper *v.* Louisville, 14 Bush 87.

Michigan.— Detroit *v.* Detroit R. Co., 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600.

Nebraska.— Omaha *v.* Olmstead, 5 Nebr. 446.

North Carolina.— See Eastman *v.* Burke County, 119 N. C. 505, 26 S. E. 39.

Tennessee.— Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

Texas.—Marshall *v.* McAllister, (Civ. App. 1898) 43 S. W. 1043; Missouri, etc., R. Co. *v.* Bishop, (Civ. App. 1896) 34 S. W. 323.

See 31 Cent. Dig. tit. "Jury," § 411.

The ground of the decisions holding such persons to be incompetent as jurors is that they are directly interested because of their ultimate liability for a ratable proportion of the verdict, which increases the burden of taxation (Diveny *v.* Elmira, 51 N. Y. 506; Garrison *v.* Portland, 2 Oreg. 123); while those supporting the contrary rule hold that the interest in such cases is too slight to influence the jurors' verdict and that an application of the rule would also in many cases interfere with the administration of justice (Kemper *v.* Louisville, 14 Bush (Ky.) 87).

A taxpayer, although he is not a resident of the city, is incompetent as a juror in an action against the city. Kendall *v.* Albia, 73 Iowa 241, 34 N. W. 833.

Who may challenge.— It has been held that a city cannot challenge a juror in an action to which it is a party on the ground that he is a resident and taxpayer thereof, since any interest that he might have on this ground would be in favor of the city. Conklin *v.* Keokuk, 73 Iowa 343, 35 N. W. 444. *Contra*, Kansas City *v.* Kirkham, 9 Kan. App. 236, 59 Pac. 675, holding that either party may challenge on this ground.

18. Fine *v.* St. Louis Public Schools, 30 Mo. 166; Eberle *v.* St. Louis Public Schools, 11 Mo. 247.

19. Russell *v.* Hamilton, 3 Ill. 56. *Contra*, Massachusetts Bay *v.* Paxton, Quincy (Mass.) 548.

20. Alexandria *v.* Brockett, 1 Fed. Cas.

should be applied to residents and taxpayers of counties in actions where the county is a party or pecuniarily interested,[21] unless the application of the rule would result in a failure of justice, as in cases where a change of venue could not be granted.[22] There are, however, in some jurisdictions statutes providing that the corporate interest of a resident or taxpayer shall not render a juror incompetent,[23] or that residents of a county shall be competent to act as jurors in actions where the county is a party or interested,[24] and such provisions are not unconstitutional as impairing the right to a trial by an impartial jury.[25]

b. In Criminal Prosecutions and Proceedings. A resident and taxpayer of a city is not incompetent to act as a juror on a trial for a violation of a city ordinance,[26] nor is a resident and taxpayer of a county or municipality incompetent as a juror on the trial of a criminal prosecution for an offense committed against the property thereof,[27] or on a criminal trial where a part of the punishment may be a fine which if imposed would be payable into the treasury of the county or municipality;[28] but in a bastardy proceeding persons who are inhabitants of the

No. 181, 1 Cranch C. C. 505; Hesketh *v.* Braddock, 3 Burr. 1847.

In a qui tam action to recover a penalty one moiety of which would by statute go to the poor of the town where the offense was committed, the inhabitants of the town are incompetent to act as jurors. Wood *v.* Stoddard, 2 Johns. (N. Y.) 194.

21. Peck *v.* Essex County, 21 N. J. L. 656 [*reversing* 20 N. J. L. 457]; Reg. *v.* Wilts County, 6 Mod. 307. *Contra*, Pool *v.* Warren County, 123 Ga. 205, 51 S. E. 328; Eastman *v.* Burke County, 119 N. C. 505, 26 S. E. 39; Martin *v.* Somerville County, 21 Tex. Civ. App. 308, 52 S. W. 556.

If the interest of the inhabitants is uncertain they are not incompetent. Pike County *v.* Griffin, etc., Plank Road Co., 15 Ga. 39, holding that in an action for damages brought by a county against a plank-road company for violating the provisions of the charter, where an injunction against a further operation of the road is asked until security is given for payment of such damages as may be awarded, the granting of the injunctive relief would be such an inconvenience to the citizens of the county as to render it uncertain whether they would consider themselves as injured or benefited by the action.

22. Bassett *v.* Governor, 11 Ga. 207.

23. Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238; Cartersville *v.* Lyon, 69 Ga. 577; New Orleans *v.* Ripley, 2 La. 344.

Where a city charter provides that the inhabitants of a city shall be competent to act as jurors in actions by or against the city, it is error for the court to exclude them on the ground of interest. Hildreth *v.* Troy, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686.

24. Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; O'Brien *v.* Vulcan Iron-Works, 7 Mo. App. 257; Hildreth *v.* Troy, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686; Watson *v.* Dewitt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

The Missouri statute providing that in actions by or against a county the inhabitants thereof shall be competent as jurors applies to the city of St. Louis, which has for most purposes the attributes of a county. O'Brien *v.* Vulcan Iron-Works, 7 Mo. App. 257.

25. See *supra*, V, F, 3.

26. State *v.* Wells, 46 Iowa 662. See also Williams *v.* Warsaw, 60 Ind. 457; Anderson *v.* Fowler, 48 S. C. 8, 25 S. E. 900.

27. *Georgia.*— Phillips *v.* State, 29 Ga. 105.

Kansas.— State *v.* McDonald, 59 Kan. 241, 52 Pac. 453.

Massachusetts.— Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

New York.— People *v.* Bennett, 37 N. Y. 117, 4 Transcr. App. 32, 4 Abb. Pr. N. S. 89, 93 Am. Dec. 551.

Washington.— State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

See 31 Cent. Dig. tit. "Jury," § 412.

There is no pecuniary interest in such criminal cases since the county or municipality can neither gain nor lose by defendant's conviction or acquittal. Phillips *v.* State, 29 Ga. 105.

Where an attorney is employed by a city council to prosecute the murder of a policeman the liability of residents of the city to taxation for payment of such attorney's fees is too remote and contingent to affect their competency as jurors on the trial for the murder. Doyal *v.* State, 70 Ga. 134.

Under a statutory provision that on a prosecution for maliciously secreting the goods, chattels, or valuable papers of another, defendant shall be liable to the party injured in a sum equal to three times the value of the property destroyed or injured, the inhabitants of a town are pecuniarily interested and incompetent to act as jurors on the trial of a prosecution for maliciously secreting a book of the town records. State *v.* Williams, 30 Me. 484.

28. State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878; Middletown *v.* Ames, 7 Vt. 166.

A distinction must be made between actions the object of which is to recover a penalty and actions where a fine may be imposed the recovery of which is not the object of the

town where complainant resides are directly interested and incompetent to act as jurors where by statute such town is liable for the child's support.[29]

E. Relationship or Business Connection — 1. Relationship — a. To Party — (I) *In General.* A juror is incompetent and subject to challenge if he is related within the prohibited degree, to either party,[30] which is reckoned according to the rules of the civil law.[31] At common law a juror was incompetent if the relationship was within the ninth degree,[32] and this rule has been adopted in some jurisdictions,[33] while in others a closer degree of relationship is prescribed.[34] In the absence of statutory provision as to the degree of relationship, the question is to be determined by the court according to the probability of prejudice or partiality resulting therefrom;[35] and the court may, on the ground of probable prejudice, sustain a challenge to a juror, although the relationship is not within the degree prescribed by statute as rendering the juror incompetent,[36] or where

action but merely incidental thereto. State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878.

29. Hawes *v.* Gustin, 2 Allen (Mass.) 402.

30. *Florida.*— O'Connor *v.* State, 9 Fla. 215.

Georgia.— Ledford *v.* State, 75 Ga. 856; Rust *v.* Shackleford, 47 Ga. 538.

Indiana.— Hudspeth *v.* Herston, 64 Ind. 133.

Maine.— Hardy *v.* Sprowle, 32 Me. 310.

Missouri.— State *v.* Walton, 74 Mo. 270; Price *v.* Patrons', etc., Home Protection Co., 77 Mo. App. 236.

New Jersey.—Hinchman *v.* Clark, 1 N. J. L. 446.

New York.— People *v.* Clark, 62 Hun 84, 16 N. Y. Suppl. 473, 695; Paddock *v.* Wells, 2 Barb. Ch. 331.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* Perry, 44 N. C. 330.

Tennessee.— Parrish *v.* State, 12 Lea 655.

Texas.— Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410; Davidson *v.* Wallingford, (Civ. App. 1895) 30 S. W. 286; Stringfellow *v.* State, 42 Tex. Cr. 588, 61 S. W. 719.

Canada.— Lynds *v.* Hoar, 10 Nova Scotia 327.

See 31 Cent. Dig. tit. "Jury," §§ 413–415.

In an action by an administrator the fact that a juror is related to the administrator is a ground of challenge in the same manner as if he sued in his own right. Balsbaugh *v.* Frazer, 19 Pa. St. 95.

31. *Alabama.*— Danzey *v.* State, 126 Ala. 15, 28 So. 697.

Indiana.— Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549.

Maine.— Hardy *v.* Sprowle, 32 Me. 310.

New York.— People *v.* Clark, 62 Hun 84, 16 N. Y. Suppl. 473, 695.

Ohio.— Kahn *v.* Reedy, 8 Ohio Cir. Ct. 345, 4 Ohio Cir. Dec. 284.

Vermont.— Churchill *v.* Churchill, 12 Vt. 661.

See 31 Cent. Dig. tit. "Jury," §§ 413–415.

Canon and civil law distinguished.— By the canon law persons were considered as near related to each other as they were to their common ancestor, and therefore the number of degrees most distant from their common ancestor was their degree of relationship; but by the civil law persons are related only in that number of degrees which exist between them to be counted by reckoning from one up to their common ancestor and down to the other (Churchill *v.* Churchill, 12 Vt. 661); in which computation the person from whom the count begins is excluded and he in whom it ends is counted (People *v.* Clark, 62 Hun (N. Y.) 84, 16 N. Y. Suppl. 473, 695).

32. Tegarden *v.* Phillips, (Ind. App. 1894) 39 N. E. 212; Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331; State *v.* Perry, 44 N. C. 330; Churchill *v.* Churchill, 12 Vt. 661.

33. *Florida.*— O'Connor *v.* State, 9 Fla. 215.

Georgia.— Ledford *v.* State, 75 Ga. 856.

Iowa.— Wisehart *v.* Dietz, 67 Iowa 121, 24 N. W. 752.

New York.— People *v.* Clark, 62 Hun 84, 16 N. Y. Suppl. 473, 695; Paddock *v.* Wells, 2 Barb. Ch. 331.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657; State *v.* Perry, 44 N. C. 330.

Canada.— Lynds *v.* Hoar, 10 Nova Scotia 327.

See 31 Cent. Dig. tit. "Jury," §§ 413–415.

34. *Alabama.*— Danzey *v.* State, 126 Ala. 15, 28 So. 697.

Arkansas.— Arkansas So. R. Co. *v.* Loughridge, (1898) 45 S. W. 907.

California.— Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293.

Indiana.— Hudspeth *v.* Herston, 64 Ind. 133; Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549.

Maine.— Hardy *v.* Sprowle, 32 Me. 310.

Missouri.— Price *v.* Patrons', etc., Protection Co., 77 Mo. App. 236.

Ohio.— Kahn *v.* Reedy, 8 Ohio Cir. Ct. 345.

Tennessee.— Parrish *v.* State, 12 Lea 655.

Texas.— Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410.

See 31 Cent. Dig. tit. "Jury," §§ 413–415.

35. State *v.* Brock, 61 S. C. 141, 39 S. E. 359; Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905.

The same degree of relationship as would disqualify a judge has in some cases been adopted and approved as a proper standard. Woodbridge *v.* Raymond, Kirby (Conn.) 279; State *v.* Brock, 61 S. C. 141, 39 S. E. 359; Churchill *v.* Churchill, 12 Vt. 661.

36. Wisehart *v.* Dietz, 67 Iowa 121, 24 N. W. 752.

the degree of relationship is uncertain,[37] or where there is any family connection reasonably calculated to prevent the juror from being impartial although not amounting to actual relationship.[38]

(II) *By Affinity.* A juror is incompetent if related to a party within the prohibited degree, whether such relationship is by consanguinity or affinity.[39] In the application of this rule marriage relates each of the contracting parties by affinity to the blood relations of the other,[40] but not to the other relations by affinity ;[41] nor is there any relation between the relatives of one and the relatives of the other whether by blood [42] or by marriage.[43]

b. To Persons Interested But Not Parties — (I) *In General.* A juror is incompetent if related within the prohibited degree to a person directly and beneficially interested in the result of the litigation, although not a party of record,[44] and notwithstanding the statute in terms referred to relationship to a "party."[45] So a juror is incompetent if related to a stock-holder of a corporation which is a party,[46] or directly interested in the result of the litiga-

37. State *v.* Hatfield, (W. Va. 1900) 37 S. E. 626.

38. Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760; State *v.* Kellogg, 104 La. 580, 29 So. 285.

39. *Delaware.*— Armstrong *v.* Timmons, 3 Harr. 342.

Indiana.— Trullinger *v.* Webb, 3 Ind. 198.

Maine.— Hardy *v.* Sprowle, 32 Me. 310.

New York.— Paddock *v.* Wells, 2 Barb. Ch. 331.

North Carolina.— State *v.* Perry, 44 N. C. 330.

See 31 Cent. Dig. tit. "Jury," § 414.

Affinity properly means the tie which arises between the husband and the blood relatives of the wife and *vice versa* (North Arkansas, etc., R. Co. *v.* Cole, (Ark. 1902) 70 S. W. 312; Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331); and the blood relatives of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her (Paddock *v.* Wells, *supra*).

Affinity defined see 2 Cyc. 38.

Consanguinity defined see 8 Cyc. 582.

40. Burns *v.* State, 89 Ga. 527, 15 S. E. 748; State *v.* Potts, 100 N. C. 457, 6 S. E. 657; Churchill *v.* Churchill, 12 Vt. 661.

A juror is incompetent therefore if he is the husband of a party's niece. Trullinger *v.* Webb, 3 Ind. 198; Hinchman *v.* Clark, 1 N. J. L. 509.

41. Baldwin *v.* State, 120 Ga. 188, 47 S. E. 558; Oneal *v.* State, 47 Ga. 229; Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549; Doyle *v.* Com., 4 Va. 143, 40 S. E. 925.

It is only through one marriage that relationship by affinity extends. Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549.

42. *Alabama.*— Kirby *v.* State, 89 Ala. 63, 8 So. 110.

Arkansas.— North Arkansas, etc., R. Co. *v.* Cole, (1902) 70 S. W. 312.

Georgia.— Baldwin *v.* State, 120 Ga. 188, 47 S. E. 558; Smith *v.* Smith, 119 Ga. 239, 46 S. E. 106; Keener *v.* State, 97 Ga. 388, 24 S. E. 28; Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; McDuffie *v.* State, 90 Ga. 786, 17 S. E. 105; Burns *v.* State, 89 Ga. 527, 15 S. E. 748.

Indiana.—Tegarden *v.* Phillips, (App. 1894) 39 N. E. 212.

Kentucky.— Hensley *v.* Com., 82 S. W. 456, 26 Ky. L. Rep. 767.

Maine.— Chase *v.* Jennings, 38 Me. 44.

Massachusetts.— Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144.

New York.— Paddock *v.* Wells, 2 Barb. Ch. 331.

Texas.—Johnson *v.* Richardson, 52 Tex. 481.

See 31 Cent. Dig. tit. "Jury," § 414.

A juror is not incompetent therefore because his brother married a party's sister (Burns *v.* State, 89 Ga. 527, 15 S. E. 748; Chase *v.* Jennings, 38 Me. 44), or his sister married a party's brother (Smith *v.* Smith, 119 Ga. 239, 46 S. E. 106; Johnson *v.* Richardson, 52 Tex. 481), or a party's nephew (Rank *v.* Shewey, 4 Watts (Pa.) 218), or because his aunt married a party's uncle (Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144).

43. North Arkansas, etc., R. Co. *v.* Cole, 71 Ark. 38, 70 S. W. 312; Central, etc., R. Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315.

44. Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293; McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501; Sehorn *v.* Williams, 51 N. C. 575; Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410. *Compare* Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. 949.

The relative of a surety for the prosecution of a suit is not a competent juror. Sehorn *v.* Williams, 51 N. C. 575.

Relationship to a person having no interest at the time of the trial does not render a juror incompetent. Seavy *v.* Dearborn, 19 N. H. 351, holding that in an action against a sheriff for the wrongful act of his deputy, the father of the deputy is not incompetent where the deputy has himself been released from all liability and admitted as a witness.

45. Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293; Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410. *Compare* Pettis *v.* Pomfret, 28 Conn. 566.

46. University Bank *v.* Tuck, (Ga. 1899) 33 S. E. 70; Georgia R. Co. *v.* Hart, 60 Ga. 550; Dangerfield Nat. Bank *v.* Ragland,

tion,[47] or in an action to which a mutual insurance company is a party if related to a member of the company who is liable to be assessed for losses incurred by it.[48] The rule does not apply where the interest of the person not a party is remote and merely contingent,[49] or where the juror is related to one who is merely a witness in the case.[50] In criminal cases a juror is incompetent if related to a prosecuting witness,[51] or to a person who has voluntarily taken an active part in the prosecution,[52] or is particularly interested in the result,[53] or who is under indictment for the same offense.[54]

(II) *Person Injured by Commission of Offense.* In a criminal prosecution a juror is incompetent if related within the prohibited degree to the person injured by the commission of the offense,[55] and if the injury is to several persons the relatives of either are incompetent, although as to the different persons injured the offense is charged by different indictments.[56]

c. Relationship Terminated by Death. Relationship by affinity is dissolved by the death of either party to the marriage which created the affinity, provided the deceased party left no issue living;[57] but if there be living issue of the marriage the relationship by affinity is preserved and continued through the medium of such issue.[58]

d. Relationship to Attorney or Counsel. A juror is not incompetent in a crimi-

(Tex. Civ. App. 1899) 51 S. W. 661; Young *v.* Marine Ins. Co., 30 Fed. Cas. No. 18,163, 1 Cranch C. C. 452.

47. McElhannon *v.* State, (Ga. 1896) 26 S. E. 501.

48. Moore *v.* Farmers' Mut. Ins. Assoc., (Ga. 1899) 33 S. E. 65; Price *v.* Patrons', etc., Home Protection Co., 77 Mo. App. 236.

49. Manion *v.* Flynn, 39 Conn. 330, holding that in a bastardy proceeding a juror is not incompetent because related to an inhabitant of the town which may become liable for the infant's support unless the reputed father is rendered liable therefor.

It is not safe to lay down any precise rule as to the nature and extent of the interest necessary to render the juror incompetent, but he should be held to be so whenever the circumstances are such as to raise an inference that he would not be impartial. Sehorn *v.* Williams, 51 N. C. 575.

50. Faith *v.* Atlanta, 78 Ga. 779, 4 S. E. 3.

A statement of an intention to impeach a witness made by counsel after the jury is impaneled may, however, be sufficient ground for excusing a juror who is a relative of such witness. State *v.* Christian, 30 La. Ann. 367.

51. Ledford *v.* State, 75 Ga. 856; People *v.* Clark, 62 Hun (N. Y.) 84, 16 N. Y. Suppl. 473, 695; Hamilton *v.* State, 101 Tenn. 417, 47 S. W. 695.

52. Dumas *v.* State, 62 Ga. 58.

53. State *v.* Anthony, 29 N. C. 234; Wright *v.* State, 12 Tex. App. 163.

On a prosecution of a jailer for negligently allowing the escape of prisoners, a juror who is related to the escaped prisoners is not competent. State *v.* Baldwin, 80 N. C. 390.

54. Thomas *v.* State, 133 Ala. 139, 32 So. 250. See also Smith *v.* State, 61 Miss. 754.

55. State *v.* Walton, 74 Mo. 270; Powers *v.* State, 27 Tex. App. 700, 11 S. W. 646; Page *v.* State, 22 Tex. App. 551, 3 S. W. 745; Jaques *v.* Com., 10 Gratt. (Va.) 690.

A juror is incompetent if related to the owner of the stolen property on a prosecution for the theft (Page *v.* State, 22 Tex. App. 551, 3 S. W. 745), to the person whose house was burned on a prosecution for arson (Jacques *v.* Com., 10 Gratt. (Va.) 690), or to the deceased on a prosecution for murder (Garner *v.* State, 76 Miss. 515, 25 So. 363; State *v.* Byrd, 72 S. C. 104, 51 S. E. 542).

If the juror is not in fact related, according to the rules previously stated in the text, he is not incompetent, as where on a murder trial the juror is a cousin of the deceased's stepfather (Kirby *v.* State, 89 Ala. 63, 8 So. 110), or the juror's stepson is a cousin of deceased (Moses *v.* State, 11 Humphr. (Tenn.) 232).

56. Wright *v.* State, 12 Tex. App. 163, holding that on a trial for stealing the horse of a certain person, a juror is incompetent if related to another person whose horse defendant by another indictment is charged with stealing at the same time and place.

57. *Georgia.*— Miller *v.* State, 97 Ga. 653, 25 S. E. 366.

Massachusetts.— Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144.

New York.— Cain *v.* Ingham, 7 Cow. 478; Paddock *v.* Wells, 2 Barb. Ch. 331.

North Carolina.— State *v.* Shaw, 25 N. C. 532.

England.— Mounson's Case, 1 Leon. 88.

See 31 Cent. Dig. tit. "Jury," § 418.

Compare Bank *v.* Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274.

The burden of proving the existence of issue necessary to continue the relationship is upon the party asserting the juror's incompetency. Miller *v.* State, 97 Ga. 653, 25 S. E. 366; State *v.* Shaw, 25 N. C. 532.

58. Dearmond *v.* Dearmond, 10 Ind. 191; Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331; Stringfellow *v.* State, 42 Tex. Cr. 588, 61 S. W. 719.

nal action because related to the prosecuting attorney,[59] or in a civil action because related to the attorney of one of the parties,[60] except where such attorney is directly interested in the event of the action.[61]

2. Business Connection or Relations — a. With Party. A person is not competent to serve as a juror in an action where there exists any business relation between him and one of the parties calculated to influence his verdict.[62] This rule applies where a party and a juror are partners in business,[63] or where there exists between them the relation of master and servant,[64] employer and employee,[65]

59. People *v.* Waller, 70 Mich. 237, 38 N. W. 261; State *v.* Jones, 64 Mo. 391; State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

Relationship to one acting as a partisan for the state in a criminal prosecution affords no ground of challenge for cause to such person as a juror. Atkinson *v.* State, 112 Ga. 411, 37 S. E. 747.

60. Fait, etc., Co. *v.* Truxton, 1 Pennew. (Del.) 24, 39 Atl. 457; Funk *v.* Ely, 45 Pa. St. 444; Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214; Kelso *v.* Kuehl, 116 Wis. 495, 93 N. W. 455.

61. Crockett *v.* McLendon, 73 Ga. 85; Melson *v.* Dickson, 63 Ga. 682, 36 Am. Rep. 128.

Where an attorney is compensated by way of a contingent fee to be taken out of the amount recovered a relative of such attorney is incompetent as a juror. Melson *v.* Dixon, 63 Ga. 682, 36 Am. Rep. 128.

62. *Georgia.*— Central R. Co. *v.* Mitchell, 63 Ga. 173.

Iowa.— Stumm *v.* Hummell, 39 Iowa 478.

Mississippi.— Louisville, etc., R. Co. *v.* Mask, 64 Miss. 738, 2 So. 360.

Nebraska.— Omaha, etc., R. Co. *v.* Cook, 37 Nebr. 435, 55 N. W. 943; Burnett *v.* Burlington, etc., R. Co., 16 Nebr. 332, 20 N. W. 280.

Pennsylvania.— Harrisburg Bank *v.* Forster, 8 Watts 304.

See 31 Cent. Dig. tit. "Jury," § 420.

A juror who has business relations with a person jointly indicted with defendant but not on trial owing to a severance granted by the court is not a competent juror. Minich *v.* People, 8 Colo. 440, 9 Pac. 4.

The executor of a deceased creditor is not a competent juror in an action of ejectment by the heirs at law of an insolvent debtor. Smull *v.* Jones, 6 Watts & S. (Pa.) 122.

A juror who is a shipper over a certain railroad, who admits that he has received favors from the road and desires to retain its favorable consideration, is not a competent juror in an action to which the railroad company is a party, although he states that he can render an impartial verdict. Omaha, etc., R. Co. *v.* Cook, 37 Nebr. 435, 55 N. W. 943.

It is not error for the court to reject a juror who is connected with a corporation which manufactures articles for a company of which defendant is a member. Laidlaw *v.* Sage, 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770.

63. Stumm *v.* Hummell, 39 Iowa 478.

64. State *v.* Coella, 3 Wash. 99, 28 Pac. 28; 3 Blackstone Comm. 363. See also Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 304.

A person who was an employer of decedent at the time the latter was murdered is not a competent juror on a trial for the murder. State *v.* Coella, 3 Wash. 99, 28 Pac. 28.

65. *Georgia.*— Central R. Co. *v.* Mitchell, 63 Ga. 173.

Indiana.— Block *v.* State, 100 Ind. 357.

Mississippi.— Louisville, etc., R. Co. *v.* Mask, 64 Miss. 738, 2 So. 360; Hubbard *v.* Rutledge, 57 Miss. 7.

Nebraska.— Burnett *v.* Burlington, etc., R. Co., 16 Nebr. 332, 20 N. W. 280.

Texas.— Houston, etc., R. Co. *v.* Smith, (Civ. App. 1899) 51 S. W. 506.

See 31 Cent. Dig. tit. "Jury," § 420.

The fact that the party is a corporation does not affect the rule that an employee is incompetent to act as a juror (Burnett *v.* Burlington, etc., R. Co., 16 Nebr. 332, 20 N. W. 280); but in an action against a corporation a juror is not incompetent merely because he is in the employ of a stock-holder of the corporation (Frederickton Boom Co. *v.* McPherson, 13 N. Brunsw. 8).

The fact that a juror was formerly an employee of one of the parties, if he is not such at the time of the trial, is not of itself sufficient to render him incompetent. East Line, etc., R. Co. *v.* Brinker, 68 Tex. 500, 3 S. W. 99; Swope *v.* Seattle, 36 Wash. 113, 78 Pac. 607.

A juror who is an employee of defendant in another suit brought by the same plaintiff, involving the same issues, is not necessarily incompetent; but the fact is sufficient to support a challenge to the favor, the effect of which is to require an investigation by the court into the question whether the juror is biased in point of fact. Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291.

Where a juror is clerk of a firm on intimate relations with some of the parties in interest, and which became their bondsmen upon the instrument which secured them in the possession of the property in controversy, it is not error for the court to excuse him. Hill *v.* Corcoran, 15 Colo. 270, 25 Pac. 171.

The employee of a company not a party to the suit but engaged in the same business as the company which is a party is not incompetent, where it does not appear that such relation would be in any way calculated to influence his judgment. Kohler *v.* West Side, etc., R. Co., 99 Wis. 33, 74 N. W. 568.

landlord and tenant,[66] or attorney and client.[67] There may, however, be an existing business relation between a party and a juror of a character in no way calculated to influence the latter and which will not be a ground of challenge for cause.[68]

b. With Attorney or Counsel. A juror is incompetent if he is a deputy in the employ of the prosecuting attorney;[69] and it has also been held that a juror is incompetent if he is a client of the attorney for one of the parties,[70] but not by reason of having previously been a client, where the relation is terminated at the time of the action,[71] or because he has had business relations with the attorney,[72] boards at the attorney's house during the term of court,[73] or has an office in the rooms occupied by the attorney;[74] because he and one of the attorneys are both in the employ of the same company;[75] or because such attorney is the prosecuting counsel of the city in which the juror lives.[76]

F. Prior Services as Juror[77] **— 1. Service in Same Case — a. In General.** A juror who has rendered a verdict in a case is incompetent to serve as a juror upon a subsequent trial of the same case,[78] and by the weight of authority a juror who was sworn and impaneled in the case is incompetent upon a subsequent trial

66. Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29; Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214; Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 304. But see Arnold *v.* Producer's Fruit Co., 141 Cal. 738, 75 Pac. 326.

An abolition of the landlord's right to distrain for rent does not affect the rule. Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29.

A tenant of a person not a party, but having a mere contingent interest in the event of the suit, as where the juror is tenant of a bondsman for the prosecution of the suit, is not necessarily incompetent. Brown *v.* Wheeler, 18 Conn. 199.

67. 3 Blackstone Comm. 363. See also State *v.* Carter, 121 Iowa 135, 96 N. W. 710; McCorkle *v.* Mallory, 30 Wash. 632, 71 Pac. 186.

68. Cummings *v.* Gann, 52 Pa. St. 484; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015. See also Kennedy *v.* Holladay, 105 Mo. 24, 16 S. W. 688.

The mere fact that a juror is indebted to a party, where it is not shown that he has been favored by the creditor or that the amount of the indebtedness and the juror's financial condition are such as to place him at the other's mercy, is not sufficient to render him incompetent (Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015); but the parties should be allowed to question jurors as to such indebtedness to ascertain the real state of feeling between them and the party (Davis *v.* Panhandle Nat. Bank, (Tex. Civ. App. 1895) 29 S. W. 926).

The fact that a juror boards with a party who is an innkeeper, where the juror lives entirely at his own expense, is not a ground for principal challenge. Cummings *v.* Gann, 52 Pa. St. 484.

69. Block *v.* State, 100 Ind. 357.

70. State *v.* McGraw, (Ida. 1899) 59 Pac. 178.

In Illinois and Washington the statutes making the relation of attorney and client a ground of challenge to a juror are construed as applying only where such relation exists between the juror and a party, and not where the juror is merely a client of the attorney of one of the parties in other litigation. State *v.* Carter, (Iowa 1903) 96 N. W. 710; McCorkle *v.* Mallory, 30 Wash. 632, 71 Pac. 186.

Where a justice of the peace is drawn as a juror the fact that the prosecuting attorney is *ex officio* his legal adviser as justice is not sufficient to render him incompetent. State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

71. Fairbanks *v.* Irwin, 15 Colo. 366, 25 Pac. 701; Brown *v.* McNair, 5 Indian Terr. 67, 82 S. W. 677; People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

72. Scott *v.* Rues, 56 N. Y. Suppl. 1057.

73. Statham *v.* State, 84 Ga. 17, 10 S. E. 493.

74. State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543.

75. Miller *v.* South Covington, etc., R. Co., 74 S. W. 747, 25 Ky. L. Rep. 207.

76. O'Connor *v.* Bucklin, 59 N. H. 589.

77. **Prior service within a specified time as** a disqualification and ground of challenge see *supra*, VI, A, 14; as a ground of exemption see *supra*, VI, B, 1.

78. *Kentucky.*— Herndon *v.* Bradshaw, 4 Bibb 45.

Louisiana.—Henry *v.* Cuvillier, 3 Mart. N. S. 524.

North Carolina.— Kaighn *v.* Kennedy, 1 N. C. 26.

Virginia.— Hunter *v.* Matthews, 12 Leigh 228.

England.— See Argent *v.* Darrell, 2 Salk. 648.

See 31 Cent. Dig. tit. "Jury," § 425.

The trial of a plea in bar to an indictment is not a trial of the case and the fact that a juror has served on the trial of such plea is not a ground for challenge on the trial of the accused under the indictment. Carano *v.* State, 24 Ohio Cir. Ct. 93.

If the juror is not objected to it is not ground for an arrest of judgment that he served upon a former trial, although it would

although on the former trial no verdict was rendered,[79] as where the jury were discharged because unable to agree,[80] or because of a continuance granted after the introduction of evidence;[81] but on the contrary it has been held that a juror is not incompetent if on the former trial he did not render a verdict and it does not appear that he has formed or expressed an opinion on the merits of the case.[82]

b. Rejection at Former Trial. A juror is not incompetent because he was a member of the panel summoned at the time of a former trial if he did not sit in the trial of the case,[83] as where he was challenged by one of the parties,[84] or excused by the court,[85] or the entire panel discharged upon the granting of a change of venue.[86]

c. Member of Grand Jury Finding Indictment. One who served as a grand juror on the finding of an indictment is incompetent to serve as a petit juror on the trial of the offense,[87] or on the trial of a civil action based upon the same offense,[88] and in an action of malicious prosecution for causing plaintiff to be indicted he may challenge any juror who was on the grand jury that found the indictment.[89]

2. Service in Similar Cases — a. In General. A juror is not incompetent

have been a ground of challenge. Bellows *v.* Williams, Kirby (Conn.) 166.

79. Dothard *v.* Denson, 72 Ala. 541; Weeks *v.* Medler, 20 Kan. 57; and cases cited *infra*, notes 80, 81.

80. Dothard *v.* Denson, 72 Ala. 541; Scott *v.* McDonald, 83 Ga. 28, 9 S. E. 770; Hester *v.* Chambers, 84 Mich. 562, 48 N. W. 152; Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

A juror who acted in condemnation proceedings where the jury disagreed and were discharged is incompetent upon a subsequent proceeding to condemn the same land for the same purposes. Hester *v.* Chambers, 84 Mich. 562, 48 N. W. 152.

Discharge by court of its own motion.— The fact that certain jurors summoned on the panel served upon a former trial where a mistrial was declared does not authorize the court of its own motion and without defendant's consent to exclude such jurors and order talesmen to be summoned in their places. Cunneen *v.* State, 96 Ga. 406, 23 S. E. 412.

81. Weeks *v.* Medler, 20 Kan. 57.

82. Whitner *v.* Hamlin, 12 Fla. 18 (where the jury were discharged because unable to agree); Atkinson *v.* Allen, 12 Vt. 619, 36 Am. Dec. 361 (where a verdict was directed by the court).

Where the jurors were not properly sworn and were discharged after some evidence had been introduced, and a new jury was impaneled, the same jurors are competent to serve, provided that they have formed no opinion from the evidence introduced before their discharge. Leas *v.* Patterson, 38 Ind. 465.

83. Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670; and cases cited *infra*, notes 84, 85, 86.

84. *Georgia.*— Blackman *v.* State, 80 Ga. 785, 7 S. E. 626; State *v.* Henley, R. M. Charlt. 505.

New York.— People *v.* Tweed, 50 How. Pr. 280.

Tennessee.— Robertson *v.* State, 4 Lea 425.

Texas.— Easterwood *v.* State, 34 Tex. Cr. 400, 31 S. W. 294; Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670; Wilson *v.* State, 3 Tex. App. 63.

Virginia.— Smith *v.* Com., 7 Gratt. 593.

See 31 Cent. Dig. tit. "Jury," § 424.

But if a juror shows any bias on his *voir dire* examination on account of a previous challenge such bias would be a good cause of challenge. See Wilson *v.* State, 3 Tex. App. 63.

A juror challenged on the trial of another defendant charged with the same offense is not incompetent. Cargen *v.* People, 39 Mich. 549; State *v.* Mathews, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136.

85. Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

86. State *v.* Mathews, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136.

87. *Alabama.*—Williams *v.* State, 109 Ala. 64, 19 So. 530; Finch *v.* State, 81 Ala. 41, 1 So. 565; Birdsong *v.* State, 47 Ala. 68.

Indiana.— Rice *v.* State, 16 Ind. 298; Barlow *v.* State, 2 Blackf. 114.

Massachusetts.— Com. *v.* Hussey, 13 Mass. 221.

Mississippi.— Beason *v.* State, 34 Miss. 602.

Texas.— Greenwood *v.* State, 34 Tex. 334.

West Virginia. — State *v.* McDonald, 9 W. Va. 456.

See 31 Cent. Dig. tit. "Jury," § 426.

The state may challenge such jurors, although the objection has been waived by defendant. Williams *v.* State, 109 Ala. 64, 19 So. 530; Finch *v.* State, 81 Ala. 41, 1 So. 565.

Where the prosecution is by information a member of the grand jury who had nothing to do with the case is not incompetent to serve upon the trial. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

88. Hawkins *v.* Andrews, 39 Ga. 118.

If the issues are entirely different so that the return of the indictment would not involve the formation or expression of an opinion on the part of the grand juror as to the issues involved in the civil case he is not incompetent. Medlock *v.* De Kalb County, 115 Ga. 337, 41 S. E. 579.

89. Rogers *v.* Lamb, 3 Blackf. (Ind.) 155.

because he has previously tried a case of the same character and involving the same general considerations,[90] or where the second case is brought on different grounds to be established by different evidence;[91] but where they arise out of the same transaction and involve the same issues or are to be determined upon the same evidence the juror is incompetent;[92] and if practically the same question is to be again decided it is immaterial whether only the same or other and additional witnesses are to be examined.[93] So also if during the continuance of a case any of the jurors are impaneled and render a verdict in another case in which the same issues are involved, they are not competent to proceed with the trial of the first case.[94]

b. Offenses By Same Defendant. A juror is not incompetent because he has been one of the jury on a former trial of the same defendant for a different offense,[95] or a separate and distinct offense of the same character,[96] or because he was a member of the grand jury which found an indictment against the same defendant for a different, although similar offense;[97] but a juror who rendered verdict against defendant on an indictment is not competent in an action of trespass against the same defendant involving the same questions and relating to the same subject-matter.[98]

c. Similar Offenses by Persons Other Than Defendant. A juror is not incompetent because he has previously served upon the trial of another defendant charged with a separate and distinct offense, although of the same character;[99] and it has also been held that in the absence of any showing of prejudice a juror who has tried one co-defendant is not incompetent to try the other;[1] but on the other hand it is held that a juror is incompetent if he has served upon the trial

90. Algier *v.* The Maria, 14 Cal. 167; Chariton Plow Co. *v.* Deusch, 16 Nebr. 384, 20 N. W. 268.

91. Smith *v.* Wagenseller, 21 Pa. St. 491.

92. *Arkansas.*— Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752; Garthwaite *v.* Tatum, 21 Ark. 336, 76 Am. Dec. 402.

California.— Grady *v.* Early, 18 Cal. 108.

Illinois.— Swarnes *v.* Sitton, 58 Ill. 155.

North Carolina.— Baker *v.* Harris, 60 N. C. 271.

Tennessee.—Apperson *v.* Logwood, 12 Heisk. 262.

See 31 Cent. Dig. tit. "Jury," § 428.

After the trial is begun it is too late to object to the juror on this ground and it is not error for the court to refuse to discharge him (Central R., etc., Co. *v.* Ogletree, 97 Ga. 325, 22 S. E. 953; Nugent *v.* Trepagnier, 2 Mart. (La.) 205), although the court may in its discretion do so (Grady *v.* Early, 18 Cal. 108).

If no objection is made to the juror on the trial the fact that he served in both cases is immaterial. Jennings *v.* Heinroth, 71 Ill. App. 664.

93. Baker *v.* Harris, 60 N. C. 271.

94. Weeks *v.* Lyndon, 54 Vt. 638.

95. *Indiana.*— Howell *v.* State, 4 Ind. App. 148, 30 N. E. 714.

Massachusetts.— Com. *v.* Hill, 4 Allen 591.

Missouri.— State *v.* Maloney, 118 Mo. 112, 23 S. W. 1084.

New Jersey.—Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

Texas.— Arnold *v.* State, 38 Tex. Cr. 1, 40 S. W. 734; West *v.* State, 35 Tex. Cr. 48, 30 S. W. 1069.

United States.— U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

See 31 Cent. Dig. tit. "Jury," § 429.

96. Com. *v.* Hill, 4 Allen (Mass.) 591; Arnold *v.* State, 38 Tex. Cr. 1, 40 S. W. 734; West *v.* State, 35 Tex. Cr. 48, 30 S. W. 1069.

If the offenses are in effect parts of the same affair and involve the consideration of substantially the same testimony, the rule is otherwise, and a juror who has served in one trial is incompetent on another, as in the case of trials for a series of embezzlements from the same person but covering different periods (Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038), or for a series of forgeries practised upon the same person and where the instruments forged were traded to the same persons (Curtis *v.* State, 118 Ala. 125, 24 So. 111).

97. Johnson *v.* State, 34 Tex. Cr. 115, 29 S. W. 473.

98. Spear *v.* Spencer, 1 Greene (Iowa) 534.

99. Gerald *v.* State, 128 Ala. 6, 29 So. 614; State *v.* Sheeley, 15 Iowa 404; State *v.* Van Waters, 36 Wash. 358, 78 Pac. 897.

1. State *v.* Williams, 31 S. C. 238, 9 S. E. 853; Thomas *v.* State, 36 Tex. 315; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. See also People *v.* Betts, 94 Mich. 642, 54 N. W. 487; Bowman *v.* State, 41 Tex. 417. But see People *v.* Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; Sessions *v.* State, 37 Tex. Cr. 58, 38 S. W. 605.

It is ground for examining the juror, however, and if he states that if the same evidence is produced he will find defendant guilty, it is a ground of challenge. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

of another defendant charged with the same identical offense involving the same transaction,[2] or a different offense growing out of the same transaction and involving the same facts and circumstances,[3] or where any of the material issues in the case on trial were considered and passed upon at the former trial,[4] and this notwithstanding the juror states that he has formed no opinion as to defendant's guilt and can try the case impartially.[5]

G. Bias or Prejudice — 1. In General. Jurors to be competent must stand indifferent, having no bias or prejudice for or against either party.[6] The juror must be indifferent both as to the person and the cause to be tried,[7] and must be so at the time of the trial.[8] Bias or prejudice may arise from such a variety of

A juror who states that he discredited some of the witnesses on the former trial of a co-defendant, at which he served as a juror, and that if they are again examined in the case on trial he will still discredit them, is properly rejected. State *v.* James, 34 S. C. 49, 12 S. E. 657.

2. People *v.* Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; Sessions *v.* State, 37 Tex. Cr. 58, 38 S. W. 605; Obenchain *v.* State, 35 Tex. Cr. 490, 34 S. W. 278; Dunn *v.* State, 7 Tex. App. 600; U. S. *v.* Smith, 27 Fed. Cas. No. 16,342*b*.

3. Lewis *v.* State, 118 Ga. 803, 45 S. E. 602; Brown *v.* State, 104 Ga. 736, 30 S. E. 951; People *v.* Troy, 96 Mich. 530, 56 N. W. 102; Clark *v.* State, 44 Tex. Cr. 536, 72 S. W. 591; Obenchain *v.* State, 35 Tex. Cr. 490, 34 S. W. 278; Willis *v.* State, 9 Tex. App. 297; Jacobs *v.* State, 9 Tex. App. 278.

If it is not shown to the court that the two cases involve the same transaction or depend upon the same evidence, or are in any way connected, but only that they are of the same character, the overruling of a challenge on this ground is not error. Turner *v.* State, 114 Ga. 421, 40 S. E. 308.

4. Smith *v.* State, 55 Ala. 1. See also Wickard *v.* State, 109 Ala. 45, 19 So. 491.

Where counsel for the state misleads the court by stating that a material issue in the case will be a question passed upon in the trial of another defendant, and the court sustains a challenge on this ground, and no such issue is in fact raised in the case, it is reversible error. State *v.* Hammond, 14 S. D. 545, 86 N. W. 627.

5. Sessions *v.* State, 37 Tex. Cr. 58, 38 S. W. 605; Obenchain *v.* State, 35 Tex. Cr. 490, 34 S. W. 278.

6. *California.*— Lombardi *v.* California St. R. Co., 124 Cal. 311, 57 Pac. 66; Lawlor *v.* Linforth, 72 Cal. 205, 13 Pac. 496; People *v.* Reyes, 5 Cal. 347.

Georgia.—Almand *v.* Rockdale County, 78 Ga. 199; McLaren *v.* Birdsong, 24 Ga. 265.

Illinois.— Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465.

Kansas.— Naylor *v.* Metropolitan St. R. Co., 66 Kan. 407, 71 Pac. 835.

Maine.— Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

Massachusetts.— Davis *v.* Allen, 11 Pick. 466, 22 Am. Dec. 386.

Nebraska.— Omaha St. R. Co. *v.* Craig, 39 Nebr. 601, 58 N. W. 209.

Nevada.— State *v.* McClear, 11 Nev. 39.

New Hampshire.— March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

New York.— Lewis *v.* Few, Anth. N. P. 102.

Pennsylvania.— Hawker *v.* Goldsmith, 5 L. T. N. S. 122.

Texas.—Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

West Virginia.—State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

United States.— Mima Queen *v.* Hepburn, 7 Cranch 290, 3 L. ed. 348.

See 31 Cent. Dig. tit. "Jury," § 431.

Standing indifferent means that the mind is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias for or against either party in the mind of the juror calculated to operate upon him; that he goes to the trial uncommitted and prepared to weigh the evidence in impartial scales. People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

Bias in a juror "is being under an influence which so sways his mind to one side as to prevent his deciding the cause according to the evidence." Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 399, 53 N. W. 769 [*quoting* Anderson L. Dict.].

Bias is of two kinds: Actual, where a real bias for or against one of the parties exists; and implied, where the relations which the juror sustains to one of the parties are such as to raise a presumption of bias in his favor. Block *v.* State, 100 Ind. 357.

Prejudice has no degrees in the eye of the law, but if a juror is prejudiced in any manner he is not a fit or proper person to sit in the box. People *v.* Reyes, 5 Cal. 347.

The rule as to witnesses is very different from that relating to jurors, since testimony can only be obtained from the particular individual who knows the facts; but as there is no such limitation upon the range of selection of jurors none should be allowed to sit who are not entirely impartial. Davis *v.* Allen, 11 Pick. (Mass.) 466, 22 Am. Dec. 386.

Bias in favor of defendant in a criminal prosecution is as much a cause of challenge on the part of the state as a prejudice against him on the part of the defense. Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

7. People *v.* Allen, 43 N. Y. 28; People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

8. Thompson *v.* People, 3 Park. Cr. (N. Y.) 467, holding that it is therefore competent to

causes and depends so much upon the facts and circumstances of the particular cases that no definite rule can be laid down;[9] but the true inquiry in all cases is whether the juror will act with entire impartiality,[10] in deciding which, except in those cases where the law conclusively presumes bias,[11] much must be left to the discretion of the court,[12] which, unless clearly abused, will not be interfered with.[13] A juror is clearly incompetent, however, who admits that he has such a feeling with regard to one of the parties or the nature of the case as would influence his verdict,[14] or that he would be so influenced in case a certain state of facts should be developed on the trial,[15] or if he is doubtful of his ability to render an impartial verdict.[16] But a juror is not incompetent because of a feeling of prejudice against a person formerly a party to the suit but who is not such or interested therein at the time of the trial.[17]

2. Race Prejudice. A juror is incompetent if he is so prejudiced against defendant's race or nationality that he could not on this account give him a fair and impartial trial,[18] but not where he merely has a general unfavorable opinion of persons of that race or nationality which he testifies will no way influence his verdict[19]

3. Prejudice Against Party's Business or Occupation — a. In General. A prejudice against an unlawful business, or against persons engaged therein arising solely from the fact that they are so engaged, does not render a juror incompetent on a trial for the exercise of such unlawful calling;[20] but in an action

ascertain not only the juror's state of mind before coming to court, but also whether anything has taken place in court to influence him for or against either party.

9. People *v.* Reynolds, 16 Cal. 128; May *v.* Elam, 27 Iowa 365.

10. May *v.* Elam, 27 Iowa 365; Chesapeake, etc., R. Co. *v.* Smith, 103 Va. 326, 49 S. E. 487.

11. See Chesapeake, etc., R. Co. *v.* Smith, 103 Va. 326, 49 S. E. 487.

12. Smith *v.* State, 24 Ind. App. 688, 57 N. E. 572; Dew *v.* McDivitt, 31 Ohio St. 139; Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

13. *California.*— Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

Colorado.— Denver, etc., R. Co. *v.* Discoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

Indiana.— Smith *v.* State, 24 Ind. App. 688, 57 N. E. 572.

Iowa.— Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

Missouri.— Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626; McCarthy *v.* Cass Ave., etc., R. Co., 92 Mo. 536, 4 S. W. 516.

Pennsylvania.— Herr *v.* Herr, 17 Lanc. L. Rev. 209.

Texas.— Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

United States.— Press Pub. Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516.

See 31 Cent. Dig. tit. "Jury," § 431.

So much depends upon the manner of the juror and his tone of voice and the opportunity of the trial judge to see and know the juror, that it is the settled practice not to interfere with his finding unless clearly against the evidence. Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626.

14. *Colorado.*— Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760.

Kansas.— Naylor *v.* Metropolitan St. R. Co., 66 Kan. 407, 71 Pac. 835.

Missouri.— State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; Billmeyer *v.* St. Louis Transit Co., 108 Mo. App. 6, 82 S. W. 536.

Nebraska.— Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

New York.— People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018.

Texas.— Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

See 31 Cent. Dig. tit. "Jury," § 431.

In an action by a non-resident to recover for personal injuries, where a juror states that he has a prejudice against non-residents bringing such actions where they might have been brought in the state of plaintiff's residence, and that he will require more evidence in such cases on the part of plaintiff, he is incompetent. Naylor *v.* Metropolitan St. R. Co., 66 Kan. 407, 71 Pac. 835.

15. People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; Marande *v.* Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562.

16. *California.*— Quill *v.* Southern Pac. Co., 140 Cal. 268, 73 Pac. 991.

Colorado.— Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

Georgia.— McLaren *v.* Birdsong, 24 Ga. 265.

Nebraska.— Curry *v.* State, 4 Nebr. 545. *Compare* Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

United States.— Williams *v.* U. S., 93 Fed. 396, 35 C. C. A. 369.

See 31 Cent. Dig. tit. "Jury," § 431.

17. Strawn *v.* Cogswell, 28 Ill. 457.

18. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

19. Balbo *v.* People, 80 N. Y. 484 [*affirming* 19 Hun 424]. See also State *v.* Brown, 188 Mo. 451, 87 S. W. 519.

20. U. S. *v.* Borger, 7 Fed. 193, 19 Blatchf.

against a corporation engaged in a lawful business a juror is incompetent if he has such a prejudice against such corporations as would influence him in his consideration of the particular case.[21]

b. Sale of Intoxicating Liquors. The fact that a person is prejudiced against the sale of intoxicating liquors does not render him incompetent as a juror on the trial of a liquor dealer for an offense having no relation to such business;[22] nor is a juror necessarily incompetent by reason of such prejudice in a criminal prosecution for a violation of the liquor law,[23] a civil action for damages arising under such law,[24] or an action on a liquor dealer's bond;[25] or, on the other hand, because he thinks favorably of such business.[26] The question of competency in such cases depends upon whether the general prejudice against the business is of such a character as to influence the juror's decision of the particular case;[27] so if he has no prejudice against defendant personally and can, notwithstanding his prejudice against the business, give him a fair trial and render an impartial verdict according to the evidence, he is competent;[28] but if on the other hand it appears that his prejudice is such that he could not give defendant a fair and impartial trial he is incompetent.[29] So also on an appeal from a refusal of an application for a license a juror is incompetent who states that he is opposed to granting a license to any person under any circumstances,[30] or where the law requires that licenses shall be issued only to persons of good character and the juror states that he believes only an immoral man would engage in such business,[31] or considers that engaging in such business is evidence of immorality.[32]

4. Prejudice Against Crime and Criminals. In the absence of any prejudice against a particular defendant on trial a juror is not incompetent because he has a general prejudice against crime,[33] or persons charged therewith,[34] or against the

249; U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

21. Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465; Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

22. Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237. See also Fortune *v.* Trainor, 19 N. Y. Suppl. 598, holding further that it is not error for the court to refuse to allow jurors to be questioned as to their prejudice against defendant's business in such cases.

23. Carrow *v.* People, 113 Ill. 550; Stoots *v.* State, 108 Ind. 415, 9 N. E. 380; Shields *v.* State, 95 Ind. 299; State *v.* Nelson, 58 Iowa 208, 12 N. W. 253; People *v.* Keefer, 97 Mich. 15, 56 N. W. 105.

24. Robinson *v.* Randall, 82 Ill. 521; Albrecht *v.* Walker, 73 Ill. 69; De Puy *v.* Quinn, 61 Hun (N. Y.) 237, 16 N. Y. Suppl. 708.

25. Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259.

26. Pemberton *v.* State, 11 Ind. App. 297, 38 N. E. 1096; Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259.

A wholesale liquor dealer is not incompetent to act as a juror in an action by a wife for the sale of liquor to her husband. Owen *v.* Kamer, 29 S. W. 437, 16 Ky. L. Rep. 705.

But if the juror is opposed to enforcing the law relating to the sale of intoxicating liquors under which the particular action is brought he is incompetent. Theisen *v.* Johns, 72 Mich. 285, 40 N. W. 727.

27. Carrow *v.* People, 113 Ill. 550; and cases cited *infra*, notes 28, 29.

28. Carrow *v.* People, 113 Ill. 550; Kroer *v.* People, 78 Ill. 294; Dolan *v.* State, 122 Ind. 141, 23 N. E. 761; Elliott *v.* State, 73 Ind. 10 [*distinguishing* Swigart *v.* State, 67 Ind. 287]; State *v.* Nelson, 58 Iowa 208, 12 N. W. 253; De Puy *v.* Quinn, 61 Hun (N. Y.) 237, 16 N. Y. Suppl. 708.

29. Carrow *v.* People, 113 Ill. 550; Albrecht *v.* Walker, 73 Ill. 69; People *v.* Wheeler, 96 Mich. 1, 55 N. W. 371; Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

30. Fletcher *v.* Crist, 139 Ind. 121, 38 N. E. 472; Keiser *v.* Lines, 57 Ind. 431.

31. Chandler *v.* Ruebelt, 83 Ind. 139.

32. Fletcher *v.* Crist, 139 Ind. 121, 38 N. E. 472.

33. *Alabama.*— Davis *v.* Hunter, 7 Ala. 135.

Georgia.— Williams *v.* State, 3 Ga. 453.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Missouri.— State *v.* Burns, 85 Mo. 47.

Wisconsin.— Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

See 31 Cent. Dig. tit. "Jury," § 481.

Prejudice against anarchism is nothing more than a prejudice against crime which will not render a juror incompetent on the trial of an indictment for a conspiracy of an anarchical nature. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

34. People *v.* Reynolds, 16 Cal. 128; People *v.* McGonegal, 136 N. Y. 62, 32 N. E.

particular offense with which defendant is charged,[35] unless his feelings are so strong that he would convict unless defendant should prove himself innocent.[36] Nor is a juror incompetent merely because he expressed a just indignation on hearing of the commission of the offense with which defendant is charged,[37] or, if he has no prejudice against the particular defendant, merely because he has a general unfavorable opinion of his character.[38]

5. Prejudice Against Particular Defenses. A juror is not incompetent who has no prejudice against a particular defense, such as insanity, when genuine, but only when simulated,[39] or who believes that the defense is often simulated and should therefore be carefully scrutinized;[40] nor is a juror incompetent because of a prejudice against a particular defense, where no such defense is made or contemplated,[41] where the court is satisfied that the nature of the prejudice is not of a character calculated to influence the juror's verdict,[42] or where it appears from the juror's examination that he has a mistaken view of the law applicable to a certain defense, where it further appears that he is willing to recognize and abide by the law as explained by the court;[43] but the rule would of course be otherwise as to a juror who was unwilling to accept as a defense if proved that which the law recognizes as such.[44]

6. Personal Relations — a. In General. A juror is incompetent if there exists any hostility between him and one of the parties,[45] although it has no connection with the action to be tried,[46] or if the juror admits a friendship for one of the parties which, other things being equal, would influence his verdict[47] or would cause him to believe such party unless contradicted by witnesses with whom the juror was personally acquainted,[48] or where he admits a feeling of gratitude and

616; State *v.* Croney, 31 Wash. 122, 71 Pac. 783.

35. *Georgia.*— Parker *v.* State, 34 Ga. 262.
Kansas.— State *v.* Kelley, 70 Kan. 98, 78 Pac. 151.
North Dakota.— State *v.* Tomlinson, 7 N. D. 294, 74 N. W. 995.
Texas.— Franks *v.* State, (Cr. App. 1905) 88 S. W. 923; Lively *v.* State, (Cr. App. 1903) 73 S. W. 1048.
Wisconsin.— Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.
United States.— U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. 139.
See 31 Cent. Dig. tit. "Jury," § 481.
The fact that a juror has contributed to a fund to employ counsel to represent the prohibition side in an election contest does not render him incompetent as a juror on a trial for violating a local option law. Taul *v.* State, (Tex. Cr. App. 1901) 61 S. W. 394.

36. State *v.* Vogan, 56 Kan. 61, 42 Pac. 352.

37. State *v.* Perioux, 107 La. 601, 31 So. 1016; Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107. See also State *v.* Coleman, 20 S. C. 441.

38. People *v.* Allen, 43 N. Y. 28; People *v.* Lohman, 2 Barb. (N. Y.) 216.
If the rule were otherwise it might well happen that notorious criminals could not be tried at all. People *v.* Lohman, 2 Barb. (N. Y.) 216.

39. *California.*— People *v.* Sowell, 145 Cal. 292, 78 Pac. 717.
Indiana.— Butler *v.* State, 97 Ind. 378.
Missouri.— State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.
New York.— People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 [*affirming* 38 Hun 490].
Pennsylvania.— Hall *v.* Com., 9 Pa. Cas. 279, 12 Atl. 163.
Texas.— Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351.
See 31 Cent. Dig. tit. "Jury," §§ 485, 494.

40. Butler *v.* State, 97 Ind. 378.

41. People *v.* Collins, 105 Cal. 504, 39 Pac. 16; Franks *v.* State, (Tex. Cr. App. 1905) 88 S. W. 923.

42. State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; State *v.* Baber, 74 Mo. 292, 41 Am. Rep. 314; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 [*affirming* 38 Hun 490].

43. Butler *v.* State, 97 Ind. 378; State *v.* Croney, 31 Wash. 122, 71 Pac. 783.

44. See People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584.

45. McLaren *v.* Birdsong, 24 Ga. 265; Brittain *v.* Allen, 13 N. C. 120.
Where a juror uses violent and abusive language with regard to defendant after the jury has been sworn indicating a prejudice against him, a new trial should be granted, although the juror stated upon his examination, that he was indifferent. State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924.
The fact that a juror has had a trivial misunderstanding with defendant is not sufficient to render him incompetent where he swears that he is without prejudice and entirely impartial between him and the prosecution. Memmler *v.* State, 75 Ga. 576.

46. Brittain *v.* Allen, 13 N. C. 120.

47. Omaha St. R. Co. *v.* Craig, 39 Nebr. 601, 58 N. W. 209.

48. Stinson *v.* Sachs, 8 Wash. 391, 36 Pac. 287.

obligation for services rendered him by one of the parties;[49] and where it appears that the relations between a juror and one of the parties are of such an intimate character as would be reasonably calculated to influence his verdict it is proper to exclude him.[50] But a person is not incompetent as a juror merely because he is an intimate acquaintance[51] or on friendly relations with one of the parties,[52] because in a personal injury case he offered assistance to the injured party,[53] or in a murder case because he was the officiating clergyman at the burial of deceased.[54]

b. Personal Relations With Attorney. A person is not incompetent as a juror because he is personally acquainted with the attorney for one of the parties,[55] or has a good opinion of him,[56] or because his partner in business is a friend of one of the attorneys;[57] nor, on the other hand, because he has some feeling of prejudice against one of the attorneys,[58] or has at some time been involved in litigation with such attorney.[59]

c. Member of Association, Church, Order, or Party. Unless pecuniarily interested[60] a person is not incompetent to act as a juror in a trial for a particular offense because he is a member of an association organized for the prosecution or prevention of such offenses;[61] nor is a juror incompetent because he and one of the parties are both members of the same religious denomination[62] or fraternal order,[63] except in actions involving the pecuniary interests of the particular congregation or lodge to which the juror belongs,[64] or in an election contest because he belongs to the opposing political party or voted against respondent;[65] but a juror who has been a member of a posse organized for defendant's capture is not competent to serve on a jury to try him.[66]

7. Interest in Another Cause Pending. In some jurisdictions it is a ground of challenge to any person called as a juror that he has a case pending for trial at the same term,[67] and it is immaterial as affecting the juror's competency whether

49. Texas Cent. R. Co. *v.* Blanton, (Tex. Civ. App. 1904) 81 S. W. 537.

50. Omaha St. R. Co. *v.* Craig, 39 Nebr. 601, 58 N. W. 209; Com. *v.* Mosier, 135 Pa. St. 221, 19 Atl. 943.

51. Moore *v.* Cass, 10 Kan. 288.

52. Decker *v.* Laws, (Ark. 1905) 85 S. W. 425.

53. Paducah St. R. Co. *v.* Walsh, 58 S. W. 431, 22 Ky. L. Rep. 532.

54. State *v.* Stokeley, 16 Minn. 282.

55. Fairbanks *v.* Irwin, 15 Colo. 366, 25 Pac. 701; People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

56. Tolles *v.* Meyers, 65 Nebr. 704, 91 N. W. 505; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

57. Santee *v.* Standard Pub. Co., 36 N. Y. App. Div. 555, 55 N. Y. Suppl. 361.

58. State *v.* Gordon, 5 Ida. 297, 48 Pac. 1061; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

59. Goodall *v.* State, (Tex. Cr. App. 1898) 47 S. W. 359.

60. See *supra*, XII, D, 5.

61. *Colorado.*— Boyle *v.* People, 4 Colo. 176, 34 Am. Rep. 76.

Illinois.— Musick *v.* People, 40 Ill. 268.

Iowa.— State *v.* Wilson, 8 Iowa 407.

Kansas.— State *v.* Flack, 48 Kan. 146, 29 Pac. 571.

Maryland.— Guy *v.* State, 96 Md. 692, 54 Atl. 879.

Massachusetts.— Com. *v.* O'Neil, 6 Gray 343. *Compare* Com. *v.* Moore, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128.

Texas.— Dodd *v.* State, (Cr. App. 1904) 82 S. W. 510.

See 31 Cent. Dig. tit. "Jury," § 433.

A member of the Good Templars society, the object of which is not the enforcement of the prohibitory liquor law but the promotion of temperance among its members by moral suasion, is not incompetent to serve as juror in a criminal prosecution for the violation of such law. State *v.* Estlinbaum, 47 Kan. 291, 27 Pac. 996.

Conversely it has been held that on the trial for selling intoxicating liquors without a license, the members of a club organized for obtaining liquor to drink are not incompetent to act as jurors where they swear that they have no partiality in favor of defendant and can render a verdict according to the law and the evidence. Boldt *v.* State, 72 Wis. 7, 38 N. W. 177.

62. Barton *v.* Erickson, 14 Nebr. 164, 15 N. W. 206.

63. Reed *v.* Peacock, 123 Mich. 244, 82 N. W. 53, 81 Am. St. Rep. 194, 49 L. R. A. 423; Purple *v.* Horton, 13 Wend. (N. Y.) 9, 27 Am. Dec. 167, holding further that the oath taken by a master mason or royal arch mason does not render him incompetent in such cases.

64. See *supra*, XII, D, 4.

65. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

66. State *v.* Defee, 47 La. Ann. 193, 16 So. 734.

67. Plummer *v.* People, 74 Ill. 361; Murphy *v.* State, 9 Lea (Tenn.) 373; Riley *v.*

the case is in fact tried at that term or not,[68] or that the case in which the juror is a party has been disposed of in advance of the one in which he is called upon to serve.[69] Independently of statute a juror is incompetent on the ground of bias if he is a party to or interested in another suit of the same character or involving the same controversy,[70] is under indictment for an offense of the same character,[71] or is the prosecuting witness in another case then pending against the same defendant for a similar offense;[72] but a juror is not incompetent because he has formerly had a similar suit against the same defendant,[73] or was defendant in a similar suit brought by the same plaintiff.[74]

8. INFLUENCE ON VERDICT — a. In General. There are some cases in which the law conclusively presumes bias,[75] and whenever a juror admits that he is biased he is incompetent, although he states that he can render an impartial verdict;[76] but in other cases where the juror swears positively that he is without any bias or prejudice and will render an impartial verdict according to the law and the evidence, he may be held competent, although there are circumstances which otherwise might in some degree be supposed to influence him in his consideration of the case,[77] or he may have made statements during his examination which might

Bussell, 1 Heisk. (Tenn.) 294; Claggett's Case, 5 Fed. Cas. No. 2,779, 2 Cranch C. C. 247. See also Vickers *v.* Leigh, 104 N. C. 248, 10 S. E. 308; Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923.

The object of the statutes is to prevent the possibility of any combination between jurors to render verdicts in favor of each other. Riley *v.* Bussell, 1 Heisk. (Tenn.) 294.

The statutes do not apply to a person who is merely the prosecuting witness in another suit (State *v.* Brady, 107 N. C. 822, 12 S. E. 325), or interested as a creditor in a fund for which a receiver is suing (Vickers *v.* Leigh, 104 N. C. 248, 10 S. E. 308); or who is surety on the prosecution bond of another plaintiff in a different action (Jenkins *v.* Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193); or who has a suit pending but not at issue and not to be tried at the term for which the juror is drawn (Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923. See also State *v.* Spivey, 133 N. C. 989, 43 S. E. 475; State *v.* Smarr, 121 N. C. 669, 28 S. E. 549).

68. Plummer *v.* People, 74 Ill. 361; Riley *v.* Bussell, 1 Heisk. (Tenn.) 294.

69. Murphy *v.* State, 9 Lea (Tenn.) 373.

70. Jefferson County *v.* Lewis, 20 Fla. 980; Courtwright *v.* Strickler, 37 Iowa 382; May *v.* Elam, 27 Iowa 365; Jeffries *v.* Randall, 14 Mass. 205; Gardner *v.* Lanning, 3 N. J. L. 651.

But a juror is not incompetent because he has a suit pending against the same defendant growing out of an entirely different subject-matter. San Antonio *v.* Diaz, (Tex. Civ. App. 1901) 62 S. W. 549. See also Southern R. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862.

71. McGuire *v.* State, 37 Miss. 369.

72. Carr *v.* State, 104 Ala. 4, 16 So. 150.

73. Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067.

74. Austin *v.* Cox, 60 Ga. 520, holding that the fact that such a suit had been had is not a principal cause of challenge to the juror but at most merely a cause of challenge to the favor.

75. See Chesapeake R. Co. *v.* Smith, 103 Va. 326, 49 S. E. 487.

76. Lombardi *v.* California St. R. Co., 124 Cal. 311, 57 Pac. 66; Naylor *v.* Metropolitan St. R. Co., 66 Kan. 407, 71 Pac. 835; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591. *Compare* Denham *v.* Washington Water Power Co., 38 Wash. 354, 80 Pac. 546.

The courts should be governed by the facts stated and not by the conclusions of the juror. Texas Cent. R. Co. *v.* Blanton, 36 Tex. Civ. App. 307, 81 S. W. 537.

77. *Georgia.*— Memmler *v.* State, 75 Ga. 576.

Louisiana.— State *v.* Forbes, 111 La. 473, 35 So. 710.

Nebraska.— Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

Texas.— Hubbard *v.* State, 43 Tex. Cr. 564, 67 S. W. 413.

Utah.— Hern *v.* Southern Pac. R. Co., 29 Utah 127, 81 Pac. 902.

Virginia.—Chesapeake R. Co. *v.* Smith, 103 Va. 326, 49 S. E. 487.

Wisconsin.— Boldt *v.* State, 72 Wis. 7, 38 N. W. 177.

See 31 Cent. Dig. tit. "Jury," § 437.

On the trial of a negro for killing another negro a juror is not incompetent who states that he would be prejudiced in a case between a white man and a negro but who swears that he has no prejudice against defendant personally, or in cases where both defendant and the injured party are negroes (State *v.* Mayfield, 104 La. 173, 28 So. 997); nor is a juror incompetent on the trial of a negro who states that he would not employ a negro because he lives in a community where there is a prejudice against them but that he is personally without such prejudice and can try the case as impartially as if defendant were a white man (Hubbard *v.* State, 43 Tex. Cr. 564, 67 S. W. 413).

seem to indicate some sympathy for or prejudice against one of the parties to the action.[78]

b. In Cases of Evenly Balanced Testimony. By the weight of authority a juror is incompetent who admits that by reason of his feelings toward one of the parties or the nature of the case he would, if the testimony were evenly balanced, decide in favor of one side or the other.[79] This is clearly the proper rule in cases where the admitted inclination is to favor the party upon whom is the burden of proof,[80] but it has been expressly held that the same rule should be applied where the inclination is to favor the other party.[81]

H. Formation and Expression of Opinion — 1. In General. It has been well said that there is no subject which presents a greater conflict of authority,[82] or with regard to which it is more difficult to derive from the many decisions any fixed rules, than the question of the competency of jurors as affected by the formation or expression of an opinion as to the merits of the case.[83] While there is much conflict as to the nature of the opinion which will render the juror incompetent,[84] it is now well settled that the mere formation or expression of an opinion, irrespective of its source and character, is not sufficient.[85] Formerly when jurors who

78. *Illinois.*— Chicago, etc., R. Co. *v.* Bingenheimer, 116 Ill. 226, 4 N. E. 840.

Louisiana.— State *v.* Bailey, 50 La. Ann. 533, 23 So. 603.

New York.— Laidlaw *v.* Sage, 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770; McKinney *v.* Long Island R. Co., 2 Silv. Sup. 543, 6 N. Y. Suppl. 168.

Oregon.— Schwarz *v.* Lee Gon, (1905) 80 Pac. 110.

United States.— Press Pub. Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516.

See 31 Cent. Dig. tit. "Jury," § 437.

A juror is on the extreme limit of competency where he states that "notwithstanding his sympathies" he can render an impartial verdict upon the evidence, but it cannot be said that such a juror is clearly incompetent. McKinney *v.* Long Island R. Co., 2 Silv. Sup. (N. Y.) 543, 6 N. Y. Suppl. 168.

79. *California.*— Lombardi *v.* California St. R. Co., 124 Cal. 311, 57 Pac. 66. *Compare* McFadden *v.* Wallace, 38 Cal. 51.

Colorado.— Denver, etc., R. Co. *v.* Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

Illinois.— Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Chicago, etc., R. Co. *v.* Buttolf, 66 Ill. 347; Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344. *Compare* Richmond *v.* Roberts, 98 Ill. 472.

Michigan.— People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540; Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

Nebraska.— Omaha *v.* Cane, 15 Nebr. 657, 20 N. W. 101.

United States.— Mima Queen *v.* Hepburn, 7 Cranch 290, 3 L. ed. 348.

See 31 Cent. Dig. tit. "Jury," § 436.

Compare Keegan *v.* Kavanaugh, 62 Mo. 230.

In a criminal case a juror who states that if the evidence were evenly balanced he would render a verdict of guilty is incompetent. People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540.

80. Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344; Thompson & M. Jur. § 202.

81. Denver, etc., R. Co. *v.* Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

82. Brady *v.* Territory, 7 Ariz. 12, 60 Pac. 698; People *v.* Reynolds, 16 Cal. 128; Jackson *v.* Com., 23 Gratt. (Va.) 919.

This conflict is due to the nature of the subject, involving as it does the condition and operations of the human mind (Rothschild *v.* State, 7 Tex. App. 519), the effort of the courts to lay down general rules for a class of cases, where almost every case presents some peculiarity of circumstance (Jackson *v.* Com., 23 Gratt. (Va.) 919), and to the fact that jurors who had no knowledge or opinion regarding the case were formerly much easier to procure, and that a change of conditions has necessitated some relaxation of the rule laid down by the older cases (Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520; Staup *v.* Com., 74 Pa. St. 458).

83. Jackson *v.* Com., 23 Gratt. (Va.) 919.

It would be a useless and almost interminable task to explore the various decisions of the several states for the purpose of reconciling them and deducing therefrom a uniform rule as to the competency of a juror in a criminal case. The decisions of scarcely any one state are reconcilable with each other and the mind would be lost in bewilderment at the threshold of the attempt. Rothschild *v.* State, 7 Tex. App. 519.

84. See the following cases:

Maryland.— Waters *v.* State, 51 Md. 430.

Oregon.— Kumli *v.* Southern Pac. R. Co., 21 Oreg. 505, 28 Pac. 637.

Texas.— Rothschild *v.* State, 7 Tex. App. 519.

Virginia.— Jackson *v.* Com., 23 Gratt. 919.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244.

See 31 Cent. Dig. tit. "Jury," § 439 *et seq.*

Nature of disqualifying opinion see *infra*, XII, H, 3.

85. *Alabama.*— Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Hammil *v.* State, 90 Ala. 577, 8 So. 380.

had not heard of a case or formed any opinion regarding it were easier to procure the rule was more strict,[86] but at this time to exclude all jurors who had heard or read of a case and consequently formed some opinion regarding it would make it extremely difficult to procure an intelligent jury in cases of any prominence,[87] and would tend to place the administration of justice in the hands of the most ignorant and least discriminating portion of the community.[88] Where the distinction between challenges for principal cause to the favor is preserved, it seems that any formation or expression of opinion as to the merits of the case may be made a ground of challenge to the favor;[89] but nothing short of an unqualified or fixed opinion is a ground of challenge for principal cause.[90] It has also been held that the formation or expression of even a fixed opinion is available as a ground of challenge only to that party against whom it was formed or expressed,[91] but on the contrary it has been held that a juror who states that he has formed an unqualified opinion as to defendant's guilt or innocence is incompetent, and that it is proper to exclude any further inquiry as to the direction of the opinion.[92]

2. KNOWLEDGE OR INFORMATION WITHOUT OPINION. If a juror has formed no opinion as to the merits of the case or the guilt or innocence of accused, he is not

California.— People *v.* Cochran, 61 Cal. 548; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95.

Colorado.— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Georgia.— Blackman *v.* State, 80 Ga. 785, 7 S. E. 626; Wright *v.* State, 18 Ga. 383.

Indiana.— Stout *v.* State, 90 Ind. 1.

Iowa.— State *v.* Foster, 91 Iowa 164, 59 N. W. 8; State *v.* Field, 89 Iowa 34, 56 N. W. 276; State *v.* Smith, 73 Iowa 32, 34 N. W. 597.

Louisiana.— State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26; State *v.* George, 8 Rob. 535.

Maryland.— Waters *v.* State, 51 Md. 430.

Michigan.— People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

New York.— People *v.* Johnson, 2 Wheel. Cr. 361.

Oklahoma.— Huntley *v.* Territory, 7 Okla. 60, 54 Pac. 314.

Oregon.— Kumli *v.* Southern Pac. R. Co., 21 Oreg. 505, 28 Pac. 637.

Pennsylvania.— Staup *v.* Com., 74 Pa. St. 458.

Tennessee.— Alfred *v.* State, 2 Swan 581.

Texas.— Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458.

Virginia.— Jackson *v.* Com., 23 Gratt. 919.

West Virginia.— State *v.* Schnelle, 24 W. Va. 767.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244.

See 31 Cent. Dig. tit. "Jury," § 439 *et seq.*

The standard of Lord Mansfield that a juror should be as white paper and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him (see Mylock *v.* Saladine, 1 Wm. Bl. 480) has long since been discarded as impracticable (Kumli *v.* Southern Pac. R. Co., 21 Oreg. 505, 28 Pac. 637).

86. Staup *v.* Com., 74 Pa. St. 458.

87. *Arkansas.*— Dolan *v.* State, 40 Ark. 454.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Maryland.— Waters *v.* State, 51 Md. 430.

Michigan.— Holt *v.* People, 13 Mich. 224.

New York.— People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005; People *v.* Hayes, 1 Edm. Sel. Cas. 582.

Ohio.— Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126.

Oregon.— Kumli *v.* Southern Pac. R. Co., 21 Oreg. 505, 28 Pac. 637.

Pennsylvania.— Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374; O'Mara *v.* Com., 75 Pa. St. 424; Staup *v.* Com., 74 Pa. St. 458.

United States.— Gallot *v.* U. S., 87 Fed. 446, 31 C. C. A. 44.

See 31 Cent. Dig. tit. "Jury," §§ 450, 451.

88. State *v.* Potter, 18 Conn. 166; People *v.* Hayes, 1 Edm. Sel. Cas. (N. Y.) 582; O'Mara *v.* Com., 75 Pa. St. 424; Moran *v.* Com., 9 Leigh (Va.) 651.

89. People *v.* Reynolds, 16 Cal. 128; Anderson *v.* State, 14 Ga. 709; Boon *v.* State, 1 Ga. 618; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; People *v.* Bodine, 1 Den. (N. Y.) 281; State *v.* Benton, 19 N. C. 196.

A challenge to the favor is for a cause which does not *per se* render a juror incompetent, but which merely raises a suspicion that he is not indifferent, which is to be determined as to a question of fact. State *v.* Benton, 19 N. C. 196.

90. People *v.* Honeyman, 3 Den. (N. Y.) 121; People *v.* Hayes, 1 Edm. Sel. Cas. (N. Y.) 582; Stout *v.* People, 4 Park. Cr. (N. Y.) 71; State *v.* Benton, 19 N. C. 196; Sprouce *v.* Com., 2 Va. Cas. 375.

91. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; State *v.* Efler, 85 N. C. 585; State *v.* Benton, 19 N. C. 196. See also State *v.* Bill, 15 La. Ann. 114.

It is incumbent upon the challenging party to show by further questioning that he is the party calculated to be prejudiced by the opinion formed. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

92. State *v.* Shelledy, 8 Iowa 477.

incompetent merely because he has heard the case talked about,[93] even in the form of a detailed statement,[94] or because he has read about the case in the newspapers,[95] or has some personal knowledge of some of the facts involved;[96] but if he has conversed with one of the parties with regard to the merits of the case it is not error to exclude him.[97]

3. Character of Opinion — a. In General. Various terms have been adopted by statute or judicial decision to designate the character of the opinion which a juror must have in order to render him incompetent,[98] such as "unqualified,"[99] "fixed,"[1] "decided,"[2] "established,"[3] "fixed and deliberate,"[4] and other terms of similar import,[5] as distinguished from an opinion which is conditional, hypothetical, contingent, indefinite, or uncertain.[6] These terms are intended to convey one and the same idea,[7] which is that the opinion which should exclude a juror must be one of a fixed and determined character, deliberately formed and still entertained, and which in an undue measure shuts out a different belief,[8] or repels the presumption of innocence in a criminal case;[9] or in other words, which amounts to a prejudgment of the case,[10] or will prevent the juror from

93. *Illinois.*— Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127, 17 N. E. 1.

Iowa.— State *v.* Geier, 111 Iowa 706, 83 N. W. 718.

Kansas.— Roy *v.* State, 2 Kan. 405; State *v.* Bane, 1 Kan. App. 537, 42 Pac. 376.

Massachusetts.— Com. *v.* Thrasher, 11 Gray 57.

Missouri.— State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

New Hampshire.— State *v.* Howard, 17 N. H. 171.

Texas.— Gaines *v.* State, (Cr. App. 1896) 37 S. W. 331.

Virginia.— Lyles *v.* Com., 88 Va. 396, 13 S. E. 802.

See 31 Cent. Dig. tit. "Jury," §§ 438, 449.

The fact that a juror has heard of a former trial and its result does not render him incompetent. Texas, etc., R. Co. *v.* Crowder, 25 Tex. Civ. App. 536, 64 S. W. 90.

Where there is a strong public sentiment in the community against defendant, a juror is incompetent who states that people have talked in his presence in regard to such sentiment, although he states that he thinks he has not been influenced thereby. People *v.* Evans, 72 Mich. 367, 40 N. W. 473.

94. Roy *v.* State, 2 Kan. 405.

95. Gradle *v.* Hoffman, 105 Ill. 147; People *v.* Summers, 115 Mich. 537, 73 N. W. 818; State *v.* Lewis, 181 Mo. 235, 79 S. W. 671; U. S. *v.* McHenry, 26 Fed. Cas. No. 15,681, 6 Blatchf. 503.

96. People *v.* Keefer, 97 Mich. 15, 56 N. W. 105; Burlington, etc., R. Co. *v.* Beebe, 14 Nebr. 463, 16 N. W. 747.

97. U. S. Rolling Stock Co. *v.* Weir, 96 Ala. 396, 11 S. W. 427. See also Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638, where the court said that a challenge on this ground should have been sustained but refused to reverse the judgment because of the failure of the trial court to so do.

98. State *v.* Williams, 49 La. Ann. 1148, 22 So. 759; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637; Rothschild *v.* State, 7 Tex. App. 519; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

99. People *v.* Reynolds, 16 Cal. 128; Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145; State *v.* Sater, 8 Iowa 420; Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

An unqualified opinion involves a belief in the facts as well as a conclusion from them. People *v.* Reynolds, 16 Cal. 128.

1. Carson *v.* State, 50 Ala. 134; State *v.* Johnson, 33 La. Ann. 889.

2. Osiander *v.* Com., 3 Leigh (Va.) 780, 24 Am. Dec. 693.

3. Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458.

4. Waters *v.* State, 51 Md. 430.

5. State *v.* Williams, 49 La. Ann. 1148, 22 So. 759; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

Other terms which have been adopted to designate the nature of the opinion necessary to render a juror incompetent are "fixed and definite" (People *v.* Hayes, 1 Edm. Sel. Cas. (N. Y.) 582), "fixed and determined" (Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637; Staup *v.* Com., 74 Pa. St. 458), "decided and substantial" (State *v.* Baker, 33 W. Va. 319, 10 S. E. 639), "deliberate and decided" (Thompson *v.* Updegraff, 3 W. Va. 629), and "fixed, deliberate and determined . . . which cannot be changed" (State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26; State *v.* Farrer, 35 La. Ann. 315).

6. State *v.* Hebert, 104 La. 227, 28 So. 898; State *v.* Williams, 49 La. Ann. 1148, 22 So. 759; Stout *v.* People, 4 Park. Cr. (N. Y.) 71; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

7. State *v.* Williams, 49 La. Ann. 1148, 22 So. 759; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637; Thompson & M. Jur. § 211.

8. Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637; O'Mara *v.* Com., 75 Pa. St. 424; Staup *v.* Com., 74 Pa. St. 458.

9. People *v.* Thacker, 108 Mich. 652, 66 N. W. 562; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; Holt *v.* People, 13 Mich. 224.

10. Waters *v.* State, 51 Md. 430; O'Mara *v.* Com., 75 Pa. St. 424; Staup *v.* Com., 74 Pa. St. 458.

rendering a fair and impartial verdict according to the evidence as adduced at the trial.[11] While this rule is now generally recognized, its practical application is in many cases extremely difficult,[12] and the courts have not succeeded in establishing any judicial test by which the question can be determined.[13]

b. Unqualified, Fixed, or Decided Opinion. A juror who has formed an unqualified, fixed, or decided opinion as to the merits of the case, or the guilt or innocence of the accused, is incompetent,[14] regardless of the source of the information upon which it is based,[15] or if he has formed such an opinion as to any material issue involved in the case.[16]

c. Qualified or Hypothetical Opinion.[17] It is ordinarily held that a juror is not incompetent by reason of having formed a mere hypothetical opinion dependent upon the truth of the information received;[18] but this rule should be applied with caution and discrimination, since in a sense it may be said that all opinions based upon hearsay are hypothetical, being contingent upon the truth of what has been heard.[19] It also frequently happens that even intelligent jurors are

A prejudgment of the case, to render a juror incompetent, is that condition of mind which has formed a conclusion so irrevocably fixed as not to be liable to be changed or to be free to persuasion, or to be open to a different conviction upon the production of testimony or evidence which ought reasonably to produce a different conclusion. Scott *v.* Reyer, 5 Leg. Gaz. (Pa.) 73.

11. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Stout *v.* State, 90 Ind. 1; State *v.* Field, 89 Iowa 34, 56 N. W. 276; Ortwein *v.* State, 76 Pa. St. 414, 18 Am. Rep. 420.

12. Baxter *v.* People, 8 Ill. 368; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637; Jackson *v.* Com., 23 Gratt. (Va.) 919.

This difficulty is due largely to a lack of perception on the part of jurors as to the nature of a disqualifying opinion, and the difficulty they experience in explaining, so as to be fully understood, the exact condition of their minds (Baxter *v.* People, 8 Ill. 368), and to the fact that almost every case presents some peculiar circumstances making the application of any general rule difficult (Jackson *v.* Com., 23 Gratt. (Va.) 919).

13. Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

14. *California.*— People *v.* Weil, 40 Cal. 268.

Georgia.— Maddox *v.* State, 32 Ga. 581, 79 Am. Dec. 307; Willis *v.* State, 12 Ga. 444; Wade *v.* State, 12 Ga. 25; Boon *v.* State, 1 Ga. 618.

Illinois.— Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Kansas.— State *v.* Morrison, 64 Kan. 669, 68 Pac. 48; State *v.* Start, 60 Kan. 256, 56 Pac. 15; State *v.* Miller, 29 Kan. 43.

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110.

Texas.— Ward *v.* State, 19 Tex. App. 664; Choctaw, etc., R. Co. *v.* True, (Civ. App. 1904) 80 S. W. 120.

Virginia.— Wright *v.* Com., 32 Gratt. 941; Armistead *v.* Com., 11 Leigh 657, 37 Am. Dec. 633; Sprouce *v.* Com., 2 Va. Cas. 375; Lithgow *v.* Com., 2 Va. Cas. 297.

United States.— Anonymous, 1 Fed. Cas. No. 469; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*g*.

Under the California and Nevada statutes a juror is incompetent if he has formed an unqualified opinion, or having formed an opinion of any character has expressed it without qualification. People *v.* Cottle, 6 Cal. 227; People *v.* Williams, 6 Cal. 206; State *v.* Roberts, 27 Nev. 449, 77 Pac. 598.

15. Wright *v.* Com., 32 Gratt. (Va.) 941; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

Unqualified opinion based upon rumor see *infra*, XII, H, 5, b, (I).

Unqualified opinion based upon newspaper reports see *infra*, XII, H, 5, c, (I).

16. Pine *v.* Callahan, 8 Ida. 684, 71 Pac. 473; State *v.* Otto, 61 Kan. 58, 58 Pac. 995; State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144; Johnson *v.* Park City, 27 Utah 420, 76 Pac. 216.

17. **Based on rumor and newspaper reports** see *infra*, XII, H, 5, b, (II); XII, H, 5, c, (III).

18. *Illinois.*— Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

Iowa.— State *v.* Slater, 8 Iowa 420.

Louisiana.— State *v.* Desmouchet, 32 La. Ann. 1241.

New Jersey.— Mann *v.* Glover, 14 N. J. L. 195.

New York.— Durell *v.* Mosher, 8 Johns. 445; People *v.* Fuller, 2 Park Cr. 16. *Compare* People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 121.

Pennsylvania.— Irvine *v.* Lumbermen's Bank, 2 Watts & S. 190.

Virginia.— Jackson *v.* Com., 23 Gratt. 919; Osiander *v.* Com., 3 Leigh 780, 24 Am. Dec. 693; Sprouce *v.* Com., 2 Va. Cas. 375.

See 31 Cent. Dig. tit. "Jury," §§ 443, 464.

If the juror states that he has formed an opinion which would bias his verdict if the facts proved were as he had heard them he is incompetent, although he states that if the facts proved differed from what he had heard he believes that he would not be biased. Jackson *v.* State, 77 Ala. 18.

19. Thompson & M. Jur. § 208.

unable to distinguish between a fixed or unqualified opinion and a hypothetical one,[20] and some are so constituted that even a hypothetical opinion will exert a controlling influence upon their decision, in which case they should be excluded.[21] Such an opinion therefore while not necessarily rendering a juror incompetent is ground for investigation as to his actual indifference.[22]

d. Impressions. A mere impression in the mind of a juror not amounting to an opinion as to the merits of the case or the guilt or innocence of accused will not render him incompetent,[23] although derived from hearing or reading the evidence adduced at another trial.[24] This rule is founded both upon reason and necessity,[25] for it is not to be supposed that a mere impression will influence a juror's verdict,[26] and to exclude jurors on this ground would make it practically impossible to procure a jury of intelligent persons in cases of any prominence or notoriety.[27] Such mere impressions are usually produced from rumor or newspaper reports,[28] and where it appears that they are unaccompanied by any prejudice and the juror testifies that they will not influence his verdict he should be held competent;[29] nor does the fact that a juror states that he has formed an

20. People *v.* Brotherton, 43 Cal. 530; State *v.* Johnson, Walk. (Miss.) 392.

21. People *v.* Reynolds, 16 Cal. 128; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

22. People *v.* Reynolds, 16 Cal. 128; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; State *v.* Benton, 19 N. C. 196.

It is error for the court to instruct the triers as a matter of law on a challenge to the favor based upon this ground that such an opinion does not render a juror incompetent. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

23. *California.*— People *v.* Symonds, 22 Cal. 348; People *v.* Reynolds, 16 Cal. 128.

Delaware.— State *v.* Anderson, 5 Harr. 493.

Illinois.— Baxter *v.* People, 8 Ill. 368.

Kansas.— State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805; State *v.* Medlicott, 9 Kan. 257.

Louisiana.— State *v.* Ward, 14 La. Ann. 673.

Mississippi.— White *v.* State, 52 Miss. 216; Noe *v.* State, 4 How. 330.

New York.— Abbott *v.* People, 86 N. Y. 460.

Pennsylvania.— Traviss *v.* Com., 106 Pa. St. 597.

South Dakota.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Tennessee.— Moses *v.* State, 11 Humphr. 232.

Texas.— Thompson *v.* State, 19 Tex. App. 593.

Washington.— State *v.* Carey, 15 Wash. 549, 46 Pac. 1050; State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244.

See 31 Cent. Dig. tit. "Jury," § 441.

The word "impression" if it can be properly applied to a mental operation does not reach the strength of an opinion. An opinion is a conviction which is based and must be based upon testimony. An impression is a mere fancy or lodgment in the mind which is not based upon testimony and the existence of which cannot be traced to proof. State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

The effect upon the juror's mind to render him incompetent must be more than an impression, it must amount to a conclusion like that upon which he would be willing to act in ordinary matters. People *v.* Reynolds, 16 Cal. 128.

On a challenge for principal cause it is not competent to examine a juror as to whether he has an "impression" as to defendant's guilt or innocence as only a settled opinion will sustain such challenge. People *v.* Honeyman, 3 Den. (N. Y.) 121.

24. Noe *v.* State, 4 How. (Miss.) 330; Thompson *v.* State, 19 Tex. App. 593; Moran *v.* Com., 9 Leigh (Va.) 651.

25. State *v.* Medlicott, 9 Kan. 257.

26. State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805; State *v.* Medlicott, 9 Kan. 257.

27. State *v.* Potter, 18 Conn. 166; State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805; State *v.* Medlicott, 9 Kan. 257; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; People *v.* Hayes, 1 Edm. Sel. Cas. (N. Y.) 582.

Intelligence even when coupled with preconceived impressions may award more impartial justice than ignorance too often swayed by impulse or prejudice and perhaps incapable of logical discrimination. Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145.

28. Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359; State *v.* Treadwell, 54 Kan. 507, 38 Pac. 799; State *v.* Crawford, 11 Kan. 32; State *v.* Medlicott, 9 Kan. 257; State *v.* Brannon, 6 Kan. App. 765, 50 Pac. 986; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

29. *Kansas.*— State *v.* Treadwell, 54 Kan. 507, 38 Pac. 799; State *v.* Brannon, 6 Kan. App. 765, 50 Pac. 986.

Louisiana.— State *v.* Ford, 42 La. Ann. 255, 7 So. 696.

Mississippi.— White *v.* State, 52 Miss. 216.

New York.—People *v.* Clark, 102 N. Y. 735, 8 N. E. 38 [*affirming* 38 Hun 214]; Abbott *v.* People, 86 N. Y. 460.

Texas.— Thompson *v.* State, 19 Tex. App. 593.

opinion require his exclusion, where it appears from his further examination that it is in fact merely an impression.[30]

e. Opinions as to Particular Matters. A juror is not incompetent if the opinion formed or expressed is not with regard to the merits of the particular case in which he is called upon to serve,[31] unless the fact about which the juror has formed an opinion is necessarily decisive of the issue in controversy.[32] So in civil cases a juror is not incompetent because he has formed and expressed an opinion as to some questions involved in the litigation,[33] unless the opinion is with regard to one of the material issues in the case.[34] In criminal cases a juror is not incompetent unless he has formed or expressed an opinion as to the guilt or innocence of the particular defendant on trial, and as to the particular crime with which he is charged;[35] and if the juror has not formed such an opinion he is not incompetent merely because he has formed an opinion as to the guilt of a person jointly indicted with defendant,[36] or because he has a general bad opinion of defendant's character,[37] or has formed an opinion that a crime has been committed,[38] or that whoever committed the offense charged ought to be punished.[39] Nor is a juror

Washington.— State *v.* Royse, 24 Wash. 440, 64 Pac. 742; State *v.* Harras, 22 Wash. 57, 60 Pac. 58.

See 31 Cent. Dig. tit. "Jury," § 441.

30. State *v.* Medlicott, 9 Kan. 257; State *v.* Johnson, Walk. (Miss.) 392; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; Abbott *v.* People, 86 N. Y. 460.

The average juror is not usually skilled in the niceties of language and frequently answers that he has formed an opinion when he means merely an impression. State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

31. Delaney *v.* Salina, 34 Kan. 532, 9 Pac. 271; Elbin *v.* Wilson, 33 Md. 135; Irvine *v.* Lumbermens' Bank, 2 Watts & S. (Pa.) 190. See also King *v.* Dale, 2 Ill. 513.

32. State *v.* John, 124 Iowa 230, 100 N. W. 193, (Iowa 1903) 93 N. W. 61; Brown *v.* State, 57 Miss. 424. See also Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*g*.

33. Royston *v.* Royston, 21 Ga. 161; Morgan *v.* Stevenson, 6 Ind. 169.

34. Trout *v.* Williams, 29 Ind. 18; Lord *v.* Brown, 5 Den. (N. Y.) 345.

In an action of ejectment a juror is incompetent who has formed and expressed a decided opinion as to the title under which defendant claims. White *v.* Moses, 11 Cal. 68.

35. *California.*— People *v.* Murphy, 146 Cal. 502, 80 Pac. 709.

Iowa.— State *v.* Bryan, 40 Iowa 379; State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342; Wau-kon-chaw-neek-kaw *v.* U. S. 1 Morr. 332.

Kansas.— State *v.* Brownfield, 67 Kan. 627, 73 Pac. 925.

Louisiana.— State *v.* Perioux, 107 La. 601, 31 So. 1016.

Missouri.— State *v.* Martin, 28 Mo. 530.

Nevada.— State *v.* Carrick, 16 Nev. 120.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

Tennessee.— Leach *v.* State, 99 Tenn. 584, 42 S. W. 195.

Washington.— State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

United States.— U. S. *v.* Callender, 25 Fed. Cas. No. 14,709.

See 31 Cent. Dig. tit. "Jury," §§ 440, 453, 469.

A juror is not incompetent on the trial of a public officer for embezzling or using public funds for his personal profit, if he has no opinion as to defendant's guilt of the offense charged, merely because he has an opinion that there is a deficiency in defendant's accounts (State *v.* Carrick, 16 Nev. 120), or that defendant has loaned money but has no knowledge as to whether it was his own (State *v.* Krug, 12 Wash. 288, 41 Pac. 126).

But on an indictment for embezzlement of checks and notes from a bank a juror is incompetent who has formed and expressed a decided opinion as to defendant's guilt, although unable to state that such opinion relates particularly to the charge laid in the indictment, there being various checks forming the subject of different indictments against him. Lithgow *v.* Com., 2 Va. Cas. 297.

36. Lambright *v.* State, 34 Fla. 564, 16 So. 582; Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191; Peddy *v.* State, 31 Tex. Cr. 547, 21 S. W. 542; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; Thompson *v.* State, 19 Tex. App. 593.

37. *Georgia.*— Anderson *v.* State, 14 Ga. 709.

Mississippi.— Helm *v.* State, 67 Miss. 562, 7 So. 487.

Montana.— State *v.* Anderson, 14 Mont. 541, 37 Pac. 1.

New York.— People *v.* Allen, 43 N. Y. 28 [*reversing* 57 Barb. 338]; People *v.* Lohman, 2 Barb. 216.

Texas.— Monroe *v.* State, 23 Tex. 210, 76 Am. Dec. 58.

See 31 Cent. Dig. tit. "Jury," §§ 440, 453, 469.

38. State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520; State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

39. State *v.* Perioux, 107 La. 601, 31 So. 1016.

incompetent because he has formed an opinion as to some fact necessary to be proved to establish the offense charged, where the existence of such fact is inconsistent with the innocence of accused or equally consistent with the guilt of some other person.[40] So on a trial for homicide a juror is not incompetent merely because he believes that deceased was murdered,[41] or that he was killed and that defendant did the killing,[42] since the act may have been accidental or justifiable;[43] and it has also been held under this rule that a juror who has formed and expressed an opinion as to the guilt of the principal felon is not incompetent to act on the trial of one charged as an accessary.[44] A juror is not incompetent because he has formed an opinion as to a fact admitted by the pleadings,[45] or which is conceded on the trial,[46] or upon a question of law to be decided by the court;[47] nor where in case of a conviction the degree of punishment is fixed by the jury, is a juror incompetent because he has formed an opinion as to the punishment to be inflicted in case of a verdict of guilty.[48]

f. Opinions Formed But Not Expressed. It seems that at common law the formation, without any expression of an opinion, did not render a juror incompetent,[49] and this rule has been adopted in some cases in this country;[50] but the sounder rule would seem to be that if the opinion is of a fixed and decided character it is immaterial whether it has been expressed or not,[51] and it will be observed that the cases do not ordinarily recognize any such distinction.[52]

40. *Georgia.*— Loyd *v.* State, 45 Ga. 57.
Maryland.— Gillespie *v.* State, 92 Md. 171, 48 Atl. 32.
Michigan.— People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730.
Missouri.— State *v.* Martin, 28 Mo. 530.
New York.— Lowenberg *v.* People, 27 N. Y. 336 [*affirming* 5 Park. Cr. 414].
See 31 Cent. Dig. tit. "Jury," §§ 440, 453, 469.

41. State *v.* Weems, 96 Iowa 426, 65 N. W. 387; Cargen *v.* People, 39 Mich. 549; State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

42. *Alabama.*— Bales *v.* State, 63 Ala. 30.
Iowa.— State *v.* Thompson, 9 Iowa 188, 74 Am. Dec. 342.
Kansas.— State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.
New York.— Lowenberg *v.* People, 27 N. Y. 336 [*affirming* 5 Park. Cr. 414].
Tennessee.— Conatser *v.* State, 12 Lea 436.
See 31 Cent. Dig. tit. "Jury," §§ 440, 453, 469.

Where the only controverted question is defendant's sanity at the time of the commission of the alleged offense, a juror is not incompetent who has formed an opinion that defendant killed deceased but has no opinion as to the question of his sanity at the time of doing so. State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

43. Conatser *v.* State, 12 Lea (Tenn.) 436.

44. Loyd *v.* State, 45 Ga. 57. *Compare* State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294. *Contra*, Arnold *v.* State, 9 Tex. App. 435.

45. Lake Shore, etc., R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402, 11 Ohio Cir. Dec. 701.

46. State *v.* Everett, 62 Kan. 275, 62 Pac. 657; State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036; State *v.* Wells, 28 Kan. 321; State *v.* Martin, 28 Mo. 530; Conatser *v.* State, 12 Lea (Tenn.) 436.

On a trial for murder a juror is not incompetent because of an opinion that defendant killed deceased, where the only issue is as to whether the killing was justifiable. State *v.* Morrison, 67 Kan. 144, 72 Pac. 554; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970; State *v.* Wells, 28 Kan. 321.

47. Wischover *v.* German Mut. F. Ins. Co., 71 Ill. 65.

48. State *v.* Bill, 15 La. Ann. 114 [*overruling* State *v.* George, 8 Rob. 535]; State *v.* Snyder, 182 Mo. 462, 82 S. W. 12. See also State *v.* Bennett, 14 La. Ann. 651; State *v.* Ward, 14 La. Ann. 673.

49. Thompson & M. Jur. § 206.

50. Noble *v.* People, 1 Ill. 54; State *v.* Phair, 48 Vt. 366; Boardman *v.* Wood, 3 Vt. 570; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693. See also U. S. *v.* Devaughan, 25 Fed. Cas. No. 14,952, 3 Cranch C. C. 84.

An opinion formed from rumor only and not expressed does not render a juror incompetent. State *v.* Morea, 2 Ala. 275; Baker *v.* State, 15 Ga. 498; Griffin *v.* State, 15 Ga. 476; Hudgins *v.* State, 2 Ga. 173.

51. State *v.* Johnson, Walk. (Miss.) 392; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139. See also People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People *v.* Christie, 2 Park. Cr. (N. Y.) 579; Osiander *v.* Com., 3 Leigh (Va.) 780, 24 Am. Dec. 693.

The better view would seem to be that the expression of an opinion is not an essential condition of disqualification. The expression of the opinion is only an evidence of its existence, and if the juror manifests or admits the existence of an opinion amounting to prejudgment of the case he is incompetent whether he has ever expressed the opinion or not. Thompson & M. Jur. § 206.

52. Thompson & M. Jur. § 206.

g. Opinions Requiring Evidence to Remove. It has been held in some cases that a juror is incompetent if he has formed an opinion which it will require evidence to remove,[53] notwithstanding he states that he can disregard the opinion so formed and render an impartial verdict.[54] But on the contrary it has been expressly held that this is no certain or proper test of a juror's competency,[55] since it must necessarily be in every case where any opinion or impression is formed that some evidence will be required to remove it.[56] The proper test is whether the juror can and will, notwithstanding such opinion, render a fair and impartial verdict according to the evidence.[57] It has been held that the juror should be held incompetent if he states that he has formed an unqualified,[58] fixed,[59] or even a rather positive opinion,[60] which it will require evidence to remove; or that to remove it would take conclusive,[61] strong,[62] or considerable evidence;[63] or where such an opinion is based upon certain sources of information such as the evidence given on a former trial or conversations with parties or witnesses,[64] or where the juror seems uncertain as to whether the opinion will yield to evidence and not affect his verdict.[65] But the mere fact that some evidence may be necessary to remove an opinion is not sufficient to render a juror incompetent,[66] and by the

53. State *v.* Snodgrass, 52 Kan. 174, 34 Pac. 750; State *v.* Beatty, 45 Kan. 492, 25 Pac. 899; People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79; Stephens *v.* People, 38 Mich. 739; Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825; State *v.* Riley, 36 Wash. 441, 78 Pac. 1001 [*distinguishing* State *v.* Croney, 31 Wash. 122, 71 Pac. 783]; State *v.* Lattin, 19 Wash. 57, 52 Pac. 314; State *v.* Rutten, 13 Wash. 203, 43 Pac. 30; State *v.* Wilcox, 11 Wash. 215, 39 Pac. 368; State *v.* Coella, 3 Wash. 99, 28 Pac. 28.

54. State *v.* Snodgrass, 52 Kan. 174, 34 Pac. 750; Stephens *v.* People, 38 Mich. 739; State *v.* Riley, 36 Wash. 441, 78 Pac. 1001 [*distinguishing* State *v.* Croney, 31 Wash. 122, 71 Pac. 783]; State *v.* Rutten, 13 Wash. 203, 43 Pac. 30; State *v.* Wilcox, 11 Wash. 215, 39 Pac. 368.

55. Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526; Stout *v.* State, 90 Ind. 1; Allison *v.* Com., 99 Pa. St. 17.

56. *Colorado.*— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Florida.— O'Connor *v.* State, 9 Fla. 215.

Indiana.— Stout *v.* State, 90 Ind. 1.

Iowa.— State *v.* Field, 89 Iowa 34, 56 N. W. 276.

New York.— People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; Pender *v.* People, 18 Hun 560.

Pennsylvania.— Allison *v.* Com., 99 Pa. St. 17.

Texas.— Post *v.* State, 10 Tex. App. 579.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

See 31 Cent. Dig. tit. "Jury," §§ 444, 465, 466.

57. Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526; Stout *v.* State, 90 Ind. 1; State *v.* Field, 89 Iowa 34, 46 N. W. 276; Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458.

58. Conway *v.* Clinton, 1 Utah 215.

59. People *v.* Johnston, 46 Cal. 78. *Compare* State *v.* Dugay, 35 La. Ann. 327.

60. Washington *v.* Com., 86 Va. 405, 10 S. E. 419; Dejarnette *v.* Com., 75 Va. 867.

61. Andrews *v.* State, 21 Fla. 598.

62. *Alabama.*— King *v.* State, 89 Ala. 146, 7 So. 750.

Louisiana.— State *v.* McCoy, 109 La. 682, 33 So. 730.

Mississippi.— Fugate *v.* State, 82 Miss. 189, 33 So. 942.

New York.— Doherty *v.* Lord, 8 Misc. 227, 28 N. Y. Suppl. 720 [*affirming* 5 Misc. 596, 25 N. Y. Suppl. 752]. But see People *v.* Wah Lee Mon, 13 N. Y. Suppl. 767.

Ohio.— Palmer *v.* State, 42 Ohio St. 596.

Oregon.— State *v.* Miller, (1905) 81 Pac. 363.

Texas.— Randle *v.* State, 34 Tex. Cr. 43, 28 S. W. 953.

Washington.— Rose *v.* State, 2 Wash. 310, 26 Pac. 264.

See 31 Cent. Dig. tit. "Jury," §§ 444, 465, 466.

63. People *v.* Fultz, 109 Cal. 258, 41 Pac. 1040.

64. *Arkansas.*— Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59.

Michigan.— People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

Oregon.— State *v.* Miller, (1905) 81 Pac. 363.

Pennsylvania.— Staup *v.* Com., 74 Pa. St. 458.

Tennessee.— Turner *v.* State, (1902) 69 S. W. 774.

Texas.— Drye *v.* State, 40 Tex. Cr. 125, 49 S. W. 83.

Utah.— State *v.* Neel, 23 Utah 541, 65 Pac. 494.

See 31 Cent. Dig. tit. "Jury," §§ 444, 465, 466.

65. McGuire *v.* State, 76 Miss. 504, 25 So. 495; Matter of Klock, 49 Hun (N. Y.) 450, 3 N. Y. Suppl. 478; Halsted *v.* Manhattan R. Co., 58 N. Y. Super. Ct. 270, 11 N. Y. Suppl. 44.

66. Stout *v.* State, 90 Ind. 1; State *v.* Field, 89 Iowa 34, 56 N. W. 276; State *v.* Barton, 71 Mo. 288; Allison *v.* Com., 99 Pa. St. 17.

great weight of authority if the juror testifies that, notwithstanding some evidence will be required to remove his opinion, it is of such a character that it will readily yield to evidence and not affect his verdict and the court is satisfied of the truth of his statement he is a competeut juror.[67]

4. Character and Purpose of Expressions. The mere expression of an opinion adverse to defendant does not render a juror incompetent if it is not accompanied by any malice or ill-will[68] or a fixed opinion as to defendant's guilt.[69] So a juror is not incompetent by reason of having made loose, inconsiderate, or jocular remarks indicating an opinion as to defendant's guilt, where it appears from his examination that he is in fact without prejudice and has formed no opinion,[70] or where it appears that such remarks were made solely for the purpose of avoiding jury duty,[71] or owing to the juror's embarrassment and confusion at having been peremptorily challenged.[72] If, however, the language used clearly indicates a prejudice or settled conviction as to defendant's guilt, the juror is incompetent.[73]

5. Source of Information on Which Opinion Is Based — a. In General. The opinion which will render a juror incompetent depends upon the nature and strength of the opinion and not upon its source and origin,[74] for some persons are so constituted that they will form the most positive opinions upon the most unre-

67. *Alabama.*— Beason *v.* State, 72 Ala. 191.

Arizona.— Brady *v.* Territory, 7 Ariz. 12, 60 Pac. 698.

Arkansas.— Hardin *v.* State, 66 Ark. 53, 48 S. W. 904 [*distinguishing* Vance *v.* State, 56 Ark. 402, 9 S. W. 1066; Polk *v.* State, 45 Ark. 165]; Casey *v.* State, 37 Ark. 67.

California.— People *v.* Mahoney, 18 Cal. 180.

Colorado.— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Florida.— English *v.* State, 31 Fla. 340, 12 So. 689; Andrews *v.* State, 21 Fla. 598.

Indiana.— Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa.— State *v.* Hudson, 110 Iowa 663, 80 N. W. 232.

Louisiana.— State *v.* Dugay, 35 La. Ann. 327; State *v.* De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426; State *v.* Johnson, 33 La. Ann. 889; State *v.* Hugel, 27 La. Ann. 375.

Mississippi.— Green *v.* State, 72 Miss. 522, 17 So. 381 [*disapproving* Logan *v.* State, 50 Miss. 269; Alfred *v.* State, 37 Miss. 296; Sam *v.* State, 13 Sm. & M. 189].

Missouri.— State *v.* Barton, 71 Mo. 288.

Nevada.— Estes *v.* Richardson, 6 Nev. 128.

New York.— People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; Griffin *v.* Barton, 22 Misc. 228, 49 N. Y. Suppl. 1021 [*disapproving* Cancemi *v.* People, 16 N. Y. 501].

Oregon.— State *v.* Morse, 35 Oreg. 462, 57 Pac. 631.

Pennsylvania.— Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795; Myers *v.* Com., 79 Pa. St. 308.

Texas.— Parker *v.* State, 45 Tex. Cr. 334, 77 S. W. 783; Shannon *v.* State, (Cr. App. 1894) 26 S. W. 410; Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458; Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552.

Utah.— People *v.* Thiede, 11 Utah 241, 29 Pac. 837.

Virginia.— Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Dejarnette *v.* Com., 75 Va. 867.

Wyoming.— Bryant *v.* State, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596.

See 31 Cent. Dig. tit. "Jury," §§ 465, 466.

68. State *v.* Howard, 17 N. H. 171; State *v.* Fox, 25 N. J. L. 566; Rex *v.* Edmonds, 4 B. & Ald. 471, 23 Rev. Rep. 350, 6 E. C. L. 564.

69. State *v.* Howard, 17 N. H. 171.

70. Lovett *v.* State, 60 Ga. 257; John *v.* State, 16 Ga. 200; Ray *v.* State, 15 Ga. 223; State *v.* Diskin, 35 La. Ann. 46; Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; Monroe *v.* State, 23 Tex. 210, 76 Am. Dec. 58; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989.

71. State *v.* Cole, 2 Pennew. (Del.) 344, 45 Atl. 391; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Moughon *v.* State, 59 Ga. 308; John *v.* State, 16 Ga. 200.

72. Com. *v.* Hailstock, 2 Gratt. (Va.) 564, holding that where a juror fully qualified upon his examination, but was nevertheless peremptorily challenged, and owing to his embarrassment and mortification made remarks to the effect that it was well for the prisoner that he was rejected, the juror was not on that account incompetent when subsequently called as a talesman to complete the panel.

73. Monroe *v.* State, 5 Ga. 85; Brakefield *v.* State, 1 Sneed (Tenn.) 215; Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562. See also Territory *v.* Kennedy, 3 Mont. 520.

74. *California.*— People *v.* Reynolds, 16 Cal. 128.

Florida.— Andrews *v.* State, 21 Fla. 598.

Georgia.— Boon *v.* State, 1 Ga. 631.

Illinois.— Neely *v.* People, 13 Ill. 685.

Indiana.— Goodwin *v.* Blachley, 4 Ind. 438.

Iowa.— State *v.* Gillick, 7 Iowa 287.

Kansas.— State *v.* Morison, 64 Kan. 669, 68 Pac. 48.

New Hampshire.— State *v.* Webster, 13 N. H. 491.

New York.— People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

liable sources of information,[75] while others are so skeptical that they will accept nothing as true which is not proved by plain and direct evidence or established upon mathematical demonstration;[76] but the source of the opinion is often a material consideration in determining the actual state of the juror's mind,[77] since the opinion will generally be more or less decided according to the nature of the evidence upon which it is founded.[78]

b. Opinions Based on Rumor — (i) *In General.* It is ordinarily held that an opinion based solely upon common rumor will not render a juror incompetent,[79] since opinions so formed are usually no more than slight or hypothetical impressions which will readily yield to legal evidence.[80] The term "rumor," however, within the application of this rule relates to common reports of uncertain origin and which the juror has no just grounds to believe true,[81] and does not include information from what the juror believes to be a reliable and authentic source.[82] As in other cases therefore the strength and not the source of the opinion must finally determine the question of the juror's competency,[83] and if the opinion is of

Tennessee.— Moses *v.* State, 10 Humphr. 456.

Texas.— Rothschild *v.* State, 7 Tex. App. 519.

Utah.— Conway *v.* Clinton, 1 Utah 215.

Virginia.— Jackson *v.* Com., 23 Gratt. 919; Armistead *v.* Com., 11 Leigh 657, 37 Am. Dec. 633.

See 31 Cent. Dig. tit. "Jury," § 448.

The source of the opinion is wholly immaterial, except in so far as it may tend to illustrate the strength or weakness of the conclusion. Rothschild *v.* State, 7 Tex. App. 519.

75. People *v.* Reynolds, 16 Cal. 128; Boon *v.* State, 1 Ga. 631; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

That a person has formed a decided opinion without due deliberation and upon insufficient and unreliable information adds to rather than lessens his incompetency. Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

76. Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

77. Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; Conatser *v.* State, 12 Lea (Tenn.) 436; Alfred *v.* State, 2 Swan (Tenn.) 581; Post *v.* State, 10 Tex. App. 579; Jackson *v.* Com., 23 Gratt. (Va.) 919.

Influence of opinion on verdict see *infra*, XII, H, 6, a.

78. Logan *v.* State, 50 Miss. 269; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

79. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Delaware.— State *v.* Anderson, 5 Harr. 493.

Georgia.— Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595; Westmoreland *v.* State, 45 Ga. 225; Thompson *v.* State, 24 Ga. 297.

Illinois.— Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

Indiana.— Gillooley *v.* State, 58 Ind. 182; Bradford *v.* State, 15 Ind. 347; McGregg *v.* State, 4 Blackf. 101.

Louisiana.— State *v.* Caulfield, 23 La. Ann. 148; State *v.* Lartigue, 29 La. Ann. 642; State *v.* Bunger, 14 La. Ann. 461.

Michigan.— Holt *v.* People, 13 Mich. 224.

Missouri.— State *v.* Wilson, 85 Mo. 134; State *v.* Davis, 29 Mo. 391.

Tennessee.— Conatser *v.* State, 12 Lea 436; Johnson *v.* State, 11 Lea 47; Major *v.* State, 4 Sneed 597; Payne *v.* State, 3 Humphr. 375; Alfred *v.* State, 2 Swan 581.

See 31 Cent. Dig. tit. "Jury," § 450.

80. *Delaware.*— State *v.* Anderson, 5 Harr. 493.

Indiana.— McGregg *v.* State, 4 Blackf. 101.

Michigan.— Holt *v.* People, 13 Mich. 224.

Mississippi.— State *v.* Johnson, Walk. 392.

North Carolina.— State *v.* Ellington, 29 N. C. 61.

Tennessee.— Alfred *v.* State, 2 Swan 581.

Virginia.— Brown *v.* Com., 2 Leigh 769.

See 31 Cent. Dig. tit. "Jury," §§ 450, 471.

Rumor is so proverbially false it would seem that no man with sufficient intelligence to sit upon a jury in any case could found upon it an opinion affecting the person or property of another that would stand for a moment in opposition to evidence given on oath in a court of justice. State *v.* Ellington, 29 N. C. 61.

81. Payne *v.* State, 3 Humphr. (Tenn.) 375.

Rumor is defined as "a flying or popular report, a current story, passing from one to another, without any known authority for the truth of it." Webster Dict. [*quoted* in Quesenberry *v.* State, 3 Stew. & P. (Ala.) 308, 313; State *v.* Culler, 82 Mo. 623, 627].

82. *Alabama.*— Quesenberry *v.* State, 3 Stew. & P. 308.

Iowa.—State *v.* Crofford, 121 Iowa 395, 96 N. W. 889.

Kansas.— State *v.* Snodgrass, 52 Kan. 174, 34 Pac. 750.

Mississippi.— Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94.

Tennessee.— McGowan *v.* State, 9 Yerg. 184.

See 31 Cent. Dig. tit. "Jury," § 450.

83. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; Olive *v.* State, 34 Fla. 203, 15 So. 925; Boon *v.* State, 1 Ga. 618; Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

a fixed and positive character, although based upon common rumor, the juror is incompetent.[84] So the formation or expression of an opinion based on rumor may be made a ground of challenge to the favor;[85] but if the juror testifies and it appears to the court that he is without any prejudice and can notwithstanding such opinion render a fair and impartial verdict according to the evidence he should be held competent,[86] and in a number of jurisdictions there are now statutory provisions to this effect.[87]

84. Maddox *v.* State, 32 Ga. 581, 79 Am. Dec. 307; Boon *v.* State, 1 Ga. 618; State *v.* Miller, 29 Kan. 43.

85. Boon *v.* State, 1 Ga. 618. See also Anderson *v.* State, 14 Ga. 709.

86. *Alabama.*— Carson *v.* State, 50 Ala. 134.

Arkansas.— Sneed *v.* State, 47 Ark. 180, 1 S. W. 68. See also Meyer *v.* State, 19 Ark. 156.

California.— People *v.* Sewell, 145 Cal. 292, 78 Pac. 717; People *v.* Nunley, 142 Cal. 441, 76 Pac. 45; People *v.* Owens, 123 Cal. 482, 56 Pac. 251; People *v.* McCauley, 1 Cal. 379.

Florida.— Brown *v.* State, 40 Fla. 459, 25 So. 63; Olive *v.* State, 34 Fla. 203, 15 So. 925; Montague *v.* State, 17 Fla. 662.

Georgia.— Westmoreland *v.* State, 45 Ga. 225; Anderson *v.* State, 14 Ga. 709.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Plummer *v.* People, 74 Ill. 361.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Scranton *v.* Stewart, 52 Ind. 68; Fahnestock *v.* State, 23 Ind. 231; Van Vacter *v.* McKillip, 7 Blackf. 578.

Iowa.— State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693; State *v.* Sopher, 70 Iowa 494, 30 N. W. 917; State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370.

Kansas.— State *v.* Treadwell, 54 Kan. 513, 38 Pac. 813.

Kentucky.— Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652.

Louisiana.— State *v.* Kellogg, 104 La. 580, 29 So. 285; State *v.* Dent, 41 La. Ann. 1082, 7 So. 694; State *v.* George, 37 La. Ann. 786; State *v.* Bunger, 14 La. Ann. 461; State *v.* Brette, 6 La. Ann. 652.

Michigan.— People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540.

Mississippi.— Lee *v.* State, 45 Miss. 114; King *v.* State, 5 How. 730; State *v.* Johnson, Walk. 392.

Missouri.— State *v.* Forsha, 190 Mo. 296, 88 S. W. 746; State *v.* Bronstine, 147 Mo. 520, 49 S. W. 512; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

Montana.— State *v.* Sheerin, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600.

Nebraska.— Jahnke *v.* State, 68 Nebr. 154, 94 N. W. 158, 104 N. W. 154; Russell *v.* State, 62 Nebr. 512, 87 N. W. 344; Bolln *v.* State, 51 Nebr. 581, 71 N. W. 144; Curry *v.* State, 5 Nebr. 412.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

New York.— Phelps *v.* People, 6 Hun 401.

North Carolina.— State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; State *v.* Green, 95 N. C. 611; State *v.* Kilgore, 93 N. C. 533; State *v.* Cockman, 60 N. C. 484; State *v.* Ellington, 29 N. C. 61.

Oklahoma.— Huntley *v.* Territory, 7 Okla. 60, 54 Pac. 314.

Oregon.— State *v.* Armstrong, 43 Oreg. 207, 73 Pac. 1022; State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 29 Pac. 637.

Pennsylvania.— O'Mara *v.* Com., 75 Pa. St. 424.

South California.— State *v.* Hayes, 69 S. C. 295, 48 S. E. 251; Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; State *v.* James, 34 S. C. 49, 12 S. E. 657.

South Dakota.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Tennessee.— Conatson *v.* State, 12 Lea 436.

Texas.— Long Mfg. Co. *v.* Gray, 13 Tex. Civ. App. 172, 35 S. W. 32; Bratt *v.* State, (Cr. App. 1897) 41 S. W. 624; Deon *v.* State, 37 Tex. Cr. 506, 40 S. W. 266; Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278; Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354.

Utah.— State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Virginia.— Little *v.* Com., 25 Gratt. 921; *In re* Epes, 5 Gratt. 676; Brown *v.* Com., 2 Leigh 769.

Washington.— State *v.* Farris, 26 Wash. 205, 66 Pac. 412; Rose *v.* State, 2 Wash. 310, 26 Pac. 264.

See 31 Cent. Dig. tit. "Jury," §§ 450, 471.

87. *Illinois.*— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Plummer *v.* People, 74 Ill. 361.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Stout *v.* State, 90 Ind. 1.

Kentucky.— Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652.

Missouri.— State *v.* Duffy, 124 Mo. 1, 27 S. W. 358; State *v.* Rose, 32 Mo. 346.

Montana.— State *v.* Sheerin, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600.

Nebraska.— Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Curry *v.* State, 5 Nebr. 412.

North Dakota.— State *v.* Ekanger, 8 N. D. 559, 80 N. W. 482.

Ohio.— Frazier *v.* State, 22 Ohio St. 551.

Oklahoma.— Huntley *v.* Territory, 7 Okla. 60, 54 Pac. 314.

Oregon.— Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

(II) *Qualified or Hypothetical Opinion.* A hypothetical opinion based upon rumor only and entirely contingent upon the truth or falsity of such rumors, as to which the juror has no fixed belief, is not such an opinion as will render him incompetent;[88] and if the juror testifies that he is without any bias or prejudice and that this opinion will not prevent him from rendering an impartial verdict a challenge on this ground is properly overruled.[89]

(III) *Opinion Requiring Evidence to Remove.* It has been held that a juror is incompetent, although his opinion is based upon rumor if it would require evidence to remove it,[90] notwithstanding he states that he can render an impartial verdict.[91] But by the weight of authority if the juror testifies and it appears to the court that the opinion is of such a character that it will readily yield to evidence and that the juror can render an impartial verdict he is competent.[92]

Texas.— Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708 [*affirming* 4 Utah 247, 9 Pac. 407].

See 31 Cent. Dig. tit. "Jury," §§ 450, 471.

In North Dakota the statute does not use the term "rumor," but applies to what the juror "may have heard from others or read in newspapers or public journals," and therefore includes conversations with persons having knowledge of the facts as well as common rumor. State *v.* Ekanger, 8 N. D. 559, 80 N. W. 482.

88. *California.*— People *v.* Murphy, 45 Cal. 137; People *v.* Williams, 17 Cal. 142.

Illinois.— Leach *v.* People, 53 Ill. 311; Baxter *v.* People, 8 Ill. 368; Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

Iowa.— State *v.* Ostrander, 18 Iowa 435.

Kentucky.— Fowler *v.* Com., 7 Ky. L. Rep. 529.

Michigan.— People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79.

Missouri.— State *v.* Reed, 89 Mo. 168, 1 S. W. 225; State *v.* Farrow, 74 Mo. 531.

Nebraska.— Murphy *v.* State, 15 Nebr. 383, 19 N. W. 489.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196.

New York.— Durell *v.* Mosher, 8 Johns. 445.

South Dakota.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Texas.— Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

Virginia.— McCune *v.* Com., 2 Rob. 771.

See 31 Cent. Dig. tit. "Jury," § 455.

If the juror has expressed an opinion positively, it has been held that he is incompetent, although on his examination he states that his opinion is hypothetical only and that if what he has heard is not true he has formed no opinion. Trimble *v.* State, 2 Greene (Iowa) 404.

89. *Alabama.*— Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; State *v.* Williams, 3 Stew. 454.

Maryland.— Waters *v.* State, 51 Md. 430.

Michigan.— People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; Murphy *v.* State, 15 Nebr. 383, 19 N. W. 489.

South Dakota.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

Virginia.— Clore's Case, 8 Gratt. 606; McCune *v.* Com., 2 Rob. 771; Moran *v.* Com., 9 Leigh 651.

See 31 Cent. Dig. tit. "Jury," §§ 455, 472.

But the rule is otherwise if the juror states that he believes what he has heard and does not state that he can try the case impartially without reference to such opinion. People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79.

90. State *v.* Beatty, 45 Kan. 492, 25 Pac. 899; Owens *v.* State, 32 Nebr. 167, 49 N. W. 246; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

91. Owens *v.* State, 32 Nebr. 167, 49 N. W. 266; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451.

92. *Arkansas.*— Hardin *v.* State, 66 Ark. 53, 48 S. W. 904; Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

California.— People *v.* Brown, 48 Cal. 253. *Compare* People *v.* Gehr, 8 Cal. 359.

Florida.— O'Connor *v.* State, 9 Fla. 215.

Iowa.— State *v.* Lawrence, 38 Iowa 51.

Louisiana.— State *v.* Frier, 45 La. Ann. 1434, 14 So. 296.

Mississippi.— Gammons *v.* State, 85 Miss. 103, 37 So. 609; Green *v.* State, 72 Miss. 522, 17 So. 381 [*disapproving* Alfred *v.* State, 37 Miss. 296; Cotton *v.* State, 31 Miss. 504].

Missouri.— State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102; State *v.* Walton, 74 Mo. 270; State *v.* Core, 70 Mo. 491.

New York.— Thomas *v.* People, 67 N. Y. 218.

Ohio.— Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126.

Tennessee.— Wilson *v.* State, 109 Tenn. 167, 70 S. W. 57; Spence *v.* State, 15 Lea 539.

Texas.— Tardy *v.* State, 46 Tex. Cr. 214, 78 S. W. 1076; Reed *v.* State, 32 Tex. Cr. 25, 22 S. W. 22; Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771; Post *v.* State, 10 Tex. App. 579.

Utah.— People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

c. Opinions Based on Newspaper Reports — (i) *In General.* Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of evidence given under oath;[93] and it is now a well settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence and the court is satisfied that he will do so,[94] and there are now in many jurisdictions statutory provisions to this effect.[95] But a juror is incompetent, although his

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

United States.— Gallot *v.* U. S., 87 Fed. 446, 31 C. C. A. 44.

See 31 Cent. Dig. tit. "Jury," §§ 456, 473, 474.

93. State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; State *v.* Wilson, 85 Mo. 134; Baldwin *v.* State, 12 Mo. 223. See also State *v.* Young, 104 Iowa 730, 74 N. W. 693.

94. *Alabama.*— Long *v.* State, 86 Ala. 36, 5 So. 443.

Arkansas.— Dolan *v.* State, 40 Ark. 454.

California.— People *v.* Sowell, 145 Cal. 292, 78 Pac. 717; People *v.* Nunley, 142 Cal. 441, 76 Pac. 45; People *v.* Collins, 105 Cal. 504, 39 Pac. 16; People *v.* Cochran, 61 Cal. 548.

Connecticut.— State *v.* Laudano, 74 Conn. 638, 51 Atl. 860; State *v.* Willis, 71 Conn. 293, 41 Atl. 820.

District of Columbia.— U. S. *v.* Barber, 21 D. C. 456.

Florida.— Montague *v.* State, 17 Fla. 662.

Idaho.— Pine *v.* Callahan, 8 Ida. 684, 71 Pac. 473.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Noe *v.* State, 92 Ind. 92; Stout *v.* State, 90 Ind. 1; Hart *v.* State, 57 Ind. 102; Cluck *v.* State, 40 Ind. 263.

Iowa.— State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737; State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211; State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403.

Maryland.— Waters *v.* State, 51 Md. 430.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; State *v.* Brennan, 164 Mo. 487, 65 S. W. 325; State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83; State *v.* Hunt, 141 Mo. 626, 43 S. W. 389; State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719; State *v.* Duffy, 124 Mo. 1, 27 S. W. 358; State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Montana.— State *v.* Howard, 30 Mont. 518, 77 Pac. 50; State *v.* Sheerin, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600; Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147.

Nebraska.— Jahnke *v.* State, 68 Nebr. 154, 94 N. W. 158, 104 N. W. 154; Rottman *v.* State, 63 Nebr. 648, 88 N. W. 857; Russell *v.* State, 62 Nebr. 512, 87 N. W. 344; Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445; Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Bohanan *v.* State, 18 Nebr. 57, 24 N. W. 390, 53 Am. Rep. 791; Curry *v.* State, 5 Nebr. 412.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

New Jersey.— Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428.

New York.— People *v.* Crowley, 102 N. Y. 234, 6 N. E. 384 [*affirming* 4 N. Y. Cr. 26]; People *v.* Otto, 101 N. Y. 690, 5 N. E. 788 [*affirming* 38 Hun 97]; Balbo *v.* People, 80 N. Y. 484 [*affirming* 19 Hun 424]; Sanchez *v.* People, 22 N. Y. 147 [*reversing* 18 How. Pr. 74, 4 Park. Cr. 535]; Phelps *v.* People, 6 Hun 401; People *v.* Hayes, 1 Edm. Sel. Cas. 582.

Ohio.— Doll *v.* State, 45 Ohio St. 445, 15 N. E. 293; Frazier *v.* State, 23 Ohio St. 551; Jones *v.* State, 14 Ohio Cir. Ct. 35, 7 Ohio Cir. Dec. 305; Blair *v.* State, 5 Ohio Cir. Ct. 496, 3 Ohio Cir. Dec. 242.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520; State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128; State *v.* Kelly, 28 Oreg. 225, 42 Pac. 217, 52 Am. St. Rep. 777; State *v.* Ingraham, 23 Oreg. 434, 31 Pac. 1049.

Pennsylvania.— Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374; Com. *v.* Taylor, 129 Pa. St. 534, 18 Atl. 558; Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520; Myers *v.* Com., 79 Pa. St. 308; O'Mara *v.* Com., 75 Pa. St. 424; Hall *v.* State, 9 Pa. Cas. 279, 12 Atl. 163.

South Carolina.— State *v.* Coleman, 20 S. C. 441.

Tennessee.— State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65; Woods *v.* State, 99 Tenn. 182, 41 S. W. 811.

Utah.— State *v.* Haworth, 24 Utah 398, 68 Pac. 153.

Virginia.— McCue *v.* Com., 103 Va. 870, 49 S. E. 623; Smith *v.* Com., 7 Gratt. 593.

Washington.— State *v.* Farris, 26 Wash. 205, 66 Pac. 412; State *v.* Gile, 8 Wash. 12, 35 Pac. 417; Rose *v.* State, 2 Wash. 310, 26 Pac. 264.

West Virginia.— State *v.* Schnelle, 24 W. Va. 767.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708 [*affirming* 4 Utah 247, 9 Pac. 407]; Dimmick *v.* U. S., 121 Fed. 638, 57 C. C. A. 664.

See 31 Cent. Dig. tit. "Jury," §§ 451, 475.

A newspaper report within the application of this rule means a current story printed in a newspaper. State *v.* Culler, 82 Mo. 623, holding that the rule does not apply to opinions formed by reading newspaper reports of the sworn testimony of witnesses given upon a former trial.

95. *Illinois.*— Spies *v.* People, 122 Ill. 1,

opinion was formed from general newspaper reports, if the opinion is of a fixed and decided character,[96] or if he admits that it would influence his decision of the case.[97]

(II) *Reports of Sworn Testimony of Witnesses.* There is much conflict of authority as to the effect of opinions derived from reading newspaper reports of the sworn testimony of witnesses, some of the cases holding that a juror may be held competent who testifies that he can render an impartial verdict, notwithstanding he has formed an opinion from reading a newspaper report of the evidence given on a former trial;[98] while others, on the contrary, hold that notwithstanding he so testifies he is incompetent if his opinion was formed from reading newspaper reports of the evidence given on a former trial of defendant,[99] on the trial of a co-defendant,[1] or even reports of the evidence given on a coroner's inquest;[2] but some of the cases make an express distinction between reading reports of the evidence given on a former trial, and that taken

12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Noe *v.* State, 92 Ind. 92; Stout *v.* State, 90 Ind. 1.

Kentucky.— Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652.

Missouri.— State *v.* Duffy, 124 Mo. 1, 27 S. W. 358; State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

Montana.— State *v.* Sheerin, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600; Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147.

Nebraska.— Barker *v.* State, (1905) 103 N. W. 71; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Curry *v.* State, 5 Nebr. 412.

Ohio.— Frazier *v.* State, 23 Ohio St. 551.

Oregon.— Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

Texas.— Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708 [*affirming* 4 Utah 247, 9 Pac. 407].

See 31 Cent. Dig. tit. "Jury," §§ 451, 475.

If the juror's opinion is decided and positive he is incompetent, although he may state that he can render an impartial verdict, so that under the statute as before, the court must be satisfied of the juror's impartiality. Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

96. Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; Gallaher *v.* State, 40 Tex. Cr. 296, 50 S. W. 388.

97. State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

98. State *v.* Ford, 37 La. Ann. 443; Smith *v.* Com., 7 Gratt. (Va.) 593; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

99. *Kansas.*— State *v.* Morrison, 64 Kan. 669, 68 Pac. 48.

Missouri.— State *v.* Foley, 144 Mo. 600, 46 S. W. 733. *Compare* State *v.* Bryant, 93 Mo. 273, 6 S. W. 102.

Nebraska.— Smith *v.* State, 5 Nebr. 181; Carroll *v.* State, 5 Nebr. 31.

New York.— Greenfield *v.* People, 74 N. Y. 277, 6 Abb. N. Cas. 1 [*reversing* 13 Hun 242].

Pennsylvania.— Staup *v.* Com., 74 Pa. St. 458. *Compare* Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

Tennessee.— Ward *v.* State, 102 Tenn. 724, 52 S. W. 996.

See 31 Cent. Dig. tit. "Jury," §§ 451, 475.

The statutory provisions authorizing jurors to be held competent, notwithstanding opinions formed from reading newspaper reports, do not apply to opinions formed from reading reports of the sworn testimony of witnesses. State *v.* Culler, 82 Mo. 623; Carroll *v.* State, 5 Nebr. 31; Frazier *v.* State, 23 Ohio St. 551.

If the juror did not understand that he was reading the testimony of witnesses, but considered what he was reading as an ordinary newspaper report, he is not incompetent if he states that notwithstanding the opinion so formed he can render an impartial verdict. People *v.* McGonegal, 17 N. Y. Suppl. 147.

1. Black *v.* State, 42 Tex. 377; Dolan *v.* U. S., 123 Fed. 52, 59 C. C. A. 176 [*reversing* 116 Fed. 578, 54 C. C. A. 34, and in effect *overruling* Hawkins *v.* U. S., 116 Fed. 569, 53 C. C. A. 663].

If a juror has read only fragmentary portions of the evidence given on a trial of a co-defendant, he is not incompetent when he testifies that he can render an impartial verdict. Com. *v.* Taylor, 129 Pa. St. 534, 18 Atl. 558.

2. State *v.* Culler, 82 Mo. 623; McHugh *v.* State, 38 Ohio St. 153; Frazier *v.* State, 23 Ohio St. 551.

Reading a mere garbled statement of the evidence given before a coroner, or a reporterial comment thereon, will not render a juror incompetent if he testifies that he can render an impartial verdict. State *v.* Shackelford, 148 Mo. 493, 50 S. W. 105.

If it does not appear who testified, or what testimony was given before the coroner's jury, it cannot be said, as a matter of law, that the ruling of the trial court was erroneous in holding that a juror was competent, where he testified that he could ren-

before a coroner, holding that in the latter case a juror is competent if he testifies that he can render an impartial verdict.[3]

(III) *Qualified or Hypothetical Opinion.* An opinion formed from reading newspaper reports which is purely hypothetical, depending upon the truth or falsity of the accounts read, is not such an opinion as will render a juror incompetent,[4] but is at most merely a ground for a challenge to the favor;[5] and if the juror upon examination testifies that he is without any bias or prejudice and can try the case fairly and impartially according to the evidence, a challenge on this ground is properly overruled.[6] But if the juror states that he believes what he has read and has formed an opinion, such opinion cannot be said to be hypothetical.[7] And if he admits that he is biased or could not be entirely indifferent by reason of such opinion he should be excluded.[8]

(IV) *Opinion Requiring Evidence to Remove.* It has been held that a juror is incompetent who has formed an opinion, although based upon newspaper reports which it will require evidence to remove,[9] and although the juror states that he can render an impartial verdict;[10] but by the weight of authority if the juror states and it satisfactorily appears to the court that the opinion is of such a character that it will readily yield to evidence and that the juror can render an impartial verdict he is competent.[11]

der an impartial verdict. State *v.* Olberman, 33 Oreg. 556, 55 Pac. 866.

3. People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; Allison *v.* Com., 99 Pa. St. 17; Myers *v.* Com., 79 Pa. St. 308; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

4. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; People *v.* Mallon, 3 Lans. (N. Y.) 224; Stout *v.* People, 4 Park. Cr. (N. Y.) 71; State *v.* Meaker, 54 Vt. 112.

5. Stout *v.* People, 4 Park. Cr. (N. Y.) 71.

6. *Connecticut.*— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State *v.* Potter, 18 Conn. 166.

Illinois.— Wilson *v.* People, 94 Ill. 299.

Indiana.— Rice *v.* People, 7 Ind. 332.

Maryland.— Waters *v.* State, 51 Md. 430.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

New York.— Abbott *v.* People, 86 N. Y. 460; Cox *v.* People, 80 N. Y. 500 [*affirming* 19 Hun 430].

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

See 31 Cent. Dig. tit. "Jury," §§ 455, 476.

7. Gray *v.* People, 26 Ill. 344.

8. People *v.* Mallon, 3 Lans. (N. Y.) 224; Wright *v.* Com., 32 Gratt. (Va.) 941.

9. State *v.* Beatty, 45 Kan. 492, 25 Pac. 899; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444; State *v.* Murphy, 9 Wash. 204, 37 Pac. 420.

10. Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

11. *Arkansas.*— Taylor *v.* State, 72 Ark. 613, 82 S. W. 495; Hardin *v.* State, 66 Ark. 53, 48 S. W. 904.

Florida.— Marlow *v.* State, (1905) 38 So. 653.

Iowa.— State *v.* Lawrence, 38 Iowa 51.

Louisiana.— State *v.* Coleman, 27 La. Ann. 691.

Michigan.— Ulrich *v.* People, 39 Mich. 245.

Mississippi.— Gammons *v.* State, 85 Miss. 103, 37 So. 609.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102; State *v.* Walton, 74 Mo. 270.

New York.— People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766 [*affirming* 4 N. Y. Cr. 230]; People *v.* New York County Oyer & T. Ct., 83 N. Y. 436; Pender *v.* People, 18 Hun 560; People *v.* McGonegal, 17 N. Y. Suppl. 147; People *v.* Wah Lee Mon, 13 N. Y. Suppl. 767.

Ohio.— Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126; McCarthy *v.* State, 5 Ohio Cir. Ct. 627, 3 Ohio Cir. Dec. 306.

Pennsylvania.— Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40; Com. *v.* McMillan, 144 Pa. St. 610, 22 Atl. 1029; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795; Allison *v.* Com., 99 Pa. St. 17.

Tennessee.— State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65; Spence *v.* State, 15 Lea 539.

Texas.— Reed *v.* State, 32 Tex. Cr. 25, 22 S. W. 22; Ashton *v.* State, 31 Tex. Cr. 479, 21 S. W. 47; Grissom *v.* State, 4 Tex. App. 374.

Virginia.— Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

West Virginia.— State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

Wisconsin.— Hughes *v.* State, 109 Wis. 397, 85 N. W. 333; Baker *v.* State, 88 Wis. 140, 59 N. W. 570.

Wyoming.— Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

United States.— Gallot *v.* U. S., 87 Fed. 446, 31 C. C. A. 44.

See 31 Cent. Dig. tit. "Jury," §§ 456, 477, 478.

d. Opinions Based on Evidence Adduced at Trial — (I) *Evidence on Preliminary Proceedings.* A juror is not incompetent to sit on the trial of a case because he heard the evidence on the trial of a plea in bar to the indictment,[12] or on a preliminary investigation as to defendant's sanity.[13] Nor is a juror incompetent, provided he has formed no opinion as to defendant's guilt or innocence, because he has heard the evidence given on a coroner's inquest,[14] habeas corpus proceeding,[15] or on the preliminary hearing before a magistrate;[16] but he is incompetent if he has formed an opinion from hearing[17] or reading such evidence,[18] even, it has been held, although he states that he can, notwithstanding such opinion, render an impartial verdict.[19]

(II) *Evidence on Former Trial.* A juror is not incompetent merely because he has heard the evidence at a former trial, if he has formed no opinion therefrom as to the merits of the case or the guilt or innocence of defendant;[20] but he is incompetent if he has formed such an opinion from hearing[21] or reading such evidence,[22] and this notwithstanding the juror states that he can disregard the opinion so formed and render a fair and impartial verdict.[23]

(III) *Evidence on Trial of Another Case.* A juror is incompetent who has formed an opinion as to defendant's guilt or innocence from hearing the evidence on the trial of another indictment against the same defendant involving the same evidence,[24] or the evidence given on the separate trial of another person indicted with defendant for the same offense,[25] or for an offense involving the same evidence,[26] notwithstanding the juror states that he can try the case impar-

12. State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264.

13. State *v.* Arnold, 12 Iowa 479.

14. O'Connor *v.* State, 9 Fla. 215.

15. State *v.* Riddle, 179 Mo. 287, 78 S. W. 606.

16. Wade *v.* State, 12 Tex. App. 358.

17. Dugle *v.* State, 100 Ind. 259; State *v.* Hultz, 106 Mo. 41, 16 S. W. 940.

18. State *v.* Culler, 82 Mo. 623.

19. Dugle *v.* State, 100 Ind. 259; State *v.* Hultz, 106 Mo. 41, 16 S. W. 940; State *v.* Culler, 82 Mo. 623. But see Denham *v.* State, 22 Fla. 664; Monroe *v.* State, 23 Tex. 210, 76 Am. Dec. 58; Hendrick *v.* Com., 5 Leigh (Va.) 707; Pollard *v.* Com., 5 Rand. (Va.) 659.

Evidence on habeas corpus proceeding.— A juror who has formed an opinion as to defendant's guilt from hearing a part of the evidence on a habeas corpus proceeding is not incompetent where he testifies that it will not influence his verdict and that he can try the case impartially. Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252.

20. State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; Spangler *v.* Kite, 47 Mo. App. 230; Wade *v.* State, 12 Tex. App. 358; Shields *v.* State, 8 Tex. App. 427; Parchman *v.* State, 2 Tex. App. 228, 27 Am. Rep. 435.

21. *Indiana.*— Dugle *v.* State, 100 Ind. 259.

Mississippi.— Mabry *v.* State, 71 Miss. 716, 14 So. 267.

Missouri.— State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

Nebraska.— Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825.

New York.— People *v.* Vermilyea, 7 Cow. 108.

Oregon.— State *v.* Miller, (1905) 81 Pac. 363.

Pennsylvania.— Staup *v.* Com., 74 Pa. St. 458; Irvine *v.* Kean, 14 Serg. & R. 292.

See 31 Cent. Dig. tit. "Jury," § 459.

22. Laidlaw *v.* Sage, 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770; Staup *v.* Com., 74 Pa. St. 458.

23. *Indiana.*—Dugle *v.* State, 100 Ind. 259.

Missouri.— State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

New York.— Laidlaw *v.* Sage, 2 N. Y. App. Div. 374, 37 N. Y. Suppl. 770.

Oregon.— State *v.* Miller, (1905) 81 Pac. 363.

Pennsylvania.— Staup *v.* Com., 74 Pa. St. 458; Irvine *v.* Kean, 14 Serg. & R. 292. But see Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

See 31 Cent. Dig. tit. "Jury," §§ 459, 467.

But see State *v.* Prins, 117 Iowa 505, 91 N. W. 758.

Under the Indiana statute of 1881 the court may in its discretion admit a juror as competent who states on oath that he can render an impartial verdict notwithstanding an opinion based upon reading testimony given at a former trial, provided it was not the testimony of "witnesses to the transaction." Siberny *v.* State, 149 Ind. 684, 39 N. E. 936.

24. State *v.* Webster, 13 N. H. 491; Goble *v.* State, 42 Tex. Cr. 501, 60 S. W. 968; Gilmore *v.* State, 37 Tex. Cr. 81, 38 S. W. 787.

25. State *v.* Anderson, 5 Harr. (Del.) 493; Brown *v.* State, 70 Ind. 576; Shannon *v.* State, 34 Tex. Cr. 5, 28 S. W. 540; Dolan *v.* U. S., 123 Fed. 52, 59 C. C. A. 176 [*reversing* 116 Fed. 578, 54 C. C. A. 34].

26. Drye *v.* State, 40 Tex. Cr. 125, 49 S. W. 83.

tially;[27] but a juror is not incompetent merely because he has heard such evidence where no opinion was formed as to defendant's guilt or innocence,[28] although an opinion was formed as to the guilt of the person then on trial.[29]

e. Opinions Based on Conversations With Witnesses, Parties, or Persons Claiming to Know the Facts. It is ordinarily held that a juror is incompetent, although he states that he can render an impartial verdict, if he has formed an opinion from conversing with witnesses in the case,[30] or with one of the parties,[31] or some person claiming to know the facts and in whom the juror relies.[32]

6. Influence of Opinion on Verdict — a. In General. The essential test of a juror's competency is whether, notwithstanding some opinion or impression previously formed or expressed, he can render an impartial verdict according to the

27. Goble *v.* State, 42 Tex. Cr. 501, 60 S. W. 968; Gilmore *v.* State, 37 Tex. Cr. 81, 38 S. W. 787; Shannon *v.* State, 34 Tex. Cr. 5, 28 S. W. 540; Dolan *v.* U. S., 123 Fed. 52, 59 C. C. A. 176 [*reversing* 116 Fed. 578, 54 C. C. A. 34]. *Compare* State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211; Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

28. Robinson *v.* State, 82 Ga. 535, 9 S. E. 528; State *v.* Philpot, 97 Iowa 365, 66 N. W. 730; Noe *v.* State, 4 How. (Miss.) 330; Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1006; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; Thompson *v.* State, 19 Tex. App. 593.

29. Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468. See also *supra*, XII, H, 3, e.

30. *Arkansas.*— Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59.

Indiana.— Goodwin *v.* Blachley, 4 Ind. 438.

Louisiana.— State *v.* Barnes, 34 La. Ann. 395. But see State *v.* Covington, 45 La. Ann. 979, 13 So. 266.

Mississippi.— Shepprie *v.* State, 79 Miss. 740, 31 So. 416; Klyce *v.* State, 79 Miss. 652, 31 So. 339; Logan *v.* State, 50 Miss. 269; Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94.

Missouri.— State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

Oregon.— State *v.* Miller, (1905) 81 Pac. 363.

Tennessee.— Rice *v.* State, 1 Yerg. 432.

Texas.— Keaton *v.* State, 40 Tex. Cr. 139, 49 S. W. 90; Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278.

Virginia.— Armistead *v.* Com., 11 Leigh 657, 37 Am. Dec. 633.

See 31 Cent. Dig. tit. "Jury," § 468.

The mere fact that a juror has talked with a witness does not render him incompetent if he has formed no opinion as to defendant's guilt or innocence (Thomson *v.* People, 24 Ill. 60, 76 Am. Dec. 733), or if it does not appear that such conversation had any bearing upon the opinion formed (Wade *v.* State, 35 Tex. Cr. 170, 32 S. W. 772, 60 Am. St. Rep. 31).

In Indiana the criminal code of 1881 provides that a juror is incompetent if he has formed an opinion "founded upon conversations with witnesses of the transaction, or reading reports of their testimony or hearing them testify" (Woods *v.* State, 134 Ind. 35, 33 N. E. 901; Dugle *v.* State, 100 Ind. 259), and an opinion formed from reading an affidavit of a witness is within the application of the statute (Woods *v.* State, *supra*); but a juror is not necessarily incompetent, under the statute, who has talked with a witness, who was not a "witness of the transaction," or where the opinion formed thereby does not relate to the gravamen of the offense, but merely to some incidental or collateral matter (Walker *v.* State, 102 Ind. 502, 1 N. E. 856).

31. People *v.* Wells, 100 Cal. 227, 34 Pac. 718; State *v.* Smith, 124 Iowa 334, 100 N. W. 40; State *v.* Neel, 23 Utah 541, 65 Pac. 494. See also Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756; May *v.* Elam, 27 Iowa 365; Rogers *v.* Rogers, 14 Wend. (N. Y.) 131.

A juror who has been consulted by an agent of one of the parties, and has given his opinion upon the merits of the case, is incompetent, although he states that as he has heard only one side of the question his mind is still open to conviction. Laverty *v.* Gray, 3 Mart. (La.) 617.

It is not error for the court to stand a juror aside upon his statement that he has conversed with one of the parties, although the juror states that he could render an impartial verdict. Stoner *v.* State, 4 Mo. 368.

32. *California.*— People *v.* Miller, 125 Cal. 44, 57 Pac. 770.

Kansas.— State *v.* Otto, 61 Kan. 58, 58 Pac. 995; State *v.* Beuerman, 59 Kan. 586, 53 Pac. 874.

Michigan.— People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

Mississippi.— Shepprice *v.* State, 79 Miss. 740, 31 So. 416; Nelms *v.* State, 13 Sm. & M. 500, 53 Am. Dec. 94.

Nebraska.— Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405.

Tennessee.— Turner *v.* State, (1902) 69 S. W. 774. See also McGowan *v.* State, 9 Yerg. 184.

See 31 Cent. Dig. tit. "Jury," § 468.

Compare State *v.* Bone, 114 Iowa 537, 87 N. W. 507; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

A person who has conversed with a juror who served upon a former trial and formed an opinion as to defendant's guilt or innocence is incompetent. Ned *v.* State, 7 Port. (Ala.) 187. *Contra*, State *v.* Williams, 49 La. Ann. 1148, 22 So. 759.

evidence adduced upon the trial.[33] If the juror so testifies and it satisfactorily appears to the court that he can do so, he is competent notwithstanding he has formed an opinion as to the merits of the case,[34] and there are in a number of jurisdictions statutory provisions to this effect,[35] or which make such provision with regard to opinions based upon rumor or newspaper reports.[36] There are a variety of circumstances, however, which arise in practice, which make this question in many cases difficult to determine,[37] and much must be left to the discretion of the trial judge,[38] who must decide the question, not from isolated

33. *Colorado.*— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Indiana.— Stout *v.* State, 90 Ind. 1.

Iowa.— State *v.* Hudson, 110 Iowa 663, 80 N. W. 232; State *v.* Field, 89 Iowa 34, 56 N. W. 276.

Pennsylvania.— Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374; Com. *v.* Taylor, 129 Pa. St. 534, 18 Atl. 558.

Texas.— Parker *v.* State, 45 Tex. Cr. 334, 77 S. W. 783; Suit *v.* State, 30 Tex. App. 319, 17 S. W. 458.

See 31 Cent. Dig. tit. "Jury," § 461 *et seq.*

34. *Alabama.*— Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Hammil *v.* State, 90 Ala. 577, 8 So. 380.

California.— People *v.* Ochoa, 142 Cal. 268, 75 Pac. 847.

Colorado.— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Connecticut.—State *v.* Smith, 49 Conn. 376.

Indiana.— Stout *v.* State, 90 Ind. 1.

Iowa.— State *v.* Williams, 115 Iowa 97, 88 N. W. 194; State *v.* Foster, 91 Iowa 164, 59 N. W. 8; State *v.* Field, 89 Iowa 34, 56 N. W. 276; State *v.* Smith, 73 Iowa 32, 34 N. W. 597; State *v.* Vatter, 71 Iowa 557, 32 N. W. 506.

Kansas.— State *v.* Spaulding, 24 Kan. 1.

Louisiana.— State *v.* Vogel, 49 La. Ann. 1057, 22 So. 308; State *v.* Leduff, (1894) 15 So. 397; State *v.* Covington, 45 La. Ann. 979, 13 So. 266; State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26; State *v.* Revells, 35 La. Ann. 302.

Maryland.— Zimmerman *v.* State, 56 Md. 536.

Michigan.— People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061.

Mississippi.— Parker *v.* State, 55 Miss. 414.

Missouri.— Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36.

New York.— People *v.* Crowley, 102 N. Y. 234, 6 N. E. 384 [*affirming* 4 N. Y. Cr. 26]; People *v.* Cornetti, 92 N. Y. 85; Balbo *v.* People, 80 N. Y. 484; People *v.* Johnson, 2 Wheel. Cr. 361.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Palmer *v.* State, 9 Ohio Dec. (Reprint) 377, 12 Cinc. L. Bul. 258. *Compare* Fouts *v.* State, 7 Ohio St. 471.

Pennsylvania.— Curley *v.* Com., 84 Pa. St. 151; Ortwein *v.* State, 76 Pa. St. 414, 18 Am. Rep. 420; Com. *v.* Ivory, 10 Pa. Dist. 277; Com. *v.* Beucher, 10 Pa. Co. Ct. 3; Com. *v.* Berger, 3 Brewst. 247; Com. *v.* Morrow, 9 Phila. 583; Com. *v.* Work, 3 Pittsb. 493.

South Carolina.— State *v.* Milam, 65 S. C. 321, 43 S. E. 677; State *v.* Summers, 36 S. C. 479, 15 S. E. 369.

Texas.— Parker *v.* State, 45 Tex. Cr. 334, 77 S. W. 783; Smith *v.* State, (Cr. App. 1901) 65 S. W. 186; Tellis *v.* State, 42 Tex. Cr. 574, 61 S. W. 717; Hamlin *v.* State, 39 Tex. Cr. 579, 47 S. W. 656; Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650.

West Virginia.— State *v.* Schnelle, 24 W. Va. 767.

United States.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648.

See 31 Cent. Dig. tit. "Jury," § 461 *et seq.*

35. *Colorado.*— Thompson *v.* People, 26 Colo. 496, 59 Pac. 51; Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Michigan.— People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061.

Mississippi.— Gammons *v.* State, 85 Miss. 103, 37 So. 609; Green *v.* State, 72 Miss. 522, 17 So. 381.

New York.— People *v.* Cornetti, 92 N. Y. 85; Balbo *v.* People, 80 N. Y. 484; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

Ohio.— Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Palmer *v.* State, 9 Ohio Dec. (Reprint) 377, 12 Cinc. L. Bul. 258.

See 31 Cent. Dig. tit. "Jury," § 461 *et seq.*

Under the New York statute the juror must state under oath both that he believes his opinion or impression will not influence his verdict, and also that he can render an impartial verdict according to the evidence; one statement without the other is not sufficient. People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73 [*reversing* 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574]; People *v.* Wilmarth, 156 N. Y. 566, 51 N. E. 277 [*affirming* 29 N. Y. App. Div. 612, 51 N. Y. Suppl. 688]; People *v.* Miller, 81 N. Y. App. Div. 255, 80 N. Y. Supp. 1070, 17 N. Y. Cr. 263.

36. See *supra*, XII, H, 5, b, (I); XII, H, 5, c, (I).

37. Denver, etc., R. Co. *v.* Moynahan, 8 Colo. 56, 5 Pac. 811; Baxter *v.* People, 8 Ill. 368; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

38. *Colorado.*— Denver, etc., R. Co. *v.* Moynahan, 8 Colo. 56, 5 Pac. 811.

Indiana.— Howell *v.* State, 4 Ind. App. 148, 30 N. E. 714.

Mississippi.— State *v.* Johnson, Walk. 392.

Oregon.— Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637.

answers, but from the juror's whole examination,[39] taking into consideration his appearance and demeanor while testifying,[40] and any other evidence or circumstances which tend to throw any light on the subject.[41] In determining whether a juror's opinion is of such a character as to influence his verdict, the source of the information from which the opinion was derived is also a very important consideration.[42] A juror is not necessarily incompetent because he at first answers that he has formed an opinion,[43] or even a fixed opinion,[44] since jurors frequently answer without fully understanding the question,[45] or fail to distinguish between impressions and opinions,[46] or between fixed and hypothetical opinions,[47] or are induced by leading questions to make apparently contradictory statements.[48] On the other hand the fact that a juror testifies positively that he can render an impartial verdict does not prevent his exclusion.[49] He should be excluded, although he so testifies, where it appears that he is doing so from a corrupt motive in an effort to get on the jury,[50] where it appears that his opinion is of a fixed and positive character,[51] or where his opinion is coupled with any circumstances or

South Dakota.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Virginia.— Jackson *v.* Com., 23 Gratt. 919.

See 31 Cent. Dig. tit. "Jury," § 461 *et seq.*

39. *Iowa.*— State *v.* Vatter, 71 Iowa 557, 32 N. W. 506.

Kansas.— State *v.* Bussey, 58 Kan. 679, 50 Pac. 891; State *v.* Spaulding, 24 Kan. 1.

Kentucky.— Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652.

Missouri.— State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

New York.— Phelps *v.* People, 72 N. Y. 334 [*affirming* 6 Hun 401].

Pennsylvania.— Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795.

Virginia.— Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

See 31 Cent. Dig. tit. "Jury," § 461 *et seq.*

40. Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005; Kumli *v.* Southern Pac. Co., 21 Oreg. 505, 28 Pac. 637; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244.

41. Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

42. Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; Allison *v.* Com., 99 Pa. St. 17; Staup *v.* Com., 74 Pa. St. 458; Alfred *v.* State, 2 Swan (Tenn.) 581; Black *v.* State, 42 Tex. 377; Miller *v.* State, 32 Tex. Cr. 319, 20 S. W. 1103; Post *v.* State, 10 Tex. App. 579.

Trial courts should constantly keep in mind the distinction as to the sources of information from which the opinions of jurors were derived. Dolan *v.* U. S., 123 Fed. 52.

Where the record does not show the source of the opinion, the ruling of the trial court in holding a juror to be competent will not be reviewed upon appeal. Palmer *v.* People, 4 Nebr. 68; Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650; Miller *v.* State, 32 Tex. Cr. 319, 20 S. W. 1103.

43. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891; State *v.* Medlicott, 9 Kan. 257; State *v.* Johnson, Walk. (Miss.) 392; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; Abbott *v.* People, 86 N. Y. 460.

It is the duty of the challenging party, when a juror states that he has formed an opinion, to follow up his inquiries so as to make it appear that the opinion is of such a character as to render the juror incompetent. Holt *v.* People, 13 Mich. 224; Keffer *v.* State, (Wyo. 1903) 73 Pac. 556.

44. Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; State *v.* Hudson, 110 Iowa 663, 80 N. W. 232; Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795.

45. Taylor *v.* State, 72 Ark. 613, 82 S. W. 495; State *v.* Johnson, Walk. (Miss.) 392.

46. State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; Lindsey *v.* State, 69 Ohio St. 215, 69 N. E. 126.

47. People *v.* Brotherton, 43 Cal. 530; State *v.* Vatter, 71 Iowa 557, 32 N. W. 506; State *v.* Johnson, Walk. (Miss.) 392.

48. State *v.* Vatter, 71 Iowa 557, 32 N. W. 506; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

49. State *v.* Barnes, 34 La. Ann. 395; Klyce *v.* State, 79 Miss. 652, 31 So. 339; Logan *v.* State, 50 Miss. 269; Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633.

A juror is not the final judge of his own frame of mind, and it must still appear to the satisfaction of the court that he can render an impartial verdict. Com. *v.* House, 3 Pa. Super. Ct. 304.

In Alabama, under the code of 1896, the question whether the juror has formed a fixed opinion which will bias his verdict is to be determined by the oath of the juror alone. Jones *v.* State, 120 Ala. 303, 25 So. 204.

50. State *v.* Barnes, 34 La. Ann. 395.

51. *California.*— People *v.* Weil, 40 Cal. 268.

Iowa.— State *v.* Crofford, 121 Iowa 395, 96 N. W. 889.

Kansas.— State *v.* Morrison, 64 Kan. 669, 68 Pac. 48; State *v.* Start, 60 Kan. 256, 56 Pac. 15.

conditions calculated to influence his judgment.[52] So also, where the opinion is based upon certain sources of information, the law presumes that the juror will be influenced, although perhaps unconsciously, and excludes him, although he states that he can render an impartial verdict.[53]

b. Effect on Presumption of Innocence. A juror is incompetent in a criminal case if his opinion is of such a decided character that he could not give due weight to the presumption of innocence of the accused.[54] This rule does not require that the juror should be entirely without any opinion or impression as to defendant's guilt,[55] nor is he necessarily incompetent because some evidence may be required to remove the opinion or impression;[56] but he is incompetent where the opinion is so fixed that the juror states that he would not acquit unless defendant should prove himself innocent.[57]

c. Doubt as to Whether Opinion Will Influence Verdict. If the juror himself expresses any doubt or uncertainty as to whether his opinion will affect his ability to decide the case impartially according to the evidence he is incompetent;[58] and if the court has any doubt from the juror's whole examination as to his ability to

Louisiana.— State *v.* Ricks, 32 La. Ann. 1098.

Mississippi.—Fugate *v.* State, 81 Miss. 189, 33 So. 942.

Pennsylvania.—Com. *v.* House, 3 Pa. Super. Ct. 304.

Texas.— Gallagher *v.* State, 40 Tex. Cr. 296, 50 S. W. 388.

See 31 Cent. Dig. tit. "Jury," § 461 *et seq.*

52. State *v.* Jackson, 37 La. Ann. 768; Com. *v.* House, 3 Pa. Super. Ct. 304.

53. Logan *v.* State, 50 Miss. 269; Turner *v.* State, 111 Tenn. 593, 69 S. W. 774; Armistead *v.* Com., 11 Leigh (Va.) 657, 37 Am. Dec. 633; Dolan *v.* U. S., 123 Fed. 52 [*reversing* 116 Fed. 578, 54 C. C. A. 34].

Opinions based on evidence adduced at trial see *supra*, XII, H, 5, d.

Opinions based on conversations with parties or witnesses see *supra*, XII, H, 5, e.

Many jurors are reluctant to admit that they cannot disregard a previously formed opinion and decide a case according to the evidence, and state that they can do so, when it would be unsafe to trust them. Logan *v.* State, 50 Miss. 269; Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405.

54. *Kansas.*— State *v.* Start, 60 Kan. 256, 56 Pac. 15.

Michigan.— People *v.* Thacker, 108 Mich. 652, 66 N. W. 562; Stephens *v.* People, 38 Mich. 739.

Nebraska.— Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

Texas.— Randle *v.* State, 34 Tex. Cr. 43, 28 S. W. 953.

Washington.— State *v.* Moody, 18 Wash. 165, 51 Pac. 356; State *v.* Rutten, 13 Wash. 203, 43 Pac. 30.

See 31 Cent. Dig. tit. "Jury," § 462.

55. Holt *v.* People, 13 Mich. 224. See also People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

56. See People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. *Compare* Stephens *v.* People, 38 Mich. 739.

Opinions require evidence to remove see *supra*, XII, H, 3, g.

57. Gallaher *v.* State, 40 Tex. Cr. 296, 50 S. W. 388; Randle *v.* State, 34 Tex. Cr. 43, 28 S. W. 953.

58. *Illinois.*— Plummer *v.* People, 74 Ill. 361.

Louisiana.— State *v.* Ramsey, 50 La. Ann. 1339, 24 So. 302; State *v.* Bunger, 11 La. Ann. 607.

Massachusetts.— Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

Mississippi.—Fugate *v.* State, 81 Miss. 189, 33 So. 942; McGuire *v.* State, 76 Miss. 504, 25 So. 495.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Nebraska.— Thurman *v.* State, 27 Nebr. 628, 43 N. W. 404; Curry *v.* State, 4 Nebr. 545.

New York.— People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, 21 Abb. N. Cas. 417, 6 N. Y. Cr. 1 [*reversing* 1 N. Y. Suppl. 155]; People *v.* Mallon, 3 Lans. 224.

South Carolina.— Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905.

Texas.— Long Mfg. Co. *v.* Gray, 13 Tex. Civ. App. 172, 35 S. W. 32.

Virginia.— Dejarnette *v.* Com., 75 Va. 867; Wright *v.* Com., 32 Gratt. 941.

West Virginia.— State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665; State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626; State *v.* Schnelle, 24 W. Va. 767.

See 31 Cent. Dig. tit. "Jury," § 479.

Compare Hall *v.* State, 51 Ala. 9.

Under the New York statute which provides in substance that the fact that a juror has formed or expressed an opinion or impression shall not be a sufficient ground for challenge for actual bias, if the juror shall state under oath that he believes such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied that he can do so (see People *v.* Casey, 96 N. Y. 115), it is not necessary for the juror to state that he knows he can render an impartial verdict, but merely that he believes that he can do so (People *v.* Willett, 36 Hun (N. Y.) 500); nor need he make this statement literally in the words of the stat-

render an impartial verdict it should decide it against the juror's competency and exclude him.[59]

I. Personal Opinions and Conscientious Scruples — 1. In General. A juror is incompetent who has such personal opinions as would influence his verdict with regard to the subject-matter of the suit,[60] or the law under which it is instituted,[61] or the defense pleaded,[62] or who has a fixed opinion as to any of the main issues involved;[63] but not by reason of opinions not affecting the merits of the case,[64] or where it appears that he is entirely willing to accept the law as laid down by the court and able to decide the case impartially according to the evidence.[65]

2. Religious Beliefs. A person who by reason of his religious belief does not consider an act as criminal which the law denominates as such is incompetent as a juror on a trial for such offense.[66]

3. Questions of Law and Particular Statutes. A person who has formed and expressed an opinion on a general principle of law is not incompetent as a juror in a case in which that principle applies,[67] or because he believes that the law under which the proceedings are instituted is a good law,[68] or that it is constitutional;[69] or, on the other hand, because he doubts the wisdom or expediency of the law, provided he is willing so long as it is in effect to enforce it;[70] but a juror is incompetent who states that he is opposed to the law under which an action is brought and admits that he is not in favor of enforcing it,[71] or who states that he has such an opinion as to its unconstitutionality that he could not convict defendant no matter what the state of the evidence might be.[72]

4. Punishment Prescribed For Offense — a. In General. A juror is incompetent who is so opposed to a particular form of punishment that it would influence

ute (People *v.* Martell, 138 N. Y. 595, 33 N. E. 838), but they must be made in substance and under oath (People *v.* Casey, *supra*), and the declaration of the juror's belief that he can render an impartial verdict must be unequivocal (People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, 21 Abb. N. Cas. 417, 6 N. Y. Cr. 1 [*reversing* 1 N. Y. Suppl. 155]).

59. People *v.* Brotherton, 43 Cal. 530; Moses *v.* State, 10 Humphr. (Tenn.) 456; Wright *v.* Com., 32 Gratt. (Va.) 941.

60. *Illinois.*— Albrecht *v.* Walker, 73 Ill. 69.

Maine.— Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

Massachusetts.— Com. *v.* Buzzell, 16 Pick. 153.

Missouri.— Chouteau *v.* Pierre, 9 Mo. 3.

New York.— See People *v.* Larubia, 69 Hun 197, 23 N. Y. Suppl. 579.

See 31 Cent. Dig. tit. "Jury," § 480.

In a will contest a juror is incompetent who states that the fact that the testator left nothing to certain of his children would influence his verdict. *In re* Goldthorp, 115 Iowa 430, 88 N. W. 944.

In a civil action based on a criminal offense of which defendant has been previously convicted, a juror is incompetent who has expressed a belief that defendant has been sufficiently punished and has signed a petition for his pardon. Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

61. See *infra*, XII, I, 3.

62. See *supra*, XII, G, 5.

63. Davis *v.* Walker, 60 Ill. 452.

On an indictment for a nuisance in keeping up a mill-dam a juror is incompetent who believes that mill-dams generally in that part of the country are nuisances, and that all he is acquainted with are such, although he states that he has no knowledge of the one in question and has formed no opinion regarding it. Crippen *v.* People, 8 Mich. 117.

64. Elbin *v.* Wilson, 33 Md. 135. See also Hughes *v.* Cairo, 92 Ill. 339.

65. State *v.* Ford, 42 La. Ann. 255, 7 So. 696; Judd *v.* Claremont, 66 N. H. 418, 23 Atl. 427.

66. U. S. *v.* Reynolds, 1 Utah 226; Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481 [*affirming* 2 Utah 19]. See also Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

67. Pettis *v.* Warren, Kirby (Conn.) 426; Com. *v.* Abbott, 13 Metc. (Mass.) 120. See also U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139, holding, however, that it was proper to exclude a juror who had settled for himself the meaning in application of the constitutional definition of the term "treason," which at the time had never been settled by a judicial decision.

An erroneous idea of the law governing a case will not render a juror incompetent if no disposition is shown by him to be governed by his own ideas rather than the instructions of the court as to what the law is. Johnson *v.* Park City, 27 Utah 420, 76 Pac. 216.

68. McNall *v.* McClure, 1 Lans. (N. Y.) 32.

69. Com. *v.* Abbott, 13 Metc. (Mass.) 120.

70. Judd *v.* Claremont, 66 N. H. 418, 23 Atl. 427.

71. Theisen *v.* Johns, 72 Mich. 285, 40 N. W. 727.

72. Com. *v.* Austin, 7 Gray (Mass.) 51; Pierce *v.* State, 13 N. H. 536.

his verdict,[73] or has such opposition to applying the form of punishment prescribed by statute to the particular offense with which defendant is charged.[74]

b. Conscientious Scruples Against Capital Punishment. It is now well settled that in capital cases the state may challenge a juror for cause, who states that he has conscientious scruples against finding a prisoner guilty where the punishment is death,[75] and while this rule is uniformly followed in the absence of any statute,

73. State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143; Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789.

In Alabama it is provided by statute that it shall be a good ground of challenge for cause by the state that a juror has a fixed opinion against capital or penitentiary punishment. Garrett *v.* State, 76 Ala. 18; Murphy *v.* State, 37 Ala. 142; Stalls *v.* State, 28 Ala. 25.

74. Thayer *v.* State, 138 Ala. 39, 35 So. 406; People *v.* Tanner, 2 Cal. 257; Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650.

In Kansas the statute provides that "no person who believes the punishment fixed by the law to be too severe for the offense . . . shall be sworn as a juror." State *v.* Vogan, 56 Kan. 61, 42 Pac. 352, holding, however, that the statute is intended as a protection to the state and to the juror having such opinions, and that the retention of such a juror is not ground for reversing a judgment of conviction, since it is in no way calculated to prejudice defendant.

75. *Alabama.*— Murphy *v.* State, 37 Ala. 142; Stalls *v.* State, 28 Ala. 25.

Arkansas.— Jones *v.* State, 58 Ark. 390, 24 S. W. 1073.

California.— People *v.* Cebulla, 137 Cal. 314, 70 Pac. 181; People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; People *v.* Tanner, 2 Cal. 257.

Colorado.— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Florida.— Metzger *v.* State, 18 Fla. 481.

Georgia.— Bell *v.* State, 91 Ga. 15, 16 S. E. 207; Mercer *v.* State, 17 Ga. 146; Williams *v.* State, 3 Ga. 453.

Illinois.— Gates *v.* People, 14 Ill. 433.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Fahnestock *v.* State, 23 Ind. 231; Gross *v.* State, 2 Ind. 329.

Kentucky.— Smith *v.* Com., 37 S. W. 586, 18 Ky. L. Rep. 652.

Louisiana.— State *v.* Nolan, 13 La. Ann. 276; State *v.* Costello, 11 La. Ann. 283; State *v.* Kennedy, 8 Rob. 590.

Maine.— State *v.* Jewell, 33 Me. 583.

Mississippi.— Smith *v.* State, 58 Miss. 867; Williams *v.* State, 32 Miss. 389, 66 Am. Dec. 615; Lewis *v.* State, 9 Sm. & M. 115.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445; Johnson *v.* State, 34 Nebr. 257, 51 N. W. 835; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361; St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

Nevada.— State *v.* Hing, 16 Nev. 307.

New Hampshire.— State *v.* Howard, 17 N. H. 171.

New York.— O'Brien *v.* People, 36 N. Y. 276, 3 Abb. Pr. N. S. 368 [*affirming* 48 Barb. 274]; Walter *v.* People, 32 N. Y. 147 [*affirming* 18 Abb. Pr. 147, 6 Park. Cr. 15]; Lowenberg *v.* People, 5 Park. Cr. 414; People *v.* Wilson, 3 Park. Cr. 199; People *v.* Damon, 13 Wend. 351.

North Carolina.— State *v.* Vick, 132 N. C. 995, 43 S. E. 626; State *v.* Bowman, 80 N. C. 432.

Ohio.— Martin *v.* State, 16 Ohio 364.

Pennsylvania.— Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405; Com. *v.* Lesher, 17 Serg. & R. 155.

South Carolina.— State *v.* James, 34 S. C. 49, 12 S. E. 657, 34 S. C. 579, 13 S. E. 325.

Texas.— Burrell *v.* State, 18 Tex. 713; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; White *v.* State, 16 Tex. 206; Kennedy *v.* State, 19 Tex. App. 618.

Utah.— State *v.* Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911.

Vermont.— State *v.* Shaw, 73 Vt. 149, 50 Atl. 863; State *v.* Ward, 39 Vt. 225.

Virginia.— Cluverius *v.* Com., 81 Va. 787; Clore's Case, 8 Gratt. 606.

United States.— Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]; U. S. *v.* Hewsom, 26 Fed. Cas. No. 15,360, Brunn. Col. Cas. 532; U. S. *v.* Ware, 28 Fed. Cas. No. 16,641, 2 Cranch C. C. 477; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

See 31 Cent. Dig. tit. "Jury," § 491.

It would be a solemn mockery to go through the forms of a trial with such a jury or even with one such juror. It would be a misnomer to call such a proceeding a trial. People *v.* Damon, 13 Wend. (N. Y.) 351.

It is not necessary that the juror should belong to a religious denomination which entertains such scruples to render him incompetent. People *v.* Damon, 13 Wend. (N. Y.) 351; People *v.* Jones, 1 Edm. Sel. Cas. (N. Y.) 112.

Who may raise objection.— While the fact that a juror has conscientious scruples against capital punishment is a ground of challenge on the part of the state (Murphy *v.* State, 37 Ala. 142; State *v.* Compagnet, 48 La. Ann. 1470, 21 So. 46), and is sufficient cause for excusing a juror at his own request (see State *v.* Compagnet, *supra*), it is not a ground of challenge on the part of defendant (Murphy *v.* State, *supra*; State *v.* Compagnet, *supra*); nor is the court obliged, in the absence of any objection, to exclude a juror on this ground of its own motion (Murphy *v.* State, *supra*), although it is not error to do so (Waller *v.* State, 40 Ala. 325; Lewis *v.* State, 9 Sm. & M. (Miss.) 115).

in some cases the statutes now expressly so provide,[76] or provide that persons having such scruples shall not be permitted or compelled to serve.[77] The same rule applies, although under the statutes the jury are permitted to bring in a verdict of guilty "without capital punishment,"[78] or substitute imprisonment for the death penalty.[79] A juror is also subject to challenge who states that he is uncertain as to whether he has such conscientious scruples,[80] or who states that he has such scruples except as to a particular offense or offenses other than that with which defendant is charged.[81] A juror is not incompetent, however, who has no conscientious scruples against finding a verdict of guilt in such cases, but is merely opposed to capital punishment on principle as matter of policy,[82] unless it appears that his opinion is of such a character as would influence him in his consideration of the evidence, or hinder him in arriving at such a verdict if the evidence warrants it.[83] By the weight of authority a juror is incompetent in a capital case who states that he has conscientious scruples against finding defendant guilty of an offense punishable by death, although he further states that if satisfied beyond a reasonable doubt of defendant's guilt he would render a verdict accordingly;[84] but the rule is otherwise where a juror is merely opposed to capital

And after a juror has been accepted by both parties, upon his statement that he has no conscientious scruples against capital punishment, if he states that he misunderstood the question and answered erroneously, it is not error for the court to dismiss him and proceed with the reorganization of the jury. Black *v.* State, 46 Tex. Cr. 590, 81 S. W. 302.

76. Murphy *v.* State, 37 Ala. 142; Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652; Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

77. People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; People *v.* Tanner, 2 Cal. 257; Metzger *v.* State, 18 Fla. 481; People *v.* Carolin, 115 N. Y. 658, 21 N. E. 1059; Walter *v.* People, 32 N. Y. 147.

78. State *v.* Melvin, 11 La. Ann. 535.

If a juror states that he would always qualify his verdict and would not hang any man if he could help it, he is subject to challenge by the state, although he states that he has no conscientious scruples against capital punishment. State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143.

79. *California.*— People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; People *v.* Tanner, 2 Cal. 257.

Indiana.— Driskill *v.* State, 7 Ind. 338; Gross *v.* State, 2 Ind. 329.

Kentucky.— Smith *v.* Com., 100 Ky. 133, 37 S. W. 586, 18 Ky. L. Rep. 652.

Mississippi.— Spain *v.* State, 59 Miss. 19.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Hill *v.* State, 42 Nebr. 503, 60 N. W. 916.

See 31 Cent. Dig. tit. "Jury," § 491.

In Iowa and South Dakota, it is held that conscientious scruples against capital punishment is not in such cases a ground for challenge by the state (State *v.* Lee, 91 Iowa 499, 60 N. W. 119; State *v.* Garrington, 11 S. D. 178, 76 N. W. 326), but that a juror may be examined as to his scruples as a basis for a peremptory challenge (State *v.* Dooley, 89 Iowa 584, 57 N. W. 414; State *v.* Garrington, *supra*).

The reason of the rule applies in either case, for, if in the one case the juror's scruples would not permit him to render a verdict in accordance with the law, in the other they would not permit him to exercise the discretionary power with which he is invested and which it is essential he should exercise to carry out the spirit and intention of the law. Gross *v.* State, 2 Ind. 329.

The state is entitled to a jury who can conscientiously, if the evidence warrants it, return a verdict which will subject the offender to the extreme penalty of the law. St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

80. Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650.

81. Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650. See also Thayer *v.* State, 138 Ala. 39, 35 So. 406.

82. People *v.* Stewart, 7 Cal. 140; People *v.* Donaldson, 2 Edm. Sel. Cas. (N. Y.) 78.

Conscience and principle are essentially different and in many cases have no connection whatever. Many persons are opposed to capital punishment on grounds of public policy, because they believe society would be benefited by the adoption of some other form of punishment, and yet so long as the law provides that certain crimes shall be punishable by death, would feel no conscientious scruples in finding a verdict of guilty against one accused of such crime. People *v.* Stewart, 7 Cal. 140.

83. Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789.

84. People *v.* Carolin, 115 N. Y. 658, 21 N. E. 1059; O'Brien *v.* People, 36 N. Y. 276, 3 Abb. Pr. (N. Y.) 368 [*affirming* 48 Barb. 274]; Walter *v.* People, 32 N. Y. 147 [*affirming* 6 Park. Cr. 15]; State *v.* Bowman, 80 N. C. 432; State *v.* Ward, 39 Vt. 225. See also Waller *v.* State, 40 Ala. 325. *Contra,* Stratton *v.* People, 5 Colo. 276; Williams *v.* State, 32 Miss. 389, 66 Am. Dec. 615.

punishment as a question of policy, and states that his opinion will in no way influence his verdict.[85]

5. Weight and Effect of Evidence — a. In General. A juror is incompetent who is unwilling to be governed by the established rules of evidence,[86] who would not convict on legal evidence,[87] or whose answers show that he would follow his own views regardless of the instructions of the court as to the weight and effect to be given to a certain kind of evidence under certain circumstances;[88] but a juror is not incompetent because it appears from his examination that he has erroneous views as to the law relating to the burden of proof or the weight and effect of evidence if he testifies that he has no prejudice and will follow the instructions of the court.[89] It is not competent to examine a juror as to whether he has formed or expressed an opinion as to the credibility of a witness who is to be called,[90] or how he would regard the testimony of defendant if he should go on the stand as a witness.[91]

b. Circumstantial Evidence. A juror is incompetent and subject to challenge by the state who states that he would not convict upon circumstantial evidence, however strong,[92] or who would not convict upon circumstantial evidence where the punishment would be death,[93] although having no conscientious scruples

A juror who must either violate his conscience or his oath ought never to be permitted to serve (Thompson & M. Jur. § 202), and if he has conscientious scruples against capital punishment he will naturally be influenced no matter how much he is disposed to do his duty (State *v.* Bowman, 80 N. C. 432).

If a juror does not state whether his scruples would influence his verdict but admits that he has such scruples he is incompetent. State *v.* David, 131 Mo. 380, 33 S. W. 28.

85. Atkins *v.* State, 16 Ark. 568; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

86. State *v.* Barker, 46 La. Ann. 798, 15 So. 98; State *v.* Mahoney, 73 Hun (N. Y.) 601, 26 N. Y. Suppl. 257; People *v.* Fanshawe, 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 8 N. Y. Cr. 326; State *v.* Flint, 60 Vt. 304, 14 Atl. 178.

Suicide as evidence of insanity.— In an action on an insurance policy where suicide is a defense, a juror is incompetent who believes that the fact that a man has committed suicide is conclusive evidence that he was insane at the time of the act (Boileau *v.* Life Ins. Co., 9 Phila. (Pa.) 218; Texas Mut. L. Ins. Co. *v.* Brown, 2 Tex. Unrep. Cas. 160; Hiatt *v.* Mut. L. Ins. Co., 12 Fed. Cas. No. 6,449*a*, 2 Dill. 572); but not where he merely believes that suicide is some evidence of insanity (Hagadorn *v.* Connecticut Mut. L. Ins. Co., 22 Hun (N. Y.) 249).

Personal opinion of expert witness.— A juror who states that by reason of his personal opinion of a particular expert witness he would give his testimony more weight than that of any other such witness who might be called by the other side to testify to the same matter is incompetent. Lewke *v.* Dry Dock, etc., R. Co., 46 Hun (N. Y.) 283.

87. State *v.* Amaya, 134 Cal. 531, 66 Pac. 794; State *v.* Barker, 46 La. Ann. 798, 15 So. 98.

Conviction on circumstantial evidence see *infra*, XII, I, 5, b.

88. People *v.* Fanshawe, 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 8 N. Y. Cr. 326.

89. State *v.* Ford, 42 La. Ann. 255, 7 So. 696; Montgomery *v.* Wabash, etc., R. Co., 90 Mo. 446, 2 S. W. 409. See also Richmond *v.* Roberts, 98 Ill. 472.

90. Com. *v.* Porter, 4 Gray (Mass.) 423.

91. State *v.* Everitt, 14 Wash. 574, 45 Pac. 150.

Examination as to prejudice against defendant's business or nationality in such cases see *infra*, XII, I, 5, c.

92. Smith *v.* State, 55 Ala. 1; State *v.* Barker, 46 La. Ann. 798, 15 So. 98; State *v.* Frier, 45 La. Ann. 1434, 14 So. 296; State *v.* Miller, 156 Mo. 76, 56 S. W. 907; State *v.* Young, 119 Mo. 495, 24 S. W. 1038; Blair *v.* State, 5 Ohio Cir. Ct. 496.

The rule applies to trials for misdemeanors as well as felonies. Smith *v.* State, 55 Ala. 1.

93. *Alabama.*— Griffin *v.* State, 90 Ala. 596, 8 So. 670; Tatum *v.* State, 82 Ala. 5, 2 So. 531; Garrett *v.* State, 76 Ala. 18; Jackson *v.* State, 74 Ala. 26.

California.— People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; People *v.* Ah Chung, 54 Cal. 398.

Florida.— Holland *v.* State, 39 Fla. 178, 22 So. 298; Olive *v.* State, 34 Fla. 203, 15 So. 925.

Illinois.— Gates *v.* People, 14 Ill. 433.

Louisiana.— State *v.* Frier, 45 La. Ann. 1434, 14 So. 296.

Mississippi.— Coleman *v.* State, 59 Miss. 484; Jones *v.* State, 57 Miss. 684.

Missouri.— State *v.* Young, 119 Mo. 495, 24 S. W. 1038; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; State *v.* West, 69 Mo. 401, 33 Am. Rep. 506.

Nebraska.— Johnson *v.* State, 34 Nebr. 257, 51 N. W. 835; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

Nevada.— State *v.* Pritchard, 15 Nev. 74.

against capital punishment,[94] or any objection to a conviction on circumstantial evidence where the punishment is not capital.[95] A juror is also incompetent who states that he has conscientious scruples against finding a verdict of guilty in capital cases upon circumstantial evidence,[96] although he states that he has no such scruples where the evidence is direct.[97]

c. Testimony of Particular Classes of Persons. It is competent to examine jurors as to whether, if defendant should testify as a witness in his own behalf, they would give his testimony less weight because of his nationality,[98] or because he was engaged in certain business,[99] and also as to whether they would disregard the testimony of an accomplice,[1] or are so prejudiced against informers as to prevent them giving the testimony of such person its lawful weight;[2] and it has been held that a juror is incompetent who on the trial of a person engaged in a certain business states that he would give his testimony less weight on this account,[3] or who states that he has a strong prejudice against informers and appears uncertain as to whether he would believe such testimony even if corroborated by other witnesses.[4]

XIII. CHALLENGES AND OBJECTIONS.

A. Nature and Classification. A challenge is an exception or objection taken to the jurors summoned and returned for the trial of a cause either individually (to the polls), or collectively (to the array).[5] Challenges to jurors are divided primarily into challenges to the array and challenges to the polls.[6] Chal-

Pennsylvania.— Com. *v.* Heist, 14 Pa. Co. Ct. 239.

Texas.— Clanton *v.* State, 13 Tex. App. 139.

See 31 Cent. Dig. tit. "Jury," § 487.

The fact that the evidence is direct does not make it erroneous to sustain a challenge to a juror who will not convict on circumstantial evidence, since it cannot be assumed that the case will not derive any support from circumstantial evidence (People *v.* Amaya, 134 Cal. 531, 66 Pac. 794); and furthermore the juror's competency is not to be determined by the character of the evidence expected to be produced but by the standard established by law for all cases (Coleman *v.* State, 59 Miss. 484. *Compare* State *v.* Anderson, 52 La. Ann. 101, 26 So. 781).

If a juror doubts his ability to convict on circumstantial evidence it is not error for the court to reject him, although he states that he believes that he can do so. State *v.* Bauerle, 145 Mo. 1, 46 S. W. 609.

94. People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; Olive *v.* State, 34 Fla. 203, 15 So. 925.

95. Tatum *v.* State, 82 Ala. 5, 2 So. 531; Jackson *v.* State, 74 Ala. 26; Jones *v.* State, 57 Miss. 684.

96. State *v.* Punshon, 133 Mo. 44, 34 S. W. 25; State *v.* West, 69 Mo. 401, 33 Am. Rep. 506; Martin *v.* State, (Tex. Cr. App. 1904) 83 S. W. 390; Shafer *v.* State, 7 Tex. App. 239; Cluverius *v.* Com., 81 Va. 787.

In Alabama the statute provides that it shall be a ground of challenge for cause by the state that a juror thinks that a conviction should not be had on circumstantial evidence. Garrett *v.* State, 76 Ala. 18; Jackson *v.* State, 74 Ala. 26; Smith *v.* State, 55 Ala. 1.

The court may explain the nature of circumstantial evidence to a juror by means of an illustration, and if the juror then retracts his statement and says that he would have no conscientious scruples as to convicting on such evidence he may be held competent. Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

A juror who merely states that he has some prejudice against convicting on circumstantial evidence, without any statement as to the nature and extent of such prejudice, is not incompetent. State *v.* Shields, 33 La. Ann. 991.

97. State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

98. People *v.* Car Soy, 57 Cal. 102.

99. Stoots *v.* State, 108 Ind. 415, 9 N. E. 380. But see Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906.

1. State *v.* Flint, 60 Vt. 304, 14 Atl. 178.

2. People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68 [*affirming* 48 Hun 36].

3. Robinson *v.* Randall, 82 Ill. 521; Stoots *v.* State, 108 Ind. 415, 9 N. E. 380; Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708. *Compare* Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906. *Contra,* People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

4. People *v.* Mahoney, 73 Hun (N. Y.) 601, 26 N. Y. Suppl. 257.

5. Black L. Dict.

"Challenges are exceptions to jurors returned, when about to be impanneled for the trial of the case, and are of various descriptions." State *v.* Howard, 17 N. H. 171, 190.

6. State *v.* Knight, 43 Me. 11; Carnal *v.* People, 1 Park. Cr. (N. Y.) 272.

A challenge to the poll is "a challenge made separately to an individual juror; as distinguished from a challenge to the array." Black L. Dict. "Challenges to the polls are

lenges to the polls are further divided into challenges for cause and peremptory challenges,[7] and both challenges to the array and challenges for cause are further divided into challenges for principal cause and challenges to the favor.[8] All objections to the entire panel growing out of any error or irregularity in selecting or summoning the jury must be taken by a challenge to the array or motion to quash the venire,[9] while objections to the qualifications or competency of particular jurors or a part of the panel must be taken by a challenge to the polls.[10]

B. Order of Interposing Different Challenges. Challenges to the array should precede challenges to the polls;[11] and of challenges to the polls the challenges for cause should precede peremptory challenges,[12] or at least a party cannot require to challenge peremptorily before challenging for cause;[13] and of challenges for cause those for principal cause should precede those to the favor.[14]

C. Right to Stand Jurors Aside. The practice of allowing the prosecution to stand jurors aside originated under the English statutes,[15] which took away the crown's right of peremptory challenge and limited it to challenge for cause shown.[16] The practice is in effect a challenge for cause, without at the time assigning the cause,[17] which cannot be required until the whole panel is gone through;[18] but if the whole panel is gone through without obtaining a full jury those stood aside are then recalled and if not challenged are sworn.[19] The right exists in trials for mis-

objections to individual jurors, operating, if successful, as a rejection of a particular juror against whom the objection is taken." State *v.* Howard, 17 N. H. 171, 191.

Challenge to the array see *infra*, XIII, F.

7. Carnal *v.* People, 1 Park. Cr. (N. Y.) 272.

Challenges for cause see *infra*, XIII, G.

Peremptory challenges see *infra*, XIII, H.

8. Carnal *v.* People, 1 Park. Cr. (N. Y.) 272; State *v.* Howard, 17 N. H. 171.

9. *California.*— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

Georgia.— Thomas *v.* State, 27 Ga. 287.

Illinois.— Bruen *v.* People, 206 Ill. 417, 69 N. E. 24; Borrelli *v.* People, 164 Ill. 549, 45 N. E. 1024.

Missouri.— Boteler *v.* Roy, 40 Mo. App. 234.

Nebraska.— Davis *v.* State, 31 Nebr. 247, 47 N. W. 854.

North Carolina.— State *v.* Moore, 120 N. C. 570, 26 S. E. 697; State *v.* Douglass, 63 N. C. 500.

Pennsylvania.—Com. *v.* Sallager, 4 Pa. L. J. 511.

United States.— Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436.

See 31 Cent. Dig. tit. "Jury," § 541.

10. *Georgia.*— Nixon *v.* State, 121 Ga. 144, 48 S. E. 966; Teal *v.* State, 119 Ga. 102, 45 S. E. 964.

Massachusetts.— Com. *v.* Walsh, 124 Mass. 32.

Mississippi.—Durrah *v.* State, 44 Miss. 789.

West Virginia.— State *v.* Cartright, 20 W. Va. 32.

Canada.— Dow *v.* Dibblee, 12 N. Brunsw. 55.

See 31 Cent. Dig. tit. "Jury," §§ 541, 543.

11. State *v.* Davis, 41 Iowa 311; State *v.* Wright, 45 Kan. 136, 25 Pac. 631; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; Forsythe *v.* State, 6 Ohio 19.

Challenge to polls as a waiver of right to challenge the array see *infra*, XIII, E, 10.

12. Cooley *v.* State, 38 Tex. 636; U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457.

13. State *v.* Fuller, 39 Vt. 74.

14. Thompson & M. Jur. § 266.

15. St. 33 Edw. I, c. 4.

16. State *v.* Bone, 52 N. C. 121; Haines *v.* Com., 100 Pa. St. 317; Com. *v.* Marra, 8 Phila. (Pa.) 440; Mansell *v.* Reg., Dears. & B. 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52; Reg. *v.* Benjamin, 4 U. C. C. P. 179.

A private prosecutor may exercise the right of ordering jurors to stand aside equally with the crown. Reg. *v.* McGowen, 11 Ir. C. L. 207.

17. Com. *v.* Noonan, 15 Phila. (Pa.) 372; Com. *v.* Keenan, 10 Phila. (Pa.) 194; State *v.* Stalmaker, 2 Brev. (S. C.) 1.

18. State *v.* Craton, 28 N. C. 164; State *v.* Barrontine, 2 Nott & M. (S. C.) 553; Mansell *v.* Reg., Dears. & B. 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52; Reg. *v.* Fellowes, 19 U. C. Q. B. 48; 4 Blackstone Comm. 353; 2 Hawkins P. C. c. 43, § 3.

19. Com. *v.* Keenan, 10 Phila. (Pa.) 194.

Until the panel is gone through and exhausted a juror stood aside cannot be recalled, and when recalled the state may challenge him for cause with as much effect as in the first instance. Jewell *v.* Com., 22 Pa. St. 94.

The order in which the jurors are recalled should be the same as that in which they are stood aside, and it is not error for the court to refuse to allow them to be recalled in a different order. Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670.

The fact that a juror is not recalled and the challenge passed upon and a talesman called in his place is not error where the parties had knowledge of the fact and made no objection. State *v.* Lytle, 27 N. C. 58.

demeanors as well as felonies,[20] and applies to jurors called to supply vacancies as well as those of the original panel;[21] but the right can be claimed only by the prosecution and not by defendant.[22] The practice has been recognized in a number of jurisdictions in this country,[23] and in Canada.[24] It has been held in some jurisdictions that the right to stand jurors aside is not affected by the statutes giving the state the right of peremptory challenge,[25] but in others the contrary is held,[26] and in one jurisdiction at least the privilege has been expressly abolished by a recent statute.[27]

D. Rejection or Discharge on Court's Own Motion — 1. In General — a. Power of Court. It is well settled that the court may of its own motion reject or discharge from the panel a juror who is disqualified, unfit, or incompetent to serve as such, although not challenged or objected to by either party,[28] at any

20. Com. *v.* O'Brien, 140 Pa. St. 555, 21 Atl. 385; Haines *v.* Com., 100 Pa. St. 317; Com. *v.* Llewellyn, 14 Pa. Super. Ct. 214; Com. *v.* Noonan, 15 Phila. (Pa.) 372; Com. *v.* Keenan, 10 Phila. (Pa.) 194; Reg. *v.* Fellowes, 19 U. C. Q. B. 48; Reg. *v.* Benjamin, 4 U. C. C. P. 179.

The Pennsylvania statute of 1885 regulating the drawing and impaneling of jurors does not affect the right of the state to stand jurors aside on the trial of misdemeanors. Com. *v.* Todd, 1 Pa. Co. Ct. 416.

21. Rudy *v.* Com., 128 Pa. St. 500, 18 Atl. 344.

22. State *v.* Bone, 52 N. C. 121. *Compare* Reg. *v.* Blakeman, 3 C. & K. 97.

23. State *v.* Bone, 52 N. C. 121; State *v.* Craton, 28 N. C. 164; Haines *v.* Com., 100 Pa. St. 317; Com. *v.* Llewellyn, 14 Pa. Super. Ct. 214; Com. *v.* Marra, 8 Phila. (Pa.) 440; State *v.* Stephens, 13 S. C. 285; State *v.* McNinch, 12 S. C. 89.

In the federal courts the right to stand jurors aside was formerly recognized (see U. S. *v.* Douglass, 25 Fed. Cas. No. 14,989, 2 Blatchf. 207), but is denied since the statute conferring the right of peremptory challenge (U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457).

The number which may be stood aside is not unlimited, but rests in the sound discretion of the court and may be restricted if the state carries the privilege to an unwarrantable and needless extent. State *v.* Sloan, 97 N. C. 499, 2 S. E. 666.

The time for standing jurors aside should not be more restricted than right of challenge (Com. *v.* Noonan, 15 Phila. (Pa.) 372), and may be exercised after the juror has been examined as to his competency (Com. *v.* Mayland, 29 Leg. Int. (Pa.) 150), and after a full panel of twelve has been called and seated in the box (Com. *v.* Noonan, *supra*).

24. Reg. *v.* Fellowes, 19 U. C. Q. B. 48; Reg. *v.* Benjamin, 4 U. C. C. P. 179.

Prosecutions for libel. — In Canada it is provided by statute that the right to stand jurors aside shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. Reg. *v.* Patteson, 36 U. C. Q. B. 129.

25. Com. *v.* O'Brien, 140 Pa. St. 555, 21 Atl. 385; Zell *v.* Com., 94 Pa. St. 258; Warren *v.* Com., 37 Pa. St. 45; State *v.* McNinch, 12 S. C. 89.

The right to challenge peremptorily is not waived on the part of the state by standing a juror aside. Zell *v.* Com., 94 Pa. St. 258.

26. Mathis *v.* State, 31 Fla. 291, 12 So. 681; Reynolds *v.* State, 1 Ga. 222; Sealy *v.* State, 1 Ga. 213, 44 Am. Dec. 641; U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457.

The original reason for allowing the privilege of standing jurors aside was because the state had no right of peremptory challenge and the practice should cease with the reason upon which it was based, otherwise the state would not only be accorded an unfair advantage but a privilege that might easily result in abuses which it would be difficult for the court to detect. Mathis *v.* State, 31 Fla. 291, 12 So. 681.

27. Com. *v.* Brown, 23 Pa. Super. Ct. 470.

28. *Alabama.* — Scott *v.* State, 133 Ala. 112, 32 So. 623; Long *v.* State, 86 Ala. 36, 5 So. 443; State *v.* Marshall, 8 Ala. 302.

Arkansas. — Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Robinson *v.* State, 33 Ark. 180.

California. — People *v.* Arceo, 32 Cal. 40.

Georgia. — Doyal *v.* State, 70 Ga. 134.

Indiana. — Watson *v.* State, 63 Ind. 548. See also Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875.

Kentucky. — Barnes *v.* Com., 110 Ky. 348, 61 S. W. 733, 22 Ky. L. Rep. 1802.

Louisiana. — State *v.* Lartigue, 29 La. Ann. 642.

Maine. — Snow *v.* Weeks, 75 Me. 105.

Michigan. — O'Neil *v.* Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162; Atlas Min. Co. *v.* Johnston, 23 Mich. 36.

Minnesota. — State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

Mississippi. — Marsh *v.* State, 30 Miss. 627.

Missouri. — State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

Nevada. — State *v.* Larkin, 11 Nev. 314.

New York. — People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Spiegel, 75 Hun 161, 26 N. Y. Suppl. 1041 [*affirmed* in 143 N. Y. 107, 28 N. E. 284].

North Carolina. — State *v.* Vick, 132 N. C. 995, 43 S. E. 626.

Ohio. — Ickes *v.* State, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442.

time before the jury is sworn,[29] and may, for this purpose, of its own motion and without the suggestion of either party, examine the jurors on oath as to their qualifications.[30] The fact that a party has exhausted his peremptory challenges does not affect the power of the court to discharge a juror who is disqualified.[31]

b. Grounds. The power of the court to reject jurors of its own motion is not confined to the enumerated grounds of challenge,[32] or to cases where a refusal to sustain a challenge for cause would be error;[33] but may be exercised for any cause which the court in its discretion deems sufficient to render the juror unfit to serve.[34] A juror may be excluded if he lacks any of the ordinary qualifications for jury duty,[35] as where he is ignorant of the English language,[36] not of age,[37] a

Oklahoma.— Cochran *v.* U. S., 14 Okla. 108, 76 Pac. 672.

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110.

South Carolina.— State *v.* Murphy, 48 S. C. 1, 25 S. E. 43.

Tennessee.—Hines *v.* State, 8 Humphr. 597; Lewis *v.* State, 3 Head 127.

Texas.— Mundine *v.* Pauls, 28 Tex. Civ. App. 46, 66 S. W. 254.

Virginia.— Burch *v.* Hylton, 89 Va. 441, 16 S. E. 342; Montague *v.* Com., 10 Gratt. 767.

Wisconsin.— Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

United States.— U. S. *v.* Dickinson, 25 Fed. Cas. No. 14,957*a*, Hempst. 1.

See 31 Cent. Dig. tit. "Jury," § 524.

A statute providing that the first twelve persons drawn who are approved as indifferent shall be sworn does not deprive the court of the power to set aside a juror whose examination satisfies the court that he is unbiased, although not challenged by either party. Atlas Min. Co. *v.* Johnston, 23 Mich. 36.

In the case of a special or struck jury the court may, of its own motion, discharge any disqualified jurors and supply their places before the parties are required to strike the jury (Steed *v.* Knowles, 97 Ala. 573, 12 So. 75); but cannot discharge a juror who is qualified and competent, merely because he was summoned by the wrong christian name (Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22).

29. O'Neil *v.* Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162; State *v.* Larkin, 11 Nev. 314; Cochran *v.* U. S., 14 Okla. 108, 76 Pac. 672; Boyd *v.* State, 14 Lea (Tenn.) 161; Hines *v.* State, 8 Humphr. (Tenn.) 597.

30. Marsh *v.* State, 30 Miss. 627; Montague *v.* Com., 10 Gratt. (Va.) 767. See also Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

31. O'Neil *v.* Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162.

32. Scott *v.* State, 133 Ala. 112, 32 So. 623; Long *v.* State, 86 Ala. 36, 5 So. 443; State *v.* Marshall, 8 Ala. 302; Boyd *v.* State, 14 Lea (Tenn.) 161. *Compare* Boggs *v.* State, 45 Ala. 30, 6 Am. Rep. 689.

33. People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; Atlas Min. Co. *v.* Johnston, 23 Mich. 36.

34. Long *v.* State, 86 Ala. 36, 5 So. 443; State *v.* Marshall, 8 Ala. 302; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; People *v.* Spiegel, 75 Hun (N. Y.) 161, 26 N. Y. Suppl. 1041 [*affirmed* in 143 N. Y. 107, 38 N. E. 284].

The court may properly discharge a juror, of its own motion, for misconduct on the trial of a prior case (State *v.* Lartigue, 29 La. Ann. 642. See also People *v.* Murray, 85 Cal. 350, 24 Pac. 666), or for improper conduct in the presence of the court after being chosen as a juror (Lewis *v.* State, 3 Head (Tenn.) 127), or where a juror refuses to take the oath (Isaac *v.* State, 2 Head (Tenn.) 458), or is on defendant's bail-bond (Scott *v.* State, 133 Ala. 112, 32 So. 623), or has signed a petition asking the court in a murder trial to accept a plea of guilty of murder in the second degree (Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110); and where the parties agree that the court may name the persons to be summoned on a special venire and that none shall be summoned from certain townships, if a juror is, by mistake, summoned from one of these townships, the court may reject him, although a competent juror (State *v.* McKinney, 31 Kan. 570, 3 Pac. 356).

35. State *v.* Ring, 29 Minn. 78, 11 N. W. 233; Jenkins *v.* State, 99 Tenn. 569, 42 S. W. 263; Mundine *v.* Pauls, 28 Tex. Civ. App. 46, 66 S. W. 254.

Qualifications for jury duty see *supra*, VI, A.

36. *Alabama.*— Long *v.* State, 86 Ala. 36, 5 So. 443.

California.— People *v.* Arceo, 32 Cal. 40.

Michigan.— O'Neil *v.* Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162; Atlas Min. Co. *v.* Johnston, 23 Mich. 36.

Minnesota.— State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

New York.— People *v.* Spiegel, 75 Hun 161, 26 N. Y. Suppl. 1041 [*affirmed* in 143 N. Y. 107, 38 N. E. 284].

Virginia.— Montague *v.* Com., 10 Gratt. 767.

Wisconsin.— Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

See 31 Cent. Dig. tit. "Jury," § 526.

Even where ignorance of the English language is not a disqualification, the court may discharge a juror on this ground. People *v.* Arceo, 32 Cal. 40.

37. Hines *v.* State, 8 Humphr. (Tenn.) 597.

non-resident of the state,[38] or not a citizen of the United States,[39] or for reasons rendering the juror incompetent in the particular case,[40] such as bias or prejudice,[41] relationship to a party,[42] the formation and expression of an opinion,[43] a member of the grand jury which found the indictment,[44] having conscientious scruples against capital punishment,[45] intoxication,[46] or physical disability.[47]

2. AFTER SWEARING OF JURY — a. Power of Court. By the weight of authority the court may for sufficient cause discharge a juror even after being sworn,[48] at any time before the introduction of evidence.[49]

b. Grounds. While there is some conflict of authority as to the grounds justifying the rejection of a juror after he is sworn, the weight of authority is that the court cannot reject a juror after he is accepted and sworn against the objection of one of the parties in the absence of any good cause for his exclusion,[50] or for a mere ground of challenge which the parties might waive, and if waived would in no way affect the juror's competency in the particular case;[51] but that the court may exclude a juror who could not render a lawful verdict,[52] or who the law expressly says shall not be permitted to serve,[53] or for any ground render-

38. State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

39. Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; State *v.* Larkin, 11 Nev. 314.

40. People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; and cases cited *infra*, notes 41–47.

41. Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687; Robinson *v.* State, 33 Ark. 180; Smith *v.* State, 61 Miss. 754; People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018.

42. Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3; State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406; State *v.* Murphy, 48 S. C. 1, 25 S. E. 43; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

43. *Arkansas.*— Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

Indiana.— Watson *v.* State, 63 Ind. 548.

Michigan.— Atlas Min. Co. *v.* Johnston, 23 Mich. 36.

Mississippi.— Marsh *v.* State, 30 Miss. 627.

Texas.— Spear *v.* State, 16 Tex. App. 98.

See 31 Cent. Dig. tit. "Jury," § 525 *et seq.*

44. State *v.* Kelly, 1 Nev. 224.

45. *Alabama.*— Waller *v.* State, 40 Ala. 325; State *v.* Marshall, 8 Ala. 302.

Arkansas.—Robinson *v.* State, 33 Ark. 180.

Louisiana.— State *v.* Reeves, 11 La. Ann. 685.

Texas.— Gonzales *v.* State, 31 Tex. Cr. 508, 21 S. W. 253.

Virginia.— Montague *v.* Com., 10 Gratt. 767.

United States.— U. S. *v.* Cornell, 25 Fed. Cas. No. 14,868, 2 Mason 91.

See 31 Cent. Dig. tit. "Jury," § 528.

The court is not obliged to discharge, of its own motion, a juror who is opposed to capital punishment (Murphy *v.* State, 37 Ala. 142), but may do so, even against defendant's objection (Waller *v.* State, 40 Ala. 325. *Compare* Stalls *v.* State, 28 Ala. 25).

46. Thomas *v.* State, 27 Ga. 287; Torrent *v.* Yager, 52 Mich. 506, 18 N. W. 239; Guice *v.* State, 60 Miss. 714; Bullard *v.* Spoor, 2 Cow. (N. Y.) 430.

47. Jesse *v.* State, 20 Ga. 156; Atlas Min. Co. *v.* Johnston, 23 Mich. 36; Ickes *v.* State, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442; Montague *v.* Com., 10 Gratt. (Va.) 767.

48. *Florida.*— Keech *v.* State, 15 Fla. 591.

Illinois.— Ochs *v.* People, 124 Ill. 399, 16 N. E. 662 [*affirming* 25 Ill. App. 379]; Thomas *v.* Leonard, 5 Ill. 556.

Louisiana.— State *v.* Diskin, 34 La. Ann. 919, 44 Am. Rep. 448.

Michigan.— People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

Mississippi.— McGuire *v.* State, 37 Miss. 369.

Nevada.— State *v.* Pritchard, 16 Nev. 101.

New York.— People *v.* Beckwith, 103 N. Y. 360, 8 N. E. 662 [*affirming* 4 N. Y. Cr. 335]; People *v.* Damon, 13 Wend. 351.

South Carolina.— Rice *v.* Sims, 3 Hill 5. But see State *v.* Cason, 41 S. C. 531, 19 S. E. 918.

See 31 Cent. Dig. tit. "Jury," § 532.

49. Keech *v.* State, 15 Fla. 591; Jefferson *v.* State, 52 Miss. 767; McGuire *v.* State, 37 Miss. 369; People *v.* Damon, 13 Wend. (N. Y.) 351; Rice *v.* Sims, 3 Hill (S. C.) 5.

After the case has been opened and the jury sworn and counsel for the state has proceeded considerably in opening the case the court cannot discharge a juror without defendant's consent. U. S. *v.* Randall, 27 Fed. Cas. No. 16,117, 2 Cranch C. C. 412.

Effect of discharge pending trial after introduction of evidence see *infra*, XIV, A, 5.

50. Greer *v.* Norvill, 3 Hill (S. C.) 262.

Where a juror absents himself from the court-house without leave after being sworn it is error for the court to reject such juror without allowing the parties an opportunity to explain his absence and remove his *prima facie* incompetency by showing that during his absence he had not spoken or been spoken to by any one in regard to the case. Standley *v.* State, 10 Ga. 82.

51. O'Brian *v.* Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715.

52. Thomas *v.* Leonard, 5 Ill. 556.

53. Keech *v.* State, 15 Fla. 591; State *v.* Pritchard, 16 Nev. 101.

ing a juror manifestly disqualified or incompetent which is discovered after he is sworn,[54] although previously existing,[55] or generally wherever from any cause such a necessity exists as to make it appear that the ends of justice would otherwise be defeated.[56] It has been held that the court may reject a juror after being sworn upon the ground that he is an alien,[57] related to one of the parties,[58] a member of the grand jury which found the indictment,[59] that he has formed and expressed an opinion as to the merits of the case,[60] or in a capital case because he is conscientiously opposed to capital punishment.[61] A juror may also be discharged after being sworn on the ground of intoxication,[62] sickness,[63] or where, by reason of the sickness or death of a member of his family, the court is of the opinion that the knowledge of such fact will incapacitate him from properly discharging his duties as a juror.[64]

3. Effect of Discharge on Insufficient Grounds. It has been held to be reversible error for the court of its own motion and against the direct objection of one of the parties to exclude a juror without good cause,[65] or for a cause which merely affords a ground of challenge which the parties may waive and which if waived would not affect the juror's competency;[66] but on the contrary it has been held that it is not reversible error to exclude a juror for an insufficient cause if an impartial and unobjectionable jury is afterward obtained,[67] particularly where

54. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Stone *v.* People, 3 Ill. 326; State *v.* Pritchard, 16 Nev. 101; People *v.* Damon, 13 Wend. (N. Y.) 351.

55. People *v.* Damon, 13 Wend. (N. Y.) 351. *Compare* State *v.* Williams, 3 Stew. (Ala.) 454.

56. State *v.* Pritchard, 16 Nev. 101. See also Ochs *v.* People, 124 Ill. 399, 16 N. E. 662.

57. Keech *v.* State, 15 Fla. 591; Stone *v.* People, 3 Ill. 326; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

58. Thomas *v.* Leonard, 5 Ill. 556; State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406.

59. Jefferson *v.* State, 52 Miss. 767. *Contra*, O'Brian *v.* Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715, holding that this is merely a ground of challenge for implied bias not affecting the juror's competency unless challenged, and that it is error for the court to exclude such a juror if accepted by both parties against the objection of the accused.

60. Rice *v.* Sims, 3 Hill (S. C.) 5. See also State *v.* Vaughan, 23 Nev. 103, 43 Pac. 193. But see State *v.* Cason, 41 S. C. 531, 19 S. E. 918, holding that the court cannot discharge such a juror and summon another in his place, but that the court is not obliged to proceed with the trial and should discharge the entire jury and order a new trial.

The court is not obliged to discharge a juror of his own motion who states after being impaneled that he has formed an opinion, and his failure to do so is not error where no motion for the juror's exclusion was made. State *v.* Coleman, 8 S. C. 237.

61. State *v.* Diskin, 34 La. Ann. 919, 44 Am. Rep. 448; State *v.* Pritchard, 16 Nev. 101; People *v.* Damon, 13 Wend. (N. Y.) 351.

62. Nolen *v.* State, 2 Head (Tenn.) 520.

63. Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Webb *v.* State, 100 Ala. 47, 14 So. 865; Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Dec. 321; State *v.* Johnson, 48 La. Ann. 437, 19 So. 476; State *v.* Madison, 47 La. Ann. 30, 16 So. 566; State *v.* Moncla, 39 La. Ann. 868, 2 So. 814; Fletcher *v.* State, 6 Humphr. (Tenn.) 249.

The court is not obliged to discharge a juror and summon another in his place, although authorized by statute to do so, but may as at common law discharge the entire jury and continue the case. State *v.* Curtis, 5 Humphr. (Tenn.) 601.

In Texas under the constitutional provision that after jurors not exceeding three have been disabled the remainder may render a verdict, the court may discharge a juror on account of sickness. Ray *v.* State, 4 Tex. App. 450.

64. Hawes *v.* State, 88 Ala. 37, 7 So. 302; State *v.* Davis, 31 W. Va. 390, 7 S. E. 24. But see Houston, etc., R. Co. *v.* Waller, 56 Tex. 331.

65. Welsh *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233; Montague *v.* Com., 10 Gratt. (Va.) 767.

66. Bell *v.* State, 115 Ala. 25, 22 So. 526; Van Blaricum *v.* People, 16 Ill. 364, 63 Am. Dec. 316; Greer *v.* State, 14 Tex. App. 179.

A distinction is to be made between matters of disqualification for jury duty in general, and a mere matter of challenge by the parties which imputes no absolute want of capacity to serve as a juror. Montague *v.* Com., 10 Gratt. (Va.) 767.

A juror cannot challenge himself and the court will not discharge him on his own request for an objection which the law allows a party to make for his own benefit where he refuses to do so. Bickham *v.* Pissant, 1 N. J. L. 254.

67. Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353; Pittsburg, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; Atchison, etc., R. Co. *v.*

the excepting party has not exhausted the peremptory challenges to which he is entitled.[68]

E. Waiver of Challenge or Objection and Harmless Error — 1. In General. Since a jury trial itself may be waived it follows that the parties may waive any lesser right or privilege incident to this mode of trial,[69] whether given by the common law or by statute;[70] and where such waiver has been made the parties will be bound thereby and the action of the court founded thereon cannot be assigned as error.[71] They may waive an objection to the whole panel which would furnish ground for a challenge to the array,[72] or objections to the individual jurors which would furnish ground for a challenge for cause,[73] or any irregularity in the selection and formation of the jury.[74] Such waiver need not be express but will be held to follow a failure to interpose a known ground of challenge or objection,[75] a failure to exercise due diligence to discover those not known,[76] acquiescence in or failure to object to the action or rulings of the court,[77] to interpose challenges or objections on different grounds at the proper time and in the proper order,[78] or by refusing to take advantage of a means or opportunity afforded by the court for excluding an objectionable juror or effectually correcting the error or irregularity complained of.[79] Nor can a party assign as error a ruling of the court in impaneling the jury which was made at his own request.[80]

2. Failure to Challenge or Object — a. Competency and Qualifications of Jurors. An objection to a juror which is a good cause of challenge must be made in time or will be considered as waived.[81] It is well settled that a failure to challenge or object operates as a conclusive waiver if the ground of objection is known

Franklin, 23 Kan. 74; Stout *v.* Hyatt, 13 Kan. 232.

There is a material distinction between an error in retaining a disqualified juror and rejecting one who is qualified, and the latter is not material if it did not prevent a trial by fair and impartial jury. State *v.* Marshall, 8 Ala. 302.

68. Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74; Stout *v.* Hyatt, 13 Kan. 232.

69. Vaughan *v.* State, 88 Ga. 731, 16 S. E. 64; Sarah *v.* State, 28 Ga. 576; Merrill *v.* St. Louis, 83 Mo. 244, 53 Am. Rep. 576 [*affirming* 12 Mo. App. 466]. See also State *v.* Robertson, 71 Mo. 446.

The time allowed by statute for making challenges may be waived. State *v.* Gilmore, 95 Mo. 554, 8 S. W. 359, 912.

70. Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64.

71. Inman *v.* State, 72 Ga. 269.

72. Sarah *v.* State, 28 Ga. 576; Haggard *v.* Com., 79 Ky. 366; State *v.* Robertson, 71 Mo. 446; Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524 [*affirming* 18 Hun 239]; Watkins *v.* Weaver, 10 Johns. (N. Y.) 107.

73. Bell *v.* State, 115 Ala. 25, 22 So. 526; State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33; Greer *v.* State, 14 Tex. App. 179.

74. Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64; State *v.* Robertson, 71 Mo. 446; Collins *v.* State, (Tex. Cr. App. 1904) 83 S. W. 806; Flynn *v.* State, 97 Wis. 44, 72 N. W. 373.

75. See *infra*, XIII, E, 2.

76. *Florida.*— Webster *v.* State, 47 Fla. 108, 36 So. 584.

Georgia.— Britt *v.* State, 112 Ga. 583, 37 S. E. 886; Gormley *v.* Laramore, 40 Ga. 253.

Louisiana.— State *v.* Button, 50 La. Ann. 1071, 23 So. 868, 69 Am. St. Rep. 470.

Maryland.— Young *v.* State, 90 Md. 579, 45 Atl. 531.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895.

West Virginia.— Wagoner *v.* Iaeger, 49 W. Va. 61, 38 S. E. 528.

See 31 Cent. Dig. tit. "Jury," § 503 *et seq.*

77. State *v.* Watkins, 106 La. 380, 31 So. 10; State *v.* Thornton, 108 Mo. 640, 18 S. W. 841; Cook *v.* Ritter, 4 E. D. Smith (N. Y.) 253.

78. See *infra*, XIII, E, 10.

79. Braham *v.* State, (Ala. 1905) 38 So. 919; People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; People *v.* Lee, 1 Cal. App. 169, 81 Pac. 969; Williams *v.* True, 1 Cinc. Super. Ct. (Ohio) 321; Spong *v.* Lesher, 1 Yeates (Pa.) 326.

Where the incompetency of the juror is discovered after the jury is sworn, a party who refuses either to permit such juror to be withdrawn and another substituted or to proceed with the trial before the remaining eleven waives any objection to the juror's competency. Livingston *v.* Heerman, 9 Mart. (La.) 656.

80. Allen *v.* State, 134 Ala. 159, 32 So. 318; State *v.* Allen, 46 Conn. 531.

81. *Alabama.*— Hamner *v.* Eddins, 3 Stew. 192.

Arkansas.— Daniel *v.* Guy, 23 Ark. 50.

Colorado.— Brooke *v.* People, 23 Colo. 375, 48 Pac. 502.

Florida.— Gavin *v.* State, 42 Fla. 553, 29 So. 405.

Georgia.— Jordan *v.* State, 119 Ga. 443, 46 S. E. 679.

Illinois.— Bradshaw *v.* Hubbard, 6 Ill. 390.

to the party at the time the jury is impaneled,[82] is discovered during the progress of the trial,[83] if he has knowledge of facts sufficient to put him upon

Iowa.— State *v.* Pickett, 103 Iowa 714, 43 N. W. 346, 39 L. R. A. 302.

Kentucky.— Combs *v.* Com., 97 Ky. 24, 29 S. W. 734, 16 Ky. L. Rep. 699.

Louisiana.— State *v.* Robinson, 37 La. Ann. 673; State *v.* Harris, 30 La. Ann. 90; State *v.* Nolan, 13 La. Ann. 276; State *v.* Kennedy, 8 Rob. 590.

Michigan.— Clark *v.* Montrose Tp. Drain Com'r, 50 Mich. 618, 16 N. W. 167; The Milwaukie *v.* Hale, 1 Dougl. 306.

Minnesota.— State *v.* Thomas, 19 Minn. 484.

Missouri.— State *v.* Snyder, 182 Mo. 462, 82 S. W. 12; State *v.* Ward, 74 Mo. 253.

Nebraska.— Coil *v.* State, 62 Nebr. 15, 86 N. W. 925; Van Etten *v.* Butt, 32 Nebr. 285, 49 N. W. 365.

New Mexico.— U. S. *v.* Gomez, 7 N. M. 554, 37 Pac. 1101.

New York.— Stedman *v.* Batchelor, 49 Hun 390, 3 N. Y. Suppl. 580; Seacord *v.* Burling, 1 How. Pr. 175.

North Carolina.— State *v.* Lambert, 93 N. C. 618; Briggs *v.* Byrd, 34 N. C. 377.

Pennsylvania.— Bradwell *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 404, 20 Atl. 1046; Com. *v.* Kloss, 2 Blair Co. Rep. 321.

Texas.— Tweedy *v.* Briggs, 31 Tex. 74.

Vermont.— Orcutt *v.* Carpenter, 1 Tyler 250, 4 Am. Dec. 722.

Virginia.— Barnes *v.* Com., 92 Va. 794, 23 S. E. 784; Poindexter *v.* Com., 33 Gratt. 766; Bristow *v.* Com., 15 Gratt. 634.

West Virginia.— Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957.

Wisconsin.— Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427.

United States.— Hollingsworth *v.* Duane, 4 Dall. 353, 1 L. ed. 864, 12 Fed. Cas. No. 6,618, Wall. Sr. 147; Brewer *v.* Jacobs, 22 Fed. 217.

England.— Rex *v.* Sutton, 8 B. & C. 417, 15 E. C. L. 208, 6 L. J. M. C. O. S. 102, 2 M. & R. 406, 17 E. C. L. 716.

See 31 Cent. Dig. tit. "Jury," § 504.

The fact that a party does not appear at the trial does not affect the application of the rule. Cressap *v.* Winchester, 6 Rob. (La.) 458; Clark *v.* Van Vrancken, 20 Barb. (N. Y.) 278.

82. *Alabama.*— Oliver *v.* Herron, 106 Ala. 639, 17 So. 387; Brown *v.* State, 52 Atl. 345.

California.— People *v.* Sanford, 43 Cal. 29.

Georgia.— Hadden *v.* Thompson, 118 Ga. 207, 44 S. E. 1001.

Illinois.— Davis *v.* People, 19 Ill. 74.

Indiana.— Barlow *v.* State, 2 Blackf. 114.

Iowa.— State *v.* Pray, (1904) 99 N. W. 1065.

Kansas.— Lane *v.* Scoville, 16 Kan. 402.

Louisiana.— State *v.* Jackson, 37 La. Ann. 897.

Maine.— State *v.* Bowden, 71 Me. 89; Hussey *v.* Allen, 59 Me. 269; McLellan *v.* Crofton, 6 Me. 307.

Maryland.— Busey *v.* State, 85 Md. 115, 36 Atl. 257.

Massachusetts.— Fox *v.* Hazelton, 10 Pick. 275; Hallock *v.* Franklin County, 2 Metc. 558.

Michigan.— Walker *v.* Ann Arbor, 111 Mich. 1, 69 N. W. 87.

Mississippi.— West *v.* State, 80 Miss. 710, 32 So. 298.

Missouri.— Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

Nebraska.— Tomer *v.* Densmore, 8 Nebr. 384, 1 N. W. 315.

Nevada.— State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

New Jersey.— Sutton *v.* Petty, 5 N. J. L. 504; *In re* Lindsley, 46 N. J. Eq. 358, 19 Atl. 726.

New Mexico.— U. S. *v.* Folsom, 7 N. M. 532, 38 Pac. 70; Territory *v.* Abeita, 1 N. M. 545.

Ohio.— Schneider *v.* State, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565.

Oklahoma.—Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324.

Texas.— Garcia *v.* State, (Cr. App. 1901) 63 S. W. 309.

Virginia.— Gray *v.* Com., 92 Va. 772, 22 S. E. 858.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

Canada.— Reg. *v.* Earle, 10 Manitoba 303.

See 31 Cent. Dig. tit. "Jury," § 504.

Knowledge on the part of an attorney of the objecting party is the same in effect as knowledge of the party himself. Brown *v.* Reed, 81 Me. 158, 16 Atl. 504.

The fact that a party forgot a ground of objection of which he had previously had information does not excuse a failure to make such objection by way of challenge at the particular time. McLellan *v.* Crofton, 6 Me. 307.

83. *Alabama.*— Oliver *v.* Herron, 106 Ala. 639, 17 So. 387.

Florida.— McNish *v.* State, 47 Fla. 69, 36 So. 176.

Georgia.— Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523.

Indiana.— Cleveland, etc., R. Co. *v.* Osgood, (App. 1905) 73 N. E. 285.

Iowa.— Pfeiffer *v.* Dubuque, (1903) 94 N. W. 492.

Kentucky.— Bickel *v.* Kraus, 100 Ky. 728, 39 S. W. 414, 18 Ky. L. Rep. 1054.

North Carolina.— State *v.* Lambert, 93 N. C. 618.

Ohio.— Lowe *v.* McCorkle, 1 Ohio Dec. (Reprint) 352, 7 West. L. J. 64.

Pennsylvania.— McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420.

Texas.— Blanton *v.* Mayes, 72 Tex. 417, 10 S. W. 452.

United States.— Queenan *v.* Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175 [*affirming* 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324].

inquiry,[84] or is otherwise chargeable with knowledge of the ground of objection.[85] While some of the cases simply held that objections on account of the incompetency of jurors are not available after verdict in the absence of an affirmative showing that the objecting party did not previously know of the ground of objection,[86] it is ordinarily held that such objections are too late after verdict, although the ground of objection was not previously known;[87] and this rule has been applied to objections based upon the ground that the juror was a non-resident of the state or county,[88] an alien,[89] not an elector, freeholder, or taxpayer,[90] under or over the

England.— Reg. *v.* Sullivan, 8 A. & E. 831, 8 L. J. M. C. 3, 1 P. & D. 96, 1 W. W. & H. 610, 35 E. C. L. 865.

Canada.— Le Blanc *v.* McRae, 11 Nova Scotia 240; Hart *v.* Pryor, 10 Nova Scotia 53.

See 31 Cent. Dig. tit. "Jury," § 504.

But if objection is promptly made on discovering during the trial that a juror is incompetent and the juror was examined and testified falsely as to his competency, the party cannot be charged with lack of diligence and it is error for the court to overrule the objection to the juror and proceed with the trial. Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562. See also Taylor *v.* Combs, 50 S. W. 64, 20 Ky. L. Rep. 1828.

84. Brown *v.* Reed, 81 Me. 158, 16 Atl. 504; Fox *v.* Hazelton, 10 Pick. (Mass.) 275; Zickefoose *v.* Kuykendall, 12 W. Va. 23.

85. Sapp *v.* State, 116 Ga. 182, 42 S. E. 410; Glover *v.* Woolsey, Dudley (Ga.) 85; Bradshaw *v.* Hubbard, 6 Ill. 390; Pittsfield *v.* Barnstead, 40 N. H. 477.

86. Wickersham *v.* People, 2 Ill. 128; State *v.* Bowden, 71 Me. 89; Russell *v.* Quinn, 114 Mass. 103; Territory *v.* Abeita, 1 N. M. 545.

An affidavit by defendant's counsel only that the ground of incompetency was not known is insufficient where it does not allege that defendant was also ignorant of the objection relied on. Kelly *v.* State, 39 Fla. 122, 22 So. 303.

87. *Florida.*— Denmark *v.* State, 43 Fla. 182, 31 So. 269.

Georgia.— Gormley *v.* Laramore, 40 Ga. 253; Epps *v.* State, 19 Ga. 102.

Illinois.— Chase *v.* People, 40 Ill. 352 [*overruling* Guykowski *v.* People, 2 Ill. 476].

Iowa.— *In re* Goldthorp, 115 Iowa 430, 88 N. W. 944; State *v.* Pickett, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302 [*overruling* State *v.* Groome, 10 Iowa 308].

Kansas.— State *v.* Jackson, 27 Kan. 581, 41 Am. Rep. 424.

Louisiana.— State *v.* Garig, 43 La. Ann. 365, 8 So. 934.

Maryland.— Busey *v.* State, 85 Md. 115, 36 Atl. 257.

Massachusetts.— Wassum *v.* Feeney, 121 Mass. 93, 23 Am. Rep. 258.

Michigan.— Johr *v.* People, 26 Mich. 427.

Mississippi.—Williams *v.* State, 37 Miss. 407.

New Jersey.— Dickerson *v.* North Jersey St. R. Co., 68 N. J. L. 45, 52 Atl. 214.

New York.— People *v.* Mack, 35 N. Y. App. Div. 114, 54 N. Y. Suppl. 698.

South Carolina.— State *v.* Quarrel, 2 Bay 150, 1 Am. Dec. 637. But see Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

Tennessee.— Goad *v.* State, 106 Tenn. 175, 61 S. W. 79.

Texas.—International, etc., R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895; Poindexter *v.* Com., 33 Gratt. 766.

West Virginia.—Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957.

Wisconsin.— State *v.* Vogel, 22 Wis. 471.

United States.— Raub *v.* Carpenter, 187 U. S. 159, 23 S. Ct. 72, 47 L. ed. 119; Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432; Hollingsworth *v.* Duane, 4 Dall. 353, 1 L. ed. 864, 12 Fed. Cas. No. 6,618, Wall. Sr. 147; Brewer *v.* Jacobs, 22 Fed. 217.

See 31 Cent. Dig. tit. "Jury," § 504 *et seq.*

But see Gaff *v.* State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235; Lafayette Plank-road Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

88. Epps *v.* State, 19 Ga. 102; Mt. Desert *v.* Cranberry Isles, 46 Me. 411; Zickefoose *v.* Kuykendall, 12 W. Va. 23.

89. *Georgia.*— Hill *v.* State, 64 Ga. 453.

Illinois.— Chase *v.* People, 40 Ill. 352 [*overruling* Guykowski *v.* People, 2 Ill. 476].

Louisiana.— State *v.* Beeder, 44 La. Ann. 1007, 11 So. 816.

Mississippi.—Fulcher *v.* State, 82 Miss. 630, 35 So. 170.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

South Carolina.— State *v.* Quarrel, 2 Bay 150, 1 Am. Dec. 637.

Wisconsin.— State *v.* Vogel, 22 Wis. 471; Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51. But see Schumaker *v.* State, 5 Wis. 324.

United States.— Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432; Hollingsworth *v.* Duane, 4 Dall. 353, 1 L. ed. 864, 12 Fed. Cas. No. 6,618, Wall. Sr. 147.

Canada.— Stephenson *v.* Fraser, 24 N. Brunsw. 482.

See 31 Cent. Dig. tit. "Jury," § 505.

Contra.— Richards *v.* Moore, 60 Vt. 449, 15 Atl. 119.

90. *Kansas.*— State *v.* Jackson, 27 Kan. 581, 41 Am. Rep. 424.

Louisiana.— State *v.* McLean, 21 La. Ann. 546.

Mississippi.— Frank *v.* State, 39 Miss. 705.

Texas.— Schuster *v.* La Londe, 57 Tex. 28.

Virginia.— Poindexter *v.* Com., 33 Gratt. 766.

West Virginia.—Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957.

legal age for jury duty,[91] prejudiced or pecuniarily interested,[92] related to one of the parties,[93] that he was a member of the grand jury that found the indictment,[94] or had formed or expressed an opinion with regard to the merits of the case.[95] This rule is based upon the ground that it is the duty of the parties to ascertain by proper examination at the time the jury is impaneled the existence of any grounds of objection to the jurors, and that failing to do so they should be precluded from thereafter raising any objection which might have been so discovered,[96] and therefore an exception to the rule should be made in cases where the juror was in fact duly examined and testified falsely,[97] or where his answers were such as reasonably to mislead the examining party and prevent a specific inquiry as to the particular ground of objection subsequently discovered.[98]

b. Selecting, Drawing, and Summoning Jurors. A party by failing to challenge or object waives any irregularity in the selection of the jury-list,[99] or panel,[1] or in the drawing[2] or summoning of the jury.[3]

United States.— Brewer *v.* Jacobs, 22 Fed. 217.

See 31 Cent. Dig. tit. "Jury," § 506.

91. *Louisiana.*— State *v.* Button, 50 La. Ann. 1071, 23 So. 868, 69 Am. St. Rep. 470; State *v.* Garig, 43 La. Ann. 365, 8 So. 934.

Massachusetts.— Wassum *v.* Feeney, 121 Mass. 93, 23 Am. Rep. 258.

Mississippi.—Williams *v.* State, 37 Miss. 407.

New Mexico.— U. S. *v.* Folsom, 7 N. M. 532, 38 Pac. 70.

United States.— Brewer *v.* Jacobs, 22 Fed. 217.

See 31 Cent. Dig. tit. "Jury," § 507.

92. Webster *v.* State, 47 Fla. 108, 36 So. 584; Jeffries *v.* Randall, 14 Mass. 205. But see Page *v.* Contoocook Valley R. Co., 21 N. H. 438.

93. Woodward *v.* Dean, 113 Mass. 297; People *v.* Mack, 35 N. Y. App. Div. 114, 54 N. Y. Suppl. 698; Eggleston *v.* Smiley, 17 Johns. (N. Y.) 133. But see Lynds *v.* Hoar, 10 Nova Scotia 327.

94. Denmark *v.* State, 43 Fla. 182, 31 So. 269; Beck *v.* State, 20 Ohio St. 228.

95. Casat *v.* State, 40 Ark. 511; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

96. *Florida.*— Denmark *v.* State, 43 Fla. 182, 31 S. W. 269.

Georgia.— Epps *v.* State, 19 Ga. 102.

Illinois.—Chase *v.* People, 40 Ill. 352 [*overruling* Guykowski *v.* People, 2 Ill. 476].

Iowa.— State *v.* Pickett, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302 [*overruling* State *v.* Groome, 10 Iowa 308].

Kansas.— State *v.* Jackson, 27 Kan. 581, 41 Am. Rep. 424.

Louisiana.— State *v.* Garig, 43 La. Ann. 365, 8 So. 934.

Massachusetts.— Wassum *v.* Feeney, 121 Mass. 93, 23 Am. Rep. 258.

Mississippi.—Williams *v.* State, 37 Miss. 407.

New Mexico.— Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

Virginia.— Poindexter *v.* Com., 33 Gratt. 766.

West Virginia.—Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957.

United States.— Hollingsworth *v.* Duane, 4 Dall. 353, 1 L. ed. 864, 12 Fed. Cas. No. 6,618, Wall. Sr. 147.

See 31 Cent. Dig. tit. "Jury," §§ 504, 515.

97. *Louisiana.*— State *v.* Shay, 30 La. Ann. 114.

Mississippi.— Cody *v.* State, 3 How. 27.

New York.— People *v.* Bishop, 66 N. Y. App. Div. 415, 73 N. Y. Suppl. 226.

Utah.— State *v.* Morgan, 23 Utah 212, 64 Pac. 356.

Washington.—Heasley *v.* Nichols, 38 Wash. 485, 80 Pac. 769.

See 31 Cent. Dig. tit. "Jury," §§ 504, 515.

98. Rice *v.* State, 16 Ind. 298; Lane *v.* Scoville, 16 Kan. 402; Tarpey *v.* Madsen, 26 Utah 294, 73 Pac. 411. See also Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

99. Page *v.* Danvers, 7 Metc. (Mass.) 326.

1. Wells *v.* State, (Ark. 1891) 16 S. W. 577; Steele *v.* Malony, 1 Minn. 347; Territory *v.* Abeita, 1 N. M. 545. See also Mueller *v.* Rebhan, 94 Ill. 142.

2. *Arkansas.*— Wells *v.* State, (1891) 16 S. W. 577.

Iowa.— Moss *v.* Appanoose County, 109 Iowa 671, 81 N. W. 159.

Louisiana.— State *v.* Beasley, 32 La. Ann. 1162; State *v.* Courtney, 28 La. Ann. 794.

New Hampshire.— Bodge *v.* Foss, 39 N. H. 406; Wilcox *v.* Lempster School Dist. No. 1, 26 N. H. 303.

New York.—People *v.* De Camp, 57 Hun 591, 10 N. Y. Suppl. 811; Goodman *v.* Goetz, 13 N. Y. Suppl. 267; Cole *v.* Perry, 6 Cow. 584; Gardiner *v.* People, 6 Park. Cr. 155.

North Carolina.— State *v.* Simmons, 51 N. C. 309.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Rhode Island.— Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636.

Texas.— McMahon *v.* State, 17 Tex. App. 321.

See 31 Cent. Dig. tit. "Jury," § 513.

An objection that the jurors were not drawn but were summoned by the sheriff is waived where no challenge to the array is made. Mueller *v.* Rebhan, 94 Ill. 142.

3. *Florida.*— Sylvester *v.* State, 46 Fla. 166, 35 So. 142.

c. Impaneling, Examining, and Excusing Jurors. A party by failing to challenge or object waives any irregularity in the impaneling of a jury.[4] This rule applies to objections based on rulings of the court as to the competency of jurors,[5] the conduct of their examination,[6] a failure of the court to examine,[7] the extent and sufficiency of such examination,[8] failure to swear jurors before examining them,[9] the allowance on such examination of improper questions,[10] or the exclusion of proper questions.[11] So also by failing to object at the time a party waives any objection to the action of the court in excusing jurors,[12] or to its action in reject-

Iowa.— Harriman *v.* State, 2 Greene 270.

Massachusetts.— Tripp *v.* Bristol County Com'rs, 2 Allen 556; Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58; Fowler *v.* Middlesex County Com'rs, 6 Allen 92; Com. *v.* Norfolk County, 5 Mass. 435.

Minnesota.— State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321; Steele *v.* Malony, 1 Minn. 347.

Missouri.— State *v.* Robertson, 71 Mo. 446; State *v.* Jones, 61 Mo. 232.

Nebraska.— Brown *v.* State, 9 Nebr. 157, 2 N. W. 378.

New York.— Bergman *v.* Wolff, 11 N. Y. Suppl. 591.

Virginia.— Short *v.* Com., 90 Va. 96, 17 S. E. 786.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

See 31 Cent. Dig. tit. "Jury," § 512.

Objections to summoning officer.— A party by failing to challenge or object waives any objection on the ground that the jury was summoned by a constable instead of a sheriff (Com. *v.* Norfolk County, 5 Mass. 435), or that the sheriff was prejudiced (Harriman *v.* State, 2 Greene (Iowa) 270), interested (Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271), or a party to the action (Legaux *v.* Wells, 4 Yeates (Pa.) 43).

Irregularities in writ of venire facias.— A party by failing to challenge or object waives any defect or irregularity in the form of the writ under which the jury was summoned (Johnson *v.* Cole, 2 N. J. L. 266; Bartow *v.* Murry, 2 N. J. L. 97; Com. *v.* Smith, 2 Serg. & R. (Pa.) 300), or in the form of the return to the writ (Com. *v.* Smith, *supra*), or the time at which the writ was made returnable (Fiero *v.* Reynolds, 20 Barb. (N. Y.) 275).

Where the court sustained a challenge to the array and ordered the sheriff to summon "from the body of the county good and lawful men" the fact that the sheriff summoned the same persons which composed the challenged jury is waived by failure to challenge or object. Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399.

4. *Alabama.*— Bell *v.* State, 115 Ala. 25, 22 So. 526; Howard *v.* State, 108 Ala. 571, 18 So. 813.

California.— People *v.* Johnson, 104 Cal. 418, 38 Pac. 91; People *v.* Coffman, 24 Cal. 230.

District of Columbia.— U. S. *v.* McBride, 7 Mackey 371.

Georgia.— Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64; Thomas *v.* State, 27 Ga. 287; Pressley *v.* State, 19 Ga. 192.

Illinois.— Oakwood Stock Farm Co. *v.* Rahn, 106 Ill. App. 269.

Iowa.— State *v.* Minor, 106 Iowa 642, 77 N. W. 330; State *v.* Ostrander, 18 Iowa 435.

Louisiana.— State *v.* Watkins, 106 La. 380, 31 So. 10; State *v.* Jones, 52 La. Ann. 211, 26 So. 782.

Maine.— Wallace *v.* Columbia, 48 Me. 436.

New York.— People *v.* De Camp, 57 Hun 591, 10 N. Y. Suppl. 811.

North Carolina.— State *v.* Boon, 80 N. C. 461; State *v.* Ward, 9 N. C. 443.

Texas.— Black *v.* State, 48 Tex. Cr. 590, 81 S. W. 302; Granger *v.* State, (Cr. App. 1895) 31 S. W. 671; McMahon *v.* State, 17 Tex. App. 321.

United States.— Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436.

See 37 Cent. Dig. tit. "Jury," § 513.

Where a juror is presented whose name is not in the box or on the venire the irregularity is waived if not objected to at the time. Thrall *v.* Smiley, 9 Cal. 529; Osgood *v.* State, 63 Ga. 791; Burton *v.* Ehrlich, 15 Pa. St. 236.

5. Boyd *v.* State, 17 Ga. 194; Voorhees *v.* Dorr, 51 Barb. (N. Y.) 580; Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003; Isham *v.* State, 1 Sneed (Tenn.) 111.

A failure of the court to appoint triers to try a challenge to the favor is immaterial if no demand for triers was made. People *v.* Doe, 1 Mich. 451.

6. Lindsey *v.* State, 111 Ga. 833, 36 S. E. 62; O'Rourke *v.* Yonkers R. Co., 32 N. Y. App. Div. 8, 52 N. Y. Suppl. 706.

7. Tweedy *v.* Briggs, 31 Tex. 74.

8. State *v.* Nance, 25 S. C. 168.

9. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Trullinger *v.* Webb, 3 Ind. 193; Preston *v.* Hannibal, etc., R. Co., 132 Mo. 111, 33 S. W. 783; Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806; Zell *v.* Com., 94 Pa. St. 258.

10. State *v.* David, 131 Mo. 380, 33 S. W. 28.

11. Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475.

12. *Alabama.*— Steele *v.* State, 83 Ala. 20, 3 So. 547.

Florida.— Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Georgia.— Hardison *v.* State, 95 Ga. 337, 22 S. E. 681.

Missouri.— State *v.* Jackson, 96 Mo. 200, 9 S. W. 624.

ing or discharging from the panel of its own motion a competent juror for insufficient cause.[13]

d. Oath.[14] A party by failing to object at the time waives any irregularity in the swearing of the jury[15] or the form of oath administered.[16]

3. Failure to Examine. A party waives any objections to the juror's qualifications or competency subsequently discovered if he accepts the juror without examining him as to his qualifications,[17] or without examining him as to the

Nebraska.— Catron *v.* State, 52 Nebr. 389, 72 N. W. 354.

New Jersey.— Smith *v.* Clayton, 29 N. J. L. 357.

New York.— Cook *v.* Ritter, 4 E. D. Smith 253.

South Carolina.— State *v.* Clyburn, 16 S. C. 375; State *v.* Gill, 14 S. C. 410.

West Virginia.— State *v.* Williams, 49 W. Va. 220, 38 S. E. 495.

See 31 Cent. Dig. tit. "Jury," § 512.

13. Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; State *v.* Jackson, 96 Mo. 200, 9 S. W. 624; State *v.* Register, 133 N. C. 746, 46 S. E. 21; Norfleet *v.* State, 4 Sneed (Tenn.) 340.

14. Waiver in case of entire failure to swear jury see *infra*, XIV, B, 1.

15. *Florida.*— Jacksonville, etc., R. Co. *v.* Neff, 28 Fla. 373, 9 So. 653.

Illinois.— McDonald *v.* Fairbanks, 161 Ill. 124, 43 N. E. 783; Cornelius *v.* Boucher, 1 Ill. 32.

Indiana.— Dolan *v.* State, 122 Ind. 141, 23 N. E. 761.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

North Carolina.— State *v.* Council, 129 N. C. 511, 39 S. E. 814.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Pennsylvania.— Com. *v.* Fritch, 9 Pa. Co. Ct. 164.

Tennessee.— Looper *v.* Bell, 1 Head 373.

See 31 Cent. Dig. tit. "Jury," § 514.

Objections to the form and manner in which a jury is sworn should be made at the time so that the court may correct the irregularity. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; McConnell *v.* Ryan, 1 Tex. App. Civ. Cas. § 1020.

Failure to reswear jury.— The parties by failure to object at the time waive any irregularity in not reswearing the jury after new issues are formed by amended pleadings (Arnold *v.* Arnold, 20 Iowa 273), or new parties admitted (Merrill *v.* St. Louis, 83 Mo. 244, 53 Am. Rep. 576 [*affirming* 12 Mo. App. 466]; Vann *v.* Downing, 10 Pa. Co. Ct. 59).

An objection if made must be followed by an exception to the ruling of the court in order to be available upon a writ of error. Myers *v.* State, 43 Fla. 500, 31 So. 275.

16. *Florida.*— Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Smith *v.* State, 63 Ga. 168; Candler *v.* Hammond, 23 Ga. 493.

Illinois.— Edwards *v.* Edwards, 31 Ill. 474.

Indiana.— Lindley *v.* Kindall, 4 Blackf. 189.

Iowa.— Wrocklege *v.* State, 1 Iowa 167.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Kentucky.— Thompson *v.* Blackwell, 17 B. Mon. 609.

Michigan.— Milwaukee *v.* Hale, 1 Dougl. 306.

Tennessee.— Southern Queen Mfg. Co. *v.* Morris, 105 Tenn. 654, 58 S. W. 651.

Texas.— Clements *v.* Crawford, 42 Tex. 601; McConnell *v.* Ryan, 1 Tex. App. Civ. Cas. § 1020.

Washington.— State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961.

West Virginia.—Wells *v.* Smith, 49 W. Va. 78, 38 S. E. 547; State *v.* Ice, 34 W. Va. 244, 12 S. E. 695.

See 31 Cent. Dig. tit. "Jury," § 514.

17. *Alabama.*— James *v.* State, 53 Ala. 380.

Arkansas.— James *v.* State, 68 Ark. 464, 60 S. W. 29; Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120, 12 S. W. 203.

Illinois.— West Chicago St. R. Co. *v.* Huhnke, 82 Ill. App. 404.

Indiana.— Gillooley *v.* State, 58 Ind. 182; Alexander *v.* Dunn, 5 Ind. 122.

Iowa.— State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775; *In re* Goldthorp, 115 Iowa 430, 88 N. W. 944; State *v.* Burke, 107 Iowa 659, 78 N. W. 677; State *v.* Pickett, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302 [*overruling* State *v.* Groome, 10 Iowa 308]; Faville *v.* Shehan, 68 Iowa 241, 26 N. W. 131; State *v.* Funck, 17 Iowa 365.

Louisiana.— State *v.* Whitesides, 49 La. Ann. 352, 21 So. 540; State *v.* Garig, 43 La. Ann. 365, 8 So. 934.

Massachusetts.— Jeffries *v.* Randall, 14 Mass. 205.

Michigan.— Johr *v.* People, 26 Mich. 427.

Mississippi.— Skinner *v.* State, 53 Miss. 399.

Nebraska.— Everton *v.* Esgate, 24 Nebr. 235, 38 N. W. 794.

Ohio.— Watts *v.* Ruth, 30 Ohio St. 32; Kenrick *v.* Reppard, 23 Ohio St. 333; Hull *v.* Albro, 2 Disn. 147; Schneider *v.* State, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565; Dokes *v.* Soards, 8 Ohio Dec. (Reprint) 621, 9 Cinc. L. Bul. 76.

Texas.— Tweedy *v.* Briggs, 31 Tex. 74.

Washington.—Clarke *v.* Territory, 1 Wash. Terr. 68.

See 31 Cent. Dig. tit. "Jury," § 515.

It is not the duty of the court of its own motion, in the absence of statute, to examine jurors as to their qualifications, and if the

particular ground of objection afterward relied on,[18] or if the juror fails to answer any question asked and he does not challenge or insist upon an answer,[19] or if the juror's answer is not clear and he fails to procure a definite statement.[20] The rule applies to jurors summoned on a special venire as well as those of the regular panel,[21] and extends to each and every element that goes to constitute a qualified juror except such as the court is expressly required by statute to ascertain of its own motion.[22]

4. Passing or Tender of Juror. It has been held that a party waives the right to challenge a juror for cause after he has been examined, tendered to, and accepted by the other party;[23] but it is well settled that the court may in its discretion allow a challenge to be made to a juror after being tendered to the other party in case a good cause for the juror's exclusion is afterward shown.[24]

5. Acceptance of Juror or Jury. A party who accepts a juror with knowl-

parties fail to examine or to request the court to do so they waive the right to object to disqualifications subsequently discovered. Skinner *v.* State, 53 Miss. 399; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

A party is not precluded from moving to examine jurors by a direction of the court for all persons interested in the action to leave their seats, and if no inquiry is made as to their qualifications the right to object is waived. Daniels *v.* Lowell, 139 Mass. 56, 29 N. E. 222.

An exception to the rule would of course be made where an acceptance of the juror was induced by concealment or fraud on the part of the adverse party. See Faville *v.* Shehan, 68 Iowa 241, 26 N. W. 131.

18. *California.*— People *v.* Ward, 105 Cal. 335, 38 Pac. 945.

Colorado.— Brown *v.* People, 20 Colo. 161, 36 Pac. 1040.

Florida.— Denmark *v.* State, 43 Fla. 182, 31 So. 269.

Indiana.— Kingen *v.* State, 46 Ind. 132; Estep *v.* Waterous, 45 Ind. 140.

Iowa.— State *v.* Matheson, (1905) 103 N. W. 137; State *v.* Greenland, 125 Iowa 141, 100 N. W. 341.

Louisiana.— State *v.* Button, 50 La. Ann. 1071, 23 So. 868, 69 Am. St. Rep. 470.

Texas.— San Antonio, etc., R. Co. *v.* Gray, (Civ. App. 1901) 66 S. W. 229 [*reversed* on other grounds in 95 Tex. 424, 67 S. W. 763]; Russell *v.* State, 44 Tex. Cr. 465, 72 S. W. 190; Corley *v.* State, (Cr. App. 1901) 65 S. W. 1073.

Utah.— People *v.* Lewis, 4 Utah 42, 5 Pac. 543.

United States.—Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337.

See 31 Cent. Dig. tit. "Jury," § 515.

Although failure to examine is due to a mistake of fact not induced by the juror himself or by the adverse party, a party cannot object after verdict to the incompetency of a juror which might have been so discovered. Morse *v.* Montana Ore-Purchasing Co., 105 Fed. 337.

A refusal to allow jurors to be examined after they are sworn as to certain grounds of challenge is not error where no good excuse is given for failure to ask such questions when the jurors were examined upon their *voir dire.* Ferrell *v.* State, 45 Fla. 26, 34 So. 220.

Where a juror states that he has formed and expressed an opinion on his *voir dire* examination but that he can render a fair and impartial verdict, an objection on this ground is waived if the parties do not examine him or make any attempt to ascertain the nature of such expression or the strength of such opinion and permit the juror to be sworn without objection. Schneider *v.* State, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565; Kirk *v.* State, (Tex. Cr. App. 1896) 37 S. W. 440.

Even where the court refuses to allow questions as to a certain ground of objection and substitutes a direction of its own to the jury for such as are subject to such exception to leave the box the parties will be held to have accepted such direction as a satisfactory substitute for the question excluded if they permit the jury to be sworn without any further objection. Loeffler *v.* Keokuk Northern Line Packet Co., 7 Mo. App. 185.

19. Woodward *v.* Stein, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rec. 352.

20. Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381; People *v.* Lange, 56 Mich. 550, 23 N. W. 217.

21. Kenrick *v.* Reppard, 23 Ohio St. 333.

22. Watts *v.* Ruth, 30 Ohio St. 32.

23. People *v.* Stonecifer, 6 Cal. 405.

24. Johnson *v.* State, 58 Ga. 491; State *v.* Green, 95 N. C. 611; State *v.* Jones, 80 N. C. 415; McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308.

The mere passing of a juror over to the court or the other party for examination is not an absolute waiver of the right to challenge if good cause be afterward shown. If an objection to a juror be kept back at the proper time for an improper reason or from motives of caprice it would be proper to declare the right to challenge wholly waived and the discretionary power of the court to do so cannot be doubted, but if it appears that the juror is manifestly incompetent there is no error in allowing the challenge to be made. McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308.

edge of an objection to his competency waives the objection;[25] but does not by accepting a juror waive the right to challenge him at any time before he is sworn for a cause subsequently discovered,[26] where he was not guilty of any negligence in not discovering the objection before the juror was accepted.[27] If a party expressly accepts as satisfactory the jury as finally impaneled he waives any prior objection to the action of the court in overruling a challenge for cause,[28] or in sustaining a challenge for cause interposed by the adverse party on insufficient grounds,[29] or irregularity in the selection or impaneling of the jury.[30]

6. Appearance and Participation in Cause. A party by voluntarily appearing and going to trial without objection waives any irregularity in the drawing, summoning, or impaneling of the jury,[31] or objections to their competency,[32] or if after the jury has been formed the parties waive a jury trial altogether and consent to a trial by the court they waive any previous irregularity in the formation of the jury.[33] But if a challenge or objection is duly made and exception taken, a party does not by further participation in the case waive his objection to the constitution of the jury,[34] or the competency of a juror challenged,[35] or to the action of the court in erroneously discharging a juror from the panel.[36]

7. Withdrawal of Challenge. A party may withdraw a challenge to the array and if he does so and the jury is impaneled he waives the irregularity upon which the challenge was based.[37] So also if a challenge for cause to an individual juror is sustained and the challenge is afterward withdrawn and the juror impaneled, the party cannot object after verdict that he was incompetent;[38] but a challenge to an individual juror, although withdrawn, may be renewed at any time before the jury is completed and sworn.[39]

8. Failure to Challenge Peremptorily. It has been held that where a challenge for cause is improperly overruled a party is not obliged to challenge the juror peremptorily and may rely upon his exception, although he did not do so and his peremptory challenges were not exhausted;[40] but by the weight of

25. People *v.* Stonecifer, 6 Cal. 405; State *v.* Groome, 10 Iowa 308; Walker *v.* Ann Arbor, 111 Mich. 1, 69 N. W. 87; U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

Failure to challenge or object see *supra*, XIII, E, 2, a.

26. Roberts *v.* State, 68 Ala. 515; Smith *v.* State, 55 Ala. 1 [*overruling* Stalls *v.* State, 28 Ala. 25].

27. Roberts *v.* State, 68 Ala. 515.

Failure to examine jurors as a waiver of right to object upon grounds subsequently discovered see *supra*, XIII, E, 3.

28. Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813; Cornell *v.* State, 104 Wis. 527, 80 N. W. 745. But see Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29.

29. Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

30. Cornell *v.* State, 104 Wis. 527, 80 N. W. 745; Flynn *v.* State, 97 Wis. 44, 72 N. W. 373.

31. The Milwaukie *v.* Hale, 1 Dougl. (Mich.) 306; Keeler *v.* Delavan, 4 Barb. (N. Y.) 317; Com. *v.* Freeman, 166 Pa. St. 332, 31 Atl. 115; Greer *v.* Wilson, 38 W. Va. 100, 18 S. E. 380.

In Pennsylvania it is provided by statute that a trial or agreement to try on the merits or pleading guilty or the general issue in any case shall be a waiver of all errors and defects in or relating to the precept, venire, drawing, summoning, and returning of jurors (Com *v.* Freeman, 166 Pa. St. 332, 31 Atl. 115; Com. *v.* Seybert, 4 Pa. Co. Ct. 152; Com. *v.* Chauncey, 2 Ashm. 90); and this provision applies to cases where defendant stands mute and a plea of not guilty is entered for him and the trial proceeds (Dyott *v.* Com., 5 Whart. 67).

Where a party appears and has the case continued and the jury summoned is adjourned to the time set for the trial, he will be held to have waived any irregularity in the summoning of the jury unless it appears that he was injured thereby. Greer *v.* Wilson, 38 W. Va. 100, 18 S. E. 380.

32. The Milwaukie *v.* Hale, 1 Dougl. (Mich. 306.

33. Wykoff *v.* Loeber, 5 Mont. 535, 6 Pac. 363.

34. Eshelman *v.* Chicago, etc., R. Co., 67 Iowa 296, 25 N. W. 251.

35. Fulweiler *v.* St. Louis, 61 Mo. 479; Blake *v.* Millspaugh, 1 Johns. (N. Y.) 316.

36. Mahoney *v.* San Francisco, etc., R. Co., (Cal. 1895) 42 Pac. 968. But see Corbett *v.* Troy, 53 Hun (N. Y.) 228, 6 N. Y. Suppl. 381.

37. Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524 [*affirming* 18 Hun 239].

38. Doyle *v.* Com., 100 Va. 808, 40 S. E. 925.

39. State *v.* Dumphey, 4 Minn. 438.

40. People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273 [*reversing* 1 N. Y. Suppl. 155]; Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29; People *v.* Bondine, 1 Den.

authority such an error will not be regarded as material if the objecting party did not challenge the juror peremptorily and his peremptory challenges were not exhausted,[41] or if the record fails affirmatively to show that such challenges were exhausted,[42] it being held that a party must use all available means to exclude all objectionable jurors,[43] and that a failure to do so constitutes a waiver of his objection.[44]

9. Failure to Exhaust Peremptory Challenges. It is ordinarily held that if a competent jury is obtained without exhausting the peremptory challenges of the objecting party, he cannot avail himself of any error or irregularity in the summoning or selection of the jury,[45] or to the action of the court in refusing to sustain a challenge to the array,[46] or motion to quash the venire,[47] or in excusing jurors,[48] or rejecting and discharging jurors of its own motion for insufficient cause.[49] By the weight of authority this rule also applies to errors of the court in overruling or sustaining challenges for cause, but the authorities are not uniform on this point.[50]

10. Waiver of Challenge to the Array. An objection or exception to the whole panel should be made by a challenge to the array or motion to quash the venire at the time the panel is presented and before entering upon the organization of the jury, and if not so made will be held to be waived.[51] A challenge to the array should also precede any challenges to the polls,[52] and a party by interposing challenges to the polls waives the right to afterward challenge the array.[53] So also if

(N. Y.) 281. *Compare* People *v.* Ransom, 7 Wend. (N. Y.) 417.

41. *Illinois.*— St. Louis, etc., R. Co. *v.* Lux, 63 Ill. 523.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351.

Iowa.— State *v.* Elliott, 45 Iowa 486.

Kansas.— State *v.* Stockman, 9 Kan. App. 422, 58 Pac. 1032.

Montana.— Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075; State *v.* Linebarger, 12 Mont. 292, 30 Pac. 140; Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768.

Nebraska.— Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788; Jenkins *v.* Mitchell, 40 Nebr. 664, 59 N. W. 90.

See 31 Cent. Dig. tit. "Jury," § 520.

So also if a party subsequently waives a peremptory challenge by which the objectionable juror might have been excluded, he cannot complain of the error in overruling the challenge for cause. State *v.* Tyler, 122 Iowa 125, 97 N. W. 983; State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

42. Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075; Jenkins *v.* Mitchell, 40 Nebr. 664, 59 N. W. 90.

43. State *v.* Stockman, 9 Kan. App. 422, 58 Pac. 1032.

44. State *v.* Stockman, 9 Kan. App. 422, 58 Pac. 1032; Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788.

Where the number of jurors incompetent for the same reason exceeds the number of peremptory challenges and the court has overruled the challenge for cause to the first juror presented, it is not necessary to multiply exceptions upon the same point, and the objection is not waived by failing to exhaust the remaining challenges. Martin *v.* Farmers' Mut. F. Ins. Co., 139 Mich. 148, 102 N. W. 656. See also Woods *v.* State, 134 Ind. 35, 33 N. E. 901.

45. *Idaho.*— Knollin *v.* Jones, 7 Ida. 466, 63 Pac. 638.

Iowa.— State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349.

North Carolina.— State *v.* Brogden, 111 N. C. 656, 16 S. E. 170.

South Carolina.— State *v.* Campbell, 35 S. C. 28, 14 S. E. 292; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

Tennessee.— Griffee *v.* State, 1 Lea 41.

Texas.— Galveston, etc., R. Co. *v.* Wessendorf, (Civ. App. 1896) 39 S. W. 132; McKinney *v.* State, 8 Tex. App. 626.

See 31 Cent. Dig. tit. "Jury," § 520.

46. Boykin *v.* People, 22 Colo. 496, 45 Pac. 419.

47. Scott *v.* State, 29 Tex. App. 217, 15 S. W. 814.

48. State *v.* Clyburn, 16 S. C. 375; State *v.* Gill, 14 S. C. 410; State *v.* La Croix, 8 S. D. 369, 66 N. W. 944. *Contra,* Hill *v.* State, 10 Tex. App. 618.

49. Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Luebe *v.* Thorpe, 94 Mich. 268, 54 N. W. 41; People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; Jenkins *v.* State, 99 Tenn. 569, 42 S. W. 263.

50. See *infra,* XIII, E, 13.

51. *Georgia.*— Moon *v.* State, 68 Ga. 687. See also Inman *v.* State, 72 Ga. 269.

Illinois.— Mueller *v.* Rebhan, 94 Ill. 142.

Kentucky.— Haggard *v.* Com., 79 Ky. 366.

Louisiana.— State *v.* Lindsley, 14 La. Ann. 42.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

See 31 Cent. Dig. tit. "Jury," § 519 *et seq.*

52. See *supra,* XIII, B.

53. State *v.* Davis, 41 Iowa 311; State *v.* Eigle, 45 Kan. 138, 25 Pac. 632; State *v.*

a party after a challenge to the array is overruled waives all objections for cause to the jurors called and also his peremptory challenges, he waives his challenge to the array.[54]

11. Waiver of Peremptory Challenge. The right to challenge peremptorily may be waived;[55] but a party should not be precluded from exercising the right at any time before the juror is sworn unless the waiver was made intelligently and intentionally,[56] and voluntarily.[57] One party by passing or tendering a juror for examination does not waive the right to challenge the juror peremptorily if not challenged for cause by the other party.[58] If the statute expressly requires that peremptory challenges must be made to each juror when called the right is waived unless so made.[59] Where the parties are required to challenge alternately from a full panel, it is held in some cases that a party who fails to challenge in the first instance does not waive the right to challenge after the other has done so,[60] but that he loses one challenge at each time that he fails to challenge in turn.[61] Others hold that a waiver or refusal to challenge in turn is a waiver of the right to challenge any juror then presented who might have been challenged,[62] but does not affect the number of challenges,[63] which may be exercised against any juror subsequently called.[64] It is also held in some jurisdictions that no peremptory

Wright, 45 Kan. 136, 25 Pac. 631; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Clark, 121 Mo. 500, 26 S. W. 562; Forsythe *v.* State, 6 Ohio 19. But see Clinton *v.* Englebrecht, 13 Wall. (U. S.) 434, 20 L. ed. 659.

Although the challenge is in form to the array if it is based upon objections to the competency of individual jurors it is in effect a challenge to the polls and waives the right to thereafter challenge the array. State *v.* Clark, 121 Mo. 500, 26 S. W. 562.

An objection that a jury was summoned without a writ of venire facias where such writ is held to be necessary has been held not to be a ground of challenge to the array and therefore not waived by challenging peremptorily some of the panel. People *v.* McKay, 18 Johns. (N. Y.) 212.

54. Weeping Water Electric Light Co. *v.* Haldeman, 35 Nebr. 139, 52 N. W. 892; People *v.* Borgstrom, 178 N. Y. 254, 70 N. E. 780.

55. Shelby *v.* Com., 91 Ky. 563, 16 S. W. 461, 13 Ky. L. Rep. 178; Miller *v.* Wilson, 24 Pa. St. 114.

56. Murray *v.* State, 48 Ala. 675; State *v.* Pritchard, 15 Nev. 74.

Where a party states that he has "nothing to say at present" on being asked if he is satisfied with the jury he does not waive the right to challenge peremptorily at any time before the jury is sworn. Drake *v.* State, 51 Ala. 30.

Where defendant states that he waives one challenge this does not preclude him from afterward exercising his remaining challenges. State *v.* Hunter, 118 Iowa 686, 92 N. W. 872.

57. People *v.* Carpenter, 36 Hun (N. Y.) 315, 16 Abb. N. Cas. 128.

58. People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; State *v.* Wren, 48 La. Ann. 803, 19 So. 745; State *v.* Roland, 38 La. Ann. 18; Com. *v.* Evans, 25 Pa. Super. Ct. 239.

59. Com. *v.* Brown, 23 Pa. Super. Ct. 470; Horbach *v.* State, 43 Tex. 242.

60. State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; Kennedy *v.* Dale, 4 Watts & S. (Pa.) 176.

61. Smith *v.* Day, 2 Pennew. (Del.) 245, 45 Atl. 396; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Com. *v.* Frazier, 2 Brewst. (Pa.) 490. But see Zug *v.* Printers' Paper Mill Co., 1 Lanc. Bar (Pa.) 50.

So if a party waives his last challenge on his turn to challenge he cannot after the other has challenged exercise the right. Patton *v.* Ash, 7 Serg. & R. (Pa.) 116.

In Wisconsin the statute expressly provides that a party who declines to challenge in turn shall be deemed to waive at each time one challenge. Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

62. State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878; State *v.* Scott, 41 Minn. 365, 43 N. W. 62; Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

If the panel is full and one party waives his challenge in turn and the other party then accepts the jury the first party cannot then challenge peremptorily any juror. Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909.

In the case of a struck jury it has been held that a party who passes the list without striking waives the right to thereafter strike any juror then on the list and can only strike the jurors called to complete it (Hotz *v.* Hotz, 2 Ashm. (Pa.) 245); but on the contrary it has been held that the party merely loses one strike and may thereafter strike any juror on the list as well as the substitutes (How *v.* Chesapeake, etc., Canal Co., 5 Harr. (Del.) 245).

63. Moore *v.* People, 31 Colo. 336, 73 Pac. 30; State *v.* Vance, 29 Wash. 435, 70 Pac. 34; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865; Schumaker *v.* State, 5 Wis. 324.

64. Moore *v.* People, 31 Colo. 336, 73 Pac. 30; State *v.* Vance, 29 Wash. 435, 70 Pac. 34; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

challenge can be made to a juror or panel accepted as satisfactory;[65] but the acceptance of a jury at any stage of its formation is no waiver of the right to challenge peremptorily other jurors subsequently called to complete it.[66] Where the state is allowed both to stand jurors aside and to challenge peremptorily, the fact that a juror accepted by defendant is set aside by the state is not a waiver of the right to subsequently challenge such juror peremptorily.[67]

12. Waiver of Irregularities in Special or Struck Jury. A party who participates without objection in the striking of a struck jury waives any irregularity in the action of the court in ordering a trial by such jury of its own motion,[68] or any irregularity in the selection of the list,[69] or objection to the competency of any of the jurors composing it which might have been ascertained by a proper and timely inquiry;[70] but where irregularities occur in the formation of a struck jury to which a party objects and excepts at the time, he does not waive his exception by further participation in the striking of the jury,[71] nor does a party waive an objection to an error of the court in allowing the other party a peremptory challenge in selecting a struck jury by afterward challenging peremptorily some of the panel himself.[72]

13. Effect of Erroneous Rulings on Challenges — a. In Overruling Challenge. It has been held that an exception to an error in overruling a challenge for cause is good, although the objectionable juror was excluded by a peremptory challenge and the peremptory challenges of the objecting party were not exhausted before the jury was completed.[73] The weight of authority, however, is that such an error is not material if the objectionable juror did not serve upon the trial and the legal rights of the objecting party were not prejudiced,[74] as where the juror was challenged peremptorily by the adverse party,[75] or by the party whose challenge for cause was overruled, and a jury was obtained before he had exhausted his peremptory challenges.[76] Some of the cases hold that the error is material if the objecting party exhausts his peremptory challenges before the jury is com-

65. See *infra*, XIII, H, 3, d.

66. Fitzpatrick *v.* Joliet, 87 Ill. 58; Swanson *v.* Mendenhall, 80 Minn. 56, 82 N. W. 1093; State *v.* Vance, 29 Wash. 435, 70 Pac. 34; U. S. *v.* Daubner, 17 Fed. 793.

67. Zell *v.* Com., 94 Pa. St. 258.

68. Bennett *v.* Syndicate Ins. Co., 43 Minn. 45, 44 N. W. 794. See also Bank of British North America *v.* Ward, 9 Brit. Col. 49.

69. Milledgeville Mfg. Co. *v.* Etheridge, 63 Ga. 568; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246; Riley *v.* Chicago, etc., R. Co., 67 Minn. 165, 69 N. W. 718. See also Clifton *v.* State, 53 Ga. 241.

70. Central R., etc., Co. *v.* Kent, 87 Ga. 402, 13 S. E. 502.

71. Birmingham Union St. R. Co. *v.* Ralph, 92 Ala. 273, 9 So. 222.

72. May *v.* Hoover, 112 Ind. 455, 14 N. E. 472.

73. Birdsong *v.* State, 47 Ala. 68; Lithgow *v.* Com., 2 Va. Cas. 297. See also Iverson *v.* State, 52 Ala. 170; Dowdy *v.* Com., 9 Gratt. (Va.) 727, 60 Am. Dec. 314.

74. Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629; Burt *v.* Panjaud, 99 U. S. 180, 25 L. ed. 451.

75. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State *v.* Raymond, 11 Nev. 98. See also Ellis *v.* State, 25 Fla. 702, 6 So. 768.

76. *Arkansas.*— Wright *v.* State, 35 Ark. 639; Stewart *v.* State, 13 Ark. 720.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Indiana.— Siberry *v.* State, (1897) 47 N. E. 458 [*overruling* Fletcher *v.* Crist, 139 Ind. 121, 38 N. E. 472; Brown *v.* State, 70 Ind. 576].

Louisiana.— State *v.* Jackson, 42 La. Ann. 1170, 8 So. 297.

Michigan.— Stowell *v.* Standard Oil Co., 139 Mich. 18, 102 N. W. 227.

Mississippi.— Ferriday *v.* Selser, 4 How. 506.

Nebraska.— Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006.

Nevada.— Fleeson *v.* Savage Silver Min. Co., 3 Nev. 157.

New Jersey.— Drake *v.* State, 53 N. J. L. 23, 20 Atl 747.

New Mexico.— Territory *v.* Young, 2 N. M. 93.

New York.— People *v.* Larubia, 140 N. Y. 87, 35 N. E. 412 [*affirming* 69 Hun 197, 23 N. Y. Suppl. 579]; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584; People *v.* Price, 53 Hun 185, 6 N. Y. Suppl. 833; Friery *v.* People, 54 Barb. 319; Finkelstein *v.* Barnett, 17 Misc. 564, 40 N. Y. Suppl. 694; Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216.

North Carolina.— State *v.* Freeman, 100 N. C. 429, 5 S. E. 921; State *v.* Efler, 85 N. C. 585. See also State *v.* Holmes, 63 N. C. 18.

Ohio.— Mimms *v.* State, 16 Ohio St. 221.

Oklahoma.— Hyde *v.* Territory, 8 Okla. 69, 56 Pac. 851.

pleted,[77] which, however, must affirmatively appear from the record;[78] but others make a further qualification of the rule, holding that this is not sufficient to show prejudice, but that it must further appear that the objecting party was thereafter for want of such challenge compelled to accept an objectionable person upon the jury.[79] It is also held that where the court erroneously overrules a challenge and the juror is challenged peremptorily, the error may be cured by allowing the objecting party an additional peremptory challenge,[80] and that the adverse party cannot object to such allowance.[81]

b. In Sustaining Challenge on Insufficient Grounds. It has been held on exception by one party to the sustaining on insufficient grounds of a challenge interposed by the other that the error is ground for reversal, although an unobjectionable jury was subsequently obtained,[82] and the peremptory challenges of the objecting party were not exhausted,[83] but on the contrary it has been held

South Carolina.— State *v.* Anderson, 26 S. C. 599, 2 S. E. 699.

Texas.— Johnson *v.* State, 27 Tex. 758; Taylor *v.* State, 44 Tex. Cr. 547, 72 S. W. 396; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Lum *v.* State, 11 Tex. App. 483.

Vermont — State *v.* Gaffney, 56 Vt. 451.

United States.— Hopt *v.* Utah, 120 U. S. 430, 20 L. ed. 708.

See 31 Cent. Dig. tit. "Jury," §§ 519, 598.

Where several defendants are jointly tried the fact that the peremptory challenges of one were exhausted is immaterial if a jury was obtained without exhausting the peremptory challenges of all. State *v.* Breaux, 104 La. 540, 29 So. 222; State *v.* Ford, 37 La. Ann. 443.

Even where it is held that a party is not obliged to challenge peremptorily to correct an error of the court in overruling a challenge for cause, it is held that if he does elect to do so he waives his exception. Stewart *v.* State, 13 Ark. 720; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

Where a juror is excused and on objection is brought back and tendered to the objecting party and is then peremptorily challenged the error is cured. Coleman *v.* State, 59 Miss. 484.

An error in admitting improper evidence upon a juror's examination is not material if the juror is peremptorily challenged and the challenge of the objecting party are not exhausted. People *v.* Knickerbocker, 1 Park. Cr. (N. Y.) 302.

77. *Arkansas.*— Terrell *v.* State, 69 Ark. 449, 64 S. W. 223.

California.— People *v.* Weil, 40 Cal. 268.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Illinois.— Chicago, etc., R. Co. *v.* Downey, 85 Ill. App. 175; Meaux *v.* Whitehall, 8 Ill. App. 173.

Kansas.— State *v.* Brown, 15 Kan. 400.

Louisiana.— State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109 [*distinguishing* State *v.* Garig, 43 La. Ann. 365, 8 So. 934].

Mississippi.— Hubbard *v.* Rutledge, 57 Miss. 7.

New York.— People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; People *v.* Casey, 96 N. Y. 115.

Tennessee.— Ward *v.* State, 102 Tenn. 724, 52 S. W. 996.

See 31 Cent. Dig. tit. "Jury," § 519.

78. Johnson *v.* State, 27 Tex. 758; Williams *v.* State, 30 Tex. App. 354, 17 S. W. 408; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

79. *Illinois.*— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Maryland.— Johns *v.* State, 55 Md. 350.

Nevada.— State *v.* Raymond, 11 Nev. 98.

Ohio.— McCarthy *v.* State, 5 Ohio Cir. Ct. 627.

Oregon.— Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 33.

Tennessee.— Wooten *v.* State, 99 Tenn. 189, 41 S. W. 813.

Texas.— Cotton *v.* State, 32 Tex. 614; Holland *v.* State, 31 Tex. Cr. 345, 20 S. W. 750; Holt *v.* State, 9 Tex. App. 571; Grissom *v.* State, 8 Tex. App. 386.

Wisconsin.— Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629; Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

See 31 Cent. Dig. tit. "Jury," §§ 519, 598.

The fact that the peremptory challenges were exhausted is not material if the jurors subsequently presented were acceptable and there was no occasion for the use of such challenges. Ford *v.* Umatilla County, 15 Oreg. 313, 16 Pac. 53.

But if a party is forced to accept an objectionable juror after his peremptory challenges are exhausted, the error in overruling the challenge for cause is ground for reversal. Rothschild *v.* State, 7 Tex. App. 519. See also People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

80. State *v.* Bonar, (Kan. 1905) 81 Pac. 484; State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597. But see Iverson *v.* State, 52 Ala. 170.

81. State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

82. Hildreth *v.* Troy, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686; De Puy *v.* Quinn, 61 Hun (N. Y.) 237, 16 N. Y. Suppl. 708; Monk *v.* State, 27 Tex. 450, 11 S. W. 460; Wade *v.* State, 12 Tex. App. 358. See also Mooney *v.* People, 7 Colo. 218, 3 Pac. 235; Stratton *v.* People, 5 Colo. 276.

83. Monk *v.* State, 27 Tex. App. 450, 11 S. W. 460; Wade *v.* State, 12 Tex. App. 358.

that since a party has no right to any particular juror but only to a trial by an impartial jury,[84] the error is without prejudice if an impartial and unobjectionable jury is subsequently obtained to try the case,[85] and that a party cannot claim to have been prejudiced in securing such jury where his peremptory challenges were not exhausted before the jury was completed,[86] or even where they were exhausted unless it further appears that he was forced to accept an objectionable juror on account of the court's ruling.[87]

F. Challenge to Array or Motion to Quash Venire — 1. In General. A challenge to the array is an exception to the whole panel,[88] and was at common law divided into principal challenges to the array and challenges to the favor.[89] In some jurisdictions the exception is presented by what is termed a motion to quash the venire,[90] panel,[91] or array,[92] which motions are equivalent to a challenge to the array.[93] A challenge to the array or motion to quash may be made by either party,[94] and all objections to the manner of selecting and summoning the panel must be taken in this manner or the objection will be held to be waived.[95]

2. Grounds. A challenge to the array must be based upon some ground affecting the validity of the whole panel,[96] and growing out of the proceedings in select-

84. State *v.* Hamilton, 35 La. Ann. 1043; State *v.* Kluseman, 53 Minn. 541, 55 N. W. 741; and cases cited *infra*, note 85.

85. *Louisiana.*— State *v.* Carries, 39 La. Ann. 931, 3 So. 56; State *v.* Creech, 38 La. Ann. 480; State *v.* Hamilton, 35 La. Ann. 1043; State *v.* Barnes, 34 La. Ann. 395.

Minnesota.— State *v.* Kluseman, 53 Minn. 541, 55 N. W. 741.

Nebraska.— Omaha, etc., R. Co. *v.* Cook, 37 Nebr. 435, 55 N. W. 943.

New York.— Armsby *v.* People, 2 Thomps. & C. 157.

Oregon.— State *v.* Harding, 16 Oreg. 495, 19 Pac. 449; State *v.* Ching Ling, 16 Oreg. 419, 18 Pac. 844.

United States.— Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755 [*affirming* 3 Dak. 38, 13 N. W. 349]; Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416.

See 31 Cent. Dig. tit. "Jury," §§ 520, 598.

86. State *v.* West, 46 La. Ann. 1009, 15 So. 418; McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308; People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018.

87. State *v.* Carries, 39 La. Ann. 931, 3 So. 56.

88. Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; State *v.* Murph, 60 N. C. 129; People *v.* McKay, 18 Johns. (N. Y.) 212; Com. *v.* Sallager, 4 Pa. L. J. 511.

A challenge to the array is defined as "an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return." 3 Blackstone Comm. 359 [*quoted in* People *v.* McKay, 18 Johns. (N. Y.) 212, 218].

89. State *v.* Howard, 17 N. H. 171; Proffat Jury Tr. § 150; Thompson & M. Jur. § 126.

The distinction between challenges to the array for principal cause and to the favor is that the former is based upon facts with regard to the sheriff which in point of law disqualify him and the latter upon facts which do not necessarily disqualify him but might or might not render him not impartial. Brown *v.* Maltby, 20 N. Brunsw. 92.

90. See Peters *v.* State, 100 Ala. 10, 14 So. 896; Coleman *v.* Com., 84 Va. 1, 3 S. E. 878.

91. See Davis *v.* State, 31 Nebr. 247, 47 N. W. 854.

92. See Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274.

93. Swoffold *v.* State, 3 Tex. App. 76.

The method of raising the objection is, in the absence of statute, of little importance so long as the grounds thereof are brought definitely to the attention of the court. Ullman *v.* State, 124 Wis. 602, 103 N. W. 6.

94. Gardner *v.* Turner, 9 Johns. (N. Y.) 260.

Notwithstanding there is no statutory provision authorizing a challenge to the array or any equivalent proceeding, the parties have a right to make such challenge. Ullman *v.* State, 124 Wis. 602, 103 N. W. 6.

95. Crawford *v.* Creagh, 1 Ala. 592; Davis *v.* State, 31 Nebr. 247, 47 N. W. 854; State *v.* Douglass, 63 N. C. 500; Rex *v.* Sheppard, 1 Leach C. C. 119.

96. *Connecticut.*— State *v.* Hogan, 67 Conn. 581, 35 Atl. 508.

Georgia.—Taylor *v.* State, 121 Ga. 348, 49 S. E. 303; Eberhart *v.* State, 47 Ga. 598.

Illinois.— Clears *v.* Stanley, 34 Ill. App. 338.

Massachusetts.— Com. *v.* Walsh, 124 Mass. 32.

Mississippi.— Durrah *v.* State, 44 Miss. 789.

New Jersey.— State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284.

North Carolina.— State *v.* Hensley, 94 N. C. 1021.

West Virginia.— State *v.* Cartright, 20 W. Va. 32.

Wisconsin.— Conkey *v.* Northern Bank, 6 Wis. 447.

See 31 Cent. Dig. tit. "Jury," § 543.

Objections to individual jurors must be

ing and summoning the jurors composing it.[97] At common law a challenge to the array was based upon some partiality or default on the part of the sheriff or his under officer,[98] and this was the only ground for such challenge,[99] it being the duty of the sheriff to select as well as to summon the jury.[1] Bias or interest on the part of the summoning officer is still a ground of challenge to the array,[2] as is also a material departure from the procedure prescribed by law in selecting the jury, but mere irregularities are not sufficient. The particular irregularities which are or are not sufficient ground for such challenge have been fully discussed in the preceding sections relative to the selection of the jury-list,[3] drawing and summoning the regular panel,[4] special venires,[5] and special or struck juries.[6] In some jurisdictions the statutes expressly provide as to the grounds upon which a challenge to the array may be based and such challenge can be made only upon the grounds enumerated.[7] In some cases the statutes provide that the challenge can be based only upon a material departure from the forms prescribed by law in respect to the drawing and return of the jury,[8] or either upon such material departure or an intentional omission on the part of the sheriff to summon one or more of the jurors drawn.[9]

made by a challenge to the polls. Nixon *v.* State, 121 Ga. 144, 48 S. E. 966. See also *supra*, XIII, A.

97. Green *v.* State, 40 Fla. 191, 23 So. 851; Buford *v.* McGetchie, 60 Iowa 298, 14 N. W. 790; State *v.* Raymond, 11 Nev. 98.

98. Com. *v.* Walsh, 124 Mass. 32; Riley *v.* Chicago, etc., R. Co., 67 Minn. 165, 69 N. W. 718; State *v.* Powers, 136 Mo. 194, 37 S. W. 936; Conkey *v.* Northern Bank, 6 Wis. 447.

99. Com. *v.* Walsh, 124 Mass. 32; Riley *v.* Chicago, etc., R. Co., 67 Minn. 165, 69 N. W. 718.

1. See *supra*, VII, B.

2. See *supra*, VIII, A, 2, e, (II).

The statutory provisions placing the selection of the jury panel in the hands of other officers have greatly reduced the opportunities for corrupt practices on the part of the summoning officer, but have not entirely eliminated them, since the officer may still purposely neglect to summon such of the panel selected as he considers unfavorable to his interests. State *v.* Powers, 136 Mo. 194, 37 S. W. 936.

3. See *supra*, VII.

4. See *supra*, VIII, A.

5. See *supra*, VIII, B.

6. See *supra*, IX, B, 4.

7. *California.*— People *v.* McKay, 122 Cal. 628, 55 Pac. 594; People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Wallace, 101 Cal. 281, 35 Pac. 862; People *v.* Welch, 49 Cal. 174.

Iowa.— Buford *v.* McGetchie, 60 Iowa 298, 14 N. W. 790.

Nevada.— State *v.* Raymond, 11 Nev. 98.

New York.— People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54.

Texas.— Sanchez *v.* State, 39 Tex. Cr. 389, 46 S. W. 249; Swofford *v.* State, 3 Tex. App. 76; Galveston, etc., R. Co. *v.* Jessee, 2 Tex. App. Civ. Cas. § 403.

Utah.— State *v.* Bates, 25 Utah 1, 69 Pac. 70.

See 31 Cent. Dig. tit. "Jury," § 543.

In California in cases where the jury is not drawn, as in the case of special venires, the only ground for challenge to the array is bias on the part of the officer who summoned them. People *v.* Wallace, 101 Cal. 281, 25 Pac. 862; People *v.* Welch, 49 Cal. 174.

In Louisiana the statute provides that no defect or irregularity in drawing or summoning the jury shall be ground for a challenge to the array "if it shall not appear that some fraud has been practised, or some great wrong committed, that would work a great and irreparable injury." State *v.* Simmons, 43 La. Ann. 991, 10 So. 382. See also State *v.* Saintes, 46 La. Ann. 547, 15 So. 160.

Under the Texas statutes no challenge to the array is allowed to the panel selected by the jury commissioners (Carter *v.* State, 38 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508; Williams *v.* State, 24 Tex. App. 32, 5 S. W. 658) or in the case of juries selected by the sheriff, except upon the ground that the summoning officer has acted corruptly and has wilfully summoned persons upon the jury known to be prejudiced (Galveston, etc., R. Co. *v.* Perry, (Tex. Civ. App. 1905) 85 S. W. 62; Arnold *v.* State, 38 Tex. Cr. 1, 40 S. W. 734), but it has been held that notwithstanding these provisions, a motion to quash the venire should be sustained where the court intentionally and purposely failed to appoint a jury commission to select jurors (White *v.* State, 45 Tex. Cr. 597, 78 S. W. 1066), or where the jury was not selected by the jury commissioners in a case where it should have been so selected (Ray *v.* State, 46 Tex. Cr. 176, 79 S. W. 535). Nor do these provisions restrict the right of a party to question the power of the court to order a venire to be summoned by the sheriff and to substitute such venire for one regularly drawn by the jury commissioners (Texas, etc., R. Co. *v.* Pullen, 33 Tex. Civ. App. 143, 75 S. W. 1084).

8. Buford *v.* McGetchie, 60 Iowa 298, 14 N. W. 790; State *v.* Gut, 13 Minn. 341.

9. State *v.* Raymond, 11 Nev. 98; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; Peo-

3. Time For Making. Challenges to the panel or array must proceed the challenges to the polls,[10] but are not to be made until the challenging party's case is called for trial,[11] and a full jury has appeared.[12] The challenge or motion to quash must then be promptly made,[13] or at least as soon as the facts which warrant it are known,[14] or if the time is regulated by statute, within the time so limited.[15] It has been held that the challenge or motion was in time if made after a demurrer to the indictment had been overruled and defendant pleaded not guilty, but before he had announced ready for trial,[16] or before challenges to the polls and before the return of the venire;[17] but the objection must be made before trial,[18] and is too late after the jury have been impaneled and sworn,[19] or even after the impaneling of the jury has been begun.[20] If no objection was made at the trial as to the manner of selecting or summoning the jury, it is too late to urge the

ple *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; People *v.* Jackson, 111 N. Y. 362, 19 N. Y. Suppl. 506, 19 N. E. 54; State *v.* Bates, 25 Utah 1, 69 Pac. 70.

In New York under Code Cr. Proc. § 362, there must be a material departure "to the prejudice of the defendant," or an intentional omission to summon one or more of the jurors drawn. People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889.

10. State *v.* Davis, 41 Iowa 311; State *v.* Everson, 63 Kan. 66, 64 Pac. 1034; State *v.* Clark, 121 Mo. 500, 26 S. W. 562; U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267.

Challenge to polls as a waiver of right to challenge array see *supra*, XIII, E, 10.

11. Tarrance *v.* State, 43 Fla. 446, 30 So. 685.

12. St. Louis, etc., R. Co. *v.* Wheelis, 72 Ill. 538; Rex *v.* Edmonds, 4 B. & Ald. 471, 23 Rev. Rep. 350, 6 E. C. L. 564.

The court has no authority to quash a panel on the ground that the jury-list was improperly selected upon the *ex parte* motion of the prosecuting attorney, where such motion is not made in any case pending and no litigant is complaining. Heitman *v.* Morgan, 10 Ida. 562, 79 Pac. 225.

13. Clears *v.* Stanley, 34 Ill. App. 338; Klemmer *v.* Mount Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274.

14. Wallace *v.* Jameson, 179 Pa. St. 98, 36 Atl. 142; Klemmer *v.* Mount Penn Gravity R. Co., 163 Pa. St. 521, 30 Atl. 274.

15. State *v.* Brittin, 50 La. Ann. 261, 23 So. 301; State *v.* Labauve, 46 La. Ann. 548, 15 So. 172; State *v.* Simmons, 43 La. Ann. 991, 10 So. 382; State *v.* Coudier, 36 La. Ann. 291.

In Louisiana the statute provides that objections to the array must be made on the first day of the term or will be considered as waived and cannot thereafter be urged (State *v.* Brittin, 50 La. Ann. 261, 23 So. 301; State *v.* Ashworth, 41 La. Ann. 683, 6 So. 556), and while the requirement will not be enforced in cases where it could not be complied with as in the case of juries drawn or indictments returned after the first day of the term (State *v.* Vance, 31 La. Ann. 398), the rule will not be relaxed on the ground that the party had no knowledge of the objection relied on at that time if it appears that it was a matter of record and could have been discovered by reasonable diligence (State *v.* Curtis, 44 La. Ann. 320, 10 So. 784).

16. Peters *v.* State, 100 Ala. 10, 14 So. 896.

In Pennsylvania a challenge to the array cannot be made after a plea of not guilty, the statute providing that pleading the general issue shall be a waiver of all errors and defects in the drawing, summoning, and returning of jurors. Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433.

17. State *v.* Powers, 136 Mo. 194, 37 S. W. 936.

18. Boteler *v.* Roy, 40 Mo. App. 234; Davis *v.* State, 31 Nebr. 247, 47 N. W. 854; Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255.

19. *Alabama.*— Longmire *v.* State, 130 Ala. 66, 30 So. 413.

Arkansas.— Brown *v.* State, 12 Ark. 623.

California.— People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772.

Georgia.— Mikell *v.* State, 62 Ga. 368.

Illinois.— St. Louis, etc., R. Co. *v.* Union Trust, etc., Bank, 209 Ill. 457, 70 N. E. 651; St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384.

Iowa.— Suttle *v.* Batie, 1 Iowa 141.

Mississippi.— Gavigan *v.* State, 55 Miss. 533.

New York.— New York *v.* Mason, 4 E. D. Smith 142, 1 Abb. Pr. 344.

See 31 Cent. Dig. tit. "Jury," § 544.

In Virginia the statute provides that no irregularity in the venire facias shall be sufficient to set aside a verdict unless the party making the objection was injured thereby or the objection was made before the summoning of the jury (Lyles *v.* Com., 88 Va. 396, 13 S. E. 802; Vawter *v.* Com., 87 Va. 245, 12 S. E. 339); but the provision was held not to apply to felony cases where there was an entire omission to issue any writ of venire facias (Myers *v.* Com., 90 Va. 785, 20 S. E. 152; Lewis *v.* Com., (1891) 12 S. E. 1050), and by the acts of 1893 and 1894 the statute was expressly made applicable to such cases (see Myers *v.* Com., *supra*).

20. Ickes *v.* State, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442.

After the jury is accepted by the state and offered for acceptance to defendant, it is too late to move to quash the venire. Wil-

objection for the first time after verdict,[21] even though the objection was not previously known,[22] unless it appears that the objecting party was prejudiced thereby.[23]

4. Form and Sufficiency. A challenge to the array must be in writing,[24] and the statutes usually expressly so provide.[25] It must also be certain and specific,[26] setting forth distinctly the grounds relied on,[27] and in what the alleged irregularity consists;[28] and where by statute only irregularities of a certain character are sufficient to sustain the challenge there must be specific allegations bringing the case within the statute.[29] In some cases the statutes require the challenge or motion to be verified,[30] and in such cases the verification must be positive, and not upon information and belief.[31]

5. Presumptions and Burden of Proof. On a challenge to the array or motion to quash the venire, it will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing, and summoning the jury have acted faithfully and according to law, and the burden of showing

liams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

21. *California.*— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

Georgia.— Maddox *v.* Cunningham, 68 Ga. 431, 45 Am. Rep. 500; Daniel *v.* Frost, 62 Ga. 697; Thomas *v.* State, 27 Ga. 287.

Indiana.— Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246.

Kentucky.— Kennedy *v.* Com., 14 Bush 340.

Louisiana.— Vidal *v.* Thompson, 11 Mart. 23.

Minnesota.— Steele *v.* Malony, 1 Minn. 347.

Mississippi.— Jackson *v.* State, 55 Miss. 530; Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83.

Missouri.— Boteler *v.* Roy, 40 Mo. App. 234.

Nebraska.— Leavitt *v.* Sizer, 35 Nebr. 80, 52 N. W. 832; Davis *v.* State, 31 Nebr. 247, 47 N. W. 854.

North Carolina.— State *v.* Douglass, 63 N. C. 500.

Pennsylvania.— Jewell *v.* Com., 22 Pa. St. 94; Com. *v.* Sallager, 4 Pa. L. J. 511.

Tennessee.— Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269.

Texas.— Carter *v.* State, 39 Tex. Cr. 345, 48 S. W. 508, 46 S. W. 236.

Virginia.— Lyles *v.* Com., 88 Va. 396, 13 S. E. 802.

United States.— Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436.

See 31 Cent. Dig. tit. "Jury," § 544.

A party cannot take chances on a favorable verdict and afterward object to the manner in which the jury was selected. Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246; State *v.* Douglass, 63 N. C. 500.

An objection to the qualifications of the jury commissioners cannot be made after verdict. State *v.* Tisdale, 41 La. Ann. 338, 6 So. 579.

22. Boteler *v.* Roy, 40 Mo. App. 234.

23. See Boteler *v.* Roy, 40 Mo. App. 234.

While it is not a matter of right to object to the array after the jury is sworn, the court having power to grant a new trial may consider the objection and allow it to prevail in order to prevent injustice. See New York *v.* Mason, 4 E. D. Smith (N. Y.) 142, 1 Abb. Pr. 344.

24. Ryder *v.* People, 38 Mich. 269; People *v.* Doe, 1 Mich. 451; State *v.* Brennan, 164 Mo. 487, 65 S. W. 325; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Clark, 121 Mo. 500, 26 S. W. 562; Strong *v.* State, 63 Nebr. 440, 88 N. W. 772. *Compare* Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701. *Contra*, Ullman *v.* State, 124 Wis. 602, 103 N. W. 6.

25. Suttle *v.* Batie, 1 Iowa 141; State *v.* Raymond, 11 Nev. 98; Perry *v.* State, (Tex. Cr. App. 1896) 34 S. W. 618; Woodard *v.* State, 9 Tex. App. 412.

26. Fowler *v.* State, 58 N. J. L. 423, 34 Atl. 682; Conkey *v.* Northern Bank, 6 Wis. 447; Reg. *v.* Hughes, 1 C. & K. 235, 47 E. C. L. 235. See also State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284.

27. Strong *v.* State, 63 Nebr. 440, 88 N. W. 772; People *v.* Ebelt, 180 N. Y. 470, 73 N. E. 235; Jones *v.* State, 37 Tex. Cr. 433, 35 S. W. 975; Perry *v.* State, (Tex. Cr. App. 1896) 34 S. W. 618; Ullman *v.* State, 124 Wis. 602, 103 N. W. 6.

The ground of challenge must be so stated that the opposite party can demur to its sufficiency in point of law, or raise an issue with respect to the truth of the facts set forth. Fowler *v.* State, 58 N. J. L. 423, 34 Atl. 682.

A challenge to the array on the ground of bias of the summoning officer must show whether it is taken for actual or implied bias, where one is tried by the court and the other by triers. State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

If the challenge is to the favor it should contain a distinct allegation that the sheriff is not impartial. Brown *v.* Maltby, 20 N. Brunsw. 92.

28. Fowler *v.* State, 58 N. J. L. 423, 34 Atl. 682.

29. State *v.* Simmons, 43 La. Ann. 991, 10 So. 382.

30. Weeping Water Electric Light Co. *v.* Haldeman, 35 Nebr. 139, 52 N. W. 892; Perry *v.* State, (Tex. Cr. App. 1896) 34 S. W. 618.

31. Weeping Water Electric Light Co. *v.* Haldeman, 35 Nebr. 139, 52 N. W. 892.

the contrary is upon the challenging party.[32] It will also be presumed that the conditions authorizing such action existed, where the court ordered the summoning of a special venire,[33] or appointed special jury commissioners for the purpose of selecting a jury.[34]

6. EVIDENCE. When a challenge to the array is made, the challenging party must stand ready to establish his challenge by proof of the illegality of the panel,[35] and if no evidence be produced to support it, the challenge may properly be overruled.[36] It is too late unless leave was previously given to introduce such proof after the challenge or motion has been passed upon and overruled,[37] or after the jury have been impaneled and sworn, and the trial begun.[38] The proof in support of the challenge may be made either by oral evidence or affidavits,[39] the latter being the better practice.[40] On a challenge to the array, evidence is not admissible to contradict the records of the court;[41] but the testimony of the presiding judge is admissible to supplement the record when incomplete, and show the action actually taken in selecting the jury,[42] and the regularity of the drawing may be proved by the testimony of the clerk or officers present, even though it contradicts the clerk's certificate of such drawing.[43] On a challenge based on the ground of bias of the summoning officer, he may be asked any questions which would be relevant to the question of bias on the examination of a juror.[44] It will be presumed upon appeal that the challenge was tried and determined upon legal and sufficient evidence, unless the case or bill of exceptions shows the contrary.[45]

7. TRIAL AND DETERMINATION. According to the common law, challenges to the

32. *Florida.*— Tarrance *v.* State, 43 Fla. 446, 30 So. 685.

Illinois.— People *v.* Madison County, 125 Ill. 334, 17 N. E. 802; Barr *v.* People, 103 Ill. 110.

Louisiana.— State *v.* Baptiste, 105 La. 661, 30 So. 147.

Michigan.— People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Montana.— State *v.* Jones, 32 Mont. 442, 80 Pac. 1095; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

New York.— Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156.

Pennsylvania.— Com. *v.* Green, 1 Ashm. 289.

South Carolina.— State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

Texas.— Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591.

See 31 Cent. Dig. tit. "Jury," § 548.

If the summoning officer is an interested party the presumption is to the contrary. State *v.* Powers, 136 Mo. 194, 37 N. W. 936.

33. People *v.* Board of Sup'rs, 23 Ill. App. 386; State *v.* Gleason, 88 Mo. 582.

34. O'Bryan *v.* State, 12 Tex. App. 118.

35. Borrelli *v.* People, 164 Ill. 549, 45 N. E. 1024; De Kalb, etc., R. Co. *v.* Rowell, 74 Ill. App. 191; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

To authorize quashing a venire on the ground of irregularities in drawing the panel, the challenging party must clearly establish this fact, and it is not sufficient to merely show the probability of such irregularity. State *v.* Green, 49 La. Ann. 60, 21 So. 124.

36. Tarrance *v.* State, 43 Fla. 446, 30 So. 685; State *v.* Linde, 54 Iowa 139, 6 N. W. 168; State *v.* Craft, 164 Mo. 631, 65 S. W. 280; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

The averments of the motion to quash the venire are no evidence in themselves of their truthfulness. State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

37. Yunker *v.* Marshall, 65 Ill. App. 667.

38. De Kalb, etc., R. Co. *v.* Rowell, 74 Ill. App. 191.

39. Borrelli *v.* People, 164 Ill. 549, 45 N. E. 1024.

The ex parte affidavit of the accused is not sufficient to prove the facts upon which a motion to quash a venire is based. State *v.* Baptiste, 105 La. 661, 30 So. 147.

40. Borrelli *v.* People, 164 Ill. 549, 45 N. E. 1024.

In the absence of any statutory provision to the contrary, the court may direct in which form the evidence shall be produced. State *v.* Linde, 54 Iowa 139, 6 N. W. 168.

41. State *v.* Clark, 121 Mo. 500, 26 S. W. 562.

42. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

43. State *v.* Brecht, 41 Minn. 50, 42 N. W. 602; State *v.* Gut, 13 Minn. 341. See also State *v.* Riley, 41 La. Ann. 693, 6 So. 730; State *v.* Nockum, 41 La. Ann. 689, 6 So. 729.

44. People *v.* Teshara, 134 Cal. 542, 66 Pac. 798.

It is proper for the court to ask the officer whether, if he were sworn as a juror, he could and would give defendant a fair and impartial trial, notwithstanding he has formed an opinion as to the merits of the case not based upon rumor or newspaper reports. People *v.* Ryan, 108 Cal. 581, 41 Pac. 451.

45. State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

array for a principal cause are tried by the court, and challenges to the favor by triers appointed by the court.[46] The distinction between the two classes of challenges is now generally disregarded,[47] the usual practice being for the court to try all challenges to the array,[48] and where there is a right to have triers appointed, a failure to demand them and a submission of evidence to the court is a waiver of the right.[49] A demurrer or exception to the challenge admits the facts alleged,[50] and the court passes upon its sufficiency, assuming the facts alleged to be true.[51] If, however, the challenge be denied the court proceeds to try the truth of the facts alleged;[52] but if denied and no evidence is introduced in support of the challenge it is properly overruled,[53] and if the challenge presents no legal ground of objection to the jury, it may be summarily overruled without any replication thereto being filed.[54] If the challenge be disallowed, the court proceeds to impanel the jury;[55] but if sustained, the entire panel for the term must be discharged,[56] and the trial judge after setting aside the panel for the term in one case cannot subsequently during that term in another case hold it to be good,[57] nor can the challenging party where his challenge is sustained in one case and a new jury summoned challenge the jury so summoned on the ground that the regular panel was erroneously discharged.[58] The disallowance of a challenge to the array which should have been sustained renders void the trial by a jury selected from such array,[59] but a successful challenge to the array of the regular panel does not affect the competency of a special venire previously ordered.[60]

G. Challenges For Cause — 1. Nature and Classification. A challenge for cause is a challenge to a juror for which some cause or reason is alleged.[61] At common law such challenges were divided into challenges for principal cause and

46. Thompson & M. Jur. § 126. See also State *v.* Howard, 17 N. H. 171; U. S. *v.* Callender, 25 Fed. Cas. No. 14,709.

If the facts are admitted the court decides upon them, but if denied two triers are appointed by the court. Gardner *v.* Turner, 9 Johns. (N. Y.) 260.

Triers are appointed from the panel unless there are special objections, in which case persons not on the panel may be appointed. Lee *v.* Evaul, 1 N. J. L. 283.

47. Thompson & M. Jur. § 126.

48. Com. *v.* Walsh, 124 Mass. 32; State *v.* Howard, 17 N. H. 171; Ullman *v.* State, 124 Wis. 602, 103 N. W. 6.

In Kentucky the statute provides that the decision of the court upon challenges to the panel shall not be subject to exception. Alderson *v.* Com., 74 S. W. 679, 25 Ky. L. Rep. 32.

49. State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

50. People *v.* Armstrong, 2 Ida. (Hasb.) 298, 13 Pac. 342.

An "exception" to a challenge to the array is under the practice in some states equivalent to a demurrer. People *v.* Armstrong, 2 Ida. (Hasb.) 298, 13 Pac. 342; State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

The court may allow a demurrer to be withdrawn, after it is sustained and permit an answer to be filed to the challenge *nunc pro tunc,* and if such answer is sufficient may overrule the challenge. McDonald *v.* People, 25 Ill. App. 350 [*reversed* on other grounds in 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547].

51. People *v.* Armstrong, 2 Ida. (Hasb.) 298, 13 Pac. 342. See also People *v.* Wilber, 15 N. Y. Suppl. 435.

If the court proceeds to impanel the jury after an exception is made to a challenge to the panel, it is in effect sustaining the exception. People *v.* Enwright, 134 Cal. 527, 66 Pac. 726.

Sustaining the demurrer or exception is equivalent to expressly overruling the challenge. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

52. See People *v.* Armstrong, 2 Ida. (Hasb.) 298, 13 Pac. 342; State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

53. State *v.* Jones, 32 Mont. 442, 80 Pac. 1095; People *v.* Wilber, 15 N. Y. Suppl. 435.

54. Provident Sav. Inst. *v.* Burnham, 128 Mass. 458.

55. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

56. Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505; Moore *v.* Navassa Guano Co., 130 N. C. 229, 41 S. E. 293; State *v.* Owen, 61 N. C. 425.

57. State *v.* Revells, 31 La. Ann. 387; State *v.* Smith, 31 La. Ann. 406.

58. Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505.

59. Moore *v.* Navassa Guano Co., 130 N. C. 229, 41 S. E. 293.

60. State *v.* Owen, 61 N. C. 425.

61. Black L. Dict.

A challenge for cause is otherwise defined as "an objection to a particular juror, which is either general, that he is disqualified from serving in any case; or particular, that he is disqualified from serving in the action on trial." People *v.* Fong Ah Sing, 70 Cal. 8, 11, 11 Pac. 323.

to the favor,[62] the former being based upon grounds from which if shown to exist the disqualification of the juror followed as a legal conclusion, and the latter upon grounds which merely raised a suspicion of bias to be determined as a question of fact.[63] In some jurisdictions a somewhat similar classification of challenges is made by statute but under different nomenclature, the challenges being termed general or particular causes of challenge or challenges for actual or for implied bias,[64] the general causes of challenge and challenges for implied bias corresponding to what were recognized as grounds of challenge for principal cause at common law, and those for actual bias covering largely objections formerly urged upon challenges to the favor.[65] It was formerly important to observe the distinction between challenges for principal cause and to the favor in view of the different methods for trying such challenges;[66] but in most jurisdictions the distinction between the two classes is now practically disregarded,[67] the usual practice being for all challenges to be tried and determined by the court.[68]

2. Right to Challenge For Cause. The right to challenge jurors for cause exists independently of any statutory provision,[69] and is an essential incident of the right to trial by jury which the legislature cannot impair,[70] and it may be exercised without limit as to number so long as the cause assigned is sufficient.[71] The right may be exercised in trials by jury in justices' courts as well as courts of ordinary jurisdiction,[72] and in condemnation proceedings where the constitution provides that the assessment shall be by jury.[73] In criminal cases the right is in no way dependent upon the nature of the offense,[74] and may be exercised by the state as well as by defendant,[75] and unlike the right of peremptory challenge may be claimed on the trial of preliminary issues as well as the final issue.[76] In the case of a struck jury the parties may challenge any of the panel for cause before striking the jury.[77] A juror cannot, however, challenge himself,[78] nor where one party has a right of challenge for a cause not available to the other can the latter object that he does not avail himself of the right.[79]

3. Grounds. A challenge for cause is based either upon the ground that the juror is lacking in the general qualifications for jury duty, and is therefore disqualified from serving in any case, or upon some particular ground rendering him

62. Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; Carnal *v.* People, 1 Park. Cr. (N. Y.) 272; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015; Shoeffler *v.* State, 3 Wis. 823.

63. Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; State *v.* Howard, 17 N. H. 171; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015; Shoeffler *v.* State, 3 Wis. 823.

64. Thompson & M. Jur. § 173. See also the following cases:

California.— People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People *v.* Renfrow, 41 Cal. 37; People *v.* Reynolds, 16 Cal. 128.

Idaho.— State *v.* Gordon, 5 Ida. 297, 48 Pac. 1061.

Minnesota.— State *v.* Hanley, 34 Minn. 430, 26 N. W. 397.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

Utah.— People *v.* Hopt, 3 Utah 396, 4 Pac. 250.

65. Thompson & M. Jur. § 173.

66. Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

Mode of trial see *infra*, XIII, G, 8, b, (1).

67. O'Fallon Coal, etc., Co. *v.* Laquet, 198 Ill. 125, 64 N. E. 767 [*affirming* 89 Ill. App. 13]; Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; East St. Louis Electric R. Co. *v.* Snow, 88 Ill. App. 660; State *v.* Knight, 43 Me. 11; Stephens *v.* People, 38 Mich. 739; Holt *v.* People, 13 Mich. 224; Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

68. See *infra*, XIII, G, 8, b, (1).

69. State *v.* Push, 23 La. Ann. 14; State *v.* McClear, 11 Nev. 39.

70. Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679; State *v.* McClear, 11 Nev. 39.

71. See Hooker *v.* State, 4 Ohio 348; Lester *v.* State, 2 Tex. App. 432.

72. Holton *v.* Hendley, 75 Ga. 847.

73. Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679.

74. State *v.* Fulton, 66 N. C. 632.

75. State *v.* Push, 23 La. Ann. 14; Jewell *v.* Com., 22 Pa. St. 94; Pierson *v.* State, 18 Tex. App. 524; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693.

76. See Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

77. Davis *v.* Hunter, 7 Ala. 135; Lee *v.* Peter, 6 Gill & J. (Md.) 447.

78. Williams *v.* State, 3 Ga. 453; Bickham *v.* Pissant, 1 N. J. L. 220.

79. Harrison *v.* State, 79 Ala. 29; Murphy *v.* State, 37 Ala. 142.

unfit or incompetent to serve in the particular case on trial.[80] The particular grounds of objection falling under each class have been previously considered at length.[81] The fact that certain grounds of challenge are specified by statute does not preclude a challenge and the exclusion of a juror on other grounds,[82] for the circumstances which may authorize a challenge to the favor are infinite and incapable of successful enumeration.[83] Nor does the fact that the legislature provides that a certain ground of objection shall not be a sufficient ground of challenge for principal cause prevent a challenge for favor upon the same ground.[84]

4. Time and Order. The time to challenge jurors for cause is when they are presented for impaneling and before being sworn,[85] and if impaneled one at a time the challenge should be made when each individual juror is presented;[86] but unless expressly or impliedly waived the right may be exercised at any time before the juror is sworn.[87] A party must also prefer all of his challenges to a juror which are of the same nature and triable by the same forum at once,[88] but where differently tried a challenge for favor may be made after a challenge for principal cause has been tried and overruled.[89] After a juror is sworn and impaneled a party has no absolute right to challenge him for cause,[90] although

Opposition to capital punishment is available as a ground of challenge only to the state and defendant cannot object if the state declines to challenge on this ground. Murphy *v.* State, 37 Ala. 142.

80. People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323. See also State *v.* Push, 23 La. Ann. 14.

81. Qualifications for jury duty see *supra*, VI, A.

Competency for trial of particular causes see *supra*, XII.

82. Smith *v.* State, 55 Ala. 1 [*overruling* Boggs *v.* State, 45 Ala. 30, 6 Am. Rep. 689; Lyman *v.* State, 45 Ala. 72]; State *v.* Marshall, 8 Ala. 302; Gaff *v.* State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235; State *v.* West, 69 Mo. 401, 33 Am. Rep. 506; Coppersmith *v.* Mound City R. Co., 51 Mo. App. 357; Lyles *v.* State, 41 Tex. 172, 19 Am. Rep. 38; Lester *v.* State, 2 Tex. App. 432.

83. People *v.* Bodine, 1 Den. (N. Y.) 281.

84. Stephens *v.* People, 38 Mich. 739; Thomas *v.* People, 67 N. Y. 218.

85. *Alabama.*— Ripley *v.* Coolidge, Minor 11.

California.— People *v.* Reynolds, 16 Cal. 128.

Georgia.— Epps *v.* State, 19 Ga. 102; Williams *v.* State, 3 Ga. 453.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Maryland.— Young *v.* State, 90 Md. 579, 45 Atl. 531.

Michigan.— Palmer *v.* Clement, 49 Mich. 45, 12 N. W. 903.

Nevada.— State *v.* Hartly, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

South Carolina.— State *v.* Williams, 2 Hill 381.

Texas.— Hannaman *v.* State, (Cr. App. 1895) 33 S. W. 538; Lester *v.* State, 2 Tex. App. 432.

Virginia.— Bristow *v.* Com., 15 Gratt. 634.

England.— Reg. *v.* Key, 3 C. & K. 371, 2 Den. C. C. 347, 15 Jur. 1065, 21 L. J. M. C. 35, T. & M. 623.

See 31 Cent. Dig. tit. "Jury," § 556.

In California the penal code provides that the court must inform defendant before a juror is called that if he desires to challenge he must do so when the juror appears and before he is sworn (People *v.* Moore, 103 Cal. 508, 37 Pac. 510); but a failure to do so is not reversible error if defendant is informed of his rights and exercises his right of challenge (People *v.* Mortier, 58 Cal. 262); but where defendant is not represented by counsel and does not exercise his right of challenge, a failure to comply with the statute is reversible error (People *v.* Moore, *supra*).

Where the jury is completed from bystanders if such persons are not qualified and liable to be drawn as jurors objection must be taken before they are placed upon the panel. Com. *v.* Gee, 6 Cush. (Mass.) 174.

86. See People *v.* Reynolds, 16 Cal. 128; People *v.* Kuok Wah Choi, 2 Ida. 85, 6 Pac. 112; State *v.* Armington, 25 Minn. 29.

87. *Alabama.*— Roberts *v.* State, 68 Ala. 515; Smith *v.* State, 55 Ala. 1 [*overruling* Stalls *v.* State, 28 Ala. 25].

Maryland.— Edelen *v.* Gough, 8 Gill 87.

Michigan.— Scripps *v.* Reilly, 38 Mich. 10.

Pennsylvania.— McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308.

Texas.— Monson *v.* State, 45 Tex. Cr. 426, 76 S. W. 570.

See 31 Cent. Dig. tit. "Jury," § 556.

88. Mann *v.* Glover, 14 N. J. L. 195.

89. Carnal *v.* People, 1 Park. Cr. (N. Y.) 272. *Compare* People *v.* Donaldson, 2 Edm. Sel. Cas. (N. Y.) 78, where, however, the proposed challenge for favor was based practically upon the same ground as the challenge for principal cause previously overruled.

90. *Alabama.*— Mooring *v.* State, 129 Ala. 66, 29 So. 664; Henry *v.* State, 77 Ala. 75; State *v.* Morea, 2 Ala. 275; Ripley *v.* Coolidge, Minor 11.

Kentucky.— Combs *v.* Com., 97 Ky. 24, 29 S. W. 734, 16 Ky. L. Rep. 699.

Louisiana.— State *v.* Bunger, 14 La. Ann. 461; Nugent *v.* Trepagnier, 2 Mart. 205.

the ground of objection was not previously known,[91] except in cases where the ground of objection originated after the juror was sworn,[92] or where the objecting party was not in fault or guilty of any lack of diligence in sooner discovering the objection.[93] The court may, however, in its discretion, allow a challenge for cause to be made after a juror is sworn.[94] The statutes in some jurisdictions provide that in criminal cases all challenges to a juror, whether peremptory of for cause, shall be first taken by the state,[95] or by defendant.[96]

5. Right to Withdraw Challenge. Whether a challenge for cause may be withdrawn rests in the discretion of the court,[97] and a party has no right after his challenge is allowed to waive the objection and insist that the juror shall be reinstated.[98]

6. Making and Traverse of Challenge — a. Form and Sufficiency. A challenge to a juror for cause must state specifically the particular ground or grounds upon which it is based,[99] although it is not a challenge for principal cause but to the

Maryland.— Young *v.* State, 90 Md. 579, 45 Atl. 531.

Massachusetts.— See Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Michigan.— Palmer *v.* Highway Com'r, 49 Mich. 45, 12 N. W. 903.

Missouri.— Pitt *v.* Bishop, 53 Mo. App. 600; Harding *v.* Brown, 1 Mo. App. Rep. 13.

South Carolina.— State *v.* Williams, 2 Hill 381.

Tennessee.— Gillespie *v.* State, 8 Yerg. 507, 29 Am. Dec. 137; McClure *v.* State, 1 Yerg. 206; Draper *v.* State, 4 Baxt. 246; Ward *v.* State, 1 Humphr. 253.

Texas.— Munson *v.* State, 34 Tex. Cr. 498, 31 S. W. 387.

Virginia.— Thompson *v.* Com., 8 Gratt. 637.

United States.— Queen *v.* Hepburn, 7 Cranch 290, 3 L. ed. 348; U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601.

England.— Reg. *v.* Giorgetti, 4 F. & F. 546.

Canada.— Reg. *v.* Earl, 10 Manitoba 303; Pitfield *v.* Kimball, 25 N. Brunsw. 193.

See 31 Cent. Dig. tit. "Jury," § 558.

91. Young *v.* State, 90 Md. 579, 45 Atl. 531; Pitt *v.* Bishop, 53 Mo. App. 600; Gillespie *v.* State, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137; Draper *v.* State, 4 Baxt. (Tenn.) 246; Reg. *v.* Earl, 10 Manitoba 303.

92. People *v.* Bodine, 1 Edm. Sel. Cas. (N. Y.) 36.

93. State *v.* Pritchard, 16 Nev. 101; Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562; Dilworth *v.* Com., 12 Gratt. (Va.) 689, 65 Am. Dec. 264.

Where a juror is duly examined and testifies falsely as to his qualifications, and this fact is discovered after the juror is sworn and promptly brought to the attention of the court, the objection should be sustained. Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562.

94. *Alabama.*— Haynes *v.* Crutchfield, 7 Ala. 189. But see Mooring *v.* State, 129 Ala. 66, 29 So. 664.

Georgia.— Wesley *v.* State, 65 Ga. 731.

Louisiana.— State *v.* Hill, 46 La. Ann. 736, 15 So. 145.

Minnesota.— State *v.* Ames, 91 Minn. 365, 98 N. W. 190.

North Carolina.— State *v.* Adair, 66 N. C. 298.

Virginia.— Tooel *v.* Com., 11 Leigh 714.

See 31 Cent. Dig. tit. "Jury," § 557.

But after the evidence in the case has been heard the court cannot allow one party to challenge a juror and substitute another in his place where the other party does not consent but insists upon a mistrial. Simmons *v.* State, 88 Ga. 272, 14 S. E. 613.

95. Lackey *v.* State, 67 Ark. 416, 55 S. W. 213; People *v.* Miles, 143 N. Y. 383, 38 N. E. 456; People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616 [*affirming* 17 N. Y. Suppl. 147].

96. State *v.* Armington, 25 Minn. 29.

97. Morrison *v.* Lovejoy, 6 Minn. 319.

98. State *v.* Allen, 46 Conn. 531.

99. *California.*— People *v.* Owens, 123 Cal. 482, 56 Pac. 251; People *v.* Renfrow, 41 Cal. 37; Paige *v.* O'Neal, 12 Cal. 483.

Iowa.— State *v.* Wilson, 124 Iowa 264, 99 N. W. 1060; Haggard *v.* Petterson, 107 Iowa 417, 78 N. W. 53; State *v.* Young, 104 Iowa 730, 74 N. W. 693.

Maine.— State *v.* Knight, 43 Me. 11.

Missouri.— State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; State *v.* Albright, 144 Mo. 638, 46 S. W. 620; State *v.* Dyer, 139 Mo. 199, 40 S. W. 768; State *v.* Reed, 137 Mo. 125, 38 S. W. 574.

Nebraska.— Fillion *v.* State, 5 Nebr. 351.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242; Estes *v.* Richardson, 6 Nev. 128.

New Jersey.— O'Donnell *v.* Weiller, (Sup. 1905) 59 Atl. 1055; Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.

New York.— Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837; People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Virginia.— Montague *v.* Com., 10 Gratt. 767.

Washington.— State *v.* Biles, 6 Wash. 186, 33 Pac. 347.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

United States.— Southern Pac. Co. *v.* Rauh, 49 Fed. 696, 1 C. C. A. 416; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

favor.[1] It is not sufficient for a party merely to object that a juror is disqualified or incompetent,[2] that all of the jurors are disqualified,[3] to state that he challenges the juror,[4] or that he challenges "for cause" without stating the particular grounds.[5] If the challenge is on the ground of bias it must not only state the kind of bias, whether actual or implied,[6] but also the particular ground of bias or cause from which such bias is to be inferred.[7] Where such challenges are differently tried the challenge must show whether it is for principal cause or to the favor.[8] A challenge for cause need not be in writing,[9] but the grounds stated should be entered upon the record.[10]

b. Traverse or Denial. On a challenge for cause the adverse party, or in criminal cases, if the challenge be by the prisoner, the public prosecutor may traverse the facts alleged as the ground of challenge or he may demur, by which he admits the truth of the allegation.[11]

7. Examination and Evidence — a. Right to Examine — (i) *In General.* The right to a trial by a fair and impartial jury includes the right to have the jurors sworn and examined as to their qualifications, and it is error for the court to deny this right if properly requested before the jury is sworn.[12] If, however, a juror is challenged by one party and the cause of challenge is admitted by the

See 31 Cent. Dig. tit. "Jury," § 559.

If the court states that no challenge for cause will be allowed, when a party proposes to exercise the right, it is not necessary for the party, in order to avail himself of such error, to name the particular juror whom he desires to challenge or assign the specific cause of challenge. State *v.* Fulton, 66 N. C. 632.

On a writ of inquiry to assess damages by a sheriff's jury any objection to a juror must be openly and publicly stated, and if the sheriff discharges a juror upon an objection privately made by one party without the knowledge of the other, the inquisition will be set aside. Butler *v.* Kelsey, 15 Johns. (N. Y.) 177.

1. O'Donnell *v.* Weiler, (N. J. Sup. 1905) 59 Atl. 1055; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; Stout *v.* People, 4 Park. Cr. (N. Y.) 71; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. *Compare* Carnal *v.* People, 1 Park. Cr. (N. Y.) 272.

2. Shields *v.* State, 149 Ind. 395, 49 N. E. 351; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

3. Kansas City *v.* Smart, 128 Mo. 272, 30 S. W. 773.

4. People *v.* Renfrow, 41 Cal. 37.

5. *California.*— People *v.* Owens, 123 Cal. 482, 56 Pac. 251; Paige *v.* O'Neal, 12 Cal. 483.

Iowa.— Davis *v.* Anchor Mut. F. Ins. Co., 96 Iowa 70, 64 N. W. 687; State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211; Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

Missouri.— State *v.* Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

New Jersey.— Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Washington.— State *v.* Biles, 6 Wash. 186, 33 Pac. 347.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

See 31 Cent. Dig. tit. "Jury," § 559.

6. People *v.* Renfrow, 41 Cal. 37.

If defendant does not object that a challenge by the prosecution does not state that it is for actual bias but simply denies the challenge without calling the attention of the court to its form, he cannot raise objection for the first time on appeal. People *v.* Cebulla, 137 Cal. 314, 70 Pac. 181.

7. People *v.* Buckley, 49 Cal. 241; People *v.* Cotta, 49 Cal. 166; People *v.* Hardin, 37 Cal. 258; People *v.* Reynolds, 16 Cal. 128; State *v.* Gordon, 5 Ida. 297, 48 Pac. 1061; State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733; People *v.* Hopt, 3 Utah 396, 4 Pac. 250.

On a challenge for actual bias it must be alleged that the juror is biased against the party challenging. State *v.* Gordon, 5 Ida. 297, 48 Pac. 1061.

A challenge on the ground of relationship must state what the relationship is and to whom. Stevenson *v.* Stiles, 3 N. J. L. 740.

8. Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747; Mann *v.* Glover, 14 N. J. L. 195; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; Shoeffler *v.* State, 3 Wis. 823.

A party cannot by giving a challenge a name make it a principal challenge or challenge to the favor, but it must be stated in such terms that the court can see in the first place whether it is for principal cause or to the favor and so determine by what forum it is to be tried; and secondly, whether the facts if true are sufficient to support such challenge. Mann *v.* Glover, 14 N. J. L. 195.

9. State *v.* Spencer, 21 N. J. L. 196; Mann *v.* Glover, 14 N. J. L. 195; Gulf, etc., R. Co. *v.* Gilvin, (Tex. Civ. App. 1900) 55 S. W. 985.

10. State *v.* Knight, 43 Me. 11.

11. Stout *v.* People, 4 Park. Cr. (N. Y.) 71.

12. Wells *v.* State, 102 Ga. 658, 29 S. E. 442; Paducah, etc., R. Co. *v.* Muzzell, 95 Tenn. 200, 31 S. W. 999.

other, the court may exclude the juror without permitting the challenged party to examine him as to the matter alleged.[13] The right to examine is also a privilege which either party may waive.[14]

(II) *Necessity For Challenge Before Examination.* It is held in some jurisdictions that it is the duty of the court to examine jurors as to their competency and qualifications,[15] that neither party can claim the right to examine a juror without first interposing a challenge,[16] and that while the court may of its own motion and without any challenge not only examine but exclude a juror,[17] or may in its discretion permit a party to examine without first interposing a challenge,[18] it is purely discretionary with the court to permit such examination and its refusal to do so is not error.[19] This rule, however, has been elsewhere expressly disapproved and the action of the court in requiring a challenge to be interposed before examination held to be error,[20] but it is held that in such case no ruling of the court in the conduct of the examination can be assigned as error unless a challenge is taken at some stage of the proceedings in the court below.[21]

(III) *Examination For Purpose of Peremptory Challenge.* While there are a few decisions to the contrary,[22] it is held in most jurisdictions that parties have a right to question jurors on their examination not only for the purpose of showing grounds for a challenge for cause but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge,[23] and that it is error for the court to exclude questions

Where the statute provides that the court shall examine the jurors as to their qualifications on motion of either party, it is error for the court to refuse to do so when requested. Robinson *v.* Howell, 66 S. C. 326, 44 S. E. 931.

In the case of a special or struck jury the parties may demand that the jurors composing the panel shall be sworn on their *voir dire* and examined as to their qualifications before striking the jury. Howell *v.* Howell, 59 Ga. 145.

Defendant is not deprived of an opportunity to examine the jury if he has one attorney in court merely because the court will not wait for his associate counsel to arrive before proceeding to impanel the jury. Fischer *v.* Brooklyn Heights R. Co., 84 N. Y. Suppl. 254.

13. Morrison *v.* Lovejoy, 6 Minn. 319; State *v.* Creasman, 32 N. C. 395.

14. State *v.* Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

15. Kansas City, etc., R. Co. *v.* Whitehead, 109 Ala. 495, 17 So. 705; Powers *v.* Presgroves, 38 Miss. 227.

16. *Alabama.*— Parrish *v.* State, 139 Ala. 16, 36 So. 1012; Kansas City, etc., R. Co. *v.* Whitehead, 109 Ala. 495, 19 So. 705; Hornsby *v.* State, 94 Ala. 55, 10 So. 522; Bales *v.* State, 63 Ala. 30.

Georgia.— Crew *v.* State, 113 Ga. 645, 38 S. E. 941; Schnell *v.* State, 92 Ga. 459, 17 S. E. 966.

Minnesota.— State *v.* Smith, 56 Minn. 78, 57 N. W. 325; State *v.* Lautenschlager, 22 Minn. 514.

Mississippi.—Powers *v.* Presgroves, 38 Miss. 227; State *v.* Flower, Walk. 318.

New Jersey.— Clifford *v.* State, 61 N. J. L. 217, 39 Atl. 721.

See 31 Cent. Dig. tit. "Jury," § 575.

It is irregular for counsel to examine jurors without interposing any challenge and no error can be assigned to the action of the court in allowing jurors thus questioned but not challenged to be sworn to try the case. Crippen *v.* People, 8 Mich. 117.

17. See *supra*, XIII, D, 1, a.

18. Jarvis *v.* State, 138 Ala. 17, 34 So. 1025.

19. State *v.* Smith, 56 Minn. 78, 57 N. W. 325; State *v.* Lautenslager, 22 Minn. 514; Powers *v.* Presgroves, 38 Miss. 227.

20. People *v.* Backus, 5 Cal. 275, where the court held that a party should be first allowed to examine jurors to ascertain if there were any ground for challenge, and that the mere fact of challenging a juror was so calculated to prejudice him against the challenging party that to require such challenge before examination would amount almost to a denial of justice.

21. People *v.* Hamilton, 62 Cal. 377.

22. Lundy *v.* State, 91 Ala. 100, 9 So. 189. See also Clifford *v.* State, 61 N. J. L. 217, 39 Atl. 721.

23. *California.*— Watson *v.* Whitney, 23 Cal. 375. But see People *v.* Hamilton, 62 Cal. 377.

Colorado.— Jones *v.* People, 23 Colo. 276, 47 Pac. 275; Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

Illinois.— Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; Lavin *v.* People, 69 Ill. 303; Chicago, etc., R. Co. *v.* Buttolf, 66 Ill. 347; American Bridge Works *v.* Pereira, 79 Ill. App. 90; Vandalia *v.* Seibert, 47 Ill. App. 477.

Iowa.— State *v.* Foster, 91 Iowa 164, 59 N. W. 8; State *v.* Dooley, 89 Iowa 584, 57 N. W. 414.

Michigan.— Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

which are pertinent for either purpose.[24] The nature and extent of this examination must be left largely to the discretion of the trial court,[25] which will not be interfered with unless clearly abused.[26]

(iv) *Reëxamination.* The court may in its discretion allow a party to reëxamine a juror after he has been once examined and accepted,[27] and if, after evidence is introduced, a juror is excused and another substituted it is error not to allow the other jurors to be reëxamined before they are resworn to try the case with the new juror;[28] but after the trial of a special plea of former conviction defendant has no right to reëxamine jurors before proceeding to trial upon the general plea of not guilty before the same jury.[29]

b. Rights and Privileges of Jurors. In the absence of statute a juror cannot be required to answer any questions the answer to which would tend to his disgrace, infamy, or self-accusation of crime,[30] and it is not error for the court to refuse to allow such questions to be asked.[31] This, however, is a privilege which the juror may waive and if he chooses to answer the questions the adverse party cannot object to his doing so,[32] but if he declines to answer the objecting party must establish his disqualification by other evidence.[33]

Mississippi.— Hale *v.* State, 72 Miss. 140, 16 So. 387.

Missouri.— State *v.* King, 174 Mo. 647, 74 S. W. 627; State *v.* Mann, 83 Mo. 589.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Oregon.— State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947.

Pennsylvania.— Comfort *v.* Mosser, 121 Pa. St. 455, 15 Atl. 612.

Texas.— Houston, etc., R. Co. *v.* Terrell, 69 Tex. 650, 7 S. W. 670; Barnes *v.* State, (Cr. App. 1905) 88 S. W. 805; Patrick *v.* State, 45 Tex. Cr. 587, 78 S. W. 947.

Vermont.— State *v.* Godfrey, Brayt. 170.

See 31 Cent. Dig. tit. "Jury," § 563.

24. Watson *v.* Whitney, 23 Cal. 375; Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797; and cases cited *supra*, note 23.

Questions permissible.— A juror may for this purpose be questioned as to his views upon the subject of capital punishment (State *v.* Foster, 91 Iowa 164, 59 N. W. 8; People *v.* Dooley, 89 Iowa 584, 57 N. W. 414), his prejudices against certain defenses (Towl *v.* Bradley, 108 Mich. 409, 66 N. W. 347), membership in an organization for the prosecution of offenses such as that with which defendant is charged (Lavin *v.* People, 69 Ill. 303), his business relations with the attorneys of the adverse party (Vandalia *v.* Seibert, 47 Ill. App. 477), acquaintance with an attorney alleged to be interested in the case (O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923), interest in a corporation represented by an attorney who is appearing for one of the parties (Iroquois Furnace Co. *v.* McCrea, 91 Ill. App. 337), whether in a will contest, the fact that a testatrix gave nothing to some of her children would influence his verdict (*In re* Goldthorpe, 115 Iowa 430, 88 N. W. 944), or how he would be inclined in case the testimony were evenly balanced (Otsego Lake Tp. *v.* Kirsten, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524; Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797).

25. State *v.* Cross, 72 Conn. 722, 46 Atl. 148; Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; American Bridge Works *v.* Pereira, 79 Ill. App. 90; Foly *v.* Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284, 97 Am. St. Rep. 324.

26. Foly *v.* Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284, 97 Am. St. Rep. 324.

27. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Belt *v.* People, 97 Ill. 461.

28. State *v.* Vaughan, 23 Nev. 103, 43 Pac. 193.

29. People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209].

30. *Florida.*— Savage *v.* State, 18 Fla. 909.

Indiana.— Hudson *v.* State, 1 Blackf. 317.

Missouri.— State *v.* Mann, 83 Mo. 589.

North Carolina.—Baker *v.* Harris, 60 N. C. 271.

South Carolina.— State *v.* Baldwin, 3 Brev. 309, 1 Treadw. 289.

Tennessee.— Fletcher *v.* State, 6 Humphr. 249.

Texas.— Sewell *v.* State, 15 Tex. App. 56.

United States.— Burt *v.* Panjaud, 99 U. S. 180, 25 L. ed. 451.

England.— Anonymous, 1 Salk. 153.

See 31 Cent. Dig. tit. "Jury," § 573.

In New Jersey it is held that the statute relating to witnesses is applicable to a juror on examination as to his qualifications and that he is excused from testifying only where the answers would expose him to a criminal prosecution or penalty or to a forfeiture of his estate. State *v.* Fox, 25 N. J. L. 566.

31. Savage *v.* State, 18 Fla. 909; Hudson *v.* State, 1 Blackf. (Ind.) 317; Rex *v.* Edmonds, 4 B. & Ald. 471, 23 Rev. Rep. 350, 6 E. C. L. 564.

32. People *v.* Donaldson, 2 Edm. Sel. Cas. (N. Y.) 78.

33. Burt *v.* Panjaud, 99 U. S. 180, 25 L. ed. 451. But see U. S. *v.* Reynolds, 1 Utah 319, holding that the refusal of a juror to answer whether he was living in polygamy,

c. Nature and Extent of Examination — (i) *In General.* The extent to which parties should be allowed to go in examining jurors as to their qualifications cannot well be governed by any fixed rules.[34] The examination is conducted under the supervision and direction of the trial court,[35] and the nature and extent of the examination and what questions may or may not be answered must necessarily be left largely to the sound discretion of the court,[36] the exercise of which will not be interfered with unless clearly abused.[37] In practice considerable latitude is and generally ought to be indulged,[38] and all questions ought to be allowed which are pertinent to test the juror's competency.[39] But such examination ought not to be permitted to take an indefinitely wide range concerning merely collateral or incidental matters having some connection with the case,[40] and should be confined in some degree at least to the particular cause of challenge under investigation at the time.[41] While it is not error for the court to allow the same questions to be repeated,[42] it may properly exclude questions which have already been

on the ground that it would tend to incriminate him, was a virtual admission of the fact; and that it was not necessary to introduce other evidence of his disqualification.

34. Epps *v.* State, 102 Ind. 539, 1 N. E. 491; Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Fletcher *v.* State, 6 Humphr. (Tenn.) 249.

It is entirely impracticable to lay down rules as to the character and extent of the examination applicable to every case that may arise. Each case and each particular juror examined must be governed by the peculiarities surrounding that case and that juror. Stagner *v.* State, 9 Tex. App. 440.

35. State *v.* Harris, 51 La. Ann. 1194, 25 So. 984; King *v.* State, (Tex. Cr. App. 1901) 64 S. W. 245; Stagner *v.* State, 9 Tex. App. 440; Connors *v.* U. S., 158 U. S. 408, 15 S. Ct. 951, 39 L. ed. 1033.

36. *Georgia.*— Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142; Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721.

Indiana.— Stoots *v.* State, 108 Ind. 415, 9 N. E. 380; Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Kansas.— Swift *v.* Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

Kentucky.— South Covington, etc., R. Co. *v.* Weber, 82 S. W. 986, 26 Ky. L. Rep. 922.

Louisiana.— State *v.* Harris, 51 La. Ann. 1194, 25 So. 984.

Nebraska.— Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

South Carolina.— State *v.* Hayes, 69 S. C. 295, 48 S. E. 251; State *v.* Coleman, 8 S. C. 237.

United States.— Connors *v.* U. S., 158 U. S. 408, 15 S. Ct. 951, 39 L. ed. 1033.

See 31 Cent. Dig. tit. "Jury," § 564.

What would be a reasonable examination in one case would be manifestly unreasonable in another, and the trial court must therefore be clothed with a large discretion in controlling and limiting the examination. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964.

37. *District of Columbia.*— Howgate *v.* U. S., 7 App. Cas. 217.

Kansas.— Swift *v.* Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

Louisiana.— State *v.* Cancienne, 50 La. Ann. 1324, 24 So. 321.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Nebraska.— Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Texas.— Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588; Cavitt *v.* State, 15 Tex. App. 190.

United States.— Connors *v.* U. S., 158 U. S. 408, 15 S. Ct. 951, 39 L. ed. 1033.

See 31 Cent. Dig. tit. "Jury," § 564.

38. Howgate *v.* U. S., 7 App. Cas. (D. C.) 217; Epps *v.* State, 102 Ind. 539, 1 N. E. 491; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

If there is a fair doubt as to the propriety of a question it is better to allow it. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

39. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; State *v.* McAfee, 64 N. C. 339; Williams *v.* Godfrey, 1 Heisk. (Tenn.) 299.

A juror may be asked as to his membership in certain fraternal orders (Burgess *v.* Singer Mfg. Co., (Tex. Civ. App. 1895) 30 S. W. 1110); or if he believes that a man has a right to take the law into his own hands in a certain case, although he thereby commits a crime (People *v.* Plyler, 126 Cal. 379, 58 Pac. 904).

If the court afterward allows a question previously excluded before the introduction of evidence and the challenging party withdraws his exception, the error is waived. People *v.* Childs, 87 N. Y. App. Div. 474, 84 N. Y. Suppl. 853.

40. Stoots *v.* State, 108 Ind. 415, 9 N. E. 380.

The examination must be within reasonable limits, and although counsel for each party may examine the jurors they must do so by pertinent questions and subject to the court's reasonable control. South Covington, etc., R. Co. *v.* Weber, 82 S. W. 986, 26 Ky. L. Rep. 922.

41. Stagner *v.* State, 9 Tex. App. 440.

42. Jones *v.* Com., 19 S. W. 844, 14 Ky. L. Rep. 223.

satisfactorily answered in substance.[43] The court may and should exclude questions which are irrelevant or would not, however answered, affect the juror's competency in the particular case,[44] which tend to mislead or confuse the juror,[45] which are purely hypothetical,[46] which call for the opinion of the juror upon questions of law,[47] or his understanding of the meaning of legal terms and expressions.[48] Thus it is not competent to examine jurors as to how they would act or decide in certain contingencies,[49] in case the court should give certain instructions,[50] or in case certain evidence or a certain state of evidence should be developed on the trial.[51]

(II) *Bias or Prejudice.* With the exception of such questions as the juror may be privileged from answering on the ground that the answer would tend to

43. State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617; Com. *v.* Surles, 165 Mass. 59, 42 N. E. 502; State *v.* Frelinghuysen, 43 Minn. 265, 45 N. W. 432.

44. *Alabama.*— Parrish *v.* State, 139 Ala. 16, 36 So. 1012; Hawes *v.* State, 88 Ala. 37, 7 So. 302.

Florida.—Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Iowa.— State *v.* Cleary, 97 Iowa 413, 66 N. W. 794.

Louisiana.— State *v.* Casey, 44 La. Ann. 969, 11 So. 583.

Maryland.— Handy *v.* State, 101 Md. 39, 60 Atl. 452.

Massachusetts.— Com. *v.* Abbott, 13 Metc. 120.

Mississippi.— Natchez, etc., R. Co. *v.* Bolls, 62 Miss. 50.

Missouri.— State *v.* Garth, 164 Mo. 553, 65 S. W. 275.

North Carolina.— State *v.* Mills, 91 N. C. 581.

Texas.— Arnold *v.* State, 38 Tex. Cr. 5, 40 S. W. 735; Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588; Cavitt *v.* State, 15 Tex. App. 190.

Vermont.— State *v.* Smith, 72 Vt. 366, 48 Atl. 647.

Washington.— State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

See 31 Cent. Dig. tit. "Jury," § 564.

Improper questions.— It is not competent to ask a juror how many murder cases he has sat on as a juror (People *v.* Brittan, 118 Cal. 409, 50 Pac. 664), or to state his ideas of his duties as a juror (Pennsylvania Co. *v.* Rudel, 100 Ill. 603), or if he would give the same weight to the testimony of witnesses of a particular religious faith as that of persons of a different faith (Horst *v.* Silverman, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97), or if he would give more weight to the testimony of a minister than another person (State *v.* Holedger, 15 Wash. 443, 46 Pac. 652).

The fact that a juror is a debtor of defendant would not render him incompetent and it is not error to refuse to allow him to be questioned as to such indebtedness. Richardson *v.* Planters' Bank, 94 Va. 130, 26 S. E. 413.

45. State *v.* Harris, 51 La. Ann. 1194, 25 So. 984. See also State *v.* Perioux, 107 La. 601, 31 So. 1016.

46. Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406 [*affirming* 38 Ill. App. 33]; Keegan *v.* Kavanaugh, 62 Mo. 230; Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

But if one party has been allowed to ask hypothetical questions based upon his theory of the case, the other party may, on cross-examination, also ask hypothetical questions based upon his theory of the case. People *v.* Copsey, 71 Cal. 548, 12 Pac. 721.

47. Brown *v.* State, 40 Fla. 459, 25 So. 63; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; O'Rourke *v.* Yonkers R. Co., 32 N. Y. App. Div. 8, 52 N. Y. Suppl. 706; Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

48. San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1900) 59 S. W. 607.

A juror cannot be examined as to his conception of a reasonable doubt (Fugate *v.* State, 85 Miss. 86, 37 So. 557) or his understanding of what circumstantial evidence is (Roberson *v.* State, 40 Fla. 509, 24 So. 474).

49. Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236; Keegan *v.* Kavanaugh, 62 Mo. 230; Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

50. Fish *v.* Glass, 54 Ill. App. 655.

51. *Illinois.*— Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406 [*affirming* 38 Il. App. 33, and *overruling* Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Chicago, etc., R. Co. *v.* Buttolf, 66 Ill. 347; Chicago, etc., R. Co. *v.* Adler 56 Ill. 344]; Fish *v.* Glass, 54 Ill. App. 655.

Indiana.— Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236.

Missouri.— Keegan *v.* Kavanaugh, 62 Mo. 230.

New York.— People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092.

Pennsylvania.— Com. *v.* Van Horn, 4 Lack. Leg. N. 63.

See 31 Cent. Dig. tit. "Jury," § 564.

But see Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

Where a juror has served on a trial of a similar offense, but testifies that he has formed no opinion as to defendant's guilt or innocence, he cannot be asked if, in case the evidence should be the same as on the other trial, his mind is not made up as to de-

degrade or incriminate him,[52] a juror may be fully examined and asked any questions which are pertinent to show the existence of bias or prejudice,[53] and may be examined as to any bias with regard to the nature of the case or the subject-matter of the litigation as well as with regard to the parties personally.[54] On the trial of a person of foreign birth a juror may be asked if he has any prejudice against foreigners,[55] and on the trial of a negro if he could give him as fair and impartial a trial as if he were a white man.[56] So also on the trial of a white man for killing a negro it is competent for the prosecution to ask a juror if he could upon the same evidence return the same verdict as upon a prosecution for killing a white man.[57] A juror may also be asked if he is a member of any secret order or association by his oath or obligation to which he would be prevented from giving defendant a fair and impartial trial.[58] A juror may be asked whether in case defendant should testify in his own behalf he would give his testimony less weight by reason of any prejudice against defendant's business,[59] or his nationality,[60] or taking into consideration his interest in the case because he was under indictment for a crime;[61] but a juror cannot be examined as to the comparative credence which he would give to the testimony of persons of different races who might or might not be called as witnesses.[62] It has been held that a juror may be asked as tending to show bias or prejudice which way he would decide in case the evidence should be equally balanced,[63] but in other cases it has been held that such questions

fendant's guilt or innocence. State *v.* Leicht, 17 Iowa 28.

52. See State *v.* McAfee, 64 N. C. 339.

53. People *v.* Reyes, 5 Cal. 347; Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Copenhaven *v.* State, 14 Ga. 22; State *v.* McAfee, 64 N. C. 339; Comfort *v.* Mosser, 121 Pa. St. 455, 15 Atl. 612.

A juror may be asked as to his prejudice against unions in an action for damages where the defense is that the acts complained of were done by reason of the rules of such an association. Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475.

54. People *v.* O'Neil, 10 N. Y. St. 1; Houston, etc., R. Co. *v.* Terrell, 69 Tex. 650, 7 S. W. 670. But see Leach *v.* State, (Tex. Cr. App. 1899) 49 S. W. 581, holding that it was not error for the court to refuse to allow jurors to be questioned as to whether they had any prejudice against the offense with which defendant was charged, as distinguished from other offenses, where they had stated that they had no opinion as to defendant's guilt or innocence and no prejudice against him personally.

In an action against a railroad for personal injuries a juror may be asked if the fact that plaintiff was traveling on a pass would prejudice him or influence his verdict. Jacksonville Southeastern R. Co. *v.* Southworth, 32 Ill. App. 307 [*affirmed* in 135 Ill. 250, 25 N. E. 1093].

Interest in casualty or accident insurance company.— In an action for personal injury, a juror may be asked if he is a stock-holder or interested in a casualty or accident insurance company by which defendant is indemnified in respect to the liability involved. Spoonick *v.* Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079; Meyer *v.* Gundlach-Nelson Mfg. Co., 67 Mo. App. 389; Grant *v.* National R. Spring Co., 100 N. Y. App. Div. 234, 91 N. Y. Suppl. 805; Faber *v.* C. Reiss Coal Co., 124 Wis. 554, 102 N. W. 1049.

After a juror has stated that he is without any bias or prejudice in the case it is not error for the court to refuse to allow him to be further questioned. Davis *v.* Hunter, 7 Ala. 135.

55. People *v.* Reyes, 5 Cal. 347.

56. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; State *v.* McAfee, 64 N. C. 339.

But whether a juror has "the same neighborly regard" for a negro as a white man is an irrelevant inquiry and properly excluded. Cavitt *v.* State, 15 Tex. App. 190.

57. Lester *v.* State, 2 Tex. App. 432.

Conversely, it is proper to ask a juror, on the trial of a negro for murdering a white man, if, under the same facts and circumstances, he would render the same verdict in a case where a negro killed a white man for insulting his (the negro's) wife as where a white man killed a negro for insulting his (the white man's) wife. Fendrick *v.* State, (Tex. Cr. App. 1898) 45 S. W. 589.

58. People *v.* Reyes, 5 Cal. 347.

59. Stoots *v.* State, 108 Ind. 415, 9 N. E. 380.

60. People *v.* Car Soy, 57 Cal. 102.

61. Basye *v.* State, 45 Nebr. 261, 63 N. W. 811. *Contra*, State *v.* Everitt, 14 Wash. 574, 45 Pac. 150.

62. Jenkins *v.* State, 31 Fla. 196, 12 So. 677.

63. People *v.* Keefer, 97 Mich. 15, 56 N. W. 105; Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797. See also People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213, holding that the form in which the question is put should not assume that the juror would be inclined either one way or the other, but that he should merely be asked if he would have such a desire, or

not only call for a determination of a question of law but are also purely hypothetical and inadmissible.[64]

(III) *Formation and Expression of Opinion.* A juror in a civil action may be asked whether he has formed or expressed an opinion as to the merits of the case,[65] and such was the rule even at common law;[66] but in criminal cases the common-law rule was that a juror could not be required to answer whether he had formed or expressed an opinion as to defendant's guilt on the ground that the answer would tend to degrade him.[67] This rule has been followed in a few cases in this country;[68] but on the contrary it has been held that the question in no way affects the honor or integrity of the juror and that it is not only permissible,[69] but that it is error for the court to refuse to allow it.[70] As it is now held in most jurisdictions that the mere formation or expression of an opinion does not, regardless of its source and character, render a juror incompetent,[71] it is competent to examine a juror fully as to the strength and character of his opinion,[72] and if based on rumor or newspaper reports to ask him if he could notwithstanding such opinion render an impartial verdict.[73] The parties may also ascertain whether a juror has been subjected to influences calculated to unfit him for the discharge of his duties,[74] and may ask him if he has read about the case,[75] or conversed with others concerning it.[76] It has been held, however, that where a juror states that

which way he would find under the circumstances.

64. Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406 [*affirming* 38 Ill. App. 33, and *overruling* Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Chicago, etc., R. Co. *v.* Buttolf, 66 Ill. 347; Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344]; Fish *v.* Glass, 54 Ill. App. 655; Keegan *v.* Kavanaugh, 62 Mo. 230; State *v.* Royse, 24 Wash. 440, 64 Pac. 742.

65. Maize *v.* Sewell, 4 Blackf. (Ind.) 447; Williams *v.* Godfrey, 1 Heisk. (Tenn.) 299; Houston, etc., R. Co. *v.* Terrell, 69 Tex. 650, 7 S. W. 670.

66. Thompson & M. Jur. § 245. See also Anonymous, 1 Salk. 153.

67. Rex *v.* Edmonds, 4 B. & Ald. 471, 23 Rev. Rep. 350, 6 E. C. L. 564; Anonymous, 1 Salk. 153; Thompson & M. Jur. § 245.

68. State *v.* Spencer, 21 N. J. L. 196; People *v.* Donaldson, 2 Edm. Sel. Cas. (N. Y.) 78; Respublica *v.* Dennie, 4 Yeates (Pa.) 267, 2 Am. Dec. 402; State *v.* Baldwin, 3 Brev. (S. C.) 309, 1 Treadw. 289; State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; State *v.* Sims, 2 Bailey (S. C.) 29.

69. People *v.* Christie, 2 Abb. Pr. (N. Y.) 256, 2 Park. Cr. 579; People *v.* Vermilyea, 7 Cow. (N. Y.) 108. See also State *v.* Coleman, 20 S. C. 441; U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484; Thompson & M. Jur. § 245.

70. Randle *v.* State, 34 Tex. Cr. 43, 28 S. W. 953.

A question as to any former opinion is properly excluded where a juror has testified that he has no opinion as to defendant's guilt or innocence at the time of his examination. Hawes *v.* State, 88 Ala. 37, 7 So. 302.

On the trial of a special plea of former acquittal the jury should be examined only as to the formation and expression of opinion as to the issues involved in such plea, and questions as to their opinion of defendant's guilt or innocence of the offense charged are properly excluded. Josephine *v.* State, 39 Miss. 612.

71. See *supra*, XII, H, 1.

72. People *v.* Brown, 72 Cal. 390, 14 Pac. 90; People *v.* Woods, 29 Cal. 635; Limerick *v.* State, 14 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 664; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795.

In Texas the statute provides that if a juror states that his opinion will not influence his verdict he shall be further examined as to its source and character, but it is only where he so testifies that such further inquiry is permissible. Shannon *v.* State, 34 Tex. Cr. 5, 28 S. W. 540; Stagner *v.* State, 9 Tex. App. 440.

In civil actions it is held that where a juror states that he has formed and expressed an opinion as to which party ought to prevail he is disqualified and it is not error to exclude further questions as to the source or foundation of his opinion. Martin *v.* Mitchell, 28 Ga. 382.

73. Meyer *v.* State, 19 Ark. 156; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340 [*affirming* 2 Barb. 216]; People *v.* Knickerbocker, 1 Park. Cr. (N. Y.) 302; Conatser *v.* State, 12 Lea (Tenn.) 436.

But if the opinion is based on certain sources of information, such as conversations with witnesses or hearing the evidence on a former trial, the juror should be excluded without further question as to his ability to render the impartial verdict. Rice *v.* State, 1 Yerg. (Tenn.) 432. See also Conatser *v.* State, 12 Lea (Tenn.) 436.

74. State *v.* Brown, 35 La. Ann. 340.

75. Shoeffler *v.* State, 3 Wis. 823.

76. State *v.* Brown, 35 La. Ann. 340; Comfort *v.* Mosser, 121 Pa. St. 455, 15 Atl. 612; Heath *v.* Com., 1 Rob. (Va.) 735; Shoeffler *v.* State, 3 Wis. 823.

If a juror states that he has conversed with others about the case he may be asked

he has formed an opinion as to defendant's guilt, he cannot be further questioned as to whether the opinion is favorable or unfavorable to defendant,[77] nor can he be asked if in case defendant is found guilty he has made up his mind as to the degree of punishment which ought to be imposed.[78]

(iv) *Personal Opinions and Conscientious Scruples.* In a capital case a juror may be questioned as to whether he has any conscientious scruples against capital punishment,[79] and if he states that he has such scruples it is not error for the court to exclude him without permitting any further examination.[80] A juror may also be asked if he would convict upon circumstantial evidence.[81] He cannot be asked, however, whether he thinks the offense charged ought not to be punishable by law,[82] or ought to receive a different punishment from that which the law prescribes;[83] nor can he be questioned as to his opinions concerning matters not affecting his competency in the particular case on trial,[84] or his opinion as to the merits of certain defenses which might or might not be made.[85]

(v) *Statutory Interrogations.* Where certain questions are prescribed by statute to be propounded to jurors on their *voir dire* to test their competency, the court is not obliged to propound any other questions,[86] nor have the parties any right to do so;[87] but where these questions have been satisfactorily answered any other or further examination is entirely within the discretion of the trial court.[88] The court may vary the form of the questions so as to enable the jurors properly to understand them,[89] or may repeat the questions after being asked by counsel,[90] or may explain the meaning of the questions and examine the jurors to see if they have understood them.[91] The court may also in its discretion propound questions other than those prescribed[92] or may permit the parties to do

if such persons professed to have any personal knowledge of the matter. Meyer *v.* State, 19 Ark. 156.

77. State *v.* Shelledy, 8 Iowa 477; White *v.* Territory, 1 Wash. 279, 24 Pac. 447. *Contra*, People *v.* Kunz, 73 Cal. 313, 14 Pac. 836; People *v.* Brown, 72 Cal. 390, 14 Pac. 90.

Upon a challenge for actual bias it would be proper to ask a juror as to whether the opinion was in favor of or against defendant as tending to show the existence of such bias, but not in the absence of such challenge. People *v.* Hamilton, 62 Cal. 377 [*distinguishing* People *v.* Williams, 6 Cal. 206].

78. State *v.* Ward, 14 La. Ann. 673; State *v.* Bennett, 14 La. Ann. 651.

79. Coppenhaver *v.* State, 160 Ind. 540, 67 N. E. 453; State *v.* Mullen, 14 La. Ann. 570; State *v.* Howard, 17 N. H. 171; Ray *v.* State, 108 Tenn. 282, 67 S. W. 553.

80. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Russell *v.* State, 53 Miss. 367; State *v.* McIntosh, 39 S. C. 97, 17 S. E. 446.

If the juror states that he is opposed to capital punishment in cases of extreme youth when questioned on his *voir dire* the court may allow him to be further examined as to the exact nature of his scruples. Bell *v.* State, 91 Ga. 15, 16 S. E. 207.

If a juror merely states that he "would not like for a man to be hung," it is error for the court to exclude the juror without allowing him to be further examined as to his scruples regarding capital punishment. Smith *v.* State, 55 Miss. 410.

81. Mann *v.* State, 134 Ala. 1, 32 So. 704; Johnson *v.* State, 44 Tex. Cr. 332, 71 S. W. 25; Hardy *v.* U. S., 186 U. S. 224, 22 S. Ct. 889, 46 L. ed. 1137. See also People *v.* Fanshawe, 137 N. Y. 68, 32 N. E. 1102 [*affirming* 65 Hun 77, 19 N. Y. Suppl. 865]. But see Lambright *v.* State, 34 Fla. 564, 16 So. 582.

82. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

83. Com. *v.* Buzzell, 16 Pick. (Mass.) 153.

84. State *v.* Casey, 44 La. Ann. 969, 11 So. 583.

85. State *v.* Arnold, 12 Iowa 479.

86. Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885; Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906; Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884; Com. *v.* Gee, 6 Cush. (Mass.) 174.

87. Carr *v.* State, 104 Ala. 4, 16 So. 150; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Carter *v.* State, 56 Ga. 463; Nesbit *v.* State, 43 Ga. 238; Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314; Pines *v.* State, 21 Ga. 227; Com. *v.* Gee, 6 Cush. (Mass) 174.

On an examination before triers on a challenge to the favor the parties cannot ask a juror any questions other than those provided by statute, but this rule does not affect the right of the triers to interrogate the jurors. Bishop *v.* State, 9 Ga. 121.

88. Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353; Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884; Com. *v.* Gee, 6 Cush. (Mass.) 174.

89. King *v.* State, 21 Ga. 220.

90. Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

91. Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Henry *v.* State, 33 Ga. 441.

92. Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884; Pierce *v.* State, 13 N. H. 536;

so;[93] but such a request is properly refused in the absence of any showing as to why the jurors should be further examined.[94] The parties may of course introduce other evidence to show that the juror's answers were untrue or that he is incompetent.[95]

d. Mode and Conduct of Examination — (I) *In General.* In some jurisdictions the statutes provide for certain specific questions to be propounded to jurors by the court to test their qualifications,[96] and in others that the court shall, or shall upon motion of either party, examine the jurors as to their qualifications;[97] but the usual and better practice is to allow counsel to conduct the examination under the direction and supervision of the court.[98] It is held, however, in some cases that it is not error for the court to assume the exclusive conduct of the examination;[99] but in others it is held that while the court may examine the jurors to satisfy itself of their competency, it cannot deprive the parties or their counsel of the right to also examine them.[1] If accused desires to cross-examine a juror after his examination by the prosecution, he may be required to do so before the prosecution accepts or rejects the juror.[2]

(II) *Swearing Jurors on Voir Dire.* Jurors when examined as to their qualifications should be sworn on their *voir dire*,[3] and the parties cannot claim the right to examine jurors before they are sworn.[4] The jurors may be sworn collectively,[5] and the form of oath unless prescribed by statute is not material;[6] nor is it necessary, if a juror has been sworn on his *voir dire* by the court to answer all questions truthfully, that the oath should be readministered when the juror is sent before triers.[7]

Gunter *v.* Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573. See also Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782. *Compare* Williams *v.* State, 3 Ga. 453.

93. See Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884.

94. Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906; Com. *v.* Thrasher, 11 Gray (Mass.) 55.

95. See Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885; Nesbit *v.* State, 43 Ga. 238; Com. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884.

96. See *supra*, XIII, G, 7, c, (v).

97. Robinson *v.* Howell, 66 S. C. 326, 44 S. E. 931; State *v.* Coleman, 20 S. C. 441. See also McGuire *v.* State, 3 Ohio Cir. Ct. 551, 2 Ohio Cir. Dec. 318, holding, however, that it is a sufficient compliance with the statute if the examination is conducted by counsel in the hearing and with the sanction of the court.

98. Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75. See also King *v.* State, (Tex. Cr. App. 1901) 64 S. W. 245.

99. Jones *v.* State, 35 Fla. 289, 17 So. 284; Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Guice *v.* State, 60 Miss. 714.

1. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; Stephens *v.* People, 38 Mich. 739.

But a refusal to allow counsel to also examine is not error if the court asked all the questions suggested by counsel until they announce themselves satisfied (London, etc., F. Ins. Co. *v.* Rufer, 89 Ky. 525, 12 S. W. 948, 11 Ky. L. Rep. 724), or conducted the examination, allowing counsel to suggest questions and then turned the juror over to be questioned with a view to peremptory challenge (Story *v.* State, 68 Miss. 609, 10 So. 47).

2. Grissom *v.* State, 4 Tex. App. 374; Hardin *v.* State, 4 Tex. App. 355.

3. Ellis *v.* State, 25 Fla. 702, 6 So. 768; Finch *v.* U. S., 1 Okla. 396, 33 Pac. 638; Paducah, etc., R. Co. *v.* Muzzell, 95 Tenn. 200, 31 S. W. 999.

In Connecticut it is held that a party cannot as a matter of right demand that the juror shall be sworn but that it is a matter within the discretion of the court. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

The court has authority to administer the oath to jurors on their *voir dire* as a necessary incident to its power to try the case and impanel an impartial jury, and it is perjury for a juror to swear falsely as to his competency. Finch *v.* U. S., 1 Okla. 396, 33 Pac. 638.

A justice of the peace is not obliged in the absence of statute to have jurors sworn to answer questions as to their qualifications and his refusal to do so is not error. Bracken *v.* Preston, 1 Pinn. (Wis.) 365.

4. Clifford *v.* State, 61 N. J. L. 217, 39 Atl. 721; State *v.* Zellers, 7 N. J. L. 220. See also U. S. *v.* Johnson, 26 Fed. Cas. No. 15,484, 1 Cranch C. C. 371.

5. Roberts *v.* State, 65 Ga. 430; Wasson *v.* State, 3 Tex. App. 474.

6. Denham *v.* State, 22 Fla. 664.

The oath need not specify the ground of challenge unless it be requested by counsel at the time. Foster Case, 13 Abb. Pr. N. S. (N. Y.) 372.

7. Griffin *v.* State, 15 Ga. 476.

(III) *Examining Separately or Collectively.* Jurors should be examined as to their qualifications separately and not collectively,[8] and it is error for the court to refuse to allow them to be examined in this manner.[9]

(IV) *Form and Sufficiency of Questions.* The form in which a particular question shall be put to a juror rests in the discretion of the court which will not be interfered with where no prejudice is shown.[10] The court may require the question to be changed to conform to the usual and accepted form,[11] and may refuse to allow questions which, although relating to proper subjects of inquiry, are not in legal form,[12] or which assume to sum up what a juror has already stated and do not do so fairly.[13] The court in examining jurors should be careful to so frame its questions that they could not be construed as intimating an opinion as to the merits of the case,[14] nor should counsel be allowed to make any improper statements calculated to prejudice the jury;[15] and if counsel in examining a juror makes any misstatement of the law the court may interrupt the examination and instruct the juror to the contrary.[16] The court may, however, ask a juror leading questions,[17] or permit counsel to do so.[18]

e. Evidence in Support of Challenges — (I) *Presumptions and Burden of Proof.* A person selected and returned as a juror is presumed to be qualified and competent to serve,[19] and the burden is upon the challenging party to show the contrary,[20] who must at least make out a *prima facie* case, or in criminal prosecutions such a case as leaves the juror's competency in reasonable doubt.[21] But a juror who admits having formed an opinion as to defendant's guilt is *prima facie* incompetent, and the burden is upon the state to show that the opinion is of such a character as not to render him incompetent.[22] So also in a criminal case where a juror is challenged as being a relative of the wife of the injured party, proof of the marriage raises the presumption of a continuance of the relationship, and the burden is upon the state to show that it was terminated by the death of the wife without issue.[23]

(II) *Character and Admissibility of Evidence.* On the trial of a challenge the juror may himself be sworn as a witness to prove the cause of challenge,[24]

8. Wilkerson *v.* State, 74 Ga. 398; Williams *v.* State, 60 Ga. 367, 27 Am. Rep. 412; Wasson *v.* State, 3 Tex. App. 474; Driskell *v.* Parish, 7 Fed. Cas. No. 4,087.

Where a party waives the right to have the jurors separately examined, he does not waive the right to challenge any juror and introduce other evidence of his incompetency. Jackson *v.* State, 103 Ga. 417, 30 S. E. 251.

9. Wilkerson *v.* State, 74 Ga. 398; Williams *v.* State, 60 Ga. 367, 27 Am. Rep. 412. But see State *v.* Munch, 57 Mo. App. 207, holding that it was not error to refuse to allow each juror to be separately examined as to whether he had formed or expressed an opinion on the merits of the case where the court had already put this inquiry to the panel as a whole.

10. State *v.* Wilson, 8 Iowa 407; People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213. See also O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

11. State *v.* Matthews, 80 N. C. 417.

12. State *v.* Bennett, 14 La. Ann. 651.

13. People *v.* Radley, 127 Mich. 627, 86 N. W. 1029.

14. Hubbard *v.* State, 37 Fla. 156, 20 So. 235.

15. Eckhart, etc., Milling Co. *v.* Schaefer, 101 Ill. App. 500.

16. State *v.* Royse, 24 Wash. 440, 64 Pac. 742.

17. People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

18. People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

19. Jordan *v.* State, 22 Ga. 545; Holt *v.* People, 13 Mich. 224; Richards *v.* Moore, 60 Vt. 449, 15 Atl. 119; Hammond *v.* Noble, 57 Vt. 193; Keenan *v.* State, 8 Wis. 132.

20. State *v.* Hartman, 10 Iowa 589; State *v.* Weaver, 58 S. C. 106, 36 S. E. 499; Rex *v.* Savage, 1 Moody C. C. 51. See also Richards *v.* Moore, 60 Vt. 449, 15 Atl. 119.

21. Holt *v.* People, 13 Mich. 224.

22. Meyer *v.* State, 19 Ark. 156. See also Stewart *v.* State, 13 Ark. 720; State *v.* Brown, 15 Kan. 400.

23. Jaques *v.* Com., 10 Gratt. (Va.) 690.

24. Pike County *v.* Griffin, etc., Plank Road Co., 15 Ga. 39; Copenhaven *v.* State, 14 Ga. 22; State *v.* Fox, 25 N. J. L. 566; Pringle *v.* Huse, 1 Cow. (N. Y.) 432; Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115; Ogden *v.* Parks, 16 Johns. (N. Y.) 180; People *v.* Fuller, 2 Park. Cr. (N. Y.) 16. *Compare* Joice *v.* Alexander, 13 Fed. Cas. No. 7,435, 1 Cranch C. C. 528.

In Alabama the code provides that certain specified causes of challenge may be proved

and may be asked any questions not tending to degrade or incriminate him.[25] But the cause of challenge may be established by any other competent testimony,[26] and the parties have a right to contradict the testimony of the juror by that of other witnesses.[27] On a challenge to the favor any fact or circumstance from which bias or prejudice may justly be inferred is admissible as evidence.[28]

(III) *Weight and Sufficiency.* To establish the incompetency of a juror it is not sufficient merely to show facts from which a bare inference of his incompetency might be drawn,[29] and where the juror has himself been examined under oath and an attempt is afterward made to show that he has sworn falsely as to his competency, the evidence must clearly predominate in establishing this fact.[30] If the examination or evidence leaves any doubt in the mind of the court as to the juror's competency he is properly excluded;[31] but the competency of a juror is to be determined not from any particular answer but from his whole examination and all the evidence affecting it,[32] and if there is evidence, although conflicting, sufficient to support the finding of the trial court, an appellate court will not disturb it.[33]

8. Trial and Determination — a. Right to Trial. It is only where the facts alleged as the ground of challenge are denied that a trial is necessary,[34] and if one party challenges and the other admits the cause of challenge the former cannot complain of the allowance of his own exception or the latter of the reception of

either by the oath of the juror or by other evidence but that others may be proved only by other testimony. Bridges *v.* State, 110 Ala. 15, 20 S. W. 348.

25. Copenhaven *v.* State, 14 Ga. 22; Mechanics', etc., Bank *v.* Smith, 19 Johns. (N. Y.) 115; People *v.* Fuller, 2 Park. Cr. (N. Y.) 16. See also People *v.* Reyes, 5 Cal. 347.

26. People *v.* Evans, 72 Mich. 367, 40 N. W. 473; Bickham *v.* Pissant, 1 N. J. L. 220. See also Com. *v.* Wade, 17 Pick. (Mass.) 395.

But a party has no absolute right to have the proceedings suspended and delay the trial in order to bring in witnesses to testify as to a juror's competency. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

In Arkansas on a challenge for principal cause the challenging party may elect whether the juror shall be tried by the court or by triers, and if by the court the trial must be on the testimony of the juror alone, but if by triers then by other evidence to the exclusion of the oath of the juror challenged. Stewart *v.* State, 13 Ark. 720.

27. People *v.* Evans, 72 Mich. 367, 40 N. W. 473.

28. People *v.* Bodine, 1 Den. (N. Y.) 281. See also State *v.* McAfee, 64 N. C. 339.

An impression or hypothetical opinion adverse to the prisoner, although not conclusive, is admissible evidence in support of a challenge to the favor (Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216), but not where the challenge is for principal cause (People *v.* Honeyman, 3 Den. (N. Y.) 121).

29. Holt *v.* People, 13 Mich. 224. See also Jordan *v.* State, 22 Ga. 545; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51.

Evidence insufficient.— Proof that a juror is an acquaintance of one of the parties is not sufficient to show that he would not act impartially (Moore *v.* Cass, 10 Kan. 288); nor is proof of an illness accompanied by mental disorder several months prior to the trial sufficient to show that he is mentally incompetent (Com. *v.* Morrow, 9 Phila. (Pa.) 583); nor is proof that on a search of the records of the county no record of the naturalization of the juror's father, who was an alien, was found, sufficient to show that the juror is an alien (Keenan *v.* State, 8 Wis. 132); but where a juror states that he was born in another country and has not been naturalized and is uncertain as to his father's citizenship, it will be presumed that he is a citizen of that country and the mere statement of a stranger that he is a citizen of the United States is not sufficient to overcome the presumption (State *v.* Salge, 1 Nev. 455).

30. West *v.* State, 79 Ga. 773, 4 S. E. 325; Davison *v.* People, 90 Ill. 221; King *v.* State, 91 Tenn. 617, 20 S. W. 169; Schuster *v.* State, 80 Wis. 107, 49 N. W. 30.

31. People *v.* Evans, 72 Mich. 367, 40 N. W. 473; Omaha, etc., R. Co. *v.* Cook, 37 Nebr. 435, 55 N. W. 943; State *v.* Buralli, 27 Nev. 41, 71 Pac. 532; Dreyer *v.* State, 11 Tex. App. 631.

32. Pemberton *v.* State, 11 Ind. App. 297, 38 N. E. 1096; State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795.

If a juror at first expresses a doubt as to his impartiality but afterward answers positively that he is entirely impartial, it is not error for the court to hold him to be competent. Cato *v.* State, 72 Ga. 747.

33. People *v.* Evans, 124 Cal. 206, 56 Pac. 1024; State *v.* Cook, 84 Mo. 40; Schuster *v.* State, 80 Wis. 107, 49 N. W. 30. See also People *v.* Chutnacut, 141 Cal. 682, 75 Pac. 340.

34. Morrison *v.* Lovejoy, 6 Minn. 319; Com. *v.* Gross, 1 Ashm. (Pa.) 281.

his admission;[35] but if the cause of challenge is denied a party has the right to have the issue tried and witnesses on either side may be summoned and examined as on the trial of other issues.[36]

b. Mode of Trial — (i) *In General.* According to the practice at common law all challenges for principal cause are tried by the court and challenges to the favor by triers appointed by the court,[37] and while this practice seems still to be in force in a few jurisdictions[38] it is now the usual practice in most jurisdictions for the court to try and determine all challenges for cause of whatever nature.[39]

(ii) *By Triers* — (a) *Right to Triers and Proceedings to Procure.* It is error for the court to refuse to appoint triers in any case where they may be demanded and such demand is properly made;[40] but the right to triers may be waived,[41] and the court is competent to try a challenge to the favor,[42] and is not obliged to appoint triers of its own motion.[43] It is competent for the court to try and determine a challenge to the favor if the parties fail to make any demand for triers or any objection to a trial of the challenge by the court,[44] and in such case the findings of the court have the same effect as if made by triers.[45] So also if a party has consented to substitute the court for triers he cannot afterward revoke his consent.[46]

(b) *Constitution and Organization of Tribunal.* The first two jurors sworn are ordinarily the proper triers of a challenge to the favor,[47] but if several have been sworn before any challenge is made the court may assign any two of the

35. State *v.* Creasman, 32 N. C. 395. See also State *v.* Lautenschlager, 22 Minn. 514.

36. See State *v.* Morgan, 23 Utah 212, 64 Pac. 356.

37. Robinson *v.* State, 1 Ga. 563; Mann *v.* Glover, 14 N. J. L. 195; Shoeffler *v.* State, 3 Wis. 823.

38. Proffatt Jury Tr. § 191; Thompson & M. Jur. § 233.

39. *Colorado.*— Solander *v.* People, 2 Colo. 48.

Georgia.— Galloway *v.* State, 25 Ga. 596; Jordan *v.* State, 22 Ga. 545.

Illinois.— O'Fallon Coal, etc., Co. *v.* Laquet, 198 Ill. 125, 64 N. E. 767 [*affirming* 89 Ill. App. 13]; Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; East St. Louis Electric R. Co. *v.* Snow, 88 Ill. App. 660.

Louisiana.— State *v.* Porter, 45 La. Ann. 661, 12 So. 832 [*distinguishing* State *v.* Bunger, 11 La. Ann. 607].

Maine.— State *v.* Knight, 43 Me. 11.

Michigan.— Holt *v.* People, 13 Mich. 224.

New Hampshire.— Rowell *v.* Boston, etc., R. Co., 58 N. H. 514; State *v.* Howard, 17 N. H. 171.

New Jersey.— Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

New York.— Balbo *v.* People, 80 N. Y. 484 [*affirming* 19 Hun 424]; Greenfield *v.* People, 74 N. Y. 277 [*reversing* 13 Hun 242].

South Carolina.— State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Virginia.— Montague *v.* Com., 10 Gratt. 767.

West Virginia.— Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

See 31 Cent. Dig. tit. "Jury," § 594.

In Minnesota under the statutory classification of challenges for implied bias and actual bias, the former are tried by the court and the latter by triers (State *v.* Hanley, 34 Minn. 430, 26 N. W. 397), but in cases not capital the parties may submit the challenge to the determination of the court (State *v.* Smith, 78 Minn. 362, 81 N. W. 17).

40. Stewart *v.* State, 13 Ark. 720. See also People *v.* Rathbun, 21 Wend. (N. Y.) 509.

41. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

42. People *v.* Doe, 1 Mich. 451; O'Brien *v.* People, 36 N. Y. 276; Shoeffler *v.* State, 3 Wis. 823.

43. People *v.* Doe, 1 Mich. 451.

44. *Arkansas.*— Milan *v.* State, 24 Ark. 346.

Florida.— O'Connor *v.* State, 9 Fla. 215.

Georgia.— Robinson *v.* State, 1 Ga. 563.

New York.— O'Brien *v.* People, 36 N. Y. 276; People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

North Carolina.— State *v.* Mercer, 67 N. C. 266.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

See 31 Cent. Dig. tit. "Jury," § 587.

If the court asks a party how he desires to have a challenge to the favor tried and he states that he has no suggestion to make, and does not demand triers, he cannot afterward object that the challenge was determined by the court. People *v.* Doe, 1 Mich. 451.

45. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Shoeffler *v.* State, 3 Wis. 823.

46. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

47. Joice *v.* Alexander, 13 Fed. Cas. No. 7,435, 1 Cranch C. C. 528; Queen *v.* Hepburn, 20 Fed. Cas. No. 11,503, 2 Cranch C. C. 3 [*affirmed* in 7 Cranch (U. S.) 290, 3 L. ed. 348]. But see Reason *v.* Bridges, 20 Fed. Cas. No. 11,617, 1 Cranch C. C. 477, where

jurors sworn to try the challenge.[48] The triers, in case the first juror called is challenged, are two indifferent persons named by the court, and if they try one man and find him indifferent he is sworn and he and the two triers try the next, and when another is found indifferent and sworn the two triers are superseded and the two jurors first sworn try the remaining challenges.[49] It is said that this order and this only can be pursued,[50] and that except by consent more than two jurors or two triers can in no case be sworn,[51] and that it is reversible error for the court to appoint a different number to try the challenge.[52] The triers must be sworn to find whether the juror is indifferent as to the issue and impartial between the parties,[53] but need not be resworn upon the submission of each challenge in a case.[54]

(c) *Proceedings Before Triers.* The trial of a challenge before triers is best conducted after the manner of a collateral issue before a jury,[55] and it is the better practice, although not absolutely necessary, that the examination should be conducted in the presence of the court.[56] The trial proceeds by the examination of witnesses,[57] and the juror challenged may himself be sworn on his *voir dire* as a witness before the triers.[58] The court instructs the triers as to the law,[59] and the instructions should be given publicly in open court in the presence of the parties,[60] but the court will not permit any argument of counsel before the triers.[61] It is the province of the court to pass upon the admissibility of evidence before the triers,[62] but its strength and effect in establishing the allegation of favor or bias is for the triers alone to determine.[63] The triers must find both as to whether the cause of challenge alleged is true in fact and also the effect it has produced upon the mind of the juror,[64] and unless they find that he is entirely impartial they

after eight jurors had been sworn the challenge was submitted to all the jurors sworn.

In California the statute provides that the triers shall be three impartial persons not on the jury panel, but if no objection is made to the trier at the time he is appointed the fact that he is a member of the panel is not ground for a new trial. People *v.* Voll, 43 Cal. 166.

48. McGuffie *v.* State, 17 Ga. 497; 2 Hale P. C. c. 36, p. 275.

49. Copenhaven *v.* State, 14 Ga. 22; Boon *v.* State, 1 Ga. 618; McCormick *v.* Brookfield, 4 N. J. L. 69; People *v.* Dewick, 2 Park. Cr. (N. Y.) 230; 3 Blackstone Comm. 363; 2 Hale P. C. c. 36, p. 274.

50. Boon *v.* State, 1 Ga. 618; McCormick *v.* Brookfield, 4 N. J. L. 69.

51. Copenhaven *v.* State, 14 Ga. 22; Boon *v.* State, 1 Ga. 618.

52. McCormick *v.* Brookfield, 4 N. J. L. 69.

53. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

Form of oath.— The proper form of oath in a civil case is "You shall well and truly try whether A (the juryman challenged) stands indifferent between the parties to this issue" (Anonymous, 1 Salk. 153); and in a criminal case "You shall well and truly try whether A. B. (the juror challenged) stands indifferent between the parties to this issue, so help you God" (Copenhaven *v.* State, 14 Ga. 22); but the oath is insufficient if the triers are sworn merely to try whether the juror is indifferent between the people and defendant "upon the issue joined," since they must not only find that the juror is indifferent as to the issue to be tried but also indifferent, impartial, and without prejudice as to the parties (Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216).

54. State *v.* Brown, 12 Minn. 538.

55. Baker *v.* State, 15 Ga. 498.

56. Epps *v.* State, 19 Ga. 102.

57. Copenhaven *v.* State, 14 Ga. 22.

58. See *supra*, XIII, G, 7, e, (II).

59. See Baker *v.* State, 15 Ga. 498.

60. Whaley *v.* State, 11 Ga. 123.

61. Joice *v.* Alexander, 13 Fed. Cas. No. 7,435, 1 Cranch C. C. 528.

62. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

63. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; People *v.* Honeyman, 3 Den. (N. Y.) 121; People *v.* Bodine, 1 Den. (N. Y.) 281; People *v.* McMahon, 2 Park. Cr. (N. Y.) 663.

It is therefore error for the court to instruct the triers as a matter of law that a juror cannot be found unindifferent upon evidence that he has formed a hypothetical opinion of defendant's guilt. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

Although the facts proved on the trial of the challenge would sustain a challenge for principal cause, yet if the challenge was to the favor and submitted to triers, they must determine the question of the juror's competency and the court cannot be called upon to rule as a matter of law that the juror is incompetent. People *v.* Allen, 43 N. Y. 28 [*reversing* 57 Barb. 338].

64. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

should reject him.[65] A party may object to the admission of evidence before the triers or to the instructions of the court and make them a part of the record by a bill of exceptions.[66]

(D) *Disagreement of Triers.* Where the triers disagree as to the juror's competency on a challenge to the favor, it has been held that the challenge is not sustained and that the juror must be sworn;[67] but on the contrary it has been held that the challenge still remains and that it is not proper either to accept or reject the juror, but that the court should select two other jurors to retry the challenge.[68]

(III) *Trial by Court.* Where the court acts as the trier of all challenges, if the challenge is for principal cause it is, as formerly, only to find the truth of the facts alleged, but if to the favor must also determine whether the juror is indifferent;[69] but where a challenge to the favor is interposed after a challenge for principal cause is overruled, the evidence on each challenge need not be separately taken but the court on the trial of the latter challenge will consider all the evidence taken on both challenges,[70] and the court should make its findings cover both grounds.[71] It has been held, however, that the court need not make an express finding as to the juror's impartiality, as the fact of admitting or rejecting him necessarily implies such a finding.[72]

c. Retrial or Correction. A party has no right to demand a retrial of a challenge to a juror after the jury has been completed and sworn,[73] or even after the particular juror has been examined and adjudged competent;[74] but the court may, as previously stated, permit a challenge after a juror is sworn,[75] or on discovering that a juror was erroneously excluded may correct its error and restore him to the panel.[76]

d. Conclusiveness and Effect of Findings. The decision of the court upon a challenge for cause presents a question of law and is reviewable as such on appeal if the challenge is for principal cause,[77] or based upon a statutory ground of disqualification;[78] but a challenge for favor presents a question of fact upon which the finding of the triers is conclusive;[79] and where the court by consent or failure to demand triers acts in their place in determining a challenge to the favor, its findings are equally conclusive and not subject to review.[80] Where the court acts generally as the trier of all challenges, it has been held that the mode of trial does not entirely do away with the distinction between the two classes of challenges,[81] and that the decision of the court is not reviewable if the challenge is to the favor[82] or under the statutory classification of challenges if for actual bias;[83]

65. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

66. Stewart *v.* State, 13 Ark. 720; People *v.* Bodine, 1 Den. (N. Y.) 281.

67. Com. *v.* Fitzpatrick, 3 Pa. L. J. Rep. 520, 6 Pa. L. J. 201. See also U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

68. People *v.* Dewick, 2 Park. Cr. (N. Y.) 230; Thompson & M. Jur. § 239.

69. State *v.* Howard, 17 N. H. 171.

70. Greenfield *v.* People, 74 N. Y. 277, 6 Abb. N. Cas. 1.

71. Stephens *v.* People, 38 Mich. 739.

72. Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

73. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

74. State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

75. See *supra*, XIII, G, 4.

76. Epps *v.* State, 19 Ga. 102.

77. Baker *v.* Harris, 60 N. C. 271.

78. See Coppersmith *v.* Mound City R. Co., 51 Mo. App. 357.

79. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216. See also Milan *v.* State, 24 Ark. 346.

80. *Arkansas.*— Milan *v.* State, 24 Ark. 346.

Minnesota.— Morrison *v.* Lovejoy, 6 Minn. 319.

New York.— Sanchez *v.* People, 22 N. Y. 147 [*reversing* on other grounds 18 How. Pr. 72, 4 Park. Cr. 535]; People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

North Carolina.— State *v.* Mercer, 67 N. C. 266.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

United States.— U. S. *v.* McHenry, 26 Fed. Cas. No. 15,681, 6 Blatchf. 503.

See 31 Cent. Dig. tit. "Jury," § 596.

81. Solander *v.* People, 2 Colo. 48; State *v.* Howard, 17 N. H. 171.

82. Solander *v.* People, 2 Colo. 48.

83. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Hopt *v.* Utah, 120 U. S. 430, 7

others without particular regard to the classification of challenges hold that the findings of the court upon questions of fact involved in the challenge are conclusive,[84] but that its decision as to the sufficiency of the cause alleged as a ground of challenge is reviewable.[85] Other decisions hold generally that the decision of the court is reviewable whether the challenge is for principal cause or to the favor;[86] but the decision of the trial court is entitled to great weight and will not be interfered with unless clearly erroneous,[87] especially where the juror was rejected.[88]

H. Peremptory Challenges — 1. Nature and Right — a. In General. Peremptory challenges are those made without assigning any reason, and which the court must allow,[89] and a party in exercising such right cannot be compelled to assign any reason for his action.[90] The right is not intended to enable a party to select particular jurors but merely to exclude from the panel objectionable persons whom he is unable to successfully challenge for cause,[91] or, as ordinarily expressed, the right is not to select but to reject;[92] but the right of peremptory challenge within the number allowed by law is absolute and cannot be abridged or impaired

S. Ct. 614, 30 L. ed. 708 [*affirming* 4 Utah 247, 9 Pac. 407]. See also People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944.

84. *California.*— People *v.* Evans, 124 Cal. 206, 56 Pac. 1024.

Georgia.— Galloway *v.* State, 25 Ga. 596.

New Jersey.— Johnson *v.* State, 59 N. J. L. 271, 35 Atl. 787; Moschell *v.* State, 53 N. J. L. 498, 22 Atl. 50; Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

North Carolina.— State *v.* Register, 133 N. C. 746, 46 S. E. 21.

South Carolina.— State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

See 31 Cent. Dig. tit. "Jury," § 596.

85. Holt *v.* People, 13 Mich. 224; Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449. See also Galloway *v.* State, 25 Ga. 596.

86. O'Fallon Coal, etc., Co. *v.* Laquet, 198 Ill. 125, 64 N. E. 767 [*affirming* 89 Ill. App. 13]; Winneshiek Ins. Co. *v.* Schueller, 60 Ill. 465; Montague *v.* Com., 10 Gratt. (Va.) 767.

In New York the act of 1873 making the court the trier of all challenges expressly provides that either party may except to the determination and have it reviewed as other questions arising upon the trial (Balbo *v.* People, 80 N. Y. 484 [*affirming* 19 Hun 424]); and this provision applies whether the challenge is for principal cause or to the favor (Greenfield *v.* People, 74 N. Y. 277 [*reversing* 13 Hun 242]).

Evidence considered on appeal.— Where challenges for principal cause and to the favor are differently tried, it has been held that the court on appeal cannot consider the evidence on the challenge for favor which was subsequently taken in determining whether the court properly decided a prior challenge for principal cause (Cancemi *v.* People, 16 N. Y. 501); but where all challenges are tried by the court and a challenge for favor is made after a challenge for principal cause, the court will consider all the evidence taken on both challenges (Greenfield *v.* People, 74 N. Y. 277, 6 Abb. N. Cas. 1).

87. *California.*— Graybill *v.* De Young, 146 Cal. 421, 80 Pac. 618; Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

Colorado.— Denver, etc., R. Co. *v.* Discoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

Dakota.— Territory *v.* Pratt, 6 Dak. 483, 43 N. W. 711.

Georgia.— Jordan *v.* State, 22 Ga. 545.

Indiana.— Smith *v.* State, 24 Ind. App. 688, 57 N. E. 572.

Iowa.— Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

Missouri.— Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626; Mahaney *v.* St. Louis, etc., R. Co., 108 Mo. 191, 18 S. W. 895.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789.

New Hampshire.— State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New Mexico.— Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968.

Ohio.— Dew *v.* McDivitt, 31 Ohio St. 139.

Oklahoma.— Bradford *v.* Territory, 2 Okla. 228, 37 Pac. 1061.

South Carolina.— Haugen *v.* Chicago, etc., R. Co., 3 S. D. 394, 53 N. W. 769.

Texas.— Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

United States.— Press Pub. Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516.

See 31 Cent. Dig. tit. "Jury," § 596.

88. Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789.

89. State *v.* Armington, 25 Minn. 29; Bouvier L. Dict. See also Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; 4 Blackstone Comm. 353.

90. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; American Bridge Works *v.* Pereira, 79 Ill. App. 90.

91. People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; Stevens *v.* Union R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 463; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700.

92. *Alabama.*— Hawkins *v.* State, 9 Ala. 137, 44 Am. Dec. 431.

Louisiana.— State *v.* Cazeau, 8 La. Ann. 109.

Maine.—State *v.* Cady, 80 Me. 413, 14 Atl. 940.

by any arbitrary rule of court as to the mode of impaneling a jury.[93] The right is a personal privilege which can only be exercised by the party himself or by his authority,[94] and includes the right to have the jurors present and confront them at the time the challenges are made,[95] and to have them sworn on their *voir dire* and subject them to such examination as will enable the party to exercise the right intelligently.[96]

b. In Civil Cases. At common law no peremptory challenges were allowed in civil cases,[97] and in England cannot now be claimed as a matter of right.[98] The right is therefore purely statutory and does not exist except where expressly so conferred,[99] but such provision has now been very generally made.[1] Statutes authorizing peremptory challenges in civil cases have been held to apply to proceedings before a justice to recover possession of land,[2] proceedings under the statutes of forcible entry and detainer,[3] actions to recover penalties for violation of a city ordinance,[4] and writs of inquiry to assess damages in replevin,[5] but not to the selection of a jury of view,[6] or sheriff's juries.[7]

c. In Criminal Cases — (I) *Right of Defendant.* At common law peremptory challenges were allowed defendant in trials for felonies,[8] but not on trials for the lesser offenses,[9] and this rule prevails in the absence of statute.[10] The right has now been very generally conferred by statute.[11] Where the right is given in

New Hampshire.— State *v.* Doolittle, 58 N. H. 92.

North Carolina.— State *v.* Jacobs, 106 N. C. 695, 10 S. E. 1031; State *v.* Smith, 24 N. C. 402.

Pennsylvania.— Com. *v.* Brown, 23 Pa. Super. Ct. 470.

Texas.— Heskew *v.* State, 17 Tex. App. 161; Loggins *v.* State, 12 Tex. App. 65.

United States.— U. S. *v.* Marchant, 12 Wheat. 480, 6 L. ed. 700.

See 31 Cent. Dig. tit. "Jury," § 599.

93. Smith *v.* State, 4 Greene (Iowa) 189; State *v.* Briggs, 27 S. C. 80, 2 S. E. 854; Schumaker *v.* State, 5 Wis. 324; Lewis *v.* U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

94. Steele *v.* Com., 3 Dana (Ky.) 84.

95. Lewis *v.* U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011.

96. Donovan *v.* People, 139 Ill. 412, 28 N. E. 964; American Bridge Works *v.* Pereira, 79 Ill. App. 90; Vandalia *v.* Seibert, 47 Ill. App. 477; Com. *v.* Brown, 23 Pa. Super. Ct. 470.

97. Gordon *v.* Chicago, 201 Ill. 623, 66 N. E. 823; Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391; Bruce *v.* Beall, 100 Tenn. 573, 47 S. W. 204.

98. Marsh *v.* Coppack, 9 C. & P. 480, 38 E. C. L. 284; Proffatt Jury Tr. § 155; Thompson & M. Jur. § 165.

99. Gordon *v.* Chicago, 201 Ill. 623, 66 N. E. 823.

In condemnation proceedings it has been held that there is no right of peremptory challenge where no provision therefor is made by the statutes under which the proceedings are had. Brown *v.* Rome, etc., R. Co., 86 Ala. 206, 5 So. 195. But see Pettis *v.* Promfret, 28 Conn. 566, holding that on an appeal and reassessment of damages by a jury peremptory challenges may be made under a statute authorizing such challenges "on the trial of any civil action."

1. Proffatt Jury Tr. § 163; Thompson & M. Jur. § 165 (2).

Number allowed in civil cases see *infra*, XIII, H, 2, a.

2. Miner *v.* Brown, 20 Conn. 519; Lasher *v.* Currie, 68 N. Y. Suppl. 845 [*distinguishing* People *v.* Hamilton, 39 N. Y. 107, and *affirmed* in 62 N. Y. App. Div. 631, 71 N. Y. Suppl. 1140].

3. Johnson *v.* Christian, 2 Port. (Ala.) 201; Quinebaug Bank *v.* Tarbox, 20 Conn. 510.

4. Charleston *v.* Kleinback, 2 Speers (S. C.) 418.

5. Hill *v.* Bloomer, 1 Pinn. (Wis.) 463.

6. Schuylkill Nav. Co. *v.* Farr, 4 Watts & S. (Pa.) 362; Schwenk *v.* Umsted, 6 Serg. & R. (Pa.) 351.

7. Barrett *v.* Bangor, 70 Me. 335.

8. State *v.* Allen, 8 Rich. (S. C.) 448; 4 Blackstone Comm. 353.

Felonies not capital.—It is stated by Blackstone that peremptory challenges were allowed *in favorem vitæ* (4 Blackstone Comm. 353), which has been construed as meaning that at common law such challenges were allowable only in capital cases (see Com. *v.* Hand, 3 Phila. (Pa.) 403); but it seems that they were allowed in other than capital felonies (Thompson & M. Jur. § 156. See also Gray *v.* Reg., 11 Cl. & F. 427, 8 Jur. 879, 8 Eng. Reprint 1164).

9. U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71; U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

10. State *v.* Allen, 8 Rich. (S. C.) 448.

11. See the statutes of the several states; and the following cases:

Alabama.— Gregg *v.* State, 106 Ala. 44, 17 So. 321.

California.— People *v.* Clough, 59 Cal. 438.

Colorado.— Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.

Connecticut.— State *v.* Neuner, 49 Conn. 232.

the case of trials for offenses punishable in a certain manner the right exists if the offenses charged may be so punished, although the case is one where the court may impose a lighter punishment.[12] Peremptory challenges are restricted to the main issue and cannot be made on the trial of any collateral issue.[13]

(II) *RIGHT OF PROSECUTION.* By the early common law the crown might challenge peremptorily any number of jurors,[14] but by an early statute[15] this right was entirely abolished,[16] and under this statute grew up the practice of allowing the prosecution to stand jurors aside.[17] This statute is recognized as part of the common law of this country,[18] so that in the absence of statutory provision to the contrary the state has no right of peremptory challenge in criminal cases.[19] The right has now in most jurisdictions been expressly conferred by statute,[20] and such

Florida.— Savage *v.* State, 18 Fla. 909.
Georgia.— Cruce *v.* State, 59 Ga. 83.
Indiana.— Wiley *v.* State, 4 Blackf. 458.
Kansas.— State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.
Kentucky.— Hayden *v.* Com., 10 B. Mon. 125.
Maine.— State *v.* Cady, 80 Me. 413, 14 Atl. 940.
Michigan.— People *v.* Welmer, 110 Mich. 248, 68 N. W. 141.
Mississippi.— Smith *v.* State, 57 Miss. 822.
Missouri.— State *v.* May, 168 Mo. 122, 67 S. W. 566.
New Hampshire.— State *v.* Reed, 47 N. H. 466.
New Jersey.— State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046.
New York.— People *v.* Keating, 61 Hun 260, 16 N. Y. Suppl. 748.
North Carolina.— State *v.* Hargrave, 100 N. C. 484, 6 S. E. 185.
Ohio.— Stevenson *v.* State, 70 Ohio St. 11, 70 N. E. 510.
South Carolina.— State *v.* Briggs, 27 S. C. 80. 2 S. E. 854.
Tennessee.— Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678.
Texas.— Cheek *v.* State, 4 Tex. App. 444.
Utah.— People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.
Vermont.— State *v.* Stoughton, 51 Vt. 362.
Wisconsin.— Washington *v.* State, 17 Wis. 147.
See 31 Cent. Dig. tit. "Jury," § 602.

12. Dull *v.* People, 4 Den. (N. Y.) 91.

13. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; Brooks *v.* Com., 2 Rob. (Va.) 845; Rex *v.* Radcliffe, 1 W. Bl. 3; 2 Hawkins P. C. c. 43, § 6.
A peremptory challenge is not allowable on the preliminary trial of defendant's sanity (Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216), or an inquiry whether a convict received in the penitentiary is the same person mentioned in the record of a former conviction (Brooks *v.* Com., 2 Rob. Va.) 845).

14. People *v.* Aichinson, 7 How. Pr. (N. Y.) 241; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700. 2 Hawkins P. C. c. 43, § 2.

15. St. 33 Edw. I, c. 4.

16. People *v.* Aichinson, 7 How. Pr. (N. Y.) 241; People *v.* Henries, 1 Park. Cr. (N. Y.) 579; State *v.* Bone, 52 N. C. 121; State *v.* Stalmaker, 2 Brev. (S. C.) 1; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700; 4 Blackstone Comm. 353.

17. State *v.* Bone, 52 N. C. 121; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700.
Right to stand jurors aside see *supra*, XIII, C.

18. Thompson & M. Jur. § 158 (2). See also People *v.* Aichinson, 7 How. Pr. (N. Y.) 241.

19. *Kentucky.*— Com. *v.* Bailey, 7 J. J. Marsh. 246.
New Hampshire.—State *v.* Drake, 59 N. H. 21.
New York.— People *v.* Aichinson, 7 How. Pr. 241; People *v.* Henries, 1 Park. Cr. 579.
Ohio.— State *v.* Carver, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 426.
Pennsylvania.— Jewell *v.* Com., 22 Pa. St. 94; Com. *v.* Keenan, 30 Leg. Int. 416. But see Com. *v.* Addis, 1 Browne 285.
South Carolina.— State *v.* Stalmaker, 2 Brev. 1.
United States.— U. S. *v.* Douglass, 25 Fed. Cas. No. 14,989, 2 Blatchf. 207.
See 31 Cent. Dig. tit. "Jury," § 603.

20. See the statutes of the several states; and the following cases:
Alabama.— Gregg *v.* State, 106 Ala. 44, 17 So. 321.
California.— People *v.* Clough, 59 Cal. 438.
Colorado.— Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.
Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.
Florida.— Savage *v.* State, 18 Fla. 909.
Indiana.— Beauchamp *v.* State, 6 Blackf. 299.
Kansas.— State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.
Kentucky.—Buford *v.* Com., 14 B. Mon. 24.
Louisiana.— State *v.* Durr, 39 La. Ann. 751, 2 So. 546.
Maine.— State *v.* Chadbourne, 74 Me. 506.
Michigan.— People *v.* Welmer, 110 Mich. 248, 68 N. W. 141.
Mississippi.— Smith *v.* State, 57 Miss. 822.
Missouri.— State *v.* May, 168 Mo. 122, 67 S. W. 566; Mallison *v.* State, 6 Mo. 399.
New Jersey.— Cook *v.* State, 24 N. J. L. 843.
New York.— People *v.* Keating, 61 Hun 260, 16 N. Y. Suppl. 748; Waterford, etc.,

statutes are not unconstitutional.[21] An act conferring the right of peremptory challenge upon the state applies to prosecutions then pending as well as those commenced thereafter and is not *ex post facto*.[22]

d. Right as Between Co-Defendants. As the right of peremptory challenge is not to select but merely to reject,[23] defendants jointly indicted cannot, in the absence of statute, demand separate trials for the purpose of exercising the right,[24] and neither can complain that jurors whom he did not desire to exclude were peremptorily challenged by the other.[25] Each defendant is entitled to the full number of challenges to which he would be entitled if tried alone,[26] but a juror challenged by one is excluded as to all.[27] Where, however, it is provided by statute that defendants jointly indicted may elect to be tried separately and that if tried jointly they must join in their challenges, a defendant who waives his right to a separate trial cannot challenge peremptorily any juror without the consent of his co-defendant.[28]

e. Special or Struck Jury. Peremptory challenges are not ordinarily allowable in the selection of special or struck juries,[29] the process of striking being considered as taking the place of the right of peremptory challenge.[30]

f. In Federal Courts. The right of peremptory challenge in federal courts is

Turnpike *v.* People, 9 Barb. 161; People *v.* Caniff, 2 Park. Cr. 586.

Ohio.— Stevenson *v.* State, 70 Ohio St. 11, 70 N. E. 510; Fouts *v.* State, 8 Ohio St. 98.

South Carolina.— State *v.* Anderson, 59 S. C. 229, 37 S. E. 820.

Tennessee.— Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678.

Texas.— Cheek *v.* State, 4 Tex. App. 444.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

Wisconsin.— Washington *v.* State, 17 Wis. 147.

See 31 Cent. Dig. tit. "Juries," § 603.

21. See *supra*, V, F, 6.

22. Walston *v.* Com., 16 B. Mon. (Ky.) 15.

23. Hawkins *v.* State, 9 Ala. 137, 44 Am. Dec. 431; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700. See also *supra*, XIII, H, 1, a.

24. Hawkins *v.* State, 9 Ala. 137, 44 Am. Dec. 431; State *v.* Smith, 24 N. C. 402; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700; U. S. *v.* White, 28 Fed. Cas. No. 16,682, 4 Mason 158; Reg. *v.* Fisher, 3 Cox C. C. 68.

It is discretionary with the court to allow separate trials and a refusal to do so is not error. State *v.* Smith, 24 N. C. 402; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700.

25. *Alabama.*— Hawkins *v.* State, 9 Ala. 137, 44 Am. Dec. 431.

Louisiana.— State *v.* Durr, 39 La. Ann. 751, 2 So. 546; State *v.* Cazeau, 8 La. Ann. 109.

Maine.— State *v.* Cady, 80 Me. 413, 14 Atl. 940.

New Hampshire.— State *v.* Doolittle, 58 N. H. 92.

North Carolina.— State *v.* Jacobs, 106 N. C. 695, 10 S. E. 1031; State *v.* Smith, 24 N. C. 402.

Tennessee.— Hill *v.* State, 2 Yerg. 246.

United States.— U. S. *v.* Marchant, 12 Wheat. 480, 6 L. ed. 700.

See 31 Cent. Dig. tit. "Jury," § 604.

26. See *infra*, XIII, H, 2, b, (III), (A).

27. Hill *v.* State, 2 Yerg. (Tenn.) 246; U. S. *v.* Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700; 2 Hale P. C. c. 35, p. 268.

28. People *v.* McCalla, 8 Cal. 301.

29. *Georgia.*— O'Byrne *v.* State, 29 Ga. 36.

Indiana.— May *v.* Hoover, 112 Ind. 455, 14 N. E. 472.

Minnesota.— Watson *v.* St. Paul City R. Co., 42 Minn. 46, 43 N. W. 904; Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545.

Ohio.— State *v.* Moore, 28 Ohio St. 595; Cleveland, etc., R. Co. *v.* Stanley, 7 Ohio St. 155. See also Womeldorf *v.* Steinbergen, Wright 41.

United States.— Blanchard *v.* Brown, 3 Fed. Cas. No. 1,507, 1 Wall. Jr. 309.

England.— Creed *v.* Fisher, 9 Exch. 472, 18 Jur. 228, 23 L. J. Exch. 143, 2 Wkly. Rep. 196.

See 31 Cent. Dig. tit. "Jury," § 605.

In Pennsylvania the contrary has been held upon the ground that it had been the "inveterate practice" in that state to allow peremptory challenges (McDermott *v.* Hoffman, 70 Pa. St. 31); but the practice was expressly disapproved by the United States circuit court in the same jurisdiction (Blanchard *v.* Brown, 3 Fed. Cas. No. 1,507, 1 Wall. Jr. 309).

In New Jersey peremptory challenges in the case of special or struck juries are expressly allowed by statute. See Moschell *v.* State, 53 N. J. L. 498, 22 Atl. 50.

The fact that a sufficient number do not appear so that talesmen have to be called to complete a jury does not give a party a right to challenge peremptorily any of the struck list who do appear. Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545. *Contra*, Cleveland, etc., R. Co. *v.* Stanley, 7 Ohio St. 155, where the statute makes no provision for the calling of talesmen to complete a deficiency in the panel of a struck jury.

30. O'Byrne *v.* State, 29 Ga. 36; Watson

now regulated by a statute,[31] which confers the right of peremptory challenge in civil cases and to both the prosecution and defendant in criminal cases.[32]

g. Jurors Subject to Challenge. The right of peremptory challenge until the number allowed by law is exhausted or the right waived applies to any juror presented whether of the original panel or a talesman or special venireman called to complete it.[33]

2. Number — a. In Civil Cases — (i) *In General.* The number of peremptory challenges allowed in civil cases is regulated by statute and varies in the different jurisdictions,[34] the number allowed usually varying from two to

v. St. Paul City R. Co., 42 Minn. 46, 43 N. W. 904.

31. U. S. Rev. St. (1878) § 819 [U. S. Comp. St. (1901) p. 629].

32. Harrison *v.* U. S., 163 U. S. 140, 16 S. Ct. 961, 41 L. ed. 104; U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323; U. S. *v.* Daubner, 17 Fed. 793.

Under former federal statutes.— Acts Cong. 1790, provided for the allowance of peremptory challenges in case of treason and other crimes punishable by death (U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524. See also U. S. *v.* Black, 24 Fed. Cas. No. 14,601, 2 Cranch C. C. 195; U. S. *v.* Craig, 25 Fed. Cas. No. 14,882, 2 Cranch C. C. 36); but under this statute the right did not exist in other criminal cases (U. S. *v.* McPherson, 26 Fed. Cas. No. 15,703, 1 Cranch C. C. 517; U. S. *v.* Randall, *supra*; U. S. *v.* Shive, 27 Fed. Cas. No. 16,278, Baldw. 510; U. S. *v.* Smithers, 27 Fed. Cas. No. 16,347, 2 Cranch C. C. 38; U. S. *v.* Toms, 28 Fed. Cas. No. 16,532, 1 Cranch C. C. 607; the act of 1840 authorized the adoption of the state practice but gave no right to claim peremptory challenges as conferred by a state statute unless such statute had been adopted by a rule of court (U. S. *v.* Cottingham, 25 Fed. Cas. No. 14,872, 2 Blatchf. 470; U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71; U. S. *v.* Randall, *supra*); the act of 1801 provided for the allowance of peremptory challenges in Alexandria county, D. C., according to the laws of the state of Virginia (U. S. *v.* Browning, 24 Fed. Cas. No. 14,673, 1 Cranch C. C. 330. See also U. S. *v.* Gee, 25 Fed. Cas. No. 15,196, 2 Cranch C. C. 163; U. S. *v.* Peter, 27 Fed. Cas. No. 16,034, 2 Cranch C. C. 98; U. S. *v.* Summers, 27 Fed. Cas. No. 16,416, 4 Cranch C. C. 334).

33. *Massachusetts.*— Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

Minnesota.— Swanson *v.* Mendenhall, 80 Minn. 56, 82 N. W. 1093.

Ohio.— Koch *v.* State, 32 Ohio St. 352.

South Carolina.— Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

Texas.— Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

Wisconsin.— Olson *v.* Solverson, 71 Wis. 663, 38 S. W. 329.

United States.— U. S. *v.* Daubner, 17 Fed. 793.

See 31 Cent. Dig. tit. "Jury," § 606.

In South Carolina it was formerly held that no peremptory challenge could be made to a juror called to fill a vacancy caused by a prior challenge (Burckhalter *v.* Coward, 16 S. C. 435; Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443; Huff *v.* Watkins, 15 S. C. 82, 40 Am. Rep. 680; State *v.* Cardoza, 11 S. C. 195; Durant *v.* Ashmore, 2 Rich. 184), but the rule is otherwise under the present statute (Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74).

34. See the statutes of the several states; and the following cases:

Idaho.— U. S. *v.* Alexander, 2 Ida. (Hasb.) 386, 17 Pac. 746.

Illinois.— Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444.

Indiana.— Snodgrass *v.* Hunt, 15 Ind. 274.

Kentucky.— Cumberland Tel., etc., Co. *v.* Ware, 114 Ky. 581, 74 S. W. 289, 24 Ky. L. Rep. 2519.

Massachusetts.— Stone *v.* Segur, 11 Allen 568.

Michigan.— Stroh *v.* Hinchman, 37 Mich. 490.

North Carolina.— Bryan *v.* Harrison, 76 N. C. 360.

Ohio.— Gram *v.* Sampson, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666.

Rhode Island.— Stevens *v.* Union R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465.

Tennessee.— Blackburn *v.* Hays, 4 Coldw. 227.

Texas.— Hargrave *v.* Vaughn, 82 Tex. 347, 18 S. W. 695.

Wisconsin.—Hundhausen *v.* Atkins, 36 Wis. 518.

See 31 Cent. Dig. tit. "Jury," § 608.

In Rhode Island under the statute of 1896 providing that either party may peremptorily challenge "any qualified jurors called for the trial of said cause or proceeding not exceeding one in four," the number is not computed upon the basis of the number called who are qualified in the sense of possessing the statutory qualifications for jury duty, but upon the number found qualified for the trial of the particular case, excluding those successfully challenged for cause but including those called as substitutes for those peremptorily challenged. Stevens *v.* Union R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465.

Right on appeal from a justice's court.— A statute providing that the appeal must be "tried under the same rules and regulations prescribed for trials before justices," does not confer the right to the same number of peremptory challenges as on a trial before a justice but only to the number allowed in trials

five.[35] As regards the number of peremptory challenges allowed, a bastardy proceeding is considered as a civil and not a criminal action.[36]

(II) *Co-Plaintiffs or Co-Defendants.* In civil actions where there are several plaintiffs or several defendants the general rule is that all on one side constitute but one party and are entitled only to the number of peremptory challenges allowed a single plaintiff or defendant;[37] and statutes giving to "each party" a certain number of peremptory challenges are uniformly so construed.[38] A party and an intervener whose interest are not adverse constitute a single party within the application of this rule.[39] The rule, however, is to be applied according to the reasons upon which it is based and limited cases in which the positions of the several parties upon the same side are similar,[40] so while the fact that several

in the court where the appeal is heard. Kerschner *v.* Cullen, 27 Ind. 184; Van Schoiack *v.* Farrow, 25 Ind. 310.

For a collection of the statutory provisions of the several states see Proffat Jury Tr. § 163; Thompson & M. Jur. § 165.

35. Proffatt Jury Tr. § 163; Thompson & M. Jur. § 165 (2); and cases cited *supra*, note 34.

36. Dorgan *v.* State, 72 Ala. 173; Kremling *v.* Lallman, 16 Nebr. 280, 20 N. W. 383.

37. *Alabama.*— Bibb *v.* Reid, 3 Ala. 88.

Idaho.— U. S. *v.* Alexander, 2 Ida. (Hasb.) 354, 17 Pac. 746.

Illinois.— Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444.

Indiana.— Snodgrass *v.* Hunt, 15 Ind. 274.

Kentucky.— Sodousky *v.* McGee, 4 J. J. Marsh, 267; Cumberland, etc., Tel. Co. *v.* Ware, 74 S. W. 289, 24 Ky. L. Rep. 2519.

Massachusetts.— Stone *v.* Segur, 11 Allen 568.

Nebraska.— McClay *v.* Worrell, 18 Nebr. 44, 24 N. W. 429.

North Carolina.— Bryan *v.* Harrison, 76 N. C. 360.

Ohio.— Gram *v.* Sampson, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666; Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

Tennessee.— Blackburn *v.* Hays, 4 Coldw. 227.

Texas.— Hargrave *v.* Vaughn, 82 Tex. 347, 18 S. W. 695; Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772; Jones *v.* Ford, 60 Tex. 127; St. Louis, etc., R. Co. *v.* Barnes, (Civ. App. 1903) 72 S. W. 1041; Hall *v.* Hargadine, 23 Tex. Civ. App. 149, 55 S. W. 747.

See 31 Cent. Dig. tit. "Jury," § 609.

The distinction between civil and criminal cases in this regard is that in the latter, the action, although joint in form, is in substance and effect several, each defendant being punished according to his own guilt with no right of contribution or substitution. Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267.

On a trial of the right of property between a vendee's attaching creditors and the vendor, the creditors constitute but a single party (Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777); and on a trial of the right of property between a mortgagee and the purchasers at an execution sale the purchasers constitute but a single party (Watts *v.* Dubois, (Tex. Civ. App. 1902) 66 S. W. 698).

In condemnation proceedings under a statute providing that "every party interested" in the ascertaining of compensation shall have the same right of challenge as in other civil cases, if the land consists of a single tract, although owned by several persons as tenants in common, the several defendants are considered as only one party and entitled only to the number of challenges allowed a single defendant (Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444 [*distinguishing* Gordon *v.* Chicago, 201 Ill. 623, 66 N. E. 823]); but where several parcels of property owned by different persons are involved and the compensation assessed by the same jury, each owner is separately entitled to his full number of challenges (see Illinois, etc., R. Co. *v.* Freeman, *supra*; Fitzpatrick *v.* Joliet, 87 Ill. 58).

In Iowa the statute expressly provides that where there are several parties plaintiff or defendant and no separate trial is allowed they must join in their peremptory challenges. Cleveland *v.* Atkinson, 94 Iowa 621, 63 N. W. 465.

38. *Idaho.*— U. S. *v.* Alexander, 2 Ida. (Hasb.) 386, 17 Pac. 746.

Illinois.— Illinois, etc., R. Co. *v.* Freeman, 210 Ill. 270, 71 N. E. 444.

Indiana.— Snodgrass *v.* Hunt, 15 Ind. 274.

Kentucky.— Sodousky *v.* McGee, 4 J. J. Marsh. 267.

Massachusetts.— Stone *v.* Segur, 11 Allen 568.

Ohio.— Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

Tennessee.— Blackburn *v.* Hays, 4 Coldw. 227.

Texas.— Hargrave *v.* Vaughn, 82 Tex. 347, 18 S. W. 695.

See 31 Cent. Dig. tit. "Jury," § 609.

"Each party" means "side," however numerous the plaintiffs or defendants in a civil case may be. Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

39. Bruce *v.* Weatherford First Nat. Bank. 25 Tex. Civ. App. 295, 60 S. W. 1006; Baum *v.* Sanger, (Tex. Civ. App. 1898) 49 S. W. 650; Kelly-Goodfellow Shoe Co. *v.* Liberty Ins. Co., 8 Tex. Civ. App. 227, 28 S. W. 1027.

40. Stroh *v.* Hinchman, 37 Mich. 490. See also Hundhausen *v.* Atkins, 36 Wis. 518.

defendants who set up a common defense plead separately does not entitle them to any additional peremptory challenges,[41] the rule is otherwise where they set up separate and distinct defenses presenting different issues,[42] or where the parties on one side, although having a common cause against the other, have conflicting rights among themselves which the verdict of the jury will affect.[43]

(III) *Consolidation of Actions.* While a plaintiff who elects to sue several defendants jointly who might have been sued separately is not entitled to any additional peremptory challenges,[44] and several defendants jointly sued are considered as a single party,[45] yet where a statute authorizes the court without consent of the parties to consolidate separate actions and try them together,[46] and the actions are so consolidated, each defendant is entitled to the number of challenges to which he would be entitled if sued alone;[47] and a single plaintiff in such consolidated actions is also entitled to the number of peremptory challenges to which he would have been entitled if the actions had been tried separately.[48]

b. In Criminal Cases — (I) *In General.* At common law the number of peremptory challenges allowed defendant was arbitrarily fixed at thirty-five,[49] but by an early English statute[50] this number was reduced to twenty,[51] and in the absence of other statute this number may be claimed in cases where according to the common law the right of peremptory challenge exists.[52] The number allowed both to defendant and to the state is now generally expressly regulated by statute.[53]

41. Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267; Gram *v.* Sampson, 4 Ohio Cir. Ct. 490. See also Stroh *v.* Hinchman, 37 Mich. 490.

42. Stroh *v.* Hinchman, 37 Mich. 490; Rogers *v.* Armstrong, (Tex. Civ. App. 1895) 30 S. W. 848; Hundhausen *v.* Atkins, 36 Wis. 518. *Compare* Cumberland Tel., etc., Co. *v.* Ware, 74 S. W. 289, 24 Ky. L. Rep. 2519.

43. Stroh *v.* Hinchman, 37 Mich. 490; Cuero First Nat. Bank *v.* San Antonio, etc., R. Co., 97 Tex. 201, 77 S. W. 410; Rogers *v.* Armstrong Co., (Tex. Civ. App. 1895) 30 S. W. 848; Hundhausen *v.* Atkins, 36 Wis. 518. See also Flowers *v.* Flowers, (Ark. 1905) 85 S. W. 242.

Where a defendant impleads his co-defendant on his warranty of title in an action to recover land and prays judgment against him, each is entitled to his full number of peremptory challenges. Waggoner *v.* Dodson, 96 Tex. 6, 68 S. W. 813, 69 S. W. 993.

In an action against two railroad companies for damages to freight transported over their lines, the contract of carriage limiting the liability of each to the damage done on its own line, and the jury being required to apportion such damage accordingly, each is entitled to the full number of peremptory challenges, it being to the interest of each to make it appear as far as possible that the damage was done upon the line of the other. Texas, etc., R. Co. *v.* Stell, (Tex. Civ. App. 1901) 61 S. W. 980.

44. Hundhausen *v.* Atkins, 36 Wis. 518.

45. See *supra*, XIII, H, 2, a, (II).

46. See Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

47. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706. See also Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475.

If defendant in one action is allowed his full number he cannot claim to be prejudiced by an error of the court in denying the proper number to defendant in another action with which it was consolidated. Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

48. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668. But see 188 U. S. 208, 23 S. Ct. 294, 47 L. ed. 446, where, on appeal, the correctness of this ruling was questioned, but the court held that if erroneous defendant was not prejudiced thereby as he did not exhaust his own peremptory challenges.

49. Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132; State *v.* Gayner, 1 N. C. 392; U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323; 2 Hawkins P. C. c. 43, § 7.

50. St. 22 Hen. VIII, c. 14.

51. Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132; State *v.* Gayner, 1 N. C. 392; Com. *v.* Hand, 3 Phila. (Pa.) 403; State *v.* Allen, 8 Rich. (S. C.) 448; 2 Hawkins P. C. c. 43, § 8.

52. State *v.* Allen, 8 Rich. (S. C.) 448.

53. See the statutes of the several states; and the following cases:

Alabama.— Gregg *v.* State, 106 Ala. 44, 17 So. 321; Maxwell *v.* State, 89 Ala. 150, 7 So. 824; Todd *v.* State, 85 Ala. 339, 5 So. 278.

California.— People *v.* Clough, 59 Cal. 438.

Colorado.— Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

Florida.— Mathis *v.* State, 31 Fla. 291, 12 So. 681; Savage *v.* State, 18 Fla. 909.

Georgia.— Grant *v.* State, 89 Ga. 393, 15 S. E. 488; Cruce *v.* State, 59 Ga. 83.

Indiana.— Cable *v.* State, 8 Blackf. 531;

The state is usually allowed a smaller number than defendant, but the policy of such discrimination is not apparent,[54] and under some of the statutes an equal number is now allowed.[55] The statute in force at the date of the trial and not that in force at the time of the commission of the offense governs the number of challenges,[56] notwithstanding the amendatory act takes effect after the prosecution is begun.[57] At common law if defendant challenged more than the number allowed in a trial for treason he was regarded as standing mute and judgment of death was pronounced,[58] and if in a trial for felony was subjected to the punishment of *peine forte et dure* or pressing to death;[59] but at the present time any challenges in excess of the legal number are simply overruled and disregarded.[60]

(II) *Nature of Offense or Punishment.* The number of peremptory challenges in most jurisdictions varies according to the nature of the offense or the extent of the punishment which may be imposed therefor.[61] In such cases

Beauchamp *v.* State, 6 Blackf. 299; Wiley *v.* State, 4 Blackf. 458.

Indian Territory.— Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

Kansas.— State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.

Maine.— State *v.* Cady, 80 Me. 413, 14 Atl. 940; State *v.* Chadbourne, 74 Me. 506.

Michigan.— People *v.* Welmer, 110 Mich. 248, 68 N. W. 141.

Missouri.— State *v.* May, 168 Mo. 122, 67 S. W. 566.

New Hampshire.— State *v.* Reed, 47 N. H. 466.

New Jersey.— State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046.

New York.— People *v.* Keating, 61 Hun 260, 16 N. Y. Suppl. 748; Waterford, etc., Turnpike *v.* People, 9 Barb. 161.

Ohio.— Stevenson *v.* State, 70 Ohio St. 11, 70 N. E. 510; Fouts *v.* State, 8 Ohio St. 98; Martin *v.* State, 16 Ohio 364.

Oklahoma.— Cochran *v.* U. S., 14 Okla. 108, 76 Pac. 672.

Pennsylvania.— Com. *v.* Carling, 1 Pa. Co. Ct. 413.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

South Carolina.— State *v.* Anderson, 59 S. C. 229, 37 S. E. 820.

Tennessee.— Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678; Wiggins *v.* State, 1 Lea 738.

Texas.— Edmonson *v.* State, (Cr. App. 1898) 44 S. W. 154; Cheek *v.* State, 4 Tex. App. 444.

Vermont.— State *v.* Stoughton, 51 Vt. 362.

Wisconsin.— Washington *v.* State, 17 Wis. 147.

United States.— U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

See 31 Cent. Dig. tit. "Jury," § 610.

For a collection of the statutory provisions of the different states see Proffatt Jury Tr. § 158; Thompson & M. Jur. § 165.

Under the Missouri revised statutes of 1899, providing that the state shall have a certain number of peremptory challenges except in all cities having a population of one hundred thousand inhabitants, in which case a different number is provided, the number is determined by the place of trial and not by the place where the offense was committed. State *v.* May, 168 Mo. 122, 67 S. W. 566.

54. Thompson & M. Jur. § 165 (3). See also cases cited *supra*, note 53.

55. See the statutes of the several states; and the following cases:

Colorado.— Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

Mississippi.— Smith *v.* State, 57 Miss. 822.

New Jersey.— State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046.

Utah.— People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

Wisconsin.— Washington *v.* State, 17 Wis. 147.

See 31 Cent. Dig. tit. "Jury," §§ 607, 610.

56. Lore *v.* State, 4 Ala. 173; State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Mathis *v.* State, 31 Fla. 291, 12 So. 681; Edmonson *v.* State, (Tex. Cr. App. 1898) 44 S. W. 154.

The right of peremptory challenge does not accrue until the time of the trial, and the legislature may at any time change the number of challenges allowed and such change will apply to prosecutions for offenses committed before as well as after the change. Mathis *v.* State, 31 Fla. 291, 12 So. 681.

57. State *v.* Shreves, 81 Iowa 615, 47 N. W. 899.

58. 2 Hale P. C. c. 35, p. 268; Thompson & M. Jur. § 157.

59. 4 Blackstone Comm. 354; 2 Hale P. C. c. 35, p. 268. See also State *v.* Gaynor, 1 N. C. 392; Stevens *v.* Union R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465.

60. State *v.* Gayner, 1 N. C. 392; Thompson & M. Jur. § 157.

61. See the statutes of the several states; and the following cases:

California.— People *v.* Smith, 134 Cal. 453, 66 Pac. 669; People *v.* Clough, 59 Cal. 438.

Colorado.— Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.

Connecticut.— State *v.* Neuner, 49 Conn. 232.

defendant is entitled to the number of challenges corresponding to the greatest punishment that may be imposed for the offense charged.[62] Where the number of challenges is regulated by the grade of punishment, if the legislature reduces the punishment which may be imposed for the particular offense, the number of challenges is reduced accordingly;[63] and where defendant is indicted for murder in the first degree but the state elects to prosecute for murder in the second degree, he is entitled only to the number of challenges corresponding to the punishment prescribed for the lesser offense.[64] So where defendant on an indictment for murder in the first degree is convicted of murder in the second degree or manslaughter, he is acquitted of the capital charge and upon a new trial is entitled only to the number corresponding to the punishment for the lesser offense;[65] but it is held that where for a second offense defendant may be punished capitally he is entitled on a trial for a first offense to the same number of challenges as if tried for a second offense.[66]

(III) *Prosecution of Joint Defendants* — (A) *Number Allowed Defendants.* The general rule, in the absence of statute, is that where several defendants are jointly tried each may challenge peremptorily the full number of jurors to which he would be entitled if tried alone.[67] The statutes in some jurisdictions, however, are construed as giving defendants jointly only the number to which

Kansas.— State *v.* Davidson, (1905) 80 Pac. 945.

Kentucky.— Buford *v.* Com., 14 B. Mon. 24; Hayden *v.* Com., 10 B. Mon. 125; Montee *v.* Com., 3 J. J. Marsh. 132.

Maine.— State *v.* Smith, 67 Me. 328.

Missouri.— State *v.* Talmage, 107 Mo. 543, 17 S. W. 990; State *v.* Stevenson, 93 Mo. 91, 5 S. W. 806; State *v.* Ray, 53 Mo. 345.

New Jersey.— State *v.* Cannon, (Sup. 1905) 60 Atl. 177.

New York.— People *v.* Keating, 61 Hun 260, 16 N. Y. Suppl. 748.

North Carolina.— State *v.* Hargrave, 100 N. C. 484, 6 S. E. 185.

Ohio.— Stevenson *v.* State, 70 Ohio St. 11, 70 N. E. 510; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

Oklahoma.— Cochran *v.* U. S., 14 Okla. 108, 76 Pac. 672.

Pennsylvania.— Shuster *v.* Com., 38 Pa. St. 206.

South Carolina.— State *v.* Anderson, 59 S. C. 229, 37 S. E. 820.

Tennessee.— Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678; Fowler *v.* State, 8 Baxt. 573.

Texas.— Cheek *v.* State, 4 Tex. App. 444. See 31 Cent. Dig. tit. "Jury," § 611.

62. State *v.* Neuner, 49 Conn. 232; People *v.* Keating, 61 Hun (N. Y.) 260, 16 N. Y. Suppl. 748; Allen *v.* State, 7 Coldw. (Tenn.) 357.

In California the statute giving the defendant twenty peremptory challenges "if the offense charged is punishable with death or with imprisonment in the State Prison" and ten peremptory challenges on a trial for any other offense, was construed as giving a right to the greater number only in capital cases or cases in which a life sentence was in terms affixed by the legislature as the punishment of the crime and not merely where the court might impose a life sentence (People *v.* Clough, 59 Cal. 438); and while the correctness of this construction has been questioned (see People *v.* Logan, 123 Cal. 414, 56 Pac. 56), it has been uniformly followed by the later cases (People *v.* Sullivan, 132 Cal. 93, 64 Pac. 90; People *v.* Fultz, 109 Cal. 258, 4 Pac. 1040; People *v.* Riley, 65 Cal. 107, 3 Pac. 413); but if the statute expressly provides that the punishment shall be imprisonment for life defendant is entitled to twenty peremptory challenges (People *v.* O'Neil, 61 Cal. 435; People *v.* Harris, 61 Cal. 136).

63. State *v.* Smith, 67 Me. 328.

64. State *v.* Talmage, 107 Mo. 543, 17 S. W. 990; State *v.* Hunt, 128 N. C. 584, 38 S. E. 473; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

65. People *v.* Smith, 134 Cal. 453, 66 Pac. 669; Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678; Cheek *v.* State, 4 Tex. App. 444.

66. State *v.* Humphreys, 1 Overt. (Tenn.) 306. See also Hooper *v.* State, 5 Yerg. (Tenn.) 422.

67. *Alabama.*— Brister *v.* State, 26 Ala. 107; Hawkins *v.* State, 9 Ala. 137, 44 Am. Dec. 431.

Colorado.— Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.

Florida.— Savage *v.* State, 18 Fla. 909.

Georgia.— Cumming *v.* State, 99 Ga. 662, 27 S. E. 177; Cruce *v.* State, 59 Ga. 83.

Illinois.— Maton *v.* People, 15 Ill. 536.

Kansas.— State *v.* Dreany, 65 Kan. 292, 69 Pac. 182; State *v.* Durein, 29 Kan. 688.

Louisiana.— State *v.* McLean, 21 La. Ann. 546; State *v.* Cazeau, 8 La. Ann. 109.

Michigan.— People *v.* Welmer, 110 Mich. 248, 68 N. W. 141.

Mississippi.— Smith *v.* State, 57 Miss. 822.

New Hampshire.— State *v.* Doolittle, 58 N. H. 92.

Ohio.— Bixbee *v.* State, 6 Ohio 86.

Tennessee.— Hill *v.* State, 2 Yerg. 246.

Vermont.— State *v.* Stoughton, 51 Vt. 362.

each would be entitled upon a separate trial,[68] and statutes providing that "each party" or "either party" may challenge a certain number are so construed.[69] It seems also that where defendants may demand separate trials but fail to do so and consent to be tried jointly, they waive the right to sever in their challenges.[70]

(B) *Number Allowed Prosecution.* In the absence of statutory provision to the contrary the state is only entitled on a prosecution of several defendants jointly to the same number of peremptory challenges as on the trial of a single defendant;[71] but under the statutes in a few jurisdictions the state is entitled either to the same number as all of the defendants jointly,[72] or to a greater number than on the trial

Wisconsin.— Washington *v.* State, 17 Wis. 147.

United States.— U. S. *v.* Marchant, 12 Wheat. 480, 6 L. ed. 700.

See 31 Cent. Dig. tit. "Jury," § 612.

But see People *v.* Thayer, 1 Park. Cr. (N. Y.) 595.

68. *Arizona.*— Booth *v.* Territory, (1905) 80 Pac. 354.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536.

Maine.— State *v.* Cady, 80 Me. 413, 14 Atl. 940.

New Jersey.—State *v.* MacQueen, 69 N. J. L. 522, 55 Atl. 1006; State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046.

Oklahoma.— Cochran *v.* U. S., 14 Okla. 108, 76 Pac. 672.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

Utah.— People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

United States.— U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

See 31 Cent. Dig. tit "Jury," § 612.

In Alabama the act of 1889 provides that "when two or more defendants are on trial jointly, for a capital offense, or other felony, each defendant shall be entitled to one-half of the peremptory challenges allowed by this act" (Gregg *v.* State, 106 Ala. 44, 17 So. 321; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96); and the statute is not impossible of execution because a single defendant is allowed twenty-one peremptory challenges, and if defendant is allowed eleven he cannot complain (Gregg *v.* State, *supra*), or the court may allow one defendant eleven and the other ten (Gibson *v.* State, *supra*). Under the act of 1890 for Jefferson county each of the defendants is entitled to only five peremptory challenges (Hudson *v.* State, 137 Ala. 60, 34 So. 854).

In New Hampshire under the statute providing that "every person" may challenge peremptorily a certain number in capital causes but that "either party in all civil causes, and the respondent in all criminal causes, not capital" shall have a certain number, it is held that in criminal cases not capital joint defendants are only jointly entitled to the number provided. State *v.* Reed, 47 N. H. 466.

69. *District of Columbia.*— Lorenz *v.* U. S., 24 App. Cas. 337.

Maine.— State *v.* Cady, 80 Me. 413, 14 Atl. 940.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861; State *v.* Sutton, 10 R. I. 159.

Utah.— People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

United States.— U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

See 31 Cent. Dig. tit. "Jury," § 612.

But a statute providing that "every person" indicted shall, when the jury for his trial is impaneled, be entitled to a certain number of peremptory challenges, contemplates that in joint trials each individual defendant shall be entitled to that number. Washington *v.* State, 17 Wis. 147.

70. State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653. *Contra*, Cruce *v.* State, 59 Ga. 83 [*disapproving* State *v.* Monaquas, T. U. P. Charlt. (Ga.) 16], under a statute expressly providing that "every person indicted" may peremptorily challenge a certain number of the jurors impaneled to try him.

But the withdrawal of a request for a separate trial, in cases where it cannot be demanded as a right, upon a suggestion by the court that a severance might require a postponement of the trial of some of defendants is not a waiver of the right of each to challenge the full number of jurors. State *v.* Stoughton, 51 Vt. 362.

Peremptory challenges made by a co-defendant before a separate trial is demanded may be charged against the number allowed the other defendant who demands a separate trial and as to whom the trial proceeds, under a statute providing that "when several defendants are tried together the challenge of any one of the defendants shall be considered the challenge of all." Glass *v.* Com., 26 S. W. 811, 16 Ky. L. Rep. 108.

71. *Florida.*— Savage *v.* State, 18 Fla. 909.

Kansas.— State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.

Louisiana.— State *v.* Earle, 24 La. Ann. 38, 13 Am. St. Rep. 109.

Ohio.— Mahan *v.* State, 10 Ohio 232.

Tennessee.— Wiggins *v.* State, 1 Lea 738.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

See 31 Cent. Dig. tit. "Jury," § 613.

72. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; State *v.* Marsh, 70 Vt. 288, 40 Atl. 836; State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

Under the former Vermont statute the state was allowed one half of the total number allowed to all of defendants. State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

of a single defendant, the number allowed being a certain number for each defendant or a certain proportion of the total number allowed defendants.[73]

(iv) *Several Counts or Indictments.* The fact that an indictment contains several counts does not entitle defendant to any additional peremptory challenges,[74] even though the different counts charge separate and distinct offenses which may be joined in the same indictment;[75] but the rule is otherwise where several indictments against the same defendant are not consolidated but tried together before the same jury.[76]

c. On Disability and Discharge of Juror Pending Trial. At common law where a juror became sick during the trial the practice was to declare a mistrial and begin *de novo*.[77] Under statutes providing that in such cases the jury need not be discharged but that a new juror may be substituted and the trial begun anew, it is held in some jurisdictions that defendant is entitled to again exercise the full number of peremptory challenges which he had in the first instance,[78] and that he may not only challenge the new juror presented but any of the original jurors already selected;[79] but in others it is held that he is entitled only to such of his peremptory challenges as he had not already exhausted in selecting the other jurors,[80] that if he has exhausted all of his challenges he cannot challenge peremptorily the substituted juror,[81] and that in case any challenges remain to him he cannot use them against any of the other jurors previously selected.[82]

d. In Federal Courts. The number of peremptory challenges allowed in the federal courts is now regulated by statute,[83] which provides that when the offense charged is treason or a capital offense defendant shall be entitled to twenty and the

73. Butler *v.* State, 92 Ga. 601, 19 S. E. 51; State *v.* Waggoner, 39 La. Ann. 919, 3 So. 119; State *v.* Green, 33 La. Ann. 1408. See also Cheek *v.* State, 4 Tex. App. 444.

74. State *v.* Skinner, 34 Kan. 256, 8 Pac. 420; Com. *v.* Walsh, 124 Mass. 32; Smith *v.* State, 8 Lea (Tenn.) 386; State *v.* Bromley, 4 Utah 498, 11 Pac. 619; U. S. *v.* Groesbeck, 4 Utah 487, 11 Pac. 542.

75. State *v.* Skinner, 34 Kan. 256, 8 Pac. 420; U. S. *v.* Groesbeck, 4 Utah 487, 11 Pac. 542.

Joinder of separate offenses in the same indictment see INDICTMENTS AND INFORMATIONS.

76. Betts *v.* U. S., 132 Fed. 228, 65 C. C. A. 452, holding that in such case defendant is entitled to the total number of peremptory challenges to which he would be entitled if separately tried on each indictment.

77. West *v.* State, 42 Fla. 244, 28 So. 430, holding further that in the absence of a statute authorizing the substitution of another juror for the one discharged the court may utilize such jurors in impaneling the new jury, but they must be resworn and retendered to defendant who must be allowed the full number of peremptory challenges to which he was originally entitled.

78. People *v.* Zeigler, 135 Cal. 462, 67 Pac. 754; People *v.* Brady, 72 Cal. 490, 14 Pac. 202; People *v.* Stewart, 64 Cal. 60, 28 Pac. 112; Garner *v.* State, 5 Yerg. (Tenn.) 160.

Where a jury has been only partially impaneled and one of those selected is excused on account of sickness defendant is entitled to his full number of peremptory challenges in completing the jury. People *v.* Zeigler, 135 Cal. 462, 67 Pac. 754; People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115.

79. People *v.* Stewart, 64 Cal. 60, 28 Pac. 112.

80. State *v.* Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. See also Jackson *v.* State, 78 Ala. 471.

81. Jackson *v.* State, 78 Ala. 471.

In Tennessee this rule is followed in civil cases (Bruce *v.* Beall, 100 Tenn. 573, 47 S. W. 204), but not in criminal cases (see cases cited *supra*, note 78).

82. See State *v.* Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

83. U. S. Rev. St. (1878) § 819 [U. S. Comp. St. (1901) p. 629]; Harrison *v.* U. S., 163 U. S. 140, 16 S. Ct. 961, 41 L. ed. 104; U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323; U. S. *v.* Daubner, 17 Fed. 793; U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

Under former federal statutes.— The act of 1790 expressly provided the number of peremptory challenges allowable in certain cases (U. S. *v.* Dow, 25 Fed. Cas. No. 14,990, Taney 34; U. S. *v.* Russel, 27 Fed. Cas. No. 16,209, 4 Dall. 414 note, 1 L. ed. 889 note), and by the act of 1840 the federal courts were authorized to adopt the state practice (U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71); but a party could not claim the benefit of such statute as to the number of challenges unless adopted by a rule of court (U. S. *v.* Devlin, *supra*); the act of 1801 providing that offenses committed in Alexandria county, D. C., should be punishable in the same manner as by the laws of Virginia was construed as giving defendant the same number of peremptory challenges as allowed by the Virginia law (U. S. *v.* Browning, 24 Fed. Cas. No. 14,673, 1 Cranch C. C. 330. See also U. S. *v.* McLaughlin, 26 Fed. Cas. No. 15,697, 1 Cranch C. C. 444).

United States to five,[84] and on the trial of any other felony defendant ten and the United States three,[85] and in all other cases civil and criminal each party shall be entitled to three peremptory challenges.[86] The act further provides that in all cases where there are several plaintiffs or several defendants the parties on each side shall be deemed a single party for the purpose of all challenges under this section,[87] and several defendants jointly indicted and tried are held to be a single party within the meaning of this provision.[88]

e. Allowance of Additional Challenges. A party cannot claim the right to exercise any more peremptory challenges than the number allowed by law;[89] but where a party is compelled to use a peremptory challenge to exclude a juror who is incompetent and has testified falsely as to his competency, and this fact is discovered before the jury is completed, the court should allow this to be shown, and if established should allow an additional challenge.[90]

3. Time — a. In General. While the practice varies as to the number of jurors which must be presented before a party may be required to challenge peremptorily,[91] the general rule is that the right remains open and may be exercised at any time until the juror or jury is sworn.[92] This was the common-law

84. Harrison *v.* U. S., 163 U. S. 140, 16 S. Ct. 961, 41 L. ed. 104; U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

85. Harrison *v.* U. S., 163 U. S. 140, 16 S. Ct. 961, 41 L. ed. 104; U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

A felony within the meaning of this provision is: (1) Where the offense is declared by statute expressly or impliedly to be a felony; (2) where congress does not define an offense but merely punishes it by its common-law name and at common law it is a felony; and (3) where congress adopts a state law as to an offense and under such law it is a felony. Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272; U. S. *v.* Daubner, 17 Fed. 793; U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

86. Reagan *v.* U. S., 157 U. S. 301, 15 S. Ct. 610, 39 L. ed. 709; Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272; U. S. *v.* Daubner, 17 Fed. 793; U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

If a statute expressly says that an offense shall be a misdemeanor it fixes its status for the purpose of determining the number of peremptory challenges regardless of its original character or the punishment prescribed, and defendant is entitled only to three peremptory challenges. Keagan *v.* U. S., 157 U. S. 301, 15 S. Ct. 610, 39 L. ed. 709; Tyler *v.* U. S., 106 Fed. 137, 45 C. C. A. 247; Jewett *v.* U. S., 100 Fed. 832, 41 C. C. A. 88, 53 L. R. A. 568 [*affirming* 84 Fed. 142].

87. Harrison *v.* U. S., 163 U. S. 140, 16 S. Ct. 961, 41 L. ed. 104; U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

88. U. S. *v.* Hall, 44 Fed. 883, 10 L. R. A. 323.

But where there are several indictments against the same defendant which are not consolidated but are tried together before the same jury, defendant is entitled to the full number of peremptory challenges to which he would be entitled if separately tried on each indictment. Betts *v.* U. S., 132 Fed. 228, 65 C. C. A. 452.

89. Funk *v.* Ely, 45 Pa. St. 444; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468.

The fact that a juror summoned on a special venire fails to answer but his name is put in the hat and drawn therefrom and he is again called and fails to answer does not entitle defendant to an additional challenge. State *v.* Powell, 94 N. C. 965.

Standing juror aside.— Where a party having the right to challenge for cause directs a juror to stand aside without asking the judgment of the court, it will be held a peremptory challenge and deducted from the number allowed. Crider *v.* Lifsey, 10 Heisk. (Tenn.) 456.

90. Burke *v.* McDonald, 3 Ida. 296, 29 Pac. 98.

91. See *supra*, IX, A, 1, f.

92. *Alabama.*— Spigener *v.* State, 62 Ala. 383; Drake *v.* State, 51 Ala. 30; Murray *v.* State, 48 Ala. 675.

California.— People *v.* Jenks, 24 Cal. 11; People *v.* Kohle, 4 Cal. 198.

Florida.— Mann *v.* State, 23 Fla. 610, 3 So. 207.

Indiana.— Wyatt *v.* Noble, 8 Blackf. 507; Jackson *v.* Pittsford, 8 Blackf. 194; Morris *v.* State, 7 Blackf. 607; Munly *v.* State, 7 Blackf. 593; Beauchamp *v.* State, 6 Blackf. 299.

Iowa.— Spencer *v.* De France, 3 Greene 216.

Louisiana.— State *v.* Roland, 38 La. Ann. 18.

Maryland.—Rogers *v.* State, 89 Md. 424, 43 Atl. 922.

Michigan.— Hamper's Appeal, 51 Mich. 71, 16 N. W. 236; People *v.* Carrier, 46 Mich. 442, 9 N. W. 487; Hunter *v.* Parsons, 22 Mich. 96.

Nevada.— State *v.* Pritchard, 15 Nev. 74.

New York.— People *v.* Carpenter, 36 Hun 315, 16 Abb. N. Cas. 128; Lindsley *v.* People, 6 Park. Cr. 233.

Ohio.— Hooker *v.* State, 4 Ohio 348.

Pennsylvania.—Zell *v.* Com., 94 Pa. St. 258.

South Carolina.— Charleston *v.* Kleinback, 2 Speers 418.

rule,[93] and it has been said that up to this time the right is absolute and that no circumstance can bring it within the discretion of the court so long as it is confined to the number of challenges allowed by law.[94] So it has been held that in the absence of statute authorizing such practice the court cannot require parties to exercise their right of peremptory challenge as each juror is presented;[95] but where the practice prevails of first presenting a full panel of twelve before requiring any peremptory challenge,[96] it is held that the parties may, when a full panel is presented, be required to then challenge peremptorily all of such panel whom they desire to so challenge and be thereafter restricted in their challenges to jurors called to supply the vacancies caused by the challenges made.[97]

b. After Swearing. There is no right to challenge a juror peremptorily after the juror or jury as a whole has been sworn to try the case,[98] or after the ceremony of swearing is begun.[99] The statutes in some cases authorize the court to allow a peremptory challenge after a juror is sworn,[1] but it has been held that in the absence of statute the court cannot do so against the objection of the adverse party.[2]

Vermont.— State *v.* Spaulding, 60 Vt. 228, 14 Atl. 769.

Virginia.— Hendrick *v.* Com., 5 Leigh 707.

United States.— U. S. *v.* Davis, 103 Fed. 457.

England.— Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87.

See 31 Cent. Dig. tit. "Jury," § 619.

While the panel is being called a peremptory challenge may be imposed. Graves *v.* Horgan, 21 R. I. 493, 45 Atl. 152.

The right should be kept open until the latest possible period, particularly in favor of defendant in a criminal case. Murray *v.* State, 48 Ala. 675; Hooker *v.* State, 4 Ohio 348.

In Massachusetts it was formerly held that the peremptory challenges of a party on trial for a capital offense must be exercised before the jurors were interrogated by the court concerning their bias and opinions (Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458. But see Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491); but it seems that the rule is otherwise under present statutes (see Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391).

In Missouri in criminal cases defendant must make his peremptory challenges within forty-eight hours after he is furnished with the list of jurors. State *v.* Green, 66 Mo. 631, holding further that a public holiday occurring after the furnishing of the list will be counted as a part of this time.

93. People *v.* Carpenter, 36 Hun (N. Y.) 315, 16 Abb. N. Cas. 128; Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87.

94. Lindsley *v.* People, 6 Park. Cr. (N. Y.) 233; Hendrick *v.* Com., 5 Leigh (Va.) 707.

95. People *v.* Jenks, 24 Cal. 11; People *v.* Carpenter, 36 Hun (N. Y.) 315, 16 Abb. N. Cas. 128; Lamb *v.* State, 36 Wis. 414. *Contra*, State *v.* Roderigas, 7 Nev. 328; Schufflin *v.* State, 20 Ohio St. 233.

96. See *supra*, IX, A, 1, f.

97. Nicholson *v.* People, 31 Colo. 53, 71 Pac. 377; Funderburk *v.* State, 75 Miss. 20, 21 So. 658; Tatum *v.* Preston, 53 Miss. 654; Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

98. *California.*— People *v.* Reynolds, 16 Cal. 128; People *v.* Rodriguez, 10 Cal. 50.

Florida.— Mathis *v.* State, 45 Fla. 46, 34 So. 287; Myers *v.* State, 43 Fla. 500, 31 So. 275; Bradham *v.* State, 41 Fla. 541, 26 So. 730.

Indiana.— Kurtz *v.* State, 145 Ind. 119, 42 N. E. 1102.

Michigan.— Thorp *v.* Deming, 78 Mich. 124, 43 N. W. 1097; People *v.* Dolan, 51 Mich. 610, 17 N. W. 78.

Nevada.— State *v.* Anderson, 4 Nev. 265.

New Jersey.— State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398; Leary *v.* North Jersey St. R. Co., 69 N. J. L. 67, 54 Atl. 527.

New York.—People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 [*affirming* 38 Hun 490].

United States.— Hawkins *v.* U. S., 116 Fed. 569, 53 C. C. A. 663.

England.— Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87.

See 31 Cent. Dig. tit. "Jury," § 623.

The right to challenge peremptorily is waived unless exercised before the juror is sworn. Mathis *v.* State, 45 Fla. 46, 34 So. 287; Bradham *v.* State, 41 Fla. 541, 26 So. 730.

In Massachusetts in civil cases it is held that jurors may be challenged peremptorily after being sworn but before the trial is begun. Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

99. State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398; Leary *v.* North Jersey St. R. Co., 69 N. J. L. 67, 54 Atl. 527; Com. *v.* Marra, 8 Phila. (Pa.) 440.

The swearing is begun as soon as the juror takes the book, having been directed by the officer of the court to do so, but if he takes the book without authority a party wishing to challenge is not to be prejudiced thereby. Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87.

1. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; People *v.* Reynolds, 16 Cal. 128; State *v.* Anderson, 4 Nev. 265.

2. Ayres *v.* Hubbard, 88 Mich. 155, 50

c. After Passing or Tender of Juror. In the absence of statute the right of one party to challenge peremptorily is not waived or lost by passing a juror over to the other for examination,[3] and may be exercised at any time before the juror is accepted by the other party,[4] or, it has been held, even after acceptance.[5]

d. After Acceptance. The rule in most jurisdictions is that the right of peremptory challenge remains until the juror or jury is sworn notwithstanding a prior acceptance by the party challenging,[6] or by both parties.[7] Others hold that after acceptance there is no absolute right to challenge peremptorily,[8] but that the court

N. W. 111; People *v.* Dolan, 51 Mich. 610, 17 N. W. 78. *Compare* State *v.* Wren, 48 La. Ann. 803, 19 So. 745; State *v.* Roland, 38 La. Ann. 18.

In New York, under Code Civ. Proc. § 371, providing that "a challenge must be taken when the juror appears and before he is sworn; but the court may in its discretion, for good cause, set aside a juror at any time before evidence is given in the action," the court has no authority after a juror is sworn to allow a peremptory challenge. People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105 [*affirming* 19 N. Y. Suppl. 550, 8 N. Y. Cr. 448, and *distinguishing* Tweed's Case, 13 Abb. Pr. N. S. 371 note, decided prior to the above provisions], holding, however, that the allowance of such challenge was not reversible error in a case where the power of the court to do so was conceded on the trial and the only exception taken was to the refusal of the court to require the reasons for making the challenge to be publicly stated.

In the absence of any good cause shown it is error to allow a peremptory challenge by one party against the objection of the other after the jury is sworn. Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222.

3. People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; People *v.* McCarty, 48 Cal. 557; Shelby *v.* Com., 91 Ky. 563, 16 S. W. 461, 13 Ky. L. Rep. 178; State *v.* Wren, 48 La. Ann. 803, 19 So. 745; State *v.* Roland, 38 La. Ann. 18; Com. *v.* Evans, 25 Pa. Super. Ct. 239.

The mere passing of a juror to the adverse party for examination does not constitute an acceptance (People *v.* McCarty, 48 Cal. 557; Com. *v.* Evans, 25 Pa. Super. Ct. 239), and should not preclude the right of peremptory challenge, since the cross-examination may bring out facts which would afford ground for the challenge by the party who had previously passed the juror (Com. *v.* Evans, *supra*).

In Mississippi, Rev. Code (1871), § 2761, provides that "all peremptory challenges by the state shall be made before the juror is presented to the prisoner" and the court cannot allow such challenge to be made thereafter. Stewart *v.* State, 50 Miss. 587.

In North Carolina, under Code, § 1200, providing that in capital cases the state may challenge peremptorily four jurors "provided such challenge is made before the juror is tendered to the prisoner," a peremptory challenge cannot be made or permitted in a capital case after the juror is so tendered. State *v.* Fuller, 114 N. C. 885, 19 S. E. 797.

4. State *v.* Durr, 39 La. Ann. 751, 2 So. 546; State *v.* Corley, 43 S. C. 127, 20 S. E. 989; State *v.* Haines, 36 S. C. 504, 15 S. E. 555.

5. People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; People *v.* McCarty, 48 Cal. 557; State *v.* Wren, 48 La. Ann. 803, 19 So. 745; Rogers *v.* State, 89 Md. 424, 43 Atl. 922. *Compare* cases cited *supra*, note 4.

6. *Indiana.*—Jackson *v.* Pittsford, 8 Blackf. 194.

Maryland.—Rogers *v.* State, 89 Md. 424, 43 Atl. 922.

Michigan.—Hamper's Appeal, 51 Mich. 71, 16 N. W. 236.

Vermont.—State *v.* Spaulding, 60 Vt. 228, 14 Atl. 769.

Virginia.—Hendrick *v.* Com., 5 Leigh 707.

United States.—Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,502, 2 McLean 611.

See 31 Cent. Dig. tit. "Jury," § 621.

7. *California.*—People *v.* Kohle, 4 Cal. 198.

Florida.—Mann *v.* State, 23 Fla. 610, 3 So. 207.

Louisiana.—State *v.* Wren, 48 La. Ann. 803, 19 So. 745. *Compare* State *v.* Cummings, 5 La. Ann. 330.

Michigan.—People *v.* Carrier, 46 Mich. 442, 9 N. W. 487.

Nevada.—State *v.* Pritchard, 15 Nev. 74.

New York.—Lindsley *v.* People, 6 Park. Cr. 233.

United States.—U. S. *v.* Davis, 103 Fed. 457.

See 31 Cent. Dig. tit. "Jury," § 621.

8. *Alabama.*—Sparks *v.* State, 59 Ala. 82.

Arkansas.—Allen *v.* State, 70 Ark. 337, 68 S. W. 28.

Connecticut.—State *v.* Potter, 18 Conn. 166.

Kentucky.—Wiggins *v.* Com., 104 Ky. 765, 47 S. W. 1073, 20 Ky. L. Rep. 908; Colvin *v.* Com., 60 S. W. 701, 22 Ky. L. Rep. 1407. But see Shelby *v.* Com., 91 Ky. 563, 16 S. W. 461, 13 Ky. L. Rep. 178.

Minnesota.—State *v.* Scott, 41 Minn. 365, 43 N. W. 62. See also Swanson *v.* Mendenhall, 80 Minn. 56, 82 N. W. 1093.

North Carolina.—Dunn *v.* Wilmington, etc., R. Co., 131 N. C. 446, 42 S. E. 862.

South Carolina.—Ward *v.* Charleston City R. Co., 19 S. C. 521, 45 Am. Rep. 749.

Texas.—Horbach *v.* State, 43 Tex. 242; Drake *v.* State, 5 Tex. App. 649.

Wisconsin.—State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172. *Compare* Santry *v.* State, 67 Wis. 65, 30 N. W. 226.

See 31 Cent. Dig. tit. "Jury," § 621.

In Illinois where the statute requires that

may in its discretion allow such challenges to be made after a juror has been accepted.[9]

4. ORDER. In the absence of statute the order in which the peremptory challenges shall be interposed rests in the sound discretion of the court,[10] which will not be interfered with unless abused to the prejudice of the legal rights of the objecting party.[11] The court may in the absence of statute, where jurors are presented one at a time, require defendant to challenge before the state,[12] or require the state and defendant to alternate;[13] and in criminal cases, where defendant has a greater number than the state, may require him in alternating to challenge at each time such a number as will exhaust the challenges of each simultaneously,[14] or may allow the state to reserve its challenges until those of the defendant are reduced to an equal number.[15] In some jurisdictions the order of challenging is expressly regulated by statute,[16] and these statutes have usually been held to be

the jury shall be passed upon in panels of four, it is held that after a panel of four has been accepted and another panel called, neither party can peremptorily challenge any of the panel passed, although they have not been sworn. Mayers *v.* Smith, 121 Ill. 442, 15 N. E. 216 [*affirming* 25 Ill. App. 67].

Where the court stenographer is allowed to propound the questions to the jurors on their examination, he has no right to accept a juror, and such acceptance will not prevent a prosecuting attorney from challenging West *v.* State, 79 Ga. 773, 4 S. E. 325.

9. *Alabama.*— Daniels *v.* State, 88 Ala. 220, 7 So. 337; Adams *v.* Olive, 48 Ala. 551.

Arkansas.— Brewer *v.* State, 72 Ark. 145, 78 S. W. 773; Glenn *v.* State, 71 Ark. 86, 71 S. W. 254.

Idaho.— State *v.* Crea, 10 Ida. 88, 76 Pac. 1013.

Iowa.—Spencer *v.* De France, 3 Greene 216.

North Carolina.— State *v.* Vestal, 82 N. C. 563. But see Dunn *v.* Wilmington, etc., R. Co., 131 N. C. 446, 42 S. W. 862.

South Carolina.— Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

Texas.— Hubotter *v.* State, 32 Tex. 479.

See 31 Cent. Dig. tit. "Jury," § 621.

A peremptory challenge should be allowed after acceptance where the acceptance was made inadvertently (Murray *v.* State, 48 Ala. 675; Clarke *v.* Goode, 6 J. J. Marsh. (Ky.) 637), where good cause for desiring to exclude the juror is discovered after acceptance (Brewer *v.* State, 72 Ark. 145, 78 S. W. 773; State *v.* Vestal, 82 N. C. 563), or where the jury were allowed to separate after acceptance and before being sworn (Spencer *v.* De France, 3 Greene (Iowa) 216).

If the court allows one party to challenge after acceptance it is error to discriminate against the other and not allow him the same privilege. Cook *v.* State, (Miss. 1905) 38 So. 113.

After one party has exhausted his peremptory challenges it is erroneous to allow the other to peremptorily challenge a juror previously accepted. Williams *v.* State, 63 Ark. 527, 39 S. W. 709; Dunn *v.* Wilmington, etc., R. Co., 131 N. C. 446, 42 S. W. 862. But see Jones *v.* Van Zandt, 13 Fed. Cas. No. 7,502, 2 McLean 611.

In Texas in the case of juries selected from special venires for the trial of capital cases it is held to be error for the court to allow either party to challenge a juror peremptorily after acceptance. Horbach *v.* State, 43 Tex. 242; Baker *v.* State, 3 Tex. App. 525.

10. *Iowa.*— State *v.* Pierce, 8 Iowa 231.

Maryland.— Turpin *v.* State, 55 Md. 462.

Minnesota.— St. Anthony Falls Water-Power Co. *v.* Eastman, 20 Minn. 277.

Missouri.— State *v.* Hays, 23 Mo. 287.

Nebraska.— Gravely *v.* State, 45 Nebr. 878, 64 N. W. 452.

Pennsylvania.— Com. *v.* Brown, 23 Pa. Super. Ct. 470.

Vermont.— State *v.* Flint, 60 Vt. 304, 14 Atl. 178.

See 31 Cent. Dig. tit. "Jury," § 625.

11. *Iowa.*— State *v.* Pierce, 8 Iowa 231.

Maryland.— Turpin *v.* State, 55 Md. 462.

Missouri.— State *v.* Hays, 23 Mo. 287.

Nebraska.— Gravely *v.* State, 45 Nebr. 878, 64 N. W. 452.

Texas.— State *v.* Ezell, 41 Tex. 35.

See 31 Cent. Dig. tit. "Jury," § 625.

But the court cannot make the right conditional upon the exercise of the same right by the other party, each being entitled absolutely to his legal number of challenges whether the other party challenges or not. Smith *v.* State, 4 Greene (Iowa) 189.

12. Turpin *v.* State, 55 Md. 462. But see Spigener *v.* State, 62 Ala. 383.

13. Com. *v.* Brown, 23 Pa. Super. Ct. 470.

14. State *v.* Pierce, 8 Iowa 231; State *v.* Flint, 60 Vt. 304, 14 Atl. 178. *Compare* Schumaker *v.* State, 5 Wis. 324.

15. State *v.* Brown, 2 Marv. (Del.) 386, 36 Atl. 458.

16. *Arkansas.*— Lackey *v.* State, 67 Ark. 416, 55 S. W. 213; Williams *v.* State, 63 Ark. 527, 39 S. W. 709.

California.— Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909.

Idaho.— State *v.* Browne, 4 Ida. 723, 44 Pac. 552.

Iowa.— Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Minnesota.— State *v.* Armington, 25 Minn. 29; State *v.* Smith, 20 Minn. 378.

Missouri.— Hegney *v.* Head, 126 Mo. 619, 29 S. W. 587; Cunningham *v.* Prusansky, 59 Mo. App. 498.

mandatory.[17] The statutes variously provide that in criminal cases the peremptory challenges to each juror presented shall be first taken by the state,[18] or by defendant,[19] or that the state and defendant shall alternate.[20] Where a full panel is presented before peremptory challenges are made the statutes usually require that the parties shall alternate.[21] The state statutes regulating the order of peremptory challenges are not binding upon the federal courts.[22]

5. Withdrawal of Challenge. After a peremptory challenge has been made a party has no right to withdraw it,[23] either for the purpose of challenging the juror for cause,[24] securing him as a member of the jury,[25] or gaining a peremptory challenge for the purpose of excluding a more objectionable juror subsequently presented.[26] The court may, however, in its discretion allow a peremptory challenge to be withdrawn where no prejudice would result.[27]

6. Errors and Irregularities. It is reversible error for the court to deny a party the right of peremptory challenge in any case where it is a right either by

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

New York.— People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273 [*affirming* 21 Abb. N. Cas. 417, 6 N. Y. Cr. 1].

Pennsylvania.— Com. *v.* Conroy, 207 Pa. St. 212, 56 Atl. 427; Com. *v.* Reid, 1 Leg. Gaz. 182.

South Carolina.— Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

Washington.— Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241; State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

Wisconsin.— Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

See 31 Cent. Dig. tit. "Jury," § 625.

In Missouri the Revised Statutes of 1889 provides that in civil cases each party shall be entitled to three peremptory challenges and that plaintiff shall in all cases announce his challenges first (Cunningham *v.* Prusansky, 59 Mo. App. 498), which rule applies, although the case is one where defendant has the burden of proof (Hagney *v.* Head, 126 Mo. 619, 29 S. W. 587); and the rule is also expressly made applicable to criminal cases (State *v.* Steeley, 65 Mo. 218, 27 Am. Rep. 271).

17. State *v.* Steeley, 65 Mo. 218, 27 Am. Rep. 271; Cunningham *v.* Prusansky, 59 Mo. App. 498; People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273 [*affirming* 21 Abb. N. Cas. 417, 6 N. Y. Cr. 1]. But see Hagney *v.* Head, 126 Mo. 619, 29 S. W. 587.

18. Williams *v.* State, 63 Ark. 527, 39 S. W. 709; State *v.* Bowers, 17 Iowa 46; People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273 [*affirming* 21 Abb. N. Cas. 417, 6 N. Y. Cr. 1].

19. State *v.* Smith, 20 Minn. 376.

20. Com. *v.* Conroy, 207 Pa. St. 212, 56 Atl. 427.

21. *California.*— Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909.

Idaho.— State *v.* Browne, 4 Ida. 723, 44 Pac. 552.

Iowa.— Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

Washington.— Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

Wisconsin.— Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

See 31 Cent. Dig. tit. "Jury," § 625.

Where the state has a less number than defendant the proper practice under such statutes is to require defendant in alternating to challenge at each time such number as will exhaust the challenges of each at the same time. State *v.* Browne, 4 Ida. 723, 44 Pac. 552; State *v.* Sloan, 22 Mont. 293, 56 Pac. 364; State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

22. Radford *v.* U. S., 129 Fed. 49, 63 C. C. A. 491.

23. *Maryland.*— Biddle *v.* State, 67 Md. 304, 10 Atl. 794.

Missouri.— Vojta *v.* Pelikan, 15 Mo. App. 471.

New Jersey.— Furman *v.* Applegate, 23 N. J. L. 28.

Pennsylvania.— Com. *v.* Twitchell, 1 Brewst. 551.

South Carolina.— State *v.* Price, 10 Rich. 351.

England.— Rex *v.* Parry, 7 C. & P. 836, 1 Jur. 674, 32 E. C. L. 898.

See 31 Cent. Dig. tit. "Jury," § 629.

24. Vojta *v.* Pelikan, 15 Mo. App. 471; State *v.* Coleman, 8 S. C. 237; State *v.* Price, 10 Rich. (S. C.) 351.

25. Furman *v.* Applegate, 23 N. J. L. 28.

26. Biddle *v.* State, 67 Me. 304, 10 Atl. 794; Rex *v.* Parry, 7 C. & P. 836, 1 Jur. 674, 32 E. C. L. 898.

27. Garrison *v.* Portland, 2 Oreg. 123; U. S. *v.* Porter, 27 Fed. Cas. No. 16,073, 2 Dall. 345, 1 L. ed. 409.

But the permission should be very cautiously granted since otherwise the right to reject, which is the only right embraced in the right of peremptory challenge, might be perverted into a right to select. Vojta *v.* Pelikan, 15 Mo. App. 471; Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

A party who objects to the allowance of a challenge to the other party has no right to object to the court allowing the challenge to be withdrawn. Leonard *v.* State, 66 Ala. 461.

the common law,[28] or by statute,[29] or to deny the full number to which a party is entitled in either civil[30] or criminal cases.[31] The allowance to one party in a civil action of more than the number of peremptory challenges to which he is entitled is not reversible error unless the other party was prejudiced thereby;[32] but in criminal cases it is held that an allowance to the state of more than its proper number of peremptory challenges is reversible error.[33]

XIV. IMPANELING FOR TRIAL AND OATH.

A. Impaneling — 1. In General. While the term "jury panel" is used to designate the jurors drawn or selected and summoned for a particular trial or term of court from which the trial jury is to be selected,[34] the general understanding of the term "impanel" is that it covers all the steps of ascertaining who shall be the twelve men to sit as jurors for the trial of a particular case.[35] It is the act that precedes the swearing of the jury and which ascertains who are to be sworn.[36] Jurors may be said to be impaneled after they are selected and accepted by both parties for the trial of the cause,[37] although they have not been sworn.[38] Where the mode of impaneling is prescribed by statute the provisions of the statute must be complied with;[39] but in the absence of such provision all proceedings in relation to the formation of the trial jury are left to the discretion of the court,[40] which will not be interfered with if it appears that the jury which tried the case was fair and impartial.[41]

2. Appointment of Foreman. In the absence of statute it is not necessary that any foreman to the jury should be appointed,[42] he being merely the person selected

28. Hooper *v.* State, 5 Yerg. (Tenn.) 422.

29. State *v.* Pearis, 35 W. Va. 320, 13 S. E. 1006.

30. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

31. *Alabama.*— Todd *v.* State, 85 Ala. 339, 5 So. 278.

California.— People *v.* O'Neil, 61 Cal. 435; People *v.* Harris, 61 Cal. 136.

New York.— People *v.* Keating, 61 Hun 260, 16 N. Y. Suppl. 748.

North Carolina.— State *v.* Cadwell, 46 N. C. 289.

Tennessee.— Allen *v.* State, 7 Coldw. 357; Fowler *v.* State, 8 Baxt. 573.

See 31 Cent. Dig. tit. "Jury," § 618.

The error is not cured by a verdict assessing a punishment corresponding to the number of peremptory challenges actually allowed where the number is determined by the nature of the punishment which may be imposed for the offense charged. Fowler *v.* State, 8 Baxt. (Tenn.) 573.

Disallowing a challenge for cause cannot be construed as a refusal to allow a peremptory challenge, although it necessitates the use of a peremptory challenge which exhausts the number to which the party is entitled. Moore *v.* Com., 7 Bush (Ky.) 191.

A denial of a motion to determine the number of peremptory challenges to which defendant is entitled, made prior to the drawing of the jury, is not error where it does not appear that on the trial defendant was denied the number allowed by law. Clark *v.* State, 87 Ala. 71, 6 So. 368.

An erroneous statement as to the number of peremptory challenges made to a party by the court or clerk is not ground for reversal where the mistake is corrected before the party's peremptory challenges are exhausted and he is in fact allowed the number to which he is entitled. State *v.* Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897; Miller *v.* State, 36 Tex. Cr. 47, 35 S. W. 391.

32. Bibb *v.* Reid, 3 Ala. 88; State *v.* Dalton, 69 Miss. 611, 10 So. 578; Stevens *v.* Union R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465; Watts *v.* Dubois, (Tex. Civ. App. 1902) 66 S. W. 698. *Compare* Funk *v.* Ely, 45 Pa. St. 444.

A party has no right to any particular juror but only to an impartial jury, and if this right has been enjoyed he cannot complain. State *v.* Dalton, 69 Miss. 611, 10 So. 578.

33. State *v.* Anderson, 59 S. C. 229, 37 S. E. 820; Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678; Allen *v.* State, 7 Coldw. (Tenn.) 357.

34. See *supra*, VIII.

35. Thompson & M. Jur. § 257.

36. State *v.* Ostrander, 18 Iowa 435.

37. Grissom *v.* State, 4 Tex. App. 374.

38. State *v.* Potter, 18 Conn. 166; Grissom *v.* State, 4 Tex. App. 374; Rich *v.* State, 1 Tex. App. 206. But see Gerald *v.* State, 128 Ala. 6, 29 So. 614; State *v.* Squaires, 2 Nev. 226.

39. Smith *v.* Com., 50 S. W. 241, 20 Ky. L. Rep. 1848; Hall *v.* Com., 80 Va. 555.

40. Walker *v.* Kennison, 34 N. H. 257; Watson *v.* Walker, 33 N. H. 131.

41. Walker *v.* Kennison, 34 N. H. 257.

42. State *v.* Daniel, 31 La. Ann. 91; State *v.* Seaborne, 8 Rob. (La.) 518; State *v.* Nolan, 8 Rob. (La.) 513.

by the jurors themselves as their spokesman to announce their verdict,[43] and not an officer of the court or vested with any authority or control over the deliberations of the jury.[44]

3. Impaneling Persons Not Drawn or Selected. It has been held that the validity of a verdict is not affected by the fact that through an innocent mistake in the name or identity of a juror a different person is impaneled and serves upon the jury from the one drawn or selected therefor, if the person impaneled was a qualified juror;[45] but that if a person impersonates one of the regular jurors and takes his place upon the jury it is error to refuse to discharge him on discovering the substitution, although the jury have been sworn,[46] and that if not discovered until after the verdict it is ground for setting aside the verdict.[47]

4. Discharge of Accepted Jurors Before Completion of Jury. The court may, during the selection of the jury and before it is completed and sworn, excuse or discharge one of the jurors already accepted, on account of sickness,[48] or incompetency,[49] or misconduct after being accepted,[50] and may proceed to complete the jury without discharging other jurors already selected.[51] So also if one of the jurors accepted but not sworn absents himself and fails to appear after the others are selected, the court may proceed to complete the jury without him.[52]

5. Discharge or Withdrawal of Juror Pending Trial. Where, after the jury has been selected and sworn, but before the introduction of evidence, it becomes necessary to excuse or discharge a juror on account of sickness or incompetency, the court may, without discharging the entire jury, substitute another juror in the place of the one discharged and proceed with the trial,[53] it being discretionary with the court to make such substitution or to discharge the entire jury.[54] If the trial has been begun and evidence introduced the court cannot, in the absence of

43. State *v.* Seaborne, 8 Rob. (La.) 518.

44. State *v.* Nolan, 8 Rob. (La.) 513.

45. Com. *v.* Parsons, 139 Mass. 381, 31 N. E. 767; Hall *v.* Cadillac, 114 Mich. 99, 72 N. W. 33; Hill *v.* Yates, 12 East 229.

46. State *v.* Sternberg, 59 Mo. 410. See also Reg. *v.* Phillips, 11 Cox C. C. 142.

47. Dayton *v.* Church, 7 Abb. N. Cas. (N. Y.) 367; Rex *v.* Tremaine, 7 D. & R. 684, 16 E. C. L. 318; Norman *v.* Beamont, Willes 484. But see Hill *v.* Yates, 12 East 229.

48. Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247; State *v.* Johnson, 48 La. Ann. 437, 19 So. 476; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Com. *v.* Beucher, 10 Pa. Co. Ct. 3.

49. Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500; Taylor *v.* State, 11 Lea (Tenn.) 708.

50. Griffee *v.* State, 1 Lea (Tenn.) 41.

51. State *v.* Johnson, 48 La. Ann. 437, 19 So. 476; Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500; Taylor *v.* State, 11 Lea (Tenn.) 708. See also Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247.

In Texas on the trial of capital cases each juror is separately sworn when selected and the court cannot excuse or discharge a juror after he is sworn, although the jury is not completed, without discharging the other jurors selected and proceeding to form another jury (Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Sterling *v.* State, 15 Tex. App. 249; Ellison *v.* State, 12 Tex. App. 557); but on trials for lesser offenses the jurors are sworn as a body after a full jury is selected, and if a juror is excused before they are so sworn it is not necessary to discharge the other jurors selected (Rippey *v.* State, *supra*).

52. Byers *v.* State, 105 Ala. 31, 16 So. 716. *Compare* Powell *v.* State, 48 Ala. 154.

53. *Alabama.*— Yarbrough *v.* State, 105 Ala. 43, 16 So. 758.

California.— People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538; People *v.* Brady, 72 Cal. 490, 14 Pac. 202.

Louisiana.— State *v.* Moncla, 39 La. Ann. 868, 2 So. 814.

Nevada.— State *v.* Pritchard, 16 Nev. 101.

South Carolina.— Palmer *v.* Bogan, Cheves 52.

Tennessee.— Garner *v.* State, 5 Yerg. 160.

United States.— Silsby *v.* Foote, 14 How. 218, 14 L. ed. 394 [*affirming* 9 Fed. Cas. No. 4,916, 1 Blatchf. 445].

England.— Reg. *v.* Ashe, 1 Cox C. C. 150; Rex *v.* Scalbert, 2 Leach C. C. 706; Reg. *v.* Beere, 2 M. & Rob. 472.

See 31 Cent. Dig. tit. "Jury," § 635.

In the case of a struck jury if a juror is excused on account of sickness or discharged as incompetent after the jury is struck and sworn, the proper practice is to supply the place of such juror upon the list and strike the jury anew (Cobb *v.* State, 45 Ga. 11; Pannell *v.* State, 29 Ga. 681); and it is not necessary in such case to declare a mistrial (Pannell *v.* State, *supra*); but it is error instead of restriking the jury to compel the parties to either proceed with the incompetent juror or accept in his place one of the jurors previously struck (Cobb *v.* State, *supra*).

54. People *v.* Brady, 72 Cal. 490, 14 Pac.

statute, except by consent, discharge a juror without discharging the entire jury.[55] The statutes in some jurisdictions, however, authorize the substitution of a juror without discharging the entire jury during the trial after the introduction of evidence,[56] and the court has authority even in the absence of statute to do so if no objection is made;[57] but in any case where such substitution is made the trial must begin *de novo*,[58] and counsel have the right to reopen the case,[59] and to reëxamine the witnesses previously heard.[60] Under the statutes the court is not obliged to substitute a juror for the one discharged but may discharge the entire jury and continue the case.[61] It has also been held that a juror may be substituted without discharging the entire jury where a juror absents himself after being sworn and before the introduction of evidence,[62] but that if after the introduction of evidence the entire jury must be discharged.[63] On discharging the entire jury the court need not, however, continue the case but may impanel a new jury.[64]

6. Discharge of Entire Jury Pending Trial. Where a jury has been selected and impaneled the parties are entitled to have the case tried by that jury and cannot be deprived of this right in the absence of some sufficient reason for discharging the jury;[65] but the court may discharge the entire jury and impanel another in case of evident necessity.[66] After a jury has been discharged the same jury cannot be reimpaneled in the case without the consent of the parties.[67]

7. Record. It is not necessary that the names of the jurors impaneled should be set out in the record,[68] or that the record should recite that they were good and lawful men.[69]

B. Oath — 1. Necessity. In criminal cases it is absolutely essential to the validity of the proceedings that the jury should be sworn,[70] and that this fact

202; Silsby *v.* Foote, 14 How. (U. S.) 218, 14 L. ed. 394 [*affirming* 9 Fed. Cas. No. 4,916, 1 Blatchf. 445].

55. Prentice *v.* Chewning, 1 Rob. (La.) 71; State *v.* Vaughan, 23 Nev. 103, 43 Pac. 193; Noble *v.* Billings, 8 N. Brunsw. 85.

56. Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Dec. 321; Stone *v.* People, 3 Ill. 326; State *v.* Davis, 31 W. Va. 390, 7 S. E. 24. See also People *v.* Brady, 72 Cal. 490, 14 Pac. 202; Snowden *v.* State, 7 Baxt. (Tenn.) 482; State *v.* Curtis, 5 Humphr. (Tenn.) 601.

57. Lindsey *v.* Tioga Lumber Co., 108 La. 468, 32 So. 464, 92 Am. St. Rep. 384.

58. Grable *v.* State, 2 Greene (Iowa) 559; Follin *v.* Foucher, 8 La. 563; Rex *v.* Edwards, 3 Campb. 207, 13 Rev. Rep. 601, R. & R. 234, 4 Taunt. 309.

59. Follin *v.* Foucher, 8 La. 563.

60. Grable *v.* State, 2 Greene (Iowa) 559; Prentice *v.* Chewning, 1 Rob. (La.) 71; Reg. *v.* Ashe, 1 Cox C. C. 150; Rex *v.* Scalbert, 2 Leach C. C. 706; Reg. *v.* Beere, 2 M. & Rob. 472.

It is not sufficient to read the evidence which has already been taken to the substituted juror. Prentice *v.* Chewning, 1 Rob. (La.) 71.

61. State *v.* Curtis, 5 Humphr. (Tenn.) 601; Snowden *v.* State, 7 Baxt. (Tenn.) 482.

62. Rice *v.* Sims, 3 Hill (S. C.) 5. But see Pennell *v.* Percival, 13 Pa. St. 197; Com. *v.* Byers, 5 Lanc. L. Rev. (Pa.) 270.

If the absent juror returns immediately after another has been substituted and the jury sworn, it is not error to then reject the substituted juror and swear the one previously selected. Edwards *v.* State, (Tex. Cr. App. 1898) 44 S. W. 293.

If a struck juror fails to appear when his name is called after the jury is struck but before being sworn the proper practice is to supply his place upon the list and then to strike the jury anew. Clifton *v.* State, 53 Ga. 241.

63. State *v.* Scarborough, 2 S. C. 439. See also Grable *v.* State, 2 Greene (Iowa) 559; Reg. *v.* Ward, 10 Cox C. C. 573, 17 L. T. Rep. N. S. 220, 16 Wkly. Rep. 281.

64. Harris *v.* Doe, 4 Blackf. (Ind.) 369.

65. Swink *v.* Bohn, 6 Colo. App. 517, 41 Pac. 838, holding that it was error for the court without a sufficient reason to discharge the jury impaneled merely because the case was continued from one day to another and when the case was recalled to impanel a different jury.

66. State *v.* Costello, 11 La. Ann. 283, holding further that such a necessity may be either physical or moral, as where the ends of justice would otherwise be defeated. See also State *v.* Lawson, 36 La. Ann. 275.

Where a trial is postponed indefinitely without fixing any day for the trial or making any order with reference thereto, after which the court is adjourned and the jury allowed to separate, it is error for the court at the adjourned session to refuse to impanel another jury. State *v.* Williamson, 42 Conn. 261.

67. Williams *v.* People, 44 Ill. 478.

68. Clark *v.* Davis, 7 Tex. 556; O'Brien *v.* Reg., L. R. 26 Ir. 451.

69. State *v.* Kellison, 56 W. Va. 690, 47 S. E. 166.

70. Slaughter *v.* State, 100 Ga. 323, 28 S. E. 159; McHenry *v.* State, 14 Tex. App. 209; Dresch *v.* State, 14 Tex. App. 175.

should affirmatively appear from the record;[71] and while mere irregularities in the swearing or form of oath may be waived by failing to object until after verdict,[72] a total failure to swear the jury cannot in any manner or under any circumstance be waived, and a conviction by an unsworn jury is a mere nullity.[73] In civil cases, however, it has been held that a failure to swear the jury is merely an irregularity which is waived if no objection is made at the time, and that in the absence of such objection the omission will not affect the validity of the verdict.[74]

2. When Administered. In the absence of statute the time of swearing jurors in chief after they have been examined and opportunity given for challenge is within the discretion of the court.[75] At common law jurors were selected one at a time and each juror was sworn as soon as he had been examined and an opportunity given for challenges,[76] and in the absence of statute this method may be adopted,[77] notwithstanding the right of peremptory challenge is thereby foreclosed,[78] but the court is not obliged to do so.[79] In some jurisdictions it is the practice not to swear any juror until a full jury is selected,[80] and this is said to be the better practice in order to allow the longest possible time for peremptory challenges.[81] In civil cases the pleadings should all be in and the issue made up before the jury is sworn.[82] In some jurisdictions in civil cases the jury may be sworn for the term, week, or day instead of for each particular case;[83] but in criminal cases the jury must be sworn for each particular case,[84] and where by agreement several cases of the same character against the same defendant are tried by one jury they must be separately sworn in each case.[85] Where a jury is impaneled

71. See *infra*, XIV, B, 6.

72. See *supra*, XIII, E, 2, d.

73. Slaughter *v.* State, 100 Ga. 323, 28 S. E. 159.

74. Cahill *v.* Delaney, 68 N. Y. Suppl. 842; Jenkins *v.* Hudson, 16 Abb. N. Cas. (N. Y.) 137; Scott *v.* Moore, 41 Vt. 205, 48 Am. Dec. 581. But see Irwine *v.* Jones, 1 How. (Miss.) 497.

A failure to swear one of the jurors who did not arrive at the court-house until the rest of the panel had been sworn is immaterial if no objection was made. Hardenburgh *v.* Crary, 15 How. Pr. (N. Y.) 307.

75. Mathis *v.* State, 45 Fla. 46, 34 So. 287.

76. State *v.* Potter, 18 Conn. 166. See also Thompson & M. Jur. § 287.

77. *California.*— People *v.* Reynolds, 16 Cal. 128.

Idaho.— People *v.* Kuok Wah Choi, 2 Ida. (Hasb.) 90, 6 Pac. 112.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Nevada.— State *v.* Anderson, 4 Nev. 265.

New York.— People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 [*affirming* 38 Hun 490].

See 31 Cent. Dig. tit. "Jury," § 642.

78. State *v.* Anderson, 4 Nev. 265; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 [*affirming* 38 Hun 490]. *Contra*, Lamb *v.* State, 36 Wis. 424.

79. O'Connor *v.* State, 9 Fla. 215.

Even where there is an adjournment over night after some of the jury are selected, it is not necessary to swear them before placing them in charge of the officer (State *v.* Wiggins, 50 La. Ann. 330, 23 So. 334), but the court may as a matter of precaution properly do so (see Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448).

80. State *v.* Potter, 18 Conn. 166; State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; Lamb *v.* State, 36 Wis. 424.

In Pennsylvania the practice as to the time of administering the oath to jurors is said not to be uniform, it being the practice in some districts to swear each juror separately when called and unchallenged and in others not to swear any juror until all are selected. Alexander *v.* Com., 105 Pa. St. 1.

In Texas in capital cases each juror is sworn as selected but in other cases not until a full jury is selected. Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Ellison *v.* State, 12 Tex. App. 557.

81. Mathis *v.* State, 45 Fla. 46, 34 So. 287.

82. Everhart *v.* Hickman, 4 Bibb (Ky.) 341; Hopkins *v.* Preston, 2 A. K. Marsh. (Ky.) 64; Baltimore, etc., R. Co. *v.* Christie, 5 W. Va. 325; Thompson & M. Jur. § 286. But see Williams *v.* Miller, 10 Iowa 344 [*overruling* Cole *v.* Swan, 4 Greene (Iowa) 32], where the court said: "We do not understand that the jury was sworn to try the issue as already made between the parties, but to try the issue, whatever it may be, when the cause is finally submitted to them."

83. Waddell *v.* Magee, 53 Miss. 687; Pierce *v.* Tate, 27 Miss. 283; People *v.* Albany Ct. C. Pl., 6 Wend. (N. Y.) 548; Clark *v.* Davis, 7 Tex. 556. See also Barbour *v.* State, 37 Ark. 61; Taylor *v.* State, 121 Ga. 348, 37 S. E. 303.

84. Chiles *v.* State, 45 Ark. 143; Barbour *v.* State, 37 Ark. 61; Taylor *v.* State, 121 Ga. 348, 49 S. E. 303; Slaughter *v.* State, 100 Ga. 323, 28 S. E. 159; Barney *v.* People, 22 Ill. 160; Stephens *v.* State, 33 Tex. Cr. 101, 25 S. W. 286.

85. Kitter *v.* People, 25 Ill. 42.

for the trial of joint defendants but a separate trial is ordered, it is immaterial that they were sworn before the order was entered if sworn for the trial of one only.[86]

3. Mode of Administering. In the absence of statute a juror may be sworn by holding up his hand instead of kissing the book,[87] and it is provided in some jurisdictions that if he has conscientious scruples against taking an oath he may make a solemn affirmation in lieu thereof;[88] but a juror will not be permitted to make affirmation instead of being sworn merely as a matter of preference where the latter is not contrary to his religious convictions.[89] In the absence of statute the oath may be administered to the jury separately or collectively,[90] and a juror need not repeat the words "so help me God" after the words "so help you God" are pronounced by the clerk in administering the oath.[91]

4. Reswearing. The usual oath taken by jurors includes any issue between the parties submitted to them on the trial of the cause,[92] and jurors sworn to "try the matters at issue" may without being resworn return either a general or special verdict, or where a general verdict is rendered may be required to make special findings of fact.[93] It is not necessary that jurors should be resworn after an amendment of the pleadings which does not change the issues,[94] or which consists merely in the striking out or addition of the name of a party;[95] but it has been held that the jury should be resworn after an amendment which changes the issue,[96] or where after the jury has been sworn one of the jurors is discharged and another substituted.[97] If, after the trial is begun, it appears that the jury were not properly sworn, the court may have them resworn and proceed with the trial,[98] or may discharge them and impanel a new jury.[99] If a juror is under the impression that the oath administered to him was only for the purpose of his *voir dire* examination, he should be resworn in chief.[1]

5. Form and Sufficiency of Oath — a. In Civil Actions and Proceedings. The common-law form of oath in civil cases is "well and truly to try the issue between the parties, and a true verdict to give according to the evidence."[2] The term

86. People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186.

87. *In re* McIntire, 16 Fed. Cas. No. 8,824, 1 Cranch C. C. 157; Walker's Case, 1 Leach C. C. 561, 3 Rev. Rep. 717.

88. State *v.* Price, 11 N. J. L. 203.

89. *In re* Bryan, 4 Fed. Cas. No. 2,063, 1 Cranch C. C. 151; *In re* McIntire, 16 Fed. Cas. No. 8,824, 1 Cranch C. C. 157.

90. Com. *v.* Fritch, 9 Pa. Co. Ct. 164.

91. State *v.* Paylor, 89 N. C. 539.

92. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135 [*quoting* Thompson & M. Jur. § 292]. See also Arnold *v.* Arnold, 20 Iowa 273.

93. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

94. Rogers *v.* State, 99 Ind. 218; Hackney *v.* Williams, 46 Ind. 413; Smith *v.* Byers, 20 Ind. App. 51, 49 N. E. 177; Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204, 27 N. E. 448.

Amendment of indictment.—It is not necessary to reswear the jury where after they have been sworn the indictment is amended by correcting defendant's name (Clark *v.* State, 45 Tex. Cr. 456, 76 S. W. 573), or upon a prosecution for larceny by correcting the name of the owner of the stolen property (State *v.* Holmes, 23 La. Ann. 604).

95. Hinkle *v.* Davenport, 38 Iowa 355; Merrill *v.* St. Louis, 83 Mo. 244, 53 Am. Rep. 576 [*affirming* 12 Mo. App. 466]; Vann *v.* Downing, 20 Phila. (Pa.) 348.

It is the more regular practice to swear the jury where new parties are added (Maffitt *v.* Rynd, 69 Pa. St. 380); but it is not necessary, particularly where no request to have them resworn is made (Vann *v.* Downing, 20 Phila. (Pa.) 348).

96. Hoot *v.* Spade, 20 Ind. 326; Kerschbaugher *v.* Slusser, 12 Ind. 453. But see Hinkle *v.* Davenport, 38 Iowa 355; Clagett *v.* Easterday, 42 Md. 617.

If no objection was made or any request to have the jury resworn, a failure to do so is not error. Arnold *v.* Arnold, 20 Iowa 273.

97. Keech *v.* State, 15 Fla. 591; Jefferson *v.* State, 52 Miss. 767; Rex *v.* Edwards, 3 Campb. 207, 13 Rev. Rep. 601, R. & R. 234, 4 Taunt. 309. But see State *v.* Davis, 31 W. Va. 390, 7 S. E. 24.

98. Widmaier *v.* Mellert, 6 Phila. (Pa.) 515.

99. Leas *v.* Patterson, 38 Ind. 465.

1. Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

2. 3 Blackstone Comm. 365.

The oath is sufficient where the jury is sworn "well and truly to try the issue joined between the parties" (Pierce *v.* Tate, 27 Miss. 283), or "well and truly to try and the truth to speak upon the issues joined" (Burk *v.* Clark, 8 Fla. 9).

In an action of ejectment an oath "truly to try the issue joined" is the usual and doubtless sufficient form, but an oath "to speak the truth of and upon the premises"

"issue" is collective,[3] and in a case where there are several issues it is sufficient merely to swear the jury to try "the issue."[4] Where the form of oath is prescribed by statute it need not be literally followed but a substantial compliance therewith is sufficient.[5] In case of a default the proper practice is to swear the jury to assess plaintiff's damages instead of to try the issues,[6] but it has been held that the latter form of oath while irregular is not ground for reversal;[7] and where there is no default but plaintiff's right to recover is put in issue by the pleadings it is error merely to swear the jury to assess the damages instead of to try the issues between the parties.[8] In actions on penal bonds where breaches are assigned the proper practice is to swear the jury to inquire into the breaches and assess the damages as to the parties in default, and to try the issues and assess the damages as those who pleaded to the action,[9] but in an action of trover it is sufficient to swear the jury "to try the issue joined" without also swearing them to assess the damages.[10] Where questions of fact are submitted to a jury in a suit in equity they should not be sworn to try the matters in issue between the parties but to try the questions submitted to them.[11] Where a case is taken by appeal from a justice's court to a higher court of ordinary jurisdiction the jury should be sworn as in other civil cases in that court.[12]

b. In Criminal Prosecutions. The form of oath at common law in criminal cases was: "You shall well and truly try, and true deliverance make between our Sovereign Lord the King and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to evidence. So help you God,"[13] and in the absence of statute an oath substantially in this form is sufficient.[14] The

is equally comprehensive and not objectionable. Mercer Academy *v.* Rusk, 8 W. Va. 378.

3. Bate *v.* Lewis, 1 J. J. Marsh. (Ky.) 313.

4. Fowler *v.* Garret, 3 J. J. Marsh. (Ky.) 681; Bate *v.* Lewis, 1 J. J. Marsh. (Ky.) 313; Montgomery *v.* Tillotson, 1 How. (Miss.) 215; White *v.* Clay, 7 Leigh (Va.) 68. *Compare* Adams *v.* State, 11 Ark. 466.

5. Humphreys *v.* Humphreys, Morr. (Iowa) 359; Earle *v.* Vanburen, 7 N. J. L. 344; Clements *v.* Crawford, 42 Tex. 601; McConnell *v.* Ryan, 1 Tex. App. Civ. Cas. § 1020.

In a justice's court where the form prescribed is substantially, although not precisely, the same as the form used in courts of ordinary jurisdiction, it is sufficient if the latter oath is administered. Earle *v.* Vanburen, 7 N. J. L. 344. See also Carter *v.* Stanfield, 8 Ga. 49.

6. Colorado Springs *v.* Hewitt, 3 Colo. 275.

7. Colorado Springs *v.* Hewitt, 3 Colo. 275; Roberts *v.* Swearengen, Hard. (Ky.) 121. See also Southern Queen Mfg. Co. *v.* Morris, 105 Tenn. 654, 58 S. W. 651. But see High *v.* Peerce, 9 W. Va. 291.

8. Townsend *v.* Jeffries, 17 Ala. 276; Williams *v.* Norris, 2 Litt. (Ky.) 157; Bruce *v.* Mathers, 2 Bibb (Ky.) 294. See also Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428. But see Caldwell *v.* Irvine, 4 J. J. Marsh. (Ky.) 107, holding that if the jury understood that they were sworn to try the issues and did try them, the fact that they were sworn only to assess the damages would not affect the verdict.

9. State *v.* Gibson, 21 Ark. 140. See also McCoy *v.* State, 22 Ark. 308.

Oath sufficient.— Swearing the jury in actions on penal bonds to "try the issues joined" is equivalent to swearing them to inquire into the truth of the breaches (McLain *v.* Taylor, 9 Ark. 358); and conversely swearing them to try "the truth of the breaches" is equivalent to swearing them to try the issues (McCoy *v.* State, 22 Ark. 308); but it is essential that the oath should also in either case embrace the assessment of damages (McLain *v.* Taylor, *supra*).

10. Vaden *v.* Ellis, 18 Ark. 355.

11. Pence *v.* Garrison, 93 Ind. 345. But see Hornbrook *v.* Powell, 146 Ind. 39, 44 N. E. 802, holding that while a failure to swear the jury in this manner is improper it is not a material error.

12. Hendrick *v.* Cannon, 5 Tex. 248; Allen *v.* Ormsby, 1 Tyler (Vt.) 345.

13. Patterson *v.* State, 7 Ark. 59, 44 Am. Dec. 530; Garner *v.* State, 28 Fla. 113, 149, 9 So. 835, 29 Am. St. Rep. 232; 2 Hale P. C. c. 41, p. 293; Proffatt Jury Tr. § 199. See also 4 Blackstone Comm. 355.

14. O'Connor *v.* State, 9 Fla. 215; State *v.* Johnson, 37 La. Ann. 421; Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777 [*distinguishing* State *v.* Hargrove, 13 Lea 178].

The usual form of oath is said to be: "You shall well and truly try and true deliverance made between the Commonwealth and T. T., the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to the evidence." O'Connor *v.* State, 9 Fla. 215, 230 [*quoting* Robinson Forms].

An omission of the words "and true deliverance make" from the common-law form is not material. Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

juror must be sworn to render a verdict according to the evidence,[15] but not according to the law and the evidence,[16] even where the jury are considered as the judges of the law as well as of the facts.[17] In many jurisdictions the form of oath is prescribed by statute,[18] and it is fatal to the validity of a conviction if a substantially different form of oath is administered,[19] or if there is any material omission or variation from a form prescribed;[20] but an absolutely literal compliance with the statute is not necessary and if the statutory form is given in substance a slight variation will not vitiate the proceedings.[21]

6. RECORD. In criminal cases the record must affirmatively show that the jury was sworn,[22] and that defendant was present in court at the time the oath was

15. Cary *v.* State, 76 Ala. 78; Allen *v.* State, 71 Ala. 5; Johnson *v.* State, 47 Ala. 9. But see Edwards *v.* State, 49 Ala. 334; McGuire *v.* State, 37 Ala. 161.

16. O'Connor *v.* State, 9 Fla. 215; State *v.* Logan, 37 La. Ann. 778; State *v.* Johnson, 37 La. Ann. 421.

But it is not error to swear the jury to try the case according to the evidence "and the law as given by the court"; the words being merely a superfluous addition requiring only what the jury were already required to do. Hartigan *v.* Territory, 1 Wash. Terr. 447. See also State *v.* Tommy, 19 Wash. 270, 53 Pac. 157.

17. Palmore *v.* State, 29 Ark. 248; State *v.* Johnson, 37 La. Ann. 421; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

In Arkansas it was formerly held that as the jury were judges of both the law and the facts they must be sworn to try the case according to the law and the evidence (Burrow *v.* State, 12 Ark. 65; Sandford *v.* State, 11 Ark. 328; Patterson *v.* State, 7 Ark. 59, 44 Am. Dec. 530); but the oath now prescribed by statute does not contain this clause and is held not to be unconstitutional on that account (Palmore *v.* State, 29 Ark. 248).

18. *Alabama.*— Cary *v.* State, 76 Ala. 78.
Arkansas.— Palmore *v.* State, 29 Ark. 248.
Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.
Georgia.— Slaughter *v.* State, 100 Ga. 323, 28 S. E. 159.
Iowa.— Harriman *v.* State, 2 Greene 270.
Kentucky.— Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.
Minnesota.— Maher *v.* State, 3 Minn. 444.
Nevada.— State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.
New Hampshire.— State *v.* Rollins, 22 N. H. 528.
Texas.— Morgan *v.* State, 42 Tex. 224; Sutton *v.* State, 41 Tex. 513.
Washington.— Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.
See 31 Cent. Dig. tit. "Jury," § 647.

In Minnesota different forms are prescribed for capital cases and for cases not capital. Maher *v.* State, 3 Minn. 444.

Name of defendant.— Under N. Y. Code Civ. Proc. § 277, providing that "if defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment," if defendant is indicted under many aliases and his true name is afterward discovered it may be used in swearing the jury, but it is not error for the court to allow all the names appearing in the indictment to be repeated. People *v.* Everhardt, 104 N. Y. 591, 593, 11 N. E. 62 [*affirming* 5 N. Y. Cr. 91].

A change in the law taking effect during a trial does not apply if the jury has been sworn before the law went into force. People *v.* Chalmers, 5 Utah 201, 14 Pac. 131.

19. Dixon *v.* State, 4 Greene (Iowa) 381; Harriman *v.* State, 2 Greene (Iowa) 270; Warren *v.* State, 1 Greene (Iowa) 106; Maher *v.* State, 3 Minn. 444; State *v.* Rollins, 22 N. H. 528; Morgan *v.* State, 42 Tex. 224; Bawcom *v.* State, 41 Tex. 189; Bray *v.* State, 41 Tex. 560; Sutton *v.* State, 41 Tex. 513; Tharp *v.* State, 3 Tex. App. 90.

If the oath provided for civil cases is administered in a criminal prosecution it is a fatal irregularity. State *v.* Rollins, 22 N. H. 528; Stephens *v.* State, 33 Tex. Cr. 101, 25 S. W. 286.

20. Cary *v.* State, 76 Ala. 78; Storey *v.* State, 71 Ala. 329; Allen *v.* State, 71 Ala. 5; Perkins *v.* State, 60 Ala. 7; Lewis *v.* State, 51 Ala. 1; Johnson *v.* State, 47 Ala. 9.

It is a material irregularity if the oath omits the phrase "according to the evidence" (Allen *v.* State, 71 Ala. 5. But see State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961), or "so help you God" (Johnson *v.* State, 47 Ala. 9), or substitutes the phrase "between the people of the State," etc., instead of the phrase "between the State," etc. (Commander *v.* State, 60 Ala. 1; Lewis *v.* State, 51 Ala. 1).

21. *Alabama.*— Hendrix *v.* State, 50 Ala. 148; Walker *v.* State, 49 Ala. 369.
Kentucky.— Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.
Nevada.— State *v.* Angelo, 18 Nev. 425, 4 Pac. 1080.
North Carolina.— See State *v.* Owen, 72 N. C. 605.
Texas.— Faith *v.* State, 32 Tex. 373.
Washington.— Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.
See 31 Cent. Dig. tit. "Jury," § 647.

22. Chiles *v.* State, 45 Ark. 143; Barbour *v.* State, 37 Ark. 61; Carnett *v.* State, (Ark. 1888) 6 S. W. 513; State *v.* Baldwin,

administered.[23] It has also been held that the record must show that the jury was sworn in civil cases,[24] except where the jury is sworn for the term or week instead of for each particular case.[25] But the record need not set out the form of oath administered,[26] and it is the better practice that it should not attempt to do so,[27] for it will always be presumed that the jury was properly sworn where the record merely states that the jury was sworn,[28] or duly sworn,[29] or sworn according to law,[30] or even where there is some additional statement as to the oath administered, provided it appears that such statement does not purport to set out the form of oath;[31] but no presumption can be indulged to contradict the express averments of the record,[32] and if it purports to set out the oath it must show that the proper form of oath was administered or the judgment cannot be sustained.[33] Where some of the jury were affirmed instead of being sworn, it need not appear of record that they had conscientious scruples against taking an oath.[34]

JURI NON EST CONSONUM QUOD ALIQUIS ACCESSORIUS IN CURIA REGIS CONVINCATUR ANTEQUAM ALIQUIS DE FACTO FUERIT ATTINCTUS. A maxim meaning "It is not consonant to justice that any accessary should be convicted in the king's court before any one has been attainted of the fact."[1]

36 Kan. 1, 12 Pac. 318; Nels *v.* State, 2 Tex. 280; Biles *v.* State, (Tex. App. 1887) 4 S. W. 902; McHenry *v.* State, 14 Tex. App. 209; Dresch *v.* State, 14 Tex. App. 175.

23. Younger *v.* State, 2 W. Va. 579, 98 Am. Dec. 791.

24. Irwin *v.* Jones, 1 How. (Miss.) 497. See also Judah *v.* McNamee, 3 Blackf. (Ind.) 269. *Contra*, Cahill *v.* Delaney, 68 N. Y. Suppl. 842.

25. Waddell *v.* Magee, 53 Miss. 687; Pierce *v.* Tate, 27 Miss. 283; Clark *v.* Davis, 7 Tex. 556. See also Freiberg *v.* Lowe, 61 Tex. 436; Drake *v.* Brander, 8 Tex. 351.

In civil cases where the jury is sworn for the term or week the oath is not a part of the proceedings of any particular case and need not be referred to in the record as it will be presumed in such cases that the jury was sworn. Waddell *v.* Magee, 53 Miss. 687.

26. Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Graham *v.* Busby, 34 Miss. 272; Dyson *v.* State, 26 Miss. 362.

In the case of a sheriff's jury on an inquest of damages it is proper that the form of oath administered should be set out by the sheriff in his return. Walters *v.* Houck, 7 Iowa 72.

27. Johnson *v.* State, 74 Ala. 537; Storey *v.* State, 71 Ala. 329; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Edmondson *v.* State, 41 Tex. 496; Leer *v.* State, 2 Tex. App. 495; Wells *v.* Smith, 49 W. Va. 78, 38 S. E. 547.

28. Pruitt *v.* State, (Ark. 1889) 11 S. W. 822; Mann *v.* Clifton, 3 Blackf. (Ind.) 304; Judah *v.* McNamee, 3 Blackf. (Ind.) 269; Edwards *v.* State, 47 Miss. 581.

But if the verdict is signed by a man whose name does not appear in the record as one of the jurors and the record does not state that he was sworn, the verdict will be set aside, although the record does state that the jury was sworn. Younger *v.* State, 2 W. Va. 579, 48 Am. Dec. 791. But see Ryan *v.* Riddle, 109 Mo. App. 115, 82 S. W. 1117.

29. McRae *v.* Tillman, 6 Ala. 486; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Russell *v.* State, 10 Tex. 288.

30. Wells *v.* State, 49 W. Va. 78, 16 S. W. 547; State *v.* Ice, 34 W. Va. 244, 12 S. E. 695.

31. *Florida.*— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Iowa.— See State *v.* Ostrander, 18 Iowa 435.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Mississippi.— Dyson *v.* State, 26 Miss. 362. See also Welborn *v.* Spears, 32 Miss. 138; Windham *v.* Williams, 27 Miss. 313.

Texas.— Russell *v.* State, 10 Tex. 288.

Virginia.— See Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

West Virginia.— State *v.* Kellison, 56 W. Va. 690, 47 S. E. 166; Wells *v.* Smith, 49 W. Va. 78, 38 S. E. 547; State *v.* Ice, 34 W. Va. 244, 12 S. E. 695.

United States.— Baldwin *v.* State, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640.

See 31 Cent. Dig. tit. "Jury," § 648.

32. Townsend *v.* Jeffries, 17 Ala. 276; Bawcom *v.* State, 41 Tex. 189.

33. Johnson *v.* State, 74 Ala. 537; Peterson *v.* State, 74 Ala. 34; Storey *v.* State, 71 Ala. 329; Allen *v.* State, 71 Ala. 5; Roberts *v.* Smith, Morr. (Iowa) 417; Graham *v.* Busby, 34 Miss. 272; Edmondson *v.* State, 41 Tex. 496; Bawcom *v.* State, 41 Tex. 189; Leer *v.* State, 2 Tex. App. 495.

Although probably a clerical error, if the record shows that an improper form of oath was administered the error cannot be disregarded. Roberts *v.* Smith, Morr. (Iowa) 417.

34. Clark *v.* Collins, 15 N. J. L. 473; Anonymous, 3 N. J. L. 930.

1. Black L. Dict. [*citing* 2 Inst. 183].

JURIS AFFECTUS IN EXECUTIONE CONSISTIT. A maxim meaning "The effect of the law consists in the execution." [2]

JURI SANGUINIS NUNQUAM PRÆSCRIBITUR. A maxim meaning "No prescription runs against a right by blood." [3]

JURISDICTIO EST POTESTAS DE PUBLICO INTRODUCTA, CUM NECESSITATE JURIS DICENDI. A maxim meaning "Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice." [4]

JURISDICTION. The authority or power which a man hath to do justice in causes of complaint brought before him; [5] the power of hearing and determining causes and of doing justice in matters of complaint. [6] (Jurisdiction: In General, see Courts. Amount Necessary to Confer, see Appeal and Error; Courts; Justices of the Peace; Removal of Causes. Appellate, see Appeal and Error; Criminal Law. Bringing Person Illegally Within, see Extradition (International); Extradition (Interstate); Process. Clause, see Equity. Compelling Court to Assume, see Mandamus. Concurrent and Conflicting, see Courts; Criminal Law; Judgments. Criminal, see Criminal Law. Dependent Upon the Venue, see Criminal Law; Venue. Evidence of, see Evidence. Exclusive, see Courts; Criminal Law; Judgments. Exercise of Beyond Territorial Limits, see Courts; Criminal Law; False Imprisonment; International Law. Extraterritorial, see Courts; International Law. In Equity, see Equity, and the Equity Titles. Necessity For Appearance in Record, see Appeal and Error; Courts; Criminal Law; Judgments; Justices of the Peace. Of Estate of — Cestui Que Trust, see Trusts; Decedent, see Descent and Distribution; Executors and Administrators; Incompetent, see Drunkards; Guardian and Ward; Husband and Wife; Infants; Insane Persons; Spendthrifts; Insolvent, see Assignments For Benefit of Creditors; Bankruptcy; Insolvency. Of Particular Action or Proceeding, see the title where such Action or Proceeding is treated such as Death, Divorce, Garnishment, Mechanics' Liens, and the like. Of Particular Courts — Generally, see Courts; Admiralty, see Admiralty; Chancery, see Equity; Consular, see Ambassadors and Consuls; Courts-Martial, see Army and Navy; Criminal, see Criminal Law; Federal, see Courts; Impeachment, see Officers; Inquiry, see Army and Navy; Justices of the Peace, see Justices of the Peace; Municipal, see Municipal Corporations; Prize, see Admiralty. Plea of Want of, see Pleading. Presumption of, see Appeal and Error; Courts; Criminal Law; Judgments; Justices of the Peace. Probate, see Courts; Descent and Distribution; Executors and Administrators; Guardian and Ward; Wills. Territorial, see Courts; International Law. To Review Proceedings, see Appeal and Error; Certiorari; Criminal Law; Habeas Corpus; New Trial; Review. Want of Affecting — Contempt, see Contempt; Injunctions; Dismissal, see Dismissal and Nonsuit; False Imprisonment, see False Imprisonment; Habeas Corpus, see Habeas Corpus; Judgment, see Judgments; Nonsuit, see Dismissal and Nonsuit; Prohibition, see Prohibition.)

JURISDICTIONAL FACTS. Facts, the existence of which is necessary to the validity of the proceeding, and without which the act of the court is a mere nullity. [7]

JURIS IGNORANTIA EST CUM JUS NOSTRUM IGNORAMUS. A maxim meaning "It is ignorance of the law when we do not know our own rights." [8]

JURIS PRÆCEPTA SUNT HÆC: HONESTE VIVERE; ALTERUM NON LÆDERE; SUUM CUIQUE TRIBUERE. A maxim meaning "These are the precepts of

2. Black L. Dict. [*citing* Coke Litt. 289*b*].
3. Traynor Leg. Max.
4. Bouvier L. Dict.
Applied in Cox *v.* Gray, 1 Bulstr. 207, 211; Marshalsea's Case, 10 Coke 68*b*, 73*a*.
5. Jacob L. Dict. [*quoted* in State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424].
6. Burrill L. Dict. [*quoted* in State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424].
Other definitions see 11 Cyc. 659.
7. Noble *v.* Union River Logging R. Co., 147 U. S. 165, 173, 13 S. Ct. 271, 37 L. ed. 123.
8. Black L. Dict.
Applied in Haven *v.* Foster, 9 Pick. (Mass.) 112, 130, 19 Am. Dec. 353.

the law: To live honorably; to hurt nobody; to render to every one his due."[9]

JURISPRUDENTIA EST DIVINARUM ATQUE HUMANARUM RERUM NOTITIA, JUSTI ATQUE INJUSTI SCIENTIA. A maxim meaning "'Jurisprudence' is the knowledge of things divine and human, the science of what is right and what is wrong."[10]

JURISPRUDENTIA LEGIS COMMUNIS ANGLIÆ EST SCIENTIA SOCIALIS ET COPIOSA. A maxim meaning "The jurisprudence of the common law of England is a science social and comprehensive."[11]

JURIS QUIDEM IGNORANTIAM CUIQUE NOCERE, FACTI VERUM IGNORANTIAM NON NOCERE. A maxim meaning "Ignorance of fact prejudices no one, ignorance of law does."[12]

JURIS UTRUM. In English law a writ which lay for the incumbent of a benefice, to recover the lands or tenements belonging to the church, which were aliened by his predecessor.[13]

JUROR.[14] A JURYMAN,[15] *q. v.*; a member of a jury;[16] one of those persons who are sworn on a jury;[17] a man who is sworn or affirmed to serve on a jury;[18] one of twelve men sworn to try a case according to the evidence;[19] the legitimate tryers of questions of fact in criminal as well as civil cases;[20] any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled or not.[21] (See, generally, GRAND JURIES; JURIES.)

JURY-BOX. See JURIES.

JURY COMMISSIONER. See JURIES.

JURY-LIST. See JURIES.

JURYMAN. A JUROR, *q. v.*; one who is impaneled on a jury.[22] (See, generally, GRAND JURIES; JURIES.)

JURY OF THE VICINAGE. See JURIES.

JURY WHEEL. See JURIES.

JUS. A term with two meanings: (1) Law considered in the abstract,[23] or law taken as a system, an aggregate, a whole,[24] or some one particular system or body of particular laws;[25] and (2) a right in general or in the abstract.[26] It is said

9. Black L. Dict. [*citing* 1 Blackstone Comm. 40; Inst. 1, 1, 3].

10. Black L. Dict. [*citing* Dig. 1, 1, 10, 2; Inst. 1, 1, 1].

11. Black L. Dict.

12. Bouvier L. Dict. [*citing* Dig. 22, 6, 9].

13. Burrill L. Dict. [*citing* 3 Blackstone Comm. 252; Termes de la Ley]. See also Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 328, 3 L. ed. 735.

14. The word is derived from the Latin "juro," to swear. State *v.* Voorhies, 12 Wash. 53, 55, 40 Pac. 620.

15. Burrill L. Dict. [*quoted* in Marsh *v.* U. S., 88 Fed. 879, 882].

"The words 'juryman' and 'juror' include a grand juror as well as petit juror." Clawson *v.* U. S., 114 U. S. 477, 483, 5 S. Ct. 949, 29 L. ed. 179.

16. People *v.* Hopt, 3 Utah 396, 401, 4 Pac. 250 (distinguishing a juror from an "officer"); Burrill Dict. [*quoted* in Marsh *v.* U. S., 88 Fed. 879, 882].

17. Burrill L. Dict. [*quoted* in Marsh *v.* U. S., 88 Fed. 879, 882]; Tomlin L. Dict. [*quoted* in Marsh *v.* U. S., 88 Fed. 879, 882].

18. Bouvier L. Dict. [*quoted* in State *v.* McCrystol, 43 La. Ann. 907, 913, 9 So. 922; State *v.* Voorhies, 12 Wash. 53, 55, 40 Pac. 620; Marsh *v.* U. S., 106 Fed. 474, 481, 45 C. C. A. 436 [*reversing* 88 Fed. 879, 882].

19. Fife *v.* Com., 29 Pa. St. 429, 439; State *v.* Potts, 20 Nev. 389, 397, 22 Pac. 754.

20. Leake *v.* State, 10 Humphr. (Tenn.) 144, 145.

21. Bouvier L. Dict. [*quoted* in Jackson *v.* Baehr, 138 Cal. 266, 268, 71 Pac. 167; U. S. *v.* Marsh, 106 Fed. 474, 481, 45 C. C. A. 436].

22. Black L. Dict.

23. Black L. Dict.

24. Black L. Dict.

In the maxim "ignorantia juris non excusat" the word is used to denote the general law or ordinary law of the land, and not a private right. Churchill *v.* Bradley, 58 Vt. 403, 407, 5 Atl. 189, 56 Am. Rep. 563 [*citing* 1 Benjamin Sales, § 611]. See also Freichnecht *v.* Meyer, 39 N. J. Eq. 551, 561 [*quoting* Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049]; Com. *v.* Lancaster County Live Stock, etc., Ins. Co., 6 Pa. Dist. 371, 374.

25. Black L. Dict.

As used in the phrases: *Jus civile*, — the civil law. *Jus gentium*,— the law of nations.

26. Burrill L. Dict.

As used in the phrases: *Jus accrescendi*, — the right of survivorship. Burrill L. Dict. See also JOINT TENANCY. *Jus acquæductus*, — the right of drainage. Nellis *v.* Munson, 13 N. Y. St. 825, 827. *Jus compascum*,— the right of common pasture. 8 Cyc. 401 note

that the word "just" is derived from the Latin "*justus*" which is from the Latin "*jus*," which means a right, and, more technically, a legal right, a law.[27]

JUS ACCRESCENDI INTER MERCATORES, PRO BENEFICIO COMMERCII, LOCUM NON HABET. A maxim meaning "The right of survivorship has no place between merchants, for the benefit of commerce." [28]

JUS ACCRESCENDI PRÆFERTUR ONERIBUS. A maxim meaning "The right of survivorship is preferred to incumbrances." [29]

JUS ACCRESCENDI PRÆFERTUR ULTIMÆ VOLUNTATI. A maxim meaning "The right of survivorship is preferred to the last will." [30]

JUS CIVILE EST QUOD SIBI POPULUS CONSTITUIT. A maxim meaning "The civil law is what a people establishes for itself." [31]

JUS CONSTITUI OPORTET IN HIS QUÆ UT PLURIMUM ACCIDUNT NON QUÆ EX INOPINATO. A maxim meaning "Laws ought to be made with a view to

58. *Jus disponendi*,— the right of disposing. Burrill L. Dict. See also Muller *v.* Boggs, 25 Cal. 175, 183; Peters *v.* Van Lear, 4 Gill (Md.) 249, 255; Farmers,' etc., Nat. Bank *v.* Logan, 74 N. Y. 568, 577; Hobart *v.* Littlefield, 13 R. I. 341, 346; Reed *v.* Winchester Union Bank, 29 Gratt. (Va.) 719, 726 [*quoted* in White *v.* Owen, 30 Gratt. (Va.) 43, 53]; Hughes *v.* Hamilton, 19 W. Va. 366, 389; Mostyn *v.* Lancaster, 23 Ch. D. 583, 619, 52 L. J. Ch. 848, 48 L. T. Rep. 715, 31 Wkly. Rep. 686; 16 Cyc. 1017; 14 Cyc. 1188; 13 Cyc. 799; 10 Cyc. 359, 577. *Jus patronatus*,— the right of patronage, the right of presenting a clerk to a benefice. Kinney L. Dict. See also Atty.-Gen. *v.* Ewelme Hospital, 17 Beav. 366, 384, 22 L. J. Ch. 846, 1 Wkly. Rep. 523, 51 Eng. Reprint 1075. *Jus possessionis*,— the right of possession. Burrill L. Dict. *Jus tertii*,— the right of a third party, the right or interest of a third person. Burrill L. Dict. See also Pulliam *v.* Burlingame, 81 Mo. 111, 119, 51 Am. Rep. 229; The Ann C. Pratt, 1 Fed. Cas. No. 409, 1 Curt. 340, 345.

Jus ad rem is a valid claim on one or more persons to do something, by force of which a *jus in re* will be required. The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404. See also 17 Cyc. 1050.

Jus alluvions is an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased for the most by insensible degrees. Hale De Jure Maris 25 [*quoted* in Mulry *v.* Norton, 29 Hun (N. Y.) 660, 663].

Jus eminens, in the civil law, is the supreme power of the state over its members and whatever belongs to them. Gilmer *v.* Lime Point, 18 Cal. 229, 250 [*citing* Wheaton Elem. Int. L. pt. 1, c. 2].

Jus in personam is a right against a person; a right which gives its possessor a power to oblige another person to give or procure, to do or not to do, something. Black L. Dict.

Jus in re is a right, or property in a thing, valid as against all mankind. The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404. See also Munsell *v.* Lewis, 4 Hill (N. Y.) 635, 640; Rex *v.* Dilliston, 1 Show. 83, 87; 17 Cyc. 1050. Thus the assignment of bills of lading of goods afloat transfers the *jus ad rem*, but not necessarily the *jus in rem*. The Carlos F. Roses, 177 U. S. 655, 666, 20 S. Ct. 803, 44 L. ed. 929; Gilman *v.* Brown, 10 Fed. Cas. No. 5,441, 1 Mason 191; The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404. A lien is not a *jus in re*. Gilman *v.* Brown, 10 Fed. Cas. No. 5,441, 1 Mason 191.

Jus postliminii, in international law, is a right by virtue of which things taken by an enemy are to be restored to their former state or owners, when a country comes again under the power of the nation to which it formerly belonged. Wade *v.* Barnwell, 2 Bays (S. C.) 229, 231. See also U. S. *v.* Rice, 4 Wheat. (U. S.) 246, 255, 4 L. ed. 562; 1 Kent Comm. 108.

Jus precarium is an indefinite or uncertain right, the existence of which can only be determined when put to the test; a precarious right. Meyer *v.* American Star Order, 2 N. Y. Suppl. 492, 493.

"Jus publicum" and "jus privatum." — Where several states hold and own lands within their respective boundaries, "they have in them a double right, a *jus publicum* and a *jus privatum*. The former pertains to their political power — their sovereign dominion, and cannot be irevocably alienated or materially impaired. The latter is proprietary and the subject of private ownership, but it is alienable only in strict subordination to the former." Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 183, 50 Pac. 277. See also Miller *v.* Mendenhall, 43 Minn. 95, 101, 44 N. W. 1141, 19 Am. St. Rep. 219, 8 L. R. A. 89; Arnold *v.* Mundy, 6 N. J. L. 1, 5, 10 Am. Dec. 356; Palmer *v.* Mulligan, 3 Cai. (N. Y.) 307, 319, 2 Am. Dec. 270; James River, etc., Co. *v.* Turner, 9 Leigh (Va.) 313, 339; Martin *v.* Waddell, 16 Pet. (U. S.) 367, 422, 10 L. ed. 997.

27. Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1017.

28. Black L. Dict. [*citing* Broom Leg. Max. 455; Coke Litt. 182*a*; 2 Story Eq. Jur. § 1207].

Applied in Hargadine *v.* Gibbons, 114 Mo. 561, 566, 21 S. W. 726.

29. Black L. Dict. [*citing* Coke Litt. 185*a*].

Applied in Wilson *v.* Stewart, 3 Phila. (Pa.) 51, 52.

30. Black L. Dict. [*citing* Coke Litt. 185*b*].

31. Black L. Dict. [*citing* Inst. 1, 2, 1].

those cases which happen most frequently, and not to those which are of rare or accidental occurrence."[32]

JUS DESCENDIT, ET NON TERRA. A maxim meaning "A right descends, not the land."[33]

JUS DICERE. To pronounce the judgment, to give the legal decision.[34]

JUS DICERE, ET NON JUS DARE. A maxim meaning "To declare the law, not to make it."[35]

JUS EST ARS BONI ET ÆQUI. A maxim meaning "Law is the science of what is good and just."[36]

JUS EST NORMA RECTI; ET QUICQUID EST CONTRA NORMAM RECTI EST INJURIA. A maxim meaning "Law is a rule of right; and whatever is contrary to the rule of right is an injury."[37]

JUS ET FRAUS NUNQUAM COHABITANT. A maxim meaning "Right and fraud never dwell together."[38]

JUS EX INJURIA NON ORITUR. A maxim meaning "A right does (or can) not arise out of a wrong."[39]

JUS IN RE INHÆRIT OSSIBUS USUFRUCTUARII. A maxim meaning "A right in the thing cleaves to the person of the usufructuary."[40]

JUS JURANDI FORMA VERBIS DIFFERT, RECONVENIT; HUNC ENIM SENSUM HABERE DEBET: UT DEUS INVOCETUR. A maxim meaning "The form of taking an oath differs in language, agrees in meaning; for it ought to have this sense: that the Deity is invoked."[41]

JUSJURANDUM INTER ALIOS FACTUM NEC NOCERE NEC PRODESSE DEBET. A maxim meaning "An oath made among others should neither harm nor profit."[42]

JUS NATURÆ PROPRIE EST DICTAMEN RECTÆ RATIONIS, QUO SCIMUS QUID TURPE, QUID HONESTUM, QUID FACIENDUM, QUID FUGIENDUM. A maxim meaning "The law of nature is properly the dictate of right reason, by which we know what is dishonorable and what is honorable; what should be done, and what should be avoided."[43]

JUS NATURALE EST QUOD APUD HOMINES EANDEM HABET POTENTIAM. A maxim meaning "Natural right is that which has the same force among all mankind."[44]

JUS NEC INFLECTI GRATIA, NEC FRANGI POTENTIA, NEC ADULTERARI PECUNIA POTEST; QUOD SI NON MODO OPPRESSUM, SED DESERTUM AUT NEGLIGENTIA ASSERVATUM FUERIT, NIHIL EST QUOD QUISQUAM SE HABERE CERTUM, AUT A PATRE ACCEPTURUM, AUT LIBERIS ESSE RELICTURUM, ARBITRETUR. A maxim meaning "Favor ought not to be able to bend justice, power to break it, nor money to corrupt it; for not only if it be overborne, but if it be abandoned or negligently observed, no one can think that he holds anything securely, or that he will inherit anything from his father, or be able to leave anything to his children."[45]

32. Black L. Dict. [*citing* Broom Leg. Max. 43; Dig. 1, 3, 3].

33. Black L. Dict. [*citing* Coke Litt. 345].

34. Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072. See also 11 Cyc. 659 note 32.

35. Bouvier L. Dict. [*citing* Broom Leg. Max. 140].

Applied in Sheldon *v.* Steere, 5 Conn. 181, 184; Fox *v.* Abel, 2 Conn. 541, 558; Avery *v.* Stewart, 2 Conn. 69, 80, 7 Am. Dec. 240; Tyson *v.* Mattair, 8 Fla. 107, 125; Verney *v.* Verney, 2 Eden 26, 29, 28 Eng. Reprint 805.

36. Black L. Dict. [*citing* Bracton 2*b*; Dig. 1, 1, 1, 1].

37. Black L. Dict.

Applied in Cable *v.* Rogers, 3 Bulstr. 311, 313.

38. Tayler L. Gloss.

39. Black L. Dict. [*citing* Broom Leg. Max. 738 note].

Applied in Barnes *v.* Starr, 64 Conn. 136, 155, 28 Atl. 980. See also Bird *v.* Holbrook, 4 Bing. 628, 639, 6 L. J. C. P. O. S. 146, 1 M. & P. 607, 29 Rev. Rep. 657, 13 E. C. L. 667.

40. Black L. Dict.

41. Black L. Dict. [*citing* Grotius De Jur. B., 1, 2, c. 13, § 10].

42. Peloubet Leg. Max.

43. Tayler L. Gloss.

44. Black L. Dict.

45. Cyclopedic L. Dict. [*citing* Cicero].

JUS NON HABENTI TUTE NON PARETUR. A maxim meaning "One who has no right cannot be safely obeyed." [46]

JUS NON PATITUR UT IDEM BIS SOLVATUR. A maxim meaning "Law does not suffer that the same thing be twice paid." [47]

JUS NON SCRIPTUM TACITO ET ILLITERATO HOMINUM CONSENSU, ET MORIBUS EXPRESSUM. A maxim meaning "The unwritten law declared by the tacit and unlearned consent and customs of the people." [48]

JUS PUBLICUM ET PRIVATUM QUOD EX NATURALIBUS PRÆCEPTIS AUT GENTIUM AUT CIVILIBUS EST COLLECTUM; ET QUOD IN JURE SCRIPTO JUS APPELLATUR, ID IN LEGE ANGLIÆ RECTUM ESSE DICITUR. A maxim meaning "Public and private law is that which is collected from natural principles, either of nations or in states; and that which in the civil law is called '*jus*,' in the law of England is said to be 'right.'" [49]

JUS PUBLICUM PRIVATORUM PACTIS MUTARI NON POTEST. A maxim meaning "A public right cannot be altered by the agreements of private persons." [50]

JUS QUO UNIVERSITATES UTUNTUR EST IDEM QUOD HABENT PRIVATI. A maxim meaning "The law which governs corporations is the same which governs individuals." [51]

JUS RESPICIT ÆQUITATEM. A maxim meaning "Law regards equity." [52]

JUS SANGUINIS NUNQUAM PRÆSCRIBITUR. A maxim meaning "A right by blood never prescribes." [53]

JUS SUMMUM SÆPE SUMMA EST MALITIA. A maxim meaning "Strict law is often the greatest mischief"; or "Right too rigid hardens into wrong." [54]

JUS SUPERVENIENS AUCTORI ACCRESCIT SUCCESSORI. A maxim meaning "A right growing to a possessor accrues to the successor." [55]

JUST. [56] As an adjective, fair; adequate; reasonable; probable; [57] right; in accordance with law and justice; [58] right in law or ethics; [59] rightful, legitimate, well founded; [60] conformable to laws; [61] conforming to the requirements of right or of positive law; [62] conformed to rules or principles of justice. [63]

46. Black L. Dict.
47. Wharton L. Lex.
48. Tayler L. Gloss.
49. Black L. Dict. [*citing* Coke Litt. 185].
50. Wharton L. Lex.
Applied in Emery *v.* Piscataqua F. & M. Ins. Co., 52 Me. 322, 326.
51. Black L. Dict.
52. Black L. Dict. [*citing* Broom Leg. Max. 151; Coke Litt. 24*b*].
53. Trayner Leg. Max.
54. Tayler L. Gloss.
55. Black L. Dict. [*citing* Halkerstine Lat. Max. 76].
56. "The word . . . is derived from the Latin '*justus*,' which is from the Latin '*jus*,' which means a right, and, more technically, a legal right, a law." Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072.
Distinguished from "justified" in Francis *v.* State, 44 Tex. Cr. 246, 249, 70 S. W. 751.
"The words 'just' and 'justly' do not always mean just and justly in a moral sense, but they not unfrequently, in their connection with other words in a sentence, bear a very different signification." Robinson *v.* Burton, 5 Kan. 293, 300.
57. Kinney L. Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072]. See also Robinson *v.* Burton, 5 Kan. 293, 301; Fairhaven Land Co. *v.* Jordan, 5 Wash. 729, 735, 32 Pac. 729.
58. Black L. Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072].
59. Century Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072].
60. Century Dict. [*quoted* in Francis *v.* State, 44 Tex. Cr. 246, 249, 70 S. W. 751.
61. Stormonth Eng. Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072].
62. Standard Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072].
63. Imperial Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072].
The context may govern the meaning of the term. Francis *v.* State, 44 Tex. Cr. 246, 249, 70 S. W. 751. Thus it is sometimes used as the equivalent of correct, honest, or true. State *v.* Smith, 158 Ind. 543, 563, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116.
As used in connection with other words see the following phrases: "Just allowances" (Wilkes *v.* Saunion, 7 Ch. D. 188, 192, 47 L. J. Ch. 150; Jolliffe *v.* Hector, 12 Sim. 398, 35 Eng. Ch. 337, 59 Eng. Reprint 1185); "just and beneficial" (*In re* Metropolitan Bank, 15 Ch. D. 139, 142, 49 L. J. Ch. 651, 43 L. T. Rep. N. S. 299; *In re* Gold Co., 12 Ch. D. 77, 80, 48 L. J. Ch. 650, 40 L. T. Rep. N. S. 865, 27 Wkly. Rep. 757.

As an adverb of time the word "just" is equivalent to "at this moment," or the

See also *In re* North Australian Territory Co., 45 Ch. D. 87, 59 L. J. Ch. 654, 63 L. T. Rep. N. S. 77, 2 Meg. 239, 38 Wkly. Rep. 561); "just and correct" (Johnston *v.* Harrington, 5 Wash. 73, 80, 31 Pac. 316); "just and equitable" (*In re* Suburban Hotel Co., L. R. 2 Ch. 737, 741, 36 L. J. Ch. 710, 17 L. T. Rep. N. S. 22, 15 Wkly. Rep. 1096; *In re* Amalgamated Syndicate, [1897] 2 Ch. 600, 604, 66 L. J. Ch. 783, 77 L. T. Rep. N. S. 431, 4 Manson 308, 46 Wkly. Rep. 75; *In re* Brinsmead, [1897] 1 Ch. 406, 410, 66 L. J. Ch. 290, 76 L. T. Rep. N. S. 100, 4 Manson 70; *In re* Haven Gold Min. Co., 20 Ch. D. 151, 158, 51 L. J. Ch. 242, 46 L. T. Rep. N. S. 322, 30 Wkly. Rep. 389; *In re* Diamond Fuel Co., 13 Ch. D. 400, 408, 49 L. J. Ch. 301, 41 L. T. Rep. N. S. 573, 28 Wkly. Rep. 309; *In re* Australian Joint Stock Bank, [1897] W. N. 48, 41 Sc. Jur. 469); "just and fair" (People *v.* White, 14 How. Pr. (N. Y.) 498, 501. See also Matter of Roberts, 8 Daly (N. Y.) 95, 97); "just and legal excuse" (Reed *v.* Duluth, etc., R. Co., 100 Mich. 507, 59 N. W. 144); "just and reasonable" (Empire F. Ins. Co. *v.* Real Estate Trust Co., 1 Ill. App. 391, 394); "just and reasonable cause" (Reg. *v.* Saddlers' Co., 10 H. L. Cas. 404, 430, 9 Jur. N. S. 1081, 32 L. J. Q. B. 337, 9 L. T. Rep. N. S. 60. 11 Wkly. Rep. 1004, 11 Eng. Reprint 1083); "just and reasonable time" (Paxton *v.* Griswold, 122 U. S. 441, 449, 7 S. Ct. 1216, 30 L. ed. 1143 [*citing* Chambers *v.* Mifflin, 1 Penr. & W. (Pa.) 74, 78]); "just and true" (Farmer *v.* Cobban, 4 Dak. 425, 29 N. W. 12, 14; Landauer *v.* Conklin, 3 S. D. 462, 470, 54 N. W. 322); "just and true statement or account" (Erving *v.* Stockwell, 106 Iowa 26, 27, 75 N. W. 657 [*citing* Green Bay Lumber Co. *v.* Miller, 98 Iowa 468, 62 N. W. 742, 67 N. W. 383]; Sprague *v.* Branch, 3 Cush. (Mass.) 575, 577; Black *v.* Appolonio, 1 Mont. 342, 346; Turner *v.* St. John, 8 N. D. 245, 257, 78 N. W. 340 [*citing* Gwin *v.* Waggoner, 98 Mo. 315, 11 S. W. 227]); "just claim" (McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397, 400; Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 253, 67 L. R. A. 705; Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581, 588, 20 L. ed. 216); "just claim of the assured" (Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 237, 24 L. ed. 433); "just compensation" (Colbert County Com'rs Ct. *v.* Street, 116 Ala. 28, 33, 22 So. 629; Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83; Cribbs *v.* Benedict, 64 Ark. 555, 559, 44 S. W. 707; Spring Valley Waterworks *v.* Drinkhouse, 92 Cal. 528, 536, 28 Pac. 681; Moran *v.* Ross, 79 Cal. 549, 551, 21 Pac. 958; California Pac. R. Co. *v.* Armstrong, 46 Cal. 85, 90; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367, 368; Gilmer *v.* Lime Point, 18 Cal. 229, 251; Trinity College *v.* Hartford, 32 Conn. 452, 468; Nichols *v.* Bridgeport, 23 Conn. 189, 200, 60 Am. 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W. 123, 8 L. R. A. 123; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 422, 437; People *v.* Daniels, 6 Utah 288, 297, 22 Pac. 159, 5 L. R. A. 444; Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478, 487; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636, 642; Bauman *v.* Ross, 167 U. S. 548, 563, 17 S. Ct.

"least possible time since," as Webster defines the word.[64] (See Justa Causa; Just Cause; Justly.)

JUSTA CAUSA. In the civil law, a Just Cause (*q. v.*), a lawful ground.[65]

JUST CAUSE. A term meaning lawful ground;[66] often used as synonymous with reasonable cause.[67]

JUS TESTAMENTORUM PERTINET ORDINARIO. A maxim meaning "The right of testaments belongs to the ordinary."[68]

JUSTICE.[69] In its common acceptation, the rendering of every man his due;[70] the constant and perpetual desire to render every one his due;[71] the dictate of right, according to the consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals.[72] As applied to the judiciary, a judicial officer;[73] a person duly commissioned to hold courts or to try and decide controversies and administer the laws;[74] a term often used interchangeably with

966, 978, 42 L. ed. 270; Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 626, 37 L. ed. 463; Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 674, 21 L. ed. 375; Spring Valley Waterworks *v.* San Francisco, 124 Fed. 574, 601; Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415, 417; Chesapeake, etc., Canal Co. *v.* Key, 5 Fed. Cas. No. 2,649, 3 Cranch C. C. 599); "just damages for delay" (The Sydney, 47 Fed. 260, 263); "just debts" (Martin *v.* Gage, 9 N. Y. 398, 401 [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072]. See also Buck *v.* Webb, 7 Colo. 212, 215, 3 Pac. 211; Peck *v.* Botsford, 7 Conn. 172, 176, 18 Am. Dec. 92; Collamore *v.* Wilder, 19 Kan. 67, 82; Smith *v.* Mayo, 9 Mass. 62, 63, 6 Am. Dec. 28; People *v.* Tax Com'rs, 99 N. Y. 154, 157, 1 N. E. 401; Smith *v.* Porter, 1 Binn. (Pa.) 209, 211); "just ground" (Francis *v.* State, 44 Tex. Cr. 246, 249, 70 S. W. 751); "just or convenient" (Beddow *v.* Beddow, 9 Ch. D. 89, 93, 47 L. J. Ch. 588, 26 Wkly. Rep. 570); "just provocation" (State *v.* Stephens, 96 Mo. 637, 650, 10 S. W. 172 [*citing* State *v.* Ellis, 74 Mo. 207]); "just title" (Sunol *v.* Hepburn, 1 Cal. 254, 272; U. S. *v.* De la Paz Valdez de Conway, 175 U. S. 60, 70, 20 S. Ct. 13, 44 L. ed. 72; La. Civ. Code, art. 3484 [*quoted* in Texas, etc., R. Co. *v.* Smith, 159 U. S. 66, 69, 15 S. Ct. 994, 40 L. ed. 77; Davis *v.* Gaines, 104 U. S. 386, 400, 26 L. ed. 757; Pike *v.* Evans, 94 U. S. 6, 8, 9, 24 L. ed. 40]; 1 White Recopilacion 91–97, 346–349, 2 White Recopilacion 82–86, 736 *et seq.* [*quoted* in Kennedy *v.* Townsley, 16 Ala. 239, 248]); "upon such terms as may be just" (Stern *v.* Tegner, [1898] 1 Q. B. 37, 41, 66 L. J. Q. B. 859, 77 L. T. Rep. N. S. 347, 4 Manson 328, 46 Wkly. Rep. 82; Forster *v.* Clowser, [1897] 2 Q. B. 362, 366, 66 L. J. Q. B. 693, 76 L. T. Rep. N. S. 825).

64. Webster Dict. [*quoted* in State *v.* Hinton, 49 La. Ann. 1354, 1355, 22 So. 617].

65. Kinney L. Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072].

66. State *v.* Baker, 112 La. 801, 803, 36 So. 703 [*citing* Black L. Dict.].

67. Rapalje & L. L. Dict. [*quoted* in Bregman *v.* Kress, 83 N. Y. App. Div. 1, 2, 81 N. Y. Suppl. 1072]. See also Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 371, 33 S. E. 262; *Ex p.* Cocks, 21 Ch. D. 397, 400, 52 L. J. Ch. 63, 47 L. T. Rep. N. S. 496, 31 Wkly. Rep. 105; 5 Cyc. 28 note 61.

68. Black L. Dict.

69. **Distinguished from "law"** see The John E. Mulford, 18 Fed. 455, 458.

"According to equity and justice" see Abrams *v.* Johnson, 65 Ala. 465, 470.

"Establish justice" see Montgomery County *v.* Cochran, 116 Fed. 985, 992; Detroit *v.* Detroit City R. Co., 54 Fed. 1, 18.

"Legality" or "justice" see People *v.* Stout, 81 Hun (N. Y.) 336, 341, 30 N. Y. Suppl. 898.

"Necessary for the purpose of justice" see *In re* Mysore Min. Co., 42 Ch. D. 535, 537, 58 L. J. Ch. 731, 61 L. T. Rep. N. S. 453, 1 Meg. 347, 37 Wkly. Rep. 794.

"To do justice" see *In re* Bond, 4 Ch. D. 238, 46 L. J. Ch. 488, 25 Wkly. Rep. 95.

70. Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218, 224.

"Justice," says Vattel: "Is the basis of society; a sure bond of all commerce." Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306.

"Justice," the establishment and enforcement of which is the object of all law, is a comprehensive term, in which are included the three great objects for which, according to our Declaration of Independence, governments among men are instituted. Whatever rule of the unwritten law, therefore, is at variance with this great purpose of justice — the security of life, liberty, and the pursuit of happiness — is one not suited to our condition and circumstances. State *v.* Williams, 9 Houst. (Del.) 508, 526, 18 Atl. 949.

In a judicial sense, it is nothing more or less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity to or in opposition to law. Borden *v.* State, 11 Ark. 519, 528, 44 Am. Dec. 217.

71. Trayner Leg. Max. [*citing* Justinian Inst. B. 1, T. 1, Pr.].

72. Duncan *v.* Magette, 25 Tex. 245, 252.

73. Standard Dict. [*quoted* in Strauss *v.* Maddox, 109 Ga. 223, 34 S. E. 355].

74. Webster Int. Dict. [*quoted* in Strauss *v.* Maddox, 109 Ga. 223, 224, 34 S. E. 355].

judge,[75] and is broad enough to include the judge of any court in the state.[76] As used in statutes, the term is generally construed as the equivalent of a justice of the peace.[77] (Justice: In General, see Courts. Department of, see Attorney-General. Fleeing From, see Extradition (International); Extradition (Interstate). Offenses Against, see Bribery; Champerty and Maintenance; Compounding Felony; Embracery; Escape; Extortion; Obstructing Justice; Perjury; Rescue. Of the Peace, see Justices of the Peace.)

JUSTICE EJECTMENT. A proceeding given by statute where one in possession of demised premises under a written or parol lease remains in possession, without right, after the termination of the lease by its own limitation, or after a breach of a stipulation contained therein.[78] (See, generally, Landlord and Tenant.)

JUSTICE'S DISTRICT. A local subdivision of a county, which has no corporate autonomy.[79]

"Justices" is a term meaning justices in the aggregate; that is, assembled in sessions, and not merely when they act individually as justices. Rex *v.* Houghton, 5 M. & S. 300, 307. See also *Ex p.* Evans, [1894] A. C. 16, 21, 58 J. P. 260, 63 L. J. M. C. 81, 70 L. T. Rep. N. S. 45, 6 Reports 82.

75. Low *v.* Cheney, 1 Code Rep. (N. Y.) 29, 39; Anderson L. Dict. [*quoted* in Strauss *v.* Maddox, 109 Ga. 223, 34 S. E. 355].

76. Strauss *v.* Maddox, 109 Ga. 223, 224, 34 S. E. 355.

"The words 'justice of any court in this State' include others than justices of the peace, and included justices of the inferior court when that court was in existence." Strauss *v.* Maddox, 109 Ga. 223, 34 S. E. 355.

This title is given to the judge of the common-law courts in England and in the United States, and extends to judicial officers and magistrates of every grade. Webster Int. Dict. [*quoted* in Strauss *v.* Maddox, 109 Ga. 223, 34 S. E. 355].

"Justice or magistrate" see State *v.* Sorenson, 84 Wis. 27, 32, 53 N. W. 1124.

77. Hogle *v.* Mott, 62 Vt. 255, 258, 20 Atl. 276, 22 Am. St. Rep. 106.

78. Foss *v.* Stanton, 76 Vt. 365, 57 Atl. 942.

79. Breckenridge County *v.* McCracken, 61 Fed. 191, 194, 9 C. C. A. 442.

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* Author of "Boundaries," 5 Cyc. 861; "Bribery," 5 Cyc. 1038; "Covenants," 11 Cyc, 1035; "Embezzlement," 15 Cyc. 486; and joint author of "Champerty and Maintenance," 6 Cyc. 847, etc.

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CROSS-REFERENCES

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Arrest, see ARREST.
Bail, see BAIL.
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Confessions to Justices as Evidence, see CRIMINAL LAW.
Criminal Proceedings Before Justice, see CRIMINAL LAW.
Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER.
Jurisdiction in Criminal Cases, see AFFRAY; ARREST; BAIL; BREACH OF THE PEACE; CRIMINAL LAW.
Justice of the Peace as Coroner, see CORONERS.
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Warrants For Arrest, see ARREST; CRIMINAL LAW.

I. THE OFFICE IN GENERAL.

A. Definition. In American law a justice of the peace is a judicial officer of inferior rank, holding a court not of record, and having usually civil jurisdiction of a limited nature, for the trial of minor cases, to an extent prescribed by statute, and for the conservation of the peace and the preliminary hearing of criminal complaints and the commitment of offenders;[1] a judicial officer of special and limited jurisdiction, both civil and criminal.[2] In English law, justices of the peace are judges of record appointed by the crown to be justices within a certain

1. Black L. Dict.
"Conservator of the peace" and "justices of the peace" equivalent terms.— Wenzler *v.* People, 58 N. Y. 516, 529 [*citing* Reg. *v.* Bonnet, 11 Mod. 141].
2. Legates *v.* Lingo, 8 Houst. (Del.) 154, 32 Atl. 80. See also Mitchell *v.* Galen, 1 Alaska 339; Brownfield *v.* Thompson, 96 Mo. App. 340, 70 S. W. 378; Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734; Moore *v.* Bundy, 22 Pa. Co. Ct. 583.
Other definitions are: "A civil magistrate, who also has duties in connection with the administration of the criminal law." Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383.
"A public officer, invested with judicial powers, for the purpose of preventing breaches of the peace, and bringing to punishment those who have violated the law." Bouvier L. Dict. [*adopted* in Wenzler *v.* People, 58 N. Y. 516, 530]. See also Com. *v.* Frank, 7 Pa. Dist. 143, 21 Pa. Co. Ct. 120.
The word "justice" is frequently used as synonymous with "justice of the peace," and has been so construed in statutes. Helms *v.* O'Bannon, 26 Ga. 132; Hogle *v.* Mott, 62 Vt.

district for the conservation of the peace, and for the execution of divers things, comprehended within their commission and within divers statutes, committed to their charge.[3]

B. Origin and History of Office. The office of justice of the peace is one of great antiquity, and the jurisdiction of justices of the peace has varied from time to time, depending either upon the terms of their commissions or particular statutes.[4] Justices of the peace were originally mere conservators of the peace, exercising no judicial functions.[5] It is said [6] that by the statute of 1 Edward III,[7] which is the first statute that ordains the assignment of justices of the peace by the king's commission,[8] "they had no other power but only to keep the peace." But gradually their powers were enlarged,[9] and they came to constitute a very important agency in the administration of local government in England.[10] They were invested with judicial powers for the first time, it seems, by the statute of 34 Edward III, c. 1, which gave them power to try felonies, but only when two

255, 258, 20 Atl. 276, 22 Am. St. Rep. 106. But in some jurisdictions this term has, in construing particular constitutional or statutory provisions, been held not to mean justices of the peace. Thus in New York it has been held that a justice of the peace does not "hold the office of justice or judge of any court" within the meaning of N. Y. Const. art. 6, § 13, prescribing the age limit of such judicial officers. People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556 [*reversing* 32 Hun 440, and *approving* Dohring *v.* People, 2 Thomps. & C. 458]. See also *infra*, I, G.

Mayors, police judges, etc.— In some jurisdictions the term "justice" or "justice of the peace" will include police judges, and mayors or other officers who are *ex officio* justices of the peace. See *infra*, I, E. But the terms are not always so broad. Thus in Iowa it is held that the word "justice" in the statutes of that state is not a general term applicable alike to all courts having jurisdiction of minor offenses, but is used throughout the statutes as applicable to justices of the peace, and not to mayors, or judges of police courts, etc. State *v.* Jamison, 100 Iowa 342, 69 N. W. 529, holding therefore that under a statute permitting a change of venue from one justice to the next nearest justice in the township, an order changing the venue to the mayor of a town was erroneous, although a statute provided that the mayor of a city or town should have the jurisdiction of a justice of the peace, etc.

"A police justice is a magistrate charged exclusively with the duties incident to the common-law office of a conservator or justice of the peace, and the prefix 'police' serves merely to distinguish them from justices having also civil jurisdiction." Wenzler *v.* People. 58 N. Y. 516, 530.

United States officer.— A justice of the peace in the District of Columbia is an officer of the United States government, and is exempt from military duty. Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457.

3. Black L. Dict.; Lambard *v.* Eirenarcha, c. 1, p. 3. See also Bacon Abr. tit. "Justices of Peace" [*citing* Dalton Just. 8].

4. Wenzler *v.* People, 58 N. Y. 516. See also People *v.* Howland, 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347 [*affirmed* in 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838]; *In re* Barker, 56 Vt. 14.

5. Schroder *v.* Ehlers, 31 N. J. L. 44. See also Willey *v.* Strickland, 8 Ind. 453; Weikel *v.* Cate, 58 Md. 105; Smith *v.* Abbott, 17 N. J. L. 358; Gurnsey *v.* Lovell, 9 Wend. (N. Y.) 319; People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556; Wenzler *v.* People, 58 N. Y. 516; Com. *v.* Frank, 7 Pa. Dist. 143, 21 Pa. Co. Ct. 120; State *v.* Cureton, Cheves (S. C.) 235; *In re* Barker, 56 Vt. 14.

6. 3 Burn Justice (19th ed.) 4.

7. **It was ordained by 1 Edw. III,** "for the better keeping and Maintenance of the Peace . . . That in every County good Men and lawful, which be no Maintainers of Evil, or Barretors in the Country, shall be assigned to keep the Peace." 2 Reeves Hist. Eng. L. (Finlason ed.) 329. See also Bacon Abr. tit. "Justices of Peace" (B).

Before the statute, 1 Edw. III, c. 16, there were no justices of the peace, and they were first instituted by that statute; yet by the common law there were certain conservators of the peace, who were of two sorts: (1) Those who in respect of their offices had power to keep the peace, but were not simply called by the name of conservators of the peace, but by the name of such offices. (2) Those who were constituted for this purpose only, and were simply called by the name of conservators or wardens of the peace. Bacon Abr. tit. "Justices of Peace" (A) [*citing* Lambard bk. 1, c. 3; 2 Hale Hist. P. C. 44; 2 Hawkins P. C. c. 8].

8. **"Justices of the peace can only be appointed by the king's commission,** and such commission must be in his name." Bacon Abr. tit. "Justices of Peace" (C).

9. See St. 4 Edw. III, c. 2; 18 Edw. III, st. 2, c. 2; 34 Edw. III, c. 1; 36 Edw. III, c. 12.

10. "They discharged a great variety of duties connected with the support of the poor, the reparation of highways, the imposition and levying of parochial rates and other local affairs." People *v.* Mann, 97 N. Y. 530, 534, 49 Am. Rep. 556. See also 16 Geo. II, c. 18, in which an enumeration of the duties of justices of the peace will be found.

or more acted together, and not singly, and they then acquired the more honorable appellation of justices.[11] It does not appear that in England they ever exercised jurisdiction in civil causes.[12] While justices of the peace in the United States may be said technically to have, as a part of the common law of the different states, the powers granted such officers by the early English statutes,[13] yet their powers and duties have been so enlarged and so fully defined by the statutes of the various states that they are in effect wholly statutory;[14] and especially is this true as to the jurisdiction of justices in civil causes, which, of purely statutory origin,[15] and at first confined within narrow limits, has now grown to immense proportions.[16]

C. Nature of Office. Justices of the peace were originally county officers,[17] but at the present day their territorial jurisdiction varies according to the constitutional and statutory provisions on the subject.[18] When created by the constitution the office is a constitutional one,[19] and, whether so created or created by statute, it is considered judicial in its nature,[20] or rather both judicial and ministerial.[21] Sometimes the office is also political or legislative, as in cases where a

11. 1 Blackstone Comm. 351. See 2 Reeves Hist. Eng. L. (Finlason ed.) 330.

12. People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556. See also Ellis *v.* White, 25 Ala. 540.

13. See Collins *v.* Granniss, 67 Ga. 716; Warthen *v.* May, 1 Ga. 602; Upshaw *v.* Oliver, Dudley (Ga.) 241; Com. *v.* Knowlton, 2 Mass. 530; Com. *v.* Foster, 1 Mass. 488; Com. *v.* Leach, 1 Mass. 59; State *v.* Eastman, 42 N. H. 265; *In re* Barker, 56 Vt. 14. But see Day *v.* Day, 4 Md. 262.

Introduction in America.— "The office of justice of the peace was brought here by the English colonists. From the earliest colonial period it has existed in this country. By the Code known as 'the Duke's Laws' for the government of the colony of New York, promulgated in 1665, justices of the peace were commissioned for the towns in the province, with the same powers as in England." People *v.* Mann, 97 N. Y. 530, 534, 49 Am. Rep. 556.

"**Custom and usage,** and the decisions of the higher courts, have, during all that time (since the statutes of Edward III) been giving shape and form to the law on this subject, as on all others, and though originating in statutes, the law is now to be sought not in those statutes alone, but in the books of reports and works of authority on such subjects." State *v.* Eastman, 42 N. H. 265, 268.

14. See Martin *v.* Fales, 18 Me. 23, 36 Am. Dec. 693; Smith *v.* Abbott, 17 N. J. L. 358; Albright *v.* Lapp, 26 Pa. St. 99, 67 Am. Dec. 402; *In re* Barker, 56 Vt. 14.

15. Schroder *v.* Ehlers, 31 N. J. L. 44.

No presumption of civil jurisdiction.— Willey *v.* Strickland, 8 Ind. 453.

16. See *infra*, III.

17. See 1 Edw. III, c. 16; 4 Edw. III, c. 2; 18 Edw. III, st. 2, c. 2; 34 Edw. III, c. 1; 36 Edw. III, c. 1.

18. See *infra*, III, F.

A change in the mode of electing justices does not alter the character of the office. Neth *v.* Crofut, 30 Conn. 580.

19. People *v.* Keeler, 25 Barb. (N. Y.) 23.

20. *Alaska.*— Mitchell *v.* Galen, 1 Alaska 339.

California.— Bishop *v.* Oakland, 58 Cal. 572; People *v.* Ransom, 58 Cal. 558; McGrew *v.* San Jose, 55 Cal. 611.

Connecticut.— Scott *v.* Spiegel, 67 Conn. 349, 35 Atl. 262.

Illinois.— People *v.* Wilson, 15 Ill. 388.

Indiana.— Vogel *v.* State, 107 Ind. 374, 8 N. E. 164.

Kansas.— *In re* Greer, 58 Kan. 268, 48 Pac. 950.

New York.— Petterson *v.* Welles, 1 N. Y. App. Div. 8, 36 N. Y. Suppl. 1009; People *v.* Keeler, 25 Barb. 421. But *compare* People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556 [*reversing* 32 Hun 440].

Tennessee.— Grainger County *v.* State, 111 Tenn. 234, 80 S. W. 750.

Utah.— Love *v.* Liddle, 26 Utah 62, 72 Pac. 185, 62 L. R. A. 482.

Vermont.— McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231.

Judicial functions and duties see *infra*, II, A, 3.

"**Justices of the peace are 'judges'** in the legal sense of the word, having power to decide upon the rights of others by authority of law." People *v.* Wilson, 15 Ill. 388, 391. See also Scott *v.* Spiegel, 67 Conn. 349, 35 Atl. 262. But *compare* Andrews *v.* Saucier, 13 La. Ann. 301, to the effect that a justice of the peace is not a judge within La. Const. art. 82.

"**Courts.**" — Justices of the peace have been held to be embraced in the term "courts." See COURTS, 11 Cyc. 653 note 1.

21. "A justice of the peace is a judicial and ministerial officer. He performs judicial duty in the trial of causes, and ministerial duty in recording his judgments. He is both judge and clerk of his courts. His duties as recording officer are similar in every respect to those performed by clerks of the higher courts. The only difference in the cases consists in the sources of knowledge that they have of the judgments that have been rendered which they are required to record. . . . But differences in the sources

justice of the peace is a member of the legislative body of his county.[22] In a number of states justices' courts are courts of record,[23] but in other jurisdictions they are not.[24]

D. De Facto Justices.[25] A *de facto* justice of the peace is one who *colore officii* claims and assumes to exercise the authority of the office, is reputed to have it, and in whose acts the community acquiesces.[26] Thus one is a *de facto* justice of the peace who, having been duly elected or appointed as such, enters

of knowledge, in this respect, make no difference in the character of the duties they perform." Scott *v.* Spiegel, 67 Conn. 349, 359, 35 Atl. 262. See also State *v.* Cureton, Cheves (S. C.) 235.

Ministerial functions and duties see *infra*, II, A, 4.

22. Grainger County *v.* State, 111 Tenn. 234, 80 S. W. 750, where it is said in substance: The true conception indicated by the term "justice of the peace," as disclosed by our Constitution and statutes, is that of an officer having both judicial and political functions — judicial, in that he holds a court and decides matters of litigation arising between parties; political, in that he is a member of the quarterly county court, which is the governing agency or legislative body of the county — but that, in performing all of the duties pertaining to these two functions, he is, in the main, dependent upon his civil district, which creates him, which must be his home, which he cannot remove from without forfeiture of his office, and which he represents in the county legislature or county court. See also Com. *v.* Kenneday, 118 Ky. 618, 82 S. W. 237, 26 Ky. L. Rep. 504, levying taxes as a fiscal court.

23. *Connecticut.*— McVeigh *v.* Ripley, 77 Conn. 136, 58 Atl. 701.

Delaware.— Cloud *v.* State, 2 Harr. 361.

Indiana.— Pressler *v.* Turner, 57 Ind. 56; Hooker *v.* State, 7 Blackf. 272.

Mississippi.— Brian *v.* Davidson, 25 Miss. 213.

New Jersey.— Woodruff *v.* Woodruff, 3 N. J. L. 552.

Ohio.— Adair *v.* Rogers, Wright 428.

Vermont.— Stone *v.* Proctor, 2 D. Chipm. 108.

24. *Alabama.*— Ellis *v.* White, 25 Ala. 540.

Georgia.— Planter's, etc., Bank *v.* Chipley, Ga. Dec. 50.

Maryland.— Weikel *v.* Cate, 58 Md. 105.

Massachusetts.— See Smith *v.* Morrison, 22 Pick. 430.

New York.— See Wheaton *v.* Fellows, 23 Wend. 375, as to justice's court of city of Albany. *Compare* as to the justice's court of Hornellsville Lantz *v.* Galpin, 44 Misc. 356, 89 N. Y. Suppl. 1096.

North Carolina.— Hamilton *v.* Wright, 11 N. C. 283.

Pennsylvania.— See Silver Lake Bank *v.* Harding, 5 Ohio 545, to the effect that justices' courts in Pennsylvania are not courts of record within the provisions of the constitution of the United States; but that their judgments, when duly proved, are within the provisions as to each state giving full faith and credit to the judgments of other states.

United States.— Searcy *v.* Hogan, 21 Fed. Cas. No. 12,584*a*, Hempst. 20.

Canada.—Young *v.* Woodcock, 5 N. Brunsw. 554.

25. **Collateral attack on title to office** see *infra*, I, L, 3.

26. *Alabama.*— Williamson *v.* Woolf, 37 Ala. 298.

California.— *Ex p.* Fedderwitz, (1900) 62 Pac. 935.

Georgia.— Pool *v.* Perdue, 44 Ga. 454; Hinton *v.* Lindsay, 20 Ga. 746, where the justice removed to another county, but continued to act under his commission.

Illinois.— Becker *v.* People, 156 Ill. 301, 40 N. E. 944 [*affirming* 55 Ill. App. 285]; Lewiston *v.* Proctor, 23 Ill. 533.

Iowa.— Herkimer *v.* Keeler, 109 Iowa 680, 81 N. W. 178.

Kansas.— Rheinhart *v.* State, 14 Kan. 318. And see State *v.* Miller, 71 Kan. 491, 80 Pac. 497.

Kentucky.—Lexington, etc., Turnpike Road Co. *v.* McMurtry, 6 B. Mon. 214; Rodman *v.* Harcourt, 4 B. Mon. 224.

Maine.— Johnson *v.* McGinly, 76 Me. 432; Brown *v.* Lunt, 37 Me. 423.

Massachusetts.— Com. *v.* Kirby, 2 Cush. 577.

Michigan.— People *v.* Payment, 109 Mich. 553, 67 N. W. 689.

Mississippi.— Dabney *v.* Hudson, 68 Miss. 292, 8 So. 545, 24 Am. St. Rep. 276.

Missouri.— Fleming *v.* Mulhall, 9 Mo. App. 71.

New Jersey.— Conover *v.* Solomon, 20 N. J. L. 295.

New York.— People *v.* Terry, 108 N. Y. 1, 44 N. E. 815; Weeks *v.* Ellis, 2 Barb. 320.

Ohio.— Gitsky *v.* Newton, 17 Ohio Cir. Ct. 484, 9 Ohio Cir. Dec. 682.

Oregon.— Hamlin *v.* Kassafer, 15 Oreg. 456, 15 Pac. 778, 3 Am. St. Rep. 176.

Pennsylvania.— Adams *v.* Mengel, 5 Pa. Cas. 402, 8 Atl. 606; Humer *v.* Cumberland County, 8 Pa. Dist. 528.

Utah.— Vanderberg *v.* Connoly, 18 Utah 112, 54 Pac. 1097.

Vermont.— McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231.

Virginia.— Maddox *v.* Ewell, 2 Va. Cas. 59.

Wisconsin.— Deuster *v.* Zillmer, 119 Wis. 402, 97 N. W. 31; Trogman *v.* Grover, 109 Wis. 393, 85 N. W. 358; Laver *v.* McGlachlin, 28 Wis. 364.

United States.— *Ex p.* Bollman, 4 Cranch 75, 2 L. ed. 554.

England.— Margate Pier Co. *v.* Hannam,

upon the duties of his office without qualifying,[27] or who, having been a justice, continues to act as such after the expiration of his commission,[28] or who also occupies and exercises some other and incompatible office.[29] But one who is appointed a justice after the abolition of the office is not a *de facto* justice;[30] nor is a mere usurper[31] or intruder,[32] or one appointed pursuant to a law clearly unconstitutional and void.[33] So far as the public and third persons are concerned, the acts of a *de facto* justice are as valid as those of a justice *de jure*.[34]

E. Ex Officio Justices. Unless such action violates some constitutional provision,[35] it is competent for the legislature to invest other officials, such as mayors, recorders, aldermen, notaries public, commissioners, and the like, with the powers and jurisdiction of justices of the peace.[36] Within their territorial limits

3 B. & Ald. 266, 22 Rev. Rep. 378, 5 E. C. L. 160.

Canada.— Hogle *v.* Rockwell, 20 Quebec Super. Ct. 309.

See 31 Cent. Dig. tit. "Justices of the Peace," § 9.

27. Rodman *v.* Harcourt, 4 B. Mon. (Ky.) 224; People *v.* Payment, 109 Mich. 553, 67 N. W. 689; Greenleaf *v.* Low, 4 Den. (N. Y.) 168; Margate Pier Co. *v.* Hannam, 3 B. & Ald. 266, 22 Rev. Rep. 378, 5 E. C. L. 160.

28. Brown *v.* Lunt, 37 Me. 423.

29. Com. *v.* Kirby, 2 Cush. (Mass.) 577. See also State *v.* Miller, 71 Kan. 491, 80 Pac. 947; Adam *v.* Mengel, 5 Pa. Cas. 402, 8 Atl. 606; McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231; Maddox *v.* Ewell, 2 Va. Cas. 59.

30. Ayers *v.* Lattimer, 57 Mo. App. 78.

31. People *v.* Curley, 5 Colo. 412, holding that a person assuming as police judge to exercise judicial functions under no other authority than that conferred by municipal authority is guilty of usurpation.

32. Dabney *v.* Hudson, 68 Miss. 292, 8 So. 545, 24 Am. St. Rep. 276.

33. Vanderberg *v.* Connoly, 18 Utah 112, 54 Pac. 1097.

The exercise of unconstitutional jurisdiction is not the exercise of an office, from which the justice may be ousted by quo warranto. People *v.* Veuve, (Cal. 1884) 3 Pac. 862.

34. *Alabama.*— Williamson *v.* Woolf, 37 Ala. 298.

California.— *Ex p.* Fedderwitz, (1900) 62 Pac. 935.

Georgia.— Pool *v.* Perdue, 44 Ga. 454; Hinton *v.* Lindsay, 20 Ga. 746.

Illinois.— Lewiston *v.* Proctor, 23 Ill. 533.

Kansas.— Rheinhart *v.* State, 14 Kan. 318.

Kentucky.—Lexington, etc., Turnpike Road Co. *v.* McMurtry, 6 B. Mon. 214; Rodman *v.* Harcourt, 4 B. Mon. 224.

Maine.— Johnson *v.* McGinty, 76 Me. 432; Brown *v.* Lunt, 37 Me. 423.

Massachusetts.— Com. *v.* Kirby, 2 Cush. 577.

Michigan.— People *v.* Payment, 109 Mich. 553, 67 N. W. 689.

Missouri.— Fleming *v.* Mulhall, 9 Mo. App. 71.

New York.— People *v.* Terry, 108 N. Y. 1, 44 N. E. 815; Weeks *v.* Ellis, 2 Barb. 320; Greenleaf *v.* Low, 4 Den. 168.

Oregon.—Hamlin *v.* Kassafer, 15 Oreg. 456, 15 Pac. 778, 3 Am. St. Rep. 176.

Vermont.— McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231.

Virginia.— Maddox *v.* Ewell, 2 Va. Cas. 59.

Wisconsin.— Deuster *v.* Zillmer, 119 Wis. 402, 97 N. W. 31; Trogman *v.* Grover, 109 Wis. 393, 85 N. W. 358; Laver *v.* McGlachlin, 28 Wis. 364.

Canada.— Hogle *v.* Rockwell, 20 Quebec Super. Ct. 309.

See 31 Cent. Dig. tit. "Justice of the Peace," § 9; and other cases cited in the preceding notes.

Collateral attack see *infra*, I, L, 3.

35. People *v.* Maynard, 14 Ill. 419; Heggie *v.* Stone, 70 Miss. 39, 12 So. 253; Edenton *v.* Wool, 65 N. C. 379; Atty.-Gen. *v.* McDonald, 3 Wis. 805; and *infra*, I, F, 1. See also Hagerstown *v.* Dechert, 32 Md. 369, to the effect that the legislature cannot confer judicial powers on a mayor, but may make him a conservator of the peace.

36. *Alabama.*— Williamson *v.* Woolf, 37 Ala. 298.

Alaska.— Commissioners as *ex officio* justices of the peace. *In re* Munro, 1 Alaska 279 [*quoting* Civ. Code, § 700].

California.— Uridias *v.* Morrill, 22 Cal. 473.

Georgia.— Pool *v.* Perdue, 44 Ga. 454.

Indiana.— Cluggish *v.* Rogers, 13 Ind. 538. *Compare* Waldo *v.* Wallace, 12 Ind. 569, where it was held that the mayor of Indianapolis assumed judicial duties, not as incident to his office as mayor, but as separate and independent duties under the statute.

Iowa.— Weber *v.* Hamilton, 72 Iowa 577, 34 N. W. 424; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Mississippi.— Nickles *v.* Kendricks, 73 Miss. 711, 19 So. 582; Heggie *v.* Stone, 70 Miss. 39, 12 So. 253.

Missouri.— Dunn *v.* St. Louis, etc., R. Co., 70 Mo. 663; State *v.* Bowen, 72 Mo. App. 66. See also Harris *v.* Hunt, 97 Mo. 571, 11 S. W. 236.

New Jersey.— Nowrey *v.* Ivins, 68 N. J. L. 203, 52 Atl. 211; Perkins *v.* Perkins, 24 N. J. L. 409; Hutchings *v.* Scott, 9 N. J. L. 218.

New York.— Port Jervis *v.* Barrett Bridge Co., 10 N. Y. St. 339.

such *ex officio* justices have the same jurisdiction as regularly elected or appointed justices of the peace.[37]

F. Creation and Abolition of Office — 1. CREATION. Where the constitution creates the office of justice of the peace, and provides for the election or appointment, number, term of office, and jurisdiction of justices of the peace, all legislation affecting the office must conform to such constitutional provisions.[38] But where the constitution confers on the legislature the power to create the office, or to define and regulate the powers, duties, and jurisdiction of justices of the peace, and to prescribe their number in the different territorial subdivisions, or when it contains no restrictions on the subject, the legislature may make such regulations concerning the office as it may see fit,[39] subject to constitutional pro-

Ohio.— The Northern Indiana *v.* Milliken, 7 Ohio St. 383.

Oregon.— Multnomah County *v.* Adams, 6 Oreg. 114; State *v.* Wiley, 4 Oreg. 184; Craig *v.* Mosier, 2 Oreg. 323; Ryan *v.* Harris, 2 Oreg. 175.

Pennsylvania.— Wilmington Steamship Co. *v.* Haas, 151 Pa. St. 113, 25 Atl. 85; Rhoads *v.* Com., 15 Pa. St. 272; St. Clair Tp. Overseers of Poor *v.* Moon Tp. Overseers of Poor, 6 Watts & S. 522; Respublica *v.* Cobbet, 3 Yeates 93 (judges of supreme court); Locher *v.* King, 5 Lanc. Bar, May 2, 1874.

South Carolina.— State *v.* Harrison, 1 Strobh. 153.

Texas.— May *v.* Finley, 91 Tex. 352, 43 S. W. 257; Harris County *v.* Stewart, 91 Tex. 133, 41 S. W. 650. See also Smith *v.* Deweese, 41 Tex. 594. But see *Ex p.* Knox, (Cr. App. 1897) 39 S. W. 670 [*citing* Leach *v.* State, 36 Tex. Cr. 248, 36 S. W. 471].

United States.— Hodgson *v.* Mountz, 12 Fed. Cas. No. 6,569, 1 Cranch C. C. 366.

England.— Wilson *v.* Strugnell, 7 Q. B. D. 548, 14 Cox C. C. 624, 45 J. P. 831, 50 L. J. M. C. 145, 45 L. T. Rep. N. S. 218; Reigate *v.* Hunt, L. R. 3 Q. B. 244, 9 B. & S. 129, 37 L. J. M. C. 70, 18 L. T. Rep. N. S. 237, 16 Wkly. Rep. 896.

Canada.— Reg. *v.* Rochester, 7 Can. L. J. 102; Reg. *v.* McGowan, 22 Ont. 497; Hunter *v.* Gilkison, 7 Ont. 735; Reg. *v.* Boyle, 4 Ont. Pr. 256.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 10, 76.

Aldermen as justices of the peace see ACKNOWLEDGMENTS, 1 Cyc. 550 note 11, 576 note 75. Presumed to be justices of the peace see ACKNOWLEDGMENTS, 1 Cyc. 576 note 75.

Under Colo. Gen. Laws, § 2661, granting justices and police magistrates certain jurisdiction, and providing that "the city council may designate one justice of the peace who shall have such jurisdiction exclusively," and § 2720, authorizing the city council in certain cities to elect a police judge, the designation or appointment of a justice of the peace with such exclusive jurisdiction makes him a police magistrate *ex officio*. People *v.* Curley, 5 Colo. 412.

After the Alabama statute of 1819, the chief justice of the county court could not try a case as justice of the peace. Rhodes *v.* Sneed, Minor 403.

37. Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73; Weber *v.* Hamilton, 72 Iowa 577, 34 N. W. 424; Nickels *v.* Kendricks, 73 Miss. 711, 19 So. 582; Heggie *v.* Stone, 70 Miss. 39, 12 So. 253; Smith *v.* Jones, 65 Miss. 276, 3 So. 740; State *v.* Perkins, 24 N. J. L. 409; and other cases cited in the preceding note.

De facto justices ex officio see Williamson *v.* Woolf, 37 Ala. 298; Pool *v.* Perdue, 44 Ga. 454; and *supra*, I, D.

38. *Idaho.*— People *v.* Maxon, 1 Ida. 330, act in conflict with organic act of territory.

Illinois.— People *v.* Maynard, 14 Ill. 419.

Mississippi.— Heggie *v.* Stone, 70 Miss. 39, 12 So. 253.

New York.— People *v.* Howland, 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347; Shaeffer *v.* Steadman, 24 Misc. 267, 53 N. Y. Suppl. 586.

North Carolina.— Edenton *v.* Wool, 65 N. C. 379.

Tennessee.— State *v.* Allen, (Ch. App. 1900) 57 S. W. 182. Under Tenn. Const. art. 6, § 15, providing that two justices of the peace shall be elected in each civil district, except such districts as include county towns, it was held that a civil district which includes a part of a county-seat town, but does not include the court-house, is only entitled to two justices of the peace, as the district entitled to three justices is that in which the court-house is situated. State *v.* Cates, 105 Tenn. 441, 58 S. W. 649.

Texas.— *Ex p.* Knox, (Cr. App. 1897) 39 S. W. 670.

Wisconsin.— Atty.-Gen. *v.* McDonald, 3 Wis. 805.

See 31 Cent. Dig. tit. "Justice of the Peace," §§ 2, 10.

39. *California.*— *Ex p.* Fedderwitz, (1900) 62 Pac. 935; People *v.* Chaves, 122 Cal. 134, 54 Pac. 596.

Colorado.— Deitz *v.* Central, 1 Colo. 323; Morris *v.* People, 8 Colo. App. 375, 46 Pac. 691.

Illinois.— *In re* Welsh, 17 Ill. 161.

Iowa.— Dubuque *v.* Rebman, 1 Iowa 444.

Massachusetts.— Wales *v.* Belcher, 3 Pick. 508.

Michigan.— O'Connell *v.* Menominee Bay Shore Lumber Co., 113 Mich. 124, 71 N. W. 449.

visions requiring uniformity of jurisdiction,[40] or forbidding local and special laws.[41] The legislature, however, cannot delegate a power conferred upon it by the constitution,[42] nor can a municipality exercise an authority belonging wholly to the legislature.[43]

2. Abolition — a. In General. While it is undoubtedly beyond the power of the legislature to abolish the office of justice of the peace, when created by the constitution,[44] it has the power to alter and change the limits of its territorial jurisdiction, or abolish the political subdivision altogether, provided it be done in good faith, and for proper constitutional objects.[45] So too where the constitution

Minnesota.— Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47.

Missouri.— State *v.* Simmons, 35 Mo. App. 374. Rev. St. (1899) § 3805, providing that any townships which now or may hereafter include a city of one hundred thousand inhabitants, shall, on or before March 1, 1890, be divided into districts, in each of which one justice of the peace shall be elected, applies only to such townships containing a city of more than one hundred thousand inhabitants as existed on the date of its passage, or came into existence between that date and March 1, 1890. State *v.* Mosman, 112 Mo. App. 540, 87 S. W. 75.

Nebraska.— State *v.* Partridge, 28 Nebr. 748, 45 N. W. 169.

New York.— People *v.* Terry, 108 N. Y. 1, 14 N. E. 815; Brandon *v.* Avery, 22 N. Y. 469; People *v.* Whitney, 32 N. Y. App. Div. 144, 52 N. Y. Suppl. 695 [*affirming* 24 Misc. 264]; Ostrander *v.* People, 29 Hun 513; Shaeffer *v.* Steadman, 24 Misc. 267, 53 N. Y. Suppl. 586.

Oregon.— Adams *v.* Kelly, 44 Oreg. 66, 74 Pac. 399; Clemmensen *v.* Peterson, 35 Oreg. 47, 56 Pac. 1015.

Pennsylvania.— Locher *v.* King, 5 Lanc. Bar, May, 1874; Com. *v.* Pattison, 1 Lanc. L. Rev. 252.

South Carolina.— *In re* Hooper, 48 S. C. 149, 26 S. E. 466.

Utah.— State *v.* Howell, 26 Utah 53, 72 Pac. 187; People *v.* Douglass, 5 Utah 283, 14 Pac. 801 [*overruling* People *v.* Speirs, 4 Utah 385, 10 Pac. 609, 11 Pac. 509].

Virginia.— *Ex p.* Bassitt, 90 Va. 679, 19 S. E. 453.

Wisconsin.— Starkweather *v.* Sawyer, 63 Wis. 297, 23 N. W. 566.

See 31 Cent. Dig. tit. "Justices of the Peace," § 2.

Charter provision in conflict with general laws invalid see Campbell *v.* Lewiston, 6 Ill. App. 530.

Number of justices.— See South Bethlehem Borough Case, 11 Pa. Dist. 734; *In re* Old Forge Justices, 30 Pa. Co. Ct. 163; Stidfole's Case, 28 Pa. Co. Ct. 389; Com. *v.* Hastings, 4 Dauph. Co. Rep. (Pa.) 303.

40. Tissier *v.* Rhein, 130 Ill. 110, 22 N. E. 848; People *v.* Meech, 101 Ill. 200. *Compare* *In re* Welsh, 17 Ill. 161.

41. Miner *v.* Berkeley Justice's Court, 121 Cal. 264, 53 Pac. 795.

A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable, as wanting uniformity of operation. State *v.* Berka, 20 Nebr. 375, 30 N. W. 267. See also Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

42. State *v.* Snodgrass, 4 Nev. 524; State *v.* Adams, 90 Tenn. 722, 18 S. W. 393. *Compare* Spencer *v.* Cline, 28 Ind. 51.

43. People *v.* Curley, 5 Colo. 412.

44. Gratopp *v.* Van Eps, 113 Mich. 590, 71 N. W. 1080; Brooks *v.* Hydorn, 76 Mich. 273, 42 N. W. 1122; People *v.* Washington County, 155 N. Y. 295, 49 N. E. 779; People *v.* Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838 [*affirming* 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347]; Gertum *v.* Kings County, 109 N. Y. 170, 16 N. E. 328; People *v.* Keeler, 25 Barb. (N. Y.) 421. But *compare* Koch *v.* New York, 5 N. Y. App. Div. 276, 39 N. Y. Suppl. 164 [*affirmed* in 152 N. Y. 72, 46 N. E. 170]; *In re* Quinn, 15 Misc. (N. Y.) 509, 36 N. Y. Suppl. 894, to the effect that N. Y. Laws (1895), c. 601, which abolishes the office of police justice in New York city, does not violate N. Y. Const. (1895) art. 6, § 22, providing that "local judicial officers" (which designation includes police justices) in office when the article takes effect shall hold their offices until the expiration of their respective terms.

Abolition by constitution.— Ill Const. (1870) art. 6, § 28, abolished by implication the office of police magistrate in the city of Chicago. People *v.* Palmer, 64 Ill. 41.

45. *Alabama.*— State *v.* Sawyer, 139 Ala. 138, 36 So. 545.

California.— Proulx *v.* Graves, 143 Cal. 243, 76 Pac. 1025.

Michigan.— People *v.* Geddes, 3 Mich. 70.

New York.— Gertum *v.* Kings County, 109 N. Y. 170, 16 N. E. 328.

Pennsylvania.— Respublica *v.* McClean, 4 Yeates 399.

Tennessee.— State *v.* Akin, 112 Tenn. 603, 79 S. W. 805.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 3, 4.

County commissioners have power, under Ida. Rev. St. (1887) § 1759, subds. 2, 3, to establish, abolish, and change justices' precincts in incorporated cities, and this power was not taken away by Sess. Laws (1891), p. 60, § 11. Johnston *v.* Savidge, (Ida. 1905) 81 Pac. 616. See also State *v.* Rigsby, (Tex. Civ. App. 1897) 43 S. W. 271, as to change of boundaries by commissioners' court.

contains no limitation on the power of the legislature over the office, it may make such regulations as to the number of justices of the peace, the mode of their election, appointment, or removal, and their territorial jurisdiction as it may see fit, although the effect of such regulations may be to abolish the office in particular instances.[46] Where the power to determine the facts which will entitle a precinct to an additional justice is conferred by the legislature upon a subordinate body, which fills the position by an appointment, such body has no power to abolish the office.[47]

b. Effect of Change of Territory. The complete abolition of a justice's precinct or district,[48] or a change of boundaries by which he is placed outside of the territorial subdivision for which he was elected,[49] will vacate his office. But the division of a town does not vacate the commission of a justice for the district in which the town lies,[50] and the same is true where a borough is erected from part of a township, for which justices have been previously elected who reside in the new borough;[51] and where a new county is made out of several towns, the justices of such towns will continue to hold their offices as such in the new county.[52] Nor is a duly commissioned justice disqualified by an act creating a new township, whose territory includes that part of his township in which he resides.[53] In Canada it seems that a justice, commissioned for three united counties, will, notwithstanding a subsequent separation of the counties, continue a justice of the peace for the three counties, or at least for that in which he is resident.[54]

G. Eligibility. To be eligible to the office of justice of the peace the candidate must be of the male sex,[55] over the age of twenty-one years,[56] a citizen of the United States and of the state in which he seeks to hold office,[57] and a resident,[58] and, in some states, an elector,[59] of the territorial subdivision in which he seeks election. In England and Canada a justice of the peace must have certain property qualifications.[60] In Colorado a police magistrate must primarily be a

46. Fahay *v.* Boardman, 70 Me. 448; Com. *v.* Pattison, 2 Pa. Dist. 128, 12 Pa. Co. Ct. 202, 3 Pa. Dist. 599, 15 Pa. Co. Ct. 238, 7 Kulp 477; Nystrom *v.* Clark, 27 Utah 186, 75 Pac. 378; State *v.* Howell, 26 Utah 53, 72 Pac. 187.

Cal. Code Civ. Proc. § 103, did not by implication repeal a provision for two justices in the town of Berkeley, made by its charter. *Ex p.* Armstrong, 84 Cal. 655, 24 Pac. 598.

Minn. Laws (1895), p. 16, c. 8, did not abolish, but recognized and continued the office of justice of the peace provided by Sp. Laws (1887), p. 602, c. 45, incorporating the city of Grand Forks. Kane *v.* Arneson Mercantile Co., 94 Minn. 451, 103 N. W. 218.

47. Pueblo County Com'rs *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465.

48. State *v.* Sawyer, 139 Ala. 138, 36 So. 545; Granger County *v.* State, 111 Tenn. 234, 80 S. W. 750.

49. People *v.* Geddes, 3 Mich. 70; People *v.* Glass, 19 N. Y. App. Div. 454, 46 N. Y. Suppl. 572; Respublica *v.* McClean, 4 Yeates (Pa.) 399. But see Pfeifer *v.* Green, 4 Ohio S. & C. Pl. Dec. 239, 3 Ohio N. P. 156, construing Rev. St. § 568.

50. Com. *v.* Sheriff, 4 Serg. & R. (Pa.) 275. See also Com. *v.* Brennan, 150 Mass. 63, 22 N. E. 628.

51. Com. *v.* Lentz, 9 North. Co. Rep. (Pa.) 75.

52. Gary *v.* People, 9 Cow. (N. Y.) 640.

53. State *v.* Dilloway, 31 N. J. L. 42.

54. Reg. *v.* Perry, 1 Ont. Pr. 237.

55. *In re* Opinion Justices Sup. Ct., 62 Me. 596; *In re* Opinion of Justices, 107 Mass. 604. See, generally, OFFICERS.

56. *In re* Golding, 57 N. H. 146, 24 Am. Rep. 66.

In Kentucky no one under twenty-four years of age is eligible to the office of judge of the police court. Boyd *v.* Land, 97 Ky. 379, 30 S. W. 1019, 17 Ky. L. Rep. 273.

57. See Fancher *v.* Stearns, 61 Vt. 616, 18 Atl. 455.

58. Boyd *v.* Land, 97 Ky. 379, 30 S. W. 1019, 17 Ky. L. Rep. 273 (police judge must have been a resident of the city for the six months preceding his election); Mullery *v.* McCann, 95 Mo. 579, 8 S. W. 774 (justice of district in St. Louis must have been a resident of the district six months before his appointment or election); Com. *v.* Hart, 1 Dauph. Co. Rep. (Pa.) 92 (residence qualification as necessary in case of appointment to fill vacancy as in case of election).

59. Kaufman *v.* People, 85 Ill. App. 421; State *v.* Lake, 16 R. I. 511, 17 Atl. 552. But see Boyd *v.* Land, 97 Ky. 379, 30 S. W. 1019, 17 Ky. L. Rep. 273; Com. *v.* Kerr, 3 Pittsb. (Pa.) 348; Camphausen's Case, 3 Pittsb. (Pa.) 57.

60. See Pack *v.* Tarpley, 9 A. & E. 468, 8 L. J. M. C. 93, 1 P. & D. 478, 2 W. W. & H. 88, 36 E. C. L. 255; Woodward *v.* Watts, 2 E. & B. 452, 17 Jur. 790, 22 L. J. M. C. 149, 1 Wkly. Rep. 386; Jones *v.* Edwards, 2 Jur. 519; Weir *v.* Smyth, 19 Ont. App. 433; Crandell *v.* Nott, 30 U. C. C. P. 63; Squire

justice of the peace.[61] A justice of the peace is not a "justice or judge of any court" within the meaning of constitutional provisions fixing an old age limit.[62]

H. Appointment and Election — 1. In General. In England and Canada justices of the peace are appointed to office;[63] but in the United States the office is generally an elective one,[64] although the constitutions and statutes of many of the states permit the appointment of such officers, either generally or under certain circumstances.[65]

v. Wilson, 15 U. C. C. P. 284; Fraser *v.* McKenzie, 28 U. C. Q. B. 255.

61. People *v.* Curley, 5 Colo. 412, construing Col. Gen. Laws, §§ 2661, 2720.

62. Keniston *v.* State, 63 N. H. 37, 56 Am. Rep. 486; People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556 [*reversing* 32 Hun 440 (*affirming* 66 How. Pr. 337)]; Dohring *v.* People, 2 Thomps. & C. (N. Y.) 458.

63. Jones *v.* Williams, 3 B. & C. 762, 10 E. C. L. 345, 1 C. & P. 459, 669, 12 E. C. L. 268, 379, 5 D. & R. 654, 3 L. J. K. B. O. S. 112, 22 Rev. Rep. 474; Arnold *v.* Dimsdale, 2 E. & B. 580, 17 Jur. 1157, 22 L. J. M. C. 161, 1 Wkly. Rep. 430, 75 E. C. L. 580. But see Rex *v.* Abell, 3 D. & R. 390, 1 L. J. K. B. O. S. 250, 16 E. C. L. 172; *Ex p.* Gallagher, 34 N. Brunsw. 329; Reg. *v.* Bennett, 1 Ont. 445.

Presumption of legality of appointment see Reg. *v.* Atkinson, 15 Ont. 110; Reg. *v.* White, 21 U. C. C. P. 354.

64. *Arkansas.*— Alford *v.* State, 69 Ark. 436, 64 S. W. 217.

California.— Bishop *v.* Oakland, 58 Cal. 572; People *v.* Ransom, 58 Cal. 558; McGrew *v.* San Jose, 55 Cal. 611. See also People *v.* Henry, 62 Cal. 557.

Iowa.— State *v.* Gaston, 79 Iowa 457, 44 N. W. 706; Lynch *v.* Vermazen, 61 Iowa 76, 15 N. W. 663.

Kansas.— Showalter *v.* Cox, 26 Kan. 120; Odell *v.* Dodge, 16 Kan. 446.

Louisiana.— Andrews *v.* Saucier, 13 La. Ann. 301; New Orleans Second Municipality *v.* Schmidt, 1 La. Ann. 387.

Missouri.— State *v.* Smith, 152 Mo. 512, 54 S. W. 221, 47 L. R. A. 560; State *v.* McCann, 81 Mo. 479.

New York.— People *v.* Terry, 108 N. Y. 1, 14 N. E. 815 [*reversing* 42 Hun 273]; People *v.* Schiellein, 95 N. Y. 124; Geraty *v.* Reid, 78 N. Y. 64; Dawson *v.* Horan, 51 Barb. 459; *Ex p.* Quackenbush, 2 Hill 369.

Oklahoma.— Davis *v.* Hull, 4 Okla. 1, 41 Pac. 144.

Pennsylvania.— Com. *v.* Morgan, 178 Pa. St. 198, 35 Atl. 589; *In re* Lawlor, 18 Pa. Co. Ct. 421.

Rhode Island.— State *v.* Stiness, 9 R. I. 368.

Utah.— *In re* Wiseman, 1 Utah 39.

Wisconsin.— State *v.* Goldstucker, 40 Wis. 124.

See 31 Cent. Dig. tit. "Justices of the Peace," § 6.

Elections to fill vacancies see *infra*, I, J, 2, b.

Contest of election see Elections.

65. *Alabama.*— Montgomery *v.* State, 107 Ala. 372, 18 So. 157. See also *Ex p.* Gist, 26 Ala. 156.

California.— People *v.* Chaves, 122 Cal. 134, 54 Pac. 596.

Florida.— *In re* Opinion of Justices, 15 Fla. 735.

Illinois.— Kaufman *v.* People, 185 Ill. 113, 57 N. E. 4 [*affirming* 85 Ill. App. 421]; People *v.* O'Toole, 164 Ill. 344, 45 N. E. 683 [*affirming* 60 Ill. App. 534]; People *v.* Moore, 60 Ill. App. 547.

Kentucky.— Com. *v.* Frazier, 4 T. B. Mon. 513; Justices Jefferson County *v.* Clark, 1 T. B. Mon. 82.

Massachusetts.— See Wales *v.* Belcher, 3 Pick. 508.

Michigan.— See *In re* Coon, 42 Mich. 65, 3 N. W. 268.

Montana.— *Ex p.* Parks, 3 Mont. 426.

New York.— People *v.* Morgan, 5 Daly 161 [*affirmed* in 58 N. Y. 679]. See also Clark *v.* People, 26 Wend. 599. But see People *v.* Kane, 23 Wend. 414.

South Carolina.— Bell *v.* Pruit, 50 S. C. 344, 29 S. E. 5.

Virginia.— Frederick County Justices *v.* Bruce, 4 Gratt. 281.

United States.— Marbury *v.* Madison, 1 Cranch 137, 2 L. ed. 60.

See 31 Cent. Dig. tit. "Justices of the Peace," § 5; and *infra*, I, J, 2, b.

Appointed justices have the same qualifications, jurisdiction, power, and authority, and are subject to the same liabilities, as justices who are elected. Kaufman *v.* People, 85 Ill. App. 421.

Authority to appoint justices of the peace cannot be delegated.— Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Jones *v.* Williams, 3 B. & C. 762, 10 E. C. L. 345, 1 C. & P. 459, 669, 12 E. C. L. 268, 379, 5 D. & R. 654, 3 L. J. K. B. O. S. 112, 22 Rev. Rep. 474. *Compare*, however, Los Angeles County *v.* Morgan, (Cal. 1884) 4 Pac. 456; Los Angeles County *v.* Los Angeles, 65 Cal. 476, 4 Pac. 453.

Appointment of additional justices.— Under Tenn. Const. art. 6, § 15, providing that there shall be two justices elected in each civil district, except districts including county towns, which shall elect three, and that the legislature shall have power to provide for the appointment of an additional number in incorporated towns, it has no power to provide for the appointment of more than two justices in any district outside of towns. Grainger County *v.* State, 111 Tenn. 234, 80 S. W. 750.

2. Commission or Election Certificate. A justice's title to his office is shown *prima facie* by his commission or election certificate.[66]

I. Qualification. Before entering upon the duties of the office justices of the peace are as a rule required to take an oath of office[67] and file an official bond,[68] and in a few states further formalities of qualification are required.[69]

J. Term of Office, Vacancies, and Holding Over — 1. Term of Office. The commencement and duration of the terms of office of justices of the peace are fixed by the constitutions of the various states or by statutes made in pursuance of constitutional authority.[70] They may be changed by a change of the

66. People *v.* De Carlo, 124 Cal. 462, 57 Pac. 383; Overseer of Poor *v.* Yarrington, 20 Vt. 473. See also People *v.* Ham, 73 Ill. App. 533.

Necessity of commission by governor see Abrams *v.* State, 121 Ga. 170, 48 S. E. 965.

A commission is not the legal title to an office, but only evidence of it. Com. *v.* Lentz, 9 North. Co. Rep. (Pa.) 18.

Conclusiveness.— Where, pending a contest for the office, a commission is inadvertently issued to one of the claimants, after due notice to the governor of the contest, and without the fault of the other claimant, the commission is not conclusive. Hardin *v.* Colquitt, 63 Ga. 588.

Certificate of clerk.— Under Ill. Acts (1847), c. 51, § 17, before the proceedings in a justice's court can be used in another county, the county clerk shall certify that the justice was at the time a justice of the peace duly commissioned. Crossett *v.* Owens, 110 Ill. 378.

67. *Kentucky.*— Barnett *v.* Hart, 112 Ky. 728, 66 S. W. 726, 23 Ky. L. Rep. 2116, holding that under St. § 3755, if the oath of office is not taken on or before the day on which the term of office begins, the office shall be considered vacant.

Michigan.— People *v.* Payment, 109 Mich. 553, 67 N. W. 689.

Mississippi.— Dabney *v.* Hudson, 68 Miss. 292, 8 So. 545, 24 Am. St. Rep. 276.

New York.— Weeks *v.* Ellis, 2 Barb. 320.

South Carolina.— State *v.* Billy, 2 Nott & M. 356.

Virginia.— Frederick County Justices *v.* Bruce, 4 Gratt. 281.

United States.— *Ex p.* Bollman, 4 Cranch 75, 2 L. ed. 554.

England.— See Margate Pier Co. *v.* Hannam, 3 B. & Ald. 266, 22 Rev. Rep. 378, 5 E. C. L. 160.

Canada.— Reg. *v.* Boyle, 4 Ont. Pr. 256; Herbert *v.* Dowswell, 24 U. C. Q. B. 427.

See 31 Cent. Dig. tit. "Justices of the Peace," § 8.

Magistrate found acting as such presumed to have taken requisite oaths.— *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554.

68. *Illinois.*— Rudesill *v.* Jefferson County Ct., 85 Ill. 446, construing the law as to filing a new bond where the surety on the original bond gives notice of unwillingness to continue longer liable.

Indiana.— Weaver *v.* State, 8 Blackf. 563, as to executing an additional bond where the surety applies to be discharged from liability.

Kentucky.— Barnett *v.* Hart, 112 Ky. 728, 66 S. W. 726, 23 Ky. L. Rep. 2116.

Michigan.— People *v.* Payment, 109 Mich. 553, 67 N. W. 689.

Mississippi.— Brown *v.* State, 75 Miss. 842, 23 So. 422, holding that elective justices of the peace must give bond, but a municipal officer, already under bond, need not give an additional bond as a prerequisite to the discharge of his duties as an *ex-officio* justice of the peace.

Ohio.— See Stevens *v.* Allmen, 19 Ohio St. 485, as to the sufficiency of additional security, where a justice's sureties were unwilling to be liable longer.

See 31 Cent. Dig. tit. "Justices of the Peace," § 8.

Tender after commencement of term.— Under Ky. St. § 3755, mandamus will not lie to compel the county judge to accept a justice's bond, not tendered until after the commencement of his term of office. Barnett *v.* Hart, 112 Ky. 728, 66 S. W. 726, 23 Ky. L. Rep. 2116.

Failure to qualify upon reëlection. — If a person who has once been elected and qualified is reëlected but fails to qualify, he nevertheless remains a justice *de jure* as well as *de facto* until a successor is qualified. Rheinhart *v.* State, 14 Kan. 318.

69. **In Pennsylvania,** under the act of April 13, 1859, a person elected justice of the peace must file his acceptance with the prothonotary of the proper county within thirty days after the election; and if an acceptance is not filed as required, the person elected will be held to have declined the office. This act was not repealed by the act of March 22, 1877. *In re* Justices of Peace, 4 Pa. Co. Ct. 539. But see Com. *v.* Reno, 25 Pa. Co. Ct. 442, to the effect that the act of April 13, 1859, was repealed by the act of March 22, 1877, and even if it was not, both acts were merely directory.

In South Carolina there was formerly a requirement, now impliedly repealed (Barksdale *v.* Morrison, Harp. 101), that justices, before commencing the duties of their office, should sign a roll to be lodged with the secretary of state (State *v.* Billy, 2 Nott & M. (S. C.) 356).

70. *California.*— People *v.* Cobb, 133 Cal. 74, 65 Pac. 325; Kahn *v.* Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; Bailey *v.* San Joaquin County, 66 Cal. 10, 4 Pac. 768.

constitution,[71] but where they are fixed by the constitution the legislature cannot alter them.[72] Where there are no constitutional restrictions, the legislature may alter the terms of justices as it may see fit.[73]

2. Vacancies — a. How Caused. A vacancy in the office of justice of the peace may be caused by the failure of the person elected or appointed to the office to qualify, where there is no predecessor entitled to hold over;[74] by the incumbent's death,[75] resignation,[76] removal,[77] conviction of a felony,[78] acceptance of an incompatible office,[79] or ceasing to be a resident of the township or district for which he was elected or appointed;[80] by a change in the boundaries of his township or district;[81] or by a determination by the proper authorities that the

Florida.— *In re* Opinion of Justices, 15 Fla. 735.

Illinois.— Becker *v.* People, 156 Ill. 301, 40 N. E. 944 [*affirming* 55 Ill. App. 285]; Kaufman *v.* People, 85 Ill. App. 421.

Kansas.— Odell *v.* Dodge, 16 Kan. 446.

Kentucky.— Tevis *v.* Rice, 97 Ky. 528, 30 S. W. 1021, 17 Ky. L. Rep. 350.

Massachusetts.— *In re* Opinion of Justices, 3 Cush. 584.

Michigan.— Messenger *v.* Teagan, 106 Mich. 654, 64 N. W. 499; Hulbert *v.* Henry, 105 Mich. 211, 62 N. W. 1030.

Minnesota.— Kane *v.* Arneson Mercantile Co., 94 Minn. 451, 103 N. W. 218.

New York.— People *v.* Kent, 83 N. Y. App. Div. 554, 82 N. Y. Suppl. 172; Waters *v.* Langdon, 40 Barb. 408.

See 31 Cent. Dig. tit. "Justices of the Peace," § 11.

71. *In re* Opinion of Justices, 15 Fla. 735; State *v.* Coenzler, 9 Iowa 433; Taylor *v.* Hebden, 24 Md. 202; Petterson *v.* Welles, 1 N. Y. App. Div. 8, 36 N. Y. Suppl. 1009; Murphy *v.* Snitzpan, 15 Misc. (N. Y.) 496, 36 N. Y. Suppl. 1013.

72. Gratopp *v.* Van Eps, 113 Mich. 590, 71 N. W. 1080; People *v.* Schiellein, 95 N. Y. 124; People *v.* Treacy, 46 N. Y. App. Div. 216, 61 N. Y. Suppl. 288; Gary *v.* People, 9 Cow. (N. Y.) 640; People *v.* Garey, 6 Cow. (N. Y.) 642; *Ex p.* Cross, 16 Lea (Tenn.) 486; Keys *v.* Mason, 3 Sneed (Tenn.) 6. See also Becker *v.* People, 156 Ill. 301, 40 N. E. 944 [*affirming* 55 Ill. App. 285]. But *compare* State *v.* Ransom, 73 Mo. 78. See also *supra*, I, F, 2, a.

In the exercise of its duty to organize cities from other forms of civil government, the legislature may extinguish the town organization, and thereby shorten the term of office of the justices thereof. Gertum *v.* Kings County, 109 N. Y. 170, 16 N. E. 328 [*affirming* 12 N. Y. St. 659].

73. Shearer *v.* Oakland, 67 Cal. 633, 8 Pac. 384; Fahay *v.* Boardman, 70 Me. 448; Coulter *v.* Murray, 15 Abb. Pr. N. S. (N. Y.) 129; Hess *v.* Evans, 1 Leg. Rec. (Pa.) 39.

74. People *v.* Percells, 8 Ill. 59; Campbell *v.* Dotson, 11 Ky. 125, 63 S. W. 480, 23 Ky. L. Rep. 510.

Holding over see *infra*, I, J, 3.

Failure to qualify caused by death.— Under Ky. Const. § 99, where one who was elected justice of the peace died before qualifying, the incumbent had no right to hold for another term, but there was a vacancy in the office to be filled by appointment of the governor. Olmstead *v.* Augustus, 112 Ky. 365, 65 S. W. 817, 23 Ky. L. Rep. 1772.

75. Boyd *v.* Land, 97 Ky. 379, 30 S. W. 1019, 17 Ky. L. Rep. 273; State *v.* Manning, 84 Mo. 661; Mechanicsburg Justices, 30 Pa. Co. Ct. 77.

76. See, generally, Officers.

77. See *infra*, I, K.

78. Com. *v.* Fugate, 2 Leigh (Va.) 724.

79. People *v.* Dillon, 38 N. Y. App. Div. 539, 56 N. Y. Suppl. 416.

The incumbent's qualifying as justice in another township created a vacancy. Eddy *v.* Peoria County Com'rs, 15 Ill. 375.

De facto justices see *supra*, I, D, text and note 29.

80. Hinton *v.* Lindsay, 20 Ga. 746; *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170; Poulson *v.* Accomack Justices, 2 Leigh (Va.) 743; Chew *v.* Spottsylvania Justices, 2 Va. Cas. 208. *Compare* State *v.* Hemsworth, 112 Iowa 1, 83 N. W. 728.

An intent to change the place of residence is necessary. Lexington, etc., Turnpike Road Co. *v.* McMurtry, 6 B. Mon. (Ky.) 214. See also Lyon *v.* Com., 3 Bibb (Ky.) 430.

A temporary absence or removal does not create a vacancy. Lyon *v.* Com., 3 Bibb (Ky.) 430; People *v.* Schirmer, 55 Hun (N. Y.) 160, 8 N. Y. Suppl. 76; Moliter *v.* State, 10 Ohio Dec. (Reprint) 324, 20 Cinc. L. Bul. 323; Crawford *v.* Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

Maintaining another office outside of district.— Where a justice continues to reside in the civil district where he was elected, and maintains an office there, where he keeps his official dockets, books, and papers, and where he remains on stated days, and attends to all business coming before him, the fact that he also maintains an office in another district of his county, where he remains a large part of the time, does not constitute an abandonment of his office. State *v.* Springfield, 97 Tenn. 302, 37 S. W. 5 [*following* Strain *v.* Hefley, 94 Tenn. 668, 30 S. W. 747].

81. See *supra*, I, F, 2, b.

Where a ward is divided into two or more wards, and no justice resides in the new wards, there is a vacancy which is properly filled at the next annual municipal election. Com. *v.* Pattison, 1 Lanc. L. Rev. (Pa.) 252.

political subdivision is entitled to an additional justice.[82] A failure to elect a successor at the regular time for holding an election for that purpose does not create a vacancy, if the incumbent is authorized to hold over.[83]

b. How Filled. A vacancy in the office of justice of the peace is usually filled by appointment by the governor,[84] or some other designated public official or body.[85] Vacancies are also sometimes filled by a special election.[86]

c. Term of Appointee. An appointment to fill a vacancy is usually for the remainder of the unexpired term,[87] or until the next election.[88]

3. Holding Over. A justice of the peace is as a rule entitled to hold over until the election or appointment and qualification of his successor.[89]

K. Removal — 1. In General. A justice of the peace is subject to removal by the legislature[90] or the courts,[91] and the power of removal has been exercised

82. State *v.* Powles, 136 Mo. 376, 37 S. W. 1124.

83. State *v.* Lusk, 18 Mo. 332.

Holding over, see *infra*, I, J, 3.

84. *Kansas.*— Ward *v.* Clark, 35 Kan. 315, 10 Pac. 827.

Kentucky.— Traynor *v.* Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 25 Ky. L. Rep. 981; Olmstead *v.* Augustus, 112 Ky. 365, 65 S. W. 817, 23 Ky. L. Rep. 1772; Daugherty *v.* Arnold, 110 Ky. 1, 60 S. W. 865, 22 Ky. L. Rep. 1504.

Maryland.— Cantwell *v.* Owens, 14 Md. 215.

Mississippi.— State *v.* Lovell, 70 Miss. 309, 12 So. 341.

New York.— People *v.* Keeler, 25 Barb. 23. But see People *v.* Albertson, 8 How. Pr. 363.

North Carolina.— Gilmer *v.* Holton, 98 N. C. 26, 3 S. E. 812.

Pennsylvania.— *In re* Mechanicsburg Justices, 30 Pa. Co. Ct. 77; Keller *v.* Hoffman, 17 Lanc. L. Rev. 238.

See 31 Cent. Dig. tit. "Justices of the Peace," § 13.

85. Common council.— People *v.* Carter, 29 Barb. (N. Y.) 208. See also Edison *v.* Almy, 66 Mich. 329, 33 N. W. 509.

County commissioners.— State *v.* Cronin, 5 Wash. 398, 31 Pac. 864.

County court.— State *v.* Powles, 136 Mo. 376, 37 S. W. 1124.

Supervisors.— People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; People *v.* Sands, 102 Cal. 12, 36 Pac. 404, 35 Pac. 330.

86. Nooe *v.* Bradley, 3 Blackf. (Ind.) 158, holding that under St. (1831), county commissioners may order an election of a justice to fill a vacancy already existing; but not in anticipation of a vacancy.

87. People *v.* Cobb, 133 Cal. 74, 65 Pac. 325; People *v.* Sands, 102 Cal. 12, 36 Pac. 404; People *v.* Rix, 33 Cal. 503; Hale *v.* Evans, 12 Kan. 562; Matter of Eliott, 6 N. Y. St. 8. *Compare* Keys *v.* Mason, 3 Sneed (Tenn.) 6.

88. Cantwell *v.* Owens, 14 Md. 215; State *v.* Powles, 136 Mo. 376, 37 S. W. 1124; State *v.* Spitz, 127 Mo. 248, 29 S. W. 1011; State *v.* Manning, 84 Mo. 661; People *v.* Keeler, 17 N. Y. 370 [*reversing* 25 Barb. 421].

Under the charter of Grand Rapids, Michigan, a justice appointed to fill a vacancy holds until the first Monday in May following. Edison *v.* Almy, 66 Mich. 329, 33 N. W. 509.

89. *Arizona.*— Meyer *v.* Culver, 4 Ariz. 145, 35 Pac. 984.

California.— French *v.* Santa Clara County, 69 Cal. 519, 11 Pac. 30.

Illinois.— Kaufman *v.* People, 85 Ill. App. 421.

Kansas.— Rheinhart *v.* State, 14 Kan. 318; Borton *v.* Buck, 8 Kan. 302.

Michigan.— Messenger *v.* Teagan, 106 Mich. 654, 64 N. W. 499.

Missouri.— State *v.* Smith, 152 Mo. 512, 54 S. W. 221, 47 L. R. A. 560.

Nebraska.— State *v.* Lynn, 31 Nebr. 770, 48 N. W. 881.

Wisconsin.— Platteville *v.* Bell, 66 Wis. 326, 28 N. W. 404.

See 31 Cent. Dig. tit. "Justices of the Peace," § 14.

Where there is a tie vote for the election of a successor, the incumbent holds over. Meyer *v.* Culver, 4 Ariz. 145, 35 Pac. 984; State *v.* Smith, 152 Mo. 512, 54 S. W. 221, 47 L. R. A. 560. But see Keller *v.* Hoffman, 17 Lanc. L. Rev. (Pa.) 238.

Qualifying anew.— Nebr. Comp. St. c. 10, § 17, provides that "when it is ascertained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified." See State *v.* Lynn, 31 Nebr. 770, 773, 48 N. W. 881.

Where the office is abolished, and the election of a successor to the justice in office prohibited, the incumbent cannot continue to hold the office after the expiration of the term for which he was elected. State *v.* Howell, 26 Utah 53, 72 Pac. 187.

Justice holding over as a de facto justice see *supra*, I, D.

90. State *v.* Thompson, 28 La. Ann. 444; People *v.* Rochester, 11 Hun (N. Y.) 241.

91. State *v.* Seawell, 64 Ala. 225 (on report of grand jury setting forth the nature and description of the misconduct charged); *In re* Prescott, 77 Hun (N. Y.) 518, 28 N. Y. Suppl. 928; *In re* King, 53 Hun (N. Y.) 631, 6 N. Y. Suppl. 420 (general term of supreme court); Com. *v.* Alexander, 4 Hen. & M. (Va.) 522 (information in superior court of

as incident to the power of appointment.[92] The officer is ordinarily entitled to a specification of the charges against him, notice, and an opportunity to be heard.[93] The legislature cannot provide a manner of removal repugnant to constitutional provisions on the subject.[94]

2. GROUNDS FOR REMOVAL. A justice may be removed for malfeasance or misconduct in office,[95] such as intentional violations of the laws governing magistrates,[96] disregard of legal rules,[97] or intoxication while in the discharge of his official duties.[98] But to warrant the removal of the justice, the acts charged

criminal jurisdiction); Arkle *v.* Board of Com'rs, 41 W. Va. 471, 23 S. E. 804 (proceeding in county court).

In England the lord chancellor is the functionary by whose advice and agency the crown usually acts in removing magistrates. But an inquiry may be set on foot by a petition for removal addressed to the secretary of state for the home department. Harrison *v.* Bush, 5 E. & B. 344, 1 Jur. N. S. 846, 25 L. J. Q. B. 25, 3 Wkly. Rep. 474, 85 E. C. L. 344.

92. U. S. *v.* Oliver, 6 Mackey (D. C.) 47, holding that the president of the United States may remove justices of the peace in the District of Columbia "for cause," and his action is not reviewable by the supreme court of the district.

The governor of Maryland has no power of removal. Cantwell *v.* Owens, 14 Md. 215.

93. State *v.* Hemsworth, (Iowa 1900) 83 N. W. 728; State *v.* St. Louis, 90 Mo. 19, 1 S. W. 757.

Scope of inquiry.— A general charge of misconduct during his present term of office will not justify an inquiry into acts committed by a justice before such term began, although such acts are set forth in the specifications accompanying the charge. Matter of King, 2 Silv. Sup. (N. Y.) 356, 6 N. Y. Suppl. 420.

Judgment by default for unspecified cause. — Where a rule *nisi* was entered against all the justices in a certain county, without naming them, to show cause why they should not be removed from office for a specified cause, a judgment by default against one of them, removing him for an entirely different cause, is void. *Ex p.* Fields, 37 Tex. 575.

Affidavits in rebuttal are relevant, and where they fully meet the affidavits in support of the charges, and on examination of all papers the charges appear to be substantially answered, a reference will not be ordered under N. Y. Laws (1880), c. 354. Matter of Grogan, 1 Silv. Sup. (N. Y.) 526, 5 N. Y. Suppl. 499.

If the jury find the officer "guilty" generally, it is sufficient to authorize the judgment of amotion from office; and no further testimony is admissible before the court after the discharge of the jury. Com. *v.* Alexander, 4 Hen. & M. (Va.) 522.

Costs.— Under a statute (N. Y. Laws (1847), c. 280, § 25, as amended by N. Y. Laws (1880), c. 354, § 1), which empowers the general term to certify "the reasonable expenses of referee," it has no authority to include in such expenses the counsel fees and disbursements of the parties to the proceeding. *In re* King, 130 N. Y. 602, 29 N. E. 1096.

Application for revocation of rule.— An alderman, who has been ruled to substitute bail, on petition of his surety under the act of April 2, 1860, and who has made no answer, has no standing, after the governor has removed him, to apply for a revocation of the rule and order. Kemmerer's Case, 2 Just. L. Rep. (Pa.) 97.

94. Laflain *v.* State, 36 Tex. 696; *Ex p.* Hogg, 36 Tex. 14.

95. See *In re* Harris, 64 N. Y. App. Div. 623, 72 N. Y. Suppl. 318, misconduct as *ex officio* member of election board.

Illustrations.— Improperly discharging strikers who were arrested and brought before him, charged with throwing stones at street-cars and assaulting the operators of the cars, notwithstanding the evidence against them, and stating that the strikers had a perfect right to take men off the cars if they could do so in no other way, is misconduct for which a justice should be removed. *In re* Quigley, 32 N. Y. Suppl. 828. Attending a prize-fight and protecting the promoters from arrest; frequenting gambling-houses on Sundays, and making no effort to suppress them, and intimacy with their "coppers"; attending a dog fight; using his office to punish a constable who was alleged to have shot the proprietor of the hotel where the prize-fight occurred, which allegation he knew to be false, are facts sufficient to justify the removal of a justice from office. *In re* Carpenter, 21 N. Y. Suppl. 351.

Where a justice maliciously issued a warrant commanding a person to appear and answer the complaint of another person, and adjudged him to pay costs, when in fact said complaint was never made to him, he was held guilty of malfeasance, and was removed from office. Wallace *v.* Com., 2 Va. Cas. 130.

96. *In re* Quigley, 32 N. Y. Suppl. 828.

97. *In re* Quigley, 32 N. Y. Suppl. 828.

98. Com. *v.* Alexander, 4 Hen. & M. (Va.) 522, 1 Va. Cas. 156; Com. *v.* Mann, 1 Va. Cas. 308.

An indictment against a justice as a private citizen for drunkenness and profanity will not support a verdict of dismissal from his office. Carpenter *v.* State, 6 Baxt. (Tenn.) 535.

The indictment must set forth the wrong done by some official act or omission to act, resulting from drunkenness. Hawkins *v.* State, 54 Ga. 653.

against him must have been done in the discharge of his functions as a justice, and with corrupt, partial, malicious, or other improper motives, and with knowledge that they were wrong.[99]

L. Title to and Possession of Office — 1. In General. When duly elected or appointed and qualified, a justice of the peace may protect his office from invasion,[1] and is entitled to the books and papers belonging thereto,[2] but not to money collected by his predecessor in office.[3] Where there are several persons in a town, each holding the office of a justice of the peace, it is not in conflict with any constitutional right that one of them should be selected by the voters of the town to exercise the powers of the office in the town, to the exclusion of the others, or that the one so selected should be vested with some superadded powers.[4] The exercise by a justice of the peace of jurisdiction outside of that conferred by the constitution is not the exercise of an office, and acts done outside such jurisdiction are void.[5]

2. Proof of Official Capacity. Ordinarily proof that a person has acted as, and exercised the office of, justice of the peace, is sufficient evidence of his being one, without producing his appointment or commission,[6] although, where his

99. See People *v.* Ward, 85 Cal. 585, 24 Pac. 785; *In re* McKinney, 16 N. Y. App. Div. 63, 44 N. Y. Suppl. 1097; Matter of King, 2 Silv. Sup. (N. Y.) 356, 6 N. Y. Suppl. 420; *In re* Petterson, 15 N. Y. Suppl. 489.

Illustrations.— Thus in New York it was held not to be sufficient cause for removal of a police justice, that on account of passion and prejudice he illegally continued a bastardy case for two months and kept defendant in jail during such time, where it appeared that no objection was made to such continuance by defendant; that he maliciously uttered from the bench slanderous words regarding the mayor of his city, and the county judge of his county; that he objected because the police commissioners detailed certain policemen for duty in his court, and told one of the policemen to tell the commissioners that he did not want the policemen there; that he suspended sentence on a prisoner convicted of assault and battery; or that in his return on an appeal he maliciously referred to the appellant's attorney as a "penitentiary outcast and legal pirate, who has made a practice of hanging around the police court and penitentiary, seeking whom he might devour, and persuading ignorant persons to . . . appeal when he knows there is no cause for a reversal . . . often causing them to unwittingly commit perjury," where it appeared that such statements were substantially true. Matter of King, 2 Silv. Sup. (N. Y.) 356, 365, 6 N. Y. Suppl. 420. And it was held that the act of a police justice in granting upon his own motion a further adjournment of a case which he had previously adjourned for six days was void, and offered no ground upon which defendant could base an application for removal of the justice from office. Matter of McKinney, 16 N. Y. App. Div. 63, 44 N. Y. Suppl. 1097. And in California it was held that an indictment charging a justice of the peace with misconduct in office, in taking jurisdiction of a criminal action for the sole purpose of making the acquittal of the defendant a bar to further prosecution for the same crime in an action pending in another township, which contained no averment that the justice intended to acquit the defendant, or that he acted from corrupt motives, or that he knew his acts to be unlawful, was insufficient as a basis for his removal from office. People *v.* Ward, 85 Cal. 585, 24 Pac. 785.

Denial of bail on an arrest for a misdemeanor, although unauthorized, is not a ground for removal of the justice. *In re* Thomas, 2 N. Y. Suppl. 38.

1. See Wright *v.* Millar, 1 Lack. Leg. N. N. (Pa.) 346.

Form of remedy.— Where an alderman elected for one ward moves his office into another ward, and holds court there, the remedy of the alderman whose ward is thus invaded is by injunction, not by quo warranto or writ of prohibition. Wright *v.* Millar, 1 Lack. Leg. N. (Pa.) 346. A person elected as justice and who duly files his acceptance, but to whom a commission is refused, has a standing, before invoking mandamus and without the intervention of the attorney-general, to apply for a writ of quo warranto against a justice commissioned under a prior election, alleged to have been held when there was no existing vacancy. Com. *v.* Lentz, 9 North. Co. Rep. (Pa.) 18.

2. Morris *v.* State, 94 Ind. 565; Regle *v.* Nugent, 2 Pars. Eq. Cas. (Pa.) 297, books of predecessor.

Form of remedy.— A justice whose term of office has expired cannot be summarily compelled to deliver over his docket and papers to his successor by an order of court, on petition and rule to show cause. *In re* Baker, 44 Pa. St. 440.

Replacing lost books.— Tenn. Act (1873), to provide justices with the statutes, etc., does not intend to replace lost copies. Perkins *v.* Gibbs, 1 Baxt. (Tenn.) 171.

3. Warren County *v.* Jeffrey, 18 Ill. 329.

4. State *v.* Coombs, 32 Me. 526.

5. People *v.* Veuve, (Cal. 1884) 3 Pac. 862.

6. Conover *v.* Solomon, 20 N. J. L. 295. See also McCraw *v.* Welch, 2 Colo. 284. And see *supra*, I, D.

proceedings are to be used outside of his jurisdiction, it is sometimes required by statute that the county clerk shall certify that he was at the time a justice of the peace duly commissioned;[7] and it has been held that where the proceedings of a justice are pleaded in a collateral proceeding his official character must be proved.[8]

3. Collateral Attack. The title of a person in possession of, and exercising the functions of, the office of justice of the peace can only be attacked in a direct proceeding, and not collaterally.[9]

II. Rights, Duties, and Liabilities.

A. In General — 1. Privileges and Disabilities. The powers of a justice of the peace are statutory and cannot be extended by construction.[10] The office of justice of the peace does not disqualify the holder for other public offices not incompatible therewith or prohibited to justices by constitution or statute.[11] Nor does it of itself deprive the holder, if an attorney, of the right to practice as such;[12] but in some states the statutes have limited the right of justices to appear as attorneys.[13] Justices are sometimes prohibited by statute from purchasing

A writ of attachment and return thereto is sufficient evidence to warrant a finding of the official character of the justice of the peace who issued the attachment. McCraw *v.* Welch, 2 Colo. 284.

7. Crossett *v.* Owens, 110 Ill. 378.

8. Hunter *v.* Harris, 4 Blackf. (Ind.) 126.

9. *California.*— *Ex p.* Fedderwitz, (1900) 62 Pac. 935.

Georgia.— Pool *v.* Perdue, 44 Ga. 454.

Illinois.— Culbertson *v.* Galena, 7 Ill. 129; People *v.* Ham, 73 Ill. App. 533 [*citing* Burgess *v.* Davis, 138 Ill. 578, 28 N. E. 817; Lewiston *v.* Proctor, 23 Ill. 533; People *v.* Matteson, 17 Ill. 167; Prichett *v.* People, 6 Ill. 525].

Indiana.— Baker *v.* Wambaugh, 99 Ind. 312.

Kansas.— State *v.* Miller, 71 Kan. 491, 80 Pac. 947.

Louisiana.— State *v.* Pertsdorf, 33 La. Ann. 1411.

Maine.— Hooper *v.* Goodwin, 48 Me. 79.

Massachusetts.— Coolidge *v.* Brigham, 1 Allen 333.

Michigan.— Grindin *v.* Logan, 88 Mich. 247, 50 N. W. 130; *In re* Corrigan, 37 Mich. 66; Facey *v.* Fuller, 13 Mich. 527.

Minnesota.— State *v.* McMartin, 42 Minn. 30, 43 N. W. 572.

Montana.— *Ex p.* Parks, 3 Mont. 426.

Nebraska.— *In re* Johnson, 15 Nebr. 512, 19 N. W. 594.

New Jersey.— Freiknicht *v.* Hulsaidt, 6 N. J. L. J. 57.

New York.— Read *v.* Buffalo, 4 Abb. Dec. 22, 3 Keyes 447; *In re* Wakker, 3 Barb. 162; Nelson *v.* People, 5 Park. Cr. 39 [*affirmed* in 23 N. Y. 293].

North Carolina.— State *v.* Davis, 111 N. C. 729, 16 S. E. 540.

Ohio.— Gitsky *v.* Newton, 17 Ohio Cir. Ct. 484, 9 Ohio Civ. Dec. 682; Molitor *v.* State, 6 Ohio Cir. Ct. 263; Caldwell *v.* High, 8 Ohio Dec. (Reprint) 183, 6 Cinc. L. Bul. 201.

Oregon.—Hamlin *v.* Kassafer, 15 Oreg. 456, 15 Pac. 778, 3 Am. St. Rep. 176.

Pennsylvania.— Humer *v.* Cumberland County, 8 Pa. Dist. 528.

Vermont.— Fancher *v.* Stearns, 61 Vt. 616, 18 Atl. 455; Overseer *v.* Yarrington, 20 Vt. 473; McGregor *v.* Balch, 14 Vt. 428, 39 Am. Dec. 231.

Washington.— State *v.* Fountain, 14 Wash. 236, 44 Pac. 270.

Wisconsin.— Deuster *v.* Zillmer, 119 Wis. 402, 97 N. W. 31; *In re* Radl, 86 Wis. 645, 57 N. W. 1105, 39 Am. St. Rep. 918; Baker *v.* State, 69 Wis. 32, 33 N. W. 52; State *v.* Bartlett, 35 Wis. 287; Tolle *v.* Stone, 1 Pinn. 230.

See 31 Cent. Dig. tit. "Justices of the Peace," § 18.

De facto justices see *supra*, I, D.

10. Cassidy *v.* Brooklyn, 60 Barb. (N. Y.) 105 [*affirmed* in 47 N. Y. 659]. And see Brownfield *v.* Thompson, 96 Mo. App. 340, 70 S. W. 378; Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734. See also *supra*, I, A, B, C; *infra*, III.

11. Mohan *v.* Jackson, 52 Ind. 599, holding that a justice is not, under Const. art. 7, § 16, ineligible to the office of city clerk since it is not an office "under the state."

12. Grady *v.* Sullivan, 112 Mich. 458, 70 N. W. 1040, holding that where there are two justices holding separate courts and having separate records in the same district, one of them may act as attorney in the circuit court in a cause appealed from the other.

13. Conover *v.* Solomon, 20 N. J. L. 295; State *v.* Bryan, 98 N. C. 644, 4 S. E. 522.

When statute not applicable. — A justice who is the *bona fide* assignee of a book-account or other chose in action not assignable in law may appear in person and prosecute the same in the name of his assignor without incurring a penalty given by statute against any justice of the peace who shall appear and prosecute or defend in any action before a justice of the peace when the justice so appearing is not a party on record in the cause. Conover *v.* Solomon, 20 N. J. L. 295.

In Massachusetts a justice of the peace who has determined a suit or action is precluded from appearing as attorney in the same cause in another court on appeal or otherwise. Reardon *v.* Russell, 9 Gray

judgments upon any docket in their possession.[14] But it is no defense in an action on a promissory note that plaintiff, a justice of the peace, bought it for the purpose of bringing an action thereon in the supreme court.[15]

2. Powers and Duties as Conservators of the Peace. The functions of justices as conservators of the peace have been universally retained under the constitutions and statutes of the states of the Union.[16] As conservators of the peace justices have power to arrest and commit offenders[17] or insane persons,[18] require bonds to keep the peace and be of good behavior,[19] appoint special constables,[20] order the delivery of stolen property to its owner,[21] prohibit[22] or disperse[23] public meetings, and order the removal of disorderly persons from such meetings.[24]

3. Judicial Functions and Duties.[25] The judicial functions and duties of justices of the peace are defined and limited by statute, and the powers thereby conferred must be strictly pursued.[26] It is the duty of a justice of the peace to pay over

(Mass.) 366. But a bastardy process is not to be dismissed because the justice before whom the sworn accusation was made appears as attorney for the complainant, although such appearance is irregular and improper. Kenney *v.* Driscoll, 1 Allen (Mass.) 210; Reardon *v.* Russell, 9 Gray (Mass.) 366.

14. Phenix Ins. Co. *v.* Bohman, 31 Nebr. 131, 47 N. W. 637, holding that Code Civ. Proc. § 1101, declaring that "it shall not be lawful for any justice of the peace to purchase any judgment upon any docket in his possession," prohibits the purchase by a justice of fees earned by a constable in an action, which are taxed as costs, and constitute part of the judgment.

15. Hoag *v.* Weston, 10 N. Y. Civ. Proc. 92.

16. See *supra*, I, A, B, C. See also Averill *v.* Perrott, 74 Mich. 296, 41 N. W. 929, holding a law depriving justices of jurisdiction as conservators of the peace to be unconstitutional.

Power of state justices under federal law. — Section 33 of the Judiciary Act of 1789 (U. S. Rev. St. (1878) § 879 [U. S. Comp. St. (1901) p. 1668)], empowering justices of the peace to arrest and commit offenders against the criminal laws of the United States, is not in conflict with U. S. Const. art. 2, § 2, cl. 2. *Ex p.* Gist, 26 Ala. 156.

17. *Ex p.* Gist, 26 Ala. 156; State Treasurer *v.* Rice, 11 Vt. 339; Still *v.* Walls, 7 East 533, 6 Esp. 36. See also Arrest; Breach of the Peace: Criminal Law.

18. Lott *v.* Sweet, 33 Mich. 308. See, generally, Insane Persons.

19. Edmunson *v.* Frean, 2 Hill (S. C.) 410; Patten *v.* Washington, 18 Fed. Cas. No. 10,813, 3 Cranch C. C. 654; Reg. *v.* Dunn, 12 A. & E. 599, Arn. & H. 8, 5 Jur. 721, 4 P. & D. 415, 40 E. C. L. 299; Rex *v.* Tregarthen, 5 B. & Ad. 678, 2 N. & M. 379, 27 E. C. L. 287; Reg. *v.* Justices Cork County, 15 Cox C. C. 78; Haylock *v.* Sparke, 1 E. & B. 471, 17 Jur. 731, 22 L. J. M. C. 67, 72 E. C. L. 471; Lort *v.* Hutton, 45 L. J. M. C. 95, 33 L. T. Rep. N. S. 730; *Ex p.* Davis, 24 L. T. Rep. N. S. 547. See Breach of the Peace.

Committal in default of sureties see Willes *v.* Bridger, 2 B. & Ald. 278.

20. Noles *v.* State, 24 Ala. 672, in cases of emergency. See also Flack *v.* Ankeny, 1 Ill. 187. *Compare*, however, McLain *v.* Matlock, 7 Ind. 525, 65 Am. Dec. 746.

21. Houghton *v.* Bachman, 47 Barb. (N. Y.) 388.

22. Reg. *v.* Graham, 16 Cox C. C. 420.

23. O'Kelly *v.* Harvey, L. R. 14 Ir. 105, 15 Cox C. C. 435.

24. Parsons *v.* Brainard, 17 Wend. (N. Y.) 522. *Compare* McLain *v.* Matlock, 7 Ind. 525, 65 Am. Dec. 746.

25. Authority to take bail or recognizance: In civil action see Bail, 5 Cyc. 14 note 46. In criminal cases see Bail, 5 Cyc. 78, 82 note 6.

Jurisdiction to bind out children as apprentices see Apprentices, 3 Cyc. 544.

Jurisdiction of affrays see Affray, 2 Cyc. 44.

Justices of the peace acting as coroners see Coroners, 9 Cyc. 984.

Issuing warrants in criminal cases see Criminal Law, 12 Cyc. 298.

Preliminary examination and commitment see Criminal Law, 12 Cyc. 304 *et seq.*

Summary trials see Criminal Law, 12 Cyc. 321 *et seq.*

26. See *infra*, III; IV. See also Bargis *v.* State, 4 Ind. 126, holding that where a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute.

Civil jurisdiction and authority see *infra*, III.

Powers conferred upon two justices. — Where a statute confers certain powers upon or requires certain duties to be performed by any two justices *quorum unus* it is only necessary that one should be of the quorum. Gilbert *v.* Sweetser, 4 Me. 483. A statute conferring authority upon two justices to sit in criminal cases, and giving them the same powers and duties as are given to any justice sitting alone, is constitutional. State *v.* Flowers, 109 N. C. 841, 13 S. E. 718.

Imprisonment for refusal to depose. — Under Me. St. (1833) c. 85, two justices of the peace and of the quorum have not the power to imprison a person for refusing to give his deposition *in perpetuam memoriam*. *In re* Pierce, 16 Me. 255.

The functions of judges of first instance were conferred by the Mexican law on justices in the department of California in dis-

all moneys collected by him by virtue of his office,[27] and he cannot legally retain it to satisfy a debt due him in his private capacity;[28] but receipting for a note for collection does not constitute a justice a collecting agent, and he is not bound to cause a suit to be instituted in another precinct.[29]

4. Ministerial Functions and Duties. While the ministerial duties of a justice of the peace under the statutes are not of so varied a nature as at common law,[30] they are nevertheless numerous and important.[31] A justice cannot delegate any part of his official power or authority to another,[32] but it seems that he may depute another to do a specific act without vesting any discretion in him.[33]

B. Compensation — 1. In General. The compensation of justices of the peace, whether made in the form of salary or of specified fees, is entirely regulated by constitutional provisions or statutes, which are so diverse in the various states that few, if any, generally applicable rules on the subject can be laid down.[34] These statutes are to be strictly construed, and no compensation can be

tricts where there were no such judges. See Mena *v.* Le Roy, 1 Cal. 216.

27. People *v.* Price, 3 Ill. App. 15; Alexander *v.* State, 9 Ind. 337.

28. Spence *v.* Mitchell, 9 Ala. 744; Lowrie *v.* Stewart, 8 Ala. 163; Prewett *v.* Marsh, 1 Stew & P. (Ala.) 17, 21 Am. Dec. 645.

29. White *v.* Goffe, 24 Tex. 658.

30. Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383.

31. **Acting as:** County commissioner see Counties. Highway commissioner see Streets and Highways. Member of town board see Towns. Supervisor of the poor see Paupers.

Acting as city recorder see People *v.* Du Bois, 26 N. Y. Suppl. 895.

Authority: To protest bill or note see Commercial Paper, 7 Cyc. 1054 note 11. To solemnize marriages see Marriage. To take acknowledgment see Acknowledgments, 1 Cyc. 545, 549, 550, 552, 576 note 75. To take affidavits generally see Affidavits, 2 Cyc. 11, 14 note 61. To take affidavit to hold to bail in civil actions see Arrest, 3 Cyc. 928 note 59. To take depositions see Depositions, 13 Cyc. 846 *et seq.*

The power to appoint a record clerk given to justices by N. Y. Laws (1867), c. 861, § 2, was taken away by N. Y. Laws (1873), c. 538. Fitch *v.* New York, 9 Daly (N. Y.) 514 [*affirmed* in 88 N. Y. 500].

Return of convictions to clerk of superior court see State *v.* Latham, 110 N. C. 490, 14 S. E. 390.

32. Borrodaile *v.* Leek, 9 Barb. (N. Y.) 611.

33. Borrodaile *v.* Leek, 9 Barb. (N. Y.) 611.

34. **For construction of the various statutes** see the following cases:

Alabama.— McPherson *v.* Boykin, 76 Ala. 602.

Arkansas.— Reigler *v.* Quinn, 54 Ark. 37, 14 S. W. 1103.

California.— Cothran *v.* Cook, 146 Cal. 468, 80 Pac. 699; McCauley *v.* Culbert, 144 Cal. 276, 77 Pac. 923; Tucker *v.* Barnum, 144 Cal. 266, 77 Pac. 919; Burce *v.* Jack, 135 Cal. 535, 67 Pac. 907; Kozminsky *v.* Williams, 126 Cal. 26, 58 Pac. 310; Reid *v.* Groezinger, 115 Cal. 551, 47 Pac. 374; Dwyer *v.* Parker, 115 Cal. 544, 47 Pac. 372; Ward *v.* Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; Anderson *v.* Pennie, 32 Cal. 265; Miner *v.* Solano County, 26 Cal. 115.

Colorado.— Pitkin County *v.* Sanders, 27 Colo. 122, 59 Pac. 402; Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266; Arapahoe County *v.* Clapp, 9 Colo. App. 161, 48 Pac. 157.

Connecticut.— Smith *v.* Moore, 38 Conn. 105.

Georgia.— McMichael *v.* Southern R. Co., 117 Ga. 518, 43 S. E. 850.

Illinois.— Carlyle *v.* Sharp, 51 Ill. 71; De Wolf *v.* Chicago, 26 Ill. 443; Smith *v.* McCandless, 101 Ill. App. 143; Young *v.* Murphysboro, 45 Ill. App. 561; Fosselman *v.* Springfield, 38 Ill. App. 296 [*affirmed* in 139 Ill. 185, 28 N. E. 916]; Moore *v.* People, 37 Ill. App. 641.

Indiana.— Huntington *v.* Cast, (App. 1900) 56 N. E. 949.

Iowa.— Peters *v.* Davenport, 104 Iowa 625, 74 N. W. 6; Mathews *v.* Clayton County, 79 Iowa 510, 44 N. W. 722; Hinesley *v.* Mahaska County, 78 Iowa 312, 43 N. W. 198; Labour *v.* Polk County, 70 Iowa 568, 31 N. W. 873; Shaw *v.* Kendig, 57 Iowa 390, 10 N. W. 771; McKay *v.* Maloy, 53 Iowa 33, 3 N. W. 808; Pennington *v.* Beedy, 50 Iowa 85; Evans *v.* Story County, 35 Iowa 126.

Kansas.— Labette County Com'rs *v.* Kiersey, 28 Kan. 40.

Kentucky.— Stone *v.* Thompson, 100 Ky. 307, 38 S. W. 486, 18 Ky. L. Rep. 857 [*distinguishing* Auditor *v.* Kinkead, 80 Ky. 596]; Hewitt *v.* Walton, 88 Ky. 633, 11 S. W. 722, 11 Ky. L. Rep. 122; Johnson *v.* Auditor, 4 Bush 321; Bristow *v.* Sullivan, 6 B. Mon. 143; Stone *v.* Falconer, 54 S. W. 712, 21 Ky. L. Rep. 1216; Paris *v.* Webb, 33 S. W. 87, 17 Ky. L. Rep. 1006.

Louisiana.— State *v.* Foster, 109 La. 587, 33 So. 611.

Maine.—Knowlton *v.* Waldo County Com'rs, 79 Me. 164, 8 Atl. 683.

Maryland.— Herbert *v.* Baltimore County Com'rs, 97 Md. 639, 55 Atl. 376.

Massachusetts.— Adams *v.* Norfolk County Com'rs, 166 Mass. 303, 44 N. E. 224; Townsend *v.* Way, 3 Allen 245.

Michigan.—Potts *v.* Jackson County Sup'rs,

allowed for services or incidental expenses which are not expressly provided for by law.[35] In some of the states any increase or reduction of a justice's compensa-

47 Mich. 635, 11 N. W. 413; People *v.* Kent County Sup'rs, 40 Mich. 481; Prentiss *v.* Webster, 2 Dougl. 5.

Minnesota.— Anderson *v.* Hanson, 28 Minn. 400, 10 N. W. 429.

Missouri.—State *v.* Heege, 40 Mo. App. 650.

Nebraska.— Courier Printing, etc., Co. *v.* Leese, 65 Nebr. 581, 91 N. W. 357; Stewart *v.* Doering, 64 Nebr. 298, 89 N. W. 808; Gibson *v.* Sidney, 50 Nebr. 12, 69 N. W. 314; Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

Nevada.— Lobensteen *v.* Storey County, 22 Nev. 376, 40 Pac. 1016; State *v.* Spinner, 22 Nev. 213, 37 Pac. 837; State *v.* Storey County Com'rs, 16 Nev. 92.

New Hampshire.— Hill *v.* Pittsfield, 64 N. H. 78, 5 Atl. 910; State *v.* Varrell, 58 N. H. 148; Upton *v.* Manchester, 56 N. H. 54; Stevens *v.* Merrill, 41 N. H. 309; George *v.* Starrett, 40 N. H. 135; Manchester *v.* Potter, 30 N. H. 409; Fowler *v.* Tuttle, 24 N. H. 9.

New Jersey.— Fairbanks *v.* Sheridan, 43 N. J. L. 484; Carpenter *v.* Titus, 9 N. J. L. 90.

New York.— People *v.* Wappinger's Falls, 144 N. Y. 616 [*affirming* 83 Hun 130, 31 N. Y. Suppl. 758 (*affirming* 9 Misc. 246)]; Cox *v.* New York, 103 N. Y. 519, 9 N. E. 48; Riley *v.* Pagan, 44 N. Y. App. Div. 16, 60 N. Y. Suppl. 457; *In re* Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345; Brooklyn *v.* Wolz, 18 N. Y. App. Div. 331, 46 N. Y. Suppl. 217; People *v.* Hamden, 71 Hun 461, 21 N. Y. Suppl. 974; People *v.* Marsh, 69 Hun 123, 23 N. Y. Suppl. 728; People *v.* Edmonds, 19 Barb. 468; Smith *v.* New York, 3 Thomps. & C. 160; Palmer *v.* New York, 2 Sandf. 318; Judson *v.* Havely, 59 N. Y. Suppl. 1018; People *v.* Board of Auditors, 2 N. Y. Suppl. 609; Powens *v.* Jones, 10 Abb. N. Cas. 458; Green *v.* New York, 5 Abb. Pr. 503; People *v.* Lawrence, 6 Hill 244; Watts *v.* Van Ness, 1 Hill 76; *Ex p.* Bennet, 1 Cow. 204.

North Carolina.— Merrimon *v.* Henderson County Com'rs, 106 N. C. 369, 11 S. E. 267.

North Dakota.— Barrett *v.* Stutsman County, 4 N. D. 175, 59 N. W. 964.

Ohio.— State *v.* Hamilton County, 10 Ohio S. & C. Pl. Dec. 467, 8 Ohio N. P. 35.

Oregon.— Wallowa County *v.* Oakes, (1904) 78 Pac. 892; Portland *v.* Denny, 5 Oreg. 160.

Pennsylvania.—Fenner *v.* Luzerne County, 167 Pa. St. 632, 31 Atl. 862; Cumberland County *v.* Holcomb, 36 Pa. St. 349; *In re* Kelly, 17 Pa. Super. Ct. 344; Henning *v.* Martin, 13 Pa. Super. Ct. 540; Landis *v.* Dauphin County, 18 Pa. Co. Ct. 149; Com. *v.* Ruski, 17 Pa. Co. Ct. 92; Rupert *v.* Chester County, 13 Pa. Co. Ct. 342; Young *v.* Northampton County, 11 Pa. Co. Ct. 508; Wallace *v.* Coates, 1 Ashm. 110; Lancaster *v.* Lancaster County, 12 Lanc. Bar 169; Clark *v.* Alderman, 3 Pa. L. J. Rep. 414.

Tennessee.— Winters *v.* State, 7 Lea 254; State *v.* Anthony, 9 Baxt. 227; Avery *v.* State, 7 Baxt. 328.

Texas.— Reynolds *v.* Tarrant County, 78 Tex. 289, 14 S. W. 580.

Utah.— Timmony *v.* Salt Lake City, 28 Utah 302, 78 Pac. 799; Hulaniski *v.* Ogden City, 20 Utah 233, 57 Pac. 876.

Vermont.— Fay *v.* Barber, 72 Vt. 55, 47 Atl. 180; Peck *v.* Powell, 62 Vt. 296, 19 Atl. 227; Lockwood *v.* Cobb, 5 Vt. 422.

Washington.— Rohde *v.* Seavey, 4 Wash. 91, 29 Pac. 768; Furth *v.* McIntosh, 2 Wash. 108, 26 Pac. 79. Act March 15, 1893 (Laws 1893, p. 427), entitled an "Act to provide for the economical management of county affairs," in so far as it impliedly repeals Act Feb. 7, 1891, entitled an "Act fixing the salaries of justices of the peace and constables," is unconstitutional for failure to express the subject of the act in the title. Anderson *v.* Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137. Const. art. 4, § 10, providing that, in incorporated towns having more than five thousand inhabitants, justices of the peace shall receive such salaries as may be provided by law, and shall receive no fees for their own use, is self-executing, and applies to cities incorporated after the last federal or state census, leaving to the courts the ascertainment to the population. Anderson *v.* Whatcom County, *supra.*

West Virginia.— Gillespy *v.* Ohio County, 48 W. Va. 269, 37 S. E. 543.

Wisconsin.— Ryan *v.* Outagamie County, 80 Wis. 336, 50 N. W. 340; Grimm *v.* Jefferson County, 62 Wis. 572, 22 N. W. 857; Chafin *v.* Waukesha County, 62 Wis. 463, 22 N. W. 732.

Wyoming.— Davis *v.* Sweetwater County Com'rs, 4 Wyo. 477, 35 Pac. 467.

Canada.— Tuttle *v.* McDonald, 36 Can. L. J. 642.

See 31 Cent. Dig. tit. "Justices of the Peace," § 24 *et seq.*

35. Smith *v.* Moore, 38 Conn. 105; Moore *v.* People, 37 Ill. App. 641 (strictly construed); Bristow *v.* Sullivan, 6 B. Mon. (Ky.) 143; State *v.* Hamilton County Com'rs, 10 Ohio Dec. (Reprint) 467, 21 Cinc. L. Bul. 467. The fees of his office are presumed to cover such expenses, and they are a personal charge on the justice. *In re* Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345. See also Adams *v.* Norfolk County Com'rs, 166 Mass. 303, 44 N. E. 224.

A justice cannot recover money expended for office rent and furnishings (Manchester *v.* Potter, 30 N. H. 409; Reynolds *v.* Tarrant Co., 78 Tex. 289, 14 S. W. 580), or for printing his blanks and books (*In re* Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345), unless especially authorized by statute (Coggins *v.* Sacramento, 59 Cal. 599; Bishop *v.* Oakland, 58 Cal. 572; People *v.* Ransom, 58 Cal. 558). Unless there is a suit, there can be no costs for the collection of a debt. Pen-

tion during his term of office is prohibited.[36] A justice of the peace has the right to demand in advance the payment of his fees for every official service rendered by him;[37] but he cannot require prepayment for services probably, but not necessarily, to be rendered in the further conduct of the cause.[38] Where a judgment removing a justice from office is reversed on appeal, the justice is entitled to his salary during the period of removal, although another has filled the vacancy and has received compensation therefor.[39]

2. Taxation of Illegal Fees. In some of the states justices are subject to penalties for taxing illegal fees.[40]

3. Accounting For and Disposition of Fees. In some states there are statutes requiring justices of the peace to account for the fees collected in the discharge of their duties,[41] and, when the justice's compensation is in the form of a salary, to pay over the fees received to certain designated officers.[42]

4. Rendering Account. In some jurisdictions a justice of the peace must ren-

nington *v.* Beedy, 50 Iowa 85. A county is not liable for the services of a justice's clerk where there is no statute authorizing his employment and fixing his compensation. Arapahoe County *v.* Clapp, 9 Colo. App. 161, 48 Pac. 157.

Entitled to cost of stationery used in criminal cases.— Evans *v.* Story County, 35 Iowa 126.

Cannot certify and collect uncertified fees of his predecessor.— Labour *v.* Polk County, 70 Iowa 568, 31 N. W. 873.

Costs of defense on impeachment.— Where a justice was impeached, tried, and acquitted, and then claimed an allowance against the county for the expenses of his defense, and the board of supervisors allowed the claim, it was held that mandamus did not lie to compel the treasurer to pay it, inasmuch as the supervisors exceeded their jurisdiction. People *v.* Lawrence, 6 Hill (N. Y.) 244.

36. See McCauley *v.* Culbert, 144 Cal. 276, 77 Pac. 923; Paris *v.* Webb, 33 S. W. 87, 17 Ky. L. Rep. 1006; Smith *v.* New York, 3 Thomps. & C. (N. Y.) 160; Rupert *v.* Chester County, 13 Pa. Co. Ct. 342. *Compare* People *v.* Edmonds, 19 Barb. (N. Y.) 468.

37. Smith *v.* McCandless, 101 Ill. App. 143. See also Riley *v.* Pagan, 32 N. Y. App. Div. 274, 52 N. Y. Supp. 980.

38. Powens *v.* Jones, 10 Abb. N. Cas. (N. Y.) 458.

39. Ward *v.* Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198.

40. Bristow *v.* Sullivan, 6 B. Mon. (Ky.) 143; Courier Printing, etc., Co. *v.* Leese, 65 Nebr. 581, 91 N. W. 357; Fowler *v.* Tuttle, 24 N. H. 9; Simmons *v.* Kelly, 33 Pa. St. 190; McConahy *v.* Courtney, 7 Watts (Pa.) 491; Curry *v.* Carrol, 5 Watts (Pa.) 477; Coates *v.* Wallace, 17 Serg. & R. (Pa.) 75 [*affirming* 1 Ashm. 110]; Jackson *v.* Purdue, 3 Penr. & W. (Pa.) 519; Henning *v.* Martin, 13 Pa. Super. Ct. 540; Lyons *v.* Means, 1 Pa. Super. Ct. 608 [*affirming* 17 Pa. Co. Ct. 382]; Clark *v.* Alderman, 3 Pa. L. J. Rep. 414; Watrous *v.* Davis, 26 Pittsb. Leg. J. N. S. (Pa.) 161. See *infra*, II, E.

The penalty is given to the party injured, and whether the charge is made ignorantly, or oppressively and fraudulently, is immaterial. Jackson *v.* Purdue, 3 Penr. & W. (Pa.) 519.

41. Mich. Comp. Laws, § 1062, provides that the justice, in his report to the prosecuting attorney of a criminal case, shall give "an itemized statement of the officers' and the court fees and how the same were disbursed, if paid to such justice." Under this statute the justice must report the officers' fees, although not paid to him by the party arrested, and failure to comply with this statute results in the forfeiture of the justice's fees. Hutchinson *v.* Ionia County, 130 Mich. 62, 89 N. W. 561 [*citing* Sunderlin *v.* Ionia County, 119 Mich. 535, 78 N. W. 651].

42. **In Missouri,** Laws (1891), p. 175, fixing the salary of a justice of the peace of the city of St. Louis at two thousand five hundred dollars, and requiring all fees and costs collected in his court to be paid to the city treasurer, is constitutional, and although the act contains no direct and positive provision for disposing of the fees of justices which may be collected by constables, it was clearly intended that those fees also should be paid to the city treasurer. Spaulding *v.* Brady, 128 Mo. 653, 31 S. W. 103. This statute does not require the payment to the city treasurer of fees received by the justice for solemnizing marriages, but he is entitled to retain such fees in addition to his salary. St. Louis *v.* Sommers, 148 Mo. 398, 50 S. W. 102. Mo. Rev. St. (1889) § 5031, requiring municipal officers who perform duties for the state, and whose salaries are paid by the municipality, to collect and pay over to the municipality all fees allowed by any state law for such duties performed for the state, does not apply to justices of the peace. St. Louis *v.* Sommers, 148 Mo. 398, 50 S. W. 102.

In Pennsylvania, the act of May 13, 1856, requiring a magistrate to pay over his receipts to the state treasurer before obtaining a warrant for his salary, was held not inconsistent with the ordinance of Nov. 21, 1855, limiting the compensation of justices or magistrates to the receipts of their respective offices; and hence police magistrates were held entitled only to the amount of fees received by them, not exceeding five hundred dollars. Gibson *v.* Philadelphia, 3 Phila. 411.

der an account or fee bill setting out the items of his charges as a prerequisite to their recovery.[43]

5. Actions For Fees. A justice of the peace may maintain an action to recover his fees against the party liable for them,[44] and his failure to exact prepayment, as under the statute he might do, will not defeat his right.[45]

C. Civil Liability — 1. Judicial Acts — a. What Acts Are Judicial. Owing to the fact that the clerical and judicial acts of justices of the peace are mingled together from the beginning to the end of a suit, it is difficult to separate the one from the other.[46] It may be said, however, that all acts and proceedings of a justice which require or admit of the exercise of discretion or judgment are to be held of a judicial, rather than of a ministerial, character.[47]

b. Acts Within Jurisdiction. When a justice of the peace has jurisdiction, he

43. *California.*—Cooley *v.* Calaveras County, 121 Cal. 482, 53 Pac. 1075.

Kentucky.— See Means *v.* Frame, 5 Dana 535.

Michigan.— McDonald *v.* Muskegon County Sup'rs, 42 Mich. 545, 4 N. W. 266.

Nebraska.— Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

New York. — People *v.* Greene County Sup'rs, 10 N. Y. St. 633.

Wisconsin.— Grimm *v.* Jefferson County, 62 Wis. 572, 22 N. W. 857.

See 31 Cent. Dig. tit. "Justices of the Peace," § 30.

Sufficiency of account.— An account filed with the county clerk for allowance, which is sufficient in form and substance to be allowed in part by the county board, is sufficient to be allowed altogether, if the whole amount claimed constitutes a legal charge against the county. Such an account is not required to stand the test of a formal complaint for the recovery of money against the county. Grimm *v.* Jefferson County, 62 Wis. 572, 22 N. W. 857. See also Means *v.* Frame, 5 Dana (Ky.) 535, where it was held that a statement of the charge for a copy of his record, made by a justice at the foot of it, and signed by him, was a fee bill, within the meaning of the act of 1798.

Mandamus will not lie to compel the board of county commissioners to allow a police magistrate his fees in a case in which he has failed to make a complete report to the board of money received and disbursed as costs. People *v.* Greene County Sup'rs, 10 N. Y. St. 633.

The fee bill may be waived by the person entitled thereto. Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

44. *Massachusetts.*— Townsend *v.* Way, 3 Allen 245.

Nebraska.— Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

New York.— Riley *v.* Pagan, 32 N. Y. App. Div. 274, 52 N. Y. Suppl. 980. *Compare* Bixby *v.* New York, 61 Hun 490, 16 N. Y. Suppl. 364.

Ohio.— Hart *v.* Murray, 48 Ohio St. 605, 29 N. E. 576.

Pennsylvania.— Harris *v.* Christian, 10 Pa. St. 233.

See 31 Cent. Dig. tit. "Justices of the Peace," § 31.

The justice's docket is evidence against the defendant, in a suit for his fees, of the suits brought for defendant and the amount of fees earned. Harris *v.* Christian, 10 Pa. St. 233.

45. Riley *v.* Pagan, 32 N. Y. App. Div. 274, 52 N. Y. Suppl. 980 [*citing* Belappi *v.* Hovey, 90 Hun (N. Y.) 135, 35 N. Y. Suppl. 624].

46. Guenther *v.* Whiteacre, 24 Mich. 504; Wertheimer *v.* Howard, 30 Mo. 420, 77 Am. Dec. 623; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

47. Rains *v.* Simpson, 50 Tex. 495, 501, 32 Am. Rep. 609, where it is said that "perhaps as safe criterion as any other, to ascertain whether a private suit would or would not lie, is to adopt the rule which governs in cases in which a mandamus would or would not be granted." But *compare* Wertheimer *v.* Howard, 50 Mo. 420, 77 Am. Dec. 623, to the effect that all the proceedings which a justice is required to perform, from the commencement to the close of a suit, are to be held to be of a judicial rather than of a ministerial character, so far as to exempt him from any greater responsibility for his acts than that which attaches to other judicial officers. And see Roderick *v.* Whitson, 51 Hun (N. Y.) 620, 4 N. Y. Suppl. 112, where it is said that having acquired jurisdiction, a justice's subsequent acts are judicial.

The following acts are judicial: Adjourning proceedings (Merwin *v.* Rogers, 15 Daly (N. Y.) 334), allowing a bill of exceptions (Whitzell *v.* Forgler, 30 Kan. 525, 1 Pac. 823), approving bonds (Lester *v.* Governor, 12 Ala. 624; Howe *v.* Mason, 14 Iowa 510; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609. But see Legates *v.* Lingo, 8 Houst. (Del.) 154, 32 Atl. 80; Tompkins *v.* Sands, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; Boyd *v.* Ferris, 10 Humphr. (Tenn.) 406), approving the form of an appeal-bond (Way *v.* Townsend, 4 Allen (Mass.) 114; Chickering *v.* Robinson, 3 Cush. (Mass.) 543), determining the sufficiency of an information (Clark *v.* Spicer, 6 Kan. 440) or an affidavit for a change of venue (State *v.* Wolever, 127 Ind. 306, 26 N. E. 762), entering defendant's appearance (Morton *v.* Crane, 39 Mich. 526), granting or refusing an appeal (Jordan *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508 [*following* State *v.* Towle, 42 N. H. 540]. *Compare* Tyler *v.* Alford, 38 Me. 530), imposing fines (Robbins *v.* Gorham, 26 Barb. (N. Y.)

is not personally liable for any error in its exercise,[43] and this immunity from civil liability extends even to cases in which a justice upholds and enforces unconstitu-

586; Burns *v.* Norton, 15 N. Y. Suppl. 75), rendering judgment (Abrams *v.* Carlisle, 18 S. C. 242), taking a supersedeas (Gannon *v.* Donn, 9 Fed. Cas. No. 5,211, 1 Hayw. & H. 346, 7 D. C. 264), and taxing costs (State *v.* Jackson, 68 Ind. 58. See also Voorhees *v.* Martin, 12 Barb. (N. Y.) 508).

48. *Alabama.*— Lester *v.* Governor, 12 Ala. 624.

Arkansas.— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1.

Connecticut.— Prince *v.* Thomas, 11 Conn. 472; Holcomb *v.* Cornish, 8 Conn. 375; Ambler *v.* Church, 1 Root 211.

Delaware.— Bailey *v.* Wiggins, 5 Harr. 462, 60 Am. Dec. 650.

District of Columbia.— Holtzman *v.* Robinson, 2 MacArthur 520; Gannon *v.* Donn, 7 D. C. 264.

Georgia.— Hitch *v.* Lambright, 66 Ga. 228.

Illinois.— Lancaster *v.* Lane, 19 Ill. 242; People *v.* Suhre, 97 Ill. App. 231; Lund *v.* Hennessey, 67 Ill. App. 233.

Indiana.— Kress *v.* State, 65 Ind. 106; State *v.* Wanee, 4 Ind. App. 1, 30 N. E. 161.

Iowa.— Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522; Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623; Londegan *v.* Hammer, 30 Iowa 508; Howe *v.* Mason, 14 Iowa 510; Gowing *v.* Gowgill, 12 Iowa 495; Hetfield *v.* Towsley, 3 Greene 584.

Kansas.— Sorensen *v.* Wellman, 69 Kan. 637, 77 Pac. 536; Clark *v.* Spicer, 6 Kan. 440.

Kentucky.— Bullitt *v.* Clement, 16 B. Mon. 193; Robinson *v.* Ramey, 8 B. Mon. 214; Walker *v.* Floyd, 4 Bibb 237; Gregory *v.* Brown, 4 Bibb 28, 7 Am. Dec. 731; Jarrett *v.* Higbee, 5 T. B. Mon. 546; Hagerman *v.* Sutherland, 27 S. W. 982, 16 Ky. L. Rep. 301.

Louisiana.— Buquet *v.* Watkins, 1 La. 131; Bore *v.* Bush, 6 Mart. N. S. 1; Dressen *v.* Cox, 2 Mart. N. S. 631.

Maine.— Bragdon *v.* Somerby, 55 Me. 92; Downing *v.* Herrick, 47 Me. 462; Tyler *v.* Alford, 38 Me. 530.

Maryland.— Deal *v.* Harris, 8 Md. 40, 63 Am. Dec. 686.

Massachusetts.— White *v.* Morse, 139 Mass. 162, 29 N. E. 539; Kelley *v.* Dresser, 11 Allen 31; Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438; Pratt *v.* Gardner, 2 Cush. 63, 48 Am. Dec. 652.

Michigan.— Curnow *v.* Kessler, 110 Mich. 10, 67 N. W. 982; Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137.

Minnesota.— Murray *v.* Mills, 56 Minn. 75, 57 N. W. 324. See also Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690.

Missouri.— Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.

Nebraska.— Kelsey *v.* Klabunde, 54 Nebr. 760, 74 N. W. 1099; Atwood *v.* Atwater, 43 Nebr. 147, 61 N. W. 574.

New Hampshire.— Jordan *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508; Fox *v.* Whitney, 33 N. H. 516; Burnham *v.* Stevens, 33 N. H. 247; Evans *v.* Foster, 1 N. H. 374.

New Jersey.— Loftus *v.* Fraz, 43 N. J. L. 667; Mangold *v.* Thorpe, 33 N. J. L. 134; Taylor *v.* Doremus, 16 N. J. L. 473; Little *v.* Moore, 4 N. J. L. 74, 7 Am. Dec. 574.

New York.— Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; McGuckin *v.* Wilkins, 75 N. Y. App. Div. 167, 77 N. Y. Suppl. 385; Handshaw *v.* Arthur, 9 N. Y. App. Div. 175, 41 N. Y. Suppl. 61 [*affirmed* in 161 N. Y. 664, 57 N. E. 1111]; Clark *v.* Holdridge, 58 Barb. 61; Hommert *v.* Gleason, 14 N. Y. Suppl. 568; Merwin *v.* Rogers, 7 N. Y. Suppl. 633; Stewart *v.* Hawley, 21 Wend. 552; Horton *v.* Auchmoody, 7 Wend. 200; Adkins *v.* Brewer, 3 Cow. 206, 15 Am. Dec. 264; Butler *v.* Potter, 17 Johns. 145; Vosburgh *v.* Welch, 11 Johns. 175; Andrews *v.* Bates, 5 Johns. 351; Moor *v.* Ames, 3 Cai. 170.

North Carolina.— Cunningham *v.* Dillard, 20 N. C. 485; Governor *v.* McAfee, 13 N. C. 15.

Ohio.— Masters *v.* Johnson, Tapp. 238; Carothers *v.* Scott, Tapp. 227.

Pennsylvania.— Kennedy *v.* Barnett, 64 Pa. St. 141; Hanna *v.* Slevin, 8 Pa. Super. Ct. 509; Reid *v.* Wood, 2 Chest. Co. Rep. 513.

Rhode Island.— Alexander *v.* Card, 3 R. I. 145.

South Carolina.— Abrams *v.* Carlisle, 18 S. C. 242; Reid *v.* Hood, 2 Nott & M. 168, 10 Am. Dec. 582; State *v.* Johnson, 2 Bay 385; Lining *v.* Bentham, 2 Bay 1.

South Dakota.— Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084.

Texas.— Bumpus *v.* Fisher, 21 Tex. 561.

Vermont.— Banister *v.* Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201; Kibling *v.* Clark, 53 Vt. 379.

Virginia.— Johnston *v.* Moorman, 80 Va. 131.

Wisconsin.— Keeler *v.* Woodard, 3 Pinn. 306, 4 Chandl. 34.

United States.— Cooke *v.* Bangs, 31 Fed. 640.

England.— Linford *v.* Fitzroy, 13 Q. B. 240, 13 Jur. 303, 18 L. J. M. C. 108, 3 New Sess. Cas. 438, 66 E. C. L. 240; Penney *v.* Slade, 1 Arn. 539, 5 Bing. N. Cas. 319, 8 L. J. C. P. 221, 7 Scott 285, 35 E. C. L. 177; Ashcroft *v.* Bourne, 3 B. & Ad. 684, 1 L. J. K. B. 209, 23 E. C. L. 301; Brittain *v.* Kinnaird, 1 Ball & B. 432, Gow 164, 4 Moore C. P. 50, 21 Rev. Rep. 680, 5 E. C. L. 725; Fawcett *v.* Fowlis, 7 B. & C. 394, 6 L. J. M. C. O. S. 44, 1 M. & R. 102, 14 E. C. L. 180; Basten *v.* Carew, 3 B. & C. 649, 5 D. & R. 558, 3 L. J. K. B. O. S. 111, 27 Rev. Rep. 453, 10 E. C. L. 295; Mills *v.* Collett, 6 Bing. 85, 7 L. J. M. C. O. S. 97, 3 M. & P. 242, 31 Rev. Rep. 355, 19 E. C. L. 47; Kendall *v.* Wilkinson, 3 C. L. R. 668, 4 E. & B. 680, 1 Jur. N. S. 538, 24 L. J. M. C. 89, 3 Wkly. Rep. 234, 82 E. C. L. 680;

tional laws.[49] In England a justice of the peace is civilly liable for acts done maliciously and without probable cause;[50] but in the United States the authorities are divided, it having been both asserted[51] and denied[52] that the justice may be liable where it is shown that he has acted corruptly or maliciously.

c. Acts Without Jurisdiction. The general rule is that a justice of the peace who acts in a case of which he has no jurisdiction, or who exceeds his jurisdiction, is liable in damages to any party injured.[53] A distinction has, however, been drawn in some cases between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter, and it has been held that where jurisdiction of the subject-matter has been invested by law in the justice, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, and he is not liable for

Floyd *v.* Barker, 12 Coke 23; Baylis *v.* Strickland, 4 Jur. 823, 10 L. J. M. C. 61, 1 M. & G. 591, 1 Scott N. R. 540; Cave *v.* Mountain, 9 L. J. M. C. 90, 1 M. & G. 257, 1 Scott N. R. 132, 39 E. C. L. 747; Grenville *v.* College of Physicians, 12 Mod. 386; Bassett *v.* Godschall, 3 Wils. C. P. 121.

Canada.— Sewell *v.* Olive, 9 N. Brunsw. 394; Anderson *v.* Wilson, 25 Ont. 91; Gordon *v.* Denison, 24 Ont. 576; Crawford *v.* Beattie, 39 U. C. Q. B. 13; Moffat *v.* Barnard, 24 U. C. Q. B. 498; Dickson *v.* Crabb, 24 U. C. Q. B. 494; Thorpe *v.* Oliver, 20 U. C. Q. B. 264; Conroy *v.* McKenney, 11 U. C. Q. B. 439; Gardner *v.* Burwell, Taylor (U. C.) 189; Sprung *v.* Anderson, 23 U. C. C. P. 152; McKinley *v.* Munsie, 15 U. C. C. P. 230; Haacke *v.* Adamson, 14 U. C. C. P. 201.

See 31 Cent. Dig. tit. "Justices of the Peace," § 33 *et seq.*

49. Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1; Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623; Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137. *Contra*, Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50, where, however, the statute had already been held unconstitutional by the supreme court before the justice assumed to act under it.

50. Under 11 & 12 Vict. c. 44, § 1. Leary *v.* Patrick, 15 Q. B. 266, 14 Jur. 932, 19 L. J. M. C. 211, 4 New Sess. Cas. 258, 69 E. C. L. 266; Barton *v.* Bricknell, 13 Q. B. 393, 15 Jur. 668, 20 L. J. M. C. 1, 66 E. C. L. 393; Linford *v.* Fitzroy, 13 Q. B. 240, 13 Jur. 303, 18 L. J. M. C. 108, 2 New Sess. Cas. 438, 66 E. C. L. 240; Prickett *v.* Gratrex, 8 Q. B. 1020, 55 E. C. L. 1020, 1 C. & K. 651, 47 E. C. L. 651, 10 Jur. 566, 15 L. J. M. C. 145, 2 New Sess. Cas. 429; Sommerville *v.* Mirehouse, 1 B. & S. 652, 3 L. T. Rep. N. S. 294, 9 Wkly. Rep. 53, 101 E. C. L. 652; Kendall *v.* Wilkinson, 4 E. & B. 680, 1 Jur. N. S. 538, 24 L. J. M. C. 89, 3 Wkly. Rep. 234, 82 E. C. L. 680; Haylock *v.* Sparke, 1 E. & B. 471, 17 Jur. 731, 22 L. J. M. C. 67, 72 E. C. L. 471; Conroy *v.* McKenney, 11 U. C. Q. B. 439.

51. *Connecticut.* — Ambler *v.* Church, 1 Root 211.

Illinois.— Reddish *v.* Shaw, 111 Ill. App. 337.

Iowa.— Howe *v.* Mason, 14 Iowa 510.

Kentucky.— Bullitt *v.* Clement, 16 B. Mon. 193; Robinson *v.* Ramey, 8 B. Mon. 214; Gregory *v.* Brown, 4 Bibb 28, 7 Am. Dec. 731; Hagerman *v.* Sutherland, 27 S. W. 982, 16 Ky. L. Rep. 301.

Maryland.— Knell *v.* Briscoe, 49 Md. 414.

Pennsylvania.— Kennedy *v.* Barnett, 64 Pa. St. 141.

South Carolina.— McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641; Peake *v.* Cantey, 3 McCord 107; State *v.* Johnson, 2 Bay 385; Lining *v.* Bentham, 2 Bay 1.

See 31 Cent. Dig. tit. "Justices of the Peace," § 33 *et seq.*

52. *Alabama.* — Irion *v.* Lewis, 56 Ala. 190. *Compare* Lester *v.* Governor, 12 Ala. 624.

Delaware.— Legates *v.* Lingo, 8 Houst. 154, 32 Atl. 80.

Michigan.— Curnow *v.* Kessler, 110 Mich. 10, 67 N. W. 982.

Missouri.— Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131 [*approved* in Pike *v.* Megoun, 44 Mo. 491; Lenox *v.* Grant, 8 Mo. 254].

New Jersey.—Taylor *v.* Doremus, 16 N. J. L. 473. *Compare* Neighbour *v.* Trimmer, 16 N. J. L. 58.

New York. — Cunningham *v.* Bucklin, 8 Cow. 178, 18 Am. Dec. 432.

North Carolina.— Cunningham *v.* Dillard, 20 N. C. 485.

United States.— Cooke *v.* Bangs, 31 Fed. 640.

See 31 Cent. Dig. tit. "Justices of the Peace," § 33 *et seq.*

53. *Alabama.* — McLendon *v.* American Freehold Land Mortg. Co., 119 Ala. 518, 24 So. 721.

Alaska.— Mitchell *v.* Galen, 1 Alaska 339.

California.— Inos *v.* Winspear, 18 Cal. 397.

Connecticut.— Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102.

District of Columbia.— Holtzman *v.* Robinson, 2 MacArthur 520.

Georgia.— Durden *v.* Belt, 61 Ga. 545.

Indiana.— Dawson *v.* Wells, 3 Ind. 398; Barkeloo *v.* Randall, 4 Blackf. 476, 32 Am. Dec. 46.

Kansas.— Hannum *v.* Norris, 21 Kan. 114; Smith *v.* Casner, 2 Kan. App. 591, 44 Pac. 752.

Kentucky.— Revill *v.* Pettit, 3 Metc. 314; Ely *v.* Thompson, 3 A. K. Marsh. 70; Kennedy *v.* Terrill, Hard. 490.

Louisiana.— Estopinal *v.* Peyroux, 37 La. Ann. 477; Buquet *v.* Watkins, 1 La. 131;

error in determining the facts necessary to his jurisdiction.[54] So too it has been held that if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the justice, in order to hold him liable for acts done without jurisdiction.[55]

Bore *v.* Bush, 6 Mart. N. S. 1; Dressen *v.* Cox, 2 Mart. N. S. 631.

Maine.— Call *v.* Pike, 66 Me. 350; Spencer *v.* Perry, 17 Me. 413.

Massachusetts.— Knowles *v.* Davis, 2 Allen 61; Kelly *v.* Bemis, 4 Gray 83, 64 Am. Dec. 50; Clarke *v.* May, 2 Gray 410, 61 Am. Dec. 470; Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438.

Michigan.— Clark *v.* Holmes, 1 Dougl. 390.

Missouri.— Patzack *v.* Von Gerichten, 10 Mo. App. 424.

Nebraska.— Head *v.* Levy, 52 Nebr. 456, 72 N. W. 583; Wright *v.* Rouss, 18 Nebr. 234, 25 N. W. 80.

New Hampshire.— Russell *v.* Perry, 14 N. H. 152.

New York.— Handshaw *v.* Arthur, 89 Hun 179, 34 N. Y. Suppl. 1034; Rivenburgh *v.* Henness, 4 Lans. 208; Pratt *v.* Hill, 16 Barb. 303; Earl *v.* Brewer, 20 Misc. 437, 46 N. Y. Suppl. 527; Adkins *v.* Brewer, 3 Cow. 206, 15 Am. Dec. 264; Bigelow *v.* Stearns, 19 Johns. 39, 10 Am. Dec. 189; Woodward *v.* Paine, 15 Johns. 493.

North Carolina.— Morgan *v.* Allen, 27 N. C. 156.

Ohio.— Harmon *v.* Gould, Wright 709; Masters *v.* Johnson, Tapp. 238.

Pennsylvania.— Ross *v.* Hudson, 6 Pa. Super. Ct. 552.

Rhode Island.— Brown *v.* Carroll, 16 R. I. 604, 18 Atl. 283.

South Carolina.— Miller *v.* Grice, 2 Rich. 27, 44 Am. Dec. 271.

Texas.— McVea *v.* Walker, 11 Tex. Civ. App. 46, 31 S. W. 839.

Wisconsin.— Selby *v.* Platts, 3 Pinn. 170, 3 Chandl. 183.

England.— Barton *v.* Bricknell, 13 Q. B. 393, 15 Jur. 668, 20 L. J. M. C. 1, 66 E. C. L. 393; Jones *v.* Gurdon, 2 Q. B. 600, 2 G. & D. 133, 6 Jur. 482, 11 L. J. M. C. 45, 42 E. C. L. 826; Mitchell *v.* Foster, 12 A. & E. 472, 9 Dowl. P. C. 527, 5 Jur. 70, 9 L. J. M. C. 95, 4 P. & D. 150, 40 E. C. L. 238; West *v.* Smallwood, 6 Dowl. P. C. 580, 2 Jur. 328, 7 L. J. Exch. 144, 3 M. & W. 418; Newbould *v.* Coltman, 6 Exch. 189, 20 L. J. M. C. 149; Lawrenson *v.* Hill, 10 Ir. C. L. 177; Cave *v.* Mountain, 9 L. J. M. C. 90, 1 M. & G. 257, 1 Scott N. R. 132, 39 E. C. L. 747.

Canada.— Stiles *v.* Brewster, 9 N. Brunsw. 414; Nary *v.* Owen, 2 N. Brunsw. 569; Anderson *v.* Wilson, 25 Ont. 91; Young *v.* Saylor, 23 Ont. 513; Briggs *v.* Spilsbury, Taylor (U. C.) 440; Appleton *v.* Lepper, 20 U. C. C. P. 138; Graham *v.* McArthur, 25 U. C. Q. B. 478; Connors *v.* Darling, 23 U. C. Q. B. 541; Gray *v.* McCarty, 22 U. C. Q. B. 568; Powell *v.* Williamson, 1 U. C. Q. B. 154.

See 31 Cent. Dig. tit. "Justices of the Peace," § 36 *et seq.*

Acts in good faith.— In some cases it has been held that the fact that the justice has acted in good faith will excuse a want of jurisdiction. Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92; Williamson *v.* Lacy, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 506; Anderson *v.* Roberts, (Tex. Civ. App. 1896) 35 S. W. 416. *Contra*, Truesdell *v.* Combs, 33 Ohio St. 186.

54. Allec *v.* Reece, 39 Fed. 341 [*quoting* and *approving* Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646, which, however, was a case involving the liability of a judge of a superior court]. See also Grove *v.* Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412; Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641; Cooke *v.* Bangs, 31 Fed. 640. And *compare* Rutherford *v.* Holmes, 66 N. Y. 368; Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758.

"The true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at least colorably under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not in any manner the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful." Grove *v.* Van Duyn, 44 N. J. L. 654, 660, 43 Am. Rep. 412.

"Execution of his office" under statutes giving a certain remedy to a person for a wrong suffered from an act done by a justice in the execution of his office, refers to acts performed by the justice as a magistrate, which are within his general jurisdiction. Jones *v.* Hughes, 5 Serg. & R. (Pa.) 299, 302, 9 Am. Dec. 264. See also Ross *v.* Hudson, 6 Pa. Super. Ct. 552.

55. Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470 [*citing* Pike *v.* Carter, 3 Bing. 78, 3 L. J. C. P. O. S. 169, 10 Moore C. P. 376, 11 E. C. L. 47; Lowther *v.* Radnor, 8 East 113; Calder *v.* Halket, 3 Moore P. C. 28, 13 Eng. Reprint 12]. See also Connelly *v.* Woods, 31 Kan. 359, 2 Pac. 773; Piper *v.*

2. Ministerial Acts. Justices of the peace are responsible for all damages arising from their illegal or negligent acts in the exercise of their ministerial powers or the discharge of their ministerial duties, whether such powers and duties are of a civil or criminal nature.[56]

3. Legislative Acts. Where justices of the peace act in a legislative rather than a judicial capacity, as in levying taxes as a fiscal court, they are not liable on their official bonds for levying a tax in excess of the constitutional limit.[57]

4. Actions Against Justices — a. In General. There is little peculiar to actions against justices of the peace. As in other cases the action should be brought by

Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

56. *Alabama.*— Olmstead *v.* Brewer, 91 Ala. 124, 8 So. 345.

Alaska.— Mitchell *v.* Galen, 1 Alaska 339.

California.— Inos *v.* Winspear, 18 Cal. 397.

Connecticut.— Allen *v.* Gray, 11 Conn. 95. *Compare* Taylor *v.* Judd, 41 Conn. 483.

Delaware.— Legates *v.* Lingo, 8 Houst. 154, 32 Atl. 80.

Georgia.— Barrett *v.* Pulliam, 77 Ga. 552.

Illinois.— Harlow *v.* Birger, 30 Ill. 425; Flack *v.* Harrington, 1 Ill. 213, 12 Am. Dec. 170. See also Garfield *v.* Douglass, 22 Ill. 100, 74 Am. Dec. 137.

Indiana.— Murray *v.* Buchanan, 7 Blackf. 549; Hooker *v.* State, 7 Blackf. 272; Dugan *v.* Melogue, 7 Blackf. 144; Modisett *v.* Governor, 2 Blackf. 135. *Compare* State *v.* Trout, 75 Ind. 563; Kress *v.* State, 65 Ind. 106; Tingle *v.* Pullium, 4 Blackf. 442.

Iowa.— Horne *v.* Pudil, 88 Iowa 533, 55 N. W. 485; Gowing *v.* Gowgill, 12 Iowa 495.

Kentucky.— Kennedy *v.* Terrill, Hard. 490.

Louisiana.— Terrail *v.* Tinney, 20 La. Ann. 444. *Compare* Maguire *v.* Hughes, 13 La. Ann. 281.

Maine.— Tyler *v.* Alford, 38 Me. 530; Spencer *v.* Perry, 17 Me. 413.

Maryland.— State *v.* Carrick, 70 Md. 586, 17 Atl. 559, 14 Am. St. Rep. 387.

Massachusetts.—Noxon *v.* Hill, 2 Allen 215; Sullivan *v.* Jones, 2 Gray 570; Hayden *v.* Shed, 11 Mass. 500; Briggs *v.* Wardwell, 10 Mass. 356. *Compare* Van Kuran *v.* May, 7 Allen 466; Jones *v.* Werden, 12 Cush. 133; Raymond *v.* Bolles, 11 Cush. 315.

Michigan.— Guenther *v.* Whiteacre, 24 Mich. 504; Shadbolt *v.* Bronson, 1 Mich. 85; Welch *v.* Frost, 1 Mich. 30, 48 Am. Dec. 692. See also Dane *v.* Holmes, 41 Mich. 661, 3 N. W. 169. *Compare* McDonald *v.* Lewis, 42 Mich. 135, 3 N. W. 300.

Montana.— See Ramsey *v.* Burns, 27 Mont. 154, 69 Pac. 711.

Nebraska.— Courier Printing, etc., Co. *v.* Leese, 65 Nebr. 581, 91 N. W. 357; Head *v.* Levy, 52 Nebr. 456, 72 N. W. 583.

New Jersey.— Neighbor *v.* Trimmer, 16 N. J. L. 58. *Compare* Loftus *v.* Prior, 5 N. J. L. 24.

New York.— Evarts *v.* Kiehl, 102 N. Y. 296; Christopher *v.* Van Liew, 57 Barb. 17; Davis *v.* Marshall, 14 Barb. 96; MacDonell *v.* Buffum, 31 How. Pr. 154; Merritt *v.* Read, 5 Den. 352; Houghton *v.* Swarthout, 1 Den. 589; Wickware *v.* Bryan, 11 Wend. 545; Tompkins *v.* Sands, 8 Wend. 462, 24 Am. Dec. 46; Lewis *v.* Palmer, 6 Wend. 367; Kidzie *v.* Sackrider, 14 Johns. 195; Case *v.* Shepherd, 2 Johns. Cas. 27. See also Smith *v.* Ford, 1 Wend. 48; Collins *v.* Ferris, 14 Johns. 246. *Compare* James *v.* Hartney, 6 Hill 487; Millard *v.* Jenkins, 9 Wend. 298.

North Carolina.—Davis *v.* Lanier, 47 N. C. 307; Cohoon *v.* Speed, 47 N. C. 133; Hardison *v.* Jordan, 1 N. C. 512.

Ohio.— Shaw *v.* Bauman, 34 Ohio St. 25; Fairchild *v.* Keith, 29 Ohio St. 156; Place *v.* Taylor, 22 Ohio St. 317; Taylor *v.* Alexander, 6 Ohio 144; Kerns *v.* Schoonmaker, 4 Ohio 331, 22 Am. Dec. 757; Cohen *v.* Marchant, 1 Disn. 113, 12 Ohio Dec. (Reprint) 519; Dummick *v.* Howitt, 8 Ohio Dec. (Reprint) 196, 6 Cinc. L. Bul. 247. *Compare* Monteith *v.* Bissell, Wright 411.

Pennsylvania.— Com. *v.* Ziegler, 4 Pa. Dist. 772; Gault *v.* Mitchell, 12 Leg. Int. 238. See also Reid *v.* Wood, 2 Chest. Co. Rep. 513.

South Carolina.— Kelly *v.* Rembert, Harp. 65, 18 Am. Dec. 643; Armstrong *v.* Campbell, 2 Brev. 259; Perrin *v.* Calhoun, 2 Brev. 248. See also Young *v.* Herbert, 2 Nott & M. 172 note; State *v.* Porter, 3 Brev. 175.

Texas.— Stacks *v.* Simmons, (Civ. App. 1900) 58 S. W. 958.

Vermont.— Banister *v.* Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201; Yates *v.* Pelton, 48 Vt. 314.

United States.— Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

England.— Clark *v.* Woods, 2 Exch. 395, 17 L. J. M. C. 189, 3 New Sess. Cas. 253; Morgan *v.* Hughes, 2 T. R. 225.

Canada.—Pickett *v.* Perkins, 12 N. Brunsw. 131; Reid *v.* Maybee, 31 U. C. C. P. 384; Cross *v.* Wilcox, 39 U. C. Q. B. 187; Murfina *v.* Suavé, 19 Quebec Super. Ct. 51.

See 31 Cent. Dig. tit. "Justices of the Peace," § 41 *et seq.*

In issuing mesne and final process a justice's duty and liability are the same as that of the clerk of any other court issuing like process. Banister *v.* Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201.

If a justice acts with malicious and wrongful intent, that is a fact for the jury in deciding whether or not they will allow exemplary damages. Banister *v.* Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201.

Liability imposed by statute for failure to take guardian's bond.— Davis *v.* Lanier, 47 N. C. 307.

57. Com. *v.* Kennedy, 118 Ky. 618, 82 S. W. 237, 26 Ky. L. Rep. 504.

the real party in interest,[58] and may be against one of several justices who might be sued.[59] So too while the usual form of action is case, trespass must be brought where the facts call for it.[60] It has been held that unless actual damage is shown an action cannot be maintained;[61] but on this question there is authority to the contrary.[62]

b. Defenses. Want of malice or corrupt motive, and error of judgment as to his jurisdiction, although they may go to the jury in mitigation of damages, will not justify or excuse a justice of the peace for any act done in excess of his jurisdiction;[63] nor can he justify a failure to perform, or a neglect in the performance of, a ministerial duty by any collateral matter.[64] But a conviction by a justice of the peace having jurisdiction, valid on its face until set aside, is a complete defense to any action against him for any act of his in the prosecution in which the conviction was had,[65] although it has been held that he cannot justify in an action for an arrest under a warrant issued by him, unless before such arrest he had taken the constitutional oath of office.[66]

c. Limitations. In the absence of special statutory provision,[67] actions against justices of the peace are subject to the general statutes of limitation.[68]

d. Notice or Demand.[69] No notice or demand is necessary as a prerequisite to an action against a justice of the peace for his official acts or misconduct,[70] unless required by statute, as is the case in some jurisdictions.[71]

58. Deuble *v.* Kolbe, 7 Ohio Dec. (Reprint) 177, 1 Cinc. L. Bul. 234.

59. **Joint and several liability.**— One of several justices of the peace who are on the bench when an appointment is made of a guardian without taking security may be sued alone, without joining the others, under a statute imposing liability for all loss and damages on the "justice or justices appointing such guardian." Davis *v.* Lanier, 47 N. C. 307.

60. Muse *v.* Vidal, 6 Munf. (Va.) 27, in which a complete declaration in trespass is set out.

61. Millard *v.* Jenkins, 9 Wend. (N. Y.) 298, holding that an action against a justice for making a false return on an appeal from a judgment rendered by him cannot be maintained unless an actual damage is shown, since otherwise it would be *injuria sine damno*.

62. Head *v.* Levy, 52 Nebr. 456, 72 N. W. 583, holding that a justice of the peace who issues an order of attachment without an undertaking therefor having been first executed as required by law is liable for nominal damages to the defendant in such attachment, although the latter has suffered no actual injury therefrom.

63. Miller *v.* Grice, 2 Rich. (S. C.) 27, 44 Am. Dec. 271. See *supra*, II, C, 1, c.

64. Deuble *v.* Kolbe, 7 Ohio Dec. (Reprint) 177, 1 Cinc. L. Bul. 234.

65. Lancaster *v.* Lane, 19 Ill. 242; Mather *v.* Hood, 8 Johns. (N. Y.) 44. See *supra*, II, C, 1, b.

In Canada a conviction not set aside protects a magistrate, whether there was jurisdiction to make it or not (Arscott *v.* Lilley, 14 Ont. App. 283 [*reversing* 11 Ont. 285]; Hunter *v.* Gilkison, 7 Ont. 735; McLellan *v.* McKinnon, 1 Ont. 219; Sprung *v.* Anderson, 23 U. C. C. P. 152; Haacke *v.* Adamson, 14 U. C. C. P. 201; McDonald *v.* Stuckey, 31 U. C. Q. B. 577; Graham *v.* McArthur, 25 U. C. Q. B. 478; Gates *v.* Devenish, 6 U. C. Q. B. 260) unless it is bad on its face (Jones *v.* Grace, 17 Ont. 681; Briggs *v.* Spilsbury, Taylor (U. C.) 440; Eastman *v.* Reid, 6 U. C. Q. B. 611).

A conviction for an offense differing from that recited in the commitment is no defense. Rogers *v.* Jones, 3 B. & C. 409, 10 E. C. L. 190, 5 D. & R. 268, 3 L. J. K. B. O. S. 40, R. & M. 129, 27 Rev. Rep. 389, 21 E. C. L. 716.

66. Courser *v.* Powers, 34 Vt. 517.

Qualification generally see *supra*, I, I.

67. **In Pennsylvania,** under the act of March 21, 1772, section 7, suits against justices of the peace were limited to six months. Prather *v.* Connelly, 9 Serg. & R. 14 (need not be specially pleaded); Killion *v.* Davis, 1 Phila. 215.

68. See LIMITATIONS OF ACTIONS.

Running of statute.— A justice of the peace having neglected to perform an act required by law, from which neglect plaintiff suffered a loss, and for which he brought his suit, the statute of limitations being pleaded, the time must be computed from the date of the negligence, and not from the time when plaintiff first knew of it. Lathrop *v.* Snellbaker, 6 Ohio St. 276.

69. **In action for penalty** see *infra*, II, E, 2.

70. Day *v.* Day, 4 Md. 262; Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

71. *Georgia.*— Collins *v.* Granniss, 67 Ga. 716; Warthen *v.* May, 1 Ga. 602.

Indiana.— See State *v.* Harding, 5 Blackf. 504, holding, however, that the statute does not apply to suits against a justice to recover money collected by him.

Pennsylvania.— Magnussen *v.* Shortt, 200 Pa. St. 257, 49 Atl. 783; Bartolett *v.* Achey, 38 Pa. St. 273; Robinson *v.* English, 34 Pa. St. 324; Grimes *v.* Percival, 9 Pa. St. 135;

e. Pleading[72] — (i) *Declaration, Petition, or Complaint.* The declaration, petition, or complaint in an action against a justice of the peace for damages must allege distinctly or by necessary implication every fact essential to plaintiff's right of action.[73]

(ii) *Plea or Answer.*[74] As a general principle a trespass by a justice of the peace, like other trespasses, cannot be justified under a plea of not guilty, but the justification must be specially pleaded.[75] This rule, however, does not exclude

Stansbury *v.* Bertron, 7 Watts & S. 362; McConahy *v.* Courtney, 7 Watts 491; Hansel *v.* Spoul, 7 Watts 297; Bates *v.* Shaw, 13 Serg. & R. 420; Miller *v.* Smith, 12 Serg. & R. 145; Jones *v.* Hughes, 5 Serg. & R. 299, 9 Am. Dec. 364; Litle *v.* Toland, 6 Binn. 83; Ross *v.* Hudson, 6 Pa. Super. Ct. 552; Kennedy *v.* Shoemaker, 1 Browne 61; Bechtel *v.* Hause, 1 Chest. Co. Rep. 239; Gardner *v.* Shoemaker, 5 Lack. Jur. 262; Bair *v.* Harple, 1 Lanc. L. Rev. 265; Watrous *v.* Davis, 26 Pittsb. Leg. J. 161.

England.— Hazeldine *v.* Grove, 3 Q. B. 997, 3 G. & D. 210, 7 Jur. 262, 12 L. J. M. C. 10, 43 E. C. L. 1073; Martins *v.* Upcher, 3 Q. B. 662, 1 Dowl. P. C. N. S. 555, 2 G. & D. 716, 6 Jur. 582, 11 L. J. Q. B. 291, 43 E. C. L. 914; Prestidge *v.* Woodman, 1 B. & C. 12, 2 D. & R. 43, 8 E. C. L. 6; Graves *v.* Arnold, 3 Campb. 242; Bird *v.* Gunston, 2 Chit. 459, 18 E. C. L. 736, 4 Dougl. 275, 26 E. C. L. 472; Kirby *v.* Simpson, 2 C. L. R. 1286, 10 Exch. 358, 18 Jur. 983, 23 L. J. M. C. 165; Weller *v.* Toke, 9 East 364; Briggs *v.* Evelyn, 2 H. Bl. 114, 3 Rev. Rep. 354.

Canada.— McGuiness *v.* Dafoe, 23 Ont. App. 704 [*affirming* 27 Ont. 117]; Sinden *v.* Brown, 17 Ont. App. 173; Kelly *v.* Barton, 26 Ont. 608 [*affirmed* in 22 Ont. App. 522]; Bond *v.* Conmee, 15 Ont. 716 [*affirmed* in 16 Ont. App. 398]; Howell *v.* Armour, 7 Ont. 363; Mills *v.* Monger, 4 U. C. Q. B. O. S. 383.

See 31 Cent. Dig. tit. "Justices of the Peace," § 51. And see *supra*, II, E, 2.

Notice must be signed by plaintiff.— Grimes *v.* Percival, 9 Pa. St. 135.

Sufficiency of notice.— The notice need not possess the technical formality of a declaration, provided it is explicit enough to identify the injury complained of and sought to be redressed. Robinson *v.* English, 34 Pa. St. 324 [*approved* in Bartolett *v.* Achey, 38 Pa. St. 273].

72. See, generally, Pleading.

73. *Georgia.*— Barrett *v.* Pulliam, 77 Ga. 552, in which there was no allegation of loss to plaintiff by reason of the neglect or refusal of the justice to collect and pay over money.

Indiana.— State *v.* Brown, 5 Blackf. 494 (sufficiency of allegation that judgment is unpaid in action for failing to issue execution in time); Peters *v.* Land, 5 Blackf. 12 (sufficiency of allegation as to want of cause of action by plaintiff in original suit); Crews *v.* Sheets, 4 Blackf. 275 (necessity to allege good defense to original action in action for failure to transmit appeal papers).

Iowa.— Horne *v.* Pudil, 88 Iowa 533, 55 N. W. 485, petition held sufficient.

New York.— Houghton *v.* Swarthout, 1 Den. 589 (corrupt motive need not be charged in action for false return to an appeal); Pangburn *v.* Ramsay, 11 Johns. 141 (sufficiency of averment of loss or damage).

Pennsylvania.— Gardner *v.* Shoemaker, 5 Lack. Jur. 262.

Texas.— Anderson *v.* Roberts, (Civ. App. 1896) 35 S. W. 416, to the effect that in an action against a justice of the peace for exceeding jurisdiction the petition must show that question of jurisdiction was not before, and passed upon by, the justice.

England.— Sommerville *v.* Mirehouse, 1 B. & S. 652, 3 L. T. Rep. N. S. 294, 9 Wkly. Rep. 53, 101 E. C. L. 652, as to necessity of allegation of malice.

Canada.— Howell *v.* Armour, 7 Ont. 363 (as to necessity of allegation of malice); Brennan *v.* Hatelie, 6 U. C. Q. B. O. S. 308 (count in trespass held good on motion in arrest of judgment).

See 31 Cent. Dig. tit. "Justices of the Peace," § 52.

Where fraud is a necessary element of the plaintiff's cause of action, the facts constituting the fraud must be set out. Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150.

Form of complaint or declaration in trespass see Kraft *v.* Porter, 76 Ill. App. 328; Muse *v.* Vidal, 6 Munf. (Va.) 27.

Demurrer.— In an action against a justice and the plaintiff in an action of forcible entry and detainer, for damages received in the service of a writ of restitution issued on a void judgment thereunder a demurrer to the complaint will not be sustained on the ground that defendants were acting under color of law, where it is alleged that they knew the judgment was void. Stacks *v.* Simmons, (Tex. Civ. App. 1900) 58 S. W. 958.

74. Defenses see *supra*, II, C, 4, b.

75. Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650.

Form of plea of justification see Kraft *v.* Porter, 76 Ill. App. 328.

Allegation of official character.— In a plea of justification in an action of trespass for false imprisonment, it is a sufficient allegation of the justice's official character to state that defendant "was a justice of the peace in and for the county aforesaid." Kraft *v.* Porter, 76 Ill. App. 328 [*following* Outlaw *v.* Davis, 27 Ill. 467, and *distinguishing* Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100].

Plea held insufficient for failure to deny allegations of complaint see Willing *v.* Bozman, 52 Md. 44.

evidence which is really not in justification but in disproof of the trespass, and such evidence may be introduced under the general issue.[76]

f. Evidence.[77] The general rules of law as to the admissibility and sufficiency of evidence govern in actions against justices of the peace.[78]

g. Instructions. The instructions in an action against a justice of the peace must be relevant[79] and predicated upon the evidence in the case.[80] It is error to refuse an instruction which correctly states the law and is supported by the evidence.[81]

h. Damages.[82] The general rule is, as in other cases, that the damages to be allowed in an action against a justice of the peace are such, and such only, as are the necessary or natural and proximate consequences of his wrongful act.[83] It is competent for the justice to show in mitigation of damages that he acted in good faith,[84] or that the act complained of was not the cause of injury;[85] and

76. Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650.

77. See, generally, EVIDENCE.

78. See the following cases:

Michigan.— Cagney *v.* Wattles, 121 Mich. 469, 80 N. W. 245.

New York.— Whitman *v.* Seaman, 61 N. Y. 633.

Ohio.— Drummond *v.* Henderson, 62 Ohio St. 136, 56 N. E. 650.

Pennsylvania.— Prather *v.* Connelly, 9 Serg. & R. 14.

Vermont.— Courser *v.* Powers, 34 Vt. 517.

England.— Stevens *v.* Clark, C. & M. 509, 2 M. & Rob. 435, 41 E. C. L. 278.

Canada.— Labelle *v.* McMillan, 34 N. Brunsw. 488; McKinley *v.* Munsie, 15 U. C. C. P. 230; Neill *v.* McMillan, 25 U. C. Q. B. 485; Graham *v.* McArthur, 25 U. C. Q. B. 478; Bross *v.* Huber, 15 U. C. Q. B. 625; Kalar *v.* Cornwall, 8 U. C. Q. B. 168; Moore *v.* Holditch, 7 U. C. Q. B. 207.

See 31 Cent. Dig. tit. "Justices of the Peace," § 53.

Docket admissible.— Lancaster *v.* Lane, 19 Ill. 242; Dupont *v.* Downing, 6 Iowa 172.

Records admissible.— Barnard *v.* Flanders, 12 Vt. 657.

The minutes of a justice are not competent in justification of his acts. He must show affirmatively facts giving him jurisdiction. Evertson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217.

Malice inferred from want of probable cause see Gault *v.* Mitchell, 12 Leg. Int. (Pa.) 238.

Taking an indemnity bond is insufficient in itself to show wilful wrong. Reid *v.* Hood, 2 Nott & M. (S. C.) 168, 10 Am. Dec. 582.

Evidence sufficient to show official misconduct see Knell *v.* Briscoe, 49 Md. 414.

Sufficient proof of notice see Minor *v.* Neal, 1 Pa. St. 403.

Evidence sufficient to warrant exemplary damages see Smith *v.* Holland, (Tex. App. 1891) 16 S. W. 424.

79. Rouss *v.* Wright, 14 Nebr. 457, 16 N. W. 765.

80. Phœnix Ins. Co. *v.* Bohman, 28 Nebr. 251, 44 N. W. 111. See, generally, TRIAL.

81. Smith *v.* Holland, (Tex. App. 1891) 16 S. W. 424.

82. See, generally, DAMAGES.

Necessity to show actual damage see *supra*, II, C, 4, a, text and notes 61, 62.

In action on official bond see *infra*, II, C, 5, c, (VI).

83. Noxon *v.* Hill, 2 Allen (Mass.) 215; Dehn *v.* Heckman, 12 Ohio St. 181.

Loss of time and counsel fees.— In an action against a justice for erroneously dating a recognizance on appeal, the jury may consider the amount plaintiff was compelled to pay, his loss of time, and reasonable counsel fees, in determining the damages. Cohen *v.* Marchant, 1 Disn. (Ohio) 113, 12 Ohio Dec. (Reprint) 519.

In an action for making a false return, whereby appellant's appeal was heard on the law, and not on the facts, as desired by him, and the justice's judgment affirmed, plaintiff's measure of damages is the costs paid by him in the county court and expense of applying for a new trial. Brooks *v.* St. John, 25 Hun (N. Y.) 540.

In an action to recover excess fees, judgment may be rendered for the excess and costs, including the statutory attorney's fee for preparing and serving the notice. Collins *v.* Hunter, 1 Ashm. (Pa.) 60.

Costs of levying an execution, or losses to which plaintiff has been subjected by reason of attempting to enforce it, cannot be included in the damages in an action against the justice for issuing an execution invalid on its face. Noxon *v.* Hill, 2 Allen (Mass.) 215.

Failure to take guardian's bond.— Under a statute providing that if any court should commit an orphan's estate to the charge or guardianship of any person without taking good and sufficient security for the same, the justice or justices appointing such guardian should be made liable for all loss and damages sustained by such orphan, to be recovered by action at the common law, it was held that the measure of damages was the amount of the principal and compound interest on the principal up to the time of the plaintiff's arrival at majority, but that nothing could be allowed for the interest accruing after that event. Davis *v.* Lanier, 47 N. C. 307.

84. Patzack *v.* Von Gerichten, 10 Mo. App. 424.

85. Noxon *v.* Hill, 2 Allen (Mass.) 215,

in an action for false imprisonment it is competent for him to show that plaintiff was guilty of the offense with which he had been charged.[86]

5. Liability on Official Bond[87]— a. In General. The requisition of an official bond from a justice of the peace does not increase his civil liability, but only renders him and his sureties liable for acts for which, without a bond, he alone would be liable.[88] A bond which has not been approved,[89] or not properly approved,[90] or one which is not required by statute,[91] may nevertheless be valid and binding as a common-law obligation. So too the official bond of a justice *de facto* is binding on the sureties,[92] and the validity of a bond is not impaired by the failure of the principal and sureties to acknowledge the same, if it has been accepted and approved without such acknowledgment.[93]

b. Extent of Sureties' Liability. The sureties on the official bond are liable for any neglect or misconduct on his part,[94] while acting in his official capacity,[95] provided the acts or omissions complained of related to the exercise of his ministerial rather than his judicial functions.[96] The death of a justice of the peace

holding that in an action against a magistrate for wrongfully issuing an execution which was invalid on its face he may show in mitigation that the circumstances of the judgment debtor were such that nothing could have been collected, even if he had issued a valid execution.

86. Haacke *v.* Adamson, 14 U. C. C. P. 201. See also Bross *v.* Huber, 15 U. C. Q. B. 625.

87. See, generally, Bonds; Principal and Surety.

88. Irion *v.* Lewis, 56 Ala. 190.

89. Green *v.* Wardwell, 17 Ill. 278, 63 Am. Dec. 366.

90. Buell *v.* Parke, 2 Ohio Dec. (Reprint) 524, 3 West. L. Month. 491.

91. Williamson *v.* Woolf, 37 Ala. 298. But see Silver *v.* Governor, 4 Blackf. (Ind.) 15.

92. Green *v.* Wardwell, 17 Ill. 278, 63 Am. Dec. 366.

De facto justices see *supra*, I, D.

93. Brown *v.* State, 76 Ind. 214.

94. *Alabama.*— Mason *v.* Crabtree, 71 Ala. 479.

Indiana.— Widener *v.* State, 45 Ind. 244; State *v.* Littlefield, 4 Blackf. 129; State *v.* Flinn, 3 Blackf. 72, 23 Am. Dec. 380.

Iowa.— Latham *v.* Brown, 16 Iowa 118; Gowing *v.* Gowgill, 12 Iowa 495.

Kansas.— Brockett *v.* Martin, 11 Kan. 378.

Ohio.— Peabody *v.* State, 4 Ohio St. 387; Lindeman *v.* Ziegler, 9 Ohio Dec. (Reprint) 401, 12 Cinc. L. Bul. 319.

Pennsylvania.— Ferry *v.* Schutter, 8 Kulp 64; Walter *v.* Ziegler, 8 Kulp 25.

See 31 Cent. Dig. tit. "Justices of the Peace," § 59.

Failure to pay over money by reason of death will not of itself render sureties liable. There must have been a demand and refusal to pay, or some omission of official duty. Price *v.* Farrar, 5 Ill. App. 536.

95. *Illinois.*— Price *v.* Farrar, 5 Ill. App. 536; People *v.* Price, 3 Ill. App. 15.

Indiana.— State *v.* Jackson, 68 Ind. 58; Dœpfner *v.* State, 36 Ind. 111; King *v.* State, 15 Ind. 64.

Iowa.— Lanpher *v.* Dewell, 56 Iowa 153, 9 N. W. 101.

Minnesota.— Larson *v.* Kelly, 64 Minn. 51, 66 N. W. 130; Cressey *v.* Gierman, 7 Minn. 398.

Nebraska.— Snyder *v.* Gross, 69 Nebr. 340, 95 N. W. 636; McCormick *v.* Thompson, 10 Nebr. 484, 6 N. W. 597.

Ohio.— Stevens *v.* Breatheven, Wright 733; Fritch *v.* Douglass, 12 Ohio Cir. Ct. 359, 5 Ohio Cir. Dec. 695.

Pennsylvania.— Ditmars *v.* Com., 47 Pa. St. 335; Hale *v.* Com., 8 Pa. St. 415; Com. *v.* Kendig, 2 Pa. St. 448.

West Virginia.— State *v.* Allen, (1900) 35 S. E. 990.

Wisconsin.— Barnes *v.* Whitaker, 45 Wis. 204.

See 31 Cent. Dig. tit. "Justices of the Peace," § 57.

The words "judicial duties," in a bond given by a justice for the faithful performance of his duty, mean "official duties." Larson *v.* Kelly, 64 Minn. 51, 66 N. W. 130.

Money collected without suit.— A surety is liable for money collected by the justice officially, although without suit. Ditmars *v.* Com., 47 Pa. St. 335. *Compare* Com. *v.* Kendig, 2 Pa. St. 448.

Money in lieu of bail is not received *virtute officii*, and a justice's sureties are not liable for it. Cressey *v.* Gierman, 7 Minn. 398; Snyder *v.* Cross, 69 Nebr. 340, 95 N. W. 636.

Money collected under a void judgment is not collected "by virtue of his office," so as to render a justice's sureties liable therefor. Barnes *v.* Whitaker, 45 Wis. 204.

Money received before due.— Money paid to a justice on a demand in his hands before due is not paid to him in his official capacity, and he is not liable on his official bond. Stevens *v.* Breatheven, Wright (Ohio) 733.

96. *Alabama.*— McGrew *v.* Governor, 19 Ala. 89. *Compare* Lester *v.* Governor, 12 Ala. 624.

Illinois.— People *v.* Scott, 45 Ill. App. 182.

Indiana.— Hood *v.* Sennett, 70 Ind. 329.

Maryland.— State *v.* Carrick, 70 Md. 586, 17 Atl. 559, 14 Am. St. Rep. 387.

Minnesota.— Larson *v.* Kelly, 64 Minn. 51, 66 N. W. 130.

Ohio.— Fairchild *v.* Keith, 29 Ohio St. 156 [*affirmed* in 7 Ohio Dec. (Reprint) 176, 1

does not relieve his sureties from liability for a breach of the condition of his official bond.[97] Sureties are manifestly not liable for any default occurring before they became sureties, unless it is so stipulated in the bond.[98]

c. Actions on Bonds — (I) *In General.* The remedy against a justice and his sureties on his official bond is by action,[99] which must be joint.[1] It has been held that such an action may be brought before another justice, provided the amount of damages claimed is within the jurisdictional limit.[2] The action should be brought by the real party in interest.[3] In some of the states notice or demand is a prerequisite to bringing suit upon the official bond of a justice of the peace.[4] The right to sue a justice upon his bond for improper conduct in the discharge of the duties of his office is not waived by an appeal from his decision, but only the right to raise any question upon the erroneous rulings in that case.[5]

(II) *Defenses.* It is a good defense to an action on a justice's bond for the issuance of execution after a writ of certiorari had been granted that he was not legally notified of the granting of the writ;[6] but it is no defense to an action on the bond of a justice for his failure to certify up a case and make a record of his proceedings that the papers in the case had been stolen, so that the justice could not make any record of or certify up the case.[7]

(III) *Limitations.*[8] In the absence of special statutory provisions, actions on the official bonds of justices of the peace are subject to the same limitations as apply by general law to other similar bonds.[9]

(IV) *Pleadings*[10] — (A) *Declaration, Petition, or Complaint.* The declaration, petition, or complaint must contain sufficient allegations to show a cause of action,[11] and where there are exceptions in the statute which prescribes the duty

Cinc. L. Bul. 227]; Place *v.* Taylor, 22 Ohio St. 317; Stallcup *v.* Baker, 18 Ohio St. 544.

See 31 Cent. Dig. tit. "Justices of the Peace," § 58; and *supra*, II, C, 1.

97. State *v.* Houston, 4 Blackf. (Ind.) 291; Peabody *v.* State, 4 Ohio St. 387; Lindeman *v.* Ziegler, 9 Ohio Dec. (Reprint) 401, 12 Cinc. L. Bul. 319.

98. Bessinger *v.* Dickerson, 20 Iowa 260. See also Warren County *v.* Jeffrey, 18 Ill. 329; Naugle *v.* State, 85 Ind. 469.

99. Ledbetter *v.* Castles, 11 Ala. 149, to the effect that a statute giving a summary remedy against a justice for failing to pay over money received or collected by him in his official capacity does not extend to his sureties, so as to authorize a judgment against them, with their principal, on motion.

1. Aucker *v.* Adams, 23 Ohio St. 543.

2. State *v.* Luckey, 51 Miss. 528. *Contra*, Collins *v.* Parker, 63 Ohio St. 16, 57 N. E. 959, to the effect that under the Ohio statutes (70 Ohio Laws 79, § 583, subd. 12) an action may be brought against a justice individually before another justice, but that an action on his bond cannot be so brought.

Amount or value in controversy see *infra*, III, D.

3. Deuble *v.* Kolbe, 7 Ohio Dec. (Reprint) 177, 1 Cinc. L. Bul. 234.

A judgment of a justice may be assigned, so as to authorize the assignee to be the relator in a suit on the justice's bond for the money collected by the justice on the judgment. Hooker *v.* State, 7 Blackf. (Ind.) 272.

4. Parker *v.* State, 8 Blackf. (Ind.) 292, may be made at any time before commencement of suit. See also *supra*, II, C, 4, d.

When a justice has absconded, no demand for money collected by him need be made. Warren County *v.* Jeffrey, 18 Ill. 329.

In Pennsylvania the law of 1772, requiring thirty days' notice of suits against justices (see *supra*, II, C, 4, d) was construed not to apply to suits on their official bonds. Com. *v.* Frailey, 69 Pa. St. 260 [*distinguishing* Wise *v.* Wills, 2 Rawle 208].

5. Gowing *v.* Gowgill, 12 Iowa 495.

6. Frohlichstein *v.* Jordan, 138 Ala. 310, 35 So. 247, in which the justice was verbally notified of the granting of the writ by plaintiff's attorney, but had no official notice of that fact until after execution issued.

7. Deuble *v.* Kolbe, 7 Ohio Dec. (Reprint) 177, 1 Cinc. L. Bul. 234, although the adverse party is willing to consent to the substitution of such papers as would give jurisdiction to the appellate court.

8. See also *supra*, II, C, 4, c.

9. See Limitation of Actions.

Ill. Rev. St. c. 59, § 138, making bonds of justices of the peace void after five years, while in the nature of a statute of limitations, is not such a statute as must be specially pleaded. People *v.* Herr, 81 Ill. 125.

In Ohio an action on a justice's bond for failing to pay over money received in an official capacity is not barred in one year. State *v.* Chenoweth, 1 Ohio Dec. (Reprint) 369, 8 West. L. J. 374.

10. See, generally, Pleading.

11. Holtzman *v.* Robinson, 2 MacArthur (D. C.) 520; Naugle *v.* State, 85 Ind. 469; Larr *v.* State, 45 Ind. 364; State *v.* Woodman, 36 Ind. 511; Weaver *v.* State, 8 Blackf. (Ind.) 563; State *v.* Hook, 6 Blackf. (Ind.) 515; State *v.* Littlefield, 4 Blackf. (Ind.)

alleged to have been neglected, such exceptions must be negatived.[12] Defendant's official character, and that his co-defendants were his bondsmen for the faithful discharge of the duties of his office, should always be averred,[13] as should also the making and approval of the bond.[14] Where the breach assigned is the failure to pay over money, it must be alleged that the money was received during the time covered by the bond,[15] that the justice has not paid over the money, and that it remains in his hands.[16] In an action in the name of the state it is not necessary that it should appear from the declaration that the relator is beneficially interested in the suit,[17] but the complaint must show a breach of some duty embraced in the covenants of the bond for which he has cause to complain.[18]

(B) *Plea or Answer.* A plea that the justice has not failed to discharge his duty as alleged in the declaration is good on general demurrer,[19] but a plea is insufficient which merely alleges matter which may be proved in mitigation of damages.[20]

(C) *Subsequent Pleadings.* In an action on a justice's bond for failure to pay over money collected, although the bond was conditioned for payment on demand, a general averment in the replication of non-payment, although often demanded, is sufficient on general demurrer.[21] In such a case where the plea was general performance, a rejoinder that the relator had recovered a judgment against the justice for the same money is bad as a departure.[22]

(V) *EVIDENCE.*[23] In a suit on the official bond of a justice for his refusal to account for money collected by him, evidence that he has receipted for the money is proper for the consideration of the jury in determining whether he ever received it,[24] and it will be presumed that he had power to give the receipt, and that his act was legal, until the contrary is shown.[25] In an action to recover damages on account of a justice's failure to issue execution, where it is shown that the execution debtor had certain property which might have been levied on, if not claimed as exempt, the presumption is that the debtor would not have so claimed it.[26]

(VI) *DAMAGES.*[27] The actual loss sustained by plaintiff is the measure of damages in an action on the official bond of a justice of the peace.[28] In a suit for the justice's failure to issue an execution, the measure of damages is *prima facie* the amount of the execution;[29] but this amount may be increased by reason of loss incurred by the justice's neglect,[30] or reduced by showing that a part only of the execution could have been collected.[31] Although no actual damages may have resulted from a justice's breach of duty nominal damages may be recovered.[32]

129; Anderson *v.* Park, 57 Iowa 69, 10 N. W. 310; Slicer *v.* Elder, 2 Ohio Dec. (Reprint) 218, 2 West. L. Month. 90.

Allegation of scienter see Holtzman *v.* Robinson, 2 MacArthur (D. C.) 520.

Conclusion of law.— In debt on a justice's bond for his failure to issue an execution, the relator's statement that the justice might, could, and should have issued an execution is only a conclusion of law, and is insufficient. Weaver *v.* State, 8 Blackf. (Ind.) 563.

12. Weaver *v.* State, 8 Blackf. (Ind.) 563.

13. State *v.* Bliss, 19 Ind. App. 662, 49 N. E. 1077.

14. Slicer *v.* Elder, 2 Ohio Dec. (Reprint) 218, 2 West. L. Month. 90.

15. Naugle *v.* State, 85 Ind. 469. See also Warren County *v.* Jeffrey, 18 Ill. 329.

Collection while in office should be substantially averred. Parker *v.* State, 8 Blackf. (Ind.) 292.

16. State *v.* Woodman, 36 Ind. 511.

17. State *v.* Harding, 5 Blackf. (Ind.) 504.

18. State *v.* Littlefield, 4 Blackf. (Ind.) 129.

19. State *v.* Scott, 6 Blackf. (Ind.) 263, where it is said, however, that such a plea might be specially demurred to as argumentative.

20. Noel *v.* State, 6 Blackf. (Ind.) 523.

21. Bell *v.* State, 7 Blackf. (Ind.) 33.

22. Bell *v.* State, 7 Blackf. (Ind.) 33.

23. See, generally, EVIDENCE.

24. State *v.* Daily, Smith (Ind.) 153.

25. State *v.* Carter, 6 Ind. 37.

26. Carpenter *v.* Warner, 38 Ohio St. 416.

27. See also *supra*, II, C, 4, h; and, generally, DAMAGES.

28. Hayes *v.* People, 3 Ill. App. 57; Dehn *v.* Heckman, 12 Ohio St. 181.

29. Carpenter *v.* Warner, 38 Ohio St. 416.

30. Gaylor *v.* Hunt, 23 Ohio St. 255.

31. Carpenter *v.* Warner, 38 Ohio St. 416.

32. Head *v.* Levy, 52 Nebr. 456, 72 N. W. 583. But *compare* Millard *v.* Jenkins, 9 Wend. (N. Y.) 298.

D. Criminal Responsibility — 1. In General. Justices of the peace are criminally responsible for their acts of official misconduct, when done wilfully or with corrupt motives, or for neglect of duty.[33] But before a justice can be punished for official misconduct, there must be some duty imposed by law; and it must be shown that he has wilfully neglected or failed to discharge such duty.[34]

33. *Alabama.*— Irion *v.* Lewis, 56 Ala. 190 (misconduct on trial of cause); Cleaveland *v.* State, 34 Ala. 254 (receiving illegal fees).

Arkansas.— State *v.* Lewis, 53 Ark. 340, 13 S. W. 925 (refusing appointment to apportion persons liable to work on public roads); State *v.* Smith, 53 Ark. 325, 14 S. W. 95 (failure to file abstract of misdemeanors); Bishop *v.* State, (1890) 14 S. W. 88 (omitting criminal cases from abstract); McClure *v.* State, 37 Ark. 426 (making imperfect abstract of misdemeanors).

Illinois.— Wickersham *v.* People, 2 Ill. 128, taking up estray animals and corruptly causing them to be appraised before himself.

Indiana.— Crawford *v.* State, 155 Ind. 692, 57 N. E. 931, failure to pay over fines after due demand.

Kentucky.— McFall *v.* Com., 2 Metc. 394, improperly solemnizing marriage.

Maryland.— Hiss *v.* State, 24 Md. 556, refusing to deliver up money.

New York.— People *v.* Brooks, 1 Den. 457, 43 Am. Dec. 704 (refusing to take affidavit for discontinuance); People *v.* Coon, 15 Wend. 277 (corruptly discharging offender without sufficient securities); People *v.* Calhoun, 3 Wend. 420 (improperly denying adjournment); People *v.* Bogart, 3 Park. Cr. 143 (wilfully taking bail and discharging prisoner committed by another magistrate, without notice to district attorney).

North Carolina.— State *v.* Sneed, 84 N. C. 816 (holding that the functions of a justice of the peace are ministerial in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for trial, and if, in the exercise of such functions, he acts corruptly, oppressively, or from other bad motive, he is liable to indictment); State *v.* Zachary, 44 N. C. 432 (holding that it is a misdemeanor for a justice to sell or transfer a judgment in his possession *virtute officii*).

Pennsylvania.— Wilson *v.* Com., 10 Serg. & R. 373 (refusal to deliver copy of proceedings to either party); Respublica *v.* Montgomery, 1 Yeates 419 (failure to attempt to suppress riot); Respublica *v.* Burns, 1 Yeates 370 (taking insufficient bail); Lyons *v.* Means, 1 Pa. Super. Ct. 608 [*affirming* 17 Pa. Co. Ct. 382] (construing act May 23, 1893, as to taking illegal fees); Derrick *v.* Litsch, 2 Chest. Co. Rep. 494 (construing act April 2, 1868, as to illegal fees); King's Charge to Grand Jury, 4 Pa. L. J. 29 (neglecting or refusing to attempt to suppress unlawful assemblies); Com. *v.* Hagan, 9 Phila. 574 (taking illegal fees).

South Carolina.— State *v.* Arthur, 1 McMull. 456 (bailing person indicted for murder); State *v.* Porter, 3 Brev. 175, Treadw. 694 (justice answerable for corruption).

Texas.— State *v.* Baldwin, 39 Tex. 155, failure to report number of causes tried and determined, and their disposition.

Virginia.— Com. *v.* Alexander, 4 Hen. & M. 522 (misbehavior in office); Com. *v.* Callaghan, 2 Va. Cas. 460 (corrupt agreement between two justices for exchange of votes); Wallace *v.* Com., 2 Va. Cas. 130 (malicious issuance of warrant without complaint).

United States.— U. S. *v.* Kindred, 5 Fed. 43, 4 Hughes 493 (wilful violation of act of congress); Mattingly *v.* U. S., 16 Fed. Cas. No. 9,295, 1 Hayw. & H. 195 (demanding illegal fees); U. S. *v.* Faw, 25 Fed. Cas. No. 15,078, 1 Cranch C. C. 486 (liability for discharging prisoner charged with felony on bail); U. S. *v.* Smith, 27 Fed. Cas. No. 16,330, 4 Cranch C. C. 727 (taking insufficient bail).

England.— Reg. *v.* Badger, 4 Q. B. 468, Dav. & M. 375, 7 Jur. 216, 12 L. J. M. C. 66, 45 E. C. L. 468; Reg. *v.* Dodson, 9 A. & E. 704, 36 E. C. L. 371; *Ex p.* Fentiman, 2 A. & E. 127, 4 N. & M. 128, 28 E. C. L. 77; Rex *v.* Borron, 3 B. & Ald. 432, 22 Rev. Rep. 447, 5 E. C. L. 252; Rex *v.* Fielding, 2 Burr. 719, 2 Ld. Ken. 386; Rex *v.* Sainsbury, Nolan 8, 4 T. R. 451, 2 Rev. Rep. 433; Rex *v.* Jackson, 1 T. R. 653, 1 Rev. Rep. 343. A magistrate may be proceeded against for failing to prevent a breach of the peace when there was reasonable ground for believing that such a breach would take place. Reg. *v.* Graham, 16 Cox C. C. 420.

Canada.— Rex *v.* Heustis, 2 Nova Scotia 101.

See 31 Cent. Dig. tit. "Justices of the Peace," § 66.

Compare State *v.* Campbell, 2 Tyler (Vt.) 177, holding that an indictment does not lie for maladministration, but the proceeding is by impeachment.

Unless the justice acted without jurisdiction, corruptly, or maliciously, an indictment against him cannot be sustained. State *v.* Ferguson, 67 N. C. 219 (forcible trespass in execution of process); State *v.* Johnson, 1 Brev. (S. C.) 155 (oppression in office). See also *infra*, II, D, 2, note 37.

Justice not liable to indictment for failure to attend sittings of county court.— State *v.* Baldwin, 39 Tex. 75.

34. State *v.* Coon, 14 Minn. 456; State *v.* Porter, 3 Brev. (S. C.) 175; Green *v.* State, 42 Tex. Cr. 549, 61 S. W. 482. A justice is not criminally liable for failing to pay over money, or for withholding information in regard to a judgment recovered before him, until after demand for such money, or request for such information. State *v.* Coon, 14 Minn. 456. Nor is a justice liable crimi-

In England it was held that a magistrate cannot be proceeded against criminally until any action pending against him shall have been discontinued.[35]

2. INDICTMENT OR INFORMATION.[36] The allegations of an indictment or information against a justice of the peace must be such as to allege every fact necessary to show an offense within the contemplation of the law, and the facts must be alleged with sufficient particularity to apprise defendant of the offense with which he is charged and to protect him against further prosecution for the same offense;[37]

nally for failing to proceed against one for carrying a pistol, unless he had information of the offense from the oath of some person or personal knowledge of it. State *v.* Graham, 38 Ark. 519. See also *infra*, note 37.

Acts not within scope of official duty.— A justice of the peace cannot be indicted for corruptly advising the sale of a judgment after he has received payment in satisfaction of it. "It is not his official duty to give any advice on such matters. A party has no right to ask it, nor rely upon it, except as he would ask the advice of a private person." State *v.* Coon, 14 Minn. 456.

35. Rex *v.* Fielding, 2 Burr. 719, 2 Ld. Ken. 386.

36. See, generally, INDICTMENTS AND INFORMATIONS.

Presentment.— In Georgia a justice cannot be arraigned on a presentment for malpractice in office. An indictment is the proper method of charging him with such offense. Hawkins *v.* State, 54 Ga. 653.

37. *Arkansas.*— State *v.* Lewis, 53 Ark. 340, 13 S. W. 925 (indictment for failure to apportion hands to a road district); State *v.* Graham, 38 Ark. 519 (holding that an indictment against a justice for failing to proceed against one for carrying a pistol must allege that he had information of the offense from the oath of some person, or that he had personal knowledge of it).

California.— People *v.* Ward, 85 Cal. 585, 24 Pac. 785.

Florida.— Snowden *v.* State, 17 Fla. 386.

Georgia.— Hawkins *v.* State, 54 Ga. 653.

Illinois.— Jones *v.* People, 3 Ill. 477.

Indiana.— State *v.* Ross, 4 Ind. 541 (rendering unlawful judgment); State *v.* Odell, 8 Blackf. 396 (oppression in convicting, fining, and collecting fine); State *v.* Boyles, 7 Blackf. 90 (failure to pay over moneys received).

Minnesota.— State *v.* Coon, 14 Minn. 456.

Missouri.— State *v.* Gardner, 2 Mo. 23; State *v.* Latshaw, 63 Mo. App. 496, indictment under a statute for failure to report to the clerk of the county court the amount of a fine imposed by him, and the name of the constable charged with its collection.

New York.— People *v.* Coon, 15 Wend. 277, corruptly discharging an offender without requiring sufficient securities for his reappearance.

North Carolina.— State *v.* Leigh, 20 N. C. 126, holding that an indictment against a justice for failure to issue his warrant for the arrest of a felon must charge either that the felony was committed in his presence, or that an affidavit was made of its commission, and also that the felon was in the justice's county when the refusal to issue the warrant took place.

Pennsylvania.— An indictment against a justice of the peace for refusing a copy of his proceedings, as required by statute, should allege a tender of his fee for the service. Wilson *v.* Com., 10 Serg. & R. 373; Com. *v.* Beerbrower, 3 Pa. L. J. Rep. 404.

Tennessee.— State *v.* Jones, 10 Humphr. 41, holding that an indictment of a justice under a statute for failure to deliver over to his successor the books and papers of his office, which shows that a period of time elapsed between the expiration of his term and the qualification of his successor, must negative the idea that defendant delivered the books and papers in the interval to the nearest justice, as he would have been authorized to do in such case under the statute; and also that such indictment must allege that the books and papers were demanded of defendant by the successor.

Texas.— Addison *v.* State, 41 Tex. 462, holding that an indictment against a justice of the peace for failing to report under oath the amount of money collected by him other than taxes, under the act of April, 1873, which failed to charge that he was authorized to collect money, other than taxes, for the use of the county, and that such money had come into his hands, was bad.

Virginia.— Jacobs *v.* Com., 2 Leigh 709; Newell *v.* Com., 2 Wash. 88, holding that an information against a justice of the peace for bribery in the election of a clerk must show that an election was held and that a vote was given therein.

See 31 Cent. Dig. tit. "Justices of the Peace," § 67.

Indictment must be full and specific.— People *v.* Coon, 15 Wend. (N. Y.) 277.

Charging corruption and scienter.— The act imputed as misbehavior should be distinctly and substantially charged to have been done corruptly, and the indictment should also charge a scienter. Jacobs *v.* Com., 2 Leigh (Va.) 709. An indictment against a justice of the peace for a wilful misdemeanor in office should show such facts as would amount to such misdemeanor independent of the word "wilful"; and, to make this out, the indictment should charge the act to have been done knowingly and corruptly. State *v.* Gardner, 2 Mo. 23. See also State *v.* Leigh, 20 N. C. 127. Thus an indictment for refusing to issue subpœnas should charge that defendant "wilfully and corruptly refused to issue the subpœnas." Jones *v.* People, 3 Ill. 477. And an indictment charging

and the charge must not violate the rule against duplicity.[38] Ordinarily it is sufficient if an indictment or information follows the language of the statute on which it is based in charging the offense;[39] but defendant's official character must be distinctly alleged, and it must also be alleged that the misconduct complained of was committed in the administration of his official duties.[40] Matters of defense need not be negatived.[41]

3. Evidence — a. Admissibility. Any evidence relevant to the issue, including the justice's docket and official papers,[42] is admissible upon the prosecution of a justice of the peace for official misconduct.[43] Defendant may be required to produce his docket and such official papers as may be relevant.[44]

b. Sufficiency. Proof of an illegal act committed with evil intent is generally necessary to sustain a charge of official misconduct.[45]

a justice with corruptly rendering an unlawful judgment is bad, unless it alleged that he knew his decision to be contrary to law. State *v.* Ross, 4 Ind. 541. See also People *v.* Ward, 85 Cal. 585, 24 Pac. 785 (holding that an indictment which averred that a justice of the peace took jurisdiction of a prosecution for the sole purpose of making the acquittal of the accused a bar to another proceeding for the same offense, but did not allege that he intended to acquit the accused or that he acted from corrupt or partial motives, was not sufficient under Pen. Code, § 758, punishing for wilful or corrupt misconduct in office); State *v.* Coon, 14 Minn. 456 (holding that an indictment for corrupt failure to pay over money received in satisfaction of a judgment and for corruptly withholding knowledge that it had been paid was bad because, among other reasons, it failed to allege demand for payment or inquiry for such information).

A presentment for assuming to be a justice when not legally qualified must show wherein the want of qualification consists. Daniel *v.* State, 3 Heisk. (Tenn.) 257.

Indictments held sufficient see the following cases:

Georgia.— Russell *v.* State, 57 Ga. 420, malpractice in office.

Illinois.— Wickersham *v.* People, 2 Ill. 128, taking up estrays and corruptly causing them to be appraised before himself.

Indiana.— Alexander *v.* State, 9 Ind. 337 (indictment for failure to pay over moneys received on account of fines need not state from whom the moneys were received); State *v.* McCormack, 2 Ind. 305 (indictment for failure to make out and file a list of fines assessed need not name the persons against whom the fines were assessed); State *v.* Noel, 5 Blackf. 548 (holding that an indictment for failure to pay over money received for a fine within the time prescribed by statute sufficiently showed the time when the money was received).

North Carolina.— State *v.* Foy, 98 N. C. 744, 3 S. E. 524, indictment for failure to furnish list of criminal prosecutions and names of persons tried need not state the names of such persons.

United States.— U. S. *v.* Clark, 25 Fed. Cas. No. 14,803, 4 Cranch C. C. 506, indictment for taking insufficient bail.

See 31 Cent. Dig. tit. "Justices of the Peace," § 67.

38. Thus where an indictment against a justice for wilfully neglecting to perform his duty, and for misbehavior in office, charged "that the defendant, having in his possession, as justice, money paid in satisfaction of a judgment recovered before him, corruptly, etc., withheld the same when the judgment creditor made inquiry about the same, and withheld knowledge that it had been paid, and neglected to pay over the money, and willfully and corruptly advised a sale of the judgment, and that afterwards he paid a portion of the money to other persons," that the indictment was bad, among other reasons, as attempting to show two or more distinct offenses. State *v.* Coon, 14 Minn. 456.

39. State *v.* Lewis, (Ark.) 2 S. W. 183 (indictment for failure to file an abstract of criminal proceedings); State *v.* Noel, 5 Blackf. (Ind.) 548 (indictment for failure to pay over fine received).

40. Snowden *v.* State, 17 Fla. 386 (holding that an indictment charging a justice with malpractice in office, which did not allege that the malpractice was committed by defendant in the administration and under the color of his office, was fatally defective on motion in arrest of judgment); Hawkins *v.* State, 54 Ga. 653 (holding bad an indictment which charges a justice with "malpractice," without the addition of the words "in office," or which simply charges him with being drunk while presiding in his court, without setting forth wrong done by some official act or omission to act, resulting from such drunkenness). An indictment of a justice of the peace for failure to apportion hands to a road district, which alleges his appointment as apportioning justice, but fails to allege his acceptance of such appointment, is defective. State *v.* Lewis, 53 Ark. 340, 13 S. W. 925.

41. Crawford *v.* State, 155 Ind. 692, 57 N. E. 931. But *compare* State *v.* Jones, 10 Humphr. (Tenn.) 41, referred to *supra*, this section, note 37.

42. Russell *v.* State, 57 Ga. 420.

43. See People *v.* Bogart, 3 Park. Cr. (N. Y.) 143.

44. Russell *v.* State, 57 Ga. 420.

45. State *v.* Tarrant, 24 S. C. 593.

4. Instructions. On the prosecution of a justice of the peace the instructions are governed by general rules, and they must of course correctly state the law and conform to the evidence.[46] In a prosecution for wilful and malicious oppression, partiality, misconduct, and abuse of authority, it is error to instruct the jury that in such a case gross ignorance of the law amounts to criminal intent.[47]

5. Punishment. A fine of one thousand dollars has been held not to be an excessive punishment for assuming the powers of a justice of the peace, without having even color of title to the office.[48]

E. Statutes Imposing Penalties — 1. In General. In some jurisdictions statutes have imposed, or still impose, specific penalties upon justices of the peace for certain acts or omissions in the discharge of their official duties, to be recovered by action.[49] Thus penalties are or have been imposed for failure to make return of convictions and fines, as required by law,[50] neglecting to post up a fee bill

Corrupt motive need not be proved on the trial of a justice for wilfully discharging on bail a person committed for larceny by another magistrate without notifying the district attorney. People *v.* Bogart, 3 Park. Cr. (N. Y.) 143.

Evidence insufficient to convict of practising as attorney see State *v.* Bryan, 98 N. C. 644, 4 S. E. 522.

46. See, generally, Criminal Law.

Taking jurisdiction of criminal proceeding after dismissal.— On an indictment of a justice of the peace for taking jurisdiction of a criminal proceeding after it had been dismissed before another justice of the same township by order of the prosecuting attorney, and brought before a justice of another township, it was held error to instruct the jury that the district attorney had authority to dismiss a criminal prosecution before a justice of the peace, since Cal. Pen. Code, § 1385, provides that "the court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed," and section 1386 provides that "neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section." People *v.* Ward, 85 Cal. 585, 24 Pac. 785.

Unlawfully and maliciously issuing warrant of arrest.— On a prosecution against a justice of the peace for unlawfully and maliciously issuing a warrant for the arrest of four persons, where it was shown that after they had been tried before two justices under a warrant issued by defendant on a certain affidavit, and two bills of indictment had been found by the grand jury, defendant, upon the same affidavit, issued another warrant against the same parties for the same offense, it was held proper to refuse an instruction that as the affiant in such affidavit swore to four distinct offenses, and the indictment covered only two of them, defendant's act in issuing the second warrant was lawful. State *v.* Sneed, 84 N. C. 816.

47. State *v.* Reeves, 15 Kan. 396.

48. Becker *v.* People, 156 Ill. 301, 40 N. E. 944.

49. See the statutes in the various jurisdictions, and the cases cited in the notes following.

50. Corsant *v.* Taylor, 10 Can. L. J. N. S. 320; Clemens *v.* Bemer, 7 Can. L. J. N. S. 126; Hunt *v.* Shaver, 22 Ont. App. 202; Longeway *v.* Avison, 8 Ont. 357; Atwood *v.* Rosser, 30 U. C. C. P. 628 (immediate return to the clerk of the peace, required by Ont. Rev. St. c. 76, § 1); Darragh *v.* Paterson, 25 U. C. C. P. 529; Corsant *v.* Taylor, 23 U. C. C. P. 607; Brash *v.* Taggart, 16 U. C. C. P. 415; Bagley *v.* Curtis, 15 U. C. C. P. 366; McLennan *v.* McIntyre, 12 U. C. C. P. 546 (holding that the transmission of the conviction itself is not sufficient without a return thereof by the convicting justice); McLellan *v.* Brown, 12 U. C. C. P. 542; Murphy *v.* Harvey, 9 U. C. C. P. 528; Donogh *v.* Longworth, 8 U. C. C. P. 437; Drake *v.* Preston, 34 U. C. Q. B. 257; Ollard *v.* Owens, 29 U. C. Q. B. 515; Keenahan *v.* Egleson, 22 U. C. Q. B. 626 (holding that the law as to the return of convictions was unchanged since the statute of 4 & 5 Vict. c. 12, and a conviction made by an alderman in a city was therefore still required to be returned to the next ensuing general quarter sessions of the peace for the county, and not to the recorder's court for the city); Kelly *v.* Cowan, 18 U. C. Q. B. 104; Ball *v.* Fraser, 18 U. C. Q. B. 100; O'Reilly *v.* Allan, 11 U. C. Q. B. 411; Metcalf *v.* Reeve, 9 U. C. Q. B. 263.

Sufficiency of return.— Where defendant, a justice of the peace, committed and fined plaintiff for carrying away some cord-wood, but after the giving of notice of appeal the prosecutor, finding that the conviction was improper, went to defendant, who drew out for him a notice of discontinuance, which was served on the person acting as attorney for plaintiff before the meeting of the next court of quarter session, and defendant sent a general return to that court, including this and another conviction, but ran his pen through the entry of this conviction, leaving the writing, however, quite legible, and wrote at the end of it, "The case withdrawn by the plaintiff," it was held that there was a sufficient return within the statute of 4 & 5 Vict. c. 12. Ball *v.* Fraser, 18 U. C. Q. B. 100.

in their office,[51] charging excessive or illegal fees,[52] or marrying a minor child

An order for the payment of money made by a justice of the peace under the Master and Servant Act is not a conviction which it is necessary to return to the quarter sessions. Ranney *v.* Jones, 21 U. C. Q. B. 370.

A police magistrate acting *ex officio* as justice of the peace is not subject to the provisions of Ont. Rev. St. c. 76, § 1, and need not make a return as therein required to the clerk of the peace, but section 6 of chapter 77 exempts him from this duty, whether he is acting as police magistrate or *ex officio* as justice of the peace. Hunt *v.* Shaver, 22 Ont. App. 202.

Separate penalty.— It is held that the neglect of a justice of the peace to return convictions made by him, as prescribed by the statute, renders him liable to a separate penalty for each conviction not returned, and not merely to one penalty for not making a general return of such convictions. Darragh *v.* Paterson, 25 U. C. C. P. 529; Donogh *v.* Longworth, 8 U. C. C. P. 437.

The fact that no record was made of a conviction and fine does not prevent an action for the penalty for failure of the justice to return the same on other proof thereof. Donogh *v.* Longworth, 8 U. C. C. P. 437.

Effect of appeal.— The fact that a conviction and fine by a justice of the peace has been appealed from does not relieve him from the penalty for failure to make an immediate return thereof as required by the statute. Murphy *v.* Harvey, 9 U. C. C. P. 528. See also Kelly *v.* Cowan, 18 U. C. Q. B. 104.

Illegality of a conviction is no defense in an action against the justice for the penalty for failure to return the same, but, if on that account the fine has not been levied, a return should be made explaining the circumstances. O'Reilly *v.* Allan, 11 U. C. Q. B. 411.

51. Kennedy *v.* Raught, 6 Minn. 235. Where a statute requiring justices of the peace to set up in their office a bill of fees, which they were entitled to charge "within six months after the passage" of the act, it was held that it applied only to those justices who were in office at the time of its passage, or came into office within six months after its passage. Kennedy *v.* Raught, *supra*.

52. *Kentucky.*— Bristow *v.* Sullivan, 6 B. Mon. 143, holding that a justice of the peace was liable only for a single penalty for one fee bill in which there were several items of illegal charge.

Massachusetts.— Lincoln *v.* Shaw, 17 Mass. 410.

Nebraska.— Courier Printing, etc., Co. *v.* Leese, 65 Nebr. 581, 91 N. W. 357 (construing the statutes with respect to what were illegal fees rendering a justice liable, and also holding that the penalty provided by the statute follows, not only the taking of greater fees than those specified for services rendered, but also the taking of fees for services other than those specified in Comp. St. c. 28, § 11); Phoenix Ins. Co. *v.* Bohman, 28 Nebr. 251, 44 N. W. 111 (holding that, in an action to recover the penalty from a justice of the peace for taking illegal fees for making out and certifying to certain transcripts of judgments, where the testimony showed that eight of the transcripts were demanded at one time and were received together and paid for in one sum, although separately itemized in the bill, an instruction which in effect directed the jury to find that there were eight separate causes of action was properly refused).

New Hampshire.— Fowler *v.* Tuttle, 24 N. H. 9.

Pennsylvania.— See *infra*, this note.

Canada.— Parsons *v.* Crabbe, 31 U. C. C. P. 151, where a magistrate acting under 32 and 33 Vict. c. 20, § 37, convicted four persons for creating a disturbance thereunder and imposed upon each a fine of five dollars, but, instead of severing the costs which he had charged, imposed the full amount thereof against each defendant and received it from each, and it was held that under the circumstances of the case the charge must be deemed to have been wilfully made, so as to render him liable to the penalty imposed in such cases by Ont. Rev. St. c. 77, § 4.

See 31 Cent. Dig. tit. "Justices of the Peace," § 47. And see *supra*, II, B, 2.

Act of attorney as act of magistrate.— The reception of illegal fees for the copies of a case by the attorney who made them at the request of the magistrate, subsequently assented to by the magistrate, and recognized by him as being done by his authority, will be regarded as the act of the magistrate, and will subject him to the penalty in the same manner as if the fees had been received by him in person. Fowler *v.* Tuttle, 24 N. H. 9.

Mistake.— It seems that a justice of the peace may set up the fact that he acted under mistake or misapprehension as a defense in an action for a penalty for receiving illegal fees. Fowler *v.* Tuttle, 24 N. H. 9. But *compare* Coates *v.* Wallace, 17 Serg. & R. (Pa.) 75 (referred to *infra*, this note); Parsons *v.* Crabbe, 31 U. C. C. P. 151 (referred to *supra*, this note).

In Pennsylvania, prior to the act of May 23, 1893 (Pamphl. Laws 117) justices of the peace were subjected under the act of March 28, 1814, and the act of Feb. 3, 1865 (Pamphl. Laws 92) to a penalty for charging illegal or excessive fees to be recovered by action. See Bartolett *v.* Achey, 38 Pa. St. 273 (holding that the penalty for taking illegal fees was incurred by every charging and taking that occurred); Simmons *v.* Kelley, 33 Pa. St. 190 (holding that where a magistrate charged more fees than was allowed by the fee bill, he was liable for the penalty); Evans *v.* Harney, 17 Pa. St. 460; McConahy *v.* Courtney, 7 Watts 491; Curry *v.* Carrol, 5 Watts 477 (holding that in an action against a justice for taking illegal fees, an overcharge for one item of

without the parent's consent.[53] These statutes are penal laws, although the penalty is recoverable in a civil action.[54]

2. Actions For Penalties. The proper form of action at common law to recover from a justice of the peace a statutory penalty for misconduct or neglect in the execution of his office is debt.[55] Sometimes the form of action is prescribed by the statute.[56] The jurisdiction of such actions is governed by the statutes in the particular jurisdiction.[57] A claim for two or more penalties for taking illegal fees may be included in the same notice and action.[58] Whether a prior action for the same cause operates as a bar depends on the circumstances.[59] In some jurisdictions before an action can be brought against a justice of the peace to recover the penalty for anything done by him in the execution of his office, notice of the action must be given to or demand made upon him, so as to afford an opportunity to make amends.[60] Such actions are governed, except in so far as different rules are prescribed by statute, by substantially the same rules as other actions

service could not be compensated by omission to charge as much as he was entitled to charge for another item); Jackson *v.* Purdue, 3 Penr. & W. 519 (holding that a justice who charged an illegal fee, which was indorsed on the execution and collected by the constable, was liable for the penalty prescribed by the statute, although the money was not actually paid over to him); Coates *v.* Wallace, 17 Serg. & R. 75 (holding that a justice incurred the penalty of the act of March 28, 1814, for taking illegal fees, although he did so by mistake); Wallace *v.* Coates, 1 Ashm. 110 (holding that a justice could not escape the statutory penalty for taxing more than legal fees by showing that they were taxed on a compromise, since an agreement to pay costs could only mean legal costs, and if the justice demanded and received on such a compromise more fees than were allowed by law he was as responsible as if they were collected adversely); Clark *v.* Alderman, 3 Pa. L. J. Rep. 114; Watrous *v.* Davis, 26 Pittsb. Leg. J. N. S. 161 (holding that taxation of legal fees by a justice in an action over which he had no jurisdiction was not an over charge of fees, within the act of March 28, 1814, imposing a penalty for over charge of fees). The above act of March 28, 1814, providing penalties against justices of the peace for charging illegal fees was repealed by the act of May 22, 1893, regulating the fees of justices. The latter act provides no penalty, and the only remedy for taking illegal fees is by an action to recover back the same or by an indictment to punish the justice therefor. See Irons *v.* Allan, 169 Pa. St. 633, 32 Atl. 655; Watrous *v.* Davis, 26 Pittsb. Leg. J. N. S. 161; Lyons *v.* Means, 1 Pa. Super. Ct. 608 [*modifying* 17 Pa. Co. Ct. 382].

53. Robinson *v.* English, 34 Pa. St. 324; Grimes *v.* Percival, 9 Pa. St. 135. A father who turns his daughter out of his house upon the world to shift for herself thereby relinquishes his paternal rights in relation to her person, absolves her from filial allegiance, and deprives himself of a right of action against a justice of the peace under the statute for marrying her without his consent. Stansbury *v.* Bertron, 7 Watts & S. (Pa.) 362. And so it is in any other case in which a father has relinquished his parental control over his minor child. Robinson *v.* English, 34 Pa. St. 324. But it is no defense to such an action that the father, by reason of moral degradation, was unfit to take care of his minor child. Robinson *v.* English, 34 Pa. St. 324.

54. Kennedy *v.* Raught, 6 Minn. 235.

55. Lincoln *v.* Shaw, 17 Mass. 410; Fowler *v.* Tuttle, 24 N. H. 9; Robinson *v.* English, 34 Pa. St. 324; Grimes *v.* Percival, 9 Pa. St. 135. See, generally, Penalties.

56. Bristow *v.* Sullivan, 6 B. Mon. (Ky.) 143 (by motion); Bagley *v.* Curtis, 15 U. C. C. P. 366 (by action of debt or information). See, generally, Penalties.

57. See, generally, Penalties.

A justice of the peace has jurisdiction of an action against another justice to recover the penalty for demanding and receiving illegal fees. Bartolett *v.* Achey, 38 Pa. St. 273; McConahy *v.* Courtney, 7 Watts (Pa.) 491. See also *infra*, III, B, 5.

In Canada it was held that a penal action against a justice of the peace for not returning a conviction is founded on tort, and that for that reason it could not be brought in a division court. Corsant *v.* Taylor, 10 Can. L. J. N. S. 320. In Brash *v.* Taggart, 16 U. C. C. P. 415, it was held that a county court had jurisdiction of such an action where the penalty claimed did not exceed eighty dollars.

58. Bartolett *v.* Achey, 38 Pa. St. 273.

59. See, generally, Judgments. Where to a *qui tam* action for not returning a conviction, defendant pleaded another action for the same cause, it was held sufficient to prevent that suit from being a bar to show that it was not brought to recover the penalty, but to prevent defendant from being obliged to pay it to others, and that it was not essential to show collusion between the defendant and the plaintiff in such an action. Kelly *v.* Cowan, 18 U. C. Q. B. 194.

60. See *supra*, II, C, 4, d.

In Pennsylvania this was required. It was held that a notice to a justice of the peace that he might tender amends before suit brought must specify the nature and cir-

for penalty and actions generally with respect to parties,[61] pleading,[62] vari-

cumstances of the injury to be redressed, and if it undertook to set out the title of the statute which had been violated, although unnecessarily, a variance was fatal. Stansbury *v.* Bertron, 7 Watts & S. 362. It was necessary that the notice of an action for a penalty for taking illegal fees should contain a sufficient reference to the case in which the illegal fees were taken and show the cause of action. Bechtel *v.* Hause, 1 Chest. Co. Rep. 239. . Where a notice to a justice of the peace to make amends for taking illegal fees gave the location of the office of plaintiff's attorney, but failed to state the attorney's abode, it was held insufficient. Watrous *v.* Davis, 26 Pittsb. Leg. J. N. S. 161. And it was held that a notice of action against a justice, although delivered to him by the plaintiff in person, and although plaintiff was known to him, was not sufficient unless signed by plaintiff. Grimes *v.* Percival, 9 Pa. St. 135. A notice is sufficient if it is sufficiently explicit to identify the injury complained of and sought to be redressed. Bartolett *v.* Achey, 38 Pa. St. 273. The notice need not possess the technical formality of a declaration, provided it is explicit enough to indicate the injury complained of and sought to be redressed. Robinson *v.* English, 34 Pa. St. 324. The notice required to be given prior to an action for the penalty for marrying a minor, without the consent of parent or guardian, need not state that there was no publication of banns, as the statute merely requires that such notice shall clearly and explicitly set forth the cause of action against the justice. Miller *v.* Smith, 12 Serg. & R. 145. The indorsement on the notice of the name and residence of the plaintiff's attorney is equivalent to an assertion that he is plaintiff's agent and authorized to receive amends. Bartolett *v.* Achey, 38 Pa. St. 273.

In Canada, while the statute requires notice of action before suit against a justice of the peace for damages by reason of anything done by him in the execution of his office (see *supra*, II, C, 4, d), it is held that the statute does not require such notice in an action for a penalty for acting as justice of the peace without qualification, etc. (Crabbe *v.* Longworth, 4 U. C. C. P. 283), or in an action against a justice of the peace to recover the penalty for not returning a conviction (Grant *v.* McFadden, 11 U. C. C. P. 122).

61. See, generally, PARTIES; PENALTIES.

Parties injured by taking of illegal fees.— Where an employer voluntarily paid to an alderman illegal fees charged by him in a criminal proceeding against persons who were in his employ, and who committed the act in obedience to his instructions, it was held that he was the party injured, and entitled to recover the penalty for taking such fees, as the presumption was, in the absence of rebutting testimony, that he paid the fees out of his own money. Evans *v.* Harney, 17 Pa. St. 460.

Partners.— An action for the recovery of a penalty for taking unlawful fees cannot be maintained in the names of two persons suing as copartners. Fowler *v.* Tuttle, 24 N. H. 9.

Qui tam actions.— Under some statutes the action may be *qui tam* by any person who chooses to sue. See Bagley *v.* Curtis, 15 U. C. C. P. 366; and other Canadian cases cited *supra*, II, E, 1. And see, generally, PENALTIES. In an action against a justice of the peace in Canada for a penalty for not returning a conviction to the quarter sessions, it was held no objection to the declaration that plaintiff sued for the receiver-general, and not for the queen, inasmuch as suing for a penalty for the receiver-general, for the public uses of the province was in fact suing for the queen, and further, because a statute authorized a party to sue *qui tam* for the receiver-general. Bagley *v.* Curtis, 15 U. C. C. P. 366. It was also held in Canada that plaintiff might sue for himself only, and need not sue *qui tam*. Drake *v.* Preston, 34 U. C. Q. B. 257.

Action against one of several justices.— In Drake *v.* Preston, 34 U. C. Q. B. 257, it was held that an action to recover the penalty for failure to return a conviction would lie against each one of several magistrates, since, although the action was in form debt, it was in fact *ex delicto*.

Joint liability.— Indeed, it has been held that the justices of the peace before whom a conviction is made are not jointly liable for not returning the same, since the statute makes it the several duty of each of the justices joining in the conviction to report it to the sessions, and they cannot commit a joint offense and be subject to one penalty, because neither has transmitted it. Metcalf *v.* Reeve, 9 U. C. Q. B. 263. See also McLennan *v.* McIntyre, 12 U. C. C. P. 546.

62. See, generally, PENALTIES; PLEADING.

Showing as to notice of action.— In Pennsylvania, in a suit against a justice of the peace to recover the penalty for taking illegal fees, where the previous notice to defendant of the action required by law stated the penalty to have been incurred under "the 26th section of the act of 1814, which said section is re-enacted by the act of 1821," but the declaration was upon the act of 1814, it was held that there was a fatal variance. Apple *v.* Rambo, 13 Pa. St. 9.

Declaration for taking illegal fees.— In an action against a justice of the peace for the penalty of Mass. St. (1795) c. 41, for receiving greater fees for copies than were allowed, it was held necessary that the declaration should allege that the money was received from him on whom the extortion was practised, and that evidence that it was paid by another person for him from whom it was alleged to have been received, if it was paid without his request or knowledge, did not support the declaration. Lincoln *v.* Shaw, 17 Mass. 410.

Aider by verdict.— If a declaration, although not strictly formal, sets forth a sub-

ance,[63] evidence,[64] instructions and province of the court and jury,[65] and nonsuit.[66] Since a statute imposing a penalty upon a justice of the peace for neglect of official duty is a penal law, notwithstanding the fact that the penalty is recoverable in a civil action by any informer in his own name, it has been held that no appeal can be taken from a judgment of acquittal in such an action.[67]

F. Attachment For Contempt. It seems that the superior court has the power in a proper case to attach a justice of the peace for contempt if he has been guilty of any flagrant official misconduct affecting private rights,[68] or other

stantial cause of action, and the defect is one that was amendable in the court below, it is cured by verdict. Robinson *v.* English, 34 Pa. St. 324. See, generally, PLEADING.

Limitations.— It seems that where the particular statute giving the penalty limits the time within which the action for its recovery shall be commenced, although it is usual to aver that the offense by which it was incurred was committed within such time, yet the averment is not material, and its omission will not vitiate the declaration; and where the limitation is contained in some statute other than that giving the penalty, such allegation is unnecessary, as it is a matter of defense properly coming from defendant. Fowler *v.* Tuttle, 24 N. H. 9.

Sufficiency of declaration for failure to return conviction.— Spillane *v.* Wilton, 4 U. C. C. P. 236; Drake *v.* Preston, 34 U. C. Q. B. 257; Keenahan *v.* Egleson, 22 U. C. Q. B. 626; O'Reilly *v.* Allen, 11 U. C. Q. B. 411. A declaration charging that the return was not made to the ensuing quarter sessions of the peace was held bad, as the statute required a return to the next ensuing general quarter sessions. Metcalf *v.* Reeve, 9 U. C. Q. B. 263. It has also been held that defendant, having actually convicted and imposed a fine, could not except to the declaration on the ground that it did not show that he had jurisdiction to convict, it not being necessary, in averring a conviction, to show that the complainant prayed the justice to proceed summarily. Bagley *v.* Curtis, 15 U. C. C. P. 366.

Plea or answer.— The effect of Ont. Rev. St. c. 76, § 1, was to require justices of the peace, where more than one took part in a conviction, to make an immediate return thereof to the clerk of the peace; and therefore where, to a declaration alleging a conviction by defendants, two justices of the peace, and their failure to make an immediate return thereof as required, defendants pleaded that before action they duly made the return of the said convictions required by law to be made by them, it was held that the plea was bad, as the return therein set up was not a compliance with the statute. Atwood *v.* Rosser, 30 U. C. C. P. 628.

63. See, generally, PENALTIES; PLEADING.

Taking illegal fees.— Where it was alleged that the defendant magistrate was entitled to receive the sum of $1.58 for the copies of the case, and for the certificate ten cents, and it appeared in evidence that he was entitled to receive $2.02½, it was held that the variance was immaterial, it being averred and proved that he demanded and received a greater sum than he was by law entitled to receive, and the penalty not being graduated by the amount of the excess taken. Fowler *v.* Tuttle, 24 N. H. 9.

64. See, generally, EVIDENCE; PENALTIES.

Burden of showing mistake.— Where, in an action against a magistrate for taking illegal fees, the defendant may have acted under some mistake or misapprehension, the burden of proof is on him to show it. Fowler *v.* Tuttle, 24 N. H. 9. *Compare supra*, II, E, 1, note 52.

As to notice of action.— In an action by a father against a justice of the peace for marrying his minor daughter without his consent, where a witness testifies that he heard plaintiff read a notice of action against defendant in the latter's presence, but cannot say when it was or that a paper offered in evidence was the notice read, the proof of notice within the required period fails. Minor *v.* Neal, 1 Pa. St. 403.

65. See, generally, PENALTIES; TRIAL.

Failure to make return of conviction.— In an action against justices of the peace to recover a penalty for not making an immediate return of a conviction as required by Ont. Rev. St. c. 76, it was held a question for the jury whether, under the circumstances of any particular case, the return made was immediate, and that in a *qui tam* action the jury's finding for defendant should not be disturbed. Longeway *v.* Avison, 8 Ont. 357. See also McLellan *v.* Brown, 12 U. C. C. P. 542, where it was also held that it was proper for the court to instruct the jury that the word "immediate" should be construed to mean within a reasonable time.

66. The plaintiff may be nonsuited in a *qui tam* action to recover a penalty for failure to return a conviction. Ranney *v.* Jones, 21 U. C. Q. B. 370. See, generally, DISMISSAL AND NONSUIT; PENALTIES.

67. Kennedy *v.* Raught, 6 Minn. 235, action for penalty for neglect to post up fee bill. See, generally, PENALTIES.

68. See King *v.* Reading, 5 Harr. (Del.) 399, where the court expressed such an opinion in a case where it was charged in an affidavit that a justice had refused a party an appeal in a case in which he was entitled to it, and had refused to give him a transcript of his record, although it had been duly applied for, and the fee therefor tendered; but where it was held that, as the justice denied the alleged facts on oath, the court would dismiss the attachment and remit the party to his action at law or indictment.

misconduct or neglect in the execution of his office, as in the case of failure to return recognizances, etc.[69]

III. Civil Jurisdiction and Authority.

A. In General — 1. Nature and Scope of Jurisdiction.[70] The civil jurisdiction of justices of the peace is of purely statutory origin, and the statutes conferring jurisdiction will not be aided or extended by inference or implication beyond their express terms.[71] Courts of justices of the peace being courts of inferior and

69. See *Ex p.* Neal, 14 Mass. 205, where the court ordered that a justice of the peace pay a fine for neglecting to return a recognizance taken by him until the second day of the term at which it was returnable.

70. **Authority to punish for contempt** see Contempt, 9 Cyc. 29.

Bastardy proceedings see Bastards, 5 Cyc. 651, text and note 53.

71. *Alabama.*— Horton *v.* Elliott, 90 Ala. 480, 8 So. 103; Ellis *v.* White, 25 Ala. 540; Jeffries *v.* Harbin, 20 Ala. 387.

Arkansas.— St. Francis County *v.* Roleson, 66 Ark. 139, 49 S. W. 351; Blass *v.* Brown, 66 Ark. 79, 48 S. W. 908; Donnagan *v.* Shaffer, 48 Ark. 476, 3 S. W. 522; Whitesides *v.* Kershaw, 44 Ark. 377; Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285; Levy *v.* Shurman, 6 Ark. 182, 42 Am. Dec. 690; Reeves *v.* Clarke, 5 Ark. 27.

California.— Jolley *v.* Foltz, 34 Cal. 321; Van Etten *v.* Jilson, 6 Cal. 19.

Colorado.— Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741; Otero County Com'rs *v.* Hoffmire, 9 Colo. App. 526, 49 Pac. 375.

Dakota.— Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

Georgia.— Williams *v.* Sulter, 76 Ga. 355.

Illinois.— Dowling *v.* Stewart, 4 Ill. 193; Evans *v.* Pierce, 3 Ill. 468. See also De Wolf *v.* Chicago, 26 Ill. 443.

Indiana.— Richards *v.* Reed, 39 Ind. 330; Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Hawkins *v.* State, 24 Ind. 288; Ohio, etc., R. Co. *v.* Hanna, 16 Ind. 391; Willey *v.* Strickland, 8 Ind. 453; Matlock *v.* Strange, 8 Ind. 57; Gregg *v.* Wooden, 7 Ind. 499; Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207.

Kansas.— Sims *v.* Kennedy, 67 Kan. 383, 73 Pac. 51; Lyons *v.* Insley, 32 Kan. 174, 4 Pac. 150.

Kentucky.— See Winston *v.* Gwathmey, 8 B. Mon. 19.

Maine.— Martin *v.* Fales, 18 Me. 23, 36 Am. Dec. 693.

Maryland.— Weikel *v.* Cate, 58 Md. 105.

Massachusetts.— Bridge *v.* Ford, 4 Mass. 641. See also Com. *v.* Foster, 1 Mass. 488; Com. *v.* Leach, 1 Mass. 59, in which the Sts. 1 & 34 Edw. III are, so far as applicable, adopted as the common law of Massachusetts.

Michigan.— King *v.* Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518.

Mississippi.— Matthews *v.* Cotten, 83 Miss. 472, 35 So. 937.

Missouri.— Harris *v.* Hunt, 97 Mo. 571, 11 S. W. 236; Williams *v.* Bower, 26 Mo. 601; Brownfield *v.* Thompson, 96 Mo. App. 340, 70 S. W. 378; Rocheport Bank *v.* Doak, 75 Mo. App. 332.

New Jersey.— Hopper *v.* Chamberlain, 34 N. J. L. 220; Pickle *v.* Covenhaven, 4 N. J. L. 368; Bispham *v.* Inskeep, 1 N. J. L. 268. See also Smith *v.* Abbott, 17 N. J. L. 358.

New York.— Abrams *v.* Fine, 28 Misc. 533, 59 N. Y. Suppl. 550; Miner *v.* Burling, 32 Barb. 540; Worden *v.* Brown, 14 How. Pr. 327.

North Carolina.— Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

North Dakota.— Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734.

Ohio.— Bowers *v.* Pomeroy, 21 Ohio St. 184; McKibben *v.* Lester, 9 Ohio St. 627; McCleary *v.* McLain, 2 Ohio St. 368.

Oklahoma.— Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356.

Pennsylvania.— Ketchledge *v.* Wyoming County, 24 Pa. Co. Ct. 7; Turner *v.* Central R. Co., 10 Kulp 420; Murry *v.* Besore, 16 Lanc. L. Rev. 374. And see Moore *v.* Bundy, 22 Pa. Co. Ct. 583.

South Carolina.— State *v.* Cureton, Cheves 235.

South Dakota.— Pyle *v.* Hand County, 1 S. D. 385, 47 N. W. 401.

Tennessee.— Vanbibber *v.* Vanbibber, 10 Humphr. 53; Collins *v.* Oliver, 4 Humphr. 439; Gibbs *v.* Bourland, 6 Yerg. 481; Walker *v.* Wynne, 3 Yerg. 62.

Texas.— Cowan *v.* Nixon, 28 Tex. 230; Heard *v.* Conly, (Civ. App. 1899) 50 S. W. 1047.

West Virginia.— Norfolk, etc., R. Co. *v.* Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414.

See 31 Cent. Dig. tit. "Justices of the Peace," § 71.

Construction of particular statutes see the following cases:

Georgia.— Scoville *v.* Varner, 121 Ga. 669, 49 S. E. 713 (construing the act of Dec. 24, 1832); Girtman *v.* Central R., etc., Co., 1 Ga. 173 (construing the act of 1843, and holding it inapplicable to causes arising previous to its passage).

Illinois.— The Delta *v.* Walker, 24 Ill. 233, giving the act of Feb. 14, 1855, such reasonable construction as would advance its object — the extension of the jurisdiction of justices in Peoria county.

Indiana.— Evansville, etc., R. Co. *v.* Ross, 12 Ind. 446, holding the act of 1859, extending the application of the act of 1853 relating

limited jurisdiction,[72] no presumption will be made in favor of their jurisdiction.[73] But when it is made to appear that jurisdiction has once been acquired, the same

to actions against railroads for failure to fence tracks, inapplicable to cases commenced before it went into operation.

Minnesota.— Marsh *v.* Smith, 22 Minn. 46, construing Sp. Laws (1875), c. 2, §§ 25, 26.

New Jersey.— Sloat *v.* McComb, 42 N. J. L. 484, construing the third proviso of Pub. Laws (1879), p. 115, § 1, as preventing certain justices from acquiring the increase of jurisdiction given by the act to justices generally.

New York.— Worden *v.* Brown, 14 How. Pr. 327 (construing Code, § 53); Bryan *v.* Cain, 1 Den. 507 (as to the jurisdiction of the justices' courts in the cities of Albany, Hudson, and Troy).

Ohio.— Bowers *v.* Pomeroy, 21 Ohio St. 184 (construing 67 Ohio Laws, p. 102); McKibben *v.* Lester, 9 Ohio St. 627 (construing St. May 1, 1854, §§ 1, 2).

Pennsylvania.— Merritt *v.* Whitlock, 200 Pa. St. 50, 49 Atl. 786, construing the act of April 9, 1849; the act of June 16, 1836; and the act of May 24, 1878.

See 31 Cent. Dig. tit. "Justices of the Peace," § 73.

Jurisdiction to issue writ of ne exeat see Straughan *v.* Inge, 5 Ind. 157; and, generally, NE EXEAT.

Jurisdiction of action on justice's judgments see *infra*, IV, O, 9, a, (II).

When a justice is provided for a new district created by law, the whole jurisdiction pertaining to the office, both civil and criminal, attaches at once. Matthews *v.* Cotton, 83 Miss. 472, 35 So. 937.

72. *Dakota.*— Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

Indiana.— Ohio, etc., R. Co. *v.* Hanna, 16 Ind. 391; Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207.

Michigan.— King *v.* Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518.

Missouri.— Brownfield *v.* Thompson, 96 Mo. App. 340, 70 S. W. 378.

New York.— Worden *v.* Brown, 14 How. Pr. 327; Lattimore *v.* People, 10 How. Pr. 336.

North Dakota.— Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734.

Ohio.— See Howell *v.* Jenkins, 2 Ohio Dec. (Reprint) 552, 3 West. L. Month. 631, where it is said that a justice's court is one of limited, though not inferior, jurisdiction.

Pennsylvania.— Moore *v.* Bundy, 22 Pa. Co. Ct. 583.

South Dakota.— Pyle *v.* Hand County, 1 S. D. 385, 47 N. W. 401.

See 31 Cent. Dig. tit. "Justices of the Peace," § 71.

Justice's court not a court of record.— *Alabama.*— Ellis *v.* White, 25 Ala. 540.

Georgia.— Planters', etc., Bank *v.* Chipley, Ga. Dec. 50.

Maryland.— Weikel *v.* Cate, 58 Md. 105.

New York.— See Wheaton *v.* Fellows, 23 Wend. 375, as to justice's court of city of Albany.

United States.— Searcy *v.* Hogan, 21 Fed. Cas. No. 12,584*a*, Hempst. 20.

Canada.— Young *v.* Woodcock, 5 N. Brunsw. 554.

See 31 Cent. Dig. tit. "Justices of the Peace," § 71.

Contra.— Woodruff *v.* Woodruff, 3 N. J. L. 552; Adair *v.* Rogers, Wright (Ohio) 428; Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

In what respect limited.— Justices' courts are courts of limited jurisdiction, not only with respect to the subject-matter of their jurisdiction, but with respect to the amount in controversy, and also with respect to the territory over which their jurisdiction may be exercised and their processes served. Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734.

Since the adoption of Ga. Const. (1877) which fixes the times and places for holding justices' courts, such courts are regular legal tribunals, at which parties summoned may appear and plead. Stansell *v.* Hays, 67 Ga. 487.

73. *Alabama.*— Horton *v.* Elliott, 90 Ala. 480, 8 So. 103.

Arkansas.— Reeves *v.* Clarke, 5 Ark. 27.

California.— Kane *v.* Desmond, 63 Cal. 464; Jolley *v.* Foltz, 34 Cal. 321; Rowley *v.* Howard, 23 Cal. 401; Swain *v.* Chase, 12 Cal. 283.

Indiana.— Smith *v.* Clausmeier, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311; Wilkinson *v.* Moore, 79 Ind. 397; Logansport, etc., R. Co. *v.* Groniger, 51 Ind. 383; Willey *v.* Strickland, 8 Ind. 453; Straughan *v.* Inge, 5 Ind. 157; Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207; Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132; Goodwine *v.* Barnett, 2 Ind. App. 16, 28 N. E. 115. *Compare* Wall *v.* Albertson, 18 Ind. 145; Remington *v.* Henry, 6 Blackf. 63; Lemert *v.* Shaffer, 5 Ind. App. 468, 31 N. E. 1128, 32 N. E. 788.

Maine.— Lane *v.* Crosby, 42 Me. 327.

Michigan.— Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688; Clark *v.* Holmes, 1 Dougl. 390; Wight *v.* Warner, 1 Dougl. 384; Beach *v.* Botsford, 1 Dougl. 199, 40 Am. Dec. 145. But see Facey *v.* Fuller, 13 Mich. 527, holding that where, under Comp. Laws, § 3893, a justice certifies a transcript of a judgment from the docket of a former justice, the original docket and judgment must be presumed to be under his legal control.

Minnesota.— Clague *v.* Hodgson, 16 Minn. 329.

Missouri.— Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; Belshe *v.* Lamp, 91 Mo. App. 477; Rochefort Bank *v.* Doak, 75 Mo. App. 332; Backenstoe *v.* Wabash, etc., R. Co., 23 Mo. App. 148; Palmer *v.* Missouri Pac. R. Co., 21 Mo. App. 437. *Compare* Franse *v.* Owens, 25 Mo. 329, holding

presumption arises in favor of the proceedings of justices as in case of courts of general jurisdiction.[74]

2. CONSTITUTIONAL LIMITATIONS. In many of the states the jurisdiction of justices of the peace is more or less definitely prescribed by constitutional provisions, to which all legislation on the subject must conform.[75] These provisions are as a rule of a limiting or exclusive character, and do not themselves fix the jurisdiction, but leave it to the legislature to determine to what extent jurisdiction shall be

that where defendant was served with process in the township in which the action was begun, it will be presumed, in the absence of evidence to the contrary, that he resided there.

Nevada.— Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

New Jersey.— Bergen Turnpike Co. *v.* Walker, 25 N. J. L. 554.

New York.— Picket *v.* Weaver, 5 Johns. 122; McNeil *v.* Scoffield, 3 Johns. 436; Jones *v.* Reed, 1 Johns. Cas. 20. *Compare* Westbrook *v.* Douglass, 21 Barb. 602; Rich *v.* Hogeboom, 4 Den. 453.

North Dakota.— Phelps *v.* McCollam, 10 N. D. 536, 88 N. W. 292.

Oklahoma.— Rhyne *v.* Manchester Assur. Co., 14 Okla. 555, 78 Pac. 558.

Wisconsin.— State *v.* Gillen, 49 Wis. 683, 6 N. W. 250. Although the code allows a general allegation of jurisdiction in the case of inferior courts, yet if the jurisdiction is denied, the jurisdictional facts must be affirmatively shown at the trial. Roys *v.* Lull, 9 Wis. 324.

See 31 Cent. Dig. tit. "Justices of the Peace," § 216.

Contra.— *Georgia.*— Carter *v.* Griffin, 113 Ga. 633, 38 S. E. 946. See also Thomas *v.* Malcom, 39 Ga. 328, 99 Am. Dec. 459, holding that where a justice officially indorsed a fieri facias but without naming the county, the legal presumption is that he was a justice for the county in which the levy was made.

Illinois.— Martin *v.* Walker, 15 Ill. 377; Hugunin *v.* Nicholson, 2 Ill. 575.

Pennsylvania.— Cooke *v.* Shoemaker, 17 Pa. Co. Ct. 641, 8 Kulp 212.

Texas.— Endel *v.* Harris, 93 Tex. 540, 57 S. W. 25; Traylor *v.* Lide, (1887) 7 S. W. 58; Howerton *v.* Luckie, 18 Tex. 257; Warren *v.* Foust, 36 Tex. Civ. App. 59, 81 S. W. 323. A judgment of a justice of the peace, although silent as to service of citation, will be presumed to be valid, on collateral attack, until the contrary is shown, either from the record or by evidence. Hambel *v.* Davis, (Civ. App. 1895) 33 S. W. 251.

Vermont.— Wright *v.* Hazen, 24 Vt. 143; Perkins *v.* Rich, 12 Vt. 595.

United States.— Maddox *v.* Stewart, 16 Fed. Cas. No. 8,934, 2 Cranch C. C. 523.

See 31 Cent. Dig. tit. "Justices of the Peace," § 216.

Where the record is applicable to a case in which the justice had jurisdiction as well as to one in which he had no jurisdiction he will be presumed to have acted within his jurisdiction. Bumpus *v.* Fisher, 21 Tex. 561. See also Schulhofer *v.* Richmond, etc., R. Co., 118 N. C. 1096, 24 S. E. 709; Turner *v.* Edwards, 19 N. C. 539.

Jurisdiction to be shown by record see *infra*, III, O.

74. *Georgia.*— Levadas *v.* Beach, 117 Ga. 178, 43 S. E. 418.

Indiana.— Smith *v.* Clausmeier, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311; Wilkinson *v.* Moore, 79 Ind. 397; Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207; Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132.

Iowa.— Moore *v.* Reeves, 47 Iowa 30.

Michigan.— Saunders *v.* Tioga Mfg. Co., 27 Mich. 520.

Minnesota.— Ellegaard *v.* Haukaas, 72 Minn. 246, 75 N. W. 128; Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540; Smith *v.* Victorian, 54 Minn. 338, 56 N. W. 47; Clague *v.* Hodgson, 16 Minn. 329.

Nebraska.— Kuker *v.* Beindorff, 63 Nebr. 91, 88 N. W. 190.

Oklahoma.— Rhyne *v.* Manchester Assur. Co., 14 Okla. 555, 78 Pac. 558.

See 31 Cent. Dig. tit. "Justices of the Peace," § 216.

75. *Alabama.*— Webb *v.* Carlisle, 65 Ala. 313.

Arkansas.— Gibson *v.* Emerson, 7 Ark. 172; Woodruff *v.* Griffith, 5 Ark. 354; McLain *v.* Taylor, 4 Ark. 147; Toby *v.* Bower, 3 Ark. 352.

California.— Young *v.* Wright, 52 Cal. 407; Small *v.* Gwinn, 6 Cal. 447; Zander *v.* Coe, 5 Cal. 230.

Georgia.— Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189; Planters', etc., Bank *v.* Chipley, Ga. Dec. 50.

Idaho.— People *v.* Maxon, 1 Ida. 330.

Mississippi.— Heggie *v.* Stone, 70 Miss. 39, 12 So. 253.

New York.— Lautz *v.* Galpin, 44 Misc. 356, 89 N. Y. Suppl. 1096; Shaeffer *v.* Steadman, 24 Misc. 267, 53 N. Y. Suppl. 586.

North Carolina.— Credle *v.* Gibbs, 65 N. C. 192.

Pennsylvania.— Stine *v.* Foltz, 3 Lanc. L. Rev. 130.

Texas.— Russell *v.* Woessner, 7 Tex. Civ. App. 281, 26 S. W. 1112.

Wisconsin.— Lybrand *v.* Carson, 2 Pinn. 33.

See 31 Cent. Dig. tit. "Justices of the Peace," § 72.

The effect of a new constitution is to invalidate all laws in conflict with its provisions. Markham *v.* Heffner, 67 Ill. 101; Phillips *v.* Quick, 63 Ill. 445; McTigue *v.* Com., 99 Ky. 66, 35 S. W. 121, 17 Ky. L. Rep. 1418; Moore *v.* Perrott, 2 Wash. 1, 25

exercised within the prescribed limits;[76] but where a justice of the peace is given express jurisdiction of a case by the constitution the legislature has no power to alter or destroy such jurisdiction,[77] although it may regulate the mode of its exercise, where the effect of its regulation is not to take away the power granted.[78] Where no restrictions are placed upon the legislative power to regulate jurisdiction, or where a general grant of power to fix the jurisdiction of the justices of the peace is contained in the constitution, the legislature may confer, enlarge, alter, or modify their jurisdiction as it may see fit.[79] The legislature may enlarge or contract the territorial jurisdiction of a justice of the peace as an incident to the power to create new counties.[80]

3. Exclusive or Concurrent Jurisdiction. Unless exclusive jurisdiction is expressly given by the constitution or statutes,[81] the jurisdiction of justices of the

Pac. 906. But *compare* Harbig *v.* Freund, 69 Ga. 180. And see Cartersville *v.* Lyon, 69 Ga. 577.

Unlawful detainer. — Statutes conferring jurisdiction on justices in proceedings of unlawful detainer are not unconstitutional, as the title to land cannot come in question. Beck *v.* Glenn, 69 Ala. 121; Credle *v.* Gibbs, 65 N. C. 192. See also Small *v.* Gwinn, 6 Cal. 447, where it was held that the legislature might give jurisdiction in forcible entry and detainer irrespective of the amount involved, because of the quasi-criminal nature of those cases.

Legality of tolls. — Under Cal. Const. art. 6, § 5, a justice of the peace is without jurisdiction where the legality of a toll comes in issue. Culbertson *v.* Kinevan, 68 Cal. 490, 9 Pac. 455.

76. *Alabama.* — Taylor *v.* Woods, 52 Ala. 474; Pearce *v.* Pope, 42 Ala. 319.

Arkansas. — Bush *v.* Visant, 40 Ark. 124.

Idaho. — Quayle *v.* Glenn, 6 Ida. 549, 57 Pac. 308.

Mississippi. — Bell *v.* West Point, 51 Miss. 262.

Nevada. — Paul *v.* Beegan, 1 Nev. 327.

Pennsylvania. — Johnson *v.* Beacham, 2 Pa. Co. Ct. 108; Wissler *v.* Becker, 2 Pa. Co. Ct. 103.

See 31 Cent. Dig. tit. "Justices of the Peace," § 72.

An act conferring exclusive jurisdiction on justices of a particular parish over the territory of their respective districts is not unconstitutional. State *v.* Falls, 32 La. Ann. 553.

77. More *v.* Woodruff, 5 Ark. 214.

78. Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447.

79. *District of Columbia.* — Booth *v.* Kengla, 10 App. Cas. 558.

Iowa. — Bryan *v.* State, 4 Iowa 349.

Kentucky. — Head *v.* Hughes, 1 A. K. Marsh. 372, 10 Am. Dec. 742.

Massachusetts. — Wales *v.* Belcher, 3 Pick. 508.

Michigan. — O'Connell *v.* Menominee Bay Shore Lumber Co., 113 Mich. 124, 71 N. W. 449.

Missouri. — Steele *v.* Missouri Pac. R. Co., 84 Mo. 57.

New York. — Brandon *v.* Avery, 22 N. Y. 469.

Oregon. — Noland *v.* Costello, 2 Oreg. 57.

Wisconsin. — Savage *v.* Carney, 8 Wis. 162.

See 31 Cent. Dig. tit. "Justices of the Peace," § 72.

Unjust discrimination. — As Ala. Code (1886), § 839, limits the jurisdiction of justices in torts to fifty dollars, section 1149, extending the jurisdiction in suits against railroads for killing stock to one hundred dollars, is unconstitutional, as an unjust discrimination. Brown *v.* Alabama, etc., R. Co., 87 Ala. 370, 6 So. 295.

80. *Ex p.* McCollum, 1 Cow. (N. Y.) 450.

81. *Alabama.* — Evans *v.* Stevens, 8 Ala. 517; Carter *v.* Dade, 1 Stew. 18; Curtis *v.* Gary, Minor 118; Howard *v.* Wear, Minor 84.

Arkansas. — Huddleston *v.* Spear, 8 Ark. 406; Wilson *v.* Mason, 3 Ark. 494.

California. — Reed *v.* Omnibus R. Co., 33 Cal. 212.

Illinois. — Bischmann *v.* Boehl, 30 Ill. App. 455.

Kansas. — Evans *v.* Adams, 21 Kan. 119.

Kentucky. — Partlow *v.* Lawson, 2 B. Mon. 46; Tudder *v.* Warren, 6 J. J. Marsh. 93; Owens *v.* Starr, 2 Litt. 230.

Louisiana. — Thompson *v.* Rogers, 4 La. 9.

Maryland. — Baltimore, etc., Turnpike Co. *v.* Barnes, 6 Harr. & J. 57; Bruner *v.* Hedges, 1 Harr. & J. 207.

Michigan. — People *v.* Merritt Tp., 38 Mich. 243; Raymond *v.* Hinckson, 15 Mich. 113.

Minnesota. — Castner *v.* Chandler, 2 Minn. 86.

Mississippi. — See Griffin *v.* Lower, 37 Miss. 458.

Missouri. — Murphy *v.* Campbell, 36 Mo. 110.

New Hampshire. — Flagg *v.* Gotham, 7 N. H. 266.

New York. — Loomis *v.* Bowers, 22 How. Pr. 361.

North Carolina. — Slocumb *v.* Cape Fear Shingle Co., 110 N. C. 24, 14 S. E. 622; Templeton *v.* Summers, 71 N. C. 269; Edenton *v.* Wool, 65 N. C. 379.

South Carolina. — Allen *v.* Singleton, 1 Rice 289.

Texas. — Hardeman *v.* Morgan, 48 Tex. 103; Swigley *v.* Dickson, 2 Tex. 192; State *v.* Trilling, (Civ. App. 1901) 62 S. W. 788; Dimmit County *v.* Salmon, (Civ. App. 1896) 35 S. W. 752.

peace is concurrent with that of the higher courts of original jurisdiction;[82] and the fact that their jurisdiction may be extended to cases originally cognizable in other courts exclusively will not take away the jurisdiction of the latter.[83]

4. Election of Remedy as Affecting Jurisdiction. The jurisdiction of a justice of the peace may depend upon the form of remedy adopted by plaintiff. Thus, where they are concurrent remedies, plaintiff may confer jurisdiction on a justice by suing in debt rather than in covenant.[84] But where the amount involved is exclusively within the justice's jurisdiction, debt must be brought, as plaintiff cannot elect to bring covenant so as to oust the justice of his jurisdiction.[85] Where a cause of action sounds in both tort and contract and it is permissible to waive the tort and sue on the implied contract, an action may be brought in the latter form before a justice of the peace, although he would have

Vermont.— Miller *v.* Livingston, 37 Vt. 467; Hodges *v.* Fox, 36 Vt. 74; Ormsby *v.* Morris, 28 Vt. 711; Hall *v.* Wadsworth, 28 Vt. 410; Mason *v.* Potter, 26 Vt. 722; Kittridge *v.* Rollins, 12 Vt. 541; Southwick *v.* Merrill, 3 Vt. 320; Richardson *v.* Denison, 1 Aik. 210; Keyes *v.* Weed, 1 D. Chipm. 379.

See 31 Cent. Dig. tit. "Justices of the Peace," § 74.

California act of April 14, 1863, conferring on justices exclusive jurisdiction over actions to recover forfeitures imposed on railroad companies for charging excess rate of fare, is constitutional. Reed *v.* Omnibus R. Co., 33 Cal. 212.

82. *Alabama.*— Kansas City, etc., R. Co. *v.* Whitehead, 109 Ala. 495, 19 So. 705; Carew *v.* Lillienthall, 50 Ala. 44.

California.— Hicks *v.* Bell, 3 Cal. 219.

Connecticut.— Loomis *v.* Bourn, 63 Conn. 445, 28 Atl. 569.

Dakota.— St. Paul F. & M. Ins. Co. *v.* Hanson, 4 Dak. 162, 28 N. W. 193.

District of Columbia.— Dawson *v.* Woodward, 6 D. C. 301.

Florida.— McMillan *v.* Savage, 6 Fla. 748.

Georgia.— McDonald *v.* Feagin, 43 Ga. 360.

Indiana.— Witz *v.* Haynes, 43 Ind. 470; Redden *v.* Covington, 29 Ind. 118; Proctor *v.* Bailey, 5 Blackf. 495; Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882.

Iowa.— Hutton *v.* Drebilis, 2 Greene 593; Nelson *v.* Gray, 2 Greene 397; Chapman *v.* Morgan, 2 Greene 374.

Kansas.— Henderson *v.* Kennedy, 9 Kan. 163.

Kentucky.— Sams *v.* Stockton, 14 B. Mon. 232; Sayre *v.* Lewis, 5 B. Mon. 90; Tudder *v.* Warren, 6 J. J. Marsh. 93.

Maine.— Abbott *v.* Knowlton, 31 Me. 77; Ridlon *v.* Emery, 6 Me. 261.

Michigan.— Knorr *v.* Macomb Cir. Judge, 78 Mich. 168, 43 N. W. 1099; Webb *v.* Mann, 3 Mich. 139.

Minnesota.— Thayer *v.* Cole, 10 Minn. 215.

Missouri.— Murphy *v.* Campbell, 36 Mo. 110; Pollock *v.* Hudgens, 12 Mo. 67; Talbot *v.* Greene, 6 Mo. 458; Pearson *v.* Gillett, 55 Mo. App. 312.

New Hampshire.— Stevens *v.* Chase, 61 N. H. 340; Rochester *v.* Roberts, 29 N. H. 360.

New Mexico.— Romera *v.* Silva, 1 N. M. 157.

New York.— Price *v.* Grant, 15 Daly 436, 7 N. Y. Suppl. 904; Lewis *v.* Spencer, 12 Wend. 139.

North Carolina.— Harvey *v.* Hambright, 98 N. C. 446, 4 S. E. 187; Barneycastle *v.* Walker, 92 N. C. 198; Montague *v.* Mial, 89 N. C. 137.

Ohio.— Job *v.* Harlan, 13 Ohio St. 485.

Pennsylvania.— Moyer *v.* Illig, 52 Pa. St. 444; Kline *v.* Wood, 9 Serg. & R. 294; Campbell *v.* Com., 8 Serg. & R. 414; Palmer *v.* Com., 6 Serg. & R. 245; Richards *v.* Gage, Ashm. 192; Devers *v.* Gething, 21 Pittsb. Leg. J. 115.

South Carolina.— Burge *v.* Willis, 5 S. C. 212.

Tennessee.— Taylor *v.* Pope, 5 Coldw. 413; Drewry *v.* Vaden, 2 Head 312.

Texas.— Johnson *v.* Happell, 4 Tex. 96; Love *v.* McIntyre, 3 Tex. 10.

Vermont.— See Glidden *v.* Elkins, 2 Tyler 218; Young *v.* Sanders, 1 Tyler 8; Keyes *v.* Weed, 1 D. Chipm. 379.

Washington.— State *v.* Hunter, 3 Wash. 92, 27 Pac. 1076.

See 31 Cent. Dig. tit. "Justices of the Peace," § 74.

Jurisdiction concurrent only within fixed sums.— Leathers *v.* Hogan, 17 Ind. 242; Murphy *v.* Campbell, 36 Mo. 110; Job *v.* Harlan, 13 Ohio St. 485.

83. *Alabama.*— Kansas City, etc., R. Co. *v.* Whitehead, 109 Ala. 495, 19 So. 705.

District of Columbia.— Dawson *v.* Woodward, 6 D. C. 301.

Indiana.— Redden *v.* Covington, 29 Ind. 118.

Michigan.— Knorr *v.* Macomb Cir. Judge, 78 Mich. 168, 43 N. W. 1099.

New Hampshire.— Rochester *v.* Roberts, 29 N. H. 360.

New York.— Lewis *v.* Spencer, 12 Wend. 139.

Pennsylvania.— Richards *v.* Gage, 1 Ashm. 192; Devers *v.* Gething, 21 Pittsb. Leg. J. 115.

Tennessee.— Taylor *v.* Pope, 5 Coldw. 413.

See 31 Cent. Dig. tit. "Justices of the Peace," § 74.

84. Hamilton *v.* McCarty, 18 N. C. 226.

85. Crabtree *v.* Moore, 7 Ark. 74.

no jurisdiction if the action were brought in tort,[86] unless the gravamen of the charge is tort.[87]

B. Nature of Subject-Matter — 1. In General. The jurisdiction of justices of the peace as dependent upon the nature of the subject-matter is to be determined solely from the constitutional and statutory provisions on the subject, which must in all cases be strictly construed.[88]

2. Contracts[89] — a. In General. The earliest and, at the present time, the most extensive civil jurisdiction of justices of the peace is over contracts, express or implied.[90] Their jurisdiction extends to actions for breaches of covenants and

86. *Arkansas.*— Harris *v.* Simpson, 50 Ark. 422, 8 S. W. 177.

Georgia.— Rockwell *v.* Proctor, 39 Ga. 105.

Kansas.— Missouri Pac. R. Co. *v.* Atchison, 43 Kan. 529, 23 Pac. 610.

North Carolina.— Scottish Carolina Timber, etc., Co. *v.* Brooks, 109 N. C. 698, 14 S. E. 315.

Pennsylvania.— Thompson *v.* Chambers, 13 Pa. Super. Ct. 213. See also Croskey *v.* Wallace, 22 Pa. Super. Ct. 112.

South Carolina.— Hyams *v.* Michel, 3 Rich. 303.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 75, 115.

Where the damages claimed exceed the jurisdiction of justices plaintiff cannot confer jurisdiction by waiving the tort and suing in assumpsit. Webb *v.* Tweedie, 30 Mo. 488.

87. Edwards *v.* Cowper, 99 N. C. 421, 6 S. E. 792; Bullinger *v.* Marshall, 70 N. C. 520; Fentress *v.* Worth, 13 N. C. 229 [*approving* State *v.* Alexander, 11 N. C. 182]; Henion *v.* Morton, 2 Ashm. (Pa.) 150.

88. *Alabama.*— The Louisiana *v.* Fettyplace, 21 Ala. 286, construing the act of 1841, conferring admiralty jurisdiction in the case of claims of less than fifty dollars. See also Monroe *v.* Brady, 7 Ala. 59.

Georgia.— Taylor *v.* Thomas, Dudley 59, demands for pilotage.

Kentucky.— Walker *v.* Floyd, 4 Bibb 237, complaints for stopping highways.

Mississippi.— Sublett *v.* Bedwell, 47 Miss. 266, 12 Am. Rep. 338, county election contests.

New Jersey.— Woodruff *v.* Woodruff, 3 N. J. L. 552, action of debt for a legacy.

New York.— Spencer *v.* Hall, 30 Misc. 75, 62 N. Y. Suppl. 826 [*affirmed* in 64 N. Y. Suppl. 1149], in which the jurisdiction of a justice was upheld over a claim against a decedent's estate for less than fifty dollars after the presentation and rejection of the claim. See Laughran *v.* Orser, 15 How. Pr. 281, no jurisdiction of action against officer for failing to return execution.

Pennsylvania.— St. Clair Tp. *v.* Moon Tp., 6 Watts & S. 522, determination of liability for support of paupers in Allegheny county.

Texas.— Demmit County *v.* Salmon, (Civ. App. 1896) 35 S. W. 752, recovery of bounties on wolf scalps.

See 31 Cent. Dig. tit. "Justices of the Peace," § 77.

Witness' fees.— A justice has jurisdiction of an action by a witness for the recovery of fees for attending as a witness in an action at law (Magruder *v.* Armes, 15 App. Cas. (D. C.) 379 [writ of error *dismissed* in 180 U. S. 496, 21 S. Ct. 454, 45 L. ed. 638]), but not for the recovery of fees in a criminal case (Zink *v.* Schuylkill County, 1 Leg. Chron. (Pa.) 191).

Justice's fees.— A justice has no jurisdiction of an action by another justice for his fees in a criminal case, although the county is liable therefor. Ketchledge *v.* Wyoming County, 24 Pa. Co. Ct. 7.

Jurisdiction to issue writ of ne exeat see Straughan *v.* Inge, 5 Ind. 157; and, generally, Ne Exeat.

Actions on justice's judgment see *infra*, IV, O, 9, a, (II).

89. **Actions on contracts** generally see Contracts.

90. *Alabama.*— Spann *v.* Boyd, 2 Stew. 480.

Arkansas.— Thruston *v.* Hinds, 8 Ark. 118.

Colorado.— Brewer *v.* Mock, 14 Colo. App. 454, 60 Pac. 578.

Delaware.— Gruell *v.* Clark, 4 Pennew. 321, 54 Atl. 955; Spahn *v.* Willman, 1 Pennew. 125, 39 Atl. 787; Dougherty *v.* Thompson, 3 Houst. 128; Cannon *v.* Matthews, 3 Houst. 96; Barr *v.* Logan, 5 Harr. 52.

Illinois.— Dodds *v.* Walker, 9 Ill. App. 37.

Indiana.—Steepleton *v.* McNeely, 6 Blackf. 76.

Kansas.— Hanson *v.* Lawson, 19 Kan. 201.

Kentucky.— Howke *v.* Buford, 8 B. Mon. 38; Harris *v.* Pendleton, 4 B. Mon. 398; Fortune *v.* Howard, 4 J. J. Marsh. 171; Huling *v.* Rife, 3 J. J. Marsh. 587.

Missouri.— Williams *v.* North Missouri R. Co., 50 Mo. 433; Brady *v.* Chandler, 31 Mo. 28.

Montana.— See Oppenheimer *v.* Regan, 32 Mont. 110, 79 Pac. 695.

Nevada.— Inda *v.* McInnis, 25 Nev. 235, 59 Pac. 3.

New York.— Loftus *v.* Clark, 1 Hilt. 310.

North Carolina.— Patterson *v.* Freeman, 132 N. C. 357, 43 S. E. 904; Edwards *v.* Cowper, 99 N. C. 421, 6 S. E. 792; Mitchell *v.* Walker, 30 N. C. 243; Ferrell *v.* Underwood, 13 N. C. 111. *Compare* Spencer *v.* Hunsucker, 30 N. C. 9.

Pennsylvania.— Coan *v.* Stumm, 31 Pa. St. 14; Zell *v.* Arnold, 2 Penr. & W. 292; Zeigler *v.* Gram, 13 Serg. & R. 102; Murphy *v.* Thall, 17 Pa. Super. Ct. 500; Thompson *v.* Cham-

warranties,[91] or for money had and received ;[92] and to actions based on contracts of bailment,[93] or of guaranty or indemnity.[94] As used in some of the statutes, however, the term "contract" is confined to those agreements which arise out of the dealings of the parties, and does not include artificial agreements growing out of a fiction of law.[95]

bers, 13 Pa. Super. Ct. 213; Reitz *v.* Wehr, 12 Pa. Dist. 653; Kuhn *v.* Eggers, 5 Pa. Dist. 156, 17 Pa. Co. Ct. 155; Robinson *v.* Dean, 8 Del. Co. 293; Knapp *v.* Short, 2 Leg. Rec. 224; Shannon *v.* Madden, 1 Phila. 254.

South Carolina.— Debruhl *v.* Parker, 3 Brev. 406, 1 Treadw. 475.

West Virginia.— O'Conner *v.* Dils, 43 W. Va. 54, 26 S. E. 354.

Wisconsin.— Prairie Grove Cheese Mfg. Co. *v.* Luder, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 98 *et seq.*

A fair construction of the term "debt" includes any demand for which an action of debt or assumpsit will lie. Dowling *v.* Stewart, 4 Ill. 193.

Actions quasi ex contractu are within the jurisdiction of a justice in Pennsylvania. Croskey *v.* Wallace, 22 Pa. Super. Ct. 112.

Recovery of money lost in gaming.— A justice of the peace has jurisdiction of an action by a creditor of the loser to recover money lost in gaming if the amount sued for is within the statutory limit. Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235. Where all wagers are declared illegal by statute, a person may sustain in a justice's court an action for money had and received against a stakeholder to recover money deposited upon a wager, notwithstanding a previous statute had forbidden the court from entertaining jurisdiction in respect of any demand for any money or thing lost or won by means of any wager. Kelly *v.* Bartley, 1 Sandf. (N. Y.) 15.

The personal liability of stock-holders for their proportion of the indebtedness of the corporation is an obligation arising on contract, within Cal. Code Civ. Proc. § 112, giving original jurisdiction to justices in actions on contract. Dennis *v.* Los Angeles County Super. Ct., 91 Cal. 548, 27 Pac. 1031. But see as to an additional statutory liability Katch *v.* Benton Coal Co., 19 Pa. Super. Ct. 476, construing the act of April 29, 1874, § 14 (Pamphl. Laws 73), as amended by the act of April 17, 1876, § 3 (Pamphl. Laws 30).

An action on a draft against drawees is founded on contract, and is within the jurisdiction of a justice. Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268. See also Powers *v.* Nahm, 7 Heisk. (Tenn.) 583, where it was held that an unconditional acceptance is a note of hand within the statute prescribing the jurisdiction of justices of the peace.

A provision in a note for attorney's fees, upon entry of judgment on the note in a court of record, is not a promise to pay upon which an action will lie before a justice, after the face of the note and interest have been paid. Swanson *v.* Hickman, 20 Pa. Co. Ct. 235.

Obligations payable otherwise than in money.— A justice has jurisdiction where by the terms of the contract specific articles are to be delivered or services performed, if such contract ascertains the money value of the articles or services. Marrigan *v.* Page, 4 Humphr. (Tenn.) 247. See also Dowdle *v.* Corpening, 32 N. C. 58 (note payable in current bank-notes); Hamilton *v.* Jervis, 19 N. C. 227 (obligation to pay the sum of one hundred bushels of corn). But see Farrow *v.* Summers, 3 Litt. (Ky.) 460, where the expression "sums," employed in 2 Ky. Dig. Laws 704, was construed to mean sums of money only.

No jurisdiction when damages unliquidated or indeterminate.— Cavender *v.* Funderburg, 9 Port. (Ala.) 460; Huling *v.* Rife, 3 J. J. Marsh. (Ky.) 587; State *v.* Alexander, 11 N. C. 182. But see cases cited *supra*, this note.

No jurisdiction in actions on executory contracts.— Tyler *v.* Harper, 12 N. C. 387.

91. *Delaware.*— Colesberry *v.* Stoops, 1 Harr. 448.

Illinois.— Martin *v.* Murphy, 16 Ill. App. 283. But see Kennedy *v.* Pennick, 21 Ill. 597.

Kentucky.— Fortune *v.* Howard, 4 J. J. Marsh. 171.

Ohio.— McKibben *v.* Lester, 9 Ohio St. 627.

Pennsylvania.— Sharpless *v.* Hibberd, 2 Lanc. L. Rev. 68.

South Carolina.— Caldwell *v.* Garmany, 3 Hill 202; Cohen *v.* Saddler, 2 McCord 239.

Tennessee.— Conger *v.* Lancaster, 6 Yerg. 477.

See 31 Cent. Dig. tit. "Justices of the Peace," § 106.

Contra.— Patterson *v.* Yancy, 81 Mo. 379.

92. Hartley *v.* Gilhofer, 109 Ill. App. 527.

93. Spann *v.* Boyd, 2 Stew. (Ala.) 480; Dowling *v.* Stewart, 4 Ill. 193; American Express Co. *v.* Lankford, 1 Indian Terr. 233, 39 S. W. 817; Todd *v.* Figley, 7 Watts (Pa.) 542; McCahan *v.* Hirst, 7 Watts (Pa.) 175; Wilkes-Barre Bottling Works *v.* Lehigh Valley R. Co., 10 Kulp (Pa.) 218.

94. Redmond *v.* Galena, etc., R. Co., 39 Wis. 426. *Contra*, Johnson *v.* Olive, 60 N. C. 213; Cogle *v.* Hamilton, 33 N. C. 231; Wall *v.* Nelson, 28 N. C. 300; Dyer *v.* Cutler, 12 N. C. 312.

95. Montgomery *v.* Poorman, 6 Watts (Pa.) 384; Murphy *v.* Thall, 17 Pa. Super. Ct. 500; Mount Joy Borough *v.* Harrisburg, etc.,

b. Bonds and Recognizances.[96] When the amount involved is within the jurisdictional limit[97] justices of the peace may take cognizance of actions on bonds and recognizances.[98] This has been held to be true of actions on the official bonds of public officers as well as on other bonds.[99]

c. Accounts.[1] Within the prescribed limits as to the amount involved,[2] justices of the peace are very generally given jurisdiction of actions on accounts.[3]

R. Co., 11 Pa. Dist. 765; Pittsburg *v.* Daly, 41 Wkly. Notes Cas. (Pa.) 236.

An action by an indorsee against an indorser is on a contract which the law implies, and not on the note, within the meaning of the statute defining a justice's jurisdiction. Meis *v.* Geyer, 4 Mo. App. 404. See also Mitchell *v.* Miller, Meigs (Tenn.) 510, where it is said that the jurisdiction is confined by the statute to the case of a liability arising directly out of the instrument, and the fact that the indorsement waived demand and notice made no difference.

96. **Actions on bonds** generally see BONDS.
Actions on recognizances generally see RECOGNIZANCES.

97. See *infra*, III, D, 2, b, (II).

98. Thomas *v.* Thomas, 2 A. K. Marsh. (Ky.) 430; Howard *v.* Clark, 43 Mo. 344; Cockrill *v.* Owen, 10 Mo. 287; Shackelton *v.* Hart, 12 Abb. Pr. (N. Y.) 325, 20 How. Pr. 39; Hunter *v.* Keller, 1 Pa. Co. Ct. 617. *Compare* Wimer *v.* Brotherton, 7 Mo. 264; Collins *v.* Oliver, 4 Humphr. (Tenn.) 439.

Undertakings on appeal are within a justice's jurisdiction. Cockrill *v.* Owen, 10 Mo. 287; Morris *v.* Hunken, 40 N. Y. App. Div. 129, 57 N. Y. Suppl. 712; Montegriffo *v.* Musti, 1 Daly (N. Y.) 77.

An undertaking of bail may be sued on before a justice of the peace. Shackelton *v.* Hart, 12 Abb. Pr. (N. Y.) 325, 20 How. Pr. 39.

An attachment bond can only be sued on before the justice before whom the action was pending at the time the bond was given or his successor in office. Sims *v.* Kennedy, 67 Kan. 383, 73 Pac. 51.

Administrator's bond.— The justice's court has jurisdiction over an action on an administrator's bond, as it is a personal action, and has no reference to the administrator in his official capacity. O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404. *Contra*, Hackworth *v.* Robinson, 31 Ohio St. 655.

An action on a guardian's bond is not within the jurisdiction of a justice of the peace. Green *v.* Clawson, 5 Houst. (Del.) 159.

99. *Illinois.*— Vaughn *v.* Thompson, 15 Ill. 39; Robertson *v.* Marshall County Com'rs, 10 Ill. 559.

Kansas.— Dodge *v.* Kincaid, 30 Kan. 346, 1 Pac. 107.

Missouri.— State *v.* Muir, 24 Mo. 263; Wimer *v.* Brotherton, 7 Mo. 264.

New York.— Sutherland *v.* McKinney, 10 N. Y. Suppl. 876, 18 N. Y. Civ. Proc. 216.

Virginia.— Hendricks *v.* Shoemaker, 3 Gratt. 197.

See 31 Cent. Dig. tit. "Justices of the Peace," § 104.

Contra.— State *v.* Tabler, 41 Md. 236; Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874; Hornbuckle *v.* State, 37 Ohio St. 361; Burrows *v.* Bliss, 2 Ohio Dec. (Reprint) 228, 2 West. L. Month. 105; Hall *v.* Strong, 2 Ohio Dec. (Reprint) 168, 1 West. L. Month. 698; Com. *v.* Reynolds, 17 Serg. & R. (Pa.) 367; Schaffer *v.* McNamee, 13 Serg. & R. (Pa.) 44; Blue *v.* Com., 4 Watts (Pa.) 215; Ferry *v.* Schutter, 8 Kulp (Pa.) 64.

1. **Actions on accounts** generally see ACCOUNTS AND ACCOUNTING.

2. See *infra*, III, D, 2, b, (III).

3. *Arkansas.*— Brinkley *v.* Barinds, 7 Ark. 165; Hempstead *v.* Collins, 6 Ark. 533.

Connecticut.— Bulkly *v.* Lewis, 1 Root 217.

Indiana.— Mitchell *v.* Smith, 24 Ind. 252; Newland *v.* Nees, 3 Blackf. 460.

Iowa.— Cochran *v.* Glover, Morr. 151; Hall *v.* Biever, Morr. 113.

Missouri.— Stephenson *v.* Porter, 45 Mo. 358; Musick *v.* Chamlin, 22 Mo. 175; Buckner *v.* Armour, 1 Mo. 534; Floyd *v.* Wiley, 1 Mo. 430.

New Jersey.— Keep *v.* Kelley, 32 N. J. L. 56; Eacrit *v.* Keen, 4 N. J. L. 235; South *v.* Hall, 1 N. J. L. 34.

New York.— Sherry *v.* Cary, 111 N. Y. 514, 19 N. E. 87 [*reversing* 55 N. Y. Super. Ct. 253]; Bartlett *v.* Mudgett, 75 Hun 292, 27 N. Y. Suppl. 56; Russell *v.* Barcles, 60 Hun 579, 14 N. Y. Suppl. 473; Bradner *v.* Howard, 14 Hun 420; Glackin *v.* Zeller, 52 Barb. 147; Parker *v.* Eaton, 25 Barb. 122; Stilwell *v.* Staples, 5 Duer 691; Ward *v.* Ingraham, 1 E. D. Smith 538; Walp *v.* Boyd, 2 N. Y. Suppl. 735; Kemp *v.* Union Gas, etc., Co., 22 N. Y. Civ. Proc. 190; Lablache *v.* Kirkpatrick, 8 N. Y. Civ. Proc. 340; Steele *v.* Macdonald, 4 N. Y. Civ. Proc. 227; Burdick *v.* Hale, 13 Abb. N. Cas. 60; Lund *v.* Broadhead, 41 How. Pr. 146; Gilliland *v.* Campbell, 18 How. Pr. 177; Crim *v.* Cronkhite, 15 How. Pr. 250; Hoodless *v.* Brundage, 8 How. Pr. 263; Lamoure *v.* Caryl, 4 Den. 370; Matteson *v.* Bloomfield, 10 Wend. 555; Abernathy *v.* Abernathy, 2 Cow. 413. But see Rickey *v.* Bowne, 18 Johns. 131.

North Carolina.— The jurisdiction only extends to liquidated accounts. Spencer *v.* Hunsucker, 30 N. C. 9; Midgett *v.* Watson, 29 N. C. 143; State *v.* Alexander, 11 N. C. 182.

Tennessee.— Ayres *v.* Moulton, 5 Coldw. 154.

Texas.— Davis *v.* Pinckney, 20 Tex. 340; Duer *v.* Seydell, 20 Tex. 61.

Vermont.— A justice has jurisdiction of

3. Torts.[4] The civil jurisdiction of justices of the peace was originally limited to actions on contracts, and is not now unreservedly extended to actions *ex delicto*.[5] In a number of states, however, jurisdiction has been conferred on justices of the peace in the case of torts affecting either real estate[6] or personal

actions of account, where the account is between no more than two parties. La Point *v.* Scott, 36 Vt. 633; Chadwick *v.* Divol, 12 Vt. 499.

See 31 Cent. Dig. tit. "Justices of the Peace," § 112.

Contra.— Crow *v.* Mark, 52 Ill. 332; Steffen *v.* Hartzell, 5 Whart. (Pa.) 448; Wright *v.* Guy, 10 Serg. & R. (Pa.) 227.

4. Actions for torts generally see Torts.

5. *Arkansas.*— McLain *v.* Taylor, 4 Ark. 147.

Delaware.— An action will not lie before a justice for consequential damages. Duross *v.* Hobson, (1901) 53 Atl. 438; Guenford *v.* Loose, 5 Houst. 596.

Georgia.— A justice's court has no jurisdiction of an action to recover the value of property which has been wrongfully converted. Southern R. Co. *v.* Born Steel Range Co., 122 Ga. 658, 50 S. E. 488.

Kentucky.— Previous to the act of Feb. 12, 1840, justices had no jurisdiction of cases of trespass and trespass on the case. Waggener *v.* Highbaugh, 10 B. Mon. 196.

New York.— Wilson *v.* McGregor, 58 Hun 607, 12 N. Y. Suppl. 39, 20 N. Y. Civ. Proc. 36. Under Code, § 54, a justice had no jurisdiction of an action against a sheriff for failure to return an execution. Laughran *v.* Orser, 15 How. Pr. 281.

North Carolina.— Prior to the act of 1876 (Code, § 887) justices had no jurisdiction in actions of tort, but since that act they have concurrent jurisdiction with the superior court when the damages claimed do not exceed fifty dollars. Harvey *v.* Hambright, 98 N. C. 446, 4 S. E. 187 [*distinguishing* and *explaining* Ashe *v.* Gray, 88 N. C. 190, 90 N. C. 137]; Barneycastle *v.* Walker, 92 N. C. 198. See also Nance *v.* Carolina Cent. R. Co., 76 N. C. 9; Heptinstall *v.* Rue, 75 N. C. 78; Bullinger *v.* Marshall, 70 N. C. 520.

Pennsylvania.— Justices have no jurisdiction of actions on the case. Mann *v.* Bower, 8 Watts 179; Hunt *v.* Wynn, 6 Watts 47; Zell *v.* Arnold, 2 Penr. & W. 292; Zeigler *v.* Gram, 13 Serg. & R. 102; Masteller *v.* Trimbly, 6 Binn. 33; Lawrence *v.* Doublebower, 2 Dall. 73, 1 L. ed. 294; Murphy *v.* Thall, 17 Pa. Super. Ct. 500; Hahn *v.* Lentz, 11 Pa. Dist. 138; Stewart *v.* Shaffer, 6 Pa. Dist. 226, 18 Pa. Co. Ct. 655; Conaghan *v.* Rudolph, 6 Pa. Dist. 225, 4 Kulp 504; Freedom Tp. *v.* Snowden, 5 Pa. Dist. 73; Ripple *v.* Keast, 5 Pa. Dist. 31, 16 Pa. Co. Ct. 548, 8 Kulp 109; Thilow *v.* Philadelphia Traction Co., 4 Pa. Dist. 83; Clader *v.* Shepowich, 2 Pa. Dist. 824, 13 Pa. Co. Ct. 459; Millheim Banking Co. *v.* Peifer, 22 Pa. Co. Ct. 129; Coulson *v.* Chronister, 4 Pa. Co. Ct. 521; Irvine *v.* Henry, 2 Pa. Co. Ct. 336; Hasbruck *v.* New York, etc., R. Co., 1 C. Pl. 156; McClain *v.* Tp., 2 Just. L. Rep. 10; Hemphill *v.* Traction Co., 1 Just. L. Rep. 106; McCae *v.* Ricketts, 11 Kulp 176; Myers *v.* Gillman, 5 Kulp 209; Sisco *v.* Miller, 2 Lack. Leg. N. 143; Dormer *v.* Handwick, 1 Leg. Chron. 293; Brody *v.* Gillen, 10 Luz. Leg. Reg. 328; Metzger *v.* Jackson, 16 Montg. Co. Rep. 180; Heineke *v.* Kohler, 2 Phila. 44; Douglass *v.* Davidson, 1 Phila. 516; Swartz *v.* Marcus, 32 Pittsb. Leg. J. 166; Chandler *v.* Haas, 12 York Leg. Rec. 127. See also Brown *v.* Quinton, 2 Pa. L. J. Rep. 169. They have, however, jurisdiction of actions of trespass *vi et armis*. See Masteller *v.* Trimbly, 6 Binn. 33; Stambaugh *v.* Baker, 10 Pa. Dist. 79; Freedom Tp. *v.* Snowden, 5 Pa. Dist. 73.

South Carolina.— Damages, indefinite in amount, given by statute for a trespass, cannot be recovered in a justice's court. State *v.* Weeks, 14 S. C. 400.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 116, 117.

Actions for nuisances are not generally within the jurisdiction of justices of the peace. Caldwell *v.* Dunshee, 15 Ohio 488; Harrington *v.* Heath, 15 Ohio 483 [*overruling* Mæller *v.* Flowers, 7 Ohio, Pt. II, 230; Nichol *v.* Patterson, 4 Ohio 200; Heisey *v.* Witmer, 4 Pa. Dist. 290; Harrigas *v.* McGill, 1 Ashm. (Pa.) 152; Whitney *v.* Bowen, 11 Vt. 250 (nuisance affecting real estate). *Contra*, Hastings *v.* Mills, 50 Nebr. 842, 70 N. W. 381.

Abatement of nuisances see *infra*, III, B, 8.

Wrongful attachment or garnishment is not cognizable by a justice. Williams *v.* Sulter, 76 Ga. 355; Rice *v.* Day, 34 Nebr. 100, 51 N. W. 464. But see as to wrongful distress Shetsline *v.* Keemle, 1 Ashm. (Pa.) 29.

6. *Illinois.*— Pitts *v.* Looby, 142 Ill. 534, 32 N. E. 519; Taylor *v.* Koshetz, 88 Ill. 479; Lachman *v.* Deisch, 71 Ill. 59; Ames *v.* Carlton, 41 Ill. 261; Reed *v.* Johnson, 14 Ill. 257; Keyser *v.* Mann, 36 Ill. App. 596; Bischmann *v.* Boehl, 30 Ill. App. 455; Chicago, etc., R. Co. *v.* Calkins, 17 Ill. App. 55.

Michigan.— Williamson *v.* Haskell, 50 Mich. 364, 15 N. W. 512.

Missouri.— Polhans *v.* Atchison, etc., R. Co., 45 Mo. App. 153, the fact that an action for an injury to land affects the inheritance does not deprive a justice of jurisdiction, so long as the title is not in issue.

New Jersey.— Ming *v.* Compton, 2 N. J. L. 345.

New York.— Brady *v.* Smith, 1 N. Y. City Ct. 175.

Pennsylvania.— A justice has jurisdiction in all cases where there is immediate injury done to the body of the property. Hobbs *v.* Geiss, 13 Serg. & R. 417; Gingrich *v.* Sheaffer, 16 Pa. Super. Ct. 299 [*affirming* 17 Lanc. L. Rev. 143]; House *v.* Ziegler, 11 Pa.

property.[7] As a general rule the jurisdiction of justices does not extend to torts affecting the person,[8] and they have no jurisdiction over actions for assault,[9] causing death,[10] malicious prosecution,[11] false imprisonment,[12] or libel and slander.[13] Personal injuries due to negligence are cognizable by justices of the peace in some states.[14]

Co. Ct. 159; Atkinson *v.* Russman, 13 Leg. Int. 29; Curry *v.* Gilroy, 3 Phila. 424.

Wisconsin.— Bandlow *v.* Thieme, 53 Wis. 57, 9 N. W. 920.

See 31 Cent. Dig. tit. "Justices of the Peace," § 128.

Contra.— Halpern *v.* Burgess, (Ark. 1890) 13 S. W. 763; Cockrum *v.* Williamson, 53 Ark. 131, 13 S. W. 592; Van Etten *v.* Jilson, 6 Cal. 19; Hill *v.* Newman, 5 Cal. 445, 63 Am. Dec. 140. See also Draper *v.* Draper, 3 Harr. (Del.) 65, holding that a justice has no jurisdiction of trespass to real estate by horses, cattle, sheep, or hogs, without the intervention of fence-viewers.

Jurisdiction of action for trespass by animals see ANIMALS, 2 Cyc. 410.

7. *Arkansas.*— Stanley *v.* Bracht, 42 Ark. 210; Wells *v.* Steele, 31 Ark. 219.

Delaware.— A justice has jurisdiction if the case does not involve consequential damages. Conner *v.* Reardon, 8 Houst. 19, 31 Atl. 878. *Compare* Guenford *v.* Loose, 5 Houst. 596.

Georgia.— Justices have no jurisdiction of torts except in the case of injuries to personal property. Dorsey *v.* Miller, (1898) 31 S. E. 736; Bagley *v.* Columbus Southern R. Co., 98 Ga. 626, 25 S. E. 638, 58 Am. St. Rep. 325, 34 L. R. A. 286; White Star Line Steam-Boat Co. *v.* Gordon County, 81 Ga. 47, 7 S. E. 231 [*distinguishing* James *v.* Smith, 62 Ga. 345]; Jones *v.* Americus, etc., R. Co., 80 Ga. 803, 7 S. E. 117; Williams *v.* Sulter, 76 Ga. 355; James *v.* Smith, 62 Ga. 345; Western, etc., R. Co. *v.* Brown, 58 Ga. 534; Rockwell *v.* Proctor, 39 Ga. 105.

Illinois.— Kellar *v.* Shippee, 45 Ill. App. 377; Northrup *v.* Smothers, 39 Ill. App. 588; Gallery *v.* Davis, 35 Ill. App. 619. But *compare* Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109, to the effect that justices have no jurisdiction of actions on the case.

Missouri.— Sublette *v.* St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S. W. 745.

Pennsylvania.— The jurisdiction is limited to direct and immediate injuries and does not extend to actions on the case for consequential damages. Murphy *v.* Thall, 17 Pa. Super. Ct. 500; Weaver *v.* Klaehn, 26 Pa. Co. Ct. 117; Porter *v.* Butchers' Ice, etc., Co., 11 Pa. Co. Ct. 256; Connelsville Grocery Co. *v.* Springer, 1 Just. L. Rep. 45; Gallagher *v.* Kudlich, 10 Kulp 220; Keoshinski *v.* Yanofski, 10 Kulp 219; Heidenrich *v.* Daniels, 8 Kulp 528; Schnaeder *v.* Micthke, 8 Kulp 370; Brenner *v.* Dombach, 3 Lanc. Bar, Feb. 10, 1872; Gingrich *v.* Schaeffer, 17 Lanc. L. Rev. 143.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 130, 132.

Trover and conversion may be brought before a justice of the peace. Parks *v.* Webb, 48 Ark. 293, 3 S. W. 521; St. Louis, etc., R. Co. *v.* Briggs, 47 Ark. 59, 14 S. W. 464; Alley *v.* Gamelick, 55 Mo. 518; Smith *v.* Grove, 12 Mo. 51; Anonymous, 3 N. J. L. 930. *Contra*, Williams *v.* Hinton, 1 Ala. 297; Jordan *v.* Glover, 111 Ga. 806, 35 S. E. 667; Watson *v.* Pearre, 110 Ga. 320, 35 S. E. 316; Blocker *v.* Boswell, 109 Ga. 230, 34 S. E. 289. But see James *v.* Smith, 62 Ga. 345.

Replevin may be brought before a justice of the peace. Elliott *v.* Black, 45 Mo. 372; Sterling *v.* Jones, 7 N. Brunsw. 522.

8. See Hasbrouck *v.* Baker, 10 Johns. (N. Y.) 248 (holding that an action against a witness for non-attendance is not cognizable by a justice); Chase *v.* Hale, 8 Johns. (N. Y.) 461 (holding that an action for enticing away one's wife is not within a justice's jurisdiction).

9. *Delaware.*— Hollis *v.* Williamson, 2 Harr. 391.

Illinois.— Horne *v.* Mandelbaum, 13 Ill. App. 607.

New Jersey.— See Carman *v.* Smock, 2 N. J. L. 111.

New York.— Kaliski *v.* Pelham Park R. Co., 20 N. Y. Civ. Proc. 315, 15 N. Y. Suppl. 519 (as to which see *infra*, note 14); Rich *v.* Hogeboom, 4 Den. 453.

Pennsylvania.— Donaldson *v.* Maginnis, 4 Yeates 127.

See 31 Cent. Dig. tit. "Justices of the Peace," § 121.

A special action on the case for damages for the loss of services of an apprentice, founded on an assault and battery committed on the apprentice, is not an action for assault and battery, within the exception of the statute giving justices of the peace jurisdiction of civil actions where the amount in dispute does not exceed sixty dollars, excepting actions for assault and battery. Carman *v.* Smock, 2 N. J. L. 111.

10. Sponseller *v.* Cleveland Terminal, etc., R. Co., 8 Ohio S. & C. Pl. Dec. 307, 6 Ohio N. P. 422.

11. Edwards *v.* Elbert, 12 Johns. (N. Y.) 466; Baldwin *v.* Hamilton, 3 Wis. 747. *Contra*, Mathews *v.* Ferguson, 5 N. J. L. 822.

12. Jeffers *v.* Brookfield, 1 N. J. L. 38.

13. Sparks *v.* Holston, 3 N. J. L. 844; Wilson *v.* McGregor, 12 N. Y. Suppl. 39; Goodrich *v.* Stewart, 3 Wend. (N. Y.) 439; Engelking *v.* Von Wamel, 26 Tex. 469.

14. Coulter *v.* American Merchants' Union Express Co., 56 N. Y. 585 [*reversing* 5 Lans. 67]; Kaliski *v.* Pelham Park R. Co., 20 N. Y. Civ. Proc. 315, 15 N. Y. Suppl. 315; Schmulback Brewing Co. *v.* Archer, 42 Ohio St. 213.

4. Actions Involving Title to Real Property[15] — a. In General. It is a rule of almost universal application that justices of the peace have no jurisdiction of actions in which the title to real property is involved,[16] and hence they have no

An action against a street-car company for injuries caused by the negligence of the car driver, whereby the car was overturned, is not an action for an assault and battery, within Code Civ. Proc. § 2863, which provides that justices of the peace shall not have jurisdiction of such actions, but is an action for "a personal injury," and is within the jurisdiction of a justice under section 2862. Kaliski *v.* Pelham Park R. Co., *supra.*

An action for damages for alienating the affections of plaintiff's husband by false, slanderous, and malicious reports, whether regarded as an action for slander, or for seduction, or for other "personal injury," within the definition of that term by Code Civ. Proc. § 3343, subd. 9, which includes any "actionable injury to the person either of the plaintiff or another," is not within the jurisdiction of a justice of the peace under section 2863, subd. 3. Wilson *v.* McGregor, 58 Hun (N. Y.) 607, 12 N. Y. Suppl. 39, 20 N. Y. Civ. Proc. 36.

15. See, generally, Real Actions, and Cross-References Thereunder.

16. *Alabama.*— Webb *v.* Carlisle, 65 Ala. 313; McDaniel *v.* Moody, 3 Stew. 314.

Arkansas.— Halpern *v.* Burgess, (1890) 13 S. W. 763; Cunningham *v.* Holland, 40 Ark. 556.

California.— King *v.* Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10; Hart *v.* Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 633.

Colorado.— Klopfer *v.* Keller, 1 Colo. 410. See also Smith *v.* Schlink, 6 Colo. App. 228, 40 Pac. 478.

Connecticut.— Lay *v.* King, 5 Day 72; French *v.* Potter, 2 Root 359; Bundy *v.* Sabin, 2 Root 54.

Delaware.— Legates *v.* Lingo, 8 Houst. 154, 32 Atl. 80; Hawkins *v.* Mendenhall, 3 Houst. 216.

Georgia.— Dougherty *v.* Marsh, 11 Ga. 277.

Indiana.— Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271; Smith *v.* Harris, 3 Blackf. 416; Parker *v.* Bussell, 3 Blackf. 411; Deane *v.* Robinson, 34 Ind. App. 468, 73 N. E. 169.

Iowa.— Delzell *v.* Burlington, etc., R. Co., 89 Iowa 208, 56 N. W. 433.

Kansas.— Douglass *v.* Easter, 32 Kan. 496, 4 Pac. 1034; Burt *v.* Reyburn, McCahon 97.

Maine.— Low *v.* Ross, 3 Me. 256.

Maryland.— Cole *v.* Hynes, 46 Md. 181; Randle *v.* Sutton, 43 Md. 64. But *compare* Deitrich *v.* Swartz, 41 Md. 196, where it was held that the rule did not apply to an action of replevin to recover logs cut on land, since Code, art. 51, §§ 13, 16, expressly confers such jurisdiction where the amount involved is under fifty dollars.

Massachusetts.— Kelley *v.* Taylor, 17 Pick. 218; Blood *v.* Kemp, 4 Pick. 169; Strout *v.* Berry, 7 Mass. 385; Spear *v.* Bicknell, 5 Mass. 125.

Michigan.— Orris *v.* Kempton, 105 Mich. 229, 63 N. W. 68; Brooks *v.* Delrymple, 1 Mich. 145; Stout *v.* Keyes, 2 Dougl. 184, 43 Am. Dec. 465. See also Reynolds *v.* Maynard, (1904) 100 N. W. 174.

Minnesota.— Tordsen *v.* Gummer, 37 Minn. 211, 34 N. W. 20.

Mississippi.— See Smith *v.* Newlon, 62 Miss. 230.

Missouri.— Bredwell *v.* Loan, etc., Co., 76 Mo. 321; Seeser *v.* Southwick, 66 Mo. App. 667; State *v.* Ganzhorn, 56 Mo. App. 519, 52 Mo. App. 220.

Nebraska.— Dold *v.* Knudsen, (1903) 97 N. W. 482; Galligher *v.* Connell, 23 Nebr. 391, 36 N. W. 566.

New Hampshire.— Bartlett *v.* Prescott, 41 N. H. 493; Morse *v.* Davis, 24 N. H. 159; Flagg *v.* Gotham, 7 N. H. 266.

New Jersey.— Bloom *v.* Stenner, 50 N. J. L. 59, 11 Atl. 131; Hillman *v.* Stanger, 49 N. J. L. 191, 6 Atl. 434; Urian *v.* Dunn, 47 N. J. L. 565, 4 Atl. 650; Edgar *v.* Anness, 47 N. J. L. 465, 2 Atl. 246; Vanatta *v.* Jones, 42 N. J. L. 561; Messler *v.* Fleming, 41 N. J. L. 108; Osborne *v.* Butcher, 28 N. J. L. 308; Dixon *v.* Scott, 18 N. J. L. 430; Randolph *v.* Montfort, 16 N. J. L. 226; Gregory *v.* Kanouse, 11 N. J. L. 62; Blackwell *v.* Leslie, 4 N. J. L. 112; Van Mater *v.* Rial, 3 N. J. L. 472; Ming *v.* Compton, 2 N. J. L. 345; Bispham *v.* Inskeep, 1 N. J. L. 231; Harvey *v.* Drummond, 1 N. J. L. 217; Smith *v.* Layton, 1 N. J. L. 177.

New York.— Alleman *v.* Dey, 49 Barb. 641; Fredonia, etc., Plank Road Co. *v.* Wait, 27 Barb. 214; Main *v.* Cooper, 26 Barb. 468 [*affirmed* in 25 N. Y. 180]; McMahon *v.* Howe, 40 Misc. 546, 82 N. Y. Suppl. 984; Little *v.* Denn, 34 How. Pr. 68; Randall *v.* Crandall, 6 Hill 342; Willoughby *v.* Jenks, 20 Wend. 96; Whiting *v.* Dudley, 19 Wend. 373; Striker *v.* Mott, 6 Wend. 465; People *v.* Onondaga C. Pl., 2 Wend. 263.

North Carolina.— Campbell *v.* Potts, 119 N. C. 530, 26 S. E. 50; Wright *v.* Harris, 116 N. C. 460, 21 S. E. 693; Edwards *v.* Cowper, 99 N. C. 421, 6 S. E. 792; Davis *v.* Davis, 83 N. C. 71.

North Dakota.— Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

Ohio.— Crafts *v.* Prior, 51 Ohio St. 21, 36 N. E. 1070; Bowers *v.* Pomeroy, 21 Ohio St. 184; Bridgmans *v.* Wells, 13 Ohio 43; Erie R. Co. *v.* Furry, 18 Ohio Cir. Ct. 880, 9 Ohio Cir. Dec. 850; Schaupp *v.* Jones, 10 Ohio S. & C. Pl. Dec. 597, 8 Ohio N. P. 151.

Oregon.— Malarkey *v.* O'Leary, 34 Oreg. 493, 56 Pac. 521; Sweek *v.* Galbreath, 11 Oreg. 516, 6 Pac. 220.

Pennsylvania.— Rhoades *v.* Patrick, 27 Pa. St. 323; Helfenstein *v.* Hurst, 15 Pa. St. 358; Sechrist *v.* Connellee, 3 Penr. & W. 388; Garrett *v.* Henry, 24 Pa. Co. Ct. 523; Snyder *v.* Moyer, 22 Pa. Co. Ct. 409; Hunsicker *v.* Miller, 14 Pa. Co. Ct. 261; Toney *v.* Hough-

jurisdiction of actions for breach of covenants of title,[17] or for flowage,[18] nor to decide a question of right of way.[19] But in order to oust the jurisdiction of a justice of the peace the question of title must be directly and necessarily involved.[20]

ton, 10 Kulp 464; Baylor *v.* Tiffany, 21 Lanc. L. Rev. 54; Stevens *v.* Sarver, 29 Leg. Int. 46.

Rhode Island.— Carroll *v.* Rigney, 15 R. I. 81, 23 Atl. 46.

Vermont.— Heath *v.* Robinson, 75 Vt. 133, 53 Atl. 995; Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943; French *v.* Holt, 57 Vt. 187, 51 Vt. 544; Flannery *v.* Hinkson, 40 Vt. 485; Jakeway *v.* Barrett, 38 Vt. 316; Thayer *v.* Montgomery, 26 Vt. 491; Haven *v.* Needham, 20 Vt. 183; Whitman *v.* Pownal, 19 Vt. 223; Whitney *v.* Bowen, 11 Vt. 250.

Virginia.— Warwick *v.* Mayo, 15 Gratt. 528.

West Virginia.— Belcher *v.* Gaston, 4 W. Va. 639.

Wisconsin.— Huddleston *v.* Johnson, 71 Wis. 336, 37 N. W. 407; Lowitz *v.* Leverentz, 57 Wis. 596, 15 N. W. 805; Ashbough *v.* Walter, 24 Wis. 466; Barteau *v.* Appleton, 23 Wis. 414; Manny *v.* Smith, 10 Wis. 509. *Compare* Savage *v.* Carney, 8 Wis. 162.

United States.— Langford *v.* Monteith, 102 U. S. 145, 26 L. ed. 53.

Canada.— Reg. *v.* Harshman, 14 N. Brunsw. 346; Sloan *v.* Davis, 7 N. Brunsw. 593; Colwell *v.* Purdy, (Trin. T. [1831] Stevens N. Brunsw. Dig. 471).

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 83, 86.

Malicious mischief.— In Nevada justices have jurisdiction of actions for malicious injury to real estate, where defendant claims an adverse title to the property. State *v.* Rising, 10 Nev. 97.

Conclusiveness of finding.— Where an action brought before a justice of the peace is dismissed on the ground that the title to real estate is in controversy, defendant cannot upon suit begun in the superior court, deny that the title to real estate is in controversy. Peck *v.* Culberson, 104 N. C. 425, 10 S. E. 511, where the action begun in the justice's court was dismissed by the superior court on appeal.

17. *Massachusetts.*— Bickford *v.* Page, 2 Mass. 455, 462 note.

Missouri.— Hillhouse *v.* Houts, (1886) 1 S. W. 752 [*reaffirming* Patterson *v.* Yancy, 81 Mo. 379; Bredwell *v.* Loan, etc., Co., 76 Mo. 321]; Coleman *v.* Clark, 80 Mo. App. 339; Birks *v.* Russell, 1 Mo. App. 335.

Nebraska.— Holmes *v.* Seaman, (1904) 101 N. W. 1030 [*modifying* on rehearing 100 N. W. 417].

Ohio.— Van Dyke *v.* Rule, 49 Ohio St. 530, 31 N. E. 882.

Pennsylvania.— Martin *v.* Ingersoll, 1 Just. L. Rep. 227.

See 31 Cent. Dig. tit. "Justices of the Peace," § 93.

Compare Flannery *v.* Hinkson, 40 Vt. 485, where it is said that in order to oust the jurisdiction the allegation of the breach of the covenant must tender an issue of title.

18. Vantyl *v.* Marsh, 5 N. J. L. 507; Coles *v.* Reiger, 2 Ohio Cir. Ct. 50, 1 Ohio Cir. Dec. 355; Burlington, etc., R. Co. *v.* Brush, 57 Vt. 472; Haven *v.* Needham, 20 Vt. 183. *Compare* Ryan *v.* Harrigan, 9 Hun (N. Y.) 520.

19. *Massachusetts.*— Strout *v.* Berry, 7 Mass. 385; Spear *v.* Bicknell, 5 Mass. 125.

New Hampshire.— Bartlett *v.* Prescott, 41 N. H. 493.

New Jersey.— Osborne *v.* Butcher, 26 N. J. L. 308; Randolph *v.* Montfort, 16 N. J. L. 226. But see Yawger *v.* Manning, 30 N. J. L. 182; Chambers *v.* Wambough, 28 N. J. L. 530, to the effect that a plea of public highway does not raise a question of title.

New York.— Alleman *v.* Dey, 49 Barb. 641; Little *v.* Denn, 34 How. Pr. 68; Randall *v.* Crandall, 6 Hill 342 [*citing* Saunders *v.* Wilson, 15 Wend. 338; Striker *v.* Mott, 6 Wend. 465].

Vermont.—Whitman *v.* Pownal, 19 Vt. 223.

Wisconsin.— Lowitz *v.* Leverentz, 57 Wis. 596, 15 N. W. 842.

See 31 Cent. Dig. tit. "Justices of the Peace," § 83.

20. *Arkansas.*— Jansen *v.* Strayhorn, 59 Ark. 330, 27 S. W. 230; Quertermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096; Benton *v.* Marshall, 47 Ark. 241, 1 S. W. 201; Mason *v.* Delancy, 44 Ark. 444; Bramble *v.* Beidler, 38 Ark. 200.

California.— Schroeder *v.* Wittram, 66 Cal. 636, 6 Pac. 737. See also Pollock *v.* Cummings, 38 Cal. 683 [*explaining* Holman *v.* Taylor, 31 Cal. 338].

Colorado.—Vaughn *v.* Grigsby, 8 Colo. App. 373, 46 Pac. 624.

Georgia.— Moore *v.* O'Barr, 87 Ga. 205, 13 S. E. 464.

Indiana.— Deacon *v.* Powers, 57 Ind. 489; Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53; Rogers *v.* Perdue, 7 Blackf. 302.

Michigan.— Hart *v.* Hart, 48 Mich. 175, 12 N. W. 33.

Minnesota.— Radley *v.* O'Leary, 36 Minn. 173, 30 N. W. 459; Goenen *v.* Schroeder, 8 Minn. 387.

Mississippi.— Smith *v.* Newlon, 62 Miss. 230.

Missouri.— Woodson *v.* Hubbard, 45 Mo. App. 359.

Nebraska.— Lipp *v.* Hunt, 25 Nebr. 91, 41 N. W. 143; Smith *v.* Kaiser, 17 Nebr. 184, 22 N. W. 368; Pettit *v.* Black, 13 Nebr. 142, 12 N. W. 841.

New Jersey.—Garcin *v.* Roberts, 69 N. J. L. 572, 55 Atl. 43; Watson *v.* Idler, 54 N. J. L. 467, 24 Atl. 554. See also Gregory *v.* Kanouse, 11 N. J. L. 62.

New York.— Main *v.* Cooper, 25 N. Y. 184; Bowyer *v.* Schofield, 1 Abb. Dec. 177, 2 Keyes

In an action of trespass to land the jurisdiction of a justice extends no further than to a trial of the fact of possession, and he cannot inquire into the title to

628; Nichols *v.* Bain, 42 Barb. 353, 27 How. Pr. 286; Fredonia, etc., Plank Road Co. *v.* Wait, 27 Barb. 214; Bellows *v.* Sackett, 15 Barb. 96; Nixon *v.* Jenkins, 1 Hilt. 318; Hastings *v.* Glenn, 1 E. D. Smith 402; Ehle *v.* Quackenboss, 6 Hill 537; Storms *v.* Snyder, 10 Johns. 109. And see Van Deventer *v.* Foster, 87 N. Y. App. Div. 62, 83 N. Y. Suppl. 1067, holding that the fact that a question of title to real estate may be raised collaterally in a summary proceeding for possession does not oust the jurisdiction of the municipal court.

North Carolina.— Pasterfield *v.* Sawyer, 133 N. C. 42, 45 S. E. 524; Durham *v.* Wilson, 104 N. C. 595, 10 S. E. 683.

Pennsylvania.—Wilmer *v.* Warfel, 19 Lanc. L. Rev. 388. See also Fulton County *v.* Tate, 47 Pa. St. 532.

Texas.— Crawford *v.* Sandridge, 75 Tex. 383, 12 S. W. 853.

Vermont.— Dano *v.* Sessions, 63 Vt. 405, 21 Atl. 922; Judevine *v.* Holton, 41 Vt. 351; Whitman *v.* Pownal, 19 Vt. 223.

Wisconsin.— Ohse *v.* Bruss, 45 Wis. 442; Coffee *v.* Chippewa Falls, 36 Wis. 121; Stoppenbach *v.* Zohrlaut, 21 Wis. 385; Miles *v.* Chamberlain, 17 Wis. 446; Watry *v.* Hiltgen, 16 Wis. 516.

Contra.— In Pennsylvania a justice is ousted of jurisdiction if the title to land may be involved. Heritage *v.* Wilfong, 58 Pa. St. 137; Doud *v.* Truby, 2 Grant (Pa.) 37; Goddard *v.* McKean, 6 Watts (Pa.) 337; Camp *v.* Walker, 5 Watts (Pa.) 482; Hunsicker *v.* Miller, 5 Pa. Dist. 107, 14 Pa. Co. Ct. 261; Shober *v.* Henry, 4 Pa. Dist. 505; Packer *v.* Taylor, 2 Pa. Dist. 443, 12 Pa. Co. Ct. 521; Gruber *v.* Sheetz, 2 Woodw. (Pa.) 63.

See 31 Cent. Dig. tit. "Justices of the Peace," § 97.

Where the title to the land is admitted, as by demurrer to a declaration alleging it, the justice has jurisdiction. Stout *v.* Keyes, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465. See also Delzell *v.* Burlington, etc., R. Co., 89 Iowa 208, 56 N. W. 433; Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726; Stoppenbach *v.* Zohrlaut, 21 Wis. 385.

Test of whether title involved.— "Whether the title to land is concerned depends upon the declaration, — that is, whether to prove its allegations will require plaintiff to prove title to land, — and does not depend upon the plea, nor the course of trial." Heath *v.* Robinson, 75 Vt. 133, 134, 53 Atl. 995. See also Reynolds *v.* Maynard, (Mich. 1904) 100 N. W. 174; Dano *v.* Sessions, 63 Vt. 405, 21 Atl. 922. "Where the plaintiff, in order to sustain his case, is compelled, in the first instance, to prove certain facts, or to disprove them, and those facts, or either of them, is title to lands or tenements, the jurisdiction of a justice of the peace is excluded, except in trespass; but, where it is unnecessary for the plaintiff to introduce such proof the defendant can not, by its introduction, take away the jurisdiction." Bridgmans *v.* Wells, 13 Ohio 43, 46 [*adopted* in Bowers *v.* Pomeroy, 21 Ohio St. 184].

A mere issue of title made by the pleadings is not of itself sufficient, under the statute, to oust the court of jurisdiction. It must appear from the evidence offered or given on the trial, that the title to land is in fact in question, and is disputed by the other party. An issue of title may be made by the answer, and afterward waived, and no evidence offered or given upon the subject whatever. In such case the question of title could not in any sense come in issue, or be determined by the justice. Malarkey *v.* O'Leary, 34 Oreg. 493, 56 Pac. 521.

Incidental proof of title.— In all cases where deeds or paper evidences of title to real estate are introduced before a justice of the peace, he is entitled to consider the purpose for which they are introduced. If they are merely introduced incidentally to establish some collateral fact not involving any title to or interest in lands, he is to receive them like other evidence. Main *v.* Cooper, 25 N. Y. 180 [*followed* in Nichols *v.* Bain, 42 Barb. 353, 27 How. Pr. 286]. See also Lorins *v.* Abbott, 49 Nebr. 214, 68 N. W. 486 [*citing* Galligher *v.* Connell, 23 Nebr. 391, 36 N. W. 566]. "A party may for the purpose of identifying and proving title to personal property, show that it was taken from off certain lands and that he was the owner thereof, but this does not bring the matter of title to lands in question. It would not follow in such a case that any controversy whatever would arise concerning the title to the land, or that as between the parties the jury would have to pass upon a question of conflicting titles." Hart *v.* Hart, 48 Mich. 175, 176, 12 N. W. 33.

Fraudulent conveyances.— In Mississippi it was held not unconstitutional for the legislature to confer upon justices of the peace jurisdiction to try and determine the issue whether a conveyance is fraudulent as to creditors. Smith *v.* Newlon, 62 Miss. 230.

An issue whether land is exempt from levy and sale under an execution as a homestead does not bring the title of the land in question. Moore *v.* O'Barr, 87 Ga. 205, 13 S. E. 464.

Replevin for a deed will not be dismissed as involving title to real estate, where there is no evidence that the deed was held as an escrow, but merely that it was deposited on bailment *depositum*. Pasterfield *v.* Sawyer, 133 N. C. 42, 45 S. E. 524.

Establishment of plaintiff's title by defendant.— In an action for disturbing a right of way, defendant having established plaintiff's title by his own evidence, and having answered by a general denial, the title to real estate cannot be said to come in question, so as to oust a justice's court of jurisdiction. Hastings *v.* Glenn, 1 E. D. Smith (N. Y.) 402.

land; and if the possession is constructive merely, and can only be shown by production of title, the justice has no jurisdiction.[21]

b. Actions on Land Contracts and Leases[22]— (i) *In General.* Justices of the peace have no jurisdiction of real contracts, or those to which the title to land is drawn in question,[23] but where it is unnecessary for the plaintiff in the first instance to introduce proof of title in order to make out his cause of action they may have jurisdiction.[24] Thus in case of a sale of land a justice may have jurisdiction of an action by the vendor to recover purchase-money due[25] or by the vendee to recover back purchase-money paid.[26]

An action on a covenant against encumbrances or for quiet enjoyment does not necessarily involve the title to realty. Holmes *v.* Seaman, (Nebr. 1904) 100 N. W. 417; Dafoe *v.* Keplinger, (Nebr. 1901) 95 N. W. 674; Campbell *v.* McClure, 45 Nebr. 608, 63 N. W. 920. *Contra,* Hastings *v.* Webber, 2 Vt. 407.

The question of title must be one between the original parties; and jurisdiction once acquired cannot be divested by the intervention of a stranger to the suit, asserting a paramount title in himself. Davis *v.* Davis, 83 N. C. 71.

21. *Colorado.*— Smith *v.* Schlink, 6 Colo. App. 288, 40 Pac. 478.

Illinois.— Pitts *v.* Looby, 142 Ill. 534, 32 N. E. 519 [*affirming* 46 Ill. App. 54].

Indiana.— Melloh *v.* Demott, 79 Ind. 502; Beach *v.* Livergood, 15 Ind. 496.

Kansas.—Loring *v.* Rockwood, 13 Kan. 178.

Massachusetts.— Wood *v.* Prescott, 2 Mass. 174.

Michigan.— Dolahanty *v.* Lucey, 101 Mich. 113, 59 N. W. 415 [*following* Newcombe *v.* Irwin, 55 Mich. 620, 22 N. W. 66]; Ostrom *v.* Potter, 71 Mich. 44, 38 N. W. 670.

Nebraska.— Dold *v.* Knudsen, (1903) 97 N. W. 482.

New Jersey.— Ely *v.* Schanck, 52 N. J. L. 119, 18 Atl. 692 [*affirmed* in 52 N. J. L. 559, 21 Atl. 783]; Bloom *v.* Stenner, 50 N. J. L. 59, 11 Atl. 131; Jeffrey *v.* Owen, 41 N. J. L. 260; Messler *v.* Fleming, 41 N. J. L. 108; Dickerson *v.* Wadsworth, 33 N. J. L. 108; Osborne *v.* Butcher, 26 N. J. L. 308; Campfield *v.* Johnson, 21 N. J. L. 83; Hill *v.* Carter, 16 N. J. L. 87; Gregory *v.* Kanouse, 11 N. J. L. 62.

New York.— Doolittle *v.* Eddy, 7 Barb. 74.

Oregon.— Sweek *v.* Galbreath, (1885) 5 Pac. 749.

Vermont.— Heath *v.* Robinson, 75 Vt. 133, 53 Atl. 995; French *v.* Freeman, 43 Vt. 93.

Wisconsin.— Boos *v.* Gomber, 24 Wis. 499; Verbeck *v.* Verbeck, 6 Wis. 159.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 85, 86.

22. Actions an land contracts generally see VENDOR AND PURCHASER.

Actions on leases generally see LANDLORD AND TENANT, VIII, B, 4, *post, p.* ——.

23. Crafts *v.* Prior, 51 Ohio St. 21, 36 N. E. 1070; Blackburn *v.* Sewell, 6 Ohio Dec. (Reprint) 967, 9 Am. L. Rec. 303; McNickle *v.* Hickox, 4 Ohio Dec. (Reprint) 240, 1 Clev. L. Rep. 149.

"A contract for real estate" is an agreement to sell or convey an interest, title, or estate in lands, and is not an agreement for something to be done upon lands, or for rent therefor. Duff *v.* Morrison, 44 Kan. 562, 24 Pac. 1105.

24. Bridgmans *v.* Wells, 13 Ohio 43. See also Quertermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096; Bramble *v.* Beidler, 38 Ark. 200; Duff *v.* Morrison, 44 Kan. 562, 24 Pac. 1105; Campbell *v.* McClure, 45 Nebr. 608, 63 N. W. 920; Mushrush *v.* Deveraux, 20 Nebr. 49, 28 N. W. 847; English *v.* Brooks, 4 Ohio Dec. (Reprint) 120, 1 Clev. L. Rep. 43; McFadgen *v.* Eisensmidt, 10 Humphr. (Tenn.) 567.

Question of sale or lease.— The status of the parties, not the title, is involved in a question whether a certain contract affecting lands is one of sale or lease. Quertermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096.

25. Quertermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096; Bramble *v.* Beidler, 38 Ark. 200; Lorius *v.* Abbott, 49 Nebr. 214, 68 N. W. 486; McFadgen *v.* Eisensmidt, 10 Humphr. (Tenn.) 567. But see Crafts *v.* Prior, 51 Ohio St. 21, 36 N. E. 1070; McNickle *v.* Hickox, 4 Ohio Dec. (Reprint) 240, 1 Clev. L. Rep. 149; Carlile *v.* Cain, 9 Ohio S. & C. Pl. Dec. 464.

In order to oust a justice of jurisdiction of an action for the purchase-money for land, it must appear affirmatively on the face of the proceedings that defendant has not accepted a deed to the property and that the contract is still executory. If the contract has been executed, he has jurisdiction. Cole *v.* Hynes, 46 Md. 181. See also Green *v.* Sewell, 8 Ohio Dec. (Reprint) 69, 5 Cinc. L. Bul. 440.

An action by the indorsee of a promissory note given in part payment for land may be brought before a justice, since the title cannot come in question. *Aliter* if suit is brought by the payee, since then the consideration can be inquired into. Camp *v.* Walker, 5 Watts (Pa.) 482; Hunsicker *v.* Miller, 5 Pa. Dist. 107; Packer *v.* Taylor, 2 Pa. Dist. 443, 12 Pa. Co. Ct. 521.

A contract for the produce of land does not concern realty, and therefore an action for the purchase-price of coal or stone is within a justice's jurisdiction. Rhoades *v.* Patrick, 27 Pa. St. 323 [*distinguishing* Goddard *v.* McKean, 6 Watts (Pa.) 337, which was an action on a note given for the sale of an easement].

26. Benton *v.* Marshall, 47 Ark. 241, 1

(II) *Actions For Rent*[27] *or Use and Occupation.*[28] Where the relation of landlord and tenant is established, a justice of the peace has jurisdiction of an action for rent, since the tenant is estopped to deny his landlord's title.[29] But in an action for use and occupation, where there is no express promise to pay rent, a justice of the peace is ousted of jurisdiction if the title to the land comes in question.[30]

c. Actions to Recover Possession of Realty.[31] Justices of the peace are very generally given jurisdiction of actions for the recovery of the possession of realty,[32]

S. W. 201; Schroeder *v.* Wittram, 66 Cal. 636, 6 Pac. 737; Herrick *v.* Newell, 49 Minn. 198, 51 N. W. 819; Adams *v.* Ellis, 86 Mo. App. 343. But see Blackburn *v.* Sewell, 6 Ohio Dec. (Reprint) 967, 9 Am. L. Rec. 303; Campbell *v.* Gallagher, 2 Watts (Pa.) 135.

27. Actions for rent generally see Landlord and Tenant, *post.*

28. Actions for use and occupation generally see Use and Occupation.

29. *Arkansas.*— Jordan *v.* Henderson, 37 Ark. 120; Nolen *v.* Royston, 36 Ark. 561; Matthews *v.* Morris, 31 Ark. 222; Thruston *v.* Hinds, 8 Ark. 118.

California.— Ghiradelli *v.* Greene, 56 Cal. 629.

Maine.— Hatch *v.* Allen, 27 Me. 85.

Maryland.— Randle *v.* Sutton, 43 Md. 64.

Missouri.— Topping *v.* Davis, 67 Mo. App. 510.

Nebraska.— Phoenix Ins. Co. *v.* Hoyt, (1902) 91 N. W. 186.

North Carolina.— Deloatch *v.* Coman, 90 N. C. 186; Durant *v.* Taylor, 89 N. C. 351.

Pennsylvania.— Louer *v.* Hummel, 21 Pa. St. 450; Reckless *v.* Charnley, 2 Chest. Co. Rep. 207. But *compare* Jacobs *v.* Haney, 18 Pa. St. 240; Williams *v.* Smith, 3 Pa. L. J. Rep. 22.

Texas.— Johnson *v.* Doss, 1 Tex. App. Civ. Cas. § 1075.

Vermont.— Clough *v.* Horton, 42 Vt. 10.

See 31 Cent. Dig. tit. "Justices of the Peace," § 89; and Landlord and Tenant, *post.*

Devolution of title.— Plaintiff in an action for rent may prove that he was the purchaser of the demised premises from the person whom defendant claims is his landlord. Johnson *v.* Doss, 1 Tex. App. Civ. Cas. § 1075. See also Louer *v.* Hummel, 21 Pa. St. 450.

Where the relation of landlord and tenant has ceased to exist, the tenant may assert title in himself, and thus oust the jurisdiction of a justice of the peace. Van Etten *v.* Van Etten, 69 Hun (N. Y.) 499, 23 N. Y. Suppl. 711.

The termination of the landlord's title since the commencement of the tenancy may be shown by the tenant in an action for rent. Lane *v.* Young, 66 Hun (N. Y.) 563, 21 N. Y. Suppl. 838.

A claim to a rent charge arising out of a perpetual lease in fee is a claim of such an interest in real estate as essentially to affect defendant's interest in his land; and an action designed to enforce, adjudicate, and establish such claim forever is one where the title to real property comes in question so as to oust the jurisdiction of a justice of the peace. Main *v.* Cooper, 25 N. Y. 180 [*affirming* 26 Barb. 468].

30. Thruston *v.* Hinds, 8 Ark. 118; Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285. *Compare* Clough *v.* Horton, 42 Vt. 10, in which there was a promise to pay for use and occupation, and it was held that the justice had jurisdiction.

31. See, generally, Ejectment; Forcible Entry and Detainer; Real Actions; Trespass to Try Title.

32. *Alabama.*— Cobb *v.* Garner, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; Welden *v.* Schlosser, 74 Ala. 355; Beck *v.* Glenn, 69 Ala. 121; Dunham *v.* Carter, 2 Stew. 496.

California.— Ivory *v.* Brown, 137 Cal. 603, 70 Pac. 657; Conner *v.* Jones, 28 Cal. 59; O'Callaghan *v.* Booth, 6 Cal. 63.

Colorado.— Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411; Kelley *v.* Andrew, 3 Colo. App. 122, 32 Pac. 175.

Dakota.— Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

Illinois.— Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Ginn *v.* Rogers, 9 Ill. 131.

Indiana.— Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271. *Compare* Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132, where it was held that a justice has jurisdiction in cases of forcible entry and detainer, and forcible detainer, but not of an action "for possession" of land.

Iowa.— Jordan *v.* Walker, 56 Iowa 686, 10 N. W. 232; Wright *v.* Phillips, 2 Greene 191.

Michigan.— The right of action before a justice to recover possession against one holding over after sale of land on execution is expressly given by statute; and neither a plea of title nor an attempt to impeach the proceedings by which plaintiff acquired title will oust the jurisdiction of the justice. Grand Rapids Nat. Bank *v.* Kritzer, 116 Mich. 688, 75 N. W. 90 [*citing* Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 35; Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342; Stevens *v.* Hulin, 53 Mich. 93, 18 N. W. 569].

Mississippi.— Ragan *v.* Harrell, 52 Miss. 818.

Missouri.— Bell *v.* Cowan, 34 Mo. 251; Beeler *v.* Cardwell, 33 Mo. 84; Gibson *v.* Tong, 29 Mo. 133; Spalding *v.* Mayhall, 27 Mo. 377; Stone *v.* Malot, 7 Mo. 158; Graham *v.* Conway, 91 Mo. App. 391; Pierce *v.* Rollins, 60 Mo. App. 497; Gooch *v.* Hollan, 30 Mo. App. 450; Craig *v.* Donnelly, 28 Mo. App. 342.

Montana.— Sheehy *v.* Flaherty, 8 Mont.

and in some states it is held that the title not only does not but cannot come into question in such actions so as to oust their jurisdiction.[33] But in other states the title may be involved, and where it does actually come into question the jurisdiction of a justice of the peace is ousted.[34] Possessory actions between landlord and

365, 20 Pac. 687; Boardman *v.* Thompson, 3 Mont. 387; Parks *v.* Barkley, 1 Mont. 514.

Nebraska.— Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401.

New York.— Rathbone *v.* McConnell, 20 Barb. 311 [*affirmed* in 21 N. Y. 466]; Taylor *v.* Wright, 24 Misc. 205, 53 N. Y. Suppl. 423, 28 N. Y. Civ. Proc. 108; *In re* White, 12 Abb. N. Cas. 348; Ehle *v.* Quackenboss, 6 Hill 537.

North Carolina.— The jurisdiction of a justice is confined to possessory actions between landlords and tenants. Smith *v.* Garris, 131 N. C. 34, 42 S. E. 445; McDonald *v.* Ingram, 124 N. C. 272, 32 S. E. 677; Wright *v.* Harris, 116 N. C. 460, 21 S. E. 693; Boone *v.* Drake, 109 N. C. 79, 13 S. E. 724; Perry *v.* Shepherd, 78 N. C. 83; Atlantic, etc., R. Co. *v.* Johnston, 70 N. C. 348. And see *infra*, note 35.

Ohio.— Brown *v.* Burdick, 25 Ohio St. 260.

Oklahoma.— McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487.

Oregon.— Duffey *v.* Mix, 24 Oreg. 265, 33 Pac. 807.

Pennsylvania.— The act of June 16, 1836, provides for recovery before a justice of possession of property sold on execution, as against persons in possession under defendant in execution, "by title derived from him subsequently to the judgment upon which the property was sold." Ferriday *v.* Reinbold, 8 Pa. Dist. 637, 7 Del. Co. 494, 7 North. Co. Rep. 82; Worman *v.* McCloskey, 1 Chest. Co. Rep. 32. See also O'Neil *v.* Soles, 3 Pa. Co. Ct. 172. *Compare* Kachel *v.* Moyer, 11 Pa. Dist. 291.

South Carolina.— State *v.* Huntington, 3 Brev. 111.

South Dakota.— Browne *v.* Haseltine, 9 S. D. 524, 70 N. W. 648.

Texas.— Smith *v.* Ryan, 20 Tex. 661; Renfro *v.* Harris, 28 Tex. Civ. App. 58, 66 S. W. 460.

Wisconsin.— Platteville *v.* Bell, 66 Wis. 326, 28 N. W. 404; Gates *v.* Winslow, 1 Wis. 650.

Wyoming.— Jenkins *v.* Jeffrey, 3 Wyo. 669, 29 Pac. 186.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 90, 91; and FORCIBLE ENTRY AND DETAINER.

Contra.— Music *v.* Barber, 99 Ga. 799, 27 S. E. 164; *Ex p.* Putnam, T. U. P. Charlt. (Ga.) 76; Strozzi *v.* Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832.

Statutes conferring jurisdiction of proceedings in unlawful detainer constitutional.— Beck *v.* Glenn, 69 Ala. 121; Credle *v.* Gibbs, 65 N. C. 192.

33. *Indiana.*— Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271.

Missouri.— In all actions under the forcible entry and detainer statute only the right to the possession can be inquired into. The fact that defendant pleads title in himself does not oust the justice of jurisdiction. Graham *v.* Conway, 91 Mo. App. 391 [*citing* Bell *v.* Cowan, 34 Mo. 251; Beeler *v.* Cardwell, 33 Mo. 84; Gibson *v.* Tong, 29 Mo. 133; Spalding *v.* Mayhall, 27 Mo. 377; Stone *v.* Malot, 7 Mo. 158; Pierce *v.* Rollins, 60 Mo. App. 497; Gooch *v.* Hollan, 30 Mo. App. 450; Craig *v.* Donnelly, 28 Mo. App. 342].

Montana.— Sheehy *v.* Flaherty, 8 Mont. 365, 20 Pac. 687 [*citing* Boardman *v.* Thompson, 3 Mont. 387; Parks *v.* Barkley, 1 Mont. 514].

New York.— Taylor *v.* Wright, 24 Misc. 205, 53 N. Y. Suppl. 423, 28 N. Y. Civ. Proc. 108 [*citing* Rathbone *v.* McConnell, 20 Barb. 311 (*affirmed* in 21 N. Y. 466); Ehle *v.* Quackenboss, 6 Hill 537]; *In re* White, 12 Abb. N. Cas. 348. See also Van Deventer *v.* Foster, 87 N. Y. App. Div. 62, 83 N. Y. Suppl. 1067; People *v.* Goldfogle, 23 N. Y. Civ. Proc. 417, 30 N. Y. Suppl. 296.

Oklahoma.— McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487, holding that the action of forcible entry and detainer is purely a possessory action, and the question of title or boundaries cannot properly arise or be tried in such a proceeding. But *compare* Smith *v.* Kirchner, 7 Okla. 166, 54 Pac. 439, holding that a justice had no jurisdiction of an action of forcible entry and detainer, brought by the vendor of real estate against a purchaser to whom he had made a contract for the sale of the land, and whom he had put in possession, and who had made default in the payment of the purchase-price.

Texas.— Smith *v.* Ryan, 20 Tex. 661; Renfro *v.* Harris, 28 Tex. Civ. App. 58, 66 S. W. 460, 795.

Wisconsin.— Gates *v.* Winslow, 1 Wis. 650.

Wyoming.— Jenkins *v.* Jeffrey, 3 Wyo. 669, 29 Pac. 186.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 90, 91.

Extent of inquiry into title.— The question of title may be an incident to or evidence of the right of possession, and in the trial of a forcible entry and detainer cause the title may be inquired into sufficiently to determine the right of possession, and for such purpose only. McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487. See also Brown *v.* Burdick, 25 Ohio St. 260.

34. *Dakota.*— Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

Iowa.— Jordan *v.* Walker, 56 Iowa 686, 10 N. W. 232.

North Dakota.— Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

Ohio.— Bridwell *v.* Barcroft, 2 Ohio Dec. (Reprint) 697, 4 West. L. Month. 617.

Oklahoma.— Smith *v.* Kirchner, 7 Okla.

tenant are as a rule within the jurisdiction of justices of the peace, since a tenant is estopped to deny his landlord's title so long as the relation of landlord and tenant exists between them.[35]

166, 54 Pac. 439. But see McDonald *v.* Stiles, 7 Okl. 327, 54 Pac. 487.

West Virginia.— Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939; Hughes *v.* Mount, 23 W. Va. 130.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 90, 91.

An unnecessary allegation of ownership in the complaint, which is not denied in the answer, will not oust the justice of jurisdiction. Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038; Chicago, etc., R. Co. *v.* Nield, 16 S. D. 370, 92 N. W. 1069.

A mere averment that title is involved does not oust jurisdiction, and the justice may proceed until it is clear from the evidence that such is the fact. Green *v.* Morse, 57 Nebr. 391, 77 N. W. 925, 73 Am. St. Rep. 518; Lipp *v.* Hunt, 25 Nebr. 91, 41 N. W. 143; Smith *v.* Kaiser, 17 Nebr. 184, 22 N. W. 368; Pettit *v.* Black, 13 Nebr. 142, 12 N. W. 841.

35. *Illinois.*— Schumann Piano Co. *v.* Mark, 208 Ill. 282, 70 N. E. 226 [*affirming* 105 Ill. App. 490].

Indiana.— Scott *v.* Willis, 122 Ind. 1, 22 N. E. 786; Dougherty *v.* Thompson, 7 Blackf. 277; Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132 [*citing* Burgett *v.* Bothwell, 86 Ind. 149; Kiphart *v.* Brennemen, 25 Ind. 152; Short *v.* Bridwell, 15 Ind. 211]. In actions against tenants unlawfully holding over, and in forcible entry and detainer, the jurisdiction of justices of the peace is special, and unlimited as to amount. Sturgeon *v.* Hitchens, 22 Ind. 107.

Iowa.— Herkimer *v.* Keeler, 109 Iowa 680, 81 N. W. 178; Jordan *v.* Walker, 52 Iowa 647, 3 N. W. 679.

Louisiana.— State *v.* Mayer, 52 La. Ann. 255, 26 So. 823.

Montana.— Justices of the peace have jurisdiction of actions under Code Civ. Proc. § 716 *et seq.*, for the possession of premises by a landlord against a tenant holding after default in the payment of rent, as such jurisdiction is provided by the act, and Const. art. 8, § 21, expressly declares that such courts shall "have concurrent jurisdiction with the district courts in case of forcible entry and unlawful detainer." State *v.* Votaw, 13 Mont. 403, 34 Pac. 315.

New Jersey.— Watson *v.* Idler, 54 N. J. L. 467, 24 Atl. 554.

New York.— Code Civ. Proc. § 2951 *et seq.*, which provide for the discontinuance of an "action" in a justice's court when the answer sets up a claim of title to land, do not apply to summary proceedings. People *v.* Goldfogle, 30 N. Y. Suppl. 296, 23 N. Y. Civ. Proc. 417.

North Carolina.— Hahn *v.* Guildford, 87 N. C. 172. See also McDonald *v.* Ingram, 124 N. C. 272, 32 S. E. 677; Parker *v.* Allen, 84 N. C. 466; Davis *v.* Davis, 83 N. C. 71; Forsythe *v.* Bullock, 74 N. C. 135; Credle *v.* Gibbs, 65 N. C. 192.

Ohio.— See Brennen *v.* Cist, 9 Ohio S. & C. Pl. Dec. 18, 6 Ohio N. P. 1.

South Carolina.— Swygert *v.* Goodwin, 32 S. C. 146, 10 S. E. 933; State *v.* Marshall, 24 S. C. 507; State *v.* Fickling, 10 S. C. 301.

South Dakota.— Browne *v.* Haseltine, 9 S. D. 524, 70 N. W. 648.

West Virginia.— See Hughes *v.* Mount, 23 W. Va. 130.

Wisconsin.— Menominee River Lumber Co. *v.* Philbrook, 78 Wis. 142, 47 N. W. 188; Winterfield *v.* Stauss, 24 Wis. 394.

See 31 Cent. Dig. tit. "Justices of the Peace," § 91.

Separate actions.—Hurd Rev. St. Ill. (1901) c. 79, § 53, providing that in all actions before a justice each party shall bring forward all demands which may be consolidated, and which, after consolidation, do not exceed two hundred dollars, does not apply to forcible entry and detainer, since in suits under the Forcible Entry and Detainer Act the jurisdiction of the justice is not affected by the amount involved; and therefore a landlord may maintain at the same time two different actions to recover different premises held by his tenant under different leases. Schumann Piano Co. *v.* Mark, 208 Ill. 282, 70 N. E. 226 [*affirming* 105 Ill. App. 490].

In ejectment the pendency of a proceeding brought by the same plaintiff against the same defendant before a justice of the peace, under the Landlord and Tenant Act, cannot be pleaded in bar, the justice having no jurisdiction of the question of title. Campbell *v.* Potts, 119 N. C. 530, 26 S. E. 50.

When statute inapplicable.— Where a statute gives justices of the peace jurisdiction of forcible entry and detainer proceedings in cases where persons shall wilfully without force hold over after termination of the time the premises were let, it applies only to cases in which plaintiff has been in lawful possession and in which the defendant and those under whom he claims peaceably obtain that possession and hold over after a demand made in writing; consequently a justice has no jurisdiction of forcible entry and detainer proceedings against one who did not obtain possession of the premises from the plaintiff, but who had lawful possession of the premises and by his deed of trust agreed to be dispossessed if he should not on a certain day pay a certain sum of money. Blount *v.* Winright, 7 Mo. 50.

Mo. Rev. St. (1879) § 2931, expressly directs that where in an action against a tenant in possession, commenced before a justice, defendant makes a motion on affidavit, setting forth plea of title in and payment of rent to a third party as landlord, the case shall be transferred to the circuit court. Meier *v.*

d. Actions For Obstructing Highways,[36] Watercourses,[37] and Easements.[38] In actions for obstructing highways, watercourses, and easements the title to land is as a rule only incidentally involved, and such actions are consequently within the jurisdiction of justices of the peace.[39] But where defendant denies the existence of the highway and asserts a freehold in himself the jurisdiction of the justice is ousted.[40]

e. Actions Respecting Boundaries[41] and Division Fences.[42] The title to land is usually so involved in actions concerning boundaries and division fences as to oust the jurisdiction of justices of the peace.[43]

Thieman, 90 Mo. 433, 2 S. W. 435; Bennett *v.* McCaffery, 28 Mo. App. 220.

In Pennsylvania a magistrate's court has no jurisdiction over a proceeding in form by a landlord against his tenant, under the act of April 3, 1830, to obtain possession of the premises for non-payment of rent, where the defense pleaded is title to the land in the tenant by parol purchase of the landlord's title. Mohan *v.* Butler, 112 Pa. St. 590, 4 Atl. 47 [*following* Bergman *v.* Roberts, 61 Pa. St. 497; Essler *v.* Johnson, 25 Pa. St. 350; Clark *v.* Everly, 8 Watts & S. 226, and *distinguishing* Koontz *v.* Hammond, 62 Pa. St. 177 (under the act of Dec. 14, 1863); Brown *v.* Gray, 5 Watts 17; Debozear *v.* Butler, 2 Grant 417 (under the act of March 21, 1775); Cress *v.* Richter, Mms. Sup. Ct. April 7, 1853 (under the act of June 16, 1836)]. *Compare* Strohm *v.* Carroll, 11 Lanc. Bar 62.

Filing an affidavit that title to real estate will come in question does not oust the jurisdiction of the justice in proceedings under the Pennsylvania act of Dec. 14, 1863. Livingwood *v.* Moyer, 2 Woodw. Dec. (Pa.) 65; Cope *v.* Briody, 9 North. Co. Rep. 101.

In New York, to authorize a justice of the peace to issue a summons in summary proceedings for the possession of lands, under 2 Rev. St. p. 512, § 28, the affidavit produced by him must show that the conventional relation of landlord and tenant exists, and that by an agreement between the parties. Russell *v.* Russell, 32 How. Pr. 400; Oakley *v.* Schoonmaker, 15 Wend. 226.

An action of waste under N. Y. Code, § 450, where forfeiture is alleged and recovery of possession sought from a tenant, involves the question of title, and precludes a justice's court from exercising jurisdiction. Snyder *v.* Beyer, 3 E. D. Smith (N. Y.) 235.

Intervention and assertion of title by third person.— Where, in an action to recover possession from a tenant, defendant does not file a written answer, but a third person is admitted as a defendant and files an answer, verified by affidavit, alleging that he is the owner of the land and entitled to possession thereof, etc., if such third person is properly admitted and plaintiff makes no objection thereto, the title to the land is "put in issue by plea supported by affidavit," and the justice should certify the cause to the circuit court. Ribbler *v.* Walker, 69 Ind. 362. But *compare* Daly *v.* Barrett, 4 Phila. (Pa.) 350, where it was held that an affidavit of a third person that he claims a reversion cannot oust the justice of jurisdiction, and that as between landlord and tenant, no other title can come into question, but a person claiming title against the landlord must bring a direct proceeding to determine his rights.

Removal of croppers.— Where a person is occupying buildings on a farm which he is cultivating under a contract with the owner for a share of the crops, a justice of the peace has no jurisdiction to remove him by proceedings under the Landlord and Tenant Act, § 11, conferring on justices jurisdiction to remove tenants holding over their terms or for non-payment of rent. Gray *v.* Reynolds, 67 N. J. L. 169, 50 Atl. 670.

36. See, generally, STREETS AND HIGHWAYS.

37. See, generally, WATERS.

38. See, generally, EASEMENTS.

39. *Illinois.*— Dolton *v.* Dolton, 201 Ill. 155, 66 N. E. 323 [*explaining* Cox *v.* East Fork Tp., 194 Ill. 355, 62 N. E. 791; Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Landers *v.* Whitefield, 154 Ill. 630, 39 N. E. 656; Brushy Mound *v.* McClintock, 150 Ill. 129, 36 N. E. 976, and *limiting* Farrelly *v.* Kane, 172 Ill. 415, 50 N. E. 118; Crete *v.* Hewes, 168 Ill. 330, 48 N. E. 36; Waggeman *v.* North Peoria, 160 Ill. 277, 43 N. E. 347; Brushy Mound *v.* McClintock, 146 Ill. 643, 35 N. E. 159]; Herman *v.* Pitman Tp., 197 Ill. 94, 64 N. E. 337.

Michigan.— Under Comp. Laws, §§ 782, 784, 786, the question of title can only be raised so as to oust the jurisdiction by giving notice and filing bond. Ramsby *v.* Bigler, 129 Mich. 570, 89 N. W. 344.

New York.— Chapman *v.* Swan, 65 Barb. 210; Browne *v.* Scofield, 8 Barb. 239.

Ohio.— Burton Tp. *v.* Tuttle, 30 Ohio St. 62.

Pennsylvania.— Leary *v.* Harter, 1 Leg. Gaz. 20.

Vermont.— Bell *v.* Prouty, 43 Vt. 279.

Wisconsin.— State *v.* Huck, 29 Wis. 202.

See 31 Cent. Dig. tit. "Justices of the Peace," § 92.

40. Warwick *v.* Mayo, 15 Gratt. (Va.) 528; State *v.* Doane, 14 Wis. 483.

41. See, generally, BOUNDARIES.

42. See, generally, FENCES.

43. *Michigan.*— Gregory *v.* Knight, 50 Mich. 61, 14 N. W. 700.

Minnesota.— Tordsen *v.* Gummer, 37 Minn. 211, 34 N. W. 20.

New York.— Hinds *v.* Page, 6 Abb. Pr. N. S. 58.

5. Penalties,[44] Fines,[45] Forfeitures,[46] and Exemplary Damages.[47] Jurisdiction to enforce penalties, fines, and forfeitures, and to impose exemplary damages, is very generally conferred upon justices of the peace,[48] and, even where this jurisdiction is not specifically conferred by the general law or by the statutes providing for such penalties, fines, and forfeitures, it has been held that justices may entertain actions of debt for their recovery, where they have general jurisdiction of such actions,[49] and the amount involved is within their jurisdictional

Vermont.— Foster *v.* Bennett, 33 Vt. 66; Shaw *v.* Gilfillan, 22 Vt. 565.

Wisconsin.— Reilly *v.* Howe, 101 Wis. 108, 76 N. W. 1114; Ames *v.* Meehan, 63 Wis. 408, 23 N. W. 586; Murray *v.* Van Derlyn, 24 Wis. 67.

See 31 Cent. Dig. tit. "Justices of the Peace," § 96.

But see Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726.

Enforcement of contribution.— In Pennsylvania it has been held that the jurisdiction of a justice, under the fence law, to enforce contribution for the expense of maintaining a division fence, is not ousted by raising a question of title to land, since the duty of contribution to maintain the fence nevertheless exists, and a dispute as to the line does not excuse it. Stephens *v.* Shriver, 25 Pa. St. 78. But see to the contrary Foster *v.* Bennett, 33 Vt. 66; Shaw *v.* Gilfillan, 22 Vt. 565.

Damages for neglecting to fence.— Under the Vermont act of 1867 (No. 9, p. 16), a justice has jurisdiction of an action by a landowner against an adjoining proprietor to recover damages for neglecting to build or maintain a proportion of the division fence, to the amount of two hundred dollars, irrespective of the question of title. Hall *v.* Niles, 44 Vt. 439.

Under Texas Land Law (1837), section 17, justices have jurisdiction with six jurors to determine the location of the field-notes of a survey, where it is disputed (Cannon *v.* Hendrick, 5 Tex. 339), if the field-notes have not been delivered to either party (Prewitt *v.* Farris, 5 Tex. 370).

44. See, generally, Penalties.

45. See, generally, Fines.

46. See, generally, Forfeitures.

47. See, generally, Damages.

48. *California.*— *In re* Thomas, 80 Cal. 40, 22 Pac. 80; Reed *v.* Omnibus R. Co., 33 Cal. 212.

Illinois.— Chicago *v.* Quimby, 38 Ill. 274; Jacksonville *v.* Block, 36 Ill. 507; Campbell *v.* Conover, 26 Ill. 64; Webster *v.* People, 14 Ill. 365; Ferris *v.* Ward, 9 Ill. 499.

Indiana.— Clevenger *v.* Rushville, 90 Ind. 258.

Kentucky.— Walker *v.* Floyd, 4 Bibb 237.

Maine.— See Spaulding *v.* Yeaton, 82 Me. 92, 19 Atl. 156.

Missouri.— O'Brien *v.* Union Fire Co., 7 Mo. 38.

New Jersey.— Inglis *v.* Schreiner, 58 N. J. L. 120, 32 Atl. 131.

New York.— Prussia *v.* Guenther, 16 Abb. N. Cas. 230; Walker *v.* Cruikshank, 2 Hill 296.

North Carolina.— Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

Pennsylvania.— Bartolett *v.* Achey, 38 Pa. St. 273; McConahy *v.* Courtney, 7 Watts 491; Porter *v.* Duncan, 24 Pa. Co. Ct. 11; Ellmore *v.* Hoffman, 2 Ashm. 159; Turnpike Co. *v.* Singer, 13 Lanc. Bar 107; Com. *v.* Winchester, 4 Pa. L. J. 371.

Rhode Island.— Parker *v.* Barstow, 5 R. I. 232.

Virginia.— *Ex p.* Marx, 86 Va. 40, 9 S. E. 475.

Wisconsin.— Carter *v.* Dow, 16 Wis. 298.

United States.— Hall *v.* Washington, 11 Fed. Cas. No. 5,953, 4 Cranch C. C. 722; *Ex p.* Reed, 20 Fed. Cas. No. 11,634, 4 Cranch C. C. 582; Washington *v.* Eaton, 29 Fed. Cas. No. 17,228, 4 Cranch C. C. 352.

Canada.— *Ex p.* Dunlap, 8 N. Brunsw. 281, holding that an authority given to one justice to recover penalties may be exercised by two.

See 31 Cent. Dig. tit. "Justices of the Peace," § 78.

Obstructing highway.— A justice has jurisdiction of an action to recover a penalty for obstructing a highway (Crosby *v.* Gipps, 19 Ill. 309; Ferris *v.* Ward, 9 Ill. 499; Walker *v.* Floyd, 4 Bibb (Ky.) 237), but not of an action for a penalty for continuing an obstruction (Bickerdike *v.* Dean, 21 Ill. 199; Crosby *v.* Gipps, 19 Ill. 309).

Where the validity of a toll is in question, as in an action to recover the penalty for collecting an excessive toll, a justice has no jurisdiction under the constitution of California. Culbertson *v.* Kinevan, 68 Cal. 490, 9 Pac. 455.

Statutory requirements.— Statutory conditions precedent to jurisdiction must be complied with. Thus "proof by affidavit" of violation of the law is essential to jurisdiction, when required by the statute; and under such a statute an affidavit on information and belief has been held insufficient. Inglis *v.* Schreiner, 58 N. J. L. 120, 32 Atl. 131. See, generally, Penalties.

49. *Alabama.*— Reagh *v.* Spann, 3 Stew. 100.

Colorado.— Duyer *v.* Smelter City State Bank, 30 Colo. 315, 70 Pac. 323.

Illinois.— Indianapolis, etc., R. Co. *v.* People, 91 Ill. 452.

Mississippi.— Western Union Tel. Co. *v.* Sullivan, 70 Miss. 447, 12 So. 460.

New York.— Jansen *v.* Stoutenbergh, 9 Johns. 369.

limit.[50] But under constitutional and statutory provisions which restrict the jurisdiction of justices of the peace to actions arising on contract, actions of replevin, and actions for injuries to personal property, they have no jurisdiction of statutory penalties,[51] unless they are in reality in the nature of exemplary damages.[52]

6. Taxes and Assessments.[53] In some states jurisdiction is conferred on justices of the peace in actions to recover money due on taxes and special assessments,[54] but they have no jurisdiction to enforce tax liens.[55]

7. Enforcement of Awards.[56] The statutes do not as a rule confer jurisdiction on justices of the peace to enforce awards.[57]

8. Abatement of Nuisances.[58] Unless the jurisdiction is expressly conferred by statute,[59] justices of the peace can take no cognizance of proceedings for the abatement of nuisances.[60]

See 31 Cent. Dig. tit. "Justices of the Peace," § 78.

Contra.— Zeigler *v.* Gram, 13 Serg. & R. (Pa.) 102; Schaffer *v.* McNamee, 13 Serg. & R. (Pa.) 44; State *v.* Marshall, 2 McCord (S. C.) 63; Anderson *v.* Fowler, 1 Hill (S. C.) 226; Stover *v.* Lasater, 8 Lea (Tenn.) 631; Duncan *v.* Maxey, 5 Sneed (Tenn.) 114. But see Mullikin *v.* Rolph, 1 Browne (Pa.) 30.

Action against another justice for receiving illegal fees see *supra*, II, E, 2, note 57.

50. See *infra*, III, D.

51. An action to recover a statutory penalty does not arise out of contract, but out of the statute imposing the penalty for a neglect of a duty owed to the public. Baltimore, etc., Tel. Co. *v.* Lovejoy, 48 Ark. 301, 3 S. W. 183; Oppenheimer *v.* Regan, 32 Mont. 110, 79 Pac. 695. But see *contra*, Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

52. Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264.

53. Texas generally see Taxes.

Local assessments see Municipal Corporations.

54. Willis *v.* Ruddock Cypress Co., 108 La. 255, 32 So. 386; State *v.* Van Every, 75 Mo. 530. See also Kansas City *v.* Winner, 58 Mo. App. 299; Kansas City *v.* Summerwell, 58 Mo. App. 246, construing Kansas City Charter (1889), art. 9 § 18. *Compare* Westport *v.* Hauk, 92 Mo. App. 364, construing Sess. Acts (1895), p. 65 [repealing Rev. St. (1889) § 1592, as amended by Act (1893)].

In California a justice has jurisdiction unless the validity of the tax or assessment is questioned. Monterey County *v.* Abbott, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73; Williams *v.* McCartney, 69 Cal. 556, 11 Pac. 186; People *v.* Mier, 24 Cal. 61.

In Pennsylvania a justice has jurisdiction of an action brought in the name of the county to recover from a purchaser of unseated lands at a treasurer's sale for taxes the amount of the bid, or such part as is necessary to pay taxes and costs. Fulton County *v.* Tate, 47 Pa. St. 532. But he has no jurisdiction in actions to recover special municipal assessments for paving. Borough *v.* Johns, 4 Pa. Co. Ct. 522; Dougherty *v.* Borough, 1 Lehigh Val. L. Rep. 11.

In Texas it was held that a justice of the peace had no jurisdiction of an action for the recovery of sums due for a license-tax. Aulanier *v.* Governor, 1 Tex. 653.

That the judgment has to be satisfied out of the immovables of the debtor, in the absence of movables, does not make the suit a land controversy. Willis *v.* Burdock Cypress Co., 108 La. 255, 32 So. 386.

55. State *v.* Hopkins, 87 Mo. 519; Kansas City *v.* Summerwell, 58 Mo. App. 246. See *infra*, III, E, 2, b.

56. See, generally, Arbitration and Award.

57. Hollingsworth *v.* Stone, 90 Ind. 244; Richards *v.* Reed, 39 Ind. 330; Kingsley *v.* Bill, 9 Mass. 198; Worthen *v.* Stevens, 4 Mass. 448; Bowles *v.* Abraham, 65 Mo. App. 10; Hubbel *v.* Baldwin, Wright (Ohio) 86. *Contra*, Scott *v.* Barnes, 7 Pa. St. 134; Weidimor *v.* Drissel, 1 Yeates (Pa.) 77; Frey *v.* Lilly, 11 York Leg. Rec. (Pa.) 104; Collins *v.* Oliver, 4 Humphr. (Tenn.) 439. But see Yates *v.* Demmer, 9 Pa. Co. Ct. 80, where the justice was held to be without jurisdiction to enforce the money part of an award because certain other provisions of the award were unenforceable by him.

In Illinois a justice can render judgment on an award only in cases pending before him, on a reference by the parties. Weinz *v.* Dopler, 17 Ill. 111. See also Shirk *v.* Trainer, 20 Ill. 301, to the effect that to authorize the selection of arbitrators by a justice there must be a suit pending before him.

In Iowa a justice has jurisdiction to render judgment on an award where, by agreement of the parties, judgment is so to be rendered, and where the amount of the award does not exceed the sum limiting the jurisdiction of the justice to render judgment by consent. Whitis *v.* Culver, 25 Iowa 30; Van Horn *v.* Bellar, 20 Iowa 255.

58. See, generally, Nuisances.

59. Under Ga. Code, § 4094, the jurisdiction of justices of the peace to abate nuisances extends to all such as are detrimental to the citizens in general, other than as specially excepted. Wetter *v.* Campbell, 60 Ga. 266. See also Hart *v.* Taylor, 61 Ga. 156. *Compare* Macon, etc., R. Co. *v.* State, 50 Ga. 156; South Carolina R. Co. *v.* Ells, 40 Ga. 87.

60. State *v.* Schaffer, 31 Wash. 305, 71 Pac. 1088.

C. Character of Parties — 1. Corporations[61] **— a. In General.** Under the earlier statutes corporations might sue,[62] but could not be sued,[63] before a justice of the peace. At the present day jurisdiction is very generally given justices of the peace to entertain suits by or against corporations, whether domestic[64] or foreign.[65]

b. Public Corporations.[66] A public corporation may sue,[67] but it has been held that it cannot be sued,[68] before a justice of the peace.

2. Public Officers.[69] Under the constitutions and statutes of some states justices of the peace have jurisdiction over public officers,[70] but in other states they

61. **Actions by or against private corporations** see Corporations.

62. Hotchkiss *v.* Homer First Religious Soc., 7 Johns. (N. Y.) 356.

63. State Bank *v.* Van Horn, 4 N. J. L. 382; Hotchkiss *v.* Homer First Religious Soc., 7 Johns. (N. Y.) 356 [*citing* Coxsackie Dutch Church *v.* Adams, 5 Johns. (N. Y.) 347]. But see Union Bank *v.* Lowe, Meigs (Tenn.) 225, holding that, although a justice cannot issue a distringas, and so cannot enforce the appearance of a corporation, he may render judgment against the corporation for default of appearance to his summons.

64. *Arkansas.*—Woodruff *v.* Griffith, 5 Ark. 354.

Michigan.— Milroy *v.* Spurr Mountain Iron Min. Co., 43 Mich. 231, 5 N. W. 287. See also McLean *v.* Prudential Ins. Co., 130 Mich. 26, 90 N. W. 405.

Mississippi.— Loomis *v.* Columbus Commercial Bank, 4 How. 660.

Missouri.— Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Mooney *v.* Hannibal, etc., R. Co., 28 Mo. 570. *Compare* Fatchell *v.* St. Louis, etc., R. Co., 28 Mo. 178, holding that a justice has no jurisdiction under the charter of the St. Louis, etc., R. Co. of an action against it for damages for injuries sustained by reason of the construction of a culvert.

New Jersey.—See Wheeler, etc., Mfg. Co. *v.* Carty, 53 N. J. L. 336, 21 Atl. 851.

Ohio.— Harding *v.* New Haven Tp., 3 Ohio 227.

West Virginia.— Joseph Speidel Grocery Co. *v.* Warder, 56 W. Va. 602, 49 S. E. 534.

See 31 Cent. Dig. tit. "Justices of the Peace," § 135.

65. McLean *v.* Prudential Ins. Co., 130 Mich. 591, 90 N. W. 405; Gallagher *v.* American Express Co., 56 Mich. 13, 22 N. W. 96; Rechnitzer *v.* Missouri, etc., R. Co., 60 Mo. App. 409. See also Boley *v.* Ohio L. Ins., etc., Co., 12 Ohio St. 139. *Contra,* Wheeler, etc., Mfg. Co. *v.* Carty, 53 N. J. L. 336, 21 Atl. 851. And see American Express Co. *v.* Conant, 45 Mich. 642, 8 N. W. 574; Hebel *v.* Amazon Ins. Co., 33 Mich. 400; Hartford F. Ins. Co. *v.* Owen, 30 Mich. 441; Brigham *v.* Eglinton, 7 Mich. 291, which were decided previous to the act of 1881 (Howell Annot. St. Mich. § 6861).

66. **Actions by or against:** County, see Counties. Municipal corporation, see Municipal Corporations. State, see States. Town, see Towns. United States, see United States.

67. McNamee *v.* U. S., 11 Ark. 148; Eaton Rapids *v.* Houpt, 63 Mich. 371, 29 N. W. 860; Hart *v.* Port Huron, 46 Mich. 428, 9 N. W. 481.

68. Mason *v.* Muskegon, 109 Mich. 456, 67 N. W. 692; Garfield Tp. Highway Com'rs *v.* Springfield Tp. Highway Com'rs, 77 Mich. 228, 43 N. W. 870; Gurney *v.* St. Clair, 11 Mich. 202; Root *v.* Mayor, 3 Mich. 433; Warren County School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115 [*following* Townsend *v.* Essex County School Dist. No. 12, 41 N. J. L. 312]; Jersey City *v.* Horton, 38 N. J. L. 88; Princeton *v.* Mount, 29 N. J. L. 299; Hill *v.* Tionesta Tp., 129 Pa. St. 525, 19 Atl. 855; Walton *v.* Lerch, 2 Lanc. L. Rev. (Pa.) 374; Walton *v.* Lerch, 1 Lehigh Val. L. Rep. (Pa.) 117; Pyle *v.* Hand County, 1 S. D. 385, 47 N. W. 401. But see State *v.* Judge First Justice's Ct., 41 La. Ann. 403, 6 So. 653 (action against police jury); Harding *v.* New Haven Tp., 3 Ohio 227; Wentz *v.* Philadelphia, 14 Phila. (Pa.) 194 (action by overseer of election against Philadelphia for compensation allowed by law); Taylor County Ct. *v.* Holt, 53 W. Va. 532, 44 S. E. 887 (action against county court for money due on contract).

69. **Summary proceedings against officers and their sureties** see *infra,* III, E, 7.

Actions on official bonds see *supra,* III, B, 2, b.

Actions against officers generally see Officers, and Cross-References Thereunder.

70. *Illinois.*— Vaughan *v.* Thompson, 15 Ill. 39; Birley *v.* Copeland, 14 Ill. 38; Skinner *v.* Morgan, 21 Ill. App. 209.

Missouri.— Lockhart *v.* Hays, 1 Mo. 271.

New York.— Van Vleck *v.* Burroughs, 6 Barb. 341; Tompkins *v.* Sands, 8 Wend. 462, 24 Am. Dec. 46; Brown *v.* Genung, 1 Wend. 115. But see Worden *v.* Brown, 14 How. Pr. 327.

Pennsylvania.— Pressel *v.* Rice, 142 Pa. St. 263, 21 Atl. 813 [*distinguishing* Seitzinger *v.* Steinberger, 12 Pa. St. 379]; Bartolett *v.* Achey, 38 Pa. St. 273; Simmons *v.* Kelly, 33 Pa. St. 190; Stamer *v.* Nass, 3 Grant 240; Prior *v.* Craig, 5 Serg. & R. 44; McDevitt *v.* Frame, 2 Chest. Co. Rep. 378.

South Carolina.— Sullivan *v.* Ellison, 20 S. C. 481. But see Davenport *v.* Corley, 1 Bailey 594.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 126, 137.

have not such jurisdiction.[71] But even where there is no jurisdiction against a public officer as such, there may be jurisdiction against him in his individual capacity, although it appears that the wrong was committed by him in his official capacity.[72]

3. Executors and Administrators.[73] Executors and administrators may sue,[74] but cannot as a rule be sued,[75] before a justice of the peace.

4. Heirs[76] **and Devisees.**[77] In Illinois, if no one administers on the estate of a decedent within one year, a suit may be maintained against his heirs and devisees before a justice of the peace, if the amount involved is within the jurisdictional limit.[78]

5. Women.[79] Justices of the peace have jurisdiction in actions against women,[80] but in the case of married women their jurisdiction is limited to cases in which a personal judgment can be rendered.[81]

6. Minors.[82] Contracts of minors are as much within the jurisdiction of a justice of the peace as those of adults,[83] and in aid of such jurisdiction a justice may appoint a guardian *ad litem* for an infant.[84]

D. Amount or Value in Controversy — 1. In General. The civil jurisdic-

71. Merfield *v.* Burkett, 56 Ark. 592, 20 S. W. 523; Neal *v.* Keller, 12 Kan. 247; Warren *v.* Sadilek, 47 Nebr. 53, 66 N. W. 15.

72. Spielman *v.* Flynn, 19 Nebr. 342, 27 N. W. 224; Neihardt *v.* Kilmer, 12 Nebr. 35, 10 N. W. 531; Miller *v.* Roby, 9 Nebr. 471, 4 N. W. 65; Dempsey *v.* Hill, 3 Ohio Dec. (Reprint) 260, 5 Wkly. L. Gaz. 181.

73. See, generally, Executors and Administrators.

Actions on official bonds see *supra*, III, B, 2, b.

74. Miller *v.* McCray, 37 Ill. 428 [*explaining* Williams *v.* Blankenship, 12 Ill. 122]; Arnold *v.* Fleming, 14 Ind. 10; Thompson *v.* Harbison, 7 Blackf. (Ind.) 495. *Contra*, Way *v.* Carey, 1 Cai. (N. Y.) 191. And see Simonds *v.* Colvert, 2 Blackf. (Ind.) 413, decided before the passage of the Indiana act of 1843.

75. *Delaware.*—Robinson *v.* Prince, 3 Harr. 389.

District of Columbia.— Newmeyer *v.* Cowling, 6 Mackey 504.

Maryland.— Hale *v.* Howe, 4 Harr. & J. 448.

Michigan.— See Singer Mfg. Co. *v.* Benjamin, 55 Mich. 330, 21 N. W. 358, 23 N. W. 25.

Pennsylvania.—Montgomery *v.* Heilman, 96 Pa. St. 44. But see McCahan *v.* Reeder, 10 Pa. Dist. 298, to the effect that a justice has jurisdiction over a non-resident executor when service has been had upon his resident surety.

United States.— Adams *v.* Kincaid, 1 Fed. Cas. No. 58, 2 Cranch C. C. 422; Foy *v.* Talburt, 9 Fed. Cas. No. 5,020, 5 Cranch C. C. 124; Ritchie *v.* Stone, 20 Fed. Cas. No. 11,864, 2 Cranch C. C. 258. *Contra*, Ennis *v.* Holmead, 8 Fed. Cas. No. 4,492, 5 Cranch C. C. 509.

See 31 Cent. Dig. tit. "Justices of the Peace," § 138.

Contra.— Bradwell *v.* Wilson, 158 Ill. 346, 42 N. E. 145 [*reversing* 57 Ill. App. 162, and *distinguishing* Williams *v.* Blankenship, 12 Ill. 122]; Harmon *v.* Birchard, 8 Blackf. (Ind.) 418; Thompson *v.* Harbison, 7 Blackf. (Ind.) 495; Sherwood *v.* Campbell, 1 B. Mon. (Ky.) 54. But see Leigh *v.* Mason, 2 Ill. 249; Simonds *v.* Colvert, 2 Blackf. (Ind.) 413.

An executor de son tort may be sued before a justice of the peace. Leach *v.* House, 1 Bailey (S. C.) 42.

76. See, generally, Descent and Distribution.

77. See, generally, Wills.

78. Dodds *v.* Walker, 9 Ill. App. 37, construing Rev. St. (1874) p. 542, c. 59.

79. Equitable relief against married women see *infra*, III, E, 2, d.

Action against married woman generally see Husband and Wife.

80. Johnson *v.* Washington, 13 Fed. Cas. No. 7,420, 5 Cranch C. C. 434.

81. Patterson *v.* Gooch, 108 N. C. 503, 13 S. E. 186; Bevill *v.* Cox, 107 N. C. 175, 12 S. E. 52, 11 L. R. A. 274; Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998; Hodges *v.* Hill, 105 N. C. 130, 10 S. E. 916; Neville *v.* Pope, 95 N. C. 346; Smaw *v.* Cohen, 95 N. C. 85; Dougherty *v.* Sprinkle, 88 N. C. 300; Hunter *v.* Weidner, 1 Woodw. (Pa.) 6.

Equitable relief against married women see *infra*, III, E, 2, d.

Under N. C. Code, § 1823, providing that the liability of a *feme sole* shall not be altered or impaired by her marriage, a justice has jurisdiction of an action against a *feme covert* for a debt contracted before her marriage. Hodges *v.* Hill, 105 N. C. 130, 10 S. E. 916 [*explaining* Dougherty *v.* Sprinkle, 88 N. C. 300, which holds that the rule that a justice has no jurisdiction of an action against a married woman, as applying only to liabilities incurred by her while a *feme covert*, and not even then where she is a free trader or the proceeding is to enforce a laborer's lien].

82. See, generally, Infants.

83. Young *v.* Trunkley, 22 Pa. Co. Ct. 127.

84. Bullard *v.* Spoor, 2 Cow. (N. Y.) 430; Mockey *v.* Grey, 2 Johns. (N. Y.) 192.

tion of justices of the peace is universally limited by the sum or amount demanded or the value of the thing in controversy; and in no case can the limitation thus fixed, whether constitutional or statutory, be exceeded.[85] This limitation varies greatly, not only in the different jurisdictions, but also in the same jurisdiction according to the subject-matter and the nature and form of the action or other proceeding.[86] In some states a justice's jurisdiction may, by consent of the

85. *Alabama.*— Lykes *v.* Schwarz, 91 Ala. 461, 8 So. 71; Pearce *v.* Pope, 42 Ala. 319.

California.— Freeman *v.* Powers, 7 Cal. 104; Horrell *v.* Gray, 1 Cal. 133.

Connecticut.— See Desborough *v.* Desborough, 1 Root 126; Mills *v.* Borroughs, 1 Root 99.

District of Columbia.— Newmeyer *v.* Cowling, 6 Mackey 504.

Georgia.— De Vaughn *v.* Byrom, 110 Ga. 904, 36 S. E. 267; Freeman *v.* Carhart, 17 Ga. 348.

Illinois.— Casey *v.* Harvey, 14 Ill. 45; Williams *v.* Blankenship, 12 Ill. 122.

Indiana.— Chandler *v.* Davidson, 6 Blackf. 367.

Iowa.— Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528.

Kansas.— Vincent *v.* Donnell, (App. 1900) 63 Pac. 24.

Kentucky.—Fleming *v.* Limebaugh, 2 Metc. 265; Howard *v.* Jones, 2 B. Mon. 526.

Mississippi.— Louisville, etc., R. Co. *v.* McCollister, 66 Miss. 106, 5 So. 695; Randall *v.* Kline, 44 Miss. 313; Morris *v.* Shryock, 50 Miss. 590.

Missouri.— St. Louis *v.* Smith, 2 Mo. 113; Mitchell Planing Mill Co. *v.* Short, 58 Mo. App. 320.

Montana.—Oppenheimer *v.* Regan, 32 Mont. 110, 79 Pac. 695.

New York.— Bellinger *v.* Ford, 14 Barb. 250; Lund *v.* Broadhead, 41 How. Pr. 146; Bryan *v.* Cain, 1 Den. 507.

North Carolina.— Meneely *v.* Craven, 86 N. C. 364; Dalton *v.* Webster, 82 N. C. 279.

Ohio.— Housatonic *v.* Kanawha Salt Co., 7 Ohio St. 261.

Pennsylvania.— Butler *v.* Urch, 2 Grant 247; Williamsport *v.* Williamsport Water Co., 7 Pa. Dist. 206.

South Carolina.— Collier *v.* Rogers, 2 Brev. 41.

Tennessee.— Kiggin *v.* Sharkey, 3 Lea 707; Collins *v.* Oliver, 4 Humphr. 439; Dixon *v.* Caruthers, 9 Yerg. 30; Morrow *v.* Calloway, Mart. & Y. 240; Arnold *v.* Embree, Peck 134.

Texas.— Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742; Smith *v.* Carroll, 28 Civ. App. 330, 66 S. W. 863; Schwartz *v.* Frees, (Civ. App. 1895) 31 S. W. 214; Loyd *v.* Capps, (Civ. App. 1895) 29 S. W. 505; Cox *v.* Wright, (Civ. App. 1894) 27 S. W. 294; Marx *v.* Carlisle, 1 Tex. App. Civ. Cas. § 93.

Virginia.— Western Union Tel. Co. *v.* Pettyjohn, 88 Va. 296, 13 S. E. 431.

West Virginia.— Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653.

Wisconsin.— Storm *v.* Adams, 56 Wis. 137, 14 N. W. 69; Power *v.* Rockwell, 39 Wis. 585; Nimmick *v.* Mathiesson, 32 Wis. 324; Elderkin *v.* Spurbeck, 2 Pinn. 129, 1 Chandl. 69, 52 Am. Dec. 148.

Canada.— Draper *v.* Munroe, 5 N. Brunsw. 438.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 148, 149.

86. Actions for torts.— *Alabama.*— Brown *v.* Alabama, etc., R. Co., 87 Ala. 370, 6 So. 295; Alabama, etc., R. Co. *v.* Christian, 82 Ala. 307, 1 So. 121; Rodgers *v.* Gaines, 73 Ala. 218; Burns *v.* Henry, 67 Ala. 209; Carter *v.* Alford, 64 Ala. 236; Taylor *v.* Woods, 52 Ala. 474.

Arkansas.— Thompson *v.* Willard, 66 Ark. 346, 50 S. W. 870.

Illinois.— Campbell *v.* Conover, 26 Ill. 64.

Indiana.— Under the act of March 11, 1861, justices have jurisdiction of torts where the damage does not exceed one hundred dollars, and concurrent jurisdiction with the higher courts to the amount of two hundred dollars. Leathers *v.* Hogan, 17 Ind. 242. *Compare* under earlier statutes Falkner *v.* Iams, 5 Ind. 200; White Water Val. Canal Co. *v.* Dow, 1 Ind. 141; Forsha *v.* Watkins, 4 Blackf. 520.

Maryland.— Herzberg *v.* Adams, 39 Md. 309.

Michigan.— Wells *v.* Scott, 4 Mich. 347.

Mississippi.— Louisville, etc., R. Co. *v.* McCollister, 66 Miss. 106, 5 So. 695.

Missouri.— In actions for damages the amount claimed is limited to fifty dollars (Webb *v.* Tweedie, 30 Mo. 488; Ahern *v.* Carroll, 30 Mo. 200), except in the case of damages to live stock by railroad companies, in which a justice has jurisdiction irrespective of amount (Hudson *v.* St. Louis, etc., R. Co., 53 Mo. 525), and may, under Rev. St. (1879) § 809, give double damages where the company has failed to fence its track as required by law (Holloman *v.* St. Louis, etc., R. Co., 92 Mo. 284, 5 S. W. 1; Parish *v.* Missouri, etc., R. Co., 63 Mo. 284).

New York.— Gardner *v.* Jones, 20 Johns. 356.

North Carolina.— Malloy *v.* Fayetteville, 122 N. C. 480, 29 S. E. 880; Womble *v.* Leach, 83 N. C. 84.

Oregon.— McFerren *v.* Umatilla County, 27 Oreg. 311, 40 Pac. 1013.

Pennsylvania.— Delaney *v.* Brindle, 15 Serg. & R. 75; Dunn *v.* French, 2 Binn. 173; Townsend *v.* Whalen, 5 Pa. Dist. 656; Continental Brewing Co. *v.* Frame, 2 Chest. Co. Rep. 379.

Vermont.— Chadwick *v.* Batchelder, 46 Vt. 724; Prindle *v.* Cogswell, 9 Vt. 183.

See 31 Cent. Dig. tit. "Justices of the Peace," § 151.

parties, be extended, within prescribed limits, beyond the amount otherwise fixed.[87] So it has been held that where the jurisdiction is limited to "less than" a fixed sum, the justice has jurisdiction where the amount claimed equals but does not exceed such sum, if the other provisions of the statute show that such must

Actions on bills and notes.— *Kentucky.*— Florrance *v.* Goodin, 5 B. Mon. 111; Hoskins *v.* Roberts, 2 B. Mon. 263.

Nebraska.— Strang *v.* Krickbaum, 18 Nebr. 365, 25 N. W. 364; Bunker *v.* State Nat. Bank, 16 Nebr. 234, 20 N. W. 256; Burton *v.* Manning, 15 Nebr. 669, 19 N. W. 509; Bullock *v.* Jordan, 15 Nebr. 665, 19 N. W. 508.

Tennessee.— Redd *v.* Brown, 3 Lea 615; White *v.* Buchanan, 6 Coldw. 32; Mason *v.* Westmoreland, 1 Head 555; Crocket *v.* Wright, 7 Humphr. 322; Hay *v.* Lea, 8 Yerg. 89; Smith *v.* Wallace, 4 Yerg. 572; Bedford *v.* Hickman, 1 Yerg. 165.

Texas.— Hampton *v.* Dean, 4 Tex. 455.

Wisconsin.— McCormick *v.* Robinson, 2 Pinn. 276, 1 Chandl. 254.

See 31 Cent. Dig. tit. "Justices of the Peace," § 152.

Actions to recover personal property.— *Alabama.*— Taylor *v.* Woods, 52 Ala. 474.

Colorado.— Robinson *v.* Bonjour, 16 Colo. App. 458, 66 Pac. 451.

Illinois.— Cruikshank *v.* Kimball, 75 Ill. App. 231; Vogel *v.* People, 37 Ill. App. 388.

Indiana.— Fawkner *v.* Baden, 89 Ind. 587; Grubaugh *v.* Jones, 78 Ind. 350; Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Harrell *v.* Hammond, 25 Ind. 104.

Iowa.— Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528.

Kansas.— Leslie *v.* Reber, 4 Kan. 315; Garrett *v.* Wood, 3 Kan. 231.

Minnesota.— Parker *v.* Bradford, 68 Minn. 437, 71 N. W. 619; Hecklin *v.* Ess, 16 Minn. 51.

Mississippi.— Illinois Central R. Co. *v.* Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252; Askew *v.* Askew, 49 Miss. 301.

Missouri.— Butler *v.* Ivie, 30 Mo. 478; Godman *v.* Gordon, 61 Mo. App. 685; Gottschalk *v.* Klinger, 33 Mo. App. 410.

Nebraska.— Selby *v.* McQuillan, 59 Nebr. 158, 80 N. W. 504.

North Carolina.— Noville *v.* Dew, 94 N. C. 43.

Ohio.— Burlinson *v.* Roe, 4 Ohio Dec. (Reprint) 47, 1 Clev. L. Rec. 61.

Oregon.— Ferguson *v.* Byers, 40 Oreg. 468, 67 Pac. 1115, 69 Pac. 32.

Rhode Island.— Howe Mach. Co. *v.* York, 11 R. I. 388.

Wisconsin.— Zitske *v.* Goldberg, 38 Wis. 216.

See 31 Cent. Dig. tit. "Justices of the Peace," § 153.

Recovery of rent.— Holland *v.* Brown, 15 Ga. 113; Ezra *v.* Manlove, 6 Blackf. (Ind.) 454; Beatty *v.* Rankin, 139 Pa. St. 358, 21 Atl. 74; Fielbach *v.* Fielbach, 4 Pa. Co. Ct. 517; Reckless *v.* Charnley, 2 Montg. Co. Rep. (Pa.) 10.

Attachment and garnishment.—*Arkansas.*— Rogers *v.* Glascock, 25 Ark. 25.

Georgia.— Barrett *v.* Black, 25 Ga. 151; Mahone *v.* McDonald, Ga. Dec. 154.

Kansas.— Holyoke Envelope Co. *v.* Heagler, 10 Kan. App. 572, 63 Pac. 450.

New Jersey.— Wright *v.* Moran, 43 N. J. L. 49.

New York.— Mattison *v.* Bancus, Hill & D. Suppl. 321; Comfort *v.* Gillespie, 13 Wend. 404.

Pennsylvania.— Jacoby *v.* Shafer, 105 Pa. St. 610; Kuhn *v.* Warren Sav. Bank, 7 Pa. Cas. 432, 11 Atl. 440; Sullivan *v.* Johnston, 10 Pa. Dist. 73; Downward *v.* Jordan, 7 Pa. Dist. 273; Enfield *v.* Squires Hardware Co., 3 Pa. Dist. 349, 14 Pa. Co. Ct. 498; Fair *v.* Hamlin, 9 Pa. Co. Ct. 8; Bumgardner *v.* Morris, 25 Pittsb. Leg. J. N. S. 355.

South Carolina.— Roberts *v.* Brown, 1 McCord 498.

Tennessee.— Stewart *v.* Vaughn, 3 Cold. 22; Apperson *v.* Looney, 2 Swan 664.

See 31 Cent. Dig. tit. "Justices of the Peace," § 156.

Action on justice's judgment see *infra*, IV, O, 9, a, (II).

The question of the liability of property to execution on a justice's judgment is triable before the justice, irrespective of the value of the property levied on. Bernheimer *v.* Martin, 66 Miss. 486, 6 So. 326.

A justice has jurisdiction of a third opposition, filed in a suit in his court, although the amount of such opposition is in excess of the constitutional limit of his jurisdiction. State *v.* Potts, 50 La. Ann. 109, 23 So. 97.

A petition to enforce a lien for work done and money expended in the manufacture or machinery is within the jurisdiction of a justice, even though the claim exceeds one hundred dollars. Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

Under the Vermont license law of 1850 (Comp. St. p. 507, § 12) justices have concurrent jurisdiction with the county court, whatever the amount of the penalty sued for. *Ex p.* Tracy, 25 Vt. 93.

87. Haworth *v.* Newell, 102 Iowa 541, 71 N. W. 404; Houghton *v.* Bauer, 70 Iowa 314, 30 N. W. 577; Marshalltown Bank *v.* Kennedy, 53 Iowa 357, 5 N. W. 508; Deming *v.* Austin, Wright (Ohio) 718; Borland *v.* Ealy, 43 Pa. St. 111 (no jurisdiction exceeding one hundred dollars, unless, in the absence of process, debtor voluntarily appears); McDonnell *v.* Hodgins, 3 Lack. Jur. (Pa.) 285 (alderman has no jurisdiction of claim above three hundred dollars, unless debtor voluntarily appears and confesses judgment).

Consent as conferring jurisdiction generally see *infra*, III, M.

Limited consent.— Where the parties to a note for two hundred and twenty-five dollars agree therein that judgment may be taken

have been the intention of the legislature.[88] The fact that the sum claimed exceeds the lower limit of the jurisdiction of a superior court will not divest a justice of jurisdiction and render him incompetent to decide a case before him.[89] Where a case is of such a character that by statute it should be tried before a justice of the peace, but the amount involved is greater than the constitutional limit of the jurisdiction of justices, the constitution of course controls, and a justice has no jurisdiction.[90] In an action or other proceeding for the recovery of the possession of realty the special jurisdiction conferred upon justices of the peace to determine the right of possession is in most jurisdictions unrestricted by the amount or value in controversy or by the value of the property.[91]

2. Determination of Amount or Value — a. In General. As a general proposition, the amount claimed, or in controversy,[92] in an action before a justice of the peace, is the test by which his jurisdiction is to be determined,[93] and this is true, although the items of recovery may in the aggregate exceed the jurisdictional

on it before any justice of a particular county, a judgment on such note, rendered by a justice of another county, is void, even though the note was payable there. Brown *v.* Davis, 59 Iowa 641, 13 N. W. 861.

Sufficiency of consent. — A stipulation in each of two notes, neither of which exceeded one hundred dollars, giving a justice jurisdiction in an action on the note to an amount not exceeding three hundred dollars, did not give a justice jurisdiction of an action on the two notes aggregating over one hundred dollars, under the statute giving a justice jurisdiction in actions for more than one hundred dollars by consent, where the amount claimed is not more than three hundred dollars. Hannasch *v.* Hoyt, 127 Iowa 232, 103 N. W. 102.

88. Butcher *v.* Smith, 29 Ohio St. 604. But *compare* Leslie *v.* Reber, 4 Kan. 315.

89. State *v.* Judge First Justice's Ct., 41 La. Ann. 403, 6 So. 653.

Under the New Jersey act of March 12, 1879 (2 N. J. Gen. St. p. 1897), which expressly excludes concurrent jurisdiction with city district courts over any cause cognizable in such courts the rule is otherwise. Hankins *v.* Berrian, 62 N. J. L. 624, 40 Atl. 624; Thompson *v.* Walker, 62 N. J. L. 631, 43 Atl. 572; Sloat *v.* McComb, 42 N. J. L. 484.

90. Lykes *v.* Schwarz, 91 Ala. 461, 8 So. 71.

91. *Illinois.* — Schumann Piano Co. *v.* Mark, 208 Ill. 282, 70 N. E. 226 [*affirming* 105 Ill. App. 490], forcible entry and detainer.

Indiana. — Sturgeon *v.* Hitchens, 22 Ind. 107; Ricketts *v.* Ash, 7 Blackf. 274.

Louisiana. — Kennedy *v.* Downey, 2 Rob. 284; Walker *v.* Vanwinkle, 8 Mart. N. S. 560.

Missouri. — January *v.* Stephenson, 2 Mo. App. 266. See also Silvey *v.* Summer, 61 Mo. 253.

Pennsylvania. — Graver *v.* Fehr, 89 Pa. St. 460.

Texas. — Smith *v.* Ryan, 20 Tex. 661.

Vermont. — Weston *v.* Haley, 27 Vt. 283.

See 31 Cent. Dig. tit. "Justices of the Peace," § 154.

Contra. — Hoban *v.* Ryan, 130 Cal. 96, 62 Pac. 296; Ballerino *v.* Bigelow, 90 Cal. 500, 27 Pac. 372; Moore *v.* Richardson, 197 Ill. 437, 64 N. E. 330 [*affirming* 100 Ill. App. 134]. But see under earlier statutes Howard *v.* Valentine, 20 Cal. 282; Hart *v.* Moon, 6 Cal. 161; Hannigan *v.* Mossler, 44 Ill. App. 117.

92. **"The sum claimed" and "the amount in controversy" are synonymous.** — Barber *v.* Kennedy, 18 Minn. 216.

93. *Alabama.* — Crabtree *v.* Cliatt, 22 Ala. 181. But see *infra*, note 95.

Arkansas. — Thompson *v.* Willard, 66 Ark. 346, 50 S. W. 870; Little Rock, etc., R. Co. *v.* Manees, 44 Ark. 100.

California. — Hoban *v.* Ryan, 130 Cal. 96, 62 Pac. 296; Sanborn *v.* Contra Costa County Super. Ct., 60 Cal. 425.

Georgia. — Georgia R., etc., Co. *v.* Knight, 122 Ga. 290, 50 S. E. 124; Griffith *v.* Elder, 110 Ga. 453, 35 S. E. 641; Rimes *v.* Williams, 99 Ga. 281, 25 S. E. 685; Ashworth *v.* Harper, 95 Ga. 660, 22 S. E. 670; Southern Express Co. *v.* Hilton, 94 Ga. 450, 20 S. E. 126.

Illinois. — Wright *v.* Smith, 76 Ill. 216; Carpenter *v.* Wells, 65 Ill. 451; Raymond *v.* Strobel, 24 Ill. 113; Hull *v.* Webb, 78 Ill. App. 617. See also Dowling *v.* Stewart, 4 Ill. 193. But see *infra*, note 95.

Indiana. — Congressional Tp. No. 11 *v.* Weir, 9 Ind. 224; Short *v.* Scott, 6 Ind. 430; Everett Piano Co. *v.* Bash, 31 Ind. App. 498, 68 N. E. 329.

Iowa. — Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528; Reed *v.* Shum, 63 Iowa 378, 19 N. W. 254; Moran *v.* Murphy, 49 Iowa 68; Galley *v.* Tama County, 40 Iowa 49; Stone *v.* Murphy, 2 Iowa 35. See also Redfield *v.* Stocker, 91 Iowa 383, 59 N. W. 270, holding that where the amount in controversy is shown by the pleadings to be within the jurisdictional limit the fact that judgment for a larger sum is inadvertently asked will not deprive a justice of jurisdiction.

Kentucky. — Burbage *v.* Squires, 3 Metc. 77.

Louisiana. — Clerc *v.* Boudreaux, 38 La. Ann. 732. But *compare* State *v.* Richardson, 26 La. Ann. 631.

Massachusetts. — Carroll *v.* Richardson, 9 Mass. 329.

limit.[94] In some cases, however, the amount recovered, and not the amount claimed, has been held to be the criterion.[95] In determining the amount of the claim, the amount at the commencement of the action, and not the amount due at the rendition of judgment, fixes the jurisdiction;[96] and where there is a variance in the amount claimed between the complaint, petition, writ, or warrant and the bill of particulars, the former controls.[97] Where there are several counts in the

Michigan. — Inkster *v.* Carver, 16 Mich. 484.

Minnesota.— Poirier *v.* Martin, 89 Minn. 346, 94 N. W. 865; Parker *v.* Bradford, 68 Minn. 437, 71 N. W. 619; Turner *v.* Holleran, 8 Minn. 451.

Missouri.— Joyce *v.* Moore, 10 Mo. 271; Shanklin *v.* Francis, 67 Mo. App. 457.

New Jersey.— De Camp *v.* Miller, 44 N. J. L. 617; Darnel *v.* Sheldon, 3 N. J. L. 522; Montgomery *v.* Snowhill, 2 N. J. L. 361; South *v.* Hall, 1 N. J. L. 29.

New York.— Spencer *v.* Hall, 30 Misc. 75, 62 N. Y. Suppl. 826 [*affirmed* in 64 N. Y. Suppl. 1149]; Bowditch *v.* Salisbury, 9 Johns. 366. But see *infra*, this section, note 95.

North Carolina.— Knight *v.* Taylor, 131 N. C. 84, 42 S. E. 537 [*citing* Cromer *v.* Marsha, 122 N. C. 563, 29 S. E. 836; Brantley *v.* Finch, 97 N. C. 91, 1 S. E. 535].

Ohio.— Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

Pennsylvania.— Peter *v.* Schlosser, 81 Pa. St. 439; Kehler *v.* Bright, 28 Pa. Co. Ct. 316; McKenney *v.* Allen, 31 Leg. Int. 373.

Texas.— Allen *v.* Glover, 27 Tex. Civ. App. 483, 65 S. W. 379. But see Times Pub. Co. *v.* Hill, 36 Tex. Civ. App. 389, 81 S. W. 806, to the effect that the amount alleged in the petition, and not the judgment prayed, determines the jurisdiction.

Vermont.— Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604; McDaniels *v.* Johnson, 36 Vt. 687; Rutland Bank *v.* Cramton, 28 Vt. 330; Bell *v.* Mason, 10 Vt. 509; Hair *v.* Bell, 6 Vt. 35.

Washington.— Ebey *v.* Engle, 1 Wash. Terr. 72.

West Virginia.— Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489; Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653; Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88, 10 S. E. 26.

Wisconsin.— Keegan *v.* Singleton, 5 Wis. 115.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 157, 158, 159.

In action on a justice's judgment see *infra*, IV, O, 9, a, (II), note 7.

Consent jurisdiction.— Where, by stipulation, a justice had jurisdiction to the extent of three hundred dollars, and the judgment claimed did not exceed that sum, jurisdiction attached, and could not be ousted by an error of the justice in taxing the fees so as to make the aggregate exceed three hundred dollars. Reed *v.* Shum, 63 Iowa 378, 19 N. W. 254. See also Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528.

Effect of joinder or consolidation.— Where two causes of action are joined in one complaint or where two suits against the same defendant are consolidated, if jurisdiction as to one of the causes of action is conferred without regard to the amount involved, and the amount claimed in the other does not exceed the jurisdictional limit, the amount involved in the former cannot be added to that claimed in the latter, in order to oust the justice of jurisdiction. Fenton *v.* St. Louis, etc., R. Co., 72 Mo. 259.

In a trial of right of property, the value of the property, as alleged in the affidavit of claim and given in the bond taken by the constable who made the levy, being within the jurisdictional limit, is sufficient to show that the justice had jurisdiction; and it is immaterial that the constable failed to indorse the value of the goods on the bond, as required by Tex. Rev. St. art. 4826. Leman *v.* Borden, 83 Tex. 620, 19 S. W. 160.

Where plaintiff claimed "$100 and over," but took judgment for less than that sum, there was no error, the words "and over" being void for uncertainty. Rockwell *v.* Perine, 5 Barb. (N. Y.) 573.

94. Sanborn *v.* Contra Costa County Super. Ct., 60 Cal. 425; Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489; Keegan *v.* Singleton, 5 Wis. 115.

Effect of bill of particulars.— Since the amount of recovery in a civil action before a justice demanded by the summons is the test of the amount in controversy, on the question of jurisdiction, where a summons of a justice in a civil action for the recovery of money for the breach of contract demands judgment for three hundred dollars, which is within the justice's jurisdiction, the fact that plaintiff files two bills of particulars on different causes of action, aggregating more than three hundred dollars, is not cause for dismissing the action before trial for want of jurisdiction. Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653.

95. Rose *v.* Thompson, 17 Ala. 628; Hart *v* Turk, 15 Ala. 675; Cothran *v.* Weir, 3 Ala. 24; Lawrence *v.* Ford, 44 Me. 427; Bushey *v.* Culler, 26 Md. 534; Ott *v.* Dill, 7 Md. 251; Beall *v.* Black, 1 Gill (Md.) 203; O'Reilly *v.* Murdoch, 1 Gill (Md.) 32; Brady *v.* Smith, 1 N. Y. City Ct. 175. See also Clark *v.* Whitbeck, 14 Ill. 393; Rogers *v.* Blanchard, 7 Ill. 335.

96. McDaniels *v.* Johnson, 36 Vt. 687.

97. Decker *v.* Graves, 10 Ind. App. 25, 37 N. E. 550; Elgin *v.* Mathis, 9 Ind. App. 277, 36 N. E. 650; Burbage *v.* Squires, 3 Metc. (Ky.) 77; Adams *v.* Nebraska Sav., etc., Bank, 56 Nebr. 121, 76 N. W. 421. See also Moran *v.* Murphy, 49 Iowa 68, where a petition claiming one hundred dollars was held to con-

declaration, complaint, or statement, each stating the same cause of action in somewhat different phraseology, or upon a different theory of recovery, and each claiming an amount within the jurisdictional limit, an objection that the aggregate amount claimed is beyond the justice's jurisdiction is without merit,[98] even though the counts are not stated in the alternative.[99] On the other hand if the *ad damnum* in one of the counts exceeds the jurisdictional limit, the justice cannot take cognizance of the action.[1] The fact that any part of the amount demanded cannot be recovered will not give the justice of the peace jurisdiction, since he is without jurisdiction so to determine.[2]

b. Particular Actions and Proceedings — (i) *Actions on Bills and Notes.*[3] In some states the amount claimed to be due by plaintiff is held to be the criterion of the amount in controversy in an action on a bill or note,[4] but in others the rule is that the jurisdiction is to be determined by the face of the note,[5] unless it has been reduced by credits or payments indorsed thereon.[6] In an action by an assignee against his assignor, while the amount of the note is *prima facie* the price paid for the assignment, the actual amount paid may be shown to determine the measure of damages; and therefore, although the face of the note exceeds the jurisdictional limit, if the *ad damnum* is within the jurisdiction, the action will not be dismissed, since the justice cannot know until after the close of the evidence whether the claim is cognizable by him.[7] Conversely, such an action will not be regarded as on the note for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit.[8]

(ii) *Actions on Bonds.*[9] In actions on bonds the amount claimed, and not the penalty, determines the jurisdiction of justices of the peace in the greater number of the states.[10] It has been held, however, that where the action is an action of debt, a justice has no jurisdiction if the penalty exceeds the jurisdic-

fer jurisdiction, although the notice stated that unless defendants appeared judgment would be rendered for the full amount of the claim, which exceeded the jurisdictional limit. But see Richmond Second Nat. Bank *v.* Hutton, 81 Ind. 101, to the effect that, although the complaint prays for an amount beyond the jurisdiction of the justice, if it clearly appears from the bill of particulars that only an amount within his jurisdiction can be recovered he may take jurisdiction.

98. Colvin *v.* Sutherland, 32 Mo. App. 77. See also Bell *v.* Mason, 10 Vt. 509.

Effect of amendment.— Where, after summons was issued on a complaint claiming damages in the sum of three hundred dollars for breach of a contract of lease, an amended complaint was filed containing a bill of particulars of items of charge to the amount of three hundred dollars, the justice had jurisdiction, as the amended complaint was either a restatement of the cause of action contained in the original complaint, or a statement of the same ground of action based on a different theory of recovery, in either of which events the amount involved did not exceed three hundred dollars. Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653.

99. Houston Ice, etc., Co. *v.* Edgewood Distilling Co., (Tex. Civ. App. 1901) 63 S. W. 1075.

1. Chadwick *v.* Batchelder, 46 Vt. 724. See also Schulz *v.* Schulz, (Tex. Civ. App. 1894) 26 S. W. 107, where one count of the complaint sought partition of property worth two thousand dollars, plaintiff's share being one hundred and forty-five dollars, and a second count alleged conversion of property worth forty-five dollars, and a special exception to the first count, as being beyond the jurisdiction of the justice (two hundred dollars) was sustained.

2. Thompson *v.* Willard, 66 Ark. 346, 50 S. W. 870 [*citing* Trammel *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1]. But see Richmond Second Nat. Bank *v.* Hutton, 81 Ind. 101.

3. See, generally, Commercial Paper.

4. Byers *v.* Bellan-Price Inv. Co., 10 Colo. App. 74, 50 Pac. 368; Orme *v.* Williams, 47 Md. 552.

5. Windham County Mut. F. Ins. Co. *v.* Pierce, 36 Vt. 16; Washington County Mut. Ins. Co. *v.* Miller, 26 Vt. 77; Butler *v.* Wagner, 35 Wis. 54.

6. Felt *v.* Felt, 19 Wis. 193. See *infra*, III, D, 2, i.

7. Bozell *v.* Hauser, 9 Ind. 522.

8. Stone *v.* Corbett, 20 Mo. 350.

9. See, generally, Bonds.

10. *Arkansas.*— Files *v.* Reynolds, 66 Ark. 314, 50 S. W. 509.

Georgia.— Lovejoy *v.* Woolfolk, 105 Ga. 252, 31 S. E. 164; Bowden *v.* Taylor, 81 Ga. 199, 6 S. E. 277.

Illinois.— It is only on official bonds that a justice has jurisdiction where the penalty exceeds the jurisdictional limit. Snowhook *v.* Dodge, 28 Ill. 63.

tional limit.[11] A justice has no jurisdiction where a judgment for the penalty stands as security for further breaches, if the penalty exceeds the limit,[12] unless all liability under the bond has accrued, and the amount sued for is within his jurisdiction.[13]

(III) *Actions on Accounts.*[14] The balance due usually determines the jurisdiction of justices of the peace in actions on accounts.[15] In case of mutual accounts, the jurisdiction is determined in New York by their sum,[16] in Tennessee

Indiana. — Anderson *v.* Farns, 7 Blackf. 343; Washburn *v.* Payne, 2 Blackf. 216. *Compare* Beard *v.* Kinney, 6 Blackf. 425.

Iowa. — Stone *v.* Murphy, 2 Iowa 35; Culbertson *v.* Tomlinson, Morr. 404.

Michigan. — Montgomery *v.* Martin, 104 Mich. 390, 62 N. W. 578. See also Gray *v.* Stafford, 52 Mich. 497, 18 N. W. 235, to the effect that Howell Annot. St. § 6820, conferring jurisdiction on justices, however large the penalty of the bond, applies, although the bond is not a money bond.

Mississippi. — State *v.* Luckey, 51 Miss. 528; Shattuck *v.* Miller, 50 Miss. 386.

New Jersey. — Anderson *v.* Rose, 51 N. J. L. 471, 17 Atl. 956.

New York. — Sutherland *v.* McKinney, 18 N. Y. Civ. Proc. 216; Shackleton *v.* Hart, 20 How. Pr. 39; Boomer *v.* Laine, 10 Wend. 525.

Pennsylvania. — Ginter *v.* Gresley, 1 Del. Co. Ct. 354. But see Blue *v.* Com., 4 Watts 215.

South Carolina. — Cavender *v.* Ward, 28 S. C. 470, 6 S. E. 302.

Tennessee. — Fowler *v.* McDaniel, 6 Heisk. 529. *Contra,* Collins *v.* Oliver, 4 Humphr. 439; Wallen *v.* Lane, 1 Overt. 74.

Texas. — Hail *v.* Tunstall, 21 Tex. Civ. App. 593, 54 S. W. 323.

West Virginia. — State *v.* Lambert, 24 W. Va. 399.

Wisconsin. — Buechel *v.* Buechel, 65 Wis. 532, 27 N. W. 318.

See 31 Cent. Dig. tit. "Justices of the Peace," § 161.

Contra. — Graves *v.* McHugh, 58 Mo. 499; State *v.* Emmerling, 12 Mo. App. 98; Pitman *v.* Dwyer, 8 Mo. App. 570; Coggins *v.* Harrell, 86 N. C. 317; Morris *v.* Saunders, 85 N. C. 138; Dalton *v.* Webster, 82 N. C. 279; Bryan *v.* Rousseau, 71 N. C. 194; Fell *v.* Porter, 69 N. C. 140; Hedgecock *v.* Davis, 64 N. C. 650.

11. Richland Tp. *v.* Cliff, 131 Mich. 628, 92 N. W. 285; Bishop *v.* Freeman, 42 Mich. 533, 4 N. W. 290.

12. Probate Judge *v.* Dean, 52 Mich. 387, 18 N. W. 118.

13. Files *v.* Reynolds, 66 Ark. 314, 50 S. W. 509.

14. See, generally, Accounts and Accounting.

15. *Arkansas.* — Brinkley *v.* Barinds, 7 Ark. 165; Hempstead *v.* Collins, 6 Ark. 533.

Indiana. — Newland *v.* Nees, 3 Blackf. 460.

Iowa. — Cochran *v.* Glover, Morr. 151; Hall *v.* Biever, Morr. 113.

New Jersey. — South *v.* Hall, 1 N. J. L. 34. See also Keep *v.* Kelly, 32 N. J. L. 56; Eacrit *v.* Keen, 4 N. J. L. 235, holding that if plaintiff demands more than one hundred dollars, and defendant's plea reduces it below that sum, the justice may try; but if plaintiff's demand is proved, and defendant's is not, he cannot render judgment.

New York. — Brisbane *v.* Batavia Bank, 36 Hun 17.

See 31 Cent. Dig. tit. "Justices of the Peace," § 162.

A liquidated account, within the meaning of the statute giving jurisdiction to magistrates of liquidated accounts, is one in which the balance is stated, leaving no necessity for extrinsic evidence. Midgett *v.* Watson, 29 N. C. 143. See also State *v.* Alexander, 11 N. C. 182.

The account sued upon and the specific items claimed, and not the amount named in the prayer for judgment, should be taken as showing the "debt or balance" sued for. Stephenson *v.* Porter, 45 Mo. 358. See also Musick *v.* Chamlin, 22 Mo. 175; Buckner *v.* Armour, 1 Mo. 534.

Error in computation. — Where the account is footed up as amounting to a sum within the jurisdictional limit, a justice has jurisdiction, although a correct footing would show a sum beyond the limit. Mitchell *v.* Smith, 24 Ind. 252.

In Illinois a justice of the peace has no power to investigate an account whose items exceed the jurisdictional limit, although it may be reduced by credits to a less sum (Blue *v.* Weir, 1 Ill. 372; Clark *v.* Cornelius, 1 Ill. 46), unless defendant admits a balance due within the limit, which he promises to pay (Mauver *v.* Derrick, 1 Ill. 197).

16. Sherry *v.* Cary, 111 N. Y. 514, 19 N. E. 87 [*reversing* 55 N. Y. Super. Ct. 253, 13 N. Y. St. 275]; Bartlett *v.* Mudgett, 75 Hun (N. Y.) 292, 27 N. Y. Suppl. 56, 23 N. Y. Civ. Proc. 288, 31 Abb. N. Cas. 259; Russell *v.* Bardes, 60 Hun (N. Y.) 579, 14 N. Y. Suppl. 473; Bradner *v.* Howard, 14 Hun (N. Y.) 420; Glackin *v.* Zeller, 52 Barb. (N. Y.) 147; Parker *v.* Eaton, 25 Barb. (N. Y.) 122; Stilwell *v.* Staples, 5 Duer (N. Y.) 691, 3 Abb. Pr. 365; Ward *v.* Ingraham, 1 E. D. Smith (N. Y.) 538; Walp *v.* Boyd, 2 N. Y. Suppl. 735; Kemp *v.* Union Gas, etc., Co., 22 N. Y. Civ. Proc. 190; Lablache *v.* Kirkpatrick, 8 N. Y. Civ. Proc. 340; Steele *v.* Macdonald, 4 N. Y. Civ. Proc. 227; Burdick *v.* Hale, 13 Abb. N. Cas. (N. Y.) 60; Lund *v.* Broadhead, 41 How. Pr. (N. Y.) 146; Gilliland *v.* Campbell, 18 How. Pr. (N. Y.) 177; Crim *v.* Cronkite, 15 How. Pr. (N. Y.) 250; Hoodless *v.* Brundage, 8 How. Pr. (N. Y.) 263; Lamoure *v.* Caryl, 4 Den. (N. Y.) 370;

and Texas by the amount claimed,[17] and in Vermont by the debit side of plaintiff's book, unaffected by defendant's book, or by any entries therein;[18] while in Wisconsin a justice has jurisdiction when the amount of plaintiff's account, proven to the satisfaction of the justice, shall not exceed five hundred dollars, and when the same shall be reduced to an amount not exceeding two hundred dollars by credits given, or by the set-off or demand of the opposite party.[19]

(iv) *Proceedings to Recover Rent.*[20] In an ordinary action to recover rent the jurisdiction of justices of the peace is determined, in the absence of a special statute to the contrary, by the amount claimed.[21]

(v) *Enforcement of Liens.*[22] In suits to enforce liens on personal property, the value of the property determines the jurisdiction of the court.[23]

(vi) *Actions to Recover Personal Property.*[24] In actions to recover personal property the jurisdiction of justices of the peace is dependent upon the value of the property,[25] which has been variously held to be determined by its real value, irrespective of the pleading or appraisement,[26] by the affidavit in

Matteson *v.* Bloomfield, 10 Wend. (N. Y.) 555; Abernathy *v.* Abernathy, 2 Cow. (N. Y.) 413.

Until the trial has commenced, and the proof has been entered upon, the justice has jurisdiction to act. Glackin *v.* Zeller, 52 Barb. (N. Y.) 147.

The items of account must have arisen in a course of mutual dealing, and in themselves constitute an affirmative claim in defendant's favor, and which have not been specifically appropriated as payments in reduction of plaintiff's claim, in order to oust the justice of jurisdiction. Steele *v.* Macdonald, 4 N. Y. Civ. Proc. 227.

17. Ayres *v.* Moulton, 5 Coldw. (Tenn.) 154; Davis *v.* Pinckney, 20 Tex. 340; Duer *v.* Seydell, 20 Tex. 61.

18. Beach *v.* Boynton, 26 Vt. 105. See also Mason *v.* Hutchins, 32 Vt. 780, to the effect that if the debit side of plaintiff's book and of his account as presented on appeal before the auditor is less than one hundred dollars, the jurisdiction of the appellate court is not defeated by such a mode of stating the account by the auditor as to swell the debit side to more than that sum.

A charge made by mistake which makes the debit side of plaintiff's book exceed the jurisdictional limit, but which is corrected, does not deprive the justice of jurisdiction. Sheldon *v.* Flynn, 17 Vt. 238; Catlin *v.* Aiken, 5 Vt. 177.

The entry of items which plaintiff has no right to charge on book, and which he does not insist upon as a ground of recovery, will not affect the justice's jurisdiction. Scott *v.* Sampson, 9 Vt. 339.

19. Wis. Rev. St. (1898) § 3572. See also Fleischer *v.* Klumb, 56 Wis. 439, 14 N. W. 607; Henckel *v.* Wheeler, etc., Co., 51 Wis. 363, 7 N. W. 780; French *v.* Keator, 51 Wis. 290, 8 N. W. 190; Cooban *v.* Bryant, 36 Wis. 605.

If there has been a settlement or an account stated, the sum involved in the original account does not deprive the justice of jurisdiction. Orr *v.* Le Clair, 55 Wis. 93, 12 N. W. 356; Cuer *v.* Ross, 49 Wis. 652, 6 N. W. 331.

In an action arising or growing out of contract, the justice has jurisdiction of the balance due, although not agreed on, if the amount sought to be recovered is within the jurisdictional limit. Froelich *v.* Christie, 115 Wis. 549, 92 N. W. 241 [*citing* Prairie Grove Cheese Mfg. Co. *v.* Luder, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085].

20. See, generally, Landlord and Tenant, *post.*

21. In proceedings for the recovery of rent under the Texas statutes, the jurisdiction of justices of the peace is determined by the amount claimed, and not by the value of the property seized. Irwin *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550; Yeiser *v.* Taylor, (Tex. Civ. App. 1895) 31 S. W. 84; Lawson *v.* Lynch, 9 Tex. Civ. App. 582, 29 S. W. 1128.

22. See, generally, Liens; and Cross-References Thereunder.

23. Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742; Smith *v.* Carroll, 28 Tex. Civ. App. 330, 66 S. W. 863; Schwartz *v.* Frees, (Tex. Civ. App. 1895) 31 S. W. 214. But *compare* Allen *v.* Glover, 27 Tex. Civ. App. 483, 65 S. W. 379. See also Busfield *v.* Wheeler, 14 Allen (Mass.) 139, holding that under Mass. Gen. St. c. 151, § 21, a justice of the peace had original jurisdiction of a petition to enforce a lien on personal property, although the amount of the claim exceeded one hundred dollars.

24. See, generally, Replevin.

25. Ball *v.* Sledge, 82 Miss. 749, 35 So. 447; Biddle *v.* Paine, 74 Miss. 494, 24 So. 250.

Stock certificate.— A justice has no jurisdiction to issue a writ of replevin for a stock certificate for five thousand dollars, on the theory that the certificate itself is of merely nominal value. The measure of damages for its conversion is the value of the stock it represents. Barth *v.* Union Nat. Bank, 67 Ill. App. 131.

26. Carter *v.* Alford, 64 Ala. 236; Leslie *v.* Reber, 4 Kan. 315; Garret *v.* Wood, 3 Kan. 231; Davenport *v.* Burke, 9 Allen (Mass.) 116; Higgins *v.* Deloach, 54 Miss. 498. See also House *v.* Lassiter, 49 Ala. 307.

replevin,[27] by the plaintiff's pleading,[28] and by the appraised value.[29] It has also been held that jurisdiction is determined by the sum of the value of the property

In an action brought by the purchaser against the seller to recover possession of the chattels sold, their value and not the amount plaintiff was to pay for them determines the jurisdiction. Houston Ice, etc., Co. *v.* North Galveston Imp. Co., 29 Tex. Civ. App. 259, 67 S. W. 1079.

27. Brown *v.* Jenks, 5 Kan. App. 45, 47 Pac. 324. See also Ball *v.* Sledge, 82 Miss. 749, 35 So. 447; Darling *v.* Conklin, 42 Wis. 478, holding that a justice's jurisdiction rests on the affidavit, independently of the value of the chattels in fact, until his judgment determines their value; and that where the affidavit fails to state the value of the property, or states it over the jurisdictional limit, the justice has no jurisdiction, whatever its actual value may be.

In Michigan the value is determined by the allegation of the affidavit or writ. Burt *v.* Addison, 74 Mich. 730, 42 N. W. 278 (writ); Chilson *v.* Jennison, 60 Mich. 235, 26 N. W. 859 (affidavit); Humphrey *v.* Bayn, 45 Mich. 565, 8 N. W. 556 (writ); Henderson *v.* Desborough, 28 Mich. 170 (affidavit, writ, and declaration).

In Minnesota where the affidavit and complaint in replevin in a justice's court state the value of the property at one hundred dollars or less, the justice acquires jurisdiction to proceed and dispose of the case on the merits, although the value is in fact more than one hundred dollars, unless defendant, as he may do, pleads and proves, in bar to the jurisdiction, the fact that the value exceeds the jurisdictional limit. But pleading the fact alone does not oust the justice of jurisdiction; the fact must be proved and determined in favor of defendant. Parker *v.* Bradford, 68 Minn. 437, 71 N. W. 619.

28. *California.*—Shealor *v.* Amador County, 70 Cal. 564, 11 Pac. 653; Astell *v.* Phillippi, 55 Cal. 265.

Indiana.— Markin *v.* Jornigan, 3 Ind. 548. See also Middleton *v.* Harris, 6 Blackf. 397; Perkins *v.* Smith, 4 Blackf. 299, construing Rev. St. (1838) c. 364, § 18, and holding that justices have jurisdiction where the value of the property sued for does not exceed fifty dollars, although the damages claimed exceed twenty dollars.

Missouri.— Under Rev. St. § 6182, "the value of the property, as set forth in the statement and affidavit, shall fix the jurisdiction of the justice so far as the value is concerned." Knoche *v.* Perry, 90 Mo. App. 483; Malone *v.* Hopkins, 40 Mo. App. 331; Gottschalk *v.* Klinger, 33 Mo. App. 410. But *compare* under earlier statutes Scott *v.* Russell, 39 Mo. 407; Butler *v.* Ivie, 30 Mo. 478.

North Carolina.— See Pasterfield *v.* Sawyer, 133 N. C. 42, 45 S. E. 524, holding that where the complaint alleges a specific value within the limit, and the answer simply denies the allegation, there is no issue as to the property being worth more than the limit, so as to take it out of the justice's jurisdiction.

Tennessee.— Plaintiff may fix whatever value he pleases on the property, and so bring it within the jurisdiction of a justice, but he will be bound by his own valuation. Gray *v.* Jones, 1 Head 542.

Texas.— The jurisdiction will be determined by the value placed on the chattels by plaintiff, unless it appears that the value has been fraudulently understated to give jurisdiction. In doubtful cases all intendments will be in favor of the jurisdiction Dwyer *v.* Bassett, 63 Tex. 274; Graham *v.* Roder, 5 Tex. 141. It will not be defeated even if on the trial it should appear that the property was worth more than the limit of value. The alternative recovery would, however, be limited by the value claimed. Houston Ice, etc., Co. *v.* North Galveston Imp. Co., 29 Tex. Civ. App. 40, 67 S. W. 1079.

See 31 Cent. Dig. tit. "Justices of the Peace," § 163.

The pleadings prima facie determine value (Ball *v.* Sledge, 82 Miss. 749, 35 So. 447); but a plaintiff's honest mistake as to the value of the property in controversy will not oust a justice's jurisdiction (Ross *v.* Natchez, etc., R. Co., 61 Miss. 12).

29. Darrell *v.* Biscoe, 94 Md. 684, 51 Atl. 410 (no jurisdiction without appraisement fixing value at less than one hundred dollars); Selby *v.* McQuillan, 59 Nebr. 158, 80 N. W. 504; Kilpatrick-Koch Dry-Goods Co. *v.* Rosenberger, 57 Nebr. 370, 77 N. W. 770; Bates *v.* Stanley, 51 Nebr. 252, 70 N. W. 972; Hill *v.* Wilkinson, 25 Nebr. 103, 41 N. W. 134; Lawrence *v.* Curtis, 13 Nebr. 515, 14 N. W. 483. Under the present Nebraska statute (Cobbey Annot. St. (1903) § 1984) when the appraised value is less than two hundred dollars, but the jury or the justice find the value of the property to exceed two hundred dollars, no judgment is to be entered, but the proceedings are to be certified to the district court.

Fictitious appraisement.— The return by the constable of the certificate of the appraisers is only *prima facie* evidence that the property has in fact been appraised as therein set forth, and may be contradicted by testimony that the appraisement was in fact fictitious, and that the valuation of the property was falsely placed within the justice's jurisdiction. Darrell *v.* Biscoe, 94 Md. 684, 51 Atl. 410 [*citing* Karthaus *v.* Owings, 2 Gill & J. (Md.) 430; Hayes *v.* Lusby, 5 Harr. & J. (Md.) 485].

The value certified and returned by the officer, and not the value found by a jury on a trial before the justice, is the value which is to determine whether the justice had jurisdiction. Williams *v.* McDonal, 3

and the damages claimed for its detention.[30] In Canada a justice has jurisdiction in cases of poundage if the amount required to obtain the release of the cattle does not exceed the jurisdictional limit, although their value does.[31] It is the value of the property at the time suit is brought that determines the jurisdiction, and a subsequent enhancement beyond the jurisdictional limit will not oust the justice of jurisdiction.[32]

(VII) *FORCIBLE ENTRY AND DETAINER.*[33] In actions of forcible entry and detainer, or of forcible detainer, the amount involved is to be determined by the rental value of the premises.[34]

(VIII) *ATTACHMENT*[35] *AND GARNISHMENT.*[36] In attachment and garnishment proceedings, the jurisdiction of justices of the peace is determined by the amount claimed or in controversy in the principal action, and not the value of the property attached,[37] or the amount in the hands of the garnishee.[38]

c. Interest.[39] Interest, whether as a legal incident to the debt or arising by contract, is regarded in some jurisdictions as a part of the amount in controversy, and if the sum of the amount claimed and the computed interest exceeds the jurisdictional limit, a justice cannot take cognizance of the action.[40] In other jurisdictions interest is regarded as an incident merely, and is not to be taken into

Pinn. (Wis.) 331, 4 Chandl. 65, construing Wis. Gen. St. p. 335, § 5.

30. Stevers *v.* Gunz, 23 Minn. 520; Dempsey *v.* Hill, 3 Ohio Dec. (Reprint) 260, 5 Wkly. L. Gaz. 181; Ferguson *v.* Byers, 40 Oreg. 468, 67 Pac. 1115, 69 Pac. 32; Reynolds *v.* Philips, 72 S. C. 32, 51 S. E. 523.

31. Sterling *v.* Jones, 7 N. Brunsw. 522.

32. Scott *v.* Russell, 39 Mo. 407.

33. See, generally, FORCIBLE ENTRY AND DETAINER.

34. Moore *v.* Richardson, 197 Ill. 437, 64 N. E. 330 [*affirming* 100 Ill. App. 134].

The allegation of a complaint that the rental value does not exceed twenty-five dollars is not conclusive, but the same must be determined from the evidence. Ballerino *v.* Bigelow, 90 Cal. 500, 27 Pac. 372.

35. See, generally, ATTACHMENT.

36. See, generally, GARNISHMENT.

37. Fly *v.* Grieb, 62 Ark. 209, 35 S. W. 214; Hoppe *v.* Byers, 39 Iowa 573; Landa *v.* Mercantile Banking Co., 10 Tex. Civ. App. 582, 31 S. W. 55. See also E. E. Forbes Piano Co. *v.* Owens, 120 Ga. 449, 47 S. E. 938.

Sequestration.— Where the sum claimed and the alleged value of mortgaged personalty are within the jurisdictional limit, as are the damages claimed by defendant in reconvention, the cause is within the jurisdiction of the justice, although defendant's claim for damages for the sequestration, if added to his claim in reconvention for overpayment and the alleged value of the property would exceed the jurisdictional limit. The sequestration is only auxiliary to plaintiff's cause of action, and does not affect the question of jurisdiction, where the matters in controversy are within the court's jurisdiction. Rhodes Haverty Furniture Co. *v.* Henry, (Tex. Civ. App. 1902) 67 S. W. 340 [*citing* Tucker *v.* Williams, (Tex. Civ. App. 1900) 56 S. W. 585].

The statement of value in the affidavit for a writ of sequestration is required by statute for the purposes of the proceeding, but not to determine the jurisdiction. Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608.

38. *Arkansas.*— Davis *v.* Choctaw, etc., R. Co., (1904) 83 S. W. 318. *Contra,* Traylor *v.* Allen, 61 Ark. 13, 31 S. W. 570; More *v.* Woodruff, 5 Ark. 214.

Georgia.— Welch *v.* Alligood, 22 Ga. 618. But see Mahone *v.* McDonald, Ga. Dec. 154.

Illinois.— Pomeroy *v.* Rand, 157 Ill. 176, 41 N. E. 636 [*reversing* 54 Ill. App. 522]; Surine *v.* Ft. Dearborn Nat. Bank, 59 Ill. App. 329; New York Home Ins. Co. *v.* Kirk, 23 Ill. App. 19.

Kansas.— Fitch *v.* Manhattan F. Ins. Co., 23 Kan. 366.

Michigan.— Wetherwax *v.* Paine, 2 Mich. 555.

Missouri.— Doggett *v.* St. Louis M. & F. Ins. Co., 19 Mo. 201.

Vermont.— Briggs *v.* Beach, 18 Vt. 115. See also Kimball *v.* Hopkins, 16 Vt. 618.

See 31 Cent. Dig. tit. "Justices of the Peace," § 156.

A justice cannot render judgment against the garnishee for a sum beyond his jurisdiction, although the garnishment may be founded on several judgments against the original defendant. Witherspoon *v.* Barber, 3 Stew. (Ala.) 335.

39. See, generally, INTEREST.

40. *Alabama.*— Crabtree *v.* Cliatt, 22 Ala. 181 (no jurisdiction unless plaintiff enters a credit for the excess, or otherwise releases it, before or at the time of rendition of judgment); Hogan *v.* Odam, 3 Stew. 58.

Arizona.— Brown *v.* Braun, (1905) 80 Pac. 323.

Colorado.— Cramer *v.* McDowell, 6 Colo. 369.

Georgia.— E. E. Forbes Piano Co. *v.* Owens, 120 Ga. 449, 47 S. E. 938.

Idaho.— Quayle *v.* Glenn, 6 Ida. 549, 57 Pac. 308.

Indiana.— Gregg *v.* Wooden, 7 Ind. 499.

account in determining the question of jurisdiction.[41] Interest accruing after the commencement of the action,[42] or between verdict and judgment,[43] or after judgment,[44] is not to be considered in determining jurisdiction; and similarly a justice may enforce by garnishment a judgment which he had jurisdiction to render, but which, by reason of interest and costs, exceeds the jurisdictional limit.[45]

d. Costs.[46] Costs are merely incidental to the judgment and do not affect the jurisdiction.[47]

e. Attorney's Fees. In some states, in an action before a justice of the peace on a promissory note stipulating for the payment of attorney's fees, the aggregate of such fees and the amount claimed to be due on the note must be within the jurisdictional limit, or a justice can take no cognizance of the action;[48]

Iowa.— Galley *v.* Tama County, 40 Iowa 49.

Kansas.— Ball *v.* Biggam, 43 Kan. 327, 23 Pac. 565; St. Louis, etc., R. Co. *v.* Brown, 10 Kan. App. 401, 61 Pac. 457.

Kentucky.— Fidler *v.* Hall, 2 Metc. 461. But see Sweeny *v.* Lowe, 6 B. Mon. 314.

Nebraska.— Adams *v.* Nebraska Sav., etc., Bank, 56 Nebr. 121, 76 N. W. 421.

Oregon.—Ferguson *v.* Reiger, 43 Oreg. 505, 73 Pac. 1040.

South Carolina.— Melton *v.* Ellison, 2 Brev. 399.

South Dakota.— Plunket *v.* Evans, 2 S. D. 434, 50 N. W. 961.

Tennessee.— Wharton *v.* Thompson, 9 Yerg. 45.

Washington.—State *v.* King County Super. Ct., 9 Wash. 369, 37 Pac. 489.

United States.— Milburn *v.* Burton, 17 Fed. Cas. No. 9,541, 2 Cranch C. C. 639.

See 31 Cent. Dig. tit. "Justices of the Peace," § 166.

A statutory interest penalty of five per cent a month to be assessed against railroad companies in actions for damages is to be treated as a part of the principal; and where the amount claimed, added to the amount of the penalty, exceeds two hundred dollars, the justice is without jurisdiction. Gulf, etc., R. Co. *v.* Gregory, (Tex. Civ. App. 1900) 59 S. W. 310.

Confession of judgment.— Where a promissory note for three hundred dollars, dated three days before its execution, and bearing interest at eight per cent per annum, was filed as the cause of action before a justice of the peace, but the note was in fact executed on the day it was filed, and on the same day there was judgment by confession for three hundred dollars, it was held that the cause of action — the note — must be regarded as only three hundred dollars without adding interest for three days according to the face of the note, and therefore the justice had jurisdiction and the judgment was valid. Calloway *v.* Byram, 95 Ind. 423.

41. *Arkansas.*—Sherrill *v.* Wilson, 29 Ark. 384; Chatten *v.* Heffley, 21 Ark. 313; Fisher *v.* Hall, 1 Ark. 275. But see Howell *v.* Milligan, 13 Ark. 40.

California.— Bradley *v.* Kent, 22 Cal. 169.

Mississippi.— Jackson *v.* Whitfield, 51 Miss. 202; Planters' Bank *v.* Coulson, 6 How. 395.

Missouri.— See James *v.* Crown Cereal Co., 90 Mo. App. 227.

North Carolina.— Hedgecock *v.* Davis, 64 N. C. 650.

Texas.— Clark *v.* Brown, 48 Tex. 212.

West Virginia.— Moore *v.* Harper, 42 W. Va. 39, 24 S. E. 633.

See 31 Cent. Dig. tit. "Justices of the Peace," § 166.

42. Ormond *v.* Sage, 69 Minn. 523, 72 N. W. 810. *Contra,* Melton *v.* Ellison, 2 Brev. (S. C.) 399; McCormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, 39 Pac. 483.

43. Hervey *v.* Bangs, 53 Me. 514.

44. See Houston, etc., R. Co. *v.* Lockhart, (Tex. Civ. App. 1896) 39 S. W. 320 [*distinguishing* Baker *v.* Smelser, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163].

Scire facias to revive judgment.—An alderman has jurisdiction to hear and decide a scire facias to revive a judgment, although the interest has increased the claim beyond the limit of jurisdiction. McGarry *v.* Douredoure, 6 Phila. (Pa.) 332.

45. Nesbitt *v.* Dickover, 22 Ill. App. 140; Gillett *v.* Richards, 46 Iowa 652; Austin *v.* Erwin, 2 Tex. App. Civ. Cas. § 290. See also Brandt *v.* Moore, (Tex. Civ. App. 1902) 65 S. W. 1124.

46. See, generally, COSTS.

47. Closen *v.* Allen, 29 Minn. 86, 12 N. W. 146; Watson *v.* Ward, 27 Minn. 29, 6 N. W. 407; Jackson *v.* Whitfield, 51 Miss. 202.

48. De Jarnatt *v.* Marquez, 127 Cal. 558, 60 Pac. 45; E. E. Forbes Piano Co. *v.* Owens, 120 Ga. 449, 47 S. E. 938; Morgan *v.* Kiser, 105 Ga. 104, 31 S. E. 45; Peeples *v.* Strickland, (Ga. 1897) 29 S. E. 22; Ashworth *v* Harper, 95 Ga. 660, 22 S. E. 670; Almand *v.* Almand, 95 Ga. 204, 22 S. E. 213; Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591; Bell *v.* Rich, 73 Ga. 240; Hill *v.* Haas, 73 Ga. 122; Johnson *v.* Stephens, 69 Ga. 756; Baxter *v.* Bates, 69 Ga. 587; Waters *v.* Walker, (Tex. App. 1891) 17 S. W. 1085; King *v.* Robinson, 2 Tex. App. Civ. Cas. § 554.

Even though such stipulations are made invalid by statute, the rule applies. Rimes *v* Williams, 99 Ga. 281, 25 S. E. 685; Warder, etc., Co. *v.* Raymond, 7 S. D. 451, 64 N. W. 525.

Notice of suit for fees.— A suit on a note providing for the payment of one hundred dollars with interest and ten per cent attor-

but in other jurisdictions it is held that such stipulations are not to be regarded in the determination of jurisdiction.[49]

f. Punitive Statutory Damages.[50] Where a justice of the peace has jurisdiction of an action in all other respects, the fact that he may by statute give double or treble damages, which will reach an amount in excess of his jurisdiction, will not prevent his taking cognizance of the case.[51]

g. Several or Split Claims[52] — (i) *In General.* A single cause of action cannot be split up into several actions so as to give a justice of the peace jurisdiction;[53] but this rule does not apply to suits instituted at different times and on

ney's fees is within the justice's jurisdiction, where plaintiff without objection files an amendment setting up that he has not complied with the act of Dec. 12, 1900, by giving notice to defendant of his intent to sue for attorney's fees, and expressly waiving the right to recover such fees. De Lamater *v.* Martin, 117 Ga. 139, 43 S. E. 459.

An action to cancel notes for an amount not exceeding his jurisdiction may be brought before a justice, although they provide for attorney's fees, in case of collection by legal proceedings, which would bring the amount above his jurisdiction, where the suit is brought before the maturity of the note. Hildebrand *v.* Walter A. Wood Mowing, etc., Mach. Co., 8 Tex. Civ. App. 132, 27 S. W. 826.

A justice has jurisdiction of an attachment for the recovery of the principal only of a note, although the note provides for the payment of attorney's fees in case of collection by suit, and although the aggregate amount of principal and attorney's fees would exceed his jurisdiction. Pickett *v.* Smith, 95 Ga. 757, 22 S. E. 669.

49. Davis *v.* Jones, 109 Ala. 418, 19 So. 841 (as plaintiff could not have rightfully demanded more than the principal before suit, and that was within the limit); Spiesberger *v.* Thomas, 59 Iowa 606, 13 N. W. 745 (fees treated as costs); Long *v.* Loughran, 41 Iowa 543 (holding the mention of attorney's fees in the notice of suit to be simply descriptive of the note); Exchange Bank *v.* Apalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813 (holding, however, that such stipulations are void as against public policy).

50. See, generally, DAMAGES.

51. Roosevelt *v.* Hanold, 65 Mich. 414, 32 N. W. 443; Godsey *v.* Weatherford, 86 Tenn. 670, 8 S. W. 385. But see Hoban *v.* Ryan, 130 Cal. 96, 62 Pac. 296.

Wagner St. Mo. p. 809, § 3, cl. 5, giving justices concurrent jurisdiction with the circuit court in actions against railroads for killing stock, etc., confers jurisdiction on justices to give judgment for double the amount of the damages, regardless of the amount, in the cases mentioned in the Damage Act. Parish *v.* Missouri, etc., R. Co., 63 Mo. 284.

52. See, generally, JOINDER AND SPLITTING OF ACTIONS.

53. *Arkansas.*— Gregory *v.* Williams, 24 Ark. 177.

Delaware.— Messick *v.* Dawson, 2 Harr. 50.

Georgia.— Floyd *v.* Cox, 72 Ga. 147; *Ex p.* Gale, R. M. Charlt. 214. See also Planters', etc., Bank *v.* Chipley, Ga. Dec. 50.

Indiana.— Bainum *v.* Small, 4 Ind. 49; Markin *v.* Jornigan, 3 Ind. 548; Wetherwell *v.* Congressional Tp., 5 Blackf. 357; Swift *v.* Woods, 5 Blackf. 97.

Louisiana.— State *v.* Newman, 49 La. Ann. 52, 21 So. 189; Reynolds, etc., Constr. Co. *v.* Monroe, 47 La. Ann. 1289, 17 So. 802; State *v.* Third Justice of Peace, 15 La. Ann. 660.

Michigan.— Milroy *v.* Spurr Mountain Iron Min. Co., 43 Mich. 231, 5 N. W. 287.

Mississippi.— Grayson *v.* Williams, Walk. 298, 12 Am. Dec. 568. And see Morris *v.* Shryock, 50 Miss. 590.

Missouri.— Dillard *v.* St. Louis, etc., R. Co., 58 Mo. 69; Robbins *v.* Conley, 47 Mo. App. 502.

New York.— Willard *v.* Sperry, 16 Johns. 121.

North Carolina.— Where the indebtedness or liability is single, whole, and indivisible, it cannot be split, so as to confer jurisdiction on a justice of the peace (Norvell *v.* Mecke, 127 N. C. 401, 37 S. E. 452 [*distinguishing* Kiser *v.* Blanton, 123 N. C. 400, 31 S. E. 878]; McPhail *v.* Johnson, 109 N. C. 571, 13 S. E. 799; Moore *v.* Nowell, 94 N. C. 265; Magruder *v.* Randolph, 77 N. C. 79; Boyle *v.* Robbins, 71 N. C. 130); but where plaintiff has an account, the different items of which constitute separate transactions, he may split it up so as to bring it within a justice's jurisdiction (Caldwell *v.* Beatty, 69 N. C. 365), unless the account has become an account stated, by reason of having been presented as a whole, and not objected to within a reasonable time (Simpson *v.* Elwood, 114 N. C. 528, 19 S. E. 598 [*citing* Marks *v.* Ballance, 113 N. C. 28, 18 S. E. 75]).

Oklahoma.— Hesser *v.* Johnson, 13 Okla. 53, 74 Pac. 320.

Pennsylvania.— Moneghan *v.* Conyngham Tp., 2 Luz. Leg. Reg. 145; Walton *v.* Vanhorn, 1 Phila. 377.

Tennessee.— Johnson *v.* Pirtle, 1 Swan 262.

Vermont.— Bullard *v.* Thorpe, 66 Vt. 599, 30 Atl. 36, 25 L. R. A. 605, 44 Am. St. Rep. 867. *Compare* Reed *v.* Stockwell, 34 Vt. 206.

Virginia.— James *v.* Stokes, 77 Va. 225 [*distinguishing* Hendricks *v.* Shoemaker, 3 Gratt. 197]; Hutson *v.* Lowry, 2 Va. Cas. 42.

West Virginia.— Richmond *v.* Henderson,

different claims,[54] nor to actions brought upon one or more instalments of a debt, payable in instalments, where the amount sued for is within the justice's jurisdiction, and the remaining instalments are not yet due;[55] and where the items of an account are incurred under different contracts, an action may be brought on each item before a justice, the separate items being less than the jurisdictional limit.[56] But it has also been asserted that where several demands for damages for torts, each being for less than the statutory limit, but the aggregate exceeding such limit, are joined in one action a justice of the peace has jurisdiction.[57] It has been held that where a declaration in a suit before a justice contains several counts, each having its own conclusion, and the aggregate amount demanded exceeds the jurisdictional limit, the suit must be dismissed for want of jurisdiction.[58]

(II) *Bills and Notes.*[59] The holder of several bills or notes made or accepted by the same party may elect to bring a separate action on each before a justice of the peace, and the fact that their aggregate amount exceeds the jurisdictional limit will not oust the justice of jurisdiction;[60] but where the notes were given in the same transaction, as where an entire claim is divided, and several notes are given, each for less than the jurisdictional limit, and all are due, the better opinion seems to be that a justice of the peace cannot entertain jurisdiction of separate actions on the notes, if in the aggregate they exceed the limit.[61] In

48 W. Va. 389, 37 S. E. 653; Hale *v.* Weston, 40 W. Va. 313, 21 S. E. 742; Bodley *v.* Archibald, 33 W. Va. 229, 10 S. E. 392.

See 31 Cent. Dig. tit. "Justices of the Peace," § 168.

It must be proved that the whole demand was originally entire in order to oust a justice's court of jurisdiction on the ground that the entire demand has been divided into several smaller ones. Kendall *v.* Muscogee County, Ga. Dec. Pt. II, 185; Pinckard *v.* Ware, Ga. Dec. Pt. II, 172.

The wrongful taking of several chattels at the same time gives but one cause of action, which plaintiff cannot split up so as to confer jurisdiction on a justice. Hesser *v.* Johnson, 13 Okla. 53, 74 Pac. 320.

A joint claim cannot be so divided and apportioned among the creditors without the debtor's consent that the amount assigned to each shall be within the justice's jurisdiction. Bodley *v.* Archibald, 33 W. Va. 229, 10 S. E. 392.

Division of lease.— Where a lot of ground upon which were two houses was leased at a rent of one hundred and twenty-five dollars per month, and, upon the death of the lessor the two houses became the property of two distinct persons, one of whom sought to eject the lessee by suit before a justice of the peace, it was held that the lease could not be divided for the purpose of giving jurisdiction to the justice. State *v.* Third Justice of Peace, 15 La. Ann. 660.

54. Ash *v.* Lee, 51 Miss. 101.

The Illinois statute requiring the consolidation of all demands which are of a nature to be consolidated, and which do not exceed two hundred dollars when consolidated, has no application to distinct claims, the aggregate of which, when consolidated, exceeds that amount. Page *v.* Shields, 102 Ill. App. 575.

Distinct accounts.— If two accounts are regarded by the parties as separate and distinct, and the justice of one be acknowledged after judgment on the other, separate actions may be maintained, and costs recovered. Johnson *v.* Pirtle, 1 Swan (Tenn.) 262. See also State *v.* King, 5 Ind. 439, construing 2 Ind. Rev. St. (1852) § 122.

55. Winston *v.* Majors, 6 Ala. 659; Walker *v.* Byrd, 15 Ark. 33. *Aliter* when all the instalments were due, and aggregated a sum beyond the justice's jurisdiction. Planters', etc., Bank *v.* Chipley, Ga. Dec. 50.

56. Copland *v.* Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501 [*following* Fort *v.* Perry, 122 N. C. 230, 29 S. E. 362; Magruder *v.* Randolph, 77 N. C. 79; Boyle *v.* Robbins, 71 N. C. 130; Caldwell *v.* Beatty, 69 N. C. 365].

57. Little Rock, etc., R. Co. *v.* Smith, 66 Ark. 278, 50 S. W. 502.

58. Bainum *v.* Small, 4 Ind. 49. See also Markin *v.* Jornigan, 3 Ind. 548. It seems, however, that if there is a general conclusion limiting the amount claimed, the justice has jurisdiction. Swift *v.* Woods, 5 Blackf. (Ind.) 97.

59. See, generally, Commercial Paper.

60. Luce *v.* Shoff, 70 Ind. 152; Drysdale *v.* Biloxi Canning Co., 67 Miss. 534, 7 So. 541; Thecker *v.* Milburn, 23 Fed. Cas. No. 13,876, 1 Hayw. & H. 271. But see Morris *v.* Shryock, 50 Miss. 590.

61. *Georgia.*— Bell *v.* Rich, 73 Ga. 240.

Mississippi.— Scofield *v.* Pensons, 26 Miss. 402; Grayson *v.* Williams, Walk. 298, 12 Am. Dec. 568. See also Morris *v.* Shryock, 50 Miss. 590.

Pennsylvania.— Walton *v.* Vanhorn, 1 Phila. 377.

Virginia.— Hutson *v.* Lowry, 2 Va. Cas. 42. See also James *v.* Stokes, 77 Va. 225.

United States.— Moore *v.* Hough, 17 Fed. Cas. No. 9,766, 2 Cranch C. C. 561.

See 31 Cent. Dig. tit. "Justices of the Peace," § 169.

Contra.— Herrin *v.* Buckelew, 37 Ala. 585; Fortescue *v.* Spencer, 24 N. C. 63.

Arkansas and Wisconsin one suit may be brought before a justice of the peace on several notes, neither of which exceeds the jurisdictional limit, although their aggregate may exceed it.[62]

h. Remission or Abandonment of Part of Claim. As a general rule a plaintiff may, in order to bring his claim within the jurisdiction of a justice of the peace, remit or abandon a part thereof,[63] or the interest thereon,[64] and where the

62. Collins *v.* Woodruff, 9 Ark. 463; Howard *v.* Mansfield, 30 Wis. 75.

63. *Alabama.*— Wharton *v.* King, 69 Ala. 363; Long *v.* Bakefield, 48 Ala. 608; Henderson *v.* Plumb, 18 Ala. 74; Nibbs *v.* Moody, 5 Stew. & P. 198; King *v.* Dougherty, 2 Stew. 487.

Arkansas.— Hunton *v.* Luce, 60 Ark. 146, 29 S. W. 151, 46 Am. St. Rep. 165, 28 L. R. A. 221; Lafferty *v.* Day, 7 Ark. 258. See also State *v.* Scoggin, 10 Ark. 326.

Colorado.— Litchfield *v.* Daniels, 1 Colo. 268.

Georgia.— See Stewart *v.* Thompson, 85 Ga. 829, 11 S. E. 1030.

Illinois.— Carpenter *v.* Wells, 65 Ill. 451; Raymond *v.* Strobel, 24 Ill. 113.

Indiana.— Pate *v.* Shafer, 19 Ind. 173; Remington *v.* Henry, 6 Blackf. 63.

Massachusetts.— Hapgood *v.* Doherty, 8 Gray 373.

Michigan.— Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831.

Minnesota.— Parker *v.* Bradford, 68 Minn. 437, 71 N. W. 619.

Missouri.— Phillips *v.* Fitzpatrick, 34 Mo. 276; Denny *v.* Eckelkamp, 30 Mo. 140; Hempler *v.* Schneider, 17 Mo. 258.

Nebraska.— Hill *v.* Wilkinson, 25 Nebr. 103, 41 N. W. 134.

New York.— Farley *v.* Gibbs, 4 N. Y. Suppl. 353.

North Carolina.— Where several dealings are included in an account, plaintiff can omit, or give credit for, any items he may choose, so as to bring the case within the jurisdiction of a single magistrate. If there is but one item of dealing, this cannot be done. Coggins *v.* Harrell, 86 N. C. 317; Waldo *v.* Jolly, 49 N. C. 173. If the principal sum demanded exceeds two hundred dollars, the excess must be remitted of record (McPhail *v.* Johnson, 115 N. C. 298, 20 S. E. 373; Dalton *v.* Webster, 82 N. C. 279), but when plaintiff claims only two hundred dollars in his summons, and recovers less than that sum, it is not necessary to enter a remittitur, although the evidence shows that more than two hundred dollars is due (Brantley *v.* Finch, 97 N. C. 91, 1 S. E. 535).

Ohio.— Woolever *v.* Stewart, 36 Ohio St. 146, 38 Am. Rep. 569.

South Carolina.— Catawba Mills *v.* Hood, 42 S. C. 203, 20 S. E. 91.

Tennessee.— Carraway *v.* Burton, 4 Humphr. 108.

Texas.— Fuller *v.* Sparks, 39 Tex. 136; Ball *v.* Hines, (Civ. App. 1901) 61 S. W. 332. *Compare* Mabry *v.* Little, 19 Tex. 337.

Vermont.— Danforth *v.* Streeter, 28 Vt. 490; Warren *v.* Newfane, 25 Vt. 250; Herren *v.* Campbell, 19 Vt. 23.

West Virginia.— Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653; Wells *v.* Michigan Mut. L. Ins. Co., 41 W. Va. 131, 23 S. E. 527. See also Ward *v.* Evans, 49 W. Va. 184, 38 S. E. 524. But see Todd *v.* Gates, 20 W. Va. 464.

Wisconsin.— McCormick *v.* Robinson, 2 Pinn. 276, 1 Chandl. 254.

United States.— Porter *v.* Rapine, 20 Fed. Cas. No. 11,288, 2 Cranch C. C. 47; Witt *v.* Hereth, 30 Fed. Cas. No. 17,921, 6 Biss. 474.

See 31 Cent. Dig. tit. "Justices of the Peace," § 170.

Contra.— Colwell *v.* Parcell, 3 N. J. L. 561; Sonders *v.* Stratton, 3 N. J. L. 528; Bower *v.* McCormick, 73 Pa. St. 427; Collins *v.* Collins, 37 Pa. St. 387; Torbert *v.* Yocum, 2 Leg. Chron. (Pa.) 319; Carey *v.* Branch, 1 Leg. Chron. (Pa.) 170; Plunkett *v.* Evans, 2 S. D. 434, 50 N. W. 961; White *v.* Macklin, 3 N. Brunsw. 94.

In attachment see *infra*, III, E, 4, text and note 15.

Consent of debtor necessary.— Cox *v.* Stanton, 58 Ga. 406; Howell *v.* Burnett, 20 N. J. L. 265; Burton *v.* Varnum, 4 Fed. Cas. No. 2,220, 2 Cranch C. C. 524; Greenough *v.* Langtree, 10 Fed. Cas. No. 5,785, 1 Hayw. & H. 72.

An indorsement on a bond by a payee without the consent or knowledge of the obligor, for the purpose of reducing the amount in controversy within the jurisdiction of a justice, is a fraud on the law, and a plea of abatement will be sustained. Moore *v.* Thomson, 44 N. C. 221, 59 Am. Dec. 550.

False or feigned credits are not allowed, where the amount due is expressly fixed by contract. Sands *v.* Delap, 2 Ill. 168; Ball *v.* Hines, (Tex. Civ. App. 1901) 61 S. W. 332; Cazenove *v.* Darrel, 5 Fed. Cas. No. 2,539, 2 Cranch C. C. 444.

Remission of penalty.— In an action of assumpsit to recover a municipal assessment, the municipality may waive its right to a penalty allowed by law, in order to bring the amount of the claim within the jurisdiction of an alderman. Chester *v.* McGeoghegan, 41 Wkly. Notes Cas. (Pa.) 423.

An indorsement by a justice on the back of a note for six hundred dollars that plaintiff offered to release all but one hundred dollars is not a credit or payment within the Wisconsin statute. Felt *v.* Felt, 19 Wis. 193.

After suit has been instituted plaintiff cannot remit a part of his demand so as to bring it within the jurisdictional limit. Brown *v.* Braun, (Ariz.) 80 Pac. 323. See also Barker *v.* Baxter, 1 Pinn. (Wis.) 407.

64. *Alabama.*— Solomon *v.* Ross, 49 Ala. 198.

sum demanded is within, it is immaterial that the evidence shows an indebtedness beyond, the jurisdiction.[65] Where in replevin the property exceeds in value the jurisdiction of the justice, a part thereof can be released from the levy and the jurisdiction of the justice sustained;[66] but where the property is indivisible and the value exceeds the jurisdiction, the want of jurisdiction cannot be cured by remitting any excess in value.[67] Where, on the failure of plaintiff to give bond, the property is returned to defendant, and the action proceeds as one for damages only, it is competent to plaintiff to remit any excess of interest in the property as determined by the justice.[68] A justice of the peace cannot of course give himself jurisdiction by rendering judgment for a part only of a demand, the whole of which exceeds his jurisdiction.[69]

i. Partial Payments, Credits, and Set-Offs.[70] A justice of the peace has jurisdiction over an action in which the original indebtedness exceeds the limit of his jurisdiction, if it has been reduced within that sum by payments,[71] or fair cred-

Illinois.— Raymond *v.* Strobel, 24 Ill. 113; Bates *v.* Bulkley, 7 Ill. 389; Simpson *v.* Updegraff, 2 Ill. 594.

Maryland.— Kirk *v.* Grant, 67 Md. 418, 10 Atl. 230.

New Jersey.— Where, by the express terms of the contract, a certain sum is to be paid on a future day, with interest, or with legal interest, or with interest at a given rate, the contract is one and entire, and the creditor cannot, without the consent of the debtor, relinquish any part of his interest for the purpose of giving jurisdiction. But where the contract does not name interest, the creditor may sue for the principal, and relinquish any claim he may lawfully have to damages for the detention of the debt or the violation of the contract. Howell *v.* Burnett, 20 N. J. L. 265. See also Griffith *v.* Clute, 9 N. J. L. 264; Saddle River Tp. *v.* Colfax, 6 N. J. L. 115.

Pennsylvania.— Evans *v.* Hall, 45 Pa. St. 235; Cook *v.* Minick, 1 Pa. Co. Ct. 603.

South Carolina.— Varney *v.* Vosch, 3 Hill 237; Melton *v.* Ellison, 2 Brev. 399.

Vermont.— Paige *v.* Morgan, 28 Vt. 565; Parkhurst *v.* Spalding, 17 Vt. 527; Stone *v.* Winslow, 7 Vt. 338; Gibson *v.* Sumner, 6 Vt. 163.

United States.— Homans *v.* Moore, 12 Fed. Cas. No. 6,655, 5 Cranch C. C. 505.

See 31 Cent. Dig. tit. "Justices of the Peace," § 171.

Compare Hearn *v.* Cutberth, 10 Tex. 216, where it is questioned whether a party can remit the interest on a note, for the purpose of applying payments on the note in reduction of the principal, so as to give a justice jurisdiction, and held that at all events it cannot be done after the case has been removed to the district court by certiorari.

65. *Arkansas.*— Lafferty *v.* Day, 7 Ark. 258.

Illinois.— Ellis *v.* Snider, 1 Ill. 336.

Indiana.— Mitchell *v.* Smith, 24 Ind. 252.

Kansas.— Wooster *v.* McKinley, 1 Kan. 317.

Missouri.— Best *v.* Best, 16 Mo. 530.

New Jersey.— Johnson *v.* Colbaugh, 1 N. J. L. 66.

North Carolina.— Knight *v.* Taylor, 131 N. C. 84, 42 S. E. 537 [*citing* Cromer *v.* Marsha, 122 N. C. 563, 29 S. E. 836; Brantly *v.* Finch, 97 N. C. 91, 1 S. E. 535].

Tennessee.— Boyd *v.* Hensley, 5 Hayw. 258.

West Virginia.— Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489, holding that, although a complaint or bill of particulars claims items beyond the jurisdiction, yet, if the summons demands a sum within the jurisdiction, the action cannot be dismissed upon the face of the complaint or bill of particulars; and although the proof goes to show ground of recovery beyond the jurisdiction, plaintiff may, at any time before the verdict or finding of the justice, withdraw any item of his demand, so as to reduce his recovery so as to be within the justice's jurisdiction, and thus prevent dismissal. See also Junkins *v.* Hamilton Lumber Co., 44 W. Va. 641, 29 S. E. 1017.

See 31 Cent. Dig. tit. "Justices of the Peace," § 170.

Remission by implication.— Where the sum demanded is within a justice's jurisdiction, and it appears from the evidence that a larger amount is due, it is not necessary that plaintiff formally remit the excess, the jurisdiction being determined by the sum demanded. By his own action plaintiff has limited his possible recovery to the sum demanded, and has in legal effect remitted the excess by necessary implication. Knight *v.* Taylor, 131 N. C. 84, 42 S. E. 537.

66. Nigh *v.* Dovel, 84 Ill. App. 228.

67. Cruikshank *v.* Kimball, 75 Ill. App. 231.

68. Hill *v.* Wilkinson, 25 Nebr. 103, 41 N. W. 134.

69. Thompson *v.* Kerr, 17 Ind. 288.

70. See also *infra*, III, E, 3.

71. *Georgia.*— Nichols *v.* McAbee, 30 Ga. 8.

Kentucky.— See Farrow *v.* Summers, 3 Litt. 460, the payments must have been indorsed on the contract.

New York.— Brisbane *v.* Batavia Bank, 36 Hun 17; Ward *v.* Ingraham, 1 E. D. Smith 538; Lamoure *v.* Caryl, 4 Den. 370.

Pennsylvania.— Collins *v.* Collins, 37 Pa.

its.[72] So too he has jurisdiction in an action on account where the balance claimed,[73] or which defendant admits and promises to pay,[74] or which has been found due upon a settlement of accounts,[75] is within the jurisdictional limit. But a plaintiff cannot give jurisdiction by allowing matters of set-off or counter demand,[76] although it has been held that if defendant files an offset reducing the amount below the jurisdictional limit, the justice may try the case, but cannot render judgment if plaintiff's demand is proved, and defendant's is not.[77]

E. Nature of Remedy or Relief — 1. In General. The jurisdiction of justices of the peace is largely dependent upon the nature of the remedy or of the

St. 387; Herbert *v.* Conrad, 1 Am. L. Reg. 440; Baer *v.* Garrett, 2 Leg. Chron. 207.

Tennessee.— Thompson *v.* Gibson, 2 Overt. 235.

Texas.— A note for more than the limit cannot be sued before a justice, unless, by payments indorsed, the interest shall be discharged and enough of the principal paid to reduce it within the limit. Hampton *v.* Dean, 4 Tex. 455. See also Hearn *v.* Cutberth, 10 Tex. 216.

Vermont.— Page *v.* Warner, 71 Vt. 180, 44 Atl. 67; Stevens *v.* Howe, 6 Vt. 572.

Wisconsin.— Avery *v.* Rowell, 59 Wis. 82, 17 N. W. 875.

See 31 Cent. Dig. tit. "Justices of the Peace," § 172.

Application of payments.— Plaintiff cannot ignore the legal rule as to computation of interest and application of payments, in order to bring the amount in controversy within the jurisdiction of the justice. James *v.* Hiatt, 80 Mo. App. 43. See also Hearn *v.* Cutberth, 10 Tex. 216; Hampton *v.* Dean, 4 Tex. 455.

72. *Arkansas.*— Brinkley *v.* Barinds, 7 Ark. 165.

Illinois.— Korsoski *v.* Foster, 20 Ill. 32; Hugunin *v.* Nicholson, 2 Ill. 575. But see Simpson *v.* Rawlings, 2 Ill. 28, decided prior to the act of 1839.

Maryland.— Orme *v.* Williams, 47 Md. 552.

New Jersey.— Farley *v.* McIntire, 13 N. J. L. 190.

New York.— Brady *v.* Durbrow, 2 E. D. Smith 78.

Vermont.— Paige *v.* Morgan, 28 Vt. 565.

Wisconsin.— Avery *v.* Rowell, 59 Vt. 82, 17 N. W. 875.

See 31 Cent. Dig. tit. "Justices of the Peace," § 172.

To antedate a credit, so as to produce the effect of reducing the amount due on a note to a sum within the jurisdiction of a justice, is an evasion of the law, and judgment should be rendered for defendant. Ramsour *v.* Barrett, 50 N. C. 409.

73. *Alabama.*— Baird *v.* Nichols, 2 Port. 186.

Arkansas.— Hempstead *v.* Collins, 6 Ark. 533.

Indiana.— Newland *v.* Nees, 3 Blackf. 460.

Iowa.— Cochran *v.* Glover, Morr. 151; Hall *v.* Biever, Morr. 113.

Missouri.— Musick *v.* Chamlin, 22 Mo. 175; Buckner *v.* Armour, 1 Mo. 534.

North Carolina.— McRae *v.* McRae, 20 N. C. 81.

Pennsylvania.— McFarland *v.* O'Neil, 155 Pa. St. 260, 25 Atl. 756; Zimmerman *v.* Snyder, 9 Pa. Super. Ct. 201, 43 Wkly. Notes Cas. 380.

Texas.— Davis *v.* Pinckney, 20 Tex. 340; Duer *v.* Seydell, 20 Tex. 61.

See 31 Cent. Dig. tit. "Justices of the Peace," § 172.

Contra.— Blue *v.* Weir, 1 Ill. 372; Clark *v.* Cornelius, 1 Ill. 46 (both decided prior to the act of 1839); Woodward *v.* Garner, 2 Pinn. (Wis.) 28; Barker *v.* Baxter, 1 Pinn. (Wis.) 407.

74. Maurer *v.* Derrick, 1 Ill. 197.

75. Lamoure *v.* Caryl, 4 Den. (N. Y.) 370; Abernathy *v.* Abernathy, 2 Cow. (N. Y.) 413; Midgett *v.* Watson, 29 N. C. 143; Spear *v.* Peck, 15 Vt. 566; Gibson *v.* Sumner, 6 Vt. 163; Fargo *v.* Remington, 6 Vt. 131; Orr *v.* Le Clair, 55 Wis. 93, 12 N. W. 356; Cuer *v.* Ross, 49 Wis. 652, 6 N. W. 331.

A liquidated account, within the statute giving jurisdiction to magistrates of liquidated accounts over sixty dollars and under one hundred dollars, is one in which the balance is stated, leaving no necessity for extrinsic evidence. Midgett *v.* Watson, 29 N. C. 143.

Under N. Y. Code Civ. Proc. § 2863, where plaintiff and defendant presented accounts largely in excess of the jurisdiction of the court, but which were reduced by the justice's findings on either side to amounts the total of which was within the jurisdictional limit, it was held that the existence of credits on either side was a question of fact for the justice, and that having found them to exist, and to reduce the claim of each to sums whereof the total was less than four hundred dollars, he had properly taken jurisdiction of the cause. Shaw *v.* Roberts, 14 N. Y. Suppl. 579. See also Milbanks *v.* Coonley, 2 N. Y. Suppl. 167.

Necessity of settlement.— In Wisconsin, without a settlement, credits are not allowed. Henckel *v.* Wheeler, etc., Mfg. Co., 51 Wis. 363, 7 N. W. 780. See also Cuer *v.* Ross, 49 Wis. 652, 6 N. W. 331.

76. Stroh *v.* Uhrich, 1 Watts & S. (Pa.) 57; Wanner *v.* Zimmerman, 5 Pa. Dist. 29; O'Connell *v.* Bank, 2 Chest. Co. (Pa.) 296; Lucas Coal Co. *v.* Struble, 3 Lanc. L. Rev. (Pa.) 300; James *v.* Frick, 12 Phila. (Pa.) 443.

77. Eacrit *v.* Keen, 4 N. J. L. 235.

relief sought. Thus in Illinois they have no jurisdiction of actions in the form of trespass or case,[78] but only of actions of debt or assumpsit;[79] in Indiana an action to recover the possession of real estate can be brought before a justice only under prescribed circumstances;[80] in Kentucky the jurisdiction has been excluded where a party had a right to a trial by jury;[81] while in South Carolina justices of the quorum, as commissioners of special bail, were given jurisdiction to carry into execution the Prison Bounds Act.[82] Where jurisdiction is conferred over "all civil cases," special proceedings are included.[83]

2. Equitable Jurisdiction and Relief[84] — a. In General. Justices of the peace have no jurisdiction to administer equitable relief, either in those states which still retain the distinction between actions at law and suits in equity or in those in which the distinction has been abolished,[85] unless such jurisdiction is expressly granted by statute.[86] They may, however, where they otherwise have jurisdiction of a case, apply equitable principles in its determination, although they cannot exercise the extraordinary jurisdiction of a chancellor.[87]

78. Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Horne *v.* Mandelbaum, 13 Ill. App. 607; Stuckey *v.* Churchman, 2 Ill. App. 584. But see Northup *v.* Smothers, 39 Ill. App. 588; Gallery *v.* Davis, 35 Ill. App. 619; Skinner *v.* Morgan, 21 Ill. App. 209, in which actions on the case were brought for damages for injuries to personal property.

79. Bedell *v.* Janney, 9 Ill. 193.

80. An action to recover possession of real estate can only be brought where the relation of landlord and tenant exists; or where there has been an unlawful or forcible entry into lands, and either a peaceable or forcible detainer thereof; or where, having peaceably obtained possession, one unlawfully and forcibly keeps the same. Short *v.* Bridwell, 15 Ind. 211.

81. Singleton *v.* Madison, 1 Bibb (Ky.) 342.

82. Noyes *v.* Haynesworth, 2 McCord (S. C.) 367.

83. Herkimer *v.* Keeler, 109 Iowa 680, 81 N. W. 178 [*citing* College *v.* Guilbert, 100 Iowa 213, 69 N. W. 453; Tomlinson *v.* Hammond, 8 Iowa 40].

84. See, generally, Equity.

85. *Alabama.*— Hall *v.* Cannte, 22 Ala. 650.

Arkansas.—Whitesides *v.* Kershaw, 44 Ark. 377.

California.— See Garniss *v.* San Francisco, 88 Cal. 413, 26 Pac. 351.

Delaware.— See Moore *v.* Frame, 3 Harr. 427.

Georgia.— Woodruff *v.* M. G. McDonald Furniture Co., 96 Ga. 86, 23 S. E. 195.

Indiana.— Straughan *v.* Inge, 5 Ind. 157; Smith *v.* Taylor, 34 Ind. App. 194, 72 N. E. 651.

Kansas.— See Griffin *v.* O'Neil, 47 Kan. 116, 27 Pac. 826.

Missouri.—Ridgley *v.* Stillwell, 28 Mo. 400; Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049; Miller *v.* Metropolitan L. Ins. Co., 68 Mo. App. 19; Paddock-Hawley Iron Co. *v.* McDonald, 61 Mo. App. 559; Orr *v.* McCurdy, 34 Mo. App. 418; Enlow *v.* Newland, 22 Mo. App. 581. See also January *v.* Stephenson, 2 Mo. App. 266.

Nebraska.— Grimm *v.* Kucera, 16 Nebr. 349, 20 N. W. 396; Chicago, etc., R. Co. *v.* Skupa, 16 Nebr. 341, 20 N. W. 393.

New Mexico.— Munis *v.* Herrera, 1 N. M. 362.

North Carolina.— Fidelity, etc., Co. *v.* Jordan, 134 N. C. 236, 46 S. E. 496; Parker *v.* Allen, 84 N. C. 466.

Ohio.— Moore *v.* Freeman, 50 Ohio St. 592, 35 N. E. 502; Devou *v.* Simpson, 1 Handy 557, 12 Ohio Dec. (Reprint) 287; Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251.

South Carolina.— Holliday *v.* Poston, 60 S. C. 103, 38 S. E. 449; Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126.

Tennessee.—Flanagan *v.* Oliver Finnie Grocery Co., 98 Tenn. 599, 40 S. W. 1079.

Texas.— Crawford *v.* Sandridge, 75 Tex. 383, 12 S. W. 853; Gibson *v.* Moore, 22 Tex. 611.

See 31 Cent. Dig. tit. "Justices of the Peace," § 184.

A justice cannot acquire jurisdiction to enforce specific performance of a contract by an alternative judgment requiring defendant to perform the contract or to pay a certain sum, and an execution to enforce such judgment is void on its face. Munis *v.* Herrera, 1 N. M. 362.

The fact that a lease is held by a trustee will not affect the jurisdiction of a justice to dispossess a tenant; the equitable character of the trust relation not conferring any equitable rights as against the landlord. January *v.* Stephenson, 2 Mo. App. 266.

86. Sherwood *v.* Campbell, 1 B. Mon. (Ky.) 54 (construing the Kentucky statute of 1838 conferring chancery jurisdiction to enforce judgments, and holding it applicable to judgments against executors and administrators); Bryan *v.* Buckholder, 8 Humphr. (Tenn.) 561 (construing Tenn. Acts (1817), c. 68, § 1, authorizing a justice to inquire into the consideration of contracts under seal, and holding that it did not give the general power of courts of chancery in other respects).

87. Whitesides *v.* Kershaw, 44 Ark. 377;

b. Enforcement of Liens.[88] As a general proposition, justices of the peace have no jurisdiction to enforce liens on property, real or personal,[89] except by express statutory authorization.[90]

c. Settlement of Partnership Accounts.[91] Justices of the peace have no jurisdiction of suits involving the settlement of partnership accounts;[92] but the mere

Snell *v.* Mohan, 38 Ind. 494; Flanagan *v.* Oliver Finnie Grocery Co., 98 Tenn. 599, 40 S. W. 1079; Crawford *v.* Sandridge, 75 Tex. 383, 384, 12 S. W. 853 (where it is said: "Suits for cancellation of contracts or to reform them are cognizable by the courts of equity; but a Justice Court has power to hear and determine such cases when it has jurisdiction in other respects. A justice of the peace cannot exercise the extraordinary powers of a chancellor in granting injunctions, but he can try cases involving equitable rights as well as legal"); Gibson *v.* Moore, 22 Tex. 611.

Equitable defenses.— A justice's court, having incidental jurisdiction of every question necessary to the proper determination of an action within its jurisdiction, may permit an equity to be set up as a defense, although having no affirmative equitable jurisdiction. Lutz *v.* Thompson, 87 N. C. 334. See also Holden *v.* Warren, 118 N. C. 326, 24 S. E. 770; Bell *v.* Howerton, 111 N. C. 69, 15 S. E. 891; Gibson *v.* Moore, 22 Tex. 611.

88. See, generally, LIENS, and Cross-References Thereunder.

89. *Arkansas.*— Cotton *v.* Penzel, 44 Ark. 484; White *v.* Milbourne, 31 Ark. 486.

Illinois.— O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898.

Indiana.— Snell *v.* Mohan, 38 Ind. 494; Ainsworth *v.* Atkinson, 14 Ind. 538.

Missouri.— Pleasant Hill *v.* Dasher, 120 Mo. 675, 25 S. W. 566. But see Varney *v.* Jackson, 66 Mo. App. 348, to the effect that a justice has jurisdiction of actions involving a liveryman's lien or a chattel mortgage lien, since they are each legal liens, and not dependent upon equitable principles, or equity jurisdiction for enforcement. *Compare* Littlefield *v.* Lemley, 75 Mo. App. 511, 514, where it is said that "a mortgage of chattels not in existence at the execution of the instrument, will not pass the legal title of such after-acquired property. When the property comes into existence an equitable lien will attach, but to enforce this the mortgagee must resort to equity. Scudder *v.* Bailey, 66 Mo. App. 40, and cases cited; France *v.* Thomas, 86 Mo. 80. It seems, however, that if the mortgagee shall take possession of the after-acquired property, before other rights have attached, then the legal title will become vested. Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89."

North Carolina.— Since justices have no equitable jurisdiction, an action to establish a lien must be brought as an action of debt — in which event the statute creates the lien for the amount recovered — and not as a suit to establish an equitable lien. Weathers *v.* Borders, 124 N. C. 610, 32 S. E. 881, 121 N. C. 387, 28 S. E. 524. *Compare* Markham *v.* McCown, 124 N. C. 163, 32 S. E. 494, in which the action was held to be in assumpsit, and not an equitable action.

Tennessee.— State *v.* Covington, 4 Lea 51.

Texas.— Liens on real estate are not enforceable before a justice. Hillebrand *v.* McMahan, 59 Tex. 450; Houston *v.* Musgrove, 35 Tex. 594; Hargrave *v.* Simpson, 25 Tex. 390; Lane *v.* Howard, 22 Tex. 7; Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160.

See 31 Cent. Dig. tit. "Justices of the Peace," § 185.

90. *Georgia.*— Under the Lien Law of 1873, a justice may take the affidavit and issue the execution for a laborer's lien. Dexter *v.* Glover, 62 Ga. 312. See also Cowart *v.* Revere, 47 Ga. 9.

Massachusetts.— A petition under Gen. St. c. 151, § 21, to enforce a lien for work done and money expended in the manufacture of certain machinery is within the jurisdiction of a justice, even though the claim exceeds one hundred dollars. Busfield *v.* Wheeler, 14 Allen 139.

Missouri.— Jurisdiction over actions to enforce mechanics' liens was conferred by the act of 1872. Stamps *v.* Bridwell, 57 Mo. 22. See also Ewing *v.* Donnelly, 20 Mo. App. 6.

Ohio.— See Scioto Valley R. Co. *v.* Cronin, 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315, holding that the enforcement of a claim for labor under the Mechanics' Lien Law of March 31, 1874, as to railroads, may be had before a justice by an action at law, since the case is not an equity suit to assert a lien on a fund, but is of legal cognizance, and no priorities are given.

Texas.— Under the acts of 1876, page 155, justices' courts were given jurisdiction to enforce liens on personal property. Conner *v.* Jacobs, (Civ. App. 1899) 51 S. W. 640. See also Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160.

See 31 Cent. Dig. tit. "Justices of the Peace," § 185.

Actions involving title to real property see *supra*, III, B, 4.

91. See, generally, PARTNERSHIP.

92. Rankin *v.* Fairley, 29 Mo. App. 587; Thornton *v.* Barber, 48 N. Y. App. Div. 298, 62 N. Y. Suppl. 527; Rosenfeld *v.* Marcus, 36 Misc. (N. Y.) 772, 74 N. Y. Suppl. 870; Rickey *v.* Bowne, 18 Johns. (N. Y.) 131. But see Hyatt *v.* Harmon, 6 Ill. 379.

Where an action at law will lie by a partner against his copartner, all their partnership affairs being settled, except an accounting which involves only a limited number of simple transactions, it can be maintained be-

fact that the action incidentally concerns a partnership will not oust a justice of the peace of jurisdiction, if no settlement of partnership affairs is involved.[93]

d. Equitable Relief Against Married Women.[94] Justices of the peace cannot take cognizance of suits to charge the equitable separate estates of married women.[95]

e. Enforcement of Estoppels In Pais.[96] As estoppel *in pais* is a defense at law as well as in equity,[97] the fact that it may arise and become an issue in a proceeding before a justice will not defeat the jurisdiction.[98]

f. Actions on Lost Notes.[99] As a recovery on lost notes may be had at law, justices of the peace have jurisdiction.[1]

3. Set-Offs and Counter-Claims[2] **— a. In General.** In most of the states justices of the peace are given jurisdiction of set-offs and counter-claims,[3] where they are of such a character as to be within the jurisdiction of a justice if sued upon directly.[4]

b. Amount or Value as Affecting Jurisdiction.[5] A justice of the peace has as a rule no jurisdiction of a set-off or counter-claim which exceeds in amount his jurisdictional limit.[6] But a defendant cannot oust a justice of his jurisdiction by

fore a justice. Clarke *v.* Mills, 36 Kan. 393, 13 Pac. 569.

93. See Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815; Hooks *v.* Houston, 109 N. C. 623, 14 S. E. 49; Hartness *v.* Wallace, 106 N. C. 427, 11 S. E. 259.

94. Actions against married women see *supra*, III, C, 5.

95. Coon *v.* Brook, 21 Barb. (N. Y.) 546; Bevill *v.* Cox, 107 N. C. 175, 12 S. E. 52, 11 L. R. A. 274; Berry *v.* Henderson, 102 N. C. 525, 9 S. E. 455; Dougherty *v.* Sprinkle, 88 N. C. 300; Allison *v.* Porter, 29 Ohio St. 136; Schultz *v.* Myer, 6 Ohio Dec. (Reprint) 1086, 10 Am. L. Rec. 312; McConnel *v.* Nolan, 4 Ohio Dec. (Reprint) 306, 1 Clev. L. Rep. 268.

96. See, generally, Estoppel.

97. See Estoppel, 16 Cyc. 725.

98. Pitman *v.* 16 to 1 Min. Co., 78 Mo. App. 438 [*overruling* Kelchner *v.* Morris, 75 Mo. App. 588; Sandige *v.* Hill, 70 Mo. App. 71; Phillips *v.* Burrows, 64 Mo. App. 351; Hicks *v.* Martin, 25 Mo. App. 359; Willis *v.* Stevens, 24 Mo. App. 494, and *distinguishing* Ridgley *v.* Stillwell, 28 Mo. 400; Seeser *v.* Southwick, 66 Mo. App. 667; Rankin *v.* Fairley, 29 Mo. App. 587; Enlow *v.* Newland, 22 Mo. App. 581].

99. See, generally, Lost Instruments.

1. Moore *v.* Frame, 3 Harr. (Del.) 427; Fisher *v.* Webb, 84 N. C. 44.

Justice may exercise power of requiring indemnity.— Fisher *v.* Webb, 84 N. C. 44. But see Baker *v.* Weaver, 1 Ohio Cir. Ct. 397, 1 Ohio Cir. Dec. 222.

2. See also *supra*, III, D, 2, i.

Set-off and counter-claim generally see Recoupment, Set-Off, and Counter-Claim.

3. *Georgia.*— A demand *ex contractu* may be pleaded as a set-off in an action *ex delicto*, if plaintiff is insolvent; but unless the insolvency is proved, plaintiff, on making out his case, is entitled to recover, although he admits the correctness of the counter-claim. Follendore *v.* Follendore, 99 Ga. 71, 24 S. E. 407.

Illinois.— Howell *v.* Goodrich, 69 Ill. 556, where defendant pleaded malpractice on the part of plaintiff as a set-off to a suit to recover for professional services.

Missouri.— Green *v.* Beebe, 39 Mo. App. 465.

New York.— Williams *v.* Bitner, 1 Lans. 200; Williams *v.* Wieting, 3 Thomps. & C. 439; McCumber *v.* Goodrich, 1 Johns. 56. But see Dygert *v.* Coppernoll, 13 Johns. 210, holding that a set-off is not admissible in an action founded on tort.

North Carolina.— Heyser *v.* Gunter, 118 N. C. 964, 24 S. E. 712.

Pennsylvania.—Rafferty *v.* Clark, 2 Pa. Co. Ct. 301; White *v.* Johnson, 2 Ashm. 146; Slyhoof *v.* Flitcraft, 1 Ashm. 171.

Wisconsin.— Under Rev. St. § 3626, the plea of set-off, but not that of counter-claim, is available to defendant. Hartel *v.* Kite, 70 Wis. 396, 36 N. W. 7.

See 31 Cent. Dig. tit. "Justices of the Peace," § 173.

But see Christy *v.* Jones, 39 Kan. 183, 18 Pac. 56, where a set-off in tort was not allowed in an action on a book-account.

Accounts or demands must have existed at commencement of suit.— Cobb *v.* Curtiss, 8 Johns. (N. Y.) 470.

4. Love *v.* Rhyne, 86 N. C. 576; Henion *v.* Morton, 2 Ashm. (Pa.) 150. *Compare* Harris *v.* Simpson, 50 Ark. 422, 8 S. W. 177, where it was held that in an action for the rent of a farm, it is no objection to a counter-claim based on the fact that the farm was smaller than represented, that such a claim constitutes an action of tort, over which the justice has no jurisdiction, as such defense may be regarded as a plea of failure of consideration.

5. Amount or value in controversy as affecting jurisdiction generally see *supra*, III, D.

6. *California.*— Maxfield *v.* Johnson, 30 Cal. 545; Malson *v.* Vaughn, 23 Cal. 61.

Missouri.— Emery *v.* St. Louis, etc., R. Co., 77 Mo. 339.

North Carolina.— General Electric Co. *v.*

setting up a demand for a greater sum than is within his jurisdiction,[7] and when the balance claimed exceeds the jurisdiction of the justice, the set-off should be rejected entirely.[8] In some states, however, a set-off or counter-claim will be allowed, although it exceeds the jurisdictional limit, where defendant admits a portion or all of plaintiff's claim, and himself claims a balance within the justice's jurisdiction.[9]

Williams, 123 N. C. 51, 31 S. E. 288; Raisin *v.* Thomas, 88 N. C. 148; Meneely *v.* Craven, 86 N. C. 364; Boyett *v.* Vaughan, 85 N. C. 363; Derr *v.* Stubbs, 83 N. C. 539. *Compare* McClenahan *v.* Cotten, 83 N. C. 332, to the effect that a defendant sued in contract may plead, simply as a defense, an independent cross demand arising *ex contractu*, although it is beyond the justice's jurisdiction.

Pennsylvania.— Milliken *v.* Gardner, 37 Pa. St. 456; Henion *v.* Morton, 2 Ashm. 150; Selser *v.* Mackenzie, 19 Pa. Co. Ct. 280; Kraus *v.* Bickhart, 1 Chest. Co. Rep. 479; Jones *v.* Stauffer, 1 Leg. Gaz. 91. *Compare* Lowenstein *v.* Helfrick, 7 Kulp 533.

Texas.— Williamson *v.* Bodan Lumber Co., 36 Tex. Civ. App. 446, 82 S. W. 340 [*following* Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470 (*distinguishing* Dalby *v.* Murphy, 25 Tex. 355)]; Pioneer, Sav., etc., Co. *v.* Nelson, (Civ. App. 1897) 39 S. W. 1095; Cain *v.* Culbreath, (Civ. App. 1896) 35 S. W. 809. See also Rylie *v.* Elam, (Civ. App. 1900) 58 S. W. 51.

Vermont.— Temple *v.* Bradley, 14 Vt. 254.

Wisconsin.— Martin *v.* Eastman, 109 Wis. 286, 85 N. W. 359.

See 31 Cent. Dig. tit. "Justices of the Peace," § 174.

Contra.— Bowman *v.* Gary, Minor (Ala.) 326; Heigle *v.* Willis, 50 Hun (N. Y.) 588, 3 N. Y. Suppl. 497; McClain *v.* Kincaid, 5 Yerg. (Tenn.) 232.

The judgment claimed in set-off, and not the amount of set-off pleaded, determines whether the suit is within the jurisdiction of a justice. Murphy *v.* Evans, 11 Ind. 517.

The aggregate of the counter-claims determines the jurisdiction. General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288.

Where defendant avers a set-off exceeding a justice's jurisdiction, but substantiates it only to a sum within the jurisdiction, it must be allowed. Smith *v.* Burke, 10 Johns. (N. Y.) 110.

Mutual set-offs.— A justice is not ousted of jurisdiction by the fact that after defendant has pleaded an offset, plaintiff claims an offset to that, and the two sums claimed by plaintiff exceed the justice's jurisdiction, unless perhaps where the amount first sued for and plaintiff's offset appear to be parts of the same demand. Talbot *v.* Robinson, 42 Vt. 698. See also Wooster *v.* McKinley, 1 Kan. 317; *Ex p.* Hatch, 2 Aik. (Vt.) 28. Where the parties have mutual demands which together amount to over four hundred dollars, a justice has no jurisdiction in New York. Stilwell *v.* Staples, 5 Duer (N. Y.) 691, 3 Abb. Pr. 365.

Waiver of excess.—Where defendant's counter-claim exceeds the court's jurisdiction, he may waive the excess and bring himself within the jurisdiction. Scott *v.* Mexican Nat. R. Co., (Tex. Civ. App. 1892) 18 S. W. 137. But see Ware *v.* Fambro, 67 Ga. 515, holding that where, on a plea of set-off of one hundred dollars, the jury found for defendant in more than that sum, he would not be allowed to write down the finding to one hundred dollars so as to have judgment.

Evidence of set-off merely as a defense see *infra*, IV, K, 1, c, text and note 82.

7. *Colorado.*— Ramer *v.* Smith, 4 Colo. App. 434, 36 Pac. 302.

Minnesota.— Barber *v.* Kennedy, 18 Minn. 216.

New Jersey.— Hoffman *v.* Reading, 3 N. J. L. 561; Montgomery *v.* Snowhill, 2 N. J. L. 341.

Pennsylvania.— Holden *v.* Wiggins, 3 Penr. & W. 469; Boone *v.* Boone, 17 Serg. & R. 386.

South Carolina.— Corley *v.* Evans, 69 S. C. 520, 48 S. E. 459. But *compare* Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803 [*citing* Beckham *v.* Perry, 1 Bailey 121], decided under Code, § 88, subd. 4.

See 31 Cent. Dig. tit. "Justices of the Peace," § 174.

8. Seafkas *v.* Evey, 29 Ill. 178; Gharkey *v.* Halstead, 1 Ind. 389, Smith 208; Alexander *v.* Peck, 5 Blackf. (Ind.) 308; Clancy *v.* Neumeyer, 51 N. J. L. 299, 17 Atl. 154; Pickett *v.* Edwards, (Tex. Civ. App. 1894) 25 S. W. 32. *Compare* Nichols *v.* Ruckells, 4 Ill. 298, holding that the justice should allow so much of the set-off as will balance plaintiff's claim, and give judgment for defendant for costs.

9. Purcell *v.* Booth, 6 Dak. 17, 50 N. W. 196; Nichols *v.* Ruckells, 4 Ill. 298; West *v.* Hatfield, Morr. (Iowa) 493; Glass *v.* Moss, 1 How. (Miss.) 519. *Contra*, Reed *v.* Snodgrass, 55 Mo. 180; Almeida *v.* Sigerson, 20 Mo. 497.

In North Carolina the constitutional provision restricting the jurisdiction of justices contemplates their adjudication on claims within the required limits, and it is not allowable for a defendant to set up a counter-claim for so much as will extinguish plaintiff's claim and permit defendant to recover a balance within the limit; in such case the remission must be absolute of all in excess of the jurisdiction. Derr *v.* Stubbs, 83 N. C. 539. See also McClenahan *v.* Cotton, 83 N. C. 332.

In Ohio defendant may withhold the amount of his claim in excess of the jurisdiction, and make it the subject of a subsequent action. But this does not relate to unliqui-

4. Attachment[10] and Garnishment.[11] The jurisdiction of justices of the peace in attachment proceedings is strictly limited to the powers conferred by the statutes creating it, and as a rule is determined by the amount in controversy in the principal action,[12] and the same is true of their jurisdiction in garnishment pro-

dated damages, and where such is the nature of the claim, the whole excess must be remitted, or the justice is without jurisdiction to act on the claim. Woolever *v.* Stewart, 36 Ohio St. 146, 38 Am. Rep. 569.

In Texas the earlier cases are in accord with the text (Dolby *v.* Murphy, 25 Tex. 354; Mulhall *v.* Teller, 1 Tex. App. Civ. Cas. § 1162), but the later cases refuse to allow the counter-claim under such circumstances (Rylie *v.* Elam, (Tex. Civ. App. 1904) 79 S. W. 326 [*citing* Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470; Pennybacker *v.* Hazlewood, 26 Tex. Civ. App. 183, 61 S. W. 153; Brigman *v.* Aultman, (Tex. Civ. App. 1900) 55 S. W. 509]; Clark *v.* Smith, 29 Tex. Civ. App. 363, 68 S. W. 532. See also Smith *v.* Dye, 21 Tex. Civ. App. 662, 52 S. W. 981, 21 Tex. Civ. App. 662, 51 S. W. 858).

10. See, generally, Attachment.

Procedure in attachment see *infra*, IV, G.

11. See, generally, Garnishment.

Procedure in garnishment see *infra*, IV, H.

12. *Alabama.*— See Solomon *v.* Ross, 49 Ala. 198. A mayor (Bain *v.* Mitchell, 82 Ala. 304, 2 So. 706) or notary (Rice *v.* Watts, 71 Ala. 593; Griffin *v.* Appleby, 69 Ala. 409) having the powers of a justice of the peace may issue an attachment within the jurisdictional limit. Code, § 3606, requiring suits before a justice of the peace to be brought in the precinct of defendant's permanent residence, does not apply to actions commenced by attachment, as they are in their nature proceedings *in rem*. Atkinson *v.* Wiggins, 69 Ala. 190.

Arkansas.— Merriman *v.* Sarlo, 63 Ark. 151, 37 S. W. 879 (authority not limited to the case of non-resident debtors); Jones *v.* Buzzard, 2 Ark. 415 (attachment may issue although defendant is a non-resident and without the jurisdiction of the justice). But see Lemay *v.* Williams, 32 Ark. 166, right of attachment on personal property by mortgagee cannot be asserted before a justice.

District of Columbia.— Justices have jurisdiction to issue attachments for rent. Gross *v.* Goldsmith, 4 Mackey 126.

Florida.— McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Georgia.— The act of March 5, 1856, gave jurisdiction in suits by attachment as well as in others. Barrett *v.* Black, 25 Ga. 151. The code allows any justice of the peace in the county to issue attachments. A justice's jurisdiction is not limited in the issuance of distress warrants or attachments. Jones *v.* Wylie, 82 Ga. 745, 9 S. E. 614. See also Pearce *v.* Renfroe, 68 Ga. 194; Warren *v.* Purtell, 63 Ga. 428; Buchanan *v.* Sterling, 63 Ga. 227.

Illinois.— If the nature and amount of the claim is within the jurisdiction, a justice can entertain a suit begun by attachment against a steamboat as well as if begun by ordinary summons. The Delta *v.* Walker, 24 Ill. 233.

Indiana.— An action against a resident, unless commenced by capias, must be brought in the township of defendant's residence, and the fact that an attachment has issued and property been seized in the township where the suit is brought does not take the case out of the rule. Wilkinson *v.* Moore, 79 Ind. 397; Michael *v.* Thomas, 24 Ind. 72.

Iowa.— Under Code (1873), § 3511, a justice has jurisdiction of an action commenced by attachment of property within the township, although defendant is a non-resident of, and is not found within, the state, and is not personally served with notice. Anderson *v.* Union Pac. R. Co., 77 Iowa 445, 42 N. W. 366. But the fact that an attachment is issued does not give jurisdiction of an action for recovery of money against a resident of another county. Gates *v.* Wagner, 46 Iowa 355.

Kansas.— Lyons *v.* Insley, 32 Kan. 174, 4 Pac. 150.

Kentucky.— Smith *v.* Terrill, 14 B. Mon. 256.

Maryland.— See Snyder *v.* Gillott, (1895) 32 Atl. 245; Dickinson *v.* Barnes, 3 Gill 485.

Michigan.— See Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106; Brigham *v.* Eglinton, 7 Mich. 291 (no jurisdiction to issue attachments against foreign corporations); Welles *v.* Detroit, 2 Dougl. 77 (holding that the mayor's court of Detroit had no jurisdiction of proceedings against debtors by attachment).

Mississippi.— Armitage *v.* Rector, 62 Miss. 600; Plummer *v.* West, 41 Miss. 69; Davidson *v.* Martin, 33 Miss. 530.

Missouri.—See Abernathy *v.* Moore, 83 Mo. 65; Rocheport Bank *v.* Doak, 75 Mo. App. 332. The jurisdiction is confined to causes where the property is in the justice's township or an adjoining township, or in defendant's township or an adjoining township. Belshe *v.* Lamp, 91 Mo. App. 477. *Compare* Harris *v.* Meredith, 106 Mo. App. 586, 81 S. W. 203, where it was held that a proceeding to reach money in bank is properly commenced in the township where the cashier is found, although the money is in another township. Where the attached effects were in the city of St. Louis and the justice before whom the action was brought had jurisdiction coextensive with that city, it was held that he had jurisdiction of the subject-matter. Hasler *v.* Schopp, 70 Mo. App. 469.

Ohio.— A domestic corporation may be proceeded against by attachment, under Swan & C. St. p. 776, in a county where it has no office or place of business, on the ground of

ceedings.[13] A justice of the peace cannot issue an attachment in a cause of which he has no jurisdiction;[14] but where the amount claimed exceeds his jurisdiction,

non-residence. Champion Mach. Co. *v.* Huston, 24 Ohio St. 503. But see Boley *v.* Ohio L. Ins., etc., Co., 12 Ohio St. 139.

Pennsylvania.— Vansyckel's Appeal, 13 Pa. St. 128; Riley *v.* Dekker, 2 Miles 183; Roberts *v.* Wright, 2 Pa. Co. Ct. 175; Pagett *v.* Truby, 1 Pa. Co. Ct. 596; Sharpless *v.* Lansing, 1 Chest. Co. Rep. 562.

South Carolina.— Burckhalter *v.* Jones, 58 S. C. 89, 36 S. E. 495 (holding that Const. (1895) art. 5, § 23, does not prevent an action by attachment against a non-resident and a judgment *in rem* as theretofore); Bird *v.* Sullivan, 58 S. C. 50, 36 S. E. 494 (jurisdiction to render judgment *in rem* against non-resident, under Code, § 71, subd. 4); Jones *v.* Clarkson, 16 S. C. 628 (jurisdiction to issue attachment in action to foreclose agricultural lien). *Compare* White *v.* Meloy, 1 Treadw. 467 (no jurisdiction in actions of tort); McKenzie *v.* Buchan, 1 Nott & M. 205; Blakely *v.* Bradford, 1 Bay 361 (no jurisdiction against one actually out of state, but only against those who conceal themselves, or who are in the act of moving). See also Goss *v.* Gowing, 5 Rich. 477; Roberts *v.* Brown, 1 McCord 498.

Tennessee.— See Galbraith *v.* McFarland, 3 Coldw. 267, 91 Am. Dec. 281; Apperson *v.* Looney, 2 Swan 664; Walker *v.* Wynne, 3 Yerg. 62; Den *v.* Wharton, 1 Yerg. 125. Under Acts (1794), c. 1, § 56, a justice could not issue an attachment against property within his county against a resident of another county. Stewart *v.* Roberts, 1 Yerg. 387. See also Chambers *v.* Haley, Peck 159.

Texas.— See Hillebrand *v.* McMahan, 59 Tex. 450.

United States.— Sears *v.* Noon, 21 Fed. Cas. No. 12,590, 2 Cranch C. C. 220, construing Va. Act, Dec. 26, 1792.

See 31 Cent. Dig. tit. "Justices of the Peace," § 177.

Non-resident of county.— There is no jurisdiction, under Rev. St. p. 228, to issue an attachment against a debtor who is a resident of another county and merely passing through the county where the suit is brought. Dudley *v.* Staples, 15 Johns. (N. Y.) 196.

A justice of the peace in Alaska, under the laws of Oregon in force there, was held without jurisdiction to render a judgment in attachment upon a note payable in Victoria, B. C. Moody *v.* Skagway First Bank, 1 Alaska 104.

13. *Alabama.*— A justice has authority to issue a garnishment on a judgment rendered by him. Gould *v.* Meyer, 36 Ala. 565.

Colorado.— Welsh *v.* Noyes, 10 Colo. 133, 14 Pac. 317 (jurisdiction to try issue raised by answer in garnishee process setting forth that garnishees hold property by virtue of a chattel mortgage, to which a traverse is made alleging fraud and delay of creditors, and charging garnishees with knowledge of and participation in the fraud); Fisher *v.* Hervey, 6 Colo. 16 (construing Act, Feb. 21, 1879, to extend to judgments rendered before its passage).

Georgia.— A justice's court has no jurisdiction to garnish a judgment against a third person in favor of a debtor, against whom a judgment in favor of the plaintiff in garnishment has been rendered in the superior court. Durden *v.* Belt, 61 Ga. 545.

Maine.— One summoned as a trustee in a process of foreign attachment is "a defendant" within St. (1827) c. 359, which provides that where there are two or more defendants living in different counties, a justice's suit may be maintained against them all in the county in which either lives. Boynton *v.* Fly, 12 Me. 17.

Michigan.— Under Comp. Laws (1897), § 1014, a justice has jurisdiction of garnishment proceedings against a foreign corporation. Grinnell *v.* Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

New Jersey.— On a justice's judgment in attachment proceedings lawfully instituted before him, he has jurisdiction by scire facias against a garnishee who resides within the limits of a city in which a district court is established. This is not, within Rev. p. 1302, § 6, a case "arising under the District Court act." New York, etc., R. Co. *v.* Cookson, 45 N. J. L. 302, 46 N. J. L. 208.

Pennsylvania.— Strouse *v.* Lawrence, 13 Pa. Co. Ct. 131 (holding that a justice has jurisdiction to try the truth of a garnishee's answer); Hintermeister *v.* Ithaca Organ, etc., Co., 1 Pa. Co. Ct. 268 (holding that Act (1845), § 1, does not enlarge the jurisdiction under the act of March 20, 1810.

Tennessee.— A justice who has rendered judgment against a defendant has power to sequestrate his debts by garnishment to the amount of the judgment. Cheairs *v.* Slaten, 3 Humphr. 101. But see Seawell *v.* Murphy, Cooke 478, construing the act of 1794 (1 Haywood Rev. p. 194), section 56, and holding it inapplicable to justices of the peace.

See 31 Cent. Dig. tit. "Justices of the Peace," § 178.

Interest in decedent's estate.— A justice does not have jurisdiction to attach an interest in a decedent's estate. McCall *v.* Lungren, 16 Lanc. L. Rev. (Pa.) 318.

Determining right of exemption.— A justice has no jurisdiction in a case of garnishment to determine the right of defendant to hold the garnishment debt exempt from execution. Eisenberg *v.* Northwestern Turn., etc., Assoc., 70 Mo. App. 436 [*following* State *v.* Barnett, 96 Mo. 133, 8 S. W. 767; State *v.* Barada, 57 Mo. 562].

14. Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332; Walker *v.* Wynne, 3 Yerg. (Tenn.) 62. Justices of the peace, however, are sometimes given the power to issue attachments returnable to the circuit court, even in cases for amounts beyond their jurisdiction. Gal-

plaintiff may release the excess and thus bring the case within his jurisdiction.[15] A justice cannot issue an attachment returnable before another court or justice,[16] unless the authority to do so is expressly conferred;[17] and generally a justice has no authority to issue an attachment returnable into a court of another county than that for which he was appointed.[18] A justice may be given jurisdiction to issue attachments upon land;[19] but in some states such jurisdiction has not been conferred.[20]

5. Proceedings to Recover Personal Property.[21] The statutes in some states confer jurisdiction on justices of the peace in actions and proceedings to recover the possession of personal property;[22] but unless specifically conferred there is no such jurisdiction.[23] Under some circumstances, where the property has not been replevied, the action may proceed as an action for damages.[24]

braith *v.* McFarland, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281.

15. Solomon *v.* Ross, 49 Ala. 198.

16. Mitchell *v.* Lawrence, 123 Ala. 498, 26 So. 500. See also Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 162.

17. Jones *v.* Buzzard, 2 Ark. 415; Armitage *v.* Rector, 62 Miss. 600; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542 (attachment in aid of suit in circuit court); Den *v.* Wharton, 1 Yerg. (Tenn.) 125 (holding that Acts (1777), c. 2, authorizing justices to issue attachments against absconding or non-resident debtors "and make them returnable to any of the said courts, where the same is cognizable," does not authorize them to render judgment on such attachments).

18. Caldwell *v.* Meador, 4 Ala. 755.

19. Bush *v.* Visant, 40 Ark. 124 (holding that Ark. Act, Jan. 23, 1875, regulating attachments upon land in suits before justices of the peace was not in violation of Ark. Const. (1874) art. 7, § 40, which provides that "a justice of the peace shall not have jurisdiction where a lien on land, or title or possession thereto is involved," as the statute makes no provision for the justice making any adjudication as to a lien upon, or the title to, or possession of the land attached); Gross *v.* Goldsmith, 4 Mackey (D. C.) 126. In Texas justices have jurisdiction to foreclose attachment liens on land for amounts within their jurisdiction. Hillebrand *v.* McMahan, 59 Tex. 450.

20. Under Fla. Laws (1875), c. 2040, § 70, an attachment issued from the court of a justice of the peace could not be levied upon real estate, the statute specifying only "the goods and chattels, moneys and credits of the defendant not exempt by law." McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228. See also Rogers *v.* McDill, 9 Ga. 506; Plummer *v.* West, 41 Miss. 69; Puckett *v.* Owen, Peck (Tenn.) 167.

21. See, generally, Replevin.

Replevin for animals distrained see Animals, 2 Cyc. 408.

22. *Indiana.*— Rodman *v.* Kelly, 13 Ind. 377.

Massachusetts.— A justice has no jurisdiction in replevin, except for beasts distrained for going at large or impounded for doing damage. Jordan *v.* Dennis, 7 Metc. 590.

Michigan.— Act No. 188, Laws (1879), gives a justice jurisdiction of an action of replevin for beasts distrained or impounded for unlawfully running at large, and trespassing on the premises of the distrainor. Pistorious *v.* Swarthout, 67 Mich. 186, 34 N. W. 547.

New York.— Loomis *v.* Bowers, 22 How. Pr. 361.

North Carolina.— Where the value of the goods is under fifty dollars a justice has jurisdiction of an action of claim and delivery (Thomas *v.* Cooksey, 130 N. C. 148, 41 S. E. 2 [*following* Moore *v.* Brady, 125 N. C. 35, 34 S. E. 72]); and, all forms of action having been abolished, he may take jurisdiction even where the value exceeds fifty dollars where the gist of the action is breach of contract, although there is prayer for claim and delivery (Hargrove *v.* Harris, 116 N. C. 418, 21 S. E. 916; Morris *v.* O'Briant, 94 N. C. 72).

South Carolina.— A justice has jurisdiction of an action for claim and delivery, and damages for detention, where the value of the property and damages does not exceed one hundred dollars. Dillard *v.* Samuels, 25 S. C. 318.

Tennessee.— A justice has jurisdiction in replevin where the amount does not exceed fifty dollars, under Act (1851), c. 32, which was not repealed by Act (1854), c. 60. Hockaday *v.* Wilson, 1 Head 113.

Vermont.— A justice has jurisdiction in replevin for goods and chattels not exceeding twenty dollars in value. Tripp *v.* Leland, 39 Vt. 63. *Compare* Glover *v.* Chase, 27 Vt. 533, decided under the statute restricting the action to the recovery of beasts distrained or impounded.

Wisconsin.— Replevin in justices' courts not abolished by Code, tit. 7, c. 2. Pulis *v.* Dearing, 7 Wis. 221.

See 31 Cent. Dig. tit. "Justices of the Peace," § 179.

Amount or value as determining jurisdiction see *supra*, III, D, 2, b, (VI).

23. Williams *v.* Hinton, 1 Ala. 297; Ricketts *v.* Ash, 7 Blackf. (Ind.) 274. But see Maynadier *v.* Duff, 16 Fed. Cas. No. 9,349, 4 Cranch C. C. 4, where it was held that detinue is an action in form *ex contractu* and not *ex delicto*, and hence is within the jurisdiction of a justice.

24. In Kansas, where an action of replevin

6. Summary Proceedings Against Officers and Their Sureties.[25] Summary proceedings before justices of the peace against sheriffs and constables and their sureties are not warranted,[26] save where there is express statutory authority therefor.[27]

7. Summary Remedies by Surety Against Principal or Cosurety.[28] A summary remedy is sometimes given a surety before a justice of the peace against his principal[29] or cosurety.[30]

8. Mandamus.[31] Justices of the peace have no jurisdiction of mandamus proceedings.[32]

F. Territorial Extent of Jurisdiction.[33] The territorial extent of the civil jurisdiction of justices of the peace is determined by the constitutions and statutes of the various states. In a number of states their jurisdiction is coextensive with, and limited to, their respective counties;[34] but in others it is confined to their respective townships, districts, wards, precincts, or hun-

is commenced before a justice by a resident of the county against a non-resident, and defendant is properly served in the county where the action is commenced, but the property is not obtained, and has never been wrongfully detained in that county, but has been and is wrongfully detained in the county in which defendant resides, the court has jurisdiction to determine the case as one for damages only under Comp. Laws, § 4622, providing for such trial when the property has not been taken. Huckell *v.* McCoy, 38 Kan. 53, 15 Pac. 870.

Under N. Y. Code Civ. Proc. § 2933, providing that "where the summons [in replevin] has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied," a justice has jurisdiction of an action to recover a chattel, and the final judgment, under section 1730, must award plaintiff the sum fixed as the value of the chattel, under section 1726, to be paid by defendant if possession is not delivered to plaintiff. Guyon *v.* Rooney, 2 Silv. Sup. 525, 6 N. Y. Suppl. 99, 17 N. Y. Civ. Proc. 172, 5 Silv. Sup. 271, 7 N. Y. Suppl. 811; Delin *v.* Stohl, 2 N. Y. Civ. Proc. 222.

25. Actions against public officers see *supra*, III, C, 2.

26. Thompson *v.* Acree, 69 Ala. 178; Abbey *v.* Thomas, 2 Litt. (Ky.) 166; Lane *v.* Young, 1 Litt. (Ky.) 40; McGreggor *v.* McCorkle, 3 Humphr. (Tenn.) 578.

27. Powell *v.* Jones, 12 Ohio 35; Evans *v.* Frey, 3 Watts (Pa.) 208.

28. See, generally, Principal and Surety.

29. In Tennessee a justice has jurisdiction of a motion by a surety against his principal, where his suretyship appears on the face of the note, bill, bond, or obligation which is the foundation thereof; but not otherwise. Cannon *v.* Wood, 2 Sneed 177. But *compare* Vanbibber *v.* Vanbibber, 10 Humphr. 53, construing Act (1809), c. 69.

30. In Indiana the summary remedy by notice and motion by a surety against his cosurety for contribution provided by Rev. St. (1838) p. 233, is within the jurisdiction of the justice of the peace court, where the justice has jurisdiction of the subject-matter to the amount sued for. Cating *v.* Stewart, 6 Blackf. 372.

31. See, generally, Mandamus.

32. Robinson *v.* Howard, 84 N. C. 151.

33. Ga. Act, July 21, 1879, did not limit the territorial jurisdiction of those justices of Richmond county whose jurisdiction, under the act of Dec. 22, 1834, extended over the whole corporate limits of the city of Augusta. Thomas *v.* Lawton, 71 Ga. 244.

34. *Illinois.*— Durfee *v.* Grinnell, 69 Ill. 371.

Iowa.— Code (1873), § 3507, provides that the jurisdiction, when not especially restricted, shall be coextensive with the county. Coffman *v.* Trimble, 90 Iowa 737, 57 N. W. 603 [*following* Deere *v.* Council Bluffs, 86 Iowa 591, 53 N. W. 344]. See also Knowles *v.* Picket, 46 Iowa 503 [*overruling* Muench *v.* Breitenbach, 41 Iowa 527]; Craft *v.* Franks, 34 Iowa 504; Biddle *v.* Allender, 14 Iowa 410; Leversee *v.* Reynolds, 13 Iowa 310; Wright *v.* Phillips, 2 Greene 191.

Kansas.— State *v.* Brayman, 35 Kan. 714, 12 Pac. 111. *Compare* as to jurisdiction in counties in which a city court is established H. Parker Grain Co. *v.* Chicago, etc., R. Co., 70 Kan. 168, 78 Pac. 406.

Kentucky.— Guelot *v.* Pearce, (1897) 38 S. W. 892. See also Russell *v.* Muldraugh's Hill, etc., Turnpike Road Co., 13 Bush 307.

Maine.— Morton *v.* Chase, 15 Me. 188.

Massachusetts.— Pitman *v.* Flint, 10 Pick. 504 [*following* Sumner *v.* Finegan, 15 Mass. 280]. *Compare* Elder *v.* Dwight Mfg. Co., 4 Gray 201, construing St. (1852) c. 94, § 22, which took away the jurisdiction of justices of Hampden county to try civil actions within the limits of Springfield.

Minnesota.— Hoffman *v.* Parsons, 27 Minn. 236, 6 N. W. 797, construing Gen. St. (1878) c. 84, and holding that a justice of Ramsey county had jurisdiction to entertain proceedings in his town in unlawful detainer, although the parties resided and the property was situated within the city of St. Paul. But see Higgins *v.* Beveridge, 35 Minn. 285, 28 N. W. 506, construing Sp. Laws (1885), c. 74.

dreds.[35] In a few states the territorial jurisdiction is made dependent on the nature of the action,[36] while in New Hampshire and Vermont certain justices of the peace have civil jurisdiction throughout the state.[37] In cities the jurisdiction is generally coextensive with the city limits.[38] As a general rule any exercise of jurisdiction by a justice of the peace beyond his prescribed territory is *coram non judice* and void;[39] but in some states after jurisdiction has been obtained

Mississippi.— Baldwin *v.* Flash, 58 Miss. 593; Cain *v.* Simpson, 53 Miss. 521.

Nebraska.— Jones *v.* Holy Trinity Church, 15 Nebr. 81, 17 N. W. 362.

New York.— While the legislature may enlarge or contract the territorial jurisdiction of justices of the peace (People *v.* Garey, 6 Cow. 642; *Ex p.* McCollum, 1 Cow. 450), it is as a rule coextensive with their counties (Schropel *v.* Taylor, 10 Wend. 196; Gurnsey *v.* Lovell, 9 Wend. 319).

North Dakota.— Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734.

Oregon.— Taylor *v.* Jenkins, 11 Oreg. 274, 3 Pac. 681.

South Carolina.— Wise *v.* Werts, 72 S. C. 132, 51 S. E. 547; Baker *v.* Irvine, 61 S. C. 114, 39 S. E. 252. See also State *v.* Ferguson, Dudley 152.

West Virginia.— Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244.

United States.— The Martha Anne, 16 Fed. Cas. No. 9,146, Olcott 18.

See 31 Cent. Dig. tit. "Justices of the Peace," § 146.

35. *Alabama.*— Horton *v.* Elliott, 90 Ala. 480, 8 So. 103; Taylor *v.* Woods, 52 Ala. 474.

Connecticut.— Palmer *v.* Palmer, 1 Root 202.

Delaware.— Records *v.* Allen, 1 Marv. 268, 40 Atl. 1113.

Michigan.— Justices have jurisdiction in their own and adjoining townships. Burlingame *v.* Marble, 95 Mich. 5, 54 N. W. 695; Jebb *v.* Chicago, etc., R. Co., 67 Mich. 160, 34 N. W. 538.

Pennsylvania.— Godfrey *v.* Linegerger, 18 Pa. Co. Ct. 408. *Compare* Com. *v.* Lentz, 9 North. Co. Rep. 18.

Texas.— Foster *v.* McAdams, 9 Tex. 542.

Utah.— Justices have concurrent jurisdiction with the district courts within their respective precincts and cities. Briscoe *v.* Rich, 20 Utah 349, 58 Pac. 837. But *compare* Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484, where it is said that justices in Utah have jurisdiction coextensive with their respective counties.

United States.— Leadbetter *v.* Kendall, 15 Fed. Cas. No. 8,157*a*, Hempst. 302.

See 31 Cent. Dig. tit. "Justices of the Peace," § 146.

36. In Colorado in forcible entry and detainer and in replevin it is coextensive with the county. In other cases it is limited to the township in which the justice resides. Reynolds *v.* Larkins, 10 Colo. 126, 14 Pac. 114; Miller *v.* Graf, 14 Colo. App. 167, 59 Pac. 416.

In Indiana the jurisdiction is coextensive with county in attachment and unlawful detainer (Scott *v.* Willis, 122 Ind. 1, 22 N. E. 786; Wilkinson *v.* Moore, 79 Ind. 397; Jolly *v.* Ghering, 40 Ind. 139; Michael *v.* Thomas, 24 Ind. 72), but confined to the township in other cases (Johnson *v.* Ramsay, 91 Ind. 189; Grass *v.* Hess, 37 Ind. 193; Brickley *v.* Heilbruner, 7 Ind. 488).

In Missouri actions against railroads for killing stock are to be brought before a justice in the township in which the stock was killed or of an adjoining township (Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492; Hale *v.* St. Louis, etc., R. Co., 88 Mo. App. 567; White *v.* Missouri, etc., R. Co., 72 Mo. App. 400; Creason *v.* Wabash, etc., R. Co., 17 Mo. App. 111), but in other cases the jurisdiction is coextensive with the county (Keim *v.* Daugherty, 8 Mo. 498; U. S. Mutual Acc. Ins. Co. *v.* Reisinger, 43 Mo. App. 571).

In Ohio justices have jurisdiction coextensive with their counties to issue orders of attachment and to accompany said orders with summons (Rogers *v.* Prushansky, 23 Ohio Cir. Ct. 271); but this jurisdiction does not include railroad companies, and an action against a railroad company may be brought only before a justice of the peace in the township in which the president of the company may reside or in any township into or through which the road owned or leased by such company may be located (Squire *v.* Wheeling, etc., R. Co., 25 Ohio Cir. Ct. 30).

37. Young *v.* Bride, 25 N. H. 482; Sinclair *v.* Gadcomb, 1 Vt. 32.

38. Clarkson *v.* Guernsey Furniture Co., 22 Mo. App. 109; McKey *v.* Lockner, 43 N. Y. App. Div. 43, 59 N. Y. Suppl. 640; Geraty *v.* Reid, 13 Hun (N. Y.) 313 [*affirmed* in 78 N. Y. 64]; Tobias *v.* Perry, 25 Misc. (N. Y.) 74, 54 N. Y. Suppl. 716; Armstrong *v.* Kennedy, 23 Misc. (N. Y.) 47, 51 N. Y. Suppl. 509; Conor *v.* Hilton, 66 How. Pr. (N. Y.) 144; Craig *v.* Mosier, 2 Oreg. 323; Saunders *v.* Sioux City Nursery, 6 Utah 431, 24 Pac. 532. But see Gould *v.* Mahaney, 39 N. Y. App. Div. 426, 57 N. Y. Suppl. 363; Desmond *v.* Crane, 39 N. Y. App. Div. 190, 57 N. Y. Suppl. 266.

As to the jurisdiction of justices in certain cities in New York see McKey *v.* Lockner, 43 N. Y. App. Div. 43, 59 N. Y. Suppl. 640 (Lockport); Desmond *v.* Crane, 39 N. Y. App. Div. 190, 57 N. Y. Suppl. 266 (Auburn); Geraty *v.* Reid, 13 Hun 313 [*affirmed* in 78 N. Y. 64] (Brooklyn); Tobias *v.* Perry, 25 Misc. 74, 54 N. Y. Suppl. 716 (Corning).

39. *Alabama.*— Dew *v.* State Bank, 9 Ala. 323; Caldwell *v.* Meador, 4 Ala. 755.

over the subject-matter and over one or more of the defendants, a justice of the peace may issue process against the other defendants to be served in other counties.[40]

G. Ancillary and Incidental Jurisdiction. A justice of the peace who has obtained jurisdiction of the principal matter of an action has incidental jurisdiction of every question necessary to its proper determination, although such question may in itself alone be without his jurisdiction.[41] Thus a justice having jurisdiction of the principal action has also jurisdiction to try an interplea or other proceeding brought to determine the right of property levied on or replevied regardless of its value.[42]

H. Loss and Divestiture of Jurisdiction — 1. In General. The jurisdiction of a justice of the peace, once obtained, continues until the action abates or is legally disposed of by the justice,[43] unless defeated by the non-observance of some

Iowa.— Gage *v.* Maschmeyer, 72 Iowa 696, 34 N. W. 482.

Kansas.— State *v.* Brayman, 35 Kan. 714, 12 Pac. 111.

Kentucky.— Russell *v.* Muldraugh's Hill, etc., Turnpike Road Co., 13 Bush 307.

Michigan.— Hebel *v.* Amazon Ins. Co., 33 Mich. 400; Hartford F. Ins. Co. *v.* Owen, 30 Mich. 441.

Missouri.— U. S. Mutual Acc. Ins. Co. *v.* Reisinger, 43 Mo. App. 571. See also Harris *v.* Meredith, 106 Mo. App. 586, 81 S. W. 203.

New York.— People *v.* Campbell, 22 Hun 574.

North Carolina.— See Boggs *v.* Davis, 82 N. C. 27.

North Dakota.— Searl *v.* Shanks, 9 N. D. 204, 82 N. W. 734.

Pennsylvania.— Neville *v.* Morgan, 10 Phila. 522.

United States.— Leadbetter *v.* Kendall, 15 Fed. Cas. No. 8,157*a*, Hempst. 302; The Martha Anne, 16 Fed. Cas. No. 9,146, Olcott 18.

See 31 Cent. Dig. tit. "Justices of the Peace," § 147.

Under Ga. Code, § 4077, a justice of the peace of one county may administer the oath and issue the warrant necessary to dispossess a tenant holding over in another county. Du Bignon *v.* Tufts, 66 Ga. 59.

40. Miller *v.* Meeker, 54 Nebr. 452, 74 N. W. 962 [*citing dictum* in Bair *v.* People's Bank, 27 Nebr. 577, 43 N. W. 347]. *Contra,* State *v.* Brayman, 35 Kan. 714, 12 Pac. 111.

In North Carolina, under Battle Rev. c. 63, § 50, a justice has authority to issue a summons to any county in the state and bring defendant before his court for trial. Sossamer *v.* Hinson, 72 N. C. 578.

41. McDowell *v.* Morgan, 33 Mo. 555 (judgment on motion on forthcoming bond in an attachment suit, although penalty exceeds jurisdictional limit in direct suit on bond); Hallock *v.* Dominy, 69 N. Y. 238; Voorhees *v.* Martin, 12 Barb. (N. Y.) 508; Holden *v.* Warren, 118 N. C. 326, 24 S. E. 770; Bell *v.* Howerton, 111 N. C. 69, 15 S. E. 891; Lutz *v.* Thompson, 87 N. C. 334; Garrett *v.* Shaw, 25 N. C. 395; Moore *v.* Waters, 17 Fed. Cas. No. 9,780, 5 Cranch C. C. 283. *Contra,* Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285, where it is said that to allow such incidental jurisdiction would be a fraud on the law.

42. *Colorado.*— Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741.

Georgia.— Everett *v.* Brown, 117 Ga. 342, 43 S. E. 735.

Kansas.— Justices have jurisdiction to entertain an interplea in an attachment case, but not in a proceeding by garnishment in aid of an execution. Hayes *v.* Green, (App. 1898) 53 Pac. 764.

Missouri.— Mills *v.* Thomson, 61 Mo. 415; State *v.* Silverstein, 77 Mo. App. 304 [*citing* Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95].

New Jersey.— See Stryker *v.* Skillman, 14 N. J. L. 189.

North Carolina.— Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671.

See 31 Cent. Dig. tit. "Justices of the Peace," § 189.

Contra.— Jackson *v.* Bradley, 11 Pa. Co. Ct. 321. And see Jones *v.* Carr, 16 Ohio St. 420, holding that there is no jurisdiction, under Ohio Code, §§ 426, 427, to try the right of the claimant without his consent, and at the instance of the officer alone.

43. Presley *v.* Dean, 10 Ida. 375, 79 Pac. 71; Knapp *v.* King, 6 Oreg. 243. See also Southern Pac. Co. *v.* Russell, 20 Oreg. 459, 26 Pac. 304.

Where a justice dismisses a jury because of their inability to reach a verdict, his jurisdiction ceases. Waddell *v.* Physick, 17 N. J. L. 331; Gulick *v.* Van Tilburgh, 16 N. J. L. 417. But *compare* May *v.* Grawert, 86 Minn. 210, 90 N. W. 383, where it was held that jurisdiction was lost by permitting two weeks to elapse after discharging the jury before taking further action in the case. And see Chamberlain *v.* Edmonds, 18 App. Cas. (D. C.) 332.

Payment of costs on justice's promise to discontinue is the end of the action, and deprives the justice of further jurisdiction. Musser *v.* Simpson, 14 Pa. Co. Ct. 526.

The illegal transfer of a cause will not defeat plaintiff's rights by operating a discontinuance. Larue *v.* Gaskins, 5 Cal. 507.

A void judgment against one defendant, who has not been served with process, and does not appear, will not terminate a justice's jurisdiction over the other defendants.

jurisdictional requirement.[44] Where he acts within the scope of his jurisdiction, mere errors and irregularities in its exercise, to correct which appeal will lie in proper cases, will not divest a jurisdiction already attached.[45]

2. Absence or Delay of Justice. Generally, unless a cause is tried within a reasonable time[46] after the appointed hour, or that to which the cause has been regularly adjourned, the omission amounts to a discontinuance,[47] unless a continuance is had as provided by law.[48] But if the justice is engaged at the hour in trying another cause, this is a good reason for delay, and he may proceed as soon as possible after his other official engagements are disposed of.[49] So too where he is prevented by an act of God from being present at the time fixed, he will not lose jurisdiction, but may fix another time for the trial.[50]

3. Absence or Delay of Plaintiff. The failure of plaintiff to appear at the time fixed for trial, or that to which the case has been continued, or within a reasonable time thereafter, will operate as a discontinuance of the action;[51] and

French *v.* Ferguson, 77 Wis. 121, 45 N. W. 817.

A suit by defendant before another tribunal will not oust a justice of jurisdiction, where plaintiff's suit was brought first. Robinson *v.* Dean, 8 Del. Co. (Pa.) 293.

44. Mattice *v.* Litcherding, 14 Minn. 142. See also Talbot *v.* Kuhn, 89 Mich. 30, 50 N. W. 791, 28 Am. St. Rep. 273.

45. *Indiana.*— Calvert *v.* Hendricks, 155 Ind. 592, 58 N. E. 832.

Iowa.— Tennis *v.* Anderson, 55 Iowa 625, 8 N. W. 477.

Kentucky.— Schobarg *v.* Manson, 110 Ky. 483, 61 S. W. 999, 22 Ky. L. Rep. 1892; Galbraith *v.* Williams, 106 Ky. 431, 50 S. W. 686, 21 Ky. L. Rep. 79.

Michigan.— Talbot *v.* Kuhn, 89 Mich. 30, 50 N. W. 791, 28 Am. St. Rep. 273.

New York.— Hard *v.* Shipman, 6 Barb. 621.

See 31 Cent. Dig. tit. "Justices of the Peace," § 190.

46. A delay of a few minutes is not sufficient to oust jurisdiction. Stadler *v.* Moors, 9 Mich. 264; Everitt *v.* Lisk, 1 Code Rep. (N. Y.) 71.

47. *Kansas.*— Olson *v.* Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.

Maine.— Martin *v.* Fales, 18 Me. 23, 36 Am. Dec. 693; Spencer *v.* Perry, 17 Me. 413.

Michigan.— Ruberts *v.* Hathaway, 42 Mich. 592, 2 N. W. 307.

New Jersey.— Johnson *v.* Reilly, (1904) 57 Atl. 133; McKenna *v.* Murphy, 68 N. J. L. 522, 53 Atl. 695 [*citing* State *v.* Fleming, (Sup. 1902) 53 Atl. 225; Parker *v.* Mercantile Safe Deposit Co., 63 N. J. L. 505, 44 Atl. 199; Allen *v.* Summit Tp. Bd. of Health, 46 N. J. L. 99; Woodworth *v.* Wolverton, 24 N. J. L. 419; Taylor *v.* Doremus, 16 N. J. L. 473].

New York.— Flint *v.* Gault, 15 Hun 213; Lynsky *v.* Pendegrast, 2 E. D. Smith 43; Stoddard *v.* Holmes, 1 Cow. 245; McCarthy *v.* McPherson, 11 Johns. 407; Taft *v.* Grosfent, 5 Johns. 353; Wiest *v.* Critsinger, 4 Johns. 117.

Pennsylvania.— Henderson *v.* Alexander, 1 Lanc. L. Rev. 11.

Vermont.— Hinman *v.* Swift, 18 Vt. 315; Crawford *v.* Cheney, 12 Vt. 567; Phelps *v.* Birge, 11 Vt. 161; Brown *v.* Stacy, 9 Vt. 118.

See 31 Cent. Dig. tit. "Justices of the Peace," § 191.

The fact that a justice was purposely detained by defendant until after the expiration of two hours after the time set for trial, cannot give him jurisdiction, although defendant appears after such two hours, and the justice offers him a hearing, which he declines. Phelps *v.* Birge, 11 Vt. 161.

48. Martin *v.* Fales, 18 Me. 23, 36 Am. Dec. 693; Wiest *v.* Critsinger, 4 Johns. (N. Y.) 117; Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356.

Continuance by other justice.— Where a justice who signs a writ is absent on the return-day, any other justice, in order to continue the suit, must be present at the place set for trial within two hours after the time set in the writ, and have the writ in his possession. Crawford *v.* Cheney, 12 Vt. 567. See also Hinman *v.* Swift, 18 Vt. 315.

49. Kaub *v.* Mitchell, 12 Kan. 57; Hunt *v.* Wickwire, 10 Wend. (N. Y.) 102, 25 Am. Dec. 545; Chamberlain *v.* Lovet, 12 Johns. (N. Y.) 217.

Where the justice's absence was not on official duties as justice, but on duties as superintendent of poor, he was held to be divested of jurisdiction. Ruberts *v.* Hathaway, 42 Mich. 592, 4 N. W. 307.

50. Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126, flood.

51. Brady *v.* Taber, 29 Mich. 199; Todd *v.* Doremus, 60 Hun (N. Y.) 385, 15 N. Y. Suppl. 470; Norris *v.* Bleakley, 1 Hilt. (N. Y.) 90, 3 Abb. Pr. 107; Sprague *v.* Shed, 9 Johns. (N. Y.) 140.

After suspension of action.— Where the trial, after being commenced, was suspended for a time, and when it was resumed plaintiff did not appear, the cause was discontinued. Baldwin *v.* Carter, 15 Johns. (N. Y.) 496.

A delay of about an hour is not unreasonable.— Wilde *v.* Dunn, 11 Johns. (N. Y.) 459.

Where there is an oral agreement for a continuance in consequence of which the parties fail to appear, the justice does not lose

a discontinuance will also result from plaintiff's failure to prosecute the suit for an unreasonable time.[52]

4. Continuances or Adjournments[53] — a. In General. As a general rule any unauthorized continuance or adjournment of a cause will oust a justice of the peace of jurisdiction to take any further action in it;[54] but a continuance or adjournment which is within the powers of the justice and proper under the circumstances will not divest him of jurisdiction.[55]

b. For Indefinite Period. Where a justice of the peace continues a cause indefinitely, he as a rule loses jurisdiction, and any judgment subsequently rendered by him in such case is void;[56] but where jurisdiction has been obtained, and the parties have appeared on the return-day, and, to suit their own convenience, have mutually agreed to let the trial stand over to a day thereafter to be fixed, and such date has thereafter been named by the justice, and due notice given the parties, the court does not thereby lose jurisdiction to proceed with the case.[57]

c. Insufficient Entries of Adjournments. Under some statutes the time and place to which a case is adjourned or continued must be entered at the time of the action in the justice's docket, and if this is not done the case will stand discon-

jurisdiction. Barlow *v.* Riker, 138 Mich. 607, 101 N. W. 820.

52. Flanagan *v.* Smith, 21 Tex. 493, more than four years.

53. Continuances and adjournments generally see *infra*, IV, M.

54. *Connecticut.*— New Haven *v.* Rogers, 32 Conn. 221.

Illinois.— Crichton *v.* Beebe, 7 Ill. App. 272.

Iowa.— Iowa Union Tel. Co. *v.* Boylan, 86 Iowa 90, 52 N. W. 1122.

Michigan.— Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625; Scullen *v.* George, 65 Mich. 215, 31 N. W. 841. *Compare* Simon *v.* Sempliner, 86 Mich. 136, 48 N. W. 700.

Minnesota.— Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

Mississippi.— Alabama, etc., R. Co. *v.* Dalton, 86 Miss. 299, 38 So. 285.

New Jersey.— Savage *v.* Collins, 49 N. J. L. 167, 6 Atl. 502.

New York.— Moore *v.* Taylor, 88 N. Y. App. Div. 4, 84 N. Y. Suppl. 518; Burbanks Hardware Co. *v.* Hinkel, 76 N. Y. App. Div. 183, 78 N. Y. Suppl. 365; Redford *v.* Snow, 46 Hun 370; Peck *v.* Andrews, 32 Barb. 445; Wright *v.* Sheperd, 44 Misc. 454, 90 N. Y. Suppl. 154; Bonney *v.* Paul, 15 N. Y. Suppl. 442; Kiernan *v.* Reming, 2 How. Pr. N. S. 89, 7 N. Y. Civ. Proc. 311; Miller *v.* Larmon, 38 How. Pr. 417; Kimball *v.* Mack, 10 Wend. 497; Proudfit *v.* Henman, 8 Johns. 391; Gamage *v.* Law, 2 Johns. 192. *Compare* Hard *v.* Shipman, 6 Barb. 621; Goff *v.* Vedder, 12 N. Y. Civ. Proc. 358.

Vermont.— Pinney *v.* Petty, 47 Vt. 616.

Washington.— Nelson *v.* Campbell, 1 Wash. 261, 24 Pac. 539; Taylor *v.* Ringer, 3 Wash. Terr. 539, 19 Pac. 147.

Wisconsin.— Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105; Gallager *v.* Serfling, 92 Wis. 544, 66 N. W. 692; State *v.* Gust, 70 Wis. 631, 35 N. W. 559; Baizer *v.* Lasch, 28 Wis. 268; Mahr *v.* Young, 13 Wis. 634.

See 31 Cent. Dig. tit. "Justices of the Peace," § 193.

Adjournment at unauthorized time ousts jurisdiction.— Stadler *v.* Moors, 9 Mich. 264; Dittmar Powder Mfg. Co. *v.* Leon, 42 N. J. L. 540; Duel *v.* Sykes, 59 Hun (N. Y.) 117, 13 N. Y. Suppl. 166.

55. *Arkansas.*— Wheeler, etc., Mfg. Co. *v.* Donahoe, 49 Ark. 318, 5 S. W. 342.

Illinois.— Henion *v.* Pohl, 113 Ill. App. 100.

Minnesota.— Gillitt *v.* Truax, 27 Minn. 528, 8 N. W. 767, holding that where plaintiff appears and files his complaint on the return-day, but defendant does not appear, the justice does not lose jurisdiction by holding the case open until the second day thereafter to enable plaintiff to make his proofs.

New York.— Rogers *v.* Edmonds, 7 N. Y. Suppl. 881.

Vermont.— Remick *v.* Sanborn, 42 Vt. 477.

See 31 Cent. Dig. tit. "Justices of the Peace," § 193.

56. Murray *v.* Churchill, 86 Ill. App. 480; Lininger *v.* Glenn, 33 Nebr. 187, 49 N. W. 1128; Crandall *v.* Bacon, 20 Wis. 639, 91 Am. Dec. 451. But see Shanklin *v.* Francis, 67 Mo. App. 457; Thomasson *v.* Simmons, 57 W. Va. 576, 50 S. E. 740. And *compare* Gould *v.* Loughran, 19 Nebr. 392, 27 N. W. 397.

After disagreement of jury.— Failure by a justice to continue a cause to a day certain after the jury has disagreed and been discharged will not operate to discontinue the cause; but either party may at any time, on notice and motion, call it up for trial. Chamberlain *v.* Edmonds, 18 App. Cas. (D. C.) 332. *Contra*, Waddell *v.* Physick, 17 N. J. L. 331; Gulick *v.* Van Tilburgh, 16 N. J. L. 417. And see May *v.* Grawert, 86 Minn. 210, 90 N. W. 383.

57. Cedar Rapids *v.* Rall, 115 Iowa 335, 88 N. W. 826. But see Woodworth *v.* Wolverton, 24 N. J. L. 419, holding that where a cause is adjourned without fixing a day, but to such day as counsel shall agree upon, and defendant's counsel refuses to agree to a day,

tinued.[58] It is not essential that the docket should show the cause of adjournment, but where the cause is given, and it is insufficient, jurisdiction will be lost.[59] Where defendant has failed to appear, and the justice adjourns the case, but omits to state in his docket on whose motion adjournment was had, he does not thereby lose jurisdiction.[60]

d. Estoppel to Object.[61] A party who with knowledge of the facts applies for or consents to an irregular continuance or adjournment is estopped afterward to insist, to the prejudice of the other party, that the action was thereby discontinued.[62]

5. Restoration of Jurisdiction. It has been laid down as a general rule that when the jurisdiction of a justice of the peace has once been divested, it cannot be restored;[63] but this is at least subject to modifications where defendant voluntarily appears.[64]

I. Disqualification to Act — 1. In General. The causes which will disqualify a justice of the peace from trying a civil action are usually pointed out by the statutes,[65] and are exclusive of all others[66] except those operative at common

the cause is out of court, and the justice cannot fix a day and give notice thereof to defendant.

58. Woempener *v.* Ketchum, 110 Mich. 34, 67 N. W. 1106; Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609; Brahmstead *v.* Ward, 44 Wis. 591; Brown *v.* Kellogg, 17 Wis. 475. But *compare* Darlings *v.* Corey, 1 N. J. L. 200.

In West Virginia it was held that an action in a justice's court is not discontinued from the mere fact that no orders of continuance or other orders are made on the docket, and therefore where a judgment before a justice was held void on writ of prohibition and a second judgment rendered, and eighteen months elapsed during the pendency of the prohibition between the two judgments without any order in the action, it was held not to work a discontinuance. Thomasson *v.* Simmons, 57 W. Va. 576, 50 S. E. 740.

A recess is not an adjournment within the statutes. Woempener *v.* Ketchum, 110 Mich. 34, 67 N. W. 1106; French *v.* Ferguson, 77 Wis. 121, 45 N. W. 817.

Time to consider.— Where, after a cause was submitted by both parties, the justice took time to consider, and made an entry on his docket that the cause was "continued" to a specified day and hour (within the time limited by Wis. Rev. St. c. 120, § 96), but without mentioning any place, the omission did not operate as a discontinuance. Wheeler *v.* Smith, 18 Wis. 651.

A voluntary appearance by the parties will cure an omission to enter the place of adjournment in the docket. Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609.

The mere clerical mistake in a docket entry of an adjournment to another certain day "at 10 o'clock, A. P.," is not sufficient to oust a justice of jurisdiction. Taylor *v.* Wilkinson, 22 Wis. 40.

59. Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105 [*citing* Gallager *v.* Serfling, 92 Wis. 544, 66 N. W. 692].

60. Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964, 58 Am. St. Rep. 527.

61. Estoppel generally see Estoppel.

62. Patterson *v.* McRea, 29 Mich. 258; Fischer *v.* Cooley, 36 Nebr. 626, 54 N. W. 960.

63. Kelley *v.* Taylor, 17 Pick. (Mass.) 218; Bailey *v.* Delaplaine, 1 Sandf. (N. Y.) 11; Perhune *v.* Raugh, 10 Kulp (Pa.) 86; Brown *v.* Kellogg, 17 Wis. 475.

Plea of title.— Where, in trespass before a justice, the filing of a plea of title to real estate has ousted his jurisdiction, it cannot be restored by pleading over and joining an issue not involving the question of title. Kelley *v.* Taylor, 17 Pick. (Mass.) 218.

64. See *infra*, IV, F, 1, b, (II).

65. See Pegues *v.* Baker, 110 Ala. 251, 17 So. 943.

Collateral attack on judgment see *infra*, IV, O, 7, b, (IV).

Under the Connecticut statutes no one can act as justice of the peace in the trial of any civil action which shall have been brought, or in which the writ or declaration shall have been filled up, by his partner, or by any one occupying the same office or apartment with him. A judgment passed by a justice so disqualified is void. The disqualification may be removed by agreement of the parties to the suit made in writing in court, but not otherwise. Keeler *v.* Stead, 56 Conn. 501, 16 Atl. 552, 7 Am. St. Rep. 320.

Statutory disqualification of tavern keepers or inhabitants of inns see Rice *v.* Milks, 7 Barb. (N. Y.) 337; Parmelee *v.* Thompson, 7 Hill (N. Y.) 77; Clayton *v.* Per Dun, 13 Johns. (N. Y.) 218; Low *v.* Rice, 8 Johns. (N. Y.) 409; Schermerhorn *v.* Tripp, 2 Cai. (N. Y.) 108.

66. Having served as juror in an action between the same parties and for the same cause of action, wherein a verdict was rendered for the plaintiff, does not disqualify a justice from trying a cause and rendering judgment therein. Travis *v.* Jenkins, 30 How. Pr. (N. Y.) 152.

Having acted as arbitrator between the same parties and in reference to the subject-matter of the suit, and having formed an opinion and expressed it to his associate ar-

law.[67] Where the justice knows the fact of his disqualification, he should act on his own knowledge, and decline to take cognizance of the case further than to transmit it to some qualified justice, even though he first ascertains the fact after issue joined.[68]

2. INTEREST. Both at common law and by statute any direct pecuniary interest, however minute, in the result of the action or other proceeding disqualifies a justice of the peace;[69] the only exception being where it is necessary for the justice to act in order to prevent a failure of justice.[70] As a general rule the interest of a justice as a citizen or taxpayer in the result of an action or other proceeding does not disqualify him.[71]

3. RELATIONSHIP. At common law it was no disqualification in a justice of the peace to try a cause that he was related in any of the degrees of consanguinity

bitrators, will not disqualify a justice. Batchelder *v.* Nourse, 35 Vt. 642.

Having been a member of a town council by which an ordinance was passed does not disqualify a justice from hearing a case contesting its validity. Alexandria *v.* Williams, 35 La. Ann. 329.

The fact that a justice has declined to act at the first trial of a case, after objection, will not disqualify him from acting at a second trial, when he is not in fact disqualified. Vaughn *v.* Strickland, 108 Ga. 659, 34 S. E. 192.

67. Pegues *v.* Baker, 110 Ala. 251, 17 So. 943.

68. Hibbard *v.* Odell, 16 Wis. 633.

69. *Connecticut.*— Clyma *v.* Kennedy, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194.

Massachusetts.— Richardson *v.* Welcome, 6 Cush. 331; Hill *v.* Wells, 6 Pick. 104; Pearce *v.* Atwood, 13 Mass. 324.

Michigan.— Clark *v.* Mikesell, 81 Mich. 45, 45 N. W. 377 [*followed* in Howes *v.* Mikesell, 81 Mich. 51, 45 N. W. 378].

Minnesota.— Jordan *v.* Henry, 22 Minn. 245.

New Jersey.—Schroder *v.* Ehlers, 31 N. J. L. 44.

New York.— Baldwin *v.* McArthur, 17 Barb. 414.

Rhode Island.— Kentish Artillery *v.* Gardiner, 15 R. I. 296, 3 Atl. 662.

Texas.— Harrison *v.* Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030; Franco-Texan Land Co. *v.* Howe, 3 Tex. Civ. App. 315, 22 S. W. 766.

Vermont.— Howe *v.* Hosford, 8 Vt. 220.

United States.— Slacum *v.* Simms, 5 Cranch 363, 3 L. ed. 126; Barney *v.* Washington City, 2 Fed. Cas. No. 1,033, 1 Cranch C. C. 248.

Canada.— McRossie *v.* Provincial Ins. Co., 34 U. C. Q. B. 55; Rex *v.* McIntyre, Taylor (U. C.) 22.

See 31 Cent. Dig. tit. "Justices of the Peace," § 199.

A statute which disqualifies a judge to sit in a cause to which he is a party extends to justices of the peace. Baldwin *v.* McArthur, 17 Barb. (N. Y.) 414.

Interest must be direct and substantial.— See Fuller *v.* Davis, 73 Me. 556; Ayer *v.* Woodman, 24 Me. 196; Russell *v.* Perry, 16 N. H. 100; Com. *v.* Fenstermacher, 5 Pa. Co. Ct. 424.

Pecuniary interest.— "The interest in a cause which of itself disqualifies a judge from acting therein is a pecuniary one — similar to the interest which a party in a civil action has in it." Clyma *v.* Kennedy, 64 Conn. 310, 318, 29 Atl. 539, 42 Am. St. Rep. 194.

Nominal plaintiff.— Where a suit for the recovery of a penalty is brought in the name of the burgess to the use of the borough, and before a justice who is also the burgess, the fact that the burgess is the nominal plaintiff in the suit will not prevent his hearing the case in his capacity of justice. Morgan *v.* Fisher, 1 Just. L. Rep. (Pa.) 108.

Disqualified justice cannot continue cause. — See Howe *v.* Hosford, 8 Vt. 220.

If the justice is interested when the plea of interest is filed, it is sufficient to disqualify him, although he may have had no interest when the warrant issued. Howes *v.* Mikesell, 81 Mich. 51, 45 N. W. 378; Clark *v.* Mikesell, 81 Mich. 45, 45 N. W. 377.

An interested justice may sign a writ returnable to the county court (Graham *v.* Todd, 9 Vt. 166) or, upon succeeding the justice who tried a case in which he was plaintiff and rendered judgment in his favor, perform the ministerial duty of certifying a transcript thereof to the district court (Hass *v.* Leveston, (Iowa 1905) 102 N. W. 811).

70. Hill *v.* Wells, 6 Pick. (Mass.) 104; Pearce *v.* Atwood, 13 Mass. 324.

71. *Colorado.*— Deitz *v.* Central, 1 Colo. 323, action for a penalty.

Connecticut.— Tomlinson *v.* Leavenworth, 2 Conn. 292 (action to prevent encroachment on highway); Davis *v.* Salisbury, 1 Day 278 (justice may recognize defendant in bastardy proceedings to appear at county court).

Maine.— State *v.* Craig, 80 Me. 85, 13 Atl. 129, action for a penalty. But see Norridgewock *v.* Sawtelle, 72 Me. 484, holding that upon a poor debtor's disclosure on an execution in favor of the inhabitants of a town, a justice who is one of such inhabitants is not disinterested, as required by Rev. St. c. 113, § 28.

Massachusetts.— Hall *v.* Kent, 11 Gray 467, an action for penalty for obstructing streets. But see Clark *v.* Lamb, 2 Allen 396, holding

or was of affinity to either of the parties,[72] but under the statutes of most of the states relationship within the nearer degrees of consanguinity and affinity operates as a disqualification.[73] It has been held that the fact that a justice was so dis-

that prior to Gen. St. c. 122, § 13, a magistrate had no jurisdiction of an action made returnable before him, in which the inhabitants of his town were summoned as trustees of defendant.

Missouri.— Lexington *v.* Long, 31 Mo. 369, proceeding to widen street on which the mayor, who was the presiding judge of the court, owned a lot.

New York.— Wood *v.* Rice, 6 Hill 58; Corwein *v.* Hames, 11 Johns. 76, actions for penalties.

Tennessee.— Jonesborough *v.* McKee, 2 Yerg. 167.

Vermont.— A justice has jurisdiction in a criminal case, although the penalty or fine may go into the treasury of the town of which he is a rated inhabitant. Waters *v.* Day, 10 Vt. 487; State *v.* Batchelder, 6 Vt. 479. But it has been laid down that in a civil case a justice is without jurisdiction if any part of the debt or avails of the action will go into the treasury of his town. Waters *v.* Day, 10 Vt. 487, holding that the action *qui tam* is a civil action. See also Jericho *v.* Underhill, 64 Vt. 362, 24 Atl. 251; Pierce *v.* Butler, 16 Vt. 101. But *compare* Morristown *v.* Fairfield, 46 Vt. 33, holding that justices who are rated inhabitants and taxpayers in a town are not thereby disqualified from making an order of removal of a pauper in a case where such town is a party.

Wisconsin.— Hancock *v.* Merriman, 46 Wis. 159, 49 N. W. 976, special proceeding for collection of tax on personal property.

See 31 Cent. Dig. tit. "Justices of the Peace," § 202.

Contra.— Chatham *v.* Mason, 53 Ill. 411 (suit to recover penalties for obstructing highway); McVeytown *v.* Union Tp., 5 Watts & S. (Pa.) 434; Washington Tp. *v.* Beaver Tp., 3 Watts & S. (Pa.) 548; Rose Tp. *v.* Clover Tp., 32 Leg. Int. (Pa.) 449 (removal of paupers).

72. Place *v.* Butternuts Woolen, etc., Mfg. Co., 28 Barb. (N. Y.) 503.

73. *Alabama.*— Pegues *v.* Baker, 110 Ala. 251, 17 So. 943.

Georgia.— Savage *v.* Oliver, 110 Ga. 636, 36 S. E. 54; Jarrell *v.* Guann, 105 Ga. 139, 31 S. E. 149; Rogers *v.* Felker, 77 Ga. 46.

Indiana.— Dawson *v.* Wells, 3 Ind. 398.

Maine.— Spear *v.* Robinson, 29 Me. 531.

Nebraska.— Walters *v.* Wiley, 1 Nebr. (Unoff.) 235, 95 N. W. 486.

New Jersey.— Stoll *v.* Gariss, 38 N. J. L. 200.

New York.— Rivenburgh *v.* Henness, 4 Lans. 208; Post *v.* Black, 5 Den. 66; Foot *v.* Morgan, 1 Hill 654; Edwards *v.* Russell, 21 Wend. 63; Bellows *v.* Peason, 19 Johns. 172.

Pennsylvania.— Spidle *v.* Robison, 2 Pa. Co. Ct. 642; Singer *v.* Singer Mfg. Co., 2 Pa. Co. Ct. 578; Watterson *v.* Ramsay, 2 Pa. Co. Ct. 137; McGee *v.* Jackson, 2 Pa. Co. Ct. 136.

Tennessee.— Pierce *v.* Bowers, 8 Baxt. 353.

Texas.— McVea *v.* Walker, 11 Tex. Civ. App. 46, 31 S. W. 839.

Vermont.— Hill *v.* Wait, 5 Vt. 124.

Wisconsin.— Elderkin *v.* Wiswell, 61 Wis. 498, 21 N. W. 541; Hibbard *v.* Odell, 16 Wis. 633. *Compare* Rector *v.* Drury, 3 Pinn. 298, 4 Chandl. 24.

See 31 Cent. Dig. tit. "Justices of the Peace," § 200.

It is against public policy for a justice to try a case over the objection of one of the parties where the other is related to him. Sample *v.* Shidel, 20 Pa. Co. Ct. 357.

Rule applies to judgment by confession or default.— Dawson *v.* Wells, 3 Ind. 398 [*overruling* Eastwood *v.* Buel, 1 Ind. 434, Smith 376]; Hill *v.* Wait, 5 Vt. 124.

The word "kin," as used in Wis. Rev. St. c. 120, § 48, includes both relations by blood and by marriage. Hibbard *v.* Odell, 16 Wis. 633.

What constitutes affinity.— "A husband is related by affinity to the blood relations of his wife, and the wife by affinity to the blood relations of her husband, but not otherwise by affinity." Consequently a justice is not disqualified where one of the parties married a cousin of the justice's wife; the party and the justice not being otherwise related. Blalock *v.* Waldrup, 84 Ga. 145, 10 S. E. 622, 20 Am. St. Rep. 350. See also Higbe *v.* Leonard, 1 Den. (N. Y.) 186, in which a brother of the justice was the husband of the plaintiff's sister.

Relationship by affinity ceases with the dissolution of the marriage creating it, except so far as the children of such marriage are concerned. Trout *v.* Drawhorn, 57 Ind. 570. *Compare* Pegues *v.* Baker, 110 Ala. 251, 17 So. 943; Carman *v.* Newell, 1 Den. (N. Y.) 25, to the effect that for the relationship to cease there must be no surviving children of the marriage. And see Spear *v.* Robinson, 29 Me. 531, holding that a justice who had married a sister of one of the plaintiffs was disqualified whether his wife was living at the time of the suit or not.

Relationship to a corporator and stockholder does not disqualify in a suit against a corporation. Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315. *Contra*, Place *v.* Butternuts, etc., Mfg. Co., 28 Barb. (N. Y.) 503.

Poor debtor's oath.— The fact that one of the magistrates selected to administer a poor debtor's oath is a brother of the poor debtor will not disqualify him to act. Allen *v.* Bruce, 12 N. H. 418. See also Downer *v.* Hollister, 14 N. H. 122, 40 Am. Dec. 175, holding that a brother to a surety in a poor

qualified renders his judgment void,[74] but there is also authority for the view that such judgment is voidable only and not void.[75]

4. Counsel or Agent For Parties. A justice of the peace who is or has been counsel or agent of one of the parties to a case is disqualified to try it.[76] But his attorneyship or agency must be clearly shown,[77] and the mere fact that the justice has received the claim for collection and has notified defendant that suit will be brought unless it is settled is not alone sufficient to disqualify him.[78] A justice is, however, disqualified to try an action on a note which has been indorsed to him for collection,[79] or where he has received a note for collection upon an agreement that, if suit is brought, he is not to receive his costs, "unless he can make them out of the defendant."[80]

J. Powers After Expiration of Term. Purely ministerial duties may generally be performed by a justice of the peace after the expiration of his term of office,[81]

debtor's bond may act as a magistrate in discharging the debtor. *Compare* Gear *v.* Smith, 9 N. H. 63.

Remote relationship does not disqualify.— Brady *v.* Richardson, 18 Ind. 1, fifth cousin.

74. Walters *v.* Wiley, 1 Nebr. (Unoff.) 235, 95 N. W. 486; McVea *v.* Walker, 11 Tex. Civ. App. 46, 31 S. W. 839; Hill *v.* Wait, 5 Vt. 124. See also Pierce *v.* Bowers, 8 Baxt. (Tenn.) 353.

75. Rogers *v.* Felker, 77 Ga. 46 [*followed* in Jarrell *v.* Guann, 105 Ga. 139, 31 S. E. 149], holding that the judgment cannot be attacked by affidavit of illegality on that ground.

Collateral attack on judgment see *infra*, IV, O, 7, b, (IV).

76. *Connecticut.*— Yudkin *v.* Gates, 60 Conn. 426, 22 Atl. 776.

Indiana.— Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616.

Kansas.— Limerick *v.* Murlatt, 43 Kan. 318, 23 Pac. 567.

New York.— Hubbell *v.* Harbeck, 54 Hun 147, 7 N. Y. Suppl. 243; Carrington *v.* Andrews, 12 Abb. Pr. 348.

Pennsylvania.— Harlan *v.* Tripp, 7 Pa. Dist. 382; Wagner *v.* Hoffman, 10 Kulp 333. See also Harshberger *v.* Nursery Co., 1 Just. L. Rep. 216.

Texas.— Harrison *v.* Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030.

Vermont.— Ingraham *v.* Leland, 19 Vt. 304.

See 31 Cent. Dig. tit. "Justices of the Peace," § 201.

Counsel in former suit for same matters.— Where the justice who rendered the judgment had been counsel for plaintiff in a suit before another justice for the same matters declared for before himself, but on application refused to dismiss the action, the judgment should be reversed. Carrington *v.* Andrews, 12 Abb. Pr. (N. Y.) 348. See also Harrison *v.* Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030.

Retainer for suit in another court.— Where a justice, two days after a summons issued by him, accepted a retainer to bring another suit for plaintiff in the supreme court, the judgment entered by the justice for plaintiff in the original suit should be set aside, although there was probably no corrupt intent in accepting the retainer. Hubbell *v.* Harbeck, 54 Hun (N. Y.) 147, 7 N. Y. Suppl. 243.

The attorney who makes the writ cannot sign it as justice of the peace and take a recognizance for costs. Ingraham *v.* Leland, 19 Vt. 304.

77. Lovering *v.* Lamson, 50 Me. 334; Cook *v.* Berth, 102 Mass. 372; Wood *v.* Fletcher, 3 N. H. 61; McLouth *v.* Myers, 16 N. Y. Suppl. 779.

Having drawn and attested a lease and notice to quit does not disqualify a justice to try an action for possession of the leased premises. Cook *v.* Berth, 102 Mass. 372.

Counseling and aiding a debtor in preparing for his disclosure will not disqualify a justice to hear the disclosure, although it should deter him from acting. Lovering *v.* Lamson, 50 Me. 334.

78. Taggart *v.* Waters, 115 Mich. 638, 73 N. W. 885; Moon *v.* Stevens, 53 Mich. 144, 18 N. W. 600; McLouth *v.* Myers, 16 N. Y. Suppl. 779; Wagner *v.* Hoffman, 19 Pa. Super. Ct. 414; Sample *v.* Shidel, 20 Pa. Co. Ct. 357; Atwood *v.* Allis, 1 Just. L. Rep. (Pa.) 135. See also Baldwin *v.* Runyan, 8 Ind. App. 344, 35 N. E. 569. *Contra*, Harlan *v.* Tripp, 7 Pa. Dist. 382.

79. West *v.* Wheeler, 49 Mich. 505, 13 N. W. 836.

80. Limerick *v.* Murlatt, 43 Kan. 318, 23 Pac. 567.

81. Knox *v.* State, 45 Ark. 500 (filing transcript of fines and forfeitures in circuit court); Hawley *v.* Middlebrook, 28 Conn. 527 (justice may perfect records after removal to another state, under Conn. Rev. St. tit. 1, § 139); Jones *v.* Elliott, 35 Me. 137 (renewal of executions); Matthews *v.* Houghton, 11 Me. 377 (making up records); Carruth *v.* Tighe, 32 Vt. 626 (justice may certify records as long as he continues to live in county). But see Koons *v.* Headley, 49 Pa. St. 168, holding that under Pa. Act, April 21, 1846, a justice cannot certify a transcript to another justice after his term of office has expired. See also Regle *v.* Nugent, 2 Pars. Eq. Cas. (Pa.) 297; Singley *v.* Fisher, 2 Leg. Rec. (Pa.) 168; Koch *v.* Shimer, 1 Lehigh Val. L. Rep. (Pa.) 77.

but it is otherwise as to judicial duties,[82] unless he is given express statutory authority to perform them.[83]

K. Powers of Successor Over Proceedings Before Former Justice. As a general rule when a justice goes out of office, his docket and official papers are required to be transferred to his successor, who is authorized to complete all unfinished business.[84]

L. Powers Over Proceedings Within Jurisdiction of Other Justices. Ordinarily one justice has no authority to take cognizance of proceedings within the jurisdiction of another justice,[85] but in many states other justices, usually the nearest, are given jurisdiction over proceedings within the jurisdiction of a justice who has resigned or is disqualified, absent, or otherwise disabled.[86] These statutes are to be strictly construed, and will not be extended to cases not clearly

82. Gage *v.* Vail, 73 Mo. 454 (judgment entered after expiration of term a nullity); Tichenor *v.* Hewson, 14 N. J. L. 26 (acceptance of appeal-bond after expiration of commission); Ross *v.* Ford, 3 N. J. L. 906 (expiration of commission works discontinuance); *In re* Rodding, 14 N. Y. Civ. Proc. 47 (cannot finish trial and render judgment after expiration of term). *Compare* Haas *v.* Lees, 18 Kan. 449, in which a justice received an appeal-bond just before he removed from the township, whereby he vacated his office, and just afterward, and within the proper time, indorsed his approval, dating it back to the time when he received the bond, and it was held that the act might be sustained, as relating back.

83. See Hoyt *v.* Guarnieri, 67 Conn. 590, 591, 35 Atl. 511, holding that under Conn. Gen. St. § 671, which provides that "when any justice of the peace shall not be re-elected, all processes, actions, and matters, which have been begun by, or brought before him, before the expiration of his term of office, may be proceeded with by him in the same manner as if he were still in office," a justice may render judgment and issue execution after the expiration of his term.

In New Jersey, since the statute of February, 1834, a justice may accept an appeal-bond after his commission has expired. Tichenor *v.* Hewson, 14 N. J. L. 26.

84. *Arkansas.*— St. Louis, etc., R. Co. *v.* Winfrey, (1891) 16 S. W. 572 (entry of judgment by successor *nunc pro tunc*); Gates *v.* Bennet, 33 Ark. 475 (correction of judgment by *nunc pro tunc* order); Adams *v.* Thompson, 12 Ark. 670 (entry of judgment *nunc pro tunc*).

California.— Julian *v.* Gallen, 2 Cal. 358.

Iowa.— See Evans *v.* Richards, 85 Iowa 620, 52 N. W. 541.

Kansas.— St. Louis, etc., R. Co. *v.* Hurst, 52 Kan. 609, 35 Pac. 211, holding that a justice has power to supply omissions in the transcript of his predecessor.

Missouri.— Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362; Linderman *v.* Edson, 25 Mo. 105.

Ohio.— See People *v.* Price, 34 Ohio St. 15.

Pennsylvania.— Com. *v.* Kelly, 27 Pa. Co. Ct. 249; Com. *v.* Brackenridge, 4 Dauph. Co. Rep. 301. But see Abbey *v.* Hannick, 5 Lack. Jur. 62.

Texas.— Holmes *v.* Buckner, 67 Tex. 107, 2 S. W. 452.

Washington.— Nelson *v.* Campbell, 1 Wash. 261, 24 Pac. 539.

Wisconsin.— Stamm *v.* Dixon, 49 Wis. 328, 5 N. W. 858.

See 31 Cent. Dig. tit. "Justices of the Peace," § 205.

Compare Anderson *v.* Hanson, 28 Minn. 400, 10 N. W. 429, holding that an action pending before a justice of the peace when his term of office expires is not transferred by operation of law to his successor, so as to give the latter jurisdiction of the case.

Power of revision.— The successor in office of a justice of the peace cannot revise the action of his predecessor. Haley *v.* Villeneuve, 11 Tex. 617.

85. Wilson *v.* Tiernan, 3 Mo. 577; Tindall *v.* Carson, 16 N. J. L. 94; Hallowell *v.* Williams, 4 Pa. St. 339; Gibson *v.* Davis, 22 Vt. 374.

A scire facias to revive a judgment must be issued by the same justice who rendered it, and by no other. If he be dead or out of commission, the only remedy is debt upon the judgment. Tindall *v.* Carson, 16 N. J. L. 94. See also Gibson *v.* Davis, 22 Vt. 374. But *compare* Wilcher *v.* Hamilton, 15 Ga. 435, holding that justices' judgments may be renewed to the same extent that judgments of higher courts may be; and it is not necessary that the justice presiding should be the same who presided when the judgment was rendered.

Issuing execution.— Where a justice remains in office and retains his records, another justice has no authority to issue an execution upon his judgment. Clifford *v.* Cabiness, 1 Dana (Ky.) 384. See also Hallowell *v.* Williams, 4 Pa. St. 339. *Compare* Sandlin *v.* Anderson, 82 Ala. 330, 2 So. 28.

86. *Alabama.*— Where both of the justices in the precinct are incompetent or disqualified, a justice of an adjoining precinct may take jurisdiction under Code (1876), §§ 754, 3608. Horton *v.* Elliott, 90 Ala. 480, 8 So. 103.

Georgia.— Where the term of office of a notary public who is *ex officio* justice of the peace has expired after an appeal from his judgment to a jury has been entered, and his successor has not been commissioned or sworn, the other justice of the district may

within their terms,[87] and where by statute a certain proceeding must be had before a particular justice, no other justice can take jurisdiction.[88]

M. Consent to Jurisdiction. Jurisdiction of the person may be conferred upon a justice of the peace by consent,[89] but jurisdiction of the subject-matter cannot be so conferred.[90]

preside in the trial of the appeal. Harrison *v.* Perry, 90 Ga. 206, 15 S. E. 742.

Illinois.— Where a justice on removing from the county made over his papers and docket to the nearest justice, who afterward removed from the state and made over his papers and docket, including those of the first justice to a third justice, the latter had jurisdiction to issue execution on the judgment of the first justice. Martin *v.* Walker, 15 Ill. 377.

Nebraska.— Under Code Civ. Proc. § 1092, the sickness or other disability or necessary absence of a justice, which authorizes the calling in of another justice of the county to attend in his behalf and at his request, is such as occurs at the time appointed for trial. Keely Inst. *v.* Riggs, 5 Nebr. (Unoff.) 612, 99 N. W. 833.

New York.— See People *v.* Ulster County, 32 Barb. 473, as to what constitutes a "disability" within 3 Rev. St. (5th ed.) p. 475, § 25, which authorizes another justice to act in place of one disabled.

Ohio.— Where a justice resigns pending an action, and his official papers and docket are placed in the hands of the sole remaining justice in the township, the latter has authority, under Swan & C. St. p. 806, § 208, to try the case and render judgment. Pittsburg, etc., R. Co. *v.* Fleming, 30 Ohio St. 480.

Pennsylvania.— Any justice has jurisdiction, on the delivery of the transcript to him, to recover the amount of a judgment rendered by another justice, who has resigned, but retains his docket. Ingle *v.* Homman, 1 Watts & S. 414. See also McGarry *v.* Douredoure, 6 Phila. 332.

Tennessee.— Where a justice is sick on the day of trial, he may procure another justice of the same district to try the case, and himself issue execution on the judgment rendered. Fowler *v.* McDaniel, 6 Heisk. 529.

Texas.— Under Sayles Civ. St. art. 1537, when any justice shall be absent from his precinct, the nearest justice in the county may perform his duties, and retains jurisdiction until the case is removed by appeal. Crawford *v.* Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

Vermont.— A justice, continuing a writ for another justice in his absence, has no further jurisdiction than mere naked continuance. Braynard *v.* Burpee, 27 Vt. 616.

See 31 Cent. Dig. tit. "Justices of the Peace," § 206.

87. See People *v.* Ulster County, 32 Barb. (N. Y.) 473, holding that absence by procurement of one of the parties is not a "disability" within 3 N. Y. Rev. St. (5th ed.) p. 475, § 25.

Declination to act in a cause is not within a statute which authorizes a justice to take jurisdiction of an action only in case of the "absence, sickness, or other disability" of a municipal judge. Klaise *v.* State, 27 Wis. 462. See also Poyser *v.* Murray, 6 Ind. 35, construing Ind. Rev. St. (1843) p. 863.

That a justice is sick and unable to attend business will not authorize another justice to issue an alias summons, where the former is alive, in commission, and within the district. Fetters *v.* Leonard, 5 Pa. Co. Ct. 653.

88. Test *v.* Beeson, 37 Ind. 380.

89. *Alabama.*— McKinney *v.* Low, 1 Port. 129.

Georgia.—Block *v.* Henderson, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325.

Illinois.— Nigh *v.* Dovel, 84 Ill. App. 228.

Iowa.— Porter *v.* Welsh, 117 Iowa 144, 90 N. W. 582.

Kansas.— St. Louis, etc., R. Co. *v.* Brown, 10 Kan. App. 401, 61 Pac. 457.

Missouri.— Rocheport Bank *v.* Doak, 75 Mo. App. 332; Grimm *v.* Dundee Land, etc., Co., 55 Mo. App. 457.

New Jersey.— Johnson *v.* ——, 1 N. J. L. 44; Quigley *v.* Baldwin, 1 N. J. L. 37.

New York.— Hogan *v.* Baker, 2 E. D. Smith 22; Stoddard *v.* Holmes, 1 Cow. 245.

See 31 Cent. Dig. tit. "Justices of the Peace," § 217.

Appearance as consent to jurisdiction see *infra*, IV, F, 1, b, (I).

Where jurisdiction is unqualifiedly withheld from a justice consent will not render the proceedings valid. Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688.

Where a justice's appointment is void, consent of the parties cannot give him jurisdiction. Crawford *v.* Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

Consent of one of several defendants cannot give jurisdiction as to other defendants. Davis *v.* Osborn, 156 Ind. 86, 59 N. E. 279; Stoddard *v.* Holmes, 1 Cow. (N. Y.) 245.

90. *California.*— Feillett *v.* Engler, 8 Cal. 76.

Georgia.—Block *v.* Henderson, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325.

Illinois.— Leigh *v.* Mason, 2 Ill. 249; Nigh *v.* Dovel, 84 Ill. App. 228.

Indiana.— Horton *v.* Sawyer, 59 Ind. 587.

Iowa.— Porter *v.* Welsh, 117 Iowa 144, 90 N. W. 582; Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528. *Compare* White *v.* Culon, 25 Iowa 30; Van Horn *v.* Bellar, 20 Iowa 255.

Kansas.— St. Louis, etc., R. Co. *v.* Brown, 10 Kan. App. 401, 61 Pac. 457.

Maine.— Call *v.* Mitchell, 39 Me. 465.

Mississippi.— Rice *v.* Locke, 59 Miss. 189.

Missouri.— Rocheport Bank *v.* Doak, 75 Mo. App. 332.

N. Waiver and Cure of Objections to Jurisdiction—1. In General. As a rule jurisdiction of the subject-matter cannot be waived,[91] and the want of such jurisdiction will not be cured by verdict, when properly presented by plea in abatement.[92] But where a defendant appears and goes to trial on the merits, he waives all objections to the jurisdiction of the person.[93] If, however, a statute expressly declares that a justice shall have no jurisdiction of a cause if defendant be not proceeded against as the law prescribes, this strips the justice of all

New York.— Hogan *v.* Baker, 2 E. D. Smith 22; Striker *v.* Mott, 6 Wend. 465.

North Carolina.— Hughes *v.* Mason, 84 N. C. 472.

Ohio.— McCleary *v.* McLain, 2 Ohio St. 368; Place *v.* Welch, 2 Ohio Dec. (Reprint) 542, 3 West. L. Month. 611.

Pennsylvania.— Stewart *v.* Shaffer, 6 Pa. Dist. 226, 18 Pa. Co. Ct. 655; Jones *v.* Stauffer, 1 Leg. Gaz. 91.

See 31 Cent. Dig. tit. "Justices of the Peace," § 217.

Consent as conferring jurisdiction over amount involved see *supra*, III, D, 1.

91. *Alabama.*— Burgin *v.* Ivy Coal, etc., Co., 127 Ala. 657, 29 So. 67. *Compare* Clem *v.* Wise, 133 Ala. 403, 31 So. 986, holding that when first presented on motion for new trial in the circuit court an objection to the jurisdiction of a justice's court is not available.

Georgia.— Thurston *v.* Wilkerson, 65 Ga. 557. But see Gresham *v.* Landens, Ga. Dec. Pt. II, 149.

Iowa.— McMeans *v.* Cameron, 51 Iowa 691, 49 N. W. 856.

Minnesota.— May *v.* Grawert, 86 Minn. 210, 90 N. W. 383.

Missouri.— Fields *v.* Maloney, 78 Mo. 172; Stone *v.* Corbett, 20 Mo. 350; Dennis *v.* Bailey, 104 Mo. App. 638, 78 S. W. 669; White *v.* Missouri, etc., R. Co., 72 Mo. App. 400.

New Jersey.— State *v.* Folwell, 53 N. J. L. 176, 20 Atl. 1079.

Oklahoma.— Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356.

Pennsylvania.— Lucas Coal Co. *v.* Struble, 3 Lanc. L. Rev. 300. But see Montgomery *v.* Heilman, 96 Pa. St. 44.

See 31 Cent. Dig. tit. "Justices of the Peace," § 218.

Compare Edwards *v.* Smith, 16 Colo. 529, 27 Pac. 809 (holding that where, after trial in a justice's court, the parties stipulate for submission of the action to the district court, which has jurisdiction of the subject-matter, and proceed to trial, an objection that the justice had no jurisdiction, and that consequently the district court had no authority to try the case, comes too late); Thayer *v.* Gibbs, 140 Mich. 60, 103 N. W. 526 (excess of jurisdictional amount).

Judgment against married woman.— Where a judgment of a justice against a married woman was void for want of jurisdiction, failure on her part to appeal was not a waiver of the want of jurisdiction. Krause *v.* Leiby, 1 Leg. Rec. (Pa.) 74.

Legality of assessment.— Where in an action to recover a sum of money due on an assessment for street work, no question as to the legality of the assessment is raised by answer verified by oath of defendant, no evidence as to its legality can be received, and the justice's court retains jurisdiction. Williams *v.* Mecartney, 69 Cal. 556, 11 Pac. 186.

92. Carter *v.* Alford, 64 Ala. 236.

93. *Alabama.*— Stephens *v.* Cox, 124 Ala. 448, 26 So. 981.

District of Columbia.—Guarantee Sav., etc., Co. *v.* Pendleton, 14 App. Cas. 384.

Illinois.— Graves *v.* Shoefelt, 60 Ill. 462.

Michigan.— McCall *v.* Van Dusen, 104 N. W. (1905) 326; Singer Mfg. Co. *v.* Benjamin, 55 Mich. 330, 21 N. W. 358, 23 N. W. 25. See also Clute *v.* Everhart, 137 Mich. 5, 100 N. W. 124, in which defendant took a special appeal to the circuit court, on the ground that the justice acquired no jurisdiction of him, by reason of the defective copy of the process served, but the court decided against him, and he then pleaded the general issue and a trial was had on the merits, and it was held that he thereby waived the question raised by his special appeal.

Missouri.— Grimm *v.* Dundee Land, etc., Co., 55 Mo. App. 457. *Compare* Meyer *v.* Phœnix Ins. Co., 184 Mo. 481, 83 S. W. 479 [*affirming* (App. 1902) 69 S. W. 638].

New York.— Huber *v.* Ehlers, 76 N. Y. App. Div. 602, 79 N. Y. Suppl. 150.

Ohio.— Place *v.* Welch, 2 Ohio Dec. (Reprint) 542, 3 West. L. Month. 611.

Oklahoma.— Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356.

See 31 Cent. Dig. tit. "Justices of the Peace," § 218.

Pleading over.— Where a justice disregards a plea to the jurisdiction, and defendant then pleads to the merits, he thereby waives all question of jurisdiction. Storm *v.* Worland, 19 Ind. 203. See also Ovid Tp. *v.* Haire, 133 Mich. 353, 94 N. W. 1060. But see Allen *v.* Stone, 9 Barb. (N. Y.) 60.

Change of venue.— Where a person not a justice assumes the functions of one, and issues a writ of replevin, he is a trespasser; but if defendant procures a change of venue to a person who is a justice, and proceeds to trial before him, he thereby confers jurisdiction, both as to the person and the subject-matter. Graves *v.* Shoefelt, 60 Ill. 462.

Objection on specific grounds.—Where a defendant specially appears before a justice, and moves to dismiss for want of jurisdiction of the person, on specific grounds, he waives the right, on appeal, to urge any grounds not presented to the justice. People *v.* Court of Appeals, 33 Colo. 258, 79 Pac. 1017 [*affirming* 20 Colo. App. 106, 77 Pac. 255].

official authority, and he has no more power to accept a waiver, and thus acquire jurisdiction, than a private individual would have.[94]

2. Where Title to Land Is Involved. The decisions in the different states vary considerably as to the time and manner of raising an objection that the title to land is involved and what will constitute a waiver of such objection.[95]

3. Objection to Place of Bringing Suit. By appearing and going to trial without objecting to the place of bringing suit, a defendant waives the objection that it has been brought in the wrong place,[96] and in some states it is held that he waives the objection if, after service of process, he fails to appear and plead to the jurisdiction.[97]

4. Disqualification of Justice. The disqualification of a justice of the peace for any cause may be waived.[98] But while an objection that a justice is disqualified should be taken at the earliest practical moment after his incompetency becomes known to the party objecting,[99] it is not necessary that it should be made to appear before joining issue.[1]

Appearance as waiver of objections see *infra*, IV, F, 1, b, (II).

Appeal as waiver of defects see *infra*, V, A, 7, b.

94. Robinson *v.* West, 11 Barb. (N. Y.) 309 [*reversing* 1 Sandf. 19].

95. *New Jersey.*— The justice may allow defendant to file a plea of title after the return-day of the summons, but not after the day to which the cause should be first adjourned. Shannon *v.* Flood, 13 N. J. L. 301.

New York.— Under the code of procedure, a defendant in a justice's court who would interpose a plea of title is not absolutely required to do so at the time of joining issue, as under the Revised Statutes; but this, like any other defense, may be interposed by amendment at any time before trial, when substantial justice will be promoted thereby. Hinds *v.* Page, 6 Abb. Pr. N. S. 58; Weeks *v.* Stroble, 36 How. Pr. 123. See also Smith *v.* Mitten, 13 How. Pr. 325. *Compare* Fredonia, etc., Plank Road Co. *v.* Wait, 27 Barb. 214; Adams *v.* Rivers, 11 Barb. 390; Browne *v.* Scofield, 8 Barb. 239; Quimby *v.* Hart, 15 Johns. 304.

Pennsylvania.— Under the act of March 22, 1814, requiring an affidavit that title to land would come in question to be made, in order to oust the jurisdiction of the magistrate, "before the trial of the action," it is not essential that the affidavit be made before any witnesses are examined; a reasonable and liberal intendment is to be made in favor of the statutory right of defendant. Geiger *v.* Geiger, 1 Woodw. 404.

Vermont.— The defect may be taken advantage of at any time during the pendency of the action. Thayer *v.* Montgomery, 26 Vt. 491.

Wisconsin.— There must be a special plea, and the statutory bond tendered to take the case to the circuit court, or the defense is waived. Lowitz *v.* Leverentz, 57 Wis. 596, 15 N. W. 842.

See 31 Cent. Dig. tit. "Justices of the Peace," § 219.

96. Dozier *v.* Allen, 65 Ga. 254; Osburne *v.* Gilbert, 52 Barb. (N. Y.) 158; Foster *v.* Hazen, 12 Barb. (N. Y.) 547; Caldwell *v.* High, 8 Ohio Dec. (Reprint) 183, 6 Cinc. L. Bul. 201; Masterson *v.* Ashcom, 54 Tex. 324.

Under Cal. Code Civ. Proc. § 890, providing that if the objection that the action is brought in the wrong county is "not taken at the trial it is waived," the objection may be taken by answer, and urged on the trial, and an answer to the merits does not waive such objection. Holbrook *v.* Sacramento County Super. Ct., 106 Cal. 589, 39 Pac. 936.

Objection to transfer to proper justice.— Where a writ in replevin was returned to the justice of the wrong district, and plaintiff, on the jurisdiction being questioned by plea in abatement, simply moved to transfer the cause to a competent justice, defendant waived his plea and objection to the jurisdiction by objecting to the transfer. Duane *v.* Richardson, 106 Tenn. 80, 59 S. W. 135.

97. State *v.* Carter, 6 Ind. 37; Valdez *v.* Cohen, 23 Tex. Civ. App. 475, 56 S. W. 375. *Contra*, Lowe *v.* Alexander, 15 Cal. 296; Larocque *v.* Harvey, 57 Hun (N. Y.) 366, 10 N. Y. Suppl. 576; Tiffany *v.* Gilbert, 4 Barb. (N. Y.) 320.

98. *Georgia.*— Vaughn *v.* Strickland, 108 Ga. 659, 34 S. E. 192.

Indiana.— Baldwin *v.* Runyan, 8 Ind. App. 344, 35 N. E. 569.

New Hampshire.— Gilmanton *v.* Ham, 38 N. H. 108; Warren *v.* Glynn, 37 N. H. 340.

Pennsylvania.— Wagner *v.* Hoffman, 19 Pa. Super. Ct. 414.

Wisconsin.— Rector *v.* Drury, 3 Pinn. 298, 4 Chandl. 24.

See 31 Cent. Dig. tit. "Justices of the Peace," § 221.

Waiver must be in writing.— Keeler *v.* Stead, 56 Conn. 501, 16 Atl. 552, 7 Am. St. Rep. 320.

A confession of judgment in writing before a justice of the peace related to one of the parties is a waiver in writing of the relationship, within Tenn. Code, § 4098. Hilton *v.* Miller, 5 Lea (Tenn.) 395.

99. Gilmanton *v.* Ham, 38 N. H. 108.

1. Hibbard *v.* Odell, 16 Wis. 633. See also Place *v.* Butternuts, etc., Mfg. Co., 28 Barb. (N. Y.) 503, where defendant was allowed to prove the relationship of the justice to himself, although his answer disclosed no

O. Jurisdiction to Be Shown by Record — 1. In General. It should appear affirmatively upon the face of the record of the proceedings of a justice of the peace that he had jurisdiction,[2] not only of the person but also of the subject-matter.[3] Every jurisdictional fact as to the issuance, service, and return of process or notice, and as to the appearance of the parties, must appear from the rec-

such defense, and he filed no plea to the jurisdiction.

2. *Alaska.*— Hackleman *v.* Geise, 1 Alaska 568.

Arkansas.— Latham *v.* Jones, 6 Ark. 371; Levy *v.* Shurman, 6 Ark. 182, 42 Am. Dec. 690; Pendleton *v.* Fowler, 6 Ark. 41; More *v.* Woodruff, 5 Ark. 214; Reeves *v.* Clarke, 5 Ark. 27.

Illinois.— Garrett *v.* Murphy, 102 Ill. App. 65. *Compare* Willoughby *v.* Dewey, 54 Ill. 266.

Indiana.— Newman *v.* Manning, 89 Ind. 422; Straughan *v.* Inge, 5 Ind. 157.

Maine.— Granite Bank *v.* Treat, 18 Me. 340.

Michigan.— Rasch *v.* Bissell, 106 Mich. 106, 64 N. W. 7.

Minnesota.— McGinty *v.* Warner, 17 Minn. 41; Clague *v.* Hodgson, 16 Minn. 329. *Compare* Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540.

Missouri.— Shaw *v.* St. Louis, etc., R. Co., 110 Mo. App. 561, 85 S. W. 611; Belshe *v.* Lamp, 91 Mo. App. 477; Ellis *v.* Mississippi River, etc., R. Co., 89 Mo. App. 241; Warden *v.* Missouri, etc., R. Co., 78 Mo. App. 664; Rocheport Bank *v.* Doak, 75 Mo. App. 332; Olin *v.* Zeigler, 46 Mo. App. 193; Corrigan *v.* Morris, 43 Mo. App. 456; Ewing *v.* Donnelly, 20 Mo. App. 6.

Nebraska.— Kuker *v.* Beindorff, 63 Nebr. 9, 88 N. W. 190.

New Hampshire.— Flanders *v.* Atkinson, 18 N. H. 167.

New Jersey.— State *v.* Williamstown, etc., Turnpike Co., 24 N. J. L. 547; Baird *v.* Johnson, 14 N. J. L. 120.

New York.— Lattimore *v.* People, 10 How. Pr. 336.

Pennsylvania.— McGinnis *v.* Vernon, 67 Pa. St. 149; Hourner *v.* Wetherill, 5 Pa. Cas. 247, 10 Atl. 40; Wood *v.* Bronson, 12 Pa. Co. Ct. 545; Lovell Mfg. Co. *v.* Dougherty, 5 Pa. Co. Ct. 399; Leamy *v.* McClure, 1 Chest. Co. Rep. 220; Turner *v.* Central R. Co., 10 Kulp 420; Williams *v.* McCue, 1 Lack. Leg. Rec. 398; Hiester *v.* Brown, 11 Lanc. Bar 159; Fahnestock *v.* Bushey, 5 Lanc. L. Rev. 57; Jermyn *v.* Higgins, 4 Lanc. L. Rev. 185; Yeich *v.* Peterson, 2 Leg. Chron. 269; Starch *v.* Snyder, 1 Leg. Rec. 172; Smith *v.* Noone, 1 Leg. Rec. 165; Borough *v.* Gill, 1 Leg. Rec. 88; McGrath *v.* Donally, 6 Phila. 43; Adams *v.* Com., 1 Woodw. 417; Miller *v.* Frees, 1 Woodw. 409.

South Dakota.— Garlock *v.* Calkins, 14 S. D. 90, 84 N. W. 393. *Compare* Williams *v.* Rice, 6 S. D. 9, 60 N. W. 153, judgment not void because it fails to show jurisdiction expressly.

Wisconsin.— Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

United States.—Walker *v.* Turner, 9 Wheat. 541, 6 L. ed. 155.

See 31 Cent. Dig. tit. "Justices of the Peace," § 207. And see *supra*, III, A, 1, text and note 73.

Collateral attack on judgment see *infra*, IV, O, 7, b, (II).

Consent, although it may be necessary to confer jurisdiction, need not be shown of record, where the statute prescribing what the record shall contain does not require it. Schlisman *v.* Webber, 65 Iowa 114, 21 N. W. 209.

Continuances of a justice's warrant in a civil case need not appear on the face of the proceedings, to prevent them from being void on their face. State *v.* Conoly, 28 N. C. 243.

Under Ohio Justices Code, § 7, providing that if any debtor shall appear before a justice without process, and confess that he is indebted to another, such justice may, on application of the creditor, render judgment on such confession, such a judgment is not void because the docket does not show that it was rendered on the application of the creditor. Wilson *v.* Wickersham, 2 Ohio Dec. (Reprint) 545, 3 West. L. Month. 621.

Jurisdiction of feme covert see Fenstermacher *v.* Xander, 116 Pa. St. 41, 10 Atl. 128; Gould *v.* McFall, 111 Pa. St. 66, 2 Atl. 403; Hecker *v.* Haak, 88 Pa. St. 238; Weber *v.* Detwiller, 5 Pa. Cas. 555, 8 Atl. 910; Rice *v.* Foy, 2 Pa. Dist. 333; Shreiner *v.* Dommel, 2 Pa. Dist. 332; March *v.* McCardle, 1 Pa. Dist. 677; Rauch *v.* Young, 9 Pa. Co. Ct. 416; Ames *v.* Hugg, 6 Pa. Co. Ct. 83; Myers *v.* Stauffer, 5 Pa. Co. Ct. 657, 22 Wkly. Notes Cas 412; Rice *v.* Kitzelman, 1 Chest. Co. Rep. (Pa.) 174; Rodgers *v.* Carr, 3 C. Pl. (Pa.) 216; Burnes *v.* Maloney, 7 Kulp (Pa.) 341; Edwards *v.* Carr, 3 Kulp (Pa.) 192; Stephens *v.* Hadsell, 3 Kulp (Pa.) 66; Fraelich *v.* Mourer, 1 Lanc. L. Rev. (Pa.) 49; Ingham *v.* Sickler, 1 Leg. Chron. (Pa.) 151; Glenn *v.* Bracey, 7 Leg. Gaz. (Pa.) 174; O'Mallery *v.* Dempsey, 3 Leg. Gaz. (Pa.) 225; Sherman *v.* Reed, 2 Leg. Rec. (Pa.) 220; Starch *v.* Snyder, 1 Leg. Rec. (Pa.) 172; Heffner *v.* Beahler, 1 Leg. Rec. (Pa.) 118; Krause *v.* Leiby, 1 Leg. Rec. (Pa.) 74; Rosenfelt *v.* Wagner, 2 Lehigh Val. L. Rep. (Pa.) 371; O'Malley *v.* Dempsey, 2 Luz. Leg. Reg. (Pa.) 77; Hartzell *v.* Osborne, 15 Wkly. Notes Cas. (Pa.) 142.

See 31 Cent. Dig. tit. "Justices of the Peace," § 209.

3. Barnes *v.* Holton, 14 Minn. 357; McEntire *v.* McElduff, 1 Serg. & R. (Pa.) 19; Lehighton Borough *v.* Smith, 9 Pa. Dist. 428; Barnett *v.* Fisher, 5 Pa. Dist. 277; Pearre *v.* White, 4 Pa. Dist. 504; Wood *v.* Bronson, 12 Pa. Co. Ct. 545; Hennershitz *v.* Reading, 1 Woodw. (Pa.) 264; Reese *v.* Deyette, 4 C.

ord;[4] and it should also appear that the amount or value in controversy was within the justice's jurisdiction,[5] and that the suit was brought in the proper place;[6] and where a justice acts in place of the regular justice the facts as to the disability of the latter which show the jurisdiction of the acting justice must appear on the record.[7] But the jurisdiction of a justice of the peace is sufficiently shown if it appears from the entire record of the proceeding;[8] and it is never necessary that the record should negative the grounds by which the jurisdiction may be taken away.[9] Nor is it essential that the record should affirmatively show that the

Pl. (Pa.) 53; Mitchell *v.* Runkle, 25 Tex. Suppl. 132; Jones *v.* Hunt, 90 Wis. 199, 63 N. W. 81. But see Behymer *v.* Nordloh, 12 Colo. 352, 21 Pac. 37; Liss *v.* Wilcoxen, 2 Colo. 85, in which it was held that the jurisdiction might be shown by evidence without the record.

4. *California.*— Kane *v.* Desmond, 63 Cal. 464. But see Denmark *v.* Liening, 10 Cal. 93, where it was held that the failure of the justice to enter the return of service on his docket is not fatal to a default judgment on appeal.

Delaware.—Gray *v.* Vandyke, 5 Houst. 134; Johnson *v.* Layton, 5 Harr. 252.

Georgia.— Gray *v.* McNeal, 12 Ga. 424.

Indiana.— See Taylor *v.* McClure, 28 Ind. 39; Dragoo *v.* Graham, 17 Ind. 427, in which the records were held sufficient to show jurisdiction.

Iowa.— See Baker *v.* Jamison, 73 Iowa 698, 36 N. W. 647.

Maine.— Stanton *v.* Hatch, 52 Me. 244.

Michigan.— Gadsby *v.* Stimer, 79 Mich. 260, 44 N. W. 606; Post *v.* Harper, 61 Mich. 434, 28 N. W. 161; Mudge *v.* Yaples, 58 Mich. 307, 25 N. W. 297; Redman *v.* White, 25 Mich. 523. See also as to sufficiency of entry of appearance Kinyon *v.* Fowler, 10 Mich. 16.

Missouri.—Bersch *v.* Schneider, 27 Mo. 101; Ewing *v.* Donnelly, 20 Mo. App. 6.

Nebraska.— Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232.

Nevada.— Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

New Jersey.— Lentz *v.* Callin, 26 N. J. L. 218.

New York.— Groff *v.* Griswold, 1 Den. 432.

Pennsylvania.— Camp *v.* Wood, 10 Watts 118; Knoblauch *v.* Hefron, 3 Pa. Dist. 765; Ellenberger *v.* Bush, 2 Pa. Dist. 50; Missemer *v.* Trout, 17 Pa. Co. Ct. 317; Abbey *v.* Young, 10 Pa. Co. Ct. 476; Adler *v.* Patrick, 1 Chest. Co. Rep. 465; Gwinner *v.* Brendt, 6 Kulp 532; Deebeck *v.* Hildebrand, 10 Lanc. Bar 152; Klugh *v.* Rouse, 4 Lanc. Bar, Aug. 31, 1872; Shultz *v.* Sweigart, 2 Lanc. Bar, June 4, 1870; Fraelich *v.* Mourer, 1 Lanc. L. Rev. 49; Com. *v.* Turnpike Co., 1 L. T. N. S. 127; Sauser *v.* Werntz, 1 Leg. Chron. 249; Smith *v.* Fetherston, 22 Leg. Int. 40; Hawthorn *v.* Filler, 1 Leg. Rec. 48; Karche *v.* Bach, 1 Lehigh Val. L. Rep. 118; Warren *v.* Wells, 3 Luz. Leg. Reg. 111; Ashton *v.* Isard, 2 Phila. 39.

South Carolina.— Barron *v.* Dent, 17 S. C. 75; Devall *v.* Taylor, Cheves 5.

Texas.— Mitchell *v.* Runkle, 25 Tex. Suppl. 132; Schneider *v.* Gray, 7 Tex. Civ. App. 25, 26 S. W. 640. But see Hance *v.* Galveston Wharf Co., 70 Tex. 115, 8 S. W. 76, holding that the fact that a transcript from the justice does not show expressly that all the defendants were cited to appear does not invalidate the judgment.

Vermont.— Kidder *v.* Hadley, 25 Vt. 544; Marvin *v.* Wilkins, 1 Aik. 107.

See 31 Cent. Dig. tit. "Justices of the Peace," § 214.

Under Ohio Rev. St. § 594, the justice is only required to enter the date of the writ and the time of its return. Cook *v.* Dinsmore, 5 Ohio Cir. Ct. 385, 3 Ohio Cir. Dec. 189.

Time of appearance.— Where parties appeared before a justice at the time specified in the summons, and without any objection to the time of appearance, the failure of the docket to show when they appeared affects the regularity of the docket, but not the regularity of the judgment. Tyrrell *v.* Jones, 18 Minn. 312.

5. McFadin *v.* Gill, 1 Blackf. (Ind.) 309; Sager *v.* Shutts, 53 Mich. 116, 18 N. W. 580; Hansberger *v.* Pacific R. Co., 43 Mo. 196. But see Behymer *v.* Nordloh, 12 Colo. 352, 21 Pac. 37; Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376; Sullivan *v.* Miles, 117 Wis. 576, 94 N. W. 298.

6. Lowe *v.* Alexander, 15 Cal. 296; Rohland *v.* St. Louis, etc., R. Co., 89 Mo. 180, 1 S. W. 147; Warden *v.* Missouri, etc., R. Co., 78 Mo. App. 664; Johnson *v.* Fischer, 56 Mo. App. 552; Corrigan *v.* Morris, 43 Mo. App. 456; Backenstoe *v.* Wabash, etc., R. Co., 23 Mo. App. 148; Roberts *v.* Missouri Pac. R. Co., 19 Mo. App. 649; Hessey *v.* Heitkamp, 9 Mo. App. 36; Pennell *v.* Foster, 1 Browne (Pa.) 355; Lemon *v.* Reidel, 1 Lanc. L. Rev. (Pa.) 3; Brown *v.* Quinton, 3 Pa. L. J. 425; Hall *v.* Sullivan, 70 S. C. 397, 50 S. E. 27, holding the record sufficient in this respect. But see Brown *v.* Fruit, 5 Pa. L. J. 222, holding that the record of proceedings in an action of trespass to real estate need not show that the estate was situated within the county.

7. Muscatine *v.* Steck, 7 Iowa 505; Inman *v.* Whiting, 70 Me. 445; Rahilly *v.* Lane, 15 Minn. 447. *Contra*, Lutes *v.* Perkins, 6 Mo. 57.

8. Tyrrell *v.* Jones, 18 Minn. 312; Trimble *v.* Elkin, 88 Mo. App. 229; Collins *v.* Kammann, 55 Mo. App. 464; Sappington *v.* Lenz, 53 Mo. App. 44; Leamy *v.* McClure, 1 Chest. Co. Rep. (Pa.) 220.

9. Lanpher *v.* Dewell, 56 Iowa 153, 9 N. W. 101.

justice waited the required time after the time fixed in the summons before proceeding with the cause in the absence of defendant.[10]

2. PLEADING JURISDICTIONAL FACTS. All the facts essential to the jurisdiction of a justice of the peace should as a rule be set out in the declaration, statement, or complaint.[11] Similarly, where a defendant justifies under the process or judgment of a justice of the peace, he must plead the facts which conferred jurisdiction.[12]

P. Determination of Questions of Jurisdiction — 1. IN GENERAL. The determination of questions of jurisdiction is primarily for the justice of the peace before whom the action or other proceeding is instituted,[13] and his decision, although reviewable,[14] is conclusive against collateral attack.[15] Where his lack of jurisdiction is apparent on the face of the record, it is the duty of the justice to refuse to entertain the action or proceeding;[16] but a mere affidavit or plea of title does not oust the jurisdiction;[17] and generally, if the defect or objection urged is for matters *dehors* the record, the justice may hear evidence for the purpose of determining whether he has jurisdiction to try and decide the cause on its

10. Green *v.* Tower, 49 Kan. 302, 30 Pac. 468; Knight *v.* Wilson, 55 Hun (N. Y.) 559, 9 N. Y. Suppl. 20.

11. *Indiana.*— Burgett *v.* Bothwell, 86 Ind. 149. But see Perkins *v.* Smith, 4 Blackf. 299, where it was held that the statement of demand filed in an action before a justice need not show that he has jurisdiction; but that if it shows the contrary the suit must be dismissed.

Missouri.— Cook *v.* Decker, 63 Mo. 328; Haggard *v.* Atlantic, etc., R. Co., 63 Mo. 302; Harrison *v.* St. Louis, etc., R. Co., 58 Mo. App. 463; Mier *v.* St. Louis, etc., R. Co., 56 Mo. App. 655; Jones *v.* Chicago, etc., R. Co., 52 Mo. App. 381; Kinion *v.* Kansas City, etc., R. Co., 30 Mo. App. 573; Wiseman *v.* St. Louis, etc., R. Co., 30 Mo. App. 516.

New Jersey.— Chamberlain *v.* Hopper, 34 N. J. L. 220; Keep *v.* Kelly, 32 N. J. L. 56; Caldwell *v.* French, 3 N. J. L. 613; Price *v.* Smock, 2 N. J. L. 206.

New York.— See Griffin *v.* Norton, 5 N. Y. St. 812.

Vermont.— Perkins *v.* Rich, 12 Vt. 595.

See 31 Cent. Dig. tit. "Justices of the Peace," § 215.

On appeal from the judgment of a justice, it need not appear in the declaration that plaintiff's claim was for an amount within the jurisdiction of the court; it is sufficient if it appeared on the trial. Hackman *v.* Flory, 16 Pa. St. 196.

12. Jones *v.* Mason, 12 Ark. 687; Van Etten *v.* Hurst, 6 Hill (N. Y.) 311, 41 Am. Dec. 748; Bowman *v.* Russ, 6 Cow. (N. Y.) 234; Roys *v.* Lull, 9 Wis. 324. But see Campbell *v.* Webb, 11 Md. 471, holding that, in an action against a constable, a plea alleging that certain property was taken by defendant by virtue of an attachment issued by a justice implies that the writ was legally issued, and that the facts necessary to jurisdiction in the justice need not be set forth.

Negativing exceptions to jurisdiction.—A plea is sufficient which shows enough to bring the case within the general language of the act conferring jurisdiction, although, if within certain exceptions of the act, the warrant pleaded would have been unauthorized. Foster *v.* Hazen, 12 Barb. (N. Y.) 547.

Mo. Rev. St. § 2079, providing that in pleading a judgment by a court of special jurisdiction it shall be sufficient to allege it as having been "duly made," and, if this be denied, the pleader shall show the jurisdictional facts, applies to the pleading of a judgment of a justice condemning land for reservoir area for a railroad. Musick *v.* Kansas City, etc., R. Co., 124 Mo. 544, 28 S. W. 72.

13. Anderson *v.* Morton, 21 App. Cas. (D. C.) 444; Parker *v.* Allen, 84 N. C. 466; Bridgers *v.* Bridgers, 69 N. C. 451.

Justice may determine what townships are within his jurisdiction.—Wright *v.* Phillips, 2 Greene (Iowa) 191.

In New Jersey, where, on challenge to a justice for having counseled plaintiffs and expressed his opinion on the matter in controversy, three triers are appointed, their determination of the facts is conclusive. Davis *v.* Mahany, 38 N. J. L. 104.

14. Milbanks *v.* Coonley, 2 N. Y. Suppl. 167. See also Anderson *v.* Morton, 21 App. Cas. (D. C.) 444.

15. Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801 [*reversing* 117 Ill. App. 644]; Shanklin *v.* Francis, 67 Mo. App. 457. And see *infra*, IV, O, 7, b, (II).

16. Cunningham *v.* Holland, 40 Ark. 556, holding that a justice should refuse an interplea for land on which an attachment from his court has been levied, and proceed to judgment without reference to the title.

The affidavit of value, required in New York in actions to recover the possession of personal property, is an essential prerequisite to the attaching of the jurisdiction of the court, and in its absence the justice has no jurisdiction. Daily *v.* Doe, 3 Fed. 903 [*following* Dennis *v.* Crittenden, 42 N. Y. 542].

17. Cox *v.* Graham, 3 Iowa 347; Wesson *v.* Joslin, 19 Pick. (Mass.) 422 note; Magoun *v.* Lapham, 19 Pick. (Mass.) 419; Fleet *v.* Youngs, 7 Wend. (N. Y.) 291; Essler *v.* Johnson, 25 Pa. St. 350; Livingood *v.* Mover, 2 Woodw. (Pa.) 65. But *compare* Williams

merits.[18] The effect of a decision adverse to his jurisdiction is to deprive the justice of all further power over the cause, beyond rendering a judgment of dismissal or nonsuit, or in abatement,[19] or for costs,[20] unless he is required by statute to transfer it to the court or justice having jurisdiction.[21] On appeal the court may look to the justice's transcript, as well as plaintiff's statement, in determining the question of the justice's jurisdiction,[22] and if necessary it will call in the aid of affidavits to ascertain whether he has exceeded his jurisdiction.[23]

2. MODE AND SUFFICIENCY OF OBJECTIONS. When the lack of jurisdiction appears on the face of the record, it may be taken advantage of by a motion to dismiss,[24] but when it does not so appear, it must as a rule be taken advantage of by plea in abatement or answer, setting out the facts which show the want of jurisdiction.[25] In some states, however, a motion to dismiss is also available where the want of jurisdiction appears from the evidence.[26] A plea in abatement or an answer in an action before a justice of the peace alleging want of jurisdiction must distinctly state facts which if true necessarily divest the justice of jurisdiction;[27]

v. Williams, 6 Kulp (Pa.) 415; Gruber *v.* Sheetz, 2 Woodw. (Pa.) 63.

18. Anderson *v.* Morton, 21 App. Cas. (D. C.) 444; Kraft *v.* Porter, 76 Ill. App. 328; Haines *v.* Dalton, 14 N. C. 91; Stouffer *v.* Beetem, 18 Pa. Co. Ct. 605.

Where a declaration is not filed, the evidence must show a demand within the justice's jurisdiction. Latham *v.* Ford, 1 A. K. Marsh. (Ky.) 410; Patterson *v.* Martin, 1 A. K. Marsh. (Ky.) 348.

The constable's return of service of summons is admissible, either to support or to oppose the docket entries of the justice. Sappington *v.* Lenz, 53 Mo. App. 44.

19. Purdum *v.* Neil, 10 Ida. 263, 77 Pac. 631; McGinty *v.* Warner, 17 Minn. 41; Cain *v.* Simpson, 53 Miss. 521; Darling *v.* Conklin, 42 Wis. 478.

After reception of evidence.— Under Ida. Rev. St. (1887) § 4726, subd. 4, where the issue that an action had been commenced in the wrong county remains an issue throughout the trial, the objection raises not only a question of law, but one of fact, and may entitle defendant to a judgment of nonsuit after the evidence is in, although there has been no defense to the action on the merits. Purdem *v.* Neil, 10 Ida. 263, 77 Pac. 631.

A justice cannot amend himself into jurisdiction by striking out a count over which he has no jurisdiction. French *v.* Holt, 57 Vt. 187.

20. Jacobs *v.* Parker, 7 Baxt. (Tenn.) 434. But see McGinty *v.* Warner, 17 Minn. 41.

21. Klopfer *v.* Keller, 1 Colo. 410; State *v.* Patin, 47 La. Ann. 1592, 18 So. 622.

Change of venue or transfer of cause see *infra*, IV, B, 2, 3.

22. Fields *v.* Wabash, etc., R. Co., 80 Mo. 203.

23. Burginhofen *v.* Martin, 3 Yeates (Pa.) 479.

24. Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453.

Where title to land is involved, a motion must also be made to transfer the cause to the district court, under Iowa Code (1873), § 3535. Delzell *v.* Burlington, etc., R. Co., 89 Iowa 208, 56 N. W. 433.

Demurrer.—In New York the only demurrer to a complaint which is allowed in a justice's court is when the complaint is not sufficiently explicit to enable defendant to understand it, or when it contains no cause of action. Neither of the causes of demurrer applies to an objection that the action is brought in a wrong county. Lapham *v.* Rice, 63 Barb. (N. Y.) 485.

25. *Alabama.* — Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453.

California.— Williams *v.* Mecartney, 69 Cal. 556, 11 Pac. 186; Small *v.* Gwinn, 6 Cal. 447.

Indiana.— Wall *v.* Albertson, 18 Ind. 145; Perkins *v.* Smith, 4 Blackf. 299.

Maryland.— The question must be raised by filing the verified allegation prescribed by Code, art. 51, § 33, or by plea or other proper proceeding when the case is in the circuit court on appeal. Cole *v.* Hynes, 46 Md. 181.

Massachusetts.— Davenport *v.* Burke, 9 Allen 116.

Utah.— Kansas City Hardware Co. *v.* Neilson, 10 Utah 27, 36 Pac. 131; People *v.* House, 4 Utah 369, 10 Pac. 838.

See 31 Cent. Dig. tit. "Justices of the Peace," § 223.

In Pennsylvania an objection that the title to land will come in question is raised by an affidavit, signed by the party or his attorney. Acker *v.* Moore, 2 Chest. Co. Rep. 169; Stevens *v.* Sarver, 29 Leg. Int. 46. See also Haffner *v.* Hoeckley, 3 Brewst. 253. *Compare* Gruber *v.* Sheetz, 2 Woodw. 63. But see Allen *v.* Ash, 6 Phila. 312.

26. Wall *v.* Albertson, 18 Ind. 145; Perkins *v.* Smith, 4 Blackf. (Ind.) 299; Davenport *v.* Burke, 9 Allen (Mass.) 116; Kansas City Hardware Co. *v.* Neilson, 10 Utah 27, 36 Pac. 131.

27. *California.*— Hart *v.* Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

Connecticut.— Abel *v.* Abel, 1 Root 549.

Indiana.— Storm *v.* Worland, 19 Ind. 203; Nelson *v.* Zink, 3 Blackf. 101; Millikan *v.* Davenport, 5 Ind. App. 257, 31 N. E. 1122.

Maine.— Since St. (1831) c. 514, abolishing special pleading, the general issue, with a brief statement of soil and freehold, in an action *quare clausum fregit*, is sufficient. Hodgdon *v.* Foster, 9 Me. 113.

and it has been held that such a plea or answer must be in writing [28] and verified,[29] and that it must give a better writ.[30]

Q. Acts and Proceedings Without Jurisdiction. All acts and proceedings of a justice of the peace without or beyond his jurisdiction are *coram non judice* and void.[31]

IV. PROCEDURE IN CIVIL CASES.

A. In General [32] — 1. Mode of Procedure. In proceedings before a justice of the peace, matters of mere form are dispensed with,[33] and the same technicality is not required as in suits in a court of record.[34] The real object being to obtain substantial justice, great liberality is indulged with respect to these proceed-

Nebraska.— A defendant who appears specially in a case for the purpose of objecting to the jurisdiction over his person must specifically point out the defect which it is claimed prevents the court from acquiring jurisdiction. Brown *v.* Goodyear, 29 Nebr. 376, 45 N. W. 618; Bell *v.* White Lake Lumber Co., 21 Nebr. 525, 32 N. W. 561; Freeman *v.* Burks, 16 Nebr. 328, 20 N. W. 207.

New Hampshire.— Defendant may give any special matter in evidence under the general issue except such as may bring title to real estate in question, which must be specially pleaded. Foster *v.* Leavitt, 8 N. H. 353. See also as to plea of title Foster *v.* Lane, 30 N. H. 305.

New York.— An answer alleging that defendants were "owners in fee" of the premises at the time of the trespass sued for is sufficient. Manfredi *v.* Wiederman, 14 Misc. 342, 35 N. Y. Suppl. 680.

South Carolina.— Grant *v.* Clinton Cotton Mills, 56 S. C. 554, 35 S. E. 193.

Texas.— Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318; Needham *v.* Dial, 4 Tex. Civ. App. 141, 23 S. W. 240; Walthew *v.* Milby, 3 Tex. App. Civ. Cas. § 119.

Vermont.— Landon *v.* Roberts, 20 Vt. 286; Pierce *v.* Butler, 16 Vt. 101.

See 31 Cent. Dig. tit. "Justices of the Peace," § 223.

A plea of title, although insufficiently set forth, is sufficient to take the cause from the justice. Riggs *v.* Woodruff, 2 Root (Conn.) 35.

A plea answering both counts of a declaration, only one of which is for a matter of which the justice has no jurisdiction, is bad. Rich *v.* Hogeboom, 4 Den. (N. Y.) 453.

Disclaimer after plea.— Although defendant gave the justice a paper stating that the place where the trespass was alleged was his freehold and soil, still if, on being asked by the justice on what ground he claimed the land, he said that he did not own it, the justice was not bound to consider that he claimed the ownership of the premises or of a right of way over them. Legates *v.* Lingo, 8 Houst. (Del.) 154, 32 Atl. 80.

28. Sage *v.* Barnes, 9 Johns. (N. Y.) 365; Crutchfield *v.* Durando, 3 Lea (Tenn.) 68.

29. Williams *v.* Mecartney, 69 Cal. 556, 11 Pac. 186; Delzell *v.* Burlington, etc., R. Co., 89 Iowa 208, 56 N. W. 433; Shellenberger *v.* Ward, 8 Iowa 425 (motion unsupported by oath); Willard *v.* Woodland, 7 Utah 192, 26 Pac. 284. But see People *v.* House, 4 Utah 369, 10 Pac. 838.

Disqualification of a justice need not be made to appear by affidavit. Hibbard *v.* Odell, 16 Wis. 633.

30. Fain *v.* Crawford, 91 Ga. 30, 16 S. E. 106.

31. *Alabama.*— Sharpe *v.* Wharton, 85 Ala. 225, 3 So. 787; Taliaferro *v.* Lane, 23 Ala. 369.

California.— Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332.

Indiana.— Thompson *v.* Kerr, 17 Ind. 288; Hall *v.* Rogers, 2 Blackf. 429.

New Jersey.—Bispham *v.* Inskeep, 1 N. J. L. 231.

New York.— Schoonmaker *v.* Clearwater, 41 Barb. 200 [*affirmed* in 1 Abb. Dec. 341, 1 Keyes 310]; Tracy *v.* Seamans, 7 N. Y. St. 144; Yager *v.* Hannah, 6 Hill 631.

North Carolina.— Bryan *v.* Washington, 15 N. C. 479. *Compare* Dulin *v.* Howard, 66 N. C. 433, to the effect that defendant may treat proceedings before a justice over which he has no jurisdiction as void, but that as regards plaintiff they are not absolutely null, and he cannot treat them as being so after having taken the benefit of them.

Ohio.— Aten *v.* Morgan, Tapp. 232.

Oregon.— Pierce *v.* Rock Creek Gold Min. Co., 37 Oreg. 342, 61 Pac. 348.

Pennsylvania.— Geyger *v.* Stoy, 1 Dall. 135, 1 L. ed. 70; Bedford Monumental Works *v.* Dewees, 9 Pa. Dist. 68, 23 Pa. Co. Ct. 489; McGovern *v.* McTague, 13 Lanc. Bar 119.

South Carolina.— Lindau *v.* Arnold, 4 Strobh. 290; Devall *v.* Taylor, 1 McMull. 460.

United States.— Greene *v.* Briggs, 10 Fed. Cas. No. 5,764, 1 Curt. 311; Leadbetter *v.* Kendall, 15 Fed. Cas. No. 8,157*a*, Hempst. 302.

See 31 Cent. Dig. tit. "Justices of the Peace," § 224.

32. **Pendency of action before justice as ground for abatement** see Abatement and Revival, 1 Cyc. 30 note 49, 35 note 78, 36 text and note 79.

33. Casey *v.* Clark, 2 Mo. 11.

34. Arnold *v.* Mangan, 89 Ill. App. 327 [*citing* Hall *v.* Lance, 25 Ill. 277; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105]; Culbertson *v.* Tomlinson, Morr. (Iowa) 404; Clay *v.* Clay, 7 Tex. 250; Conway *v.* Merrifield, 1 Tex. App. Civ. Cas. § 1025.

Substantial accuracy is all that can be or will be required in proceedings before justices

ings;[35] but so far as practicable the practice is made to conform to that in the higher courts.[36]

2. Form of Action. Common-law forms of action, in so far as justices' courts are concerned, are disregarded in most jurisdictions.[37] If a justice has jurisdiction, it is immaterial what form of action may be specified in the summons,[38] since the form or name of the action is whatever the evidence shows it to be.[39]

3. Joinder of Causes of Action. As a rule a plaintiff in an action before a justice of the peace may join as many causes of action as he may have,[40] save that a cause of action in contract cannot be joined with one in tort.[41] A misjoinder of causes of action is not of itself jurisdictional,[42] nor is it ground for demurrer, or a "defense" in the sense that it must be alleged in the answer,[43] and an action will not be dismissed for that reason.[44] The objection should be made at the time of pleading,[45] and plaintiff should be required to elect, before proceeding to trial, which cause he will prosecute.[46]

4. Consolidation of Actions. A plaintiff cannot be compelled to consolidate

of the peace. Glass *v.* Stovall, 10 Humphr. (Tenn.) 453.

Tenn. Code, § 2754, in reference to the commencement and continuance of suits, does not apply to suits brought before justices of the peace. Maynard *v.* May, 2 Coldw. (Tenn.) 44.

35. Brunswig *v.* Kramer, 2 Tex. App. Civ. Cas. § 803. See also Wooster *v.* McKinley, 1 Kan. 317; Mooney *v.* Williams, 15 Mo. 442; Heffly *v.* Hall, 5 Humphr. (Tenn.) 581.

36. Dunn *v.* Crocker, 22 Ind. 324 (holding that the practice in attachment proceedings is the same in justices' as in superior courts); Cormier *v.* Tibideau, 3 N. Brunsw. 297 (holding that the proceedings in magistrates' courts are regulated by the same general rules as in other courts).

37. *Illinois.*— Phillips *v.* Roberts, 90 Ill. 492; Brewster *v.* Grover, 29 Ill. 246; Swingley *v.* Haynes, 22 Ill. 214; Sehnert *v.* Koenig, 99 Ill. App. 513; Rehm *v.* Halverson, 94 Ill. App. 627 [*affirmed* in 197 Ill. 378, 64 N. E. 388]; Gunnerson *v.* Erickson, 69 Ill. App. 159; Ward *v.* Montgomery, 67 Ill. App. 346.

Indiana.— Brush *v.* Carpenter, 6 Ind. 78.

Mississippi.— Stier *v.* Surget, 10 Sm. & M. 154.

Tennessee.— Bodenhamer *v.* Bodenhamer, 6 Humphr. 264.

West Virginia.— O'Connor *v.* Dils, 43 W. Va. 54, 26 S. E. 354.

See 31 Cent. Dig. tit. "Justices of the Peace," § 228.

But see Weisberger *v.* White, 12 Pa. Co. Ct. 224; Fahnestock *v.* Bushy, 5 Lanc. L. Rev. (Pa.) 57.

38. Brewster *v.* Grover, 29 Ill. 246. See also Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627]; Swingley *v.* Haynes, 22 Ill. 214.

If the proof entitles plaintiff to recover, he should have judgment, notwithstanding mistakes in the form of action. Chicago, etc., R. Co. *v.* Reid, 24 Ill. 144.

39. Sehnert *v.* Koenig, 99 Ill. App. 513; Rehm *v.* Halverson, 94 Ill. App. 627 [*affirmed* in 197 Ill. 378, 64 N. E. 388]; Gunnerson *v.* Erickson, 69 Ill. App. 159.

The affidavit for attachment for a debt alleged to be due in a justice's court, required by Ala. Code (1896), § 527, fixes the character of the action as one in contract, and not in tort. James *v.* Vicors, (Ala. 1898) 24 So. 415.

40. *Illinois.*— Under Hurd Rev. St. (1889) p. 1073, c. 79, art. 5, § 18, each party to an action commenced before a justice of the peace is required to bring forward all his demands, existing at the time of the commencement of the action, which are of a nature to be consolidated, etc., and, on neglecting or refusing so to do, to be forever barred from suing therefor. This statute does not apply, however, to suits brought for the recovery of wages. Leischke *v.* Miller, 100 Ill. App. 137.

Missouri.— Lincoln *v.* St. Louis, etc., R. Co., 75 Mo. 27; Jackson *v.* Fulton, 87 Mo. App. 228 [*citing* Seiter *v.* Bischoff, 63 Mo. App. 157; Spangler *v.* Kite, 47 Mo. App. 230; Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287].

New Jersey.— Cornelius *v.* Ivins, 10 N. J. L. 56. But *compare* Hinchman *v.* Rutan, 31 N. J. L. 496.

Vermont.— French *v.* Holt, 57 Vt. 187.

West Virginia.— Harrow *v.* Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926.

Wisconsin.— Hibbard *v.* Bell, 3 Pinn. 190, 3 Chandl. 206.

See 31 Cent. Dig. tit. "Justices of the Peace," § 229.

41. Jackson *v.* Fulton, 87 Mo. App. 228; Burdick *v.* McAmbly, 9 How. Pr. (N. Y.) 117; Yetter *v.* Carpenter, 1 Chest. Co. Rep. (Pa.) 523. *Compare* Hartzell *v.* McGrath, 8 North. Co. Rep. (Pa.) 299.

42. Gerber *v.* McCoy, 23 Mo. App. 295.

43. Gerould *v.* Cronk, 85 Hun (N. Y.) 500, 33 N. Y. Suppl. 202.

44. Koons *v.* Williamson, 90 Ind. 599.

45. Gerould *v.* Cronk, 85 Hun (N. Y.) 500, 33 N. Y. Suppl. 202; McNeil *v.* Scoffield, 3 Johns. (N. Y.) 436.

Objection cured by verdict.— See West *v.* Stanley, 1 Hill (N. Y.) 69; Whitney *v.* Crim, 1 Hill (N. Y.) 61.

46. Burdick *v.* McAmbly, 9 How. Pr. (N. Y.) 117, holding that if the justice refuses to compel an election the judgment will be reversed.

several actions against the same defendant,[47] unless consolidation is required by statute.[48] But on the other hand, where the record shows that witnesses were examined in each of several cases against the same defendant, and separate judgments were rendered in each, the fact that the justice tried them together is no ground for reversal.[49] Where several cases are consolidated, and the justice has jurisdiction of one of them only, his jurisdiction is restricted to that one, although they were consolidated on motion of defendant, who pleaded to and defended the consolidated suit.[50]

5. Commencement of Action or Other Proceeding. It is a settled rule that the cause of action must exist at the commencement of the suit.[51] The action is as a rule commenced at the issuance of process,[52] although in replevin it is commenced by filing the petition or complaint with the justice.[53]

6. Time For Taking Proceedings or Holding Court. In some of the states the time for holding justices' courts is regulated by statute.[54] Where a case is properly in court, it is competent for the justice to order it to stand open for trial for a reasonable time,[55] and in most of the states it is either provided by statute or sanctioned by usage that a case shall be held open for at least one hour after the time fixed for trial, to give the parties an opportunity to appear.[56] On the other hand, where a defendant has been served with summons to appear at a certain

47. Barns *v.* Holland, 3 Mo. 47.

48. Hurd Rev. St. Ill. (1901) p. 1116, § 18, requires the consolidation of all demands which are of a nature to be consolidated, and which do not exceed two hundred dollars when consolidated, into one action or defense. Page *v.* Shields, 102 Ill. App. 575. See also Nickerson *v.* Rockwell, 90 Ill. 460 (construing Rev. St. c. 79, § 49); Leischke *v.* Miller, 100 Ill. App. 137. Where the aggregate amount of the suits exceeds two hundred dollars, the statute does not apply. Page *v.* Shields, *supra*.

Dismissal of one suit.—Where two distinct suits are brought before the same justice, on the same day, on two demands which might be consolidated into one suit, and one suit is dismissed and judgment is rendered on the other, the proceedings are regular. McKinney *v.* Finch, 2 Ill. 152.

A demand for labor and one for breach of contract need not be consolidated by plaintiff, since no exemption can be claimed against a judgment for wages, while it may be against a judgment for breach of contract. Osborn *v.* Philpot, 46 Ill. App. 274.

49. Baker *v.* Irvine, 62 S. C. 293, 40 S. E. 672.

50. Everett *v.* Clements, 9 Ark. 478, where the cause of action was filed before issuance of the writ in only one of the suits.

51. Hodge *v.* Adee, 2 Lans. (N. Y.) 314; Bechtol *v.* Cobaugh, 10 Serg. & R. (Pa.) 121; McLaughlin *v.* Parker, 3 Serg. & R. (Pa.) 144.

52. Heman *v.* Larkin, 99 Mo. App. 294, 73 S. W. 218; Hodge *v.* Adee, 2 Lans. (N. Y.) 314; Lester *v.* Crary, 1 Den. (N. Y.) 81; Boyce *v.* Morgan, 3 Cai. (N. Y.) 133; Tuttle *v.* Sheridan, 5 Lanc. L. Rev. (Pa.) 1.

Service of notice.—In Iowa an action in a justice's court may be commenced simply by the service of a notice on defendant, save where a writ of replevin is asked for. Duffy *v.* Dale, 42 Iowa 215.

Appearance and joining of issue.—In New York suits in justices' courts may be commenced by a voluntary appearance and joining issue. Where, however, nothing more is done after appearance than to obtain an adjournment no suit is commenced. Lester *v.* Crary, 1 Den. (N. Y.) 81.

Where actions are brought before different aldermen for counter-claims by the same parties and are made returnable at the same hour, the alderman who first issued summons has jurisdiction. Tuttle *v.* Sheridan, 5 Lanc. L. Rev. (Pa.) 1.

53. Duffy *v.* Dale, 42 Iowa 215; Hopper *v.* Hopper, 84 Mo. App. 117 [*citing* Randall *v.* Lee, 68 Mo. App. 561].

54. See Starnes *v.* Mutual Loan, etc., Co., 102 Ga. 597, 29 S. E. 452; Moye *v.* Walker, 96 Ga. 769, 22 S. E. 276; Brooks *v.* Mutual Loan, etc., Co., 95 Ga. 178, 22 S. E. 55; Bostain *v.* Morris, 93 Ga. 224, 18 S. E. 649; Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921; Donelan *v.* Draddy, 107 Ky. 339, 53 S. W. 1038, 21 Ky. L. Rep. 1054; Rogers *v.* Hall, 7 B. Mon. (Ky.) 349; Bear *v.* Youngman, 19 Mo. App. 41; Koehler *v.* Earl, 77 Tex. 188, 14 S. W. 28; Galveston, etc., R. Co. *v.* Ware, (Tex. 1889) 11 S. W. 554; Stone *v.* Hill, 72 Tex. 540, 10 S. W. 665.

55. Hall *v.* Safford, 25 Vt. 87.

56. *Connecticut.*— Nugent *v.* Wrinn, 44 Conn. 273; Burgess *v.* Tweedy, 16 Conn. 39.

Delaware.— Judgment by default cannot be signed until the usual time of closing business for the day, unless a certain hour is fixed for the hearing, with due notice to defendant. Colescott *v.* Bonwill, 4 Harr. 364.

Illinois.—Chicago First Nat. Bank *v.* Beresford, 78 Ill. 391; Winans *v.* Thorp, 87 Ill. App. 297; Brown *v.* People, 24 Ill. App. 72.

Kansas.— See Green *v.* Tower, 49 Kan. 302, 30 Pac. 468.

Louisiana.— Under Code, art. 1085, the justice must wait two hours after the appointed time. State *v.* Coquillon, 35 La. Ann. 1101.

hour, he need not wait more than an hour after the appointed time for the justice to appear.[57] Where defendant is ready in court to prove his defense when plaintiff closes his case, he should be allowed to do so, although he was not present when the trial commenced.[58]

7. Place For Taking Proceedings or Holding Court. Except when he is expressly authorized by law,[59] a justice of the peace cannot hear and determine a cause outside of the territorial subdivison for which he has been elected.[60] Nor

Massachusetts.— Blanchard *v.* Walker, 4 Cush. 455.

Michigan.— Bossence *v.* Jones, 46 Mich. 492, 9 N. W. 531.

Nebraska.— See Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484.

New Hampshire.— Banks *v.* Johnson, 12 N. H. 445.

New York.— Allen *v.* Stone, 9 Barb. 60; Dunn *v.* O'Keefe, 10 N. Y. Suppl. 34; Appleby *v.* Strang, 1 Abb. Pr. 143.

Vermont.— To constitute an entry of an action within the purview of the statute, it is at least necessary for the justice to be at the place of holding court within the two hours from the time set for trial, having in his possession the writ, and ready on his part to proceed with the cause. Underwood *v.* Hart, 23 Vt. 120; Phelps *v.* Birge, 11 Vt. 161. See also Peach *v.* Mills, 13 Vt. 501; Stone *v.* Proctor, 2 D. Chipm. 108.

Wisconsin.— Brandies *v.* Robinson, 45 Wis. 464; Carter *v.* Wyatt, 43 Wis. 570.

See 31 Cent. Dig. tit. "Justices of the Peace," § 232.

But see Com. *v.* Uhl, 10 Kulp (Pa.) 483.

The rule is not inflexible in its application, and where the matter comes to one of minutes, allowance should be made for the want of accuracy of ordinary timepieces. Nugent *v.* Wrinn, 44 Conn. 273.

Where there is no defense to the action, the justice need not wait. Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484.

Remaining at place of trial.— It is not necessary for the justice to remain at the particular place set for trial during the whole time allowed for defendant to appear. Hall *v.* Safford, 25 Vt. 87; Underwood *v.* Hart, 23 Vt. 120.

A formal appearance to the action is not meant, but personal appearance before the justice. Brandies *v.* Robinson, 45 Wis. 464.

When defendant did not in fact appear within the hour a judgment by default rendered before the expiration of an hour after the time fixed in the summons is not void. Green *v.* Tower, 49 Kan. 302, 30 Pac. 468.

A plaintiff who fails to appear after one hour from the time fixed for trial cannot complain that judgment was rendered against him at a later time. Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94.

In justices' courts in the city of New York, the justice need not wait an hour after the time for appearance mentioned in the summons. Klenck *v.* De Forest, 3 Code Rep. (N. Y.) 185.

Where a jury is demanded, defendant is not entitled to one hour from the time fixed for the return of the jury, under Ohio Rev. St. §§ 6482, 6548. Brownsberger *v.* Cincinnati, etc., R. Co., 25 Ohio Cir. Ct. 765.

57. Dickinson *v.* Hoffman, 90 Ill. App. 83 [*citing* Chicago First Nat. Bank *v.* Beresford, 78 Ill. 391]. See also Blanchard *v.* Walker, 4 Cush. (Mass.) 455, to the effect that where an action is not entered within the hour named in the writ, defendant may refuse to appear, or may appear merely for the purpose of moving to dismiss the action. *Compare* Cornell *v.* Bennett, 11 Barb. (N. Y.) 657, where it was held no sufficient ground for reversal that the justice did not appear at the place named in the summons until half-past three o'clock, when the summons was returnable at one o'clock, if defendant was present at the trial, although he did not appear in the suit.

58. Atwood *v.* Austin, 16 Johns. (N. Y.) 180.

59. See Strain *v.* Hefley, 94 Tenn. 668, 30 S. W. 747, holding that under Tenn. Code, §§ 4127, 4128, a justice, having an office in his district, whereat he holds court one day in each month, has jurisdiction to hear causes at another office, opened by him out of his district, but within the county, where he holds court when not engaged at his district office.

Minn. Gen. St. (1878) c. 65, § 2, which provides that a justice "may hold his court, at any place appointed by him, in a town or ward adjoining the town or ward in which he resides, provided the place so appointed be within his county," does not authorize a justice to hold his court in an adjoining city. State *v.* Marvin, 26 Minn. 323, 3 N. W. 991.

60. *Connecticut.*— Abby *v.* Cargel, 1 Root 403; Allen *v.* Vining, 1 Root 313; Scovel *v.* Smith, 1 Root 300.

Georgia.— Brahe *v.* Boker, 75 Ga. 881; Bozeman *v.* Singer Mfg. Co., 70 Ga. 685.

Minnesota.— See State *v.* Marvin, 26 Minn. 323, 3 N. W. 991.

Nebraska.— State *v.* Shropshire, 4 Nebr. 411. But *compare* Jones *v.* Holy Trinity Church, 15 Nebr. 81, 17 N. W. 362, to the effect that while a justice is required to reside in his precinct, a judgment rendered by him anywhere in his county is valid.

North Dakota.— *In re* Evingson, 2 N. D. 184, 49 N. W. 733.

Pennsylvania.— Share *v.* Anderson, 7 Serg. & R. 43, 10 Am. Dec. 421; Wright *v.* Millar, 1 Lack. Leg. N. 346; Morrison *v.* Stuart, 9 Lanc. Bar 7; Novic *v.* Buck, 1 Leg. Rec. 76.

Texas.— Clements *v.* San Antonio, 34 Tex. 25; Foster *v.* McAdams, 9 Tex. 542.

can he hear and determine the same at a place other than that fixed by law[61] or named in the summons.[62]

8. Payment to Justice or Officer. In actions before justices of the peace defendant may pay to the justice or constable the amount claimed by him to be justly due and accrued costs, and such a payment will have the same effect upon the rights of the parties as if made in a suit in a court of record.[63] Money, when so paid to a justice, becomes the property of the adverse party, and passes beyond the control of the party making the payment.[64]

B. Venue — 1. In General. The venue of actions before justices of the peace is wholly regulated by statute. Usually an action must be brought where either plaintiff or defendant resides,[65] or in an adjoining town, precinct, district, or

West Virginia.— Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448; Stanton-Belment Co. *v.* Case, (1900) 35 S. E. 851.

See 31 Cent. Dig. tit. "Justices of the Peace," § 233.

Where the parties stipulate that the justice may for convenience try a case outside of his own township, he does not lose jurisdiction by so trying it. Rogers *v.* Loop, 51 Iowa 41, 50 N. W. 224.

After transfer a case can only be tried by the justice of the district to which it has been transferred. Simmons *v.* Thomasson, 50 W. Va. 656, 41 S. E. 335.

Justice may take confession of judgment anywhere within his county.— Pollock *v.* Aldrich, 17 How. Pr. (N. Y.) 109.

61. Hilson *v.* Kitchens, 107 Ga. 230, 33 S. E. 71, 73 Am. St. Rep. 119; Lapham *v.* Rice, 66 Barb. (N. Y.) 487. See also Koehler *v.* Earl, 77 Tex. 188, 14 S. W. 28. *Compare* Bristol Mfg. Co. *v.* Smith, 6 Pa. Dist. 332, where defendants were held estopped from objecting to the place of hearing.

Necessity of regular place of administering justice see King *v.* King, 1 Penr. & W. (Pa.) 15.

Change of place by consent see Weeks *v.* Moyles, 8 Kulp (Pa.) 425.

While on the street, a justice has no power, without having called the case, to continue it, so as to bind defendant to appear at a fixed hour on the following day. Holden *v.* McCabe, 21 Pa. Co. Ct. 41.

A notary public, who is *ex officio* justice of the peace in a city of over five thousand inhabitants, may lawfully hold his court at a place different from that at which the justice of the same district holds his court. Moye *v.* Walker, 96 Ga. 769, 22 S. E. 276.

Holding court where intoxicating liquors are sold see Savier *v.* Chipman, 1 Mich. 116.

62. Stewart *v.* Meigs, 12 Johns. (N. Y.) 417; Newcomb *v.* Trempeauleau, 24 Wis. 459.

63. Phelps *v.* Town, 14 Mich. 374; Owen *v.* Vandyke, 81 Mo. App. 668; Voss *v.* McGuire, 26 Mo. App. 452; Bahmann *v.* Stoner, 59 Ohio St. 497, 52 N. E. 1022.

Payment to constable sufficient.— Owen *v.* Vandyke, 81 Mo. App. 668; Voss *v.* McGuire, 26 Mo. App. 452.

No rule or order necessary, if payment made before or at time of plea. Phelps *v.* Town, 14 Mich. 374.

Justice cannot accept amount in excess of that involved in action.— Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207.

Payment after judgment.— Where a defendant, after judgment against him, but before appeal, paid part of the claim to the justice, who held it till the trial above took place, and then paid it to the clerk of the appellate court, it was held unavailing under the pleas of "tender" and of "always ready." Cope *v.* Bryson, 60 N. C. 112.

64. Rightmire *v.* Kimball, 2 Hun (N. Y.) 598, 5 Thomps. & C. 95.

65. *Alabama.*— Read *v.* Coker, 1 Stew. 22. See also Wright *v.* Burt, 5 Ala. 29.

Colorado.— Melvin *v.* Latshaw, 2 Colo. 81.

Connecticut.— Humphreville *v.* Perkins, 5 Day 117.

Delaware.— Lewis *v.* White, 4 Pennew. 288, 55 Atl. 830.

Georgia.— Southern R. Co. *v.* Johnson, 96 Ga. 655, 23 S. E. 836.

Illinois.— Pilgrim *v.* Mellor, 1 Ill. App. 448.

Indiana.— Wilkinson *v.* Moore, 79 Ind. 397. See also Wabash, etc., R. Co. *v.* Lash, 103 Ind. 80, 2 N. E. 250.

Iowa.— Suits may be brought in the township where plaintiff or defendant resides, or in any other township of the same county, if actual service is had in such township. Kent *v.* Crenshaw, (1903) 94 N. W. 1131; Porter *v.* Welsh, 117 Iowa 144, 90 N. W. 582; Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92; Auspach *v.* Ferguson, 71 Iowa 144, 32 N. W. 249; Fitzgerald *v.* Gimmell, 64 Iowa 261, 20 N. W. 179; Bleedner *v.* Arel, 63 Iowa 727, 17 N. W. 183; Fitzgerald *v.* Arel, 63 Iowa 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733 [*distinguishing* Bradley *v.* Fraser, 54 Iowa 289, 6 N. W. 293]; Ebersole *v.* Ware, 59 Iowa 663, 13 N. W. 844; Hamilton *v.* Millhouse, 46 Iowa 74.

Kansas.— See Robinson *v.* Missouri Pac. R. Co., 67 Kan. 278, 72 Pac. 854.

Louisiana.— State *v.* Huft, 39 La. Ann. 990, 3 So. 180.

Maine.—Jewell *v.* Brown, 33 Me. 250; Morton *v.* Chase, 15 Me. 188.

Michigan.— Sleight *v.* Swanson, 127 Mich. 436, 86 N. W. 1010; Burlingame *v.* Marble, 95 Mich. 5, 54 N. W. 695; Hall *v.* Shank, 57

city.[66] Under some statutes, however, an action may be brought where the cause of action arose, or accrued,[67] or where the contract was to be performed.[68] Actions of replevin,[69] and such as affect land,[70] are as a rule local; and in some juris-

Mich. 36, 23 N. W. 478. As to non-resident plaintiffs see Weaver *v.* Rix, 109 Mich. 697, 67 N. W. 970.

Mississippi.— Fise *v.* Keer Thread Co., 84 Miss. 200, 36 So. 244; Hilliard *v.* Chew, 76 Miss. 763, 25 So. 489.

Missouri.— Smith *v.* Simpson, 80 Mo. 634; Harris *v.* Meredith, 106 Mo. App. 586, 81 S. W. 203; Dennis *v.* Bailey, 104 Mo. App. 638, 78 S. W. 669. *Compare* Scribner *v.* Smith, 104 Mo. App. 542, 79 S. W. 181. As to non-resident insurance companies see Meyer *v.* Phœnix Ins. Co., 184 Mo. 481, 83 S. W. 479 [*affirming* 95 Mo. App. 721, 69 S. W. 639].

New York.— People *v.* Haskell, 47 N. Y. App. Div. 225, 62 N. Y. Suppl. 654; McKey *v.* Lockner, 43 N. Y. App. Div. 43, 59 N. Y. Suppl. 640; Dodd *v.* Ecker, 24 N. Y. App. Div. 613, 48 N. Y. Suppl. 690; Patrick *v.* Williamson, 19 N. Y. App. Div. 451, 46 N. Y. Suppl. 504; Slavin *v.* Mansfield, 77 Hun 535, 28 N. Y. Suppl. 921; Head's Iron Foundry *v.* Sanders, 77 Hun 432, 28 N. Y. Suppl. 808; Larocque *v.* Harvey, 57 Hun 366, 10 N. Y. Suppl. 576; Bennett *v.* Weaver, 50 Hun 111, 3 N. Y. Suppl. 776; Bird *v.* Crane, 26 Hun 531; Webb *v.* Hecox, 27 Misc. 169, 58 N. Y. Suppl. 382; Cooper *v.* Ball, 14 How. Pr. 295; Hunter *v.* Burtis, 10 Wend. 358; Hardy *v.* Rowe, 7 Wend. 452.

North Carolina.— Fisher *v.* Bullard, 109 N. C. 574, 13 S. E. 799. See also Lilly *v.* Purcell, 78 N. C. 82.

Ohio.— Place *v.* Welch, 2 Ohio Dec. (Reprint) 542, 3 West. L. Month. 611.

South Carolina.— Baker *v.* Irvine, 62 S. C. 293, 40 S. E. 672; Jones *v.* Brown, 57 S. C. 14, 35 S. E. 397.

Texas.— Cowan *v.* Nixon, 28 Tex. 230; Aspermont Drug Co. *v.* J. W. Crowdus Drug Co., (Civ. App. 1904) 80 S. W. 258; Brown *v.* Pope, 27 Tex. Civ. App. 225, 65 S. W. 42; Landa *v.* Moody, (Civ. App. 1900) 57 S. W. 51; Eastham *v.* Harrell, (Civ. App. 1898) 46 S. W. 389; Claiborne *v.* Pickens, (Civ. App. 1890) 16 S. W. 867.

Utah.— Saunders *v.* Sioux City Nursery, 6 Utah 431, 24 Pac. 532.

Vermont.— Stone *v.* Hazen, 25 Vt. 178. As to trespass on the freehold see June *v.* Conant, 17 Vt. 656.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 143, 235.

A mere temporary residence of defendant in a justice's county is insufficient to confer jurisdiction. Bradley *v.* Fraser, 54 Iowa 289, 6 N. W. 293.

An objection that an action is brought in the wrong township is waived where not taken at trial. McGorray *v.* San Joaquin Super. Ct., 74 Pac. 853, 141 Cal. 266.

66. *Connecticut.*— Lyme *v.* East Haddam, 14 Conn. 394.

Delaware.— Lewis *v.* White, 4 Pennew. 288, 55 Atl. 830.

Michigan.— Jebb *v.* Chicago, etc., R. Co., 67 Mich. 160, 34 N. W. 538.

Minnesota.— Tyrrell *v.* Jones, 18 Minn. 312.

Missouri.— Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492 [*affirming* 23 Mo. App. 148]; Harris *v.* Meredith, 106 Mo. App. 586; Whitesides *v.* St. Louis, etc., R. Co., 49 Mo. App. 250; Kinney *v.* Hannibal, etc., R. Co., 27 Mo. App. 610; Manuel *v.* Missouri Pac. R. Co., 19 Mo. App. 631; Chaney *v.* Wabash, etc., R. Co., 18 Mo. App. 661.

New York.— Holmes *v.* Carley, 31 N. Y. 289 [*affirming* 32 Barb. 440]; People *v.* Miller, 97 N. Y. App. Div. 35, 89 N. Y. Suppl. 601; People *v.* Haskell, 47 N. Y. App. Div. 225, 62 N. Y. Suppl. 654; McKey *v.* Lockner, 43 N. Y. App. Div. 43, 59 N. Y Suppl. 640; Dodd *v.* Ecker, 24 N. Y. App. Div. 613, 49 N. Y. Suppl. 690; Slavin *v.* Mansfield, 77 Hun 535, 28 N. Y. Suppl. 921; Head's Iron Foundry *v.* Sanders, 77 Hun 432, 28 N. Y. Suppl. 808; Larocque *v.* Harvey, 57 Hun 366, 10 N. Y. Suppl. 576; Cooper *v.* Ball, 14 How. Pr. 295; Hardy *v.* Rowe, 7 Wend. 452.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 144, 235.

67. Wright *v.* Burt, 5 Ala. 29; Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417; Williams *v.* Stewart, 79 Miss. 46, 30 So. 1; Stone *v.* Hazen, 25 Vt. 178; Wainwright *v.* Berry, 3 Vt. 423.

68. Cole *v.* Fisher, 66 Cal. 441, 5 Pac. 915; Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594; Thompson *v.* Thompson, 117 Iowa 65, 90 N. W. 493; Fitzgerald *v.* Gimmell, 64 Iowa 261, 20 N. W. 179; Klingel *v.* Palmer, 42 Iowa 166; Perry *v.* Lovett, 24 Tex. 359; Sanders *v.* Woolf, 3 Utah 429, 4 Pac. 228; Klopenstein *v.* Woolf, 3 Utah 426, 4 Pac. 227; Fenton *v.* Salt Lake County, 3 Utah 423, 4 Pac. 241.

69. Test *v.* Small, 21 Ind. 127; Richardson *v.* Davis, 59 Miss. 15; Turner *v.* Lilly, 56 Miss. 576; Byers *v.* Ferguson, 41 Oreg. 77, 65 Pac. 1067, 68 Pac. 5. But *compare* Young *v.* Lego, 38 Wis. 206, to the effect that actions for the recovery of personal property are transitory, except where the property has been distrained.

70. Jolly *v.* Ghering, 40 Ind. 139; Schultz *v.* Larkin, 53 Mo. App. 223; Graves *v.* McKeon, 2 Den. (N. Y.) 639. See also Pitman *v.* Flint, 10 Pick. (Mass.) 504; Sumner *v.* Finegan, 15 Mass. 280. *Compare* Pilgrim *v.* Mellor, 1 Ill. App. 448. An action under Ind. Rev. St. (1881) § 5225, which provides that where a landlord, in pursuance of legal notice or otherwise, is entitled to the possession of land, he may have the tenant unlawfully holding over removed therefrom on complaint before a justice of the peace of the county wherein the lands are situated, may be brought before any justice of the peace in the county, and not necessarily be-

dictions actions of tort should be brought where the tort was committed.[71] Non-residents found within the jurisdiction may be sued where found, if the justice otherwise has jurisdiction.[72]

2. Change of Venue — a. In General. Where a justice of the peace is interested[73] or prejudiced,[74] or is a material witness,[75] or near of kin to one of the parties,[76] or where there is no justice qualified to try the suit in the proper precinct,[77] the statutes provide that upon proper application by either party the justice shall grant him a change of venue to the next nearest justice qualified to hear the cause.[78] In New York, if the term of office of a justice is about to expire, or he is about to remove from the town or city, before judgment is rendered in an action, he must previously make a written order reciting the fact, and directing the action to be continued before another justice.[79] The right to a change of venue in actions before justices of the peace is *strictissimi juris* and dependent solely upon statutory authority;[80] and in granting or refusing to grant a change the justice acts ministerially,[81] although he has power to pass upon the sufficiency of the affidavit,[82] and exercises judicial discretion in determining to what justice he will send the cause.[83] A change of venue obtained by a gar-

fore the justice of the particular township where the lands are situated. Scott *v.* Willis, 122 Ind. 1, 22 N. E. 786.

71. Southern R. Co. *v.* Johnson, 96 Ga. 655, 23 S. E. 736 (actions against railroads); Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492 [*affirming* 23 Mo. App. 148]; Whitesides *v.* St. Louis, etc., R. Co., 49 Mo. App. 250; Kinney *v.* Hannibal, etc., R. Co., 27 Mo. App. 610; Manuel *v.* Missouri Pac. R. Co., 19 Mo. App. 631 (actions against railroads for killing or injuring stock); Brown *v.* Pope, 27 Tex. Civ. App. 225, 65 S. W. 42; Bracken *v.* Johnson, (Tex. Civ. App. 1894) 24 S. W. 1101. *Compare* Wabash, etc., R. Co. *v.* Lash, 103 Ind. 80, 2 N. E. 250.

72. Graham *v.* Klyla, 29 Ind. 432; Harris *v.* Knapp, 21 Ind. 198; Maxwell *v.* Collins, 8 Ind. 38; Bennett *v.* Weaver, 50 Hun (N. Y.) 111, 3 N. Y. Suppl. 776; Hoffman *v.* Barton, 47 Hun (N. Y.) 409; Webb *v.* Hecox, 27 Misc. (N. Y.) 169, 58 N. Y. Suppl. 382; Hunter *v.* Burtis, 10 Wend. (N. Y.) 358; Taylor *v.* Jenkins, 11 Oreg. 274, 3 Pac. 681. *Compare* Bradley *v.* Fraser, 54 Iowa 289, 6 N. W. 293.

73. Larue *v.* Gaskins, 5 Cal. 507.

74. Berner *v.* Frazier, 8 Iowa 77; Garland *v.* McKittrick, 52 Wis. 261, 9 N. W. 160. But see Cooper *v.* Brewster, 1 Minn. 94.

75. Cooper *v.* Brewster, 1 Minn. 94; Bronson *v.* Gutches, 17 N. Y. App. Div. 204, 45 N. Y. Suppl. 487; McMillen *v.* Andrews, 10 Ohio St. 112.

76. Cooper *v.* Brewster, 1 Minn. 94; Morris *v.* Foreaker, (Tex. Civ. App. 1889) 15 S. W. 37.

77. Morris *v.* Foreaker, (Tex. Civ. App. 1889) 15 S. W. 37.

78. See Palmer *v.* Snyder, 67 Cal. 105, 7 Pac. 196.

An execution defendant in garnishment proceedings issued by a justice in aid of a judgment previously rendered by him or his predecessor is not entitled to a removal on the ground of prejudice. Garland *v.* McKittrick, 52 Wis. 261, 9 N. W. 160.

On a scire facias to revive a judgment it is not error to refuse defendant a change of venue, since it is not an original action, but merely a continuation of the former action. Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052.

A proceeding for the revival of a judgment is not subject to a change of venue. Sutton *v.* Cole, 73 Mo. App. 518 [*citing* Kincaid *v.* Griffith, 64 Mo. App. 673].

Iowa Rev. § 2802, providing that if a suit is brought in the wrong county defendant may demand a change of venue to the proper county, does not apply to proceedings before a justice of the peace. Post *v.* Brownell, 36 Iowa 497.

A town within which a village is located is an adjoining town to which a change of venue should be taken, under Minn. Gen. Laws (1897), p. 285, c. 151. Wadena Cracker Co. *v.* Gaylord, 93 Minn. 199, 101 N. W. 72.

Change of venue to mayor of town see *supra*, I, A, note 2; and *infra*, note 93.

79. De Zur *v.* Provost, 99 N. Y. App. Div. 14, 90 N. Y. Suppl. 1016.

80. Sutton *v.* Cole, 73 Mo. App. 518 [*citing* State *v.* Wofford, 119 Mo. 408, 24 S. W. 1009].

81. Berner *v.* Frazier, 8 Iowa 77; Herbert *v.* Beathard, 26 Kan. 746; Paul *v.* Ziebell, 43 Nebr. 424, 61 N. W. 630; Peyton *v.* Johnson, 37 Nebr. 886, 56 N. W. 728; Bronson *v.* Gutches, 17 N. Y. App. Div. 204, 45 N. Y. Suppl. 487.

82. Bronson *v.* Gutches, 17 N. Y. App. Div. 204, 206, 45 N. Y. Suppl. 487, where it is said: "The power to pass upon the sufficiency of an affidavit does not mean the power to determine as to its truth or falsity; that is not the test of sufficiency." See also Young *v.* Scott, 3 Hill (N. Y.) 32.

83. Barnhart *v.* Davis, 30 Kan. 520, 2 Pac. 633 [*quoted* in Reed *v.* Marple, 7 Kan. App. 170, 53 Pac. 674].

An erroneous exercise of discretion, or an erroneous exercise of judgment as to the disqualification of other justices, will not de-

nishee will not affect the jurisdiction of the justice in the principal case, as to which there is no change.[84]

b. Time of Application. An application for a change of venue should be made before the commencement of the trial,[85] and the change of venue may be granted before the return-day of the summons, where both parties appear.[86]

c. Procedure. A party desiring a change of venue must make an affidavit setting out the facts which entitle him to a change,[87] and pay costs.[88] The affidavit must be made by the party himself,[89] and where there are several joint parties all must join in the affidavit.[90] Defendant may set up a well founded objection disqualifying the nearest or any other justice in the county,[91] but plaintiff cannot show prejudice in the nearest justice in order to prevent defendant from procuring a change of venue.[92] When the proper affidavit is filed and the costs paid, it is the duty of the justice to transfer the papers in the cause to the nearest qualified justice, naming him,[93] and enter an order on his docket showing

feat the jurisdiction of the one to whom the cause is sent. Reed *v.* Marple, 7 Kan. App. 170, 53 Pac. 674.

84. Martin *v.* Chicago, etc., R. Co., 50 Mo. App. 428.

85. Columbus Junction Tel. Co. *v.* Overholt, 126 Iowa 579, 102 N. W. 498; McKenney *v.* Hopkins, 20 Iowa 495; Marshall *v.* Kinney, 1 Iowa 580; Lyne *v.* Hoyle, 2 Greene (Iowa) 135; Curtis *v.* Moore, 3 Minn. 29; Tyler *v.* Baxter, 29 Nebr. 688, 46 N. W. 153; Jacubeck *v.* Hewitt, 61 Wis. 96, 20 N. W. 372.

What constitutes commencement of trial.— Neither the settlement of the pleadings nor the argument of a motion to dissolve an attachment is a commencement of the trial, and an application for a change of venue before the commencement of the trial on the merits is in time. Curtis *v.* Moore, 3 Minn. 29.

A party may procure a change of venue after the cause has been continued, and before the day to which it has been continued. Herbert *v.* Beathard, 26 Kan. 746.

After a jury has disagreed and before a second jury is sworn is before the commencement of the trial for the purposes of an application for a change of venue. Marshall *v.* Kinney, 1 Iowa 580.

86. Weber *v.* Cummings, 39 Mo. App. 518.

87. Galbraith *v.* Williams, 106 Ky. 431, 50 S. W. 686, 21 Ky. L. Rep. 79; Bacot *v.* Deas, 67 S. C. 245, 45 S. E. 171; Hager *v.* Falk, 82 Wis. 644, 52 N. W. 432. *Compare* Burns *v.* Doyle, 28 Wis. 460, to the effect that Wis. Rev. St. c. 120, § 47, does not require an affidavit, but only an oath.

An affidavit in the language of the statute is sufficient and it need not set out the facts showing bias and prejudice. Peyton *v.* Johnson, 37 Nebr. 886, 56 N. W. 728.

Affidavit for change of venue cannot be amended at hearing.— Bacot *v.* Deas, 67 S. C. 245, 45 S. E. 171. But see Morrell *v.* Glasspoole, 111 Wis. 292, 87 N. W. 301, where the justice was allowed to sign the jurat to the affidavit *nunc pro tunc*, after the case had been removed to the county court, and from there appealed to the circuit court.

88. State *v.* Nickerson, 154 Ind. 439, 56 N. E. 912; Holmes *v.* Butts, 87 Iowa 412, 54 N. W. 249; Chapin *v.* Brown, 17 Kan. 142 (payment of costs or security therefor); Oakley *v.* Dunn, 63 Mich. 494, 30 N. W. 96. *Contra*, Endicott *v.* Hall, 61 Mo. App. 185; State *v.* McCracken, 1 Mo. App. 223.

The taxation of costs is fixed and absolute, and consequently the prevailing party in the action cannot have taxed against his adversary the costs already taxed against himself by the justice on sustaining his motion for a change of venue. Moss *v.* Lindsey, 62 Nebr. 829, 88 N. W. 119.

A failure to pay costs will not excuse the justice's refusal to attach his jurat and signature to the affidavit for a change of venue or to file such affidavit. Herbert *v.* Beathard, 26 Kan. 746.

Refusal to pay after change granted.— Where defendant on being granted a change of venue refused to pay the accrued costs, it was the duty of the justice who granted the change to proceed with the trial. Taney *v.* Vollenweider, 28 Mont. 147, 72 Pac. 415.

89. Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126, holding an affidavit by the attorney insufficient.

90. State *v.* Roberts, 87 Wis. 292, 58 N. W. 409; Jacubeck *v.* Hewitt, 61 Wis. 96, 20 N. W. 372. But *compare* Hellriegel *v.* Trueman, 60 Wis. 253, 19 N. W. 79.

91. Paul *v.* Ziebell, 43 Nebr. 424, 61 N. W. 630; Peyton *v.* Johnson, 37 Nebr. 886, 56 N. W. 728 [*quoting* State *v.* Cotton, 33 Nebr. 560, 50 N. W. 688].

Form of affidavit showing disqualification of nearest justice see Peyton *v.* Johnson, 37 Nebr. 886, 56 N. W. 728.

92. Paul *v.* Ziebell, 43 Nebr. 424, 61 N. W. 630.

93. Bremner *v.* Hallowell, 59 Iowa 433, 13 N. W. 412.

Where the case is not transferred to the nearest justice the justice to whom it is transferred acquires no jurisdiction. Otero County *v.* Hoffmire, 9 Colo. App. 526, 49 Pac. 375.

Change from mayor to justice see Finch *v.* Marvin, 46 Iowa 384. But *compare* State *v.* Jamison, 100 Iowa 342, 69 N. W. 529, holding that a justice cannot send a case to a mayor

what he has done.[94] An order granting a change of venue, made on an *ex parte* hearing and before the return-day of the summons, is void;[95] but where, after change of venue, a party appears, and without objection participates in the trial, he waives all irregularities in securing the change.[96] Consent to a continuance after a plea of privilege to be sued in the county of one's residence is filed is not a waiver of the plea.[97]

d. Jurisdiction and Proceedings After Change. A change of venue divests the justice making the transfer of all further jurisdiction over the proceedings,[98] and invests the justice to whom the transfer is made with jurisdiction, which cannot be questioned by the party securing the change and appearing,[99] unless such justice is disqualified to act,[1] or the proceedings for removal are void,[2] or defend-

who is nearer than the next nearest justice. See *supra*, I, A, note 2.

Transfer to justice of other county see Starkweather *v.* Sawyer, 63 Wis. 297, 23 N. W. 566.

A change will not lie from a justice to a probate court or from a probate court to a justice. Chicago Bldg., etc., Co. *v.* Pewthers, 10 Okla. 724, 63 Pac. 964.

94. See McGinity *v.* Warner, 17 Minn. 41, holding the docket entry a sufficient order of transfer.

Changing order.—Where a justice made an order transferring a cause to one R, supposed to be the nearest qualified justice, but on the next day ascertained that said justice had resigned, whereupon he changed the order, transferring the cause to one B, the nearest justice exercising the duties of his office, all parties being notified of the change, and appearing at the trial before B and a jury, there was no error. Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507. *Compare* State Farmer's Mut. Ins. Co. *v.* Gran, 76 Minn. 32, 78 N. W. 862, where the justice making the transfer adjourned his own court as to the action before he learned that the person to whom he had transferred the case was not a justice, and afterward attempted to make a new transfer.

95. Martin *v.* Mershon, 3 Nebr. (Unoff.) 174, 91 N. W. 180.

96. Woldenberg *v.* Haines, 35 Oreg. 246, 57 Pac. 627. But see Columbus Junction Tel. Co. *v.* Overholt, 126 Iowa 579, 102 N. W. 498.

97. Jennings *v.* Shiner, (Tex. Civ. App. 1897) 43 S. W. 276.

98. State Farmers Mut. Ins. Co. *v.* Gran, 76 Minn. 32, 78 N. W. 862 [*distinguishing* Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507]; Simmons *v.* Thomasson, 50 W. Va. 656, 41 S. E. 335.

Reassumption of jurisdiction.—Where, after an order of removal made on motion for change of venue, the parties agreed, before leaving the court, to submit the controversy to arbitration, and allow judgment to be entered on the award, it was held that the justice might, at the request of the parties, retain jurisdiction and enter up the arbitration and judgment thereon. Bivert *v.* Perkins, 4 Okla. 718, 47 Pac. 475.

99. *Arkansas.*— Buffington *v.* Sipe, 53 Ark. 235, 13 S. W. 763.

Indiana.— Mayes *v.* Goldsmith, 58 Ind. 94; Nesbit *v.* Long, 37 Ind. 300.

Minnesota.— Oltman *v.* Yost, 62 Minn. 261, 64 N. W. 564; McGinty *v.* Warner, 17 Minn. 41.

Missouri.— Carter *v.* Wamack, 64 Mo. App. 338.

North Dakota.— Henry *v.* Maher, 6 N. D. 413, 71 N. W. 127.

See 31 Cent. Dig. tit. "Justices of the Peace," § 240.

A general appearance by the parties in a justice's court to which the venue of a case is changed, and also in the circuit court on appeal, confers jurisdiction to try the cause of action. Buzzard *v.* Hapeman, 61 Mo. App. 464.

By proceeding to trial before a justice to whose court the case is removed, the parties waive the right to object to his jurisdiction on the ground of a defect in the affidavit of removal. Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26. See also Cox *v.* Groshong, 1 Pinn. (Wis.) 307.

1. Hitchcock *v.* McKinster, 21 Nebr. 148, 3 N. W. 507, holding that where the justice is disqualified the proper procedure is a motion to remand.

2. Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126, holding that where the venue of an action was changed solely on the affidavit of defendant's attorney, the justice to whom the cause was transferred acquired no jurisdiction, and a judgment entered by him was a nullity.

Where the order of transfer does not appear on the docket of the justice by whom the transfer is made, neither the subsequent appearance of the parties before the second justice, nor recitals in his docket, will confer jurisdiction upon him. McGinty *v.* Warner, 17 Minn. 41; Rahilly *v.* Lane, 15 Minn. 447.

Where a justice has failed to certify his transcript to another justice, in case of a change of venue, the cause should be remanded back for trial. Todhunter *v.* Marshall, 32 Ind. 96.

Effect of new summons and appearance.— The defect that the transcript furnished by a justice on a change of venue was not properly certified is obviated when the justice to whom the cause is transferred issues a new summons, which is duly served on defendant, who appears to the action. Schaefer *v.* Green, 68 Mo. App. 168.

ant has failed to comply with the conditions on which the change was granted.[3] After change of venue the justice to whom the cause is transferred must proceed to hear it in accordance with the terms of the order of transfer.[4] He may dismiss all proceedings had before the first justice if he was disqualified to act,[5] but he cannot set aside and reverse any order which such justice was qualified to make.[6]

e. Second or Subsequent Change. In some jurisdictions where the venue of an action has been once changed, a further change may be ordered for good cause shown,[7] and the fact that defendant has procured a change of venue will not preclude plaintiff from thereafter procuring another change.[8]

f. Jurisdiction and Proceedings After Refusal to Change. In most jurisdictions a motion for a change of venue does not oust the justice of jurisdiction, and consequently he retains jurisdiction after a refusal to change the venue, however erroneous such refusal may be.[9]

3. Removal of Cause to Court of Record — a. In General. Unless authorized by statute a justice of the peace cannot certify a case to another court,[10] nor can a cause be transferred by stipulation.[11] The statutes of many states, however, provide for the removal of causes where the title to land is involved,[12] or where,

An erroneous change of venue is not void, so that the second justice has no jurisdiction. Marshall *v.* Kinney, 1 Iowa 96.

3. Presley *v.* Dean, 10 Ida. 375, 79 Pac. 71.

4. Larson *v.* Dukleth, 74 Minn. 402, 77 N. W. 220.

5. Limerick *v.* Murlatt, 43 Kan. 318, 23 Pac. 567.

6. Nixon *v.* Johnson, 7 Kan. App. 239, 52 Pac. 702.

7. People *v.* Hubbard, 22 Cal. 34; Mayes *v.* Goldsmith, 58 Ind. 94. *Contra*, People *v.* Gibbons, 91 Ill. App. 567. And see Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126, to the effect that a defendant is entitled to only one motion for a change of venue.

8. Herbert *v.* Beathard, 26 Kan. 746.

9. Ritzman *v.* Burnham, 114 Cal. 522, 46 Pac. 379; Grampp *v.* McBrearty, 109 Ill. App. 277; Barnhart *v.* Davis, 30 Kan. 520, 2 Pac. 633; Jennings *v.* Shiner, (Tex. Civ. App. 1897) 43 S. W. 276. *Contra*, Baskowitz *v.* Guthrie, 99 Mo. App. 304, 73 S. W. 227; O'Rielly *v.* Henson, 97 Mo. App. 491, 71 S. W. 109; Endicott *v.* Hall, 61 Mo. App. 185.

See 31 Cent. Dig. tit. "Justices of the Peace," § 242.

10. Evans *v.* Phelps, 77 Iowa 526, 42 N. W. 432; Crismon *v.* Tufts, 3 Utah 251, 2 Pac. 705.

11. Ramsdell *v.* Duxberry, (S. D. 1901) 85 N. W. 221.

12. *Alabama.*— Fearn *v.* Beirne, 129 Ala. 435, 29 So. 558.

California.— Where, in an action of unlawful detainer against a tenant for holding over, the title becomes involved, the statute authorizing removal of actions from a justice's court to a district court applies. Henderson *v.* Allen, 23 Cal. 519.

Colorado.— In unlawful detainer before a justice of the peace against a tenant holding over, the effect of raising the question of title is to remove the cause to another court, and not to defeat it altogether. Klopfer *v.* Keller, 1 Colo. 410.

Connecticut.— See Lamb *v.* Beebe, 10 Conn. 322.

Indiana.— Dean *v.* Robinson, 34 Ind. App. 468, 73 N. E. 169, holding that the fact that a third person should be made a party to a proceeding before a justice for the recovery of land is no objection to the right of defendant to a transfer of the case to the circuit court, under Burns Annot. St. (1901) § 1501.

Massachusetts.— Lawrence *v.* Souther, 8 Metc. 166.

Michigan.— See Hinchman *v.* Spaulding, 137 Mich. 655, 100 N. W. 901.

Missouri.— Westport *v.* Hauk, 92 Mo. App. 364. *Compare* as to forcible entry and detainer Graham *v.* Conway, 91 Mo. App. 391.

South Dakota.— See Ramsdell *v.* Duxberry, (1901) 85 N. W. 221.

Wisconsin.— Verbeck *v.* Verbeck, 6 Wis. 159. See also Abbott *v.* Cremer, 118 Wis. 377, 95 N. W. 387.

See 31 Cent. Dig. tit. "Justices of the Peace," § 243; and *supra*, III, B, 4.

But see Easterbrook *v.* Low, 2 Vt. 135.

N. Y. Code Civ. Proc. §§ 2951, 2952, provides that an action must be discontinued where defendant files an affidavit showing that the title to land will come in question, and delivers to the justice an undertaking, with one or more sureties, "approved by the justice," conditioned that defendant will admit service in a new action brought by plaintiff in the proper court. See Kohlbrenner *v.* Elsheimer, 19 Hun 88; Barnard *v.* Clark, 33 Misc. 330, 68 N. Y. Suppl. 624; Harding *v.* Ellston, 13 N. Y. Suppl. 549; Wiggins *v.* Tallmadge, 7 How. Pr. 404; Davis *v.* Jones, 4 How. Pr. 340; Brown *v.* Van Duzen, 11 Johns. 472.

Under Minn. Gen. St. (1894) § 4991, requiring justices to certify causes to the district court, where it appears from the evidence that the title to real estate is involved, the justice cannot certify the same until the title comes in issue, and the fact that the plead-

in replevin, the appraised value of the property exceeds the justice's jurisdiction,[13] and in certain other specified cases.[14] The manner prescribed by the statute in which a cause may be removed to a court of record must be complied with, in order to give the court jurisdiction,[15] and if the justice did not primarily have jurisdiction, his certification of the cause does not confer jurisdiction.[16] One of several defendants cannot defeat the right of his co-defendants to remove a case by certiorari on the ground of concurrent jurisdiction, by refusing to join in the application for the writ.[17]

b. Proceedings After Removal. Where a suit instituted before a justice of the peace is removed to a court of record, it becomes a case pending in that court as fully to all intents and purposes as if it had been originally instituted therein.[18]

ings show such issue is not material. Sorenson *v.* Torvestad, 94 Minn. 410, 103 N. W. 15, holding further that the improper certification of a cause to the district court by a justice ousts both courts of jurisdiction, and the only order the district court can make in such case is one of dismissal.

Where the action is held for trial by the justice, although the answer shows that the title to land is involved, and judgment is rendered, and defendant appeals, the district court has jurisdiction as though the case had been certified by the justice. Lyman *v.* Stanton, 39 Kan. 443, 18 Pac. 513. See also as to forcible entry and detainer Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42.

13. Kaufmann *v.* Drexel, 56 Nebr. 229, 76 N. W. 559; Bernhard *v.* Iglauer, 1 Ohio S. & C. Pl. Dec. 378, 7 Ohio N. P. 329.

14. **Prejudice.**—An affidavit by a defendant in a replevin suit, in behalf of himself and the other defendants, of prejudice on the part of the justice, is sufficient for removal of the case to the county court. Olson *v.* Peabody, 121 Wis. 121, 99 N. W. 458.

Attachment cases see Miller *v.* Bates, 30 N. C. 477; Breckenridge *v.* Grace, 2 Ohio Dec. (Reprint) 558, 3 West. L. Month. 639.

Removal on ground of concurrent jurisdiction see Bradford *v.* Brown, 22 App. Cas. (D. C.) 455.

Pendency in higher court of suit involving same issues see Silcock *v.* Bradford, (Tex. Civ. App. 1897) 40 S. W. 234.

Confession of judgment in fraud of creditors.— Under the Pennsylvania act of March 20, 1810, section 14, if it shall appear "by due proof, on oath or affirmation," that a judgment was confessed before a justice of the peace for the purpose of defrauding creditors, the parties shall certify the proceedings to the common pleas. A verified affidavit in the words of the act is sufficient. Minick *v.* Tharp, 5 Pa. Dist. 44.

Legality of tax.— Under Utah Rev. St. (1898) § 3674, if it appears from the verified answer of defendant that the determination of the action will necessarily involve the legality of a tax, the justice must suspend proceedings and certify the case to the district court. An unverified answer does not oust the justice of jurisdiction. Pleasant Grove City *v.* Holman, 18 Utah 338, 54 Pac. 1013.

Where the amount involved exceeds the justice's jurisdiction, and an appeal is taken from his judgment, it will be treated as a proper transfer of the case to the superior court. Moore *v.* Perrott, 2 Wash. 1, 25 Pac. 906.

15. Verbeck *v.* Verbeck, 6 Wis. 159. See also Kaufman *v.* Drexel, 56 Nebr. 229, 76 N. W. 559; Bernhard *v.* Iglauer, 1 Ohio S. & C. Pl. Dec. 378, 7 Ohio N. P. 329.

16. Westport *v.* Hauk, 92 Mo. App. 364.

17. Bradford *v.* Brown, 22 App. Cas. (D. C.) 455.

18. *Alabama.*—Van Aspen *v.* Townsend, 36 Ala. 582.

California.— Baker *v.* Southern California R. Co., 114 Cal. 501, 46 Pac. 604.

District of Columbia.— Bradford *v.* Brown, 22 App. Cas. 455.

Indiana.— Bibbler *v.* Walker, 69 Ind. 362; Love *v.* Bohan, 4 Ind. 235.

Iowa.— Schiele *v.* Thede, 126 Iowa 398, 102 N. W. 133.

Kansas.— Missouri Pac. R. Co. *v.* Atchison, 43 Kan. 529, 23 Pac. 610.

Michigan.—Rawson *v.* Finlay, 27 Mich. 268.

New Mexico.— Romero *v.* Luna, 6 N. M. 440, 30 Pac. 855.

New York.— The action is a new action for the same cause, and must be commenced as other actions are, and be governed by the same rules of pleading as other actions. Jewett *v.* Jewett, 6 How. Pr. 185, Code Rep. N. S. 409.

North Carolina.— Peck *v.* Culberson, 104 N. C. 425, 10 S. E. 511.

Ohio.— Breckenridge *v.* Grace, 2 Ohio Dec. (Reprint) 558, 3 West. L. Month. 639; Louden *v.* Clark, 2 Ohio Dec. (Reprint) 161, 1 West. L. Month. 598.

See 31 Cent. Dig. tit. "Justices of the Peace," § 244.

But see Belding *v.* Sloan, 65 Ark. 175, 45 S. W. 245, to the effect that under the Arkansas act of 1875, page 123, section 22, the cause must be tried in the common pleas upon its merits, as though still in the justice's court, and that no set-off can be filed which was not filed or offered before the justice.

What sufficient to give jurisdiction.— The docket entry of a justice of the certificate and return to the district court of a cause, the pleadings showing that the title to land may be involved, and the cause otherwise

The defendant is estopped to deny the ground on which he obtained the removal,[19] or to insist that the justice had jurisdiction.[20] Such suits are, however, regarded as arising in the justice's court.[21] Where a justice has jurisdiction to hear and determine a case, and improperly certifies it to a court of record, that court acquires no jurisdiction, and should remand the case to the justice's court on motion.[22]

c. Amendments to Pleadings and Repleading. A plaintiff may new assign on the removal of an action brought before a justice of the peace to a court of record,[23] or he may so amend his declaration or complaint as to perfect it by making it more definite and certain.[24] Although the justice's jurisdiction is ousted by a plea of title before a reply is put in, the necessity for a reply when a new suit is instituted in a court of record is not thereby obviated.[25] In such an

being one within the justice's jurisdiction, is *prima facie* sufficient to invest the district court with complete jurisdiction. Lindekugel *v.* Angelhofer, 24 Minn. 324. See also Clyde, etc., Plankroad Co. *v.* Baker, 12 How. Pr. (N. Y.) 371, where it was held that the fact that the justice had acquired jurisdiction of the person of defendant, together with the proceedings before him, was sufficient to give the county court jurisdiction.

Extent of jurisdiction.— Where an action for less than three hundred dollars was before a justice, who decided that title to land was involved, and certified the pleadings to the district court, that court, having found against plaintiff on the two causes pleaded, had no jurisdiction to find for him on a cause not pleaded, in which the title to land was not involved, and which was exclusively within the justice's jurisdiction. Union Ditch Co. *v.* Leete, 24 Nev. 345, 54 Pac. 724.

When cause triable.— Under Mo. Rev. St. § 2931, an action of landlord's summons, certified to the circuit court on the ground that it involves title to land, is triable at the return-term. Anselm *v.* Groby, 26 Mo. App. 126.

Right to jury trial.— If a suit in a justice's court, in which defendant is entitled to the general issue, is certified to the probate court, the trial in the latter court should be by jury, although defendant fails to appear there. Owen *v.* Moore, 8 Blackf. (Ind.) 79.

Change of venue.—Where defendant asks to have the cause transferred to the superior court of the county where he is sued, there is no authority, upon the transfer being made, to transfer the cause to another county for trial. A demand for a change of venue made in the superior court is too late. Powell *v.* Sutro, (Cal. 1889) 21 Pac. 436, 80 Cal. 559, 22 Pac. 308.

Evidence in support of plea of liberum tenementum see Ellice *v.* Boyer, 8 Wend. (N. Y.) 503.

19. Carpenter *v.* Britton, 61 N. H. 430. But see Yawger *v.* Manning, 30 N. J. L. 182.

Withdrawal of plea of title.—Where an action of trespass is removed to the supreme court, after an issue of title has been raised by defendant by plea admitting the trespass, but denying plaintiff's title, defendant cannot, in the supreme court, withdraw his plea, and interpose a general denial. Wilgus *v.* Wilkinson, 50 N. Y. App. Div. 1, 63 N. Y. Suppl. 517.

20. Bernstein *v.* Smith, 10 Kan. 60; Bradner *v.* Howard, 75 N. Y. 417 [*affirming* 14 Hun 420].

21. Cook *v.* Nellis, 18 N. Y. 126; Brown *v.* Brown, 6 How. Pr. (N. Y.) 320.

22. Pleasant Grove City *v.* Holman, 18 Utah 338, 54 Pac. 1013.

The voluntary appearance of both parties will not give jurisdiction to a court to which a cause has been improperly removed. Verbeck *v.* Verbeck, 6 Wis. 159.

Time of objection.—Where a cause is certified to the district court on the ground that title to land is involved, and it does not in fact so appear on the trial before the justice, the objection should be seasonably brought to the attention of the district court by an affidavit and motion for a further return, showing what the evidence on the question of title was; and in the absence of such motion the judgment of the district court will not be disturbed. Lindekugel *v.* Angelhofer, 24 Minn. 324.

23. Littleton *v.* Clayton, 77 Ala. 571; Janvrin *v.* Scammon, 26 N. H. 360; Ellice *v.* Boyer, 8 Wend. (N. Y.) 503; Verell *v.* Coleman, 4 Call (Va.) 230. *Contra*, Johnson *v.* Shed, 21 Pick. (Mass.) 225; Magoun *v.* Lapham, 19 Pick. (Mass.) 419; Tuthill *v.* Clark, 11 Wend. (N. Y.) 642.

Under N. Y. Code Civ. Proc. § 2957, if the complaint in the supreme court fails to conform to the complaint in the justice's court, defendant's remedy is by motion to strike out. Wilgus *v.* Wilkinson, 50 N. Y. App. Div. 1, 63 N. Y. Suppl. 517 [*affirmed* in 167 N. Y. 618, 60 N. E. 1122].

Proof must be confined to declaration.— Houghtaling *v.* Houghtaling, 5 Barb. (N. Y.) 379.

24. Baker *v.* Southern California R. Co., 114 Cal. 501, 46 Pac. 604; Cuminge *v.* Rawson, 7 Mass. 440; Romero *v.* Luna, 6 N. M. 440, 30 Pac. 855; Fox *v.* Erie Preserving Co., 93 N. Y. 54; Wilgus *v.* Wilkinson, 50 N. Y. App. Div. 1, 63 N. Y. Suppl. 517 [*affirmed* in 167 N. Y. 618, 60 N. E. 1122]; People *v.* Albany C. Pl., 19 Wend. (N. Y.) 123.

25. Royce *v.* Brown, 3 How. Pr. (N. Y.) 391. See also Kiddle *v.* Degroot, Code Rep.

action where defendant has interposed a special plea of title, which is not such as to form an issue between the parties, plaintiff may demur to such plea.[26] On the other hand, where a defendant has interposed a plea of title and caused the removal of the action to a court of record, he will be confined to such plea in that court,[27] unless plaintiff enlarges his demand beyond what he demanded before the justice.[28] Where the grounds of an attachment in the justice's court are put in issue by plea in abatement, and the case is transferred to the court of chancery for equitable relief, the plea is transferred to the chancery court, and it is not necessary to file a new plea there.[29] Where the pleadings vary from what they were before the justice, and the parties acquiesce in such variance, the cause will be treated as an original action in the court to which it was removed.[30]

C. Limitations of Actions.[31] The statute of limitations may be pleaded in a suit before a justice of the peace,[32] although it is not necessary that it should be, since it may be availed of under the general issue,[33] or by objecting to evidence introduced on the trial for the purpose of proving a claim barred by the statute.[34] So too limitations need not be pleaded where no formal pleadings are required.[35] An action is commenced before a justice, so as to stop the running of the statute, when process is issued with the intent that it shall be served.[36] The limitation applicable in a given case is determined by the limitation which would be applicable if the case were of such a character as to force the parties into a court of record.[37]

N. S. (N. Y.) 202. But see McNamara *v.* Biteley, 4 How. Pr. (N. Y.) 44.

New assignment in replication see Tindall *v.* Tindall, 20 N. J. L. 146.

26. Dorman *v.* Lang, 3 How. Pr. (N. Y.) 59, holding that such a demurrer is not a departure from the pleadings.

27. Copeland *v.* Bean, 9 Me. 19; Brain *v.* Snyder, 30 N. J. L. 56; Campfield *v.* Johnson, 21 N. J. L. 83; Westervelt *v.* Merenus, 3 N. J. L. 693; Moisen *v.* Burr, 102 N. Y. App. Div. 248, 92 N. Y. Suppl. 435; Wilgus *v.* Wilkinson, 50 N. Y. App. Div. 1, 63 N. Y. Suppl. 517 [*affirmed* in 167 N. Y. 618, 60 N. E. 1122]; Wendell *v.* Mitchell, 5 How. Pr. (N. Y.) 424; Marsh *v.* Berry, 7 Cow. (N. Y.) 344.

Scope of rule.— The rule that the answer of defendant must be the same that he made before the justice does not require him to use the identical words in his answer in the supreme court that he used in the justice's court, but only the same substantial defense; and he may abandon part of his defense before the justice when he comes to answer in the supreme court, and the defense will be the same within the meaning of the statute N. Y. Code (1849), § 60. Wiggins *v.* Tallmadge, 7 How. Pr. (N. Y.) 404.

Defendant cannot amend in matters of substance.— Wendell *v.* Mitchell, 5 How. Pr. (N. Y.) 424.

Defendant may allege title in a different person from the one alleged in the plea before the justice. Phillips *v.* Kent, 20 N. J. L. 686.

28. Snedicker *v.* White, 11 N. J. L. 87.

29. Gordonsville Milling Co. *v.* Jones, (Tenn. Ch. App. 1900) 57 S. W. 630.

30. Tuthill *v.* Clark, 11 Wend. (N. Y.) 642.

31. See, generally, LIMITATIONS OF ACTIONS.

32. Hoyt *v.* Reed, 3 Blackf. (Ind.) 368; Nafie *v.* Ackerman, 3 N. J. L. 562; Sayres *v.* Scudder, 2 N. J. L. 53.

Sufficiency of plea.— In an action on a note given eight years before, payable one day after date, where defendant has pleaded that he did not "undertake and promise" within six years, he should be allowed the defense of the statute of limitations, the plea fairly apprising plaintiff of that defense. Snyder *v.* Winsor, 44 Mich. 140, 6 N. W. 197. An oral plea that "defendant pleads limitation of statute that the cause of action did not accrue within six years preceding the commencement of suit" is sufficient. Eddy *v.* Manshaun, 42 Mich. 532, 4 N. W. 286.

An amendment to the answer setting up the statute of limitations may be refused, in the discretion of the court. Fogarty *v.* Horrigan, 28 Wis. 142.

33. Williams *v.* Root, 14 Mass. 273.

34. Sanford *v.* Shepard, 14 Kan. 228.

35. Hornsby *v.* Stevens, 65 Mo. App. 185.

36. Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661; Hornsby *v.* Stevens, 65 Mo. App. 185; Turner *v.* Burns, 42 Mo. App. 94. But see Bell *v.* Dart, 54 Ill. 526, to the effect that the bar of the statute may intervene between the time of issuing an unserved summons and the issuance and service of an alias summons.

In the absence of proof showing when summons issued, the day of its service will be taken as the beginning of the action, for the purpose of the statute of limitations. McGraw *v.* Walker, 2 Hilt. (N. Y.) 404.

37. Phipps *v.* Richmond, 1 Humphr. (Tenn.) 21, holding that the statute of limitations of three years is not a bar to an action on simple contract, on which an action of debt might

D. Parties — 1. In General. The general rules of law as to parties to actions[38] govern in actions brought before justices of the peace as in actions brought in courts of record.[39]

2. New Parties and Change of Parties.[40] As a general proposition a justice of the peace cannot permit an amendment which changes the parties to an action,[41] if the change of parties would have the effect to introduce a new cause of action, not contained in the original declaration or complaint.[42] He may, however, amend by striking out the name of a joint plaintiff,[43] but not, it seems, of a joint defendant.[44] Where suit is brought against one in his private and individual capacity, the justice may, before hearing, so amend as to show the action to be against defendant in a representative capacity.[45] A party sued before a justice of the peace may interplead adverse claimants.[46]

3. Defects and Objections, Amendment, Waiver, and Cure. Proceedings before a justice of the peace need not be formal, and where the pleadings offered will enable the justice to decide the case according to the right of the matter, mere formal defects as to parties will be disregarded,[47] or such defects may be cured by

be maintained, if of sufficient amount to force the parties into a court of record.

38. See, generally, Parties

39. *Alabama.*— Mooney *v.* Ivey, 8 Ala. 810, holding that a plaintiff, who sues for the use of another, cannot recover for work and labor done for the beneficial plaintiff, unless he stood in such a relation that the right to compensation inured to him.

Colorado.— Layton *v.* Kirkendall, 20 Colo. 236, 38 Pac. 55; Forsyth *v.* Ryan, 17 Colo. App. 511, 68 Pac. 1055, both holding that an assignee of a chose in action may maintain an action thereon before a justice.

Connecticut.— Goodsel *v.* Wheeler, 34 Conn. 485.

Illinois.—Columbian Hardwood Lumber Co. *v.* Langley, 51 Ill. App. 100, parties who cannot be sued jointly in a court of record cannot be so sued before a justice.

Missouri.— Smith *v.* Zimmerman, 29 Mo. App. 249 (administrator, suing on a note, must allege that he is administrator); Crescent Furniture, etc., Co. *v.* Raddatz, 28 Mo. App. 210 (suit cannot be maintained in agent's name).

New York.— Buyce *v.* Buyce, 48 Hun 433, 1 N. Y. Suppl. 642 (action against defendant in official capacity); Leggett *v.* Raymond, 6 Hill 639 (summons and declaration must agree in respect to the names and number of defendants).

Pennsylvania.— Powell *v.* Roderick, 1 Pa. Dist. 120, 11 Pa. Co. Ct. 191, 6 Kulp 400, action cannot be brought in name of agent.

See 31 Cent. Dig. tit. "Justices of the Peace," § 247.

40. Revival of action on death of party see Abatement and Revival, 1 Cyc. 83 note 9.

41. Davis Ave. R. Co. *v.* Mallon, 57 Ala. 168; Frierson *v.* Blakesley, 3 Stew. (Ala.) 267; Crescent Furniture, etc., Co. *v.* Raddatz, 28 Mo. App. 210; Webster *v.* Hopkins, 11 How. Pr. (N. Y.) 140; Colegrove *v.* Breed, 2 Den. (N. Y.) 125; Emerson *v.* Wilson, 11 Vt. 357, 34 Am. Dec. 695. But see Hanlin *v.* Baxter, 20 Kan. 134 (bill of particulars amended by substituting name of another party as plaintiff); Weinsteine *v.* Harrison, 66 Tex. 546, 1 S. W. 626.

Principal's name cannot be substituted for agent's.—Crescent Furniture, etc., Co. *v.* Raddatz, 28 Mo. App. 210.

Where the nominal plaintiff dies before suit is brought, an amendment cannot be allowed by the justice to change the name of the party plaintiff. Frierson *v.* Blakesley, 3 Stew. (Ala.) 267.

42. Emerson *v.* Wilson, 11 Vt. 357, 37 Am. Dec. 695.

43. Lapham *v.* Rice, 55 N. Y. 472. See also Gates *v.* Ward, 17 Barb. (N. Y.) 424.

Cannot restore name stricken out if objection made.— Gates *v.* Ward, 17 Barb. (N. Y.) 424.

44. Gilmore *v.* Jacobs, 48 Barb. (N. Y.) 336. But see Noyes *v.* Hewitt, 18 Wend. (N. Y.) 141, where it was held no cause of reversal of a justice's judgment that on the trial of the cause he himself discharged one of several defendants in an action of trespass, against whom no evidence had been given, and permitted him to be examined as a witness, instead of directing the jury to find him not guilty.

45. Wilson *v.* Wilson, 3 Pa. L. J. Rep. 419.

46. Geller *v.* Puchta, 1 Ohio Cir. Ct. 30, 1 Ohio Cir. Dec. 18.

47. *California.*— Allison *v.* Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89, the omission of the middle initial of defendant's name does not affect the validity of the proceedings.

Georgia.— Dorsey *v.* Black, 55 Ga. 315, the omission of the word "as" before "executor" did not vitiate the proceedings.

Illinois.— Newton *v.* People, 72 Ill. 507, the fact that the information or complaint in an action to recover a fine imposed on school officers, and the affidavit on which the summons was issued did not run in the name of the people, was immaterial, but it was sufficient if the process ran in the name of the people.

Michigan.— Olson *v.* Muskegon Cir. Judge, 49 Mich. 85, 15 N. W. 369, a complaint in a

amendment.[48] The proper mode of taking objection for misnomer or other defect of parties is by plea in abatement,[49] motion,[50] or, in New York, by answer, where the defect does not appear on the face of the complaint.[51] A defect in a complaint as to the christian name of plaintiff will be cured by a written answer setting out the full names of all the parties;[52] and where no objection is made at the time to a change in the name of plaintiff in a suit before a justice, it is a waiver of the irregularity, and defendant cannot, after judgment, take advantage of it.[53] But a defendant, by consenting to a subsequent motion to amend a complaint, or by going to trial, does not waive an objection that the justice has restored as co-plaintiff in an action of tort one whose name he had previously stricken out.[54] Questions as to the description or misjoinder of the parties are concluded by the judgment.[55]

E. Process[56] — **1. Nature, Issuance, Requisites, and Validity — a. In General.** A summons is the ordinary process of a justice's court,[57] and is indispensable to give a justice jurisdiction, unless defendant appears and waives it,[58] although he has

proceeding to recover possession of premises is not jurisdictionally defective in omitting the name of defendant from the body of the instrument, if there is enough in it to supply the name.

Missouri.— Rohrbough *v.* Reed, 57 Mo. 292, the fact that a suit between two firms is entitled of their firm-names only is not such an error as to work a dismissal; a correction under the statute being practicable.

New York.— Benson *v.* Brown, 10 Wend. 258, where, in a bill of particulars, defendants, sued as partners, are described as belonging to a particular association, plaintiff is not precluded from proving his account against defendants as belonging to an association with a name different from that in the bill of particulars.

United States.— Hall *v.* Washington, 11 Fed. Cas. No. 5,953, 4 Cranch C. C. 722, justice may reject a plea of misnomer in abatement.

See 31 Cent. Dig. tit. "Justices of the Peace," § 249.

48. Where an account in proper form is filed before a justice as the foundation of an action, and is lost, and a substituted account is filed in which the name of the creditor is omitted, he should be permitted to amend at any time. Martin *v.* McClellan, 30 Ark. 405.

Amendment of bill of particulars to conform to summons see Haskins *v.* Citizens' Bank, 12 Nebr. 39, 10 N. W. 466.

After judgment.— Howell Annot. St. Mich. §§ 7633, 7635, provide that after judgment any variation in the record from any process, pleading, or proceeding had in such cause shall be amended accordingly, and that no judgment on default shall be reversed, impaired, or affected by mistake in the name of the party where the same has once been correctly alleged in the pleadings or proceedings. Bole *v.* Sands, etc., Lumber Co., 77 Mich. 239, 43 N. W. 873.

49. Smelt *v.* Knapp, 16 Nebr. 53, 20 N. W. 20 (objection that plaintiff had no legal capacity to sue in name in which suit was brought); Gorman *v.* Dewey, 24 Misc. (N. Y.) 643, 54 N. Y. Suppl. 303 (objection that one of several joint debtors was sued alone).

50. *Alabama.*— Davis Ave. R. Co. *v.* Mallon, 57 Ala. 168.

Iowa.— Hall *v.* Bennett, 2 Greene 466.

Michigan.— Fisher *v.* Northrup, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629.

New Jersey.— Smith *v.* Van Houten, 9 N. J. L. 381; Ryerson *v.* Ryerson, 4 N. J. L. 363.

New York.— Where the defect appears on the face of the complaint, the objection may be raised by motion for a nonsuit on the trial. Rice *v.* Hollenbeck, 19 Barb. 664.

See 31 Cent. Dig. tit. "Justices of the Peace," § 249.

51. Frazier *v.* Gibson, 15 Hun (N. Y.) 37.

Misjoinder or nonjoinder cannot be taken advantage of by demurrer.—Gorman *v.* Dewey, 24 Misc. (N. Y.) 643, 54 N. Y. Suppl. 303; Lord *v.* Lord, 11 N. Y. Suppl. 389.

52. Sherrod *v.* Shirley, 57 Ind. 13.

53. Cornelius *v.* McIlvaine, Morr. (Iowa) 318.

54. Gates *v.* Ward, 17 Barb. (N. Y.) 424.

55. Peeples *v.* Sethness Co., 119 Ga. 777, 47 S. E. 170.

56. See, generally, Process.

57. Barnes *v.* Harris, 4 N. Y. 374. See also Fitzgerald *v.* Adams, 9 Ga. 471.

Under Wyo. Rev. St. (1899) § 4431, civil actions before justices of the peace are required to be commenced by summons or by the appearance of the parties without summons. Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823.

Notice instead of citation.— The attempted use by a justice of the peace of a notice instead of a citation to commence an action is wholly without force or effect. Carpenter *v.* Anderson, 33 Tex. Civ. App. 484, 77 S. W. 291.

58. *Georgia.*— Jeffers *v.* Ware, 72 Ga. 135; Fitzgerald *v.* Adams, 9 Ga. 471.

Illinois.— Evans *v.* Pierce, 3 Ill. 468.

Massachusetts.— Arnold *v.* Tourtellot, 13 Pick. 172.

Michigan.— Vliet *v.* Westenhaver, 42 Mich. 593, 4 N. W. 448.

Mississippi.— Louisville, etc., R. Co. *v.* McCollister, 66 Miss. 105, 5 So. 695.

North Carolina.— Durham Fertilizer Co. *v.*

actual notice of the pendency of the proceedings.[59] So too a defendant is entitled to notice of the time of hearing where a cause has been continued without day,[60] where it has been adjourned on an adjourned day in his absence and without his consent,[61] or where, in the absence of the justice, he has left the place of hearing after the expiration of an hour from the time set for hearing;[62] but neither party is entitled to notice when a case is suspended to give an opportunity for a settlement, which is attempted, but fails.[63] In some jurisdictions provision is made for both a "long" and a "short" summons. The former is the regular form of process,[64] and a "short summons" can only be issued where expressly authorized by statute,[65] or where defendant cannot be proceeded against by "long summons" or warrant.[66]

b. Issuance. The authority of a justice of the peace to issue a summons on the request of plaintiff is as ample as to issue a warrant or attachment on a special application and proof required by law.[67] Where a summons is not served, and the return-day passes, the justice has a right to treat the original summons as a nullity, and issue another.[68] So too if a summons regularly issued is returned unexecuted as to defendant or a part of the defendants, plaintiff may in some jurisdictions have a series of alias and pluries writs until personal service is secured.[69]

Marshburn, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708.

Pennsylvania.— Com. *v.* Blessington, 3 Lanc. L. Rev. 153; Huddy *v.* Putt, 13 Phila. 550. See also Meyl *v.* Wedeman, 3 C. Pl. 96.

Texas.— Carpenter *v.* Anderson, 33 Tex. Civ. App. 484, 77 S. W. 291.

West Virginia.— Colborn *v.* Booth, 41 W. Va. 289, 23 S. E. 556.

See 31 Cent. Dig. tit. "Justices of the Peace," § 250.

Action commenced by appearance.— N. D. Rev. Codes, § 6635, providing that an appearance for any purpose except to object to the jurisdiction is a voluntary appearance, authorizes an action to be commenced by the mere appearance and pleading of the parties, without the issue of a summons. Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926. And see *infra*, IV, F, 1, b, (II), (D).

59. Vliet *v.* Westenhaver, 42 Mich. 593, 4 N. W. 448.

60. Hunt *v.* Laufer, 6 Pa. Co. Ct. 337.

61. Brannin *v.* Voorhees, 14 N. J. L. 590.

62. Stadler *v.* Moors, 9 Mich. 264.

63. Bostain *v.* Morris, 93 Ga. 224, 18 S. E. 649.

64. Barnes *v.* Harris, 4 N. Y. 374. See also Murphy *v.* Mooney, 2 Sandf. (N. Y.) 288; Burghart *v.* Rice, 2 Den. (N. Y.) 95; Courtors *v.* Jennings, 1 Just. L. Rep. (Pa.) 195.

Where defendant is a resident of the county, he is not liable to be sued by short summons. Kennedy *v.* Davidson, 1 Just. L. Rep. (Pa.) 141, 144.

65. Moore *v.* Vrooman, 32 Mich. 526, holding that Mich. Comp. Laws, § 5264, authorizing the issuance of a short summons when plaintiff is a non-resident, is permissive only.

In New York, prior to the acts of 1840, page 125, one residing out of the state could not be sued in a justice's court by a short summons. Dowd *v.* Stall, 5 Hill 186. And a short summons cannot, in any case, go against a defendant who is a non-resident of the county, except when plaintiff's demand arises on contract, express or implied. Waters *v.* Whittemore, 22 Barb. (N. Y.) 593.

Under Pennsylvania act of July 12, 1842, an action before a justice against a non-resident debtor must be begun by a short summons. But see Meany *v.* Cannon, 11 Pa. Dist. 25; Benighouse *v.* Felt, 1 Pa. Co. Ct. 496.

66. Rue *v.* Perry, 41 How. Pr. (N. Y.) 385. See also Thompson *v.* Sayre, 1 Den. (N. Y.) 175.

67. Barnes *v.* Harris, 4 N. Y. 374.

The word "issue," as relating to writs of summons before justices of the peace, imports an idea of delivery. Heman *v.* Larkin, (Mo. App. 1902) 70 S. W. 907.

A justice may issue a summons wherever he may be in the county, so that he make it returnable to his office, which must be in his township. Durfree *v.* Grinnell, 69 Ill. 371; Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815.

Under Swan & C. St. Ohio, p. 528, § 54, a bill of particulars must be filed by plaintiff in a justice's court before the summons can issue. McCarty *v.* Blake, 2 Ohio Dec. (Reprint) 155, 1 West. L. Month. 589.

68. McKey *v.* Lockner, 43 N. Y. App. Div. 43, 59 N. Y. Suppl. 640, where the justice instead of writing out another summons took the original and the copies handed in by the constable, altered their dates, and delivered them to the constable for service, and it was held that this was permissible.

69. Kittering *v.* Norville, 39 Ind. 183; Root *v.* Dill, 38 Ind. 169; Brown *v.* Knop, 137 Mich. 234, 100 N. W. 466, 101 N. W. 227; Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

Time of issuance.— A justice need not wait an hour for the appearance of defendant served before issuing an alias summons. Brown *v.* Knop, 137 Mich. 234, 100 N. W. 466, 101 N. W. 227.

A "short summons," being an extraordinary process, can only issue on proper preliminary proof;[70] and similarly a justice should be satisfied by affidavit or otherwise of the necessity for so doing, before issuing a summons returnable forthwith,[71] or within a shorter time than is regularly required.[72] It is the duty of the constable to indicate by a memorandum the date when the summons from a justice was received by him for service;[73] but when this is omitted, evidence *aliunde* is admissible to show when the writ was in fact delivered to the constable.[74]

c. Requisites and Validity — (I) *In General.* The summons in an action commenced before a justice of the peace should follow the prescribed statutory form,[75] it should run in the name of the state,[76] be directed to the constable of the proper township or district,[77] or to a special constable by name;[78] and should contain the names of all the parties,[79] state the amount of plaintiff's demand,[80]

Where an alias is defective, the justice loses jurisdiction to render judgment against defendant served with the original writ by adjourning the case to the return-day of the defective writ, and never acquires jurisdiction to render judgment against defendant served with the alias. Reed *v.* Parker, 134 Mich. 68, 95 N. W. 979.

70. Rue *v.* Perry, 41 How. Pr. (N. Y.) 385. See also Sperry *v.* Major, 1 E. D. Smith (N. Y.) 361.

The affidavit should state that defendant is a non-resident, that the cause of action arose on contract, and facts showing that defendant cannot be arrested under the provisions of the Non-Imprisonment Act. It need not state that plaintiff is a resident. Wende *v.* Bradley, 5 Hun (N. Y.) 513. See also Clark *v.* Wellington, 5 Hun (N. Y.) 638.

By whom issued.— A short summons in favor of a non-resident of the county may be issued by any justice of the county, although he and defendant do not reside in the same or adjoining towns. Onderdonk *v.* Ranlett, 3 Hill (N. Y.) 323.

71. Bishop *v.* Carpenter, 1 Houst. (Del.) 526.

The unsworn statement of plaintiff is sufficient to warrant the issue of summons returnable forthwith, if the justice is satisfied therewith. Gehring *v.* Pfrommer, 1 Marv. (Del.) 336, 40 Atl. 1124.

72. Cavender *v.* Ward, 28 S. C. 470, 6 S. E. 302.

73. Heman *v.* Larkin, (Mo. App. 1902) 70 S. W. 907.

74. Heman *v.* Larkin, (Mo. App. 1902) 70 S. W. 907.

Docket entry sufficient proof of issuance.— Perry *v.* Gholson, 39 Oreg. 438, 65 Pac. 601, 87 Am. St. Rep. 685.

75. Streeter *v.* Frank, 3 Pinn. (Wis.) 386, 4 Chandl. 93. See also Montpelier *v.* Andrews, 16 Vt. 604. *Compare* Perry *v.* Gholson, 39 Oreg. 438, 65 Pac. 601, 87 Am. St. Rep. 685, holding that the fact that a summons was in the form required by a statute other than that under which the action was brought did not render it invalid.

Substantial compliance sufficient.—Andrews *v.* Harrington, 19 Barb. (N. Y.) 343.

76. Charless *v.* Marney, 1 Mo. 537.

77. McCabe *v.* Payne, 37 Ark. 450; Clark *v.* Worley, 7 Serg. & R. (Pa.) 349; Chestnut St. Nat. Bank *v.* Howarth, 13 York Leg. Rec. 108.

A summons directed to the coroner is not void but voidable. McCabe *v.* Payne, 37 Ark. 450.

The summons may be addressed to defendant when there is no statutory provision as to the form of summons. Bell *v.* Pruit, 51 S. C. 344, 29 S. E. 5.

78. Benninghoof *v.* Finney, 22 Ind. 101; Schaw *v.* Dietrichs, Wils. (Ind.) 153.

79. Wynn *v.* Richard Allen Lodge, No. 14, K. P., 115 Ga. 796, 42 S. E. 29; Hunt *v.* Atchison, etc., R. Co., (Tex. Civ. App. 1894) 28 S. W. 460.

When service is by reading the summons to defendant, and delivering him a copy of the summons at his request, the omission of plaintiff's name from the proper blank space in the copy is a mere irregularity, which does not render the service void. Martin *v.* Lindstrom, 73 Minn. 121, 75 N. W. 1038.

Description of plaintiffs.— Where, in the notice of an action on a note, plaintiffs described themselves as heirs of the payee, it was held that the statement might be regarded as merely *descriptio personae,* or might be rejected as immaterial. King *v.* Gottschalk, 21 Iowa 512.

In an action by a firm in the firm-name, the summons need not recite that plaintiff is a partnership formed to do business in the state. Biddle *v.* Spatz, I Nebr. (Unoff.) 175, 95 N. W. 354.

Misnomer of defendant.— A summons against "Martha Male" will not give the justice jurisdiction to render judgment by default against "Margaret Meyl," who was served, unless the amendment of the record is accompanied with an alias summons or a rule to show cause why the amendment should not be made. Meyl *v.* Wedeman, 3 C. Pl. (Pa.) 96.

80. Leathers *v.* Morris, 101 N. C. 184, 7 S. E. 783; Singer Mfg. Co. *v.* Barrett, 95 N. C. 36; Noville *v.* Dew, 94 N. C. 43; Allen *v.* Jackson, 86 N. C. 321. But see Hedinger *v.* Silsbee, 2 Greene (Iowa) 363.

Immaterial variance.—Where the process in a suit before a justice under the twenty-five

or have the same indorsed on its back,[81] and be signed by the justice,[82] and entirely filled up when it is delivered to the officer to be executed.[83] When plaintiff sues in an official capacity the summons must show the capacity in which he claims to act.[84] When issued from a court composed of several justices, the summons need not bear teste in the name of more than one of the justices,[85] nor state that it was issued at the direction of the presiding justice.[86] A short summons need not show why a long summons was not used.[87] A citation in a justice's court need not give the file number of the suit.[88] As a rule a summons issued by a justice will not be quashed or set aside for any defect therein, if it is sufficient on its face to show what is intended thereby, and defendant is not misled by it,[89] but a summons issued on Sunday is void.[90]

(II) *Statement as to Nature, Form, and Cause of Action.* In an action before a justice of the peace the cause of action must be stated in the summons with sufficient certainty to apprise defendant of the character of plaintiff's demand.[91] The summons must show a cause of action within the justice's

dollar act is for twenty-five dollars only, and the declaration recites a larger sum, the variance is immaterial. Dennison *v.* Collins, 1 Cow. (N. Y.) 111.

81. Hedinger *v.* Silsbee, 2 Greene (Iowa) 363. See also Eaton *v.* Graham, 11 Ill. 619, holding, however, that the statute is merely directory, and that an omission to indorse the amount of plaintiff's demand on the summons ought not to operate to defeat the action.

82. See *infra*, IV, E, 1, c, (VI).

83. Hannaman *v.* Muckle, 20 N. Y. Civ. Proc. 296. See also People *v.* Smith, 20 Johns. (N. Y.) 63.

Writ filled up by constable void.—Winchell *v.* Pond, 19 Vt. 198.

Writ may be filled up in justice's presence and under his control.— People *v.* Smith, 20 Johns. (N. Y.) 63.

84. Hamilton *v.* Spiers, 2 Utah 225.

85. Brown *v.* Roberts, 19 Ga. 424.

86. Helms *v.* Dunne, 107 Cal. 117, 4 Pac. 100.

87. Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042.

88. Valdez *v.* Cohen, 23 Tex. Civ. App. 475, 56 S. W. 375.

89. *Georgia.*— Southern R. Co. *v.* Collins, 118 Ga. 411, 45 S. E. 306.

New York.— Andrews *v.* Harrington, 19 Barb. 343.

South Carolina.— Wideman *v.* Pruitt, 52 S. C. 84, 29 S. E. 405.

South Dakota.— Berry *v.* Bingaman, 1 S. D. 525, 47 N. W. 825.

West Virginia.— Blankenship *v.* Kanowha, etc., R. Co., 43 W. Va. 135, 27 S. E. 355; Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298.

See 31 Cent. Dig. tit. "Justices of the Peace," § 252.

Abbreviations.—A justice's warrant is not invalidated by the use of the abbreviation "Tenn." for "Tennessee." Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376.

An indorsement of the words "small cause court" on a summons issued by a justice of the peace is immaterial. Hankins *v.* Maul, 63 N. J. L. 153, 43 Atl. 434 [*citing* Bayles *v.* Newton, 50 N. J. L. 549, 18 Atl. 77]. See also O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

90. Whiteside *v.* Flora, 27 Pa. Co. Ct. 25.

91. *Alabama.*— Abrams *v.* Johnson, 65 Ala. 465.

Arkansas.— Jeffery *v.* Underwood, 1 Ark. 108.

Georgia.— Civ. Code, § 4116, requires the justice to attach a copy of the cause of action to the summons when it is issued. Macon, etc., R. Co. *v.* Walton, 121 Ga. 275, 48 S. E. 940; Thomas & Blake *v.* Forsyth Chair Co., 119 Ga. 693, 46 S. E. 869; Southern R. Co. *v.* Collins, 118 Ga. 411, 45 S. E. 306 (statute complied with whether copy is contained in the body of the summons or is attached as an exhibit); National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783. But see Davis *v.* Wilson, 61 Ga. 388, to the effect that a summons commencing a suit for debt need not set forth the cause of action.

Iowa.— Francis *v.* Bentley, 50 Iowa 59; Dilley *v.* Nusum, 17 Iowa 238; Hall *v.* Monahan, 1 Iowa 554.

Kansas.— Hoffman *v.* Forslund, 6 Kan. App. 352, 51 Pac. 816.

Missouri.— Hill *v.* St. Louis Ore, etc., Co., 90 Mo. 103, 2 S. W. 289; Anthony *v.* St. Louis, etc., R. Co., 76 Mo. 18; Reinhardt *v.* Varney, 72 Mo. App. 646 [*citing* Brandenburger *v.* Easley, 78 Mo. 659, and *distinguishing* Leonard *v.* Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77]; Damhorst *v.* Missouri Pac. R. Co., 32 Mo. App. 350. But see Missouri, etc., R. Co. *v.* Warden, 73 Mo. App. 117, where it was held that a summons which states the sum demanded and the time and place of trial, but fails to state the nature of the suit, is merely irregular, and does not defeat jurisdiction; and that a failure to appear and object waives the irregularity.

New York.— Bissell *v.* Dean, 3 E. D. Smith 172; Hogan *v.* Baker, 2 E. D. Smith 22; Cooper *v.* Chamberlain, 2 Code Rep. 142; Ellis *v.* Merit, 2 Code Rep. 68.

Pennsylvania.— Mills *v.* Ross, 11 Pa. Dist. 790.

Tennessee.— Seals *v.* Cummings, 8 Humphr.

cognizance,[92] but it need not state the kind or form of action.[93] In an action to recover a penalty imposed by statute, the process need not state that the act was done contrary to the statute.[94]

(III) *Directions as to Time For Return or Appearance.* In a suit before a justice of the peace, not only the day of appearance, but the hour of the day, ought to be designated in the writ;[95] and the time fixed for return or appearance must neither exceed nor fall short of the time fixed by law which must elapse between the issuance of summons and its return.[96] In some jurisdictions, how-

442; Wood *v.* Hancock, 4 Humphr. 465; Kirby *v.* Lee, 8 Yerg. 439.

West Virginia.— Meighen *v.* Williams, 50 W. Va. 65, 40 S. E. 332.

See 31 Cent. Dig. tit. "Justices of the Peace," § 253.

Variance.— A plaintiff cannot recover on a cause of action different from that stated in the summons. Coyle *v.* Coyle, 26 N. J. L. 132; Weisberger *v.* White, 2 Pa. Dist. 626; Watkins *v.* Kittrell, 3 Baxt. (Tenn.) 38; Foy *v.* Talburt, 9 Fed. Cas. No. 5,020, 5 Cranch. C. C. 124; Madding *v.* Peyton, 16 Fed. Cas. No. 8,933*a*, Hempst. 192.

Misjoinder of causes of action.—If the summons states a legal cause of action and is in other respects sufficient, the justice ought not to quash it because it states two or more causes of action. Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298.

The giving of dates, in an action on a promissory note, is mere surplusage, and a justice's judgment will not be set aside on the ground of want of jurisdiction because of a mistake in the dates. Soadheimer *v.* Fox, 19 Lanc. L. Rev. (Pa.) 386.

92. Allen *v.* Jackson, 86 N. C. 321.

93. Jeffrey *v.* Underwood, 1 Ark. 108; Delancy *v.* Nagle, 16 Barb. (N. Y.) 96; Smith *v.* Joyce, 12 Barb. (N. Y.) 21; Cornell *v.* Bennett, 11 Barb. (N. Y.) 657; Kern *v.* Com., 2 Del. Co. (Pa.) 490.

94. Kirby *v.* Rice, 8 Yerg. (Tenn.) 442.

95. *Connecticut.*— Burgess *v.* Tweedy, 16 Conn. 39, where it was said that, although a judgment might be good if no hour was designated in the writ, such an omission would be fatal on a plea in abatement.

Iowa.— Hodges *v.* Brett, 4 Greene 345, in which a notice fixing the time as "11 o'clock, M." was held insufficient to confer jurisdiction.

Minnesota.— Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283; Craighead *v.* Martin, 25 Minn. 41.

New York.— Stewart *v.* Smith, 17 Wend. 517.

North Dakota.— Miner *v.* Francis, 3 N. D. 549, 58 N. W. 343.

See 31 Cent. Dig. tit. "Justices of the Peace," § 254.

But see Grant *v.* Clinton Cotton Mills, 56 S. C. 554, 35 S. E. 193 [*distinguishing* Paul *v.* Southern R. Co., 50 S. C. 23, 27 S. E. 526; Kelly *v.* Kennemore, 47 S. C. 256, 25 S. E. 134; Adkins *v.* Moore, 43 S. C. 173, 20 S. E. 985].

Return-day incorrectly given in copy.— A judgment of a justice for plaintiff will be reversed on appeal where it appears by affidavit that a copy of the summons as served upon defendant gave the return-day incorrectly. Monroe *v.* White, 25 N. Y. App. Div. 292, 49 N. Y. Suppl. 517.

That a writ is made returnable on a day not the regular court day of the justice is not ground for dismissing the writ. Harper *v.* Baker, 9 Mo. 116.

Hours between which defendant must appear sufficient see Mills *v.* Ross, 11 Pa. Dist. 790.

96. *California.*— Deidesheimer *v.* Brown, 8 Cal. 339.

Georgia.— Thurston *v.* Wilkerson, 65 Ga. 557. *Compare* Blue *v.* McCorkle, 110 Ga. 275, 34 S. E. 847.

Indiana.— Davis *v.* Osborn, 156 Ind. 86, 59 N. E. 279; Fuller *v.* Indianapolis, etc., R. Co., 18 Ind. 91; Ohio, etc., R. Co. *v.* Hanna, 16 Ind. 391.

Michigan.— Simonson *v.* Durfee, 50 Mich. 80, 14 N. W. 706; Evarts *v.* Fisk, 44 Mich. 515, 7 N. W. 81.

Missouri.— Williams *v.* Bower, 26 Mo. 601. See also East *v.* Whitmer, 84 Mo. App. 223.

New York.— Willins *v.* Wheeler, 28 Barb. 669; King *v.* Dowdall, 2 Sandf. 131.

Oregon.— See Belfils *v.* Flint, 15 Oreg. 158, 14 Pac. 295.

Pennsylvania.— Hess *v.* Lee, 5 Pa. Dist. 563; Gilmore *v.* Allds, 1 Just. L. Rep. 225; Ambler *v.* Gehring, 1 Just. L. Rep. 61; Turnpike Co. *v.* Com., 2 L. T. N. S. 233; Hunter *v.* Weidner, 1 Woodw. 6.

South Carolina.— Adkins *v.* Moore, 43 S. C. 173, 20 S. E. 985; Simmons *v.* Cochran, 29 S. C. 31, 6 S. E. 859. See also Wideman *v.* Pruitt, 52 S. C. 84, 29 S. E. 405; Kelley *v.* Kennemore, 47 S. C. 256, 25 S. E. 134.

See 31 Cent. Dig. tit. "Justices of the Peace," § 254.

In computing the time in which a summons may be made returnable, the day of issuance should be excluded. Goldman *v.* Teitlebaum, 10 Pa. Dist. 53; Bigham *v.* Redding, 19 Pa. Co. Ct. 200; Yohe *v.* Rockel, 9 Kulp (Pa.) 441; Wideman *v.* Pruitt, 52 S. C. 84, 29 S. E. 405.

Intervention of Sunday.—Where, under a statute requiring that a summons against a non-resident shall be returnable not less than two or more than four days from its issue, a summons, returnable on the tenth of the month, was issued and served on the seventh, the justice had jurisdiction, although an intervening day was Sunday. Lemon *v.* Hampton, 128 Mich. 182, 87 N. W. 53. But see Simonson *v.* Durfee, 50 Mich. 80, 14 N. W. 706.

ever, a summons may be made returnable forthwith,[97] or within such reasonable time as the justice may deem fit,[98] where he is satisfied by the oath of plaintiff or otherwise that there is danger of losing the benefit of the process by delay. A summons returnable on a legal holiday is a nullity, and the justice has no jurisdiction to adjourn the case or to enter judgment at the adjourned trial.[99]

(iv) *Directions as to Place For Appearance.* A justice's summons must designate a place at which defendant is to appear.[1]

(v) *Return to Other Justice.* In Connecticut a writ of summary process to recover the possession of leased property may be signed by one justice and made returnable before another;[2] while in North Carolina a summons issued by one justice cannot be made returnable to any other justice, except in bastardy proceedings and in ejectment.[3]

(vi) *Signature and Seal.* Process issued by a justice of the peace must as a rule be signed by himself,[4] although a signing of his name by someone else in his presence and by his direction has been held sufficient.[5] When a seal is

Under Tex. Rev. St. arts. 1568, 1570, requiring a citation to be made returnable at the first day of "some" term of court, such citation need not be made returnable at the "next" term of court. White *v.* Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568.

97. Harris *v.* Buehler, 1 Pennew. (Del.) 346, 40 Atl. 733; Hunter *v.* Roach, 1 Pennew. (Del.) 265, 40 Atl. 192; Murray *v.* West, 2 Marv. (Del.) 372, 43 Atl. 256; Gehring *v.* Pfrommer, 1 Marv. (Del.) 336, 40 Atl. 1124.

98. Goodbar *v.* Owen, 70 Miss. 840, 12 So. 556; Cothran *v.* Knight, 47 S. C. 243, 25 S. E. 142.

99. People *v.* Schwartz, 3 Abb. Pr. N. S. (N. Y.) 395; Leonosio *v.* Bartilino, 7 S. D. 93, 63 N. W. 543.

1. Coulter *v.* Layton, 1 Harr. (Del.) 494; Stewart *v.* Smith, 17 Wend. (N. Y.) 517; Murdy *v.* McCutcheon, 95 Pa. St. 435; Garey *v.* Redmond, 12 Pa. Dist. 580; Mills *v.* Ross, 11 Pa. Dist. 790; Williams *v.* Shultz, 20 Pa. Co. Ct. 301; Skinner *v.* Morrow, 16 Pa. Co. Ct. 606; Bogert *v.* Miller, 16 Pa. Co. Ct. 592; Lumber, etc., Co. *v.* Curley, 15 Pa. Co. Ct. 428; Ritchie *v.* Perd, 11 Pa. Co. Ct. 590; Gilroy *v.* Bostock Show Co., 4 Lack. Jur. (Pa.) 97.

The words "appear before subscriber" are insufficient. Murdy *v.* McCutcheon, 95 Pa. St. 435. But see Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550; Beach *v.* Averitt, 106 Ga. 73, 31 S. E. 806, 71 Am. St. Rep. 239.

Designation of place held sufficient see Trickman *v.* Wender, 28 Pa. Co. Ct. 145; Reviere *v.* Overseers, 1 Just. L. Rep. (Pa.) 237.

Where a borough is divided into a number of wards, a justice must designate in a summons the ward in which his office is situated. Ritchie *v.* Perd, 11 Pa. Co. Ct. 590. See also Harbold *v.* Bailey, 11 Pa. Dist. 736; Lumber, etc., Co. *v.* Curley, 15 Pa. Co. Ct. 428. And see Caldwell *v.* Volpe, 1 Just. L. Rep. (Pa.) 19. *Compare* Purnell *v.* McBreen, 23 Pa. Co. Ct. 442, to the effect that a summons which states the street and number where the justice's office is situated is sufficient, and the ward need not be stated.

Where the streets are named and the houses numbered, the summons should contain the name of the street and the number of the justice's office. Griffith *v.* Headler, 10 Pa. Dist. 632; Parvine *v.* Parvine, 10 Kulp (Pa.) 376.

Giving name of city and block in which office situated sufficient see Hawley *v.* Crawford, 11 Pa. Dist. 548.

Where the venue of a summons was O county, town of G, and defendant was ordered to appear at the justice's office in the village of M, it was held that the summons was good, M being in G. Barnum *v.* Fitzpatrick, 11 Wis. 81.

The omission of the words "me," or "the undersigned," in a summons requiring defendant "to appear before one of the justices of the peace," etc., "at my office," will not vitiate the summons. Smith *v.* Young, 11 Mo. 566.

2. McNamara *v.* Rogers, 36 Conn. 205.

3. Williams *v.* Bowling, 111 N. C. 295, 16 S. E. 176.

4. Smith *v.* Smith, 15 N. H. 55; Hannaman *v.* Muckle, 20 N. Y. Civ. Proc. 296; Kirkwood *v.* Smith, 9 Lea (Tenn.) 228; Colborn *v.* Booth, 41 W. Va. 289, 23 S. E. 556. But see Burckhalter *v.* Jones, 58 S. C. 89, 36 S. E. 495.

The signature is sufficient if it gives the justice's surname in full, and his christian name by initials. Wood *v.* Fithian, 24 N. J. L. 838.

A notice signed in blank by the justice, and filled out by plaintiff under his authority, is sufficient. Loughren *v.* Bonniwell, 125 Iowa 518, 101 N. W. 287.

A summons signed by the justice's clerk is a valid summons. Helms *v.* Dunne, 107 Cal. 117, 40 Pac. 100.

Subscription with stamp bearing facsimile of signature sufficient see Loughren *v.* Bonniwell, 125 Iowa 518, 101 N. W. 287.

5. Achorn *v.* Matthews, 38 Me. 173; Hanson *v.* Rowe, 26 N. H. 327. *Contra*, Kirkwood *v.* Smith, 9 Lea (Tenn.) 228, holding that a justice of the peace cannot authorize another to sign his name to the original process. And

required, a scroll affixed to the name of the justice with the word "seal" written within it may be sufficient.[6]

2. SERVICE — a. In General. Service of process issuing from a justice's court must be made the required statutory time before the time of appearance,[7] in computing which the day of service is to be excluded, but that of appearance included.[8] The mode of service is wholly dependent upon statute,[9] and if service be not made according to law a judgment based thereon will be reversed.[10] Under some statutes service may be had by producing the original summons to defendant and informing him of its contents,[11] while under others a copy of the summons must be left with defendant,[12] or with some adult member of his family

see Kidder *v.* Prescott, 24 N. H. 263, holding that a writ signed by the justice's authority but not in his presence was invalid.

6. Wright *v.* The Vesta, 5 How. (Miss.) 152.

7. *Connecticut.*— Payne *v.* Bacon, 1 Root 109.

Kansas.— Foster *v.* Markland, 37 Kan. 32, 14 Pac.452.

Nebraska.— Leake *v.* Gallogly, 34 Nebr. 857, 52 N. W. 824. See also White *v.* German Ins. Co., 15 Nebr. 660, 20 N. W. 30.

New Jersey.— See Day *v.* Hall, 12 N. J. L. 203.

New York.— See Jones *v.* Wallace, 75 N. Y. App. Div. 401, 78 N. Y. Suppl. 35.

North Carolina.— Durham Fertilizer Co. *v.* Marshburn, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708.

Ohio.— Richter *v.* Thornton, 16 Ohio Cir. Ct. 637, 8 Ohio Cir. Dec. 369.

Pennsylvania.— Harlan *v.* Tripp, 7 Pa. Dist. 382; Carter *v.* Shindel, 7 Pa. Dist. 308; Clohessy *v.* Frick, 22 Pa. Co. Ct. 160; Overshire *v.* Cook, 8 Kulp 164.

Vermont.— Nelson *v.* Denison, 17 Vt. 73.

See 31 Cent. Dig. tit. "Justices of the Peace," § 258.

Under the Georgia act of Oct. 17, 1885, whenever process is not served for the required length of time before the appearance term of the court from which it issues, such service shall be good for the next succeeding term thereafter, which shall be the appearance term of the cause. Hyfield *v.* Sims, 90 Ga. 808, 16 S. E. 990.

Service on joint defendant on appeal.— In an action on a joint demand against three defendants, plaintiff, who was able to obtain service on only two of them while the action was pending in the justice's court, may serve the third during the pendency of an appeal in the district court. Houston *v.* Pepperl, 32 Nebr. 828, 49 N. W. 803.

8. Wort *v.* Firley, 8 Blackf. (Ind.) 335; Schultz *v.* American Clock Co., 39 Kan. 334, 18 Pac. 221; Foster *v.* Markland, 37 Kan. 32, 14 Pac. 452; Sappington *v.* Lenz, 53 Mo. App. 44. *Contra*, Messick *v.* Wigent, 37 Nebr. 692, 56 N. W. 493.

9. See cases cited *infra*, this note.

In Georgia a copy of the contract, note, debt, or cause of action should be attached to the summons, but it is not error to refuse to dismiss an action pending on appeal in the superior court, on the ground that the note sued on instead of a copy was attached to the original summons. Bull *v.* Edward Thompson Co., 99 Ga. 134, 25 S. E. 31.

In Montana a copy of the complaint must be served with the summons. State *v.* Harrington, 31 Mont. 294, 78 Pac. 484.

In Oregon a copy of the complaint, certified by the justice or by plaintiff, must be served on defendant. Belfils *v.* Flint, 15 Oreg. 158, 14 Pac. 295. See also Marooney *v.* McKay, 3 Oreg. 372.

Under the Pennsylvania act of July 9, 1901, summonses issued by a justice are to be served in the same manner as similar writs directed to the sheriff. Caldwell *v.* Volpe, 1 Just. L. Rep. 19.

Under Vermont Revised Laws, section 1402, where an action is brought against a nonresident, he may be notified of its pendency by delivering to him at any place without the state "copies of the process and pleading, and of an order for such delivery stating the time and place when and where he is required to appear, all under the hand of the clerk of the court, or of a judge or justice thereof." Section 1403 provides for the mode of delivery. Hogle *v.* Mott, 62 Vt. 255, 20 Atl. 276, 22 Am. St. Rep. 106.

10. Galligan *v.* Railroad Co., 1 Just. L. Rep. (Pa.) 233; Corson *v.* Sullivan, 1 Just. L. Rep. (Pa.) 74; Thomas *v.* Scotch Woolen Mills Co., 11 Kulp (Pa.) 80; Gilroy *v.* Bostock Show Co., 4 Lack. Jur. (Pa.) 97.

11. Lenore *v.* Ingram, 1 Phila. (Pa.) 519.

Service by reading the summons personally to the party to be served is a substantial compliance with the statute. French *v.* Pennsylvania, etc., R. Co., 1 Leg. Chron. (Pa.) 66.

Reading copy.— The service of an original notice of an action by reading a copy of the notice to defendant instead of the notice itself is sufficient to give the court jurisdiction. Hewett *v.* Jensen, (Iowa 1900) 85 N. W. 16.

Misstatement by constable as to place of return.— Where a constable, in serving a summons issued by a justice, who had two offices, stated to defendant that it was returnable at the office other than that stated in the summons, the process was not duly served, and the justice acquired no jurisdiction over defendant's person. Waring *v.* McKinley, 62 Barb. (N. Y.) 612. *Compare* Bertz *v.* Troast, 17 Lanc. L. Rev. (Pa.) 169.

12. McMullin *v.* Mackey, 6 N. Y. Suppl. 885 (copy of summons and complaint must be

at his dwelling-house.[13] Where the action is on a joint contract or obligation, and the summons has been served on defendant resident in the county, jurisdiction of the person of defendant residing out of the county is properly obtained by a personal service on him out of the county.[14] But service of summons on a non-resident of the county, while in the county in attendance on the trial of an action as a party and witness, is unauthorized and should be set aside on motion.[15]

b. Authority or Capacity to Serve. Process can only be served by the person designated by statute.[16] Regularly the constable is the proper officer to serve process issued by a justice of the peace,[17] although in some states the

left); Munroe *v.* Thomas, 35 Oreg. 174, 57 Pac. 419; Looney *v.* Horn, 12 Pa. Dist. 605; Frickman *v.* Wunder, 12 Pa. Dist. 590; Montgomery Table Works *v.* Nice, 11 Pa. Dist. 202; Main Co. *v.* Sloan, 2 Blair Co. Rep. (Pa.) 371; Burket *v.* Shuff, 2 Blair Co. Rep. (Pa.) 236; Covert *v.* Harrower, 2 Just. L. Rep. (Pa.) 1, 2; Gilmore *v.* Allds, 1 Just. L. Rep. (Pa.) 225; Cumbler *v.* Gehring, 1 Just. L. Rep. (Pa.) 61; Yeager *v.* Holt, 1 Just. L. Rep. (Pa.) 58; Clark *v.* Gadshaw, 11 Kulp (Pa.) 227; Union Furniture Co. *v.* Housenick, 11 Kulp (Pa.) 122; Witmeyer *v.* Kreider, 20 Lanc. L. Rev. (Pa.) 50; Corson *v.* Sullivan, 18 Montg. Co. Rep. (Pa.) 198; South Bethlehem *v.* Wyandotte Gas Co., 9 North. Co. Rep. (Pa.) 106. But see Kirkland *v.* Hogan, 65 N. C. 144.

Delivery through medium of third person.— Where the officer delivered the copy to a third person, who delivered it, in his presence, to defendant, this was a sufficient compliance with the statute. Palmer *v.* Belcher, 21 Nebr. 58, 31 N. W. 262.

13. See *infra*, IV, E, 2, c.

14. Brown *v.* Brown, 12 S. D. 21, 80 N. W. 139.

Collusive joinder.— Where there is a collusive joinder of defendants, in order to sue a person in a county where he does not reside, a summons issued to another county to bring in a defendant residing therein is void, and confers no jurisdiction on the justice. Stowbridge *v.* Miller, 4 Nebr. (Unoff.) 449, 94 N. W. 825.

15. Letherby *v.* Shaver, 73 Mich. 500, 41 N. W. 677; Kennedy *v.* Davidson, 1 Just. L. Rep. (Pa.) 141.

16. See cases cited *infra*, this note.

Justice issuing summons cannot serve it.— McDugle *v.* Filmer, 79 Miss. 53, 29 So. 996.

City marshal not authorized to serve see Dunham *v.* Solomon, 16 N. J. L. 50.

High constable not authorized to serve see Harbold *v.* Bailey, 11 Pa. Dist. 736.

Detective not authorized to serve see Com. *v.* Blankenmeyer, 8 Del. Co. (Pa.) 400.

Plaintiff, whether a constable or deputized for the purpose, cannot serve process. Smith *v.* Burliss, 23 Misc. (N. Y.) 544, 52 N. Y. Suppl. 841 [*disapproving* Putnam *v.* Man, 3 Wend. (N. Y.) 202, 20 Am. Dec. 686; Tuttle *v.* Hunt, 2 Cow. (N. Y.) 436; Bennet *v.* Fuller, 4 Johns. (N. Y.) 486 (all decided prior to N. Y. Code Civ. Proc. § 3156)]; Warring *v.* Keeler, 11 Misc. (N. Y.) 451, 33 N. Y. Suppl. 415.

Service by non-official person see State *v.* Harrington, 31 Mont. 294, 78 Pac. 484, construing Mont. Code Civ. Proc. §§ 1510, 1688.

17. *Louisiana.*— Any constable of the parish can serve the citation. State *v.* Dupre, 46 La. Ann. 117, 14 So. 907.

Maine.— Constable of a town may serve process on any person within the town, although an inhabitant of another town. Blanchard *v.* Day, 31 Me. 494.

Missouri.— Rev. St. § 6927, providing that citations shall be placed in the hands of the constable of the town where the suit is pending, is directory merely, and service by the constable of another township is valid. Bick *v.* Wilkerson, 62 Mo. App. 31.

New York.— Constable of a county may serve writs in any part of the county. Mills *v.* Kennedy, 1 Johns. 502.

North Carolina.— Under Code, § 3810, providing that city and town constables may serve all process within their counties, directed to them by any court, the service of a summons by a town constable, not directed to him as constable of such town, is a nullity. Baker *v.* Brem, 126 N. C. 367, 35 S. E. 630.

Pennsylvania.— Service is to be made by the constable of the district where defendant resides (Fire Ins. Co. *v.* Keller, 9 Pa. Dist. 61), or by the constable most convenient to the defendant. But the statute is directory only, and the service is good if made by the constable to whom the process is directed. Kans *v.* Cherry Tp. School Dist., 26 Pa. Co. Ct. 276; Delaware Mercantile Co. *v.* Fulton, 8 Del. Co. 227; Lyons *v.* Farrell, 11 Kulp 145. *Contra*, Butz *v.* Phœnix Iron Co., 11 Pa. Dist. 630. The discretion of the justice in selecting the next and most convenient constable is not an arbitrary but a legal discretion. Smith *v.* Miller, 20 Lanc. L. Rev. 116.

Rhode Island.— A constable outside of Providence can serve a writ issued by a magistrate's court outside of Providence, where both parties reside in, and the property attached is in, Providence. Goldrick *v.* Bennett, 20 R. I. 581, 40 Atl. 761.

See 31 Cent. Dig. tit. "Justices of the Peace," § 259.

A constable's deputy cannot make legal service, unless the record shows that he was acting under regular appointment for the

sheriff or his deputy may serve such process,[18] while in others it may be served by any lawful officer.[19] In cases of emergency, however, provision is made in most jurisdictions for the appointment, by indorsement upon the writ, of special officers to serve process. The provisions of the statutes relating to such special appointments or deputations must in all cases be strictly pursued.[20]

c. Leaving Copy at Residence. In some jurisdictions process may be served, in defendant's absence, by leaving a copy at his residence, usually with some adult member of his family.[21]

purpose. Prickett *v.* Cleek, 13 Oreg. 415, 11 Pac. 49.

18. Early County *v.* Powell, 94 Ga. 680, 20 S. E. 10; Parker *v.* Meader, 32 Vt. 300.

A deputy sheriff may serve process, even though there is no law directly conferring the power, where the usage has long prevailed, and been recognized in the statutes. Union Bank *v.* Lowe, 1 Meigs (Tenn.) 225. See also Estes *v.* Williams, Cooke (Tenn.) 413.

19. McCabe *v.* Payne, 37 Ark. 450; Durham Fertilizer Co. *v.* Marshburn, (N. C. 1898) 29 S. E. 411.

20. *Colorado.*— Hamill *v.* Ferrier, 8 Colo. App. 266, 45 Pac. 522.

Connecticut.— Case *v.* Humphrey, 6 Conn. 130; Lawrence *v.* Kingman, Kirby 6.

Michigan.— Gadsby *v.* Stimer, 79 Mich. 260, 44 N. W. 606; Union Mut. F. Ins. Co. *v.* Page, 61 Mich. 72, 27 N. W. 859; Rasch *v.* Moore, 57 Mich. 54, 23 N. W. 456; Buel *v.* Duke, 38 Mich. 167. See also King *v.* Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518.

Mississippi.— Miller *v.* Edwards, 75 Miss. 739, 23 So. 426.

Montana.— Layton *v.* Trapp, 20 Mont. 453, 52 Pac. 208. See also State *v.* Harrington, 31 Mont. 294, 78 Pac. 484.

Nebraska.— Mysenburg *v.* Leisure, 63 Nebr. 239, 88 N. W. 478; Morse *v.* Carpenter, 31 Nebr. 224, 47 N. W. 853; Haskins *v.* Citizens' Bank, 12 Nebr. 39, 10 N. W. 466. But see Republican Valley R. Co. *v.* Sayre, 13 Nebr. 280, 13 N. W. 404.

North Carolina.— Baker *v.* Brem, 127 N. C. 322, 37 S. E. 454, 126 N. C. 367, 35 S. E. 630; State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216. But see McKee *v.* Angel, 90 N. C. 60.

Oregon.— North Pac. Cycle Co. *v.* Thomas, 26 Oreg. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

South Carolina.— Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126; Bell *v.* Pruit, 50 S. C. 344, 29 S. E. 5.

Tennessee.—Allison *v.* Hampton, 11 Humphr. 71.

Vermont.— Carr *v.* Tyler, 28 Vt. 783; Edgerton *v.* Barrett, 21 Vt. 196; Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342; Clark *v.* Washburn, 9 Vt. 302; *Ex p.* Kellogg, 6 Vt. 509.

Wisconsin.— Moulton *v.* Williams, 101 Wis. 236, 77 N. W. 918; Betts *v.* Stevens, 6 Wis. 398.

See 31 Cent. Dig. tit. "Justices of the Peace," § 259.

Contra.— Hill *v.* Blackwelder, 113 Ill. 283; Gordon *v.* Knapp, 2 Ill. 488.

Appointment is a judicial act, which cannot be done by proxy. *Ex p.* Kellogg, 6 Vt. 509.

Justice's certificate conclusive.— Lawrence *v.* Kingman, Kirby (Conn.) 6. See also State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216.

A minor may be appointed to serve a summons. Bell *v.* Pruit, 51 S. C. 344, 29 S. E. 5 [*following* McConnell *v.* Kennedy, 29 S. C. 180, 7 S. E. 76]. See, generally, INFANTS.

The full name of the person deputized must be indorsed on the process. Allison *v.* Hampton, 11 Humphr. (Tenn.) 71.

A deputation signed in blank, and afterward filled up by a third person without the direction or knowledge of the justice, is void. Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342.

An appointment by the clerk of a justice without indorsement on the process is invalid. Hamill *v.* Ferrier, 8 Colo. App. 266, 45 Pac. 522.

An appointment for service outside of the county in which the justice resides is invalid. Miller *v.* Edwards, 75 Miss. 739, 23 So. 426. But see Clark *v.* Washburn, 9 Vt. 302.

The authority of a special officer cannot be extended beyond the expiration of the time of service without the concurrence of the magistrate. Carr *v.* Tyler, 28 Vt. 783.

Forms of indorsement on summons held sufficient see Haskins *v.* Citizens' Bank, 12 Nebr. 39, 10 N. W. 466; North Pac. Cycle Co. *v.* Thomas, 26 Oreg. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

21. *Delaware.*— Hitch *v.* Gray, 1 Marv. 400, 41 Atl. 91.

Georgia.— Moye *v.* Walker, 96 Ga. 769, 22 S. E. 276.

Missouri.— Byrd *v.* Steele, 49 Mo. App. 419.

Nebraska.— Palmer *v.* Belcher, 21 Nebr. 58, 31 N. W. 262.

Oregon.— Munroe *v.* Thomas, 35 Oreg. 174, 57 Pac. 419.

Pennsylvania.— Bailey *v.* Jefferson Tp., 21 Pa. Co. Ct. 20. But see Smith *v.* Noone, 1 Leg. Rec. 165.

Wisconsin.— Frederick *v.* Clark, 5 Wis. 191.

See 31 Cent. Dig. tit. "Justices of the Peace," § 260.

Return must show party to be an adult.— Williams *v.* McDonald, 1 Just. L. Rep. (Pa.) 117.

Leaving copy with plaintiff.— A summons is not sufficiently served on a resident of the county, who boards with plaintiff, by leaving a copy at his dwelling-house in the presence of the plaintiff as an adult member of defendant's family. Robbits *v.* Hurilko, 10 Kulp (Pa.) 217.

d. Publication. Where a summons has issued,[22] but has not been and cannot be otherwise served, the statutes of some of the states provide for service by publication.[23]

e. Return and Proof of Service — (i) *In General.* A justice of the peace cannot proceed in a cause, in the absence of defendant, until the summons is duly returned according to law.[24] The officer's return on the summons in a justice's court is evidence of the service,[25] but it is not conclusive evidence of the facts

Leaving a copy of the summons with a neighbor is insufficient, unless he is at the time on the inside of defendant's dwelling-house. Dennis *v.* McGill, 2 Blair Co. Rep. (Pa.) 180.

22. Unless summons has previously issued, an order of publication is premature. Little *v.* Currie, 5 Nev. 90.

23. *California.*— The justice may, on affidavit that defendant is concealing himself in order to avoid process, issue a new summons and order notice by publication. Seaver *v.* Fitzgerald, 23 Cal. 85.

Nebraska.— If service cannot be had within the county, and property of defendant has been attached, constructive service may be had under Code Civ. Proc. § 932. Meyer *v.* Hibler, 52 Nebr. 823, 73 N. W. 289 [*following* Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217, and *citing* Hay Co. *v.* Cline, 9 Ohio Cir. Ct. 280, 6 Ohio Cir. Dec. 145].

Nevada.— Comp. Laws (1900), § 3125, authorizes the justice to direct service by publication, where it appears by affidavit or by verified complaint that defendant resides without the state, and that a cause of action exists against him. If the complaint is not verified, the affidavit may refer to and adopt its contents. Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514 [*following* Ligare *v.* California R. Co., 76 Cal. 610, 18 Pac. 777].

Ohio.— Under Rev. St. p. 6496, property must have been attached, and it must appear, not only that defendant has not been served, but that he cannot be served in the county. Stone *v.* Whittaker, 61 Ohio St. 194, 55 N. E. 614.

Texas.— Hambel *v.* Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46 [*affirming* (Civ. App. 1895) 33 S. W. 251]; Davis *v.* Robinson, 70 Tex. 394, 7 S. W. 749, process may be served by publication under rules governing district courts. *Compare*, as to commencing actions against non-residents by notice, Carpenter *v.* Anderson, 33 Tex. Civ. App. 491, 77 S. W. 291.

See 31 Cent. Dig. tit. "Justices of the Peace," § 261.

Necessity of statutory authority. — The courts cannot supply the omission of the statute to provide for an order of publication against a non-resident defendant in a mechanic's lien proceeding before a justice. Bieswaenger *v.* Werner, 5 Mo. App. 582.

Finding of impossibility of other service.— Where the finding of the justice did not show that defendant could not be summoned by leaving the summons at his usual place of abode with a member of his family, the publication was unauthorized. Byrd *v.* Steele, 49 Mo. App. 419.

Personal service equivalent to publication. — Under Nev. Comp. Laws (1900), § 3539, providing that when publication is ordered personal service shall be equivalent to publication, the same time must be allowed for appearance in case of personal service without the state in lieu of publication as is required where service is had by publication. Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514.

24. Rape *v.* Titus, 11 N. J. L. 314; Layton *v.* Cooper, 2 N. J. L. 59; Jackson *v.* Sherwood, 50 Barb. (N. Y.) 356 (necessity of return by special officer); Brown *v.* Carroll, 16 R. I. 604, 18 Atl. 283.

In computing the time for the return-day, the day on which the summons issued will be excluded, and the day on which it is returnable will be included. Ferris *v.* Zeidler, 5 Phila. (Pa.) 529; Brenner *v.* Dombach, 3 Lanc. Bar (Pa.), Feb. 10, 1872.

Presumption as to time intended.— Where a summons, returnable at an hour named, does not specify that standard time is relied upon, it will be presumed that common time was intended. Searles *v.* Averhoff, 28 Nebr. 668, 44 N. W. 872.

25. *California.*— Denmark *v.* Liening, 10 Cal. 93.

Illinois.— Leitch *v.* Colson, 8 Ill. App. 458.

Michigan.— Merrick *v.* Mayhue, 40 Mich. 196. *Compare* Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485.

Minnesota.— Flohrs *v.* Forsyth, 78 Minn. 87, 80 N. W. 852.

Mississippi.— Quarles *v.* Hiern, 70 Miss. 891, 14 So. 23.

Missouri.— Perryman *v.* State, 8 Mo. 208.

Pennsylvania.— Sweeney *v.* Girolo, 154 Pa. St. 609, 26 Atl. 600. See also Maines *v.* Black, 8 Pa. Dist. 82, where it was held that the proof of service which is made a condition of a judgment by default must be by the jurat of the justice attached to the return of the constable on the back of the summons.

Tennessee.— Myers *v.* Hammond, 6 Baxt. 61.

See 31 Cent. Dig. tit. "Justices of the Peace," § 262.

Return presumed to show all that was done by person making service.— State *v.* Harrington, 31 Mont. 294, 78 Pac. 484.

Proof of service cannot rest in parol.—King *v.* Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518.

Recital in justice's docket of no value as against officer's return see Lowe *v.* Alexander, 15 Cal. 296.

stated therein,[26] and may be impeached by defendant.[27] The justice cannot certify of his own knowledge as to the day when the summons was issued, but the fact must be proved by competent evidence.[28] So too the certificate of a justice on certiorari that he delivered the summons to a constable on a certain day does not show that he had legal evidence before him that the suit was commenced on that day.[29]

(II) *Form and Requisites.* The return of process issued from a justice's court must affirmatively show everything necessary to constitute a valid service, and must respond to the mandate of the writ.[30] It should be signed by the officer

Presumption as to service.— Where a summons showed a return, "Served by copy," and there was nothing to show that service by copy was not made in the manner prescribed by law, the presumption is that the service was so made, although the docket shows service by leaving the copy at defendant's place of business. Sweeney *v.* Girolo, 154 Pa. St. 609, 26 Atl. 600.

A constable's oral evidence of the service of a summons is admissible before a justice as a basis for "proceedings to recover possession of land," although he may have made a written return by affidavit. Robinson *v.* McManus, 4 Lans. (N. Y.) 380.

Where the return is equivocal as to which of two defendants is served, the justice may decide whether the return was personal or not. Fleming *v.* Nunn, 61 Miss. 603.

26. Perryman *v.* State, 8 Mo. 208. See also Merrick *v.* Mayhue, 40 Mich. 196; Com. *v.* Blankenmeyer, 8 Del. Co. (Pa.) 400. But see Delaware Mercantile Co. *v.* Fulton, 8 Del. Co. (Pa.) 327; French *v.* Pennsylvania, etc., R. Co., 1 Leg. Chron. (Pa.) 66.

Under Mo. Rev. St. (1899) § 3839, providing that if defendant is a non-resident of the county in which plaintiff resides the action may be brought before some justice of any township in such county where defendant may be found, the constable's return, in an action against a railroad for the destruction of crops by fire, that the writ was served on defendant's agent in the township of suit, is conclusive evidence of the justice's jurisdiction. Kerr *v.* Quincy, etc., R. Co., 113 Mo. App. 1, 87 S. W. 596.

27. *Kansas.*— Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149.

Michigan.— Lane *v.* Jones, 94 Mich. 540, 54 N. W. 283.

Minnesota.— Knutson *v.* Davies, 51 Minn. 363, 53 N. W. 646.

New York.— Burbanks Hardware Co. *v.* Hinkel, 76 N. Y. App. Div. 183, 78 N. Y. Suppl. 365; Wheeler, etc., Mfg. Co. *v.* McLaughlin, 8 N. Y. Suppl. 95. But see Perry *v.* Tynen, 22 Barb. 137.

Pennsylvania.— Bertz *v.* Troast, 17 Lanc. L. Rev. 169.

Tennessee.— See Myers *v.* Hammond, 6 Baxt. 61.

See 31 Cent. Dig. tit. "Justices of the Peace," § 262.

Parol proof is admissible of the fact that the parties were not legally summoned. Bertz *v.* Troast, 17 Lanc. L. Rev. (Pa.) 169.

Impeachment on appeal.— Where a summons was actually served on defendant's son, in defendant's absence, the constable's return of service on the person may be contradicted on appeal. Fitch *v.* Devlin, 15 Barb. (N. Y.) 47.

The mere denial of a defendant that he had been served is not sufficient to impeach the constable's return, supported by the justice's indorsement of judgment thereon and issuance of execution. Myers *v.* Hammond, 6 Baxt. (Tenn.) 61.

A finding in favor of a traverse to a return of personal service, when the evidence shows that no personal service was had upon defendant, is proper, although the evidence may show service perfected by leaving a copy of the summons at defendant's usual place of abode. Wood *v.* Callaway, 119 Ga. 801, 47 S. E. 178.

A constable's return of service cannot be collaterally attacked in another action for the purpose of defeating the judgment recovered under it. New York, etc., R. Co. *v.* Purdy, 18 Barb. (N. Y.) 574. See also Putnam *v.* Man, 3 Wend. (N. Y.) 202, 20 Am. Dec. 686. *Compare* Squires *v.* Jeffrey, 101 Iowa 676, 70 N. W. 730.

28. McGraw *v.* Walker, 2 Hilt. (N. Y.) 404.

Evidence of custom.— When a constable neglected to indorse on a writ the date it was delivered to him, and none of the officers through whose hands it passed could state this from memory, it was competent to show the custom prevailing in the justice's office with reference to the issuance and delivery of writs, for the purpose of establishing that a writ was issued before a named date. Heman *v.* Larkin, 99 Mo. App. 294, 73 S. W. 218.

29. Cornell *v.* Moulton, 3 Den. (N. Y.) 12.

30. *Iowa.*— Bain *v.* Galyear, 10 Iowa 585; Milbourn *v.* Fouts, 4 Greene 346. *Compare* Little *v.* Devendorf, 109 Iowa 47, 79 N. W. 476, to the effect that the exact date of the receipt of the notice is of no importance.

Michigan.— Shaw *v.* Moser, 3 Mich. 71; Campau *v.* Fairbanks, 1 Mich. 151.

Missouri.— McCloon *v.* Beattie, 46 Mo. 391; Trimble *v.* Elkin, 88 Mo. App. 229.

New York.— Syracuse Molding Co. *v.* Squires, 61 Hun 48, 15 N. Y. Suppl. 321 [*reversing* 13 N. Y. Suppl. 547, 19 N. Y. Civ. Proc. 241, and *following* McMullin *v.* Mackey, 6 N. Y. Suppl. 885];Manning *v.* Johnson, 7 Barb. 457; Nichols *v.* Fanning, 20 Misc. 73, 45 N. Y. Suppl. 409; Brownley *v.* Smith, 2 Hill 517. *Compare* Foster *v.* Hazen, 12 Barb.

who made the service,[31] must be free from ambiguity,[32] and in some jurisdictions must be made on oath or affirmation.[33] Where actual personal service is had, a return "personally served," and stating the time of service, is sufficient;[34] but in case of substituted or constructive service, the return should show the facts which authorize such service,[35] and that the statutory requirements as to the manner of service have been complied with.[36] The return of service of summons on a corporation must show the manner of service, so that it shall appear that personal service was had on the proper officer or agent,[37] naming him.[38] Where a summons is issued against several defendants, a return showing proper service on one is sufficient, without negative additions explaining why it was not served on the others.[39]

3. DEFECTS AND OBJECTIONS, WAIVER, AND CURE. A justice of the peace acquires no jurisdiction where the process does not satisfy the statutory requirements,[40] or where the return of the summons is invalid.[41] But as a rule defects and irregu-

547, in which the return was only collaterally before the court. And see Beach *v.* Baker, 25 N. Y. App. Div. 9, 48 N. Y. Suppl. 1042.

Ohio.— Vandement *v.* Trisler, 4 Ohio S. & C. Pl. Dec. 447, 4 Ohio N. P. 37.

Oregon.— Belfils *v.* Flint, 15 Oreg. 158, 14 Pac. 295.

Pennsylvania.— Brennan *v.* Miner's Mills Borough, 10 Pa. Dist. 64; Com. *v.* Savery, 1 Chest. Co. Rep. 179; Philadelphia *v.* Cathcart, 10 Phila. 103.

South Carolina.— State *v.* Cohen, 13 S. C. 198.

See 31 Cent. Dig. tit. "Justices of the Peace," § 263.

Presumption in favor of return.— An officer is not required to state in his return what in particular he did to constitute the service he returns, but it will be presumed that he did all the law requires. Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520.

The return affords presumptive evidence that the person certifying the service as constable was a constable of the proper county. Potter *v.* Whittaker, 27 How. Pr. (N. Y.) 10.

Return on warrant against steamboat.— The return of a constable on a warrant against a steamboat, showing that he executed it by going on board the boat and reading the warrant to the clerk, and by finding the sheriff in charge of her, is sufficient. Parkinson *v.* The Robert Fulton, 15 Mo. 258; The Eureka *v.* Noel, 14 Mo. 513.

31. Reno *v.* Pinder, 24 Barb. (N. Y.) 423.

Official designation.— A return merely signed with the name of a person without official designation, although not showing that he had authority to make the service, does not show want of authority, and the presumption is in favor of the judgment. Foust *v.* Warren, (Tex. Civ. App. 1903) 72 S. W. 404.

32. Sevitsky *v.* Clifford, 28 Pa. Co. Ct. 445.

33. Garey *v.* Redmond, 12 Pa. Dist. 580; Adler *v.* Patrick, 1 Chest. Co. Rep. (Pa.) 465; Starch *v.* Snyder, 1 Leg. Rec. (Pa.) 172.

Special officer need not verify return.— Winsor *v.* Goddard, 10 Kan. 625; Winsor *v.* Cole, 10 Kan. 620; Betts *v.* Stevens, 6 Wis. 398.

34. Tuttle *v.* Hunt, 2 Cow. (N. Y.) 436; Legg *v.* Stillman, 2 Cow. (N. Y.) 418. *Compare* Wood *v.* Callaway, 119 Ga. 801, 47 S. E. 178.

The return need not state that either party was a resident of the county in which the action was brought, under N. Y. Code Civ. Proc. § 2869, subd. 3. Syracuse Molding Co. *v.* Squires, 61 Hun (N. Y.) 48, 15 N. Y. Suppl. 321.

35. Sperry *v.* Reynolds, 65 N. Y. 179, return must show that defendant could not be found. But see Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540.

36. McCloon *v.* Beattie, 46 Mo. 391; Deisher *v.* Flannery, 27 Pa. Co. Ct. 286; Bennett *v.* Roles, 1 Just. L. Rep. (Pa.) 152; McDonald *v.* Central Dist., etc., Co., 1 Just. L. Rep. (Pa.) 107; Miller *v.* Pesto, 1 Just. L. Rep. (Pa.) 17; Bixby *v.* Mangan, 11 Kulp (Pa.) 147; Yaple's Estate, 9 Kulp (Pa.) 141; Yeich *v.* Peterson, 2 Leg. Chron. (Pa.) 269; Chestnut St. Nat. Bank *v.* Howarth, 13 York Leg. Rec. (Pa.) 108. See also Henneman *v.* Thomson, 8 S. C. 115. But see Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540.

Return need not name person with whom summons was left.— Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540; Purnell *v.* McBreen, 23 Pa. Co. Ct. 442. But see Chestnut St. Nat. Bank *v.* Howarth, 13 York Leg. Rec. (Pa.) 108.

Return of substituted service held sufficient see Leighbold *v.* Bulford, 11 Pa. Dist. 232.

37. Hoffman *v.* Alabama Distillery, etc., Co., 124 Ala. 542, 27 So. 485 [*citing* Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; Oxanna Bldg. Assoc. *v.* Agee, 99 Ala. 571, 13 So. 279; Manhattan F. Ins. Co. *v.* Fowler, 76 Ala. 372]; Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713.

38. Singer *v.* Singer Mfg. Co., 2 Pa. Co. Ct. 578.

39. Fogg *v.* Child, 13 Barb. (N. Y.) 246.

40. Milbourn *v.* Touts, 4 Greene (Iowa) 346; Willins *v.* Wheeler, 28 Barb. (N. Y.) 669.

41. Segar *v.* Muskegon Shingle, etc., Co., 81 Mich. 344, 45 N. W. 982. *Compare* Reno

larities in process issued from a justice's court or in its service or return do not render the writ void, but voidable;[42] and defendant, in order to avail himself of them, must appear before the justice and there make objection.[43] Defects which go to the jurisdiction over the subject-matter cannot be cured,[44] but those which go only to the jurisdiction over the person are subject to waiver by the party.[45] Such waiver may be made by defendant's appearing[46] and obtaining a continuance,[47] by his objecting to the sufficiency of the declaration,[48] by his pleading to the merits and going to trial,[49] or by his taking an appeal from the justice's judgment.[50] Defects and irregularities may also be cured by a written acceptance of service;[51] and where the justice overrules a motion to dismiss for want of sufficient service, but continues the cause, the continuance gives defendant sufficient notice of the pendency of the suit, and he is bound to take notice of the subsequent action of the court therein,[52] and is not entitled, on appeal from a judgment by default, to have the case dismissed on renewal of his motion.[53]

4. AMENDMENT OR ALTERATION. If a justice of the peace has jurisdiction of the parties and of the subject-matter,[54] defects or irregularities in the summons may be

v. Pinder, 24 Barb. (N. Y.) 423 [*reversed* in 20 N. Y. 298, holding that the return was sufficient].

42. Webster v. Daniel, 47 Ark. 131, 14 S. W. 550; McCabe v. Payne, 37 Ark. 450; Friend v. Green, 43 Kan. 167, 23 Pac. 93; Martin v. Lindstrom, 73 Minn. 121, 75 N. W. 1038. See also Ingraham v. Leland, 19 Vt. 304; June v. Conant, 17 Vt. 656.

Failure to prove publication, in the form prescribed by law, of a warning order to appear before a justice cannot be taken advantage of in a collateral proceeding. Webster v. Daniel, 47 Ark. 131, 14 S. W. 550.

43. Lindsay v. Tansley, 18 N. Y. Suppl. 317.

Mode of objection. — Where process has been defectively served, defendant cannot come into court and by plea or answer set up such defect or want of service to defeat the action, but may by affidavit show the error and ask a dismissal of the proceedings; and if the justice disregards his objection, he may, on appeal, have a review of the question and obtain the relief denied him. Waring v. McKinley, 62 Barb. (N. Y.) 612.

Objection must be taken before judgment. — Nichols v. Smith, 26 N. H. 298; Haulenbeck v. Gillies, 2 Hilt. (N. Y.) 238.

44. Griswold v. Nichols, 111 Wis. 344, 87 N. W. 300 [*citing* Detroit Safe Co. v. Kelly, 78 Wis. 134, 47 N. W. 187]. See also Leathers v. Morris, 101 N. C. 184, 7 S. E. 783.

45. Griswold v. Nichols, 111 Wis. 344, 87 N. W. 300 [*following* Krueger v. Pierce, 37 Wis. 269; Lowe v. Stringham, 14 Wis. 222, and *distinguishing* Detroit Safe Co. v. Kelly, 78 Wis. 134, 47 N. W. 187; Steen v. Norton, 45 Wis. 412]. See also Gilbert-Arnold Land Co. v. O'Hare, 93 Wis. 194, 67 N. W. 38; Bell v. Olmstead, 18 Wis. 69.

46. See *infra*, IV, F, 1, b, (II), (D).

47. Thayer v. Dove, 8 Blackf. (Ind.) 567.

48. Stevens v. Harris, 99 Mich. 230, 58 N. W. 230.

49. *Alabama.*— Hamner v. Holman, 116 Ala. 368, 22 So. 286.

Iowa.— Houston v. Walcott, 1 Iowa 86.

Michigan.— Slattery v. Hilliker, 39 Mich. 573.

Minnesota.— McKee v. Metraw, 31 Minn. 429, 18 N. W. 148.

New York.— Bray v. Andreas, 1 E. D. Smith 387; Leggett v. Raymond, 6 Hill 639. *Compare* Belden v. New York, etc., R. Co., 15 How. Pr. 17.

North Carolina.— Cherry v. Lilly, 113 N. C. 26, 18 S. E. 76.

Texas.— Fulton v. Thomas, 2 Tex. App. Civ. Cas. § 243.

West Virginia.— Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716.

See 31 Cent. Dig. tit. "Justices of the Peace," § 264.

Matter in abatement must be pleaded at the first appearance before the justice, or it will be regarded as waived. Vermont University v. Joslyn, 21 Vt. 52.

50. Paul v. Rooks, 16 Colo. App. 44, 63 Pac. 711; Shilling v. Reagan, 19 Mont. 508, 48 Pac. 1109 (appeal from order overruling motion to set aside judgment); Silley v. Burt, 21 Pa. Super. Ct. 618. And see *infra*, V, A, 7, c.

51. Benson v. Carrier, 28 S. C. 119, 5 S. E. 272. But *compare* Myers v. Stauffer, 5 Pa. Co. Ct. 657; Fulmer v. Kinney, 5 Pa. Co. Ct. 426.

52. Michigan Southern, etc., R. Co. v. Shannon, 13 Ind. 171.

53. Toledo, etc., R. Co. v. Talbert, 23 Ind. 438.

54. Hart v. Waitt, 3 Allen (Mass.) 532; McIniffe v. Wheelock, 1 Gray (Mass.) 600; Chadwick v. Navel, 33 Misc. (N. Y.) 683, 68 N. Y. Suppl. 1110; McGill v. Weill, 19 N. Y. Civ. Proc. 43; Hoffman v. Fish, 18 Abb. Pr. (N. Y.) 76; Baker v. Brem, 126 N. C. 367, 35 S. E. 630.

Where a summons issues against defendant by a wrong name, and he does not appear, the judgment against him is void, although before its rendition the summons was so amended as to give his true name. McGill v. Weill, 19 N. Y. Civ. Proc. 43. See also Hoffman v. Fish, 18 Abb. Pr. (N. Y.) 76.

amended[55] at any time before final judgment,[56] provided the cause of action is not thereby changed.[57] So too the officer may be permitted, on proper showing and notice, either before or after judgment, to amend his return to the summons according to the facts.[58] Where it is plain that if the summons by which a justice obtained jurisdiction has been tampered with, the burden is on plaintiff to explain and defend it;[59] but where there is a conflict of evidence as to whether an interlineation in a summons was made before or after service, it will be presumed to have been made before service.[60]

F. Appearance[61] and Representation — 1. Appearance — a. What Constitutes. An appearance in a justice's court may be either general or special. A special appearance is one made for the purpose of challenging the jurisdiction of the justice, and must be limited to that purpose;[62] any other appearance is

Where the service of a summons was a nullity because the summons did not show that it had been directed to the town constable who served it as constable of such town, the justice had no authority to allow such summons to be amended to show that it had been so directed, since an amendment cannot be made to confer jurisdiction. Baker *v.* Brem, 126 N. C. 367, 35 S. E. 630.

55. *Georgia.*— Telford *v.* Coggins, 76 Ga. 683; Woods *v.* Johnson, 58 Ga. 138.

Illinois.— Wadhams *v.* Hotchkiss, 80 Ill. 437.

Massachusetts.— Lapham *v.* Locke, 103 Mass. 555; Hart *v.* Waitt, 3 Allen 532; McIniffe *v.* Wheelock, 1 Gray 600.

New Jersey.— Abrahams *v.* Jacoby, 69 N. J. L. 178, 54 Atl. 525 [*distinguishing* Dittmar Powder Mfg. Co. *v.* Leon, 42 N. J. L. 540; Elbertson *v.* Richards, 42 N. J. L. 69]; Drake *v.* Berry, 42 N. J. L. 60.

New York.— Bradbury *v.* Van Nostrand, 45 Barb. 194; Snyder *v.* Schram, 59 How. Pr. 404; Arnold *v.* Maltby, 4 Den. 498; Brace *v.* Benson, 10 Wend. 213.

North Carolina.— Cox *v.* Grisham, 113 N. C. 279, 18 S. E. 212; Singer Mfg. Co. *v.* Barrett, 95 N. C. 36.

Pennsylvania.— Albert Lewis Lumber, etc., Co. *v.* Ruggles, 2 Pa. Dist. 34.

West Virginia.— Meighen *v.* Williams, 50 W. Va. 65, 40 S. E. 332.

See 31 Cent. Dig. tit. "Justices of the Peace," § 265.

Request for amendment need not be made in writing.— Wadhams *v.* Hotchkiss, 80 Ill. 437.

Amendment by officer.— Under Mich. Comp. Laws, § 421, prohibiting any sheriff from drawing or filling up any writ, a sheriff's alteration of the teste and return-day of a justice's summons, although by the justice's authority, renders the writ void. Garrison *v.* Hoyt, 25 Mich. 509.

56. King *v.* Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518 [citing Foster *v.* Alden, 21 Mich. 507]. See also Dolbear *v.* Hancock, 19 Vt. 388

57. Phillips *v.* Deveny, 47 W. Va. 653, 35 S. E. 821, holding that inserting the names of additional parties as joint plaintiffs with the party who brought the action introduces a new cause of action, and cannot be done, on motion, over the objection of defendant. See also Hallmark *v.* Hopper, 119 Ala. 78, 24 So. 563, 72 Am. St. Rep. 900, to the effect that the rule against amendments which effect a change of the sole party plaintiff applies to amendments before a justice.

58. *Georgia.*— Freeman *v.* Carhart, 17 Ga. 348.

Missouri.— Martin *v.* Castle, 182 Mo. 216, 81 S. W. 426; Daniel *v.* Atkins, 66 Mo. App. 342; Cassidy Bros. Commission Co. *v.* Estep, 63 Mo. App. 540. *Compare* Mitchell *v.* Shaw, 53 Mo. App. 652, to the effect that a town marshal, appointed as special constable to serve a writ, cannot amend his return as special constable, to show that he acted as town marshal.

Nebraska.— Newby *v.* Miller, 5 Nebr. (Unoff.) 468, 98 N. W. 1066, holding, however, that it was error to allow defendant to introduce in evidence a docket entry of the justice showing leave to the constable to amend his return to a subpœna nearly two years after judgment was rendered and without notice.

New York.— Perry *v.* Tynen, 22 Barb. 137.

Wisconsin.— Bacon *v.* Bassett, 19 Wis. 45.

See 31 Cent. Dig. tit. "Justices of the Peace," § 265.

Service of notice on improper person.— After judgment, service of notice of motion to amend the return, made on a person not specially authorized by defendant to be his attorney or agent in reference to such judgment, did not give the justice jurisdiction of the motion. Clark *v.* McGregor, 55 Mich. 412, 21 N. W. 866.

59. Hummell *v.* Hoffecker, 5 Lack. Leg. N. (Pa.) 162.

60. Fitzgerald *v.* Campbell, 10 Pa. Co. Ct. 396.

61. See, generally, Appearances.

62. Downing *v.* Gow, etc., Inv. Co., 53 Kan. 246, 36 Pac. 335 (appearance to contest a summons and the service, and to dismiss the action); Shaw *v.* Rowland, 32 Kan. 154, 4 Pac. 146 (appearance after judgment by motion to set aside as void for want of service); Smith *v.* Simpson, 80 Mo. 634 (taking out subpœnas for witnesses and moving for security for costs preliminary to a motion to dismiss for want of jurisdiction does not constitute a general appearance); Stevens *v.* Benton, 39 How. Pr. (N. Y.) 13 (appearance for purpose of objecting to sufficiency of affidavit for a short summons is not a general appearance).

general.[63] But the mere corporal presence of defendant or his agent at the time and place of trial is not sufficient to constitute an appearance;[64] and where defendant in a civil action is brought before the justice under warrant of arrest, he does not voluntarily appear to the action.[65]

b. Operation and Effect — (i) *In General.* A special appearance for the purpose of contesting the jurisdiction of the justice, and restricted to that purpose, does not give the justice jurisdiction over the person of defendant,[66] or authorize the consideration of any other questions.[67] But by a general appearance defendant waives all objections to the justice's jurisdiction over his person and no such question can be subsequently raised;[68] and where, after special appearance and the denial of a motion to dismiss on the ground that the justice had no jurisdiction, a defendant appears generally, without further objection or saving an exception, he thereby confers jurisdiction upon both the justice and the

63. *Colorado.*— Paul *v.* Rooks, (App. 1901) 63 Pac. 711, motion by defendant on return-day to dismiss attachment.

Delaware.— Davis *v.* Rees, 3 Harr. 490, holding that where defendant asked a postponement, and by letter put in a plea of the general issue but declined to appear in person this was a general appearance.

Indiana.— Kirkpatrick Constr. Co. *v.* Central Electric Co., 159 Ind. 639, 65 N. E. 913 [*following* Smith *v.* Jeffries, 25 Ind. 376; Cox *v.* Pruitt, 25 Ind. 90], an agreement for continuance constitutes a general appearance.

Michigan.— Wagner *v.* Kellogg, 92 Mich. 616, 52 N. W. 1017, written request by plaintiff for continuance constitutes appearance on his part.

Missouri.— Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743, an appeal amounts to a general appearance.

Nebraska.— Dryfus *v.* Moline, etc., Co., 43 Nebr. 233, 61 N. W. 599, motion for retaxation of costs.

Oregon.— McAnish *v.* Grant, 44 Oreg. 57, 74 Pac. 396, filing answer to complaint.

See 31 Cent. Dig. tit. "Justices of the Peace," § 266.

An entry that the "parties appeared" in a justice's docket means, in the absence of any qualification, a general appearance. Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854.

64. McCoy *v.* Bell, 1 Wash. 504, 20 Pac. 595, construing Wash. Code, §§ 72, 1755, and holding that defendant must, in person or by attorney, give notice of his appearance within an hour of the time set for trial.

65. Ramsay *v.* Robinson, 86 Hun (N. Y.) 511, 33 N. Y. Suppl. 910.

66. Sinsabaugh *v.* Dun, 114 Ill. App. 523 [*affirmed* in 214 Ill. 70, 73 N. E. 390]; Monroe *v.* Heintzman, 46 Mich. 12, 8 N. W. 571; McLean *v.* Isbell, 44 Mich. 129, 6 N. W. 210; Higgins *v.* Beveridge, 35 Minn. 285, 28 N. W. 506.

67. Wideman *v.* Pruitt, 52 S. C. 84, 29 S. E. 405.

68. *Arkansas.*— Wheeler, etc., Manufacturing Co. *v.* Donahoe, 49 Ark. 318, 5 S. W. 342; Sykes *v.* Laferry, 25 Ark. 99.

Indiana.— Day *v.* Henry, 104 Ind. 324, 4 N. E. 44; Vanschoiack *v.* Farrow, 25 Ind. 310.

Michigan.— Ramsby *v.* Bigler, 129 Mich. 570, 89 N. W. 344 [*following* Gott *v.* Brigham, 41 Mich. 227, 2 N. W. 5; Grand Rapids, etc., R. Co. *v.* Gray, 38 Mich. 461]; Stevens *v.* Harris, 99 Mich. 230, 58 N. W. 230. *Compare* Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034, to the effect that a general appearance in attachment cannot be considered a submission to the jurisdiction, when taken in connection with defendant's motion to dismiss the writ for want of proper service.

Minnesota.— Anderson *v.* Hanson, 28 Minn. 400, 10 N. W. 429, in which the voluntary appearance of the parties on the return-day before the successor of the justice who issued the summons was held to confer jurisdiction, under Gen. St. (1878) c. 65, § 10.

Missouri.— Bohn *v.* Devlin, 28 Mo. 319; Miller-Arthur Drug Co. *v.* Curtis, (App. 1902) 67 S. W. 712; Abington *v.* Steinberg, 86 Mo. App. 639; Livingston *v.* Allen, 80 Mo. App. 521 [*distinguishing* Smith v. Simpson, 80 Mo. 634]; State *v.* Hopper, 72 Mo. App. 171; Ashby *v.* Holmes, 68 Mo. App. 23; Rechnitzer *v.* Missouri, etc., R. Co., 60 Mo. App. 409.

Nebraska.— Dryfus *v.* Moline, etc., Co., 43 Nebr. 233, 61 N. W. 599; Leake *v.* Gallogly, 34 Nebr. 857, 52 N. W. 824.

New York.— Stevens *v.* Benton, 2 Lans. 156; Paulding *v.* Hudson Mfg. Co., 3 Code Rep. 223.

North Dakota.— Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926.

Ohio.— Pittsburg, etc., R. Co. *v.* Fleming, 30 Ohio St. 480; Miller *v.* Creighton, 7 Ohio Dec. (Reprint) 602, 4 Cinc. L. Bul. 139.

South Carolina.— Bird *v.* Sullivan, 58 S. C. 50, 36 S. E. 494.

Utah.— Kuhn *v.* Mount, 13 Utah 108, 44 Pac. 1036.

Wisconsin.— Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854.

See 31 Cent. Dig. tit. "Justices of the Peace," § 267.

But see Nelson *v.* Campbell, 1 Wash. 261, 24 Pac. 539, in which defendant appeared and asked for a continuance for one day, which was granted, and on the next day he appeared specially and objected to the jurisdiction, and it was held that his appearance had not conferred jurisdiction.

Where a justice had lost jurisdiction, but defendant, having been arrested and brought

appellate court.[69] Where, however, the justice has no jurisdiction of the subject-matter, a general appearance by defendant cannot confer jurisdiction upon him;[70] and the same is true where the justice is forbidden by law to act,[71] but not where he is merely disqualified by reason of interest[72] or relationship to one of the parties.[73] Where a cause is discontinued by reason of the absence of the justice, the appearance of the parties before another justice cannot confer jurisdiction upon him, unless it appears by the return that the first justice was absent from or unable to attend at his usual place of holding court.[74]

(II) *Waiver of Defects* — (A) *In General.* Where the justice has jurisdiction of the subject-matter, a general appearance by the parties without objection is a waiver of defects and irregularities in the proceedings;[75] but illegality in the justice's proceedings is not waived by special appearance to object to the jurisdiction, nor by answer and defense after the objection is overruled.[76]

(B) *Objection to Jurisdiction Over Amount Involved.* A justice of the peace does not acquire jurisdiction of an action, in which a greater sum is claimed than he has jurisdiction of, by defendant's making a general appearance.[77] But where an attachment is issued by a justice for an amount in excess of his jurisdiction, and defendant appears and makes a defense on the merits, the rest of the proceedings will be allowed to stand, although the attachment will be quashed.[78]

(C) *Objection to Place of Bringing Suit.* In some jurisdictions a defendant by appearing generally waives any objection to the place of bringing suit,[79] and the same is true where he appears specially to object to the jurisdiction on the

into court, then appeared, and asked that the cause be continued, jurisdiction was restored. Holz *v.* Rediske, 119 Wis. 563, 97 N. W. 162.

69. Plano Mfg. Co. *v.* Nordstrom, 63 Nebr. 123, 88 N. W. 164; Chandler *v.* Hill, 13 S. D. 176, 82 N. W. 397.

70. Breeding *v.* Adams, 2 Marv. (Del.) 378, 43 Atl. 251; White *v.* Missouri, etc., R. Co., 72 Mo. App. 400 [*citing* Fields *v.* Maloney, 78 Mo. 172]; Dailey *v.* Doe, 3 Fed. 903; The G. H. Montague, 10 Fed. Cas. No. 5,377.

71. Clayton *v.* Per Dun, 13 Johns. (N. Y.) 218 (justice a tavern-keeper); Low *v.* Rice, 8 Johns. (N. Y.) 409 (justice living in house where tavern was kept).

72. Howe *v.* Hosford, 8 Vt. 220. See *supra*, III, I, 2.

73. Austin *v.* Smith, 23 Vt. 704. See *supra*, III, I, 3.

74. Reed *v.* Warth, 2 Hilt. (N. Y.) 281.

75. *Delaware.*— Lynch *v.* Hill, 4 Harr. 312.

District of Columbia.— Costello *v.* Palmer, 20 App. Cas. 210.

Illinois.— Clifford *v.* Eagle, 35 Ill. 444; Barker *v.* Smith, 90 Ill. App. 595.

Indiana.— Smith *v.* Emerson, 16 Ind. 355; State *v.* Martin, 3 Ind. App. 20, 29 N. E. 164.

Iowa.— Herkimer *v.* Keeler, 109 Iowa 680, 81 N. W. 178; Rahn *v.* Greer, 37 Iowa 627.

Kansas.— Scott *v.* Kreamer, 37 Kan. 753, 16 Pac. 123.

Michigan.— Smith *v.* St. Joseph Cir. Judge, 46 Mich. 338, 9 N. W. 440.

Minnesota.— Steinhart *v.* Pitcher, 20 Minn. 102.

Missouri.— Hendrickson *v.* Trenton Nat. Bank, 81 Mo. App. 332; Building, etc., Co. *v.* Huber, 42 Mo. App. 432; State *v.* Boettger, 39 Mo. App. 684; Voight *v.* Avery, 14 Mo. 48. *Compare* Leith *v.* Shingleton, 42 Mo. App. 449, to the effect that a justice having no authority to set aside a judgment not by default, appearance at the new trial will not confer jurisdiction.

Nebraska.— Dawson *v.* Welsh, 25 Nebr. 626, 41 N. W. 549.

New York.— Scranton *v.* Levy, 1 Hilt. 261, 4 Abb. Pr. 21; Stoddard *v.* Holmes, 1 Cow. 245. *Compare* Ressequie *v.* Brownson, 4 Barb. 541.

Ohio.— Gaiser *v.* Heim, 8 Ohio Cir. Ct. 120, 4 Ohio Cir. Dec. 378.

Pennsylvania.— Quay *v.* Kuckner, 2 Pa. L. J. Rep. 79, 3 Pa. L. J. 307; Adams *v.* Com., 1 Woodw. 417.

South Carolina.— Baker *v.* Irvine, 62 S. C. 293, 40 S. E. 672.

Texas.— McHam *v.* Gentry, 33 Tex. 441; Mabry *v.* Little, 19 Tex. 337.

West Virginia.— Blair *v.* Henderson, 49 W. Va. 282, 38 S. E. 552.

Wisconsin.— Anderson *v.* Morris, 12 Wis. 689.

See 31 Cent. Dig. tit. "Justices of the Peace," § 268.

76. Dial *v.* Olsen, 4 Ariz. 293, 36 Pac. 175.

77. Hynds *v.* Fay, 70 Iowa 433, 30 N. W. 683. But *compare* Mabry *v.* Little, 19 Tex. 337, in which the holder of a note for more than one hundred dollars, in order to sue in a justice's court, relinquished the excess, and defendant appeared without objection; and it was held that by his appearance and submission he waived objection to the jurisdiction.

78. Fair *v.* Hamlin, 9 Pa. Co. Ct. 8.

79. *Colorado.*— Denver, etc., R. Co. *v.* Roberts, 6 Colo. 333.

Indiana.— Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106.

Massachusetts.— Cahoon *v.* Harlow, 7 Allen 151.

ground that he has not been served with summons.[80] Under the statutes of other states, however, an objection to the place of bringing suit is not waived by a general appearance.[81]

(D) *Waiver of Process or of Defects Therein.* A general appearance by the defendant in a justice's court, without first objecting to the justice's jurisdiction, will not only waive any defects in the process or notice,[82] or in the service[83]

Ohio.— Mack *v.* Stephens, 7 Ohio Dec. (Reprint) 92, 1 Cinc. L. Bul. 104.

Texas.— McDonald *v.* Blount, 2 Tex. App. Civ. Cas. § 344.

See 31 Cent. Dig. tit. "Justices of the Peace," § 271.

80. Boulder County School Dist. No. 38 *v.* Waters, 20 Colo. App. 106, 77 Pac. 255.

81. Boyer *v.* Moore, 42 Iowa 544; Chapman *v.* Morgan, 2 Greene (Iowa) 374; Heggie *v.* Stone, 70 Miss. 39, 12 So. 253; Rocheport Bank *v.* Doak, 75 Mo. App. 332; Cornell *v.* Smith, 2 Sandf. (N. Y.) 290. But *compare* Post *v.* Brownell, 36 Iowa 497, holding that after appearing, and moving for and obtaining a change of venue to another justice, it is too late for defendant to object to the jurisdiction on the ground that suit was brought in another county than that of his residence.

82. *Delaware.*— Bishop *v.* Carpenter, 1 Houst. 526.

Illinois.— McManus *v.* McDonough, 107 Ill. 95; Bliss *v.* Harris, 70 Ill. 343; Ewbanks *v.* Ashley, 36 Ill. 177.

Indiana.— Sargent *v.* Flaid, 90 Ind. 501; Smith *v.* Emerson, 16 Ind. 355; Dudley *v.* Fisher, 7 Blackf. 553; Vermilya *v.* Davis, 7 Blackf. 158; Swift *v.* Woods, 5 Blackf. 97.

Iowa.— Hedinger *v.* Silsbee, 2 Greene 363.

Mississippi.— Armitage *v.* Rector, 62 Miss. 600.

Missouri.— Peters *v.* St. Louis, etc., R. Co., 59 Mo. 406; Griffin *v.* Van Meter, 53 Mo. 430. *Compare* Williams *v.* Bower, 26 Mo. 601, a case of special appearance.

Nevada.— Armstrong *v.* Paul, 1 Nev. 134.

New Jersey.— Palmer *v.* Sanders, 51 N. J. L. 408, 17 Atl. 1084; Drake *v.* Berry, 42 N. J. L. 60; Foulkes *v.* Young, 21 N. J. L. 438.

New York.— Clapp *v.* Graves, 26 N. Y. 418; Hogan *v.* Baker, 2 E. D. Smith 22; Andrews *v.* Thorp, 1 E. D. Smith 615; Heilner *v.* Barras, 3 Code Rep. 17; Day *v.* Wilber, 2 Cai. 134.

North Dakota.— Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926.

Pennsylvania.— Stroup *v.* McClure, 4 Yeates 523; Gallagher *v.* Maclean, 7 Pa. Super. Ct. 408; Myers *v.* Stauffer, 5 Pa. Co. Ct. 657; Tuttle *v.* Sheridan, 5 Lanc. L. Rev. 1; McGinley *v.* McDonough, 3 Lanc. L. Rev. 202; Shannon *v.* Madden, 1 Phila. 254; Adams *v.* Com., 1 Woodw. 417. *Compare* Givens *v.* Miller, 62 Pa. St. 133.

South Carolina.— Rosamond *v.* Earle, 46 S. C. 9, 24 S. E. 44; Benson *v.* Carrier, 28 S. C. 119, 5 S. E. 272.

West Virginia.— Blair *v.* Henderson, 49 W. Va. 282, 38 S. E. 552; Weimer *v.* Rector, 43 W. Va. 735, 28 S. E. 716; Blankenship *v.* Kanawha, etc., R. Co., 43 W. Va. 135, 27 S. E. 355; Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

Wisconsin.— Fairfield *v.* Madison Mfg. Co., 38 Wis. 346.

See 31 Cent. Dig. tit. "Justices of the Peace," § 273.

Appearance on appeal as waiver of defects see *infra*, V, A, 7, c.

83. *Colorado.*— Colorado Cent. R. Co. *v.* Caldwell, 11 Colo. 545, 19 Pac. 542.

Illinois.— Reynolds *v.* Foster, 89 Ill. 257.

Iowa.— Church *v.* Crossman, 49 Iowa 444; Baker *v.* Kerr, 13 Iowa 384.

Kentucky.— Forsythe *v.* Huey, 74 S. W. 1088, 25 Ky. L. Rep. 147.

Massachusetts.— Briggs *v.* Humphrey, 1 Allen 371.

Michigan.— Fisher *v.* Hardwood Mfg. Co., 120 Mich. 490, 79 N. W. 693 [*distinguishing* Newbauer *v.* Newbauer, 112 Mich. 562, 70 N. W. 1104; Noyes *v.* Hillier, 65 Mich. 636, 32 N. W. 872]; Waldron *v.* Palmer, 104 Mich. 556, 62 N. W. 731; Olson *v.* Muskegon Cir. Judge, 49 Mich. 85, 13 N. W. 369.

Minnesota.— Steinhart *v.* Pitcher, 20 Minn. 102. See also Tyrrell *v.* Jones, 18 Minn. 312, where the defect in the service was held waived, although the appearance was special, but for the purpose of objecting to the jurisdiction on other grounds.

Missouri.— Fitterling *v.* Missouri Pac. R. Co., 79 Mo. 504; Gant *v.* Chicago, etc., R. Co., 79 Mo. 502; Smith *v.* Wineland, 21 Mo. App. 387.

Nebraska.— Keely Inst. *v.* Riggs, 5 Nebr. (Unoff.) 612, 99 N. W. 833.

New York.— Grafton *v.* Brigham, 70 Hun 131, 24 N. Y. Suppl. 54; Behan *v.* Phelps, 27 Misc. 718, 59 N. Y. Suppl. 713.

North Carolina.— Johnson v. Grand Fountain U. O. of T. R., 135 N. C. 385, 47 S. E. 463.

North Dakota.— Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926.

Ohio.— Shafer *v.* Hockheimer, 36 Ohio St. 215; Godfred *v.* Godfred, 30 Ohio St. 53.

Pennsylvania.— Gallagher *v.* Maclean, 193 Pa. St. 583, 45 Atl. 76 [*affirming* 7 Pa. Super. Ct. 408]; Weidenhamer *v.* Bertle, 103 Pa. St. 448; Rickets *v.* Goldstein, 24 Pa. Co. Ct. 1; Brensinger *v.* Eachus, 8 Del. Co. 457. *Compare* as to defective return of service on corporation Emmensite Gun, etc., Co. *v.* Pool, 6 Pa. Dist. 47.

West Virginia.— Chesapeake, etc., R. Co. *v.* Wright, 50 W. Va. 653, 41 S. E. 147; Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

Wisconsin.— Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300 [*following* Krueger *v.*

or return thereof, but it will also dispense with the necessity of process or notice.[84]

(E) *Irregular Adjournments.* Where a case is illegally or irregularly continued, an appearance by defendant at the time and place of trial for the purpose of protesting against such continuance is no waiver of the irregularity.[85] But, even though a justice has lost jurisdiction of a cause by irregularly continuing it, a subsequent general appearance waives the irregularity and reinstates the cause.[86] Where, however, objection is made in due time, but overruled, a defendant does not waive it by subsequently appearing and defending on the merits.[87]

c. Withdrawal, Striking Out, and Failure to Appear. A justice of the peace cannot render judgment based alone on defendant's failure to appear, but must proceed to hear plaintiff's proofs and determine the cause as though issue were joined.[88] On the other hand the non-appearance of plaintiff or his authorized agent in a suit on a specialty is no ground for reversing a judgment in his favor.[89] Where defendant withdraws his appearance, the justice is not ousted of jurisdic-

Pierce, 37 Wis. 269; Lowe *v.* Stringham, 14 Wis. 222]; Fairfield *v.* Madison Mfg. Co., 38 Wis. 346; Heeron *v.* Beckwith, 1 Wis. 17.

See 31 Cent. Dig. tit. "Justices of the Peace," § 274.

An entry of bail for stay of execution has been held equivalent to an appearance, so as to cure an irregular service of the summons. Wassal *v.* Mangan, 13 Pa. Dist. 738, 9 Del. Co. 192, 2 Just. L. Rep. 203, 12 Luz. Leg. Reg. 60.

Special appearance.—An appearance, after judgment, by motion to set aside such judgment as void for want of service, does not waive defects of service. Shaw *v.* Rowland, 32 Kan. 154, 4 Pac. 146.

Answer insisting on want of jurisdiction.—A defendant who appears and moves to dismiss, on the ground that the service was wholly illegal, does not make a general appearance, and waive his rights, by filing an answer, after his motion is denied, in which he insists that the court has no jurisdiction, and by taking part in the trial. Perkins *v.* Meilicke, 66 Minn. 409, 69 N. W. 220.

84. *Arkansas.*— Jester *v.* Hopper, 13 Ark. 43; Woolford *v.* Howell, 2 Ark. 1.

Colorado.— Paul *v.* Rooks, 16 Colo. App. 44, 63 Pac. 711.

Georgia.— See Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921.

Illinois.— Reynolds *v.* Foster, 89 Ill. 257; Hohmann *v.* Eiterman, 83 Ill. 92; Bliss *v.* Harris, 70 Ill. 343; Fink *v.* Disbrow, 69 Ill. 76; McMurray *v.* Thede, 86 Ill. App. 555 [*citing* Wasson *v.* Cone, 86 Ill. 46]; Whitehead *v.* Jones, 71 Ill. App. 219; Udell *v.* Slocum, 56 Ill. App. 216.

Missouri.— Bonney *v.* Baldwin, 3 Mo. 49.

New York.— Conway *v.* Hitchins, 9 Barb. 378; Malone *v.* Clark, 2 Hill 657.

Wisconsin.— Heeron *v.* Beckwith, 1 Wis. 17.

See 31 Cent. Dig. tit. "Justices of the Peace." § 272.

A special appearance to contest a summons and service, and to dismiss the action, is not a waiver of service. Downing *v.* W. J. Gow, etc., Mortg. Inv. Co., 53 Kan. 246, 36 Pac. 335.

85. Martin *v.* Fales, 18 Me. 23, 36 Am. Dec. 693; Crisp *v.* Rice, 83 Hun (N. Y.) 465, 31 N. Y. Suppl. 908.

86. *Delaware.*— Figgs *v.* Mumford, 1 Pennew. 267, 40 Atl. 193 [*citing* Wright *v.* Hayes, 2 Harr. 389].

Michigan.— Gilmore *v.* Lichtenberg, 129 Mich. 275, 88 N. W. 629.

Minnesota.— Mead *v.* Sanders, 57 Minn. 108, 58 N. W. 683; Steinhart *v.* Pitcher, 20 Minn. 102.

New Jersey.— Hillman *v.* Hayden, 5 N. J. L. 575; Chance *v.* Chambers, 2 N. J. L. 384; Darlings *v.* Corey, 1 N. J. L. 200. *Compare* White *v.* Lippincot, 2 N. J. L. 266, in which, although defendant appeared, he took no part in the trial, and it was held that there was no waiver.

New York.— Tifft *v.* Culver, 3 Hill 180; Willoughby *v.* Carleton, 9 Johns. 136; Dunham *v.* Hayden, 7 Johns. 381; Palmer *v.* Green, 1 Johns. Cas. 101.

North Dakota.— Benoit *v.* Revoir, 8 N. D. 226, 77 N. W. 605.

Vermont.— Bryant *v.* Pember, 43 Vt. 599.

See 31 Cent. Dig. tit. "Justices of the Peace," § 275.

Conditional waiver.— Where defendant appeared and requested a further adjournment, and before his motion had been decided objected to any proceedings being had in the cause, as the prior adjournment had not been made in court or when the justice was present, it was held that this appearance did not cure the irregularity, but was a waiver of it, on condition that a further adjournment should be had, and, the condition not being granted, it did not become an absolute waiver or binding on defendant. Weeks *v.* Lyon, 18 Barb. (N. Y.) 530.

87. Hannaman *v.* Muckle, 20 N. Y. Civ. Proc. 296.

88. Blair *v.* Bartlett, 75 N. Y. 150, 31 Am. Rep. 455 [*citing* Armstrong *v.* Smith, 44 Barb. (N. Y.) 126; Cudner *v.* Dixon, 10 Johns. (N. Y.) 106]. And see *infra*, IV, O, 3, c.

89. Taylor *v.* Hogan, 23 Fed. Cas. No. 13,749*a*, Hempst. 16.

Failure to appear as ground for dismissal see *infra*, IV, L, 2, b.

tion over his person, although it was acquired by his appearance;[90] but if a justice has, at the request of an attorney, erased his docket entry of an attorney's appearance for defendant, he should not proceed in the case without notice to defendant, or to the attorney who assumed to appear for him.[91]

2. REPRESENTATION BY ATTORNEY OR AGENT. While it is held that attorneys at law, as such, are not recognized in justices' courts, and persons who appear there as attorneys are attorneys in fact merely, or agents,[92] the appearance of his authorized attorney is equivalent to the appearance of the party.[93] But the attorney's authority must, if questioned,[94] be proved;[95] and an appearance by an

90. White *v.* Thompson, 3 Oreg. 115.

91. King *v.* McKenzie, 51 Mich. 461, 16 N. W. 813.

92. Bowlsby *v.* Johnston, 13 N. J. L. 349; McWhorter *v.* Bloom, 3 N. J. L. 134; Sperry *v.* Reynolds, 65 N. Y. 179; Cutting *v.* Jessmer, 101 N. Y. App. Div. 283, 91 N. Y. Suppl. 658; Bailey *v.* Delaplaine, 3 N. Y. Super. Ct. 11; Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713; Barnes *v.* Sutliff, 24 Misc. (N. Y.) 526, 53 N. Y. Suppl. 974; Peck *v.* Hayes, 14 N. Y. Civ. Proc. 110. But see Smith *v.* Goodrich, 5 Johns. (N. Y.) 353.

The word "attorney," under the act creating justices' courts, and providing for appearance therein of a party in person or by "attorney," includes any one to whom a party may delegate his appearance. Hughes *v.* Mulvey, 1 Sandf. (N. Y.) 92.

It is a matter of sound discretion with a justice whether to permit a party to appear by an attorney in fact or not. Bowlsby *v.* Johnston, 13 N. J. L. 349. See also McWhorter *v.* Bloom, 3 N. J. L. 134, in which the question was as to admitting an unlicensed attorney to appear or not.

Adult defendant can appear by a minor.— Peck *v.* Hayes, 14 N. Y. Civ. Proc. 110.

N. Y. Jud. Act, § 52, which forbids a partner or clerk of a judge to practise before him "as attorney, solicitor, or counsel," is not applicable to a justice's court. Fox *v.* Jackson, 8 Barb. (N. Y.) 355.

93. Rahn *v.* Greer, 37 Iowa 627; Morgan *v.* Eldridge, 3 N. J. L. 658; Armstrong *v.* Craig, 18 Barb. (N. Y.) 387. *Compare* Covart *v.* Haskins, 39 Kan. 571, 18 Pac. 522, to the effect that where an attorney for defendants, assuming to appear specially, asks a continuance because defendants are absent, which is refused, and he leaves court, and the trial is proceeded with, defendants are "absent," under Kan. Comp. Laws (1879), c. 81, § 114, notwithstanding the action of their attorney.

94. Where the authority of an attorney is not questioned, a justice has a right to enter judgment on the supposition that the attorney who appeared on the return-day and consented to an adjournment was duly authorized to appear. Rickey *v.* Christie, 40 Hun (N. Y.) 278.

Failure to object is an admission of authority, under 2 N. Y. Rev. St. p. 233, § 45. Ackerman *v.* Finch. 15 Wend. (N. Y.) 652.

95. Clark *v.* McGregor, 55 Mich. 412, 21 N. W. 866; Westbrook *v.* Blood, 50 Mich. 443, 15 N. W. 544; Woodbridge *v.* Robinson, 49 Mich. 228, 13 N. W. 527; Sperry *v.* Reynolds, 65 N. Y. 179 [*reversing* 5 Lans. 407]; Bailey *v.* Delaplaine, 1 Sandf. (N. Y.) 11; Hirschfield *v.* Landman, 3 E. D. Smith (N. Y.) 208; Timmerman *v.* Morrison, 14 Johns. (N. Y.) 369. *Compare* Churchill *v.* Goldsmith, 64 Mich. 250, 31 N. W. 187; Carlisle *v.* Rankin, 17 Pa. Co. Ct. 319.

Where defendant does not appear, plaintiff's attorney must prove authority. Scofield *v.* Cahoon, 31 Mich. 206.

A parol authority is sufficient to authorize an attorney to appear for a party. Pixley *v.* Butts, 2 Cow. (N. Y.) 421; Tullock *v.* Cunningham, 1 Cow. (N. Y.) 256; Gaul *v.* Groat, 1 Cow. (N. Y.) 113.

Proof by oath of attorney sufficient.— Syracuse Moulding Co. *v.* Squires, 61 Hun (N. Y.) 48, 15 N. Y. Suppl. 321 [*reversing* 19 N. Y. Civ. Proc. 241]; Andrews *v.* Harrington, 19 Barb. (N. Y.) 343; Tullock *v.* Cunningham, 1 Cow. (N. Y.) 256. See also Hirshfield *v.* Landman, 3 E. D. Smith (N. Y.) 208; McMinn *v.* Richtmyer, 3 Hill (N. Y.) 236.

Filing a verified complaint, which recites that he is plaintiff's attorney, is sufficient proof of the attorney's authority, under N. Y. Code, § 2890. Barnes *v.* Sutliff, 24 Misc. (N. Y.) 526, 53 N. Y. Suppl. 974.

A client's letters containing a general authority to an attorney to take such steps as he may deem advisable for the recovery of a debt are sufficient to authorize the attorney to appear for the client. Bush *v.* Miller, 13 Barb. (N. Y.) 481.

Where the party appears at the time of the issue, it is sufficient evidence that issue was joined by his authority. Underhill *v.* Taylor, 2 Barb. (N. Y.) 348.

Presence of the manager of a corporation's store, who testifies as a witness, sufficiently establishes the authority of a person who appeared as the attorney of the corporation, although he does not swear to his authority. Crown Point Iron Co. *v.* Fitzgerald, 14 N. Y. St. 427.

Proof by justice's return.— An allegation of error that an attorney did not sufficiently prove his authority in writing to appear for plaintiff cannot be sustained, where the return of the justice shows that the attorney "not only proved his authority to appear orally, but produced, when sworn as a witness in said cause, other documentary proof." Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042.

unauthorized attorney will not conclude his pretended principal.[96] In an action concerning the property of a married woman the justice may appoint a next friend.[97]

3. Arrest and Bail. In some jurisdictions the appearance of a defendant to an action may under prescribed circumstances be secured by warrant of arrest;[98] but to authorize such process the existence of the facts and circumstances under which it may issue must be shown by oath or affidavit.[99] To be sufficient the warrant should name the parties,[1] and state a cause of action within the justice's jurisdiction, both as to nature and amount of the demand;[2] and where it issues under a penal statute, the omission of a reference to the statute will be fatal, even after verdict.[3] The warrant should command the officer to take defendant and bring him forthwith before the justice,[4] and may be served by a special constable appointed for the purpose.[5] A seal is not required.[6] As in actions in courts of record, a defendant arrested on a warrant issued by a justice of the peace is entitled to be discharged on giving a sufficient bond,[7] and justices can issue scire facias on recognizances of special bail taken before them, and give judgment for execution.[8]

G. Attachment[9] — 1. Nature and Grounds of Remedy. While the process of attachment in a justice's court is extraordinary, and can issue only on special application and on proof required by law,[10] the remedy is provisional, and an

A justice cannot decide on his own knowledge (Beaver *v.* Van Every, 2 Cow. (N. Y.) 429), or on information received out of court (Fanning *v.* Trowbridge, 5 Hill (N. Y.) 428), that an attorney has authority to appear. See also Rosekrans *v.* Van Antwerp, 4 Johns. (N. Y.) 228.

Authority cannot be shown by a letter of a third person requesting the attorney's appearance for a party, it nowhere appearing that such person had authority to make request. Westbrook *v.* Blood, 50 Mich. 443, 15 N. W. 544.

96. Allen *v.* Stone, 10 Barb. (N. Y.) 547; Miller *v.* Larmon, 38 How. Pr. (N. Y.) 417.

97. Walker *v.* Swayzee, 3 Abb. Pr. (N. Y.) 136.

98. McFarlan *v.* McJinsey, 6 Blackf. (Ind.) 65 (capias ad respondendum proper process, under the statute of 1838, where defendant was not a resident and householder in the county); Dearborn *v.* Kent, 14 Wend. (N. Y.) 183 (non-resident plaintiff entitled to proceed by warrant); Reed *v.* Gillet, 12 Johns. (N. Y.) 296 (justice may issue warrant, where defendant does not appear on the return of summons served by copy). But see England *v.* McDermott, 2 N. J. L. J. 238 (justice in Newark without jurisdiction to issue civil warrant of arrest); *Ex p.* Minor, 17 Fed. Cas. No. 9,643, 2 Cranch C. C. 404 (justice in Alexandria county, D. C., without power to issue capias, or warrant of arrest, for a small debt, before judgment).

Appearance under warrant of arrest not voluntary see *supra*, IV, F, 1, a.

Execution against person see *infra*, IV, Q, 16.

99. Whitney *v.* Shufelt, 1 Den. (N. Y.) 592; Bissell *v.* Hills, 3 Wend. (N. Y.) 389; Gold *v.* Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Terry *v.* Fargo, 10 Johns. (N. Y.) 114; Brown *v.* Hinchman, 9 Johns. (N. Y.) 75. But see McFarlan *v.* McJinsey, 6 Blackf. (Ind.) 85; Walker *v.* Cruikshank, 2 Hill (N. Y.) 296; Linnell *v.* Sutherland, 11 Wend. (N. Y.) 568.

1. Duffy *v.* Averitt, 27 N. C. 455; Hamilton *v.* Jervis, 19 N. C. 227.

A warrant in the firm-name of plaintiffs is not open to objection. Snow *v.* Ray, 2 Ala. 344.

2. Emmit *v.* McMillen, 35 N. C. 7; Duffy *v.* Averitt, 27 N. C. 455; Hamilton *v.* Jervis, 19 N. C. 227. See also Hamilton *v.* McCarty, 18 N. C. 226.

3. Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306.

A warrant in the form provided in criminal cases against a party for a forfeiture enforceable only in a civil action, although irregular, and liable to be set aside on motion, is not void, and the error will not deprive the justice of jurisdiction. Carter *v.* Dow, 16 Wis. 298.

4. Colvin *v.* Luther, 9 Cow. (N. Y.) 61.

When returnable.— A warrant in a civil case need not on its face be returnable on a certain day or at a certain place, but only within thirty days. Duffy *v.* Averitt, 27 N. C. 455.

5. Britton *v.* State, 54 Ind. 535, holding that the appointment need not be in writing, if it is noted on the justice's docket.

Direction to an "indifferent" person see Kelsey *v.* Parmelee, 15 Conn. 260.

6. Parker *v.* Gilreath, 29 N. C. 400; Duffy *v.* Averitt, 27 N. C. 455.

7. See, generally, Arrest; Bail.

8. Peyton *v.* Moseley, 3 T. B. Mon. (Ky.) 77.

9. See, generally, Attachment.

10. Barnes *v.* Harris, 4 N. Y. 374. See also Garrison *v.* Marshall, 44 How. Pr. (N. Y.) 193.

error of the justice in regard thereto is not cause for reversal, if the case was properly decided on the merits.[11] The grounds on which an attachment may be sued out are as a rule the same in a justice's court as in a court of record,[12] the most usual being that the debtor has departed or is about to depart from the state,[13] or from the county where he last resided, with intent to defraud his creditors or to avoid the service of any civil process, or that such debtor keeps himself concealed with like intent,[14] or that he is about to remove, assign, dispose of, or secrete any of his property (or has done so), with intent to defraud his creditors.[15] In some states a justice of the peace is not authorized to issue an attachment upon a claim before it is due.[16] In Minnesota an attachment may be issued in an action on contract in which the damages claimed are unliquidated.[17] In Pennsylvania attachment is an original process, and cannot issue, after a summons and judgment for the same debt, and an appeal therefrom.[18]

2. Property Subject to Attachment. Only goods and chattels, including money and bank-notes, are as a rule subject to attachment,[19] and where property has been levied upon by one constable it cannot be attached by another.[20]

3. Affidavit or Oath. The jurisdiction of a justice of the peace is dependent upon the oath or affidavit,[21] which must state one of the statutory grounds on which an attachment may issue,[22] and in some jurisdictions the facts and circum-

11. Rosenthal *v.* Grouse, 1 How. Pr. N. S. (N. Y.) 447.

12. See, generally, Attachment, 4 Cyc. 410 *et seq.*

Ida. Rev. St. (1887) § 4304 (Laws (1899), p. 250) does not apply to justices of the peace. Kimball *v.* Raymond, 9 Ida. 176, 72 Pac. 957.

Claim for "necessaries." — Coal to be used for domestic purposes is within Ohio Rev. St. § 6489, making a claim for "necessaries" a ground of attachment; and where, in an attachment issued under this section in a suit on a claim for coal furnished, it is stated that the coal furnished was "necessaries," it will be presumed that it was furnished for domestic purposes, unless it is made to appear that it was in fact to be used for other than domestic purposes, and therefore could not be classed as necessaries within the statute. Collins *v.* Bingham, 22 Ohio Cir. Ct. 533.

13. Davidson *v.* Martin, 33 Miss. 530; Goss *v.* Gowing, 5 Rich. (S. C.) 477; McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205.

14. Garrison *v.* Marshall, 44 How. Pr. (N. Y.) 193; Adkins *v.* Brewer, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; Goss *v.* Gowing, 5 Rich. (S. C.) 477; McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205.

Concealment to avoid arrest in the name of the people, as authorized by N. Y. Sess. Laws (1831), p. 396, § 4, to enable a creditor to collect of a debtor guilty of fraud, is not a ground of attachment, under 2 N. Y. Rev. St. p. 230, § 26, authorized when defendant conceals himself to avoid service of civil process. Lynde *v.* Montgomery, 15 Wend. (N. Y.) 461.

15. Howard *v.* Joice, 4 Leg. Gaz. (Pa.) 249; Goss *v.* Gowing, 5 Rich. (S. C.) 477.

16. Lyons *v.* Insley, 32 Kan. 174, 4 Pac. 150, holding that Kan. Code Civ. Proc. §§ 230, 231 (Gen. St. (1905) § 5125, 5126), authorizing attachments on claims not due, do not apply to cases before justices of the peace.

17. Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964.

18. Keith *v.* Moore, 31 Pittsb. Leg. J. (Pa.) 374.

19. Plummer *v.* West, 41 Miss. 69 (attachment for a sum not exceeding fifty dollars cannot be levied on real estate); Umla *v.* Bennett, 30 N. Y. App. Div. 324, 51 N. Y. Suppl. 932 (chose in action not attachable); Deutsch *v.* Stone, 11 Ohio Dec. (Reprint) 436, 27 Cinc. L. Bul. 436 (pew in church not attachable); Messinger *v.* Mantz, 10 Pa. Cas. 9, 13 Atl. 197 (interest in descendant's estate not subject); Dawson *v.* Kirby, 6 Pa. Dist. 13 (interests in an oil lease or an oil company not subject); Thomas *v.* Morasco, 5 Pa. Dist. 133 (building on leasehold not attachable). But see cases cited *passim* this section.

The property must be capable of manual seizure and of manual surrender by defendant or his bail. Wolbert *v.* Fackler, 32 Pa. St. 452.

20. Com. *v.* Kelly, 23 Pa. Co. Ct. 357.

21. Davis *v.* Marshall, 14 Barb. (N. Y.) 96; Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520; McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205; Walker *v.* Wynne, 3 Yerg. (Tenn.) 62; Colborn *v.* Booth, 41 W. Va. 289, 23 S. E. 556. See also Connelly *v.* Woods, 31 Kan. 359, 2 Pac. 773. But *compare* Clark *v.* Luce, 15 Wend. (N. Y.) 479, to the effect that an attachment authorized by the Non-Imprisonment Act may issue against a defendant residing without the county without any affidavit whatever.

Oath need not be in writing. — McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205. See also Devall *v.* Taylor, Cheves (S. C.) 5.

"Satisfactory proof" required by statute means legal evidence, and not the creditor's oath; but, if issued on such oath, the proceedings are not void, but only erroneous. Van Steenbergh *v.* Kortz, 10 Johns. (N. Y.) 167.

22. Curtis *v.* Moore, 3 Minn. 29; Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514; Kelly *v.* Archer, 48 Barb. (N. Y.) 68; Stewart

stances on which the right to the writ depends.[23] It must state the nature of plaintiff's claim and the sum demanded,[24] must aver that the property sought to be attached is not exempt,[25] and must be sworn to before a disinterested person;[26] but it need not state or recite that it is made by plaintiff or some person in his behalf, where the fact is apparent from the record,[27] or show that it was ever filed in the suit, if the justice's transcript shows the filing.[28] Where a justice issues an attachment for a sum within his jurisdiction on an insufficient affidavit, the proceedings are not void, but only voidable;[29] and if he is sufficiently satisfied of the facts stated in the affidavit to issue the writ it cannot be attacked collaterally.[30] The justice may allow an attachment affidavit to be so amended after the original

v. Brown, 16 Barb. (N. Y.) 367; Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520; Comfort *v.* Gillespie, 13 Wend. (N. Y.) 404; Spencer *v.* Bloom, 149 Pa. St. 106, 24 Atl. 185; Griffis *v.* Swick, 12 Pa. Co. Ct. 389.

Presumption in favor of affidavit.— From the fact of an affidavit's appearing to have been made at the commencement of the proceedings, although denominated an "affidavit for proceedings against S., as garnishee," it may be presumed that it contained a legal cause for attachment, such as the non-residence of defendant. Carper *v.* Richards, 13 Ohio St. 219.

Affidavit in language of statute sufficient.— Curtis *v.* Moore, 3 Minn. 29; Spencer *v.* Bloom, 149 Pa. St. 106, 24 Atl. 185.

Affidavit in substantial compliance with statute sufficient.— Starr *v.* Taylor, (Tex. Civ. App. 1900) 56 S. W. 543.

Allegation of non-residence.— An affidavit stating that the debtors were not residents of the county in which the proceedings were brought, but were residents of another county named, sufficiently alleged their non-residence, so as to sustain the justice's jurisdiction. Bascom *v.* Smith, 31 N. Y. 595. See also Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520, in which an affidavit stating that plaintiff had a debt of a specified amount arising out of contract against defendant, and that defendant was a non-resident of the county, was held sufficient.

An affidavit stating grounds under two statutes will authorize an attachment under either. Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161.

Under the Pennsylvania act of May 8, 1874, the affidavit, after a specification of plaintiff's claim, is restricted to an averment that defendant is a non-resident of the commonwealth. Pratt *v.* Mosser, 1 Lehigh Val. L. Rep. (Pa.) 178.

An affidavit sufficient under the Non-Imprisonment Act is sufficient for an attachment under the New York Revised Statutes. Colver *v.* Van Valen, 6 How. Pr. (N. Y.) 102.

Amendment.—Where the ground of attachment is that defendant is a non-resident, but the affidavit states that he "has resided" in the state for one month before suit, an amendment by the insertion of "not" before "resided" is not authorized by Howell **Annot.** St. Mich. § 7631. Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

23. Stewart *v.* Brown, 16 Barb. (N. Y.) 367; Frost *v.* Willard, 9 Barb. (N. Y.) 440; Bump *v.* Dehany, 12 N. Y. Suppl. 901; Garlock *v.* James, 55 How. Pr. (N. Y.) 306; Comfort *v.* Gillespie, 13 Wend. (N. Y.) 404; Tallman *v.* Bigelow, 10 Wend. (N. Y.) 420; Gates *v.* Bloom, 149 Pa. St. 107, 24 Atl. 184; Curwensville Mfg. Co. *v.* Bloom, 10 Pa. Co. Ct. 295. But see Curtis *v.* Moore, 3 Minn. 29.

If the facts are stated on belief only, the affidavit is insufficient. Dewey *v.* Greene, 4 Den. (N. Y.) 93. See also Tallman *v.* Bigelow, 10 Wend. (N. Y.) 420. But see Ketchum *v.* Vidvard, 4 Thomps. & C. (N. Y.) 138.

"Proof satisfactory to the justice" is not the sole test of the sufficiency of an affidavit under the Pennsylvania act of July 12, 1842, § 27; and an affidavit that plaintiff has every reason to believe that defendant is about to dispose of his personal property and leave the county is insufficient. Curwensville Mfg. Co. *v.* Bloom, 10 Pa. Co. Ct. 295.

Affidavit sufficient to show intent to defraud creditors see Schoonmaker *v.* Spencer, 54 N. Y. 366.

24. Freer *v.* Hamilton, 127 Mich. 381, 86 N. W. 824; Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514 (affidavit held sufficient); Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

An affidavit that affiant "believes" that plaintiff ought to recover a certain sum is sufficiently positive. Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

Affidavit need not state whether claim is on express or implied contract.— Freer *v.* Hamilton, 127 Mich. 381, 86 N. W. 824.

25. Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243. See also Kirk *v.* Stevenson, 59 Ohio St. 556, 53 N. E. 49.

26. Ward *v.* Ward, 9 Ohio S. & C. Pl. Dec. 690.

27. West *v.* Berg, 66 Minn. 287, 68 N. W. 1077 [*explaining* Smith *v.* Victoria, 54 Minn. 338, 56 N. W. 47].

28. Lively *v.* Southern Bldg., etc., Assoc., 46 W. Va. 180, 33 S. E. 93.

29. Parmer *v.* Ballard, 3 Stew. (Ala.) 326.

A technical defect in an affidavit will not invalidate the writ of attachment so as to render the officer serving it liable, as he would be if acting under void process, it not being shown that the justice had no jurisdiction of the principal suit. State *v.* Foster, 10 Iowa 435.

30. Bascom *v.* Smith, 31 N. Y. 595; Kis-

levy as to authorize the seizure of property otherwise exempt, and the amendment will relate back to the date of the original levy;[31] and in Alabama a plaintiff who has sued out an attachment in a justice's court for a sum exceeding the jurisdiction of the justice should be permitted to amend by filing a new affidavit for a sum within the justice's jurisdiction.[32] Unless it is so required by the statute the affidavit need not be made before the justice who issues the attachment.[33]

4. Attachment Bond. The statutes generally require the execution of a bond by plaintiff as a prerequisite to the issuance of a writ of attachment,[34] but under some statutes no bond is required.[35] When a bond is required, it must be taken by the justice,[36] must be under seal,[37] must be entirely filled up when filed,[38] and must comply, substantially at least, with the statutory requirements as to its conditions and obligations.[39] But irregularities in the form of the condition or in the number of sureties will not avoid a judgment subsequently rendered;[40] and where the bond is taken by the justice as sufficient for the purpose for which it is given, his approval of the bond is sufficient as against third persons.[41] A justice of the peace has authority to allow an amended undertaking in attachment to be filed *nunc pro tunc*.[42]

5. Writ or Warrant.[43] A writ or warrant of attachment is sufficient to give jurisdiction if it be in the form prescribed by statute.[44] It must show that it was issued by a justice of the peace;[45] must contain matter which justifies its issuance;[46] must be under seal;[47] must recite the affidavit or oath on which it issues;[48] must be directed for service to the proper officer;[49] or to some indiffer-

sock *v.* Grant, 34 Barb. (N. Y.) 144; Ketchum *v.* Vidvard, 4 Thomps. & C. (N. Y.) 138.

31. State *v.* Lynn, 51 Mo. 114.

32. Webb *v.* McPherson, 142 Ala. 540, 38 So. 1009.

33. Dickinson *v.* Barnes, 3 Gill (Md.) 485, holding that it was no reason for quashing an attachment that the affidavit of the creditor was made before a justice of the peace of one county, while the warrant to the clerk of the county court to issue the attachment was granted by a justice of his county.

34. Bennett *v.* Brown, 4 N. Y. 254; Davis *v.* Marshall, 14 Barb. (N. Y.) 96; Homan *v.* Brinckerhoff, 1 Den. (N. Y.) 184; Downward *v.* Jordan, 7 Pa. Dist. 273; Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179.

Non-resident defendants can compel plaintiff to give bond under Hurd Rev. St. Ill. (1899) c. 79, § 3. Crawford-Adsit Co. *v.* Fordyce, 100 Ill. App. 362.

35. Young *v.* Mitchell, 33 Ark. 222; Stewart *v.* Houston, 25 Ark. 311; Snyder *v.* Gillott, (Md. 1895) 32 Atl. 245.

36. Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179.

37. Tiffany *v.* Lord, 65 N. Y. 310.

38. Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179, holding that a bond signed in blank and afterward filled up by the magistrate is void.

39. Homan *v.* Brinckerhoff, 1 Den. (N. Y.) 184; Downward *v.* Jordan, 7 Pa. Dist. 273; Harville *v.* Meyers, 1 Brev. (S. C.) 3.

Amount of penalty.— Where the bond is for less than double the amount of the claim, an attachment is improperly issued, the doctrine *de minimis* not applying. Downward *v.* Jordan, 7 Pa. Dist. 273. But see Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

A bond which does not contain all the statutory conditions is a good bond as to the conditions which it does contain. State *v.* Berry, 12 Mo. 376.

40. Kramer *v.* Wellendorff, 8 Pa. Cas. 1, 10 Atl. 892.

41. Bascom *v.* Smith, 31 N. Y. 595, to the effect that the justice's approval is sufficient, even if he does not expressly certify that the bond was executed in his presence.

42. Riley *v.* Skidmore, 2 Silv. Sup. (N. Y.) 573, 6 N. Y. Suppl. 107.

43. See Attachment, 4 Cyc. 540 *et seq.*

Under Wyo. Rev. St. (1899) § 4478, where a writ of attachment in a civil action before a justice of the peace is issued at the commencement of the action, it is required to contain the substance of a summons, in which case no summons is necessary, but, if issued after the summons, the writ must be made returnable at the same time as the summons. Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823.

44. Beseman *v.* Weber, 53 Minn. 174, 54 N. W. 1053.

45. McLorty *v.* Davis, Ky. Dec. 57. *Compare* Plumpton *v.* Cook, 2 A. K. Marsh. (Ky.) 450.

46. McLorty *v.* Davis, Ky. Dec. 57.

47. McCulloch *v.* Foster, 4 Yerg. (Tenn.) 162; Walker *v.* Wynne, 3 Yerg. (Tenn.) 62.

48. Devall *v.* Taylor, Cheves (S. C.) 5.

49. See Drewry *v.* Lienkauff, 94 Ala. 486, 10 So. 352, holding that under Ala. Code, § 2956, a writ addressed to the sheriff "or the constable of beat No. 3," etc., is sufficiently indorsed by the justice. The Alabama statute of 1836, requiring that process issued from the clerk's office of any court shall be

ent person,[50] directing him to attach goods of defendant to satisfy the sum claimed, stating it;[51] must require defendant to answer plaintiff;[52] and must be made returnable at a specified time and place.[53] Generally the writ should be made returnable before the justice who issued it;[54] but may sometimes be made returnable before another justice or court.[55] Writs of attachment may be amended by leave of the justice.[56] In some jurisdictions the writ of attachment may be issued either before or after the commencement of the action,[57] while in others it can only be issued at or after the commencement of the action.[58]

6. LEVY. An attachment issued from a justice's court must be directed for service to the regular officer designated by statute, and the levy cannot be made or the summons served by a special officer appointed for the purpose.[59] In order that the justice may obtain jurisdiction, the attachment properly issued must be levied on the property of defendant in the mode prescribed by law.[60]

7. RETURN. A justice of the peace has no jurisdiction to proceed with an

directed to "any sheriff of the State," did not apply to attachments issued by justices. Alford *v.* Johnson, 9 Port. 320.

In Georgia it has been held that attachments returnable to justices' courts should be directed "to all and singular the constables of this state" under section 3273 of the code. Pearce *v.* Renfroe, 68 Ga. 194; Warren *v.* Purtell, 63 Ga. 428; Buchanan *v.* Sterling, 63 Ga. 227.

Constable of either of adjoining townships. — Where the property to be attached is located in the township adjoining the justice's township, the writ may be directed to the constable of either township. Friar *v.* McGuire, 70 Mo. App. 581.

Improper direction does not render attachment void.— Warren *v.* Purtell, 63 Ga. 428; Buchanan *v.* Sterling, 63 Ga. 227.

50. Tyler *v.* Atwater, 2 Root (Conn.) 72. See Kelsey *v.* Parmelee, 15 Conn. 260.

Form of direction to indifferent person see Kellogg *v.* Wadhams, 9 Conn. 201.

51. See Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129, in which the writ was so construed with reference to the amount claimed as to uphold the jurisdiction of the justice.

52. See Marston *v.* Hurlburt, 49 Wis. 630, 6 N. W. 316, in which a warrant was issued on an affidavit of G W K in behalf of plaintiffs, and required defendant to answer "G. W. K. on behalf of" plaintiffs, naming them, and it was held that the writ was not invalid, as the words "G. W. K. on behalf of" would be rejected as surplusage.

53. Houston *v.* Porter, 32 N. C. 174; Clark *v.* Quinn, 27 N. C. 175. *Compare* McLane *v.* Moore, 51 N. C. 520, in which an attachment was levied on real estate, and after judgment of condemnation, by a justice having jurisdiction of the amount, the writ was returned to court, where an order of sale was made, and it was held that the omission of the justice to set out in the writ a day of return was cured.

The time between issuance and return must not exceed the time prescribed by statute within which the writ is to be returned. Clark *v.* Quinn, 27 N. C. 175; Protzman *v.* Wolff, 4 Pa. Dist. 473; Shores *v.* Carpenter, 1 Just. L. Rep. (Pa.) 60. *Compare* Baldwin *v.* Flash, 58 Miss. 593.

Where two grounds for attachment are stated in the affidavit, on one of which the writ may be made returnable in three days, on the other in six, either may be rejected as surplusage, and the writ may be sustained on the other. Curtis *v.* Moore, 3 Minn. 29.

54. Griggs *v.* Jesse French Piano, etc., Co., 70 Miss. 211, 14 So. 24, so holding in the case of an attachment issued against a non-resident and levied in a district other than the one in which the issuing justice resided and in which there was a qualified and acting justice. See also Caldwell *v.* Meador, 4 Ala. 755; and *supra*, III, E, 4.

A failure to state expressly before whom further proceedings will be had does not render the writ substantially defective, the inference being that they will be had before the justice who issued the writ. Bruner *v.* Kinsel, 42 Ala. 493.

55. See Wanet *v.* Corbet, 13 Ga. 441. And see *supra*, III, E, 4.

56. McGuire *v.* Davis, 8 Cush. (Mass.) 356; Near *v.* Van Alstyne, 14 Wend. (N. Y.) 230. *Contra*, Halley *v.* Jackson, 48 Md. 254.

57. Mowicke *v.* Wolf, 7 Ohio Dec. (Reprint) 299, 2 Cinc. L. Bul. 86, holding that under Ohio Rev. St. § 6489, a writ of attachment may be issued by a justice of the peace in a civil action for the recovery of money before or after the commencement of such action, and it is not necessary that a summons should be issued in the first instance and returned "not found."

58. Butler *v.* Wilson, 10 Ark. 313; Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823.

59. Carter *v.* Ellis, 90 Ala. 138, 7 So. 531; Peebles *v.* Weir, 60 Ala. 413; Orenstine *v.* Schaffer, 58 N. J. L. 344, 33 Atl. 285; Marsh *v.* Williams, 63 N. C. 371.

Sheriff authorized to levy see Turners *v.* Howard, 2 Duv. (Ky.) 112.

Where the property is in an adjoining township, the writ can be directed to the constable of either township, but only the one to whom it is directed has authority to levy. Friar *v.* McGuire, 70 Mo. App. 581.

60. Dittmar Powder Mfg. Co. *v.* Leon, 42 N. J. L. 540 (execution must be in presence of a freeholder, who must sign appraisement); Colborn *v.* Booth, 41 W. Va. 289, 23 S. E. 556.

action in which an attachment has been issued until the officer has made a return thereof showing service as required by statute.[61] The return should show the receipt of the attachment by the officer,[62] and must state facts showing the manner of service, and not conclusions of law.[63] Where substituted service has been had, the facts and circumstances authorizing such service must be fully set out,[64] and it must be shown that the statutory requirements as to such service has been strictly complied with.[65] The certificate of the officer to his return is sufficient, although not under oath;[66] and even though in fact false, a return that the officer has levied on defendant's property, and made personal service on defendant is conclusive on the parties, and sufficient to give the court jurisdiction.[67]

8. Lien and Priorities.[68] An attachment issued by a justice of the peace creates a lien upon the property attached from its levy;[69] but it may be lost by

When the goods can be reached, the officer must take them into his custody, and hold them subject to the order of the justice. Lyeth *v.* Griffis, 44 Kan. 159, 24 Pac. 59. See also Hotchkiss *v.* Pinney, 10 Pa. Dist. 219.

To justify appointing a day of trial, some property must be attached. Lentz *v.* Callin, 26 N. J. L. 218.

In Maryland a short note should be filed at the time of issuing the attachment, and a copy thereof sent with the writ to be set up at the court-house door by the sheriff. Campbell *v.* Webb, 11 Md. 471.

61. White *v.* Prior, 88 Mich. 647, 50 N. W. 655; Langtry *v.* Wayne Cir. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034; Alverson *v.* Dennison, 40 Mich. 179; Adams *v.* Abram, 38 Mich. 302; Town *v.* Tabor, 34 Mich. 262; Nicolls *v.* Lawrence, 30 Mich. 395; Rocheport Bank *v.* Doak, 75 Mo. App. 332; Barnaman *v.* Williams, 18 Abb. Pr. (N. Y.) 158; Marshall *v.* Canty, 14 Abb. Pr. (N. Y.) 237; Williams *v.* Barnaman, 28 How. Pr. (N. Y.) 59; Selby *v.* Platts, 3 Pinn. (Wis.) 170, 3 Chandl. 183.

Before a day of trial can be appointed, it must clearly appear by the return that some property has been attached. Lentz *v.* Callin, 26 N. J. L. 218.

A return is prima facie sufficient, although the officer does not state that the copies personally served on defendants were certified by him. Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520.

The place of seizure need not be stated, as it will be presumed to have been "within the county," as required by Mich. Comp. Laws, § 5275. Bushey *v.* Raths, 45 Mich. 181, 7 N. W. 802.

Service by city marshal.— But as a city marshal had no authority to serve process outside of the city, it was held that his return to a writ of attachment issued by a justice did not confer jurisdiction to proceed, where it did not show affirmatively that it was served within the city. Alverson *v.* Dennison, 40 Mich. 179.

Return of writ against joint debtors.— Where a writ of attachment against two joint debtors was returned as served on only one of them, and nothing was said in the return as to the other, the service was insufficient. Cook *v.* McDoel, 3 Den. (N. Y.) 317.

62. The validity of a return with the proper indorsement of the receipt and service of the writ by the constable is not affected by an indorsement on the writ of its receipt for the constable by the sheriff, who was one of the plaintiffs. Hart *v.* Forbes, 60 Miss. 745.

63. Johnson *v.* Layton, 5 Harr. (Del.) 252, holding that a return that notice was given "according to law" is insufficient; but it is otherwise, if the justice so state.

64. Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106; Farr *v.* Kilbour, 117 Mich. 227, 75 N. W. 457 (holding that substituted service of a justice's attachment is void if the return of the officer fails to show that diligent search was made for defendant during the whole time within which personal service might lawfully be made); Matthews *v.* Forslund, 113 Mich. 416, 71 N. W. 854; Bargh *v.* Ermeling, 110 Mich. 164, 67 N. W. 1083; Noyes *v.* Hillier, 65 Mich. 636, 32 N. W. 872; Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034; Brown *v.* Williams, 39 Mich. 755; Town *v.* Tabor, 34 Mich. 262; Nicolls *v.* Lawrence, 30 Mich. 395; Withington *v.* Southworth, 26 Mich. 381; Barnaman *v.* Williams, 18 Abb. Pr. (N. Y.) 158, 28 How. Pr. 59; Griffis *v.* Swick, 12 Pa. Co. Ct. 389.

A return of "Not found" cannot be made until the last day for serving the writ personally has expired. Withington *v.* Southworth, 26 Mich. 381.

Return held sufficient see Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106; Matthews *v.* Forslund, 113 Mich. 416, 71 N. W. 854.

65. White *v.* Prior, 88 Mich. 647, 50 N. W. 655; Segar *v.* Muskegon Shingle, etc., Co., 81 Mich. 344, 45 N. W. 982; Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034; Adams *v.* Abram, 38 Mich. 302; Town *v.* Tabor, 34 Mich. 262; Nicolls *v.* Lawrence, 30 Mich. 395; Stone *v.* Miller, 62 Barb. (N. Y.) 430; Egbert *v.* Watson, 21 How. Pr. (N. Y.) 429.

Return of substituted service held sufficient see Bascom *v.* Smith, 31 N. Y. 595; Rosenfield *v.* Howard, 15 Barb. (N. Y.) 546.

66. Flohrs *v.* Forsyth, 78 Minn. 87, 80 N. W. 852.

67. Shanklin *v.* Francis, 59 Mo. App. 178.

68. **Nature and priority of attachment lien** generally see Attachment, 4 Cyc. 622 *et seq.*

69. Langdon *v.* Raiford, 20 Ala. 532 (at-

the dismissal of the suit or the abatement of the writ,[70] or by the creditor's taking judgment, by agreement with the debtor, on a day other than that set in his writ.[71] Where property is sold under a prior attachment, the lien of a subsequent attachment, levied by the same officer, on the same property, is transferred, by operation of law, to any surplus money in the hands of the officer.[72] If a writ is prematurely served, the officer acquires no right to the property attached as against a subsequent attachment, even though defendant made no objection to the seizure;[73] but in Massachusetts an attaching creditor in an action before a justice cannot, by petition, dispute the validity of a prior attachment in an action in a higher court.[74] A person having a claim bearing a privilege on property attached by another in a justice's court has a priority over the latter, which may be enforced by proper proceedings.[75]

9. Custody and Disposition of Property. The general rules of law as to the custody and disposition of attached property are as a rule applicable to attachment proceedings before justices of the peace.[76] The justice cannot order the delivery of the property attached to plaintiff,[77] but it may be delivered to defendant upon his executing a forthcoming bond conformable to the statutes;[78] and in case of perishable property the justice is authorized to order its sale.[79]

10. Proceedings to Support or Enforce — a. In General. In an attachment before a justice of the peace, where there is no personal service upon defendant, or levy upon his property and notice as required by law, the justice has no jurisdiction, and any judgment rendered is a nullity.[80]

b. Process or Notice — (I) *Necessity For* — (A) *To Authorize Attachment.* In some jurisdictions before an attachment may issue process must issue in the principal action and be returned unserved;[81] but where the ground of attachment is that defendant so conceals himself that a summons cannot be served upon him, it is not necessary that a summons should be issued in the first instance and returned "Not found."[82]

(B) *To Confer Jurisdiction.* It is essential to the jurisdiction of the court

tachment on land); Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685. *Contra*, Merriman *v.* Sarlo, 63 Ark. 151, 37 S. W. 879, to the effect that the attachment binds the property from the time the writ comes to the officers.

70. O'Connor *v.* Blake, 29 Cal. 312.

Preservation of lien pending the taking of an appeal see Newman *v.* York, 74 Mo. App. 292.

71. Murray *v.* Eldridge, 2 Vt. 388, in which the lien was held forfeited to a subsequent attacher.

72. Wheeler *v.* Smith, 11 Barb. (N. Y.) 345.

73. Nelson *v.* Denison, 17 Vt. 73.

74. Putnam *v.* Bixby, 6 Gray (Mass.) 528.

75. Where the claim bearing the privilege exceeds the justice's jurisdiction, the remedy of the party is by a suit in the district court, claiming his privilege, and enjoining the officer from proceeding with the execution of the writ of attachment and paying over the proceeds to the attaching creditors; or by a rule on the creditor to show cause why he should not be paid by preference out of the proceeds of the attached property. Shiff *v.* Carprette, 14 La. Ann. 801.

76. See Morgan *v.* Saline Valley Bank, 4 Kan. App. 668, 46 Pac. 61; Alexander *v.* Archer, 21 Nev. 22, 24 Pac. 373 (construing Nev. St. (1881) p. 56, § 3); McNamara *v.* Roderick, 11 Pa. Co. Ct. 37. And see, generally, Attachment, 4 Cyc. 653 *et seq.*

77. Welch *v.* Jamison, 1 How. (Miss.) 160.

78. Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804; Conrad *v.* Ehrman, 61 Ill. App. 128; Stow *v.* Shay, 54 Kan. 574, 38 Pac. 784. See also Terrail *v.* Tinney, 20 La. Ann. 444, where, however, the bond was held a nullity, as not conforming to the statutory requirements.

Bond unauthorized after final judgment.— Woodward *v.* Witascheck, 38 Kan. 760, 17 Pac. 658.

79. Young *v.* Davis, 30 Ala. 213.

Under Sandel & H. Dig. Ark. §§ 4422, 5877, no bond is required of a resident plaintiff as a prerequisite to an order of sale. Merriman *v.* Sarlo, 63 Ark. 151, 37 S. W. 879.

Where jurisdiction has lapsed by a failure to return the writ in time an order of sale is void. Brown *v.* Carroll, 16 R. I. 604, 18 Atl. 283.

80. Borders *v.* Murphy, 78 Ill. 81.

81. Doyle *v.* Richards, 7 Fed. Cas. No. 4,054, 4 Cranch C. C. 527, holding that in the District of Columbia, an attachment issued upon a single *non est*, returned upon a justice's warrant for a small debt, will be quashed, defendant being a resident, two *non ests* being necessary.

82. Mawicke *v.* Wolf, 7 Ohio Dec. (Reprint) 299, 2 Cinc. L. Bul. 86.

in attachment proceedings that defendant shall be served with notice, either personally,[83] or, where this is impossible, by substituted service.[84]

(II) *Form and Requisites.* A summons returnable in less than the time required by statute is defective.[85] A judgment, rendered on service by publication, is not subject to collateral attack because the citation of publication, otherwise sufficient, makes no mention of the attachment proceedings.[86] Where the original notice is returned "Not found," a defect therein will not affect the jurisdiction over the property.[87]

(III) *Mode and Sufficiency of Service.* Questions as to the mode and sufficiency of service on the attachment defendant are governed by the same principles that control the service of process in other proceedings.[88] Where the

83. Town *v.* Tabor, 34 Mich. 262, holding that personal service is required if defendant can be found in the country.

Sufficiency of service.— Personal service of the writ is insufficient, unless made after levy, and accompanied by an inventory of the property seized. Langtry *v.* Wayne Cir. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352. But see West *v.* Berg, 66 Minn. 287, 68 N. W. 1077, to the effect that failure to serve a copy of the inventory of the property levied on does not affect the validity of the writ.

Under Minn. Gen. St. (1894) § 4955, the authority to issue writs of attachment to an officer of a county other than that in which the justice resides is limited to the purpose of causing an attachment of property in such county, and such a writ cannot be used for the purpose of obtaining jurisdiction over the person of defendant, if he is a resident of the county to which it is issued. Perkins *v.* Meilicke, 66 Minn. 409, 69 N. W. 220.

84. *Colorado.*— Conway *v.* John, 14 Colo. 30, 23 Pac. 170, posting notices of levy.

Delaware.— Burton *v.* Frame, (1904) 58 Atl. 804; Money Weight Scale Co. *v.* Edwards, 3 Pennew. 85, 50 Atl. 62, posting notices.

Michigan.— If defendant cannot be found in the county then certified copies may be left at his last place of residence in the county, or, as a last alternative, service may be had on the person found in possession of the property. The officer is bound to use diligence to secure the best service, and may not adopt an inferior one until all superior modes are found impracticable. Town *v.* Tabor, 34 Mich. 262. See also Segar *v.* Muskegon Shingle, etc., Co., 81 Mich. 344, 45 N. W. 982. *Compare* Rolfe *v.* Dudley, 58 Mich. 208, 24 N. W. 657.

Missouri.— McCloon *v.* Beattie, 46 Mo. 391.

New York.— Where defendant is a nonresident of the county, copies of the summons, warrant, and inventory should be left with the person in possession of the goods. Umla *v.* Bennett, 30 N. Y. App. Div. 324, 51 N. Y. Suppl. 932; Stone *v.* Miller, 62 Barb. 430; Marshall *v.* Canty, 14 Abb. Pr. 237.

North Carolina.— Ditmore *v.* Goins, 128 N. C. 325, 39 S. E. 61.

Tennessee.— Rumbough *v.* White, 11 Heisk. 260.

Wisconsin.— Notice to defendant that the writ has been issued and the property attached must be posted or published at least fifteen days before judgment. Champion *v.* Argall, 25 Wis. 521.

Wyoming.— Rev. St. (1899) § 4481, providing that if defendant in an attachment proceeding before a justice of the peace does not appear "to the action of the return writ," is a misprint of the original enactment (Laws (1871), p. 58, § 154), providing that if he does not appear "to the action at the return of the writ" the justice is required to enter an order in his docket requiring plaintiff to give notice to defendant by publication. Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823, holding further that the fact that defendants are out of the state, so that personal summons is impossible, does not relieve plaintiffs of the necessity of issuing summons where service is to be obtained by publication.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 285, 288.

85. Roberts *v.* Wright, 2 Pa. Co. Ct. 175.

86. Reid *v.* Mickles, (Tex. Civ. App. 1895) 29 S. W. 563.

87. Johnson *v.* Dodge, 19 Iowa 106.

88. See *supra*, IV, E, 2; and, generally, Process.

Service out of county.— In an action commenced by attaching personal property of defendant, who resides in another county, the summons may be served upon him personally in the county of his residence, and such service gives the justice jurisdiction to render judgment at least to the extent of the property attached. Flohrs *v.* Forsyth, 78 Minn. 87, 80 N. W. 852.

Effect of personal service where no property is seized.—Where, in an action brought in the county, but not in the township of defendant's residence, the summons is accompanied by an order of attachment, and is duly served, the justice obtains jurisdiction over defendant's person, and may proceed to judgment against him, although no property is seized or held under the attachment. Kelly *v.* Flanagan, 20 Ohio Cir. Ct. 391, 11 Ohio Cir. Dec. 111.

A return on an order of publication which does not show that the notice was posted at and for the required time is insufficient to give jurisdiction. McCloon *v.* Beattie, 46 Mo. 391.

A return of substituted service will not give the justice jurisdiction to proceed in attachment, if it does not appear that diligent

attachment defendant is a corporation, service is usually had upon some officer or agent designated by statute.[89]

(IV) *Effect of Failure to Give Notice.* Failure to give the prescribed notice renders the proceedings erroneous;[90] and indeed the weight of authority is to the effect that a judgment rendered without the notice prescribed by law against a defendant who has not appeared is absolutely void and open to collateral attack.[91] But an attachment, regularly issued at the time of the issuance of the first summons, is not vitiated by failure to serve the first summons and the issuance of the second one.[92]

c. Appearance — (I) *Right to Appear.* In New Jersey it is absolutely necessary that defendant, in order to enter his appearance, file a bond to plaintiff.[93]

(II) *Appearance to Contest Attachment.* A special appearance for the purpose of contesting the attachment proceedings, and limited to that purpose, will not, in most jurisdictions, be deemed an appearance for all purposes;[94] but in others such an appearance is regarded as general.[95]

(III) *Effect of General Appearance.* When there is a general affirmance the justice acquires jurisdiction of the person, and want of service, or defects or irregularities therein, or in the return, are waived.[96] Where neither party actually appears, a written request by plaintiff to continue the case is sufficient to give the justice jurisdiction to grant the continuance.[97]

d. Pleadings. In some jurisdictions no declaration or complaint need be filed in an attachment suit in a justice's court;[98] while in others an attachment affidavit which contains the requisites of both an affidavit and a declaration or complaint will dispense with the necessity of filing the latter.[99] Where the defendant, in an action by attachment commenced before a justice of the peace, fails to file

search was made for defendant until the time allowed by law for making personal service had expired. Brown *v.* Williams, 39 Mich. 755.

Return of substituted service held sufficient to sustain judgment see Pomeroy *v.* Rand, 157 Ill. 176, 41 N. E. 636.

89. Hinman *v.* Andrews Opera Co., 49 Ill. App. 135, holding that service must be had either by leaving a copy of the writ with some of the corporation's officers, agents, or employees, or by posting notices, and mailing a copy of such notice addressed to defendant at its place of residence. See, generally, PROCESS.

In the case of foreign corporations, personal service must, under Howell Annot. St. Mich. §§ 6831, 6840, 6841, 8143, be had on an officer, member, clerk, or agent of such corporation within the state, or, where no such person is found within the county, upon the custodian of the property. Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106. See, generally, PROCESS.

90. Rumbough *v.* White, 11 Heisk. (Tenn.) 260.

91. Wilkinson *v.* Moore, 79 Ind. 397 (holding, however, that where the attachment defendant is sued in the wrong county, but is served with process and does not appear to dispute the jurisdiction, a judgment against him on his property cannot be collaterally attacked); Selby *v.* Platts, 3 Pinn. (Wis.) 170, 3 Chandl. 183. See, generally, ATTACHMENT, 4 Cyc. 814.

92. Seaver *v.* Fitzgerald, 23 Cal. 85. See also Stone *v.* Whittaker, 61 Ohio St. 194, 55 N. E. 614.

93. Hazlitt *v.* Morrow, 55 N. J. L. 547, 26 Atl. 885 (holding that where defendant neglects to file a bond, the justice, after plaintiff rests his case, may refuse to permit defendant to file a bond); Davis v. Mahany, 38 N. J. L. 104.

94. Bushey *v.* Raths, 45 Mich. 181, 7 N. W. 802; Wright *v.* Russell, 19 Mich. 346; Mawiecke *v.* Wolf, 7 Ohio Dec. (Reprint) 476, 3 Cinc. L. Bul. 458; Sherry *v.* Divine, 11 Heisk. (Tenn.) 722, plea in abatement.

Appearance and consent to adjournment, "without prejudice," do not waive defective service. Tunningly *v.* Butcher, 106 Mich. 35, 63 N. W. 994.

95. Deshler *v.* Foster, Morr. (Iowa) 403. And see ATTACHMENT, 4 Cyc. 817 note 34.

96. O'Hara *v.* McEnny, 2 Mich. N. P. 164; McGinley *v.* McDonough, 3 Lanc. L. Rev. (Pa.) 202; Hammond *v.* Wilder, 25 Vt. 342; Baizer *v.* Lasch, 28 Wis. 268.

97. Wagner *v.* Kellogg, 92 Mich. 616, 52 N. W. 1017.

98. Smith *v.* Wilson, 58 Ga. 322; Henry *v.* Blasco, 1 Tex. App. Civ. Cas. § 765.

99. Tignor *v.* Bradley, 32 Ark. 781; Holman *v.* Kerr, 44 Mo. App. 481; Crolot *v.* Maloy, 2 N. M. 198; Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344.

In Iowa the mere statement of the cause of action, without filing a transcript of the judgment whereon it is brought, is sufficient to allow an attachment to issue. Collins *v.* Rodolph, 3 Greene 299.

a plea in abatement, either before the justice or on appeal, it is a confession of the grounds alleged for the attachment.[1]

e. Time of Trial. Where the proceedings are regular, the justice must on their return proceed to hear the cause as on any other process.[2]

f. Judgment — (i) *In General.* Where no jurisdiction has been acquired over defendant's person, either by service of process or appearance, the judgment should be rendered only against the attached property;[3] although in some jurisdictions a judgment personal in form may be rendered, the operation of which, however, is limited to the property seized.[4] To authorize a judgment where there is no personal jurisdiction, it must be shown that all statutory requirements have been fully complied with.[5]

(ii) *Amount of Recovery.* The fact that a justice who has obtained no jurisdiction of defendant's person renders judgment for a larger sum than that demanded in the attachment affidavit will not render the judgment void,[6] although such a judgment is usually regarded as erroneous.[7]

(iii) *Time of Entry.* The statute sometimes requires the justice to enter judgment within a certain time after submission of the cause.[8] But it has been held that, although a statute requires that judgment be entered immediately after the close of the trial, it is permissible for the justice to take the case under advisement for a reasonable time.[9] In some jurisdictions it is not permissible to enter a default judgment against an attachment defendant who has not been personally served until a specified time after the execution of the writ.[10]

(iv) *Setting Aside.* A justice may set aside a judgment, void for want of service of summons, retain the custody of the attached property, issue a new summons in the action, and on due service thereof again proceed to judgment.[11]

(v) *Death of Defendant.* In Missouri it is the duty of a justice of the peace in case of the death of defendant pending an attachment suit to proceed to final judgment.[12]

1. Rechnitzer *v.* Missouri, etc., R. Co., 60 Mo. App. 409.

2. Field *v.* McVickar, 9 Johns. (N. Y.) 130. See also Noyes *v.* Hillier, 65 Mich. 636, 32 N. W. 872.

In Maryland, Code, art. 52, § 21, providing that where defendant has been summoned and fails to appear on the return-day, the justice shall fix a day for trial, not less than six or more than fourteen days from return-day, does not apply to attachment proceedings. Weed *v.* Lewis, 80 Md. 126, 30 Atl. 610.

Postponement pending another attachment. —In Missouri, where property which has been seized by attachment from a justice's court is likewise levied on by attachment from the circuit court, the statute authorizes the continuance of the cause to await the determination of the suit in the circuit court, and an irregularity of the justice in indefinitely postponing the case will not vitiate a judgment afterward rendered by him where no prejudice seems to have resulted. Shanklin *v.* Francis, 67 Mo. App. 457.

3. See Attachment, 4 Cyc. 822.

4. State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032; Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217; Chicago, etc., Coal Co. *v.* Manley, 10 Ohio Dec. (Reprint) 394, 21 Cinc. L. Bul. 38.

5. Bird *v.* Norquist, 46 Minn. 318, 48 N. W. 1132, where the return-day of a summons served by publication was fixed at less than six days after the period of publication, and it was held that a judgment rendered on such return-day was void.

Service held sufficient to sustain judgment by default see Hammond *v.* Wilder, 25 Vt. 342.

6. Gum-Elastic Roofing Co. *v.* Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700.

7. See Attachment, 4 Cyc. 828.

8. In Missouri the statute requiring a justice of the peace to render judgment and enter the same on his docket within three days after the cause shall have been submitted to him does not require the judgment on the merits in an attachment suit to be entered within three days after the submission of the issues under a plea in abatement. Cella *v.* Schnairs, 42 Mo. App. 316.

9. Huff *v.* Babbott, 14 Nebr. 150, 15 N. W. 230 [*distinguished* in Austin *v.* Brock, 16 Nebr. 642, 21 N. W. 437, in which it was held that in the case of a trial by jury "immediately" meant precisely what the word implies].

10. Rumbough *v.* White, 11 Heisk. (Tenn.) 260; Sorrels *v.* Wiley, 6 Heisk. (Tenn.) 318. And see Attachment, 4 Cyc. 828.

11. Wehlen *v.* Macke, 9 Ohio Dec. (Reprint) 565, 15 Cinc. L. Bul. 125.

12. Abernathy *v.* Moore, 83 Mo. 65.

Abatement by death of party in attachment proceedings see, generally, Abatement and Revival.

g. Execution. The justice has no right or power to issue a general execution, unless plaintiff gives notice as required by law, or unless defendant has given bond and security, or has appeared and made defense. Otherwise the justice can only issue execution against the property attached.[13]

11. Dissolution, Vacating, and Quashing — a. Grounds. Mere clerical[14] or nonprejudicial[15] errors and irregularities in the proceedings do not warrant the dissolution of an attachment; but where the defect is in matter of substance the attachment will be dissolved.[16] A justice may discharge an attachment made under his order, on the ground that the facts stated in the attachment affidavit are not true.[17] But an attachment should not be quashed for a variance between the affidavit for the attachment and the affidavit to the itemized account filed by plaintiff, where there is no variance between plaintiff's cause of action as entered on the docket and the affidavit for attachment.[18]

b. Proceedings — (i) *Vacation by Justice Ex Mero Motu.* It is within the power of the justice, and in New York it is his duty,[19] to discharge an attachment on his own motion, if he deems the papers on which it was granted insufficient to authorize it.[20]

(ii) *Motion to Discharge.* Reasonable notice of a motion to discharge an attachment should be given plaintiff by defendant.[21] Where the motion is based on evidence outside of the record it should be supported by affidavit;[22] and plaintiff may file counter-affidavits in opposition to the motion.[23] Where the averments of the affidavit for attachment are traversed by defendant's affidavit, the burden is on plaintiff to maintain the truth of his averments by other evidence, and where no such additional evidence is offered the attachment should be discharged.[24]

c. Effect. Where an attachment is merely ancillary to the main action, its dissolution does not affect the action, which may proceed to judgment, provided the justice has jurisdiction of both the person and the subject-matter.[25] But

13. Reeves *v.* Chattahoochee Brick Co., 85 Ga. 477, 11 S. E. 837 [*following* Carithers *v.* Venable, 52 Ga. 389].

Land can only be levied on and sold by virtue of an execution issuing on the judgment in attachment. Rogers *v.* McDill, 9 Ga. 506.

14. Hard *v.* Stone, 11 Fed. Cas. No. 6,046, 5 Cranch C. C. 503, in which the clerk by mistake wrote "cash" for "each" in the copy of the short note sent with the writ.

15. Paul *v.* Rooks, 16 Colo. App. 44, 63 Pac. 711, holding that where summons, made returnable in thirteen days, was not served, but on the return-day the case was continued for twelve days at defendant's request, made by letter, his motion to quash the summons and dismiss the action because Colo. Laws (1897), p. 113, § 2, requires that on the return-day of the summons, which shall not be more than ten days from its issuance, the justice shall continue the hearing twenty days, was properly denied, since the statute was intended for the benefit of defendant's creditors other than plaintiff, and a failure to comply with it could not prejudice defendant.

That the affidavit was made before a justice of a different county is no reason for quashing an attachment, if the warrant to issue the attachment was granted by a justice of the county where the attachment issued. Dickenson *v.* Barnes, 3 Gill (Md.) 485.

16. See cases cited *infra*, this note.

Substantial defect in affidavit warrants dissolution.—See Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Kingsford *v.* Butler, 71 Hun (N. Y.) 598, 24 N. Y. Suppl. 1094.

Insufficient service.—An attachment on real estate of defendant is not a sufficient service of a writ returnable before a justice, and may be quashed on motion, when that is the only service. Farley *v.* Day, 26 N. H. 527.

17. Bancroft *v.* Talbott, 29 Ohio St. 538.

18. Brasher *v.* Cuchia, 4 Tex. Civ. App. 690, 24 S. W. 85.

19. Kingsford *v.* Butler, 71 Hun (N. Y.) 598, 24 N. Y. Suppl. 1094.

20. See Attachment, 4 Cyc. 781.

21. See Kirk *v.* Stevenson, 59 Ohio St. 556, 53 N. E. 49, holding that a notice given the day after the attachment was levied, and before trial on that day, was reasonable notice, within Ohio Rev. St. § 6522.

22. Kirk *v.* Stevenson, 59 Ohio St. 556, 53 N. E. 49; Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430; Bradley *v.* Wacker, 13 Ohio Cir. Ct. 530, 7 Ohio Cir. Dec. 565.

23. Baer *v.* Otto, 34 Ohio St. 11.

An oral denial, not under oath, of an affidavit in support of a motion to dissolve, is not a denial of which the justice is required to take notice. Ward *v.* Ward, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656.

24. Kirk *v.* Stevenson, 59 Ohio St. 556, 53 N. E. 49 [*citing* Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430]; Bradley *v.* Wacker, 13 Ohio Cir. Ct. 530, 7 Ohio Cir. Dec. 565.

25. Collins *v.* Bingham, 22 Ohio Cir. Ct.

where the action is commenced by attachment, and the attachment is the basis of the jurisdiction, its dissolution will abate the main action.[26] The dissolution of an attachment destroys the lien on the property,[27] except where by statute the lien is preserved until an appeal can be taken.[28] Where an attachment is discharged, but judgment is rendered for plaintiff, who brings suit on the judgment and sues out a second attachment, the order discharging the first attachment does not conclude him as to any questions of fact, and he is entitled to a decision on the merits of a motion to discharge the second attachment.[29]

d. Ipso Facto Dissolution. An attachment is dissolved by the dismissal of the action,[30] a verdict[31] or a judgment[32] for defendant upon the merits, or an illegal exchange of justices by agreement of the parties.[33]

12. Claims of Third Persons[34]—a. Right to Intervene. The right of a claimant of attached property to intervene and assert his claim in the attachment proceedings is purely statutory, and consequently both the right to intervene and the mode of procedure are determined by the statutes in the particular jurisdiction.[35] Where intervention is provided for, any person claiming title to or interest in attached property may interpose his claim in the case.[36] Generally claimants must assert their rights to property seized under attachment issued by a justice of the peace before the trial of the main action.[37]

b. Forthcoming Bond. An intervener before a justice of the peace, claiming property attached, cannot, by giving a forthcoming bond, become repossessed of the property pending a determination of the intervention proceeding,[38] unless, as is sometimes the case, there is statutory provision therefor.[39]

c. Action or Proceeding—(i) *Form of Remedy and Procedure.* The form of remedy and procedure is wholly dependent upon the statutes in the par-

533, 12 Ohio Cir. Dec. 825; Kruger *v.* Stayton, 11 Heisk. (Tenn.) 726.

26. Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Sherry *v.* Divine, 11 Heisk. (Tenn.) 722. It has been held that the dissolution of an attachment issued by a justice of the peace, where defendant is not sufficiently served and does not appear, vacates a judgment rendered in plaintiff's favor. Churchill *v.* Coldsmith, 64 Mich. 250, 31 N. W. 187. But see Hills *v.* Moore, 40 Mich. 210, to the effect that where personal service has been had, jurisdiction is not ousted by the dissolution of the attachment.

27. See Attachment, 4 Cyc. 808.

28. Newman *v.* York, 74 Mo. App. 292.

29. Brooks *v.* Todd, 1 Handy (Ohio) 169, 12 Ohio Dec. (Reprint) 84, the basis of the decision being that the order discharging the first attachment was a mere collateral matter not affecting the merits of the action, was made on a summary hearing, and was not appealable.

30. O'Connor *v.* Blake, 29 Cal. 312, holding further that, although the case is reinstated and the parties appear and try it, defendant cannot by submitting himself anew to the jurisdiction of the court affect the rights of strangers to the action as to the property attached.

31. Stephenson *v.* Jones, 84 Mo. App. 249.

32. Loveland *v.* Alvord, etc., Co., 76 Cal. 562, 18 Pac. 682; Blynn *v.* Smith, 4 N. Y. Suppl. 306.

33. Wells *v.* Mansur, 52 Vt. 239.

34. Intervention in attachment generally see Attachment, 4 Cyc. 724 *et seq.*

35. *Colorado.*— Whalen *v.* McMahon, 16 Colo. 373, 26 Pac. 583.

Connecticut.— Darrow *v.* Adams Express Co., 41 Conn. 525.

Illinois.— Stafford *v.* Scroggin, 43 Ill. App. 48, holding that Ill. Rev. St. c. 11, § 29, entitled "Attachments in Courts of Record," and providing for interpleaders, does not apply to attachments before justices of the peace, but claims by third persons in such attachments are governed by Rev. St. c. 79, §§ 98–103.

New Jersey.— Stryker *v.* Skillman, 14 N. J. L. 189.

North Carolina.— Simpson *v.* Harry, 18 N. C. 202.

See 31 Cent. Dig. tit. "Justice of the Peace," § 291.

36. See Attachment, 4 Cyc. 725.

A mortgagee is a claimant, within the meaning of the Illinois statute, and may intervene. Armour Packing Co. *v.* Sjogren, 103 Ill. App. 197.

37. Whalen *v.* McMahon, 16 Colo. 373, 26 Pac. 583. See Attachment, 4 Cyc. 728.

38. Kennear *v.* Flanders, 17 Colo. 11, 28 Pac. 327.

39. See Kamena *v.* Wanner, 6 Duer (N. Y.) 698 [*reversing* 15 How. Pr. 5], holding that where a constable, on an attachment issued out of a justice's court against one person, seized and removed property found in the possession of another, and the latter claimed to be the owner, and desired to proceed under Rev. St. pt. 3, tit. 4, § 31, to perfect his right to have the property restored to his possession, he must give a bond, as required

ticular jurisdiction.[40] An officer executing an attachment issued by a justice of the peace has no authority to impanel a jury to inquire into the right of property attached,[41] unless such authority is given him by the statute, and then only in accordance with the statute.[42]

(II) *Jurisdiction.* While it is the general rule that the right of property must be tried in a court which has jurisdiction of the amount at which the attached property is valued,[43] yet, where the amount originally sued for is within the jurisdiction of a justice of the peace, he will have jurisdiction, although the value of the property attached is in excess of his jurisdictional limit.[44] Where, however, the intervention proceedings are equitable in their nature, they are without the jurisdiction of a justice,[45] and in some states a bill in equity is provided for on interpleader in foreign attachment, and the court of equity is empowered to take entire jurisdiction of the matter pending at law.[46] In North Carolina an early statute provided for the removal of claim cases to the county court, where the intervention of a jury might become necessary to determine the right.[47]

(III) *Judgment.* In intervention proceedings there must be a valid judgment,[48] which must conform to the verdict,[49] and be in accordance with statutory requirements.[50]

(IV) *Appeal.* On appeal by the attachment defendant alone, the intervener cannot question the correctness of a decision of the justice against his claim.[51]

13. Liabilities on Bonds and Undertakings[52] — a. In General. There is no liability on a bond or undertaking given in attachment proceedings before a justice of the peace when the justice had no authority to require the bond or undertaking.[53]

by the statute, in a penalty equal to double the value of the property attached, although such value greatly exceeded the debt on which it was seized; as the statute contemplated protection to the real owner of the property as well as to the plaintiff in the attachment.

40. See Attachment, 4 Cyc. 735.

41. Dickey *v.* Evans, 2 Litt. (Ky.) 129; Stryker *v.* Skillman, 14 N. J. L. 189.

42. See Stryker *v.* Skillman, 14 N. J. L. 189.

43. See Attachment, 4 Cyc. 736.

44. Fly *v.* Grieb, 62 Ark. 209, 35 S. W. 214; Mills *v.* Thomson, 61 Mo. 415; Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95.

45. Shea *v.* Regan, 29 Mont. 308, 74 Pac. 737, which was an action to establish a claim for services as a preferred lien over attaching creditors.

46. Darrow *v.* Adams Express Co., 41 Conn. 525, construing Gen. St. tit. 1, § 324.

47. See Simpson *v.* Harry, 18 N. C. 202, construing N. C. Act (1794), § 9 (Rev. c. 414), and holding that the word "appeal," as used in the act, was not to be taken in its technical sense, and that it was not necessary or regular therefore for the justice to pass on a claim of a third person to property attached before such person could carry his case to the county court.

48. State *v.* Silverstein, 77 Mo. App. 304, holding that a verdict for the interpleader cannot be taken as a judgment.

49. Mills *v.* Thomson, 61 Mo. 415, holding that where a number of horses were attached before a justice of the peace, and the jury found for an interpleader "in the sum of $150, for horses," etc., the verdict was a nullity, and should have been set aside as not responsive to the issue, and that a judgment rendered thereon "for the possession of the property mentioned in the interplea" was unauthorized.

50. McCormick Harvesting Mach. Co. *v.* Scott, 66 Nebr. 479, 92 N. W. 599, construing Nebr. Code Civ. Proc. §§ 996–998, and holding that the only judgment authorized is one for costs.

In Arkansas the judgment for the intervener should be for costs and the proceeds of the property in the sheriff's hands, and not for the property or its value, where the attached property had been sold and the proceeds delivered to the sheriff. Fly *v.* Griebs, 62 Ark. 209, 35 S. W. 214.

51. Winship *v.* May, 7 Colo. App. 355, 43 Pac. 904.

52. See, generally, Attachment.

53. Snyder *v.* Gillott, (Md. 1895) 32 Atl. 245, holding that as a justice of the peace had no authority to require plaintiff, before issuing an attachment in a suit against a non-resident, to furnish a bond to prosecute the suit with effect, an action could not be maintained on such a bond. See also Butler *v.* Wilson, 10 Ark. 313, where an action on a bond given by defendant in an attachment to procure a release of the property attached was defeated because the justice's transcript of the attachment suit did not show certain jurisdictional facts, as that plaintiff's cause of action was filed with the justice before the writ of attachment issued, or that a proper affidavit was filed, etc.

b. Discharge of Liability. An attachment bond is not discharged by the recovery of a judgment by the obligor before the justice, which is reversed on appeal.[54]

c. Enforcement of Liability — (I) *Right to Sue.* Where a forthcoming or claimant's bond is payable to plaintiff his right to sue is clear;[55] but where it is taken to the officer as obligee, plaintiff has no cause of action, either by motion or suit, until the bond is duly assigned to him,[56] except where, as the real party in interest, he is authorized by statute to sue in his own name.[57]

(II) *Election of Remedies.* Where a defendant was erroneously sued by long instead of short attachment, and plaintiff made default, it was held that defendant might either treat the process as void and recover damages in trespass, or waive the irregularity and sue on the attachment bond.[58]

(III) *Evidence.* In an action on a claim bond the attachment plaintiff need not show that the justice had jurisdiction to issue the attachment;[59] and where he is sued on his attachment bond, he may, under the plea of *non est factum*, prove in mitigation of damages that the property was sold by the constable, and a portion of it applied to the payment of an execution issued in another suit.[60]

(IV) *Damages.* Where a judgment in favor of the attachment plaintiff is reversed on appeal, the attachment defendant is entitled to recover, in an action upon the attachment bond, as part of his damages, the costs incurred by him in the higher court.[61]

14. Wrongful Attachment — a. Liability. An attachment before a justice of the peace which is merely irregular or voidable will protect the attachment plaintiff until set aside,[62] but after it is set aside it affords no protection;[63] and where an attachment is void, the attachment plaintiff is a trespasser *ab initio* and liable to defendant in damages, and there is no necessity that it be set aside before action is brought.[64]

b. Enforcement of Liability — (I) *Pleadings* — (A) *Declaration, Petition, or Complaint.* Where a final termination of the original action and attachment proceedings is essential to a cause of action for a wrongful attachment, the fact must be averred in the declaration, petition, or complaint;[65] and where an action is brought for wrongfully and vexatiously suing out an attachment before a justice in a foreign state, the declaration must show that the justice had authority by the laws of such state to issue attachments, and must contain averments connecting defendant with the levy.[66]

(B) *Plea of Justification.* Facts on which jurisdiction depends must be set forth in a plea of justification under an attachment, where it is necessary to show jurisdiction. General averments that the party complied with the statute and that the proceedings were according to its requirements will not answer.[67]

(II) *Defenses.* An attachment issued by a justice having jurisdiction, the recitals of which, and of the attachment bond, authorize the process, is a good justification in an action of trespass against plaintiff therein, nothing appearing upon the face of the proceedings or from the proof to invalidate it, although it

54. Bennett *v.* Brown, 20 N. Y. 99.
55. See Attachment, 4 Cyc. 703, 761.
56. McDowell *v.* Morgan, 33 Mo. 555.
57. See Attachment, 4 Cyc. 761.
58. Bowne *v.* Mellor, 6 Hill (N. Y.) 496.
59. Whiley *v.* Sherman, 3 Den. (N. Y.) 185.
60. Bennett *v.* Brown, 31 Barb. (N. Y.) 158.
61. Bennett *v.* Brown, 31 Barb. (N. Y.) 158 [*affirmed* in 20 N. Y. 99].
62. See Attachment, 4 Cyc. 831.
63. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62.
64. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62; Kelly *v.* Archer, 48 Barb. (N. Y.) 68; Davis *v.* Marshall, 14 Barb. (N. Y.) 96; Selby *v.* Platts, 3 Pinn. (Wis.) 170, 3 Chandl. 183.
65. Zigler *v.* Russell, 2 Ohio Dec. (Reprint) 518, holding the allegation sufficient.
66. Marshall *v.* Betner, 17 Ala. 832.
67. Van Etten *v.* Hurst, 6 Hill (N. Y.) 311, 41 Am. Dec. 748, to the effect that where a party proceeds by a justice's attachment to avoid a sale by a debtor as fraudulent with respect to creditors, and is sued in trespass for the wrongful taking, he must show that the justice had jurisdiction, and that the process was regularly issued.

appears that the attachment was issued and executed without cause, and was afterward discontinued, and the property restored.[68]

(III) *EVIDENCE.* Questions as to the burden of proof and the admissibility and weight and sufficiency of evidence in actions for wrongful attachment will be found exhaustively treated in another portion of this work.[69]

(IV) *DAMAGES.* Where an attachment is wrongfully sued out, but no actual damages have resulted, the attachment defendant is only entitled to nominal damages.[70]

H. Garnishment[71] — **1. WHEN PROCESS MAY ISSUE.** The process of garnishment in aid of an attachment or execution can only issue by a justice of the peace in such cases as are provided for by statute;[72] but generally speaking garnishment proceedings may be maintained in all cases where an ordinary suit at law would lie against the garnishee in favor of the attachment or judgment debtor.[73] It is necessary, in some states, to the validity of such proceedings that a valid attachment shall have been issued,[74] or that a valid judgment shall have been rendered,[75] and an authorized execution issued and returned unsatisfied.[76] But in Pennsylvania, where the judgment exceeds one hundred dollars, an attachment execution, as garnishment is called in that state, may issue without a return of *nulla bona* previously made.[77]

2. WHO MAY BE GARNISHED.[78] The statutes of most of the states provide comprehensively that any person indebted to or having in his possession or under his control property, money, or effects of the principal debtor is subject to garnishment.[79]

68. Lovier *v.* Gilpin, 6 Dana (Ky.) 321. *Compare* Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80, holding that where attachment issues from a justice in a case in which he has jurisdiction, it is a justification, unless causelessly issued to plaintiff in an action of trespass *vi et armis*.

69. See ATTACHMENT, 4 Cyc. 864 *et seq.*

Facts held insufficient to show abuse of process or fraudulent purpose see Mitchell *v.* Shook, 72 Ill. 492.

70. Blynn *v.* Smith, 4 N. Y. Suppl. 306.

71. See, generally, GARNISHMENT.

72. Smith *v.* Green, 34 Ga. 178.

In Pennsylvania to sustain an attachment execution it must appear as a statutory prerequisite that an execution was issued on the original judgment and returned *nulla bona*. Lyons *v.* Farrell, 11 Kulp 145. See also Shade *v.* Hartman, 11 Pa. Dist. 449; Harrington *v.* Gear, 26 Pa. Co. Ct. 274.

73. Bank of Commerce *v.* Franklin, 88 Ill. App. 198 [*citing* Bartell *v.* Bauman, 12 Ill. App. 450].

74. Where the main action is not begun by attachment, garnishment pending the judgment is void. Littlejohn *v.* Lewis, 32 Ark. 423. *Compare* Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207 [*citing* Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330; Brown *v.* Goble, 97 Ind. 86; Johnson *v.* Ramsay, 91 Ind. 189; Williams *v.* Hitzie, 83 Ind. 303; Earl *v.* Matheney, 60 Ind. 202], construing Burns Suppl. Rev. St. Ind. (1897) § 943, and holding that where a justice issues a summons, which is served on defendant, and a writ of garnishment, on the filing of an affidavit in garnishment only, which is served on the garnishee, the justice acquires jurisdiction of the subject-matter and of the persons of defendant and garnishee; and that the proceedings in garnishment, while erroneous, are not void. But see Pomeroy *v.* Beach, 149 Ind. 511, 49 N. E. 370, construing the same statute, and holding that an affidavit in attachment must be filed, as well as an affidavit in garnishment, before the garnishee summons can issue.

75. A void judgment cannot sustain judgment against garnishee. McCloon *v.* Beattie, 46 Mo. 391. But this is not true if the judgment is not void, but merely voidable, and it is acquiesced in by the party against whom it was rendered. Field *v.* Peel, 122 Ga. 503, 50 S. E. 346.

76. Bank of Commerce *v.* Franklin, 88 Ill. App. 198; Miller *v.* Snyder, 133 Pa. St. 23, 19 Atl. 309; Leiss *v.* Engard, 8 Pa. Dist. 608, 23 Pa. Co. Ct. 335; Delaney *v.* Carey, 10 Kulp (Pa.) 204; McGovern *v.* McTague, 13 Lanc. Bar (Pa.) 119; Brackbill *v.* Hess, 17 Lanc. L. Rev. (Pa.) 43; Mowry *v.* Thomas, Wilcox (Pa.) 106.

Cannot issue on void execution.— Dearborn Laundry Co. *v.* Chicago, etc., R. Co., 55 Ill. App. 438. See also Kansas, etc., Coal Co. *v.* Adams, 99 Mo. App. 474, 74 S. W. 158.

77. See Brackbill *v.* Hess, 17 Lanc. L. Rev. (Pa.) 43, where it was held that interest cannot be added to bring a judgment up to an amount sufficient to allow an attachment execution to issue without a previous return of *nulla bona*.

78. See, generally, GARNISHMENT.

79. Woodruff *v.* Griffith, 5 Ark. 354 (debtor of corporation subject); Luton *v.* Hoehn, 72 Ill. 81 (judgment debtor in court of record subject); Grinnell *v.* Niagara F. Ins. Co., 127

3. PROPERTY SUBJECT TO GARNISHMENT.[80] The garnishment statutes are as a rule limited in their operations to debts due from the garnishee to the principal debtor, and to personal property in the possession, or under control, of the garnishee, which may be seized and sold under execution.[81]

4. PROCEEDINGS TO PROCURE — a. Affidavit.[82] In some jurisdictions the creditor must, as a prerequisite to the issuance of a summons in garnishment, file an affidavit, stating the facts which under the statutes entitle him to the process.[83] The affidavit must substantially conform to the statute, or the justice will acquire no jurisdiction;[84] and, where the garnishment is issued in aid of an execution, it must show the judgment on which the proceedings are based, the amount thereof, and execution issued thereon and returned unsatisfied.[85]

b. Writ or Summons.[86] In order that a justice of the peace may obtain jurisdiction in garnishment proceedings, the garnishee must be summoned to appear and answer at the time and place fixed by law.[87] The writ or summons must conform to the statutory requirements,[88] must be issued by the justice having juris-

Mich. 19, 86 N. W. 435 (corporations subject).

An agent of defendant's debtor, through whom payment was to be made, cannot be garnished. Voorhies *v.* Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65.

The defendant in a suit before a justice for a debt cannot, pending the suit, be garnished before another justice by a creditor or a plaintiff. Custer *v.* White, 49 Mich. 262, 13 N. W. 583.

80. See, generally, GARNISHMENT.

81. See, generally, GARNISHMENT.

Evidences of debt not subject.— Osborne *v.* Schutt, 67 Mo. 712. See also Barker *v.* Garland, 22 N. H. 103, where it was held that a trustee cannot be charged on account of a negotiable note due from him to the principal defendant.

A judgment before one justice cannot be garnished before another. Noyes *v.* Foster, 48 Mich. 273, 12 N. W. 221; Sievers *v.* Woodburn Sarven Wheel Co., 43 Mich. 275, 5 N. W. 311.

Wages of laborers, or the salary of any person, are not subject to attachment execution in the hands of the employer, under the Pennsylvania act of April 5, 1845. Baker *v.* Harding, 6 Pa. Co. Ct. 21.

Wages attached for board.— The Pennsylvania act of May 8, 1876, for attachment of wages for board, does not authorize attachment as an original process, or otherwise than on a judgment. Dillon *v.* Treverton, 16 Pa. Co. Ct. 89; McCarty *v.* Dougherty, 16 Pa. Co. Ct. 86; Thatcher *v.* Beam, 14 Pa. Co. Ct. 109. See also Liess *v.* Engard, 8 Pa. Dist. 608.

Jury-fees not subject.— Simons *v.* Whartenaby, 2 Pa. L. J. Rep. 438.

Money due decedent.— Money in the hands of a debtor of a decedent is not subject to attachment execution at the suit of a creditor, on a justice's judgment against the administrator. Hartshorne *v.* Henderson, 3 Pa. L. J. Rep. 511.

82. See, generally, GARNISHMENT.

83. Garrett *v.* Murphy, 102 Ill. App. 65; Pomeroy *v.* Beach, 149 Ind. 511, 49 N. E. 370; Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196. See also Jones *v.* St. Onge, 67 Wis. 520, 30 N. W. 927, construing Laws (1881), c. 86; Laws (1885), c. 286, amending Rev. St. §§ 2753, 2768, and holding that they did not amend, by implication, Rev. St. § 3716, prescribing the practice as to garnishment proceedings in justices' courts.

84. An affidavit is fatally defective, where it omits to state that the money, effects, goods, and credits of the principal debtor in the garnishee's possession are not exempt. Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196; Steen *v.* Norton, 45 Wis. 412.

Substantial compliance sufficient.—An affidavit is not bad because it states that the affiant "verily believes," instead of the statutory form "has good reason to believe"; or because it uses the disjunctive form "is indebted to, or has property"; and a statement that garnishee has property, credits, moneys, and effects, is a sufficient statement that he has personal property. Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518.

85. Garrett *v.* Murphy, 102 Ill. App. 65.

86. See, generally, GARNISHMENT.

87. McClay *v.* Houston, 1 Harr. (Del.) 529.

Time for appearance.—Where an attachment clause is added to an execution, the garnishee must be summoned to appear at the return-day of the execution. McClay *v.* Houston, 1 Harr. (Del.) 529. But *compare* Wise *v.* Hull, 32 Mo. 209, where it was held that the return-day is the next law day of the justice, and not the return-day of the execution.

Notice of hearing.—Where the time and place for hearing the issue on the traverse of a garnishee's answer is fixed by law, no notice thereof need be given the garnishee. Mandeville *v.* Askew, 73 Ga. 18.

88. Illinois Cent. R. Co. *v.* Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

Where a statute requires written notice, a verbal notice to appear and answer is insufficient. Thus where it appeared that the officer read the execution to the garnishee's agent, and verbally told him to appear and

diction of the original suit,[89] and must be directed to, and served by, the officer or officers authorized by law to serve it.[90] A valid service of the process is essential to the justice's jurisdiction.[91]

c. Notice. Where so required by statute, notice must be served upon the principal defendant, either personally or by publication;[92] and such notice must comply with the requirements of the statute,[93] and the record of the justice must show such compliance.[94] When service on the defendant in an attachment execution is dispensed with when he resides out of the county, or service cannot be made, these facts must be shown in the return, in order to warrant a judgment by default.[95]

d. Appearance.[96] By appearing and answering a garnishee waives defects and irregularities in the proceedings against himself;[97] but he cannot waive objections to defects in the proceedings against the principal defendant,[98] or any of the statutory requirements essential to the justice's jurisdiction over the subject-matter.[99] The principal defendant may appear in the garnishment proceedings for the purpose of contesting the jurisdiction without submitting himself generally to the jurisdiction of the justice.[1]

answer, it was held that the notice was not sufficient to warrant a conditional judgment against the garnishee, and that the defect was not cured by the issuance and service of a scire facias, and the failure of the garnishee to defend. Illinois Cent. R. Co. *v.* Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

Writ against corporation as garnishee held sufficient see Grinnell *v.* Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

89. Attachment execution cannot be issued by a justice of another county on a transcript from the docket of a justice in defendant's county. Miller *v.* Snyder, 6 Lanc. L. Rev. (Pa.) 92.

90. Fletcher *v.* Wear, 81 Mo. 524; Brown *v.* Dudley, 33 N. H. 511.

Justice cannot appoint special officer to serve.— Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126; Fletcher *v.* Wear, 81 Mo. 524.

A justice cannot serve a garnishment summons.— Massengale *v.* McGinty, 73 Ga. 120.

In New Hampshire, where plaintiff and defendant reside in one county, and the trustee in another, the writ should be directed to the sheriff of any county or his deputy, or to any constable of each of the towns wherein either of the parties resides. Brown *v.* Dudley, 33 N. H. 511.

91. Lawrence *v.* Ware, 1 Stew. (Ala.) 33; Massengale *v.* McGinty, 73 Ga. 120; McFarland *v.* Wilder, (Tex. Civ. App. 1899) 54 S. W. 267.

Service of process generally see *supra*, IV, E; and, generally, PROCESS.

In an action against a non-resident based on garnishment, if no valid service of summons has been had on the garnishee, a judgment rendered on the garnishee's affidavit is erroneous, and will not support a judgment against the principal defendant. Lawrence *v.* Ware, 1 Stew. (Ala.) 33.

Service on corporation held sufficient see Grinnell *v.* Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

92. See, generally, GARNISHMENT.

Service by publication.— Newman *v.* Manning, 89 Ind. 422; Andrews *v.* Powell, 27 Ind. 303. *Compare* Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83.

93. Where the notice published was under the attachment statute, and not under the statute relating to garnishments, it was held that the justice had no jurisdiction. State *v.* Cordes, 87 Wis. 373, 58 N. W. 771.

94. Andrews *v.* Powell, 27 Ind. 303.

95. Henaughen *v.* Golden, 4 Lanc. L. Rev. (Pa.) 75.

96. **Appearance in garnishment proceedings** generally see GARNISHMENT.

97. Carey *v.* Brinton, 6 Houst. (Del.) 340; Walter A. Wood Mowing, etc., Mach. Co. *v.* Edwards, 9 Tex. Civ. App. 537, 29 S. W. 418. Where garnishee appears, admits his indebtedness, and authorizes the entry of judgment, he thereby waives the want of a declaration, second process and proof, and is estopped from asserting the invalidity of the judgment in a collateral suit. Bigalow *v.* Barre, 30 Mich. 1. But the appearance and answer of a garnishee in response to a summons reciting a judgment and unsatisfied execution does not waive the necessity of proving such judgment and execution in the action against the garnishee. Miller *v.* Wilson, 86 Tenn. 495, 7 S. W. 638.

98. Segar *v.* Muskegon Shingle, etc., Co., 81 Mich. 344, 45 N. W. 982.

99. Fletcher *v.* Wear, 81 Mo. 524 (in which the process was served by an unauthorized person); Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695 (in which the record failed to show the affidavit required by the statute); Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196; Steen *v.* Norton, 45 Wis. 412 (in both of which the affidavit omitted to state that the effects in the garnishee's hands were not exempt).

Voluntary appearance cannot confer jurisdiction, or waive the requirements of the statute. McCormick Harvesting Mach. Co. *v.* James, 84 Wis. 600, 54 N. W. 1088.

1. State *v.* Cordes, 87 Wis. 373, 58 N. W.

5. Lien of Garnishment and Liability of Garnishee.[2] A debt due from another is as much property, and as effectually attached, when the person owing it has been summoned as a garnishee, as is any visible property upon which an attachment may have been levied;[3] but the garnishee's liability is limited to debts or property for which he would otherwise be liable to the principal defendant,[4] and judgment against him should only be for the amount of such defendant's liability to the plaintiff.[5]

6. Custody and Disposition of Property. Under some statutes, the property must be seized by the officer, or a forthcoming bond must be taken from the garnishee, and an order by the justice that the garnishee shall retain possession of the property until the final disposition of the case gives the justice no jurisdiction to render judgment against a non-resident defendant.[6]

7. Proceedings to Support or Enforce[7] **— a. In General.** Proceedings to support or enforce garnishment are in the nature of an original action.[8] When properly summoned the garnishee must appear in person and make a written disclosure,[9] or submit to an oral examination.[10] To warrant a judgment the disclosure must be explicit in its admissions;[11] but if the facts disclosed clearly show an indebtedness to the principal defendant which is subject to garnishment, judgment should go against the garnishee, although he denies such indebtedness.[12] In such proceedings the garnishee is entitled to interpose any set-off or defense he

771, where the principal defendant, who had not been served with summons, appeared in the garnishment proceeding in order to claim a fund garnished as exempt, and it was held that such appearance did not give the court jurisdiction of him in the main action.

2. See, generally, Garnishment.

3. Stahl *v.* Webster, 11 Ill. 511.

Lien of attachment see *supra*, IV, G, 8.

Loss of priority of lien.—When plaintiff in garnishment against a non-resident defendant fails to have the cause continued as required by statute (Ohio Rev. St. § 6496), and does not advertise for service on defendant, he loses his priority of lien on the fund garnished. Vorhees *v.* Fisher, 8 Ohio Dec. (Reprint) 184, 6 Cinc. L. Bul. 202.

4. Voorhies *v.* Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65.

5. Pomeroy *v.* Rand, 157 Ill. 176, 41 N. E. 636 [*reversing* 54 Ill. App. 522, and *distinguishing* Stahl *v.* Webster, 11 Ill. 511].

6. Davis *v.* Lewis, 16 Ohio Cir. Ct. 138, 8 Ohio Cir. Dec. 772.

7. **What statutes govern.**—Where the suit is commenced by attachment, the procedure as to the garnishee is under the attachment act only until it has reached the stage where judgment has been rendered against defendant in attachment, and thereafter is under the garnishment act, as in garnishment proceedings in aid of an execution, and exists only by virtue of that act. Flannigen *v.* Pope, 97 Ill. App. 263.

8. See Atchinson *v.* Rosalip, 3 Pinn. (Wis.) 288, 4 Chandl. 12, where it was held that a judgment was void for irregularity where the docket did not disclose the entry of a separate suit and separate proceedings against the garnishee, and a judgment as in ordinary cases.

"**The proper proceeding,** after a garnishee has either failed to answer, or answered unsatisfactorily, is for the plaintiff to file his complaint, and upon that to cause summons to be issued on the garnishee, and thus institute a regular suit against him, on the basis of the judgment against the defendant in the original suit and the allegations and interrogatories of the plaintiff and the garnishee's answer thereto." Nelson *v.* Blanks, 67 Ark. 347, 349, 56 S. W. 867.

9. See, generally, Garnishment.

Although the statute requires a written disclosure, yet if the trustee appears and without such disclosure consents orally that judgment may be entered against him, he cannot maintain audita querela to have the judgment set aside. Lockwood *v.* Fletcher, 74 Vt. 72, 52 Atl. 119.

Unless the examination is in writing and signed by the garnishee, the recital in the judgment that he came before the justice and admitted facts necessary to charge him is not conclusive upon him. Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335.

10. Cornell *v.* Payne, 115 Ill. 63, 3 N. E. 718; Rice *v.* Whitney, 12 Ohio St. 358.

Striking a written disclosure from the files, and compelling the garnishee to submit to an oral examination, does not involve error prejudicial to the rights of the garnishee. Grinnell *v.* Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

11. Weirich *v.* Scribner, 44 Mich. 73, 6 N. W. 91; Spears *v.* Chapman, 43 Mich. 541, 5 N. W. 1038.

Amendment. — When a garnishee answers that he will not be able to state the exact amount due defendant in money until a future day, inasmuch as he is to pay a part of the debt otherwise than in money, the court may afterward allow him to file an amended answer on which the case may be tried. Karnes *v.* Pritchard, 36 Mo. 135.

12. Donnelly *v.* O'Connor, 22 Minn. 309.

may have;[13] but he is not required to question the jurisdictional legality or the regularity of the proceedings as to the principal defendant, where the latter is personally present in court,[14] and he cannot contest the validity of the judgment or execution upon which the garnishment proceedings are based.[15] The principal defendant may also defend the garnishment proceedings, on the ground that the indebtedness of the garnishee to him is not liable to attachment.[16] Whether or not costs will be allowed to garnishees is wholly dependent upon the statutes.[17]

b. Judgment Against Garnishee[18] — (i) *In General.* A judgment against the principal defendant is as a rule prerequisite to a judgment against the garnishee, and that there is such a judgment must be shown by the record.[19] But the reverse is true where an action has been commenced against a non-resident, based on an attachment against a garnishee, in which case judgment cannot be rendered against defendant by default, until after judgment against the garnishee.[20] The judgment against the garnishee should be rendered on return-day, unless there is a regular adjournment;[21] but the justice's failure to enter an adjournment of the garnishment proceedings in his docket will not affect a judgment subsequently rendered.[22] In some jurisdictions no judgment can be rendered against a garnishee;[23] and where this is the case an order of the justice that the garnishee shall pay money into court is not a final determination of plaintiff's right to the money, but is in effect merely an assignment of the claim from the debtor to the creditor.[24]

13. Secor *v.* Witter, 39 Ohio St. 218.

Privity of defendant necessary to set-off.— A garnishee cannot set off against plaintiff a debt, or maintain a defense by showing a mutual agreement for the payment of the garnished debt by plaintiff, to which the principal defendant was not privy. Matthews *v.* Robinson, 20 Ala. 130.

Where the attachment is void, the garnishee may object its invalidity to any judgment being given against himself. Houston *v.* Porter, 32 N. C. 174.

A defense of a dilatory character must be presented before an issue on the merits has been formed and is being tried. Ellis *v.* Galesburg Base Ball Assoc., 45 Ill. App. 279.

14. Ohio, etc., R. Co. *v.* Alvey, 43 Ind. 180.

15. Illinois Cent. R. Co. *v.* Brooks, 90 Tenn. 161, 16 S. W. 77; Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

16. Jones *v.* St. Onge, 67 Wis. 520, 30 N. W. 927.

17. See, generally, GARNISHMENT.

Costs not allowed.—Julius King Optical Co. *v.* Royal Ins. Co., 24 Pa. Super. Ct. 527.

Counsel fees not allowed to be taxed.— Miller *v.* Williams, 30 Vt. 386.

18. See, generally, GARNISHMENT.

19. The true rule is that, in a garnishment proceeding under an attachment or summons, the record in such proceeding and in the principal suit are to be read together; and it is sufficient if the whole record shows that a judgment has been rendered against the principal defendant. Where a statute gives a garnishment proceeding upon a judgment without execution, the record in the proceeding should show the judgment upon which it is based. Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599.

A personal judgment against defendant will not support a judgment against the garnishee, under Ind. Rev. St. (1881) § 936. Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150.

20. Laurence *v.* Ware, 1 Stew. (Ala.) 33. *Compare* Rector *v.* Drury, 3 Pinn. (Wis.) 298, 4 Chandl. 24.

21. Hamilton *v.* Allen, 4 Harr. (Del.) 326.

22. Bushnell *v.* Allen, 48 Wis. 460, 4 N. W. 599.

23. In Kansas an order is made by the justice requiring the property or money to be delivered to the court pending final adjudication. Such an order is not enforceable by execution, plaintiff's remedy against the garnishee being by action. Missouri Pac. R. Co. *v.* Reid, 34 Kan. 410, 8 Pac. 846 [*following* Fitch *v.* Manhattan F. Ins. Co., 23 Kan. 366, and *citing* Muse *v.* Lehman, 30 Kan. 514, 1 Pac. 804; Board of Education *v.* Scoville, 13 Kan. 17]. The order is not final, and may be attacked by the garnishee in the subsequent action of plaintiff against him. Fitch *v.* Manhattan F. Ins. Co., 23 Kan. 366; Kansas City, etc., R. Co. *v.* Cunningham, (Kan. App. 1898) 51 Pac. 972 [*following* Board of Education *v.* Scoville, 13 Kan. 17].

In Ohio the garnishee is required to submit to an examination, and if the justice concludes that his statements admit indebtedness, he may order the sum admitted to be paid into court; but such an order can be enforced only by action against the garnishee. Rice *v.* Whitney, 12 Ohio St. 358.

In Rhode Island the garnishee is merely charged, and upon his default becomes liable to satisfy the judgment that plaintiff may recover against the principal defendant, to be recovered by action on the case. Eddy *v.* Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116.

24. Board of Education *v.* Scoville, 13 Kan. 17; Le Roy Bank *v.* Harding, 1 Kan. App. 389, 41 Pac. 680.

(II) *Form and Contents of Judgment.* The judgment against the garnishee should state for what reason it is entered — whether for neglect or refusal to answer, in default of appearance, upon answer, or upon a verdict; and in all but the first case judgment should be entered specially.[25] Where the justice finds that the garnishee has property of defendant subject to be delivered at a future time, the judgment should first direct a delivery to the court at such time for plaintiff's benefit, and on the garnishee's failure so to deliver it judgment should go against him for its value.[26] So too money absolutely and unconditionally due from the garnishee to defendant may be ordered to be paid into court.[27]

(III) *Amount of Judgment.* In Minnesota a judgment cannot be rendered against a garnishee for less than ten dollars.[28]

(IV) *Judgment by Default.*[29] Judgment by default may be rendered against a garnishee who fails to answer.[30] In some jurisdictions, however, the default judgment is only conditional, and before final judgment scire facias must issue commanding the garnishee to appear on the return-day of the writ, and show cause why the conditional judgment should not be made final and conclusive;[31] while in those jurisdictions in which no judgment can be given against a garnishee, his default renders him liable to satisfy the judgment that plaintiff may recover, to be recovered by action.[32] A justice of the peace may set aside a judgment by default and grant a new trial in a garnishment proceeding as in other cases;[33] but a garnishee cannot defeat such a judgment, rendered after judgment against the principal defendant, by entering an appeal to a jury, and then filing an answer denying indebtedness.[34]

(V) *Judgment Upon Answer.* Unless the answer of a garnishee is traversed or denied, the judgment must depend upon its legal import.[35] Although one answer might authorize more than one judgment, it would be irregular, if not erroneous, to render but one judgment on two or more executions returned *nulla bona*, notwithstanding they might be at the instance of the same plaintiff against the same defendant.[36]

(VI) *Reopening Judgment.* After entry of judgment against the garnishee, the justice cannot, either of his own motion or by agreement of the parties, reopen the case, and adjourn the action to a future day.[37]

(VII) *Enforcement of Judgment.* Personal property delivered into court by a garnishee, under the order of a justice of the peace, must be sold in the

25. Leiss *v.* Engard, 8 Pa. Dist. 608, 23 Pa. Co. Ct. 335.

26. Rasmussen *v.* McCabe, 43 Wis. 471.

27. Under Wis. Rev. St. § 3727, an order requiring a garnishee to pay into court the amount of a conditional debt from him to defendants, which was subject to claims for mechanics' liens, was held improper. Krueger *v.* Cone, 106 Wis. 522, 81 N. W. 984.

28. Sheehan *v.* Newpick, 77 Minn. 426, 80 N. W. 356.

29. See, generally, Garnishment.

30. Jarrell *v.* Guann, 105 Ga. 139, 31 S. E. 149; Farley *v.* Bloodworth, 66 Ga. 349; Scott *v.* Patrick, 44 Ga. 188.

31. See Rice *v.* American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024, to the effect that if the conditional judgment is void there is nothing upon which the scire facias can rest.

32. Eddy *v.* Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116.

33. Smith *v.* Parker, 25 Ark. 518.

Time of motion.— In Missouri a motion to set aside a default judgment must be filed within ten days. Roach *v.* Montserrat Coal Co., 71 Mo. 398.

Petition to county court. — A trustee, against whom a judgment by default has been rendered, cannot, under Vt. Rev. St. c. 33, § 8, maintain a petition in the county court to vacate the judgment. Denison *v.* True, 22 Vt. 42.

34. Proctor *v.* Rhodes, 112 Ga. 110, 37 S. E. 171; Davis *v.* Rhodes, 112 Ga. 106, 37 S. E. 169. But *compare* Boozer *v.* Fuller, 88 Ga. 295, 14 S. E. 615.

35. Kapp *v.* Teel, 33 Tex. 811, where the garnishee answered that his indebtedness was on a note not yet due, and it was held that the justice had no authority, without further proceedings or proof, to render judgment against him.

Where the justice errs in his construction of the answer, or in rendering judgment against the garnishee for damages, such judgment is merely erroneous, and an execution sale thereunder will pass title. Rasmussen *v.* McCabe, 43 Wis. 471.

36. Witherspoon *v.* Barber, 3 Stew. (Ala.) 335.

37. McCormick Harvesting Mach. Co. *v.* James, 84 Wis. 600, 54 N. W. 1088.

township where the notice was served upon the garnishee, as the property is constructively seized where the notice is served.[38]

(VIII) *INJUNCTIVE RELIEF.*[39] A court of equity will enjoin the enforcement of a judgment against a garnishee where it is void,[40] or where it would be against good conscience to execute it, and the garnishee has not been guilty of laches, but has been deprived of his rights through some fraud or accident.[41]

(IX) *FORCE AND EFFECT OF JUDGMENT.* A judgment of a justice of the peace against a garnishee in a case within his jurisdiction, although erroneous, cannot be avoided collaterally, but may be enforced until reversed.[42] Such a judgment, however, is not *res judicata* or binding on the principal defendant, except as to the property or money which the garnishee has been compelled to deliver up;[43] and even as to such property or money the garnishee will not be protected, if he has wilfully or negligently suffered judgment without making known any exemption rights which the principal defendant may have had.[44] Where the garnishment proceedings are void, a judgment against the garnishee cannot have the effect to release him from liability to defendant.[45]

8. DISSOLUTION AND DISCHARGE[46] — a. In General. A garnishee will be discharged where no liability subject to be garnished is shown,[47] where plaintiff fails to recover judgment against defendant,[48] or where a final judgment has been rendered against himself.[49]

b. Effect of Payment. The statutes of some states provide that a garnishee may exonerate himself from liability by paying over to the justice or constable the money due from him to the principal debtor;[50] and generally a payment *bona fide* made by a garnishee will protect him, although the proceedings are irregular or erroneous, if they are not void.[51] Where payment is pleaded as a defense, the answer must show that the demand set forth in the complaint and that passed on in the garnishment proceeding were identical.[52]

9. CLAIMS OF THIRD PERSONS.[53] The rights of third persons in the property or money attached in garnishment proceedings are usually protected by the statutes.[54] An appeal will lie from the decision of a justice of the peace on an

38. Beamer *v.* Winter, 41 Kan. 596, 21 Pac. 1078.

39. See, generally, JUDGMENTS.

40. Rice *v.* American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024; Missouri Pac. R. Co. *v.* Reid, 34 Kan. 410, 8 Pac. 846; Cobbey *v.* Wright, 34 Nebr. 771, 52 N. W. 713.

41. Davis *v.* Staples, 45 Mo. 567; Watkins *v.* Gray, 5 Mo. App. 592.

42. Boynton *v.* Fly, 12 Me. 17. See, generally, JUDGMENTS.

43. Low *v.* Arnstein, 73 Ill. App. 215; Smith *v.* Dickson, 58 Iowa 444, 10 N. W. 890. See, generally, JUDGMENTS.

44. Curran *v.* Fleming, 76 Ga. 98; Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. W. 83; State *v.* Barnett, 96 Mo. 133, 8 S. W. 767.

45. Littlejohn *v.* Lewis, 32 Ark. 423.

46. See, generally, GARNISHMENT.

47. Barker *v.* Garland, 22 N. H. 103, where the trustees did not disclose any funds in their hands except negotiable notes on which they were liable to defendant jointly and severally with other persons not summoned as trustees in the suit.

48. See Erickson *v.* Duluth, etc., R. Co., 105 Mich. 415, 63 N. W. 420, construing Howell Annot. St. Mich. §§ 8037, 8038, 8040, 8041, and holding that a garnishee is not released from plaintiff's claim by a judgment in a justice's court in favor of defendant, from which an appeal has been taken.

49. Where final judgment was rendered against a garnishee, an order of continuance in the cause, made four days later, together with a subsequent judgment *nisi*, afterward made final, was void, and gave the justice no further jurisdiction over the garnishee. Burgin *v.* Ivy Coal, etc., Co., 127 Ala. 657, 29 So. 67.

50. **Payments held sufficient.**— Barber *v.* Howd, 85 Mich. 221, 48 N. W. 539 (payment under justice's order to plaintiff, who satisfies judgment on docket); Troyer *v.* Schweizer, 15 Minn. 241 (voluntary payment to justice before execution); Melton *v.* Kansas City, etc., R. Co., 39 Mo. App. 194 (payment to justice, who turned money over to constable).

Payment of wages exempt from garnishment will not protect garnishee, unless defendant has so acted as to estop himself from recovering them from garnishee. Crisp *v.* Wayne, etc., R. Co., 98 Mich. 648, 57 N. W. 1050, 23 L. R. A. 732. See GARNISHMENT.

51. Parmer *v.* Ballard, 3 Stew. (Ala.) 326; Taylor *v.* Benjamin, 76 Ga. 762; Ohio, etc., R. Co. *v.* Alvey, 43 Ind. 180.

52. Sangster *v.* Butt, 17 Ind. 354.

53. See, generally, GARNISHMENT.

54. In Kansas Laws (1877), c. 137, pro-

interplea,[55] and where a claimant goes to trial on plaintiff's traverse of the garnishee's answer, and then sues out a certiorari to review the justice's decision, he waives any formal objections to the traverse.[56] In such proceedings the burden is on the claimant to establish his claim.[57] The claimant of a fund brought into court by a summons of garnishment issued on a judgment which is not void, but merely voidable, cannot question the validity of the judgment, when it is acquiesced in by the party against whom it was rendered.[58]

10. Liabilities on Bonds and Undertakings. Where a bond is given to discharge garnishment proceedings, and is conditioned to pay any judgment which may be rendered against the garnishee on final hearing, it will bind the obligors to pay any final judgment rendered against him on appeal;[59] and where sureties have voluntarily given a bond in consideration of the discharge of a garnishee or trustee, they cannot object that the justice who took the bond and discharged the garnishee or trustee had lost jurisdiction of the action by reason of the pendency of an appeal.[60]

I. Pleading[61] — **1. In General.** While pleadings are essential to the formation of the issues to be tried,[62] no formal pleadings are necessary, and technical rules will not be enforced in suits before justices of the peace.[63] In some states

viding for interpleas where money, effects, or credits are attached, is applicable to garnishment proceedings commenced before a justice of the peace. Clark *v.* Wiss, 34 Kan. 553, 9 Pac. 281.

In Michigan Comp. Laws (1897), § 1017, provides that proceedings in garnishment shall be adjourned for not less than ten nor more than thirty days after the return-day of the summons, for the purpose of giving notice to claimants. An adjournment for more than thirty days divests the justice of jurisdiction. Hagen *v.* Johnson, 126 Mich. 695, 86 N. W. 143. Under 3 Howell Annot. St. Mich. § 8057*a*, providing that the garnishee may deliver the money to the justice, who shall cause a notice to be served on a third person, who, according to the garnishee's disclosure, makes claim thereto, and the garnishee shall be thereafter discharged from liability, where the notice is served before the delivery of the money, the proceedings are not binding on the claimant. Stone *v.* Dowling, 119 Mich. 476, 78 N. W. 549.

55. Smith *v.* Sterritt, 24 Mo. 260.

56. Pedrick *v.* McCall, 80 Ga. 491, 5 S. E. 633, in which claimant was held to have waived the objection that the traverse was not filed in time.

57. Donnelly *v.* O'Connor, 22 Minn. 309.

58. Field *v.* Peel, 122 Ga. 503, 50 S. E. 346, so holding where a case had been continued in a justice's court and the judgment was erroneously rendered during the term at which the continuance was granted.

59. Washer *v.* Campbell, 40 Kan. 398, 19 Pac. 858.

60. Rich *v.* Sowles, 65 Vt. 135, 26 Atl. 585.

61. See, generally, Pleading.

62. Moore *v.* Jordan, 67 Tex. 394, 3 S. W. 317.

63. *Georgia.*— Dorsey *v.* Black, 55 Ga. 315.

Indiana.— Indianapolis, etc., R. Co. *v.* McMahan, 14 Ind. 422; Brush *v.* Carpenter, 6 Ind. 78; Gharkey *v.* Halstead, Smith 208.

Iowa.— West *v.* Moody, 33 Iowa 137; Shea *v.* Livingston, 32 Iowa 158; Teagarden *v.* Baker, 9 Iowa 271; Hall *v.* Monahan, 1 Iowa 554, 6 Iowa 216, 71 Am. Dec. 404; Burton *v.* Hill, 4 Greene 379; Levi *v.* McCraney, Morr. 91.

Kansas.— McAboy *v.* Talbot, 37 Kan. 19, 14 Pac. 536; West *v.* Rice, 4 Kan. 563.

Maryland.— Herzberg *v.* Adams, 39 Md. 309.

Michigan.— Hurtford *v.* Holmes, 3 Mich. 460.

Missouri.— Quinn *v.* Stout, 31 Mo. 160; Holland *v.* The R. H. Winslow, 25 Mo. 57; Thruston *v.* McClanahan, 5 Mo. 521; Byrne *v.* St. Louis, etc., R. Co., 75 Mo. App. 36.

New Jersey.— Hixon *v.* Schooley, 26 N. J. L. 461.

New York.— Campbell *v.* Porter, 46 N. Y. App. Div. 628, 61 N. Y. Suppl. 712; Hartwell *v.* Young, 67 Hun 472, 22 N. Y. Suppl. 486; Osborn *v.* Nelson, 59 Barb. 375; Hall *v.* McKechnie, 22 Barb. 244; Willard *v.* Bridge, 4 Barb. 361; Ross *v.* Hamilton, 3 Barb. 609; Boyce *v.* Perry, 26 Misc. 355, 57 N. Y. Suppl. 214; Musier *v.* Trumpbour, 5 Wend. 274; Pintard *v.* Tackington, 10 Johns. 104; McNeil *v.* Scoffield, 3 Johns. 436.

Ohio.— Niven *v.* Smith, 2 Ohio Dec. (Reprint) 337, 2 West. L. Month. 465.

Oklahoma.— Brewer *v.* Black, 5 Okla. 57, 47 Pac. 1089.

South Carolina.— Williams *v.* Irby, 15 S. C. 458.

Tennessee.— Baker *v.* Allen, 2 Overt. 175.

Texas.— Melton *v.* Katzenstein, (Civ. App. 1899) 49 S. W. 173.

Wisconsin.— Meyer *v.* Prairie du Chien, 9 Wis. 233; Hibbard *v.* Bell, 3 Pinn. 190, 3 Chandl. 206.

United States.— Davis *v.* Pitman, 7 Fed. Cas. No. 3,647*a*, Hempst. 44.

See 31 Cent. Dig. tit. "Justices of the Peace," § 306.

"The only pleadings in a justice's court are: 1. The plaintiff's complaint. 2. The defendant's answer. 3. The defendant's de-

the pleadings may be oral,[64] but in such case there must be an entry by the justice on his docket showing the substance of the pleading.[65] But whether oral or written, the pleadings in justices' courts will be treated with great liberality,[66] the only distinction between the two modes being that written pleadings are treated with somewhat more strictness than oral.[67]

2. DECLARATION, PETITION, COMPLAINT, OR STATEMENT — a. Necessity and Time of Filing. In many jurisdictions no formal declaration, petition, complaint, or statement of demand is required,[68] its place being taken either by the summons,[69] or by the filing of the bill, note, bond, certificate of deposit, account, or other instrument in writing on which the suit is brought.[70] Where plaintiff is required or

murrer to the complaint, etc. 4. The plaintiff's demurrer to one or more counterclaims stated in the answer." Boyce *v.* Perry, 26 Misc. (N. Y.) 355, 357, 57 N. Y. Suppl. 214.

Sufficient regard must be had to form to prevent the substantial rights of the parties from being sacrificed. Hibbard *v.* Bell, 3 Pinn. 190, 3 Chandl. (Wis.) 206.

Where a time is fixed by statute at which the pleadings in a justice's court shall take place, a justice has no power to receive them after the expiration of such time. Mattice *v.* Litcherding, 14 Minn. 142; Holgate *v.* Broome, 8 Minn. 243. *Compare* Rauen *v.* Burg, 38 Minn. 389, 37 N. W. 946.

Stipulation to waive pleadings see *infra*, IV, J, note 69.

64. *Arkansas.*—Sparks *v.* Robinson, 66 Ark. 460, 51 S. W. 460.

Illinois.— Wilcox *v.* Tetherington, 103 Ill. App. 404.

Iowa.— Finch *v.* Central R. Co., 42 Iowa 304; Sinnamon *v.* Melbourn, 4 Greene 309; Taylor *v.* Barber, 2 Greene 350.

Michigan.— Carmer *v.* Hubbard, 123 Mich. 333, 82 N. W. 64.

Minnesota.— Rauen *v.* Burg, 38 Minn. 389, 37 N. W. 946.

Missouri.— Byrne *v.* St. Louis, etc., R. Co., 75 Mo. App. 36.

Oregon.— Whipple *v.* Southern Pac. Co., 34 Oreg. 370, 55 Pac. 975.

South Carolina.— Williams *v.* Irby, 15 S. C. 458.

South Dakota.— Sinkling *v.* Illinois Cent. R. Co., 10 S. D. 560, 74 N. W. 1029.

Texas.— Moore *v.* Jordan, 67 Tex. 394, 3 S. W. 317; Frost *v.* Byrd, (Civ. App. 1896) 39 S. W. 127; Texas, etc., R. Co. *v.* Miller, 1 Tex. App. Civ. Cas. § 262.

Wisconsin.— Lester *v.* French, 6 Wis. 580; Maynard *v.* Tidball, 2 Wis. 34.

See 31 Cent. Dig. tit. "Justices of the Peace," § 306.

65. Carmer *v.* Hubbard, 123 Mich. 333, 82 N. W. 64; Whipple *v.* Southern Pac. Co., 34 Oreg. 370, 55 Pac. 975; Moore *v.* Jordan, 67 Tex. 394, 3 S. W. 317; Melton *v.* Katzenstein, (Tex. Civ. App. 1899) 49 S. W. 173; Frost *v.* Byrd, (Tex. Civ. App. 1896) 39 S. W. 127. *Compare* Sinnamon *v.* Melbourn, 4 Greene (Iowa) 309, where it was held that the statutory provision that the justice should reduce oral pleadings to writing was directory only, and that the parties should not be prejudiced by his failure to do so.

Sufficiency of entry.—All that is necessary is an entry informing the opposite party what issues will be raised; and it is not required that the entry should be complete in itself, as constituting good pleading, when tested by the rules governing pleadings in courts of record. Melton *v.* Katzenstein, (Tex. Civ. App. 1899) 49 S. W. 173.

Form of docket entry see Carmen *v.* Hubbard, 123 Mich. 333, 82 N. W. 64.

66. Stuart *v.* Lander, 16 Cal. 372, 76 Am. Dec. 538; Metropolitan L. Ins. Co. *v.* Bowser, 20 Ind. App. 557, 50 N. E. 86; Ross *v.* Hamilton, 3 Barb. (N. Y.) 609; Cohen *v.* Dupont, 1 Sandf. (N. Y.) 260; Chamberlain *v.* Graves, 2 Hill (N. Y.) 504; Pintard *v.* Tackington, 10 Johns. (N. Y.) 104; McNeil *v.* Scoffield, 3 Johns. (N. Y.) 436; Swineford *v.* Pomeroy, 16 Wis. 553.

Test of sufficiency.—Any allegation or denial which apprises the opposite party of what is intended will be sufficient; and if the party is at a loss as to what is intended, he should require the pleader to be more explicit. Cohen *v.* Dupont, 1 Sandf. (N. Y.) 260.

67. International, etc., R. Co. *v.* Donalson, 2 Tex. App. Civ. Cas. § 238; Fobes *v.* School Dist., 10 Wis. 117; Lester *v.* French, 6 Wis. 580; Maynard *v.* Tidball, 2 Wis. 34.

68. Ewbanks *v.* Ashley, 36 Ill. 177; Ruble *v.* Massey, 2 Ind. 636; Cook *v.* Minick, 1 Pa. Co. Ct. 603, actions exceeding one hundred dollars. And see Mastin Bank *v.* Hammerslough, 72 Mo. 274; Harris *v.* Harman, 3 Mo. 450; Harryman *v.* Robertson, 3 Mo. 449; Odle *v.* Clark, 2 Mo. 12, to the effect that a statement of the cause of action is only necessary where damages for wrong done are claimed. *Contra*, Goble *v.* Snover, 3 N. J. L. 407; Sloan *v.* Holland, 2 N. J. L. 141.

69. In Alabama, under Code (1896), § 2667, it is enough to indorse the cause of action on the summons. Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56.

In Georgia, under Code, § 4139, there is no pleading in a justice's court except the summons, to which the justice is required to attach a copy of the cause of action. Carnes *v.* Mattox, 71 Ga. 515. See also Farkas *v.* Stewart, 73 Ga. 90.

In Massachusetts the declaration may be inserted in the writ. See Keenan *v.* Knight, 9 Allen (Mass.) 257.

70. *Arkansas.*— Jacks *v.* Nelson, 34 Ark. 531, in which the filing of a certificate of deposit indorsed to plaintiff was held a sufficient statement of the cause of action against

elects to plead, he must file his pleading, or where necessary, have it served on defendant, within the time prescribed by law.[71]

b. Form and Requisites[72] — (i) *In General.* In a suit commenced before a justice of the peace, the same fulness, certainty, and formality of statement in the declaration, petition, or complaint is not required as is demanded in suits commenced in the higher courts;[73] and this is peculiarly the case where written

the party with whom the deposit was made.

Indiana.— Audleur *v.* Kuffel, 71 Ind. 543; Baldwin *v.* Webster, 68 Ind. 133; Tucker *v.* Gardiner, 63 Ind. 299; Barnett *v.* Juday, 38 Ind. 86; Hauser *v.* Hays, 11 Ind. 368; Adams *v.* Kerns, 11 Ind. 346; Hardesty *v.* Kinworthy, 8 Blackf. 304; Olds *v.* State, 6 Blackf. 91; Barber *v.* Summers, 5 Blackf. 339; Watson *v.* New, 4 Blackf. 313.

Iowa.— Hall *v.* Monahan, 1 Iowa 554, 6 Iowa 216, 71 Am. Dec. 404.

Minnesota.— When a cause of action upon an account or instrument is for the payment of money only, it is sufficient for the party to deliver the instrument to the court, and to state that there is due him thereon a specified sum, which he claims to recover. Continental Ins. Co. *v.* Richardson, 69 Minn. 433, 72 N. W. 458. In an action on an account stated, the pleading is sufficient where the complaint consists only of the account itself. Taylor *v.* Parker, 17 Minn. 469.

Missouri.— A written statement is only required when the suit is not on an account, or an instrument purporting to have been executed by defendant. Mastin Bank *v.* Hammerslough, 72 Mo. 274; Gillihan *v.* Wren, 44 Mo. 377; Phillips *v.* Fitzpatrick, 34 Mo. 276; Harris *v.* Harman, 3 Mo. 450; Harryman *v.* Robertson, 3 Mo. 449; First State Bank *v.* Noel, 94 Mo. App. 498, 68 N. W. 235; Collins *v.* Burrus, 66 Mo. App. 70.

West Virginia.— Mountain City Mill Co. *v.* Southern, 46 W. Va. 754, 34 S. E. 782.

Wisconsin.—Swineford *v.* Pomeroy, 16 Wis. 553.

See 31 Cent. Dig. tit. "Justices of the Peace," § 307.

Contra.— Dean *v.* Whitmore, 3 N. J. L. 739; Cowperwaite *v.* Horned, 3 N. J. L. 613; Heritage *v.* Daniels, 3 N. J. L. 551; Longstreet *v.* Cummines, 2 N. J. L. 195.

In action on account from another state see Accounts and Accounting, 1 Cyc. 481 note 78.

71. Keenan *v.* Knight, 9 Allen (Mass.) 257 (justice cannot allow declaration to be filed after entry of the writ); Hunt *v.* South, 5 N. J. L. 583; Clark *v.* Read, 5 N. J. L. 571 (state of demand must be filed on return-day, and before adjournment can be had); Paul *v.* Southern R. Co., 50 S. C. 23, 27 S. E. 526 (where demand is less than twenty-five dollars, complaint must be served not less than five days before day fixed for trial); Bruner *v.* Dubard, 1 Tex. App. Civ. Cas. § 391 (where distress warrant is made returnable to county court, petition must be filed before appearance day of the term to which the papers are returnable).

Complaint stated after jury sworn.—Where a summons demands a specific sum, the fact that after the jury was sworn plaintiff for the first time makes a statement of his cause of action is not error, as the oath of the jury relates to all matters involved in the case. Straley *v.* Payne, 43 W. Va. 185, 27 S. E. 359.

72. **In action for killing or injuring animals** see Animals, 2 Cyc. 422 note 21.

73. *California.*— O'Callaghan *v.* Booth, 6 Cal. 63.

Indiana.— Howe *v.* Young, 16 Ind. 312; Stephens *v.* Scott, 13 Ind. 515.

Iowa.— Winneshiek County *v.* Humpal, 61 Iowa 172, 16 N. W. 67.

Missouri.— Blewett *v.* Smith, 74 Mo. 404; Key *v.* St. Louis, etc., R. Co., 73 Mo. 475; Razor *v.* St. Louis, etc., R. Co., 73 Mo. 471; Darnell *v.* Lafferty, 113 Mo. App. 282, 88 S. W. 784; Schluter *v.* Wiedenbrocker, 23 Mo. App. 440; Muckel *v.* Rose, 15 Mo. App. 393.

New Jersey.—Scott *v.* Beatty, 23 N. J. L. 256; Bergin *v.* Riggens, 3 N. J. L. 654; McCannan *v.* Anderson, 3 N. J. L. 560; Burt *v.* Hicks, 3 N. J. L. 461; Moore *v.* Whitacar, 3 N. J. L. 460; Longstreet *v.* Taylor, 2 N. J. L. 250; Lewis *v.* Albertson, 2 N. J. L. 93.

New York.— Siemer *v.* Federall, 22 N. Y. App. Div. 506, 48 N. Y. Suppl. 91; Hall *v.* McKechnie, 22 Barb. 244. But *compare* Stone *v.* Case, 13 Wend. 283, where it was held that a declaration must be good in form as well as in substance if it is objected to before the justice.

North Carolina.— Turner *v.* McKee, 137 N. C. 251, 49 S. E. 330; Brittain *v.* Payne, 118 N. C. 989, 24 S. E. 711.

Pennsylvania.— Godcharles *v.* Laufer, 3 Del. Co. 514.

South Dakota.— Sinkling *v.* Illinois Cent. R. Co., 10 S. D. 560, 74 N. W. 1029.

Texas.— Texas, etc., R. Co. *v.* Miller, 1 Tex. App. Civ. Cas. § 262. See Evans *v.* Gray, (Civ. App. 1905) 86 S. W. 375.

Vermont.— Thompson *v.* Colony, 6 Vt. 91.

See 31 Cent. Dig. tit. "Justices of the Peace," § 308.

If the statement contains necessary jurisdictional averments, it is sufficient, although inartificially drawn. Schluter *v.* Wiedenbrocker, 23 Mo. App. 440.

Pleading jurisdictional facts see *supra*, III, O, 2.

Venue need not be laid in actions on the case for tort. Moore *v.* Whitacar, 3 N. J. L. 460. *Compare* Muckel *v.* Rose, 15 Mo. App. 393, where it was held that in trespass *quare clausum fregit* the complaint is sufficiently definite if it lays the place so as to determine the venue, and the time within a month.

pleadings are not required.[74] In some states, under the statute, counts in trespass *de bonis asportatis* and in trover may be joined in suits commenced before a justice of the peace, although not in the superior courts.[75]

(II) *Statement of Cause of Action.* A declaration, petition, complaint, or statement of demand in an action commenced before a justice of the peace is sufficient, if it contains enough to inform defendant of the nature of plaintiff's claim, and is so explicit that a judgment thereon will bar another suit for the same cause of action;[76] but to this extent it is indispensable that the state-

Surplusage does not vitiate a statement of demand otherwise sufficient. Burt *v.* Hicks, 3 N. J. L. 461.

State of demand need not be dated nor filed.— Longstreet *v.* Taylor, 2 N. J. L. 250.

If first count shows a case within the jurisdiction, the others may be regarded as only different modes of declaring for the same cause of action. Thompson *v.* Colony, 6 Vt. 91.

In actions by or against a firm it is not essential that the statement should set out the names of the members, although it is otherwise as to actions by or against persons composing an unincorporated company. Clark *v.* Dunlap, 2 Ind. 551.

In an action by a corporation failure to state in the complaint and summons that plaintiff is a corporation invested with power to sue is ground for demurrer. Lookout Mountain Medicine Co. *v.* Hare, 56 S. C. 456, 35 S. E. 130. See also Crown Point Iron Co. *v.* Fitzgerald, 14 N. Y. St. 427.

A penal statute or ordinance need not generally be declared on. O'Callaghan *v.* Booth, 6 Cal. 63; Carmer *v.* Hubbard, 123 Mich. 333, 82 N. W. 64. But *compare* as to necessity of pleading local statutes or city ordinances Pittsburgh *v.* Madden, 14 Pa. Co. Ct. 120. See also Ganaway *v.* Mobile, 21 Ala. 577 (holding that in an action instituted before a justice of the peace by the mayor, etc., of Mobile against defendant, for the violation of a city ordinance, and removed by appeal into the circuit court, the statement is fatally defective on demurrer if it does not set forth the provision of the ordinance alleged to have been violated); White *v.* Neptune City, 56 N. J. L. 222, 28 Atl. 378 (in which the summons referred to one section of the ordinance and the complaint to another, and it was held that no recovery could be had under either).

74. Finch *v.* Central R. Co., 42 Iowa 304; Taylor *v.* Barber, 2 Greene (Iowa) 350; Carmer *v.* Hubbard, 123 Mich. 333, 82 N. W. 64; Texas, etc., R. Co. *v.* Miller, 1 Tex. App. Civ. Cas. § 262.

In determining the sufficiency of an oral complaint, it may be construed with the written answer. Sinkling *v.* Illinois Cent. R. Co., 10 S. D. 560, 74 N. W. 1029 [*citing* Kelsey *v.* Chicago, etc., R. Co., 1 S. D. 80, 45 N. W. 204].

An oral complaint against a corporation need not allege that defendant is "a corporation duly incorporated." Texas, etc., R. Co. *v.* Miller, 1 Tex. App. Civ. Cas. § 262.

75. Earl *v.* Hamilton, 6 Blackf. (Ind.) 77.

76. *Alabama.*— Bessemer Ice Delivery Co. *v.* Brannon, 138 Ala. 157, 35 So. 56; Martin *v.* Higgins, 23 Ala. 775.

California.— Lataillade *v.* Santa Barbara Gas Co., 58 Cal. 4.

Georgia.— Williams *v.* George, 104 Ga. 599, 30 S. E. 751. *Compare* Thomas *v.* Forsyth Chair Co., 119 Ga. 693, 46 S. E. 869, construing Laws (1880–1881), p. 66. And see Georgia R. & Electric Co., 122 Ga. 290, 50 S. E. 124.

Indiana.— Clifford *v.* Meyer, (1893) 33 N. E. 127; Rice *v.* Manford, 110 Ind. 596, 11 N. E. 283; Wabash, etc., R. Co. *v.* Lash, 103 Ind. 80, 2 N. E. 250; Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254; Louisville, etc., R. Co. *v.* Zink, 92 Ind. 406; Bieneke *v.* Wurgler, 77 Ind. 468; Duffy *v.* Howard, 77 Ind. 182; De Priest *v.* State, 68 Ind. 569; Goshen *v.* Kern, 63 Ind. 468, 30 Am. Rep. 234; Powell *v.* De Hart, 55 Ind. 94; Griffin *v.* Cox, 30 Ind. 242; Clark *v.* Benefiel, 18 Ind. 405; Indiana Cent. R. Co. *v.* Leamon, 18 Ind. 173; Desher *v.* Parks, 13 Ind. 394; Milholland *v.* Pence, 11 Ind. 203; Mullen *v.* Decatur County Com'rs, 9 Ind. 502; Taylor *v.* Webster, 3 Ind. 513; Davis *v.* Davis, 6 Blackf. 394; Cook *v.* Hedges, 6 Blackf. 184; State *v.* Mowbray, 6 Blackf. 89; Smith *v.* District Trustees, 5 Blackf. 40; Wiley *v.* Shank, 4 Blackf. 420; Cleveland, etc., R. Co. *v.* Baker, 24 Ind. App. 152, 54 N. E. 814; Metropolitan L. Ins. Co. *v.* Bowser, 20 Ind. App. 557, 50 N. E. 86; Chicago, etc., R. Co. *v.* Woodward, 13 Ind. App. 296, 41 N. E. 544; Clifford *v.* Meyer, 6 Ind. App. 633, 34 N. E. 23; Watson *v.* Conwell, 3 Ind. App. 518, 30 N. E. 5; Milhollin *v.* Fuller, 1 Ind. App. 58, 27 N. E. 111.

Iowa.— Fauble *v.* Stewart, 35 Iowa 379; Brownell *v.* Smith, 13 Iowa 287.

Michigan.— Wilcox *v.* Toledo, etc., R. Co., 43 Mich. 584, 5 N. W. 1003.

Minnesota.— Continental Ins. Co. *v.* Richardson, 69 Minn. 433, 72 N. W. 458; Guthrie *v.* Olson, 32 Minn. 465, 21 N. W. 557; Johnson *v.* Knoblauch, 14 Minn. 16.

Missouri.— Weese *v.* Brown, 102 Mo. 299, 14 S. W. 945; Witting *v.* St. Louis, etc., R. Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636; Lynn *v.* Chicago, etc., R. Co., 75 Mo. 167; Meyer *v.* McCabe, 73 Mo. 236; Armstrong *v.* Keleher, 71 Mo. 492; Cook *v.* Decker, 63 Mo. 328; Wallace *v.* Moore, 61 Mo. 472; Baker *v.* Farris, 61 Mo. 389; Gillihan *v.* Wren, 44 Mo. 377; Burt *v.* Warne, 31 Mo. 296; Quinn *v.* Stout, 31 Mo. 160; Holland *v.* The R. H. Winslow, 25 Mo. 57; Early *v.* Fleming, 16 Mo. 154; Darnell *v.* Lafferty, (App. 1905) 88 S. W.

ment should go,[77] and all the facts material to the cause of action must be set

784; Smith *v.* Truitt, 107 Mo. App. 1, 80 S. W. 686; Cunningham *v.* Dickerson, 104 Mo. App. 410, 79 S. W. 492; Sepetowski *v.* St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693; Manley *v.* Crescent Novelty Mfg. Co., 103 Mo. 135, 77 S. W. 489; White *v.* Missouri Pac. R. Co., 98 Mo. App. 542, 72 S. W. 716; Johnson *v.* Kahn, 97 Mo. App. 628, 71 S. W. 725; Jaco *v.* Southern Missouri, etc., R. Co., 94 Mo. App. 567, 68 S. W. 379; First State Bank *v.* Noel, 94 Mo. App. 498, 68 S. W. 235; Maxwell *v.* Quimby, 90 Mo. App. 469; Harmon *v.* Iden, 88 Mo. App. 314; Barham *v.* Colp, 87 Mo. App. 152; Adams *v.* Ellis, 86 Mo. App. 343; Glasscock *v.* Chicago, etc., R. Co., 86 Mo. App. 114; Eastin *v.* Joyce, 85 Mo. App. 433; Calmes *v.* Haight, 85 Mo. App. 362; Hubble *v.* Coiner, 83 Mo. App. 455; St. Louis Trust Co. *v.* American Real Estate, etc., Co., 82 Mo. App. 260; Finley *v.* Dyer, 79 Mo. App. 604; Terti *v.* American Ins. Co., 76 Mo. App. 42; Byrne *v.* St. Louis, etc., R. Co., 75 Mo. App. 36; Cameron Sun *v.* McAnaw, 72 Mo. App. 196; Doggett *v.* Blanke, 70 Mo. App. 499; Buschmann *v.* Bray, 68 Mo. App. 8; Funsten *v.* Funsten Commission Co., 67 Mo. App. 559; Glenn *v.* Weary, 66 Mo. App. 75; Collins *v.* Burrus, 66 Mo. App. 70; Wilkinson *v.* Metropolitan L. Ins. Co., 54 Mo. App. 661; Lee *v.* Western Union Tel. Co., 51 Mo. App. 375; Johnson *v.* Loomis, 50 Mo. App. 142; Bauer *v.* Barnett, 46 Mo. App. 654; Strickland *v.* Quick, 45 Mo. App. 610; Polhans *v.* Atchison, etc., R. Co., 45 Mo. App. 153; Holman *v.* Kerr, 44 Mo. App. 481; Dahlgren *v.* Yocum, 44 Mo. App. 277; Penninger *v.* Reilley, 44 Mo. App. 255; Grabbe *v.* St. Louis Drayage Co., 42 Mo. App. 522; Beofer *v.* Sheridan, 42 Mo. App. 226; Gregg *v.* Dunn, 38 Mo. App. 283; Fleischmann *v.* Miller, 38 Mo. App. 177; Ingalls *v.* Averitt, 34 Mo. App. 371; Sturdy *v.* St. Charles Land, etc., Co., 33 Mo. App. 44; Damhorst *v.* Missouri Pac. R. Co., 32 Mo. App. 350; Gibbs *v.* Missouri Pac. R. Co., 11 Mo. App. 459; Strathmann *v.* Gorla, 14 Mo. App. 1.

New Jersey.— Weill *v.* Jacoby, 71 N. J. L. 85, 58 Atl. 80; McCall Co. *v.* Merritt, 66 N. J. L. 502, 49 Atl. 466; Patten *v.* Heustis, 26 N. J. L. 293; Vanderveer *v.* McMackin, 6 N. J. L. 213; Sykes *v.* Stokes, 4 N. J. L. 248; Tichenor *v.* Colfax, 4 N. J. L. 178; Leonard *v.* Ware, 4 N. J. L. 174; Lippencott *v.* Smith, 4 N. J. L. 109; Seely *v.* Myres, 2 N. J. L. 364.

New York.— Smith *v.* Kerr, 3 N. Y. 144; Willard *v.* Bridge, 4 Barb. 361; Hubbell *v.* Clark, 1 Hilt. 67; Button *v.* Lusk, 10 N. Y. Suppl. 582; First Presb. Church *v.* Ayer, 4 N. Y. St. 388; Stolp *v.* Van Cortland, 3 Wend. 492.

Oklahoma.— Brewer *v.* Black, 5 Okla. 57, 47 Pac. 1089.

Texas.— Long *v.* Cude, 75 Tex. 225, 12 S. W. 827; Doyle *v.* Glasscock, 24 Tex. 200; Craig *v.* Pruitt, (Civ. App. 1901) 60 S. W. 586; Ethridge *v.* San Antonio, etc., R. Co., (Civ. App. 1897) 39 S. W. 204; Texas, etc., R. Co. *v.* Wright, 2 Tex. App. Civ. Cas. § 339. A statement in a justice's court claiming a commission for selling the separate property of a married woman, and alleging that the amount of the commission was reasonable, and that plaintiff's services were for the benefit of defendant's separate property, sufficiently charged that the debt was contracted by defendant for the benefit of her separate property, and that the amount thereof was reasonable. Evans *v.* Gray, (Civ. App. 1905) 86 S. W. 375.

West Virginia.— Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222; O'Connor *v.* Dils, 43 W. Va. 54, 26 S. E. 354.

Wisconsin.— Dehnel *v.* Komrow, 37 Wis. 336; Phillips *v.* Bridges, 3 Wis. 270.

United States.— Dillingham *v.* Skein, 7 Fed. Cas. No. 3,912*a*, Hempst. 181.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 309–322.

"The object of the declaration is fully accomplished when the defendant is fairly apprised by it of the grounds of the plaintiff's claim, so that he need be under no misapprehension as to what matters are to be litigated on the trial." Wilcox *v.* Toledo, etc., R. Co., 43 Mich. 584, 5 N. W. 1003.

In an action on a sealed instrument it is not necessary to aver that it was signed and sealed by the parties, or either of them. It is enough to declare generally for a breach of contract, referring to the contract or agreement in such terms as to identify it, or to set out the contract according to its legal effect. Smith *v.* Kerr, 3 N. Y. 144.

77. *Alabama.*— Ganaway *v.* Mobile, 21 Ala. 577.

Indiana.— Murphy *v.* Lambert, 59 Ind. 477.

Michigan.— Smith *v.* Hobart, 43 Mich. 465, 5 N. W. 666.

Missouri.— Sone *v.* Wallendorf, 187 Mo. 1, 85 S. W. 592; Swartz *v.* Nicholson, 65 Mo. 508; Brashears *v.* Strock, 46 Mo. 221; St. Louis Trust Co. *v.* American Real Estate, etc., Co., 82 Mo. App. 260; Moffett-West Drug Co. *v.* Johnson, 80 Mo. App. 428; McCrary *v.* Good, 74 Mo. App. 425; Webster *v.* Atchison, etc., R. Co., 57 Mo. App. 451; Leas *v.* Pacific Express Co., 45 Mo. App. 598; Nutter *v.* Houston, 32 Mo. App. 451; Rosenburg *v.* Boyd, 14 Mo. App. 429.

New Jersey.— Denny *v.* Quintin, 28 N. J. L. 134; Smith *v.* Dunn, 26 N. J. L. 212; Carter *v.* Lackey, 20 N. J. L. 608; Meeker *v.* Garland, 16 N. J. L. 486; Angus *v.* Flood, 15 N. J. L. 437; Hutchinson *v.* Targee, 14 N. J. L. 386; Stewart *v.* Patterson, 14 N. J. L. 141; South *v.* Decou, 12 N. J. L. 125; Collet *v.* Smith, 12 N. J. L. 125; Evans *v.* McClellan, 12 N. J. L. 123; Folwell *v.* Ford, 12 N. J. L. 68; Vanguilder *v.* Stull, 10 N. J. L. 233; Cornelius *v.* Ivins, 10 N. J. L. 56; Boyd *v.* Rose, 4 N. J. L. 267; Kline *v.* Ramsay, 4 N. J. L. 163; Beaumont *v.* Dunn, 4 N. J. L. 122; La Rue *v.* Boughaner, 4 N. J. L. 105;

forth.[78] Where the justice's jurisdiction is special, every essential to its exercise must be alleged.[79]

3. PLEA OR ANSWER[80] AND CROSS COMPLAINT — a. In General. Defendant in an action before a justice of the peace is not required to enter a formal plea or answer,[81] and the same liberality of construction will be indulged in favor of his

English *v.* Horner, 3 N. J. L. 816; Dougherty *v.* Anderson, 3 N. J. L. 428; Hagerman *v.* Titus, 2 N. J. L. 151.

New York.— Cortland *v.* Howard, 1 N. Y. App. Div. 131, 37 N. Y. Suppl. 843; Howe Sewing Mach. Co. *v.* Haupt, 7 Daly 108; Houghton *v.* Strong, 1 Cai. 486.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 309–322.

That defendant knows what he is sued for is not sufficient; the petition or statement must be sufficient to advise him of the nature of the claim, and definite enough to bar another action. McCrary *v.* Good, 74 Mo. App. 425.

Where the action is in form ex delicto, plaintiff should allege in substance that he has sustained some damage by the act or omission of defendant, and should set out in an intelligible manner the nature of the act of which he complains. Phillips *v.* Bridges, 3 Wis. 270.

In an action on an account the statement of demand must contain the dates of the items. La Rue *v.* Boughaner, 4 N. J. L. 120; Sims *v.* Smith, 4 N. J. L. 105.

A declaration for breach of warranty must show the nature of the warranty and state the breach. Smith *v.* Hobart, 43 Mich. 465, 5 N. W. 666.

78. Denny *v.* Quintin, 28 N. J. L. 134; Meeker *v.* Garland, 16 N. J. L. 486. A statement of demand that "the plaintiff comes into court, and pleads that S. is indebted to him for $55, for not paying me the freedom due in his indenture," was held fatally defective for failing to allege who made the indenture, and the nature of the liability on it. Sayre *v.* Rose, 3 N. J. L. 743.

Evidentiary facts need not be stated. Cook *v.* Hedges, 6 Blackf. (Ind.) 184; Wiley *v.* Shank, 4 Blackf. (Ind.) 420; Collins *v.* Burrus, 66 Mo. App. 70 [*citing* Polhans *v.* Atchison, etc., R. Co., 115 Mo. 535, 22 S. W. 478; Weese *v.* Brown, 102 Mo. 299, 14 S. W. 945; Hale *v.* Van Dever, 67 Mo. 732; Coughlin *v.* Lyons, 24 Mo. 533; Wilkinson *v.* Metropolitan Ins. Co., 54 Mo. App. 661; Boefer *v.* Sheridan, 42 Mo. App. 226].

79. Heimberger *v.* Harrison, 83 Mo. App. 544 [*citing* Ewing *v.* Donnelly, 20 Mo. App. 6].

Pleading jurisdictional facts see *supra*, III, O, 2.

80. In action on account see ACCOUNTS AND ACCOUNTING, 1 Cyc. 482 note 88.

81. *Arkansas.*—Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105; Texas, etc., R. Co. *v.* Hall, 44 Ark. 375.

California.— Koehler *v.* Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73.

Georgia.— If defendant, in response to the summons, appears and marks his name, or the name of his counsel, on the docket, it is equivalent to filing a plea of the general issue. It is the making of his defense at the first term, and thereafter he may plead any other matter appropriate to his defense. Heyward *v.* Field, 95 Ga. 714, 22 S. W. 653, construing the act of Oct. 16, 1891, amending the act of Sept. 26, 1883. *Compare* McCall *v.* Tufts, 85 Ga. 619, 11 S. E. 886, decided under the act of Sept. 26, 1883.

Illinois.— Williams *v.* Corbet, 28 Ill. 262; Lindley *v.* Hitchings, 78 Ill. App. 425, written plea of fraud not necessary.

Indiana.— All defenses except the statute of limitations, set-off, matter in abatement, and the denial of the execution or assignment of a written instrument, may be given in evidence without plea. Metropolitan L. Ins. Co. *v.* Bowser, 20 Ind. App. 557, 50 N. E. 86 [*citing* Campbell *v.* Nixon, 2 Ind. App. 463, 28 N. E. 107].

Iowa.— Where the petition, although written and sworn to, does not call for a sworn answer, an oral answer is admissible. Freibertsheyser *v.* Rischatch, 10 Iowa 587.

Kansas.—Royal Fraternal Union *v.* Crosier, 70 Kan. 85, 78 Pac. 162.

Missouri.— The general issue is raised by defendant's appearing and interposing a defense. Melican *v.* Missouri Edison Electric Co., 90 Mo. App. 595; Beck *v.* Kinealy, 89 Mo. App. 418; Sherman *v.* Rockwood, 26 Mo. App. 403; Lewis *v.* Baker, 24 Mo. App. 682.

Nebraska.— Mullins *v.* South Omaha St. Fair Assoc., 5 Nebr. (Unoff.) 572, 99 N. W. 521.

New Hampshire.— Colby *v.* Stevens, 38 N. H. 191.

New Jersey.— Bray *v.* Van Note, 2 N. J. L. 143.

New York.— Statute of frauds need not be pleaded. Campbell *v.* Porter, 46 N. Y. App. Div. 628, 61 N. Y. Suppl. 712 [*citing* Hartwell *v.* Young, 67 Hun 472, 22 N. Y. Suppl. 486].

Oregon.— Whipple *v.* Southern Pac. Co., 34 Oreg. 370, 55 Pac. 975.

Texas.— Low *v.* Griffin, (Civ. App. 1897) 41 S. W. 73.

West Virginia.— It is not necessary that there be a plea or issue, where there is a full trial as if on plea and issue. White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761.

See 31 Cent. Dig. tit. "Justices of the Peace," § 324; and *infra*, IV, I, 8, b, (II).

But see as to necessity of affidavit of defense in Pennsylvania Moore *v.* Bundy, 8 Pa. Dist. 529, 22 Pa. Co. Ct. 583; Longnecker *v.* Red Lion Council, 13 York Leg. Rec. (Pa.) 190. In an appeal from a judgment of a

pleading as toward plaintiff.[82] If, however, defendant elects to file an answer, it will limit the issues as under the ordinary rules of pleading.[83] In the absence of statutory requirements on the subject,[84] defendant may interpose his defense at any time during the pendency of the action.[85] Where defendant interposes inconsistent defenses, he must elect on which he will stand, or his offer of evidence will be rejected.[86]

b. Dilatory Pleas and Matter in Abatement. In a proper case defendant may plead in abatement to an action before a justice of the peace in some jurisdictions,[87] while in others such pleas are inadmissible, and the defects which they are

justice "no statute requires the filing of a specific affidavit of defence. The filing of such affidavit is only rendered obligatory by rule No. 20, court of common pleas of Blair county. But this court has repeatedly ruled that affidavits of defence, filed under the provisions of said rule No. 20, will not be scrutinized with that degree of legal nicety with which affidavits, required by general statute, are viewed." Cordes *v.* Swartz, 26 Pa. Co. Ct. 486, 488.

A plea of breach of warranty in an attachment for purchase-money in a justice's court need not be in writing. Casey *v.* Crane, 122 Ga. 318, 50 S. E. 92.

Oral plea must be docketed by justice.— Whipple *v.* Southern Pac. Co., 34 Oreg. 370, 55 Pac. 975. And see *supra*, IV, I, 1.

82. **Pleadings are to be construed with great liberality,** and where the answer clearly indicates the defense, it must be considered sufficient. McGrath *v.* O'Brien, 42 Minn. 13, 43 N. W. 486. And see also the following cases:

California.— Minturn *v.* Burr, 20 Cal. 48; Sullivan *v.* Cary, 17 Cal. 80, general or specific denial of material allegations of complaint sufficient.

Minnesota.— Harm *v.* Davies, 79 Minn. 311, 82 N. W. 585.

North Carolina.— Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891.

Pennsylvania.— Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135 (plea of not guilty instead of *non assumpsit* presents no ground of objection after trial on merits); Longenecker *v.* Red Lion Council, 13 York Leg. Rec. 190 (affidavit of defense held sufficient).

South Carolina.— Porter *v.* Charleston, etc., R. Co., 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670.

Texas.— Collins *v.* Dignowity, (1888) 8 S. W. 326; Harris *v.* Pinckney, (Civ. App. 1900) 55 S. W. 38.

See 31 Cent. Dig. tit. "Justices of the Peace," § 324.

83. Royal Fraternal Union *v.* Crosier, 70 Kan. 85, 78 Pac. 162.

Plea to the jurisdiction.—A plea in a justice's court in F county alleging that defendant does not, and for many months before the commencement of the suit has not resided in F county, but in I county, is not good because of failure to show what court in I county has the jurisdiction of the case as required in the plea to the jurisdiction under Civ. Code (1895), § 5082. Akers *v.* J. M. High Co., 122 Ga. 279, 50 S. E. 105.

84. **In Georgia,** under Civ. Code (1895), § 4134, where an action is brought upon "an unconditional contract in writing," defendant is required to make his defense at the first term. Morgan *v.* Cohutta, 120 Ga. 423, 47 S. E. 971. *Compare* as to what is not an "unconditional" contract Lewis *v.* Nevils, 97 Ga. 744, 25 S. E. 409.

In Minnesota, where the complaint is filed on the return-day, and defendant, omitting to plead, consents to an adjournment for more than a week, "the pleadings are closed," within Gen. St. c. 65, § 34, and defendant's right to answer is gone. O'Brien *v.* Pomroy, 22 Minn. 130.

85. O'Dell *v.* Meacham, 114 Ga. 910, 41 S. E. 41 (affidavit of defense filed after case was called for trial); Thompson *v.* Sheridan, 80 Hun (N. Y.) 33, 29 N. Y. Suppl. 868 (appearance and answer after plaintiff has given his evidence, but is still present); Doty *v.* Campbell, 1 How. Pr. N. S. (N. Y.) 101 (answer during plaintiff's examination of witnesses); Jenkins *v.* Brown, 21 Wend. (N. Y.) 454 (discretionary with justice to allow defendant, who did not appear on return-day, to plead on adjourned day); Pickert *v.* Dexter, 12 Wend. (N. Y.) 150 (if defendant appears on return-day before plaintiff has closed, it is error to refuse him leave to plead); Riley *v.* Seymour, 1 Wend. (N. Y.) 143 (defendant, who has made no appearance, has right to plead on adjourned day); Lowther *v.* Crummie, 8 Cow. (N. Y.) 87 (may plead on adjourned day on paying costs of adjournment, etc.); Bowen *v.* Bell, 19 Johns. (N. Y.) 390 (plea may be entered on adjourned day). *Compare* Tallmadge *v.* Potter, 12 Wis. 317, where it is questioned whether the refusal of a justice to receive a plea after submission of plaintiff's case is error. And see Bates *v.* Bulkley, 7 Ill. 389 (defendant should state grounds of defense before trial); Sweet *v.* Coon, 15 Johns. (N. Y.) 86; Snell *v.* Loucks, 11 Johns. (N. Y.) 69.

86. Sherman *v.* Rockwood, 26 Mo. App. 403.

87. Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

That an action is not seasonably entered is properly pleadable in abatement; and the objection cannot be reached by motion to dismiss. Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

designed to reach must be taken advantage of by motion.[88] Pleas or motions in abatement and dilatory defenses must be entered or made at the earliest opportunity.[89]

c. Set-Off and Counter-Claim. In most jurisdictions a set-off or counter-claim, to be available to defendant in an action before a justice of the peace, must be pleaded, and the plea, whether verbal or written, must show the nature of the set-off or counter-claim relied on.[90]

4. Reply. No reply is necessary in an action in a justice's court.[91]

5. Demurrer or Motion, Amendments, and Pleas Puis Darrein Continuance — a. Demurrer or Motion. In some jurisdictions there is no demurrer to a defective complaint or bill of particulars, the remedy being by motion to dismiss, strike out, or make more definite.[92] In other jurisdictions, however, where a pleading is not sufficiently explicit to be understood, or where it does not state facts sufficient to constitute a cause of action or counter-claim, the proper mode of raising

Plea stricken out as frivolous see Wagnon *v.* Turner, 73 Ala. 197.

Plea of privilege held defective see McQuigg *v.* Nabors, 23 Tex. Civ. App. 357, 56 S. W. 212.

After overruling defendant's plea in abatement, it is error to render judgment against him without requiring plaintiff to give evidence of his demand. Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385, 17 N. E. 483.

88. Otis *v.* Ellis, 78 Me. 75, 2 Atl. 851; Mountain City Mill Co. *v.* Southern, 46 W. Va. 754, 34 S. E. 782; Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

89. Beck *v.* Glenn, 69 Ala. 121; Noles *v.* Marable, 50 Ala. 366; Dodge *v.* People, 113 Ill. 491, 1 N. E. 826; Otis *v.* Ellis, 78 Me. 75, 2 Atl. 851.

Plea of title to lands may be pleaded at any time before trial. Barnard *v.* Clark, 33 Misc. (N. Y.) 330, 68 N. Y. Suppl. 624.

Plea of privilege.—Where plaintiff fails to ask for a default against defendant for failure to appear when required, he cannot prevent him, on his first appearance, from filing and insisting on a privilege to be sued in another county. Landa *v.* Moody, (Tex. Civ. App. 1900) 57 S. W. 51.

90. *Arkansas.*—A verbal notice of set-off, whether the notice is direct or indirect, is sufficient. Reed *v.* Akin, 14 Ark. 475.

Georgia.— A plea of recoupment to an attachment for purchase-money in a justice's court need not be in writing. Casey *v.* Crane, 122 Ga. 318, 50 S. E. 92.

Iowa.— The plea comes too late after a settlement with one of several defendants. Holmes *v.* Hull, 48 Iowa 177.

Michigan.— A notice of recoupment in an action for breach of contract, where the pleadings are verbal, must point out in what respect the contract has been broken by plaintiff. Kerr *v.* Bennett, 109 Mich. 546, 67 N. W. 564 [*followed* in Bacon *v.* Reich, 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 311].

Missouri.— Defendant must file his statement of set-off or counter-claim before the trial is commenced (Shepherd *v.* Padgitt, 91 Mo. App. 473; West *v.* Freeman, 76 Mo. App. 96; Stephens *v.* Koken Barber Supply Co., 67 Mo. App. 587), and must give notice thereof to plaintiff (Frisby *v.* Rittman, 66 Mo. App. 418).

Nebraska.— On demand of plaintiff, defendant must file a written plea of counter-claim. Mullins *v.* South Omaha St. Fair Assoc., 5 Nebr. (Unoff.) 572, 99 N. W. 521.

New Jerscy.— A written plea of set-off is required. Bray *v.* Van Note, 2 N. J. L. 143.

New York.— Defendant must plead or give notice of his set-off at the time of joining issue. Bell *v.* Davis, 8 Barb. 210; Sellick *v.* Fox, 12 Johns. 205; Waring *v.* Lockwood, 10 Johns. 108.

Texas.— The plea is not required to be in writing. Eastham *v.* Randolph, 3 Tex. App. Civ. Cas. § 115; Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 155.

West Virginia.— In an action before a justice, to justify a recovery for defendant, there must be some account or claim filed by him on which to base such recovery. Longacre Colliery Co. *v.* Creel, 54 W. Va. 347, 50 S. E. 430.

Wisconsin.— In pleading a set-off the answer need not expressly denominate it as such, but will be sufficient if it gives notice in a plain and direct manner that defendant will rely on that defense. Bacher *v.* Gray, 112 Wis. 487, 88 N. W. 307.

See 31 Cent. Dig. tit. "Justices of the Peace," § 326.

Sufficiency of statement.—A counter-claim filed before a justice should be a statement of a cause of action, and the mere filing of an account will not suffice. Hayden *v.* Maher, 67 Mo. App. 434.

Plea in reconvention held sufficient see Times Pub. Co. *v.* Hill, 36 Tex. Civ. App. 389, 81 S. W. 806.

Stipulation as extension of time for filing set-off see *infra*, IV, J, note 69.

91. Carter *v.* Edwards, 16 Ind. 238; Turner *v.* Simpson, 12 Ind. 413; Millington *v.* O'Dell, 35 Ind. App. 225, 73 N. E. 949; Barth *v.* Hovejs, 45 Minn. 184, 47 N. W. 717; Hodges *v.* Hunt, 22 Barb. (N. Y.) 150; Boyce *v.* Perry, 26 Misc. (N. Y.) 355, 57 N. Y. Suppl. 214; Conklin *v.* Field, 37 How. Pr. (N. Y.) 455.

92. Martin *v.* Creech, 58 Mo. App. 391; Miller *v.* Mesick, 15 Nebr. 646, 20 N. W.

the objection is by demurrer;[93] and in Michigan an objection to a complaint for want of fulness can only be made by demurrer where the complaint states a sufficient cause of action and defendant has not been misled.[94] The filing of a demurrer to a verified complaint is not an admission of service of the complaint, where the demurrer is not signed by defendant, but by his attorney;[95] and generally, where defendant's demurrer to a verified complaint is overruled, the justice cannot enter judgment for plaintiff without further proof of his claim.[96]

b. Amendments — (i) *In General.* Amendments to pleadings are allowed with great liberality in justices' courts, and where substantial justice will be obtained thereby they may be permitted at any stage of the proceedings before judgment,[97] provided the pleading is sufficient to afford a basis for amend-

100; Bruden *v.* Biehl, 1 Ohio Cir. Ct. 85, 1 Ohio Cir. Dec. 51.

93. Ganaway *v.* Mobile, 21 Ala. 577 (a demurrer is proper where a statement filed in lieu of a declaration in a cause commenced before a justice of the peace does not show a cause of action); Hilliard *v.* Austin, 17 Barb. (N. Y.) 141 (motion to dismiss improper); Gorman *v.* Dewey, 24 Misc. (N. Y.) 643, 54 N. Y. Suppl. 303; New York *v.* Mason, 1 Abb. Pr. (N. Y.) 344 (motion to strike out defense improper); Harker *v.* New York, 17 Wend. (N. Y.) 199; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75.

If the declaration sets out no cause of action, defendant is entitled to judgment, although he takes issue without demurring. Tifft *v.* Tifft, 4 Den. (N. Y.) 175.

When answer demurrable.— Under N. Y. Code Civ. Proc. § 2935, subd. 4, an answer in a justice's court is not demurrable because it improperly denies any knowledge or information as to the allegation of the complaint. Singer *v.* Effler, 16 Misc. (N. Y.) 334, 39 N. Y. Suppl. 720.

94. Chancey *v.* Skeels, 43 Mich. 347, 5 N. W. 380, in which defendant, after pleading to the merits and going to trial, attempted to offer objections to evidence based on the want of fulness of the complaint.

95. *Non constat* that defendant has ever seen the complaint. International Seed Co. *v.* Hartmann, 65 N. Y. App. Div. 478, 72 N. Y. Suppl. 943.

96. Lansing *v.* Stevens, 50 Hun (N. Y. 605, 3 N. Y. Suppl. 79; Thomas *v.* Jones, 47 Hun (N. Y.) 81; Oulman *v.* Schmidt, 35 Hun (N. Y.) 345, construing N. Y. Laws (1881), c. 414, § 3, in connection with N. Y. Code Civ. Proc. § 2891. But *compare* Saratoga County *v.* Doherty, 16 How. Pr. (N. Y.) 46, decided under earlier statutes.

97. *California.*— Canfield *v.* Bates, 13 Cal. 606; Linhart *v.* Buiff, 11 Cal. 280; Butler *v.* King, 10 Cal. 342.

Georgia.— Barnes *v.* Coker, 112 Ga. 137, 37 S. E. 104; Georgia Cent. R. Co. *v.* Bowen, 108 Ga. 810, 33 S. E. 996; Hogans *v.* Dixon, 105 Ga. 171, 31 S. E. 422; Heyward *v.* Field, 95 Ga. 714, 22 S. E. 653.

Michigan.— Stanley *v.* Anderson, 107 Mich. 384, 65 N. W. 247; Meddaugh *v.* Williams, 48 Mich. 172, 12 N. W. 34.

Minnesota.— Middelstadt *v.* McIntyre, 55 Minn. 69, 56 N. W. 464. See also Royce *v.* Gray, 21 Minn. 329, where a complaint, defective in failing to state that defendant made the note sued on, and that plaintiff was the owner or holder, was held to be amended by the subsequent filing of the note.

Missouri.— Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261; Burt *v.* Warne, 31 Mo. 296; Maxwell *v.* Quimby, 90 Mo. App. 469; Lamb *v.* Bush, 49 Mo. App. 337; Dahlgren *v.* Yocum, 44 Mo. App. 277; Lustig *v.* Cohen, 44 Mo. App. 271.

New York.— Walsh *v.* Cornett, 17 Hun 27; Jaycox *v.* Pinney, 62 Barb. 344; Osborn *v.* Nelson, 59 Barb. 375; Perry *v.* Tynen, 22 Barb. 137; Hilliard *v.* Austin, 17 Barb. 141; Fulton *v.* Heaton, 1 Barb. 552; Ryan *v.* Lewis, 5 Thomps. & C. 662; Barnard *v.* Clark, 33 Misc. 330, 68 N. Y. Suppl. 624; Vaughn *v.* Lego, 1 N. Y. Suppl. 689; Mosher *v.* Lawrence, 4 Den. 419; White *v.* Stevenson, 4 Den. 193; Babcock *v.* Lipe, 1 Den. 139; Colvin *v.* Corwin, 15 Wend. 557.

South Carolina.— Lookout Mountain Medicine Co. *v.* Hare, 56 S. C. 456, 35 S. E. 130; Harby *v.* Wells, 52 S. C. 156, 29 S. E. 563.

Texas.— McRae *v.* White, (Civ. App. 1897) 42 S. W. 793.

Wisconsin.— Hibbard *v.* Peek, 75 Wis. 619, 44 N. W. 641.

See 31 Cent. Dig. tit. "Justices of the Peace," § 328.

Amendment taking away right of appeal.— A justice may allow an amendment to a complaint by reducing the amount of damages claimed below the amount necessary to give a right to a new trial in the county court. Jaycox *v.* Pinney, 62 Barb. (N. Y.) 344.

An adjournment taken by consent, because of the allowance of an amendment after a witness is sworn, is not within Wis. Rev. St. § 3626, subd. 11, providing that no amendment shall be allowed after a witness is sworn when an adjournment will be thereby made necessary, and will not oust the justice of jurisdiction. State *v.* Daubner, 111 Wis. 671, 87 N. W. 802.

Construction.—Where, in trover, defendant denied the complaint, and afterward filed an amended answer setting up matters of justification, but containing no denial, it was held that, since defendant evidently intended the amended answer to be in addition to the denial, it would be so considered, and all

ment.[98] While the allowance of amendments is said to be within the discretion of the justice,[99] a sound judicial discretion is meant, and it is error to refuse to allow an amendment in a proper case.[1] Where a demurrer to a judgment is sustained, it is the duty of the justice to order the pleading to be amended, and he cannot pronounce judgment on the demurrer without such order.[2]

(II) *Bringing Cause Within Justice's Jurisdiction.* A justice of the peace may permit a plaintiff to amend his pleading so as to bring the cause within the jurisdiction of the court.[3] Such an amendment is in effect the institution of a new suit.[4]

(III) *New or Different Cause of Action.* A justice of the peace has no power to allow an amendment which introduces a new or different cause of action.[5] But an amendment which merely changes the form of action, as from tort to contract, is not open to this objection;[6] and where a statute provides for the joinder in one action of as many causes of action as plaintiff may have, he may amend by setting up additional causes of action.[7]

(IV) *Notice.* Under the rule that, when a party is summoned, or enters his appearance, in the absence of a statute to the contrary, he must take notice of all proceedings in the cause, no formal notice of the filing of an amended statement need be given defendant.[8]

matters which might have constituted a defense under either answer should be admitted. Van Keuren *v.* Switzer, 11 N. Y. Suppl. 263.

Alteration without permission.— If a plaintiff alters his "state of demand" after filing it in the justice's office, without express permission from the justice, a nonsuit must be entered, or it will vitiate the judgment. Blackwell *v.* Leslie, 4 N. J. L. 130.

98. A fatally defective statement will afford no basis for amendment. Maxwell *v.* Quimby, 90 Mo. App. 469 [*citing* Brashears *v.* Strock, 46 Mo. 221]. See also Lamb *v.* Bush, 49 Mo. App. 337; Dahlgren *v.* Yocum, 44 Mo. App. 277; Lustig *v.* Cohen, 44 Mo. App. 271.

99. Canfield *v.* Bates, 13 Cal. 606; Linhart *v.* Buiff, 11 Cal. 280; White *v.* Stevenson, 4 Den. (N. Y.) 193.

1. Hogans *v.* Dixon, 105 Ga. 171, 31 S. E. 422; Walsh *v.* Cornett, 17 Hun (N. Y.) 27; Ryan *v.* Lewis, 5 Thomps. & C. (N. Y.) 662; Barnard *v.* Clark, 33 Misc. (N. Y.) 330, 68 N. Y. Suppl. 624; Vaughn *v.* Lego, 1 N. Y. Suppl. 689.

It is mandatory on a justice to allow the amendment of a pleading, where substantial justice requires it. Barnard *v.* Clark, 33 Misc. (N. Y.) 330, 68 N. Y. Suppl. 624.

Amendment of right.—A person arrested on a civil warrant has, under Mich. Comp. Laws, § 5309, a right to a reasonable time for pleading, and where the justice requires him to plead immediately, and he pleads the general issue, and the case is then adjourned, he is entitled of right, and without conditions, to amend his pleadings, and put in any justification he may have on the adjourned day. Meddaugh *v.* Williams, 48 Mich. 172, 12 N. W. 34.

2. Turck *v.* Richmond, 13 Barb. (N. Y.) 533; Glasse *v.* Keusen, 3 Abb. Pr. (N. Y.) 100; Lookout Mountain Medicine Co. *v.* Hare, 56 S. C. 456, 35 S. E. 130.

Right to amend.— It is improper for the justice to dismiss an action for defects in the complaint without first giving the right to amend. Middelstadt *v.* McIntyre, 55 Minn. 69, 56 N. W. 464; Hilliard *v.* Austin, 17 Barb. (N. Y.) 141.

3. *California.*— Howard *v.* Valentine, 20 Cal. 282; Linhart *v.* Buiff, 11 Cal. 280.

Indiana.— Blair *v.* Porter, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81; Bensch *v.* Farnsworth, 9 Ind. App. 547, 34 N. E. 571, 37 N. E. 284.

Minnesota.— Lamberton *v.* Raymond, 22 Minn. 129.

Missouri.— Burden *v.* Hornsby, 50 Mo. 238.

New York.— Woolley *v.* Wilber, 4 Den. 570. See also Bull *v.* Cotton, 22 Barb. 94.

West Virginia.— If the summons demands a sum within the jurisdiction, but the complaint claims items aggregating an amount in excess of the jurisdiction, plaintiff may, at any time before verdict, withdraw any item, so as to bring his demand within the jurisdiction. Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489.

See 31 Cent. Dig. tit. "Justices of the Peace," § 329.

4. Ball *v.* Hagy, (Tex. Civ. App. 1899) 54 S. W. 915, where the amended petition was filed more than four years after the note in suit became due, and it was held that the claim was barred.

5. Griswold *v.* Walker, 66 Mo. App. 35; Emerson *v.* Wilson, 11 Vt. 357, 34 Am. Dec. 695. See also Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261; Cameron *v.* Hart, 57 Mo. App. 142.

6. Bigelow *v.* Dunn, 53 Barb. (N. Y.) 570; De Witt *v.* Greener, 17 N. Y. Civ. Proc. 327; Doughty *v.* Crozier, 9 Abb. Pr. (N. Y.) 411.

7. Jackson *v.* Fulton, 87 Mo. App. 228, construing Mo. Rev. St. (1899) § 3851.

8. Jackson *v.* Fulton, 87 Mo. App. 228. *Contra*, Alvey *v.* Wilson, 9 Kan. 401.

c. Pleas Puis Darrein Continuance. A plea *puis darrein continuance* may be received in a justice's court,[9] and such a plea in abatement is the proper if not the only effectual mode of taking advantage of an agreement to submit the cause to arbitration, made after issue joined.[10]

6. Signature and Verification. Except in the case of pleas denying the execution of the instrument on which suit is brought,[11] or in case of a plea or answer to a verified declaration or complaint,[12] pleadings before justices of the peace need not as a rule be signed[13] or verified.[14] Where, however, a pleading is required to be signed and verified, it may be done by the party's agent,[15] and a pleading will be considered sufficiently verified, if the justice's certificate states that it has been sworn to before him.[16] A verification to the effect that the affiant believes the pleading to be true is sufficient;[17] and since a justice is not required to use a seal in proceedings before himself a pleading is not rendered insufficient by reason of the absence of a seal from the jurat.[18] A justice may allow a pleading to be verified by way of amendment after it has been filed.[19]

7. Filing Bill of Particulars or Written Instrument — a. Bill of Particulars. In many jurisdictions the plaintiff in an action before a justice of the peace is required to furnish a bill of particulars setting out his cause of action. Technical precision is not required in the statement of the cause of action in a bill of particulars, but the most liberal construction will be given it, and if it is sufficient to apprise defendant of the claim against him it will be upheld.[20] The defendant,

9. West *v.* Stanley, 1 Hill (N. Y.) 69.

10. Ressequie *v.* Brownson, 4 Barb. (N. Y.) 541.

11. Griswold *v.* Peoria University, 26 Ill. 41, 79 Am. Dec. 361; McBride *v.* Kilgore, 55 Miss. 242.

12. Stafford *v.* Wilson, 122 Ga. 32; 49 S. E. 800; Peeples *v.* Sethness Co., 119 Ga. 777, 47 S. E. 170 (verified accounts attached to summons); Thompson *v.* Killian, 25 Minn. 111. See also Morris *v.* Hunken, 40 N. Y. App. Div. 129, 57 N. Y. Suppl. 712.

13. Montgomery *v.* Yolo County Super. Ct., 68 Cal. 407, 9 Pac. 720. *Contra*, by statute in New York. Clark's Cove Fertilizer Co. *v.* Stever, 29 Misc. (N. Y.) 571, 62 N. Y. Suppl. 249; Barnes *v.* Sutliff, 24 Misc. (N. Y.) 526, 53 N. Y. Suppl. 974.

Signature by one as next friend of plaintiff shows a sufficient consent in writing under 2 Gavin & H. St. Ind. p. 42, § 11. Rowe *v.* Arnold, 39 Ind. 24.

14. Shinn *v.* Tucker, 37 Ark. 580; Peeples *v.* Sethness Co., 119 Ga. 777, 47 S. E. 170.

Pleas in abatement need not be verified. Henry *v.* Lane, 2 Mo. 201; Gilbert *v.* Vanderpool, 15 Johns. (N. Y.) 242. *Contra*, Indianapolis, etc., R. Co. *v.* Summers, 28 Ind. 521; Blake *v.* Nichols, 4 Blackf. (Ind.) 311; Landa *v.* Mack, (Tex. Civ. App. 1900) 56 S. W. 540, plea of privilege.

Necessity of verification to form issues see *infra*, IV, I, 8, a.

15. Syracuse Moulding Co. *v.* Squires, 61 Hun (N. Y.) 48, 15 N. Y. Suppl. 321 [*reversing* 19 N. Y. Civ. Proc. 241]; Barnes *v.* Sutliff, 24 Misc. (N. Y.) 526, 53 N. Y. Suppl. 974.

A subscription to the verification, in which it is stated that the affiant is "the attorney and agent of the plaintiff in the above-entitled action," is a sufficient subscription of the complaint. Clark's Cove Fertilizer Co. *v.* Stever, 29 Misc. (N. Y.) 571, 62 N. Y. Suppl. 249.

16. Blake *v.* Nichols, 4 Blackf. (Ind.) 311.

A complaint signed by plaintiff's attorney, and containing the justice's jurat stating that it was sworn to, is not insufficient to give jurisdiction, on the ground that it does not appear who verified it. Stacks *v.* Simmons, (Tex. Civ. App. 1900) 58 S. W. 958.

Amendment of jurat.—Where the certificate of a justice attached to a pleading is imperfect, and it appears that it was properly sworn to, the justice may amend the certificate. Blake *v.* Nichols, 4 Blackf. (Ind.) 311. See also Hoover *v.* Rhoads, 6 Iowa 505.

17. Schwerin *v.* Mills, 2 Hilt. (N. Y.) 394.

18. Stacks *v.* Simmons, (Tex. Civ. App. 1900) 58 S. W. 958.

19. Landa *v.* Mack, (Tex. Civ. App. 1900) 56 S. W. 540.

20. *Indiana.*— Smithson *v.* Dillon, 16 Ind. 169.

Iowa.— McKenney *v.* Hopkins, 20 Iowa 495.

Kansas.— Missouri Pac. R. Co. *v.* Henning, 48 Kan. 465, 29 Pac. 597; Pate *v.* Fitzhugh, 46 Kan. 129, 26 Pac. 452; High *v.* Hill, 46 Kan. 96, 26 Pac. 456; Krouse *v.* Pratt, 37 Kan. 651, 16 Pac. 103; Missouri, etc., R. Co. *v.* Brown, 14 Kan. 557; Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444; Atchison, etc., R. Co. *v.* Bartlett, 2 Kan. App. 167, 43 Pac. 284.

Nebraska.— Massillon Engine, etc., Co. *v.* Prouty, 65 Nebr. 496, 91 N. W. 384; Cook *v.* Hester, 21 Nebr. 369, 32 N. W. 72; Phœnix Ins. Co. *v.* Lemke, 18 Nebr. 184, 24 N. W. 727; Freeman *v.* Burks, 16 Nebr. 328, 20 N. W. 207; Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484; Crossley *v.* Steele, 13 Nebr. 219, 13 N. W. 175; Biddle *v.* Spatz, 1 Nebr. (Unoff.) 175, 95 N. W. 354.

Ohio.— Squires *v.* Martin, 24 Ohio Cir. Ct.

however, need not give a bill of particulars of his set-off or counter-claim,[21] unless required to do so by plaintiff.[22] In some states a justice may order a party to give a bill of particulars, and if he refuses to give one when so ordered he is precluded from giving evidence as to the subject in regard to which it was demanded;[23] but where a complaint sufficiently informs defendant of the cause of action, and it does not appear that a refusal to require plaintiff to file a bill of particulars in any manner injured defendant, such a refusal does not constitute error.[24]

b. Filing Written Instrument.[25] In some jurisdictions the instrument or account upon which the action is founded must be filed with the justice before or at the time of the issuance of the summons as a condition to his jurisdiction.[26] The lodgment of the instrument with the justice, although it is not marked filed by him, is a sufficient filing of the same within the meaning of the statutes to confer jurisdiction over the subject-matter;[27] and the mere temporary withdrawal

232; Winders *v.* Hudson, 15 Ohio Cir. Ct. 511, 8 Ohio Cir. Dec. 463; Scioto Valley R. Co. *v.* Cronin, 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315 [*affirmed* in 38 Ohio St. 122].

Oklahoma.— Brewer *v.* Black, 5 Okla. 57, 47 Pac. 1089; Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

Texas.— Sanger *v.* Noonan, (Civ. App. 1894) 27 S. W. 1056.

See 31 Cent. Dig. tit. "Justices of the Peace," § 334.

The test of sufficiency is whether the bill of particulars will admit proof of sufficient facts to make out the claim. Scioto Valley R. Co. *v.* Cronin, 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315.

Particular items must be set out in the copy of an account. MaGee *v.* Buckbee, 3 N. J. L. 550; Clark *v.* Hillyer, 2 N. J. L. 102. See also Lehman *v.* Winters, 10 Pa. Dist. 147. But *compare* Yahe *v.* Shopf, 16 Lanc. L. Rev. (Pa.) 276.

A statement in the form of a common debtor and creditor account is sufficient as a bill of particulars in a claim for damages. Crossley *v.* Steele, 13 Nebr. 219, 13 N. W. 175.

Note as bill of particulars.—Where an action is brought on a promissory note, and the note is copied by the justice into his docket, and a summons issued thereon, it is a sufficient bill of particulars. Phœnix Ins. Co. *v.* Lemke, 18 Nebr. 184, 24 N. W. 727; Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484.

A suit cannot be dismissed for insufficiency of the account, where a sufficient account is filed before the commencement of the trial. White *v.* Missouri Pac. R. Co., 98 Mo. App. 542.

Where a bill of particulars is lost, a copy may be established instanter. Ballard Transfer Co. *v.* Clark, 91 Ga. 234, 18 S. E. 138.

21. Harrington *v.* Ensign, 11 Wend. (N. Y.) 554, to the effect that defendant need only specify the nature of his claim with reasonable certainty.

22. Gregg *v.* Berkshire, (Kan. App. 1900) 62 Pac. 550; Boatz *v.* Berg, 51 Mich. 8, 16 N. W. 184; Clarine *v.* Nelson, 15 Nebr. 440, 19 N. W. 684.

23. Bloom *v.* Huyck, 71 Hun (N. Y.) 252, 25 N. Y. Suppl. 7.

24. Carver *v.* O'Neal, 11 App. Cas. (D. C.) 353.

25. As dispensing with declaration or complaint see *supra*, IV, I, 2, a.

26. Evans *v.* Parks, 10 Ark. 306; Everett *v.* Clements, 9 Ark. 478; Keath *v.* Berkley, 7 Ark. 469; Dickey *v.* Pettigrew, 6 Ark. 424; Latham *v.* Jones, 6 Ark. 371; Levy *v.* Shurman, 6 Ark. 182, 42 Am. Dec. 690; Pendleton *v.* Fowler, 6 Ark. 41; *Ex p.* Anthony, 5 Ark. 358; Stone *v.* Murphy, 2 Iowa 35; Duncan *v.* Scott County, 64 Miss. 38, 8 So. 204 (copy of original sufficient); Rechnitzer *v.* St. Louis Candy Co., 82 Mo. App. 311; St. Louis Trust Co. *v.* American Real Estate, etc., Co., 82 Mo. App. 260; Rhea *v.* Buckley Custom Shirt Mfg. Co., 81 Mo. App. 400 (copy sufficient); Phenix Ins. Co. *v.* Foster, 56 Mo. App. 197; Olin *v.* Zeigler, 46 Mo. App. 193. But see McDermott *v.* Dwyer, 91 Mo. App. 195 [*citing* Buzzard *v.* Hapeman, 61 Mo. App. 464], to the effect that the filing of the instrument sued on before the jury is sworn or the trial commences cures any omission to file it sooner. Mo. Rev. St. (1899) § 3852, requiring a written instrument, when made the basis of suit before a justice, to be filed with the justice, does not require the action to be brought specifically on such instrument, but, if the subject-matter of the action is such that it may be stated in an account, plaintiff may state his case in the form of an account, and need not sue on the contract, and may offer the contract in evidence. Standard Scale, etc., Co. *v.* Kansas City Furnace Co., (Mo. App. 1905) 88 S. W. 108.

Filing may be waived by defendant.— Sublett *v.* Noland, 5 Mo. 516.

A subscription paper signed by various subscribers is not within the meaning of the statutes, and need not be filed in an action against one of the subscribers. Heinrich *v.* Missouri, etc., Coal Co., 102 Mo. App. 229.

27. Rowe *v.* Schertz, 74 Mo. App. 602 [*citing* State *v.* Grate, 68 Mo. 22; Baker *v.* Henry, 63 Mo. 517; Bensley *v.* Haeberle, 20 Mo. App. 648]; Randall *v.* Lee, 68 Mo. App. 561 [*citing* Grubbs *v.* Cones, 57 Mo. 83; State *v.* Hocker, 68 Mo. App. 415; Collins *v.* Kammann, 55 Mo. App. 464; Olin *v.* Zeigler, 46 Mo. App. 193]; Horton *v.* Toeneboehn, 68 Mo. App. 42.

Failure to mark the instrument "Filed" at

of the instrument by plaintiff will not deprive the justice of the jurisdiction which has already attached.[28]

8. ISSUES, PROOF, AND VARIANCE — a. Matters to Be Proved. On the trial of an action before a justice of the peace, the general issue need not be formally pleaded,[29] and defendant has a right to insist upon the proof of every material fact necessary to plaintiff's recovery.[30] But unless denied plaintiff need not prove the character in which he sues,[31] nor need a plaintiff firm prove the partnership and the names of the partners,[32] or a corporation plaintiff its corporate existence.[33] So too plaintiff is not required to prove the execution, indorsement, or assignment of the instrument sued on, unless it is denied on oath,[34] nor need he prove the correctness of a verified account which is not met by a bill of particulars or verified denial;[35] nor, "in the first instance," that defendants sued jointly are jointly liable, where they fail to deny their joint liability by affidavit.[36] Where a defendant pleads a set-off, he admits plaintiff's demand,[37] and where he pleads payment he admits the making and performance of the contract sued on.[38] All new matter in the plea or answer is presumed to be denied,[39] except in cases where a set-off or counter-claim is interposed.[40]

b. Evidence Admissible Under Pleadings and Without Plea — (I) *IN GENERAL.* Since plaintiff's pleading need do no more than apprise defendant of the nature of the claim against him and set out enough facts to bar another suit for the same cause of action,[41] plaintiff is entitled, where his pleading meets these requirements, to prove all the facts necessary to a recovery, even though not pleaded.[42] A

the proper time does not prejudice plaintiff. The omission may be remedied by an entry *nunc pro tunc*. Stone *v.* Murphy, 2 Iowa 35. See also Rowe *v.* Schertz, 74 Mo. App. 602.

28. Rowe *v.* Schertz, 74 Mo. App. 602; Crenshaw *v.* Pacific Mut. L. Ins. Co., 71 Mo. App. 42; Randall *v.* Lee, 68 Mo. App. 561.

29. Logansport, etc., R. Co. *v.* Braden, 53 Ind. 234; Howard *v.* Cobb, 6 Ind. 5; McHatton *v.* Bates, 4 Blackf. (Ind.) 63; Farmers', etc., Bank *v.* Williamson, 61 Mo. 259; Lamb *v.* Bush, 49 Mo. App. 337; Lewis *v.* Baker, 24 Mo. App. 682. But see Everitt *v.* Lisk, 1 Code Rep. (N. Y.) 71, where it was held that a defendant, by refusing to answer or demur, admits the truth of the complaint.

Defendant may waive the general denial which the statute puts in in his favor by waiver of record. Cross *v.* Pearson, 17 Ind. 612.

30. Lewiston *v.* Proctor, 27 Ill. 414; Logansport, etc., R. Co. *v.* Braden, 53 Ind. 234; Kusselewskey *v.* Fabricant, 8 Misc. (N. Y.) 104, 29 N. Y. Suppl. 1091.

31. Liening *v.* Gould, 13 Cal. 598; Carpenter *v.* Whitman, 15 Johns. (N. Y.) 208.

32. Evans *v.* Fisher, 10 Ill. 569.

33. Crown Point Iron Co. *v.* Fitzgerald, 14 N. Y. St. 427. *Contra*, Lewiston *v.* Proctor, 27 Ill. 414.

In Kansas the existence of a corporation may be put in issue by defendant, without a denial under oath, and even without a written denial of any kind. Stanley *v.* Farmers' Bank, 17 Kan. 592.

Manner of putting corporate existence in issue see CORPORATIONS, 10 Cyc. 1362.

34. Archer *v.* Bogue, 4 Ill. 526; Neely *v.* Chinn, 8 Blackf. (Ind.) 84; Pegg *v.* Bidleman, 5 Mich. 26; Fish *v.* Hale, 4 Mich. 506; Hickman *v.* Kunkle, 27 Mo. 401.

Sufficiency of affidavit.—An affidavit by defendant that he "did not sign the note sued upon" is sufficient to put in issue the "execution" of the note, although the statute uses the word "execution," and not "sign." Edmonston *v.* Henry, 45 Mo. App. 346.

Where the assignment is by an attorney in fact, the filing of the instrument and the failure to deny its execution on oath is not an admission of its execution. Hinkley *v.* Weatherwax, 35 Mich. 510.

35. Bolen Coal Co. *v.* Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810; Southern Kansas R. Co. *v.* Gould, 44 Kan. 68, 24 Pac. 352. *Compare* Kusselewskey *v.* Fabricant, 8 Misc. (N. Y.) 104, 29 N. Y. Suppl. 1091.

36. Readey *v.* Schwanzenbach, 46 Ill. App. 348.

Failure to file a plea denying liability is an admission that, if there was a contract by any of the defendants, it was that of all. Fitzpatrick *v.* Reilly, 46 Ill. App. 520.

37. Young *v.* Moore, 2 Code Rep. (N. Y.) 143.

38. De Courcy *v.* Spalding, 3 Code Rep. (N. Y.) 16.

39. Kinch *v.* Weatherall, 2 Ind. 226; Lamb *v.* Bush, 49 Mo. App. 337; Bellingham Bay, etc., R. Co. *v.* Strand, 1 Wash. 133, 23 Pac. 928.

40. Walker *v.* McDonald, 5 Minn. 455; Taylor *v.* Bissell, 1 Minn. 225; Bellingham Bay, etc., R. Co. *v.* Strand, 1 Wash. 133, 23 Pac. 928.

41. See *supra*, IV, I, 2, b, (II).

42. *Iowa.*— Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114; Byers *v.* Des Moines Valley R. Co., 21 Iowa 54.

Michigan.— Lynch *v.* Craney, 95 Mich. 199, 54 N. W. 879; Bradshaw *v.* McLoughlin, 39 Mich. 480.

reply being inadmissible in a justice's court,[43] the allegation of new matter in the plea or answer is presumed to be controverted by plaintiff, and he may countervail it by evidence, either in direct denial or by way of avoidance.[44]

(II) *DEFENSES.* Under the rule that formal pleadings are not required in actions before justices of the peace, the defendant in such an action is entitled to interpose under the general issue practically any defense he may have without pleading it specially.[45] In some jurisdictions, however, defendant is required to

Missouri.— Mooney *v.* Williams, 15 Mo. 442.

New York.— Smith *v.* Kerr, 3 N. Y. 144; Young *v.* Rummell, 5 Hill 60, 7 Hill 503.

Texas.— St. Louis, etc., R. Co. *v.* Denson, (Civ. App. 1894) 26 S. W. 265; Gulf, etc., R. Co. *v.* Hutcheson, 3 Tex. App. Civ. Cas. § 96; Mensing *v.* Ayres, 2 Tex. App. Civ. Cas. § 562.

Wisconsin.— Davis *v.* McKay, 18 Wis. 477.

See 31 Cent. Dig. tit. "Justices of the Peace," § 337.

Special and consequential damages need not be pleaded. Dugan *v.* Hunt, 29 Iowa 447; Glenville *v.* St. Louis R. Co., 51 Mo. App. 629.

To be admissible evidence must sustain pleadings.— McFarland *v.* Nixon, 15 N. C. 141; Hassa *v.* Junger, 15 Wis. 598.

Accrual of items of account.— The date at the head of an account filed with a justice does not preclude plaintiff from proving the time when the various items accrued. It does not presuppose the entire indebtedness to have accrued prior to that time, since such a rigid construction of the accounts of illiterate men would tend to prevent justice. Mooney *v.* Williams, 15 Mo. 442.

Assignment of an account must be alleged. Balden *v.* Thomasen, 17 Mont. 487, 43 Pac. 627.

43. See *supra*, IV, I, 4.

44. Hodges *v.* Hunt, 22 Barb. (N. Y.) 150; Conklin *v.* Field, 37 How. Pr. (N. Y.) 455.

45. *Arkansas.*—Greer *v.* George, 8 Ark. 131 (want of consideration); Howell *v.* Vinsant, 7 Ark. 146 (usury).

California.— In an action in a justice's court for the amounts due under an order directing defendant to pay to plaintiff a specified sum per month, where the complaint alleged that there was due under the order a specified sum, and this allegation was denied, it was held that the pleadings were sufficient to raise the issue whether the order had been previously revoked, and defendant, under the issue, could prove that the order had been revoked, so that there was nothing due under it. Koehler *v.* Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73.

Illinois.— Donnan *v.* Gross, 3 Ill. App. 409; Donnan *v.* Bang, 3 Ill. App. 400, to the effect that defendants may prove want of joint liability without filing an affidavit denying it, since, under Rev. St. c. 79, § 58, the only effect of a failure to file such affidavit is to relieve plaintiff of the necessity of proving joint liability "in the first instance."

Indiana.— Kennard *v.* Brough, 64 Ind. 23 (failure of consideration and breach of implied warranty); Davis *v.* Grater, 62 Ind. 408 (coverture, or want or failure of consideration); Hill *v.* Sleeper, 58 Ind. 221 (payment); Riggs *v.* Adams, 12 Ind. 199 (want or failure of consideration). See also Aurora, etc., Turnpike Co. *v.* Niebrugge, 25 Ind. App. 567, 58 N. E. 864.

Iowa.— West *v.* Moody, 33 Iowa 137 (payment); Greff *v.* Blake, 16 Iowa 222 (proof of contract different in terms from that set up in the answer).

Massachusetts.— Wilbur *v.* Taber, 9 Gray 361, holding that under plea of not guilty defendant may give in evidence any matter admissible under any general or special plea in bar.

Mississippi.— Currie *v.* Chambers, (1888) 3 So. 412, to the effect that it is only where it affirmatively appears that defendant has, by resorting to technical pleading, narrowed his right of defending, that any good defense shown by the evidence should be rejected.

Missouri.— Buxton *v.* Debrecht, 95 Mo. App. 599, 69 S. W. 616 (payment); Bales *v.* Heer, 91 Mo. App. 426 (fraud in transaction out of which notes in suit grew); Melican *v.* Missouri Edison Electric Co., 90 Mo. App. 595 (contributory negligence); Freeze *v.* Lockhard, 87 Mo. App. 102 (statute of limitations); Glenville *v.* St. Louis R. Co., 51 Mo. App. 629 (contributory negligence). See also generally Helm *v.* Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148; Holmes *v.* Leadbetter, 95 Mo. App. 419, 69 S. W. 23; Beck *v.* Kinealy, 89 Mo. App. 418; Lewis *v.* Baker, 24 Mo. App. 682.

New Hampshire.— Colby *v.* Stevens, 38 N. H. 191 (tender); Wheeler *v.* Rowell, 7 N. H. 515 (holding that in trespass *quare clausum fregit* it is not necessary to plead license to enter).

New Jersey.— Vandoren *v.* Gaston, 52 N. J. L. 321, 19 Atl. 608 (certificate of discharge in bankruptcy); Hill *v.* Carter, 16 N. J. L. 87 (defendant in a *qui tam* action for cutting timber may show ownership of land in order to show his right of possession); Smith *v.* Van Houten, 9 N. J. L. 381 (infancy).

New York.— Hartwell *v.* Young, 67 Hun 472, 22 N. Y. Suppl. 486 (statute of frauds need not be pleaded); Jennings *v.* Carter, 2 Wend. 446, 20 Am. Dec. 635 (defendant, acting in aid of officer, may justify on that ground under general issue). *Compare* Riley *v.* Seymour, 1 Wend. 143, to the effect that where defendant has not put in a plea, he is not entitled to offer evidence which goes to defeat plaintiff's right to recover.

Rhode Island.— Carroll *v.* Rigney, 15 R. I. 81, 23 Atl. 46, holding that a tenant sued in trespass for damages to the premises may, under the general issue, controvert his land-

give notice of special matter to be proved;[46] while in others he must deny under oath the execution or assignment of the instrument in suit[47] or the correctness of a verified account.[48] Where defendant desires to prove the pendency of another suit before another justice for the same cause of action,[49] or relies upon a former trial and judgment,[50] he must plead specially or give notice at the time of joining issue. So too in actions of trespass, unless defendant files a plea of title and has the cause removed to a court of record, he cannot justify by showing legal title in himself or a third person, under whose authority he claims to have acted.[51]

(III) *SET-OFF OR COUNTER-CLAIM.* As a rule in a suit before a justice of the peace defendant cannot prove a set-off or counter-claim unless he has pleaded it.[52] The set-off may be pleaded or notice thereof given in general terms, unless plaintiff requires a specification of its nature,[53] or unless, where it is based upon a written instrument, plaintiff requests its exhibition.[54] Where defendant in his answer alleges a set-off, and no reply is interposed, evidence to contradict the set-off is inadmissible.[55]

c. Variance. While the plaintiff in an action before a justice of the peace must recover, if at all, on the cause of action set forth in his pleading, and cannot recover on a different ground of liability,[56] a variance between the allegations of

lord's possession whenever he can do so without bringing his right into question.

Vermont.— In an action for damages (aside from taxable costs) for suffering a suit to be discontinued by the non-attendance of the justice, it is competent to show in defense, under the general issue, that plaintiff in that case paid defendant the taxable costs immediately after such discontinuance. Read *v.* Amidon, 40 Vt. 169.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 338, 340; and *supra*, IV, I, 3, a.

Matter in abatement may be shown in Indiana under the general issue. McCormick *v.* Maxwell, 4 Blackf. (Ind.) 168; Thomas *v.* Winters, 4 Blackf. (Ind.) 161.

A general allegation of fraud is sufficient to authorize the admission of evidence thereunder. Blake *v.* Graves, 18 Iowa 312.

Payment after joinder of issue.—It is error for a justice to receive evidence under a general denial of the making of a payment since the commencement of the suit and joining issue therein, without an amendment of the answer, by leave, for that purpose. Hall *v.* Olney, 65 Barb. (N. Y.) 27.

46. Whittle *v.* Bailes, 65 Mich. 640, 32 N. W. 874; Cohen *v.* Dupont, 1 Sandf. (N. Y.) 260.

47. Zuel *v.* Bowen, 78 Ill. 234; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Hudson *v.* Dickinson, 12 Ill. 407; Judd *v.* Cralle, 37 Ill. App. 149. See also Stephenson *v.* Landis, 14 Lea (Tenn.) 433, where it was held that a defense that a note was made at a time other than that of its date must be set up by special plea under oath. *Compare* Klein *v.* Keyes, 17 Mo. 326, to the effect that the only consequence of a failure to deny the execution of a note under oath is to relieve plaintiff of the necessity of proving its execution; and that under a plea of *non est factum*, without an affidavit, every other defense is admissible.

Right to contest validity of instrument.— Under Mich. Comp. Laws (1897), §§ 767, 826, 828, defendant in an action on a stock-subscription agreement is not entitled to prove that his signature was conditional on his right to withdraw if he desired, and that he elected to do so, unless he has given notice under oath of his intention to deny the validity of the agreement. Ada Dairy Assoc. *v.* Mears, 123 Mich. 470, 82 N. W. 258.

48. Payment of a verified account cannot be proved, unless the account has been denied under oath. Gray *v.* Bryant, 46 Kan. 43, 26 Pac. 470.

49. Wright *v.* Maseras, 56 Barb. (N. Y.) 521.

50. Morris *v.* State, 101 Ind. 560, 1 N. E. 70; Dexter *v.* Hazen, 10 Johns. (N. Y.) 246.

51. Strout *v.* Berry, 7 Mass. 385; Flagg *v.* Gotham, 7 N. H. 266; Edgar *v.* Anness, 47 N. J. L. 465, 2 Atl. 246. See also Vannoy *v.* Givens, 23 N. J. L. 201.

After removal under plea of title, defendant has three grounds of defense, namely, title in himself, title in a third person, and possession out of plaintiff. Douglas *v.* Valentine, 7 Johns. (N. Y.) 273.

52. Thompson *v.* Pearce, 3 Harr. (Del.) 497; Lord *v.* Ellis, 9 Iowa 301. See also Buxton *v.* Debrecht, 95 Mo. App. 599, 69 S. W. 616.

In Kansas, however, defendant may prove a set-off to an account duly verified, although he has not denied the account under oath. Baughman *v.* Hale, 45 Kan. 453, 25 Pac. 856.

53. Civill *v.* Wright, 13 Wend. (N. Y.) 403. See also Harrington *v.* Ensign, 11 Wend. (N. Y.) 554.

54. Connors *v.* Taylor, 13 Wis. 230.

55. Walker *v.* McDonald, 5 Minn. 455; Taylor *v.* Bissell, 1 Minn. 225; Bellingham Bay, etc., R. Co. *v.* Strand, 1 Wash. 133, 23 Pac. 928. But see Patterson *v.* Newton, 74 Ga. 366; Emerick *v.* Clemens, 26 Iowa 332. And *compare supra*, IV, I, 4, 8, b, (I), text and note 44.

56. Powell *v.* Alford, 113 Ga. 979, 39 S. E. 449; Turner *v.* McCook, 77 Mo. App. 196;

the pleading and the proof will be disregarded as immaterial,[57] unless it is of such a character as to mislead the adverse party to his prejudice.[58]

9. Defects and Objections, Waiver, and Cure. Defects and irregularities in the pleadings in an action before a justice of the peace, which do not go to the jurisdiction of the justice over the subject-matter of the action,[59] may be waived by failure to make specific[60] objection at the proper time,[61] or by pleading to the merits after an objection has been overruled.[62] The insufficiency of plaintiff's

Houston, etc., R. Co. *v.* Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834. See, generally, Pleading.

That a copy is filed, instead of the original note sued on, does not make the recovery one on a different cause of action than that set out in the petition. Rhea *v.* Buckley Custom Shirt Mfg. Co., 81 Mo. App. 400.

57. *Arkansas.*—Lafferty *v.* Day, 7 Ark. 258.

Missouri.— Force *v.* Squier, 133 Mo. 306, 34 S. W. 574; Coughlin *v.* Lyons, 24 Mo. 533; Metz *v.* Eddy, 21 Mo. 13; Barngrover *v.* Maack, 46 Mo. App. 407; Lustig *v.* Cohen, 44 Mo. App. 271; Kehoe *v.* Phillipi, 42 Mo. App. 292; Vette *v.* Leonora, 42 Mo. App. 217.

Montana.— Budd *v.* Power, 8 Mont. 380, 20 Pac. 820.

Nebraska.— Buckley *v.* Hook, 43 Nebr. 552, 61 N. W. 719.

New York.— Irvine *v.* Wortendyke, 2 E. D. Smith 374; Schuyler *v.* Ross, 13 N. Y. Suppl. 944; Riddle *v.* Sanders, 10 N. Y. St. 153; Ring *v.* Grout, 7 Wend. 341.

Wisconsin.— Otte *v.* McLean, 67 Wis. 242, 30 N. W. 367.

See 31 Cent. Dig. tit. "Justices of the Peace," § 341.

58. Fatal variances.— Wathen *v.* Farr, 8 Mo. 324; Penninger *v.* Reilley, 44 Mo. App. 255; Edwards *v.* Albrecht, 42 Mo. App. 497; Hull *v.* Phillips, 2 N. J. L. 367; Eldreth *v.* Haffmire, 2 N. J. L. 136; Rockefeller *v.* Hoysradt, 2 Hill (N. Y.) 616.

59. Consent cannot give jurisdiction over subject-matter see *supra*, III, M.

Defects as to parties may be waived. Burt *v.* Bailey, 21 Minn. 403.

60. Specific defect must be pointed out.— Rude *v.* Crandell, 11 N. Y. Civ. Proc. 11.

61. *California.*— McFall *v.* Buckeye Grangers' Warehouse Assoc., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47, in which defendant failed to object either by demurrer or answer.

Georgia.— Bigbee *v.* Hutcheson, 99 Ga. 398, 27 S. E. 732, appearing and pleading to the merits. See also Georgia R., etc., Co. *v.* Knight, 122 Ga. 290, 50 S. E. 124, holding that a declaration which in general terms alleged negligence was good against an oral demurrer made after trial before the justice and at the trial on appeal to the jury in the justice court.

Kansas.— Ciesielski *v.* Nowacki, 39 Kan. 340, 18 Pac. 232 (going to trial without objection); Kansas Pac. R. Co. *v.* Taylor, 17 Kan. 566 (failure to object at trial).

Michigan.— Achey *v.* Hull, 7 Mich. 423 (failure to demur); Whelpley *v.* Nash, 46 Mich. 25, 8 N. W. 570 (going to trial on merits); Wilcox *v.* Toledo, etc., R. Co., 43 Mich. 584, 5 N. W. 1003 (failure to demur); Chancey *v.* Skeels, 43 Mich. 347, 5 N. W. 380 (pleading to merits and going to trial).

Minnesota.— Kubesh *v.* Hanson, 93 Minn. 259, 101 N. W. 73 (objection after judgment); Burt *v.* Bailey, 21 Minn. 403 (asking venire after adjournment, change of venue, and second adjournment); Taylor *v.* Bissell, 1 Minn. 225 (going to trial).

Missouri.— Keyes, etc., Livery Co. *v.* Freber, 102 Mo. App. 315 (entering general appearance waives filing written instrument before summons issues); Williams *v.* Sanders, 69 Mo. App. 608 (appearing and going to trial waives objection to amended complaint).

New Jersey.— Leary *v.* Van Dyk, 2 N. J. L. 370, going to trial waives objection to uncertainty of complaint.

New York.— Hall *v.* McKechnie, 22 Barb. 244 (failure to demur); Willard *v.* Bridge, 4 Barb. 361 (failure to demur); Spencer *v.* Hall, 30 Misc. 75, 62 N. Y. Suppl. 826 [*affirmed* in 64 N. Y. Suppl. 1149] (failure to object to variance between amount of claim presented against administrator, rejected and proved at trial, and amount claimed in complaint); Bloodgood *v.* Overseers of Poor, 12 Johns. 285 (joining issue and going to trial).

North Carolina.— Little *v.* McCarter, 89 N. C. 233, filing answer to oral waives written complaint.

Pennsylvania.— Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135, to the effect that where an action should have been in assumpsit the fact that defendant pleaded not guilty presents no ground of objection after trial on the merits.

Wisconsin.— Jarvis *v.* Hamilton, 16 Wis. 574 (answering and going to trial); Meyer *v.* Prairie du Chien, 9 Wis. 233 (to the effect that almost every defect in form will be disregarded unless objected to).

See 31 Cent. Dig. tit. "Justices of the Peace," § 342.

Where trial is had without reference to an insufficient answer, and no exception is taken to evidence on the ground of variance, the sufficiency of the answer cannot be objected to. Budd *v.* Power, 8 Mont. 380, 20 Pac. 820.

Consent by plaintiff to an adjournment does not waive the objection that defendant's answer is unverified. Thompson *v.* Killian, 25 Minn. 111.

62. Webb *v.* Robertson, 74 Mo. 380; Irvine *v.* Forbes, 11 Barb. (N. Y.) 587; Harper *v.* Leal, 10 How. Pr. (N. Y.) 276; Peck *v.* Cowing, 1 Den. (N. Y.) 222. But see Dorroh *v.* McKay, (Tex. Civ. App. 1900) 56 S. W. 611.

Plea of privilege not waived by removal to county court see Burnett *v.* Lambach, (Tex. Civ. App. 1897) 39 S. W. 1015.

pleading may be cured by the allegations and admissions in defendant's,[63] and as a rule defects and irregularities in the pleading of either party are cured by verdict[64] or judgment,[65] and are also curable by stipulation.[66] Where the cause of action is insufficiently stated, plaintiff may be compelled to make it more specific,[67] and where two causes of action are alleged, the one sufficiently, the other defectively, the justice may proceed to judgment on the one sufficiently stated.[68]

J. Stipulations. The parties to an action in a justice's court may be bound by stipulations as to the course and conduct of the trial to the same extent and with the same effect as parties to actions in courts of record.[69]

K. Evidence, Witnesses, Depositions, and Affidavits — 1. Evidence[70] — a. In General. While the same precision is not required with respect to evidence in a justice's court as in courts of record,[71] a justice of the peace is nevertheless bound by the general rules of evidence applicable to other courts.[72] He is

63. Keep *v.* Kelly, 32 N. J. L. 56; Tinman *v.* McMeekin, 42 S. C. 311, 20 S. E. 36.

64. Polhans *v.* Atchison, etc., R. Co., 115 Mo. 535, 22 S. W. 478; Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109; Basnett *v.* Singer Mfg. Co., 83 Mo. App. 76; Byrne *v.* St. Louis, etc., R. Co., 75 Mo. App. 36; Bigelow *v.* Pines, 3 N. J. L. 523; Snyder *v.* Satterly, 2 N. J. L. 87; Vanderveer *v.* Ogburn, 2 N. J. L. 66.

65. Emerson *v.* Lakin, 23 Me. 384; Taylor *v.* Parker, 17 Minn. 469; Young *v.* Prentice, 105 Mo. App. 563, 80 S. W. 10.

Judgment equivalent to verdict see Emerson *v.* Lakin, 23 Me. 384.

After judgment of affirmance by default defendant cannot object to the sufficiency of plaintiffs' statement before the justice. Horn *v.* Excelsior Springs Co., 52 Mo. App. 548.

66. Where the parties stipulated that the pleadings should be made up at any time after trial, and a defective declaration appeared in the record, it was held that the defect would be deemed to have been cured, whether the declaration was filed before or after the stipulation. McGrew *v.* Adams, 2 Stew. (Ala.) 502. See also *infra*, IV, J.

67. Basnett *v.* Singer Mfg. Co., 83 Mo. App. 76; Dehnel *v.* Komrow, 37 Wis. 336.

68. Singer Mfg. Co. *v.* Barrett, 95 N. C. 36.

69. Parmalee *v.* Loomis, 24 Mich. 242 (an adjournment upon written stipulation of counsel is legal, although neither party is present); Ramsland *v.* Roste, 66 Minn. 129, 68 N. W. 847 (stipulation by counsel fixing amount of judgment and waiving irregularities held valid); Richardson *v.* Brown, 1 Cow. (N. Y.) 255 (stipulation for adjournment held binding unless revoked by consent of both parties); Standard Granite Co. Quarries *v.* Aikey, 67 Vt. 116, 30 Atl. 806 (stipulation for continuance construed). And see, generally, Stipulations.

A stipulation to waive the pleadings, and to go into the cause on the merits, is binding, and will extend to the cause on appeal, so that no objection to the form of the pleadings can be taken in the higher court. Stephens *v.* Baird, 9 Cow. (N. Y.) 274.

Cure of defects in pleading see *supra*, IV, I, 9, text and note 66.

A stipulation for further adjournment waives objection that justice had lost jurisdiction by adjourning for too long a time. Johnson *v.* Hagberg, 48 Minn. 221, 50 N. W. 1037.

Mere consent by attorney in the absence of adverse counsel to the extension of time in which judgment may be rendered does not amount to a stipulation. Flynn *v.* Hancock, 46 Hun (N. Y.) 368.

Authority of counsel to make a stipulation extending the time in which a justice may render judgment, after the submission of the action, will not be presumed from the fact that the counsel tried the case. Flynn *v.* Hancock, 46 Hun (N. Y.) 368.

A stipulation for adjournment without prejudice, entered into before the return-day of the summons, does not waive the statutory requirement that defendant shall file his set-off on or before the day to which the hearing shall be first adjourned. De Mott *v.* Taylor, 51 N. J. L. 307, 17 Atl. 291.

An agreement for an indefinite continuance, the period to be determined by the parties, is not binding on the justice. He may set the case for a day certain, and notify them, and his judgment then rendered will be binding. Hall *v.* Bramell, 87 Mo. App. 285.

An indefinite extension of time for rendering judgment is void. Flynn *v.* Hancock, 46 Hun (N. Y.) 368.

A stipulation agreeing to a settlement, entered in the justice's docket, and signed by the justice, is not a judgment, and can be contradicted in a subsequent suit between the parties. Gunter *v.* Earnest, 68 Ark. 180, 56 S. W. 876.

Extending statutory time for entering judgment.— In Nicholson *v.* Roberts, 6 Ohio Dec. 233, it was held that the parties cannot by agreement extend the statutory time for entering judgment.

70. See, generally, Evidence.

71. Musier *v.* Trumpbour, 5 Wend. (N. Y.) 274.

72. Davis *v.* Cleaveland, 4 Mo. 206.

Justices may receive proof of written instruments in the same manner as judges of courts of record. Shiffer *v.* Broadhead, 126 Pa. St. 280, 17 Atl. 592.

A statute allowing equitable defenses to be set up to actions at law before justices of the peace does not change the rules of evidence. Davis *v.* Cleaveland, 4 Mo. 206.

not an arbitrator with power to divide damages in doubtful cases, but is bound to decide according to the weight of the evidence;[73] and he cannot act on his own knowledge of a fact as evidence in the case before him.[74]

b. Burden of Proof. As in other courts the burden of proof is upon the party having the affirmative of the issue;[75] and in an action on a promissory note the filing of a plea of want of consideration, verified by affidavit, does not shift the burden of proof from defendant to plaintiff.[76]

c. Admissibility. The general rules of law governing the admissibility of evidence apply to actions before justices of the peace.[77] In actions of trespass, however, no evidence is admissible involving the question of title,[78] unless it is introduced, not to show title, but to explain testimony.[79] In some jurisdictions it is provided that where the instrument in suit is filed with the justice, it shall be received in evidence without proof of its execution, unless its execution has been denied under oath;[80] but that it may be so received such filing is necessary.[81] Where a defendant desires to introduce a set-off as a defense merely, he may do so, although it exceeds in amount the justice's jurisdictional limit.[82]

d. Sufficiency. While the rules of pleading as applied to justices' courts are extremely liberal, a cause of action must be as fully proved in those courts as in any other.[83]

2. Witnesses[84] — a. In General. A justice of the peace may compel the attendance of witnesses by subpœna,[85] and where a witness who has been duly summoned refuses to appear or to testify, he is not only liable to be punished by the justice for contempt,[86] but may be sued civilly by the party injured.[87] On the other hand the party calling a witness and not the justice is responsible for his fees.[88] The rules as to the examination and cross-examination of witnesses in justices' courts are the same as in courts of record.[89]

73. Prentiss *v.* Sprague, 1 Hilt. (N. Y.) 428.

74. Corlies *v.* Vannote, 16 N. J. L. 324; Locke *v.* Smith, 10 Johns. (N. Y.) 250; Burlingham *v.* Deyer, 2 Johns. (N. Y.) 189.

75. See, generally, Evidence.

76. Greer *v.* George, 8 Ark. 131.

77. See, generally, Evidence.

Declarations of co-defendant. — Where a cause has been discontinued by reason of the justice's non-attendance at the adjourned day, and plaintiff and one of the defendants appear and go to trial on another day agreed on, declarations of the defendant who did not appear or consent to the arrangement are inadmissible against the other. Stoddard *v.* Holmes, 1 Cow. (N. Y.) 245.

To render plaintiff's oath to an account admissible, he must make a preliminary oath in writing that he has no evidence to establish the account except his own oath. Shirley *v.* Price, 30 Ga. 328. *Compare* Caudell *v.* Southern R. Co., 119 Ga. 21, 45 S. E. 712.

78. Lowitz *v.* Leverentz, 57 Wis. 596, 15 N. W. 842. See *supra*, III, B, 4.

79. Dougherty *v.* O'Connell, 9 Ohio Dec. (Reprint) 380, 12 Cinc. L. Bul. 261, where a plat showing the location and size of plaintiff's and defendant's lots was held admissible to explain testimony.

80. See *supra*, IV, I, 7, b.

81. Colbath *v.* Jones, 28 Mich. 280; Maupin *v.* Triplett, 5 Mo. 422.

82. Mills *v.* David, (Pa. 1888) 15 Atl. 914. See also McClenahan *v.* Cotten, 83 N. C. 332.

83. Cicotte *v.* Morse, 8 Mich. 424. See also Lenore *v.* Ingram, 1 Phila. (Pa.) 519; Mills *v.* Wilson, 17 Fed. Cas. No. 9,616, 2 Cranch C. C. 216.

Judgment may be rendered on a verified account, without other proof of its correctness. Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105.

84. See, generally, Witnesses.

85. Harris *v.* Reams, 2 Ohio Dec. (Reprint) 281, 2 West. L. Month. 302.

Subpœna may be directed to an indifferent person to serve. Smith *v.* Wilbur, 35 Vt. 133.

86. Humphrey *v.* Knapp, 41 Conn. 313; Bowen *v.* Hunter, 45 How. Pr. (N. Y.) 193; *Ex p.* Gorman, 10 Fed. Cas. No. 5,628, 4 Cranch C. C. 572; Washington *v.* Dawson, 29 Fed. Cas. No. 17,227, 1 Hayw. & H. 236. See, generally, Contempt.

In New York, under 2 Rev. St. p. 274, § 204, a justice has no power to commit a witness for a refusal to answer a question, until the party at whose instance he attended shall have made affidavit as to the materiality of the testimony. Rutherford *v.* Holmes, 66 N. Y. 368 [*affirming* 5 Hun 317]; People *v.* Webster, 14 How. Pr. 242.

87. See Hasbrouck *v.* Baker, 10 Johns. (N. Y.) 248.

88. Watts *v.* Van Ness, 1 Hill (N. Y.) 76.

Amount recoverable.—A witness is not entitled to recover from the party subpoenaing him anything for expenses beyond the *per diem* allowed by law. Fuller *v.* Mattice, 14 Johns. (N. Y.) 357.

89. Dillard *v.* Samuels, 25 S. C. 318. See

b. Competency. Questions concerning the competency of witnesses in justices' courts, unless controlled by special statutes,[90] are governed by the general rules of law relating to the competency of witnesses.[91]

also Shirley *v.* Price, 30 Ga. 328; and, generally, WITNESSES.

A defendant who refuses to answer or demur, but appears at the trial and objects to the jurisdiction, has no right to cross-examine plaintiff. Everitt *v.* Lisk, 1 Code Rep. (N. Y.) 71.

90. *Alabama.*— Under an early statute (Aiken Dig. p. 294, § 11) parties were made competent in suits in which the matter in controversy did not exceed twenty dollars. Ivey *v.* Pierce, 5 Ala. 374; Thompson *v.* Jones, 2 Stew. & P. 46. This was in effect repealed by Code, § 3058. Lemay *v.* Walker, 62 Ala. 39.

Georgia.— Plaintiff is allowed to prove his account, not exceeding a fixed amount, upon written oath that he has no other evidence (Shirley *v.* Price, 30 Ga. 328), and an account which exceeds the limit may be brought within the statute by payments (Nichols *v.* McAbee, 30 Ga. 8).

Illinois.— Plaintiff may testify upon making affidavit that he has a claim or demand against defendant, and that he has no witness or other legal testimony to support it (Lee *v.* Quirk, 20 Ill. 392); and a party may avail himself of the oath of the adverse party, and, in case he refuses to be sworn, or being sworn, refuses to testify, the party calling him may be sworn as a witness in his own behalf. If the adverse party elects to become a witness, he must testify fairly and fully, so far as he may be questioned. If he does not so testify, the court may properly hold this to be a refusal to testify, and allow the party calling him to become a witness (Pickering *v.* Misner, 11 Ill. 597). See also Carver *v.* Crocker, 2 Ill. 265. And see Arnold *v.* Johnson, 2 Ill. 196, to the effect that the assignor of a note is not the adverse party within the statute.

Indiana.— Under Rev. Code (1831), p. 304, in all trials in actions of debt or assumpsit, it was lawful for plaintiff, if defendant denied the debt, to require him to answer on oath to such charge; and whenever defendant alleged matter of payment or set-off, or any other plea in defense or bar, he might in like manner require plaintiff to answer on oath; and on refusal of either party to answer, the justice might enter judgment as confessed. Sherry *v.* Martin, 5 Blackf. 156; Hubble *v.* Hubble, 3 Blackf. 205.

Michigan.— Where defendant admitted the debts charged against him on plaintiff's books, plaintiff could be sworn as a witness to prove his account, under Rev. St. c. 93, § 5, providing that where, in an action on a book-account, a party should make oath that there was no disinterested witness who knew the facts, he might produce in court the book containing the account, and be examined in relation thereto. Morse *v.* Congdon, 3 Mich. 549.

Missouri.— Rev. St. (1835) p. 361, allowed a party to call upon the adverse party to testify, and in case of his refusal to give his own testimony. Under this statute he was required to call on all the adverse parties, and his testimony was available against those who refused to testify. Grigg *v.* Bodrio, 9 Mo. 223. But one defendant on a joint and several contract could not be allowed to testify against his co-defendants without their consent (Levy *v.* Hawley, 8 Mo. 510); and a defendant so called was not entitled to testify as to a set-off (Musick *v.* Musick, 7 Mo. 495).

New York.— The general statute (Code, § 399, cl. 3), requiring ten days' notice of the intended examination of an assignor of a chose in action to be given the adverse party, applies to justices' courts. Collins *v.* Knapp, 18 Barb. 532. See also Butler *v.* New York, etc., R. Co., 22 Barb. 110, to the effect that notice cannot be served on defendant's attorney before appearance and issue joined, and *quære*, whether notice to an attorney is ever sufficient.

North Carolina.— Where an account is reduced by credits in order to bring it within the justice's jurisdiction, plaintiff cannot prove it under the book debt law, by his own oath, since under that law he has to swear that the account sued on contains a true account of all the dealings. Waldo *v.* Jolly, 49 N. C. 173.

South Carolina.— The act of 1747 (Pub. Laws, p. 214) authorized a justice to swear the parties, and if defendant did not offer to deny the debt on oath, the oath of plaintiff was sufficient to prove it. Cohen *v.* Saddler, 2 McCord 239.

Texas.— Where plaintiff swore that he knew of no one but A by whom he could prove his account, and it appeared by the unsworn statement of the sheriff that A was then and almost always too drunk to get to the court-house, it was held that plaintiff had not established his right under the statute to prove his account. McGee *v.* Currie, 4 Tex. 217.

See 31 Cent. Dig. tit. "Justices of the Peace," § 347.

91. See, generally, WITNESSES.

Justice not competent in his own court.— Corlies *v.* Vannote, 16 N. J. L. 324; McCormick *v.* Brookfield, 4 N. J. L. 78; Cobb *v.* Curtiss, 8 Johns. (N. Y.) 470; Perry *v.* Weyman, 1 Johns. (N. Y.) 520. *Compare* McMillen *v.* Andrews, 10 Ohio St. 112, to the effect that a justice before whom a cause is being tried by a jury cannot testify therein except by consent.

A nominal joint plaintiff was held not a competent witness for the real party in interest, for whose use the suit was brought. Kelly *v.* Eichman, 5 Whart. (Pa.) 446.

One of several defendants was held incompetent where his co-defendants objected to

3. Affidavits[92] and Depositions.[93] An affidavit taken before one justice cannot be read to prove a notice in a cause pending before another justice;[94] and where, on an application by defendant for a continuance, plaintiff, a non-resident, asks that his deposition and that of one of his witnesses be taken, the justice cannot, on the subsequent trial, consider such depositions, unless they are offered in evidence.[95] In Iowa a justice of the peace is empowered, on the application of a person desirous of obtaining the affidavit of another, to require the appearance of the latter before him by subpœna, and may commit him for contempt if he refuses to appear or to answer.[96]

L. Dismissal and Nonsuit[97] — 1. Voluntary. The plaintiff in an action before a justice of the peace has the right to discontinue his case as to any or all of the defendants at any time before verdict or judgment,[98] provided the adverse party will not be injured thereby.[99]

2. Involuntary — a. Power to Dismiss or Nonsuit. A justice of the peace has no power to enter a judgment of dismissal or nonsuit after issue joined and trial on the merits,[1] or even after evidence has been given on the part of plaintiff pertinent to the issue.[2] In some states a justice cannot render a judgment of nonsuit against a plaintiff who has appeared, without his consent;[3] and in Georgia the

his examination. Loesch *v.* Hofsien, 13 Leg. Int. (Pa.) 21.

Competency of experts. — A justice is to judge whether a witness is competent to testify as an expert, and if he misjudges, it is error. It is not a question of discretion, in which his judgment is conclusive. Wiggins *v.* Wallace, 19 Brad. (N. Y.) 338.

92. See, generally, Affidavits.

93. See, generally, Depositions.

94. Hunt *v.* Langstroth, 9 N. J. L. 223.

95. Livingston *v.* Morrissey, 6 N. Y. Civ. Proc. 28, construing Code, § 2966.

96. Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211.

97. See, generally, Dismissal and Nonsuit.

98. *Indiana.*— Cohn *v.* Rumely, 74 Ind. 120 (construing Code, § 363); Root *v.* Dill, 38 Ind. 169 (dismissal as to defendants not found). See also Kittering *v.* Norville, 39 Ind. 183.

Iowa.— Kuhn *v.* Bone, 10 Iowa 392.

Kansas.— Sawyer *v.* Forbes, 36 Kan. 612, 14 Pac. 148.

Nebraska.— See Wilcox *v.* Brown, 20 Nebr. 355, 30 N. W. 264.

New York.— Hess *v.* Beekman, 11 Johns. 457 (at any time before final submission); Platt *v.* Storer, 5 Johns. 346 (before verdict).

Pennsylvania.— Blair *v.* McLean, 25 Pa. St. 77; Lancaster Bank *v.* McCall, 4 Pa. L. J. 287. See also Raber *v.* Laubach, 2 Del. Co. 355. But *compare* Stout *v.* Wertsner, 8 Pa. Dist. 507.

Utah.— Flygare *v.* Maloney, 12 Utah 497, 23 Pac. 879.

Vermont.— Flint *v.* Whitton, 28 Vt. 557.

See 31 Cent. Dig. tit. "Justices of the Peace," § 349.

Dismissal of case after appeal to jury.— Where a plaintiff appeals to a jury from a judgment in defendant's favor, and, when the case comes on for hearing, dismisses, not the appeal, but the "case," it is a dismissal of the cause of action, and he has the right to sue again. Georgia Cent. R. Co. *v.* Howard, 112 Ga. 917, 38 S. E. 338.

99. *Iowa.*— Where defendant has pleaded a set-off, he is entitled to proceed to judgment on it. See Kuhn *v.* Bone, 10 Iowa 392.

Missouri.— If a counter-claim is filed before plaintiff has dismissed his action, defendant may proceed to the trial of his claim. McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 79 S. W. 745.

Nebraska.— If, after set-off is filed, plaintiff dismisses his action and pays costs, the justice, after entry of his dismissal, should docket the set-off under its proper title, reversing the parties. Rawalt *v.* Brewer, 16 Nebr. 444, 20 N. W. 391.

New York.— Plaintiff has a right to discontinue, although a counter-claim is interposed. Bidwell *v.* Weeks, 2 Hilt. 106.

Tennessee.— Where defendant pleads a set-off showing a balance in his favor, plaintiff cannot dismiss his action without defendant's consent. Riley *v.* Carter, 3 Humphr. 230.

See 31 Cent. Dig. tit. "Justices of the Peace," § 349.

1. Miller *v.* Miller, 13 N. J. L. 165; Shall *v.* Lathrop, 3 Hill (N. Y.) 237.

Dismissal for want of proof is a judgment on the merits, and not of nonsuit. Parsell *v.* Smyers, 7 Ark. 55; Wilkins *v.* Stiles, 75 Vt. 42, 52 Atl. 1048, 98 Am. St. Rep. 804 [*citing* Smith *v.* Crane, 12 Vt. 487].

2. Hyde *v.* Barker, 1 Pinn. (Wis.) 305. But see Fuller *v.* Tabbs, 115 Wis. 212, 91 N. W. 660, where it was held that a justice may dismiss a counter-claim for want of evidence to support it.

3. McCahan *v.* Reeder, 10 Pa. Dist. 298; Smith *v.* Crane, 12 Vt. 487. See also Severance *v.* Elliott, 75 Vt. 421, 56 Atl. 85 [*citing* State *v.* Little, 42 Vt. 430], where plaintiff appeared, and, after a jury had been partly impaneled, refused to proceed, and the justice directed judgment for defendant for costs, and it was held that the judgment was upon the merits.

presiding justice has no power to grant a nonsuit, on the ground of the insufficiency of the evidence, where an appealed case is on trial before a jury.[4]

b. Grounds. The most usual ground for an involuntary dismissal or nonsuit is plaintiff's failure to appear and prosecute his action.[5] A judgment of dismissal or nonsuit may also be entered for want of valid service of process;[6] or where the action is brought in the wrong county,[7] where it appears that the right of action is not in the plaintiff,[8] where defendant has a constitutional right to and demands a jury,[9] or where it is shown by affidavit that the justice before whom the action is brought is a necessary and material witness for defendant.[10] On the other hand it has been held no ground for dismissal or nonsuit that the title to land is involved;[11] that plaintiff has been nonsuited in a former suit, or that the costs in such suit are unpaid;[12] that the venire is not returned at the time appointed for trial;[13] that the justice, thinking himself disqualified, called on a justice to try the cause who was without jurisdiction;[14] that the suit is not seasonably entered;[15] that there is a non-joinder of parties;[16] or that a complaint to recover possession of a mining claim improperly contains an allegation of an injury done and a prayer for damages.[17]

c. Proceedings to Procure — (i) *Time of Motion.* A motion for a nonsuit

4. Favors *v.* Johnson, 79 Ga. 553, 4 S. E. 925 [*followed* in Gunn *v.* Wood, 99 Ga. 70, 24 S. E. 407]. See also Carnes *v.* Mattox, 71 Ga. 515, in which the question was adverted to but not decided.

5. *Alabama.*— Wyatt *v.* Judge, 7 Port. 37, where it was held that an entry of "Judgment *v.* plaintiff by default for costs," and signed by the justice, was not void for want of form, but was a judgment of nonsuit.

Georgia.— Bateman *v.* Smith Gin Co., 98 Ga. 219, 25 S. E. 422.

Illinois.— Cunningham *v.* Wright, 27 Ill. App. 334.

Michigan.— Purdy *v.* Law, 132 Mich. 622, 94 N. W. 182.

New York.— Wilcox *v.* Clement, 4 Den. 160. See also Relyea *v.* Ramsay, 2 Wend. 602, where it was held that where plaintiff neglects to appear on the coming in of the verdict, judgment of discontinuance may be rendered. *Compare* Barber *v.* Parker, 11 Wend. 51, where it was held that a justice may refuse to enter a nonsuit against a plaintiff who fails to appear within one hour, if a reasonable cause exists for such refusal.

North Dakota.— Piano Mfg. Co. *v.* Stokke, 9 N. D. 40, 81 N. W. 70.

Pennsylvania.— Cornish *v.* Young, 1 Ashm. 153.

Tennessee.— Maynard *v.* May, 2 Coldw. 44.

West Virginia.— Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817. *Compare* White *v.* Christy, 47 W. Va. 16, 34 S. E. 756.

Wisconsin.— Duffy *v.* Ryan, 79 Wis. 242, 48 N. W. 374.

See 31 Cent. Dig. tit. "Justices of the Peace," § 350.

Where the suit is on a written instrument, purporting to have been executed by defendant, and the signature is not denied on oath, the non-appearance of plaintiff within an hour after the time fixed for trial will not justify a nonsuit. Jewett *v.* McLelland, 3 Greene (Iowa) 568. See also Leah *v.* Mayer, 45 Misc. (N. Y.) 139, 91 N. Y. Suppl. 975, in which the summons was accompanied by a verified complaint and defendant failed to file a verified answer.

6. Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921. *Compare* Hamilton *v.* McDonald, 18 Cal. 128. Under 2 Ind. Rev. St. p. 454, § 22, a justice had the right to continue a cause where want of sufficient service was not waived by consent. Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440; Michigan Southern, etc., R. Co. *v.* Shannon, 13 Ind. 171.

7. Knoff *v.* Puget Sound Co-op. Colony, 1 Wash. 57, 24 Pac. 27.

8. If the justice finds in a suit for rent that, incidental to a conveyance to a third person, the right of action is not in plaintiff, the suit should be dismissed, and defendant should not be required to plead title and give bond. Messler *v.* Fleming, 41 N. J. L. 108.

9. Baxter *v.* Putney, 37 How. Pr. (N. Y.) 140, which was an action to recover the possession of chattels.

10. Murtha *v.* Walters, 2 Sandf. (N. Y.) 517; Hopkins *v.* Cabrey, 24 Wend. (N. Y.) 264.

Sufficiency of affidavit.— The affidavit required by N. Y. Laws (1838), p. 232, § 1, should be such that the justice can judicially pronounce it relevant or irrelevant, and should show that the justice is a necessary as well as a material witness. Young *v.* Scott, 3 Hill (N. Y.) 32.

11. Cox *v.* Graham, 3 Iowa 347.

12. Youle *v.* Brotherton, 10 Johns. (N. Y.) 363.

13. Blanchard *v.* Richly, 7 Johns. (N. Y.) 198.

14. Ely *v.* Dillon, 21 Iowa 47.

15. Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

16. Amsterdam Electric Light, etc., Co. *v.* Rayher, 43 N. Y. App. Div. 602, 60 N. Y. Suppl. 330, to the effect that such an objection must be taken by plea in abatement.

17. Van Etten *v.* Jilson, 6 Cal. 19.

because of the absence of plaintiff at the time of hearing should be made at that time,[18] and a motion to dismiss because of defects in the writ must be made on the return-day.[19]

(II) *Sufficiency of Motion.* A motion to dismiss must point out the defect for which a dismissal is asked,[20] and must not involve the merits of the case.[21]

(III) *Evidence.* On motion to dismiss on the ground that the summons was issued in blank, it is error to exclude the testimony of the managing clerk of plaintiff's attorneys that before bringing the action they received such a summons from the justice.[22]

d. Effect. Proving an account in a justice's court, previous to a nonsuit, will not dispense with proof of the same account in a subsequent action founded on it in the same court.[23]

e. Reinstatement. A justice may, after announcing the dismissal of a case, but before the entry of the order, reinstate it;[24] but he has no power to do so after entering an order of dismissal.[25]

M. Continuance and Adjournment[26]**— 1. In General.** The whole subject of continuances and adjournments in civil cases before justices of the peace is regulated by statute, and it has been held that unless authority is so given a justice has no jurisdiction to grant a continuance.[27] In some states a justice is authorized to continue a case of his own motion, where his own convenience or the exigencies of the case require it;[28] but such a continuance must be to a day certain, not exceeding the period fixed by statute.[29] A statement made by a magistrate, when not actually presiding in court, as to whether or not a given case will be called that day is not such a judicial act on his part as to justify the person asking the question in shaping his conduct upon the answer, and if he relies upon it he must take the consequences.[30]

2. Right to Continuance and Discretion of Court. The continuance of a case is usually a matter within the discretion of the justice;[31] but this discretion is a sound

18. Cornish *v.* Young, 1 Ashm. (Pa.) 153.

19. Wheelock *v.* Sears, 19 Vt. 559.

20. Southern R. Co. *v.* Johnson, 96 Ga. 655, 23 S. E. 836.

21. Bruder *v.* Biehl, 1 Ohio Cir. Ct. 85, 1 Ohio Cir. Dec. 51.

22. Hannaman *v.* Muckle, 20 N. Y. Civ. Proc. 296.

23. Mann *v.* Crombie, Ga. Dec. Pt. II, 133.

24. Hodges *v.* Bagg, 81 Mich. 243, 45 N. W. 841.

25. Abrams *v.* Fine, 28 Misc. (N. Y.) 533, 59 N. Y. Suppl. 550. See also Pratt *v.* Roberts, 53 Me. 399, to the effect that a justice cannot set aside an order of nonsuit on a day subsequent to that on which the entry was made. But see Petrie *v.* Karsch, 35 Kan. 357, 11 Pac. 154.

26. See, generally, Continuances.

Loss of jurisdiction by continuance or adjournment see *supra*, III, H, 4.

Stipulations as to continuance or adjournment see *supra*, IV, J, note 69.

27. Lyman-Eliel Drug Co. *v.* Cooke, 12 N. D. 88, 94 N. W. 1041. *Compare*, however, Caswell *v.* Ward, 2 Dougl. 374, holding that suits pending before justices of the peace, under the statutes of forcible entry and detainer, may be continued on cause shown; the power to continue, although not expressly conferred, being incident to the jurisdiction to hear and determine.

Where there is no special law regulating the adjournment of a particular class of cases, the general laws of the state are to be looked to. Vicksburg *v.* Briggs, 85 Mich. 502, 48 N. W. 625.

Collateral attack.— The right of a justice to continue a case cannot be collaterally attacked. Lemp *v.* Fullerton, 83 Iowa 192, 48 N. W. 1034, 13 L. R. A. 408.

28. Pierson *v.* Millan, 3 N. J. L. 564; Nellis *v.* McCarn, 35 Barb. (N. Y.) 115; Wilcox *v.* Clement, 4 Den. (N. Y.) 160. *Contra*, Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

From day to day.— A justice may continue his court from day to day when the exigencies of the case require it. Day *v.* Wilber, 2 Cai. (N. Y.) 134.

Upon default.— Mo. Rev. St. § 6235, authorizing a justice, neither party appearing, to give judgment by default on a written instrument, and section 6236, requiring him in other cases to enter a nonsuit, are mandatory, and, in a case to be established by parol, a justice cannot, plaintiff not appearing, pass it down, continue, or postpone it. Bohle *v.* Kingsley, 51 Mo. App. 389.

29. See *infra*, IV, M, 7.

30. Watkins *v.* Ellis, 105 Ga. 796, 32 S. E. 131 [*citing* Bostain *v.* Morris, 93 Ga. 224, 18 S. E. 649; Balland Transfer Co. *v.* Clark, 91 Ga. 234, 18 S. E. 138].

31. Walter A. Wood Mowing, etc., Mach. Co. *v.* Vanderbilt, 109 Mich. 489, 67 N. W. 690 (refusal of second adjournment); Hardenburgh *v.* Fish, 61 N. Y. App. Div. 333, 70

judicial discretion,[32] and where a party clearly brings himself within the terms of the statute allowing a continuance it is error to refuse it.[33] In some jurisdictions a continuance is granted as a matter of right to either party on the return-day,[34] or when the pleadings are closed.[35] If on an application for continuance the adverse party will admit the matters expected to be proved by the absent witness, and such admission is accepted, the movant is precluded from asking for a second adjournment to enable him to prove the testimony of the same witness.[36]

3. CONDITION OF CAUSE. The stage of the proceedings at which a continuance or adjournment may be had is regulated by the statutes of the various states.[37]

4. GROUNDS. It is good ground for a continuance in a justice's court that the party cannot safely proceed to trial for want of some material testimony or wit-

N. Y. Suppl. 415; Rawson *v.* Grow, 4 E. D. Smith (N. Y.) 18 (defendant not entitled to adjournment as matter of right); Ranney *v.* Gwynne, 3 E. D. Smith (N. Y.) 59 (defendant not entitled to second adjournment as matter of right because his counsel is engaged in another court); Steele *v.* Wells, 56 N. Y. Suppl. 367; Penoyer *v.* Phillips, 10 N. Y. St. 783; Parmalee *v.* Thompson, 7 Hill (N. Y.) 77 (adjournment cannot be claimed as matter of right after jury is impaneled); Kittle *v.* Baker, 9 Johns. (N. Y.) 354; Benoit *v.* Revoir, 8 N. D. 226, 77 N. W. 605 (intermission for twenty-four hours to consider questions submitted).

Continuance to obtain service.— Vt. Gen. St. c. 31, § 50, requiring a justice, in an action commenced without service on defendant, to continue the cause for notice to him, is mandatory. Rollins *v.* Clement, 49 Vt. 98.

32. Mercer *v.* Lowell Nat. Bank, 29 Mich. 243; Rose *v.* Stuyvesant, 8 Johns. (N. Y.) 426.

33. West *v.* Rice, 4 Kan. 563; Mercer *v.* Lowell Nat. Bank, 29 Mich. 243.

34. Moody *v.* Becker, 70 N. Y. Suppl. 543 (plaintiff entitled to adjournment for eight days on return of summons); Smith *v.* Fenton, 2 Cow. (N. Y.) 425 (defendant entitled to one adjournment of course, on making oath and giving security); Cross *v.* Moulton, 15 Johns. (N. Y.) 469 (defendant sued by warrant entitled to adjournment on giving security for appearance, without making oath of the want of a material witness); Sebring *v.* Wheedon, 8 Johns. (N. Y.) 458 (to the same effect).

Adjournment at plaintiff's request after the return-day, and over defendant's objection, is error. Moody *v.* Becker, 70 N. Y. Suppl. 543.

35. Minn. Gen. St. (1894) § 4990, provides that when the pleadings are closed, the justice shall, on the application of either party, adjourn the case not exceeding one week. Kennedy *v.* Kellum, 90 Minn. 325, 96 N. W. 792; Johnson *v.* Little, 82 Minn. 69, 84 N. W. 648.

36. Brill *v.* Lord, 14 Johns. (N. Y.) 341.

37. *Illinois.*— Under Gross Comp. Laws, p. 405, §§ 105, 106, a cause cannot be continued without service by copy on defendant. Bell *v.* Dart, 54 Ill. 526.

Maine.—A justice has no power to continue a cause before the time at which the writ is returnable (Martin *v.* Fales, 18 Me. 23, 36 Am. Dec. 693), and under the statute authorizing one justice to continue once a cause brought before another justice, the continuance may be ordered on the return-day, or any day of adjournment (Tyler *v.* Beal, 31 Me. 336. *Compare* Spencer *v.* Perry, 17 Me. 413).

Michigan.— A justice can only adjourn a cause on his own motion on the return-day of the writ (Stadler *v.* Moors, 9 Mich. 264), and then only when the writ is actually returned (Harbour *v.* Eldred, 107 Mich. 95, 64 N. W. 1054).

New Jersey.— Before an adjournment can take place, a summons must be returned and the parties be in court, or at least plaintiff must appear (Halsey *v.* Whitlock, 3 N. J. L. 869), and a justice cannot adjourn a trial without the consent of the parties after it is actually commenced by going into the evidence (Parker *v.* Mercantile Safe-Deposit Co., 63 N. J. L. 505, 44 Atl. 199; Stretch *v.* Forsyth, 3 N. J. L. 713; Andrews *v.* Wright, 2 N. J. L. 262).

New York.— Under Code Civ. Proc. §§ 2959, 2960, providing that a justice may grant an adjournment only at the time of the return of the summons or of joining issue, an adjournment after such time, unless by consent of the parties, is unauthorized (Stoutenburg *v.* Humphrey, 9 N. Y. App. Div. 27, 41 N. Y. Suppl. 140. See also Suiter *v.* Kent, 12 N. Y. App. Div. 599, 43 N. Y. Suppl. 137; Hannaman *v.* Muckle, 15 N. Y. Suppl. 961; Thompson *v.* Sayre, 1 Den. 175; Green *v.* Angel, 13 Johns. 469; Fink *v.* Hall, 8 Johns. 437; Kilmore *v.* Sudam, 7 Johns. 529), unless it be found impossible to finish the trial within a reasonable time for holding court (Story *v.* Bishop, 4 E. D. Smith 423).

Vermont.— The statute confines the power of adjourning a cause to no particular stage of the proceedings, and it may be adjourned after a jury has been drawn which the officer is proceeding to summon. Griffin *v.* Spaulding, 6 Vt. 60.

See 31 Cent. Dig. tit. "Justices of the Peace," § 353.

Where attachments were issued against witnesses after the court had decided to adjourn until the next day, the fact that it did adjourn before the return of the writs was not error. Fish's Eddy Chemical Co. *v.* Stevens, 92 Hun (N. Y.) 179, 36 N. Y. Suppl. 397.

ness;[38] that the party has been summoned as a juror in another court;[39] that he is too unwell to leave his house;[40] or that, in an attachment suit, the same property has been attached in a court of record.[41] On the other hand it has been held that a continuance should not be allowed for the purpose of perfecting service,[42] to allow a party to procure the assistance of counsel,[43] because the party's attorney would be engaged in another court on the day set for trial,[44] or because the party was prevented by stress of weather from appearing at the return of the summons.[45] A cause may, however, be continued after the trial has begun, upon sufficient grounds arising since its commencement, or coming to the applicant's knowledge since that time, and which could not, with diligence, have been ascertained before.[46]

5. Application and Procedure. While a continuance may be had by consent or agreement of the parties,[47] in the presence of the justice,[48] or by the written stipulation of counsel,[49] the usual mode of procedure is by motion, supported by the oath or affidavit[50] of the party or of his attorney.[51] The affidavit must be properly entitled, or state in its body the action in which the adjournment is asked,[52] must set out all the facts required by the statute to authorize a continuance,[53] and must show the exercise of due diligence on the part of the party or his attorney.[54] In determining the application the justice may receive affidavits or evidence in rebuttal,[55] and may cross-examine the applicant;[56] and on an application for a continuance made on appeal, the court will consider previous

38. Nellis *v.* McCarn, 35 Barb. (N. Y.) 115; Lynsky *v.* Pendegrast, 2 E. D. Smith (N. Y.) 43; Goff *v.* Vedder, 12 N. Y. Civ. Proc. 358; Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311; Mullinax *v.* Waybright, 33 W. Va. 84, 10 S. E. 25.

Laches.— A party who neglects, up to the day of hearing, to take the proper legal steps to procure the attendance of his witnesses, is not entitled to a continuance. Knight *v.* Parry, 1 Ashm. (Pa.) 221. See also Sherar *v.* Willis, 5 Lans. (N. Y.) 329.

Summary proceedings may be adjourned not only for the purpose of procuring necessary witnesses, but for any other cause satisfactory to the court. Goff *v.* Vedder, 12 N. Y. Civ. Proc. 358. But see Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311.

Defendant is entitled to the necessary time to resummon his witnesses, where the justice was a few minutes late at the hour set for the hearing of an adjourned case, being employed on a coroner's inquest, and defendant, ignorant of the cause of the justice's absence, dismissed his witnesses. Stadler *v.* Moors, 9 Mich. 264.

39. Brower *v.* Tatro, 115 Mich. 368, 73 N. W. 421.

40. Locke *v.* Leonard Silk Co., 37 Mich. 479.

41. Shanklin *v.* Francis, 67 Mo. App. 457.

42. Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921. But see Rollins *v.* Clement, 49 Vt. 98.

43. Warner *v.* Comstock, 55 Mich. 615, 22 N. W. 64.

44. Disque *v.* Herrington, 139 Cal. 1, 72 Pac. 336.

45. Howell *v.* Capelli, 9 N. Y. App. Div. 18, 41 N. Y. Suppl. 105.

46. Lyman-Eliel Drug Co. *v.* Cooke, 12 N. D. 88, 94 N. W. 1041.

47. O'Brien *v.* Pomroy, 22 Minn. 130.

Stipulation for continuance or adjournment see *supra*, IV, J, note 69.

48. **An adjournment by agreement, in the absence of the justice,** is not regularly made, although afterward entered by him on his docket. Kimball *v.* Mack, 10 Wend. (N. Y.) 497. See also Weeks *v.* Lyon, 18 Barb. (N. Y.) 530.

49. Parmalee *v.* Loomis, 24 Mich. 242. And see *supra*, IV, J, note 69.

50. **Necessity of oath.**— The authority of a justice to adjourn a cause on account of the absence of material witnesses must, under Howell Annot. St. Mich. § 6899, be on showing made upon oath; and it is error to adjourn a cause in the absence thereof. Scullen *v.* George, 65 Mich. 215, 31 N. W. 841. But see Dunfee *v.* Vargason, 3 Pa. Co. Ct. 207.

51. **If defendant's attorney offers to make affidavit** of the absence of a material witness and requests an adjournment, his affidavit should be received, unless some special objection be shown. Seers *v.* Grandy, 1 Johns. (N. Y.) 514. *Compare* Killmer *v.* Crary, 13 Johns. (N. Y.) 228, to the effect that the admission of the affidavit of the party's attorney rests in the sound discretion of the justice.

52. Irroy *v.* Nathan, 4 E. D. Smith (N. Y.) 68.

53. **Sufficiency of affidavit.**— Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280; Burgett *v.* Edwards, 4 Lans. (N. Y.) 193; Cristman *v.* Paul, 16 How. Pr. (N. Y.) 17.

Oath of absence of material witness held sufficient see Nellis *v.* McCarn, 35 Barb. (N. Y.) 115.

54. Cox *v.* Allen, 91 Iowa 462, 59 N. W. 335.

55. Weed *v.* Lee, 50 Barb. (N. Y.) 354.

56. A refusal to submit to cross-examination warrants a refusal of the application. Boatz *v.* Berg, 51 Mich. 8, 16 N. W. 184.

applications made in the justice's court in determining its sufficiency.[57] To be valid an order for a continuance must embrace all of several joint defendants,[58] and where one justice acts in the absence of another, it must be made at the place fixed for trial, within the time allowed by law for appearance, and the acting justice must then and there have the writ in his possession.[59] It is no ground of objection to a continuance that the entry is in the handwriting of plaintiff's attorney, if the continuance was granted by the justice and the entry assented to and adopted by him by his official signature.[60]

6. SECURITY. Under some statutes a defendant, as a condition to the adjournment of the case on his application, is required to give security for his appearance at the adjourned day and for the payment of the judgment or damages and costs.[61] Such a bond is not required when the cause is adjourned by consent,[62] or where plaintiff proceeds as a non-resident;[63] and it is not necessary to give a new bond on a second adjournment, unless it is required by the justice or the bail.[64] The liability of the surety becomes fixed upon the adjournment being had,[65] and, if judgment is rendered against defendant, is only discharged by payment of the debt or surrender of defendant's body in execution.[66] In an action on the bond the measure of damages is the judgment in the original action.[67]

7. TIME AND PLACE FOR APPEARANCE ON ADJOURNMENT. When an adjournment is had, it must be to a time[68] and place certain.[69] The time may be less

57. See *infra*, V, A, 11, c, note 17.

58. An order as to part of the defendants only is void. Root *v.* Dill, 38 Ind. 169.

59. Belcher *v.* Treat, 61 Me. 577; Hinman *v.* Swift, 18 Vt. 315. See also Knight *v.* Berry, 22 Vt. 246, where the office at which the writ was returnable was closed, and a continuance made at the door of the office was held valid.

60. Eastman *v.* Waterman, 26 Vt. 494.

61. Peck *v.* Andrews, 32 Barb. (N. Y.) 445; Belshaw *v.* Colie, 1 E. D. Smith (N. Y.) 213.

The object of the statute is to place plaintiff in the same situation at the adjourned day as he was in on the return of process. Cornell *v.* Reynolds, 1 Cow. (N. Y.) 241.

Form of security.— The security to be taken by a justice for defendant's appearance at an adjournment must be either a recognizance, or a written engagement, of the bail. Oral security is void by the statute of frauds. McNutt *v.* Johnson, 7 Johns. (N. Y.) 18.

Amount.— That a bond is in double the amount prescribed by the statute will not invalidate it. Williams *v.* Hubbard, 2 Code Rep. (N. Y.) 52.

62. Nevada Cent. R. Co. *v.* Lander County Dist. Ct., 21 Nev. 409, 32 Pac. 673.

63. Row *v.* Pulver, 1 Cow. (N. Y.) 246.

64. Williams *v.* Hubbard, 2 Code Rep. (N. Y.) 52.

65. The bond is only effective in case an adjournment is had; and if no adjournment is had after the execution of the bond the surety incurs no liability. Mosier *v.* McKay, 4 Den. (N. Y.) 116.

66. Mere appearance of defendant does not discharge liability. Sarles *v.* Hyatt, 1 Cow. (N. Y.) 253.

Surrender after verdict is sufficient, although defendant is not found on entering judgment and issuing execution. Cornell *v.* Reynolds, 1 Cow. (N. Y.) 241.

67. Stewart *v.* McGuin, 1 Cow. (N. Y.) 99.

68. Boggs *v.* Arthurs, 2 Pennew. (Del.) 401, 47 Atl. 623; Barr *v.* Chaytor, 3 Harr. (Del.) 492; Allen *v.* Edwards, 3 Hill (N. Y.) 499; Houseler *v.* Hogan, 1 Just. L. Rep. (Pa.) 43; Roberts *v.* Warren, 3 Wis. 736, hour of day must be fixed.

Indefinite adjournment as ousting jurisdiction see *supra*, III, H, 4, b.

From term to term.— In Georgia continuances should be from term to term. But where a case was continued from a regular term to a day agreed on by the parties, and on the latter day a judgment was rendered against defendant, it was held that the judgment was not void. Artope *v.* Macon, etc., R. Co., 110 Ga. 346, 35 S. E. 657. But see White *v.* Mandeville, 72 Ga. 705.

Agreement of parties.— Where the parties, to suit their own convenience, have agreed to let the trial stand over to a day thereafter to be fixed, and such day has thereafter been named by the justice, and due notice given them, the court does not thereby lose jurisdiction. Cedar Rapids *v.* Rall, 115 Iowa 335, 88 N. W. 826.

Holding case open.— An agreement by a justice to hold a case open till the agent of defendant could wire his principal as to the defense is a mere matter of grace, and is reasonably complied with by an adjournment from Saturday till eight o'clock Monday morning. Olim *v.* Chicago, etc., R. Co., 61 Iowa 250, 16 N. W. 124.

69. The place need not be that originally fixed for appearance. Lyme *v.* East Haddam, 14 Conn. 394 (to adjoining town in county); Morrell *v.* Near, 1 Cow. (N. Y.) 112; Griffin *v.* Spaulding, 6 Vt. 60 (to any part of the town in which the original place of sitting was fixed).

Office of justice.— The place designated for appearance on an adjourned day may be the office of the justice, and if he keeps no place

than,[70] but cannot exceed in duration, the maximum limit prescribed by statute except by consent of the parties.[71] A continuance usually dates from the return day,[72] and in computing the time Sundays are to be excluded,[73] and the word "months" is to be construed as calendar, not lunar, months.[74]

8. Second and Further Adjournment. A justice of the peace may order a second adjournment *ex mero motu* in Delaware,[75] but not in New York,[76] in which state such an adjournment can be had only on the application of defendant;[77] while in Vermont one justice cannot adjourn a case in the absence of the justice before whom it was brought on the day to which it had been previously adjourned.[78] A party desiring a second continuance must clearly and affirmatively bring himself within the terms of the statute,[79] but where he does so the justice has no right to refuse the adjournment[80] or to impose costs as a condition of granting it.[81] Such further continuance cannot be ordered before the expiration of the previous one,[82] and where the justice has once adjourned the case for the maximum limit of time at defendant's request, he cannot grant him a second adjournment.[83] Where a case has been adjourned by the justice to a particular day, and plaintiff secures defendant's consent to a further adjournment, it is the duty of plaintiff to appear before the justice and have the case adjourned.[84]

or room as his office, his place of residence will be deemed such. Roberts *v.* Warren, 3 Wis. 736.

70. Bowditch *v.* Salisbury, 9 Johns. (N. Y.) 366; Stevens *v.* Fisher, 30 Vt. 200.

71. Covart *v.* Haskins, 39 Kan. 571, 18 Pac. 522; McKenna *v.* Murphy, 68 N. J. L. 522, 53 Atl. 695 [*citing* Savage *v.* Collins, 49 N. J. L. 167, 6 Atl. 502; Taylor *v.* Doremus, 16 N. J. L. 473]; Lloyd *v.* Hance, 16 N. J. L. 127; White *v.* Lippincot, 2 N. J. L. 266; Moore *v.* Taylor, 88 N. Y. App. Div. 4, 84 N. Y. Suppl. 518; Wilcox *v.* Clement, 4 Den. (N. Y.) 160; Allen *v.* Edwards, 3 Hill (N. Y.) 499; Gamage *v.* Law, 2 Johns. (N. Y.) 192; Colden *v.* Dopkin, 3 Cai. (N. Y.) 171; Candee *v.* Goodspeed, 2 Cai. (N. Y.) 245; Palmer *v.* Green, 1 Johns. Cas. (N. Y.) 101. See also Caughey *v.* Vance, 3 Pinn. (Wis.) 275, 3 Chandl. 308.

The maximum limit refers to the period of a single adjournment, and not to the aggregate of all adjournments that may be granted. Buchanan First Nat. Bank *v.* Smith, 24 Misc. (N. Y.) 709, 53 N. Y. Suppl. 795. See also Bryant *v.* Pember, 43 Vt. 599.

Agreement of parties.— It is entirely competent for the parties in an action in a justice's court to agree, subject to the approval of the court, as to when the pleadings shall be filed, and to what time the case shall be adjourned, without affecting the jurisdiction of the justice. West *v.* Berg, 66 Minn. 287, 68 N. W. 1077.

72. Hatch *v.* Christmas, 68 Mich. 84, 35 N. W. 833; Gamage *v.* Law, 2 Johns. (N. Y.) 192. But see White *v.* Lippincot, 2 N. J. L. 266, where the time was computed from the date of the summons.

Where there is no service, but defendant appears, a continuance for less than ninety days from the date of the appearance, although for more than ninety from the return-day of the summons, will not work a discontinuance. Reed *v.* Mott, 2 Nebr. (Unoff.) 450, 89 N. W. 277.

73. Speidell *v.* Fash, 1 Cow. (N. Y.) 234; Shipman *v.* Mears, 15 N. C. 484.

74. Kimball *v.* Lamson, 2 Vt. 138.

75. Deputy *v.* Betts, 4 Harr. (Del.) 352; Kinniken *v.* Kinney, 4 Harr. (Del.) 313; Mousely *v.* Allmond, 4 Harr. (Del.) 92.

76. Gamage *v.* Law, 2 Johns. (N. Y.) 192.

Second adjournment construed as by consent see Kilmore *v.* Sudam, 7 Johns. (N. Y.) 529.

77. Newman *v.* Woodcock, 16 Misc. (N. Y.) 142, 38 N. Y. Suppl. 957; Payne *v.* Wheeler, 15 Johns. (N. Y.) 492.

As to right of defendant see Smith *v.* Fenton, 2 Cow. (N. Y.) 425; Annin *v.* Chase, 13 Johns. (N. Y.) 462.

78. Whitcomb *v.* Rood, 20 Vt. 49.

79. Moran *v.* McCullum, 50 Nebr. 449, 69 N. W. 938; Savage *v.* Collins, 49 N. J. L. 167, 6 Atl. 502; Midler *v.* Lazadder, 14 N. J. L. 34; Horner *v.* Hewlings, 8 N. J. L. 227; Christman *v.* Paul, 16 How. Pr. (N. Y.) 17; Farrington *v.* Payne, 15 Johns. (N. Y.) 432; St. John *v.* Benedict, 12 Johns. (N. Y.) 418; Powers *v.* Lockwood, 9 Johns. (N. Y.) 133; Field *v.* Heckman, 118 Wis. 461, 95 N. W. 377.

The party must show that he has used due diligence to procure his witnesses, or that there is some special cause for their non-attendance, or for an adjournment. Powers *v.* Lockwood, 9 Johns. (N. Y.) 133.

80. Smith *v.* Fenton, 2 Cow. (N. Y.) 425; Beekman *v.* Wright, 11 Johns. (N, Y.) 442; Easton *v.* Coe, 2 Johns. (N. Y.) 383.

81. Hemstract *v.* Youngs, 9 Johns. (N. Y.) 364.

82. Spencer *v.* Perry, 17 Me. 413; Deland *v.* Richardson, 4 Den. (N. Y.) 95.

83. Townsend *v.* Lee, 3 Johns. (N. Y.) 435. *Compare* Richardson *v.* Brown, 1 Cow. (N. Y.) 255, to the effect that a justice may adjourn from time to time, till the adjournments aggregate the limit. But see Bryant *v.* Pember, 43 Vt. 599.

84. Barlow *v.* Riker, 138 Mich. 607, 101 N. W. 820.

9. Renewal of Proceedings After Adjournment. After an adjournment the parties must appear within the time allowed for appearance after the hour fixed and proceed as upon the return-day of the writ.[85] But if the justice is engaged at the hour in trying another cause which occupies him until after the time allowed for appearance, it is a good reason for delay, and he may proceed as soon as possible after his other official engagements are disposed of.[86]

10. Operation and Effect.[87] A request for or a consent to an adjournment does not carry with it a consent to file pleadings after the expiration of the time fixed by statute,[88] nor is it an implied recognition of the validity of an insufficient pleading;[89] but such request will estop the party making it from taking advantage of the fact that no cause for adjournment was shown.[90] Where a justice has adjourned a cause, and entered the adjournment in his docket, he cannot afterward, without the consent of the parties, change the day of adjournment,[91] nor, where no certain day is fixed, but the time is left to the agreement of counsel, can he, without such consent, afterward appoint a time and place for trial.[92] Where a continuance is granted by one justice by reason of the absence on the return-day of the justice before whom the writ is returnable, his decision is final,[93] and the continuance constitutes a sufficient entry of the action.[94] Upon the continuance of a case the same jury may be required to attend again, although the better course is to summon a new jury at the adjourned day.[95]

11. Objections and Exceptions, Waiver, and Cure.[96] Defects in respect to an adjournment in a justice's court may as to parties be waived,[97] and a party at whose instance an adjournment has been had is estopped to question its regularity.[98] But a defense on the merits is no waiver of defendant's right to an adjournment,[99] although a judgment by confession is;[1] nor will the fact that plaintiff has his old subpœna renewed waive an unauthorized adjournment had on the motion of defendant;[2] and an irregularity in granting a second adjournment is not waived because a condition that plaintiff pay defendant's witness' fees was imposed and complied with.[3]

N. Trial, New Trial, Reference, and Appeal to Jury — 1. Trial — a. Preliminary Proceedings and Conduct of Trial — (I) *In General.* Generally speak-

85. Andrews *v.* Mullin, 14 Nebr. 248, 15 N. W. 216; Clark *v.* Garrison, 3 Barb. (N. Y.) 372; Freeborn *v.* Badgley, 15 Misc. (N. Y.) 173, 37 N. Y. Suppl. 17 (unless the parties waive the practice of waiting one hour); Nichols *v.* Place, 1 Misc. (N. Y.) 497, 23 N. Y. Suppl. 134; Shufelt *v.* Cramer, 20 Johns. (N. Y.) 309. *Contra*, Steel *v.* Bates, 2 Vt. 320, holding that the statute did not apply to adjourned cases.

Time allowed for appearance generally see *supra*, IV, M, 7.

Reliance on promise of notice.—Defendant's attorney has no right to rely on a promise of the justice that the case will not be called after adjournment until he shall have been notified. Snively *v.* Hill, 46 Kan. 494, 26 Pac. 1024.

86. Hunt *v.* Wickwire, 10 Wend. (N. Y.) 102, 25 Am. Dec. 545.

87. **Loss or divestiture of jurisdiction** see *supra*, III, H. 4.

By stipulation see *supra*, IV, J.

88. Mettice *v.* Litcherding, 14 Minn. 142; Holgate *v.* Broome, 8 Minn. 243.

89. Thompson *v.* Killian, 25 Minn. 111.

90. State *v.* Merrick, 101 Wis. 162, 77 N. W. 719.

91. Wardlow *v.* Besser, 3 Minn. 317. See also Mahr *v.* Young, 13 Wis. 634.

92. Woodworth *v.* Wolverton, 24 N. J. L. 419.

93. Holland *v.* Osgood, 8 Vt. 276.

94. Knight *v.* Berry, 22 Vt. 246.

95. *Ex p.* Tracy, 25 Vt. 93.

96. **Continuance and adjournments as ousting jurisdiction** see *supra*, III, H, 4.

97. Burt *v.* Bailey, 21 Minn. 403.

Consent of parties waives objection. Nellis *v.* McCarn, 35 Barb. (N. Y.) 115.

Going to trial on the merits waives objections. Erie Preserving Co. *v.* Witherspoon, 49 Mich. 377, 13 S. W. 781; Frost *v.* Chandler, 54 N. J. L. 128, 22 Atl. 1084.

Appearance as waiver see *supra*, IV, F, 1, b, (II), (E).

98. Jennerson *v.* Garvin, 7 Kan. 136; Ewing *v.* Nickle, 45 Md. 413; Peck *v.* McAlpine, 3 Cai. (N. Y.) 166.

Applying for further adjournment precludes the applicant from taking advantage of a defect or irregularity in the previous adjournment. Cron *v.* Krones, 17 Wis. 401.

99. Seers *v.* Grandy, 1 Johns. (N. Y.) 514.

1. A judgment by confession waives refusal to adjourn at defendant's request. Hill *v.* Downer, 11 Johns. (N. Y.) 461.

2. Peck *v.* Andrews, 32 Barb. (N. Y.) 445.

3. Newman *v.* Woodcock, 16 Misc. (N. Y.) 142, 38 N. Y. Suppl. 957.

ing a justice of the peace has the same incidental powers as other courts in the proceedings preliminary to, and in the conduct of, the trial of a cause before him.[4] A justice must call his cases,[5] issue subpœnas,[6] swear the jury,[7] and where the trial is not held at the return of the summons he must fix the day of trial and notify the parties.[8] He cannot allow a peremptory challenge,[9] and he is not required to try an exception separately from the answer,[10] or, unless requested by one of the parties, to reduce the evidence to writing.[11] He may, by consent of the parties, consult another justice, who happens to be present, on a matter of practice,[12] and, in the absence of an express statute, the fact that a judgment is rendered by two justices of the same county sitting together will not invalidate it.[13] The right to open and close is with the party holding the affirmative of the issue, usually the plaintiff.[14] Where, before an action is finished, the term of the justice before whom it was brought expires, it is no more the duty of one party than of the other to call in a second justice.[15]

(II) *Reception of Evidence.* The reception of evidence at any stage of the proceedings before verdict or judgment is a matter resting in the sound discretion of the justice.[16] But the justice cannot refuse to allow defendant's wit-

4. U. S. *v.* O'Neal, 10 App. Cas. (D. C.) 205.

Supplying lost papers.—A justice has the same power to supply the loss of any paper relating to the cause as other courts have. Cunningham *v.* Green, 3 Ala. 127.

Delay for procuring testimony or papers.—A justice should grant a reasonable delay after appearance or the call of the case for the purpose of allowing a party to procure testimony or papers. State *v.* Frederick, 48 La. Ann. 1374, 21 So. 23 [*citing* State *v.* Coquillon, 35 La. Ann. 1101]; Cowan *v.* Farrell, 7 N. D. 397, 75 N. W. 771.

Removal of improper persons.—A justice has the power to cause the removal from the court-room of any person whose presence, in the exercise of a sound judicial discretion, he deems prejudicial to the interests of justice. State *v.* Copp, 15 N. H. 212.

View of premises.—Although a justice has power in a proper case to send the jury to view premises, he should not do so in an action to recover a penalty for excavating in a street, where the excavation has been filled up. Sell *v.* Ernsberger, 8 Ohio Cir. Ct. 499, 4 Ohio Cir. Dec. 100.

5. Where, after a justice has called his cases, a defendant who was waiting asked his case to be called, and was told that there was no such case, whereupon he left the court, it was held that the justice could not afterward proceed with the case in his absence. Murling *v.* Grote, 3 Abb. Pr. (N. Y.) 109. *Compare* Ballard Transfer Co. *v.* Clark, 91 Ga. 234, 18 S. E. 138.

6. Where there is no action pending, a justice has no authority to issue subpœnas. Chambers *v.* Oehler, 107 Iowa 155, 77 N. W. 853.

7. Fulton *v.* Guill, 24 Misc. (N. Y.) 285, 53 N. Y. Suppl. 707, holding a failure to swear jurors fatal to a verdict and judgment.

8. **In California,** under Code Civ. Proc. § 850, the justice must fix a day of trial and notify in writing plaintiff and defendants who have appeared thereof, the giving of such notice being jurisdictional. Elder *v.* Fresno County, 136 Cal. 364, 68 Pac. 1022; Jones *v.* Los Angeles, 97 Cal. 523, 32 Pac. 575.

In Maryland, under Code (1860), art. 51, § 19 (Pub. Gen. Laws (1904), art. 52, § 22), a summons having been served, and defendant having failed to appear, the justice shall fix a day of trial not less than six nor more than fourteen days from the return, and proceed to try the case *ex parte*. It is not necessary that the record show an order in writing fixing a day, but it is enough that it appears by a trial being had within the specified time that a day was fixed. Motta *v.* Fahey, 78 Md. 389, 28 Atl. 387.

In Missouri, under Rev. St. (1899) § 3974, providing that a justice to whom a case is transferred shall notify the parties of the time set for trial, the notice should be served on defendant, and not on his attorney. Cullen *v.* Callison, (App. 1904) 80 S. W. 290.

Telephonic consent by defendant's attorney to the setting of the trial for a day certain cannot waive notice. Elder *v.* Fresno County, 136 Cal. 364.

9. Eldridge *v.* Hubbell, 119 Mich. 61, 77 N. W. 631.

10. State *v.* Tully, 48 La. Ann. 1532, 21 So. 119.

11. State *v.* Clemmensen, 92 Minn. 191, 99 N. W. 640.

12. Chivers *v.* Lytle, 97 Mich. 477, 56 N. W. 862.

13. Griffin *v.* Haught, 45 W. Va. 460, 31 S. E. 957.

14. Howard *v.* Kisling, 15 Ind. 83; Felts *v.* Clapper, 69 Hun (N. Y.) 373, 23 N. Y. Suppl. 508.

Where defendant waives the general denial, and pleads affirmative matter in avoidance, he is entitled to open and close. Cross *v.* Pearson, 17 Ind. 612.

15. Johnson *v.* Kingsbury, 28 Vt. 486.

16. Davis *v.* Mobley, 87 Ga. 481, 13 S. E. 596 (pending argument to jury); Henry *v.* Lane, 2 Mo. 201 (evidence in support of plea in abatement after cause has proceeded to trial); Heidenheimer *v.* Wilson, 31 Barb.

nesses to testify,[17] and he may not, after the testimony is closed, examine a witness for one party in the absence of the other,[18] or without allowing such other party to introduce evidence also if he wishes.[19] The offer of a transcript of a judgment against plaintiff and in favor of defendant on the trial will not preclude its use as a set-off when thereafter offered as such before the hearing of testimony is closed.[20]

b. By Jury — (i) *In General.* In many states the statutes provide for trial by jury upon the demand of either party,[21] or in some states upon the justice's own motion, if he thinks the ends of justice will be subserved thereby.[22] If neither party demand a jury the case is to be tried by the justice.[23]

(ii) *Selection of Jury.* A party has no right to a trial by a jury composed of men selected by a method other than the one prescribed by law.[24] The statutes are mandatory, and any material variation from the prescribed mode of selection is fatal.[25]

(iii) *Custody, Conduct, and Deliberations of Jury.* Upon the submission of the case, the jury is placed in the custody of a sworn officer during their deliberations,[26] and are to be kept together until they arrive at a verdict, or until every reasonable hope of their doing so has vanished.[27] The justice cannot give the jury his minutes of the trial;[28] and during their deliberations it is not only improper but reversible error for him to communicate or advise with them in the absence of the parties and without their consent,[29] or even to go into the jury room.[30] He may, however, at the request of the jury, give them further instructions upon the law of the case, if the parties are or have an opportunity to

(N. Y.) 636; Dunckle *v.* Kocker, 11 Barb. (N. Y.) 387; Reed *v.* Barber, 3 Code Rep. (N. Y.) 160; Harby *v.* Wells, 52 S. C. 156, 29 S. E. 563.

17. Com. *v.* Shafnoski, 5 Pa. Dist. 784; Betts *v.* Stevens, 6 Wis. 400.

18. Sloan *v.* Holland, 3 N. J. L. 997.

19. Davis *v.* Mobley, 87 Ga. 481, 13 S. E. 596.

20. O'Neil *v.* Whitecar, 1 Phila. (Pa.) 446.

21. See the statutes of the several states and the cases in the notes following.

Appeal to jury see *infra*, IV, N, 4.

22. Van Sickle *v.* Kellogg, 19 Mich. 49.

23. Van Sickle *v.* Kellogg, 19 Mich. 49; Latimer *v.* Motter, 26 Ohio St. 480.

24. Eldridge *v.* Hubbell, 119 Mich. 61, 77 N. W. 631.

25. Becker *v.* Sitterley, 58 How. Pr. (N. Y.) 38.

26. **Constable plaintiff's counsel.**—Where the constable sworn to attend the jury was plaintiff's counsel, and defendant knew this and made no objection, and no abuse was shown, it was held that the court would infer, in support of the judgment, that the parties consented to his attending the jury. Tallman *v.* Woodworth, 2 Johns. (N. Y.) 385.

27. Gulick *v.* Van Tilburgh, 16 N. J. L. 417.

What a reasonable time a matter of discretion with justice.— Murphy *v.* Wilson, 46 Ind. 537; Rollins *v.* Nolting, 53 Minn. 232, 54 N. W. 1118.

Two or three hours consultation not sufficient.— Gulick *v.* Van Tilburgh, 16 N. J. L. 417.

28. Neil *v.* Abel, 24 Wend. (N. Y.) 185.

29. Hudson *v.* Stearns, 75 N. Y. Suppl. 735; Taylor *v.* Betsford, 13 Johns. (N. Y.) 487; Bunn *v.* Croul, 10 Johns. (N. Y.) 239. But *compare* Welker *v.* Allen, 39 Misc. (N. Y.) 523, 80 N. Y. Suppl. 382, where, after the counsel and defendant had gone home, the justice returned to the court-room and read to the jury, at its request, his minutes of the testimony of two witnesses, without requesting plaintiff to return to the court-room, and it was held no ground for granting a new trial.

Sending message to jury error. — Snyder *v.* Wilson, 65 Mich. 336, 32 N. W. 642.

Sending papers to jury error.— Benson *v.* Clark, 1 Cow. (N. Y.) 258.

Consent must appear affirmatively, and cannot be inferred from the silence of the parties. Taylor *v.* Betsford, 13 Johns. (N. Y.) 487.

30. "The latest decisions are that if the justice goes to the jury room and communicates privately with the jury about the case without the consent of the parties, the judgment thereafter rendered must be set aside, and it is not necessary to show that anything was said unfavorable to the appellant. This rule seems to be founded upon considerations of public policy, and in its application the court will not inquire whether in the particular instance under review the defeated party was injured." Abbott *v.* Hockenberger, 31 Misc. (N. Y.) 587, 588, 65 N. Y. Suppl. 566. See also Stager *v.* Harrington, 27 Kan. 414; Hance *v.* Deklyne, 3 N. J. L. 659; Seeley *v.* Bisgrove, 83 Hun (N. Y.) 293, 31 N. Y. Suppl. 914; Valentine *v.* Kelley, 54 Hun (N. Y.) 78, 7 N. Y. Suppl. 184; Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156; Moody *v.* Pomeroy, 4 Den. (N. Y.) 115; Benson *v.* Clark, 1 Cow. (N. Y.) 258. But see Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218 (in which the rights of the unsuccessful party were not prejudiced); Helmbrecht *v.* Helmbrecht, 31

be present.[31] Misconduct on the part of the jury during their deliberations is ground for reversal;[32] but it has been held that a verdict will not be set aside on the sole ground that the constable who had charge of the jury urged them to give a verdict for the prevailing party.[33] When a jury fail to agree, it is the duty of the justice to discharge them, the effect of which is not to terminate the cause and oust the jurisdiction of the justice, but to remit the parties to the position they held before the jury was impaneled.[34]

(IV) *Taking Case or Questions From Jury, and Instructions.*[35] Where, in an action in a justice's court, a jury is impaneled, questions of fact are solely for their determination, and it is error for the justice to take such a question from them,[36] or to direct a verdict.[37] Where, however, there is no evidence to support a judgment for plaintiff, the justice must in some jurisdictions order a nonsuit;[38] but this cannot be done after the cause has once been submitted to the jury,[39] or where the cause is submitted to the justice, and he takes time to make up his judgment.[40] In some jurisdictions a justice has no power to instruct the jury as to the law;[41] in others it is within his discretion to instruct or not as he may see fit;[42]

Minn. 504, 18 N. W. 449 (no injury to unsuccessful party shown); Lasher *v.* Currie, 62 N. Y. App. Div. 631, 71 N. Y. Suppl. 1140 [*affirming* 68 N. Y. Suppl. 845] (in which consent was inferred); Hancock *v.* Salmon, 8 Barb. (N. Y.) 564 (consent inferred); Kerr *v.* Hammer, 15 N. Y. Suppl. 605; Keeler *v.* Lockwood, Lalor (N. Y.) 137; Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111.

See 31 Cent. Dig. tit. "Justices of the Peace," § 365.

31. Rogers *v.* Moulthrop, 13 Wend. (N. Y.) 274. See also Hance *v.* Deklyne, 3 N. J. L. 659.

32. Drinking during the deliberations is cause for reversal. Rose *v.* Smith, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331. See also Kellogg *v.* Wilder, 15 Johns. (N. Y.) 455, in which the justice permitted one of the parties to treat the jury during the trial.

Having minutes of the testimony taken by counsel for the successful party in their possession is sufficient cause for reversal. Durfee *v.* Eveland, 8 Barb. (N. Y.) 46.

Carrying a document not in evidence to the jury room is ground for a new trial, where it was calculated to injure a party. Gildea *v.* Hill, 115 Ga. 136, 41 S. E. 492.

That some of the jurors obtained food and publicly ate it in an adjoining room, and refused to admit those who disagreed with them, with the result that a verdict was agreed to by the latter for fear of being starved out, is such misconduct as to call for a reversal. Morrow *v.* McLennen, 3 N. J. L. 918.

Calling for additional evidence, although irregular, is not such misconduct as to render a subsequent finding invalid. Nolen *v.* Heard, 87 Ga. 293, 13 S. E. 554.

Absence of a juror during the examination of a witness, without the knowledge of the justice or the parties, is no cause for reversal, where, as soon as his absence was discovered, the examination was suspended, and the witness was reëxamined in full upon his return. Eastman *v.* Tuttle, 1 Cow. (N. Y.) 248.

33. Baker *v.* Simmons, 29 Barb. (N. Y.) 198.

34. Chamberlain *v.* Edmonds, 18 App. Cas. (D. C.) 332.

35. **On appeal to jury** see *infra*, IV, N, 4.

36. Borrodaile *v.* Leek, 9 Barb. (N. Y.) 611.

37. State *v.* Cline, 85 Mo. App. 628; Blumburg *v.* Briggs, 10 N. Y. St. 242.

38. Sanford *v.* Emery, 2 Me. 5; Mead *v.* Crane, 5 N. J. L. 1004; Blumburg *v.* Briggs, 10 N. Y. St. 242; Elwell *v.* McQueen, 10 Wend. (N. Y.) 519; Stuart *v.* Simpson, 1 Wend. (N. Y.) 376; Clements *v.* Benjamin, 12 Johns. (N. Y.) 299. But see Ferrall *v.* Bluffton Lodge No. 371, 31 Ohio St. 463; Lawyer *v.* Walls, 17 Pa. St. 75.

If there is the slightest proof on which a verdict can properly be founded a nonsuit is error. Blumburg *v.* Briggs, 10 N. Y. St. 242. But *compare* Neal *v.* Fox, 114 Ga. 164, 39 S. E. 860; Elwell *v.* McQueen, 10 Wend. (N. Y.) 519, to the effect that the insufficiency of the evidence is ground for a nonsuit.

39. Young *v.* Hubbell, 3 Johns. (N. Y.) 430. See also Baily *v.* Knight, 8 Tex. 58, where it was held that after submission on the merit a justice has no power to withdraw the case from the jury and dismiss it, unless it appear to be done by consent of parties.

40. Elwell *v.* McQueen, 10 Wend. (N. Y.) 519.

41. St. Joseph Mfg. Co. *v.* Harrington, 53 Iowa 380, 5 N. W. 568; Wilson *v.* Young, 15 Nebr. 627, 19 N. W. 487; Ives *v.* Norris, 13 Nebr. 252, 13 N. W. 276. But *compare* Hall *v.* Monohan, 6 Iowa 216, 71 Am. Dec. 404.

42. U. S. *v.* O'Neal, 10 App. Cas. (D. C.) 205; Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160; Bendheim *v.* Baldwin, 73 Ga. 594; Adams *v.* Clark, 64 Ga. 648; Johnson *v.* Nelms, 21 Ga. 192; Delancy *v.* Nagle, 16 Barb. (N. Y.) 96; Blumberg *v.* Briggs, 10 N. Y. St. 242; Pettit *v.* Ide, 12 Abb. Pr. (N. Y.) 44; Long *v.* Thompson, 34 Oreg. 359, 55 Pac. 978.

The improper admission of evidence cannot be cured by instructing the jury to disregard it. People *v.* Parish, 4 Den. (N. Y.) 153.

while in others instructions are required upon the law.[43] Where a justice does instruct a jury, he must do so in accordance with the law, and if he gives wrong instructions it is error.[44] On the other hand, where no instructions are given, the jury become the judges of the law as well as of the facts.[45]

(v) *Verdict and Findings.* On the trial of an action before a justice of the peace all material issues must be submitted to the jury, unless waived,[46] and, where necessary, the jury may render a special verdict.[47] The verdict must be in writing and signed by the foreman,[48] must be sufficiently certain to support a judgment,[49] and in New York it must be rendered in the presence of plaintiff.[50] It need not, however, make a special finding upon a counter-claim, where a general finding is necessarily decisive against it,[51] and where the pleadings are oral, the debt and damages need not be distinguished.[52] Unnecessary and unauthorized matter contained in a verdict may be rejected as surplusage,[53] and where damages are improperly awarded to defendant, the justice may enter a remittitur, and give judgment for him generally.[54] So too the jury may correct their verdict at the time of returning it, and before they have dispersed or have been discharged.[55] The verdict, as soon as rendered, has in some states the effect of a judgment;[56] and conversely, where a judgment is based on a verdict, it is unnecessary for the justice to make findings of fact.[57]

c. Trial by Justice Without Jury. In those states in which provision is made for trial by jury, the neglect to demand a jury within the time prescribed by law is a waiver of the right,[58] and, even when a jury is demanded, if defendant fails to appear the justice may discharge the jury and hear the plain-

43. Broadwell *v.* Nixon, 4 N. J. L. 420; Marchbanks *v.* Marchbanks, 58 S. C. 92, 36 S. E. 438.

Where no question of law arises in an action requiring an instruction to the jury, the refusal to give such instruction is not error. Dougherty *v.* O'Connell, 9 Ohio Dec. (Reprint) 380, 12 Cinc. L. Bul. 261.

44. Bendheim *v.* Baldwin, 73 Ga. 594; Delancy *v.* Nagle, 16 Barb. (N. Y.) 96; Pettit *v.* Ide, 12 Abb. Pr. (N. Y.) 44.

Reading a statute and giving it to the foreman, instead of charging the jury, is not error. Pullen *v.* Boney, 4 N. J. L. 125.

Inconsistency.— On an issue as to the existence of a special contract to pay a stated amount for services, where there are no written pleadings, plaintiff may by instructions urge his right to recover on the theory of both a special and implied contract, and they will not be open to the objection of inconsistency. Phillips *v.* Roberts, 90 Ill. 492.

45. Blumburg *v.* Briggs, 10 N. Y. St. 242; McNeil *v.* Scoffield, 3 Johns. (N. Y.) 436.

46. "The issues submitted must present the material facts in controversy, and they must, when answered, be sufficient to enable the Court to proceed to judgment and must also support the judgment rendered." Falkner *v.* Pilcher, 137 N. C. 449, 451, 49 S. E. 945.

47. Springer *v.* Reeves, 4 N. J. L. 207. *Compare* Barnes *v.* Schmitz, 44 Wis. 482, in which a general verdict was held irregular, but not jurisdictionally defective. *Contra,* Marcellus *v.* Countryman, 65 Barb. (N. Y.) 201; Wylie *v.* Hyde, 13 Johns. (N. Y.) 249.

48. Hanson *v.* Lawson, 19 Kan. 201.

49. **Verdicts held sufficiently certain.**— Mitchell *v.* Addison, 20 Ga. 50; People *v.* Foote, 1 Dougl. (Mich.) 102; Glaze *v.* Keith, 55 Nebr. 593, 76 N. W. 15; Morehead *v.* Brown, 13 N. Y. Suppl. 197.

Must fix amount of recovery.— Bartle *v.* Plane, 68 Iowa 227, 26 N. W. 88.

In an action to recover personal property the verdict must find the value of each article of the property sued for as in an action of detinue or replevin. White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761.

In a suit on open account, or for an unliquidated demand, a general verdict is of doubtful validity, and will not support a judgment for the amount claimed. Harrell *v.* Babb, 19 Tex. 148.

50. Douglass *v.* Blackmann, 14 Barb. (N. Y.) 381; Marion Bd. of Excise *v.* Turk, 2 Thomps. & C. (N. Y.) 367.

51. Flesh *v.* Christopher, 11 Mo. App. 483.

52. Horton *v.* Critchfield, 18 Ill. 133, 65 Am. Dec. 701, where it is said that it might be otherwise where the party pleads specially and in writing.

53. Hodge *v.* People, 78 Ill. App. 378; Cahill *v.* Delaney, 68 N. Y. Suppl. 842.

54. Burger *v.* Kortright, 4 Johns. (N. Y.) 414.

55. Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644; Almand *v.* Scott, 83 Ga. 402, 11 S. E. 653. *Compare* Nickelson *v.* Smith, 15 Oreg. 200, 14 Pac. 40.

56. Rutherford *v.* Wim, 3 Mo. 14. But see Beach *v.* Lavender, 138 Ala. 406, 35 So. 352.

57. Dye *v.* Russell, 24 Nebr. 829, 40 N. W. 416.

58. Van Sickle *v.* Kellogg, 19 Mich. 49.

Right of justice to order jury see *supra,* IV, N, 1, b, (I).

tiff's proofs;[59] and similarly, where the justice has erroneously summoned a jury before defendant has appeared, and default is made, the jury may be dismissed and the cause tried by the justice.[60] Where trial by jury is dispensed with, the justice must nevertheless observe the ordinary rules of procedure.[61] He must make a general finding of facts,[62] but it need be no more specific than the verdict of a jury, of which it is a substitute, upon the same pleadings and evidence,[63] and need not be stated separately from the justice's conclusions of law.[64] Where a ruling upon the admission of evidence in effect determines the question of fact in issue, no error can be predicted upon it.[65]

2. Rererence.[66] In a few states provision is made for the reference of causes, or of particular matters connected therewith, to referees appointed by the justice before whom the cause is pending. The circumstances under which a reference may be made, the proceedings on a reference, the powers and duties of the referees, and the effect of their finding are regulated by the statutes.[67]

3. New Trial[68] **— a. Power to Grant.** The power of a justice of the peace to grant a new trial is wholly dependent upon statute,[69] and unless the power to do

59. Helmick *v.* Churchill, 92 Hun (N. Y.) 524, 36 N. Y. Suppl. 1028.

60. Wills *v.* McDole, 5 N. J. L. 501.

61. State *v.* Barrow, 7 N. C. 121. See also Hall *v.* Olney, 65 Barb. (N. Y.) 27, to the effect that the improper reception of evidence under defective pleadings cannot be corrected after the case is submitted by rejecting the evidence.

Additional testimony cannot be received after submission in the absence of the adverse party, without reopening the proceedings and giving notice. Com. *v.* King, 1 Chest. Co. Rep. (Pa.) 203.

62. Crossley *v.* Steele, 13 Nebr. 219, 13 N. W. 175.

63. Rhodes *v.* Thomas, 31 Nebr. 848, 48 N. W. 886; Ransdell *v.* Putnam, 15 Nebr. 642, 19 N. W. 611.

64. Hartman *v.* White, 7 Ohio Dec. (Reprint) 45, 1 Cinc. L. Bul. 79.

65. Dreyer *v.* Meyer, 38 N. Y. Suppl. 902.

66. See, generally, References.

67. *Delaware.*—The referees are the judges of the competency as well as the credibility of testimony and have the general regulation of the trial. Kinney *v.* Short, 2 Harr. 357. They may, without the application of either party, adjourn to a day certain for consideration or award. Deputy *v.* Betts, 4 Harr. 352.

Massachusetts.— See Bullard *v.* Coolidge, 3 Mass. 324.

New Hampshire.— The submission to referees must be acknowledged before the justice, or his judgment on their report will be erroneous. Atwood *v.* York, 4 N. H. 50.

New Jersey.— A rule of reference may be made by consent (Schooley *v.* Thorne, 1 N. J. L. 71), but the parties must be before the court, and the cause actually depending, before it can be referred (Ogden *v.* Dibbine, 3 N. J. L. 413; Prosser *v.* Richards, 2 N. J. L. 377; Burroughs *v.* Genung, 2 N. J. L. 103), and an account or state of demand must be delivered to the referees in the presence of the parties (Ayres *v.* Burt, 3 N. J. L. 739). See also, upholding a report good in part and bad in part, Burr *v.* Fairholme, 3 N. J. L. 965.

Pennsylvania.— Where in an action of trover or trespass, plaintiff's demand exceeds ten dollars, the justice can, at the request of either party, refer the decision of the case to referees. Knight *v.* Vandegrift, 1 Ashm. 245.

Vermont.— The enlargement of a rule of reference by a justice cannot be shown by a statement in the referee's report, but a record or certificate to that effect from the justice is necessary. Lazell *v.* Houghton, 32 Vt. 579.

See 31 Cent. Dig. tit. "Justices of the Peace," § 368.

Allegations of misconduct on the part of a referee in a case before him must be heard and passed on by the justice, and his refusal to do so is ground for reversal on certiorari. Yetter *v.* Carpenter, 1 Chest. Co. Rep. (Pa.) 523.

68. See, generally, New Trial.

69. *Kentucky.*—A justice may grant a new trial in any case in which he has entered judgment, unless it has been satisfied or replevied. Holton *v.* Greenwell, 4 Dana 633.

Louisiana.— A justice has the right to grant a new trial, either on motion of the aggrieved party or *ex proprio motu*, where he considers his previous finding erroneous. State *v.* McCrea, 40 La. Ann. 20, 3 So. 380.

Missouri.— A justice may grant a new trial in cases of nonsuit, or of judgment by default. Downing *v.* Garner, 1 Mo. 751.

New York.— The mayor's court of Albany can grant a new trial. People *v.* Austin, 43 Barb. 313.

North Carolina.— A justice may grant a new trial where judgment has been rendered against an absent party. If the party was present his only remedy is by appeal. Gambill *v.* Gambill, 89 N. C. 201; Froneburger *v.* Lee, 66 N. C. 333.

Pennsylvania.— Where plaintiff's proof and allegations were heard at the first hearing a judgment of nonsuit cannot be rendered against him on a rehearing of the action. Cole *v.* Bishop, 2 C. Pl. 225.

Rhode Island.— Pub. St. c. 221, § 8, expressly limits the power to grant a trial to cases where no trial has been held. Brayton *v.* Dexter, 16 R. I. 70, 12 Atl. 132.

so is expressly granted [70] a justice cannot set aside a verdict or judgment and grant a new trial.[71]

b. Grounds. That a verdict has been obtained by fraud, partiality, or undue means,[72] or that it is contrary to law and equity,[73] is good ground for setting it aside and granting a new trial. So too a new trial should be granted to determine whether the case was within the justice's jurisdiction, where attention is called to the fact that the property in controversy exceeds in value his jurisdictional limit for the first time by the affidavit for a new trial.[74] Whether misconduct on the part of the jurors or a party is ground for a new trial has been questioned;[75] but a justice cannot grant a new trial because of error in the rendition of judgment,[76] or because of the presence of the sheriff in the jury room, and the rendition of a compromise verdict, where he first learns of such facts afterward.[77]

c. Proceedings to Procure. The regular mode of procedure to obtain a new trial is by motion, setting out the grounds upon which it is based.[78] If the motion is not made on the day of the former trial and in the presence of the adverse party,[79] such party must have reasonable notice thereof;[80] and in all cases the notice must be given and the motion made,[81] and the determination of the justice

Texas.— Under Rev. St. (1895) art. 1656, but one new trial can be granted. Smith *v.* Carroll, 28 Tex. Civ. App. 330, 66 S. W. 863.

West Virginia.— Under Code (1891), c. 50, § 91, not more than one new trial can be granted either party. Dickey *v.* Smith, 42 W. Va. 805, 26 S. E. 373.

See 31 Cent. Dig. tit. "Justices of the Peace," § 369.

70. See U. S. *v.* O'Neal, 10 App. Cas. (D. C.) 205; Stager *v.* Harrington, 27 Kan. 414; Kerner *v.* Petigo, 25 Kan. 652 (construing Kan. Comp. Laws (1885), c. 81, § 110); Glaze *v.* Keith, 55 Nebr. 593, 76 N. W. 15 (justice may set aside verdict for fraud, partiality, or undue means); Dickey *v.* Smith, 42 W. Va. 805, 26 S. E. 373.

71. *Alabama.*— Barr *v.* White, 2 Port. 342.

Arkansas.— McDaniel *v.* Coleman, 14 Ark. 545.

Georgia.— McCook *v.* Moore, 78 Ga. 322, 2 S. E. 473; Doughty *v.* Walker, 54 Ga. 595; Dalton City Co. *v.* Haddock, 54 Ga. 584. But see Johnson *v.* Nelms, 21 Ga. 192.

Iowa.— Helmich *v.* Johnson, Morr. 89.

Michigan.— People *v.* Foote, 1 Dougl. 102.

Mississippi.— Morris *v.* Shryock, 50 Miss. 590.

Missouri.— Weeks *v.* Etter, 81 Mo. 375; Cason *v.* Tate, 8 Mo. 45; Rutherford *v.* Wim, 3 Mo. 14; Downing *v.* Garner, 1 Mo. 751; State *v.* Hopper, 72 Mo. App. 171.

New Jersey.— Foreman *v.* Murphy, 3 N. J. L. 1024.

New York.— Van Valkenburgh *v.* Evertson, 13 Wend. 76.

Canada.— Rose *v.* Marsh, (Trin. T. 1827) Stevens N. Brunsw. Dig. 472.

See 31 Cent. Dig. tit. "Justices of the Peace," § 369.

72. Theilen *v.* Hann, 27 Kan. 778; Glaze *v.* Keith, 55 Nebr. 593, 76 N. W. 15 [*citing* State *v.* King, 23 Nebr. 540, 37 N. W. 310; Vaughn *v.* O'Conner, 12 Nebr. 478, 11 N. W. 738; Templin *v.* Snyder, 6 Nebr. 491; Cox *v.* Tyler, 6 Nebr. 297].

73. Johnson *v.* Nelms, 21 Ga. 192.

74. Cox *v.* Wright, (Tex. Civ. App. 1894) 27 S. W. 294.

75. Keath *v.* Sergeant, 3 N. J. L. 524.

76. White *v.* Burnett, 113 Ga. 151, 38 S. E. 332.

77. Alt *v.* Lalone, 54 Mich. 302, 20 N. W. 52.

78. **Motion must be written.**— Smith *v.* Carroll, 28 Tex. Civ. App. 330, 66 S. W. 863.

Affidavit of grounds.— Under Tex. Rev. St. art. 1623, the grounds of a motion for a new trial, other than that the judgment is contrary to the law or the evidence, must be supported by affidavit. Mills *v.* Hackett, 1 Tex. App. Civ. Cas. § 845.

Effect of affidavit.—Where the grounds for a new trial are verified by affidavit, and are not controverted, the statements in the motion are to be considered as *prima facie* true, and if the grounds are sufficient the motion should be granted. Durham *v.* Flannagan, 2 Tex. App. Civ. Cas. 522.

79. Friedberg *v.* Cubbison, 6 Kan. App. 184, 51 Pac. 297.

80. Erskine *v.* Onyett, 11 Ind. 335; Friedberg *v.* Cubbison, 6 Kan. App. 184, 51 Pac. 297; Erwin *v.* Ashe, 41 S. C. 92, 19 S. E. 297. *Contra*, Holton *v.* Greenwell, 4 Dana (Ky.) 633.

Notice must specify time and place of hearing.— Erwin *v.* Ashe, 41 S. C. 92, 19 S. E. 297.

Sufficiency of notice.—Where a motion was entered by the magistrate without notice to the adverse party, but his attorney was verbally notified thereafter, and appeared on the day set and argued the motion, it was held that the judgment rendered on the motion would not be set aside for want of notice. Mitchell *v.* Bates, 57 S. C. 44, 35 S. E. 420.

Facts held to constitute reasonable notice see Barons *v.* Anderson, 37 Kan. 399, 15 Pac. 226.

81. Kerner *v.* Petigo, 25 Kan. 652; State *v.* Votaw, 16 Mont. 308, 40 Pac. 597 (mere giving of notice within prescribed time insufficient unless motion is made within that

had thereon,[82] within the time prescribed by law. When an application for a new trial is abandoned after having been granted, it leaves the judgment as entered by the justice in full force.[83]

4. Appeal to Jury. In Alabama and Georgia the statutes provide that in any civil cases in a justice's court either party dissatisfied with the judgment of the justice on the merits may, as of right, enter an appeal to a jury in said court,[84]

time); Dafoe *v.* Keplinger, 1 Nebr. (Unoff.) 440, 95 N. W. 674; Doty *v.* Duvall, 19 S. C. 143.

Where judgment is not rendered in the presence of the parties or notified to defendant, as required by La. Code Civ. Proc. art. 1139, defendant is always in time to ask for a new trial. State *v.* McCrea, 40 La. Ann. 20, 3 So. 380.

Motion within the time within which a new trial may be granted is sufficient, although the statute provides that the motion shall be made within a less time. Texas, etc., R. Co. *v.* Gill, 9 Tex. Civ. App. 139, 28 S. W. 911.

The motion is filed when placed in the custody of the justice. Brooks *v.* Acker, (Tex. Civ. App. 1901) 60 S. W. 800.

82. *Indiana.*— Vogel *v.* Lawrenceburgh Tobacco Mfg. Co., 49 Ind. 218; Hathaway *v.* Hathaway, 2 Ind. 513; Robideau *v.* Ewing, 5 Blackf. 552.

Kentucky.— A new trial may be granted, provided the time allowed for appeal has not expired. Holton *v.* Greenwell, 4 Dana 633.

Ohio.— Derby *v.* Heath, 59 Ohio St. 54, 51 N. E. 547.

Texas.— Carter *v.* Van Zandt County, 75 Tex. 286, 12 S. W. 985; Odle *v.* Davis, (Civ. App. 1896) 35 S. W. 721; Grant *v.* Fowzes, 3 Tex. App. Civ. Cas. § 105.

Virginia.— Burroughs *v.* Taylor, 90 Va. 55, 17 S. E. 745.

See 31 Cent. Dig. tit. "Justices of the Peace," § 371.

But see Scott *v.* Kreamer, 37 Kan. 753, 16 Pac. 123, to the effect that where a motion is made in proper time, an order granting a new trial after the expiration of the prescribed time is not void.

Where a new trial is granted after the expiration of the prescribed time, the judgment rendered on such trial is void. Odle *v.* Davis, (Tex. Civ. App. 1896) 35 S. W. 721.

Effect of mistake or sickness.—A justice may grant a rehearing after the time for the appeal or hearing allowed by the act of March 20, 1810, section 7, has elapsed, where defendant has been prevented by the mistake of the justice, or by sickness, from being present at the hearing or entering an appeal. Cole *v.* Bishop, 2 C. Pl. (Pa.) 225.

In Iowa, under Code, § 3549, providing that a justice may discharge a jury when satisfied that they cannot agree, and shall "immediately" issue a new precept for another, to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree, a delay of two days in issuing it will oust the justice of jurisdiction to try the case without further notice. Gates *v.* Knosby, 107 Iowa 239, 77 N. W. 863.

83. Cathey *v.* Bowen, 70 Ark. 348, 68 S. W. 31.

84. East Tennessee, etc., R. Co. *v.* Hughes, 76 Ala. 590; Hollis *v.* Doster, 113 Ga. 115, 38 S. E. 308; Davis *v.* Rhodes, 112 Ga. 106, 37 S. E. 169; Merry *v.* Wilds, 100 Ga. 425, 28 S. E. 444; Reed *v.* De Laperiere, 99 Ga. 93, 24 S. E. 855; Barnett *v.* Travis, 96 Ga. 760, 22 S. E. 314; Savannah, etc., R. Co. *v.* McMillan, 95 Ga. 504, 22 S. E. 273; Southern Express Co. *v.* Hilton, 94 Ga. 450, 20 S. E. 126; Jackson *v.* Lewis, 76 Ga. 92; East Tennessee, etc., R. Co. *v.* Miles, 72 Ga. 252; Candler *v.* Mann, 70 Ga. 726. "The appeal system in justices' courts . . . is a peculiar one. The justice first hears and determines the case, but either party who is dissatisfied with his judgment may, under certain restrictions, appeal to a jury in the justice's court. When this is done the justice's court is composed of the justice and the jury, the justice having no jurisdiction to hear or determine the case without the jury. Until the jury is properly impanelled, the appellate court is not organized." Merry *v.* Wilds, 100 Ga. 425, 426, 28 S. E. 44, where it was held that until the jury is impaneled the justice is without jurisdiction to dismiss the case as originally brought for any defect of pleadings.

Effect.—An appeal to a jury, after notice, but before entry of appeal, by the other party to the superior court, holds the action in the justice's court. East Tennessee, etc., R. Co. *v.* Miles, 72 Ga. 252.

Party who has confessed judgment may appeal.— Southern Express Co. *v.* Hilton, 94 Ga. 450, 20 S. E. 126.

One of several coparties may appeal.— Barnett *v.* Travis, 96 Ga. 760, 22 S. E. 314.

Appeal must be to judgment as a whole.— Bryson *v.* Scott, 111 Ga. 196, 36 S. E. 619.

When allowable.—Under Ga. Code, § 4157*a*, an appeal from a judgment of a justice to a jury may be taken in all civil cases, whether the judgment was rendered upon questions of law or fact, or upon a combination of both. Bates *v.* Messer, 76 Ga. 696.

A judgment of dismissal is not appealable to a jury (Coker *v.* Carrollton Dry Goods Co., 108 Ga. 769, 33 S. E. 422), unless it is in effect a judgment on the merits (Hollis *v.* Doster, 113 Ga. 115, 38 S. E. 308; Reed *v.* De Laperiere, 99 Ga. 93, 24 S. E. 855; Savannah, etc., R. Co. *v.* McMillan, 95 Ga. 504, 22 S. E. 273).

Form of action cannot be changed on appeal to jury.—Vaughan *v.* McDaniel, 73 Ga. 97.

Granting nonsuit.—Where a justice on a trial before him renders a judgment for plaintiff, he cannot on the trial of an appeal to

within the time prescribed by law.[85] The bond required of the appellant, if in an insufficient amount, may be amended with the assent of the surety;[86] and where the justice refused to dismiss the appeal because the costs accruing at the first trial have not been paid, it is a waiver of the right to payment in advance.[87]

O. Judgment[88] — **1. In General — a. General Nature and Essentials.** While not strictly records,[89] judgments in justices' courts partake of the nature of records, and until reversed are for every purpose as conclusive between the parties as those of courts of record.[90] The test of the validity of a justice's judgment is its intelligibility,[91] and where the justice has jurisdiction, errors and irregularities for which it might be reversed will not render his judgment void;[92] nor will the validity of a judgment in his favor be affected by a verbal order of plaintiff that it be dismissed, where the order is not complied with.[93] A decision of a justice adverse to the validity of a city ordinance has no force except as to the suit in which it is rendered.[94]

b. Jurisdiction to Sustain Judgment.[95] The judgment of a justice of the peace in a case in which he is without jurisdiction,[96] or has lost jurisdic-

the jury grant a nonsuit. Georgia R., etc., Co. *v.* Knight, 122 Ga. 290, 50 S. E. 124. The justice cannot order a nonsuit for insufficiency of evidence on the appeal. Favors *v.* Johnson, 79 Ga. 553, 4 S. E. 925.

Municipal corporation.— An appeal to a jury in a justice's court from a judgment against a municipal corporation must be entered in the name of the corporation. Morgan *v.* Cohutta, 120 Ga. 423, 47 S. E. 971.

Where defendant has not pleaded in due time, it is proper on his appeal to a jury to strike his pleas filed after judgment. McCall *v.* Tufts, 85 Ga. 619, 11 S. E. 886.

85. In computing the time, Sunday is to be excluded, under Ga. Civ. Code (1895), §§ 4138, 4140. Puett *v.* McCall Co., 121 Ga. 309, 48 S. E. 960.

86. Satzky *v.* King, 115 Ga. 948, 42 S. E. 233.

87. Stafford *v.* Wilson, 122 Ga. 32, 49 S. E. 800.

88. **Stipulation agreeing to settlement not a judgment** see *supra*, IV, J, note 69.

89. Sherwood *v.* Johnson, 1 Wend. (N. Y.) 443; Cobb *v.* Cornegay, 28 N. C. 358, 45 Am. Dec. 497; Hamilton *v.* Wright, 11 N. C. 283. *Contra*, Oliver *v.* Foster, 5 Pa. L. J. 335.

90. Mitchell *v.* Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec. 260 [*citing* Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Pease *v.* Howard, 14 Johns. (N. Y.) 479]; Cobb *v.* Cornegay, 28 N. C. 358, 45 Am. Dec. 497; Hamilton *v.* Wright, 11 N. C. 283. See also *infra*, IV, O, 7; and JUDGMENTS, 23 Cyc. 1060, 1114, 1219.

91. Davis *v.* Bargas, 12 Tex. Civ. App. 59, 33 S. W. 548.

A clerical error in a justice's judgment will not render it invalid. Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

92. Hodgin *v.* Barton, 23 Kan. 740; Meyer *v.* Singletary, 75 Mo. App. 481; Wilkinson *v.* Vorce, 41 Barb. (N. Y.) 370; Kramer *v.* Wellendorf, 129 Pa. St. 547, 18 Atl. 525. But see Brisbane *v.* Macomber, 56 Barb. (N. Y.) 375, where it is held that unless the proceedings prescribed by statute are strictly adhered to, or waived by the party who has a right to insist upon them, any judgment founded thereon is irregular and void.

The inclusion of an attorney's fee in a judgment will not invalidate it, under 2 Howell Annot. St. Mich. § 7046, providing that no justice's judgment shall be reversed on account of any fees having been improperly allowed by the justice. Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379.

Stipulation waiving irregularities see *supra*, IV, J, note 69.

93. Jordan *v.* Mayo, 22 Ga. 588.

94. Marshall *v.* Cleveland, etc., R. Co., 80 Ill. App. 531.

95. See also *supra*, III.

96. *Alabama.* — Witherspoon *v.* Barber, 3 Stew. 335.

California.— Lowe *v.* Alexander, 15 Cal. 296.

Dakota.— Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

Indiana.— Penrose *v.* McKinzie, 116 Ind. 35, 18 N. E. 384; State *v.* Forry, 64 Ind. 260; Hampton *v.* Warren, 51 Ind. 288; Dawson *v.* Wells, 3 Ind. 398; Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132. *Compare* Congressional Tp. No. 11 *v.* Weir, 9 Ind. 224.

Kansas.— Neal *v.* Keller, 12 Kan. 247.

Michigan.— Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302.

Missouri.— Bick *v.* Tanzey, 181 Mo. 515, 80 S. W. 902.

North Carolina.— Jones *v.* Jones, 14 N. C. 360.

Oregon.— Munroe *v.* Thomas, 35 Oreg. 174, 57 Pac. 419.

Pennsylvania.— Phillips' Appeal, 34 Pa. St. 489; Moore *v.* Wait, 1 Binn. 219; Hudson *v.* Trethaway, 10 Kulp 570; Igham *v.* Sickler, 2 Lug. Leg. Reg. 105.

Tennessee.— Harris *v.* Hadden, 7 Lea 214.

Texas.— Hillman *v.* Baumbach, 21 Tex. 203; McFaddin *v.* Spencer, 18 Tex. 440.

United States.— Foy *v.* Talburt, 9 Fed. Cas. No. 5,020, 5 Cranch. C. C. 124. *Compare* Mickum *v.* Edds, 17 Fed. Cas. No. 9,531, 2 Cranch. C. C. 568.

See 31 Cent. Dig. tit. "Justices of the Peace," § 374.

tion,[97] is void, and a judgment void in part for want of jurisdiction is void *in toto*.[98]

c. Process and Appearance to Sustain Judgment.[99] To sustain a justice's judgment there must be a valid summons,[1] and a valid service[2] and return thereof,[3] or appearance by defendant.[4] A justice's judgment rendered before the time fixed for the return of summons, or before the time prescribed by statute after the service thereof, is void.[5]

d. Effect of Invalidity. Although a justice's court has no power to set aside its void judgment, it may disregard it, and treat it as a nullity whenever it comes in question.[6] Such a judgment is not aided by the subsequent taking and dis-

But see Lamoure *v.* Caryl, 4 Den. (N. Y.) 370.

A judgment involving title to land is a nullity (Hillman *v.* Baumbach, 21 Tex. 203), but where the title is not disputed, although it plainly comes in question, the judgment is merely voidable (Koon *v.* Mazuzan, 6 Hill (N. Y.) 44), and that the justice certifies to the circuit court that the title to land came in issue does not render his judgment in an action of forcible entry and detainer void (Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271).

Where a justice was related to plaintiff his judgment was held void. Dawson *v.* Wells, 3 Ind. 398. But see Holmes *v.* Eason, 8 Lea (Tenn.) 754, where it was held that a judgment rendered without objection by a justice related to one party within the prohibited degrees was not void but voidable. *Compare infra*, IV, O, 7, b, (IV).

A judgment against a husband is not void because the action was against husband and wife, and a justice cannot entertain a suit to charge a married woman's separate property. Lindenschmidt *v.* Vallee, 23 Mo. App. 594.

97. Holland *v.* Chester, 64 N. J. L. 535, 45 Atl. 1032.

98. Foy *v.* Talburt, 9 Fed. Cas. No. 5,020, 5 Cranch C. C. 124.

99. See also *supra*, IV, E, F. And see JUDGMENTS, 23 Cyc. 684–694.

1. Jeffers *v.* Ware, 72 Ga. 135; Gunnels *v.* Deavours, 54 Ga. 496; Case *v.* Hannahs, 2 Kan. 490; Rue *v.* Perry, 63 Barb. (N. Y.) 40; Willins *v.* Wheeler, 28 Barb. (N. Y.) 669; Pantall *v.* Dickey, 123 Pa. St. 431, 16 Atl. 789; Klugh *v.* Rouse, 4 Lanc. Bar, Aug. 31, 1872. *Compare* Moore *v.* Vrooman, 32 Mich. 526, to the effect that a statute authorizing the issuance of a short summons when plaintiff was a non-resident was permissive only, and the use of a long summons did not render the judgment void. See also *supra*, IV, E.

Mere irregularities in the summons will not render the justice's judgment void. Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376; Jarrell *v.* White, 5 Humphr. (Tenn.) 306.

Clerical errors. — Where a summons was dated November 23, and the copy served specified, by mistake, the second day of the same month as return-day, it was held that a judgment rendered in pursuance thereof should not be set aside. Mabbett *v.* Vick, 53 Wis. 158, 10 N. W. 84.

Requisites and validity of process generally see *supra*, IV, E, 1, c.

2. *Indiana.*— Johnson *v.* Ramsay, 91 Ind. 189.

Michigan.— King *v.* Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518.

Mississippi.— Raiford *v.* Weems, 68 Miss. 138, 8 So. 260.

North Carolina.— Durham Fertilizer Co. *v.* Marshburn, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708.

Pennsylvania.— Hudson *v.* Trethaway, 10 Kulp 570.

But *compare* Stewart *v.* Bodley, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105 [*citing* Friend *v.* Green, 43 Kan. 167, 23 Pac. 93; Bassett *v.* Mitchell, 40 Kan. 549, 20 Pac. 192].

Mere recital in judgment of due service of summons is not sufficient to show jurisdiction. Moore *v.* Hansen, 75 Mich. 564, 42 N. W. 981; McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517.

Where partners are sued before a justice, and only one is served with process, the validity of a judgment for plaintiff is not affected merely by want of service on the other defendants, under Mich. Corp. Laws, § 840. Hirsh *v.* Fisher, 138 Mich. 95, 101 N. W. 48.

3. Rowley *v.* Howard, 23 Cal. 401. See also *supra*, IV, E, 2, e.

A mistake of date in an officer's return of service, which corrects itself, will not invalidate a judgment based upon the summons. Evans *v.* Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; Snyder *v.* Schram, 59 How. Pr. (N. Y.) 404.

4. Nelson *v.* Rockwell, 14 Ill. 375; Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713. See also Rowe *v.* Heiber, 30 N. Y. App. Div. 173, 51 N. Y. Suppl. 889. And see *supra*, IV, F.

5. Warfield *v.* Ivey, 59 Ga. 603; Mitchell *v.* Braswell, 59 Ga. 532; Comeuitz *v.* Bank of Commerce, 85 Miss. 662, 38 So. 35; Sagendorph *v.* Shult, 41 Barb. (N. Y.) 102; Glover *v.* Holman, 3 Heisk. (Tenn.) 519. See also Holmes *v.* Cole, 95 Mich. 272, 54 N. W. 761, where the docket showed that the summons was issued on the twelfth of the month, returnable on the twentieth, and the judgment was rendered on the tenth, and it was held that the judgment could not be sustained.

6. Chapman *v.* Floyd, 68 Ga. 455; Fontaine *v.* Bergen, 55 Ga. 410.

missing of an appeal,[7] nor, where it is for a sum beyond the justice's jurisdiction, is it remedied by a judgment of the higher court for a sum within such jurisdiction.[8]

2. By Confession, and on Consent, Offer, or Admission — a. By Confession[9] — (i) *In General.* A justice of the peace is authorized to render judgment by confession.[10] Such a confession may be made by defendant's agent.[11] Whether so made, or by defendant, it must be reasonably specific and definite,[12] must be made in apt time,[13] and must conform to the requirements of the statutes providing for judgments by confession.[14] In Alabama the statute declaring that a

7. Jones *v.* Pharis, 59 Mo. App. 254.

8. Houser *v.* McKennon, 1 Baxt. (Tenn.) 287.

9. See, generally, Judgments, 23 Cyc. 699.

10. *Delaware.*— Dickinson *v.* Horn, 3 Harr. 496.

Illinois.— Boettcher *v.* Bock, 74 Ill. 332; Hopkins *v.* Walter, 11 Ill. 543.

Michigan.— Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688.

New Jersey.— Vandergriff *v.* Pierson, 3 N. J. L. 992.

New York.— Stone *v.* Williams, 40 Barb. 322.

Pennsylvania.— Barber *v.* Chandler, 17 Pa. St. 48, 55 Am. Dec. 533.

See 31 Cent. Dig. tit. "Justices of the Peace," § 377.

Where the justice is a party in interest he cannot render judgment by confession. Bates *v.* Thompson, 2 D. Chipm. (Vt.) 96.

After the death of the maker of a judgment note, judgment cannot be entered by a justice on the note. Lynch *v.* Tunnell, 4 Harr. (Del.) 284.

11. Barber *v.* Chandler, 17 Pa. St. 48, 55 Am. Dec. 533.

A justice cannot enter a judgment before himself, however, by virtue of a power of attorney authorizing him to confess judgment. Wright *v.* Wood, 20 N. J. L. 308. See also Alberty *v.* Dawson, 1 Binn. (Pa.) 105.

Note containing warrant of attorney.— A justice has no power to enter judgment or issue execution on a note with warrant of attorney to confess judgment. Wilson *v.* Jay, 1 Chest. Co. Rep. (Pa.) 65.

12. Mere admission of plaintiff's demand insufficient.— Elliott *v.* Daiber, 42 Ill. 467; Cahill *v.* McGrath, 67 Ill. App. 103; Goddard *v.* Fischer, 23 Ill. App. 365; Henry *v.* Estes, 127 Mass. 474; Loth *v.* Faconesowich, 22 Mo. App. 68; Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

Conversation treated as confession see Traffarn *v.* Getman, 3 N. Y. Suppl. 867.

Undertaking for stay of execution as confession of judgment see Hawes *v.* Pritchard, 71 Ind. 166.

Docket recitals held to show sufficient judgment by confession see Boettcher *v.* Bock, 74 Ill. 332; Barnett *v.* Juday, 38 Ind. 86.

Judgment for a certain sum, "and half the crops," will be reversed on certiorari, as it cannot be enforced, and the latter part cannot be treated as surplusage. Eavenson *v.* Zollers, 6 Pa. Co. Ct. 138.

Form of written confession of judgment see Sullivan *v.* Bambrick-Bates Constr. Co., 86 Mo. App. 151.

Judgment held to show every essential to render it valid see Wade *v.* Swope, 107 Mo. App. 375, 81 S. W. 471.

For sufficient entry of judgment by confession see Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

13. Bogart *v.* Rathbone, 1 Pa. St. 188, holding that after an appeal is taken an offer to confess judgment is too late.

14. *Illinois.*— Evans *v.* Pierce, 3 Ill. 468.

Kansas.— See Krueger *v.* Beckham, 35 Kan. 400, 11 Pac. 158, to the effect that defendant, by waiving summons, confessing judgment, and swearing to the necessary affidavit, waives any irregularity to the justice's taking the confession elsewhere than at his office.

Michigan.— Where the parties appear without process a judgment by confession must be signed in the presence of the justice and of one or more competent witnesses, who must sign their names as such (Beach *v.* Botsford, 1 Dougl. 199, 40 Am. Dec. 145); otherwise the confession need not be in writing (Crouse *v.* Derbyshire, 10 Mich. 479, 82 Am. Dec. 51).

Missouri.— Under Rev. St. (1899) § 4006, no confession of judgment shall be taken, or judgment rendered thereon, unless defendant personally appears before the justice in open court, in which case the confession need not be in writing (Wade *v.* Swope, 107 Mo. App. 375, 81 S. W. 471. See also Franse *v.* Owens, 25 Mo. 329; Davis *v.* Wood, 7 Mo. 162), or unless the confession be in writing, signed by defendant, or some person by him thereto lawfully authorized (Wade *v.* Swope, *supra*. See also Burr *v.* Mathers, 51 Mo. App. 470). The requirement that the confession be made in "open court" does not mean that the justice must formally announce the opening of his court for the trial of causes, since his court is always open, without formal announcement, for the conduct of *ex parte* proceedings. Sullivan *v.* Bambrick-Bates Constr. Co., 86 Mo. App. 151. See also Huff *v.* Knapp, 17 Mo. 414. But see Hunter *v.* Reinhard, 13 Mo. 23; Oyster *v.* Shumate, 12 Mo. 580.

Montana.— Where no action has been commenced, authority to enter a confessed judgment must be shown by the filing of a written statement signed by defendant. Hunter *v.* Eddy, 11 Mont. 251, 28 Pac. 296, in which an action had been commenced, but no valid summons had been filed, and there was nothing to show a voluntary appearance and pleading by defendant.

judgment by confession is a release of errors applies to judgments rendered by a justice of the peace, and precludes an appeal.[15]

(II) *Parties, Debts, and Amounts For Which Judgment May Be Confessed.* A justice of the peace as a general rule can render judgment only in those actions which he has jurisdiction to try,[16] and for debts due.[17] In some jurisdictions, however, a justice may render judgment by confession for a sum in excess of his ordinary jurisdiction.[18]

(III) *Oath or Affidavit, and Specification of Items.* In some jurisdictions a confession of judgment must be made upon oath or affidavit showing the amount due, the consideration of the indebtedness, and that the judgment is not confessed in fraud of creditors;[19] and under some statutes there must be a specification of items in addition to the oath.[20] While the omission of the oath or affidavit will render a judgment by confession void as to creditors,[21] it is nevertheless valid and binding between the parties.[22]

(IV) *Appearance and Consent to Sustain Judgment.* Where defendant is not brought into court by summons, the statutes require that he shall appear, in order to confess judgment.[23] It is essential to the validity of a judgment by

Nevada.— See Paul *v.* Armstrong, 1 Nev. 82.

New Jersey.—Outcalt *v.* Rankin, 14 N. J. L. 33.

New York.— A justice cannot legally enter judgment, unless defendant appears in person, or by attorney, before him, in court, and confesses judgment, or has been duly summoned. Tenny *v.* Filer, 8 Wend. 569; Martin *v.* Moss, 6 Johns. 126. *Compare* Stone *v.* Williams, 40 Barb. 322, to the effect that a justice has the same power to receive a confession of judgment at defendant's house, in the town of the justice's residence, as at his own house, and that the presence or absence of his docket will not affect his jurisdiction.

See 31 Cent. Dig. tit. "Justices of the Peace," § 377.

Oath or affidavit and specification of items see *infra*, IV, O, 2, a, (III).

15. Murphree *v.* Whitley, 70 Ala. 554.

16. Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688.

Having no jurisdiction of suits by executors, a justice cannot render a judgment by confession in favor of an executor. Coffin *v.* Tracy, 3 Cai. (N. Y.) 129.

A public officer who is liable to be sued for services rendered for the public may confess judgment. Gere *v.* Cayuga County Sup'rs, 7 How. Pr. (N. Y.) 255.

17. Judgment cannot be confessed on a contingent liability; and judgments based principally on such a liability are not valid as to minor items covered thereby, which were actually due at the time confession was made. Adams *v.* Tator, 57 Hun (N. Y.) 302, 10 N. Y. Suppl. 617.

18. Perry *v.* Page, 5 N. H. 172; Butler *v.* Urech, 2 Grant (Pa.) 247; Hubbard *v.* Fisher, 25 Vt. 539. *Contra,* Daniels *v.* Hinkston, 5 How. Pr. (N. Y.) 322; Hughes *v.* Helms, (Tenn. Ch. App. 1898) 52 S. W. 460; Alley *v.* Myers, 2 Tenn. Ch. 206.

19. Mann *v.* Perkins, 4 Blackf. (Ind.) 271; *Ex p.* Knight, 4 Blackf. (Ind.) 220; English *v.* Sharpe, 15 N. J. L. 457; Rowe *v.* Heiber, 30 N. Y. App. Div. 173, 51 N. Y. Suppl. 889; Germon *v.* Swartwout, 3 Wend. (N. Y.) 282.

Statute must be strictly followed.— English *v.* Sharpe, 15 N. J. L. 457; Rowe *v.* Heiber, 30 N. Y. App. Div. 173, 51 N. Y. Suppl. 889.

In an action commenced by summons served and returned, no affidavit is required. Budd *v.* Marvin, 4 N. J. L. 287; Gates *v.* Ward, 17 Barb. (N. Y.) 424.

20. Germon *v.* Swartwout, 3 Wend. (N. Y.) 282, to the effect that both oath and specification must be in writing.

Where the judgment is for fifty dollars or less, oath and specification of items are not required. Griffin *v.* Mitchell, 2 Cow. (N. Y.) 548; Snyder *v.* Warren, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519.

21. See Fraudulent Conveyances, 20 Cyc. 401.

22. Chapin *v.* McLaren, 105 Ind. 563, 5 N. E. 688; Hopper *v.* Lucas, 86 Ind. 43; Mavity *v.* Eastridge, 67 Ind. 211; Kennard *v.* Carter, 64 Ind. 31; Barnett *v.* Juday, 38 Ind. 86; Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364; Stone *v.* Williams, 40 Barb. (N. Y.) 322; Germon *v.* Swartwout, 3 Wend. (N. Y.) 282; Griffin *v.* Mitchell, 2 Cow. (N. Y.) 548.

23. *Arkansas.*— Smith *v.* Finley, 52 Ark. 373, 12 S. W. 782.

New Jersey.— Young *v.* Stout, 10 N. J. L. 302.

New York.— Tenny *v.* Filer, 8 Wend. 569; Colvin *v.* Luther, 9 Cow. 61; Bromaghin *v.* Throop, 15 Johns. 476.

Ohio.— Murdock *v.* Cooper, 2 Ohio Dec. (Reprint) 306, 2 West. L. Month. 381; Staner *v.* Stom, 1 Ohio Dec. (Reprint) 344, 7 West. L. J. 407.

Pennsylvania.— Tarr *v.* Eddy, 142 Pa. St. 410, 21 Atl. 993.

See 31 Cent. Dig. tit. "Justices of the Peace," § 380.

Compare Bates *v.* McConnell, 32 Kan. 1, 3 Pac. 515.

Appearance by attorney sufficient.— Bromaghin *v.* Throop, 15 Johns. (N. Y.) 476; Staner *v.* Stom, 1 Ohio Dec. (Reprint) 344,

confession that it shall be consented to by plaintiff,[24] and he is generally required to appear for this purpose.[25]

b. On Consent, Offer, or Admission.[26] A justice of the peace may enter a judgment, otherwise legal,[27] by consent of the parties;[28] and where it appears from the record that defendant admitted plaintiff's claim, such admission is a sufficient hearing of proofs and allegations on which to base a judgment.[29] In some states, upon service of process and before answer, defendant may make a written offer of judgment, and plaintiff must thereupon, before any other proceedings are had, determine whether he will accept or reject the offer, and in case he accepts such offer in writing the justice is authorized to file the offer and acceptance and render judgment accordingly.[30]

3. By Default[31] **— a. In General.** Where, in an action before a justice of the peace, jurisdiction of defendant's person has been obtained, and he fails to appear on the return-day or at the time fixed for trial, or, having appeared, fails to plead or make defense, plaintiff, upon proof of his cause of action,[32] may have judgment by default against him.[33] But where defendant has appeared and pleaded, but is absent at the time of trial, a judgment then rendered against

7 West. L. J. 407. *Contra*, Murdock *v.* Cooper, 2 Ohio Dec. (Reprint) 306.

24. Consent of plaintiff is necessary to a judgment by confession, but it may be presumed from the record, unless the contrary appears. Kennard *v.* Brough, 64 Ind. 23.

25. English *v.* Sharpe, 15 N. J. L. 457; Young *v.* Stout, 10 N. J. L. 302; Boon *v.* Collins, 1 Phila. (Pa.) 438. But see Tarr *v.* Eddy, 142 Pa. St. 410, 21 Atl. 993.

Plaintiff's presence will be presumed, unless the contrary appears. English *v.* Sharpe, 15 N. J. L. 457.

All parties plaintiff must appear.— Boon *v.* Collins, 1 Phila. (Pa.) 438.

Appearance by attorney sufficient.— Young *v.* Stout, 10 N. J. L. 302; Truitt *v.* Ludwig, 25 Pa. St. 145.

26. See also JUDGMENTS, 23 Cyc. 728.

27. A judgment bearing more than legal interest cannot be entered by consent. Berry *v.* Makepeace, 3 Ind. 154.

28. Hearman *v.* Snyder, 3 N. Y. Suppl. 94.

Stipulation as to amount see *supra*, IV, J, note 69.

Where there is personal service, and both parties appear, in an action on a note, and defendant consents that judgment may be rendered against him for the amount of the note, the judgment is valid without an affidavit as to the amount due, or a written confession, or proof. Gates *v.* Ward, 17 Barb. (N. Y.) 424.

Consent to majority verdict.— Judgment cannot be entered upon a majority verdict unless the consent of both parties is expressly shown, and such a judgment cannot be sustained where the defeated party's consent was given in ignorance of the fact, known to his opponent, that the majority was against him. Snow *v.* Hardy, 3 Minn. 77.

29. Griffin *v.* Koch, 1 Leg. Rec. Rep. (Pa.) 47. See also Davis *v.* Rankin, 50 Tex. 279.

30. Fowler *v.* Haynes, 91 N. Y. 346.

The object is "to allow the defendant, by making an offer of judgment, to save himself further costs in case the recovery should not exceed the offer, and the requirement that the offer should be made before answer was designed to protect the plaintiff against being put to his election by an offer made after issue, or during the progress of the trial." Fowler *v.* Haynes, 91 N. Y. 346, 351.

Offer must be in writing.— An offer to confess judgment, although made in open court, must be in writing. Dumey *v.* Donovan, 8 Ohio S. & C. Pl. Dec. 118, 7 Ohio N. P. 221.

31. See, generally, JUDGMENTS, 23 Cyc. 734.

32. The cause of action must be proved.— *Delaware.*— Phillips *v.* Cannon, 5 Harr. 366; Coulter *v.* Layton, 1 Harr. 494.

New Jersey.— Flemings *v.* Naoman, 3 N. J. L. 852; Cowperthwait *v.* Horner, 3 N. J. L. 850.

New York.— Perkins *v.* Stebbins, 29 Barb. 523; Swift *v.* Falconer, 2 Sandf. 640; Howard *v.* Brown, 2 E. D. Smith 247; Griffin *v.* Jackson, 13 N. Y. Suppl. 321; Raymond *v.* Traffarn, 12 Abb. Pr. 52; Smith *v.* Falconer, 1 Code Rep. 120; Muscott *v.* Miller, 1 Code Rep. 53; Cudner *v.* Dixon, 10 Johns. 106; Stocking *v.* Driggs, 2 Cai. 96.

Pennsylvania.— Chambers *v.* Reynolds, 2 Pa. Dist. 402; Young *v.* Getz, 18 Pa. Co. Ct. 580; Barney *v.* Fahs, 10 Pa. Co. Ct. 424; Wissler *v.* Becker, 2 Pa. Co. Ct. 103; Robinson *v.* Thomas, 2 Just. L. Rep. 4; Houseman *v.* John, 1 Just. L. Rep. 65; Caldwell *v.* Volpe, 1 Just. L. Rep. 19; Sauser *v.* Werntz, 1 Leg. Chron. 249; Karche *v.* Bach, 1 Lehigh Val. L. Rep. 118; Wagenhorst *v.* Smith, 1 Woodw. 421.

Wisconsin.—Roberts *v.* Warren, 3 Wis. 736.

See 31 Cent. Dig. tit. "Justices of the Peace," § 386.

Where the complaint is verified, judgment may be rendered on it without proof, in the absence of a verified answer, under N. Y. Code Civ. Proc. § 3126. Morris *v.* Hunken, 40 N. Y. App. Div. 129, 57 N. Y. Suppl. 712.

33. *Arkansas.*— Page *v.* Sutton, 29 Ark. 304.

California.— Stewart *v.* Los Angeles Tp., 109 Cal. 616, 42 Pac. 158.

him is not a judgment by default;[34] nor can judgment be given against him where, after arrest, he gives bond for his appearance, but fails to attend.[35] Defendant waives nothing by his failure to appear,[36] and his mere default is insufficient to sustain a judgment by default.[37] Where plaintiff makes default, the only proper judgment against him is one of nonsuit or dismissal,[38] even where defendant has pleaded a set-off or counter-claim;[39] and where plaintiff's default

Georgia.— Akers *v.* J. M. High Co., 122 Ga. 279, 50 S. E. 105.

Iowa.— Park *v.* Ratcliffe, 42 Iowa 42; McFarland *v.* Lowry, 40 Iowa 467. *Compare* Rhodes *v.* De Bow, 5 Iowa 260.

Missouri.— Smith *v.* Wineland, 21 Mo. App. 387.

New York.— Aiken *v.* Haskins, 48 N. Y. App. Div. 638, 63 N. Y. Suppl. 1104 [*affirming* 27 Misc. 629, 59 N. Y. Suppl. 486]; Muber *v.* Held, 3 Abb. Pr. 110; Myer *v.* Fisher, 15 Johns. 504.

United States.— Oneil *v.* Hogan, 18 Fed. Cas. No. 10,529, 2 Cranch C. C. 524.

See 31 Cent. Dig. tit. "Justices of the Peace," § 384.

Presence of attorney.— A judgment rendered by a justice, when defendant is present by attorney, who, however, takes no part in the trial, is not a "judgment by default," within 2 Wagner St. Mo. p. 846, §§ 1, 2. Borgwald *v.* Fleming, 69 Mo. 212.

Where the record shows a trial of the issues, and entry of judgment on plaintiff's proofs, the judgment is not one by default, although the docket recites the notice and entry of defendant's default. Clark *v.* Great Northern R. Co., 30 Mont. 458, 76 Pac. 1003.

Where judgment appears to be on appearance and trial as to all defendants, any defendant not served, in order to impeach it, must prove that he did not appear in court. Howerton *v.* Luckie, 18 Tex. 237.

"When an answer is frivolous it must be treated as a nullity and the plaintiff is entitled to judgment as though no answer had been interposed. If it raises no material issue by the denial of any facts set forth in the complaint or by the setting up of any new matter material to the action, it fails to perform its office as an answer, and it has no legal effect." Aiken *v.* Haskins, 27 Misc. (N. Y.) 629, 634, 59 N. Y. Suppl. 486 [*affirmed* in 48 N. Y. App. Div. 638, 63 N. Y. Suppl. 1104].

On striking out plea to the jurisdiction.— Where a plea to the jurisdiction in the justice's court is insufficient, the magistrate does not err in striking it out and rendering judgment for plaintiff. Akers *v.* J. M. High Co., 122 Ga. 279, 50 S. E. 105.

Judgment by default not authorized in forcible entry and detainer see Stacks *v.* Simmons, (Tex. Civ. App. 1900) 58 S. W. 958.

34. *California.*— Weimmer *v.* Sutherland, 74 Cal. 341, 15 Pac. 849.

Dakota.— Harris *v.* Watkins, 5 Dak. 374, 40 N. W. 536.

Iowa.— Douglass *v.* Langdon, 29 Iowa 245.

Missouri.— State *v.* Hopper, 72 Mo. App. 171.

Montana.— State *v.* Gallatin County, 31 Mont. 258, 78 Pac. 498; Clark *v.* Great Northern R. Co., (1904) 76 Pac. 1003.

See 31 Cent. Dig. tit. "Justices of the Peace," § 384.

But see Everton *v.* Smith, 1 Alaska 422, where it was held that defendant's unexplained failure to appear at the trial was an abandonment of his answer, and that judgment was properly rendered against him.

35. Camman *v.* Randolph, 7 N. J. L. 136. See also Anonymous, 7 N. J. L. 120, where plaintiff discharged defendant from arrest on his promising to appear, and it was held that a judgment taken in his absence would be reversed.

36. Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280, where it was held that plaintiff must show strict compliance with the statute in obtaining an adjournment, in order to sustain a judgment by default. See also Fitzhugh *v.* Rivard, 109 Mich. 154, 66 N. W. 947; Waldron *v.* Palmer, 104 Mich. 556, 62 N. W. 731, where the docket entry failed to state the place to which the cause was adjourned.

37. Hevenor *v.* Kerr, 4 N. J. L. 58; Clarke *v.* Clarke, 3 N. J. L. 724; Pearson *v.* Briggs, 3 N. J. L. 621; Keen *v.* Scull, 3 N. J. L. 544; Cooper *v.* Madara, 3 N. J. L. 531; Crane *v.* Crane, 3 N. J. L. 412; Hendrickson *v.* Code, 2 N. J. L. 322; Shinn *v.* Earnest, 2 N. J. L. 155; Torrence *v.* Van Emburgh, 2 N. J. L. 106.

Necessity of jurisdiction.— To sustain a judgment by default the justice must have jurisdiction of both the person and the subject-matter. Brickley *v.* Heilbruner, 7 Ind. 488; Bornschein *v.* Finck, 13 Mo. App. 120; Holden *v.* McCabe, 21 Pa. Co. Ct. 41.

38. State *v.* McCrea, 40 La. Ann. 20, 3 So. 380; State *v.* Laurandeau, 21 Mont. 216, 53 Pac. 536; Cavalier *v.* Doughty, 6 N. J. L. 227; Sharp *v.* Liddle, 3 Ohio Dec. (Reprint) 64, 2 Wkly. L. Gaz. 391.

A judgment for costs in favor of defendant upon failure of plaintiff to appear is not a judgment on the merits, barring another action by plaintiff. Dewey *v.* Feiler, 11 S. D. 632, 80 N. W. 130.

Where, in an action of replevin, the property has been taken under the writ, and plaintiff fails to appear, the justice must render judgment of nonsuit and for a return of the property, under Mich. Corp. Laws, §§ 836, 10,679. Barlow *v.* Riker, 138 Mich. 607, 101 N. W. 820.

39. Adkins *v.* Jester, 1 Houst. (Del.) 352; McCullum *v.* McClare, 3 Abb. Pr. (N. Y.) 106; Sharp *v.* Liddle, 3 Ohio Dec. (Reprint) 64, 2 Wkly. L. Gaz. 391; Hartel *v.* Kite, 70 Wis. 396, 36 N. W. 7.

has been caused by the justice's misinforming him as to the time to which the summons could be made returnable, a judgment against him cannot be sustained.[40]

b. Process and Appearance to Sustain Judgment.[41] To sustain a judgment by default the record must show the issuance, service, and return of valid process in the mode prescribed by law,[42] and where an adjournment has been had, it must appear that due notice of the time and place of trial was given defendant.[43] It must also appear that plaintiff, or someone in his behalf, was present at the time of the rendition of the judgment,[44] unless defendant has failed to make a verified denial of the execution, acceptance, or indorsement of the instrument filed with the justice as the basis of the action.[45] To be valid a judgment by default must not exceed the amount claimed in, or indorsed upon, the summons.[46]

c. Taking Default and Judgment. A default cannot be taken before the expiration of the time allowed for appearance, or to which the action has been adjourned;[47] nor will a summons returnable one day justify a hearing and judg-

Dismissal and nonsuit generally see *supra*, IV, L.

40. Odom *v.* Carmona, (Tex. Civ. App. 1904) 83 S. W. 1100.

41. **Process** generally see *supra*, IV, E.

Appearance generally see *supra*, IV, F.

42. *Alabama.*— Hoffman *v.* Alabama Distillery, etc., Co., 124 Ala. 542, 27 So. 485; Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

Colorado.— Rice *v.* American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

Georgia.— Shearouse *v.* Wolfe, 111 Ga. 859, 36 S. E. 923.

Indiana.— Jamieson *v.* Caster, 16 Ind. 426.

Missouri.— France *v.* Evans, 90 Mo. 74, 2 S. W. 141.

New York.— International Seed Co. *v.* Hartmann, 65 N. Y. App. Div. 478, 72 N. Y. Suppl. 943; Rowe *v.* Peckham, 30 N. Y. App. Div. 173, 51 N. Y. Suppl. 889; Nichols *v.* Fanning, 20 Misc. 73, 45 N. Y. Suppl. 409. See also Wavel *v.* Wiles, 24 N. Y. 635.

Pennsylvania.— Harbold *v.* Bailey, 11 Pa. Dist. 736; Montgomery Table Works *v.* Nice, 11 Pa. Dist. 202; Goldman *v.* Teitlebaum, 10 Pa. Dist. 53; Maines *v.* Black, 8 Pa. Dist. 82; Bell *v.* Oakdale, 5 Pa. Dist. 198; Hoary *v.* McHale, 2 Pa. Dist. 686; Elwood Paper Co. *v.* Radziewicz, 16 Pa. Co. Ct. 81; Metropolitan L. Ins. Co. *v.* Cook, 14 Pa. Co. Ct. 434; Com. *v.* Dalling, 2 Pars. Eq. Cas. 285; Burket *v.* Shuff, 2 Blair Co. Rep. 236; Witmeyer *v.* Kreider, 20 Lanc. L. Rev. 50; Sauser *v.* Werntz, 1 Leg. Chron. 249; Starch *v.* Snyder, 1 Leg. Rec. 172; Smith *v.* Noone, 1 Leg. Rec. 165; Buchanan *v.* Specht, 1 Phila. 252; Hunter *v.* Weidner, 1 Woodw. 6.

Texas.— Stegall *v.* Huff, 54 Tex. 193; Whitney *v.* Krapf, 8 Tex. Civ. App. 304, 27 S. W. 843.

West Virginia.— Stanton-Belmont Co. *v.* Case, 47 W. Va. 779, 35 S. E. 851.

Wisconsin.— French *v.* Ferguson, 77 Wis. 121, 45 N. W. 817.

See 31 Cent. Dig. tit. "Justices of the Peace," § 383.

Compare McCabe *v.* Payne, 37 Ark. 450; Keybers *v.* McComber, 67 Cal. 395, 7 Pac. 838; Hewett *v.* Jensen, (Iowa 1900) 85 N. W. 16; Shea *v.* Quintin, 30 Iowa 58; Clawson *v.* Wolfe, 77 N. C. 100.

Requisites and validity of process see *supra*, IV, E, 1, c.

Service and return of process see *supra*, IV, E, 2.

Summons must apprise defendant of nature of claim against him.— Phillips *v.* Norton, 18 S. D. 530, 101 N. W. 727.

Premature judgment.— Under Mo. Rev. St. (1899) § 3862, requiring process to be served at least ten days before the day of appearance, a default judgment rendered within less than ten days after service is not void, but merely erroneous. Fry *v.* Armstrong, 109 Mo. App. 482, 84 S. W. 1001. Before expiration of time fixed for appearance or on adjournment see *infra*, IV, O, 3, c.

43. Burgess *v.* Tweedy, 16 Conn. 39; Rowley *v.* Baugh, 33 Iowa 201; Probasco *v.* Hartough, 10 N. J. L. 55; Camman *v.* Perrine, 9 N. J. L. 253; Hubbard *v.* Birdwell, 11 Humphr. (Tenn.) 220.

44. Driscoll *v.* Creighton, 24 Mont. 140, 60 Pac. 989; State *v.* Laurandeau, 21 Mont. 216, 53 Pac. 536; Karche *v.* Bach, 1 Lehigh Val. L. Rep. (Pa.) 118. *Compare* Barber *v.* Parker, 11 Wend. (N. Y.) 51, where it was held that if defendant wilfully abandons his defense by availing himself of the momentary omission of plaintiff to appear within the time limited, and judgment by default is rendered against him, he is remediless.

45. Phœnix Ins. Co. *v.* Lemke, 18 Nebr. 184, 24 N. W. 727; Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484.

46. Basset *v.* Mitchell, (Kan. 1888) 19 Pac. 671; Heffner *v.* Hoch, 1 Woodw. (Pa.) 453. See also Adams *v.* Nebraska Sav., etc., Bank, 56 Nebr. 121, 76 N. W. 421.

47. *Colorado.*— Yentzer *v.* Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563, holding that a judgment by default in a justice's court, rendered, in the absence of defendant and his counsel, prior to the hour set out in the citation, is a void judgment, and is not sufficient to support a plea in abatement on the ground of a former suit pending, filed in a second suit on the same cause of action.

Kansas.— Briggs *v.* Tye, 16 Kan. 285.

Maine.— Crosby *v.* Boyden, 33 Me. 368.

Pennsylvania.— See Van Gorder *v.* Lee, 5 Pa. Co. Ct. 239. *Compare* Chalfan *v.* Brey, 23 Pa. Co. Ct. 88 (where the place of ap-

ment by default on the next.[48] Defaults need not be taken and confirmed before justices of the peace as is done in courts of record in some states,[49] and a jury need not be summoned to assess damages.[50] The judgment must be certain and definite;[51] but it need not show an entry of default, where the record shows that defendant made a special appearance and objection to the jurisdiction by motion, which was overruled.[52] After having regularly heard a cause *ex parte* in defendant's absence, the justice cannot afterward open the matter and proceed to a rehearing, without plaintiff's consent,[53] nor can he, after rendition of judgment, grant a continuance to defendant.[54]

d. Opening or Setting Aside Default — (I) *In General.* A justice of the peace may in his discretion, upon good cause being seasonably shown, open or set aside a default upon application of defendant,[55] but not of plaintiff.[56]

(II) *Procedure.* Unless there has been a continuance, a justice of the peace has no power, except by the provisions of some statute conferring the authority, to set aside a default on a day subsequent to that on which the entry was made.[57]

pearance was indefinite, and defendant arrived only a few minutes after the hour fixed for the hearing, and it was held that a judgment entered against him should be reversed); Roushey *v.* Feist, 10 Kulp (Pa.) 79 (where a default taken at two-fifty P. M. was held good, although the summons was returnable between two and three P. M.).

Utah.— Ducheneau *v.* House, 4 Utah 363, 10 Pac. 427.

Wisconsin.— Mahr *v.* Young, 13 Wis. 634.

See 31 Cent. Dig. tit. "Justices of the Peace," § 385.

In Minnesota a justice has three days in which to render and enter judgments by default. Larson *v.* Kelly, 72 Minn. 116, 75 N. W. 13.

On constructive service.— Although a justice may render judgment by default after constructive service, yet such judgment rendered at the return term is void. Betts *v.* Baxter, 58 Miss. 329.

48. Brown *v.* Long, 9 Kulp (Pa.) 568.

49. State *v.* Riley, 43 La. Ann. 177, 8 So. 598.

50. Brown *v.* Irwin, 21 Vt. 68.

51. Sherman *v.* Palmer, 37 Mich. 509; Guaranty Sav., etc., Assoc. *v.* Osburn, (Oreg. 1901) 64 Pac. 383.

A mere recital that judgment was given is insufficient. Polhemus *v.* Perkins, 15 N. J. L. 435.

52. McPherson *v.* Beatrice First Nat. Bank, 12 Nebr. 202, 10 N. W. 707.

53. People *v.* Lynde, 8 Cow. (N. Y.) 133.

54. McCoy *v.* Bell, 1 Wash. 504, 20 Pac. 595. See *supra*, IV, M, 1.

55. *Georgia.*— See Eady *v.* Napier, 96 Ga. 736, 22 S. E. 684, where, however, ground was held insufficient.

Iowa.— Arts *v.* Rocksien, 98 Iowa 536, 67 N. W. 409; Stivers *v.* Thompson, 15 Iowa 1. See also as to retrial of action where judgment has been rendered on service by publication only Taylor, etc., Organ Co. *v.* Plumb, 57 Iowa 33, 10 N. W. 282. *Compare* Rhodes *v.* De Bow, 5 Iowa 260, where the judgment was held not to be by default.

Kansas.— Covart *v.* Haskins, 39 Kan. 571, 18 Pac. 522; Barons *v.* Anderson, 37 Kan. 399, 15 Pac. 226.

Missouri.— State *v.* Smyth, 1 Mo. App. 571.

Montana.— Schwabe *v.* Lissner, 13 Mont. 215, 33 Pac. 1012.

Nebraska.— Under Code Civ. Proc. § 1001, it is the duty of the justice to set aside a default on defendant's moving therefor within ten days, paying costs, and notifying plaintiff of the day of trial. Smith *v.* Riverside Park Assoc., 42 Nebr. 372, 60 N. W. 599.

New York.— Edel *v.* McCone, 16 Daly 216, 10 N. Y. Suppl. 538. *Compare* Appleby *v.* Strang, 1 Abb. Pr. 143. See also Martin *v.* New York, 20 How. Pr. 86. The municipal court of the city of New York has power to open defaults taken in summary proceedings. Mooney *v.* McGuirk, 31 Misc. 744, 64 N. Y. Suppl. 41.

Ohio.— Pope *v.* Pollock, 1 Ohio Cir. Ct. 347, 1 Ohio Cir. Dec. 193, holding that Rev. St. § 6578, is mandatory.

Pennsylvania.— See Whitehead *v.* Gillespy, 1 Phila. 515.

Wisconsin.— Field *v.* Heckman, 118 Wis. 461, 95 N. W. 377.

See 31 Cent. Dig. tit. "Justices of the Peace," § 387.

In the absence of statutory authority, a justice has no power to set aside a judgment by default rendered after personal service. American Bldg., etc., Assoc. *v.* Fulton, 21 Oreg. 492, 28 Pac. 636.

Where the justice has no jurisdiction, his offer to open a judgment by default, if defendant will state his defense, is without authority. Sperry *v.* Major, 1 E. D. Smith (N. Y.) 361.

Second default cannot be set aside.— Smythe *v.* Kastler, 16 Nebr. 264, 20 N. W. 208.

A mistake in spelling defendant's name in the copy of the notice of suit left with him, the notice itself being correct, and the service regular, affords no ground for setting aside a default. Breen *v.* Kuhn, 91 Iowa 325, 59 N. W. 344.

56. H. W. Crooker Shoe Co. *v.* Fry, 104 Mo. App. 134, 78 S. W. 313, construing Rev. St. (1899) § 3969.

57. Power of justice purely statutory.— Pratt *v.* Roberts, 53 Me. 399; State *v.* Hall, 49 Me. 412; Hamill *v.* Bosworth, 12 R. I. 124.

The statutory provisions as to the time within which the motion shall be made and the default set aside, and as to notice to plaintiff, must be strictly pursued;[58] and where this is not done, an order setting aside a default is unwarranted, and the original judgment remains in full force and effect.[59] It is also necessary that the order opening a default shall comply with statutory requirements.[60]

4. On Trial of Issues[61] — a. In General. At the conclusion of a trial before him a justice of the peace must either render judgment or continue the case to a definite time for that purpose;[62] he cannot grant a motion in arrest of judgment,[63] or, in the absence of statutory authority, award a new trial.[64] He may, however, after a mere verbal announcement of his decision, and before signing any judgment in accordance therewith, change his mind and render a different judgment.[65] The judgment must answer the issue,[66] and where the liability of defendant is limited, it must conform thereto.[67] Furthermore the judgment when rendered against defendant cannot exceed the amount claimed by plaintiff in the summons[68]

58. *Arkansas.*— No notice to plaintiff is necessary. Frizzell *v.* Willard, 37 Ark. 478.

California.— Simply filing a written motion within the prescribed time and giving notice of a hearing at a time after the period has expired is insufficient. Spencer *v.* Branham, 109 Cal. 336, 41 Pac. 1095.

Indiana.— A default in attachment cannot be set aside after the statutory time by an affidavit of residence and want of notice. Brown *v.* Goble, 97 Ind. 86.

Missouri.— Motion must be made within ten days. Roach *v.* Montserratt Coal Co., 71 Mo. 398; Blanchard *v.* Hatch, 32 Mo. 261.

Nebraska.— A default may be set aside on the conditions: (1) That the motion be made in ten days; (2) that defendant pay or confess judgment for costs; and (3) that he notify plaintiff of the opening of the judgment and of the time and place of trial, at least five days before the time. But the third condition need not be complied with until after the default is opened. Smith *v.* Riverside Park Assoc., 42 Nebr. 372, 60 N. W. 599. The order should be conditional, but if it is absolute, and a day is set for trial, the error is harmless. Tyler *v.* Baxter, 29 Nebr. 68, 46 N. W. 153; Stanton *v.* Spence, 22 Nebr. 191, 34 N. W. 359.

North Carolina.— The justice must issue notice to the opposite party and an order to summon witnesses and produce all the papers within thirty days, directing a forbearance of proceedings in the meantime, on which appointed day the case should be considered. Sloan *v.* McLean, 34 N. C. 260.

Ohio.— A default may be opened on motion within ten days, upon defendant's paying or confessing judgment for costs, and notifying in writing the opposite party of the opening of the judgment, and of the time and place of retrial. McCann *v.* Duffy, 2 Ohio Dec. (Reprint) 114, 1 West. L. Month. 404.

Pennsylvania.— For the purpose of allowing a set-off a default may be opened on application made within thirty days (McNamara *v.* McIntosh, 17 Pa. Co. Ct. 135), and where defendant has not been summoned, after the expiration of thirty days (Dicks *v.* Carter, 21 Leg. Int. 340).

Texas.— An application for a new trial may be made within two years after the rendition of judgment on service by publication. Brown *v.* Dutton, (Civ. App. 1905) 85 S. W. 454.

See 31 Cent. Dig. tit. "Justices of the Peace," § 388.

In computing the time within which a motion to set aside a default may be made, the first day after the rendition of the judgment should be excluded, and the last included. Reynolds *v.* Missouri, etc., R. Co., 64 Mo. 70.

Motion by one partner inures to benefit of all see Robinson *v.* Snyder, 97 Ind. 56.

59. Sloan *v.* McLean, 34 N. C. 260; McCann *v.* Duffy, 2 Ohio Dec. (Reprint) 114, 1 West. L. Month. 404.

Waiver of notice.— The failure of a justice to give plaintiff notice of the time of the application to open a default judgment is waived by the appearance of plaintiff thereafter. Steen *v.* Short, 1 Marv. (Del.) 295, 40 Atl. 1130.

60. The failure of a justice's order opening a default to recite the grounds therefor, in compliance with N. Y. Consol. Act, § 1367, as amended by Laws (1896), c. 748, is fatal, and requires a reversal thereof on appeal. Popkin *v.* Friedlander, 23 Misc. (N. Y.) 475, 51 N. Y. Suppl. 398.

61. See also Judgments, 23 Cyc. 770 *et seq.*

62. Murray *v.* Churchill, 86 Ill. App. 480.

Upon a verdict of "no cause of action," the justice must immediately render judgment in accordance therewith. Kline *v.* Harding, 43 N. Y. App. Div. 1, 59 N. Y. Suppl. 470.

63. Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741; Felter *v.* Mulliner, 2 Johns. (N. Y.) 181.

64. Felter *v.* Mulliner, 2 Johns. (N. Y.) 181. And see *supra*, IV, N, 3, a.

65. Hargrove *v.* Turner, 108 Ga. 580, 34 S. E. 1.

66. Thomas *v.* Dorchester, 2 Root (Conn.) 124.

67. Babb *v.* Bruere, 23 Mo. App. 604, holding that a general judgment against a husband for antenuptial debts of his wife, instead of a special judgment to be satisfied out of the property acquired by her, is erroneous.

68. Toledo, etc., R. Co. *v.* Pence, 71 Ill. 174; Eaton *v.* Graham, 11 Ill. 619; Badgley *v.* Heald, 9 Ill. 64; Bullock *v.* Carpenter, 3 Ill. App. 462.

or awarded by referees;[69] nor can it exceed in amount the justice's jurisdiction.[70] A general finding is sufficient to sustain a judgment for plaintiff,[71] and he is entitled to judgment upon the decision of the issue in his favor,[72] or where a bill of particulars is filed, and the answer thereto is found insufficient, the case being submitted on the pleadings,[73] or where defendant does not deny plaintiff's claim, but alleges a set-off, which he fails to prove on the trial.[74] It is no objection to the judgment of a justice that another justice sat and consulted with him on the trial of the cause.[75]

b. Time and Place For Rendition of Judgment — (i) *In General.* Where an action is tried by a justice without a jury, judgment must be rendered at the close of the trial, or at a definite and reasonable time thereafter,[76] not exceeding in duration such period as may be fixed by statute, within which judgment may be rendered after submission.[77] In case of a trial by jury, judgment should be

Excess made up of interest.— Where it appears that the excess of a judgment over the amount indorsed on the summons may be made up by interest from that date, the judgment is not erroneous. Redner *v.* Davern, 41 Ill. App. 245.

69. Jones *v.* Morris, 4 Harr. (Del.) 104.

70. Where a verdict exceeds the jurisdiction, plaintiff may remit the excess, and a judgment for the residue will be valid. Clark *v.* Denure, 3 Den. (N. Y.) 319.

71. Coad *v.* Read, 48 Nebr. 40, 66 N. W. 1002.

72. Foster *v.* Penry, 77 N. C. 160.

73. Simons *v.* Sowards, 29 Nebr. 487, 45 N. W. 779.

74. Gregory *v.* Trainer, 1 Abb. Pr. (N. Y.) 209.

75. Dougherty *v.* Mason, 4 Blackf. (Ind.) 432.

Where a justice called in three others to preside with him, and the three justices rendered one judgment, and the first justice a different one, it was held that his judgment should stand as the decision of the cause. Crouch *v.* Martin, 4 Sneed (Tenn.) 569.

76. *California.*— The justice may take a case under advisement, notwithstanding Code Civ. Proc. § 892, and a judgment rendered some months after the close of the trial is valid. American Type Founders' Co. *v.* Sausalito Tp. Justice's Ct., 133 Cal. 319, 65 Pac. 742, 978 [*following* Heinlen *v.* Phillips, 88 Cal. 557, 26 Pac. 366].

Connecticut.— Burgess *v.* Tweedy, 16 Conn. 39.

Delaware.— Lynch *v.* Hill, 4 Harr. 312.

Georgia.— Ryals *v.* McArthur, 92 Ga. 378, 17 S. E. 350.

Illinois.— Hall *v.* Reber, 36 Ill. 483; Murray *v.* Churchill, 86 Ill. App. 480. But see Harrison *v.* Chipp, 25 Ill. 575.

Nebraska.—Notwithstanding Code Civ. Proc. § 1002, a justice does not lose jurisdiction by taking an attachment case under advisement by consent of parties to a future day. Westover *v.* Van Dorn Ironworks Co., (1903) 97 N. W. 598. See also Reed *v.* Mott, 2 Nebr. (Unoff.) 450, 89 N. W. 277 [*following* Huff *v.* Babbott, 14 Nebr. 150, 15 N. W. 230].

North Dakota.— Sluga *v.* Walker, 9 N. D. 108, 81 N. W. 282.

Ohio.— Where the docket shows a trial, but no notice of any continuance, the date on which the judgment was rendered will be held to be the same as that of the trial. Hoagland *v.* Schnorr, 17 Ohio St. 30.

See 31 Cent. Dig. tit. "Justices of the Peace," § 390.

The word "render" refers to the making up and announcement of the judgment, and not to the clerical act of reducing it to writing. Ryals *v.* McArthur, 92 Ga. 378, 17 S. E. 350.

What is a reasonable time is a question depending upon circumstances and governed by sound discretion. Burgess *v.* Tweedy, 16 Conn. 39.

Judgment cannot be rendered during argument.— Prentiss *v.* Sprague, 1 Hilt. (N. Y.) 428.

A judgment rendered before the return-day of the warrant or summons is erroneous. Glover *v.* Holman, 3 Heisk. (Tenn.) 519.

Where the summons is returnable forthwith, the justice may render judgment on the return of the writ, and need not wait until the close of the business day. Hunter *v.* Roach, 1 Pennew. 265, 40 Atl. 192.

77. *Kansas.*— Stewart *v.* Waite, 19 Kan. 218.

Michigan.— Brady *v.* Taber, 29 Mich. 199.

Missouri.— Cella *v.* Schnairs, 42 Mo. App. 316; Hodgson *v.* Bartholow Banking-House, 9 Mo. App. 24.

Nebraska.— Keely Inst. *v.* Riggs, 5 Nebr. (Unoff.) 612, 99 N. W. 833; Young *v.* Joseph, 5 Nebr. (Unoff.) 559, 99 N. W. 522. See also Reed *v.* Mott, 2 Nebr. (Unoff.) 450, 89 N. W. 277.

New York.— Bissell *v.* Bissell, 11 Barb. 96; Bloomer *v.* Merrill, 1 Daly 485; Watson *v.* Davis, 19 Wend. 371.

Ohio.— Sanderson *v.* Pullman, 9 Ohio Dec. (Reprint) 175, 11 Cinc. L. Bul. 145. See also Nicholson *v.* Roberts, 6 Ohio S. & C. Pl. Dec. 233, 4 Ohio N. P. 43.

West Virginia.— Cincinnati, etc., Packet Co. *v.* Bellville, 55 W. Va. 560, 47 S. E. 301.

Wisconsin.— Gallup *v.* Johnson, 14 Wis. 197; Caughey *v.* Vance, 3 Pinn. 275, 3 Chandl. 308.

See 31 Cent. Dig. tit. "Justices of the Peace," § 390.

Consent to extension of time see *supra,* IV, J, note 69.

rendered as soon as the verdict is received, or, as expressed in some statutes, "forthwith," or "immediately."[78] In some jurisdictions, however, the statutes have been held not to mean what they say, and it is sufficient if the judgment is rendered within a reasonable time under the circumstances of the case.[79] When a trial is commenced and pursued to judgment without an intervening continuance, all the proceedings after the commencement of the trial, including the rendition of judgment, must be treated as of the day on which the trial commenced, even where the record shows that the judgment was rendered as of the last day of the trial.[80] In all cases judgment must be rendered in open court, where the parties have an opportunity to be present.[81]

(II) *Conditions Precedent.* Where a justice after trial withholds his decision without taking a regular adjournment to a particular day and hour, he must notify the parties of the time at which judgment will be rendered;[82] and where an order of reference is made, the parties have a right to be heard before judgment is rendered on the report, and must have previous notice.[83] The payment

The submission meant is a submission for final decision, and it is not necessary that a judgment on the merits be rendered within the statutory time after the submission of the issues on a plea in abatement. Cella *v.* Schnairs, 42 Mo. App. 316.

In computing the time it has been held that both the day of trial and the day of rendition must be counted. Stewart *v.* Waite, 19 Kan. 218. *Contra*, Carey *v.* Kreizer, 26 Misc. (N. Y.) 755, 57 N. Y. Suppl. 79, where the cause was submitted on the second, and the decision rendered on the tenth, and it was held that the statutory period of eight days was not exceeded.

The time is exclusive of Sundays.— Hodgson *v.* Bartholow Banking-House, 9 Mo. App. 24. See also Huber *v.* Ehlers, 76 N. Y. App. Div. 602, 79 N. Y. Suppl. 150, to the effect that Sunday must be excluded if it is the last day. *Contra*, Harrison *v.* Sagre, 27 Mich. 476.

Where decision is reserved to enable the parties to file briefs, the cause is not finally submitted until the briefs are filed. Babin *v.* Ensley, 14 N. Y. App. Div. 548, 43 N. Y. Suppl. 849.

Agreement for argument after submission. — Where a cause is submitted at the close of the evidence, with an agreement that within the time allowed for rendition of judgment the case shall be argued, the final hearing is in effect postponed to the day of argument; and the justice has a right to take four days from that time for the decision of the cause. Heidenheimer *v.* Wilson, 31 Barb. (N. Y.) 636.

Successive continuances.— A justice may reserve his decision for the full time by successive continuances, without the consent of the parties, if the judgment is finally entered within the time limited. Wheeler *v.* Hall, 42 Wis. 573.

78. *Iowa.*— Harper *v.* Albee, 10 Iowa 389. *Compare* Guthrie *v.* Humphrey, 7 Iowa 23.

Michigan.— See Saunders *v.* Tioga, etc., Mfg. Co., 27 Mich. 520.

Nebraska.— Austin *v.* Brock, 16 Nebr. 642, 21 N. W. 437; Thompson *v.* Church, 13 Nebr. 287, 13 N. W. 626.

New York.— Putnam *v.* Van Allen, 46 Hun 492; Schneider *v.* Armstrong, Sheld. 379; Sibley *v.* Howard, 3 Den. 72, 45 Am. Dec. 448.

Ohio.— Dunlap *v.* Robinson, 12 Ohio St. 530.

Wisconsin.— Smith *v.* Bahr, 62 Wis. 244, 22 N. W. 438; Hull *v.* Mallory, 56 Wis. 355, 14 N. W. 374; Wearne *v.* Smith, 32 Wis. 412; Perkins *v.* Jones, 28 Wis. 243; McNamara *v.* Spees, 25 Wis. 539.

See 31 Cent. Dig. tit. "Justices of the Peace," § 390.

Presumption as to reception of verdict.— Where the record states that the trial was held on the eleventh, and the judgment was rendered on the twelfth, it will be presumed that the verdict was not rendered until the twelfth. Beattie *v.* Qua, 15 Barb. (N. Y.) 132.

Where a verdict is received on Sunday, a justice must render judgment immediately. Thompson *v.* Church, 13 Nebr. 287, 13 N. W. 626. *Contra*, Allen *v.* Godfrey, 44 N. Y. 433, decided under the Sunday observance law, which authorizes courts to receive a verdict on Sunday, but forbids the transaction of any other business on that day.

Where the verdict is received on a public holiday, judgment must be rendered forthwith. Perkins *v.* Jones, 28 Wis. 243.

79. Sorenson *v.* Swensen, 55 Minn. 58, 56 N. W. 350, 43 Am. St. Rep. 472; Allen *v.* Godfrey, 44 N. Y. 433; Sweet *v.* Marvin, 2 N. Y. App. Div. 1, 37 N. Y. Suppl. 442; Tousley *v.* Mowers, 14 Misc. (N. Y.) 125, 35 N. Y. Suppl. 855.

80. Oakes *v.* Eden School Dist. No. 9, 33 Vt. 155. See also Hoagland *v.* Schnorr, 17 Ohio St. 30.

81. Clark *v.* Read, 5 N. J. L. 486.

82. Edwards *v.* Hance, 12 N. J. L. 108; Fessler *v.* Sharp, 7 Pa. Dist. 652; Leslie *v.* Innes, 3 Pa. Dist. 689; Bower *v.* Sturn, 1 Lanc. L. Rev. (Pa.) 19; Lehighton *v.* Gombert, 7 North. Co. Rep. (Pa.) 169; Taylor *v.* Smith, 4 Pa. L. J. 105.

Mailing a notice is insufficient, in the absence of evidence that the party received it. Leslie *v.* Innes, 3 Pa. Dist. 689.

83. French *v.* Shackford, 5 N. H. 143; Atwood *v.* York, 4 N. H. 50; Pierson *v.* Pierson, 7 N. J. L. 125. But see Fairholme *v.* Forker, 3 N. J. L. 995.

of jury-fees, however, is not a condition precedent to the rendition of a judgment by a justice of the peace.[84]

(III) *Rendition at Unauthorized Time or Place.* A judgment rendered at an unauthorized time or place is generally held to be void,[85] unless the parties have consented that it be so rendered.[86]

c. Form and Requisites. Since technical accuracy and legal precision are neither expected nor required in proceedings before a justice of the peace, mere irregularity or deficiency in the form of a judgment will not invalidate it,[87] provided it is reasonably certain and conclusive.[88] When a suit is for a money

84. Robinson *v.* Kious, 4 Ohio St. 593.

85. *Georgia.*— Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644; Freeman *v.* Gaither, 76 Ga. 741; White *v.* Mandeville, 72 Ga. 705; Reed *v.* Thomas, 66 Ga. 595.

Illinois.— Murray *v.* Churchill, 86 Ill. App. 480.

Michigan.— Harrison *v.* Sager, 27 Mich. 476. *Compare* Alt *v.* Lalone, 54 Mich. 302, 20 N. W. 52.

Missouri.— Stroch *v.* Doggett Dry-Goods Co., 65 Mo. App. 103. But see Drake *v.* Bagley, 69 Mo. App. 39; Pohle *v.* Dickmann, 67 Mo. App. 381.

New York.— Catlin *v.* Rundell, 1 N. Y. App. Div. 157, 37 N. Y. Suppl. 979; Cohen *v.* Weill, 32 Misc. 198, 65 N. Y. Suppl. 695; Lambert *v.* Salomon, 28 Misc. 562, 59 N. Y. Suppl. 676; Mulligan *v.* Cox, 26 Misc. 709, 56 N. Y. Suppl. 797; Beardsley *v.* Pope, 11 Misc. 117, 32 N. Y. Suppl. 926; Sibley *v.* Howard, 3 Den. 72, 45 Am. Dec. 448. *Compare* Rich *v.* Markham, 92 Hun 78, 37 N. Y. Suppl. 602.

Ohio.— Robinson *v.* Kious, 4 Ohio St. 593; Nicholson *v.* Roberts, 6 Ohio S. & C. Pl. Dec. 233, 4 Ohio N. P. 43.

Wisconsin.— Wearne *v.* Smith, 32 Wis. 412.

See 31 Cent. Dig. tit. "Justices of the Peace," § 392.

But see Heinlen *v.* Phillips, 88 Cal. 557, 26 Pac. 366; Glover *v.* Holman, 3 Heisk. (Tenn.) 519, holding that a judgment rendered by a justice of the peace before the return-day of the warrant is erroneous but not void.

After continuance.— Where a case had been continued in a justice's court, and a judgment was rendered during the term at which the continuance was granted, it was held that the judgment, although erroneous, was not absolutely void, and that a claimant of the fund brought into court by a summons of garnishment issued on the judgment could not question the validity of the judgment when acquiesced in by the party against whom it was rendered. Field *v.* Peel, 122 Ga. 503, 50 S. E. 346.

86. Barnes *v.* Badger, 41 Barb. (N. Y.) 98; Beardsley *v.* Pope, 11 Misc. (N. Y.) 117, 32 N. Y. Suppl. 926; Sanderson *v.* Pullman, 9 Ohio Dec. (Reprint) 175, 9 Cinc. L. Bul. 145. But see Nicholson *v.* Roberts, 6 Ohio S. & C. Pl. Dec. 233, 4 Ohio N. P. 43. See also *supra*, IV, J, text and note 69.

87. *Alabama.*— Bolin *v.* Sandlin, 124 Ala. 578, 27 So. 464, 82 Am. St. Rep. 209; Lightsey *v.* Harris, 20 Ala. 409.

Illinois.— Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 337; Horton *v.* Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Kopperl *v.* Nagy, 37 Ill. App. 23.

Indiana.— Kennard *v.* Carter, 64 Ind. 31.

Minnesota.— Smith *v.* Petrie, 70 Minn. 433, 73 N. W. 155.

Mississippi.— Ladnier *v.* Ladnier, 64 Miss. 368, 1 So. 492.

Nebraska.— Coad *v.* Read, 48 Nebr. 40, 66 N. W. 1002.

Pennsylvania.— Grube *v.* Getz, 3 Pa. Co. Ct. 124.

Tennessee.— Austin *v.* Ramsey, 3 Tenn. Ch. 118.

United States.— Deadrick *v.* Harrington, 7 Fed. Cas. No. 3,694*b*, Hempst. 50.

See 31 Cent. Dig. tit. "Justices of the Peace," § 393.

Verdict as judgment.— The entry by the justice in his docket of the verdict of the jury with the costs as taxed is in legal effect a judgment. Smith *v.* Petrie, 70 Minn. 433, 73 N. W. 155. See also Overall *v.* Pero, 7 Mich. 315; Gaines *v.* Betts, 2 Dougl. (Mich.) 98; State *v.* Myers, 70 Minn. 179, 72 N. W. 969, 68 Am. St. Rep. 521.

"I give judgment" includes the technical and formal words of a judgment and is sufficient. Deadrick *v.* Harrington, 7 Fed. Cas. No. 3,694*b*, Hempst. 50.

A judgment in conformity with an order approved by the supreme court cannot be set aside on certiorari to the superior court, if it was demanded by the evidence. Childs *v.* Moran, 114 Ga. 320, 40 S. E. 271.

Judgment in debt in action of trespass sufficient see Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105.

Judgment void as special judgment held valid as general see Hart *v.* Mayhugh, 75 Mo. App. 121 [*citing* Buis *v.* Cooper, 63 Mo. App. 196].

88. **Judgments held insufficient.**— *New Jersey.*— Smith *v.* Miller, 8 N. J. L. 175, 14 Am. Dec. 418; Van Houten *v.* Beam, 3 N. J. L. 944; Green *v.* Lawrence, 3 N. J. L. 848.

Ohio.— Means *v.* Stephenson, Tapp. 283.

Pennsylvania.— Nash *v.* Com., 2 C. Pl. 239; Carr *v.* Lewton, 1 Lack. Leg. Rec. 396; Gault *v.* Lowry, 1 Phila. 394.

Tennessee.— Hubbard *v.* Birdwell, 11 Humphr. 220.

Wisconsin.— Beemis *v.* Wylie, 19 Wis. 318.

See 31 Cent. Dig. tit. "Justices of the Peace," § 393.

"I give judgment with the jury" is in-

demand, it is erroneous for the justice, after giving judgment for the amount claimed, to specify in what kind of money it shall be paid.[89] Where a judgment is erroneous as to costs, the whole recovery is not illegal, but it may be reversed as to the costs, and affirmed as to the rest.[90]

d. Parties. A judgment for plaintiff generally,[91] or against defendant generally,[92] without stating that it is for or against the adverse party, is sufficient; and where plaintiff or defendant is a partnership or corporation, judgment may be rendered in the firm or company name, without naming the individuals who compose it.[93] A judgment against a husband and wife should give the christian name of the wife,[94] but the use of an initial letter instead of a defendant's christian name, although irregular, will not avoid a judgment.[95] By statute in some states judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants,[96] and where part of the defendants are not served, judgment may be rendered against those who are.[97] Where plaintiff at the close of the evidence discontinues the case as to one of two defendants, a judgment against both cannot stand.[98] Of course a judgment in favor of a person not a party to the record is unwarranted.[99]

5. Entry and Record of Judgment — a. In General. A justice's judgment must be evidenced by some written memorial,[1] but the formal entry of judgment

sufficient. Van Houten *v.* Beam, 3 N. J. L. 944; Green *v.* Lawrence, 3 N. J. L. 848.

In an action to recover a penalty the judgment should find the fact of the violation of the statute in express words. Nash *v.* Com., 2 C. Pl. (Pa.) 239.

In an action to recover personal property the judgment should be for the property, if to be had, and if not, then for its value as found by the verdict. White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761.

In an action of trover it is error to render judgment in a fixed sum for "debt." Hildebrand *v.* Bowman, 12 Lanc. Bar (Pa.) 30.

In trespass the record should show that plaintiff had such property and right of possession as would entitle him to maintain an action for conversion. Lovell Mfg. Co. *v.* Dougherty, 5 Pa. Co. Ct. 399.

89. Swain *v.* Smith, 65 N. C. 211.

90. Whelpley *v.* Nash, 46 Mich. 25, 8 N. W. 570. But *compare* Hay *v.* Imlay, 3 N. J. L. 832, decided before the New Jersey act of February, 1812.

A judgment for costs in figures, instead of specifying the amount in words at length, is erroneous, and will be reversed as a whole. Smith *v.* Miller, 8 N. J. L. 175, 14 Am. Dec. 418.

91. Titus *v.* Whitney, 16 N. J. L. 85, 31 Am. Dec. 228; Parker *v.* Swan, 1 Humphr. (Tenn.) 80, 34 Am. Dec. 619.

92. Madison County Ct. *v.* Rutz, 63 Ill. 65.

93. Condry *v.* Henley, 4 Stew. & P. (Ala.) 9; McDonald *v.* Simcox, 98 Pa. St. 619. *Contra,* Hitch *v.* Gray, 1 Marv. (Del.) 400, 41 Atl. 91.

94. George *v.* McCutcheon, 8 Pa. Dist. 591.

95. Bridges *v.* Layman, 31 Ind. 384.

96. Hellman *v.* Schwartz, 44 Ill. App. 84; Terwilliger *v.* Murphy, 104 Ind. 32, 3 N. E. 404; Fitzgerald *v.* Genter, 26 Ind. 238. *Contra,* Berend *v.* Avery, 39 Mich. 132; Perkins *v.* Richmond, 17 How. Pr. (N. Y.) 309. And see Briggs *v.* Adams, 31 Ill. 486. By the express provision of Mich. Pub. Acts (1899), p. 309, No. 199, in an action brought in a justice's court recovery may be had against one of the defendants, although the other be found not liable. Wilson *v.* Medler, 140 Mich. 209, 103 N. W. 548.

Judgment must name defendant.— Where a warrant issued against three, and was returned executed generally, and judgment was rendered against "defendant," without naming him, it was held that it could not be determined against whom the judgment was rendered. Thomas *v.* Holcombe, 29 N. C. 445.

97. Kerr *v.* Boyer, 7 Ill. 417; Moon *v.* Harmon, 4 Yerg. (Tenn.) 21.

In New York, under Code Civ. Proc. § 3020, in an action against persons jointly indebted, where only part are served with process, judgment must be rendered against all. Elster *v.* Goodyear, 55 N. Y. App. Div. 190, 66 N. Y. Suppl. 951. See also Fogg *v.* Child, 13 Barb. 246.

98. Fanning *v.* Lent, 3 E. D. Smith (N. Y.) 206.

99. Wilson *v.* Walton, 1 Phila. (Pa.) 517.

1. *Colorado.*— Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741.

Michigan.— See Hickey *v.* Hinsdale, 8 Mich. 267, 77 Am. Dec. 450, to the effect that the statute requiring a justice to keep a docket, and to enter his judgments therein, is directory only, and that his minutes or memoranda, made at the time of giving judgment and filed with the papers in the cause, are competent evidence of the judgment.

Mississippi.— Justices' judgments must be enrolled and recorded, their courts being courts of record. Brian *v.* Davidson, 25 Miss. 213.

New Jersey.— Stokes *v.* Schlacter, 66 N. J. L. 247, 49 Atl. 556; Seward *v.* Falkerson, 3 N. J. L. 977.

North Carolina.— Hamilton *v.* Parrish, 12 N. C. 415.

Tennessee.— A judgment need not neces-

is a mere clerical duty,[2] in the performance of which technical accuracy and legal precision are not required, if the facts are so stated as to be intelligible.[3] The record must, however, be as certain in matters of substance as the judgment of a court of record,[4] and must show that the justice had jurisdiction to render the judgment.[5] The entry may be made by the justice's clerk, if made in the name and by the

sarily be written on the warrant; it is valid if written upon the docket. Hollins *v.* Johnson, 3 Head 346.

Texas.— It is not necessary that a judgment should be recorded to render it admissible when offered in evidence solely for the purpose of showing the justice's authority for issuing execution thereon. Burrow *v.* Brown, 59 Tex. 457.

Vermont.— The statute requiring justices to make full records of their judgments must be held peremptory, so long as the justice can comply with it, but must be deemed directory when compliance has become impossible. Ellsworth *v.* Learned, 21 Vt. 535.

Wisconsin.— Benaway *v.* Bond, 2 Pinn. 449, 2 Chandl. 110, 54 Am. Dec. 147.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 395, 397.

Contra.— Maybin *v.* Virgin, 1 Hill (S. C.) 420.

Entry prima facie evidence of date of rendition see Rauer *v.* San Francisco Justices' Ct., 115 Cal. 84, 46 Pac. 870. *Compare* Chalmers *v.* Tandy, 111 Ill. App. 252, to the effect that the entries of a judgment are conclusive as to the facts therein stated.

Supplying lost record.— In the absence of other equities, a court of chancery has no jurisdiction to supply the record of a judgment destroyed by fire. Scott *v.* Watson, 3 Tenn. Ch. 652.

An execution which recites the judgment is not void by reason of the justice's failure to enter the judgment. Lynch *v.* Kelly, 41 Cal. 232. See also Travis *v.* Chambers, 120 Ga. 908, 48 S. E. 356; Maybin *v.* Virgin, 1 Hill (S. C.) 420.

2. *California.*— Lynch *v.* Kelly, 41 Cal. 232.

Colorado.— Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741.

Kansas.— Conwell *v.* Kuykendall, 29 Kan. 707.

Michigan.— Hickey *v.* Hinsdale, 8 Mich. 267, 77 Am. Dec. 450.

Missouri.— Drake *v.* Bagley, 69 Mo. App. 39.

New York.— Fish *v.* Emerson, 44 N. Y. 376.

West Virginia.— Cincinnati, etc., Packet Co. *v.* Bellville, 55 W. Va. 560, 47 S. E. 301.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 395, 396.

3. *Iowa.*— Bulfer *v.* Kilday, (1899) 78 N. W. 817.

Massachusetts.— Park *v.* Darling, 4 Cush. 197. See also Clap *v.* Clap, 4 Mass. 520.

Michigan.— Cole *v.* Potter, 135 Mich. 326, 97 N. W. 774.

Minnesota.— Glaucke *v.* Gerlich, 91 Minn. 282, 98 N. W. 94.

Mississippi.— Doxey *v.* State, (1901) 29 So. 785; Swain *v.* Gilder, 61 Miss. 667.

New Jersey.— Martin *v.* Thompson, 10 N. J. L. 142. But *compare* Robinson *v.* Applegate, 11 N. J. L. 178, where it was held that a judgment entered in figures will be reversed for that cause.

Tennessee.— Elliott *v.* Jordan, 7 Baxt. 376.

Texas.— Wahrenberger *v.* Horan, 18 Tex. 57; San Antonio, etc., R. Co. *v.* Thigpen, (Civ. App. 1900) 57 S. W. 66.

West Virginia.— Fishburne *v.* Baldwin, 46 W. Va. 19, 32 S. E. 1007; Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

Wisconsin.— Benaway *v.* Bond, 2 Pinn. 449, 2 Chandl. 110, 54 Am. Dec. 147. See also Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854, where it was held that failure to state the year is immaterial, since the current year will be understood.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 395, 397.

Entry of verdict sufficient.— Overall *v.* Pero, 7 Mich. 315; Gaines *v.* Betts, 2 Dougl. (Mich.) 98; Munday *v.* Clements, 58 Mo. 577; Stemmons *v.* Carey, 57 Mo. 222; Haseltine *v.* Reusch, 51 Mo. 50; Morse *v.* Brownfield, 27 Mo. 224; Franse *v.* Owens, 25 Mo. 329; Rutherford *v.* Wim, 3 Mo. 14; Stephenson *v.* Jones, 84 Mo. App. 249; Giett *v.* McGannon Mercantile Co., 74 Mo. App. 209; Davis *v.* Pinckney, 20 Tex. 340; Clay *v.* Clay, 7 Tex. 250. But *compare* Swift *v.* Cornes, 20 Wis. 397, which was an action of unlawful detainer, in which the jury found "in favor of the plaintiff," and the justice merely made an entry that "the court renders judgment according to the verdict," and it was held that there was no judgment.

Entry on minutes sufficient see Hickey *v.* Hinsdale, 8 Mich. 267, 77 Am. Dec. 450; O'Reilly *v.* Block, 23 N. Y. Suppl. 670; Ellsworth *v.* Learned, 21 Vt. 535.

Entry aided by reference to margin see Clothier *v.* Clark, 4 Harr. (Del.) 365; Elliott *v.* Morgan, 3 Harr. (Del.) 316; Payson *v.* Everett, 12 Minn. 216.

Aider by reference to report of referees see Elliott *v.* Morgan, 3 Harr. (Del.) 316.

An entry referring to a former order, which does not appear to have been entered, is insufficient. O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898.

4. Rood *v.* Bloomfield School Dist. No. 7, 1 Dougl. (Mich.) 502; McClellan *v.* Cornwell, 2 Coldw. (Tenn.) 298.

Must specify amount and day of rendition see McCandless *v.* Inland Acid Co., 112 Ga. 291, 37 S. E. 419.

5. Davenport Mills Co. *v.* Chambers, 146 Ind. 156, 44 N. E. 1109; State *v.* Cunningham, 106 Mo. App. 58, 79 S. W. 1017; Young *v.* Joseph, 5 Nebr. (Unoff.) 559, 99 N. W. 522; Clark *v.* Gadshaw, 11 Kulp (Pa.) 227.

direction of the justice;[6] and, in New Hampshire, where the records of a deceased justice have been lodged with the clerk of the court of common pleas, he may from the justice's minutes enter up judgment in the same manner that judgments are entered up from minutes kept by the clerk of that court.[7] In Georgia judgment may be entered on a verdict either by the plaintiff, or his attorney, or by the justice;[8] while in North Carolina a justice's judgment is admissible in evidence, although not written out in his own hand.[9]

b. Time of Entry. Where an action is tried by a justice without a jury, the clerical duty[10] of entering his judgment may in most states be performed within a reasonable time after its rendition, even where time for entry is provided by statute.[11] The same rule holds good in many states in case of trial by jury,[12] but in a few the statutes are held to be mandatory.[13] In case of judgment by default, the record should show the entry of judgment at the hour fixed in the summons, or, if at a later hour, that defendant did not appear at the proper time;[14] and where plaintiff is nonsuited, or discontinues or withdraws his action, judgment should be entered forthwith.[15] The requirement that a judgment by confession shall be entered "forthwith" is satisfied by an entry on the minutes, although it is not formally entered in the docket until some time afterward.[16] Where a justice fails to enter such a judgment as will dispose of the case as to all the parties, he may subsequently enter a judgment so disposing of it.[17]

c. Necessity of Signature. The better practice demands the identification of

Jurisdiction to be shown by record see generally *supra*, III, O.

6. Cabanne *v.* Spaulding, 14 Mo. App. 312.

7. Carlisle *v.* Thompson, 5 N. H. 411.

8. Levadas *v.* Beach, 119 Ga. 613, 46 S. E. 864, construing Civ. Code, § 5339. See also Scott *v.* Bedell, 108 Ga. 205, 33 S. E. 903.

9. Reeves *v.* Davis, 80 N. C. 209.

10. See *supra*, IV, O, 5, a, text and note 2.

11. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84.

Kansas.— Conwell *v.* Kuykendall, 29 Kan. 707.

Maine.— Matthews *v.* Houghton, 11 Me. 377.

Missouri.— Drake *v.* Bagley, 69 Mo. App. 39; Pohle *v.* Dickmann, 67 Mo. App. 381.

New York.— Fish *v.* Emerson, 44 N. Y. 376; Walrod *v.* Shuler, 2 N. Y. 134. But see Watson *v.* Davis, 19 Wend. 371.

Pennsylvania.— Black *v.* Black, 12 Pa. Dist. 424. But see Fessler *v.* Sharp, 7 Pa. Dist. 652; Gill *v.* Wagner, 20 Pa. Co. Ct. 333.

West Virginia.— Cincinnati, etc., Packet Co. *v.* Bellville, 55 W. Va. 560, 47 S. E. 301.

See 31 Cent. Dig. tit. "Justices of the Peace," § 396.

But see Bowden *v.* Taylor, 81 Ga. 199, 6 S. E. 277.

Entry after expiration of term and re-election held sufficient see Drake *v.* Bagley, 69 Mo. App. 39 [*distinguishing* Gage *v.* Vail, 73 Mo. 454, in which the justice had ceased to hold office before entering the judgment].

Waiver of statutory requirement see Barnes *v.* Badger, 41 Barb. (N. Y.) 98.

Absence of justice at time of entry.— Where the docket of a justice of the peace shows that a judgment was entered on a day on which he was not within the state, the judgment is void for want of jurisdiction. Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302.

12. *Arkansas.*— Judgment may be entered up *nunc pro tunc* at any time after verdict on motion. Adams *v.* Thompson, 12 Ark. 670.

Indiana.— Martin *v.* Pifer, 96 Ind. 245, construing Rev. St. (1881) § 1489.

Iowa.— Knox *v.* Nicoli, 97 Iowa 687, 66 N. W. 876; Davis *v.* Simma, 14 Iowa 154, 81 Am. Dec. 462. *Compare* Tomlinson *v.* Litze, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. Rep. 458, where a judgment entered more than ninety days after verdict was held void.

Minnesota.— Rucker *v.* Miller, 50 Minn. 360, 52 N. W. 958, where it was held that it was competent for defendant to waive strict conformity with the statute.

Nevada.— Fugitt *v.* Cox, 2 Nev. 370.

New York.— Goodrich *v.* Sullivan, 1 Thomps. & C. 191; Hall *v.* Tuttle, 6 Hill 38, 40 Am. Dec. 382.

South Carolina.— Thomson *v.* Dillinger, 35 S. C. 608, 14 S. E. 776.

See 31 Cent. Dig. tit. "Justices of the Peace," § 396.

13. Worley *v.* Shoug, 35 Nebr. 311, 53 N. W. 72; *In re* Evingson, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

14. Clarke *v.* Vielkoonis, 7 Kulp (Pa.) 61. But see Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135, construing Cal. Code Civ. Proc. §§ 850, 871, 416.

15. Kucklo *v.* Kleis, 2 N. Y. Suppl. 358.

16. *In re* Thompson, 29 N. Y. App. Div. 83, 51 N. Y. Suppl. 384 [*following* Fish *v.* Emerson, 44 N. Y. 376; Walrod *v.* Shuler, 2 N. Y. 134; Hall *v.* Tuttle, 6 Hill (N. Y.) 38, 40 Am. Dec. 382].

17. Young *v.* Pfeiffer, (Tex. Civ. App. 1895) 30 S. W. 94. See also Stewart *v.* Hall, 106 Ga. 172, 32 S. E. 14. But see Trevathan *v.* Caldwell, 4 Heisk. (Tenn.) 535.

justices' judgments by the signature of the officer rendering them, but this cannot be regarded as essential to their validity,[18] unless required by statute.[19]

d. Filing Transcript in Another County. Provision is sometimes made for the filing of a transcript of a justice's judgment in other counties, upon which scire facias may issue and judgment be rendered.[20] A judgment on such transcript cannot be entered by a justice in a county in which defendant is not a resident nor found;[21] but where he has jurisdiction his judgment will not be reversed because his record does not show the cause of action, or that a summons was issued or return made, in the original proceeding.[22]

6. Amendment or Correction, Opening or Vacating, and Equitable Relief — a. Amendment, Correction, or Review by Justice. Except where authority is conferred on justices of the peace to grant new trials,[23] the weight of authority is to the effect that they have no power to change, or in any manner to interfere with, judgments which they have rendered.[24]

b. Opening or Vacating.[25] In some jurisdictions a justice of the peace has no power to open, set aside, or vacate a judgment rendered by himself;[26] in

18. Gunn *v.* Tackett, 67 Ga. 725 (in which the justice merely signed his initials); Parks *v.* Norton, 114 Iowa 732, 87 N. W. 698; Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854.

Judgment admissible in evidence although not signed by justice's own hand see Reeves *v.* Davis, 80 N. C. 209.

19. Ringle *v.* Weston, 23 Ind. 588; Howard *v.* People, 3 Mich. 207.

Signature to stay of execution immediately following judgment held good see Hollister *v.* Giddings, 24 Mich. 501.

20. Collins *v.* Brower, 1 Pa. Co. Ct. 261, construing the act of March 20, 1810.

21. Mowry *v.* Thomas, Wilcox (Pa.) 106.

22. Grube *v.* Getz, 3 Pa. Co. Ct. 124.

23. See *supra*, IV, N, 3.

24. *California.*— Winter *v.* Fitzpatrick, 35 Cal. 269.

Illinois.— St. Louis, etc., R. Co. *v.* Gundlach, 69 Ill. App. 192.

Indiana.—Foist *v.* Coppin, 35 Ind. 471.

Michigan.— Foster *v.* Alden, 21 Mich. 507.

Minnesota.— Larson *v.* Johnson, 83 Minn. 351, 86 N. W. 350.

Nebraska.— Fox *v.* Meacham, 6 Nebr. 530.

New York.— Dauchy *v.* Brown, 41 Barb. 555; Rose *v.* Depue, 1 Thomps. & C. 16.

Pennsylvania.— Nippes *v.* Kirk, 8 Phila. 299.

Tennessee.— See Trevathan *v.* Caldwell, 4 Heisk. 535. But see Lorilla *v.* Alexander, 104 Tenn. 453, 58 S. W. 124; Womack *v.* Walling, 1 Baxt. 425.

Vermont.— Mosseaux *v.* Brigham, 19 Vt. 457.

See 31 Cent. Dig. tit. "Justices of the Peace," § 400.

But see Gates *v.* Bennett, 33 Ark. 475 (holding that a justice of the peace may correct a judgment rendered by his predecessor in office, by a *nunc pro tunc* order, to make it conform to the truth); Bell *v.* Bowdoin, 109 Ga. 209, 34 S. E. 339; Ramsey *v.* Cole, 84 Ga. 147, 10 S. E. 598; Rahn *v.* Greer, 37 Iowa 627; Breckinridge *v.* Coleman, 7 B. Mon. (Ky.) 331. See also Raley *v.* Sweeney, (Tex. Civ. App. 1901) 60 S. W. 573; Parker *v.* Boyd, (Tex. Civ. App. 1897) 42 S. W. 1031, to the effect that a correction must be made within ten days from rendition.

Consent.—A justice can alter his judgment, after entry, by consent. Steckmesser *v.* Graham, 10 Wis. 37.

Effect of alteration.— The alteration of a judgment already entered on the docket does not defeat the judgment, but it remains a judgment for the amount originally entered. Rose *v.* Depue, 1 Thomps. & C. (N. Y.) 16. See also Dauchy *v.* Brown, 41 Barb. (N. Y.) 555.

25. See also Judgments, 23 Cyc. 889.

26. *California.*— Simon *v.* Stockton Justice Ct., 127 Cal. 45; Heinlen *v.* Phillips, 88 Cal. 557, 26 Pac. 366.

Georgia.— Dalton City Co. *v.* Haddock, 54 Ga. 584.

Indiana.— Frankel *v.* Garrard, 160 Ind. 209, Foist *v.* Coppin, 35 Ind. 471; Jamieson *v.* Caster, 16 Ind. 426. *Compare* Smith *v.* Chandler, 13 Ind. 513.

Kansas.— Shaw *v.* Rowland, 32 Kan. 154, 4 Pac. 146. But see Freeman *v.* Wyandotte L. & T. Co., 6 Kan. App. 86, 49 Pac. 673.

Maryland.— A magistrate's court has no power to set aside a judgment rendered at the preceding term. Frazier *v.* Griffie, 8 Md. 50.

Missouri.— Langford *v.* Doniphan, 61 Mo. App. 288; Leith *v.* Shingleton, 42 Mo. App. 449.

New York.— See Martin *v.* New York, 20 How. Pr. 86, holding that the former marine court justices of New York could not open judgments rendered by them except such as were rendered by default.

Pennsylvania.— Hilton *v.* Linton, 1 Just. L. Rep. 137.

South Carolina.— Doty *v.* Duvall, 19 S. C. 143, construing Code, § 195.

See 31 Cent. Dig. tit. "Justices of the Peace," § 401.

One justice cannot set aside order of another.— *In re* National Trust Co., 4 N. Y. Civ. Proc. 203.

Consent.— A justice may open a judgment by consent of the parties, and refer the case

others he may do so where the judgment is void,[27] or where jurisdiction of the person of defendant has not been obtained;[28] while in others the power to open or vacate is regulated by statute.[29] Where a justice sets aside a judgment and grants a new trial, the judgment ceases to exist, and cannot be revived by a subsequent order of the justice vacating the order setting it aside and granting a new trial.[30]

c. Equitable Relief[31] — (I) *Grounds For Relief* — (A) *In General.* While the jurisdiction of equity to grant relief against justices' judgments is fully recognized, it is strictly exercised, and the right to relief must be clearly shown. In most jurisdictions equity will restrain the enforcement of void judgments,[32] but it will not interfere merely because of errors and irregularities which do not affect the jurisdiction.[33] It is good ground for equitable relief that judgment has been ren-

to referees. Sinex *v.* Cooper, 4 Houst. (Del.) 447.

27. In Mississippi a justice may proceed to vacate a void judgment and enter a valid one without issuing another summons. Moore *v.* Hoskins, 66 Miss. 496, 6 So. 500.

28. Whitehurst *v.* Merchants', etc., Transp. Co., 109 N. C. 342, 13 S. E. 937; Wehlen *v.* Macke, 9 Ohio Dec. (Reprint) 564, 15 Cinc. L. Bul. 125; Albert Lewis Lumber, etc., Co. *v.* Lewis, 6 Kulp (Pa.) 422.

In North Carolina, where the ground for relief is other than want of service, the proper mode of procedure is by appeal, recordari, or writ of false judgment. King *v.* Wilmington, etc., R. Co., 112 N. C. 318, 16 S. E. 929; Navassa Guano Co. *v.* Bridgers, 93 N. C. 439; Morgan *v.* Allen, 27 N. C. 156. *Compare* Gallop *v.* Allen, 113 N. C. 24, 18 S. E. 55.

29. State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214; Strine *v.* Kingsbaker, 12 Nebr. 52, 10 N. W. 534; Forest City Stone Co. *v.* French, 4 Ohio Dec. (Reprint) 141, 1 Clev. L. Rep. 69; Hern *v.* Bevington, 5 Ohio S. & C. Pl. Dec. 560, 7 Ohio N. P. 551; Carlin *v.* Holland, 11 Pa. Co. Ct. 20; Galley *v.* Davenport, 1 Ashm. (Pa.) 149; Long *v.* Caffrey, 8 Phila. (Pa.) 546; Nippes *v.* Kirk, 8 Phila. (Pa.) 299; Larue *v.* Hagarty, 5 Phila. (Pa.) 530; Gregg *v.* Ashenfelder, 5 Phila. (Pa.) 468; Stockdale *v.* Campbell, 1 Phila. (Pa.) 520; International, etc., R. Co. *v.* Pape, 1 Tex. App. Civ. Cas. § 241.

Requirement of written motion waived by adverse party see Steen *v.* Short, 1 Marv. (Del.) 295, 40 Atl. 1130; Forest City Stone Co. *v.* French, 4 Ohio Dec. (Reprint) 141, 1 Clev. L. Rep. 69.

30. Olson *v.* Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.

31. See also Judgments, 23 Cyc. 976 *et seq.*

32. *Alabama.*— Beach *v.* Lavender, 138 Ala. 406, 35 So. 352; Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

Arizona.— Dial *v.* Olsen, 4 Ariz. 293, 36 Pac. 175.

Arkansas.— *Ex p.* Woods, 3 Ark. 532.

Illinois.— Dickinson *v.* Hoffman, 90 Ill. App. 83.

Indiana.— Grass *v.* Hess, 37 Ind. 193. *Compare* Brown *v.* Goble, 97 Ind. 86, where it was held that a justice of the peace has no equity jurisdiction to relieve from a judgment valid on its face, although void in fact.

Iowa.— Iowa Union Tel. Co. *v.* Boylan, 86 Iowa 90, 52 N. W. 1122.

Kansas.— Olson *v.* Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296. See also Basset *v.* Mitchell, (1888) 19 Pac. 671.

Maryland.— Wagner *v.* Shank, 59 Md. 313.

Minnesota.— Knutson *v.* Davies, 51 Minn. 363, 53 N. W. 646, in which the qualification is made that the rights of third parties must not have intervened.

Missouri.— U. S. Mutual Acc. Ins. Co. *v.* Reisinger, 43 Mo. App. 571; Bornschein *v.* Finck, 13 Mo. App. 120.

Tennessee.— Smith *v.* Pearce, 6 Baxt. 72.

Texas.— Aycock *v.* Williams, 18 Tex. 392; Jennings *v.* Shiner, (Civ. App. 1897) 43 S. W. 276; Boaz *v.* Graham, 1 Tex. App. Civ. Cas. § 159. But see McFaddin *v.* Spencer, 18 Tex. 440.

See 31 Cent. Dig. tit. "Justices of the Peace," § 402. But see *infra*, IV, O, 6, c, (II), (B).

Application of creditors.— A judgment cannot be set aside by bill in equity on the application of other creditors of defendant, on the ground of want of jurisdiction. Brisco *v.* Brewer, Ga. Dec. Pt. II, 105.

33. *Indiana.*— Rhodes-Burford Furniture Co. *v.* Mattox, 135 Ind. 372, 34 N. E. 326, 35 N. E. 11.

Kansas.— Bassett *v.* Mitchell, 40 Kan. 549, 20 Pac. 192.

Michigan.— Wilson *v.* Coolidge, 42 Mich. 112, 3 N. W. 285.

North Carolina.— Gallop *v.* Allen, 113 N. C. 24, 18 S. E. 55; Powell *v.* Allen, 103 N. C. 46, 9 S. E. 138.

Tennessee.— Wagstaff *v.* Braden, 1 Baxt. 304.

Texas.— St. Louis, etc., R. Co. *v.* Coca Cola Co., 32 Tex. Civ. App. 611, 75 S. W. 563 [*following* Galveston, etc., R. Co. *v.* Dowe, 70 Tex. 1, 6 S. W. 790; Odom *v.* McMahan, 67 Tex. 292, 3 S. W. 286].

West Virginia.— Ensign Mfg. Co. *v.* Carroll, 30 W. Va. 532, 4 S. E. 782.

See 31 Cent. Dig. tit. "Justices of the Peace," § 402.

Existence of other adequate remedy see *infra*, IV, O, 6, c, (II), (B).

dered contrary to agreement;[34] and that it has been satisfied;[35] and that an appeal does not lie,[36] or has been lost without fault on the part of the party seeking relief.[37] But equity will not interfere where a party was only prevented from pleading a good legal defense because it involved plaintiff's title,[38] or merely because a debt was split so as to bring it within the justice's jurisdiction;[39] and in Illinois no injunction can be granted in any case where the judgment is for less than twenty dollars.[40]

(B) *Fraud, Accident, or Mistake.* Fraud, unavoidable accident, or excusable mistake is good ground for equitable relief from a justice's judgment.[41]

(II) *Grounds For Refusing Relief*—(A) *In General.* While it has been held that a party who sues in equity to set aside a judgment by default rendered without jurisdiction need not make any showing upon the merits,[42] the better established rule is that equity will not interfere with a justice's judgment unless it be made to appear that another trial might result differently.[43] In Alabama justices are authorized to hear and determine cases according to justice and equity, and a court of chancery will not interfere where the matter in dispute is less than twenty dollars.[44]

(B) *Existence of Other Adequate Remedy.* A court of equity will not interfere with the judgment of a justice of the peace where the party seeking relief has or has pursued an adequate remedy at law;[45] and in some states, even where

34. Gwinn *v.* Newton, 8 Humphr. (Tenn.) 710; Gulf, etc., R. Co. *v.* King, 80 Tex. 681, 16 S. W. 641.

35. McFarren *v.* Athey, 6 Kan. App. 921, 49 Pac. 794.

36. Merriman *v.* Walton, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786; Gulf, etc., R. Co. *v.* Rawlins, 80 Tex. 579, 16 S. W. 430; Jennings *v.* Shiner, (Tex. Civ. App. 1897) 43 S. W. 276. But see Halcom *v.* Kelly, 57 Tex. 618; Bullard *v.* White, 2 Tex. App. Civ. Cas. § 286.

37. Tomlinson *v.* Litze, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. Rep. 458; Horn *v.* Queen, 4 Nebr. 108.

38. Davis *v.* Pou, 108 Ala. 443, 19 So. 362.

39. Pryor *v.* Emerson, 22 Tex. 162, to the effect that equity will not grant relief unless it appears that by reason of the division defendant was deprived of some right or remedy and that he had not consented to the division.

40. Breckenridge *v.* McCormick, 43 Ill. 491, in which the statute was held to apply to the collection of an unpaid balance of less than twenty dollars on a judgment for a greater amount. See also York *v.* Kile, 67 Ill. 233, in which the injunction was dissolved because the judgment did not exceed twenty dollars.

41. *Alabama.*— Wilson *v.* Collins, 9 Ala. 127.

California.— Chester *v.* Miller, 13 Cal. 558.

Georgia.— See Lee *v.* Arnsdorff, 86 Ga. 264, in which the evidence failed to sustain the fraud alleged. *Compare* Johnson *v.* Driver, 108 Ga. 595, 34 S. E. 158.

Indiana.— Greenwalt *v.* May, 127 Ind. 511, 27 N. E. 158, 22 Am. St. Rep. 660.

Iowa.— Dady *v.* Brown, 76 Iowa 528, 41 N. W. 209.

Kansas.— Kimble *v.* Short, 2 Kan. App. 130, 43 Pac. 317.

Michigan.— Burpee *v.* Smith, Walk. 327.

Missouri.— Sanderson *v.* Voelcker, 51 Mo. App. 328.

New Jersey.— Brown *v.* Elliott, 17 N. J. Eq. 353.

New York.— Hinckley *v.* Miles, 15 Hun 170.

North Carolina.— See Gallop *v.* Allen, 113 N. C. 24, 18 S. E. 55.

Oregon.— Marsh *v.* Perrin, 10 Oreg. 364.

Texas.— Gulf, etc., R. Co. *v.* Stephenson, (Civ. App. 1894) 26 S. W. 236.

Vermont.— See Davison *v.* Heffron, 31 Vt. 687; Babcock *v.* Brown, 25 Vt. 550, 60 Am. Dec. 290, in which the facts did not support the allegations of the petitions.

See 31 Cent. Dig. tit. "Justices of the Peace," § 403.

Negligence of attorney imputed to petitioner see Babcock *v.* Brown, 25 Vt. 550, 60 Am. Dec. 290.

42. Henkle *v.* Holmes, 97 Iowa 695, 66 N. W. 910.

43. *California.*— Burbridge *v.* Rauer, 146 Cal. 21, 79 Pac. 526.

Kansas.— True *v.* Mendenhall, 67 Kan. 497, 73 Pac. 67; Poor *v.* Tuston, 53 Kan. 86, 35 Pac. 792; Devinney *v.* Mann, 24 Kan. 682.

New Hampshire.— Ela *v.* Goss, 20 N. H. 52.

Ohio.— Dixon *v.* Bird Varnish Co., 10 Ohio Dec. (Reprint) 481, 21 Cinc. L. Bul. 258.

Oregon.— Meinert *v.* Harder, 39 Oreg. 609, 65 Pac. 1056.

Texas.— Masterson *v.* Ashcom, 54 Tex. 324.

See 31 Cent. Dig. tit. "Justices of the Peace," § 404.

44. Williams *v.* Berry, 3 Stew. & P. (Ala.) 284.

45. *California.*— Hollenbeak *v.* McCoy, 127 Cal. 21, 59 Pac. 201; Reagan *v.* Fitzgerald, 75 Cal. 230, 17 Pac. 198.

Connecticut.— See Blakeslee *v.* Murphy, 44 Conn. 188, where an injunction was granted on the ground that a writ of error might not be so served as to operate as a supersedeas.

Georgia.— Stites *v.* Knapp, Ga. Dec. Pt. II, 36.

the judgment of the justice of the peace is void, this rule of noninterference by a court of equity prevails.[46]

(c) *Laches or Delay.* That a party seeking relief in equity from a justice's judgment has been guilty of negligence, laches, or delay in protecting his rights is good ground for the refusal of relief.[47]

(III) *Procedure*[48] — (A) *Time of Application.*[49] Where the judgment sought to be relieved against is void, there is no limitation upon the time within which the application shall be made.[50]

(B) *Parties.*[51] Neither the justice[52] nor the officer about to levy execution[53] is a proper party to a proceeding to restrain the enforcement of a judgment. Notice to them of the injunction is sufficient.[54]

(C) *Pleading.* The general rules of equity pleading in suits for equitable relief against judgments apply to suits to declare void or to enjoin judgments rendered by justices of the peace.[55]

Illinois.— Garden City Wire, etc., Co. *v.* Kause, 67 Ill. App. 108; Gerarty *v.* Druiding, 44 Ill. App. 440.

Indiana.— Calvert *v.* Hendricks, 155 Ind. 592, 58 N. E. 832; Parsons *v.* Pierson, 128 Ind. 479, 28 N. E. 97; Baragree *v.* Cronkhite, 33 Ind. 192; Jamieson *v.* Caster, 16 Ind. 426; Pichon *v.* McHenry, 6 Blackf. 517.

Iowa.— Central Iowa R. Co. *v.* Piersol, 65 Iowa 498, 22 N. W. 648.

Maryland.— Brumbaugh *v.* Schnebly, 2 Md. 320.

Nebraska.— Proctor *v.* Pettitt, 25 Nebr. 96, 41 N. W. 131; Gould *v.* Loughran, 19 Nebr. 392, 27 N. W. 397.

Nevada.— Connery *v.* Swift, 9 Nev. 39.

New York.— Shottenkirk *v.* Wheeler, 3 Johns. Ch. 275; Gorman *v.* Low, 2 Edw. 324.

North Carolina.—Gallop *v.* Allen, 113 N. C. 24, 18 S. E. 55; Bissell *v.* Bozman, 17 N. C. 154.

South Carolina.— McDowall *v.* McDowall, Bailey Eq. 324.

Tennessee.— See Frierson *v.* Moody, 3 Humphr. 561.

Texas.— Halcomb *v.* Kelly, 57 Tex. 618; Rountree *v.* Walker, 46 Tex. 200; Rotzein *v.* Cox, 22 Tex. 62; Brady *v.* Hancock, 17 Tex. 361; Fitzhugh *v.* Orton, 12 Tex. 4; Long *v.* Anderson, 1 Tex. App. Civ. Cas. § 1161; Lackie *v.* Bramlett, 1 Tex. App. Civ. Cas. § 1129.

Vermont.— Sleeper *v.* Croker, 48 Vt. 9.

West Virginia.— Hickok *v.* Caton, 53 W. Va. 46, 44 S. E. 178.

See 31 Cent. Dig. tit. "Justices of the Peace," § 405.

46. *California.*— Luco *v.* Bushyhead, (1887) 14 Pac. 368; Luco *v.* Brown, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772; Gates *v.* Lane, 49 Cal. 266; Comstock *v.* Clemens, 19 Cal. 77.

Missouri.— St. Louis, etc., R. Co. *v.* Lowder, 59 Mo. App. 3.

Nebraska.— Lininger *v.* Glenn, 33 Nebr. 187, 49 N. W. 1128.

West Virginia.— Kanawha, etc., R. Co. *v.* Ryan, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

Wisconsin.— Crandall *v.* Bacon, 20 Wis. 639, 91 Am. Dec. 451.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 402, 405. But see *supra*, IV, O, 6, c, (I), (A).

47. *Illinois.*— Reynolds *v.* Mitchell, 1 Ill. 177; Carr *v.* Trainor, 36 Ill. App. 587.

Indiana.— Boyd *v.* Weaver, 134 Ind. 266, 33 N. E. 1027.

Missouri.— Herwick *v.* Koken Barber Supply Co., 61 Mo. App. 454.

Oregon.— Galbraith *v.* Barnard, 21 Oreg. 67, 26 Pac. 1110.

Tennessee.— Gunn *v.* Neal, 2 Heisk. 318.

Texas.— Odom *v.* McMahan, 67 Tex. 292, 3 S. W. 286; Halcomb *v.* Kelly, 57 Tex. 618; Masterson *v.* Ashcom, 54 Tex. 324; Musgrove *v.* Chambers, 12 Tex. 32; Fitzhugh *v.* Orton, 12 Tex. 4; Ivey *v.* McConnell, (Civ. App. 1892) 21 S. W. 403. *Compare* Cobbs *v.* Coleman, 14 Tex. 594, where a party who acted in due time under a law afterward held unconstitutional was held excused for not having obtained a certiorari in due time from the judge instead of the clerk.

See 31 Cent. Dig. tit. "Justices of the Peace," § 406.

48. See also Judgments, 23 Cyc. 1033 *et seq.*

49. See also Judgments, 23 Cyc. 1044.

Laches see *supra*, IV, O, 6, c, (II), (C).

50. McFaddin *v.* Spencer, 18 Tex. 440.

51. See Judgments, 23 Cyc. 1034.

52. Burpee *v.* Smith, Walk. (Mich.) 327; Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

53. Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

54. Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

55. See Judgments, 23 Cyc. 1039 *et seq.* And see the following cases:

Indiana.— Leary *v.* Dyson, 98 Ind. 317; Nicholson *v.* Stephens, 47 Ind. 185; Gage *v.* Clark, 22 Ind. 163.

Minnesota.— In an action to set aside a judgment on the ground that the summons was issued by one not a justice of the peace *de jure* or *de facto*, the complaint is defective where it does not sufficiently declare that the justice issuing the summons had not been elected at the general election preceding, and had not duly qualified. Kane *v.* Arneson

(D) *Relief.*[56] In a suit to enjoin a judgment rendered by a justice of the peace without jurisdiction, the court, having acquired jurisdiction of the controversy, should determine its merits.[57]

7. Collateral Attack[58] **— a. In General.** Where a justice of the peace has jurisdiction of the subject-matter of an action and of the parties, his judgment is no more subject to collateral attack than the judgments of courts of general jurisdiction.[59]

b. Grounds — (I) *In General.* No ground of objection which does not go to the justice's jurisdiction can be made the basis of a collateral attack upon his judgment.[60]

(II) *Want of Jurisdiction.* In most jurisdictions, where the justice's record shows a want of jurisdiction, or if it fails to show jurisdiction, his judgment is

Mercantile Co., 94 Minn. 451, 103 N. W. 218.

Missouri.— Smith *v.* De Lashmutt, 4 Mo. 103.

Nebraska.— Langley *v.* Ashe, 38 Nebr. 53, 56 N. W. 720.

North Carolina.— Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431, where it was held that relief might be sought by answer in an action founded on the judgment.

Texas.— Buie *v.* Crouch, 37 Tex. 53; Brundage *v.* Candle, 25 Tex. Suppl. 387.

West Virginia.— The bill must show that plaintiff is without adequate remedy at law. Hickok *v.* Caton, 53 W. Va. 46, 44 S. E. 178.

See 31 Cent. Dig. tit. "Justices of the Peace," § 407.

Filing copies of the proceedings with the complaint does not constitute them such exhibits as to become a part of the complaint, and they do not add to or detract from its direct averments. Matheney *v.* Earl, 75 Ind. 531.

56. See Judgments, 23 Cyc. 1036, 1050.

57. Smith *v.* Woods, 1 Tex. App. Civ. Cas. § 680. See also Willis *v.* Gordon, 22 Tex. 241, where a judgment was enjoined on proof that it was had without service; but on the admission of the party that he really owed the debt, the court terminated the controversy by continuing the injunction as to the justice's costs and giving judgment to respondent for the debt.

58. See also Judgments, 23 Cyc. 1055 *et seq.*

De facto justices see *supra*, I, D.

Stipulation agreeing to settlement not a judgment and may be contradicted see *supra*, IV, J, text and note 69.

59. *Georgia.*— Brown *v.* Webb, 121 Ga. 281, 48 S. E. 917.

Illinois.— Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801 [*reversing* 117 Ill. App. 644]; Pomeroy *v.* Rand, 157 Ill. 176, 41 N. E. 636; Weber *v.* German Ins. Co., 80 Ill. App. 390; Burke *v.* Dunning, 72 Ill. App. 193.

Indiana.— Alexander *v.* Gill, 130 Ind. 485, 30 N. E. 525; Friedline *v.* State, 93 Ind. 366.

Kansas.— State *v.* Miller, (1905) 80 Pac. 947; Vincent *v.* Davidson, 1 Kan. App. 606, 42 Pac. 390.

Michigan.— Somers *v.* Losey, 48 Mich. 294, 12 N. W. 188.

Missouri.— Livingston *v.* Allen, 80 Mo. App. 521; Wise *v.* Loring, 54 Mo. App. 258.

New York.— Wesson *v.* Chamberlain, 3 N. Y. 331; Sailesbury *v.* Creswell, 14 Hun 460.

North Carolina.— A judgment of a justice's court, regularly docketed on the judgment docket of the superior court, cannot be collaterally attacked. Moore *v.* Edwards, 92 N. C. 43; Reid *v.* Spoon, 66 N. C. 415.

Ohio.— McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93.

Pennsylvania.— A plaintiff whose cause of action is set out on the docket is concluded by it, and cannot impeach it collaterally. Warner *v.* Scott, 39 Pa. St. 274.

Tennessee.— Mason *v.* Westmoreland, 1 Head 555; Hall *v.* Heffly, 6 Humphr. 444.

Texas.— A justice's court is regarded as a court of general jurisdiction as respects a collateral attack upon its judgment. Odle *v.* Frost, 59 Tex. 684; Wakefield *v.* King, 2 Tex. App. Civ. Cas. § 695; Fendrick *v.* Shea, 1 Tex. App. Civ. Cas. § 912.

Vermont.— Small *v.* Haskins, 26 Vt. 209.

Virginia.— Adams *v.* Jennings, 103 Va. 579, 49 S. E. 982.

See 31 Cent. Dig. tit. "Justices of the Peace," § 408.

60. *Arkansas.*—Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105; Shaver *v.* Shell, 24 Ark. 122; Boothe *v.* Estes, 16 Ark. 104.

California.— Brush *v.* Smith, 141 Cal. 466, 75 Pac. 55; Gregory *v.* Allison, (1888) 19 Pac. 233; Gregory *v.* Bovier, 77 Cal. 121, 19 Pac. 232.

Illinois.— Bryant *v.* Ballance, 66 Ill. 188; Thatcher *v.* Maack, 7 Ill. App. 635.

Indiana.— Alexander *v.* Gill, 130 Ind. 485, 30 N. E. 525; Wilkinson *v.* Moore, 79 Ind. 397; McAlpine *v.* Sweetser, 76 Ind. 78.

Kansas.— Kendall *v.* Smith, 67 Kan. 90, 72 Pac. 543; Roby *v.* Verner, 31 Kan. 306, 1 Pac. 538; Day *v.* Garden City First Nat. Bank, 6 Kan. App. 821, 49 Pac. 691.

Louisiana.— Richardson *v.* Scott, 6 La. 54.

Michigan.— Chaddock *v.* Barry, 93 Mich. 542, 53 N. W. 785; Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006; Smith *v.* Brown, 34 Mich. 455; Reed *v.* Gage,

subject to collateral attack;[61] but by the weight of authority, if jurisdiction appears, the same rules are applicable as in courts of general jurisdiction; that is to say, the record of a justice of the peace is held to be entitled to the same absolute verity as the records of other courts, and no evidence is admitted to impeach it collaterally, although offered for the purpose of showing want of jurisdiction;[62] and where a justice has general jurisdiction, his judgment cannot be attacked

33 Mich. 179; Allen *v.* Mills, 26 Mich. 123; Van Kleek *v.* Eggleston, 7 Mich. 511.

Minnesota.— Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452.

Mississippi.— McDugle *v.* Fulmer, 82 Miss. 200, 34 So. 152.

Missouri.— Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; McLaughlin *v.* Schultz, 125 Mo. 469, 28 S. W. 755; State *v.* Six, 80 Mo. 61; Colvin *v.* Six, 79 Mo. 198; Cullen *v.* Callison, (App. 1904) 80 S. W. 290. See also Wise *v.* Loring, 54 Mo. App. 258.

New Hampshire.— Robertson *v.* Hale, 68 N. H. 538, 44 Atl. 695; Fowler *v.* Brooks, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425.

New York.—Strickland *v.* Laraway, 9 N. Y. Suppl. 761; Relyea *v.* Ramsay, 2 Wend. 602.

North Carolina.— Hiatt *v.* Simpson, 35 N. C. 72.

Oregon.— North Pacific Cycle Co. *v.* Thomas, 26 Oreg. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

Pennsylvania.— Cumberland County *v.* Boyd, 113 Pa. St. 52, 4 Atl. 346; Hazelett *v.* Ford, 10 Watts 101; Thompson *v.* O'Hanlen, 6 Watts 492; Tarbox *v.* Hays, 6 Watts 398, 31 Am. Dec. 478; Rank *v.* Behney, 5 Pa. Dist. 783.

South Dakota.— Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

Texas.— Roberts *v.* McCamant, 70 Tex. 743, 8 S. W. 543.

West Virginia.— Fishburne *v.* Baldwin, 46 W. Va. 19, 32 S. E. 1007; Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244.

United States.— Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. 391.

See 31 Cent. Dig. tit. "Justices of the Peace," § 409.

After a change of venue has been applied for a judgment by the justice is erroneous, but cannot be impeached in a collateral proceeding. Bryant *v.* Ballance, 66 Ill. 188; State *v.* Six, 80 Mo. 61; Colvin *v.* Six, 79 Mo. 198. But see Jones *v.* Pharis, 59 Mo. App. 254.

Judgments of de facto justices see *supra*, I, D.

61. *California.*—Rowley *v.* Howard, 23 Cal. 401, defect in return of service of process.

Illinois.— Johnson *v.* Logan, 68 Ill. 313; Johnson *v.* Baker, 38 Ill. 98, 87 Am. Dec. 293 (premature trial in defendant's absence); Pardon *v.* Dwire, 23 Ill. 572.

Maryland.— Fahey *v.* Mottu, 67 Md. 250, 10 Atl. 68, failure of record to show issue and service of summons.

Michigan.— Purdy *v.* Law, 132 Mich. 622, 94 N. W. 182, failure of record to show appearance of defendant as required by statute.

Pennsylvania.— Sharpless *v.* Lansing, 1 Chest. Co. Rep. 562.

Tennessee.— Summer *v.* Jarrett, 3 Baxt. 23; Wolf *v.* Eakerly, 10 Heisk. 124, amount in excess of jurisdiction.

Texas.— Stegall *v.* Huff, 54 Tex. 193, judgment by default based on a citation by publication, made on an affidavit that defendant's place of residence was unknown to the affiant.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 410, 411.

Jurisdiction to be shown by record see *supra*, III, O.

Presumption in favor of judgment.— But in Texas it has been held that in the absence of evidence to the contrary, a justice's judgment, collaterally attacked for want of service, will be presumed to be correct. Carter *v.* Griffin, 32 Tex. 212.

All the facts necessary to jurisdiction need not be shown in Texas. Holmes *v.* Buckner, 67 Tex. 107, 2 S. W. 452; Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730.

Omission of jurisdictional fact cured by admission see Karnes *v.* Alexander, 92 Mo. 660, 4 S. W. 518.

62. *Alabama.*— Lightsey *v.* Harris, 20 Ala. 409, cannot show that the warrant was not served on one of defendants.

California.— Gregory *v.* Bovier, 77 Cal. 121, 19 Pac. 232 (residence of defendant); Fagg *v.* Clements, 16 Cal. 389 (defendant's residence in another township).

Illinois.— Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801 [*reversing* 117 Ill. App. 644].

Massachusetts.— Hendrick *v.* Whittemore, 105 Mass. 23.

Michigan.— Miller *v.* Smith, 115 Mich. 427, 73 N. W. 418, 69 Am. St. Rep. 583 (residence of parties); Smith *v.* Pearce, 52 Mich. 370, 18 N. W. 111 (the same).

Missouri.— Fulkerson *v.* Davenport, 70 Mo. 541 (residence of defendant); Livingston *v.* Allen, 83 Mo. App. 294; Sutton *v.* Cole, 73 Mo. App. 518.

Pennsylvania.— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Tarbox *v.* Hays, 6 Watts 398, 31 Am. Dec. 478.

Texas.— Williams *v.* Haynes, 77 Tex. 283, 13 S. W. 1029, 19 Am. St. Rep. 752 (appearance); Watkins *v.* Davis, 61 Tex. 414; Long *v.* Brenneman, 59 Tex. 210; Endel *v.* Norris, (Civ. App. 1900) 57 S. W. 687.

Vermont.— Farr *v.* Ladd, 37 Vt. 156.

Wisconsin.— McCormick *v.* Cleveland, 98 Wis. 522, 74 N. W. 339, 67 Am. St. Rep. 827.

See 31 Cent. Dig. tit. "Justices of the Peace," § 410. And see JUDGMENTS, 23 Cyc. 1060, 1061.

collaterally because he had no jurisdiction in the form adopted.[63] Where the jurisdiction depends upon a fact which the justice is required to ascertain and settle, his decision, if he has jurisdiction of the parties, is conclusive in a collateral proceeding.[64]

(III) *Defects in Process.* Mere defects and irregularities in the process, or in the service or return thereof, which do not go to the jurisdiction, do not render a judgment void, and cannot be made the basis of a collateral attack on the judgment.[65]

(IV) *Disqualification of Justice.* It has been held that a judgment rendered by a justice of the peace cannot be impeached collaterally on the ground that the justice was disqualified, as for example by reason of his relationship to one of the parties.[66] Elsewhere, however, the decisions are to the contrary.[67]

8. Lien, Life, Enforcement and Revival, and Satisfaction — a. Lien.[68] As a rule judgments of justices of the peace create no liens on property,[69] until a transcript is filed, as provided by statute, in a superior court;[70] but in some states, by statute, a justice's judgment operates as a lien from the date of its enrolment,[71] or a money judgment is a lien from its date on the real estate of which the debtor is possessed, or to which he shall become entitled at or after such date, but is not a lien against a purchaser without notice until it is docketed in the county court according to law.[72]

Contra.— Bacon *v.* Jones, 117 Ga. 497, 43 S. E. 689; Cooley *v.* Barker, 122 Iowa 440, 98 N. W. 289, 101 Am. St. Rep. 276; Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149; Hamilton *v.* Wright, 11 N. C. 283.

63. Spade *v.* Bruner, 72 Pa. St. 57, which was a proceeding upon the transcript of another justice whose term of office had expired.

64. Thus the default judgment of a justice for plaintiff in a replevin suit, although not expressly finding it, is conclusive between the parties against collateral attack, that the value of the property did not exceed two hundred dollars, the limit of a justice's jurisdiction, a case within his jurisdiction being stated by the affidavit for replevin alleging the value was two hundred dollars. Hurd Rev. St. Ill. (1899) p. 1389, c. 119, § 27, providing that, where any property has been taken under a writ of replevin issued by a justice, and it shall appear on the trial that it exceeds in value the jurisdiction of the justice, he shall have power to order its return to defendant, authorizing the justice to determine the question of value, and it being conclusively presumed that he found the value to be within his jurisdiction. Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801 [*reversing* 117 Ill. App. 644]. See also *supra*, III, P, 1.

65. *Arkansas.*— Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

California.— Dore *v.* Dougherty, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48.

Indiana.— Fitch *v.* Ryall, 149 Ind. 554, 49 N. E. 455; Hume *v.* Conduitt, 76 Ind. 598.

Iowa.— Loughren *v.* Bonniwell, 125 Iowa 518, 101 N. W. 287, 106 Am. St. Rep. 319. See also Little *v.* Devendorf, 109 Iowa 47, 79 N. W. 476.

Kansas.— Nelson *v.* Becker, 14 Kan. 509.

Missouri.— Jeffries *v.* Wright, 51 Mo. 215; H. W. Crooker Shoe Co. *v.* Fry, 104 Mo. App. 134, 78 S. W. 313.

New York.— Reno *v.* Pinder, 20 N. Y. 298.

Ohio.— Righter *v.* Thornton, 11 Ohio Dec. (Reprint) 817, 30 Cinc. L. Bul. 32.

Oregon.— North Pac. Cycle Co. *v.* Thomas, 26 Oreg. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

Pennsylvania.— Sweeney *v.* Girolo, 154 Pa. St. 609, 26 Atl. 600.

South Dakota.— Kerr *v.* Murphy, (1905) 102 N. W. 687.

Texas.— Traylor *v.* Lide, (1887) 7 S. W. 58; Long *v.* Brenneman, 59 Tex. 210. See also Hambel *v.* Davis, (Civ. App. 1895) 33 S. W. 251.

See 31 Cent. Dig. tit. "Justices of the Peace," § 411.

66. Fowler *v.* Brooks, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425.

67. Dawson *v.* Wells, 3 Ind. 398; Pierce *v.* Bowers, 8 Baxt. (Tenn.) 353. See, however, Holmes *v.* Eason, 8 Lea (Tenn.) 754, holding that such a judgment was merely voidable where it was rendered without objection. See also *supra*, III, I.

68. See also Judgments, 23 Cyc. 1350 *et seq.*

69. Davis *v.* Harper, 14 App. Cas. (D. C.) 463; Ledbetter *v.* Osborne, 66 N. C. 379; Cresman *v.* Geoge, 1 N. C. 115.

Judgment for rent as lien upon crops see Hargrove *v.* Harris, 116 N. C. 418, 21 S. E. 916.

70. Filing judgment in court of record see Judgments, 23 Cyc. 1355.

71. Stevens *v.* Mangum, 27 Miss. 481.

A conveyance of land is void as against a judgment of a justice of the peace which has been duly enrolled before the conveyance is filed for record. Heirmann *v.* Stricklin, 66 Miss. 234.

72. Nuzum *v.* Herron, 52 W. Va. 499, 44 S. E. 257.

b. Life.[73] By the statutes of the various states the life of a justice's judgment is limited, and no execution can issue thereon after the period fixed, unless it has been kept alive in the manner provided by statute, or has been revived by scire facias.[74]

c. Enforcement and Revival — (I) *Enforcement.*[75] Besides the usual methods of enforcing judgments by action[76] or execution,[77] a justice's judgment may be enforced by scire facias,[78] or by a suit in equity.[79] Where a defendant dies after judgment against him, an execution cannot issue against his property without a scire facias to make his personal representative a party.[80]

(II) *Revival.*[81] Unless the issue of execution after a certain period is expressly prohibited,[82] judgments of justices of the peace which have for any cause become dormant may be revived by scire facias or other proceeding provided by statute, to the same extent that the judgments of higher courts may be.[83]

73. See also JUDGMENTS, 23 Cyc. 1428, 1436.

74. *Alabama.*—Execution cannot issue after the lapse of ten years from the issuance of the last previous execution. Brown *v.* Higginbottom, 19 Ala. 207.

California.— Judgments expire absolutely five years from entry, and the loss of the docket will not prevent the five years running. White *v.* Clark, 8 Cal. 512.

Delaware.— Execution may issue at any time within three years, and may be extended beyond that time, if followed up regularly; but if not there must be a scire facias. Messick *v.* Russel, 3 Harr. 13.

Georgia.— A judgment becomes dormant after seven years from the last entry on an execution issued thereon by an officer authorized to execute it. As to what constitutes such an entry see Bennett *v.* McConnell, 88 Ga. 177, 14 S. E. 208; Neal *v.* Brockhan, 87 Ga. 130, 13 S. E. 283; Gholston *v.* O'Kelley, 81 Ga. 19, 7 S. E. 107.

Iowa.— Execution cannot issue after the lapse of five years from entry. Givens *v.* Campbell, 20 Iowa 79.

Missouri.— After three years from rendition no execution can issue until judgment is revived. Pears *v.* Goff, 76 Mo. 92.

Pennsylvania.— After five years judgment must be revived before execution can issue. Inquirer Print, etc., Co. *v.* Wehrly, 157 Pa. St. 415, 27 Atl. 703; Smith *v.* Wehrly, 157 Pa. St. 407, 27 Atl. 700. *Compare* Heebner *v.* Chave, 5 Pa. St. 115; Ford *v.* Salisbury, 2 Pa. L. J. Rep. 401.

Tennessee.— McGrew *v.* Reasons, 3 Lea 485.

Texas.— Burns *v.* Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527.

See 31 Cent. Dig. tit. "Justices of the Peace," § 413.

Stay of execution see *infra*, IV, Q, 9.

Judgment suspended pending appeal see Twitty *v.* Bower, 84 Ga. 751, 11 S. E. 354; Dysart *v.* Branderth, 118 N. C. 968, 23 S. E. 966.

Effect of appeal on judgment generally see *infra*, V, A, 7.

75. See also JUDGMENTS, 23 Cyc. 1431 *et seq.*

76. See *infra*, IV, O, 9.

77. See *infra*, IV, Q.

78. Woolston *v.* Gale, 9 N. J. L. 32 (scire facias to show why new execution should not issue); Heath *v.* Tyson, Wright (Ohio) 442 (scire facias to subject realty must issue in county where the judgment is); Phelps *v.* Mott, Brayt. (Vt.) 191 (must set forth facts showing a case within the statute). In a special scire facias against terre-tenants, plaintiff must name all such tenants holding lands subject to the lien of the judgment. Thomas *v.* Farmers' Bank, 46 Md. 43. See also JUDGMENTS, 23 Cyc. 1434, 1435.

Cannot issue to bring in one against whom judgment has not been rendered see Orr *v.* Thompson, 9 Ill. 451; Naylor *v.* Carrell, 8 Kulp (Pa.) 208.

Parol proof of payment.— On scire facias to show cause why an execution should not issue on a judgment of the justice's predecessor, defendant may prove by parol that he paid the judgment to the justice who rendered it; it being proved that at the time of payment the justice was in office and had the docket, but neglected to enter the payment. Morrison *v.* King, 4 Blackf. (Ind.) 125.

79. Steere *v.* Hoagland, 39 Ill. 264 (creditors' bill); Ballentine *v.* Beall, 4 Ill. 203 (creditors' bill); Newdigate *v.* Jacobs, 9 Dana (Ky.) 17 (bill after return of *nulla bona* to subject any interest, legal or equitable, in any estate of the debtor, real or personal); Heiatt *v.* Barnes, 5 Dana (Ky.) 219 (bill for sale of debtor's lands); Lore *v.* Getsinger, 7 N. J. Eq. 191 (on return of execution unsatisfied, a bill may be filed for the discovery of any property of the debtor, and to subject it to the judgment); Bailey *v.* Burton, 8 Wend. (N. Y.) 339 (bill for discovery and account by several judgment creditors). But see Henderson *v.* Brooks, 3 Thomps. & C. (N. Y.) 445, where it was held that a creditors' suit cannot be maintained on a justice's judgment. See also JUDGMENTS, 23 Cyc. 1432.

80. Cooper *v.* May, 1 Harr. (Del.) 18.

81. See also JUDGMENTS, 23 Cyc. 1436 *et seq.*

82. Trammell *v.* Anderson, 52 Ark. 176, 12 S. W. 328.

83. *Alabama.*— Shelley *v.* Graves, 29 Ala. 385.

Georgia.—Wilcher *v.* Hamilton, 15 Ga. 435.

In reviving a judgment the justice must render the same judgment in kind as was rendered before,[84] and an order of revival merely confers on the judgment creditor the right to issue executions on the judgment after it has become dormant, and does not enlarge his common-law right to sue thereon.[85]

d. Satisfaction.[86] A judgment of a justice of the peace may be satisfied by payment duly made to the justice before an execution issues,[87] and made in

Indiana.— Wyant *v.* Wyant, 38 Ind. 48 (revival of judgment in favor of deceased person); Burton *v.* McGregor, 4 Ind. 550 (failure to enter judgment on scire facias within time fixed by statute discontinues suit).

Kansas.— Schultz *v.* Hine, 39 Kan. 334, 18 Pac. 221 (revival by action, or by motion and notice under Civ. Code, art. 19); Israel *v.* Nichols, 37 Kan. 68, 69, 14 Pac. 438, 439.

Mississippi.— Roberts *v.* Weiler, 55 Miss. 249.

Missouri.— Corby *v.* Tracy, 62 Mo. 511 (construing Wagner St. pp. 830, 831, §§ 5, 7–9); Jeffries *v.* Wright, 51 Mo. 215 (defendant cannot plead anything contrary to the sheriff's return, or anything else which he might have pleaded in the original suit); Wood *v.* Newberry, 48 Mo. 322 (when debtor has left the county creditor may revive by direct suit on judgment itself); Sublette *v.* St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S. W. 745 (construing Rev. St. (1899) § 4273); Kincaid *v.* Griffith, 64 Mo. App. 673 (affidavit must show that judgment was rendered by the justice before whom the proceeding is pending, or by his predecessor); Sappington *v.* Lenz, 53 Mo. App. 44 (computation of time for return of citation).

Nebraska.— Miller *v.* Curry, 17 Nebr. 321, 22 N. W. 559.

New Jersey.— Scire facias cannot issue after the expiration of the term of office of the justice who rendered the judgment. Swisher *v.* Hibler, 5 N. J. L. 947.

New York.— Scire facias must be brought within six years from rendition of judgment. Johnson *v.* Burrell, 2 Hill 238.

Pennsylvania.— Stewart *v.* Eisenhower, 3 Pa. Dist. 619 (to the effect that an appeal from a judgment reviving a judgment on a scire facias is not an action *ex contractu*, and need not be replied to by an affidavit of defense); Ford *v.* Sallisbury, 4 Pa. L. J. 187 (scire facias may issue after the expiration of a year and a day).

Tennessee.— Anderson *v.* Moore, 4 Baxt. 15 (revival where record is lost); Bryant *v.* Smith, 7 Coldw. 113 (circuit court has no jurisdiction); White *v.* Davenport, 7 Yerg. 475 (scire facias by clerk of county court to revive judgment of justice who has died or resigned must be made returnable to the clerk); Gunn *v.* Benson, 5 Yerg. 221 (notice unnecessary on scire facias to revive a judgment dormant for one year).

Texas.— The district court has no jurisdiction to revive a justice's judgment. Buie *v.* Crouch, 37 Tex. 53. In this state Rev. St. art. 1661, provides that "on the eleventh day after the rendition of any final judgment . . . it shall be the duty of the justice to issue an execution." Article 1664 declares that, "if no execution is issued within twelve months after the rendition of the judgment, the judgment shall become dormant, and no execution shall issue thereon unless such judgment be revived." Another article prescribes that a judgment in any court of record, where execution has not issued within twelve months, may be revived by scire facias or action thereon brought within ten years, and not after. Therefore, where a justice's judgment was rendered July 24, 1891, and *nunc pro tunc* entry thereof made August 31, 1901, it was held insufficient to authorize an execution, the *nunc pro tunc* entry being merely retrospective, and having the same effect as though made when judgment was originally rendered, and, no execution having been issued within twelve months from the time of such rendition, the judgment had become dormant, and, not having been revived within ten years, had become dead. Burns *v.* Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 415, 416.

A scire facias is not an action upon "contract, . . . express or implied," within the statute of limitations. Humphreys *v.* Lundy, 37 Mo. 320.

In Missouri, the act of Dec. 1, 1855, which limits to ten years actions on judgments of courts of record, which are liens on real estate, does not apply to justices' judgments. Humphreys *v.* Lundy, 37 Mo. 320. See also Corby *v.* Tracy, 62 Mo. 511.

84. McInnis *v.* Graves, 80 Miss. 632, 31 So. 902.

85. Marx *v.* Sanders, 98 Ala. 500, 11 So. 764.

86. See JUDGMENTS, 23 Cyc. 1463 *et seq.*

87. Medart *v.* Baker's Eureka Hot Air, etc., Mfg. Co., 51 Mo. App. 19; Cline *v.* Rudisill, 126 N. C. 523, 36 S. E. 36.

Payment after execution is invalid, unless made with the knowledge and consent of the judgment creditor. Medart *v.* Baker's Eureka Hot Air, etc., Mfg. Co., 51 Mo. App. 19, construing Rev. St. (1889) § 6316, which requires such consent whether the payment is made before or after execution.

In case of payment after execution issued, the justice receives the money as bailee of the debtor merely, and the creditor is not entitled to recover from the justice. Monteith *v.* Bissell, Wright (Ohio) 411.

Acceptance of defendant's tender.— Where, before judgment, defendant tenders and de-

legal currency.[88] So too the imprisonment of the debtor on execution is a satisfaction while it continues,[89] but neither the levy of execution,[90] nor, in the absence of statutory provision, the transfer of a justice's execution to another county,[91] is a good satisfaction. A justice may, on proper motion, set off mutual judgments rendered by him,[92] or by another justice.[93] After satisfaction a motion or action will lie before the justice to have it entered,[94] and where a justice neglects or refuses to enter satisfaction an action will lie against him.[95] In the absence of statutory provisions on the subject, no presumption of satisfaction arises within twenty years,[96] and the entry of satisfaction is only *prima facie* evidence of the fact, and can be proved to be incorrect.[97]

9. Actions on Judgments[98] — a. In General — (i) *Right of Action.* Where a justice of the peace has rendered a final judgment,[99] valid upon its face,[1] and the record of which shows the issuance of summons and return of personal service,[2] the judgment creditor may maintain an action thereon, although it has been docketed in the county clerk's office.[3] Under a statute requiring that, where the parties are the same, leave of court must be obtained before action can be brought, an assignee of a justice's judgment may sue without such leave.[4]

posits with the justice a sum in full of all indebtedness to plaintiff and costs, which sum plaintiff withdraws after judgment and appeal, and receipts for "as applying on the judgment," still claiming a balance, such acceptance is a full settlement of the judgment, since plaintiff cannot accept the money, except on the terms of deposit, without defendant's consent. Cline *v.* Rudisill, 126 N. C. 523, 36 S. E. 36 [*following* Kerr *v.* Sanders, 122 N. C. 635, 29 S. E. 943].

88. Hooker *v.* State, 7 Blackf. (Ind.) 272; Heald *v.* Bennett, 1 Dougl. (Mich.) 513.

Payment in unlawful currency, if made by and with the consent or approval of the owner of the judgment, is good. Buie *v.* Crouch, 37 Tex. 53.

89. Sunderland *v.* Loder, 5 Wend. (N. Y.) 58.

90. Denvrey *v.* Fox, 22 Barb. (N. Y.) 522; Boyd *v.* Mann, 9 Baxt. (Tenn.) 349, to the effect that an action may be maintained on a judgment, although execution has been levied on land and returned into the circuit court for condemnation.

91. Hollingworth *v.* Dickey, 24 Ga. 434.

92. Meloy *v.* Howk, 32 Ind. 94; Howk *v.* Meloy, 26 Ind. 176; O'Niel *v.* Whitecar, 1 Phila. (Pa.) 446.

Set-off of judgments generally see Judgments, 23 Cyc. 1478.

An unexpired stay of execution will not prevent the set-off. Meloy *v.* Howk, 32 Ind. 94.

Judgments on mutual accounts.— Where parties having mutual accounts each commenced a separate action before a justice, and each recovered judgment, and one appealed, that one, being about to fail in his defense, cannot set off his judgment, and thus secure costs. His judgment having been obtained since the commencement of the suit, the plea of set-off must be regarded as a plea *puis darrein continuance.* Groff *v.* Ressler, 27 Pa. St. 71.

93. McEwen *v.* Bigelow, 40 Mich. 215; Clark *v.* Story, 29 Barb. (N. Y.) 295. But see Kline *v.* McKee, 46 Pa. St. 519.

That the right of action on a judgment has been lost does not prevent the parties thereto from using it as a set-off or counter-claim against another justice's judgment. Clark *v.* Story, 29 Barb. (N. Y.) 295. But see Smith *v.* Jones, 2 Code Rep. (N. Y.) 78.

Where a judgment has been removed into the supreme court on certiorari, it cannot be set off against the judgment of another justice. Willard *v.* Fox, 18 Johns. (N. Y.) 497.

94. Palmer *v.* Hayes, 112 Ind. 289, 13 N. E. 882 (no answer to complaint that satisfaction was made more than six years before commencement of action); Bailey *v.* Hester, 101 N. C. 538, 8 S. E. 164 (motion after improvident issue of execution); Cunningham *v.* McCue, 31 Pa. St. 469 (notice to judgment plaintiff may be served by leaving copy with his wife at his dwelling-house).

95. In an action before one magistrate against another for refusing and neglecting to enter satisfaction of a judgment which has been paid, the record must show that the original judgment was before a magistrate, and its amount. Smith *v.* Early, 3 Harr. (Del.) 5.

96. McMahan *v.* Crabtree, 30 Ala. 470.

97. Dane *v.* Holmes, 41 Mich. 661, 3 N. W. 169. See also Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 145.

98. See also Judgments, 23 Cyc. 1502 *et seq.*

99. The judgment must be final. Anderson *v.* Young, 44 N. C. 408.

1. Where a judgment is void for uncertainty, no action will lie upon it. Hopper *v.* Lucas, 86 Ind. 43.

Judgment held sufficient to support action see Ames *v.* Hilliard, 25 Vt. 222.

2. Brown *v.* Cady, 19 Wend. (N. Y.) 477. See also Waterville Iron Mfg. Co. *v.* Goodwin, 43 Me. 431; Rossiter *v.* Peck, 3 Gray (Mass.) 538, where it was held that no action will lie where the record does not show service of process, and there is no proof of such service.

3. Harris *v.* Clark, 65 Hun (N. Y.) 361, 20 N. Y. Suppl. 232.

4. Kopper *v.* Howe, 2 Hilt. (N. Y.) 69.

(II) *Jurisdiction.* Where justices of the peace are given jurisdiction of actions on contract, they have jurisdiction of actions on judgments.[5] In some states this jurisdiction is unlimited by the amount involved,[6] while in others it is so limited.[7]

(III) *Form of Remedy.*[8] While the regular form of remedy is by action of debt, assumpsit will lie in some jurisdictions.[9] In Arkansas, where the record of a justice's judgment has been lost, a cumulative remedy is provided by statute, whereby the justice may, on motion of the judgment creditor and after five days' notice, render a new judgment.[10] In Delaware, where the action is before one justice on the judgment of a justice of another county, scire facias, not debt, is the proper remedy.[11]

(IV) *Joinder of Parties.* The general rules as to parties apply.[12] After a note has been merged into judgment, the indorser cannot be joined with the maker in an action on the judgment.[13]

(V) *Defenses.*[14] It is good defense to an action on a justice's judgment that execution is still available,[15] or that a writ of certiorari has been sued out, even after the commencement of the action, to remove the judgment;[16] and where the action is on a confessed judgment, defendant may defend on the ground of infancy when the judgment was confessed.[17]

b. Time to Sue and Limitations[18] — (I) *Accrual of Right.* The common-law right of action on a judgment accrues after the expiration of a year and a day, if no execution has been issued.[19] But in some states an action may be brought immediately upon the rendition of a judgment;[20] while in others the time at which an action may be brought is regulated by statute.[21]

(II) *Limitations.*[22] Being wholly regulated by statute, no general rules

5. Maguire *v.* Gallaghan, 1 Code Rep. (N. Y.) 127.

In Pennsylvania one justice cannot entertain an action on the judgment of another. Katch *v.* Benton Coal Co., 19 Pa. Super. Ct. 476.

6. Humphrey *v.* Persons, 23 Barb. (N. Y.) 313; Morgan *v.* Allen, 27 N. C. 156.

7. Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 337; Bishop *v.* Warner, 22 Vt. 591; Brush *v.* Torrey, Brayt. (Vt.) 141.

The declaration, not the ad damnum of the writ, determines the jurisdiction. Bishop *v.* Warner, 22 Vt. 591. But *compare* Brush *v.* Torrey, Brayt. (Vt.) 141, where it was held that the jurisdiction must be ascertained by the amount due on the judgment, as appears on the record and proceedings under the judgment; and that extrinsic evidence cannot be considered.

8. See also Judgments, 23 Cyc. 1505.

9. Alexander *v.* Arters, 11 Pa. Co. Ct. 211, 17 Pa. Co. Ct. 379 (in common pleas on judgment of justice of the same county); Green *v.* Fry, 10 Fed. Cas. No. 5,758, 1 Cranch C. C. 137. *Contra,* James *v.* Henry, 16 Johns. (N. Y.) 233; Bain *v.* Hunt, 10 N. C. 572.

10. Garibaldi *v.* Carroll, 33 Ark. 568, construing Gantt Dig. Ark. § 3774.

11. Johnson *v.* Hayes, 3 Harr. (Del.) 486.

12. See Judgments, 23 Cyc. 1507.

13. Wooten *v.* Maultsby, 69 N. C. 462.

14. See Judgments, 23 Cyc. 1511 *et seq.*

15. White *v.* Hadnot, 1 Port. (Ala.) 419.

16. Wemple *v.* Johnson, 13 Wend. (N. Y.) 515.

17. Etter *v.* Curtis, 7 Watts & S. (Pa.) 170. See, generally, Infants.

18. See Judgments, 23 Cyc. 1508 *et seq.*

19. Field *v.* Sims, 96 Ala. 540 (to the effect that the sections of the code relating to executions and revival of judgments do not suspend the common-law right to sue); White *v.* Hadnot, 1 Port. (Ala.) 419; Lee *v.* Giles, 1 Bailey (S. C.) 449, 21 Am. Dec. 476 [*approved* in Shooter *v.* McDuffie, 6 Rich. (S. C.) 61].

Where execution has issued, and is still in full force, an action on a justice's judgment is premature. Ligon *v.* McNeil, 6 Rich. (S. C.) 377.

20. Stuart *v.* Lander, 16 Cal. 372, 76 Am. Dec. 538; Fravel *v.* Springfield Tp., 34 Ind. 296 (action on default judgment); McDonald *v.* Butler, 3 Mich. 558 (action lies immediately, although execution has been stayed); Smith *v.* Mumford, 9 Cow. (N. Y.) 26. But see McGuire *v.* Gallagher, 2 Sandf. (N. Y.) 402; Hale *v.* Angel, 20 Johns. (N. Y.) 342.

21. See Barb Wire, etc., Works *v.* Malinowski, 58 Ill. App. 395 (holding the superior court of Cook county not within Ill. Laws (1891), p. 151, § 2); Parks *v.* Norton, 114 Iowa 732, 87 N. W. 698 [*following,* unwillingly, Weiser *v.* McDowell, 93 Iowa 772] (at any time after eight years from entry and within the next ten years); McGuire *v.* Gallagher, 2 Sandf. (N. Y.) 402 (the provision of the code that no action shall be brought within two years of rendition does not apply to judgments rendered before the code went into effect); Diederich *v.* Nachtsheim, 33 Wis. 225 (no action in the same county within two years after rendition).

22. See also Judgments, 23 Cyc. 1508 *et seq.*

can be laid down as to when an action upon a justice's judgment will be barred.[23]

c. Process. In an action on a justice's judgment, it is not necessary that the summons should state that the complaint will be on such judgment.[24]

d. Pleading — (I) *Declaration, Petition, or Complaint.*[25] While it is not necessary to set out the proceedings in full in pleading the judgment of a justice of the peace,[26] it is nevertheless necessary, in the absence of a statute dispensing with the requirement,[27] that the facts showing the jurisdiction of the justice over both the subject-matter and the person should be alleged in the declaration, petition, or complaint.[28] But it is not necessary to show that the justice was in commission at the time the judgment was rendered,[29] or, where the action is commenced by long summons, to allege that defendant was a resident of the county.[30]

(II) *Plea or Answer.*[31] In debt on a justice's judgment the plea of *nul tiel record* may be joined to a plea of payment.[32] Where the judgment sued on

23. *Alabama.*— Where a complaint shows that the action is brought on the judgment as originally rendered, it is barred in six years from its rendition, although revived in the meanwhile. Marx *v.* Sanders, 98 Ala. 500, 11 So. 764.

California.— After plea to the merits the court may refuse to allow defendant to set up the statute. Stuart *v.* Lander, 16 Cal. 372, 76 Am. Dec. 538.

Illinois.— American Ins. Co. *v.* Arbuckle, 32 Ill. App. 369, five years' limitation. *Compare* Eaton *v.* Henagan, 17 Ill. App. 156.

Iowa.— Action is not barred till eighteen years from rendition. Citizens' Nat. Bank *v.* Harris, (1903) 95 N. W. 272; Parks *v.* Norton, 114 Iowa 732, 87 N. W. 698; Norris *v.* Tripp, 111 Iowa 115, 82 N. W. 610; Weiser *v.* McDowell, 93 Iowa 772, 61 N. W. 1094. *Compare* Danemuller *v.* Burton, 4 Greene 445.

Massachusetts.— Seymour *v.* Deming, 9 Cush. 527 (suspension of statute during defendant's absence from state); Smith *v.* Morrison, 22 Pick. 430 (holding Rev. St. c. 120, § 1, applicable to justices' judgments).

Missouri.— Where an appeal is taken from a judgment, the statute does not begin to run until final affirmance. The limitation is five years. Sublette *v.* St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S. W. 745. See also Sublett *v.* Nelson, 38 Mo. 487, holding that justices' judgments were not barred by the statute of 1855.

New York.— Carshore *v.* Huyck, 6 Barb. 583 (revival by promise to pay); Green *v.* Hauser, 18 N. Y. Civ. Proc. 354 (defense must be set up by answer). See also under early statutes Conger *v.* Vandewater, 1 Abb. Pr. N. S. 126; Nicholls *v.* Atwood, 16 How. Pr. 475; Millard *v.* Whitaker, 5 Hill 408; Johnson *v.* Burrell, 2 Hill 238; Fairbanks *v.* Wood, 17 Wend. 329; Pease *v.* Howard, 14 Johns. 479.

North Carolina.— Salmon *v.* McLean, 116 N. C. 209, 21 S. E. 178 (statute begins to run from date of judgment granted on rehearing); Smith *v.* Brown, 99 N. C. 377, 6 S. E. 667 (judgment against personal representative cannot be enforced after seven years from rendition); Daniel *v.* Laughlin, 87 N. C. 433 (death of debtor does not arrest running of statute); Taylor *v.* Harrison, 13 N. C. 374 (action barred is not revived by statute extending the time of limitation).

South Carolina.— Vandiver *v.* Hammet, 4 Rich. 509 (statute begins to run after a year and a day); Griffin *v.* Heaton, 2 Bailey 58.

Texas.— Wahrenberger *v.* Horan, 18 Tex. 57, ten-year limitation.

West Virginia.— Livesay *v.* Dunn, 33 W. Va. 453, 10 S. E. 808, ten-year limitation.

See 31 Cent. Dig. tit. "Justices of the Peace," § 420.

Effect of revival see *supra*, IV, O, 8, c, (II).

24. Humphrey *v.* Persons, 23 Barb. (N. Y.) 313.

25. See Judgments, 23 Cyc. 1514.

26. Barnes *v.* Harris, 4 N. Y. 374 [*affirming* 3 Barb. 603].

27. In Indiana it is provided by statute that it is sufficient to allege that the judgment was duly given. Crake *v.* Crake, 18 Ind. 156; Willey *v.* Strickland, 8 Ind. 453; Shockney *v.* Smiley, 13 Ind. App. 181, 41 N. E. 348.

28. Crake *v.* Crake, 18 Ind. 156; Willey *v.* Strickland, 8 Ind. 453; Schockney *v.* Smiley, 13 Ind. App. 181, 41 N. E. 348; Barnes *v.* Harris, 3 Barb. (N. Y.) 603 [*affirmed* in 4 N. Y. 374, *approving* Cornell *v.* Barnes, 7 Hill 35; Lawton *v.* Erwin, 9 Wend. 233; Cleveland *v.* Rogers, 6 Wend. 438, and *disapproving* and *distinguishing* Stiles *v.* Stewart, 12 Wend. 473, 27 Am. Dec. 142; Smith *v.* Mumford, 9 Cow. 26]; Warner *v.* Simpson, 27 Wis. 115. *Compare* Groff *v.* Griswold, 1 Den. (N. Y.) 432. But see *contra*, Goodsell *v.* Leonard, 23 Mich. 374, where it was held that a declaration on a justice's judgment requires no further allegation in regard to jurisdiction than is required in a suit upon a judgment of a court of record.

29. Reed *v.* Gillet, 12 Johns. (N. Y.) 296.

30. Barnes *v.* Harris, 4 N. Y. 374.

31. See Judgments, 23 Cyc. 1517.

32. Witherwax *v.* Averill, 6 Cow. (N. Y.) 589. But see Adair *v.* Rogers, Wright (Ohio) 428, where it was held that *nul tiel record* and *nil debet* cannot be pleaded together.

was rendered by a justice of one township, against a defendant resident in another township, the recovery of the judgment and the residence of defendant must be pleaded in bar, and not in abatement.[33] Under a plea of set-off, defendant cannot show that he paid plaintiff's claim in full before the original suit was begun.[34] A fact which is necessarily implied from the facts pleaded need not itself be averred.[35] Where the suit is on a transcript of a judgment which does not show any record of service on defendant, and the affidavit of defense sets forth that the instrument sued on is not such an instrument as entitles plaintiff to judgment, but fails to allege want of service, a supplemental affidavit may be allowed.[36]

e. Evidence[37] — (I) *MATTERS TO BE PROVED.* Where, in an action upon the judgment of a justice of the peace, the existence of the judgment is denied, the facts conferring jurisdiction upon the justice must be proved;[38] and where the judgment was rendered by a justice of another state, the statutes of that state must be introduced to show affirmatively that he had jurisdiction.[39]

(II) *PRESUMPTION IN FAVOR OF JUDGMENT.* Where the docket recites that plaintiff declared "orally in assumpsit on the common counts and specially in writing," it cannot be assumed that in declaring specially he added a count upon a cause of action not cognizable by the justice, or that even if he did judgment was rendered on such count.[40]

(III) *ADMISSIBILITY.* Where the docket states that the judgment was rendered on confession, the recital is neither necessary nor conclusive, and it is competent to introduce the files of the case to show the character of the writing, alleged to be a confession, on which the judgment was founded.[41]

(IV) *SUFFICIENCY.* To sustain an action on a justice's judgment the evidence must show the justice's jurisdiction to render the judgment,[42] and the rendition of a valid judgment.[43] Where suit is brought on the transcript of a justice's judgment, the certified transcript is *prima facie* evidence on which plaintiff may recover,[44] if it is sufficiently certain and definite.[45] Where defendant gives in evidence a docket entry showing that the cause was removed by certiorari on the day named to the supreme court, it is sufficient to show in rebuttal an order of the supreme court, made about the same time, dismissing from the docket of that court a cause of the same title.[46]

f. Trial and Judgment.[47] An action on a justice's judgment against joint defendants should be discontinued as to a defendant who was not served in the original action, and judgment should only be rendered against him on whom service

33. Hampton *v.* Warren, 51 Ind. 288.

34. Ringelberg *v.* Peterson, 76 Mich. 107, 42 N. W. 1080.

35. See, generally, PLEADING. Where defendant pleaded the allowance of an appeal, it was held that the plea was not bad for want of an averment that a bond or recognizance was given on the appeal; and a replication that defendant moved an appeal, which was allowed, but was never entered, amounted to an admission that a valid appeal was taken and allowed. Curtiss *v.* Beardsley, 15 Conn. 518.

36. Veite *v.* McFadden, 3 Wkly. Notes Cas. (Pa.) 63.

37. See JUDGMENTS, 23 Cyc. 1520.

38. Draggoo *v.* Graham, 9 Ind. 212.

39. Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499.

40. Schlatterer *v.* Nickodemus, 50 Mich. 315, 15 N. W. 489.

41. Dodge *v.* Bird, 19 Mich. 518.

42. **Evidence of jurisdiction held sufficient** see Zeigler *v.* Henry, 77 Mich. 480, 43 N. W. 1018.

43. **Evidence insufficient to sustain action** see Bunker *v.* Forsaith, (Me. 1886) 4 Atl. 557.

Minutes as evidence.— In debt on the judgment of a justice whose commission had expired more than two years, if the minutes on his docket, although incomplete, are such as to show that the record of a regular judgment would be authorized, they will sustain the suit. Grosvenor *v.* Tarbox, 39 Me. 129.

Evidence held sufficient upon death of justice without leaving record see Ellsworth *v.* Learned, 21 Vt. 535.

44. Keck *v.* Appleback, 2 Penr. & W. (Pa.) 465.

45. **Transcript held insufficient,** because, while setting out figures apparently intended to state the amount of the judgment, it contained no mark or character to show what such figures represented, whether dollars, cents, or commodities, see Hopper *v.* Lucas, 86 Ind. 43.

46. Howard *v.* Rockwell, 1 Dougl. (Mich.) 315.

47. See JUDGMENTS, 23 Cyc. 1522.

was had.[48] Where it appeared on the trial that plaintiff's attorney delivered an execution against the debtor's person to the sheriff, and, after paying part of the debtor's board on demand, refused to pay more, it was held proper to charge that if plaintiff's agent refused to pay the expenses and defendant was discharged, no recovery could be had.[49]

P. Costs[50] — 1. In General. The right to and liability for costs in actions before justices of the peace depend entirely upon the provisions of the statutes, and they cannot be allowed or imposed except as authorized by statute.[51] Generally, however, the statutes entitle the successful party in a justice's court to costs,[52] or to costs not exceeding a certain amount.[53]

2. On Dismissal or Judgment For Want of Jurisdiction. Where a defendant successfully pleads to the jurisdiction of the court he is entitled to costs;[54] but it is otherwise if the case is stricken from the docket upon motion, or by the justice on discovering his want of jurisdiction.[55]

3. Withdrawal of Suit. Plaintiff in a suit in a justice's court cannot, after the writ is returned, withdraw the suit and thereby deprive defendant of the right to a judgment for costs.[56]

4. Taxation of Costs. The taxation of costs in a justice's court, except as affected by special statutes, is governed by the general rules on the subject.[57] The taxation of costs is in no sense a judgment, and therefore a justice of the peace may tax costs on a day subsequent to that of the rendition of the judgment.[58]

5. Security For Costs.[59] In the absence of statutory authority, a justice of the

48. Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627, construing Comp. Laws, §§ 5377, 5378.

49. Strawsine *v.* Salisbury, 75 Mich. 542, 42 N. W. 966, construing Howell Annot. St. § 8960.

50. **Compensation and fees of justice** see *supra*, II, B.

Costs on appeal from or certiorari to justice's court see Costs, 11 Cyc. 244 *et seq.*

Costs in superior court where amount recovered is within a justice's jurisdiction see Costs, 11 Cyc. 39.

51. See Welles *v.* Fowler, Kirby (Conn.) 236 (on judgment by confession); Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954. See also Costs, 11 Cyc. 24.

Statute in favor of laborers, clerks, servants, etc.— Under a statute providing that in actions tried before a justice, brought by any laborer, clerk, or servant for compensation for personal services, plaintiff, if he recovers, shall be entitled to an attorney's fee, a school-teacher is not entitled to recover such attorney's fee in a suit for wages as a teacher. Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

52. See Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94; Lagoo *v.* Seaman, 136 Mich. 418, 99 N. W. 393. Where plaintiff had instituted proceedings before a magistrate under the Pennsylvania landlord and tenant act of March 21, 1772, to recover a tract of land leased to defendants, and three juries successively disagreed, it was held, that each party should bear his own costs, as costs at law were a matter of statutory creation, and none were given in an abortive landlord and tenant proceeding. Rhoad *v.* Cain, 2 Chest. Co. Rep. (Pa.) 496.

53. **In Michigan,** Comp. Laws (1897), § 838, limiting the costs in a justice's court, unless otherwise provided, to ten dollars, does not limit the costs in a special proceeding to enforce a lien for services authorized by Comp. Laws (1897), §§ 10,756–10,770, which require the sheriff to attach the property to satisfy plaintiff's claim with costs and disbursements, and which direct that the property be sold to satisfy the judgment, costs, charges, and disbursements. Lagoo *v.* Seaman, 136 Mich. 418, 99 N. W. 393.

In New York see Lauria *v.* Capobianco, 39 Misc. 441, 80 N. Y. Suppl. 203.

54. Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94.

55. Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94.

56. Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94.

57. **Taxation of costs** generally see Costs, 11 Cyc. 154 *et seq.*

Taxation of costs in proceeding before predecessor.— Where the term of office of a justice of the peace expires before the return-day of a summons issued by him, and on the return-day of such summons the parties appear before the successor in office of such justice, file pleadings, and proceed to a trial of the action, the costs of the proceeding before the late justice are not taxable in the proceedings before the new justice; the latter being a new action, and not a continuation of the proceedings before the late justice. Anderson *v.* Hanson, 28 Minn. 400, 10 N. W. 429.

58. Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94.

59. **Security for costs** generally see Costs, 11 Cyc. 170 *et seq.*

peace cannot require a plaintiff, whether a resident or a non-resident, to give security for costs, and as a rule such authority has not been conferred.[60]

Q. Execution[61] — **1. In General.** Upon the rendition of a judgment in his favor in a justice's court, a party is entitled to execution,[62] and, in the absence of a statute requiring that it be done, it is not necessary that the judgment contain an order directing its issuance.[63] Entry of a judgment is absolutely essential to an execution,[64] and where there is no valid judgment in existence to uphold it, an execution may be attacked collaterally as well as directly.[65] But mere errors and irregularities in a judgment, for which it might be reversed, but which do not render it void, will not invalidate an execution issued thereon, which is otherwise valid.[66]

2. Property Subject to Execution.[67] Generally speaking, any personal property of the judgment debtor is subject to execution,[68] but real property is not unless by express statutory provision.[69]

3. Issuance[70] — **a. In General.** A justice of the peace may, except in so far as prevented by statute, issue execution at any time during the life of the judgment,[71] even though the right of action on it has expired;[72] and, where the issu-

60. Smith *v.* Humphrey, 15 Iowa 428 (holding that the statute requiring non-resident plaintiffs in certain cases to give security for costs applies only to proceedings in the district courts); Gordon *v.* Ellison, 9 Iowa 317, 74 Am. Dec. 353; Payne *v.* Hathaway, 4 N. Y. Leg. Obs. 21 (holding that the statute providing that defendant may compel plaintiff to give security for costs where the latter is an infant and sues by guardian *ad litem* or next friend applies only to courts of record, and does not authorize a justice to compel an infant plaintiff to give security for costs).

A municipal court, not being a court of record, cannot require a non-resident to give security for costs under N. Y. Code Civ. Proc. § 3268. Longrill *v.* Downey, 7 N. Y. Suppl. 503; Mellen *v.* Hutchins, 8 Abb. N. Cas. (N. Y.) 228.

61. See, generally, Executions, 17 Cyc. 878.

On transcript of judgment filed in superior court see Executions, 17 Cyc. 931.

62. See the cases in the notes following.

On judgment by default in attachment, it is proper to issue execution instead of an order for the sale of the attached property. Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910.

Mo. Acts (1855), §§ 65, 66, regulating executions, do not apply to those issued by justices. Bennett *v.* Vinyard, 34 Mo. 216.

63. Roberts *v.* Connellee, 71 Tex. 11, 8 S. W. 626.

64. Hall *v.* Bramell, 87 Mo. App. 285; Huffman *v.* Sisk, 62 Mo. App. 398; Loth *v.* Faconesowich, 22 Mo. App. 68. See also Executions, 17 Cyc. 924 *et seq.*

The verdict of a jury is insufficient to support an execution. Lowther *v.* Davis, 33 W. Va. 132, 10 S. E. 20. See Executions, 17 Cyc. 924, text and note 32.

Dormant judgments see *supra*, IV, O, 8, b.

65. *Georgia.*— Benson *v.* Dyer, 69 Ga. 190.
Illinois.— Heagle *v.* Wheeland, 64 Ill. 423.
Kansas.— Olson *v.* Nunally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.
Maryland.— West *v.* Hughes, 1 Harr. & J. 6.
New York.— Cornell *v.* Barnes, 7 Hill 35.
See 31 Cent. Dig. tit. "Justices of the Peace," § 426; and, generally, Executions, 17 Cyc. 924, 929.

66. Collins *v.* Camp, 94 Ga. 460, 20 S. E. 356; Hodge *v.* Adee, 2 Lans. (N. Y.) 314; Jennings *v.* Carter, 2 Wend. (N. Y.) 446, 20 Am. Dec. 635; White *v.* Patterson, 1 Baxt. (Tenn.) 450. See, generally, Executions, 17 Cyc. 930.

67. See, generally, Executions, 17 Cyc. 940 *et seq.*

68. Taffe *v.* Warnick, 3 Blackf. (Ind.) 111, 23 Am. Dec. 383; Kyler *v.* Dunlap, 18 B. Mon. (Ky.) 561; Wheeler *v.* Smith, 11 Barb. (N. Y.) 345, surplus from previous execution sale.

A term for years or leasehold is subject to execution. Barr *v.* Doe, 6 Blackf. (Ind.) 335, 38 Am. Dec. 146; Glenn *v.* Peters, 44 N. C. 457, 59 Am. Dec. 563; Lerew *v.* Rinehart, 3 Pa. Co. Ct. 50. *Contra,* Putman *v.* Westcott, 19 Johns. (N. Y.) 73.

Choses in action not subject see Crawford *v.* Schmitz, 139 Ill. 564, 29 N. E. 40 [*affirming* 41 Ill. App. 357].

Justice's judgment not subject see Bowen *v.* Howard, 3 Fed. Cas. No. 1,723, 5 Cranch C. C. 308.

Boat not subject see Markham *v.* Dozier, 12 Mo. 288.

69. Adams *v.* Smith, 1 Ill. 283; Freeman *v.* Watts, 15 La. 476; Thompson *v.* Chauveau, 7 Mart. N. S. (La.) 331, 18 Am. Dec. 246.

70. See Executions, 17 Cyc. 882 *et seq.*

71. Woods *v.* Haviland, 59 Iowa 476, 13 N. W. 636.

72. Waltermire *v.* Westover, 14 N. Y. 16. N. Y. Code Civ. Proc. §§ 382, 3017 (before the amendment of 1894), requiring an action on a judgment of a justice's court to be brought within six years, did not limit the power of the court to permit an execution to be issued on such judgment after the lapse of six years. Becker *v.* Porter, 17 N. Y. App. Div. 183, 45 N. Y. Suppl. 296.

ance of execution is regarded as a purely ministerial act, he may delegate his power to another.[73] The time at which, and the period within which, an execution may issue is wholly regulated by the statutes of the different states;[74] but the premature or belated issuance of an execution will render it voidable only and not void.[75] On the other hand, where a statute requires that before an execution shall

73. Kyle *v.* Evans, 3 Ala. 481, 37 Am. Dec. 705, holding also that the delegation need not be in writing.

74. *Delaware.*— A fieri facias cannot issue more than three years after judgment. Spear *v.* Hill, 2 Marv. 150, 42 Atl. 424.

Illinois.— An execution cannot be issued before the expiration of twenty days, unless the party applying for it makes oath that he believes the debt will be lost unless execution issues forthwith. Where execution issues prematurely, there is no presumption that the justice required the oath. Schneider *v.* Burke, 86 Ill. App. 160. See also Bank of Commerce *v.* Franklin, 88 Ill. App. 198.

Indiana.— Execution must issue within a reasonable time. State *v.* Brown, 5 Blackf. 494. *Compare* Tingle *v.* Pullium, 4 Blackf. 442, where plaintiff directed that no execution should issue until the time for taking appeal had expired, and it was held that the justice was not bound to issue execution until plaintiff should require it.

Kentucky.— Execution may, by "order of the court," issue within ten days. Guelot *v.* Pearce, (1897) 38 S. W. 892.

Michigan.— Upon good cause shown the justice may issue execution upon the parol application of plaintiff within five days. Rash *v.* Whitney, 4 Mich. 495.

Missouri.— Execution cannot be sued out three years after rendition of a judgment, without first reviving the judgment; and the fact that an appeal has been taken and a supersedeas bond filed is immaterial. Sublette *v.* St. Louis, etc., R. Co., 81 Mo. App. 327.

New Jersey.— On a judgment rendered in the absence of defendant execution cannot issue before the expiration of the time of delay allowed to freeholders, unless applied for on the day judgment is rendered, or at a subsequent day on the proper affidavit, with notice to defendant. Eddy *v.* Williamson, 16 N. J. L. 415. Where a party applies for an execution against a freeholder before the time limited by law has expired, it is the court, and not the party only, who must think there is danger. Krumeick *v.* Krumeick, 14 N. J. L. 39. Where application for execution is not made immediately on rendition of judgment and in the presence of the debtor, notice of subsequent application should be given him, allowing him reasonable time to obtain the benefits of the statute allowing the giving of security. Krumeick *v.* Krumeick, *supra.*

New York.— Morse *v.* Goold, 11 N. Y. 281, 62 Am. Dec. 103 (new execution cannot issue after two years from rendition of judgment); Matter of Phelps, 6 Misc. 397, 26 N. Y. Suppl. 774 (execution may issue after one year from judgment debtor's death); Moulton *v.* Kavana, 21 Wend. 648 (notice by plaintiff, at the close of the trial, and before judgment, in the hearing of defendant's counsel, that he will apply for immediate execution, is sufficient to authorize it on oath of danger); Cogswell *v.* Cole, 21 Wend. 34 (execution against a resident householder issued before the time limited is good, if applied for at rendition of judgment); Sellick *v.* Brown, 19 Johns. 271 (the required oath must be taken at the rendition of judgment against a freeholder or inhabitant having a family, to warrant execution before the expiration of thirty days). An execution, upon an appeal to the county court, cannot be regularly issued until the expiration of thirty days after judgment. Teall *v.* Van Wyck, 10 Barb. 376.

Ohio.— A justice is not bound to issue execution, without special order, until the time allowed for staying execution has expired. Sharpless *v.* Taylor, 12 Ohio 243.

Pennsylvania.— Logan *v.* Griffin, 11 Pa. Dist. 454 (execution cannot issue in the common pleas upon transcript of justice's judgment not revived within five years, until judgment of revival is there obtained); Knapp *v.* Stoner, 13 Lanc. Bar 67 (upon demand execution may issue before time for appeal has passed); Spaith *v.* Guffey, 30 Pittsb. Leg. J. N. S. 307 (execution cannot issue on a judgment more than five years old, upon which no prior execution has issued). Plaintiff recovering a judgment before a magistrate may issue execution at once, without waiting until defendant's right of appeal expires. If defendant afterward appeals, the costs of execution will follow the judgment. Sickles *v.* Carroll, 10 Pa. Co. Ct. 646.

Tennessee.— Under Code, §§ 3009, 3011, an affidavit of a judgment creditor that his debt will be lost if execution is not issued instanter is insufficient to warrant a justice in issuing execution until the expiration of two days from the rendition of the judgment. Clark *v.* Bond, 7 Baxt. 288.

Texas.— Burns *v.* Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527, as to which see *supra*, IV, O, 8, c, (II), text and note 83.

Wisconsin.— McCormick *v.* Ryan, 106 Wis. 209, 82 N. W. 137 (no execution after ten years); Selsby *v.* Redlon, 19 Wis. 17 (within five years).

See 31 Cent. Dig. tit. "Justices of the Peace," § 428.

Dormant judgment see *supra*, IV, O, 8, b.

75. Friedman *v.* Waldrop, 97 Ala. 434, 12 So. 427; Waldrop *v.* Friedman, 90 Ala. 157, 7 So. 510, 24 Am. St. Rep. 775; Sandlin *v.* Anderson, 76 Ala. 403; Knoxville City Mills Co. *v.* Lovinger, 83 Ga. 563, 10 S. E. 230; Guelot *v.* Pearce, (Ky. 1897) 38 S. W. 892. An execution prematurely issued by a justice of the peace upon an insufficient affidavit is not void, but valid until set aside, and only

issue, the justice shall enter on his docket the amount of the debt, damages, and costs, a compliance with it is essential to the issuance of a valid execution;[76] but a failure by the justice to note on his docket the time of issuing execution, and to whom it was delivered, or the fact that it was issued, does not necessarily vitiate an execution actually and properly issued and delivered.[77] The issue of an execution out of a court of record upon a justice's judgment recorded in such court is a waiver of a previous writ issued by the justice.[78]

b. Issuance in or to County Other Than Where Judgment Was Rendered. Upon compliance with the statutory requirements on the subject, execution may in some states be issued on a justice's judgment in or to a county other than that in which the judgment itself was rendered;[79] and indeed by the practice

defendant can take advantage of its irregularity; nor even he collaterally. Miller *v.* O'Bannon, 4. Lea (Tenn.) 398. See also Dawson *v.* Cunning, 50 Ill. App. 286, where it was held that an execution issued before the time for appeal has expired is effective, except that no property can be sold thereunder within such time.

Injunction against premature execution see Weikel *v.* Cate, 58 Md. 105; and *infra*, IV, Q, 10, b.

76. Huffman *v.* Sisk, 62 Mo. App. 398; Loth *v.* Faconesowich, 22 Mo. App. 68.

77. Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006, construing Howell Annot. St. Mich. § 7053, subds. 12, 13.

78. Davis *v.* Harper, 14 App. Cas. (D. C.) 463.

79. *Alabama.*— In Code, § 3349, providing that an execution issued by a justice, and directed to a constable of another county, must be certified by the judge of probate of the county in which it was issued, or by a justice of the peace of the county to which it is sent, "who has knowledge of the handwriting of the justice issuing it," the quoted clause refers to the justice of the county to which the execution is sent, and a certificate by a probate judge that the person issuing the execution was an acting justice of the peace of his county is sufficient. Campbell *v.* Smith, 116 Ala. 290, 22 So. 545, 67 Am. St. Rep. 113. A levy under an execution issued by a justice of the peace, and sent to another county, which is not authenticated by the certificate of the probate judge or of a justice of the peace of the latter county who is acquainted with his handwriting, as provided for by the statute, is void. Street *v.* McClerkin, 77 Ala. 580. *Compare* Jordan *v.* Mead, 12 Ala. 247.

California.— In order to sell real estate of a judgment debtor under a justice's judgment, if the property lies in a different county, a transcript of the judgment must be filed in the recorder's office of that county, in order to fix the lien; otherwise no such proceedings are necessary, but the course for enforcement of the execution is the same as if it had issued from the district court. Campbell *v.* Wickware, 19 Cal. 145.

Delaware.— An execution cannot be issued by a justice in one county, on a transcript of a judgment of a justice of another county. The proper course is by scire facias. Lofland *v.* Cannon, 3 Harr. 320.

Georgia.— Before an execution can be levied on property in a county other than where it is issued, it must be indorsed by a justice of such county with his official signature. Dickson *v.* Burwell, 113 Ga. 93, 38 S. E. 319.

Pennsylvania.— A judgment may be transferred from the docket of a justice in one county to the docket of a justice of another for the purpose of issuing execution there (McKinney *v.* Tingley, 2 Kulp 454; Saul *v.* Geist, 1 Woodw. 306), provided the defendant resides or is found therein (Hintermeister *v.* Ithaca Organ, etc., Co., 1 Pa. Co. Ct. 268).

Tennessee.— Under New Code, § 3786, in order for execution to issue on a justice's judgment in a county other than where judgment was rendered, the judgment must be accompanied by the certificate of the clerk of the county court that the justice by whom the judgment was rendered and the execution issued was at the time an acting justice of the peace of his county. See construing this and earlier statutes of similar import State *v.* Hood, 16 Lea 235; Moore *v.* Lynch, 4 Baxt. 287; State *v.* Bettick, 1 Baxt. 209; Perry *v.* Royle, 9 Yerg. 18; Gibbs *v.* Bourland, 6 Yerg. 481. An execution, issued in one county upon a certified execution from another county, will be void, and will not protect the officer acting under it, unless the clerk of the county court, in his certificate, states that the person rendering the judgment upon which the certified execution issued was an acting justice of the peace. Eason *v.* Cummins, 11 Humphr. 210. Under the requirement that the clerk to certify that the magistrate granting a judgment and issuing execution was at the time an acting justice of the peace in his county, a certificate that he was such at the time of issuing the execution is not sufficient. Apperson *v.* Smith, 5 Sneed 372. An execution must be certified for transmission to another county before the expiration of the thirty days within which by law it is returnable. Lemons *v.* Wilson, 6 Baxt. 143. An execution issued in one county on a judgment rendered in another, in pursuance of the statute, must recite the fact that it is issued on an execution certified from the county in which the judgment was rendered, and parol or extrinsic proof will not be heard to supply the omission. Colville *v.* Neal, 2 Swan 89. Where an execution was issued in H county upon a judgment rendered in said county, and returned with the officer's indorsement upon

prevailing in some states a justice of the peace may issue his execution throughout the state.[80]

4. Form, Requisites, and Validity[81] — **a. In General.** An execution issued by a justice of the peace must conform to the prescribed statutory form if any.[82] Where no special form is prescribed, an execution which follows the form prescribed generally is sufficient.[83] The presumption is in favor of the regularity of a justice's execution,[84] and it need not show on its face all that may be necessary to give the court jurisdiction.[85] It must, however, follow the judgment or recognizance upon which it is based;[86] must be signed by the justice in his official capacity;[87] must in some jurisdictions be under seal;[88] and should have indorsed

it, and was then reissued, and taken into R county, and levied on land situated therein, it was held that the sale was void, as the execution, when returned, had fulfilled its function, and was incapable of being reissued. Paine *v.* Hoskins, 3 Lea 284.

Texas.— An execution issued from a justice's court of one county to another county, without a certificate of the county clerk as required by Rev. St. art. 1633, is voidable but not void. Seligson *v.* Staples, 1 Tex. App. Civ. Cas. § 1070.

See 31 Cent. Dig. tit. "Justices of the Peace," § 429.

Form of "backing" see Wilcher *v.* Pool, 121 Ga. 305, 48 S. E. 956; Dickson *v.* Burwell, 113 Ga. 93, 96, 38 S. E. 319.

To whom directed.— In Ala. Code, §§ 3349, 3350, providing that when a judgment debtor removes to, or has property in, a county other than that in which the judgment of a justice was rendered, execution may be issued by the justice, and "directed to any constable of such county," and may be executed by any constable of the county to which it is sent, the quoted clause is mandatory, and an execution issued by a justice of K county, directed "To any lawful officer of said county," and sent to C county to be executed, is void. Campbell *v.* Smith, 116 Ala. 290, 22 So. 545, 67 Am. St. Rep. 113. See Sandlin *v.* Anderson, 82 Ala. 330, 3 So. 28.

80. Gilbert *v.* Rider, Kirby (Conn.) 180. An execution issued on a judgment rendered by a justice of the peace may be directed to and be served by the sheriff or any constable in the county where the defendant resides. Stevens *v.* Mangum, 27 Miss. 481.

81. See, generally, Executions, 17 Cyc. 1009 *et seq.*

82. Streeter *v.* Frank, 3 Pinn. (Wis.) 386, 4 Chandl. 93.

83. Connors *v.* Joyce, 3 Lans. (N. Y.) 315.

Execution held sufficient.— An execution as follows: "Jackson county, ss: To any constable of said county greeting: In the name of the State of Iowa. You are commanded to levy of the goods and chattels of A. G. Burdick, excepting such goods and chattels as are by law exempt from execution, fifty-two dollars and forty-seven cents, which R. G. Gardner, lately before me, the undersigned, a justice of the peace of said county, recovered July 22, 1868, against him for damages and costs, and bring the money before me at my office in the town of South Fork in thirty days from the date hereof, to render to said plaintiff, and garnishee whom plaintiff directs. Given under my hand at the town aforesaid, the 24th day of July, 1868. Debt, $51.47. Costs, $1.50. Judgment, $52.97 including execution" was held not to be defective as failing to intelligibly refer to the judgment, state the time and place at which it was rendered, the names of the parties, and the amount recovered and to be collected, nor in failing to show that the venue was within the state of Iowa. Burdick *v.* Shigley, 30 Iowa 63.

84. Black *v.* Stefle, 6 S. W. 23, 9 Ky. L. Rep. 610; Peck *v.* Cavell, 16 Mich. 9.

85. Hamilton *v.* Moreland, 15 Ga. 343; State *v.* Burnside, 7 Blackf. (Ind.) 577; State *v.* Westbrook, 7 Blackf. (Ind.) 138. Where a justice has general jurisdiction to issue executions, his execution need not state facts necessary to give him jurisdiction of the action in which the judgment upon which it is issued is entered. Field *v.* Parker, 4 Hun (N. Y.) 342.

86. *Alabama.*— Cooper *v.* Jacobs, 82 Ala. 411, 2 So. 832, execution must show in whose favor it is issued.

California.— Brann *v.* Blum, 138 Cal. 644, 72 Pac. 168, construing Cal. Code Civ. Proc. § 902.

Georgia.— Steele *v.* Cochran, 88 Ga. 296, 14 S. E. 617, where it was held that there was no variance.

Massachusetts.— Albee *v.* Ward, 8 Mass. 79, execution on recognizance.

Pennsylvania.— Saul *v.* Geist, 1 Woodw. 306, execution on joint judgment must be joint.

See 31 Cent. Dig. tit. "Justices of the Peace," § 430.

Where the execution is on the same paper with the judgment, it must be considered as referring to the judgment, and is made certain as to the debt, interest, and costs, and the person who recovered the same. McLean *v.* Paul, 27 N. C. 22.

Omission of the year of the judgment will not vitiate an execution in all other respects regular. Perkins *v.* Spaulding, 2 Mich. 157.

Form of writ and indorsements see Brann *v.* Blum, 138 Cal. 644, 646, 72 Pac. 168.

87. Palmer *v.* Crosby, 11 Gray (Mass.) 46. See also Perry *v.* Whipple, 38 Vt. 278.

Signature to indorsement held sufficient signature to writ see Nichols *v.* Taylor, 6 T. B. Mon. (Ky.) 325.

88. Porter *v.* Haskell, 11 Me. 177.

upon it by the officer the time of its receipt.[89] On the other hand an execution is not rendered void by reason of the justice's failure to indorse on its back an account of the debt, damages, and costs, and the rate of interest on the judgment;[90] and it is no ground for reversing a judgment that the justice refused to indorse defendant's exemption from imprisonment on the execution against him.[91] The fact that an execution purports to be issued in the wrong county will not invalidate it, if in fact it was issued in the proper county,[92] nor will the fact that illegal items of cost are found in it render an execution void.[93] It is not necessary that an itemized bill of costs be issued with an execution.[94]

b. Directions For Levy and Return. A justice's execution must be directed to a duly authorized officer, usually the constable,[95] or, in default of such officer, to some person specially deputized to execute it.[96] The mandate must follow the statutory form, if any,[97] and should require the officer to make the amount of the judgment out of the goods and chattels of defendant,[98] or in default thereof out of his lands and tenements, if these are subject to execution.[99] It is not necessary that a particular day should be fixed on which the execution is to be returned,[1] but it should regularly be made returnable within the time fixed by law,[2] although where it is made returnable at a time beyond the statutory period it may be enforced within the time in which it should have been made returnable.[3] Where, upon the death or resignation of a justice, his papers are turned over to the clerk of the county court, an execution issued by him on a judgment

89. Gott *v.* Williams, 29 Mo. 461.

90. Buis *v.* Cooper, 63 Mo. App. 196, construing Rev. St. (1889) § 6305.

91. Spafford *v.* Griffen, 13 Johns. (N. Y.) 328.

92. Davis *v.* Davis, 2 Gratt. (Va.) 363.

The venue in the margin of an execution will not control where the body is dated in another county, and it appears that the case was tried and judgment entered in that county. Avery *v.* Lewis, 10 Vt. 332, 33 Am. Dec. 203.

93. Hall *v.* Bramell, 87 Mo. App. 285.

94. Albritton *v.* Williams, (Ala. 1902) 32 So. 636.

95. Smith *v.* Schell, 13 Serg. & R. (Pa.) 336; and cases cited *infra*, this and the following notes.

A fieri facias is a writ included in the generic word "process," as used in a statute declaring to what officer "every process in an action or proceeding shall be directed." Epperson *v.* Graves, 3 Ky. L. Rep. 527.

Municipal courts.— Where an act creating a municipal court with jurisdiction of justices' courts provides for the issuance of executions, but is silent as to whom they shall be directed to, N. Y. Code Civ. Proc. § 3025, providing that in justices' courts they shall be directed to any constable of the county, will govern, although the municipal court act provides for the appointment of constables from the city to attend on it. Levin *v.* Robie, 5 Misc. (N. Y.) 529, 25 N. Y. Suppl. 982.

Constable most convenient to defendant.— Where a statute provides that a justice's execution shall be directed to the constable of the "ward, district or township where the defendant resides, or the next constable most convenient to the defendant," the justice is to judge who is the next most convenient constable. Smith *v.* Schell, 13 Serg. & R. (Pa.) 336.

May be directed to sheriff.— Sandlin *v.* Anderson, 82 Ala. 330, 3 So. 28.

An execution directed to "any constable of the county" is not void, but may be legally executed by the proper constable of the district. Garrigues *v.* Jackson, 1 Ashm. (Pa.) 218.

96. Hampton *v.* Allison, 9 Humphr. (Tenn.) 113.

Form of deputation held valid see Hampton *v.* Allison, 9 Humphr. (Tenn.) 113, 114.

97. Kipp *v.* Chamberlin, 20 N. J. L. 656.

98. Gaskill *v.* Aldrich, 41 Ind. 338.

Mandate held sufficient see Brann *v.* Blum, 138 Cal. 644, 72 Pac. 168.

"Execute and sell according to law" following a judgment indorsed on the back of a warrant will be deemed an execution. Armstrong *v.* Bailey, 10 N. C. 463.

99. Lanier *v.* Stone, 8 N. C. 329.

1. Lewis *v.* Jones, 1 Ashm. (Pa.) 53; Evans *v.* Howell, 5 Lanc. L. Rev. (Pa.) 285.

2. Bander *v.* Burley, 15 Barb. (N. Y.) 604; Toof *v.* Bently, 5 Wend. (N. Y.) 276; Evans *v.* Howell, 5 Lanc. L. Rev. (Pa.) 285; Spaulding *v.* Robbins, 42 Vt. 90; Jameson *v.* Paddock, 14 Vt. 491; Allen *v.* Warren, 9 Vt. 263; *Ex p.* Hatch, 2 Aik. (Vt.) 28. An execution, issued by a justice of the peace, returnable in sixty days, instead of ninety days, as prescribed by law, is not merely erroneous, but is void, and will not justify the officer who levies it. Stevens *v.* Chouteau, 11 Mo. 382, 49 Am. Dec. 92.

3. Mitchell *v.* Corbin, 91 Ala. 599, 8 So. 810.

Clerical error.— An execution will not be set aside on certiorari where the justice makes affidavit, attached to the transcript, that naming a date for the return beyond the prescribed time was a clerical error. Evans *v.* Howell, 5 Lanc. L. Rev. (Pa.) 285.

of such justice must be made returnable to himself, and not to the county court.[4]

c. Amendment or Alteration.[5] Although a justice of the peace has power to amend an execution issued by him[6] before it is executed,[7] and may even change its direction to another township and another constable without making it void,[8] he cannot give a general authority to the constable to change dates, or to fill up or otherwise alter his process.[9]

5. Renewal and Reissue, and Alias and Pluries Writs — a. Renewal and Reissue.[10] In some states provision is made for the renewal and reissue of a justice's execution upon its return unsatisfied.[11] A formal return of *nulla bona* by the constable is not necessary,[12] and any memorandum in the handwriting of the justice, on any part of the execution, indicating his intention, and a redelivery to the constable is sufficient to constitute a renewal.[13] Under some statutes an execution must be renewed within the time within which a new execution can be lawfully issued,[14] but in New York an execution which has been issued and returned unsatisfied may be renewed after such time;[15] and a renewal by a justice is also authorized within six calendar months after his removal from office, which includes the expiration of his term.[16] The renewal of an execution restores it in full force in all respects,[17] and it has the same force and effect that a new writ would have.[18] But it must be made for the time prescribed by statute,[19] and a levy made after the expiration of the statutory period is unauthorized.[20] Whether an execution has been renewed before its expiration is a question of fact, of which the indorsement of the execution is not the only evidence; the justice's docket and his testimony may be considered.[21]

b. Alias and Pluries Writs.[22] Where a justice's execution duly issued is returned unsatisfied, either in whole or in part,[23] the judgment creditor may

4. White *v.* Davenport, 7 Yerg. (Tenn.) 475.

5. See, generally, Executions, 17 Cyc. 1043, 1047.

6. Johnson *v.* Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196; Brush *v.* Smith, 141 Cal. 466, 75 Pac. 55; Brann *v.* Blum, 138 Cal. 644, 72 Pac. 168; Silner *v.* Butterfield, 2 Ind. 24; Pierce *v.* Hubbard, 10 Johns. (N. Y.) 405.

7. **No power to amend after execution is executed.**— Porter *v.* Haskell, 11 Me. 177; Toof *v.* Bently, 5 Wend. (N. Y.) 276.

8. Atkinson *v.* Gatcher, 23 Ark. 101.

9. Pierce *v.* Hubbard, 10 Johns. (N. Y.) 405.

10. See also Executions, 17 Cyc. 1034 *et seq.*

11. See Calhoun County Ct. *v.* Buck, 27 Ill. 440; State *v.* Smith, 81 Mo. App. 671; Winne *v.* Houghtaling, 84 Hun (N. Y.) 166, 32 N. Y. Suppl. 450; Hodge *v.* Adee, 2 Lans. (N. Y.) 314; Bander *v.* Burley, 15 Barb. (N. Y.) 604. But see State *v.* Campbell, 2 Tyler (Vt.) 177. And *compare* Sawyer *v.* Doane, 19 Vt. 598.

Where sufficient property has been levied on, but there is not time enough remaining to advertise and sell, the execution may be renewed. People *v.* Hopson, 1 Den. (N. Y.) 574.

Showing as to sum due.— The indorsement of part of the amount paid upon an execution is a sufficient compliance with the statute requiring the sum due upon the execution to be expressed in the renewed execution. Ostrander *v.* Walter, 2 Hill (N. Y.) 329.

12. Visger *v.* Ward, 1 Wend. (N. Y.) 551; Wickham *v.* Miller, 12 Johns. (N. Y.) 320. But see Calhoun County Ct. *v.* Buck, 27 Ill. 440.

13. Preston *v.* Leavitt, 6 Wend. (N. Y.) 663; Wickham *v.* Miller, 12 Johns. (N. Y.) 320.

Signature unnecessary.—Preston *v.* Leavitt, 6 Wend. (N. Y.) 663. *Contra*, Huggins *v.* Ketchum, 20 N. C. 550.

14. Bigalow *v.* Barre, 30 Mich. 1; State *v.* Boettger, 39 Mo. App. 684; Bird *v.* Stone, 3 Hill (S. C.) 282.

15. Morse *v.* Goold, 11 N. Y. 281, 62 Am. Dec. 103.

16. Parsons *v.* Chamberlin, 4 Wend. (N. Y.) 512.

17. Hodge *v.* Adee, 2 Lans. (N. Y.) 314.

18. Bigalow *v.* Barre, 30 Mich. 1.

19. **Renewal for less than statutory time is void.**— Winne *v.* Houghtaling, 84 Hun (N. Y.) 166, 32 N. Y. Suppl. 450.

20. Bander *v.* Burley, 15 Barb. (N. Y.) 604.

21. State *v.* Smith, 81 Mo. App. 671.

22. See also Executions, 17 Cyc. 1034 *et seq.*

23. **Necessity of return.**— Friyer *v.* McNaughton, 110 Mich. 22, 67 N. W. 978; Moore *v.* Risden, 3 Pa. L. J. Rep. 409. See also Purnell *v.* Semans, 2 Houst. (Del.) 399, to the effect that where a fieri facias has not been returned, another fieri facias cannot be issued without resorting to a writ of scire facias, to enable defendant to show that the debt has been levied and collected on the former writ.

have other writs of execution issued while the judgment remains in force.[24] Mere irregularities in an alias execution will not render it void.[25]

6. Levy and Extent[26] — **a. By Whom Made.** While an execution on a justice's judgment is regularly levied by a constable,[27] it may in some states be levied by the sheriff.[28] In the absence of statutory authority, neither the justice nor the constable can deputize a private person to execute his final process.[29]

b. Time of Levy. The levy must be made before the return-day of the writ,[30] and during the life of the judgment.[31] The fact that a statute authorizes an execution to be levied in less than the usual time after judgment, upon the filing of the required affidavit as to the necessity of so doing, does not enlarge or abridge the writ when so issued, and it may be levied at any time before the return-day.[32]

Return without indorsement. — Where an execution which had been delivered to plaintiff's attorneys is returned without indorsement, an alias cannot issue unless it be shown either that the execution had been delivered to the officer during its life, or that the judgment had not been paid in whole or in part. People *v.* Brayton, 37 Ill. App. 319.

Where there has been a levy to the amount of the debt and costs, an alias cannot issue until after the former levy and execution is disposed of. Jacquett *v.* Lowber, 2 Houst. (Del.) 203.

24. Johnson *v.* Holloway, 82 Ill. 334; State *v.* Stokes, 99 Mo. App. 236, 73 S. W. 254; Faris *v.* State, 3 Ohio St. 159; Perry *v.* Royle, 9 Yerg. (Tenn.) 18; and other cases in the preceding and the following notes.

Time of issuance.—Although a fieri facias has been issued within three years after its rendition, and levied on the goods of defendant, and a venditioni exponas has also been issued thereon after the three years, and returned, "Goods sold and proceeds applied on other claims," an alias fieri facias cannot issue on such judgment three years or more after its rendition, unless issued on the same day such venditioni exponas is returned. Cowgill *v.* Mason, 4 Houst. (Del.) 320. An alias execution issued on a justice's judgment was not invalid because prior executions were returned by plaintiff's direction before they had run ninety days. State *v.* Stokes, 99 Mo. App. 236, 73 S. W. 254.

After the death of the defendant an alias cannot issue. Henderson *v.* Gandy, 11 Ala. 431. *Compare infra,* IV, Q, 6, e.

Procedendo to compel issuance of alias see McGavock *v.* Schneider, 7 Heisk. (Tenn.) 467.

Affidavit.—Where, upon affidavit, an execution is issued within twenty days after judgment, and is returned within that time, the same affidavit is sufficient to authorize the issuance of an alias before the twenty days have expired. Johnson *v.* Holloway, 82 Ill. 334.

Showing as to amount.—Where a judgment was rendered before a justice, for ninety-four dollars and fifty-two cents, upon which thirty-nine dollars and forty-eight cents was paid, and an execution was afterward issued, commanding the officer to collect the balance, to satisfy a judgment of ninety-four dollars and fifty-two cents, recovered, etc., but which was credited with thirty-nine dollars and forty-eight cents upon a former fieri facias, it was held that the last execution was regular and substantially pursued the judgment. Perry *v.* Royle, 9 Yerg. (Tenn.) 18.

25. Culbertson *v.* Milhollin, 22 Ind. 362, 85 Am. Dec. 428 (where the return was not attached to the alias); Lyon *v.* Fish, 20 Ohio 100.

The alteration of the date of the first execution, for the purpose of converting it into an alias, although irregular, will not render the alias void. Faris *v.* State, 3 Ohio St. 159.

26. See also Executions, 17 Cyc. 1076 *et seq.*

27. See the cases cited *infra,* this note; and *supra,* IV, Q, 4, b.

A constable of another county has no authority to make any levy or return under a justice's execution until it has been indorsed "*nulla bona.*" Formby *v.* Shackleford, 94 Ga. 670, 21 S. E. 711. *Compare supra,* IV, Q, 3, b

Where one justice irregularly issues execution on the judgment of another, a constable is not bound to execute or return it. Clifford *v.* Cabiness, 1 Dana (Ky.) 384.

In Virginia, where execution issues from the county or corporation court on a justice's judgment, it was held that it could not be served by a constable, except in the city of Richmond. Stokes *v.* Perkins, 4 Rand. 356.

28. Mickle *v.* Montgomery, 111 Ala. 415, 20 So. 441; Bennett *v.* McConnell, 88 Ga. 177, 14 S. E. 208.

29. Huff *v.* Alsup, 64 Mo. 51; Garlick *v.* Jones, 48 N. C. 404; State *v.* McKittrick, 11 Lea (Tenn.) 476.

Constable cannot deputize another to levy execution see Stacy *v.* Bernard, 20 Colo. App. 293, 78 Pac. 615.

30. Waldrop *v.* Friedman, 90 Ala. 157, 7 So. 510, 24 Am. St. Rep. 175, a levy after the return-day is void.

A levy on land cannot be made in North Carolina more than three months after the date of the execution. McEachin *v.* McFarland, 12 N. C. 444.

31. Unless revived, a magistrate's execution gives no authority to levy and sell after a year and a day from the time it issued. Bird *v.* Stone, 3 Hill (S. C.) 282.

32. Sidelinger *v.* Freeman, 86 Ill. App. 514, where it was contended that such an execution must be levied immediately.

c. Manner of Levy. Unless some statute intervenes,[33] the same rules of law govern the levy of justices' executions as govern the levy of executions from higher courts.[34] To authorize a levy upon land or immovables, it must appear by the execution that there is no personal property of defendant subject thereto,[35] or that defendant, being in possession, pointed out such property to the officer.[36] The fact that, at the time of the levy of an execution on land, defendant owned personalty sufficient to satisfy the execution will not invalidate it, if the proper entry was made on the writ before the levy.[37]

d. Abandonment. Where an execution has been levied by a constable, he may, on being informed of the invalidity of the writ, abandon the levy.[38]

e. Death of Plaintiff. If, after fieri facias issues and before it is executed, plaintiff dies, the writ may still be executed.[39]

7. Lien.[40] Executions issued on justice's judgments are generally liens only on the personalty.[41] The lien dates in some states from the delivery of the execution to the officer,[42] in others from its teste,[43] and in others the priority of executions depends upon the time of the actual levy.[44] The duration of the lien is fixed by statute, and during its existence the officer may sell without an alias writ, although the return-day has passed.[45] The lien of an execution is destroyed by the taking of an appeal from the judgment on which it

33. The inventory required in New Jersey by Justices Act, § 67, is essential only in the case of a constructive levy; if the constable takes actual possession of the property, or places a keeper in possession, it will amount to a valid levy, although no inventory be taken. State *v.* Martin, 51 N. J. L. 148, 16 Atl. 189; Nelson *v.* Van Gazelle Valve Mfg. Co., 45 N. J. Eq. 594, 17 Atl. 943.

Failure to indorse a levy on the execution is not fatal to the levy. The statutory provision is directory only. Havens *v.* Gordon, 5 Hun (N. Y.) 178.

34. Pixley *v.* Butts, 2 Cow. (N. Y.) 421. And see Executions, 17 Cyc. 1076 *et seq.*

Amendment of entry to cure mistake in levy.—Where a sheriff levies upon land not belonging to defendant, and makes an entry thereof on the writ, the mistake in the levy cannot be said to be a mistake in the entry on the writ, which might be corrected by an amendment of the entry on the writ. Fenno *v.* Coulter, 14 Ark. 38.

35. Robinson *v.* Burge, 71 Ga. 526; Hopkins *v.* Burch, 3 Ga. 222.

Execution issued from another county.— A constable may, after making an entry of *nulla bona* upon an execution issued outside of his county, levy the same upon land of defendant in that county, if the latter is a resident thereof when such entry is made, although there is no entry of *nulla bona* by a constable of the county in which the execution was issued. McCandless *v.* Inland Acid Co., 112 Ga. 291, 37 S. E. 419.

Presumption in favor of levy.—Where a levy on land is made in a county other than that in which the execution issued, a return of *nulla bona* having been made by another constable, it will be presumed that the return was made by a constable of the county in which judgment was rendered. Hollingworth *v.* Dickey, 24 Ga. 434.

Where specific land is pledged to secure the debt, it may be levied upon without an entry of *nulla bona*. Bennett *v.* McConnell, 88 Ga. 177, 14 S. E. 208.

36. Hopkins *v.* Burch, 3 Ga. 222. *Compare* Freeman *v.* Watts, 15 La. 476.

37. Willbanks *v.* Untriner, 98 Ga. 801, 25 S. E. 841.

38. Ezra *v.* Manlove, 7 Blackf. (Ind.) 389.

39. Murray *v.* Buchanan, 7 Blackf. (Ind.) 549.

40. See also Executions, 17 Cyc. 1049 *et seq.*

41. State Bank *v.* Marsh, 1 N. J. Eq. 288, to the effect that where an execution is sought to be enforced against a trust fund arising in part from the sale of personalty and in part from the sale of realty, and the fund created from the sale of personalty is exhausted, it will stand as to the fund created by the sale of realty, on the footing of the general debts.

42. Isbell *v.* Epps, 28 Ark. 35; Sidelinger *v.* Jones-Earl Shoe Co., 88 Ill. App. 188. Where executions on justices' judgments were delivered to the constable for levy, and within seventy days thereafter another execution was levied on personal property of the same defendant by the sheriff, the fact that the executions in the constable's hands were not levied immediately on their receipt by him, in the absence of proof of instructions from the creditors to delay such levy, will not make their lien subordinate to the lien of the execution which was actually levied. Sidelinger *v.* Jones-Earl Shoe Co., *supra.*

43. Beckerdite *v.* Arnold, 10 N. C. 296.

44. Wylie *v.* Hyde, 13 Johns. (N. Y.) 249, where it was held that if a constable levy under an execution and advertise for sale within twenty days after he has received the writ, but sells after the expiration of that time, the sale will be valid against an intermediate levy and sale on another execution, if the first sale was made before the return-day of the writ.

45. Page *v.* Gardner, 11 Pa. Co. Ct. 577,

is issued,[46] and it may also be lost by the officer's failure to comply with the statute in levying or executing the writ,[47] as by a failure to make due return as required by law,[48] or to keep it alive by the regular issuance of succeeding writs.[49] So too an attachment lien is lost, where the execution issued on the judgment in the suit in which the attachment issued does not comply with the statutory requirements.[50] A person specially appointed constable is to be regarded as the deputy of the proper constable in respect to the lien of executions in the hands of the latter, and can gain no advantage over him by taking prior possession of goods in his township.[51]

8. Custody and Disposition of Property. The duties of a constable or other officer as to the custody, care, and disposition of property levied on under an execution on a justice's judgment are in nowise dissimilar to those of a sheriff in the case of executions out of courts of record.[52] He is bound to keep the property levied on safely, unless it is delivered to defendant upon his giving a forthcoming bond,[53] or is left in the possession of a receiptor.[54] His interest in the property is such that he may maintain an action to recover possession of it against one who has purchased from defendant after the levy.[55]

9. Stay[56] — a. In General. In many states provision is made by statute authorizing a stay of execution upon certain prescribed terms and for a specified time.[57]

construing the Pennsylvania act of March 20, 1810.

46. Cope's Appeal, 39 Pa. St. 284. See *infra*, V, A, 7.

47. "If any of the provisions of the statutes are not complied with by the officer in levying or executing his writ, the lien obtained is lost." Fairbanks *v.* Bennett, 52 Mich. 61, 63, 17 N. W. 696 [*citing* Adams *v.* Abram, 38 Mich. 302; Millar *v.* Babcock, 29 Mich. 526; Roelofson *v.* Hatch, 3 Mich. 277; Buckley *v.* Lowry, 2 Mich. 418; Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498].

48. See Anderson *v.* Talbot, 1 Heisk. (Tenn.) 407.

49. Chaney *v.* Burford Lumber Co., 132 Ala. 315, 31 So. 369.

50. Jameson *v.* Paddock, 14 Vt. 491.

51. Jones *v.* Hoppie, 9 Mo. 173.

52. See Executions, 17 Cyc. 1121 *et seq.*

53. See Executions, 17 Cyc. 1121, 1124 *et seq.*

Extrinsic evidence to explain ambiguity in bond see Evans *v.* Shoemaker, 2 Blackf. (Ind.) 237.

Measure of damages on bond.—Where the bond is conditioned to return the property in as good order as it was when the bond was given, the only question on executing a writ of inquiry is the amount of plaintiff's damages; and in the absence of evidence as to the value of the property the amount of the execution is the rule of damages. Chinn *v.* Perry, 2 Blackf. (Ind.) 268.

Officer competent witness in action on bond see Chinn *v.* Perry, 2 Blackf. (Ind.) 268.

Execution on bond against security see Gilleland *v.* Ware, 4 Ala. 414.

54. See Executions, 17 Cyc 1123.

Failure to demand goods of receiptor.— If a constable delivers goods to a receiptor who promises to redeliver them on demand, and does not demand and sell them within the life of the execution, he loses all claim and title to the possession thereof. Brown *v.* Cook, 9 Johns. (N. Y.) 361.

55. Rue *v.* Perry, 63 Barb. (N. Y.) 40.

56. See also Executions, 17 Cyc. 1135 *et seq.*

57. *Delaware.*—A freeholder's stay is allowed in a suit commenced by summons, unless plaintiff makes oath as to the necessity of an earlier issuance of execution. Elligood *v.* Cannon, 4 Harr. 176.

Indiana.— See McIntosh *v.* Shotwell, 6 Blackf. 281.

Ohio.— After the expiration of the ten days in which execution may be stayed, bail may be put in with the consent of plaintiff. Whalon *v.* Glenn, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396.

Pennsylvania.— A freeholder is entitled to a stay upon the security of his real estate, and no time is prescribed at or before which the allegation of freehold must be made. Where execution has issued, he may obtain the stay upon paying accrued costs on the execution. Stiles *v.* Powers, 1 Ashm. 407.

Tennessee.— In all judgments before justices defendant is entitled, within two days after trial to stay of execution on giving proper security. Spradlin *v.* Bratton, 6 Lea 685. See also Apperson *v.* Smith, 5 Sneed 372, to the effect that after the issuance of execution, the two days having expired, a justice cannot stay execution even by consent.

See 31 Cent. Dig. tit. "Justices of the Peace," § 436.

Granting a stay is a judicial act which can be done only by the justice. Davis *v.* Tyree, 9 Humphr. (Tenn.) 473.

No stay upon judgment rendered upon judgment see Barringer *v.* Allison, 78 N. C. 79.

Where defendant has been attached in an attachment execution by a creditor of plaintiff, the execution will be stayed until the determination of the attachment execution. Dorsel *v.* Hamilton, 1 Leg. Rec. (Pa.) 123.

The effect of a legal stay is to release a levy already made,[58] and after granting a stay the justice has no power to recall it.[59] After a stay of execution has expired, a justice is not bound to issue execution unless it is demanded.[60]

b. Security[61] — (i) *In General.* The statutes require that before a stay of execution shall be granted, security must be given by the judgment defendant. The requirements as to the security vary in the different states, but in all of them there must be a substantial compliance with the statutes, or the security will be invalid as a statutory obligation.[62]

(ii) *Entry and Attestation.* Security for the stay of execution must be entered on the justice's docket,[63] and under some statutes must be attested by the justice's signature.[64]

(iii) *Liability of Surety.*[65] Where an execution on a justice's judgment

Payment of judgment after rendition is not ground for staying execution. Rogers *v.* Ferrell, 10 Yerg. (Tenn.) 254.

Assent of surety to stay.— Tenn. Code, § 3061, making it unlawful for a justice to enter security for stay of execution for any defendant bound as surety, where the security is offered by the principal, unless the surety assents in person or by writing, is directory. Stephens *v.* Taylor, (Tenn. Ch. App. 1897) 45 S. W. 228. *Compare* Gaut *v.* White, 3 Baxt. (Tenn.) 196, in which the surety procured the stayor.

A constable cannot dispense with a legal stay, even where he is agent of the creditor. Mallett *v.* Hutchinson, 1 Head (Tenn.) 558.

58. Hamilton *v.* Henry, 27 N. C. 218.

59. Cox *v.* Lee, 50 Ark. 456, 8 S. W. 400, to the effect that plaintiff, if aggrieved, must appeal.

60. Knight *v.* Vincent, Wright (Ohio) 748.

61. See also Executions, 17 Cyc. 1142 *et seq.*

62. *Indiana.*— The entry of replevin bail after the judgment has ceased to be replevinable does not constitute a judgment on which execution can be issued. Eltzroth *v.* Voris, 74 Ind. 459.

Kentucky.— Thomas *v.* Clarke, 1 Litt. 287, to the effect that a justice may quash an illegal or irregular replevy bond.

North Carolina.— To bind the surety, he must sign his own name, or someone must sign it for him in his presence. Rickman *v.* Williams, 32 N. C. 126.

Ohio.— Duckwall *v.* Rogers, 15 Ohio St. 544, to the effect that an undertaking taken and signed after the period fixed by statute may be good as a common-law contract, if based on a sufficient consideration, although not available under the statute.

Pennsylvania.— Brice *v.* Clark, 8 Pa. St. 301 (invalid recognizance held a sufficient promise to support assumpsit); Frost *v.* Roatch, 6 Whart. 359 ("I become special bail for $90," signed by the bail, held good); Caldwell *v.* Brindle, 2 Am. L. J. N. S. 95 (recognizance in which no sum is mentioned, or condition set out, is void).

Tennessee.— The stay of an execution is in the nature of a judgment confessed by the security, and to bind him he must be present when the justice officially enters his name as security, or must sign his name as such. If he is not present, a written authority to the justice or some other person is necessary. Hickman *v.* Williams, Mart. & Y. 116. See also Keeling *v.* Stokes, 14 Lea 419 (stayor liable, although authority to enter his name was given verbally to the justice at a place other than his office or where judgment was rendered); Shipley *v.* Goodwin, 13 Lea 666; Smith *v.* Hart, 10 Heisk. 468 (agreement made outside of office good); Skelton *v.* Baker, 7 Heisk. 292; Neil *v.* Beaumont, 3 Head 627 (stay by consent after expiration of two days); Cheatham *v.* Brien, 3 Head 552; Morgan *v.* Coleman, 3 Head 352; Morgan *v.* Cooper, 1 Head 430; Cannon *v.* Trail, 1 Head 282 (form of authority); Carmichael *v.* Hawkins, 2 Sneed 405; Rhodes *v.* Chappell, 11 Humphr. 527 (amount of judgment must be mentioned in authority); Barr *v.* McGregor, 11 Humphr. 518 (authority must so describe judgment as to identify it, without the aid of extrinsic evidence); Dilliard *v.* Askew, 3 Humphr. 536 (form of authority); Patrick *v.* Driskill, 7 Yerg. 140.

See 31 Cent. Dig. tit. "Justices of the Peace," § 437.

After accepting security a justice's jurisdiction is gone, and if thereafter he receives another stayor, the latter is not bound. Howard *v.* Brownlow, 4 Sneed (Tenn.) 548.

63. Lockwood *v.* Dills, 74 Ind. 56; McCormick *v.* Cassell, 16 Ind. 408; Remington *v.* Henry, 6 Blackf. (Ind.) 63; Gaylor *v.* Hunt, 23 Ohio St. 255; Anderson *v.* Kimbrough, 5 Coldw. (Tenn.) 260.

Form of entry see Anderson *v.* Kimbrough, 5 Coldw. (Tenn.) 260, 261.

Mere informality of the entry, however, will not vitiate the security or discharge the stayor from his liability. Lownes *v.* Hunter, 2 Head (Tenn.) 343.

64. Hougland *v.* State, 43 Ind. 537; Hollister *v.* Giddings, 24 Mich. 501; Cox *v.* Crippen, 13 Mich. 502. But see State *v.* Trout, 75 Ind. 563; Stone *v.* State, 75 Ind. 235; Miller *v.* McAllister, 59 Ind. 491.

Entry of approval not sufficient attestation see Cox *v.* Crippen, 13 Mich. 502.

Signature below judgment and stay held good see Hollister *v.* Giddings, 24 Mich. 501.

65. See also Executions, 17 Cyc. 1148 *et seq.*

has been stayed, the liability of the parties and the mode of enforcing it is determined by the statutes of the different states.[66] The surety is not discharged by mere delay in issuing execution against defendant;[67] nor because plaintiff, on the return of a vendi with the property in it sold, instructs the justice not to issue another execution until further orders;[68] nor because plaintiff accepts a trust deed made by the debtor;[69] nor because plaintiff has taken a delivery bond, and proceeded on it to judgment and execution, without obtaining satisfaction;[70] nor because the judgment and execution against the principals were in their partnership names;[71] nor because the officer's return to the execution against the principal is false;[72] and he cannot object after verdict that the original warrant or the judgment thereon was unsealed.[73]

10. Quashing, Vacating, and Equitable Relief — a. Quashing and Vacating.[74] An irregular or void execution is open to direct attack by defendant in execution upon affidavit of illegality or motion to quash or set aside,[75] or sometimes on cer-

66. *Arkansas.*— The stay bond is a lien on defendant's personalty in the township where the judgment was rendered. Carroll *v.* Gillespie, 41 Ark. 468, construing Gantt Dig. § 3782.

Indiana.— The mode of enforcing the surety's liability is by scire facias. Execution must first issue against the goods and chattels of defendant (Elliott *v.* Doughty, 7 Blackf. 199), and the scire facias must show this, and that the debt could not be collected under the execution (Varner *v.* Crabb, 2 Ind. 168; Elliott *v.* Doughty, *supra*. See also Thompson *v.* Harbison, 7 Blackf. 495), and that due diligence was used against defendant (Doughty *v.* Elliott, 8 Blackf. 405). Where the statutory form is followed, the scire facias cannot be objected to because there is no allegation against whom the judgment stayed was rendered. May *v.* State, 5 Blackf. 442. A plea which is substantially a plea of *non est factum* is admissible, if sworn to; otherwise it should be rejected. Merkle *v.* Bolles, 6 Blackf. 288.

New York.— Plaintiff must sue out execution after the expiration of the stay and have a return of *non est inventus*, before he can proceed on the bond (Whitney *v.* Spencer, 4 Cow. 39; Row *v.* Pulver, 1 Cow. 246; Tuttle *v.* Kip, 19 Johns. 194); and the imprisonment of defendant is a good plea in bar to an action on the bond (Sunderland *v.* Loder, 5 Wend. 58).

Ohio.— The mode of enforcing the surety's liability is by petition on his undertaking, and the petition must show the issuance of execution after stay expired. Murphy *v.* Flowers, 27 Ohio St. 468. Where the undertaking is good at common law, although invalid as a statutory undertaking, it may be sued on like other common-law obligations. The statutory remedy (Swan & C. St. p. 800, § 172) is not exclusive. Duckwall *v.* Rogers, 15 Ohio St. 544. *Compare* Hall *v.* Kerr, Wright 446.

Pennsylvania.— The recognizance for stay of execution is one of technical special bail, and therefore scire facias cannot issue thereon until a capias ad satisfaciendum has issued and been returnd *non est*. Spalding *v.* Nolcott, 5 Watts 335. Where bail reside in another county or city, the scire facias must be issued by a justice or alderman having jurisdiction where the bailor himself resides. Howell *v.* Cozens, 3 Pa. L. J. Rep. 410. Bail are entitled to ten days after service of scire facias, and before judgment to surrender the principal. Daly *v.* Dobson, 1 Ashm. 74.

United States.— Special bail become liable to pay the debt in case it is not paid by the principal, or made out of his property, on the issuing of execution at the expiration of the stay, and nothing can discharge the bail except payment. Wilson *v.* Eads, 30 Fed. Cas. No. 17,801*a*, Hempst. 284. A justice cannot issue execution, as on a supersedeas, on the mere indorsement on the original judgment that it was superseded. Thomas *v.* Summers, 23 Fed. Cas. No. 13,912, 5 Cranch C. C. 434.

See 31 Cent. Dig. tit. "Justices of the Peace," § 439.

67. Eltzroth *v.* Voris, 74 Ind. 459.

68. Whiton *v.* Ripley, 1 Ohio Dec. (Reprint) 133, 2 West. L. J. 406.

69. Wood *v.* McFerrin, 2 Baxt. (Tenn.) 493, in which the time given the trustee to wind up the trust extended beyond the stay.

70. Young *v.* Peery, 6 Blackf. (Ind.) 399.

71. Elliott *v.* Doughty, 7 Blackf. (Ind.) 199.

72. Remington *v.* Henry, 6 Blackf. (Ind.) 63.

73. Humphreys *v.* Buie, 12 N. C. 378.

74. See also Executions, 17 Cyc. 1152 *et seq.*

75. Sheppard *v.* Roberson, 106 Ga. 757, 32 S. E. 665; Moore *v.* O'Barr, 87 Ga. 205, 13 S. E. 464; Knoxville City Mills Co. *v.* Lovinger, 83 Ga. 563, 10 S. E. 230; Williams *v.* Sulter, 76 Ga. 355; Saul *v.* Geist, 1 Woodw. (Pa.) 306. *Contra*, Carr *v.* Pennsylvania R. Co., 108 Mo. App. 388, 83 S. W. 981; Brownfield *v.* Thompson, 96 Mo. App. 340, 70 S. W. 378, to the effect that a justice has no power to quash an execution.

One justice cannot set aside execution of another.— Cary *v.* Allegood, 121 N. C. 54, 28 S. E. 61.

Superior court has no jurisdiction of original motion to quash.— Hamer *v.* McCall, 121 N. C. 197, 28 S. E. 298.

tiorari.[76] But a third person cannot take advantage of a defect which renders an execution voidable only,[77] nor can a merely voidable judgment be collaterally attacked by motion to quash the execution, or by affidavit of illegality.[78]

b. Equitable Relief.[79] Where there is no adequate remedy at law,[80] and special circumstances of hardship are made to appear,[81] equity may order a stay of execution or enjoin proceedings under an execution already issued.[82]

11. Claims of Third Persons.[83] Sometimes, by statute, a constable may summon a jury to try the right of property seized by him on execution;[84] but under the statutes of most of the states the right of property levied on under a justice's execution is triable before the justice who issued the execution,[85] provided in some jurisdictions the value of the property does not exceed his jurisdiction.[86] The claimant is required, under some statutes, to make an affidavit of claim and file a claim bond,[87] while under others he is required to file a written claim with the constable, who is thereupon to delay the sale a prescribed time, and apply to a justice for a venire to summon a jury to try the right of property.[88] The case is to be docketed as a proceeding between the claimant and the judgment plaintiff,[89] and a day fixed for trial within the time prescribed by statute.[90] The only question in issue is the right of property,[91] and no inquiry can be made into the merits of the judgment,[92] or the regularity of the proceedings on which it was based.[93] Before judgment can be rendered and execution issued against the claimant and his surety, there must have been a trial of the right of property, and then a return of the claim bond forfeited.[94]

12. Sale.[95] In order that there may be a valid sale of property of the execution defendant under a justice's execution there must be not only a valid judgment,[96]

76. Com. *v.* Myers, 5 Lanc. Bar, June 7, 1873.

77. Johnson *v.* Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196.

78. Rogers *v.* Felker, 77 Ga. 46; Kansas City *v.* Winner, 58 Mo. App. 299.

79. See also Executions, 17 Cyc. 1169 *et seq.*

80. Fenstermacher *v.* Xander, 116 Pa. St. 41, 10 Atl. 128.

After an appeal has been taken equity will not enjoin further proceedings on a justice's execution. Scanland *v.* Mixer, 34 Ark. 354.

81. Brady *v.* Hancock, 17 Tex. 361.

82. Sare *v.* Butcher, 141 Ind. 146, 40 N. E. 749; Stroud *v.* Humble, 1 La. Ann. 310 (injunction granted claimant); Mallory *v.* Norton, 21 Barb. (N. Y.) 424. See also *supra*, IV, O, 6, c. Where a judgment of condemnation was rendered by a justice of the peace in a case of attachment upon a judgment rendered more than three years before the issuing of the attachment, and such judgment of condemnation was entered by mistake without any fault on his part, the attachment debtor was held entitled to an injunction restraining the execution of the same. Weikel *v.* Cate, 58 Md. 105.

83. See also Executions, 17 Cyc. 1199 *et seq.*

84. Platt *v.* Sherry, 7 Wend. (N. Y.) 236.

85. Everett *v.* Brown, 117 Ga. 342, 43 S. E. 735; Ridling *v.* Stewart, 77 Ga. 539 (claim to property levied on under mortgage fieri facias); Matlock *v.* Strange, 8 Ind. 57; Armstrong *v.* Harvey, 11 Ohio St. 527. *Compare* Cottle *v.* Dodson, 25 Ga. 633.

Trial before another justice see Griffin *v.* Malony, 13 Ind. 402.

A sale pending the trial will not oust the jurisdiction. B'Hymer *v.* Sargent, 11 Ohio St. 682.

86. Everett *v.* Brown, 117 Ga. 342, 43 S. E. 735; Yon *v.* Baldwin, 76 Ga. 769. *Contra*, Hanna *v.* Steinberger, 6 Blackf. (Ind.) 520.

87. Foust *v.* Litson, 90 Ala. 539, 8 So. 59. But see Powell *v.* Gray, 1 Ala. 77, to the effect that no bond was required.

88. Folwell *v.* Fuller, 53 N. J. L. 572, 22 Atl. 345.

89. Aldridge *v.* Glover, 53 Ill. App. 137.

90. In reckoning the time, the day on which the claim was filed must be counted. Long *v.* McClure, 5 Blackf. (Ind.) 319.

91. Folwell *v.* Fuller, 53 N. J. L. 572, 22 Atl. 345.

92. Haley *v.* Villeneuve, 11 Tex. 617.

93. Seligson *v.* Staples, 1 Tex. App. Civ. Cas. § 1070.

94. Foust *v.* Litson, 90 Ala. 539, 8 So. 59.

Issuance of execution against sureties does not operate as a judgment. Weedon *v.* Clark, 94 Ala. 505, 10 So. 307.

95. See also Executions, 17 Cyc. 1233 *et seq.*

96. Bullard *v.* McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176; Case *v.* Hannahs, 2 Kan. 490; Case *v.* Redfield, 7 Wend. (N. Y.) 398; Stegall *v.* Huff, 54 Tex. 193. *Compare* Easterday *v.* Joy, 14 Ind. 371.

A sale after an appeal is invalid. Bullard *v.* McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176. *Compare*, however, Kramer *v.* Wellendorf, 129 Pa. St. 547, 18 Atl. 525, to the effect that the title of a purchaser is not affected by a previous appeal, where he had no notice thereof, and the justice refused to

but also a valid execution.[97] Advertisement must be made and notice given of the sale, as required by statute;[98] but where the record is silent, it will be presumed that the officer did his duty,[99] and, in case of an order for an immediate sale, that the justice required proof of notice to defendant.[1] Real property or interests therein can be sold under a justice's execution only when such sale is provided for by statute,[2] and the sale must be made in strict compliance with the statute.[3] A sale of more property than is necessary to satisfy the execution is not, in the absence of fraud on the part of the purchaser, absolutely void as to the excess;[4] but a constable's sale under a junior justice's execution will not divest the lien of a senior execution from a court of record.[5] A petition claiming priority of lien, under a justice's judgment, on the proceeds of an execution sale, must describe or set out a valid execution, or it must appear in the record.[6] In Arkansas a justice of the peace has no authority to set aside a sale under execution.[7]

13. Return.[8] A constable must, within the time appointed by law,[9] return an

stay the execution, in which refusal defendants acquiesced until after the sale.

The purchaser must show jurisdiction where his title is attacked. York *v.* Roberts, 8 Mo. App. 140.

97. Dorsey *v.* Dorsey, 28 Md. 388; West *v.* Hughes, 1 Harr. & J. (Md.) 6; Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578. See also L'Engle *v.* Florida Cent. etc., R. Co., 21 Fla. 353. *Compare* Stanley *v.* Nelson, 4 Humphr. (Tenn.) 484.

A slight variance between the execution and the judgment as to the amount will not affect the right of a purchaser. Jackson *v.* Page, 4 Wend. (N. Y.) 585.

Sale under lifeless execution.—A valid sale may be made under a lifeless execution, which was levied in its lifetime. Walton *v.* Wray, 54 Iowa 531, 6 N. W. 742. See also Chaney *v.* Buford Lumber Co., 132 Ala. 315, 31 So. 369; Goss *v.* Emanuel, 1 Dauph. Co. Rep. (Pa.) 64.

A sale under an irregular execution cannot be collaterally attacked. Draper *v.* Nixon, 93 Ala. 436, 8 So. 489.

98. Johnson *v.* Walker, 23 Nebr. 736, 37 N. W. 639.

99. Culbertson *v.* Milhollin, 22 Ind. 362, 85 Am. Dec. 428.

1. Wilson *v.* Garrick, 72 Ga. 660.

2. Griffith *v.* Dicken, 4 Dana (Ky.) 561; Batterman *v.* Albright, 6 N. Y. St. 334; Putnam *v.* Westcott, 19 Johns. (N. Y.) 73.

Sale by sheriff.—Where a constable levies a fieri facias on land, and delivers the same to the sheriff for the purpose of sale, such sheriff is lawfully seized of the land, to sell the same and convey title to the purchaser. Fretwell *v.* Morrow, 7 Ga. 264.

3. **Necessity of order of court.**—Stancel *v.* Calvert, 60 N. C. 104.

Sufficiency of description.—Describing a town lot by the name of the street and the street number is a sufficient description for an order of sale under a justice's execution. McConnaughy *v.* Baxter, 55 Ala. 379.

Where the officer's return shows service of notice, the order of court need not set forth that the notice had been proved to have been given. Davis *v.* Abbot, 25 N. C. 137.

4. Jones *v.* Davis, 2 Ala. 730, where it is said, however, that, under some circumstances, it may be set aside.

5. Carrier *v.* Thompson, 11 S. C. 79.

6. Mackey *v.* McCaffrey, 23 Ill. App. 595.

7. Dunnagan *v.* Shaffer, 48 Ark. 476, 3 S. W. 522.

8. See also Executions, 17 Cyc. 1365 *et seq.*

9. Calhoun County Ct. *v.* Buck, 27 Ill. 440; Peck *v.* Cavell, 16 Mich. 9; Buckley *v.* Mason, 52 Nebr. 639, 72 N. W. 1043.

Before return-day.—An execution may lawfully be returned before the time fixed by law. Middlewood *v.* Nevitt, 7 Blackf. (Ind.) 51; Walker *v.* Columbus Bank, 64 Kan. 884, 67 Pac. 552; Islay *v.* Stewart, 20 N. C. 297; Hill *v.* Kling, 4 Ohio 135. *Contra,* Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578 [*following* Dillon *v.* Dash, 27 Mo. 243]; Huhn *v.* Lang, 122 Mo. 600, 27 S. W. 345. And see Nesbitt *v.* Ballew, 10 N. C. 57, to the effect that under the act of 1803 an unexecuted execution could not be returned in less than three months.

Premature return not subject to collateral attack see Ables *v.* Webb, 186 Mo. 233, 85 S. W. 383, 105 Am. St. Rep. 610 [*following* Whitman *v.* Taylor, 60 Mo. 127].

In computing the time, the day on which an execution issues is included in the time which it has to run. Ryman *v.* Clark, 4 Blackf. (Ind.) 329. But see Peck *v.* Cavell, 16 Mich. 9, where it is held that an execution may be returned on the sixtieth day from its date, unless such day is Sunday.

Where the time for making return has not arrived, and the constable still retains the execution, no objection can be taken to the validity of a levy thereunder because the return has not been signed. Thurston *v.* Boardman, Wils. (Ind.) 433.

An execution returnable "at our next justice court" is returnable to the justice's court of the district in which the justice issuing it resides. Adams *v.* Goodwin, 99 Ga. 138, 25 S. E. 24.

Failure to make return of nulla bona before a transcript is filed in the circuit clerk's office, as required by statute, is an irregularity which can be taken advantage of only

execution with an indorsement of his action thereon,[10] for the truth of which he is responsible;[11] but no particular form of indorsement is required,[12] and a justice may permit an amendment thereof, even after suit brought against the constable and his sureties for not duly returning an execution.[13]

14. PAYMENT, SATISFACTION, AND DISCHARGE.[14] Under some statutes any person indebted to the judgment debtor may pay to the constable the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the constable's receipt will be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution.[15] Money paid on an execution erroneously issued by a justice of the peace may be recovered by action.[16]

15. SUPPLEMENTARY PROCEEDINGS.[17] In a few states provision is made for supplementary proceedings, other than garnishment,[18] in aid of justice's executions.[19]

16. EXECUTION AGAINST THE PERSON. Under the statutes of some states justices of the peace are authorized to issue executions against the person. The grounds upon which a capias ad satisfaciendum may issue are the same in justices' courts as in courts of record,[20] and the writ can now be issued only in actions of tort, and in actions of contract where there are allegations of fraud or concealment of property. The whole subject is, however, controlled by statutory provisions;[21]

in a direct proceeding. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

Power to extend return in New Brunswick by statute see Levasseur *v.* Beaulieu, 33 N. Brunsw. 569 [*following* Marks *v.* Newcombe, 22 N. Brunsw. 419].

10. Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462 (entry by justice in docket of an oral report is not sufficient); Shover *v.* Funk, 5 Watts & S. (Pa.) 457. *Compare* Ellis *v.* Francis, 9 Ga. 325, in which the return was written by the justice at the request, and in the presence, of the constable, and it was held the return of the constable, and valid in law.

11. See, generally, SHERIFFS AND CONSTABLES.

12. Calhoun County Ct. *v.* Buck, 27 Ill. 440; Ables *v.* Webb, 186 Mo. 233, 85 S. W. 383, 105 Am. St. Rep. 610; Buckley *v.* Mason, 52 Nebr. 639, 72 N. W. 1043.

"No property found," or "no property found whereon to levy," is a sufficient return. Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227; Dumas *v.* Matthews, 51 N. J. L. 562, 19 Atl. 265 [*following* Poineer *v.* Bagnall, 49 N. J. L. 226, 7 Atl. 858]. *Compare* Matthews *v.* Miller, 47 N. J. L. 414, 1 Atl. 464.

A return of "served" is insufficient. Burkholder *v.* Keller, 2 Pa. St. 51.

Return of copy of notice.—Where an officer has levied on land and made return to the court, his return of a copy of the notice given to defendant, with his official certificate that he has served it, is sufficient *prima facie* evidence of such service. Davis *v.* Abbott, 25 N. C. 137.

13. Corby *v.* Burns, 36 Mo. 194.

The county court cannot authorize an amendment of the return of a levy of a justice's execution on land, after its sale. Gibbs *v.* Brooks, 46 N. C. 448.

14. See also EXECUTIONS, 17 Cyc. 1387 *et seq.*

15. Hallanan *v.* Crow, 15 Ohio St. 176; Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

16. Lewis *v.* Hull, 39 Conn. 116.

17. See also EXECUTIONS, 17 Cyc. 1402 *et seq.*

18. See *supra*, IV, H.

19. See Willison *v.* Desenberg, 41 Mich. 156, 2 N. W. 201 (construing Mich. Comp. Laws, § 7180); Bolt *v.* Hanser, 19 N. Y. Civ. Proc. 7 (construing N. Y. Code Civ. Proc. § 382, subd. 7); Vulte *v.* Whitehead, 2 Hilt. (N. Y.) 596 (to the effect that a judgment for less than twenty-five dollars cannot become the foundation for supplementary proceedings).

20. See EXECUTIONS, 17 Cyc. 1490 *et seq.*

21. *Georgia.*— Culberson *v.* Gray, 27 Ga. 520.

Illinois.— Brown *v.* Jerome, 102 Ill. 371 (may issue on judgment for violation of ordinance); Outlaw *v.* Davis, 27 Ill. 467 (where oath is made, affidavit is unnecessary); McDonald *v.* Wilkie, 13 Ill. 22, 54 Am. Dec. 423 (except in trespass or trover, fieri facias must first issue and be returned unsatisfied); Subim *v.* Isador, 88 Ill. App. 96 (may issue on all judgments in tort at plaintiff's election); Pease *v.* People, 82 Ill. App. 323 (imprisonment must be on verdict).

Indiana.— Gresham *v.* Bowen, 7 Blackf. 423; Ezra *v.* Manlove, 7 Blackf. 389 (both to the effect that there must be a previous return of *nulla bona*, or an affidavit filed as prescribed by statute); Webster *v.* Farley, 6 Blackf. 163 (form of capias ad satisfaciendum, and proceedings to discharge defendant); Hutchen *v.* Niblo, 4 Blackf. 148 (application for relief must be made to two justices); Gwinn *v.* Hubbard, 3 Blackf. 14 (alternative writ against property or person does not authorize defendants' arrest).

New Hampshire.— Capias ad satisfaciendum on judgment for neglect of military duty cannot issue for two days, exclusive of Sunday, after judgment. But if a writ is prematurely issued, it may lawfully be executed after the expiration of such time. Scribner *v.* Whitcher, 6 N. H. 63, 23 Am. Dec. 708.

and in the absence of any statute upon the subject a justice of the peace has no authority to issue a capias.[22]

17. WRONGFUL EXECUTION.[23] The issuance of an execution by a justice of the peace is a ministerial act, and, in case it is issued contrary to law, he is liable to the party injured,[24] as is one who knowingly procures the issuance of a wrongful execution.[25] In an action for wrongful execution, a variance between the judgment and execution, if caused by mistake, will not deprive a party of a justification under them;[26] but where, in a plea of justification, the execution is described as returnable in ninety days, and the one produced is returnable in sixty, the variance is fatal.[27]

R. Waiver and Cure of Objections. Defects, errors, and irregularities in proceedings before justices of the peace, which do not go to the jurisdiction over the subject-matter,[28] may be waived, and will be so regarded unless duly objected to;[29]

New Jersey.— A bond taken by a constable after defendant's arrest for his delivering himself up at a future time is void. Fanshor *v.* Stout, 4 N. J. L. 367.

New York.— Farrelly *v.* Hubbard, 148 N. Y. 592, 43 N. E. 65 [*reversing* 84 Hun 391, 32 N. Y. Suppl. 440] (failure to pay over money collected for another is within Code Civ. Proc. § 3026); Phelps *v.* Barton, 13 Wend. 68 (defendant in error in an action on contract not liable to arrest for costs in error); Barhydt *v.* Valk, 12 Wend. 145, 27 Am. Dec. 124; Hollister *v.* Johnson, 4 Wend. 639 (both to the effect that it is the duty of the constable to search for property before he takes body of defendant); Taylor *v.* Fuller, 3 Wend. 403 (oath to obtain capias ad satisfaciendum must be made while parties are still before the justice; but such oath is not necessary where defendant is neither a freeholder nor head of a family); Coman *v.* Merrill, 19 Johns. 277 (affidavit for discharge sufficient if it states that defendant has a family at the time of making it); Degear *v.* Nellis, 14 Johns. 382 (proof of exemption must be offered at the hearing); Spafford *v.* Griffen, 13 Johns. 328 (exemption must be indorsed by justice on execution); Lohnis *v.* Jones, 11 Johns. 174 (sheriff bound to discharge on affidavit of exemption and of thirty days' imprisonment).

North Carolina.— Fox *v.* Wood, 33 N. C. 213 (capias ad satisfaciendum issued in Buncombe county should be returnable to county, and not to superior, court); State *v.* Reeves, 20 N. C. 327 (capias ad satisfaciendum held valid, although informal).

Pennsylvania.— Where an action, begun in tort, ends in debt or assumpsit, capias ad satisfaciendum is improper. Weissbrod *v.* Gelden, 3 Leg. Gaz. 260.

Tennessee.— Hart *v.* Fizer, 4 Humphr. 48 (presumption of regularity of writ issued by another justice); Sharp *v.* Nelson, 9 Yerg. 34 (capias ad satisfaciendum need not command officer to have defendant before the justice on a day named); Buford *v.* Crook, 6 Yerg. 523 (capias ad satisfaciendum for sum within jurisdiction, returnable to county court, is void).

See 31 Cent. Dig. tit. "Justices of the Peace," § 446.

22. State *v.* Cureton, Cheves (S. C.) 235.

23. See also EXECUTIONS, 17 Cyc. 1570 *et seq.*

24. Briggs *v.* Wardwell, 10 Mass. 356. And see *supra*, II, C.

25. Sullivan *v.* Jones, 2 Gray (Mass.) 570.

26. Borland *v.* Stewart, 4 Wend. (N. Y.) 568.

27. Toof *v.* Bently, 5 Wend. (N. Y.) 276.

28. **Consent to jurisdiction and waiver of objections** see *supra*, III, M, N.

29. *Colorado.*— Lyman *v.* Schwartz, 13 Colo. App. 318, 57 Pac. 735.

Iowa.— Taylor *v.* Barber, 2 Greene 350.

Kansas.— Woodward *v.* Trask Fish Co., 38 Kan. 283, 16 Pac. 456; Scott *v.* Kreamer, 37 Kan. 753, 16 Pac. 123; Stillman *v.* McConnell, 36 Kan. 398, 13 Pac. 571.

Kentucky.— Rogers *v.* Hall, 7 B. Mon. 349; Williamson *v.* Boucher, 7 J. J. Marsh. 252.

Michigan.— Prouty *v.* Brown, 125 Mich. 507, 84 N. W. 1074; Jacklin *v.* Soutier, 82 Mich. 648, 46 N. W. 1027; Hollenberg *v.* Shuffert, 47 Mich. 126, 10 N. W. 137.

Minnesota.— Robert *v.* Brooks, 23 Minn. 138.

Mississippi.— Crisler *v.* Morrison, 57 Miss. 791.

Missouri.— Bauer *v.* Miller, 16 Mo. App. 252.

New York.— Barnes *v.* Badger, 41 Barb. 98; Allen *v.* Church of Beloved Disciple, 16 Misc. 584, 38 N. Y. Suppl. 805; Heely *v.* Barnes, 4 Den. 73; Dunham *v.* Simmons, 3 Hill 609. *Compare* Green *v.* Armstrong, 1 Den. 550.

Oregon.— Griffin *v.* Pitman, 8 Oreg. 342.

Pennsylvania.— Brown *v.* Fruit, 3 Pa. L. J. Rep. 295.

Vermont.— Egerton *v.* Hart, 8 Vt. 207; Stone *v.* Proctor, 2 D. Chipm. 108.

United States.— Davis *v.* Pitman, 7 Fed. Cas. No. 3,647*a*, Hempst. 44.

See 31 Cent. Dig. tit. "Justices of the Peace," § 448.

Failure to take an appeal waives an error of a justice in including accrued interest in reviving a judgment, and it cannot be rectified on motion to quash the execution issued thereon by the circuit court. Bauer *v.* Miller, 16 Mo. App. 252.

Accepting a modified judgment and remitting an excess in the verdict waives any irregularity and delay in the rendition and

but a defendant who does not appear waives nothing;[30] and where a party raises an objection in due time, he does not waive it by pleading or going to trial.[31] If neither the declaration nor the evidence shows a cause of action, a judgment against defendant cannot be sustained, although he moved to nonsuit on an untenable ground;[32] and where a justice examines a party as a witness *de bene esse*, it is an error which is not cured by a statement in his return that he afterward disregarded the evidence as improper.[33]

S. Records and Dockets[34] — **1. In General.** Justices of the peace are very generally required to keep dockets, in which they are to enter a record of proceedings had before them,[35] and which are open to the inspection of any parties interested.[36] The matters to be entered and the form of entries are more or less definitely prescribed by statute; but, owing to the recognized inexpertness and lack of learning in justices as a class, technical precision and accuracy in the form of their entries are neither expected nor required.[37] Original papers cannot be taken from the files of a justice and used in a higher court, without a rule, regularly entered, showing when and why they were taken.[38]

2. Time For Entries, Publicity, and Notice. A justice of the peace should regularly make the entries in his docket contemporaneously with the acts to which they refer, but that they are not so made is not ground for reversal.[39] In the case of an action for a penalty, judgment must be entered publicly, or after notice to defendant.[40]

entry of judgment. Stillman *v.* McConnell, 36 Kan. 398, 13 Pac. 571.

Submission to a justice on the same testimony after disagreement of the jury waives objections to previous rulings on the jury trial. Hollenberg *v.* Shuffert, 47 Mich. 126, 10 N. W. 137.

If testimony is objected to on untenable grounds, and the true grounds are not stated, they will be held to be waived. Dunham *v.* Simmons, 3 Hill (N. Y.) 609.

Failure to raise an objection on special appearance.—Where a party appears specially and raises certain objections, he cannot afterward make an objection which he might have raised on such appearance. Prouty *v.* Brown, 125 Mich. 507, 84 N. W. 1074.

A dilatory objection may be waived after nonsuit as well as after judgment sustaining it. Egerton *v.* Hart, 8 Vt. 207.

Withdrawal after demurrer overruled.—Where defendant demurred to the jurisdiction in a magistrate's court, and when the demurrer was overruled withdrew, it was held that he could not object to the proceedings after such withdrawal. Cotton *v.* Johnson, 71 S. C. 413, 51 S. E. 245.

30. Gilbert *v.* Hanford, 13 Mich. 40.

31. Moody *v.* Becker, 70 N. Y. Suppl. 543; Coatsworth *v.* Thompson, 5 N. Y. St. 809; Shannon *v.* Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

An exception to the denial of a motion for change of venue saves an objection to such denial, and it is not waived by proceeding to trial. Curtis *v.* Moore, 3 Minn. 29.

32. Tifft *v.* Tifft, 4 Den. (N. Y.) 175.

33. Haswell *v.* Bussing, 10 Johns. (N. Y.) 128.

34. **Admissibility in evidence** see Evidence, 17 Cyc. 301.

Exclusion of parol evidence as secondary see Evidence, 17 Cyc. 502.

Parol evidence to contradict or vary docket or record see Evidence, 17 Cyc. 573.

35. **More than one docket** of the proper description may be lawfully kept and used by a justice at one and the same time. State *v.* Mallory, 65 Ind. 43.

Deposit of docket with town-clerk.— The omission of a justice to deposit his docket with the clerk of the town, as required by statute, when he removes therefrom, will not affect the validity of the judgments in the docket, or vary the same as evidence. Humphrey *v.* Persons, 23 Barb. (N. Y.) 313.

36. Carr *v.* Lewton, 1 Lack. Leg. Rec. (Pa.) 396. See also Perkins *v.* Cummings, 66 Vt. 485, 29 Atl. 675.

Right to transcript see State *v.* Elsworth, 61 Neb. 444, 85 N. W. 439.

37. Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; Brennan *v.* Shinkle, 89 Ill. 604; Vroman *v.* Thompson, 51 Mich. 452, 16 N. W. 808; Kinyon *v.* Fowler, 10 Mich. 16; State *v.* Myers, 70 Minn. 179, 72 N. W. 969, 68 Am. St. Rep. 521; McGinty *v.* Warner, 17 Minn. 41.

Non-official entries, which do not constitute a part of the record required to be kept, are of no validity. Kimpson *v.* Hunt, 4 Iowa 340. See also McKenna *v.* Murphy, 68 N. J. L. 522, 53 Atl. 695.

38. Miller *v.* Carhart, 5 N. J. L. 720.

39. Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; Cottrell *v.* Cottrell, 126 Ind. 181, 25 N. E. 905; McLain *v.* Matlock, 7 Ind. 525, 65 Am. Dec. 746 [*approved* in Britton *v.* State, 54 Ind. 535]; Schoendman *v.* Glanz, 2 Lanc. L. Rev. (Pa.) 358. But see as to an action by a common informer Griffith *v.* West, 10 N. J. L. 301.

40. Pittsburgh *v.* Madden, 14 Pa. Co. Ct. 120.

3. Matters to Be Entered and Sufficiency of Entries — a. In General. The entries upon the docket of a justice of the peace are in the nature of minutes of a court of record, and every fact transpiring in connection with cases tried in his court essential to the validity or regularity of the judgment rendered should be entered upon the docket.[41] As has been previously stated,[42] the greatest liberality of construction will be shown in order to uphold justices' proceedings, and it is generally enough if, by the entries on their dockets and the process they issue, their jurisdiction of the subject-matter and of the person is disclosed, together with a final disposition of the case.[43]

b. Names of Parties and Residence of Defendant. The names of the parties must be entered upon the justice's docket,[44] and in some jurisdictions the record must set out the residence of defendant.[45]

c. Cause of Action and Grounds of Defense. The record of justices of the peace must show the cause of action, the demand of the plaintiff, and the nature of the claim on which the particular action is founded so as to prevent a second suit for the same cause of action.[46] It is not necessary that the cause of action be set out in full,[47] but in penal actions the substance at least of the acts committed

41. *Georgia.*— Shearouse *v.* Wolf, 117 Ga. 426, 43 S. E. 718; Scott *v.* Bedell, 108 Ga. 205, 33 S. E. 903.

Michigan.— Purdy *v.* Law, 132 Mich. 622, 94 N. W. 182; Stolte, etc., Co. *v.* Cochran, 111 Mich. 193, 69 N. W. 247.

Montana.— Driscoll *v.* Creighton, 24 Mont. 140, 60 Pac. 989; State *v.* Laurandeau, 21 Mont. 216, 53 Pac. 536.

New Jersey.— McKenna *v.* Murphy, 68 N. J. L. 522, 53 Atl. 695; Prickett *v.* Prickett, 12 N. J. L. 186; Keath *v.* Sergeant, 3 N. J. L. 524.

Pennsylvania.— Cope *v.* Risk, 21 Pa. St. 59; Ketchledge *v.* Wyoming County, 24 Pa. Co. Ct. 7; Holder *v.* Hill, 1 Woodw. 451.

South Dakota.— Dewey *v.* Feiler, 11 S. D. 632, 80 N. W. 130.

See 31 Cent. Dig. tit. "Justices of the Peace," § 451.

Jurisdiction by record see *supra*, III, O.

42. See *supra*, IV, S, 1.

43. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84.

Michigan.— Peck *v.* Cavell, 16 Mich. 9; Rash *v.* Whitney, 4 Mich. 495.

Minnesota.— McGinty *v.* Warner, 17 Minn. 41.

Nebraska.— Fowler *v.* Thomsen, 68 Nebr. 578, 94 N. W. 810; Michaut *v.* McCart, 55 Nebr. 654, 75 N. W. 1106; Rhodes *v.* Thomas, 31 Nebr. 848, 48 N. W. 886; Ransdell *v.* Putnam, 15 Nebr. 642, 19 N. W. 611.

Pennsylvania.— Purnell *v.* McBreen, 23 Pa. Co. Ct. 442; Shea *v.* Plains Tp., 7 Kulp 554.

Wisconsin.— Bacon *v.* Bassett, 19 Wis. 45.

See 31 Cent. Dig. tit. "Justices of the Peace," § 451.

The entries are limited to the objects prescribed by statute, and to such proceedings as are had before the justice touching the suit. McKenna *v.* Murphy, 68 N. J. L. 522, 53 Atl. 695.

Failure to enter matter not required by statute is at most only an irregularity. Paulsen *v.* Ingersoll, 62 Wis. 312, 22 N. W. 477.

Surplusage and irrelevant matter will be disregarded. Cleghorn *v.* Waterman, 16 Nebr. 226, 20 N. W. 636, 877.

Proceedings in garnishment entered as separate suit see Fasquelle *v.* Kennedy, 55 Mich. 305, 21 N. W. 347.

44. Scott *v.* Loomis, 13 Sm. & M. (Miss.) 635.

Entering the initials only of a party's name is insufficient. Clayton *v.* Tonkin, 9 N. J. L. 252.

45. Records *v.* Allen, 1 Marv. (Del.) 268, 40 Atl. 1113.

46. Westcott *v.* Burbage, 1 Marv. (Del.) 297, 40 Atl. 1116; Ralph *v.* Pennel, 4 Houst. (Del.) 542; Huggins *v.* Lemmon, 4 Houst. (Del.) 304; Barnes *v.* Holton, 14 Minn. 357; Bilderback *v.* Pouner, 7 N. J. L. 64; Rutherford *v.* Northampton Nat. Bldg., etc., Assoc., 12 Pa. Dist. 637; Dauphin County Mut. Live Stock Ins. Co. *v.* Pidgeon, 7 Pa. Co. Ct. 448; Com. *v.* Cochran Creamery Co., 4 Pa. Co. Ct. 253; Dove *v.* Tucker, 2 Blair Co. Rep. (Pa.) 381; Jervis *v.* McFarlan, 1 Chest. Co. Rep. (Pa.) 137; Zeidler *v.* Seischob, 4 C. Pl. (Pa.) 196; Merriam *v.* Myerscough, 4 C. Pl. (Pa.) 52; Shafer *v.* Kelly, 4 C. Pl. (Pa.) 44; Melanosky *v.* Stolper, 11 Kulp (Pa.) 271; Riley *v.* Enama, 9 Kulp (Pa.) 187; Sipple *v.* Guldin, 7 Kulp (Pa.) 100; Williams *v.* McCue, 1 Lack. Leg. Rec. (Pa.) 398; Ryan *v.* Gross, 19 Lanc. L. Rev. (Pa.) 385; Cloud *v.* Tatlow, 32 Leg. Int. (Pa.) 40; Paine *v.* Godshall, 29 Leg. Int. (Pa.) 12; Moore *v.* Philadelphia, etc., R. Co., 11 Phila. (Pa.) 348; Uber *v.* Hickson, 6 Phila. (Pa.) 132; Goodman *v.* Mogel, 1 Woodw. (Pa.) 286. See 31 Cent. Dig. tit. "Justices of the Peace," § 452.

47. Hopper *v.* Lucas, 86 Ind. 43; Reed *v.* Whitton, 78 Ind. 579.

Bill of particulars need not be entered at large.— Kuker *v.* Beindorff, 63 Nebr. 9, 88 N. W. 190.

Docket need not specify breaches of bond see Stone *v.* Murphy, 2 Iowa 35.

Entries held sufficient see Thompson *v.*

by defendant should be alleged,[48] and the act or ordinance violated should either be set out in full or referred to specifically and definitely.[49] In some jurisdictions the docket should also set out the grounds of defense.[50]

d. Time and Publicity of Proceedings. The docket of a justice of the peace should show the time of the commencement of the action,[51] the time fixed for trial,[52] and the date of the judgment;[53] but it need not show specifically the time of calling the case,[54] nor the hour at which judgment was rendered.[55] If the proceedings are otherwise regular, it is not reversible error that the justice fails to state that his judgment was rendered publicly.[56]

e. Process. The date of the issuance of process and the time of its return, and notice of the time of trial and its return, must be entered on a justice's docket,[57] and where the summons is made returnable forthwith, the record must show that the justice was satisfied, by the oath of plaintiff or otherwise, that there was danger of the latter's losing the benefit of his process by delay.[58] So also where a special constable is appointed to serve process, his appointment must be noted on the record.[59] It is not necessary that the summons and the officer's return be copied in the record at length.[60]

f. Pleadings and Affidavits. Where the pleadings are in writing and filed in the cause, it is not necessary that they be entered on the justice's docket,[61] and the same is true of written instruments filed as the foundation of actions,[62] and of

Pearce, 3 Harr. (Del.) 497; Stone *v.* Murphy, 2 Iowa 35; Missemer *v.* Trout, 17 Pa. Co. Ct. 317; Rehmeyer *v.* Sheffer, 7 Del. Co. (Pa.) 592; Cooke *v.* Shoemaker, 8 Kulp (Pa.) 212; Goodman *v.* Moyer, 1 Woodw. (Pa.) 92; Sunday *v.* Shuler, 12 York Leg. Rec. (Pa.) 134.

48. Adams *v.* Com., 1 Woodw. (Pa.) 417.

49. Nash *v.* Com., 2 C. Pl. (Pa.) 239; Lancaster *v.* Hirsh, 1 Lanc. L. Rev. (Pa.) 209; Lemon *v.* Reidel, 1 Lanc. L. Rev. (Pa.) 3.

50. Bates *v.* Bulkley, 7 Ill. 389.

51. Griffith *v.* West, 10 N. J. L. 301; De Marentille *v.* Oliver, 2 N. J. L. 379.

52. Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232; Crisman *v.* Swisher, 28 N. J. L. 149.

53. De Marentille *v.* Oliver, 2 N. J. L. 379; Martin *v.* Wiggins, 1 Lanc. L. Rev. (Pa.) 141.

54. Love *v.* Moore, 11 Okla. 645, 69 Pac. 871; Missemer *v.* Trout, 17 Pa. Co. Ct. 317; Bacon *v.* Bassett, 19 Wis. 45. *Compare* Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042, in which the entries were held sufficient to show when the proceedings were had.

55. Weisman *v.* Weisman, 133 Pa. St. 89, 19 Atl. 300; Blessington *v.* Com., 10 Pa. Cas. 509, 14 Atl. 416; Missemer *v.* Trout, 17 Pa. Co. Ct. 317; Fronheiser *v.* Werner, 14 Pa. Co. Ct. 522; Robertson *v.* Clark, 9 Pa. Co. Ct. 94; Sondheimer *v.* Fox, 19 Lanc. L. Rev. (Pa.) 386; Cope *v.* Buck, 3 Lanc. L. Rev. (Pa.) 353; Bacon *v.* Bassett, 19 Wis. 45. But see Lindsay *v.* Sweeny, 6 Phila. (Pa.) 309.

56. French *v.* Pennsylvania, etc., R. Co., 1 Leg. Chron. (Pa.) 66; Daly *v.* Nolan, 6 Phila. (Pa.) 310. But see Hildebrand *v.* Bowman, 12 Lanc. Bar (Pa.) 30.

57. *California.*— Fisk *v.* Mitchell, 124 Cal. 359, 57 Pac. 149; Jones *v.* Los Angeles City Justice's Ct., 97 Cal. 523, 32 Pac. 575.

Connecticut.— Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

Delaware.— Crawford *v.* England, 2 Houst. 171.

Georgia.— Benson *v.* Dyer, 69 Ga. 190.

Indiana.— Reed *v.* Whitton, 78 Ind. 579; Strohmier *v.* Stumph, Wils. 304.

Michigan.— Purdy *v.* Law, 132 Mich. 622, 94 N. W. 182.

Mississippi.— Scott *v.* Loomis, 13 Sm. & M. 635.

Nebraska.— Keeley Inst. *v.* Riggs, 5 Nebr. (Unoff.) 612, 99 N. W. 833.

Ohio.— Moriarity *v.* Devine, 1 Ohio Cir. Ct. 81, 1 Ohio Cir. Dec. 49.

Pennsylvania.— Sevitsky *v.* Clifford, 28 Pa. Co. Ct. 445; Hunt *v.* Laufer, 6 Pa. Co. Ct. 337; Kanatz *v.* Healy, 10 Kulp 27.

Wisconsin.— Sullivan *v.* Miles, 117 Wis. 576, 94 N. W. 298.

See 31 Cent. Dig. tit. "Justices of the Peace," § 454.

On a continuance without day the record must show notice of hearing and when it was given. Hunt *v.* Laufer, 6 Pa. Co. Ct. 337.

58. Murray *v.* West, 2 Marv. (Del.) 372, 43 Atl. 256.

59. Benninghoof *v.* Finney, 22 Ind. 101; Schaw *v.* Dietrichs, Wils. (Ind.) 153.

60. Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760; Reed *v.* Whitton, 78 Ind. 579; Strohmier *v.* Stumph, Wils. (Ind.) 304. See also Bacon *v.* Bassett, 19 Wis. 45.

Entry held sufficient see Keeley Inst. *v.* Riggs, 5 Nebr. (Unoff.) 612, 99 N. W. 833.

61. Whittington *v.* Eppstein, 3 Tex. App. Civ. Cas. § 369. See also Meyers *v.* Boyd, 37 Mo. App. 532. *Compare* Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344.

Docket need not contain verification of pleadings see Burt *v.* Bailey, 21 Minn. 403; Tyrrell *v.* Jones, 18 Minn. 312.

62. McDermott *v.* Dwyer, 91 Mo. App. 185 [*following* Baker *v.* Henry, 63 Mo. 517; Olin *v.* Zeigler, 46 Mo. App. 193].

affidavits in attachment.[63] But where the pleadings are oral, their substance should be entered.[64]

g. Evidence and Rulings Thereon. The record of a justice of the peace must show affirmatively that his judgment was based upon a hearing of allegations and proofs,[65] and in some jurisdictions the kind of evidence, whether written or parol, on which plaintiff's claim was founded, must be stated.[66] It is not necessary, however, for a justice to enter the evidence itself, whether documentary or parol, on his docket,[67] except, in some jurisdictions, in jury trials,[68] or where the action is for the recovery of a penalty, in which latter case the record must disclose some evidence of the acts constituting the offense.[69] A justice is not required to note on his docket motions to reject evidence.[70]

h. Adjournments. Except in the case of an adjournment from day to day,[71] an adjournment or continuance of a case must be entered on the docket, and the entry must show at whose instance, and the time and place to which, the case was adjourned.[72] But it is not essential that the docket should show the cause of adjournment, for in the absence of any statement in the docket as to the cause, it will be presumed that the proper cause was shown or consent given.[73] Where, however, the cause is given, no such presumption can be entertained, and if the

63. Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964. See also Carper *v.* Richards, 13 Ohio St. 219.

64. Jordan *v.* Quick, 11 Iowa 9; Stone *v.* Murphy, 2 Iowa 35; Frost *v.* Byrd, (Tex. Civ. App. 1896) 39 S. W. 127; Davis *v.* Sorrenson, (Tex. Civ. App. 1894) 27 S. W. 209.

Where the general issue is pleaded with notice of special matter, such special matter need not be entered of record. Stevenson *v.* Skank, 3 N. J. L. 434.

65. Hoffecker *v.* Eaton, 2 Houst. (Del.) 157 [*followed* in Godfrey *v.* Thompson, 1 Marv. (Del.) 298, 40 Atl. 1116]; Elligood *v.* Cannon, 4 Harr. (Del.) 176; Stocking *v.* Driggs, 2 Cai. (N. Y.) 96; Baker *v.* Richart, 2 Pa. Dist. 195; Ellenberger *v.* Bush, 2 Pa. Dist. 50; York Caramel Co. *v.* Farez, 17 Pa. Co. Ct. 129; Hildebrand *v.* Bowman, 12 Lanc. Bar (Pa.) 30; Sauser *v.* Werntz, 1 Leg. Chron. (Pa.) 249, 21 Pittsb. Leg. J. 15; Koch *v.* Miller, 2 Leg. Rec. (Pa.) 154; Griffen *v.* Koch, 1 Leg. Rec. (Pa.) 47; Karche *v.* Bach, 1 Lehigh Val. L. Rep. (Pa.) 118. *Contra,* under Wagner St. Mo. p. 839, § 15. Baker *v.* Baker, 70 Mo. 134. And see Cook *v.* Minick, 1 Pa. Co. Ct. 603; Ott *v.* Snyder, 3 Lanc. L. Rev. (Pa.) 185; Cope *v.* Myers, 1 Lehigh Val. L. Rep. (Pa.) 55.

66. Evans *v.* Brobst, 5 Pa. Dist. 30; Cook *v.* Minnick, 1 Pa. Co. Ct. 603; Merriam *v.* Myerscough, 4 C. Pl. (Pa.) 52; Jermyn *v.* Higgins, 4 Lanc. L. Rev. (Pa.) 185; Paine *v.* Godshall, 29 Leg. Int. (Pa.) 12; Wilson *v.* Wilson, 3 Pa. L. J. Rep. 419. But see Shea *v.* Plains Tp., 7 Kulp (Pa.) 554.

67. Ramsey *v.* Dumars, 19 N. J. L. 66; Evans *v.* Brobst, 5 Pa. Dist. 30; Shea *v.* Plains Tp., 7 Kulp (Pa.) 554; Hill *v.* Scouton, 7 Kulp (Pa.) 345; French *v.* Pennsylvania, etc., R. Co., 1 Leg. Chron. (Pa.) 66; York *v.* Miller, 11 York Leg. Rec. (Pa.) 138.

68. Niven *v.* Smith, 2 Ohio Dec. (Reprint) 337, construing Ohio Justices Act, § 203.

69. Com. *v.* Cochran Creamery Co., 4 Pa. Co. Ct. 253; St. Clair *v.* Carr, 2 Leg. Rec. (Pa.) 87. *Compare* Ott *v.* Snyder, 3 Lanc. L. Rev. (Pa.) 185.

70. Miller *v.* O'Neal, 9 Iowa 446. But see Harshberger *v.* Nursery Co., 1 Just. L. Rep. (Pa.) 216.

71. State *v.* Nohl, 113 Wis. 15, 88 N. W. 1004. See also New Haven *v.* Rogers, 32 Conn. 221.

72. Loder *v.* Reed, 129 Mich. 180, 88 N. W. 389; Mitts *v.* Harvey, 125 Mich. 354, 84 N. W. 288; Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363. See also Hardenburgh *v.* Fish, 61 N. Y. App. Div. 333, 70 N. Y. Suppl. 415. *Compare* Anderson *v.* Southern Minnesota R. Co., 21 Minn. 30, where it was held that a failure to show the place of adjournment was immaterial, since it would be presumed that proceedings would be resumed at the place from which the adjournment was made.

Where the year is not noted, the current year will be understood to be intended. Stromberg *v.* Esterly, 62 Wis. 632, 22 N. W. 864.

Trial on the adjourned day will be presumed, although the date of trial is not given. Tuttle *v.* Wilson, 29 Nebr. 424, 45 N. W. 688.

Rebuttal of entry.—The recital of a continuance at the instance of defendants may be shown by evidence *aliunde* not to apply to certain defendants, for the purpose of admitting a plea of privilege. Landa *v.* Moody, (Tex. Civ. App. 1900) 57 S. W. 51.

73. Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105; State *v.* Merrick, 101 Wis. 162, 77 N. W. 719; Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179.

Where there is a second adjournment without application from either party the cause should be shown. Deputy *v.* Betts, 4 Harr. (Del.) 352; Mousely *v.* Allmond, 4 Harr. (Del.) 92.

In Vermont the cause need not be stated by the second justice where it cannot be certainly known. It is sufficient if he states the

cause be insufficient, jurisdiction will be lost.[74] In case of an adjournment by referees for consideration, the record must show the adjournment.[75]

i. Witnesses and Jurors. The names of all witnesses and jurors should be entered on the justice's docket,[76] and the fact that they were sworn or affirmed.[77]

j. Reference. Where a reference is made, the justice's docket must show the existence of the conditions authorizing it,[78] and that both the justice and the referees acted in conformity with the statute.[79] The report of the referees must also be entered,[80] although this need not be done *in extenso*;[81] and in some jurisdictions the record must affirmatively show that the justice heard the proofs and allegations, although both parties appeared.[82]

k. Fees and Costs. The statutes very generally require that justices shall enter the fees and costs of an action separately in their dockets.[83] But these statutes are merely directory, and a failure to comply with their terms will not affect a judgment or execution.[84]

4. Signature and Verification. A justice's docket need not be verified by his signature;[85] and even where a statute requires the justice to certify that the amounts appearing to be due have not been paid, to his knowledge, his failure to do so will not affect the validity of judgments therein;[86] and the same is true in case of the failure of a justice to certify his docket to his successor or some other justice upon his office becoming vacant.[87]

5. Operation and Effect. A justice's docket is evidence of matter required to be stated therein,[88] but not of other matter.[89] In some states the docket of the justice is given conclusive effect,[90] while in others it is merely *prima facie*

absence of the first justice generally. Holland *v.* Osgood, 8 Vt. 276.

74. Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105 [*citing* Gallagher *v.* Serfling, 92 Wis. 544, 66 N. W. 692].

75. Rickards *v.* Patterson, 5 Harr. (Del.) 235.

76. Doughty *v.* Kendle, 3 N. J. L. 660; Steelman *v.* Bolton, 2 N. J. L. 303; Lindsley *v.* Boyle, 2 N. J. L. 193. But see Hoffman *v.* Forslund, 6 Kan. App. 352, 51 Pac. 816.

Conviction of defaulting juror should not be entered.— State *v.* Hollinshead, 16 N. J. L. 539.

77. Seward *v.* Chamberlain, 3 N. J. L. 742; Anonymous, 3 N. J. L. 632; Wykes *v.* Miller, 1 Just. L. Rep. (Pa.) 140; Laughlin *v.* Tp., 1 Just. L. Rep. (Pa.) 112.

Statement held sufficient to show swearing of witnesses see Sunday *v.* Shuler, 12 York Leg. Rec. (Pa.) 134.

78. Climenson *v.* Climenson, 163 Pa. St. 451, 30 Atl. 148.

79. Weissbrod *v.* Gelder, 3 Leg. Gaz. (Pa.) 260.

80. Little *v.* Silverthorne, 3 N. J. L. 680; Moreton *v.* Scroggy, 3 N. J. L. 676.

81. Chance *v.* Chambers, 2 N. J. L. 362.

82. Toomy *v.* Dale, 1 Marv. (Del.) 303, 40 Atl. 1105; Godfrey *v.* Thompson, 1 Marv. (Del.) 298, 40 Atl. 1116.

83. Scott *v.* Loomis, 13 Sm. & M. (Miss.) 635, construing the law of Alabama.

Entry held sufficient see Kissinger *v.* Staley, 44 Nebr. 783, 63 N. W. 55.

84. Meister *v.* Russell, 53 Minn. 54, 54 N. W. 935; Buis *v.* Cooper, 63 Mo. App. 196; Nett *v.* Serwe, 28 Wis. 663; Bacon *v.* Bassett, 19 Wis. 45; Warner *v.* Hart, 6 Wis. 464.

See 31 Cent. Dig. tit. "Justices of the Peace," § 459.

85. Daniels *v.* Thompson, 48 Ill. App. 393; Chapman *v.* Dodd, 10 Minn. 350; Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854.

86. Humphrey *v.* Persons, 23 Barb. (N. Y.) 313.

87. Pool *v.* McCullum, Wright (Ohio) 432.

88. Heman *v.* Larkin, (Mo. App. 1902) 70 S. W. 907; Goldstein *v.* Fred Krug Brewing Co., 62 Nebr. 728, 87 N. W. 958; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

Ambiguous entry.—Where the docket entry is ambiguous, it should be so construed as to sustain, if possible, the judgment rendered. Roach *v.* Mondserratt Coal Co., 71 Mo. 398.

As evidence of agreement amounting to discontinuance see Cope *v.* Risk, 21 Pa. St. 59.

89. Heman *v.* Larkin, 100 Mo. App. 294, 73 S. W. 218.

90. *Arkansas.*— Countz *v.* Markling, 30 Ark. 17.

Delaware.— Stidhan *v.* Thatcher, 2 Pennew. 567, 47 Atl. 1005. *Compare* Heavalow *v.* Conner, 4 Pennew, 1, 54 Atl. 1055.

Illinois.— Reddish *v.* Shaw, 111 Ill. App. 337. *Compare* Brown *v.* Phillips, 6 Ill. App. 250.

Maine.— Paul *v.* Hussey, 35 Me. 97.

Michigan.— Holmes *v.* Cole, 95 Mich. 272, 54 N. W. 761; Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302; Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 905. But *compare* Smalley *v.* Lighthall, 37 Mich. 348; Hickey *v.* Hinsdale, 8 Mich. 267, 77 Am. Dec. 450; Clark *v.* Holmes, 1 Dougl. 390.

New York.— See Niles *v.* Totman, 3 Barb. 594.

Ohio.— Howell *v.* Jenkins, 2 Ohio Dec. (Reprint) 552, 3 West. L. Month. 631.

evidence,[91] and, where necessary, it may be aided by evidence *aliunde*.[92] Where a case has been appealed, the justice's judgment may be shown by the record of the appellate court without the necessity of resorting to the justice's docket.[93]

6. Defects and Irregularities. The statutes prescribing the matters to be entered in a justice's docket are directory, and defects and irregularities in the entries, or a failure to enter some required matter, will not affect the validity of a judgment.[94]

7. Amendment. Although there are decisions to the contrary,[95] the weight of authority is to the effect that, after entry of judgment, the power of a justice over his docket ceases, and he cannot thereafter amend it.[96]

V. Review.

A. Appeal and Error[97] — 1. Nature of Remedy and Appellate Jurisdiction — a. Nature and Form of Remedy. By the weight of authority an appeal or writ of error will not lie from or to a justice's court, unless it is allowed by statute;[98] but, perhaps in all jurisdictions, such statutes have been enacted.[99]

Vermont.— Eastman *v.* Waterman, 26 Vt. 494.

West Virginia.— See Moren *v.* American Fire-Clay Co., 44 W. Va. 42, 28 S. E. 728.

Wisconsin.— Smith *v.* Bahr, 62 Wis. 244, 22 N. W. 438.

See 31 Cent. Dig. tit. "Justices of the Peace," § 462.

Collateral attack.—An entry that the parties appeared and adjourned the case by consent cannot be contradicted collaterally, notwithstanding a further statement that such adjournment was had without pleading. Waldron *v.* Palmer, 104 Mich. 556, 62 N. W. 731.

91. *Colorado.*— Hamill *v.* Ferrier, 8 Colo. App. 266, 45 Pac. 522.

Iowa.— Iowa Union Tel. Co. *v.* Boylan, 86 Iowa 90, 52 N. W. 1122, (1891) 48 N. W. 730. But *compare* Caughlin *v.* Blake, 55 Iowa 634, 8 N. W. 475.

Kansas.— *In re* Baum, 61 Kan. 117, 58 Pac. 958.

Mississippi.— Scott *v.* Loomis, 13 Sm. & M. 635, construing the law of Alabama.

Nevada.— Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370.

South Dakota.— Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

See 31 Cent. Dig. tit. "Justices of the Peace," § 462.

92. Cunningham *v.* Pacific R. Co., 61 Mo. 33; Rowe *v.* Schertz, 74 Mo. App. 602 [*citing* State *v.* Hockaday, 98 Mo. 590, 12 S. W. 246]; Baker *v.* Brintnall, 52 Barb. (N. Y.) 188. But see Boomer *v.* Laine, 10 Wend. (N. Y.) 525.

93. Cothran *v.* Knight, 47 S. C. 243, 25 S. E. 142.

94. *Iowa.*—Houston *v.* Walcott, 1 Iowa 86.

Minnesota.— Barber *v.* Kennedy, 18 Minn. 216; Payson *v.* Everett, 12 Minn. 216.

Missouri.— Henman *v.* Westheimer, 110 Mo. App. 191, 85 S. W. 101.

Nebraska.— Tuttle *v.* Wilson, 29 Nebr. 424, 45 N. W. 688; Dye *v.* Russell, 24 Nebr. 829, 40 N. W. 416.

New York.— Baker *v.* Brintnall, 52 Barb. 188.

Tennessee.— Johnson *v.* Billingsley, 3 Humphr. 151.

Wisconsin.— Campbell *v.* Babbitts, 53 Wis. 276, 10 N. W. 400.

See 31 Cent. Dig. tit. "Justices of the Peace," § 463.

But see Greenleaf *v.* Haberacker, 1 Woodw. (Pa.) 436.

95. Benson *v.* Dyer, 69 Ga. 190; Stratton *v.* Lockhart, 1 Ind. App. 380, 27 N. E. 715; Elsanger *v.* Grovijohn, 29 Nebr. 139, 45 N. W. 273; Backers *v.* Van Fleit, 13 N. J. L. 195.

96. *Arkansas.*— Levy *v.* Ferguson Lumber Co., 51 Ark. 317, 11 S. W. 284; Wayte *v.* Wayte, 40 Ark. 163.

Delaware.— Barclay *v.* Lawton, 1 Marv. 159, 40 Atl. 935.

Illinois.— St. Louis, etc., R. Co. *v.* Gundlach, 69 Ill. App. 192 [*following* Merritt *v.* Yates, 71 Ill. 636, 23 Am. Rep. 128].

Michigan.— Kluck *v.* Murphy, 115 Mich. 128, 73 N. W. 128; Foster *v.* Alden, 21 Mich. 507. The docket entry of a justice of the peace of the date when a judgment was rendered cannot be changed by his return to a writ of certiorari, so as to show that he was out of the state on the day named, and that the judgment was actually rendered the day previous, when he was within his jurisdiction, and erroneously entered on his docket as of the following date. Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302. See also Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 905.

Missouri.— Corrigan *v.* Morris, 43 Mo. App. 456.

New York.— An error can only be corrected on motion in a court of record. People *v.* Delaware C. Pl., 18 Wend. 558.

South Dakota.— McCormick Harvesting Mach. Co. *v.* Halvorson, 11 S. D. 427, 78 N. W. 1000, 74 Am. St. Rep. 820.

See 31 Cent. Dig. tit. "Justices of the Peace," § 464.

97. Costs on appeal from or error to justice's court see Costs, 11 Cyc. 244 *et seq.*

98. See Appeal and Error, 2 Cyc. 513, 540.

99. See the statutes of the several states.

Appeal is the most usual mode of review of decisions of justices of the peace,[1] and upon an appeal the case is generally triable *de novo* in the appellate court.[2] In some states, however, a writ of error will lie, and whether in a given case appeal, error, or certiorari is the appropriate remedy is wholly dependent on statute.[3] The practice in an appeal from a justice's judgment is governed by the

1. See the cases cited in the notes following.

2. Trial de novo see *infra*, V, A, 12.

3. *Georgia.*— The judgments from which an appeal may be taken are those in the rendition of which issues of fact are involved. If the case rests solely upon questions of law, certiorari is the remedy. Humphries *v.* Blalock, 100 Ga. 404, 28 S. E. 165. See also Maddox *v.* Witte, 100 Ga. 316, 27 S. E. 163; Reedy *v.* Helms, 54 Ga. 121.

Iowa.— A writ of error, and not an appeal, is the proper remedy for a party aggrieved by a decision on a question of law. Belding *v.* Torrence, 39 Iowa 516; Leftwick *v.* Thornton, 18 Iowa 56. Upon questions of fact appeal is the proper remedy (Lane *v.* Goldsmith, 23 Iowa 240; Miller *v.* O'Neal, 9 Iowa 446), although, if the judgment is final, whether the errors be of law or fact, the party may, at his election, bring error or appeal (Griffin *v.* Moss, 3 Iowa 261). Appeal to, and not writ of error from, the district court is the remedy of one aggrieved by a justice's judgment, where the justice made no ruling except to enter judgment after trial upon the merits. Simmons *v.* Chicago, etc., R. Co., 128 Iowa 306, 103 N. W. 954.

Louisiana.— Where a justice illegally acts as a police magistrate, and imposes a penalty, the remedy is to invoke the supervisory jurisdiction of the supreme court, and not by appeal (State *v.* Carreau, 45 La. Ann. 1446), and in no case can a party appeal to both the district or parish court and the supreme court (State *v.* Orleans Third Justice of Peace, 27 La. Ann. 669, 14 So. 292.

Maryland.— The appropriate remedy in forcible entry and detainer is by appeal. Roth *v.* State, 89 Md. 524, 43 Atl. 769.

Michigan.— Under Comp. Laws, § 5432, a special appeal lies to bring up objections "to the process, pleadings, or other proceedings, and the decision of the justice thereon, which would not be allowed to be made on the trial of the appeal." Fowler *v.* Hyland, 48 Mich. 179, 12 N. W. 26. See also Woodbridge *v.* Robinson, 49 Mich. 228, 13 N. W. 527; Wright *v.* Russell, 19 Mich. 346.

Minnesota.— See Tierney *v.* Dodge, 9 Minn. 166, to the effect that the mode of review is subject to legislative prescription.

New Jersey.— An objection that the justice has lost jurisdiction over the person must be raised by certiorari, and not by appeal. Steinlein *v.* Folwell, 53 N. J. L. 176, 20 Atl. 1079.

New York.— For errors on the trial of a cause the remedy is by appeal. In all other cases the remedy is by certiorari. People *v.* Schoharie C. Pl., 2 Wend. 260.

North Carolina.— See Grissett *v.* Smith, 61 N. C. 164, holding that no appeal lay from erroneous proceedings in forcible entry and detainer, but the remedy was by writ of recordari or of false judgment, Rev. Code, c. 62, § 23, applying only to appeals from the ordinary subjects of jurisdiction of justices of the peace.

Oregon.— Appeal and writ of review are concurrent remedies. Feller *v.* Feller, 40 Oreg. 73, 66 Pac. 468. See also Blanchard *v.* Bennett, 1 Oreg. 328.

Pennsylvania.— A party cannot have both an appeal and a writ of certiorari (Teter *v.* Cook, 2 Pa. Co. Ct. 171; Hibbert *v.* Scull, 9 Del. Co. 190; Mullen *v.* Phœnix Iron Works Co., 34 Pittsb. Leg. J. N. S. 127), and where judgment is rendered for an amount beyond the justice's jurisdiction, the remedy is by motion to strike it off, or by writ of error (Walker *v.* Lyon, 3 Penr. & W. 98).

Texas.— A party may appeal and bring certiorari at the same time, but he will be compelled to elect in the appellate court which he will rely on. Lindheim *v.* Davis, 2 Tex. App. Civ. Cas. § 108.

West Virginia.— An appeal lies from the judgment of a justice rendered upon the verdict of a jury, just as in cases tried by him without a jury, and the writ of certiorari does not lie in such case. Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653 [*overruling* in so far as they are to the contrary Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298; Vandervort *v.* Fouse, 30 W. Va. 326, 4 S. E. 660; Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; Barlow *v.* Daniels, 25 W. Va. 512].

Wisconsin.— To determine whether the remedy is by appeal or certiorari, the amount of the recovery, exclusive of costs, is to be looked to; in replevin it is the value of the property and damages, exclusive of costs. Kirby *v.* Martin, 3 Pinn. 385, 4 Chandl. 91. See also Adler *v.* Gee, 3 Wis. 742.

See 31 Cent. Dig. tit. "Justices of the Peace," § 465.

Binding effect of agreement among members of bar as to form of proceedings see Hallowell *v.* Williams, 4 Pa. St. 339.

Cases construing particular statutory provisions. — *California.* — Holbrook *v.* Sacramento County Super. Ct., 106 Cal. 589, 39 Pac. 936, construing Code Civ. Proc. § 890, subd. 4.

Illinois.— Pennsylvania Co. *v.* Chicago, 113 Ill. App. 638 (construing Hurd Rev. St. (1903) c. 146, § 36); McGillen *v.* Wolff, 83 Ill. App. 227 (construing revisory act of 1895, and act of 1872, § 68); Newberry *v.* Bowen, 26 Ill. App. 645 (construing act of June 13, 1887).

Kansas.— Stevens *v.* Beaseley, 8 Kan. App. 753, 61 Pac. 762, construing Gen. St. (1897)

laws in force at the time of taking the appeal,[4] and, while the statutes allowing appeals are liberally construed,[5] where an appeal from a judgment was not allowed at the time of its rendition, it cannot be authorized by subsequent legislation.[6]

b. Appellate Jurisdiction — (i) *In General.* The particular court, usually the next higher court, being a court of record, to which an appeal must be taken or a writ of error prosecuted to a justice's decision is designated by either the constitution or statutes of each state.[7] Where one party to a judgment of a justice

c. 103, §§ 146–148; (Gen. St. (1889) pars. 4962–4964).

Michigan.— Danville Stove, etc., Co. *v.* Adsit, 88 Mich. 244, 50 N. W. 140 (construing Pub. Acts (1891), No. 73); Wilcox *v.* Laflin, etc., Powder Co., 44 Mich. 35, 5 N. W. 1091 (construing Comp. Laws, § 5479).

Mississippi.— Pollard *v.* Parish, 23 Miss. 573, construing Hutchinson Code, p. 705, art. 17.

Nebraska.— Newcomb *v.* Boulware, 1 Nebr. 428, holding the act of Feb. 10, 1857, unaffected by the act of Feb. 13, 1857.

Nevada.— Cavanaugh *v.* Wright, 2 Nev. 166, construing Const. art. 6, §§ 6, 8.

New York.— Younghause *v.* Fingar, 63 Barb. 299 (construing Code, § 371); Teall *v.* Van Wyck, 10 Barb. 376 (construing Code (1848), and the Judiciary Act of 1847).

Ohio.— Bode *v.* Welch, 29 Ohio St. 19 (construing 72 Ohio Laws, p. 161); Barker *v.* Cory, 15 Ohio 9 (construing the act of March 4, 1845).

Oregon.— See La Fayette *v.* Clark, 9 Oreg. 225, as to appeals from a city recorder.

Pennsylvania.— Com. *v.* Courtney, 174 Pa. St. 23, 34 Atl. 300; Com. *v.* McCann, 174 Pa. St. 19, 34 Atl. 299 (both construing Const. art. 5, § 14, and the act of April 17, 1876); Com. *v.* Hart, 12 Pa. Super. Ct. 605 (construing the act of April 13, 1867); Com. *v.* Brunner, 2 Lehigh Val. L. Rep. 377 (construing Const. art. 5, § 14, and the act of April 17, 1876).

Utah.— Salt Lake City *v.* Reed, 1 Utah 183, construing 18 U. S. St. at L. 254, c. 469.

Wyoming.— Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447, construing Const. art. 5, §§ 10, 23, and Laws (1895), p. 107, c. 57.

United States.— Dennee *v.* Cromer, 114 Fed. 623, 52 C. C. A. 403, construing 30 U. S. St. at L. 499, c. 517, § 14, and Mansfield Dig. Ark. c. 29.

See 31 Cent. Dig. tit. "Justices of the Peace," § 466.

4. Roesink *v.* Barnett, 8 Nebr. 146.

5. Younghause *v.* Fingar, 63 Barb. (N. Y.) 299; Devanna *v.* Crane, 8 Leg. & Ins. Rep. (Pa.) 205.

6. Lancaster *v.* Barr, 25 Wis. 560.

7. *Alabama.*—Vaughan *v.* Seed, 7 Ala. 740, construing the act of Feb. 14, 1843.

Arkansas.— *Ex p.* Anthony, 5 Ark. 358, construing Const. art. 6, § 5.

California.— California Fruit, etc., Co. *v.* San Francisco, 60 Cal. 305 (jurisdiction in superior courts); People *v.* Fowler, 9 Cal. 85 (exclusive jurisdiction in county courts).

Colorado.— Cochrane *v.* Cowan, 11 Colo. 610, 19 Pac. 764 (city superior courts); Welsh *v.* Noyes, 10 Colo. 133, 14 Pac. 317 (city superior court); Wike *v.* Campbell, 5 Colo. 126 (county court); Foote *v.* Walker, 3 Colo. 339 (probate court).

Florida.— Otoway *v.* Devall, 6 Fla. 302 (no jurisdiction in supreme court); *Ex p.* Henderson, 6 Fla. 279 (circuit courts).

Georgia.— Stamey *v.* Hill, 114 Ga. 154; 39 S. E. 949; McGahey *v.* Smith, 113 Ga. 604, 38 S. E. 955; Kirkman *v.* Gillespie, 112 Ga. 507, 37 S. E. 714, in all of which it was held that a city court has no jurisdiction.

Illinois.— Jackson *v.* Kemble, 18 Ill. 580, holding that Const. art. 5, § 8, does not disable the legislature from allowing appeals in civil cases to the county courts.

Iowa.— Sayles *v.* Deluhrey, 64 Iowa 109, 19 N. W. 883 (exclusive jurisdiction of writ of error was formerly in the circuit court); State *v.* Knapf, 61 Iowa 522, 16 N. W. 590 (no appeal to district court); Hickox *v.* Burlington, etc., R. Co., 55 Iowa 431, 7 N. W. 645; Hickox *v.* Nutting, 55 Iowa 403, 7 N. W. 645 (each holding that the superior court of Cedar Rapids had concurrent jurisdiction with the circuit court); State *v.* Hoag, 46 Iowa 337 (appeal to district court from decision of mayor in case involving violation of ordinance); State *v.* Hodnutt, 13 Iowa 437 (no appeal from city court of Dubuque to district court).

Kentucky.— Jones *v.* Thompson, 12 Bush 394 (no jurisdiction in circuit court); Searcy *v.* Switzer, 13 B. Mon. 352 (appeal in equity cases to county court where amount was under £5); Howard *v.* Jones, 2 B. Mon. 526 (appeal to circuit court from judgment on motion against constable); Williams *v.* Wilson, 5 Dana 596; Parks *v.* Hulme, 3 Dana 499; Craddock *v.* Patterson, 1 T. B. Mon. 8 (the three cases last cited being appeals to the circuit court where the amount exceeded £5); Jackson *v.* Wernert, 30 S. W. 412, 17 Ky. L. Rep. 72 (appeal to quarterly and not to circuit court, when value in controversy exceeds ten dollars).

Louisiana.— State *v.* Voorhies, 51 La. Ann. 500, 25 So. 96, construing Const. (1898) arts. 111, 126.

Maryland.— Roth *v.* State, 89 Md. 524, 43 Atl. 769, appeal in forcible entry and detainer to circuit court.

Massachusetts.— Appeals lie to the court of common pleas. Parker *v.* Page, 4 Gray 533; McIniffe *v.* Wheelock, 1 Gray 600.

Minnesota.— Dickerman *v.* St. Paul, 72 Minn. 332, 75 N. W. 591 (appeal to St. Paul municipal court); Minneapolis Threshing Mach. Co. *v.* Voight, 63 Minn. 145, 65 N. W. 261 (appeal to district court of either of two

of the peace appeals to a particular court, another party wishing to appeal must take his appeal to the same court, and the cause will be stricken from the docket of any other court.[8]

(II) *As Dependent on Jurisdiction of Justice.* On appeal from a justice of the peace, the appellate court has only such jurisdiction as the justice had, and if he had no jurisdiction, the appellate court acquires none; and it is immaterial that such court has original jurisdiction of the subject-matter of the action.[9] But where an action is brought before a justice for an amount within the justice's

counties in which a city lies); State *v.* Hanft, 26 Minn. 264, 3 N. W. 343 (appeal under the act of 1876 to district court); McClung *v.* Manson, 25 Minn. 374 (under the act of 1876 to district court).

Mississippi.— Nations *v.* Lovejoy, 77 Miss. 36, 25 So. 494 (circuit court of district where defendants reside); Agnew *v.* Natchez, 9 Sm. & M. 104 (circuit court).

Missouri.— Smith *v.* Shore, 53 Mo. 273 (construing acts relating to the Lafayette court of common pleas); Watkins *v.* Finney, 23 Mo. 48 (appeal in trespass to real estate must be taken to the land court); Meier *v.* Eichelberger, 21 Mo. 148 (appeal in trespass to land court); Ladue *v.* Spalding, 17 Mo. 159 (superintending control over justices in circuit court); Patten *v.* Nelson, 12 Mo. 292 (in St. Louis county appeals to be taken to that court in which they can be first tried).

New Jersey.— Under Pub. Laws (1882), p. 137, district courts have exclusive jurisdiction in cities where they are established. Jackson *v.* Kelly, 6 N. J. L. J. 55.

New York.— People *v.* Murphy, 1 Daly 462, appeal to common pleas, and not to general term. An appeal will lie to the supreme court from a municipal court of New York city from a judgment by default, under Code Civ. Proc. § 3057, relating to appeals from justices of the peace, made applicable to appeals from municipal courts by Consolidation Act, § 1367. Iron-Clad Mfg. Co. *v.* Smith, 28 Misc. (N. Y.) 172, 59 N. Y. Suppl. 332.

North Carolina.— Plummer *v.* Wheeler, 44 N. C. 472, appeal to either next county or superior court at option of party.

Ohio.— Filing transcript in insolvency court does not preclude appellee from filing transcript with the common pleas. Lower *v.* Fisher, 19 Ohio Cir. Ct. 627, 10 Ohio Cir. Dec. 294.

Pennsylvania.— Cumberland County *v.* Deckman, 12 Pa. Co. Ct. 340 (quarter sessions has no jurisdiction of appeal from conviction of a violation of a health regulation); Wells *v.* Morse, 1 Lack. Leg. Rec. 391 (where county is divided, appeal is to common pleas of that part in which justice resides); Haines Tp. *v.* Penn. Tp., 1 Am. L. J. N. S. 26 (no appeal to supreme court).

Virginia.— Valley Turnpike Co. *v.* Moore, 100 Va. 702, 42 S. E. 675, construing Code, § 2956.

Wisconsin.— Asher *v.* Hill, 4 Wis. 214, circuit court given jurisdiction by Sess. Laws (1855), c. 34.

United States.— Carr *v.* Tweedy, 5 Fed. Cas. No. 2,440*a*, Hempst. 287, circuit courts of territory of Arkansas.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 468–471.

Change of venue.—When a writ of error to a justice's court is pending in a circuit court, which, under Iowa Code, § 162, has exclusive jurisdiction of such writs, an order of change of venue to the district court is void. Sayles *v.* Deluhrey, 64 Iowa 109, 19 N. W. 883.

No distinction between appeals and writs of certiorari as affecting jurisdiction see O'Leary *v.* Harris, 50 Miss. 13.

8. Aldrich *v.* Polo, 8 Ill. App. 45.

9. *Alabama.*— Webb *v.* Carlisle, 65 Ala. 313; Crabtree *v.* Cliatt, 22 Ala. 181. But *compare* Anderson *v.* Winton, 136 Ala. 422, 34 So. 962 (in which no plea in abatement was filed in that plaintiff claimed more than one hundred dollars, and the suit was treated as originating in the circuit court); Hart *v.* Turk, 15 Ala. 675 (in which the case was tried on its merits on appeal, under the provisions of the act of 1819, although the amount claimed exceeded the justice's jurisdiction).

Arkansas.—Whitesides *v.* Kershaw, 44 Ark. 377; Dunnington *v.* Bailey, 27 Ark. 508; Gregory *v.* Williams, 24 Ark. 177; Everett *v.* Clements, 9 Ark. 478; Collins *v.* Woodruff, 9 Ark. 463; Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285; Dickey *v.* Pettigrew, 6 Ark. 424; Latham *v.* Jones, 6 Ark. 371; Levy *v.* Shurman, 6 Ark. 182, 42 Am. Dec. 690; Pendleton *v.* Fowler, 6 Ark. 41; McKee *v.* Murphy, 1 Ark. 55. See also Fortenberry *v.* Gaunt, 69 Ark. 433, 64 S. W. 95.

California.— Shealor *v.* Amador County, 70 Cal. 564, 11 Pac. 653; Ford *v.* Smith, 5 Cal. 331.

Colorado.— Rosengrave *v.* Clelland, 16 Colo. App. 474, 66 Pac. 448; Robinson *v.* Compher, 13 Colo. App. 343, 57 Pac. 754.

Delaware.— Barr *v.* Logan, 5 Harr. 52.

Georgia.— Watson *v.* Pearre, 110 Ga. 320, 35 S. E. 316; Berger *v.* Saul, 109 Ga. 240, 34 S. E. 1036; Searcy *v.* Tillman, 75 Ga. 504. Where a justice is without jurisdiction of a case, proceedings on appeal therefrom are void. Southern R. Co. *v.* Born Steel Range Co., 122 Ga. 658, 50 S. E. 488.

Illinois.— Kennedy *v.* Pennick, 21 Ill. 597; Shirk *v.* Trainer, 20 Ill. 301; People *v.* Skinner, 13 Ill. 287, 54 Am. Dec. 432; Hough *v.* Leonard, 12 Ill. 456; Nigh *v.* Dovel, 84 Ill. App. 228; Cruikshank *v.* Kimball, 75 Ill. App. 231. But see Brown *v.* Wagar, 110 Ill. App. 354.

jurisdiction, and pending appeal the claim is increased by interest, so that verdict

Indiana.— Nace *v.* State, 117 Ind. 114, 19 N. E. 729; Horton *v.* Sawyer, 59 Ind. 587; Mays *v.* Dooley, 59 Ind. 287; Jolly *v.* Ghering, 40 Ind. 139; Deane *v.* Robinson, 34 Ind. App. 468, 73 N. E. 169; Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132; Goodwine *v.* Barnett, 2 Ind. App. 16, 28 N. E. 115.

Iowa.— Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594; Erret *v.* Pritchard, 121 Iowa 496, 96 N. W. 963; Porter *v.* Welsh, 117 Iowa 144, 90 N. W. 582; Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528; McMeans *v.* Cameron, 51 Iowa 691, 49 N. W. 856.

Kansas.— Parker Grain Co. *v.* Chicago, etc., R. Co., 70 Kan. 168, 78 Pac. 406; Sims *v.* Kennedy, 67 Kan. 383, 73 Pac. 51; Thompson *v.* Stone, 63 Kan. 881, 64 Pac. 969; Ball *v.* Biggam, 43 Kan. 327, 23 Pac. 565; Berroth *v.* McElvain, 41 Kan. 269, 20 Pac. 850. But *compare* Douglass *v.* Easter, 32 Kan. 496, 4 Pac. 1034, where the fact that title to land was involved did not appear in the justice's court, and it was held that the district court might try the case on appeal, although the fact that title was involved appeared by the evidence.

Kentucky.— Fleming *v.* Limebaugh, 2 Metc. 265; McKitrick *v.* Peter, 5 Dana 587; Stephens *v.* Boswell, 2 J. J. Marsh. 29.

Maryland.— Presstman *v.* Silljacks, 52 Md. 647.

Massachusetts.— Jordan *v.* Dennis, 7 Metc. 590.

Minnesota.— Dodd *v.* Cady, 1 Minn. 289. *Compare* Hecklin *v.* Ess, 16 Minn. 51.

Mississippi.— Dufour *v.* Chapotel, 75 Miss. 656, 23 So. 387; Louisville, etc., R. Co. *v.* McCollister, 66 Miss. 106, 5 So. 695; Stier *v.* Surget, 10 Sm. & M. 154; Crapoo *v.* Grand Gulf, 9 Sm. & M. 205.

Missouri.— Littlefield *v.* Lemley, 75 Mo. App. 511; Rocheport Bank *v.* Doak, 75 Mo. App. 332; Reinhardt *v.* Varney, 72 Mo. App. 646; Eisenberg *v.* North Western Turn, etc., Assoc., 70 Mo. App. 436; Mitchell Planing Mill Co. *v.* Short, 58 Mo. App. 320. But it has been held that under Rev. St. (1899) § 4071, requiring the circuit court to try a case appealed from a justice *de novo*, the circuit court has jurisdiction to try a cause appealed from a justice, although the judgment appealed from is in excess of the justice's jurisdiction to render. State *v.* Mosman, 112 Mo. App. 540, 87 S. W. 75.

Montana.—Oppenheimer *v.* Regan, 32 Mont. 110, 79 Pac. 695; Shea *v.* Regan, 29 Mont. 308, 74 Pac. 737.

Nebraska.—Jacobson *v.* Lynn, 54 Nebr. 794, 75 N. W. 243. *Compare* Selby *v.* McQuillan, 59 Nebr. 158, 80 N. W. 504.

Nevada.— Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514.

New Hampshire.— Morse *v.* Davis, 24 N. H. 159.

New Jersey.— Where the order of two justices, charging a person in bastardy, failed to recite the jurisdictional facts stated in Rev. pp. 70, 71, §§ 1–7, 15, 16, it was held that an appeal therefrom did not waive the objection, or confer on the sessions authority to adjudicate the matter; and where the sessions court did proceed, its order must also fail for want of jurisdiction. State *v.* Schomp, 45 N. J. L. 488.

New York.— O'Donnel *v.* Brown, 3 Lans. 474. But *compare* Gould *v.* Patterson, 63 Hun 575, 18 N. Y. Suppl. 332, 87 Hun 533, 34 N. Y. Suppl. 289, where defendant failed to take any steps for a discontinuance in the justice's court because title to land was involved, and the record did not show that the title was disputed before the justice.

North Carolina.— Moore *v.* Wolfe, 122 N. C. 711, 30 S. E. 120; Durham Fertilizer Co. *v.* Marshburn, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708; Ijames *v.* McClamroch, 92 N. C. 362; Jarrett *v.* Self, 90 N. C. 478.

North Dakota.— Vidger *v.* Nolin, 10 N. D. 353, 87 N. W. 593 [*distinguishing* Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926; Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095, which were cases of waiver of service of summons in the justice's court by voluntary appearance on appeal].

Ohio.— Nichol *v.* Patterson, 4 Ohio 200. See also McKibben *v.* Lester, 9 Ohio St. 627. But see Harrington *v.* Heath, 15 Ohio 483.

Oklahoma.— Hesser *v.* Johnson, 13 Okla. 53, 74 Pac. 320; Vowell *v.* Taylor, 8 Okla. 625, 58 Pac. 944.

Oregon.— Aiken *v.* Aiken, 12 Oreg. 203, 6 Pac. 682.

Pennsylvania.— Collins *v.* Collins, 37 Pa. St. 387; Wright *v.* Guy, 10 Serg. & R. 227; Myers *v.* Filley, 12 Pa. Dist. 562. *Compare* Bunce *v.* Stanford, 27 Pa. St. 265, to the effect that the common pleas has jurisdiction of an appeal where part of the demand passed upon by the justice was without his jurisdiction. See also Gingrich *v.* Sheaffer, 16 Pa. Super. Ct. 299 [*affirming* 17 Lanc. L. Rev. 143].

Tennessee.—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Cherry *v.* York, (Ch. App. 1898) 47 S. W. 184.

Texas.— Times Pub. Co. *v.* Hill, 36 Tex. Civ. App. 389, 81 S. W. 806; Barnes *v.* Feagon, (Civ. App. 1903) 74 S. W. 329; Butler *v.* Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52; Brigman *v.* Aultman, (Civ. App. 1900) 55 S. W. 509; Heard *v.* Conly, (Civ. App. 1899) 50 S. W. 1047; Hall *v.* McGill, (Civ. App. 1896) 38 S. W. 828; Cain *v.* Culbreath, (Civ. App. 1896) 35 S. W. 809; Waters *v.* Walker, (App. 1891) 17 S. W. 1085; Erwin *v.* Austin, 1 Tex. App. Civ. Cas. § 1037. *Compare* Herry *v.* Benoit, (Civ. App. 1902) 70 S. W. 359.

Utah.— See Hamner *v.* Ballantyne, 16 Utah 436, 52 Pac. 770, 67 Am. St. Rep. 643.

Vermont.— Heath *v.* Robinson, 75 Vt. 133, 53 Atl. 995; Whitcomb *v.* Rood, 20 Vt. 49; Thompson *v.* Colony, 6 Vt. 91.

West Virginia.— Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653; Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939.

Wisconsin.— Cooban *v.* Bryant, 36 Wis. 605; Blackwood *v.* Jones, 27 Wis. 498; Felt

is rendered on appeal for an amount in excess of such jurisdiction, the appellate court may, on remittitur by plaintiff, render judgment for an amount within the justice's jurisdiction.[10]

(III) *Waiver of Objections and Consent to Jurisdiction.* While it has been held that, where the justice of the peace had no jurisdiction of the subject-matter of an action, the parties cannot confer jurisdiction on the appellate court by consent,[11] the better view seems to be that where the appellate court has original as well as appellate jurisdiction of the cause,[12] jurisdiction of both the subject-matter and the person may be conferred upon it by waiver or consent.[13] But a general instead of a special appearance by an appellee on a motion to dismiss the appeal will not confer general jurisdiction on the appellate court, if no more is asked than a mere dismissal.[14]

(IV) *Determination of Jurisdiction.* The jurisdiction of an appellate court is determinable by itself,[15] and in the cause appealed.[16] The justice's jurisdiction should affirmatively appear,[17] and it is proper for the appellate court to look to the whole record to determine whether it has jurisdiction.[18] The question of want of jurisdiction may be raised by motion to dismiss the proceedings,[19] or by objecting at the trial to the introduction of any evidence on behalf of plaintiff.[20]

v. Felt, 19 Wis. 193; Barker *v.* Baxter, 1 Pinn. 407.

United States.— Langford *v.* Monteith, 102 U. S. 145, 26 L. ed. 53.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 472–474. And see Appeal and Error, 2 Cyc. 537.

Presumption of jurisdiction.—While there is no presumption that a justice had jurisdiction of an action, still, it having been appealed to a court of superior jurisdiction, there is a presumption that the latter had jurisdiction, although it had none if the justice had none. Kellogg *v.* Linger, 60 Mo. App. 571.

10. Stair *v.* Bishop, 121 Ind. 273, 23 N. E. 144.

11. *Indiana.*— Horton *v.* Sawyer, 59 Ind. 587.

Minnesota.— Dodd *v.* Cady, 1 Minn. 289.

Nebraska.— Selleck *v.* Feeney, (1902) 89 N. W. 1003 [*following* Ettenheimer *v.* Wallman, 63 Nebr. 647, 88 N. W. 859].

Ohio.— Rogers *v.* Prushansky, 23 Ohio Cir. Ct. 271.

Pennsylvania.— Collins *v.* Collins, 37 Pa. St. 387. See also Morrison *v.* Weaver, 4 Serg. & R. 190.

See 31 Cent. Dig. tit. "Justices of the Peace," § 475; and Appeal and Error, 2 Cyc. 536.

12. Where the appellate court has no jurisdiction of the subject-matter, no waiver or consent of the parties can confer jurisdiction. Little *v.* Fitts, 33 Ala. 343. See also Woodruff *v.* Harrell, 67 Tex. 298, 3 S. W. 48.

13. *Alabama.*—Vaughan *v.* Robinson, 20 Ala. 229; Pruitt *v.* Stuart, 5 Ala. 112.

Arkansas.—Smith *v.* Maberry, 61 Ark. 515, 33 S. W. 1068.

Colorado.— Flannery *v.* Trainor, 13 Colo. App. 290, 57 Pac. 189.

Illinois.— Brown *v.* Wagar, 110 Ill. App. 354.

Indiana.— Wall *v.* Albertson, 18 Ind. 145.

Iowa.— Danforth *v.* Thompson, 34 Iowa 243.

Kentucky.— Hughes *v.* Hardesty, 13 Bush 364.

Michigan.— Shaw *v.* Moser, 3 Mich. 71.

Minnesota.— Lee *v.* Parrett, 25 Minn. 128.

Ohio.— Wilson *v.* Wilson, 30 Ohio St. 365; Bisher *v.* Richards, 9 Ohio St. 495; Miller *v.* Truman, 7 Ohio Dec. (Reprint) 374, 2 Cinc. L. Bul. 241.

See 31 Cent. Dig. tit. "Justices of the Peace," § 475. See also Appeal and Error, 2 Cyc. 536, 538.

14. Houser *v.* Nolting, 11 S. D. 483, 78 N. W. 955.

15. Parker *v.* Allen, 84 N. C. 466.

16. People *v.* Huntoon, 71 Ill. 536, where it was held that the question of jurisdiction is not triable upon a petition for a writ of mandamus to compel the justice to issue execution, notwithstanding the appeal.

17. Downing *v.* Florer, 4 Colo. 209. And see *supra*, III, O.

18. Anderson *v.* Beaty, 3 Tex. App. Civ. Cas. § 260. See also Owens *v.* Levy, 1 Tex. App. Civ. Cas. § 407.

The justice's minutes of testimony cannot be referred to for the purpose of ascertaining whether the amount in controversy exceeded his jurisdiction. He should be required to certify what amount was proved on the trial to his satisfaction, and the amount it was reduced by credits or set-offs. Sellers *v.* Lampman, 63 Wis. 256, 23 N. W. 131.

Note filed in suit as proof of want of jurisdiction see Felt *v.* Felt, 19 Wis. 193.

Parol evidence of justice admitted to show amount in suit see Downey *v.* Ferry, 2 Watts (Pa.) 304; Hoops *v.* Worthington, 1 Browne (Pa.) 336.

19. Ripple *v.* Keast, 8 Kulp (Pa.) 109, in which it is said, however, that certiorari is the proper and best way.

20. Ball *v.* Biggam, 43 Kan. 327, 23 Pac. 565.

Where on appeal the parties are allowed to amend their pleadings so that either can prove an amount in excess of the justice's jurisdiction, this does not show that such proof was made on the trial below, and that the justice had no jurisdiction.[21]

2. Decisions Reviewable — a. In General. Beyond the broad statement that the decisions of justices of the peace are nearly always, within certain limitations as to the amount involved,[22] reviewable by some higher court, it is impossible to lay down any general rule as to what decisions are subject to review and what are not. The whole subject is entirely dependent upon constitutional and statutory enactments, and these vary materially, not only in the different states, but at different times in the same state.[23]

21. Sellers *v.* Lampman, 63 Wis. 256, 23 N. W. 131.

22. See *infra*, V, A, 2, b.

23. See the following cases:

Alabama.— Patterson *v.* Grace, 1 Ala. 264, appeal to county court from judgment against constable on motion.

California.— People *v.* Halloway, 26 Cal. 651 (county court cannot review proceedings in a case in which a search warrant has been issued for stolen property, which was ordered delivered to owner); Burson *v.* Cowles, 25 Cal. 535 (appeal lies in action against railroad for overcharges).

Connecticut.— Russell *v.* Monson, 33 Conn. 506 (appeal by defendant from adverse judgment on plea in abatement); Wildman *v.* Rider, 23 Conn. 172 (action for not exceeding seven dollars not appealable, although title is pleaded).

District of Columbia.— Rev. St. § 1029, giving an appeal to the supreme court of the District, applies only to such cases as are tried without a jury. U. S. *v.* O'Neal, 10 App. Cas. 205.

Illinois.— Appeals are allowed from justices' judgments in all cases, except on judgment confessed. Brown *v.* Owens, 64 Ill. App. 345.

Indiana.— Goshen *v.* Croxton, 34 Ind. 239 (appeal from mayor's court in action for violation of ordinance); White *v.* Griffey, 32 Ind. 97 (where motion for new trial is withdrawn by defendants after it has been granted, plaintiffs may appeal from judgment, although it has been replevied and paid); Hobbs *v.* Cowden, 20 Ind. 310 (appeal in township trustee's suit against a supervisor); State *v.* Wills, 4 Ind. App. 38, 30 N. E. 200 (no appeal in suit by city schoolboard for thirty-two dollars for tuition against non-resident of city).

Kentucky.— Appeal lies to correct a judgment *de bonis propriis* or *testatoris*, where it ought to have been *quando acciderint*. Bowman *v.* Green, 6 T. B. Mon. 339.

Louisiana.— The appellate jurisdiction of the district court includes questions as to the jurisdiction of the inferior court, as well as any other questions which may arise on the merits (State *v.* Mayer, 52 La. Ann. 255, 26 So. 823. See also D'Armond *v.* Pullen, 13 La. Ann. 137); but where the constitutionality or legality of an ordinance comes in question, the appeal must be to the supreme court (State *v.* Cullom, 49 La. Ann. 1744, 23 So. 253).

Massachusetts.— Writ of error will not lie in summary proceedings imposing a fine for neglect of military duty. Edgar *v.* Dodge, 4 Mass. 670; Mountfort *v.* Hall, 1 Mass. 443.

Mississippi.— Lagrone *v.* Trice, 57 Miss. 227 (no appeal in actions "in relation to Obstructions to Watercourses, Mills, and Dams"); Agnew *v.* Natchez, 9 Sm. & M. 104 (appeal from judgment for violation of city ordinance).

Missouri.— Pearce *v.* Myers, 3 Mo. 31 (appeal in all cases within jurisdiction of justice); State *v.* Johnson, 108 Mo. App. 140, 82 S. W. 962 (appeal lies from judgment enforcing a lien for the keeping of animals); Howell *v.* St. Louis, etc., R. Co., 79 Mo. App. 260 (appeal from judgment of revival in scire facias).

Nebraska.— McCormick Harvesting Mach. Co. *v.* Scott, (1902) 89 N. W. 410 (proceedings on trial of right of property in attachment are reviewable); Edwards *v.* Schutt, 7 Nebr. 18 (appeal in replevin tried by jury).

New Hampshire.—Ela *v.* Goss, 20 N. H. 52, review of refusal to receive plea in abatement, and rendition of final judgment.

New Jersey.— Pennsylvania R. Co. *v.* New Jersey S. P. C. A., 39 N. J. L. 400, appeal in action for penalty for cruelty to animals.

New York.— Port Jervis *v.* Barrett Bridge Co., 10 N. Y. St. 339 (appeal from judgment of recorder of Port Jervis); Davis *v.* Hudson, 5 Abb. Pr. 61 (appeal from judgment in summary proceedings); People *v.* Rensselaer County Judge, 13 How. Pr. 398 (appeal from judgment in mechanics' lien proceedings); People *v.* Madison C. Pl., 2 Wend. 628 (appeal lies from judgment on *ex parte* hearing after issue joined).

Ohio.— Martin *v.* Armstrong, 12 Ohio St. 548 (appeal from judgment in replevin on verdict of jury); Wright *v.* Munger, 5 Ohio 441 (appeal in suit to recover militia fines).

Pennsylvania.—Sott *v.* Kelso, 4 Watts & S. 278 (appeal in scire facias against constable); Com. *v.* Bennett, 16 Serg. & R. 243 (appeal in suit to recover penalty for neglecting to serve notice under arbitration act of 1810); Guilky *v.* Gillingham, 3 Serg. & R. 93 (appeal from judgment upon scire facias on a judgment); Carlisle Borough *v.* Lifter, 4 Pa. Dist. 230 (appeal in suit for penalty under borough ordinance); Watson

b. Amount or Value in Controversy — (I) *In General.* Under the constitutions and statutes of many of the states the right of appeal from justices' judgments in certain cases is restricted to actions in which the amount claimed or in controversy or the value of the property in dispute exceeds a specified sum.[24] Where an appeal is unauthorized because the amount recovered is less than the jurisdictional limit, the filing of a declaration by plaintiff in the appellate court will not confer jurisdiction of the appeal on that court;[25] but, on the other hand, where the right of appeal actually exists and the pleadings are in writing, it cannot be taken away by the justice's failure to enter the amount claimed on his docket.[26]

(II) *Determination of Jurisdiction* — (A) *Amount Claimed or in Controversy.* In most of the states the amount actually claimed or in controversy, or the value of the property in dispute, is the criterion by which the jurisdiction of the appellate court is to be determined, irrespective of the verdict or judgment in the justice's court.[27]

v. Wehrly, 2 Pa. Dist. 530 (appeal from judgment on scire facias to revive judgment); Scott Tp. Poor Dist.'s Appeal, 9 Pa. Co. Ct. 304 (no appeal from order approving expenditures of a person in providing for a pauper); Pritchett *v.* Moore, 1 Ashm. 26 (special bail have right to appeal from judgment against them).

Texas.— Field *v.* Anderson, 1 Tex. 437, no appeal from decision under the seventeenth section of the land law of 1837.

Vermont.— Lyons *v.* Rutland R. Co., 74 Vt. 17, 51 Atl. 1059 (railroad no right of appeal as a public officer); May *v.* Jamaica, 37 Vt. 23 (town cannot appeal on ground that the sum sued for was collected from plaintiff by town constable upon a legal rate bill and warrant); Edwards *v.* Osgood, 33 Vt. 224 (appeal in action by pound-keeper to recover penalty); Griswold *v.* Rutland, 23 Vt. 324 (no appeal on extent against delinquent collector); Gilson *v.* Gay, 10 Vt. 326 (appeal from judgment on scire facias against bail on mesne process); Penniman *v.* Robinson, 5 Vt. 569 (appeal from conviction for undue speculation).

West Virginia.— Parsons *v.* Aultman, 45 W. Va. 473, 31 S. E. 935, appeal from refusal to set aside void judgment.

Wisconsin.— Boscobel *v.* Bugbee, 41 Wis. 59, appeal from judgments of justices elected under city charter.

United States.— Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356 (no appeal in action for penalty for violating by-law of Georgetown); Howard *v.* U. S., 12 Fed. Cas. No. 6,763, 2 Cranch C. C. 259 (no appeal from fine for swearing in presence of justice); Washington *v.* Eaton, 29 Fed. Cas. No. 17,228, 4 Cranch C. C. 352 (appeal in action for penalty for violation of by-law of Washington).

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 477, 478, 493.

24. *Connecticut.* — Palmer *v.* Palmer, 6 Conn. 409.

Florida.— *Ex p.* Henderson, 6 Fla. 279.

Georgia.— Tibbs *v.* Williamson, 61 Ga. 74 (construing Const. (1877) art. 6, § 7, par. 2); Turman *v.* Cargill, 54 Ga. 663 (construing the act of 1874, and Const. art. 5, § 6); Burts *v.* Farrar, 50 Ga. 601 (decided under constitution of 1868).

Indiana.— Pennsylvania Co. *v.* Trimble, 75 Ind. 378.

Kentucky.— Searcy *v.* Switzer, 13 B. Mon. 352; Craddock *v.* Patterson, 1 T. B. Mon. 8.

Minnesota.—Shunk *v.* Hellmiller, 11 Minn. 104.

North Carolina.—Cowles *v.* Hayes, 67 N. C. 128.

Ohio.— Perkins *v.* White, 36 Ohio St. 530; Ohio, etc., R. Co. *v.* Bates, 26 Ohio St. 32; Martin *v.* Armstrong, 12 Ohio St. 548; Glover *v.* Moses, 13 Ohio 321.

Pennsylvania.— Harris *v.* Harrison, 1 Browne 161.

Texas.— Miman *v.* Eidman, 1 Tex. App. Civ. Cas. § 629, holding Rev. St. art. 1165, not repugnant to Const. art. 5, § 16.

Vermont.— Fisher *v.* Tupper, 73 Vt. 352, 50 Atl. 1106 (construing the word "exhibit" in St. § 1298); Maine Cent. R. Co. *v.* Coggins, 70 Vt. 466, 41 Atl. 436; Scott *v.* Darling, 66 Vt. 510, 29 Atl. 993 (holding that the "account" mentioned in act No. 122 of 1884 is an open account); Northfield Sav. Bank *v.* Sanders, 56 Vt. 594; Concord *v.* Derby Line Nat. Bank, 51 Vt. 144; Cabot *v.* Burnham, 28 Vt. 694; Calais *v.* Hall, 11 Vt. 494.

Wisconsin.— Cavenaugh *v.* Titus, 5 Wis. 143; Weizen *v.* McKinney, 2 Wis. 288.

United States.— Thornton *v.* Washington, 23 Fed. Cas. No. 14,001, 3 Cranch C. C. 212.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 479–481.

Contra.— Whitsett *v.* Gharky, 17 Mo. 325; Harris *v.* Hughes, 16 Mo. 599.

25. Glover *v.* Moses, 13 Ohio 321.

26. Texas, etc., R. Co. *v.* Hayes, 4 Tex. Civ. App. 88, 23 S. W. 443, where plaintiff's claim was less than twenty dollars, but defendant's claim in reconvention was for more than twenty dollars, and it was held that the justice's failure to enter the latter claim on his docket would not deprive the appellate court of jurisdiction of defendant's appeal.

27. *Georgia.*— Napier *v.* Woodall, 118 Ga. 830, 45 S. E. 684 (value of property deter-

(B) *Amount of Verdict or Judgment.* Under some statutes, however, the criterion of appellate jurisdiction is the amount of the verdict or judgment in the justice's court, without regard to the amount or value in controversy.[28]

(C) *Amount Depending on Mode of Trial Below.* In a few states the amount which determines the right to appeal is made to depend upon the mode of trial in the justice's court.[29]

mines jurisdiction in a claim case); Griffin *v.* Bradley, 110 Ga. 327, 35 S. E. 344 (amount actually in controversy); Vaughn *v.* Gloer, 108 Ga. 238, 33 S. E. 846.

Iowa.— Siver *v.* Mulligan, (1903) 94 N. W. 491; Nichols *v.* Wood, 66 Iowa 225, 23 N. W. 641; Perry *v.* Conger, 65 Iowa 588, 22 N. W. 688; Lundak *v.* Chicago, etc., R. Co., 65 Iowa 473, 21 N. W. 783.

Kentucky.— Donahue *v.* Murray, 2 Bush 194.

Louisiana.— McFarland *v.* Russ, 23 La. Ann. 608, to the effect that a claim case is appealable where the value of the property exceeds, although the amount of the execution is less than, the sum fixed by law.

Maine.— Cole *v.* Hayes, 78 Me. 539, 7 Atl. 391, to the effect that in assumpsit the jurisdiction depends on the amount of damages demanded, and not on the amount due on the note in suit.

Michigan.— A plaintiff against whom judgment is rendered for costs only, amounting to less than the appealable sum, may appeal. Wilson *v.* Davis, 1 Mich. 156.

Minnesota.— Koetke *v.* Ringer, 46 Minn. 259, 48 N. W. 917.

Nebraska.— Bates *v.* Phœnix Pub. Co., 50 Nebr. 79, 69 N. W. 305.

New York.— Fuller *v.* Brierley, 36 How. Pr. 47, to the effect that an appeal lies whenever the pleadings demand judgment for more than fifty dollars, whatever may be the sum really in controversy.

Ohio.— Vogel *v.* Haffy, 29 Ohio St. 439.

Oregon.— Troy *v.* Hallgarth, 35 Oreg. 162, 57 Pac. 374.

Pennsylvania.— The sum demanded by plaintiff gives him the right of appeal, if the decision is in whole or in part against him; and the sum adjudicated against defendant alone determines his right of appeal. McGonnegal *v.* Hopper, 1 Ashm. 195. See also Marks *v.* Swearingen, 3 Pa. St. 454; Soop *v.* Coats, 12 Serg. & R. 388; Stewart *v.* Keemle, 4 Serg. & R. 72; Wallace *v.* Hickey, 1 Chest. Co. Rep. 166. But see Stollars *v.* East Finley Tp., 3 Pa. Co. Ct. 209, where it was held that the right of appeal depends on the amount in controversy, and not on the amount of the claim proved at the trial, or on the amount of the judgment entered.

Texas.— Grooms *v.* Atascosa County, (Civ. App. 1895) 29 S. W. 73; Horton *v.* McKeehan, 1 Tex. App. Civ. Cas. § 465. See also Texas Land Mortg. Bank *v.* Voss, 29 Tex. Civ. App. 11, 68 S. W. 732.

Vermont.— The statute denies an appeal where "neither the *ad damnum* in the plaintiff's writ, nor the sum demanded by the declaration, nor the specifications or exhibits of the plaintiffs on trial, shall exceed ten dollars." Cole *v.* Goodall, 39 Vt. 400, 94 Am. Dec. 334; Downs *v.* Reed, 32 Vt. 785; Connecticut, etc., R. Co. *v.* Bates, 32 Vt. 420; Weston *v.* Marsh, 12 Vt. 420. *Compare* American Exp. Co. *v.* Gray, 62 Vt. 421, 20 Atl. 276.

Wisconsin.— Berray *v.* Woodruff, 6 Wis. 202.

See 31 Cent. Dig. tit. "Justices of the Peace," § 482.

28. *Connecticut.*— Curtis *v.* Gill, 34 Conn. 49.

Delaware.— Armstrong *v.* Brockson, 3 Pennew. 587, 53 Atl. 53, construing Rev. Code (1893), p. 754, c. 99, § 24.

Maryland.— Bushey *v.* Culler, 26 Md. 534.

New York.— *In re* Marsh, 19 Johns. 171.

Oregon.— Stoll *v.* Hoback, 2 Oreg. 225.

Pennsylvania.— Elliott *v.* Palmer, 10 Pa. Co. Ct. 427; Garvey *v.* Murphy, Wilcox 137. See also Cook *v.* Dunkle, 25 Pa. St. 340; Soop *v.* Coats, 12 Serg. & R. 388.

South Carolina.— Penning *v.* Porter, 1 Mill 396.

Texas.— Under Rev. St. art. 1165, an appeal is given when either the judgment appealed from or the amount in controversy exceeds twenty dollars. Brazoria County *v.* Calhoun, 61 Tex. 223.

Wisconsin.— Inman *v.* Gower, 3 Pinn. 152, 3 Chandl. 162.

United States.— Owner *v.* Washington, 18 Fed. Cas. No. 10,635, 5 Cranch C. C. 381.

See 31 Cent. Dig. tit. "Justices of the Peace," § 483.

29. *Kansas.*— Under **Justices Code,** § 132, no appeal shall be allowed "in jury trials where neither party claims in his bill of particulars a sum exceeding $20." Nordmark *v.* Nystrom, 46 Kan. 117, 26 Pac. 449, which was an action of replevin tried by jury in which the value of the property stated in the affidavit and the damages demanded did not exceed twenty dollars.

New Jersey.— An appeal will lie from a judgment rendered on the verdict of a jury in a case where the debt, demand, or other matter in dispute does not exceed three dollars. Cruser *v.* Duryea, 9 N. J. L. 15.

North Carolina.— Findings of fact by a justice in an action in which the recovery is for less than twenty-five dollars are not subject to review. Cauble *v.* Boyden, 69 N. C. 434.

Ohio.— See as to appeals in jury trials Leonard *v.* Cincinnati, 26 Ohio St. 447 [*reversing* 5 Ohio Dec. (Reprint) 279, 4 Am. L. Rec. 213]; Bethel *v.* Woodworth, 11 Ohio St. 393; White *v.* Coates, 4 Ohio Dec. (Reprint)

(D) *Effect of Set-Off or Counter-Claim.* A set-off or counter-claim, filed in good faith, and not merely for the purpose of obtaining an appeal,[30] if of sufficient amount, will in most jurisdictions be considered as the amount in controversy, so as to confer jurisdiction on the appellate court, where the amount claimed by plaintiff is insufficient to do so.[31] But where a set-off or counter-claim is filed which has no connection with the action, and which is disregarded by the justice, and is not involved in the judgment, it cannot be made the basis of an appeal;[32] and the same is true where a defendant neglects to comply with an order of the justice to make his counter-claim more definite and certain, and it is consequently not considered.[33] A defendant will not be permitted to increase the sum demanded by him in the justice's court so as to confer appellate jurisdiction;[34] nor can plaintiff's demand and defendant's counter-claim be added together for the purpose, but either must of itself exceed the jurisdictional minimum.[35]

(E) *Waiver and Consent to Jurisdiction.* While it has been held that an objection to an appeal because the sum involved is below the statutory minimum is waived by delaying to raise it until after trial and judgment,[36] the view more conformable to authority would seem to be that consent cannot confer jurisdiction on the appellate court over the subject-matter,[37] unless that court has original as well as appellate jurisdiction.[38]

(III) *Determination of Amount*—(A) *In General.* It is for the party who

119, 1 Clev. L. Rep. 43 (judgment in replevin appealable, although for only twelve dollars).

Pennsylvania.— See as to right of appeal in cases submitted to referees Ulrick *v.* Larkey, 6 Serg. & R. 285; McKim *v.* Bryson, 2 Serg. & R. 463; Zane *v.* Johnson, 1 Ashm. 42; Sleeper *v.* Burk, 1 Ashm. 23.

Wisconsin.— No appeal lies where the amount in controversy exceeds fifteen dollars, if no issue of law or fact was joined before the justice. Love *v.* Rockwell, 1 Wis. 382.

See 31 Cent. Dig. tit. "Justices of the Peace," § 484.

30. A fictitious counter-claim gives no right of appeal. Chicago, etc., R. Co. *v.* Weaver, 112 Iowa 101, 83 N. W. 795; Brush *v.* Hurlburt, 3 Vt. 46.

That a set-off was not maintainable in whole or in part, and that the justice refused to note it on his docket, is not sufficient proof of the bad faith of defendant in filing it, and the appeal will not be dismissed on the ground that the set-off was filed merely for the purpose of enabling defendant to appeal. Baldwin *v.* Burgess, 1 Wilcox (Pa.) 223. See also Chatfield *v.* Appleton, 8 Ohio Dec. (Reprint) 214, 6 Cinc. L. Bul. 327, where the counter-claim was ruled out because no evidence was offered to sustain it, but an appeal was allowed.

31. *Indiana.*— Hutts *v.* Williams, 55 Ind. 237.

Iowa.— Perry *v.* Conger, 65 Iowa 588, 22 N. W. 688.

Kentucky.— Parks *v.* Hulme, 3 Dana 499.

Ohio.— Chatfield *v.* Appleton, 8 Ohio Dec. (Reprint) 214, 6 Cinc. L. Bul. 327.

Pennsylvania.— Steele *v.* Walton, 3 Pa. Co. Ct. 211; Rafferty *v.* Clark, 2 Pa. Co. Ct. 301; Schineller *v.* Herrman, 1 Pa. Co. Ct. 145.

Texas.— Schneider *v.* Luckie, (Civ. App. 1898) 47 S. W. 685; International, etc., R. Co. *v.* Grant, 1 Tex. App. Civ. Cas. § 784. *Compare* Barnes *v.* Feagon, (Civ. App. 1903) 74 S. W. 329, in which the sum demanded in reconvention was itself less than twenty dollars.

Vermont.— Church *v.* French, 54 Vt. 420; Sherwin *v.* Colburn, 25 Vt. 613; Baker *v.* Blodget, 1 Aik. 342.

See 31 Cent. Dig. tit. "Justices of the Peace," § 485.

Contra.— Ross *v.* Evans, 30 Minn. 206, 14 N. W. 897. And see as to action on book debt Fowler *v.* Stocking, 5 Day (Conn.) 539.

Abandonment of set-off.—Where an appeal is allowed from a judgment for less than five dollars and thirty-three cents because a set-off was claimed by defendant in excess of such sum, the appeal will not be dismissed because defendant thereafter abandons the set-off. Schineller *v.* Herrman, 1 Pa. Co. Ct. 145. *Compare* Texas, etc., R. Co. *v.* Hook, 30 Tex. Civ. App. 325, 70 S. W. 233, in which the abandonment took place in the justice's court, and it was held that the case was not appealable. See also Galveston, etc., R. Co. *v.* Schlather, (Tex. Civ. App. 1904) 78 S. W. 953.

32. State *v.* Linn, 7 Ohio Dec. (Reprint) 468, 3 Cinc. L. Bul. 428.

33. Andrew *v.* Connelly, 6 Ohio Dec. (Reprint) 267, 6 Cinc. L. Bul. 774.

Where a counter-claim states no cause of action, it cannot be made the basis of an appeal. Campbell *v.* Lewis, 83 Iowa 583, 50 N. W. 208.

34. Barnes *v.* Feagon, (Tex. Civ. App. 1903) 74 S. W. 329.

35. Tucker *v.* Williams, (Tex. Civ. App. 1900) 56 S. W. 585. *Compare* Longacre Colliery Co. *v.* Creel, 57 W. Va. 347, 50 S. E. 430.

36. Miller *v.* Bogart, 19 Kan. 117.

37. Dodd *v.* Cady, 1 Minn. 289.

38. See *supra*, V, A, 1, b, (III).

appeals from the judgment of a justice of the peace to show affirmatively that the appellate court has jurisdiction.[39] The amount in controversy is to be determined by the pleadings filed in the case,[40] from the justice's docket,[41] or from the record on appeal.[42] In replevin the matter in demand is the property itself together with the damages for its taking and detention,[43] while in a proceeding to establish a lien on property, the value of the property determines the amount in controversy, irrespective of the amount of the debt.[44] Where an action is brought for a certain sum, and a portion of the amount claimed is admitted to be due, and tender thereof is made, the difference between the amount claimed and that tendered is the amount in controversy, for the purposes of appeal.[45] A plea in abatement to an appeal need not allege that the judgment rendered was for less than the statutory minimum, but is sufficient if it alleges that it was for a specified sum within that amount.[46]

(B) *Interest and Costs as Part of Amount.* While interest may be included in several states to bring the amount in controversy above the statutory minimum,[47] costs are not to be computed as a part of the matter in controversy in determining the right of appeal from a judgment of a justice of the peace.[48]

(C) *Reductions and Remissions of Amount, and Indorsements.* In some states it is held that the right of appeal from a justice's judgment is so fixed by the amount claimed in the pleadings or bill of particulars that it cannot be taken away by reductions or remissions made by plaintiff, whatever his purpose may

39. Persons *v.* Centre Turnpike Co., 20 Vt. 170.

40. Chicago, etc., R. Co. *v.* Weaver, 112 Iowa 101, 83 N. W. 795; Sterner *v.* Wilson, 68 Iowa 714, 28 N. W. 34; Fuller *v.* Brierley, 36 How. Pr. (N. Y.) 47; Chase *v.* Bernier, 73 Vt. 307, 50 Atl. 1056; Crosby *v.* Enterprise Cheese Co., 67 Vt. 638, 32 Atl. 494. See also Perry *v.* Gay, 52 Vt. 615. But see Griffin *v.* Bradley, 110 Ga. 327, 35 S. E. 344.

The facts alleged in the pleadings, and not the prayer for judgment, is the criterion. Chicago, etc., R. Co. *v.* Weaver, 112 Iowa 101, 83 N. W. 795 [*citing* Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285; Nash *v.* Beckman, 86 Iowa 249, 53 N. W. 228; Cooper *v.* Dillon, 56 Iowa 367, 9 N. W. 302].

Whatever may be the sum really in controversy, an appeal will lie if the pleadings demand a sum exceeding the statutory minimum. Fuller *v.* Brierley, 36 How. Pr. (N. Y.) 47.

From replevy bond.—Where a replevy bond, made a part of the statement of a cause of action thereon, shows the value of the property replevied to be one hundred and ten dollars, such statement is sufficient to give a right of appeal, although the amount in controversy does not otherwise appear. Hail *v.* Tunstall, 21 Tex. Civ. App. 593, 54 S. W. 323.

Proof need not show value as alleged.—Gill *v.* Jackson, 3 Tex. App. Civ. Cas. § 555.

In an action of book-account the jurisdiction is to be determined by the debtor side of plaintiff's book. A. H. Berry Shoe Co. *v.* Deschenes, 68 Vt. 387, 35 Atl. 335 [*approving* Paul *v.* Burton, 32 Vt. 148, and *overruling* Bates *v.* Downer, 4 Vt. 178]. *Compare* Warren *v.* Newfane, 25 Vt. 250. But see Williams *v.* Mason, 45 Vt. 372, to the effect that, under Vt. Gen. St. c. 31, § 70, relating to appeals in assumpsit, there must be a comparison of the debit and credit sides of the account to fix the amount of the claim.

Where no written pleadings are filed in an action on account, the amount alleged to be due, as shown by the account, is the measure of plaintiff's demand. Western Union Tel. Co. *v.* Garner, (Tex. Civ. App. 1904) 83 S. W. 433.

Where an answer pleads payment of an amount exceeding the jurisdictional minimum, but asks for no judgment, it is simply a defense, and not a counter-claim, and no appeal will lie if plaintiff's demand is less than such minimum sum. Boyle *v.* Wilcox, 59 Iowa 466, 13 N. W. 428.

41. Stoy *v.* Yost, 12 Serg. & R. (Pa.) 385.

42. Spencer *v.* Nugent, (Tex. Civ. App. 1902) 68 S. W. 729.

43. Andrews *v.* Baker, 59 Vt. 656, 10 Atl. 465; Fisk *v.* Wallace, 51 Vt. 418.

44. Smith *v.* Giles, 65 Tex. 341.

45. Siver *v.* Mulligan, (Iowa 1903) 94 N. W. 491; Young *v.* McWaid, 57 Iowa 101, 10 N. W. 291; State *v.* Boone, 42 La. Ann. 982, 8 So. 468.

46. **Plea in abatement held sufficient** see Curtis *v.* Gill, 34 Conn. 49.

47. Magarahan *v.* Wright, 83 Ga. 773, 10 S. E. 584; Dykes *v.* Woolsey, 62 Ga. 608; Smith *v.* Smith, 15 Vt. 620. *Contra,* Moise *v.* Powell, 40 Nebr. 671, 59 N. W. 79.

48. Curtis *v.* Gill, 34 Conn. 49; Curran *v.* Excelsior Coal Co., 63 Iowa 94, 18 N. W. 698; Dodd *v.* Cady, 1 Minn. 289; Shafer *v.* Chesapeake, etc., R. Co., (Va. 1895) 23 S. E. 221; Norfolk, etc., R. Co. *v.* Clark, 92 Va. 118, 22 S. E. 867. But *compare* Hubbard *v.* Vacher, (Tex. Civ. App. 1894) 26 S. W. 921, which was the case of a judgment against a garnishee, with costs in the principal action and also in the garnishment proceedings.

be;[49] while in others the amount of plaintiff's demand may be reduced[50] or he may remit a part of his recovery before appeal,[51] so as to deprive the appellate court of jurisdiction. After appeal neither party can reduce or waive his claim[52] or enter a remittitur, so as either to give or defeat jurisdiction.[53] If the face of a note exceeds the appealable minimum, it cannot be reduced by indorsements below that amount, so as to deprive defendant of his right of appeal,[54] at all events after the trial before the justice.[55]

c. Finality of Determination — (I) *In General.* Until the rendition of final judgment by a justice of the peace no appeal lies.[56] Except that justice's judgments are construed more liberally, there is no difference in principle as to what constitutes a final judgment in their courts and what constitutes one in a court of record,[57] and a judgment will be regarded as final within the meaning of the statutes relating to appeals, where all the issues of law and fact necessary to be determined were determined, and the case completely disposed of, so far as the

49. Dyar *v.* Scott, 99 Ga. 96, 24 S. E. 855; Bell *v.* Davis, 93 Ga. 233, 18 S. E. 647; Kingsbury *v.* Franz, 40 Nebr. 400, 58 N. W. 936 (where the remission was made in the appellate court, and it was held that the appeal should not be dismissed); Sample *v.* Shidel, 20 Pa. Co. Ct. 357; Stollars *v.* East Finlay Tp., 3 Pa. Co. Ct. 209. *Compare* Cleaden *v.* Yeates, 5 Whart. (Pa.) 94.

In an action on book-account plaintiff cannot prevent an appeal by setting his *ad damnum* lower than the debit side of his account. Church *v.* Vanduzee, 4 Vt. 195.

Interest may be remitted. — Leighow *v.* Northumberland Bridge Co., 2 Pa. Co. Ct. 622.

50. Bateman *v.* Sisson, 70 Iowa 518, 30 N. W. 870. See also Cooper *v.* Miles, 16 Vt. 642, where plaintiff before judgment waived one of his counts.

51. Henry *v.* Chicago, etc., R. Co., 127 Iowa 577, 103 N. W. 793; Rust *v.* Olson, 113 Iowa 571, 85 N. W. 799; Young *v.* Stuart, 104 Iowa 597, 73 N. W. 1045; Lynch *v.* Bruner, 99 Iowa 669, 68 N. W. 908; Knox *v.* Nicoli, 97 Iowa 687, 66 N. W. 876; Schultz *v.* Chicago, etc., R. Co., 75 Iowa 240, 39 N. W. 289; Vorwald *v.* Marshall, 71 Iowa 576, 32 N. W. 510; Bateman *v.* Sisson, 70 Iowa 518, 30 N. W. 870; Milner *v.* Gross, 66 Iowa 252, 23 N. W. 654; Ball *v.* Hines, (Tex. Civ. App. 1901) 61 S. W. 332.

52. **Defendant cannot abandon a plea in reconvention,** so as to defeat the appellate jurisdiction. Schneider *v.* Luckie, (Tex. Civ. App. 1898) 47 S. W. 685.

Defendant cannot reduce claim so as to confer jurisdiction. — Brigman *v.* Aultman, (Tex. Civ. App. 1900) 55 S. W. 509.

53. **Remittitur cannot be entered for excess beyond justice's jurisdiction,** so as to confer jurisdiction on the appellate court. People *v.* Skinner, 13 Ill. 287, 54 Am. Dec. 432; Batchelor *v.* Bess, 22 Mo. 402.

54. Sumner *v.* Jones, 24 Vt. 317; Tyler *v.* Lathrop, 5 Vt. 170. But *compare* Boardman *v.* Harrington, 9 Vt. 151.

55. Evans *v.* Head, 7 Wis. 399.

56. *Alabama.*— Francis-Chenoweth Hardware Co. *v.* Bailey, 104 Ala. 566, 18 So. 10; Little *v.* Fitts, 33 Ala. 343; Wyatt *v.* Judge, 7 Port. 37.

Arkansas.— Adams *v.* Thompson, 12 Ark. 670.

District of Columbia — U. S. *v.* Barnard, 24 App. Cas. 8.

Iowa.— Brown *v.* Scott, 2 Greene 454; Kimble *v.* Riggin, 2 Greene 245.

Kansas.— Healey *v.* Deepwater Clay Co., 48 Kan. 617, 29 Pac. 1088; Butt *v.* Herndon, 36 Kan. 370, 13 Pac. 580; Peyton *v.* Peyton, 34 Kan. 624, 9 Pac. 479; Schall *v.* Fler, (App. 1901) 63 Pac. 289.

Maine.— Waterville *v.* Howard, 30 Me. 103.

Massachusetts.— Bowler *v.* Palmer, 2 Gray 553.

Mississippi.— See Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. 267.

Missouri.— Kansas City *v.* Ford, 99 Mo. 91, 12 S. W. 346; Hull *v.* Beard, 80 Mo. App. 200.

Nebraska.— Denslow *v.* Dodendorf, 47 Nebr. 328, 66 N. W. 409; Holmes *v.* Irwin, 17 Nebr. 99, 22 N. W. 124, 347.

New York.— Haulenbeck *v.* Gillies, 2 Hilt. 238; Lewis *v.* Hoffman, 5 N. Y. Civ. Proc. 141.

Pennsylvania.— Rieseck *v.* Lanahan, 10 Pa. Super. Ct. 281.

Texas — Walker *v.* Mears, (Civ. App. 1902) 67 S. W. 167; Clopton *v.* Herring, (Civ. App. 1894) 26 S. W. 1104.

Vermont.— Spaulding *v.* Woodworth, 42 Vt. 570.

Wisconsin.— Williams *v.* Brechier, 75 Wis. 309, 43 N. W. 952.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 490, 491.

Judgment on merits condition precedent to appeal.—Where in a justice's court a judgment was given for defendant on the trial of a plea in abatement and an appeal was then taken to the circuit court, there being no trial upon the merits in either court, it was held that the circuit court had no jurisdiction to try either branch of the case, as it was still pending in the justice's court and no appeal could be taken therefrom until judgment on the merits. Hull *v.* Beard, 80 Mo. App. 200.

57. See Appeal and Error, 2 Cyc. 586; Judgments, 23 Cyc. 672.

justice had power to dispose of it.[58] Where the intention of the justice to give final judgment is apparent, the judgment will be final;[59] and where he has made an attempt to enter a judgment, although it may be informal, it will be treated as a judgment.[60]

(II) *Judgments of Dismissal, Nonsuit, and For Costs.* In most jurisdictions a judgment of dismissal or nonsuit is a final judgment from which an appeal will lie,[61] especially if rendered upon a hearing on the merits;[62] but a judgment in a justice's court for costs merely is not such a final judgment.[63]

d. Nature, Scope, and Effect of Decision — (I) *In General.* Where an order granting a new trial is set aside and a new judgment rendered, an appeal should

58. *Arkansas.*— Parsell *v.* Smyers, 7 Ark. 55.

Iowa.— Stowers *v.* Milledge, 1 Iowa 150, 63 Am. Dec. 434.

Kansas.— Cunningham *v.* Kansas City, etc., R. Co., 60 Kan. 268, 56 Pac. 502; Carlyle *v.* Smith, 36 Kan. 614, 14 Pac. 156; Kayser *v.* Bauer, 5 Kan. 202; Stacher *v.* Rockhill, 7 Kan. App. 491, 54 Pac. 286; Day *v.* Garden City First Nat. Bank, 6 Kan. App. 821, 49 Pac. 691.

Missouri.— Weisenecker *v.* Kepler, 7 Mo. 52; Hull *v.* Beard, 80 Mo. App. 200.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Scott, (1902) 89 N. W. 410; Holmes *v.* Irwin, 17 Nebr. 99, 22 N. W. 124, 347.

New York.— Blum *v.* Hartman, 3 Daly 47.

Pennsylvania — Rieseck *v.* Lanahan, 10 Pa. Super. Ct. 281.

South Dakota.— Hunter *v.* Karcher, 8 S. D. 554, 67 N. W. 621.

Texas.— Moore-Mayfield Co. *v.* Missouri, etc., R. Co., 35 Tex. Civ. App. 607, 80 S. W. 881; Clark *v.* Smith, 29 Tex. Civ. App. 363, 68 S. W. 532; Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Dillard *v.* Allison, (Civ. App. 1897) 40 S. W. 1023; Clopton *v.* Herring, (Civ. App. 1894) 26 S. W. 1104.

Wisconsin.— Williams *v.* Brechler, 75 Wis. 309, 43 N. W. 952.

See 31 Cent. Dig. tit. "Justices of the Peace," § 491.

A default judgment is final and may be appealed. Butler *v.* Heeb, 38 Iowa 429; Goldsborough *v.* Bolenbaugh, 3 Ohio Cir. Ct. 583, 2 Ohio Cir. Dec. 337; Shroudenbeck *v.* Phœnix F. Ins. Co., 15 Wis. 632; State *v.* Ives, 15 Wis. 445; Burnham *v.* Turner, 14 Wis. 622. But see *infra*, V, A, 2, d, (III).

A judgment in a garnishment proceeding is such a final judgment as may be appealed from. Kayser *v.* Bauer, 5 Kan. 202. See also Day *v.* Garden City First Nat. Bank, 6 Kan. App. 821, 49 Pac. 691, where an order overruling a motion to vacate a garnishment proceeding was held final.

A judgment against an interpleader, who claims a fund garnished, is a final judgment, and is appealable. Stacher *v.* Rockhill, 7 Kan. App. 491, 54 Pac. 286. See also Weisenecker *v.* Kepler, 7 Mo. 52.

Verdict regarded as final judgment see Morse *v.* Brownfield, 27 Mo. 224. See also Dillard *v.* Allison, (Tex. Civ. App. 1897) 40 S. W. 1023. But see Kimble *v.* Riggin, 2 Greene (Iowa) 245; Bowler *v.* Palmer, 2 Gray (Mass.) 553.

Order granting new trial not a final order see Schall *v.* Fler, (Kan. App. 1901) 63 Pac. 289.

An order certifying a case on the ground that the pleadings show the title to land to be in dispute is not a final order, reviewable on petition in error. Peyton *v.* Peyton, 34 Kan. 624, 9 Pac. 479.

59. Kase *v.* Best, 15 Pa. St. 101, 53 Am Dec. 573. See also Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760; Parker *v.* Swan, 1 Humphr. (Tenn.) 80, 34 Am. Dec. 619.

60. Lavalle *v.* Badgly, 33 Iowa 156; Barrett *v.* Garragan, 16 Iowa 47; Moore *v.* Manser, 9 Iowa 47. See *infra*, V, A, 2, d, (X).

61. *Michigan.*— Stall *v.* Diamond, 37 Mich. 429. But see Bowne *v.* Johnson, 1 Dougl. 185.

Mississippi.— Horn *v.* McKinnon, (1901) 29 So. 149 [*citing* Gill *v.* Jones, 57 Miss. 367].

Missouri.— Hannibal, etc., Plankroad Co. *v.* Robinson, 27 Mo. 396.

Pennsylvania.— See Dawson *v.* Booher, 26 Pa. Co. Ct. 136.

Texas.— Fuerman *v.* Ruble, (App. 1890) 16 S. W. 536; Howeth *v.* Clark, (App. 1890) 16 S. W. 175.

Wisconsin.— Stoppenbach *v.* Zohrlaut, 21 Wis. 385; Collins *v.* Wagoner, 20 Wis. 48.

See 31 Cent. Dig. tit. "Justices of the Peace," § 492; and *infra*, V, A, 2, d, (VI).

But see Monnell *v.* Weller, 2 Johns. (N. Y.) 8, to the effect that a judgment of nonsuit, without awarding costs, is incomplete, and can neither be affirmed nor reversed.

Nonsuit at plaintiff's request not final see Schmidt *v.* Halle, 15 Mo. App. 36.

A judgment of dismissal without prejudice is not a final judgment from which an appeal will lie under Swan & C. St. Ohio 788. Ferrall *v.* Bluffton Lodge, No. 371, I. O. O. F., 31 Ohio St. 463; Morgan *v.* Andres, 6 Ohio Dec. (Reprint) 823, 8 Am. L. Rec. 353; Strausburgh *v.* Doran, 2 Ohio Dec. (Reprint) 402, 2 West. L. Month. 600.

62. Mix *v.* Crego, 5 Ohio Dec. (Reprint) 552, 6 Am. L. Rec. 501; Smith *v.* Crane, 12 Vt. 487.

63. Riddle *v.* Yates, 10 Nebr. 510, 7 N. W. 289; Figures *v.* Dunklin, 68 Tex. 644, 5 S. W 503; Carothers *v.* Holloman, 33 Tex. Civ. App. 131, 75 S. W. 1084; Rea *v.* Raley, (Tex. Civ. App. 1896) 37 S. W. 169; White *v.* Smith, (Tex. App. 1891) 15 S. W. 1111; Owens *v.* Levy, 1 Tex. App. Civ. Cas. § 407; Giersa *v.* Yocum, 1 Tex. App. Civ. Cas. § 310.

be taken from the new judgment, and not from the order setting aside the granting of a new trial;[64] and where a judgment is a nullity, and after notice to defendant plaintiff appears and another judgment is rendered, an appeal is properly taken from the latter.[65] So too a defendant who has superseded a judgment against him by confessing a new judgment and obtaining a stay cannot prosecute an appeal from the original judgment.[66] Where, in Texas, judgment is rendered for plaintiff against both the defendant and an intervener, and also one for the defendant against the intervener on a counter-claim, the intervener cannot appeal from the latter judgment alone.[67]

(II) *Void Judgments.* The weight of authority is to the effect that an appeal will lie for the purpose of reversing a void judgment rendered by a justice of the peace.[68]

(III) *Judgments by Default.* Except where specially authorized by statute,[69] no appeal lies from a strictly default judgment rendered in a justice's court.[70] But an appeal will lie where the judgment is not strictly by default,[71] or where

Contra, Burke *v.* Dunning, 70 Ill. App. 215 [*citing* Zimmerman *v.* Zimmerman, 15 Ill. 85]; McDaniels *v.* Johnson, 36 Vt. 687.

64. Tarpy *v.* Crutchfield, 38 Ind. 58.

65. Semple, etc., Mfg. Co. *v.* Thomas, 10 Mo. App. 457.

66. Coumbe *v.* Nairn, 6 Fed. Cas. No. 3,278, 2 Cranch C. C. 676.

67. Packenius *v.* Petri, (Tex. Civ. App. 1895) 29 S. W. 1095, construing Rev. St. §§ 1294, 1337, which allow but one final judgment, and require the case on appeal to be tried *de novo.*

68. *Indiana.*— Palmer *v.* Fuller, 22 Ind. 115.

New Jersey.— Barclay *v.* Brabston, 49 N. J. L. 629, 9 Atl. 769; Williamson *v.* Middlesex County Judges, 42 N. J. L. 386.

New York.— Gillingham *v.* Jenkins, 40 Hun 594; Striker *v.* Mott, 6 Wend. 465.

Oregon.— See Gird *v.* Morehouse, 2 Oreg. 53, where it was held that Rev. St. p. 300, § 54, requiring a justice to cease proceedings in an action when the title to real estate comes in issue "and certify the cause to the circuit court in the same time as upon appeal," is substantially complied with by proceeding to judgment and sending up the papers and proceedings on appeal. The judgment is not wholly void, but will support the appeal.

Utah.— Cereghino *v.* Utah Territory Third Dist. Ct., 8 Utah 455, 32 Pac. 697. But *compare* McCormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, 39 Pac. 483.

See 31 Cent. Dig. tit. "Justices of the Peace," § 494.

Contra.— Guthrie *v.* Humphrey, 7 Iowa 23; Harrison *v.* Sager, 27 Mich. 476; Nenno *v.* Chicago, etc., R. Co., 105 Mo. App. 540, 80 S. W. 24.

Trial de novo on appeal from void judgment see Galveston, etc., R. Co. *v.* McTiegue, 1 Tex. App. Civ. Cas. § 457.

69. Holman *v.* Sigourney, 11 Metc. (Mass.) 436, construing Rev. St. c. 85, § 13.

Judgments by default appealable as final judgments see *supra,* V, A, 2, c, (I), note 58.

70. *Alaska.*— Everton *v.* Smith, 1 Alaska 422.

California — Funkenstein *v.* Elgutter, 11 Cal. 328; People *v.* El Dorado County Ct., 10 Cal. 19, to the effect that if a defendant suffer a default, he thereby admits the facts set out in the complaint, and cannot deny them on appeal.

Connecticut.— Smith *v.* French, 46 Conn. 239.

Maine.— Turner *v.* Putnam, 31 Me. 557; Harris *v.* Hutchins, 28 Me. 102.

Montana.— No appeal lies from a judgment by default, except on questions of law, or where the justice's court abuses its discretion in setting aside, or refusing to set aside, a default judgment. State *v.* Lindsay, 22 Mont. 398, 56 Pac. 827; Maxey *v.* Cooper, 21 Mont. 456, 54 Pac. 562 [*distinguishing* Gage *v.* Maryatt, 9 Mont. 265].

Nevada.— Where an unauthorized judgment by default is entered, the remedy is by certiorari rather than by appeal. Wiggins *v.* Henderson, 22 Nev. 103, 36 Pac. 459.

New York.— Williams *v.* McCauley, 3 E. D. Smith 120. See also Thomas *v.* Keller, 52 Hun 318, 5 N. Y. Suppl. 359, construing Code Civ. Proc. § 3064.

Oregon.— Whipple *v.* Southern Pac. Co., 34 Oreg. 370, 55 Pac. 975 (construing Hill Annot. Laws, § 249, subd. 2, and § 2117); Long *v.* Sharp, 5 Oreg. 438; Ryan *v.* Harris, 2 Oreg. 175.

South Dakota.— See Mouser *v.* Palmer, 2 S. D. 466, 50 N. W. 967, where the transcript was silent as to whether an answer was filed, but neither did it refer to the complaint, and it was held that the circuit court erred in dismissing the appeal on the ground that the judgment was by default.

Washington.— Under 2 Hill Code, § 1630, there can be no review by appeal from a default judgment for want of answer, but only a review of errors of law by certiorari. under section 1621. State *v.* Jefferson County Super. Ct. 12 Wash. 548, 41 Pac. 895.

See 31 Cent. Dig. tit. "Justices of the Peace," § 495.

71. Steven *v.* Nebraska, etc., Ins. Co., 29 Nebr. 187, 45 N. W. 284 (where defendant appeared on the return-day, obtained a continuance, and subpœnaed witnesses, but did not appear at the trial); Sornborger *v.* Huffman, 27 Nebr. 491, 43 N. W. 242 (where a

the judgment is prematurely rendered.[73] If a plaintiff treats an appeal from a default judgment as valid, and without objection files the necessary pleadings to make up the issues for a trial on the merits in the appellate court, he cannot object on the trial to the validity of the appeal.[73]

(iv) *Judgments by Confession or on Consent.* An appeal will not lie from a judgment entered in a justice's court against a defendant by confession or on consent;[74] and although a statute provides that judgments by confession must be in writing, signed by defendant, and filed with the justice, a defendant cannot question the action of the justice, based on his verbal agreement with the justice, made out of court, that judgment should be rendered against him.[75]

(v) *Judgments After Appearance, and on Verdict or Award.* In some jurisdictions a defendant who has appeared generally may appeal from a judgment against him, although he was not present at the trial, and did not contest the case on the merits.[76] In a few jurisdictions no appeal lies from a justice's judgment rendered upon the verdict of a jury,[77] and in Iowa the same is true of a judgment entered upon an award;[78] but in other states an appeal lies both in the former[79] and in the latter case.[80]

motion for a continuance by plaintiff was overruled, and he withdrew, and made no further appearance); *Ex p.* Stafford, 6 Cow. (N. Y.) 44 (where defendant joined issue, but did not appear and take part in the trial).

72. Andrews *v.* Mullin, 14 Nebr. 248, 15 N. W. 216, where the judgment was rendered before the expiration of the hour allowed by law for defendant's appearance.

73. Minneapolis Harvester Works *v.* Hedges, 11 Nebr. 46, 7 N. W. 531.

74. *California.*— Yeazell *v.* San Francisco Super. Ct., (1884) 4 Pac. 503.

Illinois.—Edwards *v.* Vandemack, 13 Ill. 633. See also Davis *v.* Joliet, 15 Ill. App. 664, to the effect that, to preclude an appeal, the party confessing judgment must acknowledge the amount, as well as the fact, of indebtedness. And see Elliott *v.* Diaber, 42 Ill. 467; Dearborn Laundry Co. *v.* Chicago, etc., R. Co., 55 Ill. App. 438, in which the admissions were held not to amount to confessions.

Indiana.— Justices Act, § 59 (2 Rev. St. (1852) p. 459), has reference only to such judgments as are confessed in accordance with that section, and has no reference to cases taken "as confessed" for failure to appear and testify, under section 48. Mariner *v.* Hanna, 16 Ind. 23.

Iowa.— Stever *v.* Heald, 61 Iowa 709, 17 N. W. 145.

Ohio.— Nealy *v.* Sexton, Wright 314.

Oregon.— Rader *v.* Barr, 22 Oreg. 495, 29 Pac. 889.

Pennsylvania.— Halliday *v.* Mills, 3 Pa. L. J. Rep. 394.

See 31 Cent. Dig. tit. "Justices of the Peace," § 496.

Contra.— James *v.* Woods, 65 Miss. 528, 5 So. 106.

Consent to pro forma judgment.— Where all the allegations of the complaint were denied, but, to expedite an appeal, defendant, by agreement of both parties, consented to a "*pro forma* judgment" against him, "reserving all his rights under an appeal," it was held that he was not deprived of his right to be heard in the circuit court, and his appeal was improperly dismissed. Harvey *v.* Bunker Hill, etc., Co., 2 Ida. 732, 24 Pac. 30.

75. Traffarn *v.* Getman, 3 N. Y. Suppl. 867, construing Code Civ. Proc. §§ 3011, 3063.

76. Crumay *v.* Henry, 40 Nebr. 716, 59 N. W. 369; Howard *v.* Jay, 25 Nebr. 279, 41 N. W. 148; Smith *v.* Borden, 22 Nebr. 487, 35 N. W. 218; Broadwater *v.* Jacoby, 19 Nebr. 77, 26 N. W. 629; Crippen *v.* Church, 17 Nebr. 304, 22 N. W. 567; Rawalt *v.* Brewer, 16 Nebr. 444, 20 N. W. 391; Cleghorn *v.* Waterman, 16 Nebr. 226, 20 N. W. 877; Baier *v.* Humpall, 16 Nebr. 127, 20 N. W. 108.

Appeal by judgment from judgment on set-off.— Where, upon plaintiff's dismissal of his action, a set-off filed by defendant was tried, and judgment rendered for defendant, it was held that plaintiff was entitled to appeal, the record not showing that the judgment was by default. Rawalt *v.* Brewer, 16 Nebr. 444, 20 N. W. 391.

77. Fitzgerald *v.* Leisman, 3 MacArthur (D. C.) 6; Davidson *v.* Burr, 7 Fed. Cas. No. 3,602, 2 Cranch C. C. 515; Maddox *v.* Stewart, 16 Fed. Cas. No. 8,934, 2 Cranch C. C. 523. See also under Tex. Land Laws (1837), § 19, Prewitt *v.* Farris, 5 Tex. 370; Cullen *v.* Latimer, 4 Tex. 329.

78. Whitis *v.* Culver, 25 Iowa 30.

79. Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653 [*overruling* specifically Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298; Vandervort *v.* Fouse, 30 W. Va. 326, 4 S. E. 660; Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; Barlow *v.* Daniels, 25 W. Va. 512; and in effect Woodford *v.* Hull, 31 W. Va. 470, 7 S. E. 450; Barker *v.* Walton, 31 W. Va. 468, 7 S. E. 452].

80. Rogers *v.* Holden, 13 Ill. 293; Holub *v.* Mitchell, 42 Nebr. 389, 60 N. W. 596; McCloskey *v.* McConnell, 9 Watts (Pa.) 17. But see Van Winkle *v.* Beck, 3 Ill. 488.

(vi) *Judgments of Nonsuit or Dismissal.* As has been previously stated,[81] judgments of nonsuit or dismissal are very generally regarded as final judgments, from which the party aggrieved may appeal.[82]

(vii) *Questions of Fact or Law.* Under some statutes an appeal lies from a judgment or order of a justice of the peace which is in effect final, whether it be upon matter of law or fact;[83] under others an appeal only lies on questions of law;[84] and under others questions of law are to be reviewed on error and not by appeal.[85]

(viii) *Rulings and Orders Other Than Judgments.* Whether a ruling or order of a justice of the peace which does not have the force and effect of a final judgment is appealable or not is wholly dependent upon the statutes of the particular state.[86]

(ix) *Attachment and Garnishment Proceedings.* A final judgment or order of a justice of the peace in attachment or garnishment proceedings is

81. See *supra*, V, A, 2, c, (II).

82. *Connecticut.*— Bugbee *v.* Abbot, 1 Root 109. *Contra*, under Gen. St. § 683. Norton *v.* Petrie, 59 Conn. 200, 20 Atl. 199.

Delaware.— Pepper *v.* Warren, 2 Marv. 225, 43 Atl. 91.

Illinois.— Brown *v.* Owens, 64 Ill. App. 345; Cohen *v.* Moore, 59 Ill. App. 396.

Indiana.— Lauferty *v.* Prickett, 50 Ind. 24.

Iowa.—Gilson *v.* Johnson, 4 Iowa 463.

Massachusetts.— Ball *v.* Burke, 11 Cush. 80.

Michigan.— People *v.* Judge Wayne Cir. Ct., 30 Mich. 98; Pattridge *v.* Lott, 15 Mich. 251 [both *distinguished* in Schulte *v.* Kelly, 124 Mich. 330, 83 N. W. 405, in which the nonsuit was held to be voluntary].

Missouri.— Purcell *v.* Peyton, 58 Mo. App. 442; Bohle *v.* Kingsley, 51 Mo. App. 389.

Nevada.— Nevada Cent. R. Co. *v.* Lander County Dist. Ct., 21 Nev. 409, 32 Pac. 673.

New York.— A nonsuit after hearing proofs can be reviewed only by appeal. Gleason *v.* Clark, 9 Cow. 57.

Ohio.— Brackenridge *v.* Husted, Wright 70.

Texas.— Winston *v.* Masterson, (Civ. App. 1894) 27 S. W. 691. But see Morgan *v.* Johnson, 4 Tex. 117.

Wisconsin.— Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884.

See 31 Cent. Dig. tit. "Justices of the Peace," § 478; and *supra*, V, A, 2, c, (II).

83. Hodge *v.* Ruggles, 36 Iowa 42; People *v.* Schoharie C. Pl., 2 Wend. (N. Y.) 260; People *v.* Columbia Judges, 5 Cow. (N. Y.) 285; *In re* Haywood, 5 Cow. (N. Y.) 19.

84. Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723; Squier *v.* Gould, 14 Wend. (N. Y.) 159; Board of Health *v.* Crest Farm Dairy Co., 3 Pa. Dist. 363.

85. Chapman *v.* Fuller, 7 Barb. (N. Y.) 70; Breese *v.* Williams, 20 Johns. (N. Y.) 280; Peters *v.* Parsons, 18 Johns. (N. Y.) 140. *Compare* Tattersall *v.* Hass, 1 Hilt. (N. Y.) 56.

86. **Rulings held appealable.**— *Arkansas.*— An appeal may be taken from a refusal to allow a schedule of property as exempt, and to issue a supersedeas. Winter *v.* Simpson, 42 Ark. 410 [*overruling dictum* to the contrary in Smith *v.* Ragsdale, 36 Ark. 297].

Indiana.— An appeal lies from a decision on an application to enter satisfaction of a judgment on his docket. Creekpaum *v.* Templeton, 5 Blackf. 583.

Massachusetts.— The supreme court has supervision of the extent to which justices have discretionary power to order amendments of pleadings. Guilford *v.* Adams, 19 Pick. 376.

New Jersey.— Refusal of an adjournment to which a party is entitled is appealable. Gould *v.* Brown, 9 N. J. L. 165.

New York.— In an action by the payee of a note given on the sale of a horse, a refusal to allow defendant to amend his answer by setting up breach of warranty is reviewable on appeal. Walsh *v.* Cornett, 17 Hun 27.

North Carolina.— An appeal lies from a decision on motion to enter satisfaction of a judgment on which execution has improvidently issued after payment. Bailey *v.* Hester, 101 N. C. 538, 8 S. E. 164.

Wisconsin.— An order in replevin that the property be delivered up is part of the judgment and subject to appeal. Weizen *v.* McKinney, 2 Wis. 288.

See 31 Cent. Dig. tit. "Justices of the Peace," § 500.

Where a justice has no authority to proceed in a case, no appeal lies from a refusal to do so. Gibbs *v.* Bourland, 6 Yerg. (Tenn.) 481.

Order refusing to take off default not appealable see Rickey *v.* Nevada County Super. Ct., 59 Cal. 661.

Order denying motion to quash execution not appealable see Carr *v.* Pennsylvania R. Co., 108 Mo. App. 388.

An order granting a new trial without notice and in the adverse party's absence is without authority, and any subsequent action in the presence of the party is void. Consequently his objection on such ground being overruled, only the first judgment can be appealed from. Erskine *v.* Onyett, 11 Ind. 335.

Order in supplementary proceedings not appealable see Wells *v.* Torrance, 119 Cal. 437, 51 Pac. 626.

Judgment of respondeat ouster on demurrer overruled not appealable see Denton *v.* Danbury, 48 Conn. 368.

appealable in most jurisdictions.[87] But error does not lie from a ruling of a justice of the peace refusing to vacate and discharge an attachment or garnishment process,[88] and the action of a justice in ordering a garnishee to pay money into court is not reviewable either by petition in error[89] or by appeal.[90] Where property has been seized on attachment, an appeal does not lie from the order or judgment of a justice in proceedings instituted to try the right of property therein.[91]

(x) *Mode of Rendition, Form, and Entry of Judgment or Order.* No particular form is requisite in order to constitute the finding of a justice of the peace a judgment; and if it is final, and subjects a party to injury, an appeal will lie therefrom.[92] So too a mere irregularity in the rendition of the judgment

No appeal lies from order of municipal court granting a new trial on the ground of surprise and newly discovered evidence. Moses *v.* Hargrove, 24 Misc. (N. Y.) 742, 53 N. Y. Suppl. 789.

Refusal to allow damages to be assessed by a jury after judgment by default is not the denial of a right which will entitle the party to relief by petition to the county court. Brown *v.* Irwin, 21 Vt. 68.

87. *Arkansas.*— Patterson *v.* Harland, 12 Ark. 158, appeal in garnishment cases.

Kentucky.— Kennedy *v.* Aldridge, 5 B. Mon. 141, appeal in attachment.

Michigan.— Newell *v.* Blair, 7 Mich. 103, appeal in garnishment cases.

Minnesota.— Richter *v.* Trask, 40 Minn. 379, 42 N. W. 87; Albachten *v.* Chicago, etc., R. Co., 40 Minn. 378, 42 N. W. 86, construing Gen. St. (1878) c. 66, § 197, and Sp. Laws (1881), c. 407, as to appeal by garnishee to municipal court of St. Paul.

Missouri.— On the trial of a plea in abatement in attachment, if the finding be for defendant, plaintiff may appeal after judgment on the merits. An attempt to appeal before such judgment is ineffectual. Castleman *v.* Harris, 86 Mo. App. 270 [*citing* Houser *v.* Andersch, 61 Mo. App. 15; Crawford *v.* Armstrong, 58 Mo. App. 214; Springfield Milling Co. *v.* Ramey, 57 Mo. App. 33]; Stephenson *v.* Jones, 84 Mo. App. 249. See also Newman *v.* York, 74 Mo. App. 292, construing Laws (1891), p. 45.

New Jersey.— Under Rev. p. 54, a defendant in attachment who has appeared and given bond may appeal, but there is no other grant of the right of appeal in the attachment acts (Leeds *v.* Mueller, 51 N. J. L. 467, 17 Atl. 954), and an appeal does not lie from a judgment against a garnishee (Laird *v.* Abrahams, 15 N. J. L. 22).

Ohio.— Deveaux *v.* Leslie, 18 Ohio Cir. Ct. 482, 9 Ohio Cir. Dec. 480, appeal from order in proceeding in aid of execution.

Pennsylvania.— See Hotchkiss *v.* Pinney, 10 Pa. Dist. 219, to the effect that a justice's decision in attachment is not final on the question of fraud.

Tennessee.— Clark *v.* Williams, 2 Humphr. 303, appeal in garnishment cases.

Vermont.— Although the principal defendant be defaulted, plaintiff may appeal concerning the trustee's liability. Van Buskirk *v.* Martin, 28 Vt. 726.

Wisconsin.— Where judgment has been rendered against a garnishee, the principal defendant may appeal. Eastlund *v.* Armstrong, 117 Wis. 394, 94 N. W. 301.

See 31 Cent. Dig. tit. "Justices of the Peace," § 501.

Quashing writ of attachment.— An order of a justice of the peace quashing a writ of attachment on motion of defendant in a cause pending before him is an interlocutory order, and not appealable to the supreme court of the District of Columbia while the action remains undisposed of before the justice. U. S. *v.* Barnard, 24 App. Cas. (D. C.) 8.

Order discharging garnishee not appealable see Fultz *v.* Neal, 3 Kan. App. 612, 45 Pac. 250.

88. Lease *v.* Franklin, 84 Iowa 413, 51 N. W. 21 (attachment); Miller *v.* Noyes, 34 Kan. 13, 7 Pac. 602 (garnishment). But see Nau *v.* Gobrecht, 8 Ohio Cir. Ct. 518, 4 Ohio Cir. Dec. 495, to the effect that, under Ohio Rev. St. § 6524, an order refusing to vacate an attachment may be reviewed by petition in error, although the principal case has proceeded to judgment against defendant and been appealed; that this right is not cut off by section 6506, which only applies where no ruling has been made as to the validity of the attachment.

89. Hammock *v.* Commercial Nat. Bank, 9 Ohio Cir. Ct. 139, 6 Ohio Cir. Dec. 105, where it is said that the remedy of the garnishee is to refuse to comply with the order, and have a judge adjudicate it in a civil action, pursuant to Ohio Rev. St. § 5551.

90. Williams *v.* Brechler, 75 Wis. 309, 43 N. W. 952, construing Wis. Laws (1883), c. 24.

91. Dilley *v.* McGregor, 24 Kan. 361.

The order directing restoration of property in a claim case is not a judicial order from which error will lie, but merely the means of apprising the officer of the result of the inquisition. McCormick Harvesting Mach. Co. *v.* Scott, 66 Nebr. 479, 92 N. W. 599.

92. *Alabama.*— Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458, form of entry held sufficient to support an appeal.

Illinois.— Kimball *v.* Riter, 25 Ill. 276. *Compare* Lamonte *v.* Montebello, 21 Ill. App. 186.

Indiana.— Brewer *v.* Murray, 7 Blackf. 567.

appealed from will not warrant the quashing of the proceedings;[93] and the failure of a justice to enter up a formal judgment on a verdict will not prevent an appeal, since the effect of a judgment will be given the verdict as soon as it is entered on the docket.[94]

3. Right of Review — a. In General. An appeal is purely a statutory privilege, and is not a matter of right. It is only by complying with the statutory requirements that one becomes entitled to the privilege of an appeal.[95] The privilege is, however, to be favored,[96] and the fact that the losing party may under some circumstances have the case reviewed by certiorari will not deprive him of a right of appeal given by statute.[97] A defendant against whom a judgment has been legally rendered cannot pay so much of the judgment as he admits to be due, and appeal as to the remainder, since otherwise the cause of action would not be the same in the appellate as in the justice's court.[98]

b. Persons Entitled — (I) *In General.* Generally speaking every person against whom a justice of the peace renders an appealable judgment is entitled to an appeal.[99] But one who was not a party to a judgment cannot appeal therefrom,[1] and where defendant has entered bail for an appeal, an appeal subsequently taken by plaintiff is properly dismissed.[2]

(II) *In Attachment, Garnishment, and Replevin Proceedings.* A garnishee may appeal from a judgment charging him,[3] as may an assignee for the benefit of creditors from a judgment against a trustee on an attachment against his assignor.[4] The claimant of property levied on under an attachment may

Iowa.— Lavalle *v.* Badgly, 33 Iowa 155, form of judgment held sufficient.

Missouri.— Workman *v.* Taylor, 24 Mo. App. 550, to the effect that an entry in an action on a note, "Dismissed for want of consideration," is sufficient as the foundation for an appeal.

New York.— O'Reilly *v.* Block, 23 N. Y. Suppl. 670, indorsement on minutes of memorandum rendering judgment in a specified sum.

Texas.— American Cotton-Bale Imp. Co. *v.* Forsgard, (Civ. App. 1898) 47 S. W. 475.

See 31 Cent. Dig. tit. "Justices of the Peace," § 502.

93. White *v.* Blount, 22 Ala. 697.

94. *Arkansas.*— Turner *v.* Harrison, 43 Ark. 233.

California.— Montgomery *v.* Yolo County Super. Ct., 68 Cal. 407, 9 Pac. 720.

Dakota.— Porter *v.* Parker, 4 Dak. 397, 33 N. W. 70.

Iowa.— See Moore *v.* Manser, 9 Iowa 47, in which the record recited the verdict, and concluded, "And judgment was rendered thereon by me accordingly."

Missouri.— Hazeltine *v.* Reusch, 51 Mo. 50; Stephenson *v.* Jones, 84 Mo. App. 249.

See 31 Cent. Dig. tit. "Justices of the Peace," § 502.

Contra.— Church *v.* Stunkard, 101 Ill. App. 148.

95. Vowell *v.* Taylor, 8 Okla. 625, 58 Pac. 944; Mitchell *v.* Kennedy, 1 Wis. 511. But see Townsend *v.* Timmons, 44 Ark. 482, where it is held that an appeal is a matter of right.

96. Dickinson *v.* McGuire, 1 Ashm. (Pa.) 47.

97. Vaughn *v.* Gloer, 108 Ga. 238, 33 S. E. 846 [*citing* Toole *v.* Edmondson, 104 Ga. 776, 31 S. E. 25; Dowdle *v.* Stein, 99 Ga. 661, 26 S. E. 53; Brown *v.* Robinson, 91 Ga. 275, 18 S. E. 156].

98. Wade *v.* Hook, 11 Pa. Super. Ct. 54.

99. Rowen *v.* King, 25 Pa. St. 409; Prestly *v.* Ross, 11 Pa. St. 410.

Action for penalty.— In an action brought in a justice's court to recover a penalty, under the Revenue Law, § 7 (Rev. St. p. 437), for hawking and peddling without a license, it was held that either party might appeal to the district court. Webster *v.* People, 14 Ill. 365.

Where a constable is improperly made defendant in a trial of right of property, and judgment is rendered against him for costs, appeal is a proper remedy, and it is error to dismiss such appeal on the ground that he was not the proper party defendant. Aldridge *v.* Glover, 53 Ill. App. 137.

Right of defendant pleading offset see Wilder *v.* Gilman, 55 Vt. 503.

A railroad passenger conductor is not a "public officer," within the statute which provides for an appeal in "actions where [when] the defendant in good faith, pleads in excuse or justification that he was acting as a public officer." Wyman *v.* Hayes, 73 Vt. 24, 50 Atl. 556.

1. Williams *v.* Dennis, 1 Tex. App. Civ. Cas. § 1233.

2. Nicolet *v.* Oellers, 2 Ashm. (Pa.) 115.

3. Seymour-Danne Co. *v.* Jennings, 88 Ill. App. 347; Burgess *v.* Matlock, 14 Ind. 475; Burns *v.* Payne, 31 Oreg. 100, 49 Pac. 884. But see Earl *v.* Leland, 14 Vt. 328, where the holding of the court is to the effect that one summoned as trustee in a suit not appealable by the principal debtor has no right to appeal.

4. Bletz *v.* Haldeman, 26 Pa. St. 403.

appeal from an adverse judgment on his interplea,[5] and the claimant and holder of property, as disclosed by a garnishee in his answer, may appeal from a judgment charging the garnishee.[6] So too where a justice has jurisdiction, and renders judgment in favor of a garnishee, the defendant in the original attachment proceeding may appeal therefrom.[7] But a surety in replevin cannot prosecute an appeal in his own name to retry the issues made and determined between his principal and the defendant,[8] and where an attachment is levied on mortgaged property in the possession of one summoned as garnishee, and the mortgagee intervenes and obtains an order discharging the attachment so far as the mortgaged property is concerned, he cannot assign for error a further order requiring the garnishee to pay a sum of money into court.[9] To enable the owner or consignee of a vessel which has been attached to take an appeal from the justice's judgment, he must make himself a party defendant to the suit before the justice.[10]

c. Waiver of Right. A party may waive his right of appeal, as by pleading to the merits after an adverse judgment on his plea in abatement,[11] or by an agreement entered upon the justice's docket.[12] So too a party executing a promissory note may therein waive his right of appeal,[13] so far at least as regards any defenses in existence at the time of the execution of the note;[14] and the action of the justice in entering judgment on such a note in proceedings otherwise regular will be final.[15]

d. Loss of Right. A party who has obtained a stay of execution cannot thereafter appeal,[16] and where a party appears by counsel, and before judgment obtains permission on his own motion to withdraw, and does withdraw his appearance, he will be considered as having had an opportunity to appeal, and a writ of error will not lie.[17] So too a party who has prosecuted a certiorari cannot afterward have an appeal.[18] On the other hand the payment of costs by plaintiff,[19] or the payment into court by defendant of the amount of the judgment,[20] will not deprive plaintiff of his right of appeal; nor can a judgment creditor deprive the debtor of his right to an appeal or writ of error by filing a transcript of his judgment in the circuit court within the time allowed for such appeal.[21]

4. Presentation and Reservation Before Justice of Grounds of Review — a. In General. As a general rule questions which have not been raised before a

5. Mitchell *v.* Woods, 11 Ark. 180.

6. Barker *v.* Garland, 22 N. H. 103. *Compare* Williams *v.* Dennis, 1 Tex. App. Civ. Cas. § 1233, where the claimant filed his affidavit and bond in an action other than that in which the property was sought to be reached by garnishment, and it was held that he was not entitled to appeal from a judgment therein.

7. Gilray *v.* Metropolitan Nat. Bank, 113 Ill. App. 485.

8. Crites *v.* Littleton, 23 Iowa 205.

9. Wiseman *v.* Jaco, 1 Nebr. (Unoff.) 164, 95 N. W. 367.

10. The Constitution *v.* Woodworth, 2 Ill. 511.

11. Prosser *v.* Chapman, 29 Conn. 515.

12. Bocleau *v.* Phillips, 1 Ashm. (Pa.) 92.

A verbal agreement between the parties that a verdict in the justice's court shall be final is not binding. Clark *v.* Gibson, Morr. (Iowa) 328. See also Dawson *v.* Condy, 7 Serg. & R. (Pa.) 366, to the effect that an agreement not to appeal from an award must be in writing and be made a part of the proceedings.

A mere memorandum of an agreement on the margin of the magistrate's record is insufficient to deprive a party of his right of appeal. Locher *v.* Rice, 8 Pa. Dist. 404.

13. Bohan *v.* Cawley, 120 Pa. St. 295, 14 Atl. 59; Snyder *v.* Halter, 6 Pa. Co. Ct. 418; Soden *v.* Wheaton, 6 Pa. Co. Ct. 416.

14. Where a defense was not in existence when the note was given, a waiver of the right of appeal in the note will not prevent an appeal. Minich *v.* Basom, 12 Pa. Co. Ct. 508 (defense of payment); Wells *v.* Wilson, 6 Pa. Co. Ct. 417 (statute of limitations).

15. Kauffman *v.* Lauer, 11 Pa. Dist. 664; Crulip *v.* Mayers, 10 Kulp (Pa.) 405.

16. People *v.* Judges Macomb Cir. Ct., 1 Mich. 134.

17. Howard *v.* Hill, 31 Me. 420.

18. Finley *v.* Smith, 7 Pa. Co. Ct. 661; Dehart *v.* Kerlin, 4 Pa. Co. Ct. 396. *Compare* Watson *v.* Wehrly, 2 Pa. Dist. 530, to the effect that the right of appeal is not barred where the certiorari has been stricken by the appellate court.

19. Brinkerhoff *v.* Elliott, 43 Mo. App. 185.

20. Scott *v.* Yolo County Super. Ct., 73 Cal. 11, 14 Pac. 374.

21. The judgment is still a judgment of the justice, although treated, as to its effect

justice of the peace will not be considered in the appellate court.[22] Thus, neither defects in the process, nor in its service or return,[23] nor with regard to the parties,[24] nor in the pleadings,[25] nor errors and irregularities in the proceed-

and mode of enforcement, as if rendered in the circuit court. Wilson *v.* Robinson, 61 Iowa 357, 16 N. W. 209.

22. *Alabama.*— Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175.

Delaware.— Williams *v.* Hawley, 6 Houst. 482.

Georgia.— Chambers *v.* Dickson, Ga. Dec. 164; Dodson *v.* Connally, Ga. Dec. 132.

Illinois.— Adams *v.* Miller, 12 Ill. 27; Jenkins *v.* Congreve, 92 Ill. App. 271.

Iowa.— Condray *v.* Stifel, 77 Iowa 283, 42 N. W. 185; Smith *v.* Parker, 28 Iowa 359.

Kansas.— Lee *v.* Loveridge, 11 Kan. 485.

Maine.— Strout *v.* Durham, 23 Me. 483. See also Simpson *v.* Wilson, 24 Me. 437.

Massachusetts.— Cousins *v.* Cowing, 23 Pick. 208.

Minnesota.— It is necessary to except to the rulings of a justice as to the admission of evidence, the competency of witnesses, and to all other rulings made on the trial, in order to review them on appeal on questions of law alone, except that, where the record shows that there is no cause of action or defense or jurisdiction, it is not necessary to reserve an exception. Franek *v.* Vaughan, 81 Minn. 236, 83 N. W. 982.

Missouri.— Haase *v.* Stevens, 18 Mo. 476.

Montana.— Clark *v.* Great Northern R. Co., 30 Mont. 458, 76 Pac. 1003.

New Jersey.— On appeal to the common pleas, only objections going to the form of the remedy, without questioning plaintiff's right of recovery, are waived by the failure to present them before the justice. Burk *v.* Shreve, 39 N. J. L. 214.

New York.— Hellinger *v.* Marshall, 92 N. Y. App. Div. 607, 86 N. Y. Suppl. 1051. *Compare* Bement *v.* Rockwell, 92 N. Y. App. Div. 44, 86 N. Y. Suppl. 876.

Pennsylvania.— Lively *v.* Musser, 8 North. Co. Rep. 214.

West Virginia.— Griffin *v.* Haught, 45 W. Va. 460, 31 S. E. 957.

Wyoming.— Ward *v.* Rees, 11 Wyo. 459, 72 Pac. 581.

See 31 Cent. Dig. tit. "Justices of the Peace," § 508.

Bill of exceptions necessary see Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447.

23. *Alabama.*— Linam *v.* Jones, 134 Ala. 570, 33 So. 343; Needham *v.* Newsom, Minor 407.

Arkansas.— McKee *v.* Murphy, 1 Ark. 55; Hester *v.* Murphy, 1 Ark. 55.

Illinois.— Roberts *v.* Formhalls, 46 Ill. 66. But see Evans *v.* Bouton, 85 Ill. 579, where the holding of the court is to the effect that a defendant's non-appearance should work him no prejudice, and that if he makes a motion questioning the jurisdiction at the earliest moment on appeal, he will be considered as making the objection in time.

Indiana.— Dudley *v.* Fisher, 7 Blackf. 553; Vermilya *v.* Davis, 7 Blackf. 158.

Iowa.— Leonard *v.* Hallem, 17 Iowa 564.

Kansas.— Brust *v.* Green, 32 Kan. 182, 4 Pac. 81.

Kentucky.— Sturgus *v.* White, 7 T. B. Mon. 228.

Mississippi.— Matthews *v.* Cotton, 83 Miss. 472, 35 So. 937.

New Jersey.— Naye *v.* Noezel, 50 N. J. L. 523, 14 Atl. 750.

New York.— Baird *v.* Pridmore, 31 How. Pr. 359.

North Carolina.— Taylor *v.* Marcus, 53 N. C. 402.

Texas.— White *v.* Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568.

See 31 Cent. Dig. tit. "Justices of the Peace," § 510.

Appearance as waiver of defects see *supra*, IV, F, 1, b, (II).

24. McCampbell *v.* Cavis, 10 Colo. App. 242, 50 Pac. 728; African M. E. Church *v.* McGruder, 73 Ill. 516; Scott *v.* White, 71 Ill. 287; Bower *v.* Cassels, 59 Nebr. 620, 81 N. W. 622; Matula *v.* Fitzgerald, (Tex. App. 1890) 15 S. W. 644.

The objection that plaintiff has not sued in his full christian name may be first made on appeal. Small *v.* Sandall, 48 Nebr. 318, 67 N. W. 156.

25. *Alabama.*— Horton *v.* Miller, 84 Ala. 537, 4 So. 370.

Illinois.— Tisdale *v.* Minonk, 46 Ill. 9; Willerton *v.* Shoemaker, 60 Ill. App. 126.

Indiana.— Harper *v.* Pound, 10 Ind. 32; McClelland *v.* Quarles, 3 Blackf. 459; Mason *v.* Kempf, 11 Ind. App. 311, 38 N. E. 230; Milhollin *v.* Fuller, 1 Ind. App. 58, 27 N. E. 111.

Iowa.— Atkinson *v.* Chicago, etc., R. Co., 70 Iowa 68, 29 N. W. 808.

Kansas.— Gossett *v.* Patten, 23 Kan. 340; Kaub *v.* Mitchell, 12 Kan. 57.

Michigan.— Chicago Bldg., etc., Co. *v.* Yell, 129 Mich. 517, 89 N. W. 329; Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623.

Minnesota.— Thompson *v.* Killian, 25 Minn. 111; Goodell *v.* Ward, 17 Minn. 17; Taylor *v.* Bissell, 1 Minn. 225.

Missouri.— Boeker *v.* Crescent Belting, etc., Co., 101 Mo. App. 429, 74 S. W. 385; Finley *v.* Dyer, 79 Mo. App. 604; Kennedy *v.* Prueitt, 24 Mo. App. 414. See also Wilson *v.* Wabash, etc., R. Co., 18 Mo. App. 258.

New York.— Neff *v.* Clute, 12 Barb. 466; Ross *v.* Hamilton, 3 Barb. 609; Lyungstrandh *v.* William Haaker Co., 16 Misc. 387, 38 N. Y. Suppl. 129; Dean *v.* Gridley, 10 Wend. 254.

Oklahoma.— Scott *v.* Jones, 7 Okla. 42, 54 Pac. 308.

Oregon.— Adams *v.* Kelly, 44 Oreg. 66, 74 Pac. 399.

Pennsylvania.—Schlott *v.* Lower Heidelberg Tp., 1 Woodw. 280.

ings,[26] can be objected to for the first time on appeal or error; and objections to plaintiff's right to maintain the action,[27] or to the evidence introduced on the trial,[28] must be made in the justice's court, or they cannot be considered on appeal. But the fact that plaintiff does not move that a verdict be directed in his favor does not constitute a waiver of his right to insist on appeal that the verdict was against the weight of the evidence.[29]

b. Acts Without Jurisdiction. It cannot be objected for the first time on appeal that the justice had no jurisdiction over defendant's person,[30] or that the action was not brought in the proper place;[31] but the rule is well settled in most jurisdictions that an objection to the jurisdiction over the subject-matter cannot be waived, and may be made for the first time in the appellate court.[32] But where there is no complaint, and it does not appear in the summons that the amount in

South Dakota.— Where a judgment of a justice for the return of certain property or its value was irregular in that the complaint was insufficient as one for the recovery of property and no advantage was taken of the irregularity by motion to vacate or set it aside in the justice's court, it was held that no advantage could be taken of the same on a trial *de novo* on appeal in the county court. Jerome *v.* Rust, (1905) 103 N. W. 26.

See 31 Cent. Dig. tit. "Justices of the Peace," § 511.

But see Wirth *v.* Bartell, 84 Wis. 209, 54 N. W. 399.

If a complaint is certain enough to bar another action, objections to its certainty cannot be taken for the first time on error. Harper *v.* Pound, 10 Ind. 32.

But where a statement is a nullity, defendant can object in the appellate court for the first time. Finley *v.* Dyer, 79 Mo. App. 604.

26. *Alabama.*— Wright *v.* New England Mortg. Security Co., 127 Ala. 213, 28 So. 573; Reynolds *v.* Simpkins, 67 Ala. 378.

Kansas.— Grandstaff *v.* Scoffin, 5 Kan. 165; Garvey *v.* Schollkopf, McCahon 179.

Minnesota.— Tune *v.* Sweeney, 34 Minn. 295, 25 N. W. 628.

Nebraska.— McKibben *v.* Harris, 54 Nebr. 520, 74 N. W. 952; Jones *v.* Driscoll, 46 Nebr. 575, 65 N. W. 194.

New York.— Brownell *v.* Slocum, 3 Johns. 430.

North Carolina.— Aycock *v.* Wilmington, etc., R. Co., 51 N. C. 231.

North Dakota.— Lyman-Eliel Drug Co. *v.* Cooke, 12 N. D. 88, 94 N. W. 1041.

Wisconsin.— Conrad *v.* Cole, 15 Wis. 545.

United States.— Deadrick *v.* Harrington, 7 Fed. Cas. No. 3,694*b*, Hempst. 50.

See 31 Cent. Dig. tit. "Justices of the Peace," § 512.

But see St. Joseph Mfg. Co. *v.* Harrington, 53 Iowa 380, 5 N. W. 568.

27. Compton *v.* Parsons, 76 Mo. 455; Fowler *v.* Westervelt, 40 Barb. (N. Y.) 374; Pruyn *v.* Tyler, 18 How. Pr. (N. Y.) 331.

28. Irvine *v.* Lopez, 1 Ariz. 81, 25 Pac. 799; Martin *v.* Smith, 108 Mich. 278, 66 N. W. 61; Frick Co. *v.* Marshall, 86 Mo. App. 463; Jordan *v.* McGill, 43 N. Y. App. Div. 264, 60 N. Y. Suppl. 33; Judson *v.* Havely, 59 N. Y. Suppl. 1018.

Sufficiency of objections.— Objections to evidence must specify the ground thereof, and a general objection in the trial court and specific ones in the appellate court will not be tolerated. Frick Co. *v.* Marshall, 86 Mo. App. 463. See also Jordan *v.* McGill, 43 N. Y. App. Div. 264, 60 N. Y. Suppl. 33.

29. Jacob *v.* Haefelien, 54 N. Y. App. Div. 570, 66 N. Y. Suppl. 1007.

30. Ashby *v.* Holmes, 68 Mo. App. 23. And see ***supra*, V, A, 4, a, text and note 23.**

31. Allison *v.* Hedges, 5 Blackf. (Ind.) 546; Engel *v.* Brown, 1 Tex. App. Civ. Cas. § 803; Galveston, etc., R. Co. *v.* McTiegue, 1 Tex. App. Civ. Cas. § 457. See also Walthew *v.* Milby, 3 Tex. App. Civ. Cas. § 119.

32. *Indiana.*— Poyser *v.* Murray, 6 Ind. 35.

Maryland.— Darrell *v.* Biscoe, 94 Md. 684, 51 Atl. 410.

Massachusetts.— Elder *v.* Dwight Mfg. Co., 4 Gray 201. *Compare* Davenport *v.* Burke, 9 Allen 116.

Minnesota.— Franek *v.* Vaughan, 81 Minn. 236, 83 N. W. 982; Barber *v.* Kennedy, 18 Minn. 216; Rahilly *v.* Lane, 15 Minn. 447.

Mississippi.— Hope *v.* Hurt, 59 Miss. 174. *Compare* Rice *v.* Locke, 59 Miss. 189.

Missouri.— Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; Webb *v.* Tweedie, 30 Mo. 488. But *compare* Bridle *v.* Grau, 42 Mo. 359.

Pennsylvania.— O'Connel *v.* Bank, 2 Chest. Co. Rep. 296. See also Brands *v.* Wise, 16 Pa. Super. Ct. 189.

Texas.— Lawson *v.* Lynch, 9 Tex. Civ. App. 582, 29 S. W. 1128.

See 31 Cent. Dig. tit. "Justices of the Peace," § 509.

Contra.— Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Glaze *v.* Blake, 56 Ala. 379; Vaughan *v.* Robinson, 20 Ala. 229; Slaton *v.* Apperson, 15 Ala. 721. But see Dew *v.* Alabama Bank, 9 Ala. 323.

Where the transcript shows a want of jurisdiction on its face, it may be objected to for the first time on appeal. Louisville, etc., R. Co. *v.* Creamer, 6 Ind. App. 700, 33 N. E. 238; Louisville, etc., R. Co. *v.* Parish, 6 Ind. App. 89, 33 N. E. 122; Franek *v.* Vaughan, 81 Minn. 236, 83 N. W. 982.

Objection that title to land is involved.— In Pennsylvania a justice has authority to try actions of trespass for injuries to real

controversy is beyond the justice's jurisdiction, an objection on that ground cannot be made on appeal;[33] and after trial on the merits defendant cannot on appeal raise the question of jurisdiction because the complaint did not affirmatively show that the premises in question were situated in the justice's precinct.[34] So too an objection to the jurisdiction is too late, where it is made for the first time in the supreme court after a general appeal to the circuit court, which defendant contended had jurisdiction, and which tried the case on the merits.[35]

c. Motions For New Trial and to Set Aside Default. A motion for a new trial is not generally a condition precedent to the right to appeal from a justice's judgment,[36] but under some statutes such a motion is necessary on an appeal to review an exclusion of evidence,[37] or on a petition in error to review an action tried by a jury;[38] while under others the overruling of a motion for a new trial is a prerequisite to an appeal.[39] Where a defendant has suffered judgment by default, he must make a motion within the time prescribed by statute to have it set aside, or his appeal will be dismissed.[40]

5. Parties — a. In General. Only the persons who were parties to the judgment need be brought before the appellate court;[41] but if one of two joint debtors is summoned, and he alone appears and makes defense in the name of both, he may appeal in the name of both, without summons and severance, if it does not appear that his co-defendant refuses to join in the appeal.[42] The *pendente lite* purchaser of a judgment may continue to prosecute the claim in the name of his assignor, when appealed by defendant;[43] but a stakeholder in arbitration proceedings is not bound to appeal from a judgment against him, although he must allow a party interested to use his name in an appeal, upon indemnity being given.[44] Where the action must be tried *de novo* and the adverse parties be summoned to answer, an indorsement by an attorney on the appeal-bond that one of the parties enters his appearance, does not make him a party.[45]

b. Appeal by One or More of Several Parties — (I) *In General.* An appeal may in most jurisdictions be taken by one or more of several parties against whom judgment has been rendered in a justice's court, without joining his co-parties.[46]

estate, unless defendant makes oath that the title to land will come in question, and it has been held that it is too late to make the objection after the case comes into the common pleas by appeal. Lauchner *v.* Rex, 20 Pa. St. 464.

Objection to legality of an assessment, not made before the justice, cannot be raised on appeal. Williams *v.* Mecartney, 69 Cal. 556, 11 Pac. 186.

33. Cromer *v.* Marsha, 122 N. C. 563, 29 S. E. 836.

34. Cahill *v.* Texas Mexican R. Co., 76 Tex. 100, 12 S. W. 1128.

35. Ramsby *v.* Bigler, 129 Mich. 570, 89 N. W. 344 [*following* Gott *v.* Brigham, 41 Mich. 227, 2 N. W. 5; Grand Rapids, etc., R. Co. *v.* Gray, 38 Mich. 461].

36. Henry *v.* Lansdown, 42 Mo. App. 431 (construing Rev. St. (1879) § 2442); Minnick *v.* Fort, 13 S. C. 215.

37. Hennigh *v.* Commercial Nat. Bank, 53 Kan. 370, 36 Pac. 711.

38. Hart Pioneer Nursery Co. *v.* Scruggs, 36 Kan. 407, 13 Pac. 575.

39. Langbein *v.* State, 37 Tex. 162; Griffin *v.* Brown, 1 Tex. App. Civ. Cas. § 1097; Dewey *v.* Campbell, 1 Tex. App. Civ. Cas. § 648; Howard *v.* Jenkins, 1 Tex. App. Civ. Cas. § 68. But see Masterton *v.* Conrad, 2 Tex. App. Civ. Cas. § 753.

40. Lawrence *v.* Meyer, 35 Ark. 104; Page *v.* Sutton, 29 Ark. 304; Wynn *v.* Garland, 11 Ark. 302; Horton *v.* St. Louis, etc., R. Co., 83 Mo. 541; Pearson *v.* Carson, 69 Mo. 569; Smith *v.* St. Louis, etc., R. Co., 53 Mo. 338; Burns *v.* Hunton, 24 Mo. 337; Barnett *v.* Lynch, 3 Mo. 369; Smith *v.* Wineland, 21 Mo. App. 387; Gage *v.* Maryatt, 9 Mont. 265, 23 Pac. 337; Italian-Swiss Agricultural Co. *v.* Bartagnolli, 9 Wyo. 204, 61 Pac. 1020. See also Pryor *v.* Williams, 7 Ark. 295; Hore *v.* The Belle, 11 Mo. 107.

41. Jackson *v.* Hedges, 4 Harr. (Del.) 96; Wells *v.* Reynolds, 4 Ill. 191; Fabbri *v.* Cunio, 1 Ill. App. 240; Jerry *v.* Blair, 62 N. Y. App. Div. 590, 71 N. Y. Suppl. 189; Mulrooney *v.* Lederer, 25 Ohio Cir. Ct. 1. But see People *v.* Onondaga County, 7 Cow. (N. Y.) 492; Moody *v.* Gleason, 7 Cow. (N. Y.) 482.

Appeal by agent held appeal of principal see York *v.* Free, 38 W. Va. 336, 18 S. E. 492.

42. Pharo *v.* Parker, 21 N. J. L. 332.

43. Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222.

44. Deaves *v.* Brightly, 4 Pa. L. J. Rep. 37.

45. Wills *v.* McKee, 5 Ky. L. Rep. 683.

46. *Illinois.*— Leggett *v.* Chrisman, 3 Ill. 46; Bell *v.* Bruhn, 30 Ill. App. 300.

(II) *Effect.* In Illinois, where one of several defendants appeals, the case should be docketed against the appellant only;[47] but in Kentucky an appeal by one defendant brings all the other defendants into the appellate court,[48] and the same is true in Nebraska where the interests of the several defendants are inseparably connected.[49] Where judgment has been rendered against a defendant and his sureties on a bond, an appeal by him inures to the benefit of the sureties, although they do not join therein.[50] Where an action has been dismissed as to one defendant, an appeal by his co-defendant does not vacate the judgment of dismissal and bring the former into the appellate court.[51]

c. Intervention of Parties. As a general rule one not a party to the action in the justice's court cannot intervene and become a party upon appeal from the judgment rendered therein;[52] and where a garnishee appeals from the justice's judgment against him, it is error for the appellate court to allow the principal defendant to intervene as a party in the garnishment proceedings.[53] But in Tennessee one who appeals from a judgment, and appears in the appellate court, in an action to which he is not a party, makes himself a party for the purpose of a trial *de novo*, and the appeal should not be dismissed when the successful party makes no motion to dismiss;[54] and in Alabama, in an action governed by the general rules applicable to ejectment, or the corresponding statutory action, a landlord may intervene and appeal from a judgment against his tenant."[55]

d. Death of Party. Where a party dies pending an appeal, and the cause of action survives, the action may be revived by or against his personal representative, on compliance with the statutory requirements.[56]

6. Requisites and Proceedings For Transfer of Cause — a. In General — (I) *Compliance With Statutes Necessary.* As an appeal can only be taken when allowed by law, and as it is purely a statutory proceeding, the provisions of the statute governing the appeal must be strictly followed.[57] Nevertheless it has

Indiana.— Goodhue *v.* Palmer, 13 Ind. 457. But see Ebert *v.* Ludlow, 6 Ind. 29; Lawrenceburgh, etc., R. Co. *v.* Smith, 5 Ind. 188; Congressional Tp. No. 19 *v.* Clark, 1 Ind. 139; Kain *v.* Gradon, 6 Blackf. 138.

Kentucky.— Blassingame *v.* Glaves, 6 B. Mon. 38; Clagget *v.* Blanchard, 8 Dana 41.

Mississippi.— Roberts *v.* Weiler, 52 Miss. 299.

Missouri.— Roberts, etc., Shoe Co. *v.* Shepherd, 96 Mo. App. 698, 70 S. W. 931.

Nebraska.— One of several defendants having separate and distinct defenses may prosecute an appeal without joining his co-defendants. Claflin *v.* American Nat. Bank, 46 Nebr. 884, 65 N. W. 1056.

New York.— Mattison *v.* Jones, 9 How. Pr. 152.

Pennsylvania. — Gallagher *v.* Jackson, 1 Serg. & R. 492.

Texas.— Jesse French Piano, etc., Co. *v.* Mears, (Civ. App. 1904) 83 S. W. 401. But see Baldwin *v.* White, (Tex. Civ. App. 1894) 26 S. W. 455.

Wisconsin.— Bremer *v.* Koenig, 5 Wis. 156; Kirkpatrick *v.* McCormick, 2 Wis. 284; Edson *v.* Countryman, 1 Wis. 172.

See 31 Cent. Dig. tit. "Justices of the Peace," § 517.

But see Sheppard *v.* Fenton, 9 N. J. L. 8.

47. Mitcheltree *v.* Sparks, 2 Ill. 198.

48. Clagget *v.* Blanchard, 8 Dana (Ky.) 41; Palmer *v.* Kennedy, 7 J. J. Marsh. (Ky.) 498.

49. Claflin *v.* American Nat. Bank, 46 Nebr. 884, 65 N. W. 1056.

50. McKay *v.* Irion, (Tex. App. 1890) 15 S. W. 123.

51. Mulrooney *v.* Lederer, 25 Ohio Cir. Ct. 1.

52. Shaw *v.* Groomer, 60 Mo. 495; Gulf, etc., R. Co. *v.* Ford, 3 Tex. App. Civ. Cas. § 147.

53. Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

54. Williams *v.* Webb, (Tenn. 1900) 58 S. W. 376.

55. *Ex p.* Webb, 58 Ala. 109.

56. See Chicago, etc., R. Co. *v.* Woodson, 110 Mo. App. 208, 85 N. W. 105, construing Rev. St. (1899) § 756, and holding that where, after the death of plaintiff pending an appeal, defendant does not appear, the court cannot revive the action on the mere suggestion of plaintiff's death without an order for scire facias served on defendant.

57. *California.*— Coker *v.* Colusa County Super. Ct., 58 Cal. 177.

Georgia.— Newman *v.* State, 97 Ga. 367, 23 S. E. 831.

Illinois.— See Scammon *v.* Cline, 3 Ill. 456; Olsen *v.* Stark, 94 Ill. App. 556, where the appeals were held to have been regularly taken. And see as to appeals from probate justices of the peace Scott *v.* Crow, 5 Ill. 183; Gibbons *v.* Johnson, 4 Ill. 61.

Louisiana.— New Orleans *v.* Hazelback, 1 La. Ann. 386.

Missouri.— Whitehead *v.* Cole, 49 Mo. App. 428.

been held that the order in which the prescribed statutory steps are taken is not material.[58]

(II) *Petition or Prayer.* Under the statutes of some of the states a prayer or petition is necessary as a basis for the allowance of an appeal or writ of error.[59]

(III) *Allowance.* Where the party praying an appeal has complied with all the requirements of the law, it must be allowed by the officer designated by law,[60] usually the justice who tried the case.[61] Where allowed, an appeal must be

New York.— Roberts *v.* Davids, 12 Hun 394, holding Code Civ. Proc. § 1303, inapplicable to appeals from justice's courts.

North Dakota.— See Eldridge *v.* Knight, 11 N. D. 552, 93 N. W. 860, as to what is sufficient under Rev. Code, §§ 6771, 6772, 6776, 6777.

South Dakota.— Tschetter *v.* Heiser, 9 S. D. 285, 68 N. W. 744.

Utah.— Legg *v.* Larson, 7 Utah 110, 25 Pac. 731; Salt Lake City *v.* Redwine, 6 Utah 335, 23 Pac. 756.

Vermont.— Harriman *v.* Swift, 31 Vt. 385.

See 31 Cent. Dig. tit. "Justices of the Peace," § 520.

But see Purdue *v.* Stevenson, 54 Ind. 161 (where the appeal was treated as if the cause had originally commenced in the appellate court); Bisher *v.* Richards, 9 Ohio St. 495 (to the effect that where the appellate court has original jurisdiction of the case, if the parties proceed to trial upon the merits without objection to the mode in which jurisdiction was taken, it is too late after verdict to make such an objection).

Where an appeal-bond is given by an attorney without authority, it may be repudiated by defendant, who instead moves to vacate the judgment, and there is no error on the part of the justice in regarding the appeal as a nullity and in entertaining the motion. Forest City Stone Co. *v.* French, 4 Ohio Dec. (Reprint) 141, Clev. L. Rep. 69.

58. Coker *v.* Colusa County Super. Ct., 58 Cal. 177.

59. *Indiana.*— Frazer *v.* Smith, 6 Blackf. 210 (where the docket does not show that an appeal was asked for when the appeal-bond was filed, defendant may show by affidavits that it was); Kreite *v.* Smith, 3 Ind. App. 64, 29 N. E. 174 (an answer to an application made more than thirty days after judgment, and which has been granted, is unauthorized).

Kansas.— A petition in error must set forth the errors complained of, but need not show that exceptions were taken to erroneous rulings. Deibolt *v.* Bradley, (App. 1900) 62 Pac. 431.

Massachusetts.— On petition to the superior court to enter an appeal from a trial justice, petitioner cannot show by parol evidence that he offered to recognize, or that he offered to deposit with the justice, and tendered to him, a sufficient sum in lieu of a recognizance, which the justice refused; but he must proceed in review. Tibbetts *v.* Handy, 145 Mass. 537, 14 N. E. 645.

Missouri.— Allen *v.* Singer Mfg. Co., 72 Mo. 326 (a petition for review of a judgment in attachment, rendered on publication of notice without service or appearance, must be served on plaintiff personally); Cochran *v.* Bird, 2 Mo. 141 (a party who does not enter his recognizance until after the day of trial does not "pray for an appeal" on such day, within a statute requiring written notice of appeal after such day, if no appeal is prayed for on that day).

New Jersey.— Bennet *v.* Kite, 9 N. J. L. 106, holding that an indorsement on the back of the transcript, made the day after the certificate bears date, to the effect "that the defendant appeared and filed an affidavit, and produced bond, and demanded an appeal," is not evidence of the demanding of the appeal.

New York.— The affidavit for allowance of an appeal on the ground of newly discovered evidence must set forth not only the testimony and proceedings before the justice but the substance of the newly discovered evidence. People *v.* Saratoga C. Pl., 18 Wend. 596.

Pennsylvania.— An appeal is properly refused when the petition shows no better reason than that appellant is dissatisfied with the result, and that two of his witnesses were in adjoining states at the time of the hearing. Thompson *v.* Preston, 5 Pa. Super. Ct. 154. See also Com. *v.* Menjou, 174 Pa. St. 25, 34 Atl. 301, in which it was held that the common pleas properly refused to allow an appeal where the petition did not account for the petitioner's non-appearance at the trial.

See 31 Cent. Dig. tit. "Justices of the Peace," § 521.

60. **Mandamus will lie** to compel a justice to grant an appeal in a proper case. *Ex p.* Martin, 5 Ark. 371; Levy *v.* Inglish, 4 Ark. 65. But see Shaffer *v.* Dohan, 5 Pa. Co. Ct. 384. And see Tichenor *v.* Hewson, 14 N. J. L. 26, where it is held that in granting or refusing an appeal a justice acts judicially, and is to decide whether an appeal lies, whether it is claimed in due time, and as to the form of the appeal-bond.

The mere insufficiency of the recognizance offered is not ground for refusing an appeal, without showing a refusal of those to be bound to enter into a sufficient recognizance. Levy *v.* Inglish, 4 Ark. 65. *Compare* Moulder *v.* Anderson, 63 Mo. App. 34, construing Rev. St. § 6340, providing that no appeal allowed by a justice shall be dismissed for want of affidavit or recognizance, and holding that it does not apply where no appeal was allowed, and the record shows that, although an appeal was prayed, the justice merely certified to the record, without allowing the appeal.

61. A justice, having in his possession the docket of another justice, of whom he is not the successor, cannot grant an appeal from

entered in the name of the proper party,[62] and be made returnable as required by law.[63] The entry of the allowance of an appeal on the justice's docket is not essential to its validity,[64] and it is not necessary that an officer allowing an appeal shall add the title of his office to his signature.[65] If a justice refuses to permit bail to be entered for an appeal, he thereby denies the appeal itself.[66]

b. Time For Taking Proceedings — (i) *In General.* Proceedings for an appeal or writ of error must be taken in the time prescribed by law, and when not so taken the appellate court acquires no jurisdiction.[67] Conversely

a judgment on such docket, and certify a transcript in the case, until he shall have transferred the judgment to his own docket. Walker *v.* Prather, 3 Ind. 112.

A commissioner, although he does not reside in the county where the judgment was rendered, may allow an appeal from a justice of the peace. People *v.* Rensselaer C. Pl., 7 Wend. (N. Y.) 533.

62. See Morgan *v.* Cohutta, 120 Ga. 423, 47 S. E. 971.

63. Holman *v.* Hogg, 83 Mo. App. 370. *Compare* Spencer *v.* Broughton, 77 Conn. 38, 58 Atl. 236, construing Pub. Acts (1903), p. 192, c. 206, § 22, validating appeals from judgments taken under the statutes as they were prior to the Revision of 1902.

64. Rapley *v.* Brown, 12 Ark. 80. *Compare* State *v.* Machen, 112 La. 556, 36 So. 589, to the effect that an appeal will be dismissed where the record contains no order granting it, and it is not shown by evidence *dehors* the record that one was granted. But see Rogers *v.* Hill, 1 Yerg. (Tenn.) 400, in which the proceedings did not show the granting of the appeal, except by the receipt in the appeal-bond, and it was held that the circuit court had no jurisdiction.

Filing transcript prima facie evidence of prayer and allowance see Humble *v.* Williams, 4 Blackf. (Ind.) 473. See also Hanna *v.* Kankakee, 34 Ill. App. 186.

65. People *v.* Rensselaer Ct. C. Pl., 6 Wend. (N. Y.) 543.

66. Gregor *v.* Slingluff, 1 Miles (Pa.) 210.

67. *Arkansas.*— Goings *v.* Mills, 1 Ark. 11. See also O'Bannon *v.* Ragan, 30 Ark. 181; Moehring *v.* Kayser, 21 Ark. 457.

Connecticut.— Jackson *v.* New Milford Toll Bridge Co., 34 Conn. 266. *Compare* Spencer *v.* Broughton, 77 Conn. 38, 58 Atl. 236.

Delaware.— See Moore *v.* C. H. Pearson Packing Co., 4 Pennew. 290, 55 Atl. 5, construing Rev. Code, c. 99, p. 755, § 26.

Florida.— State *v.* Walker, 32 Fla. 431, 13 So. 928 (writ of error); Summerlin *v.* Tyler, 6 Fla. 718.

Georgia.— Huzza *v.* Clark, 102 Ga. 579, 27 S. E. 677. *Compare* Dieter *v.* Ragsdale, 120 Ga. 417, 47 S. E. 942.

Idaho.— See Perkins *v.* Bridge, 10 Ida. 189, 77 Pac. 329, construing Rev. St. (1887) § 4838.

Illinois.— Pearce *v.* Swan, 2 Ill. 266; Murphy *v.* McDonald, 3 Ill. App. 19. *Compare* Fix *v.* Quinn, 75 Ill. 232; Olsen *v.* Stark, 94 Ill. App. 556.

Indiana.— Sample *v.* Gilbert, 46 Ind. 444.

Iowa.— An appeal must be perfected within twenty days from rendition of judgment (McBrearty *v.* Dyer, 6 Iowa 528), but no time is prescribed in which a writ of error must be brought (Mudgett *v.* Park, 2 Iowa 287; Porter *v.* Helmick, 2 Iowa 87).

Massachusetts.— Greeley *v.* Page, 156 Mass. 47, 30 N. E. 176.

Michigan.— Franks *v.* Smith, 45 Mich. 326, 7 N. W. 906. See also Davison *v.* Elliott, 9 Mich. 252, where it is held that after the transcript of a justice's judgment has been legally filed in the circuit court, the supreme court cannot allow an appeal from the judgment.

Mississippi.— Murff *v.* Osburn, (1899) 24 So. 873 [*quoting* Kramer *v.* Holster, 55 Miss. 243, where it is said that "the prescribed time is a limitation of the jurisdiction of the Circuit Court, and is not a mere statute of limitations to be pleaded by the opposite party"].

Missouri.— Bauer *v.* Cabanne, 11 Mo. App. 114; Moore *v.* Damon, 4 Mo. App. 111. Under Wagner St. Mo. p. 850, § 20, allowing an appeal ten days before the first day of the next term, an appeal allowed May 24, the first day of the term being June 2, was seasonably taken. Bailey *v.* Lubke, 8 Mo. App. 57.

Montana.— State *v.* Second Judicial Dist. Ct., 30 Mont. 93, 75 Pac. 862.

Nebraska.— People's Bldg., etc., Assoc. *v.* Cook, 63 Nebr. 437, 88 N. W. 763.

New Jersey.— Deacon *v.* Parry, 68 N. J. L. 186, 52 Atl. 628 [*distinguishing*, as being entirely exceptional, Lacy *v.* Cox, 15 N. J. L. 469]; Lear *v.* Budd, 56 N. J. L. 457, 28 Atl. 800; Miller *v.* Martin, 8 N. J. L. 201. See also Dyer *v.* Ludlum, 16 N. J. L. 531.

New York.—Wait *v.* Van Allen, 22 N. Y. 319; Seymour *v.* Judd, 2 N. Y. 464.

North Carolina.— Spaugh *v.* Boner, 85 N. C. 208.

Oregon.— Lemmons *v.* Huber, 45 Oreg. 782, 77 Pac. 836.

Pennsylvania.— Bessen *v.* Gregoir, 5 Pa. Super. Ct. 303; Reese *v.* Hetzel, 4 L. T. N. S. 217. See also Kutz *v.* Skinner, 7 Pa. Super. Ct. 346. And see Marvel *v.* Jones, 7 Kulp 508, where it was held that the twenty days' limitation does not apply where the justice had no jurisdiction of the case.

Tennessee.— Park *v.* Bybee, 1 Baxt. 267; Gilbert *v.* Driver, 3 Head 463; Hayes *v.* Kirk, 2 Overt. 322.

United States.— Jacobs *v.* Jacobs, 13 Fed. Cas. No. 7,161*a*, Hempst. 101.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 523, 524, 530.

an appeal from an order denying a new trial before the order is entered is ineffectual.[68]

(II) *Commencement of Period of Limitation.* The time within which an appeal or writ of error may be prosecuted to a justice's judgment begins to run, in many jurisdictions, from the date of the rendition and entry of judgment,[69] or from notice thereof, where notice is required.[70] In some states, however, the time does not begin to run until the final action of the justice in respect to the judgment has been had.[71]

(III) *Waiver of Objections to Delay.* An objection that an appeal has been taken after the time allowed by law is waived by a general appearance of the appellee, without raising the objection.[72]

In computing the time limited the day on which the judgment was rendered is to be excluded. Swisher *v.* Hine, 10 Ark. 497; Glasscock *v.* Boyer, 50 Ind. 391; Semple, etc., Mfg. Co. *v.* Thomas, 10 Mo. App. 457; Carson *v.* Love, 8 Yerg. (Tenn.) 215. *Compare* Reid *v.* Defendorf, 87 Hun (N. Y.) 40, 33 N. Y. Suppl. 954, in which, after entering judgment, the justice placed the docket in his safe, and left the state without notice to the parties of the judgment, and it was held that the time during which the defeated party was ignorant of its rendition, by reason of the justice's absence, was no part of the time within which an appeal was to be taken.

Sunday excluded in computing time for appeal see Wood *v.* McCrary, 107 Ga. 345, 33 S. E. 395. *Contra,* Warner *v.* Donahue, 99 Mo. App. 37, 72 S. W. 492.

Where the last day falls on Sunday, an appeal may be taken on Monday. Buckstaff *v.* Hanville, 14 Wis. 77.

In determining whether the appeal papers were filed in time, an appellate court is entitled to consider, in the absence of record proof, signs and abbreviations made by the clerk for his own convenience in making up the record, to rebut the presumption that he did his duty, collected the fees, and docketed the case in due time. Hall *v.* Denver Omnibus, etc., Co., 13 Colo. App. 417, 58 Pac. 402.

68. **Premature appeal ineffectual.**— Sinkling *v.* Illinois Cent. R. Co., 10 S. D. 560, 74 N. W. 1029 [*following* State *v.* Lamm, 9 S. D. 418, 69 N. W. 592].

69. *Arkansas.*— The pendency of a motion for a new trial does not enlarge the time within which an appeal must be taken from a justice's judgment. Scott *v.* Meyer, 49 Ark. 17, 3 S. W. 883.

Massachusetts.— Gardner *v.* Dudley, 12 Gray 430; Welch *v.* Damon, 11 Gray 383.

Mississippi.— An appeal to a jury will not extend the time within which an appeal from the justice's judgment must be taken. Pollard *v.* Parish, 23 Miss. 573.

Missouri.— Topping *v.* J. C. Grant Mfg. Co., 84 Mo. App. 42, to the effect that an appeal from a judgment by default within ten days after motion to set aside the default was overruled, but more than thirty days after the judgment was rendered will be dismissed. But see Fenton *v.* Russell, 6 Mo. 143, in which it was held that where judgment of nonsuit is set aside and a new trial granted, an appeal may be taken within ten days after the new trial.

Nebraska.— People's Bldg., etc., Assoc. *v.* Cook, 63 Nebr. 437, 88 N. W. 763.

New York.— Beuerlein *v.* Hodges, 10 N. Y. Suppl. 505 (the time is to be reckoned from the entry of judgment in the docket, and not from entry on the minutes); Fuchs *v.* Pohlman, 2 Daly 210.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 526, 527.

But see Summerlin *v.* Tyler, 6 Fla. 718, holding that Thompson Dig. Fla. p. 474, has reference to the adjournment of the court, not to the date of rendition of judgment.

Where a verdict has the effect of a judgment, the time commences to run from the entry of the verdict on the docket. Cason *v.* Tate, 8 Mo. 45.

70. Sammis *v.* Nassau Light, etc., Co., 91 N. Y. App. Div. 7, 86 N. Y. Suppl. 243; King *v.* Wilmington, etc., R. Co., 112 N. C. 318, 16 S. E. 929; Frantz *v.* Dehart, 1 Pa. Co. Ct. 5; Taylor *v.* Smith, 2 Pa. L. J. Rep. 318.

Where a party has no notice of the entry of judgment, the twenty days allowed for an appeal will begin to run at the end of ten days after final hearing, within which time the justice must enter judgment, by the Pennsylvania act of March 22, 1877. Imler *v.* Houser, 1 Pa. Co. Ct. 6; Haines *v.* Townsend, 1 Chest. Co. Rep. (Pa.) 146. See also Boyd *v.* Ward, 10 Pa. Co. Ct. 9.

Where the evidence as to notice does not clearly show that the time for appeal has elapsed since such notice, the right of appeal will not be denied. Frantz *v.* Dehart, 1 Pa. Co. Ct. 5.

71. Moore *v.* Jones, 13 Ala. 296.

Where a rehearing is granted after judgment by default, the time begins to run from the judgment on rehearing. Sleck *v.* King, 3 Pa. St. 211; Kremery *v.* Ameisen, 9 Pa. Dist. 708; Farra *v.* Kelly, 3 Del. Co. (Pa.) 421; Read *v.* Dickinson, 2 Ashm. (Pa.) 224. But see Topping *v.* J. C. Grant Mfg. Co., 84 Mo. App. 42.

Where a judgment is amended nunc pro tunc so as to show a judgment disposing of the entire case an appeal will lie, although the justice has lost jurisdiction of the suit, and the time for appeal from the judgment as originally entered has expired. Gray *v.* Chapman, (Tex. Civ. App. 1903) 74 S. W. 564.

72. *Connecticut.*— Spencer *v.* Broughton, 77 Conn. 38, 58 Atl. 236.

(iv) *Extension of Time.* The appellate court cannot extend the time fixed by law within which an appeal from a justice's judgment must be taken;[73] nor can a justice, after the expiration of the time fixed, by granting, without plaintiff's consent, a rule to show cause why the judgment should not be opened, secure to the defendant another like period from the decision on the rule, in which to appeal.[74]

(v) *Relief in Case of Failure to Proceed in Time*—(a) *In General.* Under the statutes of some of the states an appeal may be allowed from a justice's judgment by the appellate court after the expiration of the regular time for appeal, where the appellant brings himself within the terms of the statute.[75] An application for leave to appeal is a special proceeding materially affecting legal rights; and the court can obtain jurisdiction only by personal service of the notice required on the adverse party.[76]

(b) *Grounds*—(1) In General. As expressed in the statutes, an appeal may be allowed for good cause shown, or where the appellant was prevented from taking his appeal in time by circumstances not under his control, or by the improper conduct of the justice or of the appellee; and no more definite statement is possible, since each case necessarily depends upon its special facts and circumstances.[77]

Illinois.— Pearce *v.* Swan, 2 Ill. 266.

Michigan.— McCombs *v.* Johnson, 47 Mich. 592, 11 N. W. 400.

Pennsylvania.— Sleck *v.* King, 3 Pa. St. 211 (in which the motion to dismiss was made by appellee after he had filed his declaration); Order of Odd Fellows *v.* Reilly, 21 Pa. Co. Ct. 552 (in which respondent treated the transcript as a declaration, pleaded thereto, and the case was placed on the trial calendar).

Tennessee.— Lookout Mountain, etc., R. Co. *v.* Flowers, 101 Tenn. 362, 47 S. W. 485, in which appellee demanded a jury, and the case was continued by consent.

Vermont.— Mack *v.* Lewis, 67 Vt. 383, 31 Atl. 888.

See 31 Cent. Dig. tit. "Justices of the Peace," § 528.

Contra.— Robinson *v.* Walker, 45 Mo. 117.

73. Davis *v.* Vaughan, 7 S. C. 342.

74. Russell *v.* Smith, 1 Phila. (Pa.) 425.

75. *Indiana.*— Under Burns Rev. St. (1894) § 1571, appeals may be authorized by the circuit court after the expiration of thirty days, where the party seeking the appeal has been prevented from taking the same by circumstances not under his control. Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455 [*citing* Brooks *v.* Harris, 42 Ind. 177; Kreite *v.* Smith, 3 Ind. App. 64, 29 N. E. 174]. See also Thomas *v.* Littlefield, 1 Ind. 361, Smith 236, to the effect that the affidavit must show that an appeal in proper season was prevented by unavoidable circumstances, or by improper conduct of the justice or of the appellee.

Michigan.— An appeal may be granted after five days from rendition of judgment, when the party has been prevented from taking an appeal by circumstances not under his control. See Jackson *v.* Jackson, 135 Mich. 549, 98 N. W. 260; Stanton *v.* Donovan, 126 Mich. 715, 86 N. W. 148 (motion or accompanying affidavits must state that appeal was prevented by unavoidable circumstances); Calvert *v.* McNaughton, 2 Mich. N. P. 8 (affidavit for allowance must be sworn to). See also Goldhamer *v.* Lillibridge, 107 Mich. 259, 65 N. W. 97, construing Local Acts (1895), Act No. 460.

Missouri.— The remedy is by application to the circuit court for mandamus. Union Sav. Assoc. *v.* Keisker, 8 Mo. App. 232.

Pennsylvania.— An appeal *nunc pro tunc* may be allowed for good cause shown. See Com. *v.* Swift, 17 Pa. Co. Ct. 95 (appeal allowed); Edsall *v.* Ford, 5 Pa. Co. Ct. 72 (where two of three joint trespassers have appealed, the court will allow the other to appeal *nunc pro tunc* by giving bail); Vargason *v.* Eldred, 4 Pa. Co. Ct. 93 (appeal not allowed); Press Co. *v.* Boetticher, 9 Kulp 171 (appeal not allowed); Garner *v.* Crowl, 17 Lanc. L. Rev. 113 (appeal allowed); Detwiler *v.* Smith, 14 Montg. Co. Rep. 61 (appeal not allowed).

Vermont.— St. § 1667, authorizes the county court in its discretion to vacate a justice's judgment, and determine the cause as if brought to it by appeal, where the judgment debtor was prevented from entering an appeal by fraud, accident, or mistake. Perry *v.* Wright, 70 Vt. 615, 41 Atl. 971.

West Virginia.—An appeal may be granted after the expiration of ten days by the circuit court or a judge thereof in vacation, upon good cause shown. The applicant must file his application, and the proofs with it, in writing, including his own affidavit or those of others. Hubbard *v.* Yocum, 30 W. Va. 740, 5 S. E. 867. See also McCormick *v.* Short, 49 W. Va. 1, 37 S. E. 769.

See 31 Cent. Dig. tit. "Justices of the Peace," § 531.

76. McCaslin *v.* Camp, 26 Mich. 390.

77. **Facts held sufficient to warrant allowance.**— *Indiana.*— Pruitt *v.* Shelbyville, etc., R. Co., 2 Ind. 530.

(2) Absence or Fault of Justice. If, without fault on his part, a party desiring to appeal from a justice's judgment is prevented from doing so by reason of the absence of the justice,[78] or by reason of some act or omission of his,[79] an appeal may be allowed after the time prescribed by law; but if the court finds, on sufficient evidence, that the failure to enter the appeal in time was due to the party's lack of diligence, the appellate court will not interfere.[80]

c. Filing Affidavit — (i) *Necessity.* Under the statutes of many of the states a party desiring to appeal from the judgment of a justice of the peace must file

Michigan.— Potter *v.* Lapeer Cir. Judge, 119 Mich. 522, 78 N. W. 536; Capwell *v.* Baxter, 58 Mich. 571, 25 N. W. 493 (reliance on attorneys, who were honestly mistaken as to date of adjournment, so that they did not know of the judgment until too late to appeal); Braastad *v.* Alexander H. Dey Iron Min. Co., 54 Mich. 258, 20 N. W. 43 (serious illness of party's wife).

Missouri.— Under Rev. St. (1889) § 6334, where the justice's return shows that the affidavit and appeal-bond were filed in time, but that he entered the order allowing the appeal after that time because he had failed to satisfy himself within the time as to the sufficiency of the affidavit and bond, the appeal should not be dismissed. Jester *v.* McKinney, 47 Mo. App. 62.

Vermont.— Perry *v.* Wright, 70 Vt. 615, 41 Atl. 971, in which the ground was that the judgment debtor was unaware that the time within which appeals were to be taken had been changed by statute.

West Virginia.— The good cause for not having taken an appeal within ten days, which is required by Code, c. 50, § 174, must be such as would authorize a court of equity, if the suit had been in the circuit court, to enjoin a judgment till a new trial could be had, when a party had failed to apply to the common-law court during the term for a new trial. Hubbard *v.* Yocum, 30 W. Va. 740, 5 S. E. 867. See also McCormick *v.* Short, 49 W. Va. 1, 37 S. E. 769.

See 31 Cent. Dig. tit. "Justices of the Peace," § 532.

Grounds held insufficient.—*Indiana.*—Welch *v.* Watts, 9 Ind. 450.

Michigan.— Draper *v.* Tooker, 16 Mich. 74, where it was held that, if a justice states that he wishes time to consider the case, but does not fix a day on which he will render judgment, the parties, being still in court, are bound to inquire once each day if a decision has been reached.

Missouri.— Kelm *v.* Hunkler, 49 Mo. App. 664.

Nebraska.— Miller *v.* Camp, 28 Nebr. 412, 44 N. W. 486.

Ohio.— Price *v.* Orange, Wright 568, in which high floods and inability to find a magistrate were held insufficient.

Pennsylvania.— Board of Health *v.* Decker, 3 Pa. Dist. 362; Mason *v.* Reddington, 4 C. Pl. 147 (sickness of attorney); Butterworth *v.* Pratt, 1 Chest. Co. Rep. 53 (delay fault of appellant); Anderson *v.* Mergelkamp, 8 Del. Co. 586 (mistake of counsel in construing statute); Shipton *v.* Alexander, 9 Kulp 378 (default caused by appellant's forgetfulness); Perkins *v.* Ward, 1 Leg. Gaz. 239; Bechtel *v.* Lainbach, 1 Woodw. 470.

West Virginia.— Hubbard *v.* Yocum, 30 W. Va. 740, 5 S. E. 867; Home Sewing Mach. Co. *v.* Floding, 27 W. Va. 540, ignorance of law no excuse.

Wisconsin.— Condohr *v.* Coleman, 64 Wis. 413, 25 N. W. 422, to the effect that the mere fact that appellee expressed a desire to settle the case, and talked to appellant about a settlement is no excuse.

See 31 Cent. Dig. tit. "Justices of the Peace," § 532.

78. Atkinson *v.* Burns, 91 Mo. App. 266; Voorhis *v.* O'Malley, 9 Pa. Co. Ct. 193; Read *v.* Dickinson, 2 Ashm. (Pa.) 224. But see Combs *v.* Saginaw Cir. Judge, 99 Mich. 234, 58 N. W. 71.

That the absence of the justice may be a good excuse, it must appear that he was absent during the whole of the time allowed for appeal. Holt *v.* Varner, 5 Mo. 386. See also Murff *v.* Osburn, (Miss. 1899) 24 So. 873, where it was held that the fact that the day after rendering judgment the justice left the state, and did not return until after the time for appealing had expired, was no excuse, since the appeal could have been perfected on the day judgment was rendered.

That a justice was not at his office after five o'clock P. M. on the last day for filing an appeal-bond will not justify the district court in refusing to dismiss an appeal. People's Bldg., etc., Assoc. *v.* Cook, 63 Nebr. 437, 88 N. W. 763.

79. Kreite *v.* Smith, 3 Ind. App. 64, 29 N. E. 174; McIlhaney *v.* Holland, 111 Pa. St. 634, 5 Atl. 731; Patterson *v.* Gallitzin Bldg., etc., Assoc., 23 Pa. Super. Ct. 54; Horton *v.* Douglass, 9 Pa. Co. Ct. 192; Louderback *v.* Boyd, 1 Ashm. (Pa.) 380; Eichenberg *v.* Leed, 19 Lanc. L. Rev. (Pa.) 389; Sollenberger *v.* Heisker, 2 Leg. Rec. (Pa.) 368; Crawford *v.* Stewart, 30 Pittsb. Leg. J. N. S. (Pa.) 123; Lowther *v.* Davis, 33 W. Va. 132, 10 S. E. 20.

80. Patterson *v.* Gallitzin Bldg., etc., Assoc., 23 Pa. Super. Ct. 54; Butterworth *v.* Pratt, 12 Lanc. Bar (Pa.) 71; Powell *v.* Miller, 41 W. Va. 371, 23 S. E. 557.

One learned in the law is not justified in relying absolutely on the legal conclusion of a justice touching the time when an appeal-bond should be filed, although the justice consults an almanac before stating his conclusion. People's Bldg., etc., Assoc. *v.* Cook, 63 Nebr. 437, 88 N. W. 763.

an affidavit that the appeal is taken in good faith, and not for purposes of delay.[81]

(II) *TIME OF FILING.* The affidavit must be filed within the time prescribed by law;[82] but it is not insufficient because it was made before the rendition of verdict and judgment, where it was filed after judgment.[83]

(III) *FORMAL REQUISITES* — (A) *In General.* Where the affidavit appears to be in substantial compliance with the statute, it is sufficient to give the appellate court jurisdiction, merely formal defects being disregarded.[84] And as a rule neither the omission of the venue,[85] nor of the affiant's signature,[86] nor the failure of the justice to sign the jurat,[87] will defeat the appeal. The affidavit

81. *Arkansas.*—Garrison *v.* Nelson, 30 Ark. 394.

Indiana.— Hughes *v.* Jackson, 48 Ind. 296, affidavit of merits.

Michigan.— On appeal from a judgment for costs amounting to less than four dollars, no affidavit is necessary. Wilson *v.* Davis, 1 Mich. 156.

Minnesota.— Grimes *v.* Fall, 81 Minn. 225, 83 N. W. 835; Harm *v.* Davies, 79 Minn. 311, 82 N. W. 585.

Missouri.— Myers *v.* Woolfolk, 3 Mo. 348.

Pennsylvania.— Under the acts of March 25, 1903, and May 14, 1897, a party appealing from the judgment of a justice of the peace "shall make affidavit that the appeal is not for delay." Black *v.* Cochran, 21 Pa. Co. Ct. 326; Urich *v.* Spangler, 1 Dauph. Co. Rep. 152; McCrea *v.* Pittsburg, etc., R., 2 Just. L. Rep. 115. *Compare* Swift *v.* Shylock, 21 Pa. Co. Ct. 307. And see as to the necessity of such an affidavit under earlier statutes Ely *v.* Stanton, 120 Pa. St. 532, 14 Atl. 441; Womelsdorf *v.* Heifner, 104 Pa. St. 1; Koontz *v.* Howsare, 100 Pa. St. 506; Cressman *v.* Bossing, 6 Pa. Cas. 260, 9 Atl. 191; McCarty *v.* Killian, 2 Pa. Dist. 49; Flegel *v.* Dotterer, 11 Pa. Co. Ct. 156; McElrath *v.* Foust, 4 Pa. Co. Ct. 653; Davidson *v.* Markley, 1 Pa. Co. Ct. 594; Mee *v.* Kurtz, 2 Chest. Co. Rep. 63; Murrey *v.* Todd, 1 Chest. Co. Rep. 51; Reber *v.* Peerless Mfg. Co., 8 Kulp 258; Glahn *v.* Peeler, 7 Kulp 284; Rafferty *v.* McKeeby, 11 Lanc. Bar 150; Schneider *v.* Hess, 10 Lanc. Bar 99; Eastman *v.* O'Neill, 4 Lanc. L. Rev. 314; Worrich *v.* Slate Co., 1 Lehigh Val. L. Rep. 158.

Texas.— Bodman *v.* Harris, 20 Tex. 31.

Wisconsin.—Knappe *v.* Seyler, 87 Wis. 165, 58 N. W. 248; Pelton *v.* Blooming Grove, 3 Wis. 310.

See 31 Cent. Dig. tit. "Justices of the Peace," § 534.

But see Werner *v.* Phelps, 36 Conn. 357.

Where defendants are jointly liable, and judgment is rendered against them jointly, each defendant who attempts to appeal must file the required affidavit. Harm *v.* Davies, 79 Minn. 311, 82 N. W. 585.

82. Rawlins County *v.* Beals, 2 Kan. App. 313, 43 Pac. 95 (within ten days after rendition of judgment); Filley *v.* Walls, 4 Mo. 271 (before appeal is granted); Coleman *v.* Warne, 9 N. J. L. 290; Anonymous, 6 N. J. L. 230 (at time of filing appeal-bond); People *v.* Hayden, 4 Wend. (N. Y.) 203 (within ten days from rendition of judgment). But see Jamison *v.* Yates, 7 Mo. 571; Musser *v.* Dout, 13 Pa. Dist. 529; Culbertson *v.* Lightner, 12 Pa. Dist. 11; Roush *v.* Moyer, 10 Pa. Dist. 392; Bates *v.* Evans, 7 Pa. Dist. 259; Linhart *v.* Cunningham, 6 Pa. Dist. 788; Kile *v.* Hill Elgin Butter Co., 22 Pa. Co. Ct. 417; Clements *v.* Miller, 20 Pa. Co. Ct. 270; Hunt, etc., Co. *v.* Reilly, 20 Pa. Co. Ct. 88; Urich *v.* Spangler, 1 Dauph. Co. Rep. (Pa.) 152; Shimer *v.* Marcus, 12 York Leg. Rec. (Pa.) 177; Myers *v.* Brodbeck, 12 York Leg. Rec. (Pa.) 134, in all of which the affidavit was filed in the appellate court. *Compare* Lutsey *v.* Stout, 11 Kulp (Pa.) 229.

83. Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68.

84. Wattawa *v.* Jahnke, 116 Wis. 491, 93 N. W. 547. But see New Brunswick Steamboat, etc., Transp. Co. *v.* Baldwin, 14 N. J. L. 440; Schenck *v.* Ayers, 14 N. J. L. 311; Engle *v.* Blair, 11 N. J. L. 339, to the effect that the affidavit must conform strictly to the statute; but the exact words of the statute need not be adopted.

Affidavit cannot be indorsed on bond.— Dilkes *v.* Browning, 15 N. J. L. 471; Freas *v.* Jones, 15 N. J. L. 20. But see Bremer *v.* Koenig, 5 Wis. 156; Kearney *v.* Andrews, 5 Wis. 23, in which the affidavits were attached to recognizance, and were held good, although not entitled in the case. Thus an affidavit need not be regularly entitled of the cause and court. Wattawa *v.* Jahnke, 116 Wis. 491, 93 N. W. 547; Bremer *v.* Koenig, 5 Wis. 156; Kearney *v.* Andrews, 5 Wis. 23. But see Dunham *v.* Rappleyea, 16 N. J. L. 75, in which an affidavit entitled "In debt," when the case was trespass on the case, was held insufficient.

85. St. Louis, etc., R. Co. *v.* Deane, 60 Ark. 524, 31 S. W. 42.

86. Gill *v.* Ward, 23 Ark. 16; Garrard *v.* Hitsman, 16 N. J. L. 124. *Contra*, Schuster *v.* Haight, 53 Wis. 290, 10 N. W. 511 [*distinguishing* Lederer *v.* Chicago, etc., R. Co., 38 Wis. 244]; Wright *v.* Fallon, 47 Wis. 488, 2 N. W. 1120.

The certificate of the justice that the affidavit was made is sufficient evidence of that fact, although the affidavit was not signed. Brooks *v.* Snead, 50 Miss. 416.

87. Failure of justice to sign jurat is not fatal; but an affidavit sworn to before any other officer is of no avail unless the jurat is signed by such officer. People *v.* Simond-

must, however, show that it was taken before a proper officer,[88] and must be so certain that perjury might be predicated upon it.[89]

(B) *Who May Make and Take Affidavit.* The affidavit may usually be made by an attorney for the appellant or plaintiff in error,[90] and under some statutes it is not necessary that it be sworn to before the justice from whom the appeal is taken.[91] In Pennsylvania the president of a school board may make the affidavit and take an appeal without the authority of the board.[92]

(IV) *Contents and Sufficiency.* The statutes of the various jurisdictions determine the necessary allegations of an affidavit for appeal, and to be sufficient such affidavit must comply substantially at least with the statutory requirements.[93] But if it does this,[94] and sufficiently identifies the parties[95] and the judgment appealed from,[96] it is sufficient. Where the affidavit is general, and relates only to the merits, matters connected with process, or any question arising upon it, cannot be corrected by a retrial on the merits in the appellate court.[97]

son, 25 Mich. 113. But see Ladow *v.* Groom, 1 Den. (N. Y.) 429, in which, however, the affidavit was taken, and the appeal allowed, by an officer other than the justice.

88. Knight *v.* Elliott, 22 Minn. 551.

89. Morris *v.* Brewster, 60 Wis. 229, 19 N. W. 50, in which the affidavit was held insufficient in that it set up that only one of the parties was duly sworn, although the jurat certified that both subscribed and swore to it.

90. Dixon *v.* Brophey, 29 Iowa 460; Smith *v.* Ormsby, 61 Wis. 13, 20 N. W. 656, authority of attorney presumed. *Contra*, Papin *v.* Howard, 7 Mo. 34.

On an appeal by a city, the city solicitor is the proper person to make affidavit. Gamble *v.* Lebanon City, 3 Pa. Co. Ct. 594.

91. Bradley *v.* Andrews, 51 Mich. 100, 16 N. W. 250 (appeal not dismissed, although affidavit was sworn to before a notary who was an attorney in the case); Rahilly *v.* Lane, 15 Minn. 447; Eby *v.* Great Eastern Casualty, etc., Co., 30 Pa. Co. Ct. 50 (in which the affidavit was made before another justice previous to the taking of the appeal). *Compare* Munn *v.* Merry, 14 N. J. L. 183, where it was held that prior to the statute of February, 1834, the affidavit must have been "made before the justice who tried the cause."

92. Yellets *v.* West Hempfield Tp. School Dist., 18 Lanc. L. Rev. (Pa.) 245.

93. Mellois *v.* Chaine, 20 Cal. 679; Burns *v.* Johnson, 4 C. Pl. (Pa.) 173; McGeehan *v.* O'Donnell, 8 Kulp (Pa.) 159; Brearley *v.* Warren, 3 Wis. 397; Brown *v.* Pratt, 3 Pinn. (Wis.) 305, 4 Chandl. 32.

Facts showing merits must be set forth. Harding *v.* Mansur, 13 Ind. 454.

Affidavit must set forth distinctly grounds of appeal.—Williams *v.* Cunningham, 2 Sandf. (N. Y.) 632; Thompson *v.* Hopper, 1 Code Rep. (N. Y.) 103.

The substance of the testimony and proceedings below must be stated. Brown *v.* Stearns, 2 Code Rep. (N. Y.) 119. *Compare* Mulford *v.* Decker, 1 Code Rep. (N. Y.) 71.

The affidavit must state facts not conclusions. Bates *v.* Gorman, 8 N. Y. Civ. Proc. 180.

Excuse for default must be shown. Bates *v.* Gorman, 8 N. Y. Civ. Proc. 180.

In Missouri, Rev. St. § 6330, requires that an affidavit for an appeal shall state whether the "appeal is from the merits or from an order or judgment taxing costs," and a motion will lie in the circuit court to dismiss for failure to do so, unless amendment be made before the determination of such motion. Van Scoyoe *v.* Wolfe, 73 Mo. App. 430; Greischar *v.* Alexander, 56 Mo. App. 56; Whitehead *v.* Cole, 49 Mo. App. 428; Spencer *v.* Beasley, 48 Mo. App. 97. *Compare* Crawford *v.* Armstrong, 58 Mo. App. 214; Draper *v.* Farris, 56 Mo. App. 417; Welsh *v.* Hannibal, etc., R. Co., 55 Mo. App. 599; Watson *v.* Barbee, 55 Mo. App. 147, to the effect that the defect is not jurisdictional.

94. Affidavits held sufficient.—*Arkansas.*—Underwood *v.* Wylie, 5 Ark. 248.

Iowa.—Dixon *v.* Brophey, 29 Iowa 460; Miller *v.* State, 4 Iowa 505. But see Cook *v.* U. S., 1 Greene (Iowa) 39, where it was held that the affidavit must be in the language prescribed by the statute.

Michigan.—Austin *v.* Strong, 1 Mich. 259.

Mississippi.—Coppock *v.* Smith, 54 Miss. 640; White *v.* Shumate, 50 Miss. 130.

New Jersey.—Snover *v.* Tinsman, 38 N. J. L. 210; Hamilton *v.* Pidcock, 18 N. J. L. 435.

Pennsylvania.—Dunlap *v.* Chipps, 12 Pa. Dist. 147; Morton *v.* Blank, 4 Lanc. Bar, Dec. 7, 1872.

West Virginia.—Parsons *v.* Aultman, 45 W. Va. 473, 31 S. E. 935.

Wisconsin.—Filer, etc., Co. *v.* Sohns, 63 Wis. 118, 23 N. W. 135; Cady *v.* Anson, 4 Wis. 223.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 539, 540.

95. Nickerson *v.* Leader Mercantile Co., 90 Mo. App. 336; Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

96. Judgment must be stated in affidavit. —Davis *v.* Lounsbury, 1 Code Rep. (N. Y.) 71.

Judgment held sufficiently identified see Thames *v.* Chitwood, 24 Tex. Civ. App. 389, 60 S. W. 345.

Mistake in reciting the date of judgment not fatal see Rahilly *v.* Lane, 15 Minn. 447.

97. Chappee *v.* Thomas, 5 Mich. 53.

(v) *Amendment and Supplying Omitted Affidavit.* Where an affidavit for appeal is not void,[98] the appellate court may allow its amendment, if application is made within a reasonable time.[99] But where no affidavit has been filed, the appellant will not be permitted to supply the omission in the appellate court.[1]

(vi) *Waiver of Want of, or Defects in, Affidavits.* While it has been held that the want of an affidavit for appeal is not waived by submitting to a trial on the merits,[2] mere defects and irregularities in such affidavit will be regarded as waived if not objected to in due time.[3]

d. Payment of Fees and Costs — (i) *Necessity of Payment and Effect of Failure to Pay.* Under some statutes the payment of the costs of the action is necessary to perfect an appeal,[4] and an appeal taken without such payment will be dismissed or stricken.[5] But under other statutes the payment is not

98. **Void affidavit not amendable** see Grimes *v.* Fall, 81 Minn. 225, 83 N. W. 835, in which the affidavit was void because of the failure of the notary to affix his seal thereto.

99. *Arkansas.*— Coleman *v.* Frauenthal, 46 Ark. 302; Guy *v.* Walker, 35 Ark. 212, justice may be compelled to sign jurat.

Georgia.— Standard Carbonating, etc., Co. *v.* Capital City Guards, 99 Ga. 265, 25 S. E. 670, in which on certiorari the superior court remanded the case, with direction to the justice, who had dismissed the appeal to a jury, to allow the affidavit for appeal to be amended.

Michigan.— The circuit court may allow the justice to attach his jurat *nunc pro tunc*, if he voluntarily appears and does so, or, if not, may make an order for a further return, requiring him to certify officially whether the affidavit had been duly sworn to before him. People *v.* Simondson, 25 Mich. 113.

Mississippi.— Green *v.* Boon, 57 Miss. 617 (justice may be permitted to affix date and signature); White *v.* Shumate, 50 Miss. 130.

Missouri.— Welsh *v.* Hannibal, etc., R. Co., 55 Mo. App. 599; Watson *v.* Barbee, 55 Mo. App. 147.

Pennsylvania.— Heim *v.* Sholly, 8 Pa. Dist. 652; Burns *v.* Johnson, 4 C. Pl. 173 (appellant permitted to file new affidavit); Engle *v.* Lehigh, etc., Coal Co., 10 Kulp 70 (new affidavit may be allowed to be filed); Stukey *v.* Rissinger, 12 Luz. Leg. Reg. 198.

Wyoming.— Redman *v.* Union Pac. R. Co., 3 Wyo. 678, 29 Pac. 88, amendment by affixing signatures of affiant and officer.

See 31 Cent. Dig. tit. "Justices of the Peace," § 541.

Contra.— Harding *v.* Mansur, 13 Ind. 454; Schuster *v.* Haight, 53 Wis. 290, 10 N. W. 511, appellant not allowed to supply signature.

1. Parke *v.* Hunt, 12 N. J. L. 82. But *compare* McNair *v.* Rupp, 3 Lack. Leg. N. (Pa.) 269, in which one who appealed from a judgment one week after the approval of the act of July 14, 1897, which provides that no appeal shall be entertained from an alderman unless the appellant, his attorney, or agent shall make the required affidavit, was permitted to perfect his appeal by filing the statutory affidavit. And see *contra*, under earlier statutes. Thomas *v.* Pyle, 2 Chest. Co. Rep. (Pa.) 295; Lesch *v.* Turnpike Co., Wilcox (Pa.) 195. See also cases cited *supra*, note 99.

2. Merrill *v.* Manees, 19 Ark. 647. *Compare* Elder *v.* Crabtree, 59 Ark. 177, 26 S. W. 817, where it was held that plaintiff, by going to trial on an appeal by defendants, waives the failure of one of the defendants to file an appeal affidavit.

3. Hamilton *v.* Wayne Cir. Judge, 52 Mich. 409, 18 N. W. 193 (in which appellee appeared and noticed the case for trial); Poston *v.* Williams, 99 Mo. App. 513, 73 S. W. 1099; Evans-Smith Drug Co. *v.* White, 86 Mo. App. 540 (in which appellee made no objection or appearance until after judgment); Lowry *v.* Phillips, 57 Mo. App. 232 (in which appellee appeared and went to trial without objection); Pearson *v.* Gillett, 55 Mo. App. 312 (going to trial on merits).

4. Goss *v.* Hays, 40 N. Y. App. Div. 557, 58 N. Y. Suppl. 35 [*citing* Kenney *v.* Livery Stable Keepers' Assoc., 89 Hun (N. Y.) 190, 35 N. Y. Suppl. 8]; King *v.* Norton, 36 Misc. (N. Y.) 53, 72 N. Y. Suppl. 591; Carbaugh *v.* Sanders, 13 Pa. Super. Ct. 361; Perry *v.* O'Neil, 12 Pa. Dist. 591; Wilford *v.* Draper, 11 Pa. Dist. 768; De Noon *v.* Shew, 10 Pa. Dist. 200; Enyeart *v.* Lehrsch, 6 Pa. Dist. 404; Reese *v.* Lake Shore, etc., R. Co., 25 Pa. Co. Ct. 24; Beistle *v.* Bingaman, 22 Pa. Co. Ct. 158; Muse *v.* Lore, 21 Pa. Co. Ct. 256; Acor *v.* Acor, 20 Pa. Co. Ct. 244; Wells *v.* Weaver, 19 Pa. Co. Ct. 277; Leibson *v.* Bauer, 11 Kulp (Pa.) 230; White *v.* Martin, 11 Lanc. Bar (Pa.) 55; Kuhn *v.* Shaum, 18 Lanc. L. Rev. (Pa.) 84. But *compare* Olmstead *v.* Rittel, 9 Kulp (Pa.) 178; Com. *v.* Oldfield, 6 Kulp (Pa.) 272; Wooten *v.* Stoddard, 7 North. Co. Rep. (Pa.) 184.

Justice cannot waive payment.— See *Ex p.* La Farge, 6 Cow. (N. Y.) 61.

In Pennsylvania a defendant may either pay all the costs under the act of June 24, 1885, or pay only the costs of appeal and give bail absolute under the act of April 19, 1901. Weeks *v.* Franklin, 13 Pa. Dist. 286; Colwell *v.* Neubert, 11 Pa. Dist. 249; Hillaker *v.* Kinzua Pad Co., 28 Pa. Co. Ct. 460; Corson *v.* Morristown, 25 Pa. Co. Ct. 667; Boyer *v.* Carroll, 11 Kulp (Pa.) 29.

5. White *v.* Martin, 11 Lanc. Bar (Pa.) 55.

a prerequisite to an appeal,[6] although the justice may refuse to send up the transcript until they are paid.[7] If, however, the justice does send up the transcript, he waives payment, and the fact that his fees have not been paid is no ground for dismissing the appeal.[8] The failure of an appellant to pay the docket or filing fee, where required, is a failure to prosecute his appeal, and ground for dismissal;[9] or the appellee, on paying the fee and filing the transcript, or having the case docketed, as the statute may require, may obtain a judgment of affirmance.[10] But where the clerk dockets the case within the prescribed time, without payment of the fee, its subsequent payment by the appellee does not entitle him to an affirmance.[11]

(II) *Parties Required to Pay and Appeals In Forma Pauperis.* Costs are to be paid by the party appealing, unless he is exempted by statute,[12] or files the necessary affidavit entitling him to appeal *in forma pauperis*.[13] Where an appellee pays to the clerk of the appellate court fees which the appellant is required to pay, the court cannot order the latter to refund such sum to the appel-

In New York, where on appeal from the municipal court no return is made by the court below, as required by Code, § 3053, because of failure of appellant to pay stenographer's fees, the appeal will be dismissed, unless within ten days appellant procures filing of return and payment of costs of motion, whether appellant should have paid the stenographer's fees or not. King *v.* Norton, 36 Misc. 53, 72 N. Y. Suppl. 591.

6. *California.*— Bray *v.* Redman, 6 Cal. 287. But *compare* McDermott *v.* Douglass, 5 Cal. 89.

Georgia.— Gibson *v.* Cook, 116 Ga. 817, 43 S. E. 72, where it is said that the failure of the appellant to pay the costs is a question between him and the justice.

Maryland.—Baltimore, etc., R. Co. *v.* Waltemyer, 47 Md. 328.

Missouri.— Hooker *v.* Atlantic, etc., R. Co., 63 Mo. 449; Palmer *v.* Kansas City, etc., R. Co., 57 Mo. 249.

Ohio.— See Pollitt *v.* Farrar, 18 Ohio Cir. Ct. 270, 9 Ohio Cir. Dec. 783, holding the act of April 25, 1898, unconstitutional.

Pennsylvania.— Gainer's Appeal, 11 Lanc. Bar 135; Eastman *v.* O'Neill, 4 Lanc. L. Rev. 314; Lesch *v.* Turnpike Co., Wilcox 195, which were decided before the passage of the act of June 24, 1885. But see *supra*, note 4.

See 31 Cent. Dig. tit. "Justices of the Peace," § 543.

7. Webster *v.* Hanna, 102 Cal. 177, 36 Pac. 421; Bray *v.* Redman, 6 Cal. 287; Johnson *v.* Lipp, 13 Pa. Dist. 755; Kelly *v.* Royal, 6 Pa. Co. Ct. 495; Tiernan *v.* Manigle, 2 Pa. Co. Ct. 96; Gideon *v.* Washington Camp, 9 Del. Co. (Pa.) 353. See also Fargo *v.* Graves, 12 S. D. 293, 81 N. W. 291, construing Comp. Laws, § 6132.

8. Bray *v.* Redman, 6 Cal. 287; Carbonate Town Co. *v.* Ives, 10 Colo. 81, 14 Pac. 120; Gideon *v.* Washington Camp, 9 Del. Co. (Pa.) 353.

9. Cabanne *v.* Macadaras, 91 Mo. App. 70.

10. Harley *v.* McAuliff, 24 Mo. 85; Rosenthal *v.* Rubinstein, 72 Mo. App. 334.

Notice of motion for affirmance unnecessary see Rosenthal *v.* Rubinstein, 72 Mo. App. 334.

Where the docket-fee has been secured to the satisfaction of the clerk, the judgment below will not be affirmed because the fee has not been paid by appellant. Hess *v.* McConville, 12 Iowa 190.

The St. Louis law commissioner cannot file the papers and affirm the judgment for the non-payment of his fee. Boyle *v.* Skinner, 17 Mo. 246; Hunt *v.* Hernandez, 16 Mo. 170.

11. Vasey *v.* Parker, 118 Iowa 615, 92 N. W. 708; Squires *v.* Millett, 31 Iowa 169.

12. **Municipal corporations** are not required to pay costs before taking appeals, under Pa. Local Act, March 2, 1868, and Pa. Gen. Act, June 24, 1885. Gamble *v.* Lebanon, 3 Pa. Co. Ct. 594; Yellets *v.* West Hempfield, 18 Lanc. L. Rev. (Pa.) 245. But see Borough *v.* Heffner, 1 Leg. Rec. (Pa.) 250, construing Pa. Act, May 2, 1868, § 1.

13. **Appeals in forma pauperis.**— Standard Carbonating, etc., Co. *v.* Capital City Guards, 99 Ga. 265, 25 S. E. 670; Greer *v.* Pool, 21 Pa. Co. Ct. 521; Com. *v.* Greby, 10 Kulp (Pa.) 207; Knapp *v.* Stoner, 13 Lanc. Bar (Pa.) 67; Parr *v.* Sharretts, 14 York Leg. Rec. (Pa.) 183. See also Steever *v.* Shoffstal, 10 Kulp (Pa.) 252.

Form of affidavit see Standard Carbonating, etc., Co. *v.* Capital City Guards, 99 Ga. 265, 25 S. E. 670.

A non-resident whose property has been attached can appeal *in forma pauperis* from the judgment in such proceeding. Parr *v.* Sharretts, 14 York Leg. Rec. (Pa.) 183.

Sufficiency of affidavit.—An affidavit which merely states that the party is unable to pay costs is insufficient. It must state that his inability arises from poverty. Miller *v.* Raub, 6 Pa. Co. Ct. 209; Finney *v.* Tammany, 10 Kulp (Pa.) 304; Parr *v.* Sharretts, 14 York Leg. Rec. (Pa.) 183.

Necessity of security.— The Pennsylvania act of June 24, 1885, requiring appellant to pay costs before the making of the transcript, except where he makes an affidavit of poverty, does not permit one who makes such affidavit to appeal without giving security for costs as required by the Pennsylvania act of March 20, 1845. Marr *v.* Taylor, 5 Pa. Dist. 646.

Falsity of affidavit.— The justice may not

lee, and, on his failure to obey the order, dismiss the appeal.[14] If a party exempt from the payment of costs is prevented by the magistrate's demand for costs from perfecting his appeal, an appeal *nunc pro tunc* will be allowed.[15]

(III) *Time For Payment and Excusing Failure to Pay in Time.* While a justice is not entitled to his fees on appeal in advance,[16] statutory requirements and rules of court as to the time for the payment of costs, or of filing, docket, or jury fees must be complied with.[17] But where payment has not been made in time, the court may, for good cause shown, as that the omission was due to mistake or excusable neglect, permit payment to be made *nunc pro tunc*,[18] and in a proper case will set aside an affirmance obtained by the appellee.[19]

(IV) *Costs and Fees Included.* The costs and fees required to be paid by an appellant or plaintiff in error in order to perfect his appeal or writ are regulated by statutes and rules of court, which must be looked to in the different jurisdictions for a determination of the question.[20] Under some statutes a justice is

refuse to allow appeal and to deliver the transcript because the affidavit is false, since it is not the fact of defendant's poverty, but the making of the affidavit, which entitles him to a transcript without payment of costs. Com. *v.* Greby, 10 Kulp (Pa.) 207. See also Simrell *v.* Hall, Wilcox (Pa.) 164, to the effect that an appeal *in forma pauperis* will not be stricken off for falsity in the affidavit. But see Miller *v.* Raub, 6 Pa. Co. Ct. 209.

14. Garrity *v.* Mallory, 53 Ill. App. 300.

15. Swartz *v.* Middletown School Dist., 21 Pa. Co. Ct. 175.

16. Levy *v.* Inglish, 4 Ark. 65; Coats *v.* State, 133 Ind. 36, 32 N. E. 737.

17. *Iowa.*— A transcript is not on "file," unless the filing fee is paid to the clerk by noon of the second day of the next term, or security therefor is given. Pinders *v.* Yager, 29 Iowa 468. *Compare* Seeberger *v.* Miller, 20 Iowa 428, to the effect that it is error to affirm the judgment when less than ten days intervenes between the taking of the appeal and the commencement of the next term. See Rev. (1860) §§ 3926, 3929, 3930.

Michigan.— Appellant is entitled to the whole of the day on which the return is filed in which to make payment of the entry fee, without being in default. Grand Rapids, etc., R. Co. *v.* Wright, 32 Mich. 491.

Missouri.— Gordon *v.* Scott, 15 Mo. 249 (upon failure of appellant to pay jury-fee to clerk, as required by the act of 1847, the court may affirm the judgment upon appellee's filing a proper transcript and paying such fee); Meitz *v.* Koetter, 51 Mo. App. 370 (in the St. Louis circuit court filing fee may be paid the first day of the term to which the appeal is returnable).

New York.— Thomas *v.* Thomas, 18 Hun 481.

Pennsylvania.— Donnelly *v.* Purcell, 1 Leg. Chron. 47.

See 31 Cent. Dig. tit. "Justices of the Peace," § 545.

But see Schofield *v.* Felt, 10 Colo. 146, 14 Pac. 128.

18. Black *v.* Maitland, 1 N. Y. App. Div. 6, 36 N. Y. Suppl. 739; Wilford *v.* Draper, 11 Pa. Dist. 768; Roush *v.* Mayer, 10 Pa. Dist. 392; Stone *v.* Conway, 5 Pa. Dist. 74.

19. Johnson *v.* St. Louis, etc., R. Co., 48 Mo. App. 630.

20. **Statutes and rules of court construed.** — *Iowa.*— McKay *v.* Maloy, 53 Iowa 33, 3 N. W. 808, to the effect that, under Code (1873), § 3583, a justice cannot make a payment to himself of the filing fees of the clerk of the circuit court a condition of transmitting the papers to the clerk.

Michigan.— The costs of judgment, which Howell Annot. St. § 7003, requires appellant to pay to the justice within five days, include jury-fees. Swarthout *v.* McKnight, 99 Mich. 347, 58 N. W. 315.

Minnesota.— Fees of appellant's witnesses are not taxable as costs under the judgment. Trigg *v.* Larson, 10 Minn. 220.

Missouri.— A jury-fee must be paid on filing a transcript from a justice, the law of 1847 not having been repealed by Rev. St. (1855) p. 913, §§ 27-29, nor by the act of March 3, 1857, § 21. Bailey *v.* Lubke, 8 Mo. App. 57.

New Jersey.— See Carpenter *v.* Titus, 9 N. J. L. 90, where a rule of the common pleas requiring appellant, upon the return of the papers, and prior to the entry of the appeal, to pay the clerk one dollar, was held illegal.

New York.—Kenney *v.* Livery Stable Keeper's Assoc., 89 Hun 190, 35 N. Y. Suppl. 8 (costs of the action, under Code Civ. Proc. § 3047, include an allowance, under § 3129, to the prevailing party in a justice's court of Brooklyn of twelve dollars); Van Bussum *v.* Metropolitan Life Ins. Co., 16 Misc. 40, 37 N. Y. Suppl. 665 (on appeal from judgment dismissing complaint on a new trial, had after reversal and remand, plaintiff may appeal on tender of costs of the second trial); Schwemmer *v.* Stratton, 22 N. Y. Suppl. 523 (attorney's fee allowed prevailing party in the city court of Albany is part of the costs, under Code Civ. Proc. § 3047); People *v.* Saratoga C. Pl., 1 Wend. 282 (party cannot retain part of the costs as belonging to him); *Ex p.* Beadlestone, 7 Cow. 507 (appellant not bound to pay his own costs, nor any more than the costs recovered by appellee and included in the judgment).

Pennsylvania.— Under the act of June 24, 1885, it is the duty of the justice to demand

bound to send up his transcript or return, whether his fees therefor have been paid or not;[21] under others the payment of such fees is a condition precedent to the right to maintain the appeal;[22] while under others the justice may require payment before making return or allowing the transcript to go out of his possession,[23] or make his return without such payment.[24] In Ohio on demand, and the tender of the proper fee, a justice is bound to give a transcript to the appellant, and cannot insist that the costs be first paid.[25]

(v) *Sufficiency of Payment or Tender, and Evidence of Payment.* As in all other questions relating to fees and costs on appeals from justices of the peace, the sufficiency of the payment or tender made, and the evidence required or sufficient to show payment, are controlled by the statutes of the various states.[26]

e. Bonds or Other Securities — (i) *Necessity.* The execution and filing of an appeal-bond, recognizance, or other security is generally a condition precedent to an appeal from the judgment of a justice of the peace,[27] and cannot be waived

of the appellant all the costs of the action. Carbaugh *v.* Sanders, 13 Pa. Super. Ct. 361, 9 Pa. Dist. 13 (costs of plaintiff's witnesses included); Sunday *v.* Snayberger, 4 Pa. Dist. 295 (costs on execution included); Morrow *v.* McCoy, 21 Pa. Co. Ct. 529 (appellant need not pay his own witnesses, and court will disregard failure to pay one witness subpœnaed by both parties); Com. *v.* Snayberger, 16 Pa. Co. Ct. 83 (costs on execution included); Clark *v.* Stephens, 3 Pa. Co. Ct. 592 (failure to pay costs of plaintiff's witnesses not fatal); Knapp *v.* Stoner, 13 Lanc. Bar 67; Rafferty *v.* McKeeby, 11 Lanc. Bar 150; Herr *v.* Pirosh, 19 Lanc. L. Rev. 350 (appellant must pay witness' costs); Eichenburg *v.* Kemper, 17 Lanc. L. Rev. 351 (appellant not bound to pay costs incurred in the issuance of an attachment on a transcript of the judgment filed in the court of common pleas); Waters *v.* Carr, 17 Lanc. L. Rev. 197 (appellant not required to pay more costs than are demanded by the justice). See also under earlier statutes Shirk *v.* Schadt, 5 L. T. N. S. 167.

Wisconsin.— On appeal from an order of a justice appellant is not required to pay any portion of the costs, except the justice's fees. Kensler *v.* Brunett, 1 Pinn. 112.

See 31 Cent. Dig. tit. "Justices of the Peace," § 546.

21. Ingram *v.* Plasket, 3 Blackf. (Ind.) 450; Edminster *v.* Rathbun, 3 S. D. 129, 52 N. W. 263. See *supra*, V, A, 6, d, (I).

22. People *v.* Allegan Cir. Judge, 29 Mich. 487; Trigg *v.* Larson, 10 Minn. 220. See *supra*, V, A, 6, d, (I).

23. McKay *v.* Maloy, 53 Iowa 33, 3 N. W. 808; Van Heusen *v.* Kirkpatrick, Code Rep. N. S. (N. Y.) 74, 5 How. Pr. 422. See *supra*, V, A, 6, d, (I).

24. Golling *v.* Harder, 14 Wis. 86. See *supra*, V, A, 6, d, (I).

25. Leffingwell *v.* Flint, 1 Ohio 274.

26. *California.*— An offer to the justice to pay his fee when the appeal papers are made out is not a sufficient tender, under Wood Dig. p. 245, § 627. People *v.* Harris, 9 Cal. 571.

Colorado.— Under Gen. St. § 1979, it is not necessary that the costs be paid to the justice personally when the appeal-bond is filed in the county court. Denver, etc., R. Co. *v.* Tong, 11 Colo. 539, 19 Pac. 478; Denver, etc., R. Co. *v.* Rader, 11 Colo. 536, 19 Pac. 476.

Georgia.— Pearce *v.* Renfroe, 68 Ga. 194 (appeal will not be dismissed because of the failure of the justice to certify that appellant had, within the proper time, paid the costs and given bond); Abrams *v.* Lang, 60 Ga. 218 (Code, § 3616, is not complied with by a mere deposit of costs).

Illinois.— It is reversible error to dismiss an appeal upon non-payment of court fees in excess of the amount of such fees as allowed by law. Hanford *v.* Hagler, 49 Ill. App. 258.

Michigan.— Under Howell Annot. St. § 7019, the justice's return is not conclusive that the jury-fees have been paid, but only of the payment of the justice's fees. Swarthout *v.* McKnight, 99 Mich. 347, 58 N. W. 315.

Minnesota.— A certificate of a justice, on allowance of appeal, "Costs paid, and appeal allowed," is evidence of the payment of the appeal fee. Rahilly *v.* Lane, 15 Minn. 447.

New York.— Mann *v.* Dennis, 3 N. Y. Suppl. 95 (where defendant pays all costs said by the justice to be due, and is refused permission to see the taxed bill of costs, his appeal will not be dismissed for failure to pay the justice's fee for filing his return in time); People *v.* Genesee C. Pl., 4 Wend. 202 (appeal will not be quashed because justice took less costs than he was entitled to, when the party was willing and offered to pay all costs, and did pay all demanded); *Ex p.* Stephens, 6 Cow. 69 (party must pay not only the fee for making and filing the return, but the full costs); *Ex p.* Kellogg, 3 Cow. 372 (payment need not be indorsed on appeal-bond).

Pennsylvania.— Where appellant has omitted to give bail for costs, but deposited in lieu thereof a certified check, the defect is fatal if not corrected, but he will be allowed to perfect the appeal on application before the first day of the term when the transcript is to be filed. Kohl *v.* Allen, 27 Pa. Co. Ct. 141.

See 31 Cent. Dig. tit. "Justices of the Peace," § 548.

27. *California.*— McConky *v.* Alameda County Super. Ct., 56 Cal. 83.

by agreement of the parties.[28] An appeal cannot be dismissed for non-compliance with an unauthorized rule of court or custom of the clerk to require a deposit as a security for his costs.[29]

(II) *Nature of Security Required.* The nature of the security required to be given upon an appeal from a justice's judgment is controlled by the various state statutes, whose requirements must be observed.[30] Where a bond or recognizance is required by the statute, a deposit of money in lieu thereof is insufficient,[31] but in some jurisdictions a deposit is permitted by statute.[32]

Dakota.— Judson *v.* Bulen, 6 Dak. 70, 50 N. W. 484.

Georgia.— Brown *v.* Griffith, 94 Ga. 453, 20 S. E. 383; Sparks *v.* Hancock, 73 Ga. 143.

Idaho.— Perkins *v.* Bridge, 10 Ida. 189, 77 Pac. 329.

Illinois.— Rozier *v.* Williams, 92 Ill. 187.

Iowa.— Minton *v.* Ozias, 115 Iowa 148, 88 N. W. 336; Lynch *v.* Bruner, 99 Iowa 669, 68 N. W. 908.

Kentucky.— Bledsoe *v.* Cassady, 2 A. K. Marsh. 459.

Maine.— A recognizance, with or without sureties, is unnecessary, unless required by the adverse party. Colby *v.* Sawyer, 76 Me. 545 [*overruling* Dolloff *v.* Hartwell, 38 Me. 54]. But see Bennett *v.* Green, 46 Me. 499.

Massachusetts.—An appellant is not obliged to enter into any recognizance, unless required by the adverse party. McKeag *v.* O'Donnell, 10 Allen 543.

Mississippi.— Mann *v.* Lowry, 58 Miss. 73.

Montana.— See Morin *v.* Wells, 30 Mont. 76, 75 Pac. 688.

New York.— Code Civ. Proc. § 355, requiring security only in cases where, on prevailing, appellant would be entitled to a new trial, does not require it where appellant, although entitled to a new trial, does not ask it. Lake *v.* Kels, 11 Abb. Pr. N. S. 37.

Oklahoma.— Vowell *v.* Taylor, 8 Okla. 625, 58 Pac. 944.

Pennsylvania.— Guilky *v.* Gillingham, 3 Serg. & R. 93; Columbia *v.* Patton, 5 Lanc. Bar, June 7, 1873.

South Dakota.— Erpenbach *v.* Chicago, etc., R. Co., 11 S. D. 201, 76 N. W. 923; Brown *v.* Chicago, etc., R. Co., 10 S. D. 633, 75 N. W. 198, 66 Am. St. Rep. 730; Smith *v.* Coffin, 9 S. D. 502, 70 N. W. 636; Rudolph *v.* Herman, 2 S. D. 399, 50 N. W. 833.

Vermont.— Finney *v.* Hill, 11 Vt. 233.

Wisconsin.— Pelton *v.* Blooming Grove, 3 Wis. 310.

See 31 Cent. Dig. tit. "Justices of the Peace," § 550.

One who brings two suits, one against two defendants, and the other against the same two and a third person, must, on appeal to a jury, give an appeal-bond in each case. Sparks *v.* Hancock, 73 Ga. 143.

Excusable failure.— In Howard *v.* Harman, 5 Cal. 78, it was decided that where an objection was made within the proper time, that the county court had no jurisdiction because no appeal-bond was filed in a case on appeal from a justice of the peace, it was the duty of the presiding judge to hear the excuse of the appellant, and if sufficient, to allow him to file a bond.

28. Erpenbach *v.* Chicago, etc., R. Co., 11 S. D. 201, 76 N. W. 923; Brown *v.* Chicago, etc., R. Co., 10 S. D. 633, 75 N. W. 198, 66 Am. St. Rep. 730 [*quoting* Santom *v.* Ballard, 133 Mass. 464, to the effect that, "the provisions of law requiring a bond are not wholly for the benefit of the appellee, but partly upon considerations of public policy, to discourage frivolous and vexatious litigation"].

29. Wescott *v.* Eccles, 3 Utah 258, 2 Pac. 525.

30. See The Lake of the Woods *v.* Shaw, 2 Greene (Iowa) 91 (holding that Rev. St. p. 333, § 34, allowing security for the prosecution of appeals to be given by recognizance, applied to appeals in proceedings before a justice against boats and vessels); Nurse *v.* Porter, 18 N. H. 57 (holding that when the statute requires a bond, a recognizance will not be accepted); Garrett *v.* Gay, 1 Tex. App. Civ. Cas. § 1026 (holding that a law requiring an appeal-bond to be "a bond filed with the justice" is not complied with by an entry in the justice's docket that certain persons acknowledge themselves bound by the obligations required in an appeal-bond).

31. Hughes *v.* Hughes, 10 Kulp (Pa.) 85; Steam Heat, etc., Co. *v.* Hutchinson, 14 Pa. Co. Ct. 491; Brown *v.* Brown, 12 S. D. 380, 81 N. W. 627 [*following* Smith *v.* Coffin, 9 S. D. 502, 70 N. W. 636].

Check.— In Allen *v.* Walnut Hills, etc., Turnpike Co., 9 Ohio Dec. (Reprint) 322, 12 Cinc. L. Bul. 168, where appellant deposited a check with the justice, who attached it to the ordinary form of undertaking, regularly filled out, except the signature, and certified that the check was received as a bond and approved, it was held that the appellate court acquired no jurisdiction.

Mortgage.— But see Comron *v.* Standland, 103 N. C. 207, 9 S. E. 317, 14 Am. St. Rep. 797, to the effect that, while there is no statute providing that a mortgage of real or personal property may be given in lieu of the undertaking provided for by Code, §§ 883, 884, still if the parties agree upon and execute a mortgage for such purpose, it is valid, and may be enforced as between them.

32. See Laws *v.* Troutt, 147 Cal. 172, 81 Pac. 401 (holding that Cal. Code Civ. Proc. § 926, providing that in all civil cases arising in justices' courts where an undertaking is required as prescribed by the code, plaintiff or defendant may deposit with the justice a sum of money in United States gold coin equal to the amount required by such undertaking, which said sum of money shall be taken as security in place of the undertaking, authorizes a deposit in lieu of an undertaking

(III) *Who Required to Give Security and Appeals In Forma Pauperis.* The general rule is that any party desiring to appeal from or prosecute a writ of error to a judgment of a justice of the peace must give the required security.[33] But under some statutes certain classes of persons are exempted from the necessity of giving security,[34] and in at least one state a person unable to give a bond through poverty may be allowed to appeal upon making the affidavit required by statute.[35] In Texas it is not necessary for the appellant to give a bond where no judgment is rendered against him, except for costs,[36] and a plaintiff may appeal from a judgment in his favor for only a part of his claim, without giving bond.[37]

(IV) *Parties*—(A) *Obligors.* The appellant, his agent, or attorney usually gives bond or enters into a recognizance on appeal,[38] but under some statutes it is

for costs on appeal, required by section 978, clause 1, on appeal in a civil case from a justice to a superior court); Hansen *v.* Anderson, 21 Utah 286, 61 Pac. 219 (holding that it is optional with appellant to file an undertaking under Rev. St. § 3747, or to make a deposit under section 3748).

33. Quinn *v.* Adair, 4 Ala. 315; Cass County School Dist. No. 6 *v.* Traver, 43 Nebr. 524, 61 N. W. 720 (school-district); Richardson *v.* Campbell, 9 N. D. 100, 81 N. W. 31 (executors, administrators, and guardians); Germantown, etc., Turnpike Co. *v.* Naglee, 9 Serg. & R. (Pa.) 227; Adams *v.* Lancaster Paper Mills Co., 10 Pa. Dist. 266 (foreign corporation); Dreibelbis *v.* Lancaster Paper Mills Co., 17 Lanc. L. Rev. (Pa.) 399 (foreign corporation); Johnson *v.* Fackney, 1 Pa. L. J. Rep. 501 (women).

34. **Persons appealing in representative or fiduciary capacity.**—Thomas *v.* Moore, 52 Ohio St. 200, 39 N. E. 803 (administrator who is party to the judgment, and appeals in the interest of the estate); Terry Clock Co. *v.* Mussey, 9 Ohio Dec. (Reprint) 449, 13 Cinc. L. Bul. 568 (assignee); Koontz *v.* Howsare, 100 Pa. St. 506 (appeal by administrator in representative capacity); Jones *v.* Hughes, 33 Tex. 598 (executors exempt). But see Richardson *v.* Campbell, 9 N. D. 100, 81 N. W. 31.

School-district need not give bond.—Kelly *v.* School Directors, 66 Ill. App. 134. *Contra*, Cass County School Dist. No. 6 *v.* Traver, 43 Nebr. 524, 61 N. W. 720.

Appellant in replevin may perfect his appeal, under Wis. Rev. St. c. 12[illegible], § 205, without giving the undertaking described in Wis. Laws (1859), c. 112, § 4. Haentze *v.* Howe, 28 Wis. 293.

35. Hutcherson *v.* Blewett, (Tex. Civ. App. 1900) 58 S. W. 150; Cox *v.* Wright, (Tex. Civ. App. 1894) 27 S. W. 294. *Contra*, Hyatte *v.* Wheeler, 101 Mo. App. 357, 73 S. W. 1100; Woods *v.* Davidson, 57 Miss. 206; Iams *v.* Hall, 4 Pa. Dist. 259; Davison *v.* Good Will Cloak, etc., Co., 4 Pa. Dist. 237; Parr *v.* Sharretts, 14 York Leg. Rec. (Pa.) 183. See also Brooks *v.* Workman, 10 Heisk. (Tenn.) 430, to the effect that a next friend cannot appeal upon the pauper's oath.

Affidavit must follow statute.—Golightly *v.* Irvine, (Tex. App. 1890) 15 S. W. 48; Young *v.* Bickley, 1 Tex. App. Civ. Cas. § 1073.

Affidavit held sufficient see Duffey *v.* Cagle, 3 Tex. App. Civ. Cas. § 419.

An affidavit was held insufficient when made before the justice after the adjournment of the term, but not certified to by the county judge to the effect that the facts therein contained were proved before him. Isbell *v.* Everheart, 2 Tex. App. Civ. Cas. § 658. *Compare* Cox *v.* Wright, (Tex. Civ. App. 1894) 27 S. W. 294.

36. Brown *v.* Dutton, (Tex. Civ. App. 1905) 85 S. W. 454; Voges *v.* Dittlinger, (Tex. Civ. App. 1903) 72 S. W. 875; Thomas *v.* Hogan, (Tex. Civ. App. 1900) 57 S. W. 300; J. A. Kemp Grocer Co. *v.* Keith, (Tex. Civ. App. 1899) 48 S. W. 743 [*following* Edwards *v.* Morton, 92 Tex. 152, 46 S. W. 792; Houston, etc., R. Co. *v.* Red Cross Stock Farm, 91 Tex. 628, 45 S. W. 375]. But *compare* Dickey *v.* Cox, 23 Tex. Civ. App. 67, 55 S. W. 360, in which a third person interpleaded by defendant was required to give bond on appeal from a judgment against defendant for the sum claimed, and against him for costs. The court said that, although there was no money judgment against him, yet, as the judgment appealed from was for a sum of money in favor of plaintiff, and would involve a new trial on appeal, plaintiff was entitled to an appeal-bond, under Tex. Rev. St. art. 1670.

37. Edwards *v.* Morton, 92 Tex. 152, 46 S. W. 792; Clifford *v.* Kohr, (Tex. Civ. App. 1901) 61 S. W. 424; American Cotton-Bale Imp. Co. *v.* Forsgard, (Tex. Civ. App. 1898) 47 S. W. 475.

38. **Where the attorney has no authority under seal,** a bond executed by him in behalf of his client is void, and the appeal will be dismissed. R. I. Pub. Laws, c. 582, § 2, is unconstitutional so far as it attempts to validate such bonds. Andrews *v.* Beane, 15 R. I. 451, 8 Atl. 540. But *compare* Bragg *v.* Fessenden, 11 Ill. 544, in which an unauthorized appeal-bond executed by an attorney was afterward ratified by the client by the execution of a power of attorney under seal, and the appeal was sustained.

The real party in interest may enter into recognizance. Wilson *v.* Davis, 1 Mich. 156.

Bond in individual name of partner.—Where plaintiff's affidavit for a writ of sequestration against the firm of M. & Co. stated that M was a member of the firm, but that the other partners were unknown, it is proper for M, on appeal from a judgment for

only necessary for the surety or sureties to sign the undertaking.[39] Although, in a bond on appeal from a joint judgment against two persons, one of them fails to bind himself to pay such judgment as may be rendered on appeal against the two jointly, the bond is good as to the other;[40] and where an appeal is prayed for by one of two defendants, but the recognizance is entered into by both, the appeal is well taken.[41]

(B) *Obligees.* An appeal-bond or recognizance must as a rule[42] be made payable to all parties to the judgment whose interests are adverse to those of the appellant.[43] But in Kansas and Ohio a bond which is good in all other respects, and shows the parties to the judgment, will be upheld, although the obligee is not specially named in it.[44]

(C) *Sureties*—(1) IN GENERAL. An undertaking on appeal which is signed only by the applicants is insufficient to confer jurisdiction on the appellate

plaintiff, to sign the appeal-bond in his individual name. Munzerheimer *v.* Merrill, 1 Tex. App. Civ. Cas. § 578.

On an appeal by a town from a judgment on a complaint of the overseer of highways in a township organization on account of an alleged neglect to perform road labor, the bond should be executed by the town supervisor in the name of the town. Gardner *v.* Chambersburgh, 19 Ill. 99.

39. *Georgia.*— Shirley *v.* Price, 30 Ga. 328.

Michigan.—Under Howell Annot. St. § 7000, an appellant may give a bond executed by himself and one or more sureties, or by two or more sureties without appellant. Where one of two defendants made affidavit of appeal for both, but the bond was signed by him only, and by one surety, the judgment against the other defendant was unaffected thereby. Jopp *v.* Kegel, 83 Mich. 50, 46 N. W. 1027.

Nebraska.— Chase *v.* Omaha L. & T. Co., 56 Nebr. 358, 76 N. W. 896; Stump *v.* Richardson County Bank, 24 Nebr. 522, 39 N. W. 433; Clark *v.* Strong, 14 Nebr. 229, 15 N. W. 236.

Ohio.— Geller *v.* Puchta, 1 Ohio Cir. Ct. 30, 1 Ohio Cir. Dec. 18.

Oregon.— Drouilhat *v.* Rottner, 13 Oreg. 493, 11 Pac. 221.

Pennsylvania.— Cavence *v.* Butler, 6 Binn. 52, construing the act of March 20, 1810. But see Newton *v.* Haggerman, 1 Browne 94, decided under the act of 1804.

Texas.— Pryor *v.* Johnson, (Civ. App. 1898) 45 S. W. 39; Houston, etc., R. Co. *v.* Lockhart, (Civ. App. 1896) 39 S. W. 320; Trial *v.* Lepori, 1 Tex. App. Civ. Cas. § 1272.

See 31 Cent. Dig. tit. "Justices of the Peace," § 552.

Contra.— Lyman *v.* Williams, 84 Ill. App. 82; Nichols *v.* St. Louis County Cir Ct., 1 Mo. 357; *Ex p.* Brooks, 7 Cow. (N. Y.) 428 [*overruling* People *v.* Judges Dutchess County, 5 Cow. (N. Y.) 34].

40. Missouri, etc., R. Co. *v.* Mosty, 8 Tex. Civ. App. 330, 27 S. W. 1057 [*followed* in Ayers *v.* Smith, (Tex. Civ. App. 1894) 28 S. W. 835].

41. Sargent *v.* Sharp, 1 Mo. 601. *Compare* Pryor *v.* Johnson, (Tex. Civ. App. 1898) 45 S. W. 39, to the effect that a bond signed by one of several appellants and the sureties or by the sureties alone is good.

42. **In Connecticut,** under Rev. St. p. 822, § 10, and Conn. St. (1855) c. 26, § 17, a bond or recognizance on appeal from a justice's judgment to the superior court should be made payable to the county treasurer. Calef *v.* Phelps, 25 Conn. 114.

43. Girvin *v.* Wood, 32 Tex. Civ. App. 536, 75 S. W. 49; Friedman *v.* Dockery, (Tex. Civ. App. 1896) 34 S. W. 766; Packenius *v.* Petri, (Tex. Civ. App. 1895) 29 S. W. 1095; Cockrill *v.* Eason, (Tex. Civ. App. 1894) 26 S. W. 464.

Where defendants have no adverse interests as against each other, one may appeal without making his co-defendant a party to the undertaking. Slayton *v.* Horsey, 97 Tex. 341, 78 S. W. 919; Houston, etc., R. Co. *v.* Ivy, 36 Tex. Civ. App. 452, 82 S. W. 195; Cross *v.* Moores, (Tex. Civ. App. 1900) 55 S. W. 373; Ballard *v.* Coker, (Tex. Civ. App. 1899) 49 S. W. 921; Jackson *v.* Owen, (Tex. Civ. App. 1898) 46 S. W. 664; Martin *v.* Lapowski, 11 Tex. Civ. App. 690, 33 S. W. 300.

Where a firm is the appellee, the appeal-bond may be made payable to the firm, without naming its members. Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198.

Where the judgment is assigned before appeal, a bond afterward made to plaintiff, and not to the assignees, is sufficient. Wells-Fargo Express Co. *v.* Holliday, (Tex. Civ. App. 1893) 23 S. W. 91.

Where a person is not permitted to intervene, he does not become a party to the cause, and an appeal-bond made payable to plaintiffs only is sufficient. Nabors *v.* McQuigg, (Tex. Civ. App. 1899) 52 S. W. 637.

Misnomer of obligee defeats appellate jurisdiction.— Houston Ice, etc., Co. *v.* Edgewood Distilling Co., (Tex. Civ. App. 1901) 63 S. W. 1075; Hubbert *v.* Texas Cent. R. Co., 24 Tex. Civ. App. 432, 59 S. W. 292.

Surplusage.— An appeal-bond is not void because made payable to appellees, "or to their certain attorney, executors or administrators, or assigns." Brazoria County *v.* Grand Rapids School-Furniture Co., (Tex. Civ. App. 1897) 43 S. W. 900 [*overruling* Nones *v.* McGregor, (Tex. Civ. App. 1896) 35 S. W. 1083]. See also San Antonio, etc., R. Co. *v.* Addison, (Tex. Civ. App. 1901) 65 S. W. 38.

44. Kirtley *v.* Tuthill, 9 Kan. App. 452, 60 Pac. 662; Job *v.* Harlan, 13 Ohio St. 485.

court,[45] and where a statute requires two or more sureties, an undertaking with one only is bad.[46] As a rule any person not a party to the appeal is a competent surety on the appeal-bond,[47] but in some jurisdictions attorneys are disqualified by statute or rules of court.[48]

(2) JUSTIFICATION OF SURETIES. The justice from whose judgment an appeal is taken may require the persons offered as sureties to justify,[49] and where the appellee is dissatisfied with the sureties upon the appeal-bond or other security, he may file exceptions to their sufficiency within the time prescribed by law, and unless they justify in the time and manner required,[50] or unless the appellant gives other sufficient sureties, the appeal is ineffectual for any purpose.[51] Notice

45. **Surety necessary to jurisdiction.**— Indianapolis, etc., R. Co. *v.* Beam, 63 Ind. 490; Minton *v.* Ozias, 115 Iowa 148, 88 N. W. 336; Hudson *v.* Smith, 111 Iowa 411, 82 N. W. 943, in which the surety was incompetent.

46. Gilman *v.* Bartlett, 20 N. H. 168; Brickner *v.* Sporleder, 3 Okla. 561, 41 Pac. 726; Smith *v.* Gale, 13 S. D. 162, 82 N. W. 385; Bradway *v.* Clipper, 1 Tex. App. Civ. Cas. § 306. *Compare* Delamater *v.* Byrne, 57 How. Pr. (N. Y.) 170, where it is said that the ordinary practice is to require two sureties, although the justice may in his discretion require but one. And see Farnam *v.* Davis, 32 N. H. 302, where it was held that the want of two sureties is merely an irregularity in the proceedings, and not a jurisdictional exception.

47. A joint defendant against whom no judgment was rendered is a proper person to act as surety upon the bond of his co-defendant. Baumbach *v.* Cook, 2 Tex. App. Civ. Cas. § 100.

Sureties on defendant's replevin bond are competent.— Nabors *v.* McQuigg, (Tex. Civ. App. 1899) 52 S. W. 637; Witten *v.* Caspary, (Tex. App. 1890) 15 S. W. 47. *Contra*, Osborne *v.* Hughes, 93 Ga. 445, 21 S. E. 65 [*following* Ins. Co. *v.* Plant, 36 Ga. 623]. See also Napier *v.* Woodall, 118 Ga. 830, 45 S. E. 684.

Surety on claim bond.— An appeal by the principal in a claim bond from the judgment in the claim proceeding does not render the surety on such bond a party to the appeal, nor incompetent as a surety on the appeal-bond. Peoples *v.* Rodgers, 11 Tex. Civ. App. 447, 32 S. W. 798. See also Heidenheimer *v.* Bledsoe, 1 Tex. App. Civ. Cas. § 316, in which a judgment had been rendered against the surety on the claim bond.

Sureties on a sequestration bond who do not join in plaintiff's appeal are competent as sureties on the appeal-bond. Word *v.* Reither, 2 Tex. App. Civ. Cas. § 778.

Surety need not be resident of county.— Fuerman *v.* Ruhle, (Tex. App. 1890) 16 S. W. 536. But see Jenkins *v.* Emery, 2 Wyo. 58.

48. Hudson *v.* Smith, 111 Iowa 411, 82 N. W. 943; Valley Nat. Bank *v.* Garretson, 104 Iowa 655, 74 N. W. 11 [*distinguishing* Smith *v.* Humphrey, 15 Iowa 428]; Towle *v.* Bradley, 2 S. D. 472, 50 N. W. 1057. But see Ohio, etc., R. Co. *v.* Hardy, 64 Ind. 454, where it was held that attorneys infringing the rules of court prohibiting their becoming sureties on appeal-bonds are liable on such bonds; and the bond is sufficient, although they are probably liable also for contempt. And see Lawler *v.* Van Aernam, 22 Alb. L. J. (N. Y.) 156; Ober *v.* Koser, 12 Lanc. Bar (Pa.) 104, to the effect that the rules of court as to attorneys becoming sureties on appeal-bonds did not apply to justices' courts.

49. Lane *v.* Goldsmith, 23 Iowa 240; Chicago, etc., R. Co. *v.* Marshall, 47 Kan. 614, 28 Pac. 701; Hagerty *v.* Lierly, 109 Mo. App. 631, 83 S. W. 542. *Compare* Smith *v.* Nescatunga Town Co., 36 Kan. 758, 14 Pac. 246, where it was held that the failure of the sureties to make affidavit of their qualifications is not a ground for a dismissal of the appeal, where it does not appear that they were insufficient.

Approval of bond or security see *infra*, V, A, 6, e, (VII).

50. **Failure to justify in the prescribed time** is ground of dismissal. Pratt *v.* Jarvis, 8 Utah 5, 28 Pac. 869. See also Peterson *v.* Kjellin, 93 Minn. 422, 101 N. W. 948.

Stipulation for extension of time.— Counsel for the parties have a right to stipulate for an extension of the time within which sureties may justify beyond the time fixed by statute; and where, within the time so stipulated for, a person signs as surety, his signature cannot be said to be without consideration. Morin *v.* Wells, 30 Mont. 76, 75 Pac. 688.

Sufficiency of justification.— Where a new surety justifies with the acquiescence of a previous cosurety, and such two sureties, although their obligations are expressed in two instruments, are accepted at different times by different judges of the district court of the same bench, it is error to affirm the judgment of the justice for a failure to furnish a proper bond. Eidam *v.* Johnson, 79 Minn. 249, 82 N. W. 578.

Justification before court commissioner of proper county sufficient see Betts *v.* Newman, 91 Minn. 5, 97 N. W. 371.

Affidavit held insufficient see Starks *v.* Stafford, 14 Oreg. 317, 12 Pac. 670.

51. *California.*— McCracken *v.* Los Angeles County Super. Ct., 86 Cal. 74, 24 Pac. 845. See also Dutertre *v.* San Francisco Super. Ct., 84 Cal. 535, 24 Pac. 284, where it was held that the fact that the undertaking was filed more than five days before the notice of appeal was served will not deprive appellee of his opportunity to except to the sureties.

must be given to the appellant of the exceptions,[52] and to the appellee of the justification;[53] but a justification filed with the undertaking, and a certificate of the justice approving the sureties, have been held to constitute a sufficient compliance with the statute.[54]

(v) *Execution and Filing of Undertaking* — (A) *In General.* An undertaking on appeal is valid if executed and filed in substantial, although not in strict, conformity with the mode prescribed by statute.[55] It must be entered into before the officer designated by the statute,[56] and when required by the statute, it must be delivered to the justice to be entered in his records,[57] and must be returned to and filed in the court to which the appeal is taken.[58] The mere recital of the names of sureties in the body of an appeal-bond is not sufficient evidence that the persons so designated are bound as sureties;[59] but a bond, signed by the marks of obligors unable to write, is valid, although there are no

Idaho.— Perkins *v.* Bridge, 10 Ida. 189, 77 Pac. 329. See also Numbers *v.* Rocky Mountain Bell Tel. Co., 7 Ida. 408, 63 Pac. 381, to the effect that an undertaking of a surety company, filed in lieu of justification of sureties, must be accompanied with documentary evidence showing *prima facie* that the company has qualified to do business by complying with the requirements of the act of Feb. 23, 1899, and that the execution of the undertaking has been authorized by the company, executed by agents or officers authorized to execute it, and that notice of filing such undertaking and evidence was given to respondent. And see Snyder *v.* Wooden, (1905) 81 Pac. 377, holding that where the respondent on appeal from a justice excepts to the sufficiency of the sureties on an appeal-bond, he may waive the justification, or accept a new undertaking and waive justification of the new sureties.

Montana.— Morin *v.* Wells, 30 Mont. 76, 75 Pac. 688; State *v.* Napton, 24 Mont. 450, 62 Pac. 686.

New York.— Ross *v.* Markham, 5 N. Y. Civ. Proc. 81, where the holding of the court is to the effect that the failure on the part of sureties to justify after notice renders the undertaking a nullity, although they have been approved by the justice or a judge of the appellate court.

Oregon.— Starks *v.* Stafford, 14 Oreg. 317, 12 Pac. 670.

Pennsylvania.— Cummings *v.* Forsman, 6 Pa. St. 194. See also Smith *v.* Steel, 1 Ashm. 80.

South Dakota.— Barber *v.* Johnson, 4 S. D. 528, 57 N. W. 225.

Utah.— Pratt *v.* Jarvis, 8 Utah 5, 28 Pac. 869.

Wisconsin.— An appeal will not be entertained unless the sureties justify on oath within ten days after rendition of judgment, or are acknowledged to be sufficient by the appellee or his attorney. Clark *v.* Bowers, 2 Wis. 123.

See 31 Cent. Dig. tit. "Justices of the Peace," § 555.

Waiver.— The appellee may waive his privilege of excepting to the sureties, and may withdraw an exception already made; but if he insists that the sureties justify, the statute is mandatory on appellant. Morin *v.* Wells, 30 Mont. 76, 75 Pac. 688.

Amendment or new security see *infra*, V, A, 6, e, (VIII).

52. Sufficiency of notice.— Where a notice of exceptions is served after the exceptions are filed, it is valid, although it was given to the officer before the undertaking was filed. McDonald *v.* Paris, 9 S. D. 310, 68 N. W. 737.

Form of affidavit of service see McDonald *v.* Paris, 9 S. D. 310, 68 N. W. 737.

53. Perkins *v.* Bridge, 10 Ida. 189, 77 Pac. 329; McDonald *v.* Paris, 9 S. D. 310, 68 N. W. 737.

The object of the requirement "is to enable the adverse party to be present and examine the sureties, in order to ascertain their pecuniary responsibility. It is not enough, therefore, that they are willing to make the ordinary affidavit as to their property." McDonald *v.* Paris, 9 S. D. 310, 68 N. W. 737.

54. Judson *v.* Bulen, 6 Dak. 70, 50 N. W. 484, where it was held that the failure of the **sureties to justify again, after notice by the** adverse party, was immaterial. But see Barber *v.* Johnson, 4 S. D. 528, 57 N. W. 225.

55. Waldo *v.* Averett, 2 Ill. 487; Moore *v.* Manser, 9 Iowa 47; Ballou *v.* Smith, 29 N. H. 530; Job *v.* Harlan, 13 Ohio St. 485.

56. Austin *v.* Strong, 1 Mich. 259.

Presence of appellant unnecessary see Crist *v.* Smith, 66 Mo. App. 398.

Sureties need not sign in presence of justice.— If he requires proof of the genuineness of the signatures, he should make it known when the bond is received by him or soon thereafter; otherwise the objection will be waived. State *v.* Clark, 24 Nebr. 318, 38 N. W. 832.

57. Caster *v.* Scheuneman, (Nebr. 1905) 104 N. W. 152.

Delivery to agent.— Upon an appeal from a justice of the peace, the bond may be delivered to the justice's agent as well as to himself. People *v.* Judges Dutchess County, 7 Cow. (N. Y.) 487.

58. The original recognizance and not a copy should be returned to the appellate court. Stetson *v.* Corinna, 44 Me. 29. *Compare* Job *v.* Harlan, 13 Ohio St. 485.

59. Pevito *v.* Rodgers, 52 Tex. 581.

subscribing witnesses,[60] and where a justice signs his name to a bond in his official character, it is not necessary that the word "teste" or "witness" should be prefixed.[61] An appeal will not be dismissed for want of a seal opposite the party's signature to the undertaking,[62] nor will the failure of the justice to place a file-mark on an appeal-bond affect its validity, or prejudice the rights of the appellant.[63] It is not the duty of a justice to draw up an appeal-bond.[64]

(B) *Time For Execution and Filing* — (1) In General. An appeal-bond or recognizance must be executed and filed within the time prescribed by law, or the appellate court will not acquire jurisdiction.[65]

(2) Calculation and Determination of Time. The day upon which judgment was rendered is to be excluded in computing the time within which an undertaking on appeal is to be filed,[66] and generally, where the last day falls on Sunday, the undertaking may be filed on Monday.[67] Ordinarily the time runs

60. Boehl *v.* Hecker, 1 Tex. App. Civ. Cas. § 761.

61. Sargent *v.* Sharp, 1 Mo. 601.

62. Fisher *v.* Trevor, 8 Ohio Dec. (Reprint) 408, 7 Cinc. L. Bul. 322.

63. Filing will be presumed, where the bond is properly approved. Whitman Agricultural Co. *v.* Voss, 2 Tex. App Civ. Cas. § 548.

Evidence of filing.— If the affidavit is indorsed on the bond, and sworn to before the justice on the same day on which the bond is filed and the appeal demanded. it is sufficient evidence of the seasonable filing of the bond. Carman *v.* Smick, 14 N. J. L. 117.

64. See Nurse *v.* Porter, 18 N. H. 57, where it is said that there is an essential distinction in this respect between a recognizance and a bond.

65. *California.*— McKeen *v.* Naughton, 88 Cal. 462, 26 Pac. 354. See also Mullen *v.* Hunt, 67 Cal. 69, 7 Pac. 121, to the effect that where, under Code Civ. Proc. § 978, money has been deposited in lieu of an undertaking, the appellant cannot withdraw it, and file an undertaking, after the statutory limitation for filing undertakings has expired.

District of Columbia.— Schrot *v.* Schoenfeld, 23 App. Cas. 421.

Georgia.— Brown *v.* Griffith, 94 Ga. 453, 20 S. E. 383.

Illinois.— Campbell *v.* Quinlin, 4 Ill. 288.

Indiana.— White Water Valley Canal Co. *v.* Henderson, 8 Blackf. 528.

Kansas.— Bubb *v.* Cain, 37 Kan. 692, 16 Pac. 89.

Kentucky.— Bledsoe *v.* Cassady, 2 A. K. Marsh. 459.

Massachusetts.— Parker *v.* Snow, 143 Mass. 423, 9 N. E. 808.

Nebraska.— People's Bldg., etc., Assoc. *v.* Cook, 63 Nebr. 437, 88 N. W. 763; Bell *v.* White Lake Lumber Co., 21 Nebr. 525, 32 N. W. 561; Johnston *v.* Payton, 1 Nebr. (Unoff.) 598, 95 N. W. 777.

New Jersey.—Stevens *v.* Scudder, 5 N. J. L. 503.

Ohio.— State *v.* Block, 7 Ohio Dec. (Reprint) 532, 3 Cinc. L. Bul. 792, to the effect that where a justice improperly refused to allow the execution of an appeal-bond, he cannot be compelled to allow it by mandamus after the time in which the bond could have been executed has expired.

Oregon.— Strang *v.* Keith, 1 Oreg. 312.

Pennsylvania.— Perot *v.* Packer, 2 Ashm. 155; Beerbower *v.* Furry, 1 Chest. Co. Rep. 369; Fogarty *v.* Manville Colliery Ben. Assoc., 2 Lack. Leg. N. 170; Singerfield *v.* George, 30 Leg. Int. 321; Souders *v.* Potteiger, 2 Woodw. 18. See also Willard *v.* Martin, 23 Pa. Co. Ct. 285. But see Wynn *v.* Nichols, 30 Pittsb. Leg. J. N. S. 345.

Tennessee.— Howard *v.* Long, 3 Lea 207. But see McCarver *v.* Jenkins, 2 Heisk. 629, to the effect that where an appeal is prayed and granted within the time prescribed by law, the mere fact that the appeal-bond was executed afterward, if accepted and filed by the justice, will not vitiate the appeal.

Texas.— San Antonio, etc., R. Co. *v.* Thigpen, (Civ. App. 1900) 57 S. W. 66; Conally *v.* Gambull, 1 Tex. App. Civ. Cas. § 90.

Vermont.— Webb *v.* Hopkinson, 10 Vt. 544.

United States.— See Billingsley *v.* Bell, 30 Fed. Cas. No. 18,237, Hempst. 24.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 558, 559.

Compare Lamon *v.* Gilchrist, 12 N. C. 176, where it was held that an appeal, granted on security given two days after judgment, will not be dismissed, although no entry appears that time was given at the trial for appellant to find sureties, and although the appeal was allowed without affidavits. But see Henderson *v.* Plumb, 18 Ala. 74; Spencer *v.* Broughton, 77 Conn. 38, 58 Atl. 236.

Premature execution.— The fact that a bond on appeal from a justice is executed and approved before rendition of judgment does not invalidate the bond. James *v.* Woods, 65 Miss. 528, 5 So. 106. *Compare* Byers *v.* Cook, 13 Oreg. 297, 10 Pac. 417, where it was held that an undertaking, prepared and signed, to be used in perfecting an appeal from a justice's court, is valid where it is not prepared until after judgment is rendered, and not filed until the notice of appeal is filed, although prepared before such notice is served.

66. Easton *v.* Wash, (Tex. App. 1890) 16 S. W. 788.

67. Monell *v.* Terwilliger, 8 Nebr. 360, 1 N. W. 246; Meyers *v.* Seinsheimer, 7 Ohio

from the entry of judgment;[68] but a bond filed within the prescribed time from the date of a judgment overruling a motion for a new trial is filed in time,[69] provided such motion is made in apt time after judgment,[70] and is duly acted upon;[71] if not duly acted upon, the bond may be filed within the prescribed time after the last day upon which such motion could have been acted upon.[72] In determining whether a bond was filed in time, the appellate court must consider the whole record;[73] but it is competent to contradict by parol the file-mark indorsed on the bond, in order to show that it was not filed within the proper time.[74]

(3) Excuses For Delay and Relief. An appeal will not be dismissed where the failure to execute and file an appeal-bond in the prescribed time is due to the absence[75] or the default or negligence of the justice,[76] or to excusable neglect[77] or mistake;[78] and the appellate court, for good cause shown, may extend the time for filing the bond, or for filing a second bond where the first is insufficient.[79]

(vi) *Requisites and Sufficiency*—(a) *In General.* An appeal-bond or other security which identifies the parties and the judgment appealed from, and is executed for a sufficient sum[80] and conditioned as required by law,[81] is sufficient.[82] Clerical errors and mistakes which cannot mislead will not invalidate a

S. & C. Pl. Dec. 409, 5 Ohio N. P. 281. *Contra*, Dale *v.* Lavigne, 31 Mich. 149.

68. See Antonio, etc., R. Co. *v.* Thigpen, (Tex. Civ. App. 1900) 57 S. W. 66, in which, on the 8th of July, a justice made a brief entry of judgment in his docket, and on the 11th made a full entry reciting the proceedings had on the 8th, and it was held a bond filed more than ten days after the 8th was invalid, the docket entry of that date constituting a valid judgment.

69. Williams *v.* Sims, (Tex. App. 1890) 16 S. W. 786; Grant *v.* Fowzes, 3 Tex. App. Civ. Cas. § 105; Missouri Pac. R. Co. *v.* Houston Flour Mills Co., 2 Tex. App. Civ. Cas. § 571; Laird *v.* Frieberg, 2 Tex. App. Civ. Cas. § 110; Kyle *v.* Becton, 2 Tex. App. Civ. Cas. § 49.

70. Bond *v.* Rintleman, 24 Tex. Civ. App. 298, 59 S. W. 48.

Parol evidence is admissible to show that a written motion for new trial, sent up with the transcript on appeal, but bearing no file-mark, was filed within five days of the trial, as bearing on the question whether or not the appeal-bond was actually filed in time. Brooks *v.* Acker, (Tex. Civ. App. 1901) 60 S. W. 800.

71. Jackson *v.* Coates, (Tex. Civ. App. 1897) 43 S. W. 24.

72. West *v.* White, (Tex. App. 1890) 16 S. W. 788.

73. Brown *v.* Beesett, 13 Iowa 185; Moore *v.* Manser, 9 Iowa 47.

74. St. Louis, etc., R. Co. *v.* Turner, 3 Tex. App. Civ. Cas. § 341.

75. Averett *v.* Horn, 19 Ala. 803.

76. *California.*— Perkins *v.* Fresno County Super Ct., (1894) 37 Pac. 780.

Kansas.— Struber *v.* Rohlfs, 36 Kan. 202, 12 Pac. 830.

Pennsylvania.— McIlhaney *v.* Holland, 111 Pa. St. 634, 5 Atl. 731.

Texas.— Williams *v.* Hilburn, 3 Tex. App. Civ. Cas. § 287.

West Virginia.—Holmes *v.* Yoke, 48 W. Va. 267, 37 S. E. 545.

See 31 Cent. Dig. tit. "Justices of the Peace," § 561.

77. Richardson *v.* Debnam, 75 N. C. 390, in which the justice of the peace accepted an appeal-bond, assuring appellant that it was sufficient; but after the expiration of the time for giving bond it was determined to be defective.

78. **Mistake in date of bond.**—Where the record shows that an appeal was taken on the day of trial, and that the bond was by mistake dated the next day, the appeal will not be dismissed. Pearce *v.* Myers, 3 Mo. 31.

79. McKee *v.* Bassick Min. Co., 8 Colo. 392, 8 Pac. 561; Eidam *v.* Johnson, 79 Minn. 249, 82 N. W. 578. *Compare* Johnston *v.* Payton, 1 Nebr. (Unoff.) 598, 600, 95 N. W. 777, where it is said: "The time cannot be enlarged except, perhaps, under peculiar circumstances authorizing the interposition of a court of equity." And see *contra*, Schrot *v.* Schoenfeld, 23 App. Cas. (D. C.) 421; Rozier *v.* Williams, 92 Ill. 187, to the effect that no court can make a rule whereby jurisdiction of a cause may be obtained, when it is not conferred by general law.

80. See *infra*, V, A, 6, e, (vi), (b).

81. See *infra*, V, A, 6, e, (vi), (c).

82. See Hardee *v.* Abraham, 133 Ala. 341, 32 So. 595 [*citing* South, etc., R. Co. *v.* Pilgreen, 62 Ala. 305; Larcher *v.* Scott, 2 Ala. 40; McAlpin *v.* Pool, Minor (Ala.) 316]; Doolittle *v.* Dininny, 31 N. Y. 350; Robinson *v.* Justin, 3 Tex. App. Civ. Cas. § 376. *Compare* Putnam *v.* Boyer, 140 Mass. 235, 5 N. E. 493, in which the bond was held fatally defective.

The bond need not state that an appeal has been taken, if the fact that it has been taken is otherwise made to appear. Moses *v.* Clements, 3 Tex. App. Civ. Cas. § 171.

Docket entry held sufficient entry from which justice might draw out recognizance in full see Ballou *v.* Smith, 29 N. H. 530.

In Texas, where an appeal-bond does not state the time of holding the next regular term of the county court, the appeal should

bond,[83] nor is its validity affected by the fact that it bears date prior to the rendition of judgment,[84] or subsequent to the time of its filing.[85] An appeal-bond must correctly describe the court to which the appeal is taken.[86]

(B) *Amount of Bond or Security.* The amount in which an undertaking on appeal shall be given is usually fixed by statute, and an appeal will be dismissed where the bond or other security does not conform to the statutory requirements in this respect.[87] But where a statute does not specify any particular sum or penalty, a bond is sufficient which does not specify the sum;[88] and where the bond is required to be conditioned that the appellant will prosecute his appeal with effect or pay all costs adjudged against him the sureties cannot limit their liability by giving bond in a specified sum, and such a bond is defective.[89] On the other hand, a party cannot be deprived of his right of appeal by the justice's arbitrarily or ignorantly demanding a bond in a greater penalty than that authorized by the statute, and refusing to approve a proper bond tendered in due time.[90]

(C) *Conditions.* An undertaking on appeal from a justice's judgment must contain the conditions prescribed by statute;[91] but it need not conform literally to

be dismissed. Smith *v.* State, (Civ. App. 1904) 78 S. W. 937.

83. Moses *v.* Clements, 3 Tex. App. Civ. Cas. § 171; Kerr *v.* Murrell, 1 Tex. App. Civ. Cas. § 890.

84. Peoples *v.* Rodgers, 11 Tex. Civ. App. 447, 32 S. W. 798; Galveston, etc., R. Co. *v.* Hodge, 2 Tex. App. Civ. Cas. § 619.

85. Littell *v.* Bradford, 8 Blackf. (Ind.) 185.

86. A bond reciting a justice's judgment, and stating that defendant desires to appeal therefrom to the county court, is insufficient to confer jurisdiction of the appeal on the district court. Ft. Worth, etc., R. Co. *v.* Henry, (Tex. Civ. App. 1905) 88 S. W. 399; Gulf, etc., R. Co. *v.* Lyons, (Tex. Civ. App. 1905) 86 S. W. 44; Turner *v.* Southern Pine Lumber Co., 16 Tex. Civ. App. 545, 40 S. W. 1078.

87. Field *v.* O'Bryan, 4 J. J. Marsh. (Ky.) 365; Young *v.* Colvin, 168 Pa. St. 449, 31 Atl. 1094 (construing Pennsylvania act, March 15, 1847); Germantown, etc., Turnipke Co. *v.* Maglee, 9 Serg. & R. (Pa.) 227 (appeal by corporation); Langs *v.* Galbraith, 1 Serg. & R. (Pa.) 491; Davenport *v.* Searfoss, 10 Pa. Cas. 340, 13 Atl. 956 (construing Pennsylvania act, April 20, 1876); Stewart *v.* Prosser, 1 Browne (Pa.) 282 (in which appellant gave no security, but lodged the amount of the judgment with the justice to wait the event of the suit, without making provision for interest and costs); Kearney *v.* Andrews, 5 Wis. 23.

Inclusion of costs not necessary see Yarbrough *v.* Collins, 91 Tex. 306, 42 S. W. 1052; Colorado County *v.* Delaney, 54 Tex. 280; Blanks *v.* Stamps, (Tex. Civ. App. 1897) 43 S. W. 18; Ganet *v.* Mears, 4 Wis. 306. *Contra, Ex p.* Corwin, 5 Cow. (N. Y.) 291; *Ex p.* Harrison, 4 Cow. (N. Y.) 61; Bell *v.* Brady, 11 Tex. Civ. App. 526, 33 S. W. 303.

Effect of partial payment of judgment.— Under a statute requiring the appeal-bond to be in double the amount of the judgment, a bond for twenty dollars is sufficient, where the judgment was for costs amounting to sixteen dollars and twenty-five cents, of which plaintiff had paid nine dollars and forty cents. Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198.

In an action to recover possession of a mining claim, an undertaking on appeal given in accordance with Oreg. Code, § 2182, for an amount sufficient to compensate plaintiff for its use pending appeal, and for costs and disbursements, is sufficient. Bilyeu *v.* Smith, 18 Oreg. 335, 22 Pac. 1073.

On appeal from a judgment for claimant, plaintiff's bond in double the amount of costs of the suit is sufficient. Ross *v.* Williams, 78 Tex. 371, 14 S. W. 796.

Under the Pennsylvania act of 1845, requiring all bail in cases of appeal from justices' judgments to be bail absolute in double the amount of costs, a recognizance, "in the sum of thirty-five dollars, on condition that the defendant shall appear at the next Court of Common Pleas to prosecute his appeal with effect," was sufficient. Murray *v.* Haslett, 19 Pa. St. 356.

Undertaking held sufficient in California see Ward *v.* Marin County Super. Ct., 58 Cal. 519.

88. Ruffin *v.* Hines, 59 Ala. 565; Jenkins *v.* Emery, 2 Wyo. 58.

89. Territory *v.* Doan, 7 Ariz. 89, 60 Pac. 893.

90. Redus *v.* Gamble, 85 Miss. 165, 37 So. 1010.

91. Undertakings held insufficient. — *Alabama.*— Orr *v.* Sparkman, 120 Ala. 9, 23 So. 829.

Delaware. — Wilson *v.* State, 3 Pennew. 305, 51 Atl. 885.

District of Columbia.—Schrot *v.* Schoenfeld, 23 App. Cas. 421.

Illinois.— Smith *v.* Davis, 89 Ill. 203.

Kentucky.— Talbot *v.* Benson, 2 T. B. Mon. 59.

Maine.— Jordan *v.* McKenney, 45 Me. 306; French *v.* Snell, 37 Me. 100.

Michigan.— Wineman *v.* Donovan, 121 Mich. 601, 80 N. W. 642.

Ohio.— Job *v.* Harlan, 13 Ohio St. 485, where the holding of the court is to the effect that the stipulation "that the appel-

the words of the statute, a substantial conformity being all that is required,[92] and an appellee cannot object that a bond is more favorable to him than the statute requires.[93]

(D) *Description of Judgment.* An undertaking on appeal from the judgment of a justice of the peace must so describe the judgment as to identify it.[94] But such undertakings are to be considered in connection with the transcript, and, when so viewed, and it is shown with reasonable certainty to what judgment the bond is applied the law is satisfied. It is not the province of an appeal-bond or other security to show the character of the judgment, nor its amount, but it is sufficient if it appears that it was given to secure an appeal from the judgment set out in the transcript.[95]

lant will prosecute his appeal to effect, and without unnecessary delay" is indispensable, under Justices Code, § 112.

Pennsylvania.— Pier *v.* McKinney, 2 Watts 103.

Texas.— Pace *v.* Webb, 79 Tex. 314, 15 S. W. 269; Figures *v.* Dunklin, 68 Tex. 644, 5 S. W. 503; Galveston, etc., R. Co. *v.* Geyer, (Civ. App. 1898) 49 S. W. 251; Allison *v.* Gregory, (App. 1890) 15 S. W. 416; Garrett *v.* Gay, 1 Tex. App. Civ. Cas. § 1026; Carter *v.* Grigsby, 1 Tex. App. Civ. Cas. § 347.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 263, 264.

92. *Alabama.*—Windham *v.* Coats, 8 Ala. 285; Lightfoot *v.* Strahan, 7 Ala. 444.

California.— Billings *v.* Roadhouse, 5 Cal. 71.

Kentucky.— Feemster *v.* Anderson, 6 T. B. Mon. 537.

North Carolina.— Walker *v.* Williams, 88 N. C. 7.

Ohio.— Farrell *v.* Finch, 6 Ohio Dec. (Reprint) 995, 9 Am. L. Rec. 412.

Oklahoma.— See Richardson *v.* Penny, 9 Okla. 655, 60 Pac. 501, in which appellants attempted and intended to give a bond in conformity to St. (1893) § 4774, but by inadvertence or mistake omitted the time for which they bound themselves to double liability for the use and occupation of the property, and it was held that the bond was not thereby invalidated.

Pennsylvania.— Rhey *v.* Baird, 51 Pa. St. 85.

South Dakota.—Doering *v.* Jensen, 16 S. D. 58, 91 N. W. 343; Aultman *v.* Nelson, 11 S. D. 338, 77 N. W. 584.

Texas.— Southern Pac. R. Co. *v.* Staniey, 76 Tex. 418, 13 S. W. 480; Girvin *v.* Wood, 32 Tex. Civ. App. 536, 75 S. W. 49; Coman *v.* Lincoln, 25 Tex. Civ. App. 276, 61 S. W. 443; Hamblen *v.* Tuck, (Civ. App. 1898) 45 S. W. 175; Moove *v.* Alston, (App. 1890) 15 S. W. 47; Clifford *v.* Clark, 3 Tex. App. Civ. Cas. § 238; Stitt *v.* Barefoot, 2 Tex. App. Civ. Cas. § 791; Laird *v.* Frieburg, 2 Tex. App. Civ. Cas. § 110; Worley *v.* Hudson, 2 Tex. App. Civ. Cas. § 26; Lee *v.* Stone, 1 Tex. App. Civ. Cas. § 1277; Trial *v.* Lepori, 1 Tex. App. Civ. Cas. § 1272; Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198; Mills *v.* Hackett, 1 Tex. App. Civ. Cas. § 845; Kerr *v.* Clegg, 1 Tex. App. Civ Cas. § 791; Heidenheimer *v.* Bledsoe, 1 Tex. App. Civ. Cas. § 316; Miller *v.* Sappington, 1 Tex. App. Civ. Cas. § 176; Haby *v.* Haby, 1 Tex. App. Civ. Cas. § 157.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 563, 564.

93. *Ex p.* Hurlburt, 8 Cow. (N. Y.) 138.

94. James *v.* Roberts, 78 Tex. 670, 15 S. W. 111; Kerr *v.* Stone, 1 Tex. App. Civ. Cas. § 810; Bradway *v.* Clipper, 1 Tex. App. Civ. Cas. § 306.

95. Wilkes *v.* Adler, 68 Tex. 689, 5 S. W. 497; Kusmierz *v.* Mahula, (Tex. Civ. App. 1903) 77 S. W. 966; Niblo *v.* Dyer, (Tex. Civ. App. 1900) 56 S. W. 216; Fussell *v.* Insall, (Tex. Civ. App. 1899) 50 S. W. 475; Houston, etc., R. Co. *v.* Lockhart, (Tex. Civ. App. 1896) 39 S. W. 320; Perry *v.* Cullen, 6 Tex. Civ. App. 478, 25 S. W. 1043; Brown *v.* Shelton, (Tex. Civ. App. 1893) 23 S. W. 483; Bauer *v.* Adkins, (Tex. Civ. App. 1893) 22 S. W. 181; Bauer *v.* Fields, (Tex. Civ. App. 1893) 22 S. W. 180; Williams *v.* Sims, (Tex. App. 1890) 16 S. W. 786; Jones *v.* Malloy, (Tex. App. 1891) 15 S. W. 198; Lewis *v.* Richardson, 3 Tex. App. Civ. Cas. § 343; Moses *v.* Clements, 3 Tex. App. Civ. Cas. § 171; Austin *v.* McMahan, 2 Tex. App. Civ. Cas. § 429; Kerr *v.* Nutten, 1 Tex. App. Civ. Cas. § 410.

Misrecitals as to parties and court are immaterial if the judgment is otherwise sufficiently identified.

Alabama.— Sossman *v.* Price, 57 Ala. 204.

California.— See Adler *v.* Staude, 136 Cal. 182, 68 Pac. 599, in which judgment was regularly pronounced against L, and the appeal-bond recited that it was given to perfect an appeal by L, from a judgment rendered against him, and it was held that the fact that the clerk in entering the judgment by a mere clerical misprision wrote the name E instead of L in one place in the body of the judgment did not show that no judgment was rendered against L.

Kansas.— Smith *v.* Nescatunga Town Co., 36 Kan. 758, 14 Pac. 246; Freeman *v.* McAtee, 4 Kan. App. 695, 46 Pac. 40.

New York.— Anonymous, 1 Wend. 85, to the effect that a bond reciting the judgment as rendered before I S, justice of the peace, is good, without adding the county of which he is justice.

Ohio.— Holton *v.* Wade, 3 Ohio St. 543, in which the recognizance was held sufficient, although it did not appear, either by the

(VII) *Approval* — (A) *In General.* In most jurisdictions an undertaking on appeal, to be effective, must be approved by the justice or other officer designated by statute.[96] But where the appellant files his bond at the proper time he cannot be deprived of his right of appeal through the failure of the justice to approve it within the time prescribed by law,[97] and on the latter's refusal to approve a good and sufficient bond, the appellant may bring mandamus to compel him to do so.[98]

recognizance or the transcript, which party took the appeal.

Texas.— Warren *v.* Marberry, 85 Tex. 193, 19 S. W. 994; Hedges *v.* Armistead, 60 Tex. 276; Jesse French Piano, etc., Co. *v.* Mears, (Civ. App. 1904) 83 S. W. 401; Kusmierz *v.* Mahula, (Civ. App. 1903) 77 S. W. 966; Condon *v.* Robertson, 33 Tex. Civ. App. 441, 76 S. W. 934; Niblo *v.* Dyer, (Civ. App. 1900) 56 S. W. 216; Missouri, etc., R. Co. *v.* Vowell, (Civ. App. 1896) 34 S. W. 354; Farror *v.* Dowd, (Civ. App. 1894) 28 S. W. 919 (names of parties omitted); Witten *v.* Casparry, (App. 1890) 15 S. W. 47; Texas, etc., R. Co. *v.* McCumsey, 3 Tex. App. Civ. Cas. § 264; Trial *v.* Lepori, 1 Tex. App. Civ. Cas. § 1272.

See 31 Cent. Dig. tit. "Justices of the Peace," § 567.

Omission or misrecital of date not fatal.— People *v.* Orlean C. P., 2 Wend. (N. Y.) 292; Niblo *v.* Dyer, (Tex. Civ. App. 1900) 56 S. W. 216; Crow *v.* Curry, (Tex. Civ. App. 1894) 28 S. W. 715; Alderman *v.* Jones, 2 Tex. Civ. App. 336, 21 S. W. 298; Edwards *v.* Allen, (Tex. App. 1891) 17 S. W. 1074; Knight *v.* Grigsby, (Tex. App. 1890) 16 S. W. 866; Eichman *v.* State, 22 Tex. App. 137, 2 S. W. 538; Knight *v.* Old, 2 Tex. App. Civ. Cas. § 77. But see Shuster *v.* Overturf, 42 Kan. 668, 22 Pac. 718; Texas, etc., R. Co. *v.* Rains, 2 Tex. App. Civ. Cas. § 752.

Omission or misrecital of amount will not defeat the bond. Christian *v.* Crawford, 60 Tex. 45; Niblo *v.* Dyer, (Tex. Civ. App. 1900) 56 S. W. 216; Nabors *v.* McQuigg, (Tex. Civ. App. 1899) 52 S. W. 637; Dillard *v.* Allison, (Tex. Civ. App. 1897) 40 S. W. 1023; Cockrill *v.* Eason, (Tex. Civ. App. 1894) 26 S. W. 464; Anderson *v.* Beaty, 3 Tex. App. Civ. Cas. § 260; Parsons *v.* Crawford, 2 Tex. App. Civ. Cas. § 669; Laird *v.* Frieberg, 2 Tex. App. Civ. Cas. § 110; Mills *v.* Hackett, 1 Tex. App. Civ. Cas. § 845; Nelson *v.* Baird, 1 Tex. App. Civ. Cas. § 1236. But see *Ex p.* Alvord, 6 Cow. (N. Y.) 585; *Ex p.* Weed, 5 Cow. (N. Y.) 286, to the effect that the bond must recite the precise amount of the judgment.

Where both date and amount are misdescribed the appeal should be dismissed. Lok Wing *v.* Sam Chung, (Tex. Civ. App. 1900) 59 S. W. 598; Gibson *v.* Giles, 2 Tex. App. Civ. Cas. § 402.

96. *Arkansas.*— The recognizance should be taken and approved by the justice granting the appeal, or it should be perfected in the circuit court. Merrill *v.* Manees, 19 Ark. 647.

Illinois.— Appellant should file his bond with the justice and have it approved by him. Fairbank *v.* Streeter, 142 Ill. 226, 31 N. E. 494 [*reversing* 41 Ill. App. 434].

Michigan. — Under 3 Howell Annot. St. § 7000, the county clerk may take and approve an appeal-bond. Cole *v.* Donovan, 106 Mich. 692, 64 N. W. 741.

New York.— Under Code Civ. Proc. § 1350, an undertaking on appeal must be approved by the justice or by a judge of the appellate court. Ross *v.* Markham, 5 N. Y. Civ. Proc. 81.

Ohio.— Where a justice tries a case filed before another justice, who is temporarily disabled, the appeal-bond must be perfected before the latter. Meyers *v.* Dwight, 24 Ohio Cir. Ct. 658.

Texas.— It is the duty of a justice, when an appeal-bond is presented to him, either to approve or reject it. Jones *v.* Wells, 3 Tex. App. Civ. Cas. § 94. See also Whitman Agricultural Co. *v.* Voss, 2 Tex. App. Civ. Cas. § 548.

Wisconsin.— A recognizance entered into before another justice who certifies in the usual form that the adverse party is satisfied with the surety is sufficient. Ganet *v.* Mears, 4 Wis. 306.

See 31 Cent. Dig. tit. "Justices of the Peace," § 570.

But see Dieter *v.* Ragsdale, 120 Ga. 417, 47 S. E. 942 (construing Civ. Code (1895), §§ 4458, 5632, and holding that if the bond is insufficient the adverse party may except to it and have it increased or the appeal dismissed); National Furniture Co. *v.* Edwards, 105 Ga. 240, 31 S. E. 161; Wilson *v.* Atlantic Elevator Co., 12 N. D. 402, 97 N. W. 535; Eldridge *v.* Knight, 11 N. D. 552, 93 N. W. 860 (construing Rev. Code, §§ 6771, 6772, 6776, 6777).

97. J. H. Rothman Distilling Co. *v.* Kermis, 79 Mo. App. 111 [*following* Jester *v.* McKinney, 47 Mo. App. 62]. *Compare* Schrot *v.* Schoenfeld, 23 App. Cas. (D. C.) 421.

98. Coats *v.* State, 133 Ind. 36, 32 N. E. 737; Cox *v.* Rich, 24 Kan. 20. See also People *v.* Judges Niagara County Ct. C. Pl., 1 How. Pr. (N. Y.) 196, where it was held that a peremptory mandamus will be allowed to compel a court of common pleas to approve a new appeal-bond, where the original bond returned by the justice of the peace was not approved by him, or was approved by some unauthorized officer. But see Braeutigam *v.* White, 61 N. J. L. 454, 39 Atl. 1069; Stull *v.* Abbott, 15 N. J. L. 338; Tichenor *v.* Hewson, 14 N. J. L. 26.

Mandamus will not lie to compel a justice to approve an appeal-bond after expiration of the time for appeal, when it has been tendered without any justification by the sureties, and the justice objects to their sufficiency, even though they possess the requisite qualifica-

If a justice erroneously rejects an undertaking offered in due time, he may correct the mistake by receiving it afterward, and the appeal will be good;[99] but where he has accepted an appeal-bond, and it is found to be in too small a sum, he cannot recall his acceptance and demand another bond.[1]

(B) *Acts Constituting Approval and Necessity of Indorsement.* An entry on an undertaking on appeal that it is approved is not a judicial but a clerical act, and the omission to make the entry will not affect the validity of the undertaking.[2] It is sufficient if the record shows that the justice received the undertaking and allowed the appeal,[3] and his approval may be inferred from his filing the undertaking in proper time,[4] or from his retaining it in his custody after examining it and expressing himself as satisfied.[5] Where it does not appear from the record that an appeal-bond was filed with the justice, or approved by him, parol evidence is admissible to show the facts.[6]

(C) *Effect of Approval.* The approval of an appeal bond or recognizance by the justice determines the sufficiency of the sureties;[7] and even if the undertaking is defective the appeal is nevertheless taken, and it is the duty of the adverse party to follow the case to the appellate court.[8]

(VIII) *Amendment and New Security*—(A) *In General.* At any time prior to the expiration of the time limited for appeal defects in a bond or undertaking may be cured by amendment in the justice's court or by filing a new bond or undertaking.[9] And where an appellate court has acquired jurisdiction of a case on appeal from a justice's court, it may allow or require the appellant to amend a defective bond or recognizance, or to give a new undertaking.[10] But

tions. Chicago, etc., R. Co. *v.* Marshall, 47 Kan. 614, 28 Pac. 701.

99. Noble *v.* Houk, 16 Serg. & R. (Pa.) 421.

1. Miller *v.* O'Reilly, 84 Ind. 168.

2. Jones *v.* Wells, 3 Tex. App. Civ. Cas. § 94. See also Shiff *v.* Brownell, 4 Wis. 285.

Indorsement nunc pro tunc.—Where an appeal-bond had been delivered to the justice, and by him approved in due time, but he failed to mark it filed and approved, he should be permitted to do so *nunc pro tunc.* Muller *v.* Humphreys, (Tex. App. 1889) 14 S. W. 1068. See also Galveston, etc., R. Co. *v.* Hodge, 2 Tex. App. Civ. Cas. § 619; Whitman Agricultural Co. *v.* Voss, 2 Tex. App. Civ. Cas. § 548.

No particular time is fixed for the indorsement of approval. The justice may approve before the bond is executed, and indorse after the expiration of the time allowed for the appeal. People *v.* Judges Dutchess County, 7 Cow. (N. Y.) 487. See also Winner *v.* Williams, 82 Miss. 669, 35 So. 308.

3. Ballou *v.* Smith, 29 N. H. 530 (entry on docket of an appeal and of the principal and sureties recognizing); Ragley *v.* Hobbs, 32 Tex. Civ. App. 408, 74 S. W. 813 (certificate to the transcript, dated March 18, indorsed "Issued March 20," and signed by the justice, held to show filing and approval of bond); Whitman Agricultural Co. *v.* Voss, 2 Tex. App. Civ. Cas. § 548; Jenkins *v.* Emery, 2 Wyo. 58.

4. Smith *v.* Ammen, 101 Ill. App. 144; Lacy *v.* Fairman, 7 Blackf. (Ind.) 558; Sholts *v.* Judges Yates County, 2 Cow. (N. Y.) 506; Jones *v.* Spann, 3 Tex. App. Civ. Cas. § 283.

5. Bingham *v.* Shadle, 45 Nebr. 82, 63 N. W. 143.

6. McCrory *v.* Anderson, 103 Ind. 12, 2 N. E. 211.

7. Wood *v.* Estes, 33 Me. 578; Voss *v.* Feurmann, (Tex. Civ. App. 1893) 23 S. W. 936; Fuerman *v.* Ruhle, (Tex. App. 1890) 16 S. W. 536; Pickle *v.* Abbott, 3 Tex. App. Civ. Cas. § 345.

8. Miller *v.* Superior Mach. Co., 79 Ill. 450; Ewing *v.* Bailey, 5 Ill. 420; Little *v.* Smith, 5 Ill. 400; Winner *v.* Williams, 82 Miss. 669, 35 So. 308; York *v.* Free, 38 W. Va. 336, 18 S. E. 492.

If the appellee is not satisfied with the bond, he can obtain a rule to file a sufficient bond, and in default thereof the appeal can be dismissed. Miller *v.* Superior Mach. Co., 79 Ill. 450.

Appellant entitled to notice before rejection of sureties see Guzzi *v.* Cassesse, 18 Pa. Co. Ct. 415.

9. **Time for execution and filing** see *supra*, V, A, 6, e, (V), (B).

In Idaho, where an appeal is taken from the justice's court to the district court, and an undertaking is filed within thirty days after entry of the judgment, and the adverse party excepts to the sufficiency of the sureties, appellant, under Rev. St. § 4842, may cause his original sureties or "other sureties" to justify before the justice within five days after the exception, and at the time of justifying other sureties may execute a separate undertaking and justify thereto. Snyder *v.* Wooden, (1905) 81 P. 377.

10. *Alabama.*— Appleton *v.* Turrentine, 19 Ala. 706; Carter *v.* Pickard, 11 Ala. 673.

Arkansas.— Morrison *v.* State, 40 Ark. 448; Miller *v.* Heard, 7 Ark. 50.

where the defect is in a matter of substance, and goes to the jurisdiction of the appellate court, it has no jurisdiction to allow an amendment or the filing of new security, so as to confer jurisdiction after the expiration of the time limited by statute for taking an appeal.[11] Where no undertaking is given, the appellate

California.—Gray *v.* Amador County Super. Ct., 61 Cal. 337.

Connecticut.— Russell *v.* Monson, 33 Conn. 506.

Illinois.— Bennett *v.* Pierson, 82 Ill. 424; Hinman *v.* Kitterman, 40 Ill. 253; Patty *v.* Winchester, 20 Ill. 261; South Range Tp. 6 *v.* Starbird, 13 Ill. 49; Hubbard *v.* Freer, 2 Ill. 467; Dedman *v.* Barber, 2 Ill. 254; Murphy *v.* Consolidated Tank Line Co., 32 Ill. App. 612; Stilley *v.* King, 3 Ill. App. 338.

Indiana.— Hollensbe *v.* Thomas, 22 Ind. 375.

Iowa.— Brock *v.* Manatt, 1 Iowa 128.

Maine.— Ingalls *v.* Chase, 68 Me. 113, amendment of recognizance by magistrate who returned it.

Michigan.— People *v.* Judge Wayne Cir. Ct., 27 Mich. 303.

Minnesota.— Eidam *v.* Johnson, 79 Minn. 249, 82 N. W. 578.

Mississippi.— Gaddis *v.* Palmer, 60 Miss. 758.

Missouri.— Williams *v.* Watson, 34 Mo. 95; Jones *v.* Davis, 4 Mo. 28; Kraas *v.* Shipp, 69 Mo. App. 46.

Nebraska.— Rohare *v.* Kendall, 22 Nebr. 677, 35 N. W. 940.

Oklahoma.—Vowell *v.* Taylor, 8 Okla. 625, 58 Pac. 944.

Oregon.— Hosford *v.* Logus, 13 Oreg. 130, 11 Pac. 900.

Pennsylvania.— Bream *v.* Spangler, 1 Watts & S. 378; Kile *v.* Hill Elgin Butter Co., 22 Pa. Co. Ct. 417; Dickinson *v.* McGuire, 1 Ashm. 47; Insurance Co. *v.* Sweigert, 9 Lanc. Bar 138; Repp *v.* Coal Co., 5 L. T. N. S. 77; Tripp *v.* Barnes, 1 L. T. N. S. 73; Gehring *v.* Lambert, 1 Leg. Gaz. 85; Hill *v.* Schucker, 1 Woodw. 251.

South Dakota.— Wasem *v.* Bellach, 17 S. D. 506, 97 N. W. 718; Towle *v.* Bradley, 2 S. D. 472, 50 N. W. 1057 [*distinguishing* Rudolph *v.* Herman, 2 S. D. 399, 50 N. W. 833].

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 573, 574.

Defects in amount or condition amendable.—*Dakota.*— Keehl *v.* Schaller, 6 Dak. 499, 50 N. W. 195, in which the condition required by Justices Code, § 93, was omitted.

Illinois.— Brown *v.* Keirns, 13 Ill. 296, defect in amount.

Kansas.— St. Louis, etc., R. Co. *v.* Hurst, 52 Kan. 609, 35 Pac. 211, defects in form and amount.

Mississippi.— Denton *v.* Denton, 77 Miss. 375, 27 So. 383, defect in amount.

Missouri.— Kellogg *v.* Linger, 60 Mo. App. 571, construing Rev. St. §§ 6340. 6400.

Pennsylvania.— Lesch *v.* Turnpike Co., Wilcox 195, defect in condition.

South Dakota.— Wasem *v.* Bellach, 17 S. D. 506, 97 N. W. 718, defect in condition of the undertaking.

See 31 Cent. Dig. tit. "Justices of the Peace," § 575.

But see Bremond *v.* Seeligson, 1 Tex. App. Civ. Cas. § 636, to the effect that the county court cannot permit appellant to amend an appeal-bond not conditioned as prescribed by statute.

Defects as to parties or sureties, which do not go to the jurisdiction of the appellate court, may be corrected by amendment or by giving new security.

Indiana.— Murphy *v.* Steele, 51 Ind. 81.

Kansas.— McClelland *v.* Allison, 34 Kan. 155, 8 Pac. 239; Freeman *v.* McAtee, 4 Kan. App. 695, 46 Pac. 40. *Compare* Lovitt *v.* Wellington, etc., R. Co., 26 Kan. 297, in which the bond was made to run to one not a party to the record or proceedings, and it was held that, no special equities being shown, the appeal could not be perfected by making a new bond to the right party.

Missouri.— State *v.* Lavalley, 9 Mo. 834.

Nebraska.— State Sav., etc., Assoc. *v.* Johnson, (1904) 98 N. W. 32.

New York.— Ross *v.* Markham, 5 N. Y. Civ. Proc. 81.

Oregon.— Gobbi *v.* Refrano, 33 Oreg. 26, 52 Pac. 761.

Texas.— Peoples *v.* Rodgers, 11 Tex. Civ. App. 447, 32 S. W. 798.

See 31 Cent. Dig. tit. "Justices of the Peace," § 576.

Compare Sutton *v.* Bower, 124 Iowa 58, 99 N. W. 104, in which the appellate court had acquired no jurisdiction, the bond having named a third person as obligee, instead of plaintiff.

11. Jurisdictional defects not amendable.—*Arizona.*— Territory *v.* Doan, 7 Ariz. 89, 60 Pac. 893.

Iowa.— Sutton *v.* Bower, 124 Iowa 58, 99 N. W. 104; Seabold *v.* Schevers, (1902) 89 N. W. 1121; Minton *v.* Ozias, 115 Iowa 148, 88 N. W. 336.

Kansas.— St. Louis, etc., R. Co. *v.* Morse, 50 Kan. 99, 31 Pac. 676.

New York.— Latham *v.* Edgerton, 9 Cow. 227; *Ex p.* Brown, 7 Cow. 468; *Ex p.* Alvord, 6 Cow. 585; *Ex p.* Chryslin, 4 Cow. 80.

Ohio.— Allen *v.* Walnut Hills, etc., Turnpike Co., 9 Ohio Dec. (Reprint) 322, 12 Cinc. L. Bul. 168.

South Dakota.— Doering *v.* Jensen, 16 S. D. 58, 91 N. W. 343.

Texas.—Walker *v.* Mears, 28 Tex. Civ. App. 210, 67 S. W. 167; Galveston, etc., R. Co. *v.* Geyer, (Civ. App. 1898) 49 S. W. 251; Snow *v.* Eastham, (Civ. App. 1898) 46 S. W. 866; Houston, etc., R. Co. *v.* Red Cross Stock Farm, (Civ. App. 1898) 43 S. W. 795; Nones *v.* McGregor, (Civ. App. 1896) 35 S. W. 1083.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 573, 574.

court acquires no jurisdiction, and, in the absence of statutory authority,[12] it cannot allow an undertaking to be filed *nunc pro tunc*.[13]

(B) *Procedure.* An objection to an appeal-bond or other security may be taken by plea in abatement;[14] but the more usual practice is to move for a rule or order against the appellant to compel him to amend or renew the undertaking, and if it is adjudged informal or otherwise insufficient, it is the duty of the court to enter a rule that, unless the appellant files a sufficient undertaking by a day named, the appeal will be dismissed.[15] Where an appellant is adjudged to furnish additional security on an *ex parte* hearing, he must have due notice thereof, or his failure to furnish it will not be ground for dismissal;[16] and where the sufficiency of the sureties on appellant's undertaking is excepted to, and he files a new undertaking, he must give notice thereof, or his appeal will be dismissed.[17] After an appeal has been dismissed for want of sufficient security, it is proper to refuse an application to amend, so long as the judgment of dismissal stands.[18]

(IX) *Waiver of Defects or of Delay in Filing.* By appearing generally and pleading, or obtaining a continuance, or going to trial, without timely objection, an appellee waives any defects in the appeal-bond or recognizance, or the failure to file it within the required time,[19] provided the defects are not such as

12. **Under N. Y. Code Proc. § 327,** providing that when a party shall in good faith give notice of appeal, and shall omit by mistake to do any other necessary act, the court may permit an amendment, where appellant fails to give security, the error is amendable by leave of court. Briggs *v.* Swales, 29 How. Pr. 201. See also Lake *v.* Kels, 11 Abb. Pr. N. S. 37.

Under Wis. Rev. St. p. 322, § 12, no appeal allowed by a justice shall be dismissed on account of there being no recognizance, if appellant will, before motion to dismiss, enter before the district court such recognizance as he ought to have entered before the allowance of the appeal, and pay all costs due to such default or omission. This statute must be complied with by actually filing such recognizance and paying costs before the motion to dismiss is disposed of. Kensler *v.* Brunett, 1 Pinn. 112.

13. Woodhull *v.* Kelly, 6 Ill. App. 323; Vowell *v.* Taylor, 8 Okla. 625, 58 Pac. 944; Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038; Odell *v.* Gotfrey, 13 Oreg. 466, 11 Pac. 190; Smith *v.* Coffin, 9 S. D. 502, 70 N. W. 636 [*following* McDonald *v.* Paris, 9 S. D. 310, 68 N. W. 737]. But see Keller *v.* Musselman, 18 Pa. Co. Ct. 407; Davis *v.* Marra, 1 Chest. Co. Rep. (Pa.) 328; Fishburn *v.* Sifflers, 4 Leg. Op. (Pa.) 468.

14. Ives *v.* Finch, 22 Conn. 101.

15. Wear *v.* Killeen, 38 Ill. 259; Galligher *v.* Wolf, 47 Nebr. 589, 66 N. W. 645; Carbaugh *v.* Sanders, 13 Pa. Super. Ct. 361; Twyford *v.* Dyer, 17 Pa. Co. Ct. 28; Steam Heat, etc., Co. *v.* Hutchinson, 14 Pa. Co. Ct. 491.

No evidence is necessary to support the petition for a rule, where the transcript shows the two essential facts that defendant is a foreign corporation and that the bail entered is only for costs. Adams *v.* Lancaster Paper Mills Co., 10 Pa. Dist. 266.

16. See Papin *v.* Buckingham, 33 Mo. 454, where it was held that the fact that appellee's second motion to dismiss (the first being overruled) was placed on the court's law docket was not sufficient notice.

17. Herting *v.* Santa Barbara County Super. Ct., (Cal. 1886) 10 Pac. 514; Wood *v.* Monterey County Super. Ct., 67 Cal. 115, 7 Pac. 200, construing Code Civ. Proc. § 978.

18. Rudolph *v.* Herman, 4 S. D. 430, 57 N. W. 65, in which the motion contained a prayer for general relief, under which the court might have vacated the judgment if asked to do so.

19. *Connecticut.*— Ives *v.* Finch, 22 Conn. 101.

Illinois.—Matlock *v.* Pray, 61 Ill. App. 102.

Massachusetts.— Brown *v.* Tobias, 1 Allen 385.

Michigan.— Goodin *v.* Van Haaften, 130 Mich. 386, 90 N. W. 23; Sherwood *v.* Ionia Cir. Judge, 107 Mich. 136, 64 N. W. 1045; Hamilton *v.* Wayne Cir. Judge, 52 Mich. 409, 18 N. W. 193; McCombs *v.* Johnson, 47 Mich. 592, 11 N. W. 400.

Mississippi.— See Battle *v.* Woolf, 23 Miss. 318, to the effect that after the term of the circuit court to which an appeal is taken, it is too late to move the court to dismiss the appeal for the insufficiency of the bond, provided the bond is voidable only, and not void.

Missouri.—Evans-Smith Drug Co. *v.* White, 86 Mo. App. 540 (in which the appellee made no objection or appearance until after judgment in the circuit court); Kraas *v.* Shipp, 69 Mo. App. 46; Long *v.* Bolen Coal Co., 56 Mo. App. 605.

New Hampshire.— Farnam *v.* Davis, 32 N. H. 302.

Pennsylvania.— Shank *v.* Warfel, 14 Serg. & R. 205 (in which motion to dismiss was not made for nearly two years after appeal was entered); Cavence *v.* Butler, 6 Binn. 52 (in which plaintiff moved to quash the appeal, but afterward appeared before arbitrators and pleaded his cause).

South Dakota.— Miller *v.* Lewis, 17 S. D. 448, 97 N. W. 364.

Tennessee.— Lookout Mountain, etc., R. Co. *v.* Flowers, 101 Tenn. 362, 47 S. W. 485.

to prevent the appellate court from obtaining jurisdiction.[20] Where the appellee appears merely for the purpose of questioning the jurisdiction of the court, he does not waive defects in the appeal,[21] nor does he waive anything by going to trial on the merits after a timely motion to dismiss.[22]

f. Notice of Appeal — (i) *In General.* When an appeal is not taken on the day judgment is rendered,[23] the appellant, or someone duly authorized by him,[24] must in many jurisdictions give notice of the appeal[25] to all adverse par-

Texas.— Cason *v.* Laney, 82 Tex. 317, 18 S. W. 667. See also Houston, etc., R. Co. *v.* Carroll, 14 Tex. Civ. App. 393, 37 S. W. 875, in which one of two defendants appealed, giving bond payable to plaintiff alone, and not to his co-defendant also. The latter appeared, but made no objection to the bond, and it was held that, the objection having been waived by the co-defendant, plaintiff could not raise it.

See 31 Cent. Dig. tit. "Justices of the Peace," § 578.

20. Battle *v.* Woolf, 23 Miss. 318; *Ex p.* Shethar, 4 Cow. (N. Y.) 540; Brown *v.* Brown, 12 S. D. 380, 81 N. W. 627; Towle *v.* Bradley, 2 S. D. 472, 50 N. W. 1057; Rudolph *v.* Herman, 2 S. D. 399, 50 N. W. 833.

An affidavit in forma pauperis, given in lieu of an appeal-bond, which does not conform to Tex. Rev. St. (1879) art. 1401, will not perfect an appeal from a justice's court, and it may be dismissed for want of jurisdiction after several continuances in the county court. Golightly *v.* Irvine, (Tex. App. 1890) 15 S. W. 48.

21. Bubb *v.* Cain, 37 Kan. 692, 16 Pac. 89.

22. Vowell *v.* Taylor, 8 Okla. 625, 58 Pac. 944.

23. Notice not required of appeal taken on day of trial see McCormick *v.* Bishop, 3 Greene (Iowa) 99; Brownsville *v.* Rembert, 63 Mo. 393; Page *v.* Atlantic, etc., R. Co., 61 Mo. 78; McGregor *v.* Leighton, 57 Mo. 597; Masterson *v.* Ellington, 10 Mo. 712; Slater *v.* The Convoy, 10 Mo. 513; Wolff *v.* Coffin, 46 Mo. App. 190; Crosby *v.* Clary, 43 Mo. App. 222; Sinclair *v.* McElmurry, 22 Fed. Cas. No. 12,895*a*, Hempst. 28; Billingsley *v.* Bell, 30 Fed. Cas. No. 18,237, Hempst. 24.

24. Attorney or agent may sign notice.— Totton *v.* Sonoma County Super. Ct., 72 Cal. 37, 13 Pac. 72 (attorneys other than those who appeared in the justice's court); Conrad *v.* Swanke, 80 Minn. 438, 83 N. W. 383; Hall *v.* Sawyer, 47 Barb. (N. Y.) 116 (agent may sign as "attorney," although he is not an attorney at law); Evangelical Lutheran St. Peter's Gemeinde *v.* Koehler, 59 Wis. 650, 18 N. W. 476. But see Bishop *v.* Van Vechten, 62 How. Pr. (N. Y.) 261, where it was held that the notice cannot be signed by appellant's attorney in fact, or agent, as such.

Authority of attorney at law presumed, unless challenged, see Conrad *v.* Swanke, 80 Minn. 438, 83 N. W. 383. See also Benjamin *v.* Houston, 24 Wis. 309, to the effect that the authority of an agent or attorney need not of necessity appear on the face of the papers.

If the notice is not signed, the record must show that it was presented to the justice by the appellant or someone authorized by him. Evangelical Lutheran St. Peter's Gemeinde *v.* Koehler, 59 Wis. 650, 18 N. W. 476.

25. *Alabama.*— See Murphy *v.* Wood, 103 Ala. 638, 16 So. 22, construing Code, § 3403.

Iowa.— Quillan *v.* Windsor, 6 Iowa 396. But see Bond *v.* Davis, 37 Iowa 163.

Michigan.— J. P. Scranton Lumber Co. *v.* Donovan, 111 Mich. 614, 70 N. W. 145, construing Local Acts (1895), No. 460, § 10.

Minnesota.— Smith *v.* Kistler, 84 Minn. 102, 86 N. W. 876; Marsile *v.* Milwaukee, etc., R. Co., 23 Minn. 4.

Missouri.— McGregor *v.* Leighton, 57 Mo. 597; McCabe *v.* Lecompte, 15 Mo. 78; Haag *v.* Ward, 89 Mo. App. 186; Studer *v.* Federle, 57 Mo. App. 534; Crosby *v.* Clary, 43 Mo. App. 222.

New Jersey.— Apgar *v.* Degraw, 28 N. J. L. 527.

New York.— Purdy *v.* Harrison, 1 Code Rep. 54.

North Carolina.— State *v.* Johnson, 109 N. C. 852, 13 S. E. 843; Green *v.* Hobgood, 74 N. C. 234. See also Hahn *v.* Guilford, 87 N. C. 172.

Oregon.— Carr *v.* Hurd, 3 Oreg. 160.

Pennsylvania.— Where defendant is appellant, and plaintiff appears neither in person nor by counsel, actual notice of the appeal must be given him before judgment can be rendered against him for want of a declaration; and where plaintiff appeals, defendant must be brought into the appellate court by notice before any step beyond filing a declaration can be taken in the action. Henry *v.* Rowe, 1 Woodw. 173.

South Carolina.— Whetstone *v.* Livingston, 54 S. C. 539, 32 S. E. 561; Scott *v.* Pratt, 9 S. C. 82.

South Dakota.— Houser *v.* Nolting, 11 S. D. 483, 78 N. W. 955; Minneapolis Threshing Mach. Co. *v.* Skau, 10 S. D. 636, 75 N. W. 199.

Texas.— Harris *v.* Credille, 1 Tex. App. Civ. Cas. § 562. *Compare* Edwards *v.* Morton, 92 Tex. 152, 46 S. W. 792.

United States.— Sinclair *v.* McElmurry, 22 Fed. Cas. No. 12,895*a*, Hempst. 28; Billingsley *v.* Bell, 30 Fed. Cas. No. 18,237, Hempst. 24.

See 31 Cent. Dig. tit. "Justices of the Peace," § 579.

But see Reiman *v.* Ater, 88 Ill. 299; Fix *v.* Quinn, 75 Ill. 232; Rowe *v.* Cannon, 84 Miss. 101, 36 So. 146; McBrien *v.* Riley, 38 Nebr. 561, 57 N. W. 385.

After the justice has refused to allow an appeal, notice would be useless, and appellant's remedy is by certiorari. Merrell *v.* McHone, 126 N. C. 528, 36 S. E. 35. And see *infra*, V, B.

ties,[26] and in some jurisdictions to the justice;[27] and if the required notice is not given at the time and in the manner prescribed by law, the appellate court will acquire no jurisdiction,[28] unless the appellee voluntarily appears,[29] and must either dismiss the appeal or affirm the judgment below.[30]

(II) *Filing and Service of Notice and Return*—(A) *In General.* A notice of appeal must be served by someone duly authorized,[31] and due service must be had, under some statutes, before it can be filed.[32] Mailing a notice to the justice by registered letter is a sufficient compliance with a statute requiring personal service upon him or his clerk,[33] and the tender of a notice to the justice, who refuses to receive it, but who accepts it as a sufficient service, is sufficient to save the right of appeal.[34] The fact of service may be established by the return of a duly authorized officer,[35] or, where notice is given in open court at the time of the rendition of judgment, it may be established by the transcript;[36] and it has been held that service may be proved by parol.[37] Where the record does not

26. Defendants jointly liable, but not served, are not adverse parties on whom notice must be served of an appeal by the other defendants. Terry *v.* San Diego County Super. Ct., 110 Cal. 85, 42 Pac. 464.

Tex. Rev. St. art. 1638, providing for notice of appeal, applies only to the party against whom the appeal is taken. Curtis *v.* Bernstein, 2 Tex. App. Civ. Cas. § 671.

27. Mitchell *v.* Watkins, 21 N. Y. App. Div. 285, 47 N. Y. Suppl. 339; Gray *v.* Wolcott, 5 N. Y. St. 129; Baker *v.* Irvine, 58 S. C. 436, 36 S. E. 742; Bigham *v.* Holliday, 52 S. C. 528, 30 S. E. 485; McKilver *v.* Manchester, 1 Wash. Terr. 255; Italian-Swiss Agricultural Colony *v.* Bartagnolli, 9 Wyo. 204, 61 Pac. 1020.

28. *Alabama.*— Hightower *v.* Crow, 102 Ala. 584, 15 So. 350, to the effect that a judgment by default against appellee will be reversed, unless the record affirmatively shows that notice was given.

Iowa.— Sprote *v.* Marshall, 4 Greene 344 (judgment of district court held a nullity); McCormick *v.* Bishop, 3 Greene 99 (no valid judgment can be given without notice of appeal, or voluntary appearance of appellee).

New Jersey.— Apgar *v.* Degraw, 28 N. J. L. 527, judgment of appellate court reversed.

Pennsylvania.— Acor *v.* Acor, 7 Pa. Dist. 360.

South Carolina.— Scott *v.* Pratt, 9 S. C. 82.

See 31 Cent. Dig. tit. "Justices of the Peace," § 585.

But see Marsh *v.* Cohen, 68 N. C. 283.

29. See *infra*, V, A, 6, f, (VI).

30. Dalzell *v.* San Benito County Super. Ct., 67 Cal. 453, 7 Pac. 910 (dismissal *ex mero motu*); Brownsville *v.* Rembert, 63 Mo. 393; Page *v.* Atlantic, etc., R. Co., 61 Mo. 78; Nay *v.* Hannibal, etc., R. Co., 51 Mo. 575; Blake *v.* Downey, 51 Mo. 437; Masterson *v.* Ellington, 10 Mo. 712; Slater *v.* The Convoy, 10 Mo. 513; Hart *v.* Mayhugh, 75 Mo. App. 121; Wolff *v.* Coffin, 46 Mo. App. 190; Crosby *v.* Clary, 43 Mo. App. 222; Holdridge *v.* Marsh, 28 Mo. App. 283; Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349; Thurston *v.* Kansas Pac. R. Co., 1 Mo. App. 400; Harris *v.* Credille, 1 Tex. App. Civ. Cas. § 562. But see Bond *v.* Davis, 37 Iowa 163.

After motion for affirmance notice is ineffective. Brownsville *v.* Rembert, 63 Mo. 393.

31. State *v.* Johnson, 109 N. C. 852, 13 S. E. 843.

Appellant cannot serve notice. Williams *v.* Schmidt, 14 Oreg. 470, 13 Pac. 305.

Attorney of appellant cannot serve notice. Clark *v.* Deloach Mills Mfg. Co., 110 N. C. 111, 14 S. E. 518 [*following* State *v.* Johnson, 109 N. C. 852, 13 S. E. 843].

32. Looney *v.* Drometer, 69 Minn. 505, 72 N. W. 797 (to the effect that it is a jurisdictional prerequisite that the original notice with proof of service be filed with the justice); Henness *v.* Wells, 16 Oreg. 266, 19 Pac. 121 [*following* Briney *v.* Starr, 6 Oreg. 207] (filing notice without "proof of service indorsed thereon" is ineffectual). See also Hall *v.* El Dorado County Super. Ct., 71 Cal. 550, 12 Pac. 672, holding that it is not necessary, under Code Civ. Proc. § 974, that the notice should be filed before service. But see State *v.* King County Super. Ct., 17 Wash. 54 (1897), 48 Pac. 733, construing 2 Wash. Code, § 1631, and holding that notice must be filed before service, and that the copy served should contain a copy of the filing.

33. Mitchell *v.* Watkins, 21 N. Y. App. Div. 285, 47 N. Y. Suppl. 339, construing Code Civ. Proc. § 3047.

34. Gray *v.* Wolcott, 5 N. Y. St. 129.

35. Hansard *v.* German Ins. Co., 62 Mo. App. 146. *Compare* Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349, in which the return was made by an unauthorized officer, and it was held that it was not even *prima facie* evidence of the facts recited therein. Under Mo. Rev. St. (1879) § 3508, making it the duty of the constable to serve notice of appeal from a justice, he acts, in doing so, in his official capacity, under his official oath, and the responsibility of his bond, and his return is *prima facie* evidence of the service in the manner stated therein. Thomas *v.* Moore, 46 Mo. App. 22.

36. Newcomb *v.* Boulware, 1 Nebr. 428.

37. Hughes *v.* Hays, 4 Mo. 209, holding also that if the witness states that he served the notice in writing, signed by the opposite party, although he does not recollect if the

affirmatively show due service, the presumption is that there was none, and the burden to prove that fact is on the appellant, in case objection is made.[38] A slight variance between the notice of appeal served on the justice and the copy served on the appellee is not ground for dismissing the appeal.[39] The return of a constable upon service of notice of appeal need not be sworn to.[40]

(B) *On Whom Service Must or May Be Made.* In some jurisdictions the notice of appeal must be served personally upon the justice and the appellee, if they are within the county,[41] and substituted service can only be had where the justice or appellee is absent,[42] or where the appellee is a non-resident of the county;[43] but in other jurisdictions, service of notice of appeal may be made on the attorney or agent of the adverse party.[44] Service of notice of appeal on one partner is notice to both,[45] and where the appellee is a corporation, service may be made on the manager.[46] The attorney who represented the appellee before the justice is not entitled to notice of appeal,[47] and after the appellee's death and before the appointment of an administrator, there is no person on whom service can be made.[48] In New York, where a notice of appeal, specifying the particulars in which the judgment should have been more favorable to the appellant, is served upon the respondent, the latter's offer of acceptance of appellant's terms must be served not only on appellant, but also upon the justice.[49]

(C) *Time of Giving or Serving Notice.* The time within which notice of appeal must be given or served is regulated by statute in the various jurisdictions.

names of the parties were inserted therein, this is *prima facie* evidence of notice.

38. Minneapolis Threshing Mach. Co. *v.* Skau, 10 S. D. 636, 75 N. W. 199.

39. McKilver *v.* Manchester, 1 Wash. Terr. 255. But *compare* Houser *v.* Nolting, 11 S. D. 483, 78 N. W. 955.

40. Boyle *v.* Tolen, 8 Mo. App. 93.

41. Bingham *v.* Holliday, 52 S. C. 528, 30 S. E. 485. *Compare* Baker *v.* Irvine, 58 S. C. 436, 36 S. E. 742.

42. **Under Minn. Gen. St. (1878) c. 65,** service of notice of appeal can be made otherwise than personally by leaving a copy of the notice "at the residence" of the person to be served. See Stolt *v.* Chicago, etc., R. Co., 49 Minn. 353, 51 N. W. 1103; Tomer *v.* Advance Thresher Co., 45 Minn. 293, 47 N. W. 810.

Where a justice is absent, notice of appeal may be served on his agent or a member of his family of suitable age. People *v.* Ulster C. Pl., 7 Wend. (N. Y.) 492; People *v.* Works, 7 Wend. (N. Y.) 486.

43. **Under Mo. Rev. St. (1879) § 3055,** if appellee does not reside in the county, "and has no agent in the suit therein, within the knowledge of the justice," notice of appeal may be served by leaving a copy with the justice. If the justice knows that appellee has an attorney attending to his interests in the suit, notice left with the justice is insufficient. Southard *v.* Nelson, 43 Mo. App. 210.

In New York service on an attorney or agent can only be had when the appellee is a non-resident of the county (Duffy *v.* Morgan, 2 Sandf. 631; Andrews *v.* Snyder, 6 N. Y. Civ. Proc. 333; Schermerhorn *v.* Golief, Code Rep. N. S. 290), and such attorney or agent is a resident (Lake *v.* Kels, 11 Abb. Pr. N. S. 37). *Compare* Bennett *v.* Kenyon, 5 N. Y. St. 496.

Under S. C. Code, § 360, service of notice of appeal cannot be made on an agent of a non-resident of the county, if such agent is also a non-resident. Sheldon *v.* Pearson, 42 S. C. 111, 20 S. E. 26.

44. *California.*— Welton *v.* Garibaldi, 6 Cal. 245.

Illinois.— Johnston *v.* Brown, 51 Ill. App. 549; Vallens *v.* Hopkins, 51 Ill. App. 337.

Missouri.— Bensberg *v.* Turk, 40 Mo. App. 227. *Compare* Ellis *v.* Kyes, 47 Mo. App. 155, in which the notice was served on an attorney employed to conduct the case for the appellee in the circuit court, but who had not entered a general appearance, and it was held that the notice gave the circuit court no jurisdiction.

North Dakota.— Richmire *v.* Andrews, etc., El. Co., 11 N. D. 453, 92 N. W. 819.

Oregon.— Hughes *v.* Clemens, 28 Oreg. 440, 42 Pac. 617; Lewis, etc., Printing Co. *v.* Reeves, 26 Oreg. 445, 38 Pac. 622. See also Carr *v.* Hurd, 3 Oreg. 160, where the qualification is made that the attorney must reside in the county where the trial was had.

See 31 Cent. Dig. tit. "Justices of the Peace," § 583.

45. Miller *v.* Perrine, 1 Hun (N. Y.) 620, *sub nom.* Perrine *v.* Miller, 4 Thomps. & C. (N. Y.) 36.

46. Pacific Coast R. Co. *v.* San Luis Obispo County Super. Ct., 79 Cal. 103, 21 Pac. 609.

Where appellee is a quasi-corporation, such as a county board of excise commissioners, notice of appeal must be served on all the members. Metcalf *v.* Garlinghouse, 40 How. Pr. (N. Y.) 50.

47. Byers *v.* Cook, 13 Oreg. 297, 10 Pac. 417.

48. Clark *v.* Snyder, 40 Hun (N. Y.) 330.

49. Smith *v.* Hinds, 30 How. Pr. (N. Y.) 187.

These statutes are mandatory, and must be complied with, unless their requirements are waived by the appellee.[50]

(III) *Requisites and Sufficiency*—(A) *In General.* Where notice of appeal is not given at the trial,[51] it must be in writing and signed by the person giving it,[52] and must show that it is given by or on behalf of the appellant, or by someone authorized by him.[53] The notice must be definite and certain,[54] must

50. *Idaho.*— To effectuate an appeal the notice must be filed with the justice, a copy served on the adverse party, and the undertaking filed, within thirty days from the rendition of judgment; but the order in which these things are done is not material. Salt Lake Brewing Co. *v.* Gillman, 2 Ida. (Hasb.) 195, 10 Pac. 32.

Iowa.— Under Code (1873), § 4691, notice of appeal by a prosecuting witness must be given at the time judgment is rendered. State *v.* Knapf, 61 Iowa 522, 16 N. W. 590.

Louisiana.— Appellant has until the regular term of the district court to make service. State *v.* Voorhies, 49 La. Ann. 1562, 22 So. 880.

Missouri.— See Priest *v.* Missouri Pac. R. Co., 85 Mo. 521; Dooley *v.* Missouri Pac. R. Co., 83 Mo. 103; Davis *v.* Schields, 14 Mo. App. 397, construing Rev. St. §§ 3056, 3057. And see Evans *v.* Hannibal, etc., R. Co., 58 Mo. App. 427, to the effect that where a change of venue is taken at the first term after an appeal, the first succeeding term of the court to which the venue is changed constitutes the second term of the appellate court for the purpose of notice of the appeal.

New York.— Notice may be served as soon as judgment is rendered (Griswold *v.* Van Deusen, 2 E. D. Smith 178), and, under the amendment of 1851, must be served in twenty days (Thomas *v.* Thomas, 18 Hun 481). See also Tullock *v.* Bradshaw, 1 Code Rep. 53, construing Code, tit. 9, c. 5, § 303.

Ohio.— Rev. St. § 6494, relating to appeals from an order of a justice overruling a motion to dissolve an attachment on giving notice of appeal, is sufficiently complied with if notice is given within ten days, as provided by section 6584, relating to appeals generally from justices. Bernard *v.* Schwartz, 22 Ohio Cir. Ct. 147, 12 Ohio Cir. Dec. 183.

Oregon.— Under Code, § 2119, an appeal is sufficient where both undertaking and notice are filed within thirty days after entry of judgment, as required by section 2118, and it is immaterial that the undertaking is filed first. Brown *v.* Jessup, 19 Oreg. 288, 24 Pac. 232.

South Carolina.— Under Code, §§ 359, 360, appellant shall, within five days after judgment, serve a notice, stating the grounds of appeal, on the justice and adverse party, and if the judgment is rendered on process not personally served, and defendant did not appear, he shall have five days after personal notice of the judgment to serve notice of appeal. Manuel *v.* Loveless, 56 S. C. 426, 35 S. E. 1, 54 S. C. 346, 32 S. E. 421. See also Foot *v.* Williams, 18 S. C. 601.

Texas.— Under Rev. St. art. 1639, appellant has ten days after judgment in which to file notice of appeal (Bach *v.* Ginacchio, 1 Tex. App. Civ. Cas. § 1315), but notice cannot be given after court has adjourned and in vacation, although a notice for a new trial was overruled in vacation (Williams *v.* Dennis, 1 Tex. App. Civ. Cas. § 1233).

United States.— See Kirk *v.* Armstrong, 14 Fed. Cas. No. 7,838*a*, Hempst. 283, to the effect that where an appeal is not taken on the day of trial, ten days' notice before the sitting of the next court authorized to try the same must be given to the opposite party.

See 31 Cent. Dig. tit. "Justices of the Peace," § 584.

51. A verbal notice of appeal, given by the justice in the presence of both parties at the trial, is sufficient. Richardson *v.* Debnam, 75 N. C. 390.

52. Where the adverse party is not present when appeal is prayed, a written notice must be given and served. Marion *v.* Tilley, 119 N. C. 473, 26 S. E. 26.

Notice void for want of signature see Larrabee *v.* Morrison, 15 Minn. 196.

Indorsement on the outside of notice held sufficient signature see Burrows *v.* Norton, 2 Hun (N. Y.) 550.

A notice signed "J. H. B.," where the judgment was rendered against "H. B.," is insufficient, since it does not show that the appeal was taken by the party against whom judgment was rendered. Stone *v.* Baer, 82 Mo. App. 339.

Where the state of Ohio prosecutes an appeal notice entered on the record is proper notice of appeal, as Rev. St. § 6408, requiring a written notice to be given, does not apply to the state. Humphreys *v.* State, 24 Ohio Cir. Ct. 238.

53. Palmer *v.* Peterson, 46 Wis. 401, 1 N. W. 73. *Compare* Rutledge *v.* Humboldt County Super. Ct., 67 Cal. 85, 7 Pac. 144, where it was held that the omission of the persons signing to designate themselves as attorneys for appellant will not render a motion of appeal ineffectual.

"Strict accuracy is by no means necessary. . . . Mistakes, however numerous, are immaterial if the notice yet contains enough to fairly identify the judgment, the parties, and the court, and to show that it was made by the party appealing, or some one authorized to do so, which authority need not expressly appear, it being sufficient if it be fairly inferable from the language of the notice and the manner in which it is signed." Patrick *v.* Baldwin, 109 Wis. 342, 344, 85 N. W. 350.

Signature of attorneys held sufficient see Igo *v.* Bradford, 110 Mo. App. 670, 85 S. W. 618.

54. An appeal from the "whole judgment"

be from the judgment rendered,[55] and, under some statutes, must state whether the appeal is from the whole or a part of the judgment,[56] and whether it is taken on questions of law or fact, or both.[57] It must be properly entitled,[58] and where the caption and venue show that the appeal is taken from a judgment rendered in one county, by a justice in and for that county, the fact that the notice is directed to him as justice of another county is immaterial.[59] Where a notice of appeal is sufficient and regular, the appeal will not be dismissed because a new trial is demanded, and the case is not one in which the appellant is entitled to a new trial;[60] nor is a notice of appeal from a judgment in an action of forcible entry and detainer invalidated by a clause limiting the appeal to questions of law alone.[61]

(B) *Description of Judgment.* A notice of appeal, to be effective, must properly designate the judgment appealed from, by a sufficient description to show the applicability of the notice to the judgment, without resort to extrinsic evidence.[62] But the object of a notice of appeal is accomplished when the appellate court can ascertain from an inspection of the notice what particular judgment the appellant complains of.[63]

is sufficiently definite. Price *v.* Van Caneghan, 5 Cal. 123.

Notice of intention to appeal is insufficient. Hempstead *v.* Darby, 2 Mo. 25.

55. See Clark *v.* Deloach Mills Mfg. Co., 110 N. C. 111, 14 S. E. 518, in which defendant attempted to appeal, not from the judgment generally, but by a limited notice of appeal in the nature of a special appearance.

56. Kirkpatrick *v.* Dakota Cent. R. Co., 4 Dak. 481, 33 N. W. 103, construing Justices Code, § 89, and holding that a notice that defendant "appeals from the judgment entered" is sufficient.

57. See Purcell *v.* Booth, 6 Dak. 17, 50 N. W. 196; Karr *v.* Chicago, etc., R. Co., 6 Dak. 14, 50 N. W. 125, construing Justices Code, §§ 89, 91. Under Minn. Gen. St. (1894) § 5068, providing that on appeal from a justice the party appealing shall serve a notice on the opposite party specifying the grounds of appeal generally, and that the appeal is taken on questions of fact alone or on questions of law alone or on questions of both fact and law, notice that defendant has appealed from the judgment of a justice "and from the whole of said judgment, and a new trial of said action is demanded," is insufficient. Buie *v.* Great Northern R. Co., 94 Minn. 405, 103 N. W. 11.

58. See State *v.* Spokane County Super. Ct., 7 Wash. 223, 34 Pac. 922, in which a notice entitled: "State of Washington, County of Spokane, ss.: Before T. J. Cartwright, Justice of the Peace," was held not objectionable as not entitled in a court.

59. Kirkpatrick *v.* Dakota Cent. R. Co., 4 Dak. 481, 33 N. W. 103.

60. Kimball *v.* Rich, 3 N. Y. Suppl. 248; Dudley *v.* Brinckerhoff, 13 N. Y. Civ. Proc. 92.

61. Zoller *v.* McDonald, 23 Cal. 136.

62. Descriptions held insufficient see Pettingill *v.* Donnelly, 27 Minn. 332, 7 N. W. 360; Hammond *v.* Kroff, 36 Mo. App. 118; Beck *v.* Thompson, 35 Oreg. 182, 57 Pac. 419, 76 Am. St. Rep. 471; Chipman *v.* Bronson, 3 Oreg. 320; Clune *v.* Wright, 96 Wis. 630, 71 N. W. 1041; Morris *v.* Brewster, 60 Wis. 229, 19 N. W. 50; Widner *v.* Wood, 19 Wis. 190.

The identification should be such that, when the record is made up, the notice will of itself show that the cause described in the notice is the same cause that was pending in the court below. Chipman *v.* Bronson, 3 Oreg. 320.

63. Notices held sufficient see Munroe *v.* Herrington, 99 Mo. App. 288, 73 S. W. 221; Holschen Coal Co. *v.* Missouri Pac. R. Co., 48 Mo. App. 578; Allen *v.* Byerly, 32 Oreg. 117, 48 Pac. 474 [*following* State *v.* Hanlon, 32 Oreg. 95, 48 Pac. 353]; Crawford *v.* Wist, 26 Oreg. 596, 39 Pac. 218; Starks *v.* Stafford, 14 Oreg. 317, 12 Pac. 670; Lancaster *v.* McDonald, 14 Oreg. 264, 12 Pac. 374; Moorehouse *v.* Donica, 13 Oreg. 435, 11 Pac. 71; State *v.* Spokane County Super. Ct., 7 Wash. 223, 34 Pac. 922; Hender *v.* Ring, 90 Wis. 358, 63 N. W. 282; Noall *v.* Halonen, 84 Wis. 402, 54 N. W. 729; Friemark *v.* Rosenkrans, 81 Wis. 359, 51 N. W. 557; Hills *v.* Miles, 13 Wis. 625.

Notices liberally construed.—"The appellate court should construe a notice of appeal liberally, and hold that jurisdiction is conferred by its service if, by fair construction or reasonable intendment, it can ascertain therefrom that the appeal is taken from a judgment in a particular action." Allen *v.* Byerly, 32 Oreg. 117, 119, 48 Pac. 474. But see State *v.* Hammond, 92 Mo. App. 231, where it is said that great particularity is required in notices of appeal, since their function is much the same as that of an original summons.

Effect of amendment of transcript.—Where after service of a sufficient notice, the justice without rule of court filed an amended transcript which varied the amount of the judgment from that given in the original transcript, it was held that the court, in passing on the sufficiency of the notice, could not consider the amended transcript. Thomas *v.* Moore, 46 Mo. App. 22.

(c) *Statement of Grounds of Appeal.* In several states the notice of appeal is required by statute to state the grounds on which the appeal is taken.[64]

(iv) *Substitutes For Notice.* Neither actual knowledge of an appeal by the appellee,[65] nor the filing of an appeal-bond,[66] nor notice to the appellee of an application for a change of venue from the court to which the appeal is returnable,[67] nor a request to the justice by defendant's attorney, made before judgment, and in the presence of plaintiff, that he will in case he renders judgment against defendant make an entry that he prays an appeal,[68] will take the place of a notice of appeal. But in Ohio the filing within the time limited of a transcript of a justice's judgment in the court of common pleas by a fiduciary who has filed a bond within the state for the faithful performance of his duties appeals the case, although no notice was given the justice of his intention to appeal.[69]

(v) *Defects and Amendment of Notice.* Where a notice of appeal is defective, the remedy is by motion to dismiss the appeal in the appellate court;[70] but a defective notice may be amended in the appellate court,[71] unless the defect is one which goes to the jurisdiction of that court.[72]

(vi) *Waiver of Want of Notice and of Defects.* The voluntary appearance of the appellee,[73] or of his attorney in the action before the jus-

64. People *v.* El Dorado County Ct., 10 Cal. 19; Buie *v.* Great Northern R. Co., 94 Minn. 405, 103 N. W. 11; Smith *v.* Kistler, 84 Minn. 102, 86 N. W. 876; Jones *v.* Cook, 11 Hun (N. Y.) 230; Avery *v.* Woodbeck, 62 Barb. (N. Y.) 557; Suydam *v.* Munson, 2 E. D. Smith (N. Y.) 198; Griswold *v.* Van Deusen, 2 E. D. Smith (N. Y.) 178; Schwartz *v.* Bendel, 2 E. D. Smith (N. Y.) 123; Derby *v.* Hannin, 5 Abb. Pr. (N. Y.) 150; Younghanse *v.* Fingar, 43 How. Pr. (N. Y.) 259; Wallace *v.* Patterson, 29 How. Pr. (N. Y.) 170; Morton *v.* Clark, 11 How. Pr. (N. Y.) 498; Dargan *v.* West, 27 S. C. 156, 3 S. E. 68; Wolfe *v.* Port Royal, etc., R. Co., 25 S. C. 379.

A specification that the justice rejected proper evidence offered by appellant is sufficient to authorize an examination of the ruling rejecting the evidence. Veddoe *v.* Van Buren, 14 Hun (N. Y.) 250.

Where the claim exceeds fifty dollars, an allegation that the judgment was against the law and evidence is a sufficient compliance with the statute. Fowler *v.* Westervelt, 40 Barb. (N. Y.) 374.

Statement of grounds held sufficient in South Carolina see Dargan *v.* West, 27 S. C. 156, 3 S. E. 68.

A notice is insufficient which merely alleges that the judgment was against law and evidence (Amsdell *v.* McCaffrey, 16 Hun (N. Y.) 255); that it is against the weight of the evidence is not supported by the evidence, on the evidence plaintiff was not entitled to recover, and the judgment is contrary to law upon the evidence (Moran *v.* McClearns, 43 How. Pr. (N. Y.) 77); that the evidence was incompetent did not support the judgment that on it the plaintiff was not entitled to recover, and that the judgment was contrary to law (Delong *v.* Brainard, 1 Thomps. & C. (N. Y.) 1); that the judgment should have been in appellant's favor, and against plaintiff, for two hundred dollars, and for damages and costs, and that it should have been for a less sum against appellant (Wadley *v.* Davis, 43 How. Pr. (N. Y.) 82); that it should have been in appellant's favor and against defendant, and that there was no evidence to warrant the judgment (Colvert *v.* Hall, 43 How. Pr. (N. Y.) 80); that it should have been in appellant's favor, for no cause of action (Wynkoop *v.* Halbut, 43 Barb. (N. Y.) 266, 25 How. Pr. 158); or which only states "that manifest injustice had been done the defendant by the said judgment, and that defendant's default in not being present at the trial was excusable" (Wolfe *v.* Port Royal, etc., R. Co., 25 S. C. 379, 380.).

65. Walker *v.* Carrew, 56 Mo. App. 320.

66. State *v.* Leyden, 13 Iowa 433.

67. Hart *v.* Mayhugh, 75 Mo. App. 121; Evans *v.* Hannibal, etc., R. Co., 58 Mo. App. 427.

68. Green *v.* Hobgood, 74 N. C. 234.

69. Terry Clock Co. *v.* Mussey, 9 Ohio Dec. (Reprint) 449, 13 Cinc. L. Bul. 568, construing Rev. St. § 6408, and holding that the demand for the transcript was in itself sufficient notice to the justice.

70. Webster *v.* Hopkins, 11 How. Pr. (N. Y.) 140.

71. Walrath *v.* Klock, 22 N. Y. App. Div. 220, 47 N. Y. Suppl. 1047; McCarthy *v.* Crowley, 1 Silv. Sup. (N. Y.) 364, 5 N. Y. Suppl. 675; Wood *v.* Kelly, 2 Hilt. (N. Y.) 334; O'Reilly *v.* Block, 23 N. Y. Suppl. 670.

72. **Proof of service of notice** cannot be amended so as to show due service, after the expiration of the ten days within which proof of service must be filed with the justice. Graham *v.* Conrad, 66 Minn. 471, 69 N. W. 334. See also Stolt *v.* Chicago, etc., R. Co., 49 Minn. 353, 51 N. W. 1103.

73. Payne *v.* Current River R. Co., 75 Mo. App. 14; Moorehouse *v.* Donica, 13 Oreg. 435, 11 Pac. 71; Hayworth *v.* Rogan, 77 Tex. 362, 14 S. W. 70; Texas, etc., R. Co. *v.* Netherland, 2 Tex. App. Civ. Cas. § 237. But see Palmer *v.* Peterson, 46 Wis. 401, 1 N. W. 73, in which the notice was void because given by

tice,[74] and taking part in the proceedings in the appellate court, waives the want of, or defects in, the notice of appeal. So too a stipulation for the trial of the case at a certain term of the appellate court is a waiver of notice,[75] and the same is true where the appellee accepts service of notice to take depositions after the appeal, appears at the taking of the depositions, objects to certain questions asked of the witness, and has the grounds of objection noted.[76] On the other hand, an admission of service of a notice of appeal, void for want of signature, does not stop the appellee from taking advantage of the defective notice,[77] and a special appearance to ask an affirmance for failure to give notice does not waive the want of notice,[78] unless upon refusal of his motion the appellee enters into the trial.[79]

g. Entry, Docketing, and Appearance — (I) *Entry and Docketing* — (A) *In General.* Until an appeal is filed in the appellate court, that court has no jurisdiction of the case,[80] and unless the appellant has the appeal entered and the case docketed, the court may dismiss the appeal,[81] or, upon the complaint of the adverse party, affirm the judgment;[82] where both parties appeal, only one cause should be docketed in the appellate court,[83] and in Texas the parties stand, not as appellant and appellee, but as plaintiff and defendant, as they stood before the justice, and the case should be so docketed.[84] Where a judge grants an appeal in vacation, the written application and proofs, as well as the bond and the order granting the appeal, should be transmitted to the clerk of the appellate court, and entered by him in the order book under the title of the case, and a copy served on the justice.[85] In Georgia it is the duty of the clerk of the appellate court to docket appeals, and if this duty is omitted at the proper time he may perform it at any time thereafter, without leave or direction from the court, and without notice to the appellant.[86]

(B) *Time For Entry and Docketing.* The requirements of the statutes as to the time within which an appeal from a justice's judgment shall be entered and docketed must be complied with, or the appeal will be dismissed or the judgment below affirmed upon motion of the appellee.[87] The court may, however, in the

an unauthorized person, and it was held that the consent of the parties could not give jurisdiction.

74. Matthews *v.* Marin County Super. Ct., 70 Cal. 527, 11 Pac. 665. *Compare* Pattison *v.* Missouri, etc., R. Co., 93 Mo. App. 643, 67 S. W. 749. And see Halford *v.* Coe, 4 Kan. 561, in which it was held that where defendant appealed, the entering by an attorney of his name as attorney for plaintiff and inquiries by him about the case was not such an appearance by plaintiff as to waive the necessity of notice.

75. State *v.* Vorhies, 49 La. Ann. 1562, 22 So. 880.

76. Bates *v.* Scott, 26 Mo. App. 428. *Compare* Wolff *v.* Danforth Artificial Light Co., 70 Mo. 182, where it was held that a notice to take depositions, served upon the appellant, will not operate as a waiver of notice, if the notice to take depositions does not appear to have been given by appellee or his attorney, and the depositions are not filed in court.

77. Larrabee *v.* Morrison, 15 Minn. 196, construing Gen. St. (1866) c. 65, § 104, subd. 4.

78. Rowley *v.* Hinds, 50 Mo. 403; Hart *v.* Mayhugh, 75 Mo. App. 121; Wolf *v.* Harrington, 38 Mo. App. 276.

79. Parmerlee *v.* Williams, 71 Mo. 410.

80. Poindexter *v.* Russell, 11 Ark. 664.

Where appeal papers are filed in the wrong court by mistake, it is proper for the clerk of such court to transfer them to the court having jurisdiction. Wadhams *v.* Hotchkiss, 80 Ill. 437. See also Steckmesser *v.* Graham, 10 Wis. 37.

Presumption of regularity in filing.—Where an appeal is marked "filed" by a prothonotary on the proper day, it will be presumed to have been regularly filed, and although it was not, the prothonotary is incompetent to contradict his own act. Egbert *v.* Miles, 21 Pa. Co. Ct. 542.

81. McGehee *v.* Carroll, 31 Ark. 550; Smith *v.* Allen, 31 Ark. 268.

82. Leyden *v.* Sweeney, 118 Mass. 418.

83. Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328.

84. Perry *v.* McKinzie, 4 Tex. 154.

85. Hubbard *v.* Yocum, 30 W. Va. 740, 5 S. E. 867.

86. Combs *v.* Choven, 89 Ga. 779, 15 S. E. 686, where it was held that appellant's failure to keep sight of the case, and to ascertain when it stands for trial, is negligence against which equity will not relieve after the case has been tried *ex parte*, and judgment rendered for respondent.

87. *Arizona.*— Zechendorf *v.* Zechendorf, 1 Ariz. 401, 25 Pac. 648.

Arkansas.— McGehee *v.* Carroll, 31 Ark. 550; Smith *v.* Allen, 31 Ark. 268.

exercise of its discretion, and for good cause shown, relieve the appellant, and allow his appeal to be filed and docketed at a later time.[88]

(II) *Appearance*—(A) *In General.* A party to an appeal from a justice of the peace cannot be put in default and a valid judgment taken against him before the expiration of the time limited for his appearance.[89] But an appeal from a justice's judgment, without anything further, amounts to a full appearance on the part of the appellant to the action in the appellate court;[90] and where the parties

Colorado.— Busby *v.* Camp, 16 Colo. 38, 26 Pac. 326; Hall *v.* Denver Omnibus, etc., Co., 13 Colo. App. 417, 58 Pac. 402.

Georgia.— Norrell *v.* Morrison, 99 Ga. 317, 25 S. E. 700 [*distinguishing* Harvey *v.* Allen, 94 Ga. 454, 19 S. E. 246].

Iowa.— See Vasey *v.* Parker, 118 Iowa 615, 92 N. W. 708, construing Code, §§ 3660, 4559, and holding that where the clerk dockets the case before the second day of the term, without payment of the fee, the subsequent payment of the docket-fee by the appellee does not entitle him to an affirmance.

Massachusetts.— Leyden *v.* Sweeney, 118 Mass. 418.

Missouri.— Under Rev. St. (1889) § 6341, all appeals allowed ten days before the first day of the term of the appellate court next after the appeal is allowed should be determined at such term, unless continued for cause (Lieberman *v.* Findley, 84 Mo. App. 384), and, under section 3370, an appeal from a judgment in unlawful entry and detainer is returnable to the circuit court within six days after the rendition of judgment, if the judgment is rendered during term-time. Warner *v.* Donahue, 99 Mo. App. 37, 72 S. W. 492; Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451; Diesing *v.* Reilly, 77 Mo. App. 450).

North Carolina.—An appeal should be dismissed where it was not docketed at the next succeeding term of the superior court commencing more than ten days after judgment rendered. Southern Pants Co. *v.* Smith, 125 N. C. 588, 34 S. E. 552; Davenport *v.* Grissom, 113 N. C. 38, 18 S. E. 78; State *v.* Johnson, 109 N. C. 852, 13 S. E. 843; Ballard *v.* Gay, 108 N. C. 544, 13 S. E. 207. See also Johnson *v.* Andrews, 132 N. C. 376, 43 S. E. 926, construing Pub. Laws (1901), p. 175, c. 28, § 2, and holding that the appeal is to be docketed on the trial docket for the next term, although it is a criminal term.

Pennsylvania.—Ward *v.* Letzkus, 152 Pa. St. 318, 25 Atl. 778; Carothers *v.* Cummings, 63 Pa. St. 199; Seltzer *v.* Schoener, 13 Pa. Co. Ct. 288; Jenkins Tp. *v.* Paradise Tp., 8 Pa. Co. Ct. 164; Singer Co. *v.* Rice, 1 Chest. Co. Rep. 108; Reinhart *v.* Seuer, 20 Lanc. L. Rev. 311. *Compare* Potts *v.* Staeger, 12 Pa. St. 363; Beale *v.* Dougherty, 3 Binn. 432; Glennan *v.* Delaware County, 8 Del. Co. 8 (in which the appeals were held to be in time); Singerfield *v.* George, 30 Leg. Int. 321; Hartranft *v.* Clarke, 12 Phila. 487.

See 31 Cent. Dig. tit. "Justices of the Peace," § 393.

But *compare* Marshall *v.* Mitchell, 59 S. C. 523, 38 S. E. 158; Citizens' R. Co. *v.* Madden, 15 Tex. Civ. App. 409, 39 S. W. 323.

Where the return-day falls upon a holiday, an appeal filed upon the following day is in time. First Nat. Bank *v.* Mead, 29 Pittsb. Leg. J. N. S. (Pa.) 120.

After an execution had issued immediately upon a justice's judgment, and the money had been made by a sale of personal property, it was held too late to enter an appeal. Patterson *v.* Peironnet, 7 Watts (Pa.) 337.

88. *Minnesota.*— Sundet *v.* Steenerson, 69 Minn. 351, 72 N. W. 569; Christian *v.* Dorsey, 69 Minn. 346, 72 N. W. 568.

Montana.— Stevenson *v.* Cadwell, 14 Mont. 311, 37 Pac. 10.

New Jersey.—State *v.* Judges Bergen County C. Pl., 3 N. J. L. 737.

North Carolina.— Johnson *v.* Andrews, 132 N. C. 376, 43 S. E. 926; Jerman *v.* Gulledge, 129 N. C. 242, 39 S. E. 835, in which the failure to make up and return the appeal in time was due to plaintiff's attorney.

Pennsylvania.— Where the appellant is misinformed by the justice as to the time when it was necessary to file his appeal, he will be allowed to enter it *nunc pro tunc.* Henderson *v.* Risser, 9 Pa. Dist. 505; Swinehart *v.* Montgomery, 1 Pa. Dist. 802. But see Kichline *v.* Shimer, 2 Pa. Dist. 355; Barber *v.* Beach, 4 Lack. Leg. N. 57.

See 31 Cent. Dig. tit. "Justices of the Peace," § 594.

Where leave has been improvidently granted to appellant to file his appeal at a later time, the court may subsequently vacate its order and restore the respondent to the right to enter the judgment of the justice against the appellant. Sundet *v.* Steenerson, 69 Minn. 351, 72 N. W. 569.

89. Sturges *v.* Hancock, 4 App. Cas. (D. C.) 289.

90. *Colorado.*—Wyatt *v.* Freeman, 4 Colo. 14.

Illinois.— Buettner *v.* Norton, etc., Co., 90 Ill. 415.

Missouri.— Blunt *v.* Atlantic, etc., R. Co., 55 Mo. 157; Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743; Winer *v.* Maness, 94 Mo. App. 162, 67 S. W. 966.

Pennsylvania.— Seidel *v.* Hurley, 1 Woodw. 352.

West Virginia.— Thorn *v.* Thorn, 47 W. Va. 4, 34 S. E. 759.

See 31 Cent. Dig. tit. "Justices of the Peace," § 595.

Compare Ward *v.* Western Horse, etc., Ins. Co., 42 Nebr. 374, 60 N. W. 547.

In Missouri the appearance of respondent

agree that two causes pending on appeal shall be tried together, such an agreement is an appearance to both suits, and a waiver of notice of appeal.[91] In order to secure a hearing or to prevent a default, the appellee must enter his appearance in the time limited by law,[92] and the mere delivery by him to the clerk of a notice of trial does not amount to an entry of appearance.[93]

(B) *Operation and Effect* — (1) In General. A general appearance in the appellate court confers jurisdiction over the person, and waives defects in the process, or in its service or return, in the justice's court.[94]

(2) As Waiver of Objections to Jurisdiction Over Subject-Matter. An appellate court does not acquire jurisdiction of the subject-matter by a general appearance on appeal,[95] except in those cases where, although the justice had no jurisdiction, it has original or concurrent jurisdiction, and the case is triable *de novo*.[96] Where no judgment has been rendered by a justice, appearance on appeal in the appellate court will not confer jurisdiction on it.[97]

on the second day of the return-term does not entitle him to an affirmance for failure of appellant to prosecute the appeal. Smith *v.* St. Louis, etc., R. Co., 20 Mo. App. 689.

91. Morgan *v.* Garretson-Greason Lumber Co., 105 Mo. App. 239, 79 S. W. 997.

92. Hammerstein *v.* Haase, 47 Mo. 498; Lieberman *v.* Findley, 84 Mo. App. 384. *Compare* Seymour *v.* Miller, 32 Conn. 402, in which the facts were held to warrant equitable relief against a judgment by default, caused by the clerk's inadvertent neglect to enter appellee's appearance as requested by his attorney. And see Jones *v.* Brown, 1 Pa. Dist. 675, holding void a rule of court in conflict with the Pennsylvania act of March 22, 1810, section 4, which provides that from the entry of an appeal upon the prothonotary's docket the suit shall "take grade with, and be subject to the same rules, as other actions where the parties are considered to be in court."

In Illinois, under Hurd Rev. St. § 178, an appearance by the appellee ten days before the term at which trial is demanded, or the service of summons upon him, or the equivalent of service as provided by the statute, must exist, or the court is without jurisdiction to do anything in the case, in the absence, and without the consent, of either party, except to continue it. Bridge, etc., Union *v.* Sigmund, 88 Ill. App. 344 [*citing* Vallens *v.* Hopkins, 157 Ill. 267, 41 N. E. 632; Camp *v.* Hogan, 73 Ill. 228; McGillen *v.* Wolff, 83 Ill. App. 227; Woodhull *v.* Kelly, 6 Ill. App. 323; McMullen *v.* Graham, 6 Ill. App. 239]. See also Boyd *v.* Kocher, 31 Ill. 295; Scheidt *v.* Goldsmith, 89 Ill. App. 217; Ward *v.* Schiesswohl, 82 Ill. App. 513; Ficklin *v.* Olmsted, 72 Ill. App. 334; Wollman *v.* Greshetti, 37 Ill. App. 366; Bessey *v.* Ruhland, 33 Ill. App. 73. *Compare* McMurray *v.* Thede, 86 Ill. App. 555, holding that it is not necessary, in order to give the court jurisdiction over a co-defendant on appeal from a justice, that his appearance be entered ten days before the first day of the term.

93. McVey *v.* Huott, 11 Ill. App. 203. See also Norton *v.* Allen, 12 Ill. App. 592.

94. *Colorado.*— Reed *v.* Cates, 11 Colo. 527, 19 Pac. 464.

Georgia.— Pickett *v.* Smith, 95 Ga. 757, 22 S. E. 669, in which an objection to the legality of an attachment levy on the ground that it was made by plaintiff's son was held waived.

Illinois.— Marshall *v.* Pope, 29 Ill. 441; Northrup *v.* Smothers, 39 Ill. App. 588.

Iowa.— Drake *v.* Achison, 4 Greene 297; Cane *v.* Watson, Morr. 52.

Michigan.— Tower *v.* Lamb, 6 Mich. 362.

Mississippi.— Mobile, etc., R. Co. *v.* Dale, 61 Miss. 206.

Missouri.— Meyer *v.* Phœnix Ins. Co., 95 Mo. App. 721, 69 S. W. 639; Winer *v.* Maness, 94 Mo. App. 162, 67 S. W. 966.

Pennsylvania.— Bowell *v.* Gould, 130 Pa. St. 434, 18 Atl. 621.

See 31 Cent. Dig. tit. "Justices of the Peace," § 596.

95. *California.*— Descalso *v.* San Francisco Municipal Ct., 60 Cal. 296.

Dakota.— Gold Street *v.* Newton, 2 Dak. 39, 3 N. W. 311.

Illinois.— McKoy *v.* Allen, 36 Ill. 429.

Missouri.— McQuoid *v.* Lamb, 19 Mo. App. 153.

South Dakota.— Minneapolis Threshing-Mach. Co. *v.* Skau, 10 S. D. 636, 75 N. W. 199; Plunket *v.* Evans, 2 S. D. 434, 50 N. W. 961.

Tennessee.— White *v.* Buchanan, 6 Coldw. 32.

See 31 Cent. Dig. tit. "Justices of the Peace," § 597.

But *compare* Chesterton *v.* Munson, 27 Minn. 498, 8 N. W. 593.

Jurisdiction dependent upon jurisdiction below see *supra*, V, A, 1, b, (II).

96. *Colorado.*— Behymer *v.* Nordloh, 12 Colo. 354, 21 Pac. 37.

Connecticut.— Cook *v.* Morse, 40 Conn. 544.

Kansas.— Freeman *v.* Waynant, 25 Kan. 279.

Missouri.— Crenshaw *v.* Pacific Mut. L. Ins. Co., 71 Mo. App. 42.

Ohio.— O'Neal *v.* Blessing, 34 Ohio St. 33; Miller *v.* Creighton, 7 Ohio Dec. (Reprint) 139, 4 Cinc. L. Bul. 139.

See 31 Cent. Dig. tit. "Justices of the Peace," § 597.

97. Kimble *v.* Riggin, 2 Greene (Iowa) 245.

(3) As Waiver of Objections to Proceedings For Appeal. By appearing generally on appeal, an appellee waives all defects and irregularities in the proceedings for appeal.[98] But where no appeal has in fact been taken or allowed, the appellate court acquires no jurisdiction, although the parties appear and take part in the trial.[99]

(c) *Special Appearance.* Any appearance by the appellee in the appellate court for a special object, such as a motion to dismiss, or to affirm for failure to prosecute, is not such an appearance as will confer jurisdiction upon the court to try the case;[1] and where a defendant has appeared specially in the justice's court, his entry on a special appeal from an adverse judgment on such appearance does not waive the objection, and confers no general jurisdiction on the appellate court.[2]

7. Effect of Appeal or Error, and Supersedeas — a. On Powers and Proceedings of Lower Court. When a case is transferred from a justice's to an appellate court by an appeal or writ of error, the powers of the lower court are in general suspended.[3] But a justice may after appeal amend his record so as to show a final judgment,[4] and where notice of appeal and the undertaking are filed after verdict, but before the entry of judgment, he has authority to enter up judgment on the verdict.[5]

b. As Waiver of Objections to Jurisdiction of Lower Court. By taking an appeal from the judgment of a justice the party appealing waives objections to the jurisdiction of the justice over his person;[6] but does not waive objections to the jurisdiction over the subject-matter,[7] unless the case is triable in the appellate court as an original action.[8]

c. As Waiver of Defects in Process and Proceedings. The taking of an appeal from the judgment of a justice of the peace is a waiver of defects in the original process, or in its service or return,[9] and, where the case is triable *de novo* on

Compare Glass *v.* Stovall, 10 Humphr. (Tenn.) 453, in which the judgment entry was not signed, but the appeal-bond recited the trial, judgment, and appeal.

98. *California.* — Shay *v.* San Francisco Super. Ct., 57 Cal. 541.

Illinois.— Boone *v.* A'Hern, 98 Ill. App. 610; Chicago, Paint, etc., Co. *v.* Hollahan, 67 Ill. App. 601 [*citing* Mitchell *v.* Jacobs, 17 Ill. 235; Randolph *v.* Emerick, 13 Ill. 344; Callimore *v.* Dazey, 12 Ill. 143]; Duggan *v.* Smyser, 46 Ill. App. 39. See also Lyman *v.* Williams, 84 Ill. App. 82.

Indiana.— Neff *v.* State, 3 Ind. 564.

Michigan.— McCombs *v.* Johnson, 47 Mich. 592, 11 N. W. 400.

Minnesota.— Knies *v.* Green, 53 Minn. 511, 55 N. W. 598; Wrolson *v.* Anderson, 53 Minn. 508, 55 N. W. 597.

Missouri.— Burton *v.* Collin, 3 Mo. 315; Morgan *v.* Garretson, etc., Lumber Co., 105 Mo. App. 239, 79 S. W. 997; Moulder *v.* Anderson, 63 Mo. App. 34.

Nebraska.— Claflin *v.* American Nat. Bank, 46 Nebr. 884, 65 N. W. 1056.

Texas.— Cason *v.* Westfall, (1892) 18 S. W. 668.

See 31 Cent. Dig. tit. "Justices of the Peace," § 598.

99. Moulder *v.* Anderson, 63 Mo. App. 34.

1. Lucas *v.* Beebe, 88 Ill. 367; Page *v.* Atlantic, etc., R. Co., 61 Mo. 78; Lake *v.* Kels, 11 Abb. Pr. N. S. (N. Y.) 37; Wren *v.* Kirsey, (Tex. Civ. App. 1895) 30 S. W. 252. But see Landa *v.* Mercantile Banking Co., 10 Tex. Civ. App. 582, 31 S. W. 55.

2. Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

3. *Alabama.*— See Andress *v.* Longmire, 11 Ala. 166.

Georgia.— Cannon *v.* Sheffield, 59 Ga. 103.

Iowa.— Sayles *v.* Deluhrey, 64 Iowa 109, 19 N. W. 883; McKeever *v.* Horine, 12 Iowa 227; Kimpson *v.* Hunt, 4 Iowa 340.

Nebraska.— Dean *v.* Kinman, 15 Nebr. 492, 20 N. W. 112.

North Carolina.— Forbes *v.* McGuire, 116 N. C. 449, 21 S. E. 178.

Pennsylvania.— Robinson *v.* Shrouds, 1 Ashm. 168; Hoffman *v.* Reber, 1 Chest. Co. Rep. 240.

Texas.— Raley *v.* Sweeney, 24 Tex. Civ. App. 620, 60 S. W. 573.

See 31 Cent. Dig. tit. "Justices of the Peace," § 600.

4. Rowe *v.* Smith, 51 Conn. 266.

5. Fugitt *v.* Cox, 2 Nev. 370.

Verdict see *supra*, V, A, 2, d, (x).

6. Thompson *v.* Clopton, 31 Ala. 647; Monroe *v.* Brady, 7 Ala. 59; Wasson *v.* Cone, 86 Ill. 46; Parker *v.* Raphael, 64 Ill. App. 299.

7. Otero County *v.* Hoffmire, 9 Colo. App. 526, 49 Pac. 375 [*citing* Reynolds *v.* Larkins, 10 Colo. 126, 14 Pac. 114; Denver, etc., R. Co. *v.* Roberts, 6 Colo. 333; Downing *v.* Florer, 4 Colo. 209; Wagner *v.* Hallack, 3 Colo. 176; Melvin *v.* Latshaw, 2 Colo. 81]; Parker *v.* Raphael, 64 Ill. App. 299.

8. Harrington *v.* Heath, 1 Ohio 483.

9. *Alabama.*—Western R. Co. *v.* Lazarus, 88 Ala. 453, 6 So. 877; McElhaney *v.* Gilleland, 30 Ala. 183.

appeal, the taking of the appeal is a waiver of errors and irregularities in the proceedings before the justice.[10]

d. On Judgment. In most jurisdictions a regularly perfected appeal from the judgment of a justice of the peace vacates the judgment,[11] while in others the judgment is merely suspended during the pendency of the appeal.[12] Where the bill of particulars sets out two causes of action, and the justice finds for defend-

Arkansas.— Kansas City, etc., R. Co. *v.* Summers, 45 Ark. 295; Smith *v.* Stinnett, 1 Ark. 497.

Colorado.— Colorado Cent. R. Co. *v.* Caldwell, 11 Colo. 545, 19 Pac. 542; Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417; Deitz *v.* Central, 1 Colo. 323; Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047.

Georgia.— Talbott *v.* Collier, 102 Ga. 550, 28 S. E. 225.

Illinois.— Schofield *v.* Pope, 104 Ill. 130; Ohio, etc., R. Co. *v.* McCutchin, 27 Ill. 9; Swingley *v.* Haynes, 22 Ill. 214; Olsen *v.* Stark, 94 Ill. App. 556; Waterbury *v.* Hobbs, 84 Ill. App. 37; Willerton *v.* Shoemaker, 60 Ill. App. 126; Eckels *v.* Wolf, 55 Ill. App. 310.

Indiana.— Baltimore, etc., R. Co., *v.* Tess, 2 Ind. App. 507, 28 N. E. 721.

Kansas.— Haas *v.* Lees, 18 Kan. 449.

Massachusetts.— Briggs *v.* Humphrey, 1 Allen 371.

Minnesota.— Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283. *Compare* Craighead *v.* Martin, 25 Minn. 41, in which the appeal was on questions of law alone, under Laws (1865), c. 22.

Missouri.— Witting *v.* St. Louis, etc., R. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602 [*affirming* 28 Mo. App. 103]; Fitterling *v.* Missouri Pac. R. Co., 79 Mo. 504; Gant *v.* Chicago, etc., R. Co., 79 Mo. 502; Boulware *v.* Chicago, etc., R. Co., 79 Mo. 494; Ser *v.* Bobst, 8 Mo. 506; Fitzpatrick *v.* Missouri Pac. R. Co., 34 Mo. App. 280; Rice *v.* St. Louis, etc., R. Co., 30 Mo. App. 110; Eubank *v.* Pope, 27 Mo. App. 463; Gibbs *v.* Missouri Pac. R. Co., 11 Mo. App. 459.

Montana.— Gage *v.* Maryatt, 9 Mont. 265, 23 Pac. 337.

Nebraska.— Dean *v.* Kinman, 15 Nebr. 492, 20 N. W. 112.

North Dakota.— Lyons *v.* Miller, 2 N. D. 1, 48 N. W. 514, in which defendant had appeared specially before the justice and moved to set aside the service, but his notice of appeal embodied a demand for a new trial. *Compare* Miner *v.* Francis, 3 N. D. 549, 58 N. W. 343.

Pennsylvania.— Silley *v.* Burt, 21 Pa. Super. Ct. 618; Jones *v.* Delaware, etc., Canal Co., 10 Phila. 570.

West Virginia.— Johnson *v.* MacCoy, 32 W. Va. 552, 9 S. E. 887.

Wisconsin.— Lowe *v.* Stringham, 14 Wis. 222; Barnum *v.* Fitzpatrick, 11 Wis. 81.

See 31 Cent. Dig. tit. "Justices of the Peace," § 602.

10. *Colorado.*— Craig *v.* Smith, 10 Colo. 220, 15 Pac. 337.

Illinois.— Coulterville *v.* Gillen, 72 Ill. 599; Olsen *v.* Stark, 94 Ill. App. 556.

Maine.— Strout *v.* Durham, 23 Me. 483.

Missouri.— Atwood *v.* Reyburn, 5 Mo. 555; Spahn *v.* Sharp, 12 Mo. App. 123.

North Carolina.— Kearney *v.* Jeffreys, 30 N. C. 96.

See 31 Cent. Dig. tit. "Justices of the Peace," § 602.

11. *Alabama.*— Louisville, etc., R. Co. *v.* Lancaster, 121 Ala. 471, 25 So. 733; Lehman *v.* Hudmon, 79 Ala. 532.

California.— Rossi *v.* San Joaquin County Super. Ct., 114 Cal. 371, 46 Pac. 177; Bullard *v.* McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176.

Connecticut.— Curtiss *v.* Beardsley, 15 Conn. 518. *Compare* Blackman *v.* Beha, 24 Conn. 331, in which the appeal was from a judgment sustaining plaintiff's demurrer to a plea in abatement, and it was held that it did not vacate the final judgment of the justice.

Indiana.— Britton *v.* Fox, 39 Ind. 369.

Kentucky.— Pollard *v.* Holemen, 4 Bibb. 416.

Maine.— Hunter *v.* Cole, 49 Me. 556.

Massachusetts.— Morse *v.* Dayton, 125 Mass. 47.

New Hampshire.— Bixby *v.* Harris, 26 N. H. 125.

New Jersey.—Vannoy *v.* Givens, 23 N. J. L. 201. *Compare* Thompson *v.* Thompson, 1 N. J. L. 159.

North Carolina.—Sturgill *v.* Thompson, 44 N. C. 392; Marshall *v.* Lester, 4 N. C. 13, 6 N. C. 227.

Pennsylvania.— Felton *v.* Weyman, 10 Pa. St. 70. See also Belber *v.* Belber, 6 Pa. Super. Ct. 361.

Texas.— Moore *v.* Jordan, 65 Tex. 395; Bender *v.* Lockett, 64 Tex. 566; Lackey *v.* Campbell, 25 Tex. Civ. App. 512, 62 S. W. 78; Hall *v.* Miller, 21 Tex. Civ. App. 336, 51 S. W. 36; Missouri, etc., R. Co. *v.* Mosty, 8 Tex. Civ. App. 330, 27 S. W. 1057.

Vermont.— Fletcher *v.* Blair, 20 Vt. 124.

West Virginia.—Evans *v.* Taylor, 28 W. Va. 184.

See 31 Cent. Dig. tit. "Justices of the Peace," § 603.

Contra.— Pruyn *v.* Tyler, 18 How. Pr. (N. Y.) 331.

Appeal not legally taken does not vacate judgment see Cunningham *v.* Rogers, 39 Conn. 482.

12. Watkins *v.* Angier, 99 Ga. 519, 27 S. E. 718; Bank of Commerce *v.* Franklin, 88 Ill. App. 198; Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; Earl *v.* Hart, 89 Mo. 263, 1 S. W. 238; Sublette *v.* St. Louis, etc., R. Co., 96 Mo. App. 115, 69 S. W. 745.

ant on one, and against him on the other, and he alone appeals, the appeal brings up the whole case, and the first cause of action is not *res judicata*.[13]

e. In Attachment and Garnishment Proceedings. An appeal from a judgment on the merits does not carry attachment or garnishment proceedings to the appellate court,[14] or release plaintiff from responsibility on the attachment bond;[15] and where attached property has been released by the justice as exempt, the suing out of a writ of error will not preserve the attachment lien, if no supersedeas bond is filed.[16] The giving of an appeal-bond in attachment proceedings releases the lien of the attachment,[17] and an appeal from a justice's judgment, on which an immediate execution has issued, vacates a judgment on a garnishment levied under such execution.[18] Defects and irregularities in the proceedings before the justice are cured by appeal,[19] and an objection to the jurisdiction over defendant's person, in a proceeding commenced by foreign attachment, on the ground that he was in fact a resident, is waived by his appeal from the justice's judgment;[20] but where a justice fails to acquire jurisdiction in an attachment proceeding on account of irregularities in the papers, an appearance by the defendant or garnishee on appeal will not confer jurisdiction upon the appellate court in the attachment and garnishment proceedings.[21] Where an attachment defendant does not appeal from a judgment against him, or join in a garnishee's appeal from an adverse judgment in the same proceeding, the former judgment is not vacated by the garnishee's appeal, but remains in full force and effect.[22] In Ohio an attachment defendant may prosecute a petition in error from an order overruling his motion to discharge the attachment, and a subsequent appeal by him from a judgment in the principal case will not destroy his right to have his petition in error adjudicated.[23]

f. When Jurisdiction of Appellate Court Attaches. The jurisdiction of an appellate court attaches upon the performance of the acts required by statute as conditions to the perfection of an appeal from a justice's court.[24]

13. Huffman *v.* Ellis, 52 Nebr. 688, 73 N. W. 10 [*citing* Bates *v.* Stanley, 51 Nebr. 252, 70 N. W. 972].

14. Becker *v.* Steele, 41 Kan. 173, 21 Pac. 169; Brown *v.* Tuppeny, 24 Kan. 29; Stephenson *v.* Jones, 84 Mo. App. 249.

15. McCall *v.* Bradley, 3 Greene (Iowa) 200.

16. Pellersells *v.* Allen, 56 Iowa 717, 10 N. W. 261. But see Rhodes *v.* Samuels, 67 Nebr. 1, 93 N. W. 148.

Preservation of lien pending appeal see Newman *v.* York, 74 Mo. App. 292, construing Laws (1891), p. 45.

17. The Standart *v.* Bond, 8 Ind. 270.

The pendency of an interpleader's appeal from a judgment in attachment operates as a supersedeas, where bond is given. State *v.* Ranson, 86 Mo. 327. *Compare* Jennings *v.* Warnock, 37 Iowa 278.

Entry of bail for payment of costs does not dissolve a foreign attachment. Pierson *v.* Gaskill, 9 Pa. Dist. 554.

18. Karr *v.* Schade, 7 Lea (Tenn.) 294. But see Bank of Commerce *v.* Franklin, 88 Ill. App. 198, where it is said that an appeal from a judgment neither vacates nor extinguishes a garnishment suit based on such judgment and that the pendency of such appeal is good cause for a continuance of the garnishment suit from time to time, until the appeal is determined.

19. Paulhaus *v.* Leber, 54 Ala. 91; Clough *v.* Johnson, 9 Ala. 425; Woodruff *v.* Sanders, 18 Wis. 161.

20. Cook *v.* Milliken, 152 Pa. St. 512, 25 Atl. 757; Wright *v.* Milliken, 152 Pa. St. 507, 511, 25 Atl. 756, 757.

21. Colorado Fuel, etc., Co. *v.* Blair, 6 Colo. App. 40, 39 Pac. 897. See also Gates *v.* Bloom, 149 Pa. St. 107, 24 Atl. 184.

22. Flannigen *v.* Pope, 97 Ill. App. 263.

23. Nau *v.* Gobrecht, 8 Ohio Cir. Ct. 518, 4 Ohio Cir. Dec. 495.

24. *Alabama.*— Martin *v.* Higgins, 23 Ala. 775.

Arkansas.— Smith *v.* Stinnett, 1 Ark. 497.

California.—Appellate jurisdiction attaches when notice of appeal is served and filed, and the undertaking is filed, within the statutory time, and the order in which these acts are done is immaterial. Hall *v.* El Dorado County Super. Ct., 68 Cal. 24, 8 Pac. 509.

Colorado.— The filing of the transcript is necessary to give the appellate court sufficient jurisdiction to dismiss the appeal. Denver, etc., R. Co. *v.* Rader, 11 Colo. 536, 19 Pac. 476.

Illinois.— The transcript must be filed, in order to give the appellate court jurisdiction. Sheridan *v.* Beardsley, 89 Ill. 477; Odd Fellows' Benev. Soc. *v.* Alt, 12 Ill. App. 570; Robinson *v.* Allen, 11 Ill. App. 574. *Compare* Miller *v.* Superior Mach. Co., 79 Ill. 450, where it was held that where an appeal-bond

g. Supersedeas or Stay of Proceedings. A duly perfected appeal operates, in most jurisdictions, to vacate or suspend the judgment appealed from;[25] but in others an appellant, in order to obtain a stay of further proceedings under the judgment, must give a supersedeas or stay bond.[26] An appeal is ineffectual to stay execution unless fully perfected,[27] and where execution has already issued, the appellant should himself, or by his attorney, serve an order recalling the execution.[28] Where an appeal has been dismissed, and an execution has issued on the judgment, a rule will be granted on the sheriff to stay proceedings under the execution, pending mandamus proceedings to compel the reinstatement of the appeal.[29]

is taken and approved by the justice, even if it is defective, the appeal is taken from the judgment, and the adverse party must follow the case to the appellate court.

Iowa.— Under Code (1873), § 3584, an appeal is deemed in the circuit court by the filing of the justice's return in the office of the clerk. Goodman *v.* Allen, 72 Iowa 616, 34 N. W. 445.

Kansas.— An appeal is complete upon the filing and approval of the appeal-bond or undertaking ten days from the rendition of judgment. St. Louis, etc., R. Co. *v.* Hurst, 52 Kan. 609, 35 Pac. 211.

Michigan.— The circuit court has no jurisdiction to try an appeal until a return is made to the appeal from the justice's court. People *v.* Allegan Cir. Judge, 29 Mich. 487.

Minnesota.— The circuit court "becomes possessed of" and acquires complete jurisdiction of an action when the appeal is perfected, and the justice's return filed. Christian *v.* Dorsey, 69 Minn. 346, 72 N. W. 568.

Missouri.— Jurisdiction attaches from the granting of the appeal, not from the filing of the transcript. Sullivan *v.* Sanders, 9 Mo. App. 75.

Nebraska.— See Fulton *v.* Ryan, 33 Nebr. 456, 50 N. W. 430, in which plaintiff, after recovering judgment, filed a certified transcript in the district court a few days thereafter, so as to make the judgment a lien on defendant's land. Afterward defendant gave an appeal undertaking in time, but did not file a transcript of the judgment and undertaking until the time allowed by law had expired. It was held that the district court had jurisdiction because of the transcript filed by the appellee (plaintiff), since such transcript, although imperfect, gave it jurisdiction to order a perfect one, and the subsequent filing of such a transcript by appellant had the same effect as if it had been ordered.

Pennsylvania.— To complete an appeal a justice's transcript must be filed in the appellate court by the principal appellant. Dietrick *v.* Mann, 1 Leg. Chron. 159. See also Dailey *v.* Mayer, 2 Leg. Gaz. 223.

Texas.— Jurisdiction attaches upon the filing of a proper bond within the time provided by law. Curtis *v.* Bernstein, 2 Tex. App. Civ. Cas. § 671; Texas, etc., R. Co. *v.* Dyer, 2 Tex. App. Civ. Cas. § 312.

United States.— The appeal of one party gives the appellate court jurisdiction. Dillingham *v.* Skein, 7 Fed. Cas. No. 3,912*a*, Hempst. 181.

See 31 Cent. Dig. tit. "Justices of the Peace," § 605.

25. See *supra*, V, A, 7, d.

Ky. Civ. Code, § 292, permitting an appeal from an order sustaining an attachment without appealing from the personal judgment, does not prevent the creditor from collecting his judgment by execution, but stays the sale until the circuit court shall sustain the attachment or the debt be paid. Hawkins *v.* Baldauf, 10 Bush (Ky.) 624.

Where an attachment execution has issued on a transcript filed in the common pleas, an appeal by defendant within the prescribed time supersedes the transcript. Eichenberg *v.* Kemper, 23 Pa. Co. Ct. 429.

26. *Arkansas.*— See Hughes *v.* Wheat, 32 Ark. 292.

Iowa.— Thomas *v.* Nicklas, 58 Iowa 49, 11 N. W. 722.

Maryland.— State *v.* Carrick, 70 Md. 586, 17 Atl. 559, 14 Am. St. Rep. 387.

Nebraska.— State *v.* Cochran, 28 Nebr. 798, 45 N. W. 52, where it was held that it is not necessary that the judgment debtor should sign the undertaking.

New York.— Wells *v.* Dawson, 43 Hun 509 (copy of undertaking must be served on respondent); Conway *v.* Hitchins, 9 Barb. 378. See also Brush *v.* Lee, 18 Abb. Pr. 398; Jones *v.* McCarl, 7 Abb. Pr. 418. But see Sholts *v.* Judges of Yates County, 2 Cow. 506.

Pennsylvania.— See Roup *v.* Waldhouer, 12 Serg. & R. 24; Mann *v.* Alberti, 2 Binn. 195.

See 31 Cent. Dig. tit. "Justices of the Peace," § 606.

Not filing supersedeas bond no ground for dismissal see Hughes *v.* Wheat, 32 Ark. 292.

The time of the stay of execution is to be computed from the first day of the term to which the appeal is taken. Woods *v.* Connor, 6 Pa. St. 430.

27. Slater *v.* The Convoy, 10 Mo. 513; Adams *v.* Wilson, 10 Mo. 341; Herron's Appeal, 29 Pa. St. 240; Bass *v.* Gay, 51 Vt. 581.

Execution may issue after time for filing appeal has passed. Carpenter *v.* Miller, 2 Leg. Rec. (Pa.) 162; Setterly *v.* Yearsley, 1 Phila. (Pa.) 517.

28. Holt *v.* Bingham, Wright (Ohio) 163. But *compare* Patterson *v.* Peironnet, 7 Watts (Pa.) 337, to the effect that after an execution has issued immediately on the judgment, and the money has been made by a sale of personal property, it is too late to enter an appeal or bail for stay of execution.

29. Allen *v.* Joice, 8 N. J. L. 135.

8. TRANSCRIPT, RECORD, RETURN, OR STATEMENT — a. Matters to Be Shown — (I) *IN GENERAL.* The transcript of a justice filed in the appellate court, however it may be called, must be such as to show that his proceedings have been regular and in conformity with law.[30] It should contain, in substance at least,[31] all of the proceedings before the justice;[32] but it need not show in what county the cause was tried, or that the person before whom it was tried was a justice.[33] Upon writ of error a justice must certify to all proceedings whatsoever stated in the affidavit for the writ.[34]

(II) *JURISDICTION OF JUSTICE.* On appeal from a justice's judgment his transcript or return must affirmatively show that he had jurisdiction.[35] But when it is said that jurisdiction of the justice over the person and the subject-matter of an action before him must affirmatively appear, and cannot be supplied by inference or presumption, reference is had only to those things which the law requires to be made matters of record.[36]

(III) *PROCESS AND PARTIES.* A justice's record must show the due issuance and service of process,[37] and the parties;[38] but the original summons

30. Hale *v.* Thayer, 2 Pinn. (Wis.) 410, 2 Chandl. 68.

31. **Substance of proceedings sufficient** see Brackenridge *v.* Husted, Wright (Ohio) 70.

32. **Evidence and judgment to be included** see Gardner *v.* Smith, 2 N. Y. Civ. Proc. 420.

Facts, and reasons of decision must be fully certified.— Richardson *v.* Johnson, 3 Brev. (S. C.) 51.

A bill of costs in the transcript, over the justice's certificate that the transcript is a true one of all the entries on his docket, is a substantial compliance with Tex. Rev. St. art. 1640, requiring a certified copy of the bill of costs to accompany the transcript. Forst *v.* Mayer, 3 Tex. App. Civ. Cas. § 450.

33. Case *v.* Rowland, 17 N. J. L. 76. See also Barber *v.* Kennedy, 18 Minn. 216.

34. Miller *v.* O'Neal, 9 Iowa 446; Hays *v.* Gorley, 3 Iowa 203.

35. *Arkansas.*— Heflin *v.* Owens, 10 Ark. 265.

Delaware.— Guarantee Friendly Fund, etc., Assoc. *v.* Henderson, 3 Pennew. 157, 50 Atl. 535; Foley *v.* Kelley, 2 Marv. 148, 42 Atl. 451; Townsend *v.* Steward, 4 Harr. 94.

Missouri.— Matson *v.* Hannibal, etc., R. Co., 80 Mo. 229; Rocheport Bank *v.* Doak, 75 Mo. App. 332; Nickerson *v.* Eddy, 50 Mo. App. 569; Emmerson *v.* St. Louis, etc., R. Co., 35 Mo. App. 621; Gideon *v.* Hughes, 21 Mo. App. 528; Manuel *v.* Missouri Pac. R. Co., 19 Mo. App. 631; Vaughn *v.* Missouri Pac. R. Co., 17 Mo. App. 4.

Nebraska.— Miller *v.* Meeker, 54 Nebr. 452, 74 N. W. 962.

Ohio.— Murdock *v.* Cooper, 2 Ohio Dec. (Reprint) 306, 2 West L. Month. 381.

Pennsylvania.— Knesal *v.* Williams, 11 Pa. Dist. 392; Fitzsimmons *v.* Phelan, 8 Pa. Dist. 651; George *v.* McCutcheon, 8 Pa. Dist. 591; Carter *v.* Shindel, 7 Pa. Dist. 308; Griffin *v.* Pittsburg Supply Co., 6 Pa. Dist. 624; Wood *v.* Bronson, 2 Pa. Dist. 746; Cook *v.* Ferguson, 23 Pa. Co. Ct. 441; Farmers' Supply Co. *v.* Foulke, 18 Pa. Co. Ct. 566; Fitzgerald *v.* Campbell, 10 Pa. Co. Ct. 396; Wells *v.* Eachus, 8 Del. Co. 458. See also Toomey *v.* Rosansky, 11 Pa. Super. Ct. 506.

Wisconsin.— Crate *v.* Pettepher, 112 Wis. 252, 87 N. W. 1104.

See 31 Cent. Dig. tit. "Justices of the Peace," § 608.

Jurisdiction to be shown by record see generally *supra,* III, O.

If the record substantially shows jurisdiction it is sufficient. Leany *v.* McClure, 1 Chest. Co. Rep. (Pa.) 220. A recital in a record of a case appealed from a justice that the action was commenced before F, "a duly qualified and acting justice of the peace in and for W. township, B. county, Missouri," satisfies the rule requiring the record to affirmatively show the justice's jurisdiction. State *v.* Mosman, 112 Mo. App. 540, 87 S. W. 75.

If the act conferring jurisdiction is a part of the general law, it is not necessary to specify it in the record; but it will be sufficient if the proceedings before the magistrate are *prima facie* authorized. McDevitt *v.* Kepple, 24 Pa. Co. Ct. 133.

36. Crate *v.* Pettepher, 112 Wis. 252, 87 N. W. 1104.

Records and dockets generally see *supra,* IV, S.

37. See *supra,* IV, S, 3, e.

Transcript must show when summons was issued, and when and where returnable. Hugg *v.* Green, 25 Pa. Co. Ct. 412.

Where the suit purports to be against a non-resident, and the service is made upon someone else, it must appear from the record that defendant is a non-resident, that he is engaged in business in the county, and that the person served was his clerk or agent, and that the service was made at the usual place of business. Robb *v.* Huston, 6 Pa. Dist. 452.

38. **The record need not show that defendant was named in the body of the summons,** where it shows that the summons was against defendant, whose name appears in the caption. McDevitt *v.* Kepple, 24 Pa. Co. Ct. 133.

need not be sent up with the transcript,[39] nor need a copy of it be set out in the record.[40]

(IV) *Pleadings and Demands of Parties.* On appeal from a justice's judgment the transcript must show the due filing of the pleadings,[41] and the cause of action.[42] Where the pleadings are in writing they must be returned with the transcript,[43] and where the complaint is required to be served on defendant, the return must state that the complaint annexed is the one served and on which judgment was rendered.[44] A judgment may not be entered for want of a sufficient affidavit of defense, where the record fails to show that defendant has had written notice that the statement has been filed, and that an affidavit of defense is required.[45]

(V) *Evidence.* Where an action is triable *de novo* in the appellate court,[46] or where the papers sufficiently present the issue involved in the appeal,[47] neither the evidence nor the facts need be sent up; and where an appeal is heard only on questions of law, the justice need only send up such evidence as is objected to.[48]

Christian name of defendant must appear. Robb *v.* Huston, 6 Pa. Dist. 452.

39. Buettner *v.* Norton, etc., Mfg. Co., 90 Ill. 415; Shawg *v.* Bruce, 3 Iowa 324; Austin *v.* Hayden, 6 Ohio 388. But see Barber *v.* Kennedy, 18 Minn. 216, where it was held that it is the duty of the justice to include the summons in his return; but that the fact that he did not so return the summons, to be available, should affirmatively appear on the record.

The only effect of the original notice would be to show the original cause of action, and where that sufficiently appears from the proper entries on the docket, not objected to for insufficiency, nothing more is needed. Shawg *v.* Bruce, 3 Iowa 324.

40. Baldwin *v.* Webster, 68 Ind. 133.

41. *Arkansas.*— The filing of the cause of action being prerequisite to the issuance of summons, the transcript must show that it was filed before summons issued. Keath *v.* Berkley, 7 Ark. 469.

Illinois.— Reynolds *v.* Gage, 91 Ill. 125; Hamilton *v.* Stafford, 78 Ill. App. 54, in which the filing of a complaint was held to be sufficiently shown.

Missouri.— Kruse *v.* Hagedorn, 50 Mo. 576; Pearson *v.* Gillett, 55 Mo. App. 312, in which the transcripts were held sufficient.

Ohio.— Under Swan St. p. 528, § 203, the transcript must show the filing of plaintiff's bill of particulars. McCarty *v.* Blake, 2 Ohio Dec. (Reprint) 155, 1 West. L. Month. 589.

Texas.— Low *v.* Griffin, (Civ. App. 1897) 41 S. W. 73.

See 31 Cent. Dig. tit. "Justices of the Peace," § 610.

Transcript held insufficient to show complaint in writing see Abbott *v.* Kruse, 37 Ill. App. 549.

42. Means *v.* Stephenson, Tapp. (Ohio) 283; McCarty *v.* Blake, 2 Ohio Dec. (Reprint) 155, 1 West. L. Month. 589; Mills *v.* Ross, 11 Pa. Dist. 790; Martin *v.* Graybill, 8 Pa. Dist. 589; Corson *v.* Sullivan, 1 Just. L. Rep. (Pa.) 71; Brubaker *v.* Sheibley, 19 Lanc. L. Rev. (Pa.) 241; Maass *v.* Solinsky, 67 Tex. 290, 3 S. W. 289; Low *v.* Griffin, (Tex. Civ. App. 1897) 41 S. W. 73. But see White *v.* Fortune, 6 Blackf. (Ind.) 116, where it was held that the cause of action filed with the justice need not be copied or referred to in the justice's transcript. And see English *v.* Bonham, 17 N. J. L. 350.

Stating cause of action so as to show jurisdiction of justice see *supra*, IV, I, 2, b.

A slight misrecital of the amount demanded is immaterial. Nickey *v.* American Hardwood Lumber Co., 75 Mo. App. 54.

Variance between summons and transcript. —Where, in an action for a penalty, the transcript of the justice spoke of an action of debt, while the summons styled the action "penal debt," it was held that the discrepancy was immaterial. Fetterman *v.* Robbins, 100 Pa. St. 282.

43. Tarleston *v.* Brily, 3 Kan. 433; Miller *v.* Woodworth, 3 Hill (N. Y.) 529. But see Carver *v.* Smith, 113 Mich. 207, 71 N. W. 528, in which no declaration was sent up, but a return showing that plaintiff declared in trespass on the case, that defendant pleaded the general issue, and that judgment was rendered for plaintiff, from which defendant appealed, was held sufficient to confer jurisdiction.

Where a note is the only cause of action filed, it must be transmitted to the appellate court with the transcript. Tucker *v.* Gardiner, 63 Ind. 299. But see Mappa *v.* Pease, 15 Wend. (N. Y.) 669.

44. Spring *v.* Baker, 1 Hilt. (N. Y.) 526.

45. Connor *v.* Lyon, 13 Pa. Super. Ct. 502.

46. Hobbs *v.* Wetherwax, 38 How. Pr. (N. Y.) 385; Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891; Cowan *v.* Lowry, 7 Lea (Tenn.) 620. See also Pfeil *v.* Harboldt, 11 Wis. 9. But see McChesney *v.* Lansing, 18 Johns. (N. Y.) 388.

47. St. Martin Parish *v.* Delahoussaye, 30 La. Ann. 1092.

48. London *v.* Headen, 76 N. C. 72. See also Mead *v.* Daniel, 2 Port. (Ala.) 86; Lecatt *v.* Stewart, 2 Stew. (Ala.) 474; Ward *v.* Lewis, 1 Stew. (Ala.) 26, where it was held that evidence objected to must appear of record, whether admitted or not.

In Iowa a writ of error requires a justice

In other cases, however, the evidence must be returned to the appellate court.[49]

(vi) *Conduct of Trial and Judgment.* The transcript or record on appeal from a justice's judgment should show all of the proceedings had upon the trial,[50] and, except where the case is triable *de novo* in the appellate court,[51] the judgment rendered.[52]

(vii) *Proceedings For Appeal.* The jurisdiction of the appellate court is as a rule determinable only from the transcript and papers certified to it by the justice,[53] and consequently the transcript or return must show that the appeal has

to certify evidence offered at the trial, only for the purpose of enabling the court to judge of the correctness of his admission or rejection thereof; and where there is no bill of exceptions to the ruling of a justice, he must certify all that he remembers. Miller *v.* O'Neal, 9 Iowa 446.

49. McCafferty *v.* Kelly, 2 Sandf. (N. Y.) 637; Calligan *v.* Mix, 12 How. Pr. (N. Y.) 495.

In Wisconsin, in those appeals where a new trial is not allowed, the justice's return should state the evidence, that the court may pass upon the questions of law, substantially in the same manner as upon a return to a certiorari; and if it fails to do this, the supreme court cannot determine whether the action of the circuit court was right or not, or allow further return to be made, but must affirm the judgment below. Pfeil *v.* Harboldt, 11 Wis. 9.

50. **The swearing of the referees** who tried the cause must be certified to in the justice's record. Davis *v.* Delaware Electric, etc., Co., (Del. 1899) 43 Atl. 841 [*citing* Deputy *v.* Betts, 4 Harr. (Del.) 352; Kinney *v.* Short, 2 Harr. (Del.) 357; Crozier *v.* Wilson, 2 Harr. (Del.) 203; Ray *v.* Hall, 1 Harr. (Del.) 106].

The record must show that evidence was taken; otherwise a judgment by default for want of an appearance cannot be sustained. Stout *v.* Wertsner, 15 Montg. Co. Rep. (Pa.) 48. See also Hall *v.* Rankin, 24 Pa. Co. Ct. 654, where it was held that a transcript is fatally defective which does not show the day or the hour when the justice heard any evidence to sustain the judgment, or the time of the entry of the judgment against defendant below.

Presence of plaintiff, or some person authorized by him, at the return of the verdict must be shown. Shove *v.* Raynor, 3 Den. (N. Y.) 77.

Presence of defendant at the rendition of judgment must be shown where it appears by the transcript that the justice took time to advise. Vandoren *v.* Vandoren, 10 N. J. L. 286.

Offer to confess judgment.— Under Iowa Code, § 3818, requiring an offer to confess judgment, after action brought, to be made in presence of plaintiff, or after notice to him, the transcript need not show expressly that plaintiff was present when such offer was made. If it appears from the record that an offer was made as contemplated, or this is the necessary inference from the language used, it is sufficient, and, if the record is silent, parol evidence is admissible to show the offer. Sloss *v.* Bailey, 104 Iowa 696, 74 N. W. 17. *Compare* State *v.* Ellsworth, (Nebr. 1904) 100 N. W. 314, where it was held that an offer to confess judgment need not be included in the transcript, it being sufficient if it is filed and certified with other papers.

51. **Where a case is triable de novo,** a failure of the justice to return with the papers in the case his judgment thereon is not ground for dismissal of the appeal. Pearce *v.* Renfroe, 68 Ga. 194.

The omission of the statement of the judgment rendered, required by Ala. Code (1896), § 484, to be sent up on appeal, ought not to prejudice appellant, when the recitals in the bond show that the judgment was rendered, and there is no proof to the contrary. Oklahoma Vinegar Co. *v.* Kaupp, 136 Ala. 629, 33 So. 868 [*citing* Larcher *v.* Scott, 2 Ala. 40; McAlpin *v.* Pool, Minor (Ala.) 316].

52. Ball *v.* Sledge, 82 Miss. 747, 35 So. 214.

The transcript is sufficient if it contains enough to show the character of the judgment, its amount, and against whom rendered. Wilson *v.* Albright, 2 Greene (Iowa) 125.

Statement of judgment held sufficient see Oklahoma Vinegar Co. *v.* Kaupp, 136 Ala. 629, 33 So. 868.

Return must show that judgment was entered in accordance with verdict.— Griswold *v.* Burroughs, 60 Hun (N. Y.) 558, 15 N. Y. Suppl. 314.

On appeal from a decision opening a default, where the transcript recited that "defendant confessed judgment for the costs awarded against him," it was held that the confession was sufficiently shown; and that the transcript need not show a formal entry thereof. Tyler *v.* Baxter, 29 Nebr. 688, 46 N. W. 153.

53. Bates *v.* Phœnix Pub. Co., 50 Nebr. 79, 69 N. W. 305. But see Williams *v.* Lassen County Super. Ct., (Cal. 1897) 47 Pac. 783, where it was held that the marking of the filing of a notice of appeal by a justice is not the only competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed.

Under Mo. Rev. St. (1899) § 4066, which provides that when the bond and affidavit required shall have been filed with the jus-

been taken or granted, that the necessary undertaking has been filed, and every other jurisdictional fact.[54]

b. Necessity, Scope, Contents, and Requisites of Transcript or Record, and of Bills of Exceptions — (I) *Transcript or Record* — (A) *In General.* Proceedings in an appellate court are based on the transcript or return, without which it has no jurisdiction of the subject-matter.[55] The contents of the record on appeal are prescribed by statute, and it usually consists of a certified copy of the record of the proceedings before the justice, with all original papers and process, and the original appeal-bond.[56] Matters not required by law to be made a part of the record will be disregarded if incorporated therein,[57] and the same is true of facts

tice in due time and the justice shall have returned such appeal to the appellate court, the same shall be considered as having been allowed by the justice, although no entry thereof shall appear in the record, where it is found that an affidavit has been made, and a bond timely filed and returned to the circuit court, without any entries thereof appearing in the transcript, the circuit court acquires jurisdiction. Curtis *v.* Tyler, 90 Mo. App. 345.

54. *Arkansas.*— See Pryor *v.* Williams, 7 Ark. 295, in which the transcript stated, "appeal prayed and granted, affidavit and bond filed," and it was held that the entry sufficiently showed that an appeal was granted.

Kansas.— Nolan *v.* Ellis County, (App. 1901) 63 Pac. 657.

Minnesota.—Looney *v.* Drometer, 69 Minn. 505, 72 N. W. 797 [*citing* Marsile *v.* Milwaukee, etc., R. Co., 23 Minn. 4; McFarland *v.* Butler, 11 Minn. 72].

Mississippi.— Ball *v.* Sledge, 82 Miss. 747, 35 So. 214; Pettus *v.* Patterson, 47 Miss. 228.

Nebraska.— In order to confer jurisdiction on a district court on appeal from a justice, the justice's docket must show affirmatively, under Code Civ. Proc. §§ 1086, 1087, not only that an undertaking such as the law requires was executed within the prescribed time, but that it was delivered to the justice to be entered on his records. Caster *v.* Scheuneman, (1905) 104 N. W. 152.

New Jersey.— Anonymous, 6 N. J. L. 230.

New York.—Belshaw *v.* Colie, 3 Code Rep. 184.

South Carolina.—Whetstone *v.* Livingston, 54 S. C. 539, 32 S. E. 561.

See 31 Cent. Dig. tit. "Justices of the Peace," § 613.

The fact that the appeal had been prayed for need not be recited in the justice's transcript. Littell *v.* Bradford, 8 Blackf. (Ind.) 185. See also Hughes *v.* Glover, 53 Ill. App. 141, construing Rev. St. c. 70, § 102.

Where an appeal-bond is approved and filed by the justice, and so indorsed, it is not necessary that the transcript should show that it has been approved and filed, since it becomes an original paper in the case. Stitt *v.* Barefoot, 2 Tex. App. Civ. Cas. § 791. See also Trial *v.* Lepori, 1 Tex. App. Civ. Cas. § 1272.

Payment of costs.— It is error to dismiss an appeal because the justice did not send up with the papers any evidence that the costs had been paid. Dietor *v.* Ragsdale, 120 Ga. 417, 47 S. E. 942.

Where an appeal is taken by both parties at separate times, the justice, in order to complete the transcript, need only certify the entry relating to the second appeal and file the appeal-bond. Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328.

55. Demilly *v.* Grosrenaud, 201 Ill. 272, 66 N. E. 234; Sheridan *v.* Beardsley, 89 Ill. 477; Reed *v.* Driscoll, 84 Ill. 96; Kellock *v.* Dickinson, 5 N. Y. App. Div. 515, 39 N. Y. Suppl. 38 (construing Code Civ. Proc. § 3064); Bruins *v.* Downey, 45 Wis. 496 (to the effect that, without a return, the court can take no proceedings, except for a dismissal of the appeal, or for an order compelling a proper return).

Where both parties appeal, only one transcript is necessary. Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328.

The transcript performs the office of a declaration in original suits in courts of record. McGillen *v.* Wolff, 83 Ill. App. 227 [*citing* Reed *v.* Driscoll, 84 Ill. 96].

56. Ball *v.* Sledge, 82 Miss. 747, 35 So. 214.

The appeal-bond becomes a part of the record of the court to which the appeal is taken. Straus *v.* Oltusky, 62 Ill. App. 660.

A return amending the transcript is a part of the record. Cooper *v.* Woodrow, 3 Iowa 189.

Allegations of complaint.—Where a justice states in his findings that the complaint is just and correct, the allegations of the complaint will be considered as a part of the findings. Speigle *v.* McFarland, 1 Walk. (Pa.) 354.

Affidavit attached to return.—Where matter which ought to have been included in the justice's return appears in an affidavit made by the justice, and attached to his return, the affidavit will be treated as part of the return. People *v.* Linzey, 79 Hun (N. Y.) 23, 29 N. Y. Suppl. 560.

Although a judgment is set aside and a new trial granted, it is a part of the record on appeal from the second judgment, and may be considered by the appellate court. Leith *v.* Shingleton, 42 Mo. App. 449.

Original process can be made part of the record by oyer.—Austin *v.* Hayden, 6 Ohio 388.

57. Hagaman *v.* Neitzel, 15 Kan. 383.

State of demand no part of record see Vandyke *v.* Bastedo, 15 N. J. L. 224.

coming to the knowledge of the justice after trial.[58] Unless expressly required by law, bills of exception need not be spread at length upon the justice's docket, and incorporated in the transcript.[59]

(B) *Making, Form, and Requisites.* The transcript or return should regularly be made by the justice before whom the action was tried;[60] but where a justice dies pending an appeal, and before extending the record of the proceedings, his original minutes, containing all the material facts which the record would have contained, are admissible in evidence, and the failure to produce a copy of the whole case attested by the justice is cured by a production of a sworn copy.[61] Technical accuracy is not required in the transcript of return of a justice,[62] and it is sufficient if it sets forth the substance of the proceedings.[63] The transcript cannot be any part of the appellant's petition in error,[64] nor can the return of a justice be treated as a bill of exceptions.[65]

(II) *Bill of Exceptions*—(A) *In General.* The matters required to be entered upon the record or docket of a justice of the peace are prescribed by statute;[66] and if a party desires to preserve the rulings of the justice as to other matters for review he must take a bill of exceptions,[67] in those cases in which bills

Minutes of testimony are no part of the record. Barber *v.* Kennedy, 18 Minn. 216.

58. Savier *v.* Chipman, 1 Mich. 116.

59. Campbell *v.* Sutton, 12 Nebr. 522, 12 N. W. 3.

60. **That a return was drawn up by the attorney for defendant in error** is not cause for setting it aside, where it was afterward corrected by the justice, and no abuse is shown. Smith *v.* Johnston, 30 How. Pr. (N. Y.) 374.

61. Davidson *v.* Slocumb, 18 Pick. (Mass.) 464.

62. Subim *v.* Isador, 88 Ill. App. 96; Froelich *v.* Aylward, 11 S. D. 635, 80 N. W. 131; Williams *v.* Rice, 6 S. D. 9, 60 N. W. 153.

63. Cochran *v.* Parker, 6 Serg. & R. (Pa.) 549.

64. Campbell *v.* Sutton, 12 Nebr. 522, 12 N. W. 3, where it was held that a motion to strike the transcript from the files because it appeared to be no part of the petition in error must be denied.

65. Spencer *v.* Saratoga, etc., R. Co., 12 Barb. (N. Y.) 382.

66. See *supra*, IV, S.

67. *Alabama.* — Gayle *v.* Turner, Minor 204. See also Stein *v.* Feltheimer, 31 Ala. 57, to the effect that on an appeal involving less than twenty dollars, which is tried by the court without a jury, all the evidence must be set out in the bill of exceptions.

Indiana.— Helfer *v.* Jelly, 10 Ind. 382.

Kansas.— Maddon *v.* Riedel, (1905) 80 Pac. 45; Towle *v.* Weise, 64 Kan. 760, 68 Pac. 637; Hagaman *v.* Neitzel, 15 Kan. 383; Stevens *v.* Beaseley, 8 Kan. App. 753, 61 Pac. 762; Friedburg *v.* Cubbison, 6 Kan. App. 184, 51 Pac. 297. See also Stager *v.* Harrington, 27 Kan. 414, to the effect that bills of exceptions may be allowed by justices in cases tried before them, either with or without a jury.

Missouri.— Elliott *v.* Pogue, 20 Mo. 263.

Nebraska.— Zeigler *v.* Sonner, (1904) 98 N. W. 1028; Chicago, etc., R. Co. *v.* Goracke, 32 Nebr. 90, 48 N. W. 879. *Compare* Meyer *v.* Hibler, 52 Nebr. 823, 73 N. W. 289, construing Sess. Laws (1895), c. 72.

New Jersey.— Davison *v.* Schooley, 10 N. J. L. 145. *Compare* Goldsmith *v.* Bane, 8 N. J. L. 87; Sockwell *v.* Bateman, 4 N. J. L. 423, where it was held that the evidence of a particular witness, when it can be correctly had, may be brought before the supreme court by affidavit, for the purpose of showing that it was incompetent.

Ohio.— Kaufman *v.* Broughton, 31 Ohio St. 424 (bill of exceptions to bring into the record the fact that no evidence was offered on a point necessary to be established to obtain judgment); Bradley *v.* Wacker, 13 Ohio Cir. Ct. 530, 7 Ohio Cir. Dec. 565.

Pennsylvania.— Wilson *v.* Wilson, 5 Pa. L. J. 461.

South Dakota.—Justices Code, § 6130, providing that, when a party appeals on questions of law alone, he must prepare a statement of the case, and file the same with the justice, which "must contain the grounds upon which the party intends to rely," etc., is mandatory. Tschetter *v.* Heiser, 9 S. D. 285, 68 N. W. 744.

Texas.— The sufficiency of oral pleadings will not be reviewed on appeal, unless such pleadings, and the objections interposed, and the rulings thereon, are fully shown by bills of exception. The brief statement of the pleadings required to be noted in the docket will not supply the place of such a bill. Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

West Virginia.— See Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653, construing Code, c. 110, § 3.

See 31 Cent. Dig. tit. "Justices of the Peace," § 616.

Presentation and reservation before justice of grounds of review see *supra*, V, A, 4.

A contradictory and ambiguous bill of exceptions may be disregarded, especially when unsustained by anything in the return. Bell *v.* Rowland, 9 Iowa 281.

On petition in error the bill of exceptions should set out all the pleadings filed in the

of exceptions are authorized by law. Whether they are authorized will depend, of course, upon the statutes of the particular state.[68]

(B) *Making and Sufficiency.* A bill of exceptions must be allowed by the justice himself,[69] and must be filed during the term.[70] But a bill which shows that it has been allowed, signed, and filed by the justice is sufficient to show that it was properly filed in the office of the justice allowing it;[71] and it is no objection to a bill of exceptions that it was allowed and signed for one party in the absence of, and without notice to, the other,[72] or that it was not submitted to the adverse party before being signed by the justice.[73] In Kansas the transcript of a justice must be incorporated in the bill of exceptions, or it cannot be considered;[74] while in Ohio bills of exceptions must be entered at length on the justice's docket, and until so entered the reviewing court can take no cognizance of their contents.[75]

(III) *Signing and Certifying Transcript or Bill of Exceptions.* In order to be effective, both the transcript and bill of exceptions must, in nearly all jurisdictions,[76] be signed and certified to by the justice who tried the action in the manner prescribed by the statutes of the various states,[77] and in some states must be

justice's court. Winter *v.* Shutter, 42 Kan. 544, 22 Pac. 564.

To obtain a review of a judgment dismissing an appeal, no exception need be taken or made part of the record by a formal bill of exceptions. Morrow *v.* Sullender, 4 Nebr. 374.

68. See the following cases, in which it was held that a bill of exceptions was unauthorized:

Arkansas.— Thorn *v.* Reed, 1 Ark. 480, which was an action of forcible entry and detainer.

Maryland.— Cole *v.* Hynes, 46 Md. 181.

Nebraska.— Vlasek *v.* Wilson, 44 Nebr. 10, 62 N. W. 245; Donaldson *v.* Fisher, 43 Nebr. 260, 61 N. W. 609; Real *v.* Honey, 39 Nebr. 516, 58 N. W. 136.

New Jersey.— Elkinson *v.* Bennet, 3 N. J. L. 637.

Ohio.— Barto *v.* Abbe, 16 Ohio 408; State *v.* Harmeyer, 3 Ohio Dec. (Reprint) 509, 3 Cinc. L. Bul. 570, actions of unlawful entry and detainer.

United States.— Smith *v.* Chase, 22 Fed. Cas. No. 13,022, 3 Cranch C. C. 348.

See 31 Cent. Dig. tit. "Justices of the Peace," § 617.

Under Ohio Justices Act, § 137, authorizing the taking of exceptions to the opinion of a justice on "questions of law and evidence," does not include questions touching the weight or sufficiency of the evidence, but only such as relate to its competency. State *v.* Wood, 22 Ohio St. 537.

69. Whitzell *v.* Forgler, 30 Kan. 525, 1 Pac. 823, in which a bill of exceptions, signed by the private clerk of a justice, without his knowledge or consent, was held a nullity, and not validated by the fact that the justice was told of it afterward, and, without seeing the bill, made no objection, and that the parties agreed that it spoke the truth.

70. Time for filing extended by extending term see West *v.* Rice, 4 Kan. 563.

Allowance of time after trial see Lewis *v.* Bancroft, 53 Ohio St. 92, 41 N. E. 32, construing Rev. St. § 6565.

71. Long *v.* Froman, 49 Kan. 360, 30 Pac. 461.

72. Long *v.* Froman, 49 Kan. 360, 30 Pac. 461.

73. Leach *v.* Sutphen, 11 Nebr. 527, 10 N. W. 409.

74. Hobson *v.* Taylor, (Kan. 1901) 65 Pac. 669.

Review of proceedings on motion to quash service of summons.— To enable the district court to review on error proceedings before a justice relating to a motion to quash service of summons made by a person specially deputed for that purpose, the summons, the motion, affidavits in support of the motion, agreement of counsel, and the justice's judgment must be embodied in a bill of exceptions. Madden *v.* Riedel, (Kan. 1905) 80 Pac. 45.

75. Huston *v.* Huston, 29 Ohio St. 600; Argo *v.* Belsar, 8 Ohio Dec. (Reprint) 475, 8 Cinc. L. Bul. 189.

76. Under Ala. Code, § 484, it is not necessary for the justice to certify to his return; it is sufficient if he returns all the papers with a signed statement of the case, and the judgment rendered by him to the clerk of the appellate court. Hardee *v.* Abraham, 133 Ala. 341, 32 So. 595. *Compare* under an earlier statute Wolfe *v.* Parham, 18 Ala. 441.

77. *Arkansas.*—Watts *v.* Hill, 7 Ark. 203.

Delaware.— Barker *v.* David, 4 Pennew. 395, 55 Atl. 334; Trimble *v.* Dugan, 2 Pennew. 524, 47 Atl. 1008.

Illinois.— Demilly *v.* Grosrenaud, 201 Ill. 272, 66 N. E. 234.

Maine.— Simpson *v.* Wilson, 24 Me. 437.

Minnesota.— Kloss *v.* Sanford, 77 Minn. 510, 80 N. W. 628; Continental Ins. Co. *v.* Richardson, 69 Minn. 433, 72 N. W. 458.

New Jersey.— Alpaugh *v.* Hockenburg, 34 N. J. L. 342.

Pennsylvania.— Weaver *v.* Russell, 16 Pa. Co. Ct. 428.

See 31 Cent. Dig. tit. "Justices of the Peace," § 618.

Several judgments may be embraced in one certificate; and it is not necessary to certify

further authenticated by the justice's seal.[78] While the statutory requirements as to signing and certifying transcripts or returns and bills of exceptions must be complied with, technical strictness is not required, and it is sufficient if the terms of the statute are substantially complied with.[79]

c. Filing Transcript or Record — (I) *In General.* An appeal is perfected when the transcript or record is filed in the appellate court, and not until then.[80] In some states it must be filed by the justice,[81] and in others by the appellant.[82] When the record has been transmitted to him, it is the duty of the clerk to mark it "Filed,"[83] but his failure to do so is no ground for dismissing the appeal.[84]

(II) *Time of Filing and Effect of Delay.* The time at or within which the transcript or record on appeal from a justice's judgment is to be filed is wholly regulated by statute.[85] But these statutes are for the most part directory

each judgment separately. Perryman *v.* State, 8 Mo. 208.

Impeachment.—A certificate to a bill of exceptions, regular on its face, and bearing date written ten days after judgment, cannot be impeached by a certificate of the same justice, made more than a month thereafter, which sets forth the circumstances under which the original certificate was made. Fuller *v.* Champaign Twine, etc., Co., 39 Kan. 492, 18 Pac. 504.

78. Hill *v.* Ableman, 1 Marv. (Del.) 401, 41 Atl. 92; Simpson *v.* Wilson, 24 Me. 437; Henry *v.* Campbell, 24 N. J. L. 141. See also Whitney *v.* Mills, 6 Blackf. (Ind.) 545. *Contra*, Scott *v.* Rushman, 1 Cow. (N. Y.) 212.

79. **Certificates held sufficient.**— *Arkansas.* — Nevells *v.* Sisson, 10 Ark. 249.

Illinois.— Smith *v.* Frazer, 61 Ill. 164.

Indiana.— Whitney *v.* Mills, 6 Blackf. 545.

Michigan.— Smart *v.* Howe, 3 Mich. 590.

Minnesota.— Smith *v.* Force, 31 Minn. 119, 16 N. W. 704.

Mississippi.— Boyd *v.* Quinn, (1897) 22 So. 802; Coleman *v.* Gordon, (1894) 16 So. 340.

New Jersey.— Henry *v.* Campbell, 24 N. J. L. 141.

South Dakota.— Froelich *v.* Aylward, 11 S. D. 635, 80 N. W. 131.

See 31 Cent. Dig. tit. "Justices of the Peace," § 618.

80. McGillen *v.* Wolff, 83 Ill. App. 227 [*citing* Reed *v.* Driscoll, 84 Ill. 96]; Woods *v.* Oregon Short Line R. Co., (Oreg. 1905) 81 Pac. 235; Goodenow *v.* Stafford, 27 Vt. 437.

81. Bower *v.* Patterson, 116 Ga. 814, 43 S. E. 25; Sheridan *v.* Beardsley, 89 Ill. 477; Burgess *v.* Matlock, 14 Ind. 475 (in which it is held that the justice may employ the attorney of the party to carry the transcript to the office for him); Bosodi *v.* State, 13 Ohio Cir. Ct. 275, 7 Ohio Cir. Dec. 31.

Failure of justice to send up transcript not ground of dismissal see Sheridan *v.* Beardsley, 89 Ill. 477. See also Bosodi *v.* State, 13 Ohio Cir. Ct. 275, 7 Ohio Cir. Dec. 31, where it was held that plaintiff in error may, within the six months allowed for filing his petition in error, file the bill of exceptions and other papers with such petition.

82. Bush *v.* Doy, 1 Kan. 86; Steel *v.* Rees, 13 Oreg. 428, 11 Pac. 68; Edwards *v.* Morton, 92 Tex. 152, 46 S. W. 792.

If the justice files the transcript, he acts as the agent of appellant, and not as an officer. Bush *v.* Doy, 1 Kan. 86.

Act of respondent in filing transcript held void see Steel *v.* Rees, 13 Oreg. 428, 10 Pac. 68.

Notice of filing must be served on appellee. — Coleman *v.* Newby, 7 Kan. 82.

83. Where an appeal is allowed by a judge in vacation, the clerk should file with the transcript and papers sent up by the justice all the papers transmitted to him by the judge. Hubbard *v.* Yocum, 30 W. Va. 740, 5 S. E. 867.

84. Hughes *v.* Wheat, 32 Ark. 292; Harris *v.* Watkins, 5 Dak. 374, 40 N. W. 536. See also Hamilton *v.* Stafford, 78 Ill. App. 54, to the effect that where the clerk fails to put any file-mark on papers sent up with the transcript, the paper may be ordered to be filed as of the date of the filing of the transcript.

85. **For cases construing the statutes** see the following:

Delaware.— Downes *v.* Smith, 2 Marv. 147, 42 Atl. 438.

Iowa.— Fisher *v.* Harber, 10 Iowa 293; Coon *v.* Matthews, 10 Iowa 290.

Louisiana.— State *v.* Todd, 104 La. 241, 28 So. 886.

Mississippi.— Brennan *v.* Straas, 85 Miss. 341, 37 So. 956, construing Code (1892), §§ 84, 2432, and holding that where a justice dies before an appeal has been perfected, and section 2432 is complied with, the appeal will not be dismissed, if sent up by the successor of the deceased justice to the next term after his qualification.

Missouri.— Bernicker *v.* Miller, 37 Mo. 498.

Montana.— Meyers *v.* Gregans, 20 Mont. 450, 52 Pac. 83.

Nebraska.— Johnson *v.* Van Cleve, 23 Nebr. 559, 37 N. W. 320; Union Pac. R. Co. *v.* Marston, 22 Nebr. 721, 36 N. W. 153; Monell *v.* Terwilliger, 8 Nebr. 360, 1 N. W. 246; Roesink *v.* Barnett, 8 Nebr. 146.

New Jersey.— Dyer *v.* Ludlum, 16 N. J. L. 531.

New York.— Lazarus *v.* Ludwig, 17 Misc. 365, 40 N. Y. Suppl. 63.

North Carolina.— Jerman *v.* Gulledge, 129 N. C. 242, 39 S. E. 835.

only,[86] and it is a matter of sound judicial discretion with the appellate court whether it will dismiss the appeal or affirm the judgment below because of delay in filing the transcript or return.[87] Where the delay is attributable to the fault or negligence of the appellant or his attorney, and no adequate excuse is shown, the appeal will be dismissed;[88] but where the appellant has taken the steps required of him to perfect his appeal he cannot be prejudiced by the failure of the justice to transmit the transcript and papers in time.[89]

Ohio.— McLees *v.* Morrison, 29 Ohio St. 155; Ransick *v.* State, 15 Ohio Cir. Ct. 371, 8 Ohio Cir. Dec. 306; Redus *v.* Green, 6 Ohio Dec. (Reprint) 1034, 9 Am. L. Rec. 634; Rea *v.* McCulloch, 2 Ohio Dec. (Reprint) 169, 1 West. L. Month. 700.

Oklahoma.— Swope *v.* Smith, 1 Okla. 283, 33 Pac. 504.

Oregon.— Jacobs *v.* Oren, 30 Oreg. 593, 48 Pac. 431; Hughes *v.* Clemens, 28 Oreg. 440, 42 Pac. 617; Carter *v.* Monnastes, 19 Oreg. 538, 25 Pac. 29.

Pennsylvania.— Brungess *v.* Brungess, 23 Pa. Co. Ct. 240; Care *v.* Atkinson, 10 Pa. Co. Ct. 400; Newton *v.* Haggerman, 1 Browne 94; Sollenberger *v.* Heisker, 2 Leg. Rec. 368; Ferry *v.* Wallen, 2 Lehigh Val. L. Rep. 324.

Tennessee.— Humphrey *v.* Humphrey, 1 Swan 154.

Texas.— Foos Mfg. Co. *v.* Prather, (App. 1890) 16 S. W. 865.

See 31 Cent. Dig. tit. "Justices of the Peace," § 620.

Transcript may be filed immediately upon allowance of appeal. — Jacobs *v.* Oren, 30 Oreg. 593, 48 Pac. 431; Hughes *v.* Clemens, 28 Oreg. 440, 42 Pac. 617.

Computation of time.—Under Ohio Rev. St. (1880) § 4951, the time within which a transcript is to be filed is to be calculated by excluding the first and including the last day, and if the last day falls on Sunday, it is to be excluded. Redus *v.* Green, 6 Ohio Dec. (Reprint) 1034, 9 Am. L. Rec. 634. But *compare* McLees *v.* Morrison, 29 Ohio St. 155, construing Swan & S. St. p. 419.

86. Pearce *v.* Renfroe 68 Ga. 194; Andrews *v.* Esher, 14 Ill. App. 67; Bonfield *v.* McGreavy, 10 Ill. App. 577; Schmidt *v.* Skelly, 10 Ill. App. 564; Norden *v.* Jones, 33 Wis. 600; Demming *v.* Weston, 15 Wis. 236. *Contra*, Carter *v.* Monnastes, 19 Oreg. 538, 25 Pac. 29.

87. *Arkansas.*— Hughes *v.* Wheat, 32 Ark. 292.

California.— McKay *v.* Santa Barbara County Super. Ct., 86 Cal. 431, 25 Pac. 10, where it was held that if the record and transcript are not filed as required by rule of court, the appeal may, on motion, with notice, be dismissed.

Montana.— Meyers *v.* Gregans, 20 Mont. 450, 52 Pac. 83, in which no sufficient excuse for delay being given, the appeal was dismissed.

North Dakota.— De Foe *v.* Zenith Coal Co., (1905) 103 N. W. 747.

Pennsylvania.— Gable *v.* Bear, 10 Pa. Dist. 630.

South Dakota.— Haukland *v.* Minneapolis, etc., R. Co., 11 S. D. 493, 78 N. W. 958 (in which no excuse for delay was shown, and it was held that the appeal might be dismissed); Edminster *v.* Rathbun, 3 S. D. 129, 52 N. W. 263 (to the effect that Comp. Laws, § 6136, if not mandatory, at least vests the appellate court with discretion as to dismissal).

Washington.— State *v.* Yakima County Super. Ct., 9 Wash. 307, 37 Pac. 448.

Wisconsin.— Norden *v.* Jones, 33 Wis. 600; Demming *v.* Weston, 15 Wis. 236.

See 31 Cent. Dig. tit. "Justices of the Peace," § 621.

88. *Arkansas.*— Wilson *v.* Starks, 48 Ark. 73, 2 S. W. 346.

Georgia.— Washington *v.* Marcrum, 106 Ga. 300, 31 S. E. 779.

Indiana.— Davis *v.* Luark, 34 Ind. 403. *Compare* Butler *v.* Skomp, 3 Blackf. 392; Brown *v.* Modisett, 3 Blackf. 381; Barnes *v.* Modisett, 3 Blackf. 253.

Kansas.— Bush *v.* Doy, 1 Kan. 86.

Missouri.— Robinson *v.* Walker, 45 Mo. 117. See also Warner *v.* Donahue, 99 Mo. App. 37, 72 S. W. 492.

Nebraska.— Miller *v.* Walker, (1904) 101 N. W. 332; Scott *v.* Burrill, 44 Nebr. 755, 62 N. W. 1093; Wilde *v.* Preuss, 33 Nebr. 790, 50 N. W. 1125; Lincoln Brick, etc., Works *v.* Hall, 27 Nebr. 874, 44 N. W. 45; Converse Cattle Co. *v.* Campbell, 25 Nebr. 37, 40 N. W. 594; Union Pac. R. Co. *v.* Marston, 22 Nebr. 721, 36 N. W. 153; Clapp *v.* Bowman, 22 Nebr. 198, 34 N. W. 362. *Compare* Hagadorn *v.* Wagoner, 4 Nebr. (Unoff.) 713, 96 N. W. 184.

Ohio.— Winders *v.* Hudson, 15 Ohio Cir. Ct. 511, 8 Ohio Cir. Dec. 463.

Pennsylvania.— Sherwood *v.* McKinney, 5 Whart. 435; Cumberland County *v.* Renninger, 9 Pa. Dist. 628; Brungess *v.* Brungess, 23 Pa. Co. Ct. 240; Wardell *v.* Weidner, 2 C. Pl. 238; Talbert *v.* Williams, 1 Browne 160; Bell *v.* Snyder, 3 Del. Co. 265; Hildebrand *v.* De Long, 16 Lanc. L. Rev. 297; Donnelly *v.* Purcell, 1 Leg. Chron. 47.

Wisconsin.— Bryant *v.* Barber, 1 Pinn. 303.

See 31 Cent. Dig. tit. "Justices of the Peace," § 621.

Where the pleadings admit that appellant did not file the transcript in time, the appeal will be dismissed, although the record, through a clerical mistake, shows the transcript to have been filed in time. Cumberland County *v.* Renninger, 9 Pa. Dist. 628.

89. *Alabama.*— Larcher *v.* Scott, 2 Ala. 40.

Georgia.—Cannon *v.* Sheffield, 59 Ga. 103; Robison *v.* Medlock, 59 Ga. 598.

Illinois.— Ewing *v.* Bailey, 5 Ill. 420;

(III) *Waiver.* Where an appellee appears and goes to trial without objecting that the transcript and papers have not been filed, or, if filed, that they were not filed in time, he waives the defect;[90] but the fact that the appellee has appeared by motion to dismiss for a defect in the appeal affidavit does not deprive the court of its discretion to affirm, nor the appellee of his right to have the action dismissed, for delay in filing the transcript;[91] and where the transcript is not filed for several terms after the appeal-bond was given, a failure to move for a dismissal at the second term after the filing of the bond does not waive the irregularity.[92]

d. Defects, Objections, and Amendment, and Compulsory Return — (I) *Effect and Amendment of Defects* — (A) *In General.* Defects and irregularities in the transcript or return are not as a rule grounds for dismissing either the action[93] or the appeal;[94] but the appellate court may, in the exercise of a sound discre-

Little *v.* Smith, 5 Ill. 400. But see Campbell *v.* Quinlin, 4 Ill. 288.

Indiana.— Gumberts *v.* Adams Express Co., 28 Ind. 181; Lacy *v.* Fairman, 7 Blackf. 558.

Iowa.— Holloway *v.* Baker, 6 Iowa 52; Whitcomb *v.* Holloway, 4 Greene 311. See also Fisher *v.* Harber, 10 Iowa 293. *Compare* Heiserman *v.* Rush, 22 Iowa 240.

Michigan.— Stevenson *v.* Kent Cir. Judge, 44 Mich. 162, 6 N. W. 217.

Missouri.— Lala *v.* The City of Joliet, 24 Mo. 23; Grassmuck *v.* Atwell, 23 Mo. 63.

New Jersey.— Ferguson *v.* Kays, 21 N. J. L. 431.

New York.— *Ex p.* Kellogg, 3 Cow. 372.

North Carolina.— Lamon *v.* Gilchrist, 12 N. C. 176.

North Dakota.—Rev. Codes (1899), § 6771*a*, providing that the district court may dismiss an appeal from a justice for failure to cause the transcript to be transmitted, does not make it the mandatory duty of the court to dismiss for that reason; and therefore, where a transcript on appeal from a justice was filed before the motion to dismiss for failure to file it was granted, and the record showed that respondent had not been prejudiced by the delay, it was held error to dismiss the appeal for failure to file the transcript. De Foe *v.* Zenith Coal Co., (1905) 103 N. W. 747.

Pennsylvania.— Gallagher *v.* Silkman, 5 Lanc. L. Rev. 192; Crawford *v.* Stewart, 30 Pittsb. Leg. J. (N. S.) 123. *Compare* Houk *v.* Knop, 2 Watts 72.

South Dakota.—McLaughlin *v.* Michel, 14 S. D. 189, 84 N. W. 777.

Texas.— Campbell *v.* Bechsenschutz, (Civ. App. 1894) 25 S. W. 971; Patty *v.* Miller, 5 Tex. Civ. App. 308, 24 S. W. 330; Muller *v.* Humphreys, (App. 1889) 14 S. W. 1068. But see Bradway *v.* Clipper, 1 Tex. App. Civ. Cas. § 306.

Wyoming.—Goodrich *v.* Peterson, 12 Wyo. 214, 74 Pac. 497.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 621, 622.

Appellant's failure to apply for mandamus to compel the justice to send up the transcript is not ground for dismissing his appeal. Campbell *v.* Bechsenschutz, (Tex. Civ. App. 1894) 25 S. W. 971.

90. Rosenberg *v.* Barrett, 2 Ill. App. 386; Cromwell *v.* Baty, 43 Ind. 357; Dougherty *v.* Mason, 4 Blackf. (Ind.) 432; Morse *v.* Dayton, 128 Mass. 451; Steven *v.* Nebraska, etc., Ins. Co., 29 Nebr. 187, 45 N. W. 284.

91. Wilson *v.* Stark, 48 Ark. 73, 2 S. W. 346.

92. Gulf, etc., R. Co. *v.* Lynch, (Tex. App. 1891) 17 S. W. 144; King *v.* Lacy, (Tex. App. 1891) 17 S. W. 143, construing Rev. St. art. 1641.

93. **Where the transcript shows a good cause of action,** although otherwise imperfect, the suit should not be dismissed, but only the appeal. Boiles *v.* Barnes, 4 Blackf. (Ind.) 76. *Compare* Denby *v.* Hart, 4 Blackf. (Ind.) 13; Bell *v.* Trotter, 4 Blackf. (Ind.) 12.

The omission of the replevin bond from the papers filed with the transcript on appeal by defendant from a judgment in a replevin suit is not ground for dismissing the suit on motion of defendant, since it is his duty to file all the necessary papers with the transcript. McArthur *v.* Howett, 72 Ill. 358.

Dismissal for alteration.—Where the record on plaintiff's appeal was shown to be materially falsified as to the appeal-bond and the amount of the judgment, such alteration being in favor of plaintiff, who declined to correct the record by certiorari, the court dismissed the cause on motion of defendant, who by affidavit acquitted himself and his attorney of complicity in the alteration. Landa *v.* Harris, (Tex. Civ. App. 1897) 40 S. W. 551.

Dismissal of action and nonsuit generally see *infra*, IV, L.

94. *Arkansas.*—Where the record is insufficient to give the proper jurisdiction as an appeal case, the court may in its discretion either compel the proper record to be certified to it, or dismiss the proceedings. Baker *v.* Calvert, 16 Ark. 485.

Iowa.— Stowers *v.* Milledge, 1 Iowa 150, 63 Am. Dec. 434.

Kentucky.— See Hicks *v.* Parks, 30 S. W. 202, 17 Ky. L. Rep. 37.

Louisiana.— Baton Rouge *v.* Cremonini, 36 La. Ann. 247.

Minnesota.— Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47; Cour *v.* Cowdery, 53 Minn. 51, 54 N. W. 935; Rahilly *v.* Lane, 15 Minn. 447.

tion, order the transcript or record to be amended or a new return to be made.[95] But a justice will not be required or allowed to amend his return to an appeal so

Nebraska. — Wolcott *v.* McCormick Harvesting Mach. Co., 4 Nebr. (Unoff.) 766, 96 N. W. 216.

New York.— Woodside *v.* Pender, 2 E. D. Smith 390; Matthews *v.* Fiestel, 2 E. D. Smith 90. *Compare* Klenck *v.* De Forest, 3 Code Rep. 185, to the effect that judgment will not be reversed because the justice's return is defective.

Ohio.— Humiston *v.* Anderson, 15 Ohio 556. But *compare* Terry *v.* State, 22 Ohio Cir. Ct. 16, 12 Ohio Cir. Dec. 274.

Oregon.— Jacobs *v.* Oren, 30 Oreg. 593, 48 Pac. 431. On appeal from a justice's court, the filing of a transcript, although imperfect, with the clerk of the circuit court, within the time allowed by law, gives the circuit court jurisdiction. Woods *v.* Oregon Short Line R. Co., (1905) 81 Pac. 235.

South Dakota.— Warder, etc., Co. *v.* Raymond, 7 S. D. 451, 64 N. W. 525.

Wisconsin.— Demming *v.* Weston, 15 Wis. 236.

See 31 Cent. Dig. tit. "Justices of the Peace," § 624.

But see Jennings *v.* Mercer, 1 Heisk. (Tenn.) 9.

Defect not a defense on the trial see Gallup *v.* Mulbah, 26 N. H. 132.

Obvious clerical errors will be disregarded. Olim *v.* Chicago, etc., R. Co., 61 Iowa 250, 16 N. W. 124; Tousley *v.* Mowers, 14 Misc. (N. Y.) 125, 35 N. Y. Suppl. 855; Caughey *v.* Vance, 3 Pinn. (Wis.) 275.

Matter not required by law will be treated as surplusage. Wood *v.* Randall, 5 Hill (N. Y.) 264; Swartwout *v.* Roddis, 5 Hill (N. Y.) 118.

95. *Alabama.*— Prinz *v.* Weber, 126 Ala. 146, 28 So. 10.

Arkansas.— See Baker *v.* Calvert, 16 Ark. 485.

Connecticut.— See Chesebro *v.* Babcock, 59 Conn. 213, 22 Atl. 145, in which the facts were held not to warrant mandamus to compel the justice to amend.

Delaware.— Waters *v.* Kirby, 1 Houst. 364.

Illinois.— Demilly *v.* Grosrenaud, 201 Ill. 272; McNichols *v.* Hunt, 43 Ill. App. 451. See also McMullen *v.* Graham, 6 Ill. App. 239.

Indiana.— Baker *v.* Chambers, 18 Ind. 222. *Compare* Lewis *v.* Morrison, 10 Ind. 394, which was an appeal from a judgment on a written offer to confess judgment, and the court refused to grant a writ of certiorari to compel the justice to certify that defendant had verbally withdrawn his offer, as that would be a matter of proof on the trial.

Indian Territory.— Fortune *v.* Wilburton, 5 Indian Terr. 251, 82 S. W. 738.

Iowa.— First Nat. Bank *v.* Bourdelais, 109 Iowa 497, 80 N. W. 553; Lord *v.* Ellis, 9 Iowa 301; Cooper *v.* Woodrow, 3 Iowa 189; Atwater *v.* Woodward, 4 Greene 431; Smith *v.* Snodgrass, 4 Greene 282. *Compare* Olim *v.* Chicago, etc., R. Co., 61 Iowa 250, 16 N. W. 124 (to the effect that an order to amend in regard to an immaterial matter will not be allowed); Jordan *v.* Quick, 11 Iowa 9.

Kansas.— Wilson *v.* Paxton, 7 Kan. App. 79, 52 Pac. 911.

Michigan.— Carver *v.* Smith, 113 Mich. 207, 71 N. W. 528. See also Hinkle *v.* Collins, 113 Mich. 105, 71 N. W. 481, to the effect that where parties have asked and obtained a further return, they are bound by it.

Minnesota.— Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47; Cour *v.* Cowdery, 53 Minn. 51, 54 N. W. 935; Rahilly *v.* Lane, 15 Minn. 447.

Mississippi.— Weddell *v.* Seal, 45 Miss. 726, where it was held that if a party fails to avail himself of the power in the court to allow amendments, he cannot afterward invoke the aid of equity.

Missouri.— Dowdy *v.* Wamble, 110 Mo. 280, 19 S. W. 489; Smith *v.* Chapman, 71 Mo. 217; Frick Co. *v.* Marshall, 86 Mo. App. 463; Rowe *v.* Schertz, 74 Mo. App. 602; Daniel *v.* Atkins, 66 Mo. App. 342; Godman *v.* Gordon, 61 Mo. App. 685, constable's return amendable. See also Curtis *v.* Tyler, 90 Mo. App. 345. But see Price *v.* Halsed, 3 Mo. 461.

Nebraska.— Wolcott *v.* McCormick Harvesting Mach. Co., 4 Nebr. (Unoff.) 766, 96 N. W. 216.

New Jersey.— Alpaugh *v.* Hockenbury, 34 N. J. L. 342; Camp *v.* Martin, 12 N. J. L. 181; Allen *v.* Joice, 8 N. J. L. 135; Thompson *v.* Sutton, 6 N. J. L. 220.

New York.— Mull *v.* Ingalls, 62 N. Y. App. Div. 631, 71 N. Y. Suppl. 1142 [*affirming* 30 Misc. 80, 62 N. Y. Suppl. 830]; Sherman *v.* Green, 90 Hun 462, 36 N. Y. Suppl. 53; Slaman *v.* Buckley, 29 Barb. 289; McCafferty *v.* Kelly, 4 N. Y. Super. Ct. 637; Smith *v.* Van Brunt, 2 E. D. Smith 534; Woodside *v.* Pender, 2 E. D. Smith 390; Hyland *v.* Sherman, 2 E. D. Smith 234; Capewell *v.* Ormsby, 2 E. D. Smith 180; Matthews *v.* Fiestel, 2 E. D. Smith 90; Tenesei *v.* Societa Italiano, etc., 50 N. Y. Suppl. 685; Smith *v.* Johnston, 30 How. Pr. 374.

North Carolina.— Harper *v.* Miller, 26 N. C. 34, in which the court permitted the sheriff to amend his return of the verdict of the jury in a proceeding to assess damages for the erection of a mill.

Ohio.— Smith *v.* Smith, 12 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 588. *Compare* Berne *v.* Britton, 7 Ohio Dec. (Reprint) 373, 2 Cinc. L. Bul. 239, where it was held that a paper neither signed, certified to, nor written by the justice is not a transcript, and hence is not amendable after the thirty days allowed for filing a transcript have expired.

[V, A, 8, d, (I), (A)]

as absolutely to contradict his original return,[96] unless it appears that he was induced by fraud to sign a false return.[97] If the return is formally complete in its averments of fact, the court acquires a jurisdiction that cannot be gainsaid in that proceeding, the party's remedy for a false return being redress at the hands of the officer making it.[98]

(B) *Authority to Make Amendments.* The appellate court may itself allow an amendment of the transcript or record,[99] or order the justice to amend or make a new return.[1] But the justice has no power to amend or make a supplemental return except by consent of the parties,[2] or by order of court,[3] although the court may receive and consider a voluntary amended return, if it sees fit.[4] Where provision is made by statute for a compulsory return, even after the justice has gone

Oregon.— Where an appeal from a justice's court is taken in good faith, and the necessary undertaking given and the transcript filed with the clerk of the circuit court within the time allowed by law, appellant is entitled to a rule to compel the justice to amend and correct his certificate so as to show the facts. Woods *v.* Oregon Short Line R. Co., (1905) 81 Pac. 235. See also Hager *v.* Knapp, 45 Oreg. 512, 78 Pac. 671, where it was held, however, that the court will not award a certiorari when, by failure or neglect of appellant, the transcript is too imperfect to show affirmatively the grounds of error on which he intends to rely.

Pennsylvania.— Smith *v.* Boyer, 2 Watts 173 (record may be amended by the transcript); Barlemont *v.* Mecke, 22 Pa. Co. Ct. 126; Kearney *v.* Pennock, 12 Pa. Co. Ct. 37. *Compare* Lehman *v.* Winters, 10 Pa. Dist. 147.

South Carolina.— Lynah *v.* Heyward, 56 S. C. 562, 35 S. E. 220.

Tennessee.— Turner *v.* Lumbrick, Meigs 7, omissions supplied by means of recital in appeal-bond.

Texas.— Brown *v.* Dutton, (Civ. App. 1905) 85 S. W. 454.

Washington.— See Knoff *v.* Puget Sound Co-op. Colony, 1 Wash. 57, 24 Pac. 27, where it was held that it is not error for the court to refuse to allow an amendment in aid of the justice's jurisdiction.

Wisconsin.— Crate *v.* Pettepher, 112 Wis. 252, 87 N. W. 1104; Evangelical Lutheran St. Peter's Gemeinde *v.* Koehler, 59 Wis. 650, 18 N. W. 476; Hills *v.* Miles, 13 Wis. 625.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 625, 626.

Where evidence has been lost, the remedy is by application to produce the same by affidavits or witnesses in the appellate court, under N. Y. Code Civ. Proc. §§ 3056, 3213. McGovern *v.* Eldredge, 1 Misc. (N. Y.) 170, 20 N. Y. Suppl. 654.

A certificate of fact within the recollection of a justice relative to a judgment rendered by him cannot be used to amend his transcript. Boylan *v.* Hays, 7 Watts (Pa.) 509.

Matters outside of the record and written proceedings kept by a justice, and resting merely in his memory, which are incorporated into a supplemental return, voluntarily made by him, cannot properly be received by the appellate court. Crate *v.* Pettepher, 112 Wis. 252, 87 N. W. 1104.

96. Bennett *v.* Taylor, 70 Hun (N. Y.) 51, 23 N. Y. Suppl. 1094; Keeler *v.* Adams, 3 Cai. (N. Y.) 84.

97. Bennett *v.* Taylor, 70 Hun (N. Y.) 51, 23 N. Y. Suppl. 1094.

98. Carter *v.* Shindel, 7 Pa. Dist. 308.

99. Johnson *v.* Johnson, 113 Ga. 942, 39 S. E. 311; Peoples' Nat. Bank *v.* McArthur, 82 N. C. 107; Hager *v.* Knapp, 45 Oreg. 512, 78 Pac. 671; Hall *v.* Bewley, 11 Humphr. (Tenn.) 106.

In Iowa, under Code, § 4557, authorizing the court, on appeal from a justice, to correct any omission or mistake made by the justice in his docket entries, the appellate court may supply the justice's omission to enter an oral remittitur of all claims in excess of twenty-five dollars, upon unquestionable proof that such remittitur was made, in order to determine the right of appeal, under Code, § 4547, prohibiting appeals from a justice when the amount in controversy does not exceed twenty-five dollars. Henry *v.* Chicago, etc., R. Co., 127 Iowa 577, 103 N. W. 793.

Presumption that justice made amendment. — An amendment allowed in the appellate court will be presumed by the supreme court to have been made by the justice, where there is nothing shown to the contrary. Hall *v.* Bewley, 11 Humphr. (Tenn.) 106.

1. See *supra*, V, A, 8, d, (I), (A).

2. **Consent of parties.**— Beville *v.* Cox, 109 N. C. 265, 13 S. E. 800.

3. **Order of court necessary.**— Smith *v.* Chapman, 71 Mo. 217; Norton *v.* Porter, 63 Mo. 345; Horton *v.* St. Louis, etc., R. Co., 21 Mo. App. 147; Beville *v.* Cox, 109 N. C. 265, 13 S. E. 800.

Clerical errors.— After an appeal is taken the justice or his successor in office still has jurisdiction to correct clerical errors in the transcript. Texas, etc., R. Co. *v.* Gill, 9 Tex. Civ. App. 139, 28 S. W. 911.

4. Crate *v.* Pettepher, 112 Wis. 252, 87 N. W. 1104; Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782. See also Cochran *v.* Parker, 6 Serg. & R. (Pa.) 549, where it was held that the court may receive an additional return from the justice, or examine him on oath.

out of office, and also for the ascertainment of facts as to the trial below, in place of a return, if the justice is dead or out of the state, his successor has no authority to make returns for him.[5]

(c) *Procedure For Amendment.* An amendment of the record may be obtained by motion on notice,[6] by suggesting a diminution of the record,[7] by affidavit,[8] or the court may of its own motion award a certiorari, when the defects are apparent on the face of the record.[9] The amendment or new return may be compelled by certiorari,[10] by rule in attachment,[11] or by any other appropriate writ.[12]

(d) *Time For Amendment.* A reasonable time should be allowed appellants, who have taken the steps required of them, to have a defective transcript perfected;[13] and generally a transcript may be amended after motion to dismiss,[14] or even in some states after trial and judgment.[15]

(ii) *Waiver of Defects.* Where the transcript or record is irregular or defective, objection must be made before pleading or going to trial, or it will be held to have been waived;[16] and conversely, unless a party objects in apt time, an appeal may properly be heard and determined on an amended return.[17]

(iii) *Compelling Justice to Make Return.* Where an appeal has been properly taken from a justice's judgment,[18] but the justice neglects or refuses to send up the transcript or record, it is within the power of the appellate court to compel him to do so by mandamus, rule, certiorari, or other appropriate writ.[19]

5. Allard *v.* Smith, 120 Wis. 22, 97 N. W. 510, construing Rev. St. (1898) §§ 3764, 3765.

6. Moore *v.* Hansen, 75 Mich. 564, 42 N. W. 981, where it was held error to allow a return which showed no jurisdiction to be amended without a proper application and showing, and an opportunity to defendant to be heard on the motion.

Notice by publication held sufficient see Prinz *v.* Weber, 126 Ala. 146, 28 So. 10.

Motion must specify defect to be remedied. — Carmer *v.* Hubbard, 123 Mich. 333, 82 N. W. 64.

Where the record is verified by affidavit, defendant's unsupported motion to compel the justice to correct his record is insufficient to show that it is defective, within Indian Terr. Annot. St. (1899) § 2825. Fortune *v.* Wilburton, 5 Indian Terr. 251, 82 S. W. 738.

7. Reedy *v.* Gift, 2 Kan. 392; Wolcott *v.* McCormick Harvesting Mach. Co., 4 Nebr. (Unoff.) 766, 96 N. W. 216.

Answer of defendant in error regarded as suggestion of diminution see Godfred *v.* Godfred, 30 Ohio St. 53.

8. Cook *v.* U. S., 1 Greene (Iowa) 39; Lynsky *v.* Pendegrast, 2 E. D. Smith (N. Y.) 43.

9. Hager *v.* Knapp, 45 Oreg. 512, 78 Pac. 671.

10. Brown *v.* Grinnan, 2 Tex. App. Civ. Cas. § 413.

11. Fortune *v.* Wilburton, 5 Indian Terr. 251, 82 S. W. 738.

12. Brown *v.* Grinnan, 2 Tex. App. Civ. Cas. § 413.

13. Coates *v.* Bryan, (Tex. Civ. App. 1897) 40 S. W. 748.

14. Boiles *v.* Barnes, 4 Blackf. (Ind.) 176.

15. Clark *v.* Barnes, 7 Iowa 6; Hill *v.* Patterson, 34 Mo. App. 169. *Contra,* Watts *v.* Hill, 7 Ark. 203. And see Warren *v.* Campbell, 14 N. Y. Suppl. 165, where it was held that, after the appellate court has intimated or announced its decision, it is too late for a motion to amend.

16. *Delaware.*— Lewis *v.* Hazel, 4 Harr. 470.

Illinois.— Leiferman *v.* Osten, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156 [*affirming* 64 Ill. App. 578].

Kentucky.— Grimes *v.* Dearborn, 3 J. J. Marsh. 60.

New York.— Peck *v.* Richmond, 2 E. D. Smith 380; Young *v.* Conklin, 3 Misc. 122, 23 N. Y. Suppl. 122.

Wisconsin.— Crate *v.* Pettepher, 112 Wis. 252, 87 N. W. 1104; Hills *v.* Miles, 13 Wis. 625.

See 31 Cent. Dig. tit. "Justices of the Peace," § 630.

17. Godfred *v.* Godfred, 30 Ohio St. 53. See also Robinson *v.* Shrouds, 1 Ashm. (Pa.) 168.

18. **Where a defective appeal-bond has been served on the justice,** the appellate court cannot compel him to make a return. People *v.* Steuben County, 2 How. Pr. (N. Y.) 248.

The judgment appealed from must be stated in appellant's affidavit, or the court will not order a return, under N. Y. Code, § 310. Davis *v.* Lounsbury, 1 Code Rep. (N. Y.) 71.

19. *Alabama.*— See South, etc., R. Co. *v.* Pilgreen, 62 Ala. 305, in which a writ of certiorari was refused, however, because it appeared from the whole record that awarding the writ would not have affected the result.

California.— Burgess *v.* Superior Ct., (1887) 13 Pac. 166; Sherman *v.* Rolberg, 9

Where the writ employed is a writ of certiorari it is not a certiorari in lieu of an appeal.[20]

(iv) *Objection to Transcript or Record.* Objections to a transcript or record must be specific,[21] and they cannot be disposed of in a summary manner by affidavits upon a motion to dismiss the appeal.[22] Where an amended return is made, it cannot be vacated because of fraud or irregularity in the procurement of the order therefor, the proper remedy being by motion for a further amended return, or by a proceeding against the justice for a false return.[23]

e. Conclusiveness of Transcript or Record, and Questions Presented For Review — (i) *Conclusiveness.* The transcript or record of a justice of the peace is in most jurisdictions conclusive of the facts required to be stated therein,[24] and cannot be contradicted or impeached by evidence *aliunde*.[25] Evidence is, how-

Cal. 17. *Compare* People *v.* Halloway, 26 Cal. 651, in which the court had no jurisdiction as a court of appeal, and it was held that it had no power to grant a mandamus on a justice to file the papers necessary to an appeal.

Connecticut.— Smith *v.* Moore, 38 Conn. 105.

Illinois.— Demilly *v.* Grosrenaud, 201 Ill. 272, 66 N. E. 234; Little *v.* Smith, 5 Ill. 400.

Massachusetts.— Johnson *v.* Randall, 7 Mass. 340.

Michigan.— People *v.* Allegan Cir. Judge, 29 Mich. 487.

Mississippi.— Redus *v.* Gamble, 85 Miss. 165, 37 So. 1010.

Missouri.— Dermody *v.* The Maria Denning, 28 Mo. 284.

New Hampshire.— Ballou *v.* Smith, 29 N. H. 530.

New York.— People *v.* Lynde, 8 Cow. 133.

South Carolina. — Lynah *v.* Heyward, 56 S. C. 562, 35 S. E. 220.

Tennessee.— McGhee *v.* Grady, 12 Lea 89.

Texas.— Jones *v.* Spann, 3 Tex. App. Civ. Cas. § 283.

Wisconsin.— See Allard *v.* Smith, 97 Wis. 534, 73 N. W. 50, 120 Wis. 22, 97 N. W. 510.

Wyoming.— Goodrich *v.* Peterson, 12 Wyo. 214, 74 Pac. 497.

See 31 Cent. Dig. tit. "Justices of the Peace," § 631.

The order should not be made before time for making return has expired, although the justice has declared that he will not make a return. Allard *v.* Smith, 97 Wis. 534, 73 N. W. 50.

Scope of order.— An order directing a magistrate to make "return and file the appeal papers required by law" does not require him to make a "report" on request to charge the jury. Lynah *v.* Heyward, 56 S. C. 562, 35 S. E. 220.

20. Redus *v.* Gamble, 85 Miss. 165, 37 So. 1010; McGhee *v.* Grady, 12 Lea (Tenn.) 89.

Certiorari as mode of review see *infra*, V, B.

21. Palmer *v.* Hunter, 8 Mo. 512.

22. Struber *v.* Rohlfs, 36 Kan. 202, 12 Pac. 830.

23. Thomas *v.* Whitlegge, 14 N. Y. Suppl. 779.

24. *Arkansas.*— Moehring *v.* Kayser, 21 Ark. 457.

Indiana.— Larr *v.* State, 45 Ind. 364.

Iowa.— Brown *v.* Beesett, 13 Iowa 185.

Michigan.— Hodges *v.* Bagg, 81 Mich. 243, 45 N. W. 841; Whitworth *v.* Pelton, 81 Mich. 98, 45 N. W. 500.

Nebraska.— Worley *v.* Shong, 35 Nebr. 311, 53 N. W. 72.

New York.— McCafferty *v.* Kelly, 2 Sandf. 637; Suspension Bridge *v.* Bedford, 10 N. Y. St. 850; De Courcy *v.* Spalding, 3 Code Rep. 16. See also Kelly *v.* Brower, 1 Hilt. 514.

Pennsylvania.— Hicks *v.* Building Assoc., 26 Pa. Co. Ct. 235.

See 31 Cent. Dig. tit. "Justices of the Peace," § 633.

Contra.— Stuttle *v.* Bowers, 31 Kan. 432, 2 Pac. 806.

As prima facie evidence see Carter *v.* Current River R. Co., 156 Mo. 635, 57 S. W. 738 (of official character and jurisdiction of the justice); Burger *v.* St. Louis, etc., R. Co., 52 Mo. App. 119 (of official character of justice); Clements *v.* Greenwell, 40 Mo. App. 589 (as to the parties plaintiff and defendant).

Docket entries not conclusive as against jurisdictional facts contained in the notice see Smith *v.* Kistler, 84 Minn. 102, 86 N. W. 876.

25. *Connecticut.*— Wight *v.* Mott, Kirby 152.

Iowa.— Sloss *v.* Bailey, 104 Iowa 696, 74 N. W. 17.

Maine.— Holden *v.* Barrows, 39 Me. 135; Wheeler *v.* Lothrop, 16 Me. 18.

Massachusetts.— Cook *v.* Berth, 102 Mass. 372.

Nebraska.— Dryfus *v.* Moline, etc., Co., 43 Nebr. 233, 61 N. W. 599. *Compare* Fenton *v.* American Jewelry Co., 51 Nebr. 395, 70 N. W. 931.

New Jersey.— Paterson, etc., R. Co. *v.* Ackerman, 24 N. J. L. 535; Prall *v.* Waldron, 2 N. J. L. 145.

New York.— Suiter *v.* Kent, 12 N. Y. App. Div. 599, 43 N. Y. Suppl. 137; Barber *v.* Stellheimer, 13 Hun 198; Spence *v.* Beck, 1 Hilt. 276; Young *v.* Conklin, 3 Misc. 122, 22 N. Y. Suppl. 993.

Pennsylvania.— Foss *v.* Bogan, 92 Pa. St. 296; Fenstermacher *v.* Lilly, 5 Lanc. L. Rev.

ever, admissible to explain or correct mistakes in the record,[26] but not as a rule to supply omissions.[27]

(II) *Questions Presented For Review.* On appeal from a justice of the peace, the appellate court will not consider questions not embraced in the transcript or record;[28] and mere recitals therein of rulings which do not amount to judgments are insufficient to support assignments of error.[29]

9. Assignment of Errors. On appeal from a justice's judgment the assignment of errors must be specific,[30] and any assignment not founded on fact,[31] or which contradicts or is inconsistent with the record,[32] is untenable.

10. Dismissal, Withdrawal, or Abandonment — a. Voluntary Dismissal. In most of the states a party appealing from a judgment of a justice of the peace may dismiss or discontinue his appeal without the consent of the adverse party,[33]

44; Halliday *v.* Mills, 3 Pa. L. J. Rep. 394. See also Hindman *v.* Doughty, 172 Pa. St. 573, 33 Atl. 563.

South Carolina.— Barron *v.* Dent, 17 S. C. 75.

Canada.— Buckstaff *v.* Doten, 4 N. Brunsw. 366.

See 31 Cent. Dig. tit. "Justices of the Peace," § 634.

But see Mosseaux *v.* Brigham, 19 Vt. 457.

26. *Georgia.*— Sanders *v.* Matthewson, 121 Ga. 302, 48 S. E. 946.

Iowa.— Brown *v.* Beesett, 13 Iowa 185.

New Jersey.— Crane *v.* Ward, 3 N. J. L. 650.

North Carolina.— Evans *v.* Williamson, 79 N. C. 86.

Ohio.— Golden *v.* McConnell, 1 Ohio Dec. (Reprint) 58, 1 West. L. J. 397.

See 31 Cent. Dig. tit. "Justices of the Peace," § 634.

But see Holden *v.* Barrows, 39 Me. 135.

27. *Minnesota.*—Plymat *v.* Brush, 46 Minn. 23, 48 N. W. 443.

Pennsylvania.— Foss *v.* Bogan, 92 Pa. St. 296; Delaware, etc., Canal Co. *v.* Loftus, 71 Pa. St. 418; Clemens *v.* Gilbert, 12 Pa. St. 255. But see Steever *v.* Shoffstall, 10 Kulp 252; Gallagher *v.* Kudlich, 10 Kulp 220.

South Dakota.— Mouser *v.* Palmer, 2 S. D. 466, 50 N. W. 967.

Vermont.— Martin *v.* Blodget, 1 Aik. 375.

Wisconsin.— Talbot *v.* White, 1 Wis. 444.

United States.— Jacobs *v.* Jacobs, 13 Fed. Cas. No. 7,161*a*, Hempst. 101.

See 31 Cent. Dig. tit. "Justices of the Peace," § 635.

Compare Monaghan *v.* McKimmie, 32 Mich. 40.

Under Mansfield Dig. Ark. § 4140, providing that on appeal the cause shall be tried anew, "without any regard to any error, defect or other imperfection in the proceedings of the justice," the venue in suits for injuries to stock against railway companies may be shown by evidence *aliunde* in the appellate court. St. Louis, etc., R. Co. *v.* Lindsay, 55 Ark. 281, 18 S. W. 59.

The issues tendered below may be shown by parol, where the transcript fails to show them. Inglehart *v.* Lull, 64 Nebr. 758, 90 N. W. 762.

Where oral pleadings are omitted from the transcript, parol evidence is admissible to show what they were. Gholston *v.* Ramey, (Tex. Civ. App. 1895) 30 S. W. 713.

28. Butler *v.* Scovel, Kirby (Conn.) 352 (in which the court refused to reverse the judgment, because it did not appear from the record what, or in whose favor, the judgment was, or whether any had been rendered); Lane *v.* Goldsmith, 23 Iowa 240; Vance *v.* Kirfman, 20 Iowa 13; Hays *v.* Gorby, 3 Iowa 203; Stone *v.* Murphy, 2 Iowa 35; Bensberg *v.* Turk, 40 Mo. App. 227; Pearce *v.* Nester, 50 Hun (N. Y.) 546, 3 N. Y. Suppl. 720.

29. Burgin *v.* Ivey Coal, etc., Co., 127 Ala. 657, 29 So. 67.

30. General assignment bad.— Breese *v.* Williams, 20 Johns. (N. Y.) 280; Reab *v.* Moor, 19 Johns. (N. Y.) 337.

Errors of fact must be assigned see Craw *v.* Daly, 2 Code Rep. (N. Y.) 118.

31. Lookout Mountain Medical Co. *v.* Hare, 56 S. C. 456, 35 S. E. 130.

32. Burgess *v.* Tweedy, 16 Conn. 39.

33. *Illinois.*— "The party appealing has the right to control his appeal, and may dismiss the same at any time before the case is finally disposed of, as a matter of right." Maplewood Coat Co. *v.* Phillips, 206 Ill. 451, 452, 69 N. E. 514 [*affirming* 109 Ill. App. 66]. See also Ring *v.* Graves, 90 Ill. App. 269 [*citing In re* Story, 120 Ill. 244, 11 N. E. 209; Bacon *v.* Lawrence, 26 Ill. 53]; Pacific Express Co. *v.* Peadro, 25 Ill. App. 75.

Kansas.—An appeal may be waived by the appellant at any time before trial in the district court. Kansas City, etc., R. Co. *v.* Hammond, 25 Kan. 208.

Missouri.— Lee *v.* Kaiser, 80 Mo. 431.

Nebraska.—Appellant may dismiss at any time before the cause is submitted to the court or jury. Dobry *v.* Northern Milling Co., (1902) 90 N. W. 757; Eden Musee Co. *v.* Yohe, 37 Nebr. 452, 55 N. W. 866.

Oklahoma.— May dismiss at any time before commencement of trial. Darlington-Miller Lumber Co. *v.* Hall, 4 Okla. 668, 46 Pac. 493.

Pennsylvania.—Appellant has a right to abandon his appeal before it has been perfected by the filing of his transcript, and

and where the appeal has not been perfected or the transcript sent up he may withdraw his appeal, and make application to set aside the judgment, within the time prescribed for such application.[34] But in some states it is held that where the cause is triable *de novo* in the appellate court, the appellant cannot dismiss his appeal over the objection of the appellee;[35] and where a defendant appeals from a judgment rendered after the justice had lost jurisdiction by an irregular adjournment, he cannot take advantage of the irregularity by a motion to nonsuit when the appeal is moved in the appellate court, but must submit to a retrial on the merits.[36]

b. Involuntary Dismissal[37] — (I) *Grounds* — (A) *In General.* Whenever it is made to appear to an appellate court that an appeal from a justice of the peace is improperly before it, it is its duty to dismiss it.[38] But on a motion to dismiss the

to elect his remedy by certiorari, within the period allowed by statute. Bailey *v.* Jefferson Tp., 21 Pa. Co. Ct. 20; Wilcox *v.* Fowler, 2 Chest. Co. Rep. 497. *Compare* Brown *v.* Kenefick, 12 Pa. Dist. 750.

Texas.— Jameson *v.* Smith, 19 Tex. Civ. App. 90, 46 S. W. 864.

Wisconsin.— Hart *v.* Minneapolis, etc., R. Co., 122 Wis. 308, 99 N. W. 1019.

See 31 Cent. Dig. tit. "Justices of the Peace," § 638.

The filing of a set-off in the appellate court will not take away appellant's right of dismissal. Maplewood Coal Co. *v.* Phillips, 109 Ill. App. 66 [*affirmed* in 206 Ill. 451, 69 N. E. 514].

34. Park *v.* Ratcliffe, 42 Iowa 42. And see Wardens of Poor *v.* Cope, 24 N. C. 44, where it was held that the parties might by consent, while the papers remained in the hands of the magistrate, set aside an appeal and have a new trial.

35. Peterson *v.* Frey, 109 Mich. 689, 67 N. W. 974; Watson *v.* Hurry, 47 W. Va. 809, 35 S. E. 830.

36. Vandervoort *v.* Fleming, 68 N. J. L. 507, 53 Atl. 225 [*explaining* Parker *v.* Mercantile Safe Deposit Co., 63 N. J. L. 505, 44 Atl. 199].

37. **Abandoning set-off as ground for dismissal** see *supra*, V, A, 2, b, (II), (D).

Appearance on motion to dismiss as waiver of right see *supra*, V, A, 6, g, (II), (C).

Defective transcript as ground for dismissal see *supra*, V, A, 8.

Failure to pay costs see *supra*, V, A, 6, d.

Failure of transcript to contain: Judgment see *supra*, V, A, 8, a, (VI). Pleadings see *supra*, V, A, 8, a, (IV).

Failure to enter or docket appeal in time see *supra*, V, A, 6, g, (I), (B).

Failure to file: Supersedeas bond see *supra*, V, A, 7, g. Transcript see *supra*, V, A, 8, c.

Failure to give: Bond see *supra*, V, A, 6, e. Notice see *supra*, V, A, 6, f.

Failure to make sufficient affidavit see *supra*, V, A, 6, c.

Failure to move for new trial or to set aside default see *supra*, V, A, 4, c.

Increasing demand beyond justice's jurisdiction see *infra*, V, A, 12, c, (VI).

Want of proper certificate to transcript see *supra*, V, A, 8, b, (III).

38. *Delaware.*— Pepper *v.* Warren, 2 Marv. 225, 43 Atl. 91.

Illinois.— Edwards *v.* Vandemack, 13 Ill. 633.

Indiana.— Davis *v.* Luark, 34 Ind. 403.

Iowa.— Seabold *v.* Schevers, (1902) 89 N. W. 1121.

Kansas.— Nolan *v.* Ellis County Com'rs, 10 Kan. App. 579, 63 Pac. 657.

Minnesota.— Grimes *v.* Fall, 81 Minn. 225, 83 N. W. 835.

Missouri.— Devore *v.* Staeckler, 49 Mo. App. 547.

Nebraska.— People's Bldg., etc., Assoc. *v.* Cook, 63 Nebr. 437, 88 N. W. 763; Bower *v.* Cassels, 59 Nebr. 620, 81 N. W. 622.

New Jersey.— Vandoren *v.* Vandoren, 10 N. J. L. 286.

New York.— People *v.* Tioga C. Pl., 1 Wend. 291.

Oregon.— Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038.

Pennsylvania.— Kutz *v.* Skinner, 7 Pa. Super. Ct. 346; Houck *v.* Whitaker, 10 Pa. Dist. 244; Grady *v.* Townsend, 8 Pa. Dist. 79; Miller *v.* Culver, 21 Pa. Co. Ct. 489; Dietrick *v.* Mann, 1 Leg. Chron. 159.

Texas.— East Liverpool Potters' Co. *v.* Hill, (Civ. App. 1904) 81 S. W. 568.

Vermont.— Porter *v.* Bishop, 77 Vt. 163, 59 Atl. 176.

Wisconsin.— Clark *v.* Miles, 2 Pinn. 432, 2 Chandl. 94. *Compare* Finley *v.* Prescott, 104 Wis. 614, 80 N. W. 930, 47 L. R. A. 695.

Wyoming.— Jenkins *v.* Cheyenne, 1 Wyo. 287; Ivinson *v.* Pease, 1 Wyo. 277.

See 31 Cent. Dig. tit. "Justices of the Peace," § 639.

Compare Agnew *v.* Natchez, 9 Sm. & M. (Miss.) 104, where it was held error for an appellate court to dismiss an appeal, unless it is shown affirmatively that the magistrate had exclusive jurisdiction of the case.

The presumption is in favor of the regularity of an appeal; and if the appellee alleges a want of right to appeal not apparent of record, he must plead such facts as, in connection with the record, will show such want of right. Johnson *v.* Williams, 48 Vt. 565.

Appeal perfected by appellee dismissed see Dietrick *v.* Mann, 1 Leg. Chron. (Pa.) 159.

court cannot consider the merits of the controversy,[39] nor defects and errors in the proceedings below;[40] and, where the case is triable *de novo*, an appeal will not be dismissed for want of process, or for defects and irregularities therein,[41] unless the defect is jurisdictional.[42] In cases where the justice is evidently responsible for the irregularities in taking an appeal and not the appellant, the proper practice is not to strike off the appeal but to grant a rule to show cause why the appellant should not perfect his appeal.[43] Where there is a ground upon which an appeal may be dismissed, and also a ground on which, if the appeal were properly perfected, the action might be dismissed, the court should dismiss the appeal and not the action.[44]

(B) *Failure to Appear and Prosecute Appeal.* Where a cause is triable *de novo* in the appellate court, an appeal should not ordinarily be dismissed for the non-appearance of the appellant;[45] but under the statutes or rules of court in some jurisdictions an appeal from a justice's judgment will be dismissed if the appellant fails to appear and prosecute his appeal within the time therein prescribed,[46]

Settlement of suit ground for dismissal see Schenck *v.* Lincoln, 17 Wend. (N. Y.) 506.

Failure of appellant to sign appeal-bond not ground for dismissal see Sanders *v.* Matthewson, 121 Ga. 302, 48 S. E. 946.

Loss of original papers not ground for dismissal see Fanning *v.* Voelker, 39 Mo. 120.

39. Bower *v.* Cassels, 59 Nebr. 620, 81 N. W. 622.

Failure of appellant to prove his cause of action in court below is not ground for dismissal. Hicken *v.* Alden, 26 Wis. 40.

Rendition of wrong judgment not ground for dismissal see State *v.* Brewer, 64 Ind. 131.

An appeal from an approved judgment, if regular, should not be dismissed. There should be a judgment of affirmance. Barringer *v.* Holbrook, 64 N. C. 540.

40. *Indiana.*— Indianapolis, etc., R. Co. *v.* Toon, 20 Ind. 230; Indianapolis, etc., R. Co. *v.* Wilsey, 20 Ind. 229; Jones *v.* Rodman, 4 Blackf. 492.

Mississippi.— Porter *v.* Fooshee, 41 Miss. 337.

North Dakota.— Olson *v.* Shirley, 12 N. D. 106, 96 N. W. 297.

Pennsylvania.— Locher *v.* Rice, 8 Pa. Dist. 404; McIlvaine *v.* Moran, 1 Chest. Co. Rep. 458.

Vermont.— Barber *v.* Garves, 18 Vt. 290.

See 31 Cent. Dig. tit. "Justices of the Peace," § 639.

41. McCrory *v.* Smith, 1 Ala. 157; Coyle *v.* Baldwin, 5 Cal 75; Boaz *v.* Paddock, 1 Tex. App. Civ. Cas. § 39.

42. Durham Fertilizer Co. *v.* Marshburn, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708.

Failure of the summons to set forth the cause of action is ground for dismissal. Macon, etc., R. Co. *v.* Walton, 121 Ga. 275, 48 S. E. 940.

43. Dunlap *v.* Chipps, 12 Pa. Dist. 147.

44. Hunter *v.* Thomas, 51 Ind. 44.

45. National Furniture Co. *v.* Edwards, 105 Ga. 240, 31 S. E. 161; Singer Mfg. Co. *v.* Walker, 77 Ga. 649; Griffin Marble, etc., Works *v.* Padgett, 77 Ga. 497; Eichelberger *v.* Garvin, 7 Ill. App. 129; Barnes *v.* Southern R. Co., 133 N. C. 130, 45 S. E. 531. But see Lum *v.* Price, 16 N. J. L. 195. And *compare* Kain *v.* Tuohy, 80 Mo. App. 350 [*following* Holloman *v.* St. Louis, etc., R. Co., 92 Mo. 284, 5 S. W. 1, which *overruled* Ray *v.* St. Louis, etc., R. Co., 25 Mo. App. 104], where it was held that it was not error to affirm a judgment of a justice without proof *de novo*, when appellant not only failed but refused to prosecute his appeal.

46. Boyd *v.* Kocher, 31 Ill. 295; Shook *v.* Thomas, 21 Ill. 87; Ficklin *v.* Olmsted, 72 Ill. App. 334; Cronin *v.* Sullivan, 61 Ill. App. 338; Equitable F. Ins. Co. *v.* Fishburne, 72 S. C. 24, 51 S. E. 528; Bell *v.* Pruit, 51 S. C. 344, 29 S. E. 5; Fred Miller Brewing Co. *v.* Quirk, 82 Wis. 197, 52 N. W. 93; Bates *v.* Steele, 65 Wis. 355, 27 N. W. 42; Holt *v.* Coleman, 61 Wis. 422, 21 N. W. 297; Vibbert *v.* Shepard, 15 Wis. 106. *Compare* Hecht *v.* Franklin, 113 Ill. App. 467; Newman *v.* Board, 74 Wis. 303, 41 N. W. 961.

Where counsel appears for appellant, it is error to dismiss the appeal with procedendo, for want of prosecution, against counsel's objection. Brown *v.* Cook, 37 Ill. App. 608.

Where a case has once been duly noticed within the prescribed time, although there has subsequently been a delay without notice for such time, the appeal should not be dismissed. Willis *v.* Gimbert, 27 Mich. 91.

Failure to enter the name of appellant's attorney on the docket does not entitle appellees to a dismissal of an appeal. Gregson *v.* Allen, 85 Ill. 478.

Delay in having papers sent up.— Where defendant, after appealing in open court, caused the justice to delay in sending up the papers by telling him not to send them, but finally determined to prosecute the appeal, and filed the necessary bond, it was held that his acts did not show an abandonment of the appeal, and that a refusal to dismiss on that ground was not error. Suttle *v.* Green, 78 N. C. 76.

In the absence of any rule providing for a preliminary call of the docket, it is error to dismiss an appeal on such preliminary call. Goode *v.* Le Clair, 10 Ill. App. 647.

Under a published notice that a general call of cases would begin on a certain day, and

unless he can show a sufficient excuse for such failure, although not if he does show such excuse.[47]

(c) *Want of Jurisdiction or Disqualification of Justice.* If it appears on the face of the proceedings or from the evidence that the justice had no jurisdiction to render judgment, an appeal from his judgment may be dismissed,[48] although, where the justice never obtained jurisdiction of the subject-matter, it is proper to dismiss the action.[49] As an objection to a justice's trial of the case because of his disqualification may be waived, a motion to dismiss an appeal for such cause should be denied, where the record does not show when defendant first acquired knowledge of the facts.[50]

(II) *Proceedings For Dismissal* — (A) *In General.* The usual mode of procedure to have an appeal dismissed is by written motion,[51] on notice to the appellant.[52] The motion must state the grounds on which it is based,[53] and, where the grounds are not apparent on the face of the record, evidence is admissible in support of the motion, or to maintain the appeal,[54] but not to contradict

that when a case was called it might be stricken from the docket or dismissed for want of prosecution, there was no authority for dismissing an appeal from a justice of the peace. Gottschalk *v.* Lembke, 61 Ill. App. 236.

47. Excuses held sufficient see Stone *v.* Halpin, 83 Wis. 483, 53 N. W. 691; Platto *v.* Western Union Tel. Co., 64 Wis. 341, 25 N. W. 421.

48. Ballard *v.* McCarty, 11 Ill. 501; Paine *v.* Portage County, Wright (Ohio) 417. *Compare* Barker *v.* Wheeler, 44 Mich. 176, 6 N. W. 234. But see Kuklo *v.* Kleis, 2 N. Y. Suppl. 358, decided under N. Y. Code Civ. Proc. § 3062, which provides for dismissal of an appeal only in case the action is not brought to a hearing before the end of the second term after appeal taken.

Where a judgment is invalid because rendered at an improper adjournment, the remedy of defendant is by certiorari, or by a suit to enjoin its collection; and if the record shows a proper adjournment, he cannot on appeal move to dismiss, and sustain his motion by affidavits. Mahr *v.* Young, 13 Wis. 634.

49. Abbott *v.* Kruse, 37 Ill. App. 549. And see *infra*, V, A, 11, a, (III), (B).

50. Baldwin *v.* Runyan, 8 Ind. App. 344, 35 N. E. 569.

51. Motion must be in writing.— Tadlock *v.* Walden, (Tex. App. 1892) 19 S. W. 330. But see Houser *v.* Nolting, 11 S. D. 483, 78 N. W. 955, where it was held that the motion need not be in writing, it being sufficient if written notice of the grounds of the motion is given to appellant.

In Illinois, if appellant does not cause the papers to be filed, and advance such fees as are required to be prepaid, the adverse party may do so, and upon due notice obtain a rule requiring the fees so advanced to be refunded by appellant, whose appeal may be dismissed for a disobedience of the rule. Garrity *v.* Bash, 84 Ill. 73.

52. Notice necessary.— Watts *v.* Naylor, 5 Kan. App. 146, 48 Pac. 921; Hubert *v.* Weger, 14 Pa. Co. Ct. 128; Keehl *v.* Schaller, 1 S. D. 290, 46 N. W. 934; Myers *v.* Mitchell, 1 S. D. 249, 46 N. W. 245. But *compare* Grimes *v.* Fall, 81 Minn. 225, 83 N. W. 835, to the effect that where an appeal is subject to dismissal on account of an imperfection in the affidavit of appeal, and the time for appeal has expired, appellant cannot be heard to complain in the supreme court that the district court dismissed the appeal because of such imperfection, on motion of appellee, of which motion he had no notice.

Waiver of notice.— Where plaintiff made a motion to dismiss, which was granted, defendant's attorney being present, and assenting to the dismissal, it was held that defendant's right to notice was waived. McFarland *v.* Butler, 11 Minn. 72, 77.

53. Motion held sufficiently definite see Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038.

54. *Illinois.*— Swingley *v.* Haynes, 22 Ill. 214.

Louisiana.— State *v.* Judge Thirteenth Judicial Dist. Ct., 38 La. Ann. 718, in which the ground of the motion was that the matter in dispute was below the jurisdictional limit, and it was held that appellant should be allowed to offer evidence to maintain his appeal, unless his want of right conclusively appears from the face of the papers.

Oregon.— See Bilyeu *v.* Smith, 18 Oreg. 335, 22 Pac. 1073.

Pennsylvania.— Stollars *v.* East Finley Tp., 3 Pa. Co. Ct. 209 (parol evidence to show amount in controversy); Ober *v.* Koser, 12 Lanc. Bar 104 (affidavit of justice to show payment of costs). But see Lowery *v.* Collins, 5 L. T. N. S. 97; Smith *v.* Finn, 5 L. T. N. S. 78, where it was held that an appeal allowed *nunc pro tunc* will not be stricken off on affidavits.

West Virginia.— Where an appeal has been obtained from a circuit judge, the adverse party may move to have it dismissed as improvidently awarded, because good cause was not shown for not having taken it within ten days, by the written proof, including the affidavits on which the judge acted. Hubbard *v.* Yocum, 30 W. Va. 740, 5 S. E. 867.

See 31 Cent. Dig. tit. "Justices of the Peace," § 642.

the record.[55] A motion to dismiss for want of jurisdiction should be determined on the case made by plaintiff, in the absence of pleading and proof to the contrary,[56] and where the motion is made on the ground that defendant's set-off was not offered in good faith, but for the purpose of securing an appeal, the court will not pass on the merits of the set-off, but only on the question of its effect.[57] Where a statute makes the transcript on appeal take the place of a declaration, and the papers have been lost, a party wishing to dismiss the appeal must first have the judgment restored;[58] and where the ground of a motion is that the appeal-bond is not for double the amount of the judgment, the court may reduce the judgment by striking therefrom an improper charge in the bill of costs.[59]

(B) *Time For Dismissal or Motion to Dismiss.* Unless an appeal fails to confer jurisdiction on the appellate court,[60] a motion to dismiss must be made at the earliest opportunity.[61] A premature motion to dismiss will generally be denied.[62]

c. Judgment on Dismissal. The practice in the different states varies in regard to the judgment to be rendered upon the dismissal of an appeal from a justice's court. In some the court can do no more than render a simple judgment of dismissal, with costs;[63] in others a writ of procedendo is awarded,[64] pro-

55. See *supra*, V, A, 8, e, (I).

A copy of the recognizance cannot be used to contradict the original on motion to dismiss for want of a proper recognizance. Stetson *v.* Corinna, 44 Me. 29.

56. Hildebrand *v.* Walter A. Wood Mowing, etc., Mach. Co., 8 Tex. Civ. App. 132, 27 S. W. 826.

57. Baldwin *v.* Burgess, Wilcox (Pa.) 223.

58. Reed *v.* Driscoll, 84 Ill. 96.

59. Porter *v.* Russek, (Tex. Civ. App. 1895) 29 S. W. 72.

60. Chalmers *v.* Tandy, 111 Ill. App. 252; Moore *v.* Lyman, 13 Gray (Mass.) 394 (in which the record did not show that an appeal had been taken); Council *v.* Monroe, 52 N. C. 396; Baer *v.* Garrett, 2 Leg. Chron. (Pa.) 207.

61. *Alabama.*— Alford *v.* Colson, 8 Ala. 550 (at first term and before continuance); Jenkins *v.* Cauley, 1 Stew. 61.

Illinois.— Metropolitan L. Ins. Co. *v.* Broach, 31 Ill. App. 496.

Indiana.— Abel *v.* Burgett, 4 Blackf. 511.

Iowa.— Frink *v.* Whicher, 4 Greene 382.

North Carolina.— McMillan *v.* Davis, 52 N. C. 218.

Pennsylvania.— Greenawalt *v.* Shannon, 8 Pa. St. 465; Marks *v.* Swearingen, 3 Pa. St. 454; Martin *v.* Graybill, 22 Pa. Co. Ct. 356; Order of Odd Fellows *v.* Reilly, 21 Pa. Co. Ct. 552; Executors *v.* Stove Co., 4 L. T. N. S. 13.

Texas.— Gulf, etc., R. Co. *v.* Conerty, (App. 1891) 15 S. W. 504. *Compare* Cook *v.* Burson, 35 Tex. Civ. App. 595, 80 S. W. 871.

See 31 Cent. Dig. tit. "Justices of the Peace," § 643.

But see Haukland *v.* Minneapolis, etc., R. Co., 11 S. D. 493, 78 N. W. 958, construing Comp. Laws, § 6136.

62. Webster *v.* School Dist. No. 4, 16 Wis. 316. See also Steinborn *v.* Thomas, 8 Ill. App. 515. But *compare* Bell *v.* Brady, 11 Tex. Civ. App. 526, 33 S. W. 303, to the effect that an appeal to the county court may be dismissed for failure to give a proper bond before the term at which the case would be triable.

A motion to quash suspends proceedings in the case, and a judgment of *non pros.* for want of a declaration cannot be entered while it is pending, although the time in which it should otherwise have been filed has passed. Craig *v.* Brown, 48 Pa. St. 202.

63. *Michigan.*— Under Howell Annot. St. § 7021, the judgment should be in favor of appellee for costs, and where the court makes an erroneous order permitting appellant to discontinue his appeal on payment of part of the costs only, the remedy of the appellee is by motion to set the order aside, and not by a motion based thereon for judgment for full costs. Swegles *v.* Donovan, 110 Mich. 631, 68 N. W. 649.

Missouri.— Hooker *v.* Atlantic, etc., R. Co., 63 Mo. 449; Manion *v.* State, 11 Mo. 578; Runkle *v.* Hagan, 3 Mo. 234; Barns *v.* Holland, 3 Mo. 47; Thompson *v.* Curtis, 2 Mo. 209.

Oregon.— Where an appeal is dismissed for want of jurisdiction, the court has no authority to render any further judgment than that of dismissal. Long *v.* Sharp, 5 Oreg. 438.

South Dakota.— Sorenson *v.* Donahoe, 11 S. D. 603, 79 N. W. 998; Haukland *v.* Minneapolis, etc., R. Co., 11 S. D. 493, 78 N. W. 958.

Texas.— Bender *v.* Lockett, 64 Tex. 566. See also Llano Imp., etc., Co. *v.* White, 5 Tex. Civ. App. 109, 23 S. W. 594, in which an unauthorized writ of procedendo was treated as mere surplusage.

Wisconsin.— Falvey *v.* O'Brien, 17 Wis. 188; Shiff *v.* Brownell, 4 Wis. 285.

United States.— Jacobs *v.* Jacobs, 13 Fed. Cas. No. 7,161*a*, Hempst. 101.

See 31 Cent. Dig. tit. "Justices of the Peace," § 644.

Judgment on appeal-bond on dismissal of appeal see *infra*, V, C, 5, b.

64. Bank of Commerce *v.* Franklin, 88 Ill. App. 198; Wilson *v.* Moses, 55 Ill. App. 230;

vided the court has obtained jurisdiction of the subject-matter;[65] and in others the judgment below is affirmed, if the cause is so before the court that it could regularly try it.[66] It is not necessary that the appellate court shall state on the record the reason for dismissing an appeal,[67] and such a judgment is conclusive until reversed on error or the removal of the cause to a higher court.[68] Before an order granting a motion to dismiss an "action" is reduced to writing, the court may at the same term amend both motion and order so as to provide for a dismissal of the "appeal."[69]

d. Acts Constituting Dismissal. An appellant will be deemed to have abandoned his appeal where he fails to perfect it within the prescribed time,[70] and an appeal will be considered dismissed where an order dismissing it is made during the term, although the judge fails to sign the record.[71] But where an appellant has given notice of appeal and filed his appeal-bond, the appellate court is not deprived of jurisdiction by his subsequently placing in the papers a writing abandoning his appeal and agreeing to the immediate issuance of execution, where neither the justice nor the appellee have any notice thereof;[72] and discontinuing a suit after appeal is not a discontinuance of the appeal, within a statute providing that on the discontinuance or dismissal of an appeal the justice shall proceed as if it had never been taken.[73]

e. Effect of Dismissal. The final and effectual dismissal of an appeal deprives the appellate court of all further jurisdiction of the cause,[74] and restores the judgment below as if no appeal had been taken.[75]

f. Reinstatement. In the exercise of a sound judicial discretion, however,[76]

Jackson *v.* Baxter, 5 Lea (Tenn.) 344. See also Rudershauer *v.* Pagels, 14 Ohio Cir. Ct. 327. But see Best Brewing Co. *v.* Klassen, 85 Ill. App. 464, where it was held that, under Rev. St. c. 79, § 181, the appellee has the right to elect whether the appeal shall be dismissed, or have judgment for the amount of the recovery appealed from.

65. Smith *v.* McCandless, 101 Ill. App. 143, holding that where no transcript has been filed, the court has no jurisdiction of the subject-matter, and no procedendo can be issued.

66. Chambers *v.* O'Bannon, 1 Litt. (Ky.) 194. See also Keen *v.* Turner, 13 Mass. 265, where it was held that upon dismissal plaintiff was entitled to a new judgment in his favor, unless, upon some issue of law or fact, the cause should have been determined against him.

Where the appellate court acquires no jurisdiction, a judgment of dismissal, and not of affirmance, is proper. Douglass *v.* Nequelona, 88 Tenn. 769, 14 S. W. 283. See also Rowell *v.* Zier, 66 Minn. 432, 69 N. W. 222, in which no return was filed.

67. Obert *v.* Whitehead, 9 N. J. L. 244.

68. Loveland *v.* Burton, 2 Vt. 521.

69. Allard *v.* Smith, 120 Wis. 22, 97 N. W. 510.

70. Goodman *v.* Allen, 72 Iowa 616, 34 N. W. 445.

71. O'Hare *v.* Leonard, 19 Iowa 515.

72. Curtis *v.* Bernstein, 2 Tex. App. Civ. Cas. § 671.

73. Franks *v.* Fecheimer, 44 Mich. 177, 6 N. W. 215.

74. Olmstead *v.* Mason, 3 Bush (Ky.) 693; Baker *v.* Irvine, 58 S. C. 436, 36 S. E. 742; Doering *v.* Jensen, 16 S. D. 58, 91 N. W. 343; Rudolph *v.* Herman, 4 S. D. 203, 56 N. W. 122.

Dismissal deprives appellant of right to trial de novo.— Hill *v.* Steel, 17 Ark. 440.

Where an appeal is dismissed before defendant's appearance, the appellant is not subject to the payment of a docket-fee. Cassady *v.* Reid, 4 Blackf. (Ind.) 178.

75. *Illinois.*— Bank of Commerce *v.* Franklin, 88 Ill. App. 198, to the effect that the warranted practice is to award a procedendo, commanding the justice to proceed upon the judgment as if the appeal had never been taken.

Kansas.— Kansas City, etc., R. Co. *v.* Hammond, 25 Kan. 208. But see Hodgin *v.* Barton, 23 Kan. 740.

Kentucky.— Olmstead *v.* Mason, 3 Bush 693.

Missouri.— Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095. But see Lee *v.* Kaiser, 80 Mo. 431.

North Carolina.— Mathis *v.* Bryson, 49 N. C. 508; Sturgill *v.* Thompson, 44 N. C. 392.

Texas.— Where an appeal is dismissed for want of jurisdiction, the justice's judgment remains in full force and effect. Kingsley *v.* Schmicker, (Civ. App. 1900) 60 S. W. 331; Jameson *v.* Smith, 19 Tex. Civ. App. 90, 46 S. W. 864.

See 31 Cent. Dig. tit. "Justices of the Peace," § 645.

76. Locke *v.* Osborne-McMillan Elevator Co., 80 Minn. 22, 82 N. W. 1084; Cabanne *v.* Macadaras, 91 Mo. App. 70; Johnson *v.* St. Louis, etc., R. Co., 48 Mo. App. 630; Vastine *v.* Bailey, 46 Mo. App. 413.

Mandamus will not lie to compel reinstatement. Lewis *v.* Barclay, 35 Cal. 213; Porter

the appellate court should, upon good cause shown,[77] reinstate an appeal which has been dismissed.[78] The order reinstating the appeal must be made at the same term,[79] unless power to do so after the expiration of the term is conferred by statute.[80] Where an appeal has been improperly reinstated, the proceedings may be set aside in a higher court by certiorari.[81]

11. Hearing and Proceedings Preliminary to Hearing — a. Preliminary Proceedings — (i) *In General.* On appeal from a justice of the peace the appellate court has the usual incidental powers. It may appoint a guardian *ad litem*,[82] order the consolidation of several suits between the same parties,[83] and may compel plaintiff to elect whether he will seek to charge a person whose name appears on the back of a note above the payee's as joint maker, indorser, surety, or guarantor.[84]

(ii) *Change of Venue.* In many states the statutes provide for a change of venue upon certain conditions on appeal from a justice's judgment.[85]

v. Klahn, 1 Tex. App. Civ. Cas. § 528. *Contra*, Alpaugh *v.* Hockenbury, 34 N. J. L. 342; Ferguson *v.* Kays, 21 N. J. L. 431.

Abuse of discretion in refusing to reinstate see Drinkwater *v.* Davidson, 90 Ill. App. 9.

77. Drinkwater *v.* Davidson, 90 Ill. App. 9; Watts *v.* Naylor, 5 Kan. App. 146, 48 Pac. 921; Aldrich *v.* Clinton County, 49 Mich. 609, 14 N. W. 565.

A meritorious defense must be shown. Fisher *v.* Friend, 78 Ill. App. 474; Hamilton *v.* Stafford, 78 Ill. App. 54; Fisher *v.* Perrine, 62 N. J. L. 643, 42 Atl. 172.

Insufficient showing for reinstatement see London Guarantee, etc., Co. *v.* Mossness, 108 Ill. App. 440; Byington *v.* State Journal Co., 40 Kan. 622, 20 Pac. 514; Locke *v.* Osborne-McMillan Elevator Co., 80 Minn. 22, 82 N. W. 1084; Bullock *v.* Cook, 28 Mo. App. 222.

78. Conditional reinstatement see Buettner *v.* Percy, 31 Ill. App. 389.

79. McIntosh *v.* Lewis, 69 Ill. App. 593 [*following* Chicago Title, etc., Co. *v.* Chicago, etc., R. Co., 58 Ill. App. 388; Angus *v.* Backus, 58 Ill. App. 259]; Hunt *v.* Baldwin, 27 Ill. App. 446; Jameson *v.* Kinsey, 85 Mo. App. 298.

80. In West Virginia, under Code (1899), c. 127, § 11, the court may, on motion, reinstate on the trial docket any case dismissed within three terms after the order of dismissal may have been made. Gorrell *v.* Willis, 54 W. Va. 78, 46 S. E. 139.

81. Howell *v.* Van Ness, 31 N. J. L. 443. See also Fisher *v.* Perrine, 62 N. J. L. 643, 42 Atl. 172.

82. Moody *v.* Gleason, 7 Cow. (N. Y.) 482.

83. Cooper *v.* Maddan, 6 Ala. 431. See, generally, Consolidation of Actions.

84. Barnett *v.* Nolte, 55 Mo. App. 184.

85. *Arkansas.*— Hurley *v.* Bevens, 57 Ark. 547, 22 S. W. 172.

Indiana.— Plaintiff is entitled to have a motion for change of venue from the county granted, upon the costs of the change being paid or replevied. McDonough *v.* Kane, 75 Ind. 181.

Iowa.— A change of venue could formerly be granted from the circuit to the district court (Browne *v.* Hickie, 68 Iowa 330, 27 N. W. 276), unless the circuit court had exclusive jurisdiction (Sayles *v.* Deluhrey, 64 Iowa 109, 19 N. W. 883; Schuchart *v.* Lammey, 62 Iowa 197, 17 N. W. 467); but no change from the county was allowed (Boileau *v.* Chicago, etc., R. Co., 69 Iowa 324, 28 N. W. 621; Ardery *v.* Chicago, etc., R. Co., 65 Iowa 723, 23 N. W. 141).

Kentucky.— In an appeal from an order rejecting a claim against a county, ten days' notice of a motion for change of venue given the county judge is sufficient, without serving it on all the justices. Washington County Ct. *v.* Thompson, 13 Bush 239.

Missouri.— Hart *v.* Mayhugh, 75 Mo. App. 121 (change may be had before notice of appeal is given); Clements *v.* Greenwell, 40 Mo. App. 589.

New York.— Under 2 N. Y. Laws (1847), p. 643, c. 470, § 31, where the county judge is disqualified by reason of relationship to the parties, or for other causes, an appeal must be transferred to the supreme court, and must be heard in the first instance at a special term (Davis *v.* Stone, 16 How. Pr. 538; Sheldon *v.* Albro, 8 How. Pr. 305), and on the original papers, which cannot be taken out of the county (Wiles *v.* Peck, 16 How. Pr. 541).

Pennsylvania.— If the case is a proper one for the allowance of an appeal, but the appeal has been taken to the wrong court, the party may be allowed to perfect his appeal and transfer his case into the proper court. Com. *v.* Fasnacht, 20 Lanc. L. Rev. 43.

Wisconsin.— Under Rev. St. § 2624, a defendant who has been personally served with process is entitled to a change of venue to the county in which he resides (Van Kleck *v.* Hanchett, 51 Wis. 398, 8 N. W. 236), unless there is another defendant who is a resident of the county where suit was brought (Campbell *v.* Chambers, 34 Wis. 310). See as to change of venue before the civil jurisdiction of the county court was abolished Dykeman *v.* Budd, 3 Wis. 640.

See 31 Cent. Dig. tit. "Justices of the Peace," § 648.

Contra.— Luco *v.* Tuolumne County Super. Ct., 71 Cal. 555, 12 Pac. 677; Gross *v.* Superior Ct., 71 Cal. 382, 12 Pac. 264; Geekie *v.* Harbourd, 52 Md. 460; Hoshall *v.* Hoffacker, 11 Md. 362.

(III) *Dismissal of Action and Nonsuit*—(A) *Voluntary Dismissal.* A plaintiff may dismiss his action or take a nonsuit as well after as before an appeal,[86] even though judgment was recovered against him;[87] and where one of several defendants appeals, and plaintiff proceeds to trial without bringing in the others, the suit is dismissed as to them.[88]

(B) *Involuntary Dismissal*—(1) Grounds. Where an action commenced before a justice of the peace is appealed, it may be dismissed or plaintiff nonsuited for want of jurisdiction in the justice,[89] because plaintiff fails to appear and prosecute his appeal,[90] because of a misnomer[91] by statute in some states, because of failure to demand judgment,[92] because the justice had an interest in, and instigated, the suit,[93] or because he entirely disregarded the general course of law in the trial before him.[94] On the other hand want of jurisdiction in the appellate court is no ground for dismissing an action,[95] nor will a nonsuit be granted or the cause dismissed for an irregularity in the appeal,[96] because of an improper refusal to grant a continuance,[97] because another suit is pending for the same claim,[98] because the judgment rendered exceeds the justice's jurisdiction or the *ad damnum* of the writ,[99] or, in the absence of proof of the fact, because defendant alleges in his answer on appeal that the title to real property was involved.[1] Where, on an appeal by defendant, the original papers have been lost, and leave has been granted each party to substitute copies, after the lapse of a reasonable time without such substitution, a motion by defendant to dismiss the action should be

86. French *v.* Weise, 112 Mich. 586, 70 N. W. 1101; Fallman *v.* Gilman, 1 Minn. 179 (plaintiff has an absolute right to dismiss where no provisional remedy has been allowed, and there is no pleading by defendant); Turner *v.* Northcut, 9 Mo. 251; Holdridge *v.* Marsh, 28 Mo. App. 283; People *v.* Tompkins County, 8 Cow. (N. Y.) 131. See also Hibbard *v.* Hoag, 2 How. Pr. (N. Y.) 186. But see Prettyman *v.* Waples, 4 Harr. (Del.) 299, where it was held that plaintiff cannot take a *non pros.* at pleasure.

87. Shaffer *v.* Currier, 13 Ill. 667. *Contra,* Reed *v.* Rocap, 9 N. J. L. 347.

88. Callaghan *v.* Myers, 89 Ill. 566; Olsen *v.* Stark, 94 Ill. App. 556; Smith *v.* Hyde Park, etc., Paving Co., 55 Ill. App. 282.

89. *California.*— Holbrook *v.* Sacramento County Super. Ct., 106 Cal. 589, 39 Pac. 936, in which the action had been brought in the wrong county.

Georgia.— McHenry *v.* Mays, (1900) 34 S. E. 1010, which was an action of trover, of which the justice had no jurisdiction.

Mississippi.— Boyd *v.* Quinn, (1897) 22 So. 802, in which the action had been brought in a county other than that in which the defendant was a resident householder.

Missouri.— Urton *v.* Sherlock, 61 Mo. 257, to the effect that where the transcript shows judgment against several defendants without sufficient service, the cause may be dismissed as to those who appeal, but not as to the others.

Vermont.— Winchell *v.* Pond, 19 Vt. 198, in which the writ was void because filled up by the constable.

See 31 Cent. Dig. tit. "Justices of the Peace," § 651.

Compare Stephens *v.* Cross, 27 Ill. 35, to the effect that it is error to dismiss a suit because the justice rendered judgment against two defendants, when he had only obtained jurisdiction over the person of one.

If a justice has jurisdiction of any one of the causes of action counted upon, the action cannot be dismissed by the appellate court for want of jurisdiction. Harris *v.* Doggett, 16 Gray (Mass.) 118.

90. People *v.* Judge Wayne Cir. Ct., 22 Mich. 408; Jacoby *v.* Mitchell, 19 Nebr. 537, 26 N. W. 255.

91. Hall *v.* Bennett, 2 Greene (Iowa) 466, in which there was a variance between the declaration and the note in suit.

92. Under Mont. Code Civ. Proc. § 1004, subd. 6, providing that an action may be dismissed when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months, where more than six months had elapsed after an order sustaining a motion to dismiss an appeal from a justice, and appellee had not demanded a judgment in accordance with the ruling on the motion, it was error to deny a motion to dismiss the case and to render a judgment dismissing the appeal. Franzman *v.* Davies, 32 Mont. 251, 80 Pac. 251.

93. Richardson *v.* Welcome, 6 Cush. (Mass.) 331.

94. Hemphill *v.* Coats, 4 Stew. & P. (Ala.) 125.

95. Ely *v.* Dillon, 21 Iowa 47.

96. Cavenaugh *v.* Titus, 5 Wis. 143.

97. Harper *v.* Baker, 9 Mo. 116.

98. Long *v.* Hackman, 20 Lanc. L. Rev. (Pa.) 53; Long *v.* Zug, 20 Lanc. L. Rev. (Pa.) 52.

99. Wallace *v.* Brown, 25 N. H. 216; Morgan *v.* Allen, 27 N. C. 156.

1. Pasterfield *v.* Sawyer, 132 N. C. 258, 43 S. E. 799, construing N. C. Code, §§ 836–838.

denied, and a motion by plaintiff to dismiss the appeal should be granted;[2] and, in Vermont, where defendant neglects to enter his appeal, but plaintiff enters the action for an affirmance of the judgment, it is no cause for dismissing the action that defendant, more than twelve days before the term to which the appeal was taken, tendered a confession of judgment, which the justice, being then out of office, refused to accept.[3]

(2) TIME FOR DISMISSAL. On appeal from a justice of the peace an action cannot be dismissed or plaintiff nonsuited after submission to the jury;[4] and after a supplemental complaint has been filed in the appellate court, and defendant has appeared by attorney, a motion to dismiss the original complaint because it does not appear to have been properly sworn to comes too late.[5] A demurrer improperly filed in a suit before a justice may be treated, on appeal, as a motion to dismiss, if properly preserved by a bill of exceptions;[6] but a motion to dismiss for want of a cost bond, in a prosecution before a justice, is too late when made for the first time in the appellate court.[7]

(c) *Effect.* The dismissal of a suit on appeal from a justice's judgment annuls the judgment and abates the suit;[8] but the dismissal of sequestration proceedings on appeal does not dispose of the principal suit on the merits.[9]

(iv) *DISCONTINUANCE.* A trustee suit appealed from a justice of the peace and continued at the first term, without an affirmance against the principal defendant, is discontinued by the death of such defendant before the next term.[10]

(v) *MOTION TO DECLARE JUDGMENT VOID.* Notice must be given the adverse party of a motion, on appeal, to declare the judgment appealed from void because of the disqualification of the justice, where the disqualifying fact does not appear on the face of the record, but is sought to be shown by evidence *aliunde*.[11]

b. Hearing — (i) *IN GENERAL.* In New York when an appeal involving questions of law only is regularly noticed for argument, and placed upon the calendar, it will remain on the calendar, if not disposed of at the first term, without any further notice by either party; but it cannot be brought on for argument except by motion on eight days' notice.[12]

(ii) *TIME OF HEARING.* The time at which an appeal from the judgment of a justice of the peace shall be heard is regulated by statutes and rules of court in the different states.[13]

2. Hunter *v.* Thomas, 51 Ind. 44.

3. Smith *v.* Fisher, 17 Vt. 117.

4. Flinn *v.* Barlow, 16 Ill. 39; Bogert *v.* Chrystie, 24 N. J. L. 57; Doremus *v.* Howard, 23 N. J. L. 390; Williamson *v.* Brown, 10 N. J. L. 296. But see Richardson *v.* Welcome, 6 Cush. (Mass.) 331.

5. Davis *v.* McEnaney, 150 Mass. 451, 23 N. E. 221.

6. Langford *v.* Doniphan, 53 Mo. App. 62.

7. Yocum *v.* Waynesville, 39 Ill. 220.

8. *Illinois.*— Shaffer *v.* Currier, 13 Ill. 667.
Kentucky.— Bassett *v.* Oldham, 7 Dana 168.
Maryland.— Borden Min. Co. *v.* Barry, 17 Md. 419.
Michigan.— French *v.* Weise, 112 Mich. 586, 70 N. W. 1101.
Minnesota.— Fallman *v.* Gilman, 1 Minn. 179.
See 31 Cent. Dig. tit. "Justices of the Peace," § 650.

9. Brown Mfg. Co. *v.* Watson, 3 Tex. App. Civ. Cas. § 329.

10. Dow *v.* Batchelder, 45 Vt. 60.

11. Ehrhardt *v.* Breeland, 57 S. C. 142, 35 S. E. 537.

12. Matthews *v.* Arnold, 14 Hun (N. Y.) 376 [*overruling* Townsend *v.* Keenan, 2 Hilt. (N. Y.) 544], construing Code Civ. Proc. § 364.
Effect of erroneously requesting new trial on appeal.— Where defendant, when sued before a justice, failed to appear, but suffered default, and appealed to the county court, erroneously requesting a new trial on appeal, such request did not render his notice of appeal inoperative, but the court was entitled, on defendant's motion, to transfer the case to the law calendar, and hear the appeal on questions of law only. Doughty *v.* Picott, 105 N. Y. App. Div. 339, 94 N. Y. Suppl. 43.

13. *Illinois.*— Under Rev. St. (1893) c. 79, § 68, in case the appeal is perfected by filing the papers and transcript ten days before the commencement of the term to which the appeal is taken, the appearance of the appellee may be entered in writing, and filed among the papers in the case; and it so entered ten days before the first day of the term, the case shall stand for trial at that term. This statute applies as well to an appeal taken by filing the bond with the justice as to one

c. Continuances. Unless a continuance is required by statute,[14] a motion therefor is addressed to the sound discretion of the court, whose action will not

taken by filing the bond in the appellate court. Vallens *v.* Hopkins, 157 Ill. 267, 41 N. E. 632 [*reversing* 51 Ill. App. 337]. See also Armstrong *v.* Crilly, 152 Ill. 646, 38 N. E. 936 [*affirming* 51 Ill. App. 504]; Hayward *v.* Ramsey, 74 Ill. 372; Hooper *v.* Smith, 19 Ill. 53; Van Stavern *v.* Sears, 35 Ill. App. 546; Ogden *v.* Danz, 22 Ill. App. 544.

Iowa.— Under Code (1873), § 3587, providing that appeals "must be tried when reached unless continued for cause," the court cannot, in the absence of any general rule of court regulating appeals from justices, try an appeal from a default judgment before it is reached in regular order on the docket. Harty *v.* D. M. & M. R. Co., 54 Iowa 327, 6 N. W. 545. See also Mediken *v.* Mason, 10 Iowa 406, to the effect that under Laws (1858), c. 127, an appeal could not be tried at the first term after the transcript was filed.

Kansas.— See Sawyer *v.* Forbes, 36 Kan. 612, 14 Pac. 148, where it was held that a respondent who appeared at an adjourned term of the term in session when the summons in error was returned, and presented his case without objection, could not object that the case did not properly stand for trial until the next regular term.

Kentucky.— The statute of 1802, requiring writs of error coram nobis to be tried at the first term, does not apply to an appeal from a justice on such writ. Breckinridge *v.* Coleman, 7 B. Mon. 331.

Minnesota.— Under Gen. St. (1878) c. 65, § 123, an appeal which is properly on the calendar may be heard, although thirty days have not elapsed since the justice's decision (Chesterson *v.* Munson, 27 Minn. 498, 8 N. W. 593), and, under Gen. St. c. 66, § 244, an appeal on questions of law alone may be brought on for hearing at any time (Rollins *v.* Nolting, 53 Minn. 232, 54 N. W. 1118).

Missouri.— An appeal, not taken on the same day that judgment was rendered, no notice of the appeal being given, cannot be tried at the first term, except by consent of both parties, or unless the appellee shall enter his appearance on or before the second day of such term. Blakely *v.* Missouri Pac. R. Co., 79 Mo. 342. See also Hawley *v.* Missouri Pac. R. Co., 80 Mo. 540. *Compare* Knapp *v.* Skeele, 31 Mo. 434. And see Berry *v.* Union Trust Co., 75 Mo. 430, in which appellee was held to have waived the rule preventing an appeal from being tried at the first term.

New Jersey.— Under Suppl. Rev. p. 404, art. 4, § 15, the party against whom judgment was rendered has the right to have the cause go over to the next term, and does not waive it by appearing at the term to which the appeal is taken, and objecting to the trial at that time. Matthews *v.* Rankin, 58 N. J. L. 584, 33 Atl. 1052.

North Carolina.— Bastardy proceedings come within a rule providing that appeals in civil actions will not be tried unless docketed ten days before the term. State *v.* Edwards, 110 N. C. 511, 14 S. E. 741.

Rhode Island.— An appeal is to be taken to the term next to be held after ten days from the time of perfecting the appeal, not from the time of taking it. McCaffrey *v.* Doyle, 14 R. I. 313.

South Carolina.— That the court heard an appeal on the same day that it was docketed, where the return had been filed thirteen days before, was not ground for reversing a dismissal of the appeal, where it did not appear that appellant was surprised, and the judgment was in accordance with the justice of the case. Marshall *v.* Mitchell, 59 S. C. 523, 38 S. E. 158, construing Code Civ. Proc. § 368.

South Dakota.—Under Comp. Laws, § 6136, it is the duty of the clerk to enter the cause upon the calendar directly on payment of his costs, and it stands for trial as soon as reached in the regular call of causes for trial. Chandler *v.* Hill, 13 S. D. 176, 82 N. W. 397. See also Myers *v.* Mitchell, 1 S. D. 249, 46 N. W. 245, to the effect that an appeal stands for trial at an appointed term as if it were a regular one.

Tennessee.— Trial may be had at the first term, although the papers were not filed until the second day of the term. Rogers *v.* Hollingsworth, 95 Tenn. 357, 32 S. W. 197.

Texas.—Under Rev. St. art. 1641, an appeal cannot be tried at a term after the first day of which the transcript and papers were filed (Henson *v.* Martin, 2 Tex. App. Civ. Cas. § 272; Cowart *v.* Oram, 1 Tex. App. Civ. Cas. § 183), and under Sayles Civ. St. tit. 32, c. 17, and art. 1294, it should not be called for trial before appearance-day (Hadden *v.* Smith, (Civ. App. 1894) 28 S. W. 458).

Vermont.— An appeal from an order of removal must be taken to the next term of the court in the same county, if there is sufficient time after service of the order. Strafford *v.* Hartland, 2 Vt. 565.

See 31 Cent. Dig. tit. "Justices of the Peace," § 653.

14. In Illinois, under Hurd Rev. St. (1901) c. 79, § 70, where one of two defendants appeals, and the other does not, nor enter his appearance, and the process issued against him is returned not served, the cause must be continued at the first term. Counselman *v.* Sullivan, 101 Ill. App. 307.

In Iowa, under Code, § 4560, if notice of appeal is not given ten days before the next term, the cause stands for continuance by operation of law, unless there be a waiver or voluntary appearance. Insel *v.* Kennedy, 120 Iowa 234, 94 N. W. 456.

In New Jersey, when ten days' notice is given of an intention to produce new evidence, it is the duty of the court to postpone the trial of the appeal, so that the new evi-

be disturbed,[15] unless an abuse of discretion is shown.[16] It is no ground for refusing a continuance because of the absence of a witness that a continuance has been granted by the justice for the same cause,[17] nor, on the other hand, is a party entitled to a continuance because the justice has not filed a complete transcript,[18] or because of the absence of the justice, by whom the applicant proposes to prove its incompleteness.[19]

12. TRIAL DE NOVO[20] — a. Cases Triable Anew and Proceedings — (I) *CASES TRIABLE ANEW* — (A) *In General.* Subject to certain limitations, cases carried up on appeal from justices of the peace are to be tried *de novo* in practically all of the states;[21] and where a statute gives an appeal, but says nothing as

dence may be received. Johnson *v.* O'Neil, 46 N. J. L. 510.

15. *Georgia.*— Rivers *v.* Hood, 65 Ga. 302.
Illinois.— Stirlen *v.* Pettibone, 77 Ill. App. 72.
Indiana.— Noble *v.* Tillotson, 2 Ind. 553.
Iowa.— James *v.* Arbuckle, 8 Iowa 272.
Michigan.— McDonald *v.* Weir, 76 Mich. 243, 42 N. W. 1114.
Missouri.— Frick Co. *v.* Marshall, 86 Mo. App. 463; Pifer *v.* Stanley, 57 Mo. App. 516.
Texas.— International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515.
Vermont.— Carruth *v.* Tighe, 32 Vt. 626.
Wisconsin.— Whitham *v.* Mappes, 89 Wis. 668, 62 N. W. 430; Sutton *v.* Wegner, 72 Wis. 294, 39 N. W. 775; Wilcox *v.* Holmes, 20 Wis. 307.
See 31 Cent. Dig. tit. "Justices of the Peace," § 654.

16. Facts held to show abuse of discretion see Hensley *v.* Tucker, 10 Ark. 527.

17. Hensley *v.* Tucker, 10 Ark. 527. But on application for a continuance made on appeal from a justice of the peace, the court will consider previous applications made in the justice's court in determining its sufficiency. Heidenheimer *v.* Bledsoe, 1 Tex. Civ. App. Cas. § 316.

18. Mitchell *v.* Stephens, 23 Ind. 466.

19. Whaley *v.* Gleason, 40 Ind. 405.

20. Jurisdiction as affected by jurisdiction of justice see *supra*, V, A, 1, b, (II).
Objections on appeal from justice's judgment on an award see ARBITRATION AND AWARD, 3 Cyc. 767 note 48.
Issue as to corporate existence.— See CORPORATIONS, 10 Cyc. 1362.

21. *Alabama.*—Lehman *v.* Hudmon, 79 Ala. 532; Murfs *v.* Harding, 6 Port. 121; Harrison *v.* Danelly, 5 Port. 213; Colman *v.* Waters, 3 Port. 381; Hagen *v.* Thompson, 2 Port. 48.
Arkansas.— Touhy *v.* Rector, 26 Ark. 315.
California.—See People *v.* El Dorado County Ct., 10 Cal. 19, construing Prac. Act, § 626. *Compare* Southern Pac. R. Co. *v.* Kern County Super. Ct., 59 Cal. 471.
Colorado.— Hurtgen *v.* Kantrowitz, 15 Colo. 442, 24 Pac. 872; Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383; Deitz *v.* Central, 1 Colo. 323; Slaughter *v.* Strouse, 20 Colo. App. 484, 79 Pac. 972, holding that on appeal from a justice of the peace the case stands for trial *de novo* in the county court, and thereafter the procedure is governed by the practice in that court.

Connecticut.— Phelps *v.* Hurd, 31 Conn. 444.
Dakota.— Bonesteel *v.* Gardner, 1 Dak. 372, 46 N. W. 590.
Delaware.— Lord *v.* Townsend, 5 Harr. 457.
Florida.— Davis *v.* Fitchett, 5 Fla. 261.
Georgia.— Booz *v.* Batty, 94 Ga. 669, 21 S. E. 848.
Idaho.— Swinehart *v.* Pocatello Meat, etc., Co., 8 Ida. 716, 70 Pac. 1054.
Illinois.— Cairo, etc., R. Co. *v.* Murray, 82 Ill. 76; Ohio, etc., R. Co. *v.* McCutchin, 27 Ill. 9; Swingley *v.* Haynes, 22 Ill. 214; Shook *v.* Thomas, 21 Ill. 87; Edwards *v.* Vandemack, 13 Ill. 633; Waterman *v.* Bristol, 6 Ill. 593; Tindall *v.* Meeker, 2 Ill. 137; Seymour-Danne Co. *v.* Jennings, 88 Ill. App. 347.
Indiana.— State *v.* Miller, 63 Ind. 475; Britton *v.* Fox, 39 Ind. 369.
Indian Territory.— Simon *v.* Aubrey, 3 Indian Terr. 680, 64 S. W. 575.
Iowa.— Edwards Loan Co. *v.* Skinner, 127 Iowa 112, 102 N. W. 828. But under Code, § 4569, authorizing a writ of error to a justice for the purpose of correcting an erroneous decision in a matter of law or other irregularity in the proceedings, section 4576, authorizing the district court to render final judgment or remand the cause to the justice for a new trial or further proceedings, and sections 4570 and 4571, providing that the errors relied on in such a proceeding shall be asserted in the affidavit for the writ, and be established by "record and proceedings in so far as they relate to the facts stated in the affidavit" as returned by the justice in response to the writ of error, the district court, on a writ of error to a justice, has no power to try the case *de novo*, or to permit proof of facts not shown by the justice's return to establish the error relied on, but merely reviews errors appearing in the record. Herald Printing Co. *v.* Walsh, 127 Iowa 501, 103 N. W. 473.
Kansas.— Donnel *v.* Clark, 12 Kan. 154.
Kentucky.— Bledsoe *v.* Cassady, 2 A. K. Marsh. 459.
Maine.— Strout *v.* Durham, 23 Me. 483.
Maryland.— Borden Min. Co. *v.* Barry, 17 Md. 419.
Massachusetts.—Ball *v.* Burke, 11 Cush. 80.
Michigan.— French *v.* Weise, 112 Mich. 586, 70 N. W. 1101.
Minnesota.— Finke *v.* Lukensmeyer, 51 Minn. 252, 53 N. W. 546.

to how the cause shall be tried in the appellate court, the fair implication is that there is to be a new trial.[22]

(B) *Amount in Controversy.* In some states the right to a trial *de novo* on appeal from a justice's judgment is dependent on the amount in controversy.[23]

Mississippi.— Redus *v.* Gamble, 85 Miss. 165, 37 So. 1010.

Missouri.— Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; Harper *v.* Baker, 9 Mo. 116; Myers *v.* Woolfolk, 3 Mo. 348.

Montana.— Missoula Electric Light Co. *v.* Morgan, 13 Mont. 394, 34 Pac. 488.

Nebraska.— Holub *v.* Mitchell, 42 Nebr. 389, 60 N. W. 596.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

New Jersey.— Woodruff *v.* Carnes, 3 N. J. L. 505.

New Mexico.— Archibeque *v.* Miera, 1 N. M. 160.

New York.— Under Code Civ. Proc. § 3064, if appeal is taken by defendant, who failed to appear before the justice, and he shows, by affidavit or otherwise, that manifest injustice has been done, and renders a satisfactory excuse for his default, a new trial may be ordered. Fischer *v.* Brooklyn Heights R. Co., 84 N. Y. Suppl. 254. See also Harding *v.* Pratt, 37 Misc. 243, 75 N. Y. Suppl. 247; Risley *v.* Van Delinder, 17 Misc. 661, 41 N. Y. Suppl. 402. But see Pruyn *v.* Tyler, 18 How. Pr. 331. Under Code Civ. Proc. § 3068, providing that when no issue of fact or law is joined before a justice of the peace, and the sum or value of property sued for exceeds fifty dollars, the appellant may, in his notice of appeal, demand a new trial in the appellate court, where defendant did not appear before the justice, but suffered default in the sum of seventy-nine dollars and costs, and no issue of fact or law was joined, he is only entitled to be heard on questions of law. Doughty *v.* Picott, 105 N. Y. App. Div. 339, 94 N. Y. Suppl. 43. Where defendant did not appear before a justice of the peace, but appealed from a judgment against him, he cannot excuse his default, and ask for a new trial before the same or another justice, under Code Civ. Proc. § 3064, providing that if an appeal is taken by defendant, and he fails to appear before the justice, and shows by affidavit or otherwise that manifest injustice has been done, and renders a satisfactory excuse for his default, the appellate court may, in its discretion, set aside the appeal and order a new trial before the same or another justice. Doughty *v.* Picott, *supra.* See also *infra*, V, A, 14, b, (VI).

North Carolina.— Turner *v.* J. I. Case Threshing Mach. Co., 133 N. C. 381, 45 S. E. 781; Wells *v.* Sluder, 68 N. C. 156.

North Dakota.— Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926.

Ohio.— See Bruder *v.* Beihl, 1 Ohio Cir. Ct. 85, 1 Ohio Cir. Dec. 51.

Oklahoma.— Boyce *v.* Augusta Camp No. 7,429, M. W. of A., 14 Okla. 642, 78 Pac. 322.

Oregon.— Currie *v.* Southern Pac. Co., 21 Oreg. 566, 28 Pac. 884.

Pennsylvania.— Walton *v.* Lefever, 17 Lanc. L. Rev. 203.

Rhode Island.— See Lewis *v.* Smith, 21 R. I. 324, 43 Atl. 542.

South Carolina.— Previous to Code Civ. Proc. (1882) § 358, a party appealing from the decision of a trial justice was entitled to a trial *de novo* (Sternberger *v.* McSween, 14 S. C. 35), but since then appellant is only entitled to a trial on the original papers, without a jury, and without the examination of witnesses (McFadden *v.* Tant, 20 S. C. 585).

South Dakota.— Wimsey *v.* McAdams, 12 S. D. 509, 81 N. W. 884.

Texas.— Sheldon *v.* San Antonio, 25 Tex. Suppl. 177; Perry *v.* McKinzie, 4 Tex. 154.

Vermont.— Bundy *v.* Bruce, 61 Vt. 619, 17 Atl. 796.

Washington.— Newberg *v.* Farmer, 1 Wash. Terr. 182.

West Virginia.— A trial *de novo* is to be had whether the case below was tried with or without a jury. Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653 [*overruling* Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298; Vandervort *v.* Fouse, 30 W. Va. 326, 4 S. E. 660; Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; Barlow *v.* Daniels, 25 W. Va. 512].

Wisconsin.—Vroman *v.* Dewey, 22 Wis. 323. But *compare* Gruetzmacher *v.* Wanninger, 113 Wis. 34, 88 N. W. 929; Bullard *v.* Kuhl, 54 Wis. 544, 11 N. W. 801, construing Rev. St. §§ 3767, 3768.

United States.— Minifie *v.* Duckworth, 17 Fed. Cas. No. 9,633, 2 Cranch C. C. 39; Taylor *v.* Hogan, 23 Fed. Cas. No. 13,794*a*, Hempst. 16.

See 31 Cent. Dig. tit. "Justices of the Peace," § 655.

22. Vroman *v.* Dewey, 22 Wis. 323.

23. **In New York,** under Code Civ. Proc. § 3068, the appellant is entitled to a new trial where the sum demanded by either party in his pleadings, or the value of the property, as fixed, together with the damages, exceeds fifty dollars. Baum's Castorine Co. *v.* Thomas, 92 Hun 1, 37 N. Y. Suppl. 913; Hayes *v.* Kedzie, 11 Hun 577; Harding *v.* Pratt, 37 Misc. 243, 75 N. Y. Suppl. 247; Risley *v.* Van Delinder, 17 Misc. 661, 41 N. Y. Suppl. 402; Dudley *v.* Brinckerhoff, 2 N. Y. Suppl. 321; Merrill *v.* Pattison, 44 How. Pr. 289; Ovenshire *v.* Adee, 27 How. Pr. 368.

In Wisconsin, under Rev. St. § 3768, providing that where a justice's judgment shall exceed fifteen dollars, exclusive of costs, the appeal shall be tried as actions originally brought in the appellate court, where plaintiff appealed from a judgment of dismissal for failure to give security for costs, and filed an affidavit that more than

(c) *Nature and Validity of Judgment.* Where a trial *de novo* is provided for on appeal from a justice's judgment, it may be held irrespective of errors and irregularities in the process or trial, or of the validity of the judgment below;[24] and where the appellate court has original jurisdiction of the cause of action, and the parties voluntarily submit thereto, it may proceed to try the case as if it had originated there, although it was without the justice's jurisdiction.[25] An appeal from a judgment by default,[26] or of nonsuit,[27] is sometimes triable *de novo* in the appellate court; but where no appeal is taken from a justice's judgment within the prescribed time, but a motion to set it aside is thereafter made and overruled, the only question that can be raised on appeal therefrom is as to the regularity of the judgment.[28]

(II) *Proceedings*—(A) *Summons.* The statutes of several states provide for the issuance of summons from the appellate court on appeal from a justice's judgment. The provisions of these statutes are mandatory, and the court acquires no jurisdiction to render judgment unless summons is issued as required, or the parties voluntarily appear.[29]

fifteen dollars, exclusive of costs, was involved, he was entitled to a trial *de novo*. Dorothy *v.* Richmond, 107 Wis. 652, 83 N. W. 768 [*following* Steinam *v.* Schulte, 83 Wis. 567, 53 N. W. 844].

An improper counter-claim cannot be made the basis of a right to a trial *de novo*. Hall *v.* Werney, 18 N. Y. App. Div. 565, 46 N. Y. Suppl. 33. See also Harvey *v.* Van Dyke, 66 How. Pr. (N. Y.) 396; Houghton *v.* Kenyon, 38 How. Pr. (N. Y.) 107.

Where defendant's claim is put in merely as matter of defense, and not as a counter-claim, on which he demands judgment, he cannot demand a new trial. Royce *v.* Gibbons, 50 Hun (N. Y.) 341, 3 N. Y. Suppl. 106; Dudley *v.* Brinckerhoff, 13 N. Y. Civ. Proc. 92.

Where the proceeding is to recover possession of land a new trial cannot be had. Brown *v.* Cassady, 34 Hun (N. Y.) 55.

Where the justice does not fix the value of the property, if it can be gathered from the record, the effect is the same on the question of the right to a new trial on appeal. Reynolds *v.* Swick, 35 Hun (N. Y.) 278. See also Bradley *v.* Morse, 21 Wis. 680; Shaw *v.* Webster, 18 Wis. 498, in which the value was determined from the affidavit in replevin.

24. Finke *v.* Lukensmeyer, 51 Minn. 252, 53 N. W. 546; Kelly *v.* Chicago, etc., R. Co., 86 Mo. 681; Matlock *v.* King, 23 Mo. 400.

Misjoinder of parties.—Although the county court is required to try appeals according to the justice and equity of the case, without regard to any defects in the warrant, capias, summons, or other proceedings, it cannot entertain a case in which there is a misjoinder of parties. Smith *v.* Cobb, 1 Stew. (Ala.) 62.

25. De Jarnatt *v.* Marquez, 132 Cal. 700, 64 Pac. 1090 [*distinguishing* Ballerino *v.* Bigelow, 90 Cal. 500, 27 Pac. 372]; Hart *v.* Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; Place *v.* Welch, 2 Ohio Dec. (Reprint) 542, 3 West. L. Month. 611.

26. Callahan *v.* Newell, 61 Miss. 437 (as to defense, but not as to set-off); Wimsey *v.* McAdams, 12 S. D. 509, 81 N. W. 884. *Contra*, People *v.* El Dorado County Ct., 19 Cal. 19.

27. Ball *v.* Burke, 11 Cush. (Mass.) 80. But see Myrick *v.* Contra Costa County Super. Ct. 68 Cal. 98, 8 Pac. 648.

In Louisiana, where a case has been dismissed by a justice for failure of plaintiff to appear, and is appealed, the only questions to be considered are, first, the regularity of the proceedings for appeal; and, second, as to whether plaintiff defaulted. Clement *v.* Breaux, 115 La. 77, 38 So. 900.

28. Baker *v.* Belvin, 122 N. C. 190, 30 S. E. 337.

29. **In Colorado,** under Mills Annot. St. § 2685, no judgment can be rendered against parties not appealing from a judgment at the first term of court, if summons has not been served and there is no appearance. Miller *v.* Kinsel, 20 Colo. App. 346, 78 Pac. 1075.

In Illinois, where an appeal is taken by filing the bond with the clerk of the court appealed to, the appellee must be summoned or appear, or two *nihils* be returned, before the court can proceed; and if one of two or more defendants against whom judgment has been entered appeals, there must be summons to those not appearing. Norton *v.* Coggswell, 35 Ill. App. 566. See also Lehman *v.* Freeman, 86 Ill. 208; Camp *v.* Hogan, 73 Ill. 228; Walter *v.* Bierman, 59 Ill. 186; Stewart *v.* Peters, 33 Ill. 384; McCormick *v.* Fulton, 19 Ill. 570; Smith *v.* Irwin, 10 Ill. 268; Ernst *v.* Friedl, 93 Ill. App. 5; Bridge, etc., Iron Workers' Union *v.* Sigmund, 88 Ill. App. 344; Ward *v.* Schiesswohl, 82 Ill. App. 513; Sutherland *v.* Lawrence, 60 Ill. App. 331; Howard *v.* Costello, 31 Ill. App. 611; Fergus *v.* Lohman, 27 Ill. App. 448; Bourton *v.* Rathbone, 23 Ill. App. 654; Chicago Dredging, etc., Co. *v.* McCarty, 11 Ill. App. 552; McVey *v.* Huott, 11 Ill. App. 203; Humphreys *v.* Rodgers, 9 Ill. App. 281; Steinborn *v.* Thomas, 8 Ill. App. 515; Pratt *v.* Bryant,

(B) *Noticing Cause For Trial.* An appeal from a justice of the peace must be regularly noticed for trial in the time and manner prescribed by statute or rule of court.[30]

b. Scope of Inquiry — (I) *Issues as Tried Below.* As a general rule, on appeal from a judgment of a justice of the peace, the issues cannot be changed, as by setting up a new cause of action, but the cause must be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken.[31] The rule, however, does not apply to

2 Ill. App. 314. *Compare* Boyd *v.* Kocher, 31 Ill. 295, to the effect that where an appeal is taken by filing the bond in the justice's office each party is bound to follow up the appeal, and no summons to appellee is necessary. And see Straus *v.* Oltusky, 62 Ill. App. 660, where it was held that the neglect to bring in the other defendant was not error, where the parties went to trial without objection.

In Kansas where plaintiff, on appeal from a judgment of dismissal, filed a sufficient petition, and a summons was regularly issued thereon and served on defendants, who answered, and plaintiff replied, it was held that the district court having original jurisdiction of the action the proceeding was valid as in effect the commencement of a new action. Reedy *v.* Gift, 2 Kan. 392.

In Louisiana a justice, after granting an appeal and receiving an appeal-bond, should issue citation to the appellee, directing him to appear before the appellate court within three days after service, if he resides in the place, or allowing one day more for every ten miles between the place of judgment and the appellee's residence. State *v.* Todd, 104 La. 241, 28 So. 886.

In Pennsylvania where plaintiff, on an appeal from a justice's judgment, has filed a statement from which a judgment may be liquidated, and has served notice of the filing of the statement, and no affidavit of defense has been filed within fifteen days after notice, judgment may be entered against defendant. Spetz *v.* Howard, 23 Pa. Super. Ct. 420.

30. *Illinois.*— Under a rule of court that only actions at issue may be noticed for trial on the "short cause calendar," an appeal from a justice cannot be so noticed unless the papers were filed ten days before the term. Vallens *v.* Hopkins, 157 Ill. 267, 41 N. E. 632 [*reversing* 51 Ill. App. 337].

Kansas.— Under Civ. Code, § 318, an appeal should be put on the trial docket before the first day of the term. Watts *v.* Naylor, 5 Kan. App. 146, 48 Pac. 921.

Michigan.— See People *v.* Bacon, 18 Mich. 247, construing 2 Comp. Laws, § 4347, and circuit court rule No. 10.

New York.— Under Code, § 304, an appeal was not required to be noticed for trial by either party after being regularly placed on the calendar. Townsend *v.* Keenan, 2 Hilt. 544. See also Bellamy *v.* Alexander, 1 Code Rep. 64, as to what must be shown to bring on an appeal *ex parte*.

Wisconsin.—Under Rev. St. c. 120, § 216, appeals from justices of the peace must be noticed for trial within two terms succeeding the return, unless a sufficient excuse is given for failing to do so. Howe *v.* Elliott, 24 Wis. 677.

See 31 Cent. Dig. tit. "Justices of the Peace," § 659.

Notice of trial is premature, when given before the justice's return is made, and the case should be stricken from the calendar. Demming *v.* Weston, 15 Wis. 236. But *compare* Gorton *v.* Bailey, 46 Wis. 633, 1 N. W. 217, in which both parties noticed the cause for trial before the return was filed, and it remained on the calendar over one term without objection, and it was held that such notices operated as a mutual stipulation to put the cause on the calendar, and that a motion to strike it off should be refused.

31. *Arkansas.*— Rhea *v.* Bagley, 66 Ark. 93, 49 S. W. 492; Chowning *v.* Barnett, 30 Ark. 560. *Compare* Gunter *v.* Earnest, 68 Ark. 180, 56 S. W. 876.

California.— People *v.* El Dorado County Ct., 10 Cal. 19.

Delaware.— Lord *v.* Townsend, 5 Harr. 457.

Kansas.— See Donnel *v.* Clark, 12 Kan. 154, where it was held that where no new pleadings are filed in the district court, it may limit the investigation to the issues made by the pleadings in the justice's court.

Maryland.— Gott *v.* Carr, 6 Gill & J. 309.

Massachusetts.— Kennedy *v.* Gooding, 7 Gray 417; Smith *v.* Kirby, 10 Metc. 150.

Michigan.— West Michigan Furniture Co. *v.* Diamond Glue Co., 127 Mich. 651, 87 N. W. 92 [*citing* Loranger *v.* Davidson, 110 Mich. 605, 68 N. W. 426; Hatzenbuhler *v.* Lewis, 51 Mich. 585, 17 N. W. 67, 273]; Button *v.* Russell, 55 Mich. 478, 21 N. W. 899. *Compare* McCabe *v.* Loonsfoot, 119 Mich. 323, 78 N. W. 128; Bly *v.* Brady, 113 Mich. 176, 71 N. W. 521.

Minnesota.— Desnoyer *v.* L'Hereux, 1 Minn. 17.

Missouri.— Shepherd *v.* Padgitt, 91 Mo. App. 473; Nickey *v.* American Hardwood Lumber Co., 75 Mo. App. 54; Rippee *v.* Kansas City, etc., R. Co., 71 Mo. App. 557. See also Van Buren County Sav. Bank *v.* Mills, 99 Mo. App. 65, 72 S. W. 497. *Compare* Wolff *v.* Vette, 17 Mo. App. 36, where it is said that the rule has no application to the case of a third person asserting independent rights, as a claimant.

Montana.— State *v.* Gallatin County Justice Ct., 31 Mont. 258, 78 Pac. 498.

new matter, such as payment, release, etc., which may have arisen after the trial below.[32]

(II) *Errors and Irregularities.* When a case is triable *de novo* upon appeal, it is to be tried upon the merits, without regard to errors and irregularities in the proceedings in the justice's court.[33]

Nebraska. — Inglehart *v.* Lull, 69 Nebr. 173, 95 N. W. 25, 64 Nebr. 758, 90 N. W. 762; Robertson *v.* Hamilton, 61 Nebr. 791, 86 N. W. 493; Western Cornice, etc., Works *v.* Meyer, 55 Nebr. 440, 76 N. W. 23; Clarke *v.* Walker, 35 Nebr. 693, 53 N. W. 598; Lee *v.* Walker, 35 Nebr. 689, 53 N. W. 597; Baier *v.* Humpall, 16 Nebr. 127, 20 N. W. 108. *Compare* Ball *v.* Beaumont, 59 Nebr. 631, 81 N. W. 858.

New York.— Maxon *v.* Reed, 8 Hun 618; Ross *v.* Hamilton, 3 Barb. 609.

North Carolina.— Falkner *v.* Pilcher, 137 N. C. 449, 49 S. E. 945.

Ohio.— Strauss *v.* Adams, 6 Ohio S. & C. Pl. Dec. 115, 4 Ohio N. P. 109.

Oregon. — Ferguson *v.* Reiger, 43 Oreg. 505, 73 Pac. 1040.

Pennsylvania.— Stehley *v.* Harp, 5 Serg. & R. 544; Owen *v.* Shelhamer, 3 Binn. 45; Moore *v.* Waite, 1 Binn. 219; Ripple *v.* Keast, 8 Kulp 109.

Tennessee. — Harrison *v.* McMillan, 109 Tenn. 77, 69 S. W. 973 [*following* Watkins *v.* Kittrell, 3 Baxt. 38]. See also Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894.

Texas. — Jones *v.* Parker, (Civ. App. 1897) 42 S. W. 646. *Compare* Ball *v.* Hines, (Civ. App. 1901) 61 S. W. 332.

West Virginia. — Bratt *v.* Marum, 24 W. Va. 652.

See 31 Cent. Dig. tit. "Justices of the Peace," § 660. *Compare infra*, V, A, 12, c, (VII).

Contra.— Dickinson *v.* Morgenstern, 111 Ill. App. 543, where it was held that plaintiff may, on the trial in the appellate court, abandon his original cause of action, and prove any demand which he may have against defendant.

"The rule is intended to prevent the proceedings in the tribunal of original jurisdiction from degenerating into a mere farce, by requiring the parties to present the controversy fully and in good faith to that tribunal, and to prevent them from making a sham prosecution or defense in the first instance and trying the cause afterwards upon its merits in the higher court." Inglehart *v.* Lull, 69 Nebr. 173, 95 N. W. 25, 26.

Construction of pleadings.— In ascertaining what were the issues in the justice's court, the pleadings therein are to be construed liberally, and not according to the strict rules applicable to pleadings in courts of record. Jerome *v.* Rust, (S. D. 1905) 103 N. W. 26. In this case Justices Code, § 10, provided that an action in a justice's court should be commenced by summons and by voluntary appearance and pleading of the parties. The summons in the action recited that defendant was summoned to answer plaintiff, who claimed to recover possession of oats of the value of seventy-five dollars detained after demand, and there was a notice that on default plaintiff would take judgment for possession of the property or the value thereof. The oral complaint of plaintiff was for oats of the value of seventy-five dollars loaned defendant, which he had promised to pay. Judgment was demanded for the oats, or seventy-five dollars, and defendant set up a general denial and payment. It was held that, on appeal and trial *de novo* in the county court, the latter was justified in trying the case on the theory that plaintiff's claim was for the value of the oats.

Election between causes of action.— Where a complaint stated in a single count the cause of the action against defendant railroad, based on common-law negligence for killing plaintiff's cow, and another cause for not fencing its track, whereby the cow was permitted to stray thereon and was killed by a passing train, it was held that it was no objection that the motion to elect on which cause of action he proceeded to trial was not made in a justice's court where the action was begun, as it in no way changed the issue, and might be made in the circuit court at any time before trial. Harvey *v.* Southern Pac. Co., (Oreg. 1905) 80 Pac. 1061.

32. Inglehart *v.* Lull, 64 Nebr. 758, 90 N. W. 762, 69 Nebr. 173, 95 N. W. 25; Robertson *v.* Hamilton, 61 Nebr. 791, 86 N. W. 493; Clarke *v.* Walker, 35 Nebr. 693, 53 N. W. 598; Lee *v.* Walker, 35 Nebr. 689, 53 N. W. 597.

33. *Alabama.*— Bessemer Ice Delivery Co. *v.* Brannon, 138 Ala. 157, 35 So. 56; Walton *v.* Parker, 114 Ala. 673, 21 So. 826; Goss *v.* Davis, 21 Ala. 479.

Arkansas.— Hopkins *v.* Harper, 46 Ark. 251; Ball *v.* Kuykendall, 2 Ark. 195; Jeffery *v.* Underwood, 1 Ark. 108.

Dakota.— Bonesteel *v.* Gardner, 1 Dak. 372, 46 N. W. 590.

Illinois.—Vaughan *v.* Thompson, 15 Ill. 39.

Indiana. — Hewitt *v.* Jenkins, 60 Ind. 110; Hunter *v.* Thomas, 28 Ind. 448; Harrington *v.* Luddington, 23 Ind. 542; Baker *v.* Chambers, 18 Ind. 222.

Iowa.— Gilson *v.* Johnson, 4 Iowa 463.

Kansas.— Kansas Pac. R. Co. *v.* Taylor, 17 Kan. 566.

Kentucky.— Bledsoe *v.* Cassady, 2 A. K. Marsh. 459.

Massachusetts.— Leyden *v.* Sweeney, 118 Mass. 418.

Minnesota.— Welter *v.* Nokken, 38 Minn.

(III) *Defects in Process.* As a rule defects in the process, or in its service or return, are not available on appeal where the cause is triable anew in the appellate court.[34]

(IV) *Jurisdiction of Justice.* On a trial *de novo* in an appellate court the jurisdiction of the justice to render the judgment appealed from may be inquired into;[35] but the validity of a statute increasing the jurisdiction of justices does not come in question on appeal,[36] nor is the fact that a justice was disqualified because of relationship to a party ground for a plea in abatement in the appellate court.[37]

(V) *Errors Waived in Appellate Court.* The parties to an appeal may by agreement waive all technical objections,[38] and generally, where a party appears and goes to trial in the appellate court, he waives all defects and irregularities, and objections to the justice's jurisdiction.[39] But where the appellate

376, 37 N. W. 947; Hooper *v.* Farwell, 3 Minn. 106.

Missouri.— Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. 214; Harper *v.* Baker, 9 Mo. 116; Ser *v.* Bobst, 8 Mo. 506; Comfort *v.* Lynam, 67 Mo. App. 668.

Montana.— Missoula Electric Light Co. *v.* Morgan, 13 Mont. 394, 34 Pac. 488.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

New Jersey.— Barclay *v.* Brabston, 49 N. J. L. 629, 9 Atl. 769.

New Mexico.— Archibeque *v.* Miera, 1 N. M. 160.

New York.— Webster *v.* Hopkins, 11 How. Pr. 140.

Pennsylvania.— Graham *v.* Vandalore, 2 Watts 131.

South Dakota.— Yankton *v.* Douglass, 8 S. D. 441, 66 N. W. 923.

Tennessee.— Allen *v.* Wood, 1 Head 436.

Texas.— Sheldon *v.* San Antonio, 25 Tex. Suppl. 177; Perry *v.* McKinzie, 4 Tex. 154; Fulton *v.* Thomas, 2 Tex. App. Civ. Cas. § 243.

See 31 Cent. Dig. tit. "Justices of the Peace," § 661.

Denial of change of venue.— In an action of forcible entry and detainer, the justice's refusal to grant a change of venue cannot by taken advantage of in the circuit court on appeal. St. Louis Agricultural, etc., Assoc. *v.* Reinecke, 21 Mo. App. 478.

Erroneous joinder of counts.— But in Hibbard *v.* Bell, 3 Pinn. (Wis.) 190, 3 Chandl. 206, it was held that the joinder of counts in trover or case with counts in assumpsit could not be disregarded by the court under a statute providing that the county court should give judgment according to the right of the matter, without regarding technical imperfections in proceedings before the justice not affecting the merits.

34. *Alabama.*— Abrams *v.* Johnson, 65 Ala. 465; South, etc., R. Co. *v.* Seale, 59 Ala. 608; Perry *v.* Hurt, 54 Ala. 285; Catterlin *v.* Spinks, 16 Ala. 467; Hart *v.* Turk, 15 Ala. 675; Hill *v.* White, 1 Ala. 576; Rutledge *v.* Rutledge, 2 Stew. 400; Perry *v.* Brown, Minor 55.

Colorado.— Deitz *v.* Central, 1 Colo. 323; Boulder County School Dist. No. 38 *v.* Waters, 20 Colo. App. 106, 77 Pac. 255.

Illinois.— Alton *v.* Kirsch, 68 Ill. 261; Bines *v.* Proctor, 5 Ill. 174; McRae *v.* Houdeshell, 88 Ill. App. 428.

Iowa.— Graves *v.* Heaton, 11 Iowa 169.

Kentucky.— Burton *v.* Longs, 3 Litt. 441.

Missouri.— Williamson *v.* Missouri Pac. R. Co., 25 Mo. App. 481.

North Dakota.— Deering *v.* Venne, 7 N. D. 576, 75 N. W. 926.

Tennessee.— Childress *v.* Nashville, 3 Sneed 347.

Texas.— Irwin *v.* Davenport, 84 Tex. 512, 19 S. W. 692; Kerr *v.* Murrell, 1 Tex. App. Civ. Cas. § 890.

See 31 Cent. Dig. tit. "Justices of the Peace," § 662.

Contra.— Chase *v.* Hagood, 3 Ida. 682, 34 Pac. 811, construing Rev. St. § 4841.

35. *Alabama.*— Alabama, etc., R. Co. *v.* Christian, 82 Ala. 307, 1 So. 121 [*overruling dictum* in Glaze *v.* Blake, 56 Ala. 379].

Illinois.— Vaughan *v.* Thompson, 15 Ill. 39.

North Dakota.— Vidger *v.* Nolin, 10 N. D. 353, 87 N. W. 593 [*distinguishing* Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095, which held that a voluntary appearance on appeal confers jurisdiction of the person].

Pennsylvania.— Wright *v.* Guy, 10 Serg. & R. 227; Curwensville Mfg. Co. *v.* Bloom, 10 Pa. Co. Ct. 295; Jones *v.* Thistle Lodge, 10 Kulp 52. *Compare* Funk *v.* Ely, 52 Pa. St. 442.

Utah.— Ducheneau *v.* House, 4 Utah 363, 10 Pac. 427.

See 31 Cent. Dig. tit. "Justices of the Peace," § 663.

36. Suter *v.* Cardwell, 6 T. B. Mon. (Ky.) 34; Pollard *v.* Holeman, 4 Bibb (Ky.) 416.

37. Wroe *v.* Greer, 2 Swan (Tenn.) 172.

38. Roy *v.* O'Connor, 5 Ark. 252.

39. *Colorado.*— Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103.

Illinois.— Center *v.* Gibney, 71 Ill. 557; Johnston *v.* Brown, 51 Ill. App. 549. *Compare* Taylor *v.* Smith, 64 Ill. 445, where it was held that an objection to a justice's exercise of unauthorized jurisdiction is not waived by not being made until after appeal and trial in the circuit court on motion for a new trial.

Indiana.— McCormick *v.* Maxwell, 4 Blackf. 168; Green *v.* Witte, 5 Ind. App. 343, 32 N. E. 214.

court improperly refuses a continuance over a party's objection and exception, the error is not waived by his contesting the case on its merits.[40]

c. New and Amended Pleadings[41] — (I) *In General.* On appeal from the judgment of a justice of the peace, the appellate court may, in the exercise of a sound discretion,[42] permit or order the pleadings to be amended or new pleadings to be filed.[43] As a rule, however, it is not permissible to amend or file new

Iowa.— Wilson *v.* Knight, 3 Greene 126.

Kansas.— Kansas City, etc., R. Co. *v.* Rodebaugh, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715.

Maine.— Strout *v.* Durham, 23 Me. 483.

Missouri.— See Fitzpatrick *v.* Missouri Pac. R. Co., 34 Mo. App. 280, where it was held that if a necessary jurisdictional fact is proved in the appellate court, its judgment will not be reversed merely because the statement filed with the justice did not state such fact.

New Jersey.— Butts *v.* French, 42 N. J. L. 397; Steward *v.* Sears, 36 N. J. L. 173.

Ohio.— Bisher *v.* Richards, 9 Ohio St. 495; Harrington *v.* Heath, 15 Ohio 483.

Pennsylvania.— Boyer *v.* Indiantown Gap Silver Min. Co., 2 Chest. Co. Rep. 331.

Tennessee.— Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

Vermont.— Reed *v.* Stockwell, 34 Vt. 206.

Wisconsin.— See Caughey *v.* Vance, 3 Pinn. 275, 3 Chandl. 308, in which a jurisdictional objection was held waived by appearance and obtaining a continuance.

See 31 Cent. Dig. tit. "Justices of the Peace," § 664.

40. Ogden *v.* Danz, 22 Ill. App. 544.

41. **Effect of stipulation waiving pleadings in justice's court** see *supra*, IV, J, note 69.

42. **Matter of discretion.**— *Indiana.*— Indianapolis, etc., R. Co. *v.* Clark, 21 Ind. 150; Duke *v.* Brown, 18 Ind. 111.

Iowa.— Clow *v.* Murphy, 52 Iowa 695, 3 N. W. 723.

Kansas.— Hartford F. Ins. Co. *v.* Warbritton, 66 Kan. 93, 71 Pac. 278; Stevens *v.* Perrier, 12 Kan. 297.

Maine.— Strout *v.* Durham, 23 Me. 483.

Michigan.—Farnam *v.* Doyle, 128 Mich. 696, 87 N. W. 1026; Hoyt *v.* Wayne Cir. Judge, 117 Mich. 172, 75 N. W. 295.

Minnesota.— Bingham *v.* Stewart, 14 Minn. 214.

New Mexico.— Sanchez *v.* Candelaria, 5 N. M. 400, 23 Pac. 239; Sanchez *v.* Luna, 1 N. M. 238.

North Carolina.— Hinton *v.* Deans, 75 N. C. 18.

Oklahoma.— Pinson *v.* Prentise, 8 Okla. 143, 56 Pac. 1049.

Oregon.— Watson *v.* Buckler, 29 Oreg. 235, 45 Pac. 765.

South Dakota.— Butler *v.* Ash, 9 S. D. 611, 70 N. W. 833.

Vermont.— Stevens *v.* Hewitt, 30 Vt. 262.

Washington.— State *v.* King County Super. Ct., 3 Wash. 705, 29 Pac. 213.

Wisconsin.— Marlett *v.* Docter, 89 Wis. 347, 61 N. W. 1125; Burnham *v.* Turner, 14 Wis. 622; Caughey *v.* Vance, 3 Pinn. 275, 3 Chandl. 308.

See 31 Cent. Dig. tit. "Justices of the Peace," § 668.

Contra.— Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143; Gould *v.* Glass, 19 Barb. (N. Y.) 179.

Not matter of right.— *Illinois.*— Webb *v.* Lasater, 5 Ill. 543.

Indiana.— Best *v.* Powers, 19 Ind. 85.

Iowa.— Griswold *v.* Bowman, 40 Iowa 367; Packard *v.* Snell, 35 Iowa 80; Warren *v.* Scott, 32 Iowa 22; May *v.* Wilson, 21 Iowa 79; Leftwick *v.* Thornton, 18 Iowa 56; Ruddick *v.* Vail, 7 Iowa 44. But *compare* Harty *v.* D. M. & M. R. Co., 54 Iowa 327, 6 N. W. 545, to the effect that, under Code (1873), § 3596, a defendant who has been defaulted has an absolute right to file "any pleading necessary to properly set forth any defense he may have."

Missouri.— Blackstone *v.* St. Louis, etc., R. Co., 44 Mo. App. 555.

North Carolina.— Forbes *v.* McGuire, 116 N. C. 449, 21 S. E. 178; Poston *v.* Rose, 87 N. C. 279.

See 31 Cent. Dig. tit. "Justices of the Peace," § 667.

But see Archibeque *v.* Miera, 1 N. M. 160; Hastings *v.* Hastings, 1 Lanc. L. Rev. (Pa.) 77; Bennett *v.* Paine, (Tex. Civ. App. 1896) 38 S. W. 398; Fowler *v.* Michael, (Tex. Cr. App. 1904) 81 S. W. 321.

Abuse of discretion see Bowles *v.* Dean, 84 Miss. 376, 36 So. 391.

43. *Alabama.*— Lagerfelt *v.* McKie, 100 Ala. 430, 14 So. 281; Littleton *v.* Clayton, 77 Ala. 571.

Arkansas.— Gunter *v.* Earnest, 68 Ark. 180, 56 S. W. 876; Shinn *v.* Tucker, 37 Ark. 580.

California.— People *v.* Nelson, 36 Cal. 375.

Connecticut.— Phelps *v.* Hurd, 31 Conn. 444.

Georgia.— Booz *v.* Batty, 94 Ga. 669, 21 S. E. 848.

Illinois.— McDermott *v.* Lewistown, 92 Ill. App. 474.

Indian Territory.— Simon *v.* Aubrey, 3 Indian Terr. 680, 64 S. W. 575.

Iowa.— Boos *v.* Dulin, 103 Iowa 331, 72 N. W. 533; St. Louis Type Foundry *v.* Medes, 60 Iowa 525, 15 N. W. 424.

Kansas.— Hardwick *v.* Rutter, 5 Kan. App. 692, 49 Pac. 98.

Michigan.— Simon *v.* Spiro, 124 Mich. 484, 83 N. W. 146; Zeigler *v.* Henry, 77 Mich. 480, 43 N. W. 1018; Fowler *v.* Pixley, 25 Mich. 513.

Missouri.— Rippee *v.* Kansas City, etc., R. Co., 154 Mo. 358, 55 S. W. 438 [*affirming* 71 Mo. App. 557]; Harrison *v.* South Carthage Min. Co., 106 Mo. App. 32, 79 S. W. 1160; Dean *v.* Trax, 67 Mo. App. 517. And see

pleadings by which a new cause of action is introduced,[44] and to authorize an

Allen *v.* Goodrich, 111 Mo. App. 617, 85 S. W. 910.

Montana.— Duane *v.* Molinak, 31 Mont. 343, 78 Pac. 588.

Nebraska.— German Nat. Bank *v.* Aultman, 63 Nebr. 324, 88 N. W. 479; Citizens' State Bank *v.* Pence, 59 Nebr. 579, 81 N. W. 623; Livingston *v.* Moore, 2 Nebr. (Unoff.) 498, 89 N. W. 289.

New Mexico.— Martinez *v.* Martinez, 2 N. M. 464.

North Carolina.— Moore *v.* Garner, 109 N. C. 157, 13 S. E. 768.

Oregon.— Dixon *v.* Johnson, 44 Oreg. 43, 74 Pac. 394.

Pennsylvania.— Wesley *v.* Davenport, 9 Kulp 283.

Tennessee.— Bailey *v.* Brooks, 11 Heisk. 1.

Texas.— S. S. White Dental Mfg. Co. *v.* Hertzberg, 92 Tex. 528, 50 S. W. 122; Fowler *v.* Michael, (Civ. App. 1904) 81 S. W. 321; Douglas *v.* Robertson, (Civ. App. 1903) 72 S. W. 868; Osborne *v.* Ayers, (Civ. App. 1895) 32 S. W. 73; Gholston *v.* Ramey, (Civ. App. 1895) 30 S. W. 713; Harrold *v.* Barwise, 10 Tex. Civ. App. 138, 30 S. W. 498; Dallas *v.* McAllister, (Civ. App. 1895) 30 S. W. 452; Green *v.* Malone, 2 Tex. App. Civ. Cas. § 466.

Washington.— Newberg *v.* Farmer, 1 Wash. Terr. 182.

West Virginia.— Drinkard *v.* Heptinstall, 55 W. Va. 320, 47 S. E. 72.

Wisconsin.— Caughey *v.* Vance, 3 Pinn. 275, 3 Chandl. 308.

See 31 Cent. Dig. tit. "Justices of the Peace," § 665.

But see Dunn *v.* Littlefield, 2 R. I. 97, where it was held that if no pleas are filed in the inferior court, the appellate court will not permit pleas to be filed therein, and the only matter subject to review is the assessment of damages.

Amended complaint supplemented by oral pleadings see Osborne *v.* Ayers, (Tex. Civ. App. 1895) 32 S. W. 73.

Effect of stipulation waiving pleadings in justice's court see *supra*, IV, J, note 69.

44. *Colorado.*— Union Pac. R. Co. *v.* Sternberg, 13 Colo. 141, 21 Pac. 1021.

Connecticut.— Allen *v.* Woodruff, 63 Conn. 369, 28 Atl. 532.

Illinois.— Waterman *v.* Bristol, 6 Ill. 593; Brookbank *v.* Smith, 3 Ill. 78; Douglas *v.* Newman, 5 Ill. App. 518.

Iowa.— Hollen *v.* Davis, 59 Iowa 444, 13 N. W. 413, 44 Am. Rep. 688; Craine *v.* Fulton, 10 Iowa 457.

Kansas.— See Kansas City, etc., R. Co. *v.* Hays, 29 Kan. 193.

Michigan.—Frohlich *v.* Graulich, 113 Mich. 65, 71 N W. 477 [*following* Loranger *v.* Davidson, 110 Mich. 605, 68 N. W. 426]; Hatzenbuhler *v.* Lewis, 51 Mich. 585, 17 N. W. 67, 273; Cross *v.* Eaton, 48 Mich. 184, 12 N. W. 35; Fowler *v.* Hyland, 48 Mich. 179, 12 N. W. 26; Evers *v.* Sager, 28 Mich. 47.

Missouri.— Hansberger *v.* Pacific R. Co., 43 Mo. 196; Clark *v.* Smith, 39 Mo. 498; Smith *v.* Anthony, 5 Mo. 504; Nenno *v.* Chicago, etc., R. Co., 105 Mo. App. 540, 80 S. W. 24; Powell *v.* Shipps, 85 Mo. App. 467; Heimberger *v.* Harrison, 83 Mo. App. 544; Slaughter *v.* Davenport, 82 Mo. App. 652; Brennan *v.* McMenamy, 78 Mo. App. 122; Evans *v.* St. Louis, etc., R. Co., 67 Mo. App. 255; Rankin *v.* Fairley, 29 Mo. App. 587; Sturges *v.* Botts, 24 Mo. App. 282. Rev. St. (1899) § 3853, providing that no suit in a justice's court shall be dismissed for a defective statement, etc., authorizes the amendment of defective statements only, and does not justify the amendment of a sufficient statement alleging a cause of action for goods sold, so as to charge a claim against a common carrier for injuries to goods in transit. Adler *v.* St. Louis, etc., R. Co., 110 Mo. App. 339, 85 S. W. 948. Where an action was originally begun before a justice on a statement in the form of an account for goods sold and delivered, the fact that the statement contained an indorsement reciting, "Damages for injury to goods in transit as per statement hereto attached, $50," under the style of the case, and that the summons directed defendant to answer the complaint founded on a petition for damages, did not entitle plaintiff to amend the statement in the circuit court so as to make it a claim against the defendant as a common carrier for damages to goods in transit. Adler *v.* St. Louis, etc., R. Co., *supra*. *Compare* Dryden *v.* Smith, 79 Mo. 525; King *v.* Chicago, etc., R. Co., 79 Mo. 328; Allen *v.* Goodrich, 111 Mo. App. 61, 85 S. W. 910 (where it was held that an amendment was merely of the statement of the cause of action, and not the substitution of another); Gunther *v.* Aylor, 92 Mo. App. 161 (in which the amendment alleged an express contract in lieu of an implied contract); Hall *v.* Wabash R. Co., 80 Mo. App. 463 (in which the amendment merely added another item of damage growing out of the same act of negligence complained of); Colbert *v.* Missouri Pac. R. Co., 78 Mo. App. 176; Heman *v.* Fanning, 33 Mo. App. 50.

Nebraska.— Western Cornice, etc., Works *v.* Meyer, 55 Nebr. 449, 76 N. W. 23.

North Carolina.— Shell *v.* West, 130 N. C. 171, 41 S. E. 65.

Ohio.— Wilson *v.* Wilson, 30 Ohio St. 365; Ballou *v.* Farnsworth, 4 Ohio Dec (Reprint) 88, 1 Clev. L. Rep. 17; Strauss *v.* Adams, 6 Ohio S. & C. Pl. Dec. 115, 6 Ohio N. P. 109.

Oregon.— Currie *v.* Southern Pac. Co., 21 Oreg. 566, 28 Pac. 884.

Pennsylvania.— Reitze *v.* Meadville, etc., R. Co., 126 Pa. St. 437, 17 Atl. 663; Caldwell *v.* Thompson, 1 Rawle 370; Depew *v.* Scism, 3 Del. Co. 275; Wesley *v.* Davenport, 9 Kulp 283. If, on appeal from justice's court, a declaration sets forth a cause of action which accrued after the commencement of the suit before the justice, the judgment will be reversed on error. Roud *v.* Griffith, 11 Serg. & R. 130; McLaughlin *v.* Parker, 3 Serg. & R. 144.

amendment it is necessary that the original pleading shall have been sufficient to support the action.[45]

(II) *Necessity of New Pleadings.* In most jurisdictions the appellate court may proceed under the rules of pleading applicable to justices' courts, and no new pleadings need be filed on appeal.[46]

Texas.— Sun L. Ins. Co. *v.* Murff, 31 Tex. Civ. App. 593, 72 S. W. 1040; Ballard *v.* Murphy, (App. 1890) 15 S. W. 42; Laing *v.* St. Louis Type Foundry Co., 3 Tex. App. Civ. Cas. § 463; Curry *v.* Terrell, 1 Tex. App. Civ. Cas. § 239. *Compare* Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Roe *v.* Holbert, (App. 1892) 18 S. W. 417.

Wisconsin.— Carlson *v.* Stocking, 91 Wis. 432, 65 N. W. 58.

See 31 Cent. Dig. tit. "Justices of the Peace," § 670.

Adding a claim not included in original action allowed see Birmingham *v.* Rogers, 46 Ark. 254. See also King *v.* Breeden, 2 Coldw. (Tenn.) 455.

Increase of animals sued for may be demanded by amendment on appeal. Simon *v.* Aubrey, 3 Indian Terr. 680, 64 S. W. 575; Hodges *v.* Peacock, 2 Tex. App. Civ. Cas. § 824.

The statutes have no application to the practice before the case reaches the appellate court; and where a justice properly refused to strike out an amendment, it is error for the higher court to strike it out on renewal of the motion before it. Jackson *v.* Fulton, 87 Mo. App. 228.

45. Rechnitzer *v.* St. Louis Candy Co., 82 Mo. App. 311. See also Peddicord *v.* Missouri Pac. R. Co., 85 Mo. 160, in which no statement of account was filed with the justice, as required by statute. *Compare* Hardwick *v.* Rutter, 5 Kan. App. 622, 49 Pac. 98, in which the bill of particulars was held sufficient to challenge the judicial examination of the justice, and was held amendable on appeal.

46. *Alabama.*— There is no necessity for a new complaint, where there is a sufficient one among the original papers. Hardee *v.* Abraham, 133 Ala. 341, 32 So. 595 [*citing* Littleton *v.* Clayton, 77 Ala. 571]. *Compare* Simmons *v.* Titche, 102 Ala. 317, 14 So. 786 (in which no sufficient complaint was filed in the justice's court); Abrams *v.* Johnson, 65 Ala. 465; Bancroft *v.* Stanton, 7 Ala. 351; Moffitt *v.* Bragg, 9 Port. 424; Steelman *v.* Owen, 8 Port. 562. See also Arundale *v.* Moore, 42 Ala. 482, where, on appeal from a justice of the peace, the circuit court rendered a final judgment by default against defendant for an amount exceeding twenty dollars, without any pleading disclosing the cause of action, and it was held error for which the judgment must be reversed.

Illinois.— Dodge *v.* People, 113 Ill. 491, 1 N. E. 826; Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79; McRae *v.* Houdeshell, 88 Ill. App. 428; Bartling *v.* Edwards, 84 Ill. App. 471; Furness *v.* Helm, 54 Ill. App. 435. *Compare* as to necessity of plea of notice of set-off Morgan *v.* Campbell, 54 Ill. App. 242.

Indiana.— Carter *v.* Edwards, 16 Ind. 238; Riggs *v.* Adams, 12 Ind. 199; Forgey *v.* Tucker, 11 Ind. 320; Helfer *v.* Jelly, 10 Ind. 382; Chapman *v.* Clevinger, 10 Ind. 23; Flanagan *v.* Reitemier, 26 Ind. App. 243, 59 N. E. 389; Metropolitan L. Ins. Co. *v.* Bowser, 20 Ind. App. 557, 50 N. E. 86.

Iowa.— Weimer *v.* Linhard, 12 Iowa 359.

Kansas.— Ziegler *v.* Osborn, 23 Kan. 464. *Compare* Carter *v.* Strom, 6 Kan. App. 722, 50 Pac. 975, where it was held that it is a matter of discretion of the district court whether to require defendant to file an answer on appeal.

Kentucky.— Davis *v.* Young, 3 T. B. Mon. 381.

Massachusetts.— Manson *v.* Arnold, 126 Mass. 399.

Minnesota.— Barth *v.* Horejs, 45 Minn. 184, 47 N. W. 717.

Mississippi.— Hairston *v.* Francher, 7 Sm. & M. 249.

Missouri.— Schergen *v.* Baerweldt Constr. Co., 108 Mo. App. 262, 83 S. W. 281; Snyder *v.* Gericke, 101 Mo. App. 647, 74 S. W. 377; Hornsby *v.* Stevens, 2 Mo. App. Rep. 1218.

Nebraska.— German Nat. Bank *v.* Aultman, 63 Nebr. 324, 88 N. W. 479.

Ohio.— See Pope *v.* Miller, 24 Ohio Cir. Ct. 640, to the effect that where a judgment in forcible entry and detainer is reversed by the common pleas, and the cause retained for trial, plaintiff must file a petition in that court; but that if the parties proceed to trial, without objection, on the bill of particulars filed in the justice's court, it is not error to found a judgment on the statement contained therein.

Oklahoma.— Brewer *v.* Black, 5 Okla. 57, 47 Pac. 1089.

Pennsylvania.— Cunningham *v.* McCue, 31 Pa. St. 469; Stehley *v.* Harp, 5 Serg. & R. 544; Mintzer *v.* Blight, 3 Pa. L. J. Rep. 433; Hughes *v.* Atherholt, 10 Kulp 473. See also Pritchett *v.* Moss, 9 Wkly. Notes Cas. 558; McMichaels *v.* McFalls, 16 Lanc. L. Rev. 324. But see Thompson *v.* Gifford, 12 Serg. & R. 74; Culbertson *v.* Lightner, 12 Pa. Dist. 11; Meredith *v.* Ferguson, 19 Pa. Co. Ct. 190; Lentz *v.* Sylvester, 6 Pa. Co. Ct. 580.

Texas.— International, etc., R. Co. *v.* Pool, 24 Tex. Civ. App. 575, 59 S. W. 911; Ethridge *v.* San Antonio, etc., R. Co., (Civ. App. 1897) 39 S. W. 204.

Vermont.— Proctor *v.* Wiley, 53 Vt. 406. See also Whittaker *v.* Perry, 37 Vt. 631, to the effect that the parties may, but are not obliged to, file new pleadings.

See 31 Cent. Dig. tit. "Justices of the Peace," § 666.

Pleadings on appeal may be oral.— Ethridge *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 39 S. W. 204.

(iii) *Substituting Lost Pleadings.* Where it appears on an appeal from a justice's judgment that the original pleadings have been lost, it is proper for the appellate court to order a substitution to be made.[47]

(iv) *Dismissal of Part of Cause of Action.* On appeal from a justice of the peace plaintiff may dismiss a part of his cause of action.[48]

(v) *Pleading Matters Not Within Jurisdiction of Justice.* On appeal from a justice's judgment it is inadmissible to plead matters not within the justice's jurisdiction.[49]

(vi) *Increasing Amount Demanded.* In some jurisdictions the amount demanded in the justice's court may be increased on appeal,[50] even beyond the amount to which the jurisdiction of the justice is limited.[51] The weight of author-

Rule to file declaration on plaintiff against whom there were two returns of *non est* see Wilmington *v.* Hedges, 5 Harr. (Del.) 421.

Defendant can be ruled to plead to the transcript in the same manner as to a declaration, if served with a copy. Union Transfer Co. *v.* Copeland, 33 Leg. Int. (Pa.) 391.

47. Ortez *v.* Jewett, 23 Ala. 662; Ritchie *v.* Warrensburg, 32 Ill. App. 181; Bauer *v.* Wasson, 60 Mich. 194, 26 N. W. 877. See also Smissen *v.* Lee, 3 Tex. App. Civ. Cas. § 449.

48. Gerber *v.* McCoy, 23 Mo. App. 295; Starke *v.* Cotton, 115 N. C. 81, 20 S. E. 184; Jones *v.* Palmer, 83 N. C. 303.

49. *Connecticut.*— Colvin *v.* Peck, 62 Conn. 155, 25 Atl. 355, in which all the counts on which the case was tried were stricken out, and a count substituted which was not within the justice's jurisdiction.

Kentucky.— Kirk *v.* Williams, 2 T. B. Mon. 135.

Maine.— Fillebrown *v.* Webber, 14 Me. 441.

Massachusetts.— Kelley *v.* Taylor, 17 Pick. 218.

Michigan.— Bureau *v.* Marshall, 55 Mich. 234, 21 N. W. 304.

New Hampshire.— Johnson *v.* Gould, 23 N. H. 251; Flagg *v.* Gotham, 7 N. H. 266.

See 31 Cent. Dig. tit. "Justices of the Peace," § 673.

But see Rankin *v.* Fairley, 29 Mo. App. 587, holding that Rev. St. § 3060, will justify an amendment giving jurisdiction over the subject not had by the justice when the suit was instituted.

50. *Arkansas.*— Hanf *v.* Ford, 37 Ark. 544.

Illinois.— Waterman *v.* Bristol, 6 Ill. 593.

Indiana.— Miller *v.* Beal, 26 Ind. 234.

Mississippi.— McCleary *v.* Anthony, 54 Miss. 708.

Nebraska.— Plano Mfg. Co. *v.* Nordstrom, 63 Nebr. 123, 88 N. W. 164.

Ohio.— See Hannon *v.* Tallman, 7 Ohio Dec. (Reprint) 45, 1 Cinc. L. Bul. 79, to the effect that where items not appearing in the bill of particulars are added to the petition without leave, a judgment by default for the full amount is erroneous.

Texas.— Van Alstyne *v.* Morrison, (Civ. App. 1903) 77 S. W. 655; North Side St. R. Co. *v.* Want, (App. 1890) 15 S. W. 40 (in which the increase consisted of damages accruing since the trial in the justice's court); Cullers *v.* Wilson, 2 Tex. App. Civ. Cas. § 816. But see Hendricks *v.* Cameron, 3 Tex. App. Civ. Cas. § 261; Texas, etc., R. Co. *v.* Melear, 2 Tex. App. Civ. Cas. § 457.

See 31 Cent. Dig. tit. "Justices of the Peace," § 672.

Contra.— *Kentucky.*— Burbage *v.* Squires, 3 Metc. 77.

Michigan.— See McDonald *v.* Weir, 76 Mich. 243, 42 N. W. 1114, to the effect that where defendant objected to the admission of evidence because no bill of particulars had been filed, it was not error to permit a bill of particulars to be filed for a larger amount than the one in the justice's court when the amount claimed was no greater.

Missouri.— The amount of damages in an action at law is an essential statement, and to change the amount by increasing it is to change a necessary averment, which cannot be done in the appellate court, unless expressly authorized under Rev. St. (1889) § 6347. Brennan *v.* McMenamy, 78 Mo. App. 122 [*following* Boughton *v.* St. Louis, etc., R. Co., 25 Mo. App. 10; Wehringer *v.* Ahlemeyer, 23 Mo. App. 277, *distinguishing* Sprague *v.* Follett, 90 Mo. 547, 2 S. W. 840; Heman *v.* Fanning, 33 Mo. App. 51, and *disapproving dictum* in the latter case that any amendment is allowable which could have been made if the action had been originally brought in the circuit court].

New York.— Longrill *v.* Downey, 7 N. Y. Suppl. 503.

Wisconsin.— Geer *v.* Holcomb, 92 Wis. 661, 66 N. W. 793; Carlson *v.* Stocking, 91 Wis. 432, 65 N. W. 58.

See 31 Cent. Dig. tit. "Justices of the Peace," § 672.

In forcible entry and detainer the *ad damnum* may be increased, since it is an extraordinary statutory remedy and therefore distinguishable from an ordinary action at law. The statute does not require that the complaint shall state the amount of damages, and it is unnecessary that it should do so. Brennan *v.* McMenamy, 78 Mo. App. 122 [*citing* Hixon *v.* Selders, 46 Mo. App. 276; Lucas *v.* Fallon, 40 Mo. App. 551; Elliott *v.* Abell, 39 Mo. App. 349].

51. McOmber *v.* Balow, 40 Minn. 388, 42 N. W. 83; Jacob *v.* Watkins, 10 N. Y. App. Div. 475, 42 N. Y. Suppl. 6; Simpson *v.* Rome, etc., R. Co., 48 Hun (N. Y.) 113, 15 N. Y. St. 539; Ross *v.* Anderson, 1 Tex. App. Civ. Cas. § 1032; Zitske *v.* Goldberg, 38 Wis. 216 (leave of court necessary); Heath *v.* Heath, 31 Wis. 223; Dressler *v.* Davis, 12 Wis. 58.

ity, however, is to the effect that in no case can the demand be increased beyond the justice's jurisdiction.[52]

(VII) *Pleading New Defenses.* Under the statutes of many of the states, a defendant, on appeal from the judgment of a justice of the peace, may plead substantive defenses not set up in the court below,[53] but as a rule he cannot plead

52. *Indiana.* — Pritchard *v.* Bartholomew, 45 Ind. 219; Miller *v.* Beal, 26 Ind. 234; White Water Valley Canal Co. *v.* Dow, 8 Blackf. 130, Smith 62. But see Boggs *v.* Near, 20 Ind. 395.

Kansas.— Wagstaff *v.* Challiss, 31 Kan. 212, 1 Pac. 631. See also Thompson *v.* Stone, 63 Kan. 881, 64 Pac. 969, in which defendant set up a claim of set-off exceeding the justice's jurisdiction. *Compare* Groenmiller *v.* Kaub, 67 Kan. 844, 73 Pac. 100, in which no objection was interposed to the amendment, and it was held that a demurrer to the evidence interposed by defendant did not bring the jurisdictional question before the court.

Mississippi.—See Ammons *v.* Whitehead, 31 Miss. 99, where it is held that the rule that the circuit court has no other jurisdiction on appeal than the justice had does not preclude the court from consolidating cases arising upon the same facts and coming before it by appeal, although the aggregate amount in suit exceeds a justice's jurisdiction.

Nebraska.— Plano Mfg. Co. *v.* Nordstrom, 63 Nebr. 123, 88 N. W. 164. *Compare* Deck *v.* Smith, 12 Nebr. 389, 11 N. W. 852, in which, pending the appeal, the property in controversy had materially increased in value, and it was held that the appellate court might allow the petition to be amended so as to show the increased value.

North Carolina.— Meneely *v.* Craven, 86 N. C. 364.

Ohio.— Bickett *v.* Garner, 21 Ohio St. 659.

Pennsylvania.— Shaw *v.* Squires, 153 Pa. St. 150, 26 Atl. 252; Linton *v.* Vogel, 98 Pa. St. 457; Depew *v.* Scism, 3 Del. Co. 275; Hastings *v.* Hastings, 1 Lanc. L. Rev. 77.

Texas.— Under the constitutional and statutory limitation of the jurisdiction of a justice of the peace to actions less than for two hundred dollars exclusive of interest, and providing that when a case is appealed from a justice the parties cannot enlarge the demand sued upon beyond the jurisdiction of the justice, a claim for interest in a suit for unliquidated damages is a part of the damages, and on appeal from a justice's court to the county court the amount of interest demanded cannot be increased so as to make the sum of the damages and interest exceed two hundred dollars. Texas, etc., R. Co. *v.* Hunt, (Civ. App. 1905) 85 S. W. 1168.

See 31 Cent. Dig. tit. "Justices of the Peace," § 674.

53. *Arkansas.*— Rhea *v.* Bagley, 66 Ark. 93, 49 S. W. 492.

Colorado.— Assig *v.* Pearsons, 9 Colo. 587, 13 Pac. 719; Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383.

Florida.— Davis *v.* Fitchett, 5 Fla. 261.

Illinois.— Gane *v.* Loemo Printing Co., 46 Ill. App. 456. *Compare* Bates *v.* Bulkley, 7 Ill. 389, to the effect that after a motion to dismiss the case has been overruled it is too late to set up the defense of usury at the trial of an action on a promissory note.

Iowa.— Boos *v.* Dulin, (1896) 68 N. W. 707; St. Louis Type Foundry *v.* Medes, 60 Iowa 525, 15 N. W. 424. But see Johnson *v.* Triggs, 4 Greene 97.

Minnesota.— A party sued before a justice, and having an equitable defense, which is not available in that court, may appeal to the district court, and there interpose his equities by way of answer. Fowler *v.* Atkinson, 6 Minn. 503.

Missouri.— Moore *v.* Hutchinson, 69 Mo. 429; Hall *v.* Mills, 11 Mo. 215; Simon *v.* Ryan, 101 Mo. App. 16, 73 S. W. 353; Van Buren County Sav. Bank *v.* Mills, 99 Mo. App. 65, 72 S. W. 497; Comfort *v.* Lynam, 67 Mo. App. 668; Hubbard *v.* Quisenberry, 28 Mo. App. 20. But see Grunewald *v.* Schaales, 17 Mo. App. 324, where it was held that defendant cannot set up equitable defenses on appeal.

Montana.— Duane *v.* Molinak, 31 Mont. 343, 78 Pac. 588.

Nebraska.— Grainger *v.* Sutton First Nat. Bank, 63 Nebr. 46, 88 N. W. 121.

New Jersey.— Hawk *v.* Seagraves, 34 N. J. L. 355.

Oregon.— Under Laws (1893), p. 38, repealing Justices Code, c. 9, § 80, the right of amendment is not limited to cases in which the pleadings were oral, nor to such amendments as will not change the issues, but a defendant may, by leave of court, file an amended answer raising a defense which he omitted to plead below, when substantial justice will be thereby promoted. Strom *v.* Edwards, (1897) 48 Pac. 696. But see Waggy *v.* Scott, 29 Oreg. 386, 45 Pac. 774; Forbes *v.* Inman, 23 Oreg. 68, 31 Pac. 204.

Texas.— S. S. White Dental Mfg. Co. *v.* Hertzberg, 92 Tex. 528, 50 S. W. 122 [*affirming* (Civ. App. 1899) 41 S. W. 355]; Burns *v.* Staacke, (Civ. App. 1899) 53 S. W. 354; McDonald *v.* Young, (Civ. App. 1897) 41 S. W. 885; Houston, etc., R. Co. *v.* Lefevre, (Civ. App. 1897) 40 S. W. 340; Bennett *v.* Paine, (Civ. App. 1896) 38 S. W. 398; Slover *v.* McCormick Harvesting Mach. Co., 12 Tex. Civ. App. 446, 34 S. W. 1155; Gulf, etc., R. Co. *v.* Crossman, 11 Tex. Civ. App. 622, 33 S. W. 290; Gholston *v.* Ramey, (Civ. App. 1895) 30 S. W. 713; Mahoney *v.* Cope, 1 Tex. Civ. App. 520, 27 S. W. 157; Texas, etc., R. Co. *v.* Klepper, (Civ. App. 1893) 24 S. W. 567; Milam *v.* Filgo, 3 Tex. Civ. App. 343, 22 S. W. 538; Texas, etc., R. Co. *v.* Norton, 1 Tex. App. Civ. Cas. § 403; Boaz *v.* Paddock, 1 Tex. App. Civ. Cas. § 39. But see Ostrom *v.* Tarver, (Civ. App. 1894) 28 S. W. 701,

in the appellate court irregularities or defects in the process or proceedings before the justice or other matter in abatement.[54]

(VIII) *PLEADING SET-OFFS AND COUNTER-CLAIMS.* In some states no plea of set-off or counter-claim can be filed on appeal from a justice of the peace, unless it was filed before him,[55] while in others such a plea is allowed;[56] and where plain-

(1895) 29 S. W. 69; McCormick Harvesting Mach. Co. *v.* Slover, (App. 1891) 16 S. W. 105; Bridges *v.* Wilson, 2 Tex. App. Civ. Cas. § 625; Rush *v.* Lester, 2 Tex. App. Civ. Cas. § 442.

See 31 Cent. Dig. tit. "Justices of the Peace," § 675. *Compare supra*, V, A, 12, b, (I).

Contra.— Matson *v.* Meach, 1 Root (Conn.) 344; Jack *v.* Watson, Ga. Dec. 168; Bastion *v.* Dalrymple, 3 Blackf. (Ind.) 365; Nelson *v.* Zink, 3 Blackf. (Ind.) 101; Reno *v.* Millspaugh, 14 Hun (N. Y.) 229; Fagan *v.* Poor, 11 N. Y. Civ. Proc. 220; Savage *v.* Cock, 17 Abb. Pr. (N. Y.) 403; Strong *v.* Smith, 2 Cai. (N. Y.) 28.

On appeal from judgment by default.— *Arkansas.*— Hall *v.* Doyle, 35 Ark. 445.

Iowa.— Edwards Loan Co. *v.* Skinner, 127 Iowa 112, 102 N. W. 828; Harty *v.* D. M. & M. R. Co., 54 Iowa 327, 6 N. W. 545. But see Brayton *v.* Delaware County, 16 Iowa 44, where it was held that defendant cannot plead before the default is set aside.

Minnesota.— A defendant who has failed to appear and answer in the justice's court is not entitled to answer on appeal as a matter of course, but must show facts tending to excuse his default. If, however, plaintiff amends his complaint on appeal, defendant is entitled to answer as a matter of right, without excusing his default. Conrad *v.* Swanke, 80 Minn. 438, 83 N. W. 383 [*citing* Libby *v.* Mikelborg, 28 Minn. 38, 8 N. W. 903]. See also Webb *v.* Paxton, 36 Minn. 532, 32 N. W. 749.

Mississippi.— Illinois Cent. R. Co. *v.* Andrews, 61 Miss. 474.

Texas.— St. Louis, etc., R. Co. *v.* Denson, (Civ. App. 1894) 26 S. W. 265; McCormick Harvesting Mach. Co. *v.* Slover, (Civ. App. 1894) 34 S. W. 1054; White *v.* Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568; Swinborn *v.* Johnson, (Civ. App. 1893) 24 S. W. 567; Texas, etc., R. Co. *v.* Jones, (Civ. App. 1893) 23 S. W. 424. But see Harrison *v.* Gulf, etc., R. Co., (App. 1890) 15 S. W. 643.

Wisconsin.—Wilcox *v.* Holmes, 20 Wis. 307.

See 31 Cent. Dig. tit. "Justices of the Peace," § 576.

But see Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411, where it was held that a party who has defaulted in the justice's court cannot interpose a plea raising a new issue, to oust the county court of jurisdiction on the ground that the justice had no jurisdiction. And see Morgan *v.* Cohutta, 120 Ga. 423, 47 S. E. 971; Hodges *v.* Rogers, 115 Ga. 951, 42 S. E. 251; Morgan *v.* Prior, 110 Ga. 791, 36 S. E. 75, to the effect that it is too late, on trial of an appeal to a jury or to the superior court from a justice's judgment on an unconditional contract in writing, for defendant to file a plea, where no defense was made in the lower court at or before the first term.

Allowing new defenses a matter of discretion see Naftzker *v.* Lantz, 137 Mich. 441, 100 N. W. 601.

Former adjudication may be pleaded for the first time on appeal. Nettman *v.* Schramm, 23 Iowa 521. *Contra*, Jack *v.* Watson, Ga. Dec. 168.

Limitations may be first pleaded on appeal. Nunn *v.* Edmiston, 9 Tex. Civ. App. 562, 29 S. W. 1115. But see Pickett *v.* Edwards, (Tex. Civ. App. 1894) 25 S. W. 32.

54. McConnell *v.* Worns, 102 Ala. 587, 14 So. 849; Noles *v.* Marable, 50 Ala. 366; Davis *v.* Brinker, 50 Ind. 25; Hinckley *v.* Smith, 4 Watts (Pa.) 433; Hopkins *v.* Elmore, 49 Vt. 176; Martin *v.* Blodget, 1 Aik. (Vt.) 375. But see Phillips *v.* Bliss, 32 Mo. 427; Dorroh *v.* McKay, (Tex. Civ. App. 1900) 56 S. W. 611. See also Knoff *v.* Puget Sound Co-Operation Colony, 1 Wash. 57, 24 Pac. 27.

An omission to note a plea in abatement on the justice's docket will not preclude the circuit court from permitting defendant to file a formal plea in that court. Robinson *v.* Taylor, 2 Mo. App. Rep. 1180.

Effect of continuance after plea.— The fact that, after the filing of a plea to the venue in a justice's court, the case was continued by consent, was not ground for striking out such plea when again made on appeal. Mahoney *v.* Cope, 7 Tex. Civ. App. 520, 27 S. W. 157.

55. *Arkansas.*— Amis *v.* Cooper, 25 Ark. 14.

Mississippi.— Marx *v.* Trussell, 50 Miss. 498.

Missouri.— Cedar Hill Orchard, etc., Co. *v.* Heiney, 106 Mo. App. 302, 80 S. W. 278; Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719; Shepherd *v.* Padgett, (App. 1902) 72 S. W. 490; West *v.* Freeman, 76 Mo. App. 96; Comfort *v.* Lynam, 67 Mo. App. 668.

Nebraska.— Carr *v.* Luscher, 35 Nebr. 318, 53 N. W. 144.

Texas.— Comer *v.* Floore, (Civ. App. 1905) 88 S. W. 246; Clements *v.* Carpenter, 34 Tex. Civ. App. 283, 78 S. W. 369; O'Maley *v.* Garriott, (Civ. App. 1899) 49 S. W. 108 (in which the set-off was acquired after the trial below); Good *v.* Caldwell, 11 Tex. Civ. App. 515, 33 S. W. 243; White *v.* Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568; Downtain *v.* Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56; Texas, etc., R. Co. *v.* Haney, 2 Tex. App. Civ. Cas. § 709. See also Brigman *v.* Aultman, (Civ. App. 1900) 55 S. W. 509. *Compare* Clements *v.* McCain, (Civ. App. 1899) 49 S. W. 122.

See 31 Cent. Dig. tit. "Justices of the Peace," § 678.

56. *Delaware.*— Wyatt *v.* Tam, 2 Marv. 370, 43 Atl. 257.

tiff has been allowed to file a bill of particulars for a larger amount than the one before the justice, although claiming no more, defendant may be given time to file a set-off on payment of costs.[57] But as a rule the set-off or counter-claim can in neither case exceed the justice's jurisdiction.[58]

(IX) *AMENDMENTS AS TO PARTIES.* The cases, even those in the same jurisdictions, are greatly at variance as to the extent to which amendments as to parties may be allowed on appeals from justices of the peace. As a general rule, however, the appellate court may, in its discretion, and to promote the ends of justice, allow such amendments as to parties as do not change the cause of action.[59] But where a new party defendant is brought in by amendment, the court can

Massachusetts.— Hall *v.* Rosenfeld, 177 Mass. 397, 59 N. E. 68.

North Carolina.— Thomas *v.* Simpson, 80 N. C. 4.

Ohio.— Henry Bill Pub. Co. *v.* Curtis, 1 Ohio S. & C. Pl. Dec. 476, 7 Ohio N. P. 202.

Pennsylvania.— Deihm *v.* Snell, 119 Pa. St. 316, 13 Atl. 283; Walden *v.* Berry, 48 Pa. St. 456; Tate *v.* Tate, 2 Grant 150; Boone *v.* Boone, 17 Serg. & R. 386.

Tennessee.— Clark *v.* Howard, 10 Yerg. 250.

Vermont.— Temple *v.* Bradley, 14 Vt. 254.

Wisconsin.— Richardson *v.* Chynoweth, 26 Wis. 656.

See 31 Cent. Dig. tit. "Justices of the Peace," § 678.

57. McDonald *v.* Weir, 76 Mich. 243, 42 N. W. 1114.

58. Henry Bill Pub. Co. *v.* Curtis, 1 Ohio S. & C. Pl. Dec. 476, 7 Ohio N. P. 202; Deihm *v.* Snell, 119 Pa. St. 316, 13 Atl. 283; Walden *v.* Berry, 48 Pa. St. 456; Boudon *v.* Gilbert, 67 Tex. 689, 4 S. W. 578; Ostrom *v.* Tarver, (Tex. Civ. App. 1894) 28 S. W. 701. But see Tate *v.* Tate, 2 Grant (Pa.) 150; Boone *v.* Boone, 17 Serg. & R. (Pa.) 386; Temple *v.* Bradley, 14 Vt. 254.

59. *Alabama.*— Kulh *v.* Long, 102 Ala. 563, 15 So. 267; Southern Express Co. *v.* Boullemet, 100 Ala. 275, 13 So. 941; South, etc., Alabama R. Co. *v.* Small, 70 Ala. 499; Couch *v.* Atkinson, 32 Ala. 633; Snow *v.* Ray, 2 Ala. 344. *Compare* Hallmark *v.* Hopper, 119 Ala. 78, 24 So. 563, 72 Am. St. Rep. 900, change of sole party plaintiff not allowable.

Arkansas.— Martin *v.* McClellan, 30 Ark. 405.

Georgia.— See Cobb *v.* Lowry, 60 Ga. 637, where it was held that, after judgment for defendant on a plea of payment in an action on a note, an amendment on appeal seeking to make the action the suit of plaintiff for the use of another was not allowable.

Illinois.— A new party plaintiff may be joined on appeal with the original plaintiff (Zipp *v.* Uhland Hain No. 16, 30 Ill. App. 280; Smith *v.* Martin, 28 Ill. App. 224), but an amendment striking out a party defendant is not allowable (Maxcy *v.* Padfield, 2 Ill. 590).

Indiana.— Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Osborn *v.* Osborn, 18 Ind. 373. *Compare* Peterman *v.* Ott, 45 Ind. 224.

Michigan.— See Anderson *v.* Robinson, 38 Mich. 407, holding that a rule of court permitting a plaintiff to discontinue as to one or more defendants does not apply to cases appealed from justices.

Missouri.— Under Rev. St. (1899) § 657, the court may at any time before final judgment, in furtherance of justice and on proper terms, amend any pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party, when the amendment does not substantially change the claim or defense. U. S. Water, etc., Supply Co. *v.* Dreyfus, 104 Mo. App. 434, 79 S. W. 184. See also Beattie *v.* Hill, 60 Mo. 72; House *v.* Duncan, 50 Mo. 453; Evans-Smith Drug Co. *v.* White, 86 Mo. App. 540; Colbert *v.* Missouri Pac. R. Co., 78 Mo. App. 176. *Compare* Flemm *v.* Whitmore, 23 Mo. 430; Kraft *v.* Hurtz, 11 Mo. 109; Altheimer *v.* Teuscher, 47 Mo. App. 284; Ingalls *v.* Averitt, 34 Mo. App. 371; Thieman *v.* Goodnight, 17 Mo. App. 429.

New Mexico.— Sanchez *v.* Luna, 1 N. M. 238.

Ohio.— Secor *v.* Witter, 39 Ohio St. 218; Geller *v.* Puchta, 1 Ohio Cir. Ct. 30, 1 Ohio Cir. Dec. 18.

Pennsylvania.— Seitz *v.* Buffum, 14 Pa. St. 69; Gue *v.* Kline, 13 Pa. St. 60; Giffen *v.* St. Clair Tp., 4 Watts & S. 327; Bratton *v.* Seymour, 4 Watts 329; Graham *v.* Vandalore, 2 Watts 131; Wesley *v.* Davenport, 9 Kulp 283; Mulvaney *v.* Turner, 12 Lanc. Bar 140; Risser *v.* Pierce, 19 Lanc. L. Rev. 149; Dohan *v.* Walsh, 5 Pa. L. J. 145 note; Logan *v.* Chandler, 2 Pa. L. J. Rep. 509.

South Dakota.— Butler *v.* Ash, 9 S. D. 611, 70 N. W. 833.

Tennessee.— Cannon *v.* Mathis, 10 Heisk. 575.

Texas.— Missouri Pac. R. Co. *v.* Smith, (1891) 16 S. W. 803; Day *v.* Johnson, (Civ. App. 1895) 33 S. W. 676; Fulton *v.* Thomas, 2 Tex. App. Civ. Cas. § 243. *Compare* Missouri, etc., R. Co. *v.* Wallis, (Civ. App. 1895) 29 S. W. 1123.

See 31 Cent. Dig. tit. "Justices of the Peace," § 679.

"The only limitation upon the right of amendment of complaints, in respect to striking out and adding new parties is that an entire change of parties can not be wrought thereby. Even a change of the capacity in which the plaintiff sues is not forbidden though formerly it was held otherwise." Southern Express Co. *v.* Boullement, 100 Ala. 275, 278, 13 So. 941. See also Hartzell *v.* McClurg, 54 Nebr. 313, 74 N. W. 625. But

acquire no jurisdiction to render a judgment against him without due service of summons or an authorized appearance.[60]

(x) *Changing Form of Action.* The form of an action may be changed on appeal,[61] provided the cause of action is not thereby changed, as by a change from contract to tort or *vice versa*,[62] or by a change from an action on a note to an action for the value of the work for which the note was given.[63]

(xi) *Amendment of Process.* Where a case is triable *de novo* on appeal, the process and the return of the officer thereto are amendable in the appellate court,[64] provided it does not change the cause of action,[65] and is not made for the purpose of conferring jurisdiction.[66]

(xii) *Making Pleadings More Definite and Certain.* On appeal from a justice's judgment the court should allow, or, upon motion, order amendments which tend to make the pleadings more definite and certain, without changing the cause of action.[67]

see Peck *v.* Colby, 31 Ala. 252; Wilson *v.* Collins, 9 Ala. 127.

60. In summary proceedings against a railroad company before a justice of the peace to recover a penalty, judgment was entered against defendant. After an appeal had been taken to the common pleas, plaintiff moved to amend the record by adding the name of a second railroad company as a party defendant. Notice of this was served upon the attorney for the appealing company, who was alleged to be also attorney for the second company. The amendment was allowed, and subsequently a rule to plead was entered and served upon the same attorney, who, however, had never entered his appearance for the company whose name had been added to the record. Judgment was subsequently entered against the companies defendant for want of a plea. Under these circumstances it was held that the amendment had been improperly allowed, and should be stricken off, and that the judgment against the second company should be reversed. Chester City *v.* Baltimore, etc., R. Co., 27 Pa. Super. Ct. 206.

61. *Delaware.*—Conner *v.* Reardon, 8 Houst. 19, 31 Atl. 878.

Illinois.— Allen *v.* Nichols, 68 Ill. 250; Skakel *v.* Hennessey, 57 Ill. App. 332.

Kentucky.— Puff *v.* Huchter, 78 Ky. 146.

Michigan. — Vreeland *v.* Loeckner, 99 Mich. 93, 57 N. W. 1093.

Ohio.—Austin *v.* Hayden, 6 Ohio 388.

Pennsylvania.— Boner *v.* Luhman, 148 Pa. St. 591, 24 Atl. 90; Kraft *v.* Gilchrist, 31 Pa. St. 470; Lyon *v.* Chalker, 2 Watts 14; Caldwell *v.* Thompson, 1 Rawle 370; Esher *v.* Flagler, 17 Serg. & R. 141. See also Thompson *v.* Chambers, 13 Pa. Super. Ct. 213.

South Carolina. — Williams *v.* Irby, 16 S. C. 371.

Vermont.— Fletcher *v.* Blair, 20 Vt. 124.

See 31 Cent. Dig. tit. "Justices of the Peace," § 680.

62. James *v.* Vicors, 119 Ala. 32, 24 So. 415; Smith *v.* East Tennessee, etc., R. Co., 98 Ala. 154, 13 So. 784; Smith *v.* Smith, 4 N. Y. App. Div. 227, 38 N. Y. Suppl. 551.

63. Sneath *v.* Holtz, 2 Ohio Dec. (Reprint) 423, 3 West. L. Month. 40.

64. *Alabama.*— Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458 [*distinguishing* Camden *v.* Bloch, 65 Ala. 236, on the ground that the case was there taken up on a common-law writ of certiorari, and was not triable *de novo*].

Georgia.— The summons is amendable in substance as well as in form, provided there is enough to amend by. Neal *v.* Reynolds, 91 Ga. 609, 18 S. E. 530. See also Johnson *v.* Johnson, 113 Ga. 942, 39 S. E. 311.

Illinois.— Moss *v.* Flint, 13 Ill. 570.

Missouri.— Transier *v.* St. Louis, etc., R. Co., 54 Mo. 189; Fee *v.* Kansas City, etc., R. Co., 58 Mo. App. 90.

North Carolina. — McPhail *v.* Johnson, 115 N. C. 298, 20 S. E. 373; Singer Mfg. Co. *v.* Barrett, 95 N. C. 36; Clawson *v.* Wolfe, 77 N. C. 100.

West Virginia. — Drinkard *v.* Heptinstall, 55 W. Va. 320, 47 S. E. 72.

See 31 Cent. Dig. tit. "Justices of the Peace," § 681.

65. Henckler *v.* Monroe County Ct., 27 Ill. 39.

66. Allen *v.* Jackson, 86 N. C. 321.

67. *Colorado.*— De Lappe *v.* Sullivan, 7 Colo. 182, 184, 2 Pac. 926, 927.

Mississippi.— Boisseau *v.* Kahn, 62 Miss. 757.

Missouri. — Schworer *v.* Christophel, 72 Mo. App. 116; Bradley *v.* Sweiger, 61 Mo. App. 419; Norville *v.* St. Louis, etc., R. Co., 60 Mo. App. 414; Green *v.* Southwest Missouri Electric R. Co., 60 Mo. App. 311; Huffer *v.* Riley, 47 Mo. App. 479; Nutter *v.* Houston, 42 Mo. App. 363; Lee *v.* Dunn, 29 Mo. App. 467; Eubank *v.* Pope, 27 Mo. App. 463.

Nebraska.— Massillon Engine, etc., Co. *v.* Prouty, 65 Nebr. 496, 91 N. W. 384.

New York. — Button *v.* Lusk, 10 N. Y. Suppl. 582.

Oklahoma.— Boyce *v.* Augusta Camp No. 7429, M. W. of A., 14 Okla. 642, 78 Pac. 322.

Pennsylvania. — Brown *v.* Kirk, 26 Pa. Super. Ct. 157.

Tennessee.—Reeves *v.* Henderson, 90 Tenn. 521, 18 S. W. 242.

(XIII) *AMENDMENTS AS TO JURISDICTIONAL FACTS*—(A) *In General.* Where the court below actually had jurisdiction of the action, the appellate court may allow an amendment to show a jurisdictional fact which has been omitted through negligence or inadvertence;[68] but no amendment can be allowed, the effect of which is to confer jurisdiction otherwise wanting.[69]

(B) *Bringing Action Within Justice's Jurisdiction.* Where the cause of action was not within the justice's jurisdiction an amendment cannot, in most states, be allowed on appeal for the purpose of bringing it within his jurisdiction.[70]

(XIV) *AMENDMENTS TO CONFORM PLEADINGS TO CASE OR PROOF.* On appeal from a justice's judgment, the appellate court may in its discretion, and upon proper conditions,[71] allow an amendment for the purpose of conforming the pleadings to the case or proof,[72] provided the amendment is not calculated to

Texas.— Van Alstyne *v.* Morrison, (Civ. App. 1903) 77 S. W. 655; Galveston, etc., R. Co. *v.* Herring, (Civ. App. 1894) 28 S. W. 580; Durham *v.* Flannagan, 2 Tex. App. Civ. Cas. § 22.

West Virginia.— Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653.

Wisconsin.— Monaghan *v.* Randall School Dist. No. 1, 38 Wis. 100; Swineford *v.* Pomeroy, 16 Wis. 553.

See 31 Cent. Dig. tit. "Justices of the Peace," § 682.

68. *Arkansas.*— Sherrill *v.* Bench, 37 Ark. 560, in which an affidavit for attachment was held amendable, no ground of attachment being stated in the amendment which did not exist at the commencement of the suit.

Illinois.— Kirkpatrick *v.* Cooper, 77 Ill. 565, replevin affidavit held amendable so as to make it conform to the statute.

Indiana.— Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203, 30 N. E. 1082; Evansville, etc., R. Co. *v.* Murphy, 59 Ind. 515.

Missouri.— Under Rev. St. (1899) § 4079, the statement of plaintiff's cause of action may be amended to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted, but no new item or cause of action not intended to be included in the original statement shall be filed. See Kitchen *v.* Missouri Pac. R. Co., 82 Mo. 686; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; Kincaid *v.* Griffith, 64 Mo. App. 673; Henry *v.* Wabash Western R. Co., 44 Mo. App. 100; South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147; Crum *v.* Elliston, 33 Mo. App. 591; Fathman, etc., Mill Co. *v.* Ritter, 33 Mo. App. 404.

New Mexico.— Under Laws (1889), c. 28, § 7, where the jurisdiction of the justice actually existed, although not affirmatively appearing on the face of the papers transmitted on appeal, the district court must allow any amendment necessary to set forth correctly the fact of jurisdiction. Romero *v.* Luna, 6 N. M. 440, 30 Pac. 855; Sanchez *v.* Candelaria, 5 N. M. 400, 23 Pac. 239; Martinez *v.* Martinez, 2 N. M. 464.

North Carolina.— Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970.

See 31 Cent. Dig. tit. "Justices of the Peace," § 683.

Compare Gaiser *v.* Heim, 8 Ohio Cir. Ct. 120, 4 Ohio Cir. Dec. 378.

69. Kiphart *v.* Brennemen, 25 Ind. 152; Madkins *v.* Trice, 65 Mo. 656; Haggard *v.* Atlantic, etc., R. Co., 63 Mo. 302; Gist *v.* Loring, 60 Mo. 487; Dowdy *v.* Womble, 41 Mo. App. 573; Turner *v.* Bondalier, 31 Mo. App. 582. Mo. Rev. St. (1889) § 6347, permitting amendments on appeal to cover jurisdictional defects, does not apply to actions of forcible entry and detainer. Dean *v.* Trax, 67 Mo. App. 517 [*citing* Johnson *v.* Fischer, 56 Mo. App. 552].

70. *Indiana.*— Goodwine *v.* Barnett, 2 Ind. App. 16, 28 N. E. 115.

Massachusetts.—Ladd *v.* Kimball, 12 Gray 139.

Michigan.— Fowler *v.* Hyland, 48 Mich. 179, 12 N. W. 26.

Missouri.— Webb *v.* Tweedie, 30 Mo. 488; Robinett *v.* Nunn, 9 Mo. 246; U. S. Fidelity, etc., Co. *v.* Foskett-Kessner Feed Co., 100 Mo. App. 724, 73 S. W. 364.

Pennsylvania.— Antes *v.* Antes, 12 Montg. Co. Rep. 33.

Vermont.— Thompson *v.* Colony, 6 Vt. 91.

See 31 Cent. Dig. tit. "Justices of the Peace," § 684.

Contra.— House *v.* Lassiter, 49 Ala. 307; Grass Valley Quartz Min. Co. *v.* Stackhouse, 6 Cal. 413; Condict *v.* Stevens, 1 T. B. Mon. (Ky.) 73.

71. Motion to be granted only on condition of payment of costs see O'Neill *v.* Morris, 28 Misc. (N. Y.) 613, 59 N. Y. Suppl. 1075.

72. *Alabama.*— Freeman *v.* Speegle, 83 Ala. 191, 3 So. 620.

Connecticut.— Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

Illinois.— Snowell *v.* Moss, 70 Ill. 313.

Kansas.— Sarbach *v.* Jones, 20 Kan. 497.

Michigan.—Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

Missouri.— Rowland *v.* St. Louis, etc., R. Co., 73 Mo. 619.

New York.— Argersinger *v.* Levor, 54 Hun 613, 7 N. Y. Suppl. 923; Williams *v.* Wieting, 3 Thomps. & C. 439.

Vermont.— Stevens *v.* Hewitt, 30 Vt. 262.

See 31 Cent. Dig. tit. "Justices of the Peace," § 685.

surprise defendant,[73] and will not substantially change the claim or cause of action.[74]

(xv) *Procedure For Amendment*— (a) *In General.* The usual mode of procedure for allowance of amendments or new pleadings is by written [75] motion, on notice,[76] showing the nature and character of the new matter,[77] a sufficient cause for leave to amend or plead,[78] and a valid excuse for failure to amend or plead before the justice;[79] and if the party is entitled to amend, leave should not be refused because of surprise to the other party, but the amendment should be allowed, and a continuance granted.[80] Where the original notice and transcript erroneously state that when the notice was issued and served it was returnable at an hour different from that named in the record, defendant may base an application for leave to file an answer on a statement of such error, without first correcting it.[81] In determining the question of the allowance of an amendment by defendant setting up a counter-claim, affidavits tending to disprove the counter-claim should not be considered by the court.[82]

(b) *Time of Pleading Anew or Amending.* Where not controlled by statute,[83] or rule of court,[84] pleadings may be filed or amendments made at any time before trial,[85] and the court may, in its discretion and for good cause shown, extend the time.[86] In Pennsylvania a written notice of filing of the statement of claim on appeal must be served on defendant in like manner as summons is served.[87]

(xvi) *Sufficency of Pleadings*— (a) *In General.* Where a cause is triable *de novo* on appeal, the sufficiency of the pleadings are to be determined by the rules which obtain before justices of the peace, and not by the strict rules of pleading applied in the higher courts, but the statement or declaration must show a cause of action.[88]

73. Snowell *v.* Moss, 70 Ill. 313.

74. Western Cornice, etc., Works *v.* Meyer, 55 Nebr. 440, 76 N. W. 23.

75. **Oral pleadings are only amendable orally.**— Stirlen *v.* Pettibone, 77 Ill. App. 72.

76. **Where leave to amend is obtained while defendant is in court,** he is entitled to no other notice, and, on his failing to appear, the court may hear the evidence on the amended pleading. Fowler *v.* Michael, (Tex. Civ. App. 1904) 81 S. W. 321.

77. Newberg *v.* Farmer, 1 Wash. Terr. 183.

78. **Affidavits held sufficient** see Wilcox *v.* Holmes, 20 Wis. 307.

Moving papers held insufficient see Cook *v.* Waterford, 2 Silv. Sup. (N. Y.) 20, 6 N. Y. Suppl. 616.

79. Ping *v.* Cockyne, 37 Iowa 211; Warren *v.* Scott, 32 Iowa 22; May *v.* Wilson, 21 Iowa 79; Stanton *v.* Warrick, 21 Iowa 76.

80. Powell *v.* Love, 36 W. Va. 96, 14 S. E. 405.

81. Graves *v.* Heaton, 11 Iowa 169.

82. Richardson *v.* Chynoweth, 26 Wis. 656.

83. **Statutory provisions.**— Jenkins *v.* Myatt, (Nebr. 1902) 89 N. W. 1028 (construing Code Civ. Proc. § 1010, as to the time of filing an answer); Beard *v.* Ringer, 41 Nebr. 831, 60 N. W. 95 (construing Code Civ. Proc. §§ 1008, 1010*a*, as to time of filing petition); Smith *v.* Borden, 22 Nebr. 487, 35 S. W. 218 (construing Code Civ. Proc. § 1008, as it existed in 1885, as to time of filing petition).

84. **An appeal from a justice is an "action brought,"** within the meaning of a rule of court requiring a declaration to be filed in twelve months from the first day of the term to which it is entered. Craig *v.* Brown, 48 Pa. St. 202.

85. *Alabama.*— Kuhl *v.* Long, 102 Ala. 563, 15 So. 267.

Connecticut.— Bennett *v.* Collins, 52 Conn. 1.

Illinois.— Defendant is not required to file an affidavit of merits until the cause is reached for trial. Reid *v.* Cisler, 35 Ill. App. 572; Jensen *v.* Fricke, 35 Ill. App. 23; World's Soap Mfg. Co. *v.* Woltz, 27 Ill. App. 302; Martin *v.* Hochstadter, 27 Ill. App. 166. See also Wayne *v.* Stern, 75 Ill. 313. But see Bell *v.* Nims, 51 Ill. 171.

Iowa.— Boos *v.* Dulin, 103 Iowa 331, 72 N. W. 533; McDowell *v.* Booth, 72 Iowa 141, 33 N. W. 463.

Michigan.— Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

See 31 Cent. Dig. tit. "Justices of the Peace," § 687.

86. McDowell *v.* Booth, 72 Iowa 141, 33 N. W. 463. *Compare* Searcy *v.* Tillman, 75 Ga. 504.

Under a statute authorizing the court to extend the time, it may consider a pleading filed after the time fixed by law, although it has not made any order on the subject. Parker *v.* Haight, 14 Ohio Cir. Ct. 548, 7 Ohio Cir. Dec. 609.

87. Connolly *v.* Wilson, 6 Pa. Co. Ct. 421.

88. *Alabama.*— Mobile, etc., R. Co. *v.* Williams, 54 Ala. 168; Ganaway *v.* Mobile, 21

(B) *Departure.* The declaration, complaint, or statement filed on appeal from a justice of the peace cannot depart from the case as tried before the justice, but there is no departure as a rule where there is no change in the original cause of action.[89] Where there is a departure in the pleadings, the proper mode of taking advantage of it is by motion to strike out, or set aside, and not by demurrer or plea in abatement.[90]

(XVII) *PLEAS PUIS DARREIN CONTINUANCE.* Any new matter of defense, except set-off,[91] arising after the rendition of the judgment below, may be set up by a plea *puis darrein continuance*,[92] or by supplemental complaint,[93] or it may be given in evidence without being specially pleaded.[94]

Ala. 577; Jones *v.* Buckley, 19 Ala. 604 (in which a statement which did not set forth the amount sued for was held defective); Schaefer *v.* Adler, 14 Ala. 723; Spann *v.* Boyd, 2 Stew. 480.

Arkansas.— Heartman *v.* Franks, 36 Ark. 501.

Georgia.— Howell *v.* Glover, 59 Ga. 774.

Illinois.— Dunsworth *v.* Walter A. Wood Mach. Co., 29 Ill. App. 23. See also Barnett *v.* Craig, 38 Ill. App. 96.

Indiana.— Anderson *v.* Lipe, 114 Ind. 464, 16 N. E. 833; Pennsylvania Co. *v.* Rusie, 95 Ind. 236; Denby *v.* Hart, 4 Blackf. 13; Terre Haute, etc., R. Co. *v.* Jarvis, 9 Ind. App. 438, 36 N. E. 774.

Iowa.— Boon *v.* Orr, 4 Greene 304.

Kansas.— St. Louis, etc., R. Co. *v.* McMullen, 48 Kan. 281, 29 Pac. 147; St. Louis, etc., R. Co. *v.* Curtis, 48 Kan. 179, 29 Pac. 146.

Kentucky.— See Wheatly *v.* Phelps, 3 Dana 302.

Massachusetts.— Holman *v.* Sigourney, 11 Metc. 436.

Michigan.— An amendment to an oral declaration need not be reduced to writing. Farnam *v.* Doyle, 128 Mich. 696, 87 N. W. 1026 [*citing* Johnson *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5].

New Hampshire.— See Jordan *v.* Gillen, 44 N. H. 65.

New Mexico.— Sanchez *v.* Luna, 1 N. M. 238.

New York.— Beardsley *v.* Jacobs, 1 Den. 504.

Oregon.— Long *v.* Thompson, 34 Oreg. 359, 55 Pac. 978. See also Robinson *v.* Carlon, 34 Oreg. 319, 55 Pac. 959, to the effect that a supplemental complaint, which sets up an accord and satisfaction entered into after the judgment was rendered, need not set up the original cause of action.

Pennsylvania.— See Kooker *v.* Williams, 3 Pa. Dist. 446; McMichael *v.* McFalls, 7 Del. Co. 451. *Compare* Medler *v.* Madlinger, 12 Pa. Co. Ct. 473; Williams *v.* Shields, 2 Wkly. Notes Cas. 176.

Texas.— Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444, 15 S. W. 692; Schwartz *v.* Frees, (Civ. App. 1895) 31 S. W. 214.

West Virginia.— Jones *v.* Browse, 32 W. Va. 444, 9 S. E. 873.

See 31 Cent. Dig. tit. "Justices of the Peace," § 688.

But *compare* Atkinson *v.* Fortinberry, 7 Sm. & M. (Miss.) 302, where it was held that, although the proceedings on appeal are *de novo*, and can be conducted without any pleadings, yet, if the parties undertake to conduct and carry on the case by means of written pleadings, they will be held to the rules of pleading.

Defect cured by verdict see Lockhart *v.* Moss, 53 Mo. App. 633.

Averment of accrual of cause of action.— If the declaration avers the accrual of the cause of action on a day subsequent to the commencement of the suit it is error. Roud *v.* Griffith, 11 Serg. & R. (Pa.) 130; Langer *v.* Parish, 8 Serg. & R. (Pa.) 134; McLaughlin *v.* Parker, 3 Serg. & R. (Pa.) 144; Miller *v.* Ralston, 1 Serg. & R. (Pa.) 309.

Petition must aver that case comes up on appeal.— Linkensdorfer *v.* Wentzel, 6 Ohio S. & C. Pl. Dec. 6. *Contra*, McCullough *v.* Cramblett, 1 Ohio Cir. Ct. 330, 1 Ohio Cir. Dec. 182.

89. Ingram *v.* Bussey, 133 Ala. 539, 31 So. 967; Lagerfelt *v.* McKie, 100 Ala. 430, 14 So. 281; Blassingame *v.* Galves, 6 B. Mon. (Ky.) 38; Ball *v.* Beaumont, 59 Nebr. 631, 81 N. W. 858; Levi *v.* Fred, 38 Nebr. 564, 57 N. W. 386; Baldwin *v.* Rhea, 33 Nebr. 319, 50 N. W. 1; Waters *v.* Reuber, 16 Nebr. 99, 19 N. W. 687, 49 Am. Rep. 710; School Dist. No. 36 *v.* McIntire, 14 Nebr. 46, 14 N. W. 656; Mullins *v.* South Omaha St. Fair Assoc., 5 Nebr. (Unoff.) 572, 99 N. W. 521. And see *supra*, V, A, 12, b, (I).

90. James *v.* Vicors, 119 Ala. 32, 24 So. 415; Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Freeman *v.* Speegle, 83 Ala. 191, 3 So. 620; McDowell *v.* Simpson, 1 Houst. (Del.) 467; Blodget *v.* Skinner, 15 Vt. 716; Way *v.* Wakefield, 7 Vt. 223. See also Baldwin *v.* Rhea, 33 Nebr. 319, 50 N. W. 1; Waters *v.* Reuber, 16 Nebr. 99, 16 N. W. 687, 49 Am. Rep. 710.

91. A set-off cannot be pleaded *puis darrein continuance*. Chase *v.* Chase, 8 Mo. 103.

92. People *v.* Ontario C. Pl., 1 Wend. (N. Y.) 80; Campbell *v.* Reeves, 3 Sneed (Tenn.) 52, oral plea.

93. Plaintiff may file a supplemental complaint setting up new matter, consisting of an accord and satisfaction entered into after the judgment of the justice was rendered. Robinson *v.* Carlon, 34 Oreg. 319, 55 Pac. 959.

94. Hagen *v.* Thompson, 2 Port. (Ala.) 48.

A reply not being necessary before a justice payment of a counter-claim subsequent to an appeal may be shown on retrial in the appellate court, without amendment of the

(XVIII) *Demurrer on Appeal.* In a few states demurrers are admissible on appeal;[95] but in others they are not contemplated by the statutes, since causes are triable *de novo* on the issues of fact as made up below.[96]

(XIX) *Waiver of Objections.* Objections to the pleadings on appeal must be taken in the appellate court[97] before pleading to the issue,[98] trial,[99] or submission to arbitration;[1] and in Tennessee matter in abatement cannot be taken advantage of unless it is pleaded in writing and verified at the first term of the court to which the appeal is taken.[2] So too, where a replevin defendant waives a bill of particulars by not requiring it in the justice's court, he cannot on appeal object that a different description of the property is given in plaintiff's petition from that given below;[3] and where a party stands upon his demurrer after it has been overruled without objecting to the rendition of judgment on his demurrer, he waives his right to a trial of the issues.[4] But the fact that plaintiff has been permitted on appeal, without objection by defendant, to amend his claim by adding new items, is no ground for overruling his objection to defendant's adding new items to his counter-claim;[5] nor is a continuance by consent after the amendment on appeal of a plea in abatement which was sustained below a waiver of the plea.[6]

(XX) *Matters Admitted, and to Be Proved, and Variance* — (A) *Matters Admitted.* A plea of the general issue in a suit by a corporation admits its cor-

pleadings. Utter *v.* Nelligan, 92 Hun (N. Y.) 185, 36 N. Y. Suppl. 591.

95. See Ganaway *v.* Mobile, 21 Ala. 577; Tyner *v.* Cory, 5 Ind. 216; Lowen *v.* Crossman, 8 Iowa 325; Strout *v.* Durham, 23 Me. 483; Palethorp *v.* Schmidt, 12 Pa. Super. Ct. 214.

96. Byers *v.* Ferguson, 41 Oreg. 77, 65 Pac. 1067, 68 Pac. 5. See also Kane *v.* Dauernheim, 51 Mo. App. 635; James *v.* Leport, 19 Nev. 17, 8 Pac. 47.

Where a demurrer is inadmissible, a defendant in an action brought before a justice and appealed to the circuit court does not waive the objection that plaintiff had not legal capacity to sue by failing to demur on such ground. Wendleton *v.* Kingery, 110 Mo. App. 67, 84 S. W. 102.

Where a demurrer is filed in the circuit court, and is preserved in a bill of exceptions on appeal therefrom, it will be treated by the higher court as a motion to strike out the complaint because not stating a cause of action. Anderson *v.* McClure, 57 Mo. App. 93.

97. Objection cannot be raised for first time on appeal to supreme court.— Smith *v.* Allen, 16 Ind. 316. See also Abel *v.* Burgett, 3 Blackf. (Ind.) 502; Tyler *v.* Denson, 3 Blackf. (Ind.) 347.

98. *Delaware.* — Townsend *v.* Steward, 4 Harr. 94.

Kansas.— Missouri Pac. R. Co. *v.* Lea, 47 Kan. 268, 27 Pac. 987, in which defendant voluntarily appeared and answered a new petition setting up a claim in excess of the justice's jurisdiction.

Michigan.— Ovid Tp. *v.* Haire, 133 Mich. 353, 94 N. W. 1060, where it was held that where defendant files a plea of general issue, he admits that a declaration has been filed, so as to justify the court in permitting plaintiff to amend. See also Evers *v.* Sager, 28 Mich. 47.

Nebraska.— Grainger *v.* Sutton First Nat. Bank, 63 Nebr. 46, 88 N. W. 121 (in which plaintiff filed a reply to an answer setting up new issues); Sawyer *v.* Brown, 17 Nebr. 171, 22 N. W. 355; Waters *v.* Reuber, 16 Nebr. 99, 19 N. W. 687, 49 Am. Rep. 710; York County School Dist. No. 36 *v.* McIntire, 14 Nebr. 46, 14 N. W. 656.

Ohio.— Wilson *v.* Butler Tp. No. 16, 8 Ohio 174.

Vermont.— Blodget *v.* Skinner, 15 Vt. 716.

See 31 Cent. Dig. tit. "Justices of the Peace," § 691.

Notice to plead not waiver of affidavit of defense.— Under rules of court that if defendant enters a rule for a more specific statement, he shall reply thereto by affidavit as in other cases, a failure to file a sworn answer authorizes judgment for plaintiff, and a notice to plead, required by the rule, does not waive an affidavit of defense. Horner *v.* Horner, 145 Pa. St. 258, 23 Atl. 441.

99. Robertson *v.* Buffalo County Nat. Bank, 40 Nebr. 235, 58 N. W. 715; Steckel *v.* Weber, 20 Pa. St. 432. But *compare* Galveston, etc., R. Co. *v.* Dromgoole, (Tex. Civ. App. 1893) 24 S. W. 372, which was an appeal from a judgment by default, and it was held not error for the county court to strike out defendant's answer for failure to plead below, notwithstanding two trials had taken place in the county court on defendant's pleading.

1. Submission to arbitration waives an objection to a counter-claim that it exceeds the justice's jurisdiction. Jackson *v.* Swope, 49 Ind. 388.

2. Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.

3. York County School Dist. No. 36 *v.* McIntire, 14 Nebr. 46, 14 N. W. 656.

4. Roberts *v.* Norris, 67 Ind. 386.

5. Downtain *v.* Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56, construing Rev. St. art. 316.

6. Howeth *v.* Clark, (Tex. App. 1892) 19 S. W. 433.

porate capacity,[7] and where, in an action of account, defendant filed a set-off of a like nature, and the transcript on appeal does not show any pleadings, oral or written, but states that plaintiff did not object to defendant's bill of particulars or set-off, the set-off is properly held to be admitted by the state of the pleadings.[8] On the other hand, where the transcript shows that the parties had a full trial before the justice, plaintiff's demand cannot be taken as admitted by the appellate court;[9] and where plaintiff upon leave files a set-off to defendant's counter-claim he does not thereby admit matter in the answer not replied to, since no replication is necessary on appeal.[10]

(B) *Matters to Be Proved.* On appeal from a justice's judgment, plaintiff must show a right of action at the time of the commencement of the suit below,[11] and must prove the execution of the instrument upon which the suit is based, unless the return of the justice shows that it was filed with him, and that its execution was not denied on oath;[12] and where defendant pleads a tender, he will be required to prove everything necessary to constitute a good tender, including proof of the presence of the money in court.[13]

(C) *Variance.* Where a case is triable *de novo* on appeal, all formal objections are disregarded, and as a rule it is immaterial that there is a variance between the instrument put in evidence and that set out in the justice's transcript.[14]

d. Evidence — (I) *Burden of Proof.* On the trial *de novo* of a case appealed from a justice of the peace, the burden of proof is on plaintiff to establish all the facts necessary to a recovery,[15] and he cannot recover upon any less evidence than would have been necessary if he had brought the suit in the higher court in the first instance.[16] He need not, however, prove the jurisdiction of the justice where it appears from the transcript or record.[17]

(II) *Evidence Admissible Generally* — (A) *In General.* On a trial *de novo* on appeal, each party may, without filing new pleadings, prove any cause of action or defense and introduce any evidence which might have been proper upon the trial before the justice,[18] and defendant may further show any matter arising

7. Farmers', etc., Bank *v.* Williamson, 61 Mo. 259.

8. Brock *v.* Manatt, 5 Iowa 270.

9. Heath *v.* Coltenback, 5 Iowa 490.

10. Turner *v.* Simpson, 12 Ind. 413.

11. Norton *v.* Janvier, 5 Harr. (Del.) 346; Salmons *v.* Collins, 2 Harr. (Del.) 45.

12. Newton *v.* Principaal, 82 Mich. 271, 46 N. W. 234.

13. Harbin *v.* Knox, 7 Ala. 675.

14. Patterson *v.* Wilson, 6 Ark. 476; Frye *v.* Tucker, 24 Ill. 180; Bechtol *v.* Cobaugh, 10 Serg. & R. (Pa.) 121; Neinast *v.* Bearden, (Tex. Civ. App. 1898) 46 S. W. 885. See also Higley *v.* Bryan, 3 Greene (Iowa) 284, in which the variance was corrected by an amended return. But *compare* Kirk *v.* Aechternacht, 1 Phila. (Pa.) 426, where it was held that on appeal from a judgment on a scire facias alleged to have been brought upon a recognizance of bail for stay of execution, a plea of *nul tiel record* will prevail, if it appears that the recognizance filed with the transcript is entirely different from that stated in the writ.

15. Suter *v.* Cardwell, 6 T. B. Mon. (Ky.) 34; Palethorp *v.* Schmidt, 12 Pa. Super. Ct. 214.

16. Stout *v.* St. Louis Tribune Co., 52 Mo. 342.

17. Duke *v.* Kansas City, etc., R. Co., 39 Mo. App. 105; Rector *v.* Drury, 3 Pinn. (Wis.) 298, 4 Chandl. 24.

Where the record discloses an apparent jurisdiction in the justice, the burden is on plaintiff in error to show that the jurisdiction is not real. Young *v.* Trunkley, 22 Pa. Co. Ct. 127.

18. *Alabama.*—Stockdale *v.* Riddle, 22 Ala. 678.

Kansas.— Frankhouser *v.* Neally, 54 Kan. 744, 39 Pac. 700; Denver, etc., R. Co. *v.* Cowgill, 44 Kan. 325, 24 Pac. 475; Stanley *v.* Farmers' Bank, 17 Kan. 592.

Massachusetts.— Wilbur *v.* Taber, 9 Gray 361.

Michigan.— Soper *v.* Mills, 50 Mich. 75, 14 N. W. 704. See also Rossman *v.* Bock, 97 Mich. 430, 56 N. W. 777, in which plaintiff's bill of particulars was objected to as too general, and it was held that he might testify that he furnished an itemized statement and bill of particulars in the justice's court, and that he was unable to make another itemized statement.

Mississippi.— Russell *v.* Moore, 8 Sm. & M. 700.

Missouri.— Atwood *v.* Reyburn, 5 Mo. 555.

Pennsylvania.— Boner *v.* Luhman, 148 Pa. St. 591, 24 Atl. 90.

Texas.— Whitley *v.* Jackson, 1 Tex. App. Civ. Cas. § 574.

since the judgment below which relieves him of liability.[19] But the evidence must be confined to the issues made below,[20] and where, in trespass, defendant pleads only the general issue, evidence is inadmissible on appeal that plaintiff was not possessed of the land.[21]

(B) *On Appeal by One of Two Defendants.* Where suit is brought before a justice against two persons, and judgment is recovered against both, and one of them appeals, evidence showing his separate liability for the claim may be introduced on the trial.[22]

(C) *Evidence of Party Given Below.* Where plaintiff examines defendant before the justice he cannot on appeal be allowed to prove the declarations of defendant in testifying below.[23]

(D) *Admissions Made Below.* Admissions made by a party in the justice's court on his oath cannot be proved in the appellate court, where he is in court and is not examined;[24] and admissions of a defendant who has not appealed are inadmissible in evidence against his co-defendant who has.[25] An admission of record is, however, admissible.[26]

(E) *Instruments Not Filed by Justice.* On the trial of an appeal it may be shown that a written instrument which was the basis of the action was offered in evidence in the court below, and that the justice neglected to file it, and then it may be introduced on the trial in the appellate court.[27]

(F) *Amended Account.* Where an amended account, filed after appeal from a justice, is a mere itemization of the first account, in which the sum was set out in the aggregate, and it is not claimed that defendant is surprised thereby, it is admissible in evidence.[28]

(G) *Deposition Taken Below.* On the trial of an appeal from a justice's court, a deposition taken upon proper notice while the action was pending below may be read in evidence.[29]

(H) *Report of Auditor.* An auditor's report to the justice's court may be recommitted for amendment by an order of the appellate court, after the case has been taken up, and the amended report may be used in evidence at the trial in that court.[30]

(I) *Certificate of Justice.* The question whether documentary evidence was offered or admitted on the trial below may be determined by certificate of the justice or by witnesses.[31]

(J) *Minutes of Justice.* A justice's minutes of the evidence taken at a trial before him are not admissible, except by stipulation, at the trial on appeal, either as evidence of the facts at issue, or to impeach or sustain the credibility of a witness.[32]

(K) *Notice to Produce Papers.* If a party in a justice's court serves a notice on the other party to produce a paper at the trial, or that parol evidence will be

Vermont.— Fletcher *v.* Blair, 20 Vt. 124.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 693, 695.

Evidence admissible before justice see *supra*, IV, K, 1, c.

19. Minard *v.* Lawler, 26 Ill. 301.

20. Ross *v.* Hamilton, 3 Barb. (N. Y.) 609; McCoy *v.* Thompson, Wright (Ohio) 649.

21. Lynch *v.* Rosseter, 6 Pick. (Mass.) 419.

22. Carmien *v.* Whitaker, 36 Ind. 509.

23. Martien *v.* Barr, 5 Mo. 102. But see Ramsden *v.* Bryden, 31 N. J. L. 27.

24. Carter *v.* Buckner, 3 Blackf. (Ind.) 314. *Compare* Morrison *v.* Riker, 26 Mich. 385.

25. Wilfong *v.* Cline, 46 N. C. 499.

26. Merriman *v.* Anselment, 86 Minn. 6, 89 N. W. 1125.

27. Eggleston *v.* Collis, 10 Iowa 554. *Compare* Graft *v.* Diltz, 2 Greene (Iowa) 570.

Proof of execution.— In Michigan, on appeal in a suit on a bond which was not filed with the justice, it is error to allow the bond to be introduced in evidence without first proving its execution. Bauer *v.* Wasson, 60 Mich. 194, 26 N. W. 877.

28. Cazeneuve *v.* Martinez, (Miss. 1900) 28 So. 788.

29. Jarret *v.* Phillips, 90 Ill. 237. See also Frick Co. *v.* Marshall, 86 Mo. App. 463.

30. Webber *v.* Orne, 15 Gray (Mass.) 351.

31. Ramsey *v.* Dumars, 19 N. J. L. 66.

32. Zitske *v.* Goldberg, 38 Wis. 216.

given of its contents, and parol evidence is given accordingly, such notice is available on appeal, and will entitle the party who gave it to give the parol evidence in the appellate court, if the paper is not produced.[33]

(L) *Offer to Reduce Judgment.* On the trial of an appeal, plaintiff's offer to reduce the judgment cannot be given in evidence to prejudice his claim.[34]

(M) *Evidence as to Conduct of Witness.* Testimony as to the improper conduct of a witness on the trial before the justice is properly admitted on the trial in the appellate court.[35]

(N) *Execution.* An execution is not admissible in evidence on an appeal to show a sale of property without proof of a judgment, although it was not objected to in the justice's court.[36]

(III) *Transcript or Record as Evidence.* In some jurisdictions the transcript or record is not evidence on an appeal from the judgment of a justice;[37] but in others it is evidence of the matters required by law to be returned,[38] and is admissible to show the justice's jurisdiction,[39] the matters in issue,[40] the proceedings below,[41] and the judgment.[42]

(IV) *Evidence Not Admissible or Not Given Below.* On a trial *de novo* on an appeal from a justice, the parties are not restricted to the evidence introduced before the justice;[43] but in some states no evidence can be received on appeal which was not admissible below.[44]

(V) *Witnesses* — (A) *In General.* As a general rule any person is a competent witness on the trial of a case appealed from a justice of the peace who was examined,[45] or who might have been examined,[46] in the justice's court.

(B) *Parties.* Under the statutes of most of the states, a party is a competent witness for himself, or may be called at the instance of the adverse party.[47]

33. Reab *v.* Moor, 19 Johns. (N. Y.) 337.

34. Finney *v.* Veeder, 45 Barb. (N. Y.) 388.

35. Hunt *v.* Rumsey, 83 Mich. 136, 47 N. W. 105, 9 L. R. A. 674.

36. Glenn *v.* Garrison, 17 N. J. L. 1.

37. Hudson *v.* Pettijohn, 4 Harr. (Del.) 356; Townsend *v.* Steward, 4 Harr. (Del.) 94; Ockenfells *v.* Moeller, 79 Mich. 314, 44 N. W. 790.

If the record is read without objection, it is not sufficient ground to set aside the verdict and for a new trial. Hudson *v.* Pettijohn, 4 Harr. (Del.) 356.

The truth of matters alleged in a scire facias issued against bail for stay of execution is not evidenced by the justice's transcript and scire facias. Burger *v.* Becket, 6 Blackf. (Ind.) 61.

38. Rawson *v.* Adams, 17 Johns. (N. Y.) 130.

39. Rector *v.* Drury, 3 Pinn. (Wis.) 398, 4 Chandl. 24.

40. Cooper *v.* Woodrow, 3 Iowa 189.

Mutually admitted facts.— Where the justice stated in his return that the parties before him mutually admitted certain facts which he specified, it was held that these admissions might be embraced in the words of an act requiring justices to state "the demands of the parties, and the issue joined," and that the return was so far admissible in evidence. Rawson *v.* Adams, 17 Johns. (N. Y.) 130.

41. Com. *v.* Doty, 2 Metc. (Mass.) 18. See also Cothran *v.* Knight, 47 S. C. 243, 25 S. E. 142.

42. Flannigen *v.* Pope, 97 Ill. App. 263.

43. Brown *v.* Landon, 11 Colo. 162, 17 Pac. 515; Burton *v.* Laurens Cotton Mills, 64 S. C. 224, 41 S. E. 975; Sternberger *v.* McSween, 14 S. C. 35.

Evidence to impeach jurisdiction inadmissible for first time on appeal see Dinnen *v.* Baxter, 18 Mich. 457.

44. Thompson *v.* Jones, 2 Stew. & P. (Ala.) 46; Hunt *v.* Wilson, 1 Metc. (Mass.) 309; Johnson *v.* Gould, 23 N. H. 251; Wallen *v.* Lane, 1 Overt. (Tenn.) 74. *Contra*, Miller *v.* Cheney, 88 Ind. 466; Wilson *v.* Petty, 21 Mo. 417; Whitcomb *v.* Green, 2 Den. (N. Y) 113; O'Ferrall *v.* Moore, 127 Pa. St. 234, 17 Atl. 891.

45. Nicholson *v.* Wood, 15 N. J. L. 463.

46. In order to introduce a witness not examined below, his name, and the points and materiality of his testimony, must be set out in the reasons assigned for a new trial. Hoagland *v.* Nevius, 7 N. J. L. 75. See also Gulick *v.* Thompson, 12 N. J. L. 149.

New witnesses only competent to prove newly discovered facts see Sherron *v.* Humphreys, 14 N. J. L. 217. See also Drennen *v.* Lindsey, 15 Ark. 359; Russell *v.* Moore, 8 Sm. & M. (Miss.) 700; Grigg *v.* Bodrio, 9 Mo. 223; Hipp *v.* Ingram, 3 Tex. 17.

47. Construing the various statutes see the following cases:

Alabama.— Deming *v.* Hamil, 38 Ala. 686 (in which plaintiff remitted part of his demand in order to bring himself within the statute); Hamblin *v.* McLendon, 37 Ala. 711; Alabama, etc., R. Co. *v.* Oaks, 37 Ala. 694; Stein *v.* McArdle, 24 Ala. 344; Wheeler *v.* Stockdale, 22 Ala. 658.

(c) *Co-Defendant.* Where one of two defendants appeals from a justice's judgment his co-defendant is a competent witness in his behalf.[48]

(d) *Sureties on Appeal.* Where competent witnesses become sureties for the appellant, their testimony is inadmissible in the appellate court, where interest disqualifies;[49] but it is the duty of the appellate court, upon being satisfied as to their materiality, to allow the substitution of other sufficient sureties, so that the first may become witnesses.[50]

(e) *Justice.* The justice before whom the action was tried may be examined to show what a witness testified to before him, and may refer to his minutes in order to refresh his memory.[51]

e. Mode and Conduct of Trial — (i) *In General.* On appeal from a justice's judgment there must be a trial *de novo* of the issues raised below,[52] according, in some states, to the procedure obtaining before justices,[53] while in others the mode of procedure is that of the appellate court.[54] Where several joint defendants in trespass appeal, the court should assess damages as to those who did not plead before the justice, although there is a verdict for those who pleaded to the issue.[55]

(ii) *Right to Open and Close, and Statements of Counsel.* The right to open and close is with the party having the affirmative of the issue, usually the plaintiff;[56] but where defendant pleads only affirmative defenses, and disclaims all benefit of the general issue, the burden is upon him, and he is entitled to open and close.[57] Since, in Texas, an action by a county judge on a county convict labor bond running in his name is necessary for the benefit of the county, it is not error to allow counsel to state on the trial on appeal to the county court that the suit is in behalf of the county;[58] nor, where the transcript, by showing judgment

Arkansas.—Adkins *v.* Hershy, 17 Ark. 425; Drennen *v.* Lindsey, 15 Ark. 359.

Mississippi.— Russell *v.* Moore, 8 Sm. & M. 700.

Missouri.— Grigg *v.* Bodrio, 9 Mo. 223.

Texas.— Hipp *v.* Ingram, 3 Tex. 17.

Wisconsin.— Greene *v.* Holley, 2 Pinn. 488, 2 Chandl. 168.

See 31 Cent. Dig. tit. "Justices of the Peace," § 698.

48. Goodhue *v.* Palmer, 13 Ind. 457.

49. Hershy *v.* Clarksville Inst., 15 Ark. 128.

50. Thomas *v.* Alton, 5 Mo. 534; Tompkins *v.* Curtis, 3 Cow. (N. Y.) 251.

51. Zitske *v.* Goldberg, 38 Wis. 216.

52. *Illinois.*— Shook *v.* Thomas, 21 Ill. 87, holding that a trial cannot be had on the transcript without further proof.

Montana.— Duane *v.* Molinak, 31 Mont. 343, 78 Pac. 588, to the effect that where the pleadings raise issues of fact it is error to give judgment on the pleadings.

New Jersey.— Burk *v.* Shreve, 39 N. J. L. 214.

New York.— People *v.* Washington C. Pl., 20 Johns. 363; Breese *v.* Williams, 20 Johns. 280.

North Carolina.— Thornburg *v.* Herron, 73 N. C. 281.

See 31 Cent. Dig. tit. "Justices of the Peace," § 699.

Cause cannot be tried as a suit in equity see Johnson *v.* Stephens, 107 Mo. App. 629, 82 S. W. 192.

53. Dickinson *v.* Morgenstern, 111 Ill. App. 543; Duane *v.* Molinak, 31 Mont. 343, 78 Pac. 588; State *v.* Gallatin County Justice Ct., 31 Mont. 258, 78 Pac. 498; Carr *v.* Smith, 14 N. Y. St. 466.

54. Samuels *v.* Greenspan, 9 Kan. App. 140, 58 Pac. 482; Stroud *v.* Morton, 70 Mo. App. 647; Burk *v.* Shreve, 39 N. J. L. 214. *Compare* Coffman *v.* Harrison, 24 Mo. 524.

Compelling election of defenses see Ferguson *v.* Prince, 2 Kan. App. 7, 41 Pac. 988.

So far as the statute of limitations is concerned, the case should be tried in the same manner as if tried in the justice's court. Sanford *v.* Shepard, 14 Kan. 228.

Where the note sued on is lost after appeal, the affidavit of loss contemplated by Wagner St. Mo. p. 81, § 10, is not required. Lemon *v.* Cross, 60 Mo. 173.

A suit for obstructing a highway may be prosecuted on appeal in Ohio as a civil action. Hill *v.* Stonecreek Tp., 10 Ohio St. 621.

Reference by stipulation of parties see Hyland *v.* Loomis, 48 Barb. (N. Y.) 126.

55. People *v.* Onondaga County Judges, 7 Cow. (N. Y.) 492.

56. Florville *v.* Stieren, 82 Ill. App. 20.

57. Blackledge *v.* Pine, 28 Ind. 466. *Compare* Mitchell *v.* Fowler, 21 S. C. 298, where it was held that defendant does not admit "by his pleadings" any part of plaintiff's case, so as to have the right to open and close, by an oral admission on appeal, no admission having been made below, where the pleadings may be oral or written.

58. Johnson *v.* Johnson, (Tex. Civ. App. 1895) 33 S. W. 682.

against the sureties only, shows that the death of the principal must have been suggested to the justice, to allow him to state that the principal is dead.[59]

(III) *Instructions.* On appeal from a justice of the peace it is not necessary to give any instruction not requested.[60] But the question of the jurisdiction of a justice is one of law and fact, and on appeal in an action of replevin, where the jurisdiction is limited to property which does not exceed a specified sum in value, it is proper to instruct the jury, left to find a general verdict, what the conclusion of law is, if they find that the value of the property exceeds such sum.[61]

(IV) *Verdict.* On appeal from a justice of the peace the verdict as a rule should not be in excess of the justice's jurisdiction;[62] but when a party receives such a verdict, he may remit the excess, and have judgment for the remainder.[63] Where, after appealing, defendant pays the debt sued for, but does not pay all the costs, plaintiff is entitled to a verdict for costs;[64] and where, on appeal in an action on a verified account, in which there was a counter-affidavit filed below, plaintiff is not present, and defendant testifies that there is nothing due, it is proper to direct a verdict for defendant.[65]

(V) *Trial by the Court.* A case carried up on appeal from a justice of the peace may, by consent of the parties, be tried by the court without a jury;[66] and in Missouri, when a case is so tried, no finding of fact is necessary, hypothetical instructions or declarations of law being the correct practice.[67]

(VI) *Attachment Proceedings.* The writ of attachment cannot issue in an action pending on an appeal by the plaintiff from a justice's judgment in his favor for a sum less than that claimed by him, since such action on appeal is not an action *ex contractu* to recover money.[68]

(VII) *Garnishment Proceedings*—(A) *In General.* Where a garnishee appeals from a judgment rendered against him on his answer denying indebtedness, the case stands in the appellate court as if there had been no judicial action on the contest, and plaintiff must tender an issue in writing;[69] but where the garnishee fails to appear at the hearing, the court need not order a continuance, but may submit the issues to a jury, and enter judgment against him.[70] To enable the appellate court to render judgment against an execution garnishee, the judgment and unsatisfied execution must be produced.[71]

(B) *Evidence.* The plaintiff may examine the garnishee anew in the appellate court for the purpose of a fuller discovery,[72] and the garnishee on his part may correct any mistake on his examination below,[73] may show that a disclosure made by him, as taken down in the minutes of the justice and signed by himself, was not the disclosure actually made,[74] and may dispute the facts recited in the justice's judgment, where his answer has not been reduced to writing and signed.[75]

59. Johnson *v.* Johnson, (Tex. Civ. App. 1895) 33 S. W. 682.

60. Houston, etc., R. Co. *v.* Houx, 15 Tex. Civ. App. 502, 40 S. W. 327.

61. Kirkpatrick *v.* Cooper, 89 Ill. 210.

62. Wabash R. Co. *v.* Barker, 79 Ill. App. 331. *Compare* McKinley *v.* McCalla, 5 Binn. (Pa.) 600.

63. Wabash R. Co. *v.* Barker, 79 Ill. App. 331.

64. Bracey *v.* Marion Coal Co., 7 Pa. Dist. 310.

65. O'Dell *v.* Meacham, 114 Ga. 910, 41 S. E. 41.

66. Stein *v.* Jackson, 31 Ala. 24; Lane *v.* Leet, 2 Ind. 535.

On appeal of a motion against a sheriff for the non-return of an execution, it is not necessary that the facts should be submitted to a jury, but the court should hear evidence as if the cause had been commenced therein. Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20.

67. Clohecy *v.* Ragan, 20 Mo. 453; Clemens *v.* Broomfield, 19 Mo. 118; Soutier *v.* Kellerman, 18 Mo. 509; Sickles *v.* Patterson, 18 Mo. 479; Haase *v.* Stevens, 18 Mo. 476.

68. Zechman *v.* Haak, 85 Wis. 656, 56 N. W. 158.

69. Lehman *v.* Hudmon, 79 Ala. 532, plaintiff cannot claim judgment by default.

70. Lehman *v.* Hudmon, 85 Ala. 135, 4 So. 741.

71. Miller *v.* Wilson, 86 Tenn. 495, 7 S. W. 638.

72. Oliver *v.* Chicago, etc., R. Co., 17 Ill. 587; Newell *v.* Blair, 7 Mich. 103.

73. Newell *v.* Blair, 7 Mich. 103.

74. Sutherland *v.* Burrill, 82 Mich. 13, 45 N. W. 1122.

75. Taylor *v.* Kain, 8 Baxt. (Tenn.) 35.

The justice's transcript is not competent evidence to show an indebtedness from the garnishee,[76] but his examination before the justice is legitimate evidence against him.[77] It cannot be contradicted by the oral testimony of the justice or any one else as to what he disclosed, nor can it be supplemented so as to increase his admitted liability;[78] and where the answers have been controverted by plaintiff they cannot be considered as facts in the case.[79] Where the garnishee admitted before the justice that he had money in his hands collected for defendant, but stated that he had been informed that it had been assigned before service of the garnishment process, he is entitled to introduce evidence of such assignment on appeal;[80] and a judgment defendant may show in defense on appeal that he has been garnished on account of his indebtedness on the judgment, and has made payments thereon as garnishee.[81]

(c) *Effect of Bond Discharging Garnishment Proceedings.* A bond releasing garnishment proceedings in a justice's court, and binding the obligors to pay any judgment which might be rendered against defendant on the final hearing of the case, binds them to pay a final judgment rendered against defendant on an appeal by plaintiff.[82]

13. Scope and Extent of Review — a. In General — (i) *Presumptions* — **(a)** *In General.* It is the uniform practice of the courts in reviewing proceedings had before justices of the peace to regard them with marked indulgence and liberality in the furtherance of the ends of justice, and if possible sustain them by every reasonable and warrantable intendment.[83] Thus, in the absence of a

76. Cairo, etc., R. Co. *v.* Killenberg, 92 Ill. 142.

77. Newell *v.* Blair, 7 Mich. 103.

78. Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

79. Clark *v.* Kinealy, 13 Mo. App. 104.

80. Newell *v.* Blair, 7 Mich. 103.

81. Minard *v.* Lawler, 26 Ill. 301.

82. Washer *v.* Campbell, 40 Kan. 747, 21 Pac. 671, where it was held that the fact that after the judgment for defendant in the justice's court the garnishment proceedings could, but for the bond, have been revived by appeal or error, constitutes sufficient consideration for continuing the obligation of the bond after such judgment.

83. Steele *v.* Wells, 56 N. Y. Suppl. 367. See also the following illustrative cases:

Arkansas.— State Bank *v.* Curran, 10 Ark. 142.

Connecticut.— Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760. *Compare* Jackson *v.* New Milford Toll Bridge Co., 34 Conn. 266.

Illinois.— Bank of Commerce *v.* Franklin, 88 Ill. App. 198; Subim *v.* Isador, 88 Ill. App. 96.

Indiana.— Tyler *v.* Bowlus, 54 Ind. 333, 601.

Iowa.— Herald Printing Co. *v.* Walsh, 127 Iowa 501, 103 N. W. 473; Little *v.* Devendorf, 109 Iowa 47, 79 N. W. 476 [*citing* Schlisman *v.* Webber, 65 Iowa 114, 21 N. W. 209; Church *v.* Crossman, 49 Iowa 444]; Chesmore *v.* Barker, 101 Iowa 576, 70 N. W. 701; Hodge *v.* Ruggles, 36 Iowa 42.

Maine.— Simpson *v.* Wilson, 24 Me. 437.

Minnesota.— Continental Ins. Co. *v.* Richardson, 69 Minn. 433, 72 N. W. 458 [*citing* Hinds *v.* American Express Co., 24 Minn. 95]; Polk *v.* American Mortg. Loan Co., 68 Minn. 169, 70 N. W. 1078; Clague *v.* Hodgson, 16 Minn. 329. And see Warner *v.* Fishbach, 29 Minn. 262, 13 N. W. 47.

Mississippi.— Eskridge *v.* Rutland, 77 Miss. 784, 27 So. 610.

Missouri.— U. S. Fidelity, etc., Co. *v.* Foskett-Kessner Feed Co., 100 Mo. App. 724, 73 S. W. 364; McHoney *v.* Kerwin, 56 Mo. App. 459; Medart *v.* Baker's Eureka Hot Air, etc., Mfg. Co., 51 Mo. App. 19; Powers *v.* Braley, 41 Mo. App. 556; State *v.* Carroll, 9 Mo. App. 275.

Nebraska.— McKibben *v.* Harris, 54 Nebr. 520, 74 N. W. 952; Rawalt *v.* Brewer, 16 Nebr. 444, 20 N. W. 391; Martin *v.* Mershon, 3 Nebr. (Unoff.) 174, 91 N. W. 180.

New Jersey.— Schomp *v.* Tompkins, 46 N. J. L. 608.

New York.— Knight *v.* Wilson, 55 Hun 559, 9 N. Y. Suppl. 20; Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Suppl. 43.

Ohio.— Shafer *v.* Hockheimer, 36 Ohio St. 215; Squires *v.* Martin, 24 Ohio Cir. Ct. 232; Howell *v.* Jenkins, 2 Ohio Dec. (Reprint) 552, 3 West. L. Month. 631.

Oklahoma.— Love *v.* Moore, 11 Okla. 645, 69 Pac. 871.

Pennsylvania.—Mullin's Appeal, 2 Pa. Cas. 158, 5 Atl. 738; Shelly *v.* Kuestner, 19 Pa. Super. Ct. 219; Kuhn *v.* Eggers, 17 Pa. Co. Ct. 155; Cornish *v.* Young, 1 Ashm. 153; Com. *v.* Myers, 5 Lanc. Bar, June 7, 1873.

Wisconsin.— State *v.* Merrick, 101 Wis. 162, 77 N. W. 719; Meyer *v.* Foster, 16 Wis. 294.

See 31 Cent. Dig. tit. "Justices of the Peace," § 705.

To obtain a reversal by writ of error, sufficient cause for the reversal should appear either upon the record or upon legal exceptions. Simpson *v.* Wilson, 24 Mo. 437. See also State Bank *v.* Curran, 10 Ark. 142.

showing to the contrary, the conduct of the hearing before the justice will be presumed to have been regular;[84] and it will be presumed that the rulings and the decision of the justice were correct.[85] But where a justice is required to enter on his docket the fact that certain things were done in the progress of a case pending before him, it will be presumed in the absence of such entry that they were not done.[86]

(B) *Process and Appearance.* On appeal from a justice of the peace it will be presumed that the process was regularly issued, served, and returned, unless the contrary affirmatively appears from the transcript or record;[87] and where the justice's return shows an appearance, it must be taken, in the absence of any qualification, to have been a general appearance,[88] and, where it is made by an agent, to have been authorized.[89]

(C) *Pleadings.* On appeal from a justice of the peace the appellate court will make every reasonable intendment in favor of the regularity and sufficiency of the pleadings below, in order to sustain the justice's judgment, in the absence of an affirmative showing to the contrary.[90] But no fact essential to the justice's jurisdiction will be presumed because its non-existence does not affirmatively

84. *Michigan.*— Savier *v.* Chipman, 1 Mich. 116.

Minnesota.— Clague *v.* Hodgson, 16 Minn. 329.

Missouri.— Hendrickson *v.* St. Louis, etc., R. Co., 34 Mo. 188, 84 Am. Dec. 76.

Nebraska.— Gapen *v.* Bretternitz, 31 Nebr. 302, 47 N. W. 918.

New York.—Knight *v.* Wilson, 55 Hun 559, 9 N. Y. Suppl. 20; Crown Point Iron Co. *v.* Fitzgerald, 14 N. Y. St. 427; Decker *v.* Hassel, 26 How. Pr. 528; Baum *v.* Tarpenny, 3 Hill 75.

Wisconsin.— Driscoll *v.* Smith, 59 Wis. 38, 17 N. W. 876; Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609; Storm *v.* Adams, 56 Wis. 137, 14 N. W. 69; Wheeler *v.* Smith, 18 Wis. 651; Meyer *v.* Foster, 16 Wis. 294.

See 31 Cent. Dig. tit. "Justices of the Peace," § 709.

85. *Alabama.*— Bell *v.* State, 124 Ala. 94, 27 So. 414.

Arkansas.— Giles *v.* Hicks, 45 Ark. 271.

Connecticut.— Lyon *v.* Alvord, 18 Conn. 66.

Iowa.— Lord *v.* Ellis, 9 Iowa 301; McKinney *v.* Hartman, 3 Iowa 344.

Michigan.— Gray *v.* Willcox, 56 Mich. 58, 22 N. W. 109; Albert *v.* Sutton, 28 Mich. 2; Achey *v.* Hull, 7 Mich. 423. *Compare* Harrison *v.* Sager, 27 Mich. 476.

Minnesota.— Warner *v.* Fishbach, 29 Minn. 262, 13 N. W. 47; Hinds *v.* American Exp. Co., 24 Minn. 95.

Missouri.— Sykes *v.* Planters' House, etc., 7 Mo. 477; Martin *v.* Chicago, etc., R. Co., 50 Mo. App. 428.

Nebraska.— Spaulding *v.* Johnson, 48 Nebr. 830, 67 N. W. 874.

New Jersey.— Davison *v.* Schooley, 10 N. J. L. 145; Fleming *v.* Newman, 3 N. J. L. 864.

New York.— Bell *v.* Moran, 25 N. Y. App. Div. 461, 50 N. Y. Suppl. 982; Slaman *v.* Buckley, 29 Barb. 289; Bellows *v.* Sackett, 15 Barb. 96; Suspension Bridge *v.* Bedford, 10 N. Y. St. 850; Oakley *v.* Van Horn, 21 Wend. 305.

North Carolina.— Haines *v.* Dalton, 14 N. C. 91.

Ohio.— Wilson *v.* Wickersham, 2 Ohio Dec. (Reprint) 545, 3 West. L. Month. 621; Niven *v.* Smith, 2 Ohio Dec. (Reprint) 337, 2 West. L. Month. 465.

Texas.— Silcock *v.* Bradford, (Civ. App. 1897) 40 S. W. 234.

See 31 Cent. Dig. tit. "Justices of the Peace," § 708.

86. McCarty *v.* Blake, 2 Ohio Dec. (Reprint) 155, 1 West. L. Month. 589.

The adjournment of court to a certain day will not be presumed from the fact that an appeal was allowed on that day. Jackson *v.* New Milford Toll Bridge Co., 34 Conn. 266.

87. Johnson *v.* Ryan, 10 Iowa 588; Potter *v.* Whittaker, 27 How. Pr. (N. Y.) 10; Taylor *v.* Marcus, 53 N. C. 402; Van Gorder *v.* Lee, 25 Pa. Co. Ct. 239; Purnell *v.* McBreen, 23 Pa. Co. Ct. 442. Where the original notice issued by a justice of the peace indicated that service had been had on defendants in the township in which the judgment was entered, it was presumed on a writ of error to the justice, in the absence of anything to the contrary in the record, that defendants' residence was such as to have conferred jurisdiction. Herald Printing Co. *v.* Walsh, 127 Iowa 501, 103 N. W. 473.

A short summons is an extraordinary process, and can only issue on proper preliminary proof; and, as jurisdiction is not obtained without such proof, a judgment in a justice's court is to be presumed void on appeal until the party on whom the onus is thrown supplies that proof, and a mere memorandum, "afft. short summons," on the justice's docket, is not sufficient evidence of jurisdiction. Rue *v.* Perry, 41 How. Pr. (N. Y.) 385.

88. Cron *v.* Krones, 17 Wis. 401.

89. Oakley *v.* Working Men's Union Benev. Soc., 2 Hilt. (N. Y.) 487.

90. *Arkansas.*— Pulaski County School Dist. No. 7 *v.* Reeve, 56 Ark. 68, 19 S. W. 106.

Illinois.— Griswold *v.* Peoria University, 26

appear,[91] and where the record does not disclose a cause of action, it will be presumed on error that none was filed.[92] So too, although the law permits oral as well as written pleadings, it will not be presumed in aid of a judgment that there were any oral pleadings, where there were pleadings noted in the justice's docket, and no oral pleadings are shown.[93] But on the other hand, where the transcript fails to show that the justice noted the pleadings on his docket, the appearance in the transcript of a general denial does not raise a conclusive presumption that defendant filed no other pleading, or prevent his showing by parol what pleadings were filed.[94]

(D) *Proceedings For Appeal and Transcript.* Except in regard to matters going to the jurisdiction of the appellate court,[95] every intendment will be made on appeal from a justice in favor of his transcript and of the regularity of the proceedings for appeal.[96]

(II) *Harmless Error.* A justice's judgment will not be reversed on appeal or error for harmless and immaterial errors,[97] or because of technical and formal defects or irregularities in the proceedings.[98]

Ill. 41, 79 Am Dec. 361; Comstock *v.* Ward, 22 Ill. 248.

Indiana.— Burger *v.* Becket, 6 Blackf. 61.

Iowa.— Clark *v.* Barnes, 7 Iowa 6; Hall *v.* Denise, 6 Iowa 534; Sinnamon *v.* Melbourn, 4 Greene 309.

Michigan.— Kerr *v.* Bennett, 109 Mich. 546, 67 N. W. 564; Brown *v.* Kelley, 20 Mich. 27.

Minnesota.— Burt *v.* Bailey, 21 Minn. 403; Tyrrell *v.* Jones, 18 Minn. 312; Hecklin *v.* Ess, 16 Minn. 51.

Nebraska.— Bell *v.* White Lake Lumber Co., 21 Nebr. 525, 32 N. W. 561; Underhill *v.* Shea, 21 Nebr. 154, 31 N. W. 510.

Tennessee.— Mason *v.* Anderson, 12 Heisk. 40; Hutchinson *v.* Fulghum, 4 Heisk. 550.

Texas.— Fessman *v.* Seeley, (Civ. App. 1895) 30 S. W. 268; Porter *v.* Russek, (Civ. App. 1895) 29 S. W. 72.

West Virginia.— Griffin *v.* Haught, 45 W. Va. 460, 31 S. E. 957.

See 31 Cent. Dig. tit. "Justices of the Peace," § 707.

91. Daily *v.* Doe, 3 Fed. 903.

92. Beaird *v.* U. S., 5 Ind. 220.

93. Missouri, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1904) 84 S. W. 298; Stanger *v.* Dorsey, (Tex. Civ. App. 1900) 55 S. W. 129.

94. Howard *v.* Faggard, (Tex. Civ. App. 1895) 32 S. W. 188.

95. McFarland *v.* Butler, 11 Minn. 72, 77; Graves *v.* Missouri Pac. R. Co., 18 Mo. App. 647.

96. *Florida.*— Summerlin *v.* Tyler, 6 Fla. 718.

Illinois.— Subim *v.* Isador, 88 Ill. App. 96.

Minnesota.— Rahilly *v.* Lane, 15 Minn. 447.

Missouri.— Hammel *v.* Weis, 54 Mo. App. 14.

Montana.— Morin *v.* Wells, 30 Mont. 76, 75 Pac. 688.

New York.— Hance *v.* Cayuga, etc., R. Co., 26 N. Y. 428; Orcutt *v.* Cahill, 24 N. Y. 578; Sholts *v.* Yates County Judges, 2 Cow. 506.

Texas.— Jones *v.* Wells, 3 Tex. App. Civ. Cas. § 94; Whitman Agricultural Co. *v.* Voss, 2 Tex. App. Civ. Cas. § 548; E. L. & R. R. Co. *v.* Davis, 1 Tex. App. Civ. Cas. § 563.

Wisconsin.— Bruins *v.* Downey, 51 Wis. 120, 8 N. W. 110.

See 31 Cent. Dig. tit. "Justices of the Peace," § 710.

97. *Alabama.*— Western Union Tel. Co. *v.* Meyer, 61 Ala. 158, 32 Am. Rep. 1.

California.— Stuart *v.* Lander, 16 Cal. 372, 76 Am. Dec. 538.

Indiana.— Powers *v.* Fletcher, 84 Ind. 154; Lawless *v.* Harrington, 75 Ind. 379; Cincinnati, etc., R. Co. *v.* Ridge, 54 Ind. 39; Bernhamer *v.* Conard, 45 Ind. 151; Blair *v.* Porter, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81.

Kansas.— Sullivan *v.* Brown, 47 Kan. 708, 28 Pac. 1008; Fitch *v.* Manhattan F. Ins. Co., 23 Kan. 366; Alvey *v.* Wilson, 9 Kan. 401.

Michigan.— Whelpley *v.* Nash, 46 Mich. 25, 8 N. W. 570.

Nebraska.— Leake *v.* Gallogly, 34 Nebr. 857, 52 N. W. 824.

New York.— Stephens *v.* Wider, 32 N. Y. 351; Needles *v.* Howard, 1 E. D. Smith 54; Halter *v.* Shaffer, 21 N. Y. Suppl. 824; Davison *v.* Luckman, 18 N. Y. Suppl. 663; Brewer *v.* Delafield, 18 N. Y. Suppl. 329; Jackson *v.* Collins, 16 N. Y. Suppl. 651; Lockwood *v.* Lockwood, 14 N. Y. Suppl. 831; Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253; Fritze *v.* Pultz, 2 N. Y. Civ. Proc. 142; Tanner *v.* Marsh, 36 How. Pr. 140; Decker *v.* Myers, 31 How. Pr. 372; Oakley *v.* Van Horn, 21 Wend. 305; Fuller *v.* Wilcox, 19 Wend. 351; Cady *v.* Fairchild, 18 Johns. 129; McDowell *v.* Van Deusen, 12 Johns. 356.

Pennsylvania.— Dunn *v.* McCord, 1 Pa. Cas. 345, 2 Atl. 863.

Texas.— Rylie *v.* Elam, (Civ. App. 1904) 79 S. W. 326; Staples *v.* Word, (Civ. App. 1898) 48 S. W. 751; Horton *v.* McKeehan, 1 Tex. App. Civ. Cas. § 465.

United States.— Taylor *v.* Hogan, 23 Fed. Cas. No. 13,794*a*, Hempst. 16.

See 31 Cent. Dig. tit. "Justices of the Peace," § 711.

Error in taxing costs not ground for reversal see Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253; Fuller *v.* Wilcox, 19 Wend. (N. Y.) 351. *Contra*, Crull *v.* Morgan, 11 Ohio Cir. Ct. 537, 5 Ohio Cir. Dec. 274.

98. *Alabama.*— Williams *v.* Hinton, 1 Ala. 297; Clark *v.* Bostick, 2 Stew. & P. 66.

(iii) *Parties Entitled to Allege Errors.* Only a party affected by errors and irregularities in the proceedings before a justice of the peace will be heard to object to them,[99] and a party is estopped to allege error for which he is responsible,[1] or to allege new grounds of error after having placed the grounds for reversal on the record.[2] By pleading and going to trial without objection, a party waives an objection to the capacity in which he is sued;[3] and, if the record shows a judgment for an amount within the justice's jurisdiction, and that no more was demanded at the trial, he cannot urge on appeal that the record is defective in not showing the sum demanded.[4] So too a defendant waives his demurrer by putting in an answer after it has been overruled;[5] and where a defendant does not appear on the return-day of the summons, he is precluded from objecting in the higher court to the regularity of the proceedings.[6] But the rule that accepting the benefit of a judgment is a release of errors does not apply to an appeal from a justice's judgment by the prevailing party, where the hearing in the appellate court is *de novo* on the merits.[7]

(iv) *Matters of Discretion.* Matters within the discretion of a justice of the peace will not be reviewed by the appellate court.[8]

b. Appeals on Questions of Law and of Fact — (i) *Questions of Law.* In some states provision is made by the statutes for the review of proceedings had before justices of the peace upon questions of the law alone. The extent to which this may be done and the mode of procedure are of course dependent upon the terms of the statutes, and no general rules applicable in any number of jurisdictions can be laid down on the subject.[9]

Indiana.— Roseberry *v.* Shields, 26 Ind. 153.
Iowa.— Miller *v.* Cassady, 25 Iowa 323.
Kansas.— Kaub *v.* Mitchell, 12 Kan. 57.
Michigan.— Kees *v.* Maxim, 99 Mich. 493, 58 N. W. 473; Deitz *v,* Groesbeck, 32 Mich. 303; People *v.* Foote, 1 Dougl. 102.
Missouri.— Hamlin *v.* Dunn, 53 Mo. 137.
New Jersey.— Branson *v.* Eayre, 12 N. J. L. 127; Brinley *v.* Wurts, 3 N. J. L. 432; Carmichael *v.* Howell, 2 N. J. L. 375.
New York.— Putnam Foundry, etc., Co. *v.* Young, 55 N. Y. App. Div. 523, 67 N. Y. Suppl. 16; Marble *v.* Towman, 5 N. Y. App. Div. 613, 39 N. Y. Suppl. 350; Kingsford *v.* Butler, 71 Hun 598, 24 N. Y. Suppl. 1094; Kilmer *v.* Messling, 70 Hun 582, 24 N. Y. Suppl. 343; McNall *v.* McClure, 1 Lans. 32; Purdy *v.* Dinkle, 2 Silv. Sup. 514, 6 N. Y. Suppl. 158; Cambeis *v.* Third Ave. R. Co., 1 Misc. 158, 20 N. Y. Suppl. 633; Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253; Arnold *v.* Maltby, 4 Den. 498; Van Alstyne *v.* Dearborn, 2 Wend. 586; Day *v.* Wilber, 2 Cai. 134.
Ohio.— Niven *v.* Smith, 2 Ohio Dec. (Reprint) 337, 2 West. L. Month. 465.
Pennsylvania.—Com. *v.* Hart, 12 Pa. Super. Ct. 605.
Texas.— Kellers *v.* Reppien, 9 Tex. 443.
West Virginia.— Furbee *v.* Shay, 46 W. Va. 736, 34 S. E. 746.
Wisconsin.— Silvernail *v.* Rust, 88 Wis. 458, 60 N. W. 787.
See 31 Cent. Dig. tit. "Justices of the Peace," § 712.

99. Stone *v.* Murphy, 2 Iowa 35; Schneider *v.* Armstrong, Sheld. (N. Y.) 379; Eldredge *v.* McNulty, 45 How. Pr. (N. Y.) 440; Glenn *v.* Shannon, 12 S. C. 570.

1. Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507; Fairbanks *v.* Corlies, 3 E. D. Smith (N. Y.) 582; Smith *v.* Goodrich, 5 Johns. (N. Y.) 353; Roberts *v.* Warren, 3 Wis. 736.

2. Cristman *v.* Paul, 16 How. Pr. (N. Y.) 17.

3. Roxborough Tp. *v.* Bunn, 12 Serg. & R. (Pa.) 292.

4. Weidenhamer *v.* Bertle, 103 Pa. St. 448.

5. Irvine *v.* Forbes, 11 Barb. (N. Y.) 587.

6. People *v.* Powers, 19 Abb. Pr. (N. Y.) 99.

7. Kasting *v.* Kasting, 47 Ill. 438.

8. Canfield *v.* Bates, 13 Cal. 606; State *v.* Nephler, 35 La. Ann. 365; Reed *v.* Barber, 3 Code Rep. (N. Y.) 160; Sammis *v.* Brice, 4 Den. (N. Y.) 576; White *v.* Stevenson, 4 Den. (N. Y.) 193; Pease *v.* Gleason, 8 Johns. (N. Y.) 409; McCahan *v.* Reeder, 10 Pa. Dist. 298.

9. *California.*— Fabretti *v.* Santa Clara County Super. Ct., 77 Cal. 305, 19 Pac. 481, in which the appeal was on questions of law and fact, but there having been no issues of fact, it was held that it must be entertained and decided by the superior court as on questions of law alone.
Indiana.— Sargent *v.* Flaid, 90 Ind. 501, holding that the insufficiency of the summons will not be considered on appeal if the specific objections to it are in no way pointed out to the appellate court.
Kansas.— Hart Pioneer Nursery Co. *v.* Scruggs, 36 Kan. 407, 14 Pac. 145 (a ruling admitting or excluding evidence cannot be reviewed on petition in error); Rice *v.* Harvey, 19 Kan. 144 (petition in error will not lie to revise a judgment upon a verdict, upon alleged partiality or error in the justice's rulings).

(II) *Questions of Fact*—(A) *In General.* A finding by a justice of the peace upon a question of fact is as conclusive on an appeal as the verdict of a jury,[10] and under some statutes cannot be reviewed on error.[11]

Louisiana.— State *v.* King, 42 La. Ann. 77, 7 So. 72 (merits are not before court for review on appeal from a judgment on a plea to the jurisdiction); Charity Hospital *v.* Lammerman, 5 La. Ann. 380; Penn *v.* Municipality No. 1, 4 La. Ann. 13; Municipality No. 1 *v.* Pease, 2 La. Ann. 538; New Orleans Third Municipality *v.* Blanc, 1 La. Ann. 385 (all to the effect that on appeals in cases involving the constitutionality or legality of an ordinance imposing any tax, etc., the power of court is limited to the question of the constitutionality or legality of the ordinance).

Maine.— Reed *v.* Tay, 32 Me. 173, to the effect that, where no error of fact has been assigned, and no fact annexed to the record has been proved, the charge will be considered as an error at law; and that a refusal to allow costs to the amount claimed, when some amount is allowed, is not error in law.

Maryland.— Bills of exceptions are not allowed on appeals from justices, and if a party desires to raise a question, he must do so before the justice by filing an affidavit, or by plea or other proper proceeding, when the case is in the appellate court. Shippler *v.* Broom, 62 Md. 318; Cole *v.* Hynes, 46 Md. 181; Herzberg *v.* Adams, 39 Md. 309; Mears *v.* Remare, 33 Md. 246.

Michigan.— If a party takes exception to the jurisdiction of the justice, he may take a special appeal. Stevens *v.* Harris, 99 Mich. 230, 58 N. W. 230 (objection to ruling sustaining declaration cannot be raised by special appeal); Webster *v.* Williams, 69 Mich. 135, 37 N. W. 62 (objections to evidence cannot be raised by special appeal); Rosevelt *v.* Hanold, 65 Mich. 414, 32 N. W. 443 (question of jurisdiction to render judgment for the amount recovered may be raised on special appeal); Benjamin *v.* Dodge, 50 Mich. 41, 14 N. W. 675 (special appeal does not lie where no question of jurisdiction is involved); Albert *v.* Sutton, 28 Mich. 2 (error in admitting or rejecting evidence not reviewable by special appeal).

Minnesota.— Merriman *v.* Anselment, 86 Minn. 6, 89 N. W. 1125 (appeal on questions of law determined solely on the return); Neuhauser *v.* Banish, 84 Minn. 286, 87 N. W. 774 (where the justice excludes a material issue, the appellate court may pass on the question excluded on the evidence returned, as if it were an original issue in that court); Croonquist *v.* Flatner, 41 Minn. 291, 43 N. W. 9 (court can only consider evidence to determine whether the justice might find facts from it to support the judgment); Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415, 38 N. W. 100 (appellant may contend that there was no evidence to justify the judgment); Craighead *v.* Martin, 25 Minn. 41 (all errors apparent on the return, jurisdictional or otherwise and excepted to, where necessary, may be reviewed); Witherspoon *v.* Price, 17 Minn. 337 (admission of evidence will not be reviewed unless excepted to); Bennett *v.* Phelps, 12 Minn. 326 (no question not tried or raised below, and to the ruling on which an exception has been taken, can be reviewed, except objections to the jurisdiction, and that the complaint or answer does not state facts sufficient to constitute a cause of action or defense).

New York.— Under Code Proc. § 353, the appellate court could not reverse the judgment upon a ground not stated in the notice (Avery *v.* Woodbeck, 62 Barb. 557), unless the point involved a question of jurisdiction (Cole *v.* Bell, 48 Barb. 194). But see Forman *v.* Forman, 17 How. Pr. 255.

North Carolina.— The appellate court has no right to review the decision of the justice on questions of fact; but where there is no evidence his decision involves a question of law and is reviewable. McDonald *v.* Ingram, 124 N. C. 272, 32 S. E. 677.

Ohio.— Hirth *v.* Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721 (instructions reviewable on error); Willenger *v.* Bramsche, 7 Ohio Cir. Ct. 208, 3 Ohio Cir. Dec. 731 (court may consider whether there was any evidence to sustain ruling below); Yager *v.* Greiss, 1 Ohio Cir. Ct. 531, 1 Ohio Cir. Dec. 296 (bill of exceptions on question of the weight of evidence cannot be considered).

United States.— In the case of a jury trial there can be no review of the law separated from the facts. Denny *v.* Queen, 7 Fed. Cas. No. 3,807, 3 Cranch C. C. 217.

See 31 Cent. Dig. tit. "Justices of the Peace," § 715.

10. Central Branch R. Co. *v.* Phillipi, 20 Kan. 9. See also Dargan *v.* Harris, 68 Ala. 144, holding that, where the amount involved is less than twenty dollars, the justice's finding of facts is the same as a jury verdict, and to be disturbed only for the same reasons.

11. *Iowa.*— Taylor *v.* Rockwell, 10 Iowa 530.

Massachusetts.— Cousins *v.* Cowing, 23 Pick. 208. See also Winslow *v.* Anderson, 4 Mass. 376, in which the court said that error would not lie, but that, in view of the fact that the mistake of bringing error was so frequently made, it would consider the case as if brought up on certiorari.

New York.— The phrase "error of fact," as used in Code Proc. § 366, had no reference to an erroneous finding of the court or jury on the evidence, but referred to errors of fact not appearing from the record or evidence, such as infancy and coverture. Biglow *v.* Sanders, 22 Barb. 147; Kasson *v.* Mills, 8 How. Pr. 377; Adsit *v.* Wilson, 7 How. Pr. 64. *Compare* Cook *v.* Swift, 18 How. Pr. 454; Willins *v.* Wheeler, 17 How. Pr. 93.

North Carolina.— Street *v.* Bryan, 65 N. C. 619. *Compare* London *v.* Headen, 76 N. C. 72, where it was held that on appeal from a

(B) *Findings on Conflicting Evidence.* In proceedings to review a judgment of a justice of the peace rendered on conflicting evidence, the judgment will not be reversed where there is evidence tending to support it,[12] unless direct authority is given the appellate court to reverse a judgment because against the weight of the evidence.[13]

(C) *Weight and Sufficiency of Evidence.* The judgment of a justice of the peace should not be reversed unless it clearly appears that it could not have been justified by the evidence.[14]

(D) *Verdicts.* Where, on a trial before a justice of the peace, there is a fair question for the jury, their decision is conclusive, although against the weight of

judgment for twenty-five dollars or less, the superior court does not revise the justice's findings of facts.

Ohio.— Bruder *v.* Biehl, 1 Ohio Cir. Ct. 85, 1 Ohio Cir. Dec. 51; Strausburgh *v.* Doran, 2 Ohio Dec. (Reprint) 402, 2 West. L. Month. 600; Nevin *v.* Smith, 2 Ohio Dec. (Reprint) 337, 2 West. L. Month. 465. *Compare* Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430, to the effect that, under Rev. St. § 6524, an order refusing to discharge an attachment may be reviewed by petition in error on a bill of exceptions embodying all the evidence on the hearing of the motion to discharge, together with the ruling of the justice and the exceptions thereto.

See 31 Cent. Dig. tit. "Justices of the Peace," § 716.

But see Redfearn *v.* Douglass, 35 S. C. 569, 15 S. E. 244; Smith *v.* Norton, 114 Wis. 458, 90 N. W. 449; Hassa *v.* Junger, 15 Wis. 598. *Compare* Burns *v.* Gower, 34 S. C. 160, 13 S. E. 331, in which there was no exception to the finding of facts, as required by Code, § 358.

12. Deam *v.* Dawson, 62 Ind. 22; Burnham *v.* Butler, 31 N. Y. 480; West Union *v.* Richey, 64 N. Y. App. Div. 156, 71 N. Y. Suppl. 871; Mason *v.* West, 61 N. Y. App. Div. 40, 70 N. Y. Suppl. 478; Putnam Foundry, etc., Co. *v.* Young, 55 N. Y. App Div. 623, 67 N. Y. Suppl. 16; James *v.* Post, 40 N. Y. App. Div. 162, 57 N. Y. Suppl. 834; Hommel *v.* Meserole, 18 N. Y. App. Div. 106, 45 N. Y. Suppl. 407; Staples *v.* Hager, 11 N. Y. App. Div. 631, 42 N. Y. Suppl. 458; Brooklyn *v.* Brooklyn City, etc., R. Co., 11 N. Y. App. Div. 168, 42 N. Y. Suppl. 371; Alford *v.* Stevens, 63 Barb. (N. Y.) 29; Parker *v.* Eaton, 25 Barb. (N. Y.) 122; Penfield *v.* Jacobs, 21 Barb. (N. Y.) 335; Cannon *v.* Van Wagner, 2 E. D. Smith (N. Y.) 590; Mellon *v.* Smith, 2 E. D. Smith (N. Y.) 462; McLaughlin *v.* Barnard, 2 E. D. Smith (N. Y.) 372; Easton *v.* Smith, 1 E. D. Smith (N. Y.) 318; Decker *v.* Jaques, 1 E. D. Smith (N. Y.) 80; Polhamus *v.* Cornell Steamboat Co., 32 Misc. (N. Y.) 695, 67 N. Y. Suppl. 577; King *v.* Kaim, 29 Misc. (N. Y.) 750, 60 N. Y. Suppl. 264; Baertz *v.* Krueger, 28 Misc. (N. Y.) 755, 58 N. Y. Suppl. 1055, 1109; Heinrich *v.* Mack, 25 Misc. (N. Y.) 597, 56 N. Y. Suppl. 155; Brunold *v.* Glasser, 25 Misc. (N. Y.) 285, 53 N. Y. Suppl. 1021; Mull *v.* Ingalls, 71 N. Y. Suppl. 1142 [*affirming* 30 Misc. 80, 62 N. Y. Suppl. 830]; Aller *v.* O'Reilley, 16 N. Y. Suppl. 831; Roosevelt *v.* Strohkoefer, 3 N. Y. St. 578; Meehan *v.* Butler, 3 N. Y. St. 556; Barber *v.* Arnoux, 18 How. Pr. (N. Y.) 285; Moak *v.* Foland, 3 How. Pr. (N. Y.) 84; Pittsburgh, etc., R. Co. *v.* Wright, 8 Ohio Dec. (Reprint) 105, 5 Cinc. L. Bul. 647; Dexter *v.* Cole, 6 Wis. 319, 70 Am. Dec. 465.

The rule does not apply where defendant swears positively to a payment, and plaintiff only states that he cannot swear whether defendant paid him or not. The dispute must be real and substantial to have the rule apply. Williams *v.* Wheeler, 40 N. Y. App. Div. 615, 57 N. Y. Suppl. 857.

13. Under N. Y. Laws (1900), p. 1277, c. 553, amending Code Civ. Proc. § 3063, a county court is authorized to reverse a judgment on appeal from a justice as against the weight of evidence and order a new trial before the same justice, or before another justice to be designated. Murtagh *v.* Dempsey, 85 N. Y. App. Div. 204, 83 N. Y. Suppl. 296; Hartmann *v.* Hoffman, 76 N. Y. App. Div. 449, 78 N. Y. Suppl. 796 [*modifying* on rehearing 65 N. Y. App. Div. 443, 72 N. Y. Suppl. 982]. See also Mason *v.* West, 61 N. Y. App. Div. 40, 70 N. Y. Suppl. 478.

Limitations on power.— The power granted by N. Y. Laws (1900), c. 553, is to be exercised only when the judgment is so plainly against the weight and preponderance of proof that it can be seen that the justice could not reasonably have arrived at the decision which he made. Murtagh *v.* Dempsey, 85 N. Y. App. Div. 204, 83 N. Y. Suppl. 296. And see Brewer *v.* Califf, 103 N. Y. App. Div. 138, 92 N. Y. Suppl. 627.

14. *Iowa.* — Anthes *v.* Booser, 112 Iowa 511, 84 N. W. 516.

Kansas.—Ayres *v.* Crum, 13 Kan. 269.

Maine.— Bullen *v.* Baker, 8 Me. 390.

Michigan.— Welch *v.* Bagg, 12 Mich. 41.

New Jersey.— Cooley *v.* Barcroft, 43 N. J. L. 363.

New York.— Burnham *v.* Butler, 31 N. Y. 480; Murphy *v.* Dernberg, 84 N. Y. App. Div. 101, 82 N. Y. Suppl. 585; Halsey *v.* Hart, 85 Hun 46, 32 N. Y. Suppl. 665; Rosenfield *v.* Howard, 15 Barb. 546; Bailey *v.* Gluth, 19 N. Y. Suppl. 945; Phillips *v.* Phillips, 18 N. Y. Suppl. 886; Kasson *v.* Mills, 8 How. Pr. 377; Adsit *v.* Wilson, 7 How. Pr. 64; Woodin *v.* Hoofut, 12 Johns. 298; Fisher *v.* Chandler, 1 Johns. 505.

Ohio.— Yager *v.* Greiss, 1 Ohio Cir. Ct. 531, 1 Ohio Cir. Dec. 296. *Compare* Hay-

the evidence.[15] It is only when the facts of a case are undisputed, or the evidence is not conflicting and is free from reasonable doubt, that the verdict of a jury in a justice's court can be set aside as contrary to or against the evidence.[16]

(E) *Hearing on Affidavits.* In New York it is provided by statute[17] that where an appeal is founded upon an error of fact in the proceedings not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the matter upon affidavits, or in its discretion upon examination of witnesses, or in both methods.[18]

14. Determination and Disposition of Cause — a. Judgment on Trial De Novo[19] — (I) *In General.* On a trial *de novo* the judgment of the justice is not reversed or affirmed, but a new, distinct, and independent judgment, as may be required by the merits shown on the trial, is rendered by the appellate court.[20] The jurisdiction acquired by the court is, however, appellate, and it cannot render any judgment on appeal which the justice could not have rendered.[21] On appeal

man *v.* Beverstock, 8 Ohio Cir. Ct. 473, 4 Ohio Cir. Dec. 491.

Wisconsin. — West *v.* Vanden Brook, 71 Wis. 469, 37 N. W. 832; Neave *v.* Arntz, 56 Wis. 174, 14 N. W. 41; Campbell *v.* Babbitts, 53 Wis. 276, 10 N. W. 400.

See 31 Cent. Dig. tit. "Justices of the Peace." § 718.

15. Clark *v.* Daniels, 29 N. Y. App. Div. 600, 51 N. Y. Suppl. 177; Cox *v.* Westchester Turnpike Road, 33 Barb. (N. Y.) 414; Wiley *v.* Slater, 22 Barb. (N. Y.) 506; Biglow *v.* Sanders, 22 Barb. (N. Y.) 147; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Bennett *v.* Scutt, 18 Barb. (N. Y.) 347; McDonald *v.* Edgerton, 5 Barb. (N. Y.) 560; Cahill *v.* Delaney, 68 N. Y. Suppl. 842; Comfort *v.* Thompson, 10 Johns. (N. Y.) 101; Squires *v.* Martin, 24 Ohio Cir. Ct. 232; Ogden *v.* Cox, 23 Tex. 22.

16. Bennett *v.* Scutt, 18 Barb. (N. Y.) 347. See also Cox *v.* Westchester Turnpike Road, 33 Barb. (N. Y.) 414; Strong *v.* Walton, 27 Misc. (N. Y.) 302, 58 N. Y. Suppl. 761 [*citing* Fish *v.* Skut, 21 Barb. (N. Y.) 333; Marselis *v.* Seaman, 21 Barb. (N. Y.) 319; Robertson *v.* Ketchum, 11 Barb. (N. Y.) 652; Newton *v.* Pope, 1 Cow. (N. Y.) 109].

17. N. Y. Code Civ. Proc. § 3057.

18. Larocque *v.* Harvey, 57 Hun (N. Y.) 366, 10 N. Y. Suppl. 576; Sperry *v.* Reynolds, 5 Lans. (N. Y.) 407 [*reversed* on other grounds in 65 N. Y. 179]; Armstrong *v.* Craig, 18 Barb. (N. Y.) 387; Jennings *v.* Miller, 10 Misc. (N. Y.) 762, 31 N. Y. Suppl. 814; Griffin *v.* Norton, 5 N. Y. St. 812.

Matters must have been without justice's knowledge. — Vallen *v.* McGuire, 49 Hun (N. Y.) 594, 2 N. Y. Suppl. 381; Jourdan *v.* Healey, 19 N. Y. Suppl. 240.

An unauthorized appearance for appellant is not within the statute. Jennings *v.* Miller, 10 Misc. (N. Y.) 762, 31 N. Y. Suppl. 814.

19. **Costs on appeal from or certiorari to justice's court** see Costs, 11 Cyc. 244 *et seq.*

20. Louisville, etc., R. Co. *v.* Lancaster, 121 Ala. 471, 25 So. 733. See also the following cases:

Alabama.—Harsh *v.* Heflin, 76 Ala. 499; Burns *v.* Howard, 68 Ala. 352; Abraham *v.* Alford, 64 Ala. 281.

Arkansas.— Fortenberry *v.* Gaunt, 69 Ark. 433, 64 S. W. 95.

California.— Rossi *v.* San Joaquin County Super. Ct., 114 Cal. 371, 46 Pac. 177.

Iowa.— Hawthorn *v.* Unthank, 52 Iowa 507, 3 N. W. 518.

Kentucky.— Bennett *v.* Thompson, 10 Bush 365.

Mississippi.— Stier *v.* Surget, 10 Sm. & M. 154.

Missouri.— Duncan *v.* Travis, 4 Mo. 369.

Nevada.— State *v.* Nye County Fifth Judicial Dist. Ct., 18 Nev. 286, 3 Pac. 417.

New Jersey.— Woodruff *v.* Carnes, 3 N. J. L. 505.

Wisconsin.— Deuster *v.* Zillmer, 119 Wis. 402, 97 N. W. 31. See also Steinam *v.* Schulte, 83 Wis. 567, 53 N. W. 844.

See 31 Cent. Dig. tit. "Justices of the Peace," § 721.

Counter-claim accruing after trial below.— Where defendant appeals from an adverse judgment, and sets up by way of counter-claim a note which was not due at the time of the trial below, and there is a finding in his favor on the note, and for plaintiff for a less amount on his cause of action, defendant is entitled to judgment for the difference, and for costs in both courts. Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512.

To authorize judgment for plaintiff, the nature and amount of his claim must be shown by some paper on file in the case or by the transcript. Sears *v.* Tubbs, 4 Greene (Iowa) 409.

Where the justice was without jurisdiction, judgment will be against plaintiff. Stephens *v.* Boswell, 2 J. J. Marsh. (Ky.) 29; Mitchell *v.* Warden, 5 T. B. Mon. (Ky.) 261; Kirk *v.* Williams, 4 T. B. Mon. (Ky.) 413; Lane *v.* Young, 1 Litt. (Ky.) 40.

Where the appellate court has no jurisdiction, it is erroneous to render judgment against appellant. Church *v.* Church, 4 J. J. Marsh. (Ky.) 13. See also Whipple *v.* Southern Pac. Co. 34 Oreg. 370, 55 Pac. 975, holding that in dismissing an appeal the court cannot give judgment for appellee.

21. *Illinois.*— Lee *v.* Bodley, 92 Ill. App. 523.

Michigan.— Cross *v.* Eaton, 48 Mich. 184,

from a judgment in attachment, the appellate court may order the proceeds of the attached property to be paid to the successful party,[22] and on an appeal by a claimant in garnishment proceedings, the court will discharge the garnishee or trustee, if it appears that he should have been discharged by the justice, although neither he nor defendant appealed from a judgment charging him.[23] In Vermont, when a trustee appeals from a judgment charging him, the same proceedings must be had in the appellate court as if the suit had originally been brought there, or, in default of prosecution of the appeal, the judgment against the trustee must be affirmed.[24] Where a defendant offers to confess judgment before the justice, the offer need not be renewed on appeal in order to make it available to the party making it on final judgment.[25]

(II) *Parties.* The issue on appeal cannot be tried in the names of different parties from those in which the appeal was entered;[26] but a plaintiff in an action on contract commenced before a justice of the peace against several defendants may have judgment on appeal against a part of them only;[27] and conversely, where judgment is rendered below against one of two defendants, and the action dismissed as to the other, upon appeal by him against whom judgment was rendered the action in the appellate court should proceed, and judgment may be rendered against both.[28] In a joint action of tort, where all the defendants answer, and a general verdict is rendered, judgment cannot properly be rendered against one only; but if on appeal by him all the defendants appear and defend, and the verdict is against all, judgment may be rendered against all.[29]

(III) *On Default or Nonsuit.* No judgment by default can be entered on appeal against an appellee who has not been given the required notice of appeal;[30] nor can an appellant have his pleas taken as confessed where he has subpœnaed the appellee, who fails to appear because of the non-payment of his witness' fees on demand therefor.[31] Since there must be a trial *de novo* on the merits, a plaintiff cannot take judgment final by default against defendant without proof of his claim,[32] and the nonsuit of a plaintiff on appeal does not entitle defendant to take

12 N. W. 35. But see McCabe *v.* Loonsfoot, 119 Mich. 323, 78 N. W. 128.

Mississippi.— Stier *v.* Surget, 10 Sm. & M. 154.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Scott. 66 Nebr. 479, 92 N. W. 599.

Tennessee.— Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736.

See 31 Cent. Dig. tit. "Justices of the Peace," § 721.

Until the evidence is heard the court has no power to determine whether the justice had jurisdiction of the subject-matter. Chicago *v.* Kenney, 35 Ill. App. 57.

Collateral attack.— A judgment rendered by an appellate court cannot be collaterally attacked on the ground that the justice had no jurisdiction of the subject-matter. Finch *v.* Hollinger, 47 Iowa 173.

22. Springfield Engine, etc., Co. *v.* Glazier, 65 Mo. App. 616.

23. Barker *v.* Garland, 22 N. H. 103.

24. Sanford *v.* Huxley, 18 Vt. 170.

25. Underhill *v.* Shea, 21 Nebr. 154, 31 N. W. 510.

26. Stehley *v.* Harp, 5 Serg. & R. (Pa.) 544.

27. Fitzgerald *v.* Genter, 26 Ind. 238.

28. Hooper *v.* Farwell, 3 Minn. 106.

A trial as to some of defendants puts all to the remedy by appeal, although others do not appear. People *v.* Onondaga County Judges, 7 Cow. (N. Y.) 492. *Compare* Prichard *v.* Campbell, 5 Ind. 494, in which a judgment on appeal against a co-defendant who had not been served with process, and against whom no judgment was rendered below, was held a nullity.

29. Cauthorn *v.* King, 8 Oreg. 138.

30. Steadman *v.* Seawell, 48 Ala. 519; Pratte *v.* Corl, 9 Mo. 163 (no judgment by default unless the appeal was taken on the day of trial, or notice served ten days before term); Wren *v.* Kirsey, (Tex. Civ. App. 1895) 30 S. W. 252; Parks *v.* Igo, (Tex. App. 1889) 14 S. W. 1069.

31. Wayman *v.* Hazzard, 2 Ind. 156.

32. Abraham *v.* Alford, 64 Ala. 281; Hamilton *v.* Humphries, 5 Ark. 640; Hartsfield *v.* Jones, 49 N. C. 309; Williams *v.* Beasley, 35 N. C. 112. *Compare* McDonald *v.* Weir, 76 Mich. 243, 42 N. W. 1114, in which defendant asked for time to file a set-off, which the court refused to grant except on payment of costs, which defendant refused to do, and made no further defense, and it was held not to be error to enter judgment against him.

Affidavit of demand cannot be filed after appeal, so as to entitle plaintiff to a default judgment for want of an affidavit to the merits. Mason *v.* Mandl, 24 Ill. App. 154.

Judgment for want of affidavit of defense unauthorized see Locher *v.* Sensenig, 9 Pa. Dist. 704; American Trade Exch. Co. *v.*

without proof a judgment on a set-off pleaded by him, on which judgment has been rendered below.[33] But in Indiana, upon default of the appellant, the court may in its discretion try the case or dismiss the appeal,[34] while in Pennsylvania the only available remedy against a defendant who appeals and defaults is by rule for judgment for want of a plea;[35] and where plaintiff fails to appear on appeal by defendant, the latter may enter a rule against him to file his statement within fifteen days, in default of which a judgment of *non pros.* will be entered.[36] Where, on appeal, plaintiff files a statement which discloses that he has no cause of action, a judgment by default against defendant is improper.[37]

(iv) *Time of Judgment.* A statute which provides that no continuance shall be allowed to either party after the second term does not prohibit the court from taking a case under advisement after trial.[38]

(v) *Amount of Judgment.* The amount for which judgment may be rendered on appeal from a justice of the peace is in no way controlled by the judgment rendered below,[39] nor by the penalty of the appeal-bond;[40] but the judgment cannot exceed the amount claimed by plaintiff,[41] nor, as a rule, the justice's jurisdictional limit,[42] except where, as in the case of interest or statutory damages, the

Schroeder, 23 Pa. Co. Ct. 660; Pritchard *v.* Hughes, 18 Pa. Co. Ct. 333; Craig *v.* Tamaqua Knitting Co., 13 Pa. Co. Ct. 444; Marshall *v.* Neiman, 6 Pa. Co. Ct. 176; Brown *v.* Brown, 16 Lanc. L. Rev. (Pa.) 176. But see Saylor *v.* Morris, 2 Leg. Chron. (Pa.) 231; Feist *v.* Prince, 1 Leg. Chron. (Pa.) 135; Louisville Cider, etc., Co. *v.* Walker, 30 Pittsb. Leg. J. N. S. (Pa.) 283; May *v.* Patterson, 15 York Leg. Rec. (Pa.) 92; Longnecker *v.* Red Lion Council, O. U. A. M., 13 York Leg. Rec. (Pa.) 190; Stewartstown First Nat. Bank *v.* Day, 13 York Leg. Rec. (Pa.) 187.

33. Joy *v.* Huit, 31 Iowa 22.

34. Louisville, etc., R. Co. *v.* Nicholson, 56 Ind. 261.

35. Seidel *v.* Hurley, 1 Woodw. (Pa.) 352, where it is said that a judgment for want of an appearance is out of the question, since the entry of the appeal is equivalent to an appearance *in propria persona.* See also Connor *v.* Lyon, 13 Pa. Super Ct. 502.

36. Walton *v.* Lefever, 17 Lanc. L. Rev. (Pa.) 203, in which defendant asked for and obtained a judgment of nonsuit, which plaintiff attacked as illegal on the ground that it should have been of *non pros.*; but it was held that the prothonotary should, upon motion of defendant's counsel, enter judgment of *non pros., nunc pro tunc* as of the date of the judgment of nonsuit.

37. Mehaffey *v.* Fink, 13 Pa. Super. Ct. 534.

38. Johnson *v.* Ackless, 1 Ill. 92.

39. Brooks *v.* Carter, 36 Ala. 682; Waring *v.* Gilbert, 25 Ala. 295.

40. Casey *v.* Coker, (Ala. 1892) 11 So. 742, where it is said that the penalty in the bond is intended to limit the liability of the sureties alone.

41. *Alabama.*— Long *v.* Bakefield, 48 Ala. 608, in which the proof on appeal showed a larger sum due plaintiff than was claimed in his complaint, and defendant proved a set-off less than plaintiff's claim, and it was held that the measure of recovery was the sum left after deducting the amount of the set-off from the amount claimed, and not from the greater amount proved to be due.

Colorado.— Meyer *v.* Helland, 3 Colo. App. 536, 34 Pac. 482.

Illinois.— Peoria, etc., R. Co. *v.* McClenahan, 74 Ill. 435.

Kansas.— St. Louis, etc., R. Co. *v.* McMullen, 48 Kan. 281, 29 Pac. 147; St. Louis, etc., R. Co. *v.* Curtis, 48 Kan. 179, 29 Pac. 146.

Minnesota.—Elfelt *v.* Smith, 1 Minn. 125.

Pennsylvania.—Kurr *v.* Brobst, 2 Woodw. 187. But *compare* Hoffman *v.* Dawson, 11 Pa. St. 280; Millar *v.* Criswell, 3 Pa. St. 449.

See 31 Cent. Dig. tit. "Justices of the Peace," § 724.

42. *Alabama.*— Smith *v.* Fleming, 9 Ala. 768; Pruitt *v.* Stuart, 5 Ala. 112. And see Giddens *v.* Bolling, 92 Ala. 586, 9 So. 274.

Colorado.—Thornily *v.* Pierce, 10 Colo. 250, 15 Pac. 335.

Georgia.— Searcy *v.* Tillman, 75 Ga. 504.

Illinois.— People *v.* Skinner, 13 Ill. 287, 54 Am. Dec. 432; Steele *v.* Hill, 35 Ill. App. 211.

Indiana.— Louisville, etc., R Co. *v.* Breckenridge, 64 Ind. 113.

Mississippi.— McLeod *v.* Gray, (1888) 4 So. 544.

Missouri.— Shields *v.* Stillman, 48 Mo. 82. See also Bridle *v.* Grau, 42 Mo. 359. And see Walter Commission Co. *v.* Gilleland, 98 Mo. App. 584, 73 S. W. 295.

Pennsylvania.— Wright *v.* Guy, 10 Serg. & R. 227; Laird *v.* McConachy, 3 Serg. & R. 290; Owen *v.* Shelhamer, 3 Binn. 45; Moore *v.* Wait, 1 Binn. 219. See also Linton *v.* Vogel, 98 Pa. St. 457. But *compare* McEntire *v.* McElduff, 1 Serg. & R. 19.

Tennessee.—Crow *v.* Cunningham, 5 Coldw. 255; Gray *v.* Jones, 1 Head 542.

Wisconsin.— Dunbar *v.* Bittle, 7 Wis. 143.

See 31 Cent. Dig. tit. "Justices of the Peace," § 724.

But see Brown *v.* Jenks, 5 Kan. App. 45, 47 Pac. 324 (construing Justices Code, § 55, as to the jurisdiction in replevin); Zitzer *v.* Jones, 48 Md. 115; Palmer *v.* Wylie, 19

excess has accrued since the rendition of the judgment below.[43] A plaintiff may, however, remit the excess over his claim or over the justice's jurisdiction, and take judgment for the balance.[44]

(vi) *Setting Aside Verdict or Judgment and New Trial.* An appellate court may, in the exercise of a sound discretion, and for good cause shown, set aside the verdict or judgment rendered on a trial *de novo*, and grant a new trial;[45] and after a verdict on appeal for defendant on a counter-claim, an objection that the counter-claim fails to state a cause of action may be raised by motion in arrest of judgment.[46]

b. Judgment on Review[47]— (i) *In General.* Where a case is not tried *de novo* on appeal from a justice of the peace, but the appellate court reviews the judgment below, it must either affirm or reverse,[48] although in some jurisdictions it may enter such judgment as the justice should have rendered,[49] or may remand the case to the lower court for further proceedings;[50] and in Michigan, where it appears on a special appeal that the judgment below was void for being entered

Johns. (N. Y.) 276; Middlebury College *v.* Lawton, 23 Vt. 688.

43. *Illinois.*— Alley *v.* McCabe, 147 Ill. 410, 35 N. E. 615 [*affirming* 46 Ill. App. 368]; Guild *v.* Hall, 91 Ill. 223; Welch *v.* Karstens, 60 Ill. 117; Mitcheltree *v.* Sparks, 2 Ill. 198; Tindall *v.* Meeker, 2 Ill. 137; Campbell *v.* Green, etc., Lumber Co., 99 Ill. App. 647. The rendition of judgment on appeal for a greater sum than that indorsed on the justice's summons is not error if the excess is made up of interest accruing after the date of the summons. Haight *v.* McVeagh, 69 Ill. 624.

Indiana.— Bargis *v.* Farrar, 45 Ind. 41.

Pennsylvania.— Linton *v.* Vogel 98 Pa. St. 457; Trego *v.* Lewis, 58 Pa. St. 463; Wright *v.* Guy, 10 Serg. & R. 227; Owen *v.* Shelhamer, 3 Binn. 45; Moore *v.* Wait, 1 Binn. 219.

Tennessee.— Patterson *v.* Sheffield, 7 Heisk. 373.

Utah.— McCormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, 39 Pac. 483.

See 31 Cent. Dig. tit. "Justices of the Peace," § 724.

44. *Alabama.*— Downs *v.* Bailey, 135 Ala. 329, 33 So. 151.

Colorado.— Thornily *v.* Pierce, 10 Colo. 250, 15 Pac. 335.

Indiana.— Louisville, etc., R. Co. *v.* Breckenridge, 64 Ind. 113.

Minnesota.— Elfelt *v.* Smith, 1 Minn. 125.

Tennessee.—Crow *v.* Cunningham, 5 Coldw. 255.

Wisconsin.— Dunbar *v.* Bittle, 7 Wis. 143.

See 31 Cent. Dig. tit "Justices of the Peace," § 724.

But see People *v.* Skinner, 13 Ill. 287, 54 Am. Dec. 432.

45. *California.*— Massman *v.* San Francisco Super. Ct., 71 Cal. 582, 12 Pac. 685.

Illinois.— Ray *v.* Bullock, 46 Ill. 64, in which the verdict was set aside as manifestly against the evidence. *Compare* Oliver *v.* Gerstle, 58 Ill. App. 615, in which a new trial was refused because the defendant had been guilty of inexcusable negligence.

Louisiana.— Under Code Prac. art. 1129, a district court has the same authority to amend a judgment which it has affirmed on a trial *de novo* as it has to amend a judgment rendered by it in the first instance. State *v.* Coco, 42 La. Ann. 408, 7 So. 620.

Missouri.— Davis *v.* Wade, 58 Mo. App. 641, in which an order dismissing the action was set aside, and judgment rendered against the defendant for costs. See also Edwards *v.* Albrecht, 42 Mo. App. 497, where it was held that a plaintiff waives his objection to the setting aside of an affirmance and the reinstatement of the appeal by proceeding to trial.

Montana.— See Falk *v.* Brown, 13 Mont. 125, 32 Pac. 492, in which the court was held to have abused its discretion in setting aside the verdict on the ground of the insufficiency of the evidence, there being ample evidence to sustain it.

New Jersey.— Squier *v.* Gale, 6 N. J. L. 157. But see Schuyler *v.* Mills, 28 N. J. L. 137.

North Carolina.— See McDaniel *v.* Watkins, 76 N. C. 399.

Ohio.— Wood *v.* O'Ferrell, 19 Ohio St. 427.

Pennsylvania.— Sander *v.* Beilstine, 6 Pa. Co. Ct. 579. *Compare* Alexander *v.* Jones, 13 Lanc. Bar 43.

See 31 Cent. Dig. tit "Justices of the Peace," § 725.

But see Brayton *v.* Dexter, 16 R. I. 70, 12 Atl. 132.

46. McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 79 S. W. 745.

47. Costs on appeal from or certiorari to justice's court see Costs, 11 Cyc. 244 *et seq.*

48. Strange *v.* Hickerson, 6 Kan. App. 875, 50 Pac. 965; Rhodes *v.* Samuels, 67 Nebr. 1, 93 N. W. 148; Manheim *v.* Seitz, 21 N. Y. App. Div. 16, 47 N. Y. Suppl. 282; Balja *v.* Rawley, 37 How. Pr. (N. Y.) 120; Gunsolus *v.* Lormer, 54 Wis. 630, 12 N. W. 62; Mock *v.* Erdmann, 28 Wis. 113.

49. Woodruff *v.* Badgley, 12 N. J. L. 367; Jones *v.* Pitman, 12 N. J. L. 93; Hendricks *v.* Craig, 5 N. J. L. 567; Southard *v.* Becker, 15 Misc. (N. Y.) 436, 37 N. Y. Suppl. 927; Coughran *v.* Wilson, 7 S. D. 155, 63 N. W. 774.

50. Bartle *v.* Plane, 68 Iowa 227, 26 N. W. 88.

more than four days after the hearing, a perpetual stay of proceedings will be granted.[51] Where a judgment was not appealable,[52] or where the case has not been properly brought up,[53] the appellate court can enter no judgment other than one of dismissal.[54] But the failure of the appellate court to decide an appeal at the term at which it is heard does not deprive the court of jurisdiction.[55]

(II) *Affirmance*—(A) *In General.* Under some statutes, upon affirming a justice's judgment, the court must enter a new judgment;[56] but as a rule a simple affirmance of the judgment below is sufficient;[57] and, in either case, if nothing further remains to be done, the appellate court may enforce the judgment.[58] Where the appellate court has no jurisdiction of an appeal, an affirmance of the judgment below is error,[59] and the same is true where a writ of error is dismissed;[60] and an affirmance of an invalid judgment cannot impart any validity to it;[61] nor can the appellate court, upon reversing a justice's judgment setting aside a previous judgment, affirm the latter.[62] The time at which a judgment may be affirmed, and the procedure for affirmance, are wholly regulated by statute,[63] and where an affirmance is prematurely had, the judgment of the appellate court will be reversed.[64]

(B) *Grounds*—(1) Failure to Prosecute Appeal. In many jurisdictions provision is made by statute or rule of court for the affirmance of a justice's judgment on a proper application by the appellee, where the appellant fails to prosecute his appeal as required by law. What constitutes such failure to prosecute as to authorize an affirmance on motion depends almost wholly upon the statutes, rules, and practice in the different states.[65] In order to confer jurisdiction on the appellate court to render a judgment of affirmance for want of

51. Hall *v.* Howard, 39 Mich. 219.

52. Stoffregen *v.* Biederman, 6 Ohio Cir. Ct. 55, 3 Ohio Cir. Dec. 347.

53. Strange *v.* Hickerson, 6 Kan. App. 875, 50 Pac. 965.

54. See *supra*, V, A, 10, b.

55. Silvernail *v.* Rust, 88 Wis. 458, 60 N. W. 787.

56. Cates *v.* Akerd, 5 Mo. 124. *Compare* Munley *v.* King, 40 Mo. App. 531.

Judgment of affirmance must conform to judgment affirmed.—Meyer *v.* Singletary, 75 Mo. App. 481.

Judgment held sufficient see Wold *v.* Ordway, 68 Wis. 176, 31 N. W. 759.

57. Cox *v.* Graham, 3 Iowa 347; Luter *v.* Rose, 16 Tex. 52.

Entry of new judgment on affirmance held error see Lindskog *v.* Schouweiler, 12 S. D. 176, 80 N. W. 190.

58. Ryan *v.* Parr, 16 N. Y. Suppl. 829; Reynolds *v.* Provan, 31 Vt. 637.

59. Wimsey *v.* McAdams, 12 S. D. 509, 81 N. W. 884.

60. Iowa Code, § 4576, providing that the district court, on writ of error to a justice, may affirm the judgment, means when the writ has been sustained, and no trial is necessary to a determination, and where the justice made no ruling except to enter judgment after trial upon the merits it was error, on dismissing the writ, to enter a judgment against appellant. Simmons *v.* Chicago, etc., R. Co., 128 Iowa 306, 103 N. W. 954.

61. Haag *v.* Ward, 89 Mo. App. 186.

62. Sherer *v.* Lassen County Super. Ct., 94 Cal. 354, 29 Pac. 716.

63. Noyes *v.* Sherburne, 117 Mass. 279 (construing Gen. St. c. 112, § 17; c. 114, § 15); St. Louis World Pub. Co. *v.* Rialto Grain, etc., Co., 108 Mo. App. 479, 83 S. W. 781 (construing Rev. St. (1899) § 4073).

64. Fisher *v.* Harber, 10 Iowa 293.

65. *Illinois.*— Fergus *v.* Haupt, 54 Ill. App. 190.

Iowa.— Harty *v.* D. M. & M. R. Co., 54 Iowa 327, 6 N. W. 545; Heald *v.* House, 39 Iowa 198; Atkins *v.* McCready, 8 Iowa 214; Taylor *v.* Barber, 2 Greene 350; Wright *v.* Clark, 2 Greene 86.

Massachusetts.— Leyden *v.* Sweeney, 118 Mass. 418.

Missouri.— Holloman *v.* St. Louis, etc., R. Co., 92 Mo. 284, 5 S. W. 1; McDowell *v.* Strong, 35 Mo. 505; Milligan *v.* Dunn, 19 Mo. 643; State *v.* Thevenin, 19 Mo. 237; Starr *v.* Stewart, 18 Mo. 410; Martin *v.* White, 11 Mo. 214; Hathaway *v.* St. Louis, etc., R. Co., 94 Mo. App. 343, 68 S. W. 109; Horn *v.* Excelsior Springs Co., 52 Mo. App. 548. *Compare* Berry *v.* Union Trust Co., 75 Mo. 430; Meitz *v.* Koetter, 51 Mo. App. 370; Ray *v.* St. Louis, etc., R. Co., 25 Mo. App. 104.

Nebraska.—Wilson *v.* Wilson, 23 Nebr. 455, 56 N. W. 661.

North Carolina.— Blair *v.* Coakley, 136 N. C. 405, 48 S. E. 804.

Ohio.— Lower *v.* Fisher, 19 Ohio Cir. Ct. 627, 10 Ohio Cir. Dec. 294.

Vermont.— Ide *v.* Story, 47 Vt. 62; Hayes *v.* Blanchard, 4 Vt. 210.

See 31 Cent. Dig. tit "Justices of the Peace," § 728.

Showing held insufficient to warrant opening judgment of affirmance see Hodowal *v.* Yearous, 103 Iowa 32, 72 N. W. 294.

prosecution, the return of the justice must be in conformity with the statute, and show the proceedings had before him.[66]

(2) Error Not Shown. If error does not affirmatively appear in the proceedings before the justice, his judgment should be affirmed.[67]

(III) *Modification.* In some jurisdictions the appellate court is not restricted to a simple affirmance or reversal of the justice's judgment, but may correct clerical errors therein;[68] and, where the facts are not in dispute and all material matters appear on the record, may modify the judgment so as to make it conform to the law and justice of the case.[69]

(IV) *Reversal* — (A) *In General.* If a justice's judgment is erroneous, it is the duty of the appellate court to reverse it.[70] A simple judgment of reversal of a justice's judgment in favor of plaintiff has the effect of a dismissal of the action;[71] and where a judgment discharging a garnishee is reversed on appeal by plaintiff and a judgment rendered on the garnishee's disclosure, a claimant, who has had full opportunity to establish his claim, is bound by such judgment.[72] Where a justice's judgment in an action to recover chattels or their value is merely reversed on appeal, a judgment entered on the reversal to the effect that defendant is entitled to a return of the chattels, or their value if a return cannot be had, is not in accordance with the decision of the appellate court, and such judgment, and an execution issued thereon, will be set aside.[73]

(B) *Grounds* — (1) Jurisdictional Defects. A want of jurisdiction in the justice to render the judgment complained of is ground for reversal.[74]

(2) Prejudicial Error — (a) In General. Wherever a prejudicial and incurable error has been committed, without the fault of the party injuriously affected

66. Hale *v.* Thayer, 2 Pinn. (Wis.) 410, 2 Chandl. 68.

67. Zeigler *v.* Sonner, (Nebr. 1904) 98 N. W. 1028.

Error cured by stipulation.— Where the only error disclosed by the justice's return is a defect in the issuance and service of the summons, which is cured by a stipulation that the summons was properly served, and there is no special assignment of errors, the judgment should be affirmed. Irvine *v.* Lopez, 1 Ariz. 81, 25 Pac. 799.

68. Neff *v.* Edwards, 81 Ala. 246, 2 So. 88.

69. *Georgia.*— Hallett *v.* Blain, 58 Ga. 142.

Illinois.— Stephens *v.* Cross, 27 Ill. 35.

Kansas.— Cartright *v.* Smith, 15 Kan. 224. See also Starr *v.* Hinshaw, 23 Kan. 532.

Minnesota.— Larson *v.* Johnson, 83 Minn. 351, 86 N. W. 350; Meister *v.* Russell, 53 Minn. 54, 54 N. W. 935; Closen *v.* Allen, 29 Minn. 86, 12 N. W. 146; Watson *v.* Ward, 27 Minn. 29, 6 N. W. 407; Kates *v.* Thomas, 14 Minn. 460.

New York.— Brownell *v.* Winnie, 29 N. Y. 400, 86 Am. Dec. 314; McAleer *v.* Warren, 77 Hun 589, 28 N. Y. Suppl. 1000; Bump *v.* Dehany, 12 N. Y. Suppl. 901; Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253; Fields *v.* Moul, 15 Abb. Pr. 6; Staats *v.* Hudson River R. Co., 23 How. Pr. 463; Kast *v.* Kathern, 3 Den. 344. *Compare* Huested *v.* Bliss, 16 N. Y. Suppl. 644, in which there was no data from which the judgment could be modified.

Pennsylvania.— Gingrich *v.* Schaeffer, 17 Lanc. L. Rev. 143.

See 31 Cent. Dig. tit "Justices of the Peace," § 729.

Contra.— Detling *v.* Weber, 29 Wis. 559. And see Sutton *v.* Chapman, 64 Wis. 312, 25 N. W. 207, construing Rev. St. (1878) § 3772.

Affirmance of modification by justice.— Where, in replevin, the justice modified the judgment in favor of defendant, and the district court affirmed his action, defendant could not complain, even if such modification was erroneous, as the district court had power to make the modification. Starr *v.* Hinshaw, 23 Kan. 532.

70. Countryman *v.* Lighthill, 24 Hun (N. Y.) 405, in which the judgment was merely for nominal damages.

Judgment need not be modified to conform to verdict see Faucett *v.* Meeker, 31 Ohio St. 634.

Conditional reversal.— On an appeal from a justice of the peace, the appellate court may order a reversal, unless respondent consents to reduce the damages to a certain amount. Powers *v.* Hanford, 7 N. Y. App. Div. 343, 39 N. Y. Suppl. 936.

If the error ought to have arrested or put an end to the action before the justice, such should be its operation in the appellate court. Johnson *v.* Pennington, 15 N. J. L. 188.

71. Daley *v.* Mead, 40 Minn. 382, 42 N. W. 85; Terryll *v.* Bailey, 27 Minn. 304, 7 N. W. 261.

72. Donnelly *v.* O'Connor, 22 Minn. 309.

73. Frost *v.* Frost, 16 Misc. (N. Y.) 430, 39 N. Y. Suppl. 856.

74. *California.*— King *v.* Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10.

Minnesota.— St. Martin *v.* Desnoyer, 1 Minn. 41.

New York.— Jaynes *v.* Jaynes, 8 N. Y. Civ. Proc. 99.

thereby,[75] it is ground for reversing the judgment.[76] But a judgment rendered in an action tried before a justice with a jury cannot be reversed for errors occurring at the trial, where the record does not contain the evidence introduced upon the trial, or on the hearing of the motion for a new trial.[77]

(b) Erroneous Rulings of Justice. An erroneous ruling by the justice on a material point, to the prejudice of the appellant, is ground for reversal.[78]

(3) Default in Appellate Court. On appeal from a justice of the peace, the judgment may be reversed on default, if the respondent fails to appear.[79]

(c) *Proceedings on Reversal.* The appellate court, on reversing a justice's judgment, will sometimes render final judgment where it manifestly appears that the ends of justice will not be promoted by remanding the cause;[80] and under the statutes of some states the appellate court must, on reversing the judgment below, retain the case for trial before itself,[81] provided the justice had jurisdiction

Ohio.— Shreve *v.* Parrott, 4 Ohio Dec. (Reprint) 373, 2 Clev. L. Rep. 52; Place *v.* Welch, 2 Ohio Dec. (Reprint) 542, 3 West. L. Month. 611.

Wisconsin.— Phillips *v.* Geesland, 2 Pinn. 120, 1 Chandl. 57.

Wyoming.— Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447.

United States.— Cross *v.* Blanford, 6 Fed. Cas. No. 3,429, 2 Cranch C. C. 677.

See 31 Cent. Dig. tit "Justices of the Peace," § 731.

Where the record fails to show whether the injury was to personal or real estate, a judgment in an action of trespass will be reversed. Clark *v.* Burton, 10 Kulp (Pa.) 61.

In Alabama, where judgment is rendered by a justice for a sum not within his jurisdiction, the appellate court should not, on motion, vacate the judgment, but should put defendant to plead to the jurisdiction. Bentley *v.* Wright, 3 Ala. 607.

Where a bill of particulars does not show want of jurisdiction affirmatively, it will not require or authorize a reversal of the judgment of the district court and the justice's court, on the ground that the justice had no jurisdiction. Kaub *v.* Mitchell, 12 Kan. 57.

75. Failure of defendant to produce evidence which would have been a bar to the suit is no ground for reversal, where he has appeared on the trial by an authorized person. Bunker *v.* Latson, 1 E. D. Smith (N. Y.) 410. *Compare* Loring *v.* Ramsey, 3 N. J. L. 630, in which defendant had been surprised, at the trial below, by the fraudulent conduct of plaintiff, and judgment obtained against him, and the court declared the proceedings null and void.

76. Want of evidence to sustain judgment is ground for reversal. Crane *v.* Brundage, 14 N. J. L. 602; Lynch *v.* McBeth, 7 How. Pr. (N. Y.) 113; Barney *v.* Fahs, 10 Pa. Co. Ct. 424; Pennsylvania Mut. F. Ins. Co. *v.* Lenker, 5 Pa. Co. Ct. 667; Edwardsville *v.* Crawtechen, 10 Kulp (Pa.) 251; Connelly *v.* Arundel, 6 Phila. (Pa.) 49; Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782. See also *supra*, V, A, 13, b, (II).

Where transcript shows no cause of action, the judgment must be reversed. Kaufman *v.* Schuder, 2 Ind. 170.

Failure of justice to render findings.—Where, in a suit to recover personal property valued at fourteen dollars, the justice rendered no findings whatever, but simply ordered defendant to deliver the property and pay the costs, it was held that the court could not on appeal disregard this as a mere technical defect, but must reverse the judgment. Carney *v.* Doyle, 14 Wis. 270.

Grounds held insufficient to warrant reversal see Gates *v.* Gilmour, 86 Ill. App. 215; Neil *v.* Neil, Morr. (Iowa) 491; Vannoy *v.* Givens, 23 N. J. L. 201; Clark *v.* Fulse, 2 N. J. L. 263; Miller *v.* Lockwood, 17 Pa. St. 248.

77. Thompson *v.* Post, 36 Kan. 709, 14 Pac. 164, construing Comp. Laws (1879), c. 81, § 110.

78. Erroneous admission of evidence.— Pearre *v.* White, 4 Pa. Dist. 504.

Wrongful overruling of objection to venue. — Kansas City Hardware Co. *v.* Neilson, 10 Utah 27, 36 Pac. 131.

Wrongful instructions.— Pettit *v.* Ide, 12 Abb. Pr. (N. Y.) 44; Penn Yan *v.* Thorne, 6 Hill (N. Y.) 326.

79. Whitney *v.* Bayard, 2 Sandf. (N. Y.) 634.

80. Pike *v.* Bright, 29 Ala. 332; Thorson *v.* Sauby, 68 Minn. 166, 70 N. W. 1083. *Compare* Howe *v.* Julien, 2 Hilt. (N. Y.) 453; Journeay *v.* Brackley, 1 Hilt. ((N. Y.) 447, to the effect that the court, on reversing a judgment for plaintiff, should not enter judgment for defendant, but should order a new trial, if it reasonably appears that plaintiff can bring proof on which he can recover.

81. *California.*— Curtis *v.* San Francisco Super. Ct., 63 Cal. 435; People *v.* Freelon, 8 Cal. 517.

Iowa.— See Garvin *v.* Wells, 8 Iowa 286, to the effect that where a justice's judgment is reversed on writ of error, the cause should be remanded to the justice, or a trial *de novo* awarded in the district court.

Nebraska.— Westover *v.* Van Dorn Iron-works Co., (1903) 97 N. W. 598; Saussay *v.* W. J. Lemp Brewing Co., 52 Nebr. 627, 72 N. W. 1026; Lichty *v.* Clark, 10 Nebr. 472, 6 N. W. 760. See also Rhodes *v.* Samuels, 67 Nebr. 1, 93 N. W. 148, where it was held that the statute (Code Civ. Proc. § 601) has

to render judgment.[82] In California a county court, on reversing a justice's judgment because the action involved the title to land, may transfer the case to the district court for trial.[83]

(v) *Remand and New Trial Before Justice.* It is impossible to lay down any definite rules as to the power of an appellate court to remand a cause to the justice for further proceedings, but it may be stated broadly that, whenever it appears to be necessary for the purposes of justice, the court will remand for a new trial or such other proceedings as the circumstances of the individual case may require.[84]

(vi) *Setting Aside Appellate Judgment and Rehearing.* After an appellate court has decided an appeal from a justice's judgment, it cannot as a rule modify or set aside its own judgment, or grant a rehearing.[85]

reference only to cases which have been entirely disposed of by final order or judgment, and which may be again tried and determined.

North Carolina.—Where one is deprived of land under color of judicial proceedings heard before a justice, the superior court, on appeal, may award restitution and allow an inquiry of damages. Dulin *v.* Howard, 66 N. C. 433.

North Dakota.— Olson *v.* Shirley, 12 N. D. 106, 96 N. W. 297 [*distinguishing* Lindskog *v.* Schouweiler, 12 S. D. 176, 80 N. W. 190; Coughran *v.* Wilson, 7 S. D. 155, 63 N. W. 774, which were decided under Comp. Laws, § 6136]; Grovenor *v.* Signor, 10 N. D. 503, 88 N. W. 278.

Ohio.— Robinson *v.* Kious, 4 Ohio St. 593. See also Roller *v.* Esman, 25 Ohio Cir. Ct. 183, where it was held that the failure of the court, in reversing the judgment, to order that the cause be retained for trial is error.

See 31 Cent. Dig. tit "Justices of the Peace," § 732.

Any error in entering judgment without setting the case down for trial is harmless, where the judgment entered is the only judgment possible. Rider *v.* Lawriston, 65 Nebr. 1, 90 N. W. 951.

82. Cook *v.* Callaway, 1 Mo. 545; Brondberg *v.* Babbott, 14 Nebr. 517, 16 N. W. 845.

Where the judgment below was rendered after the time authorized by statute, the reviewing court will not retain the cause for trial and final judgment. Nicholson *v.* Roberts, 6 Ohio S. & C. Pl. Dec. 233, 4 Ohio N. P. 43.

83. Cullen *v.* Langridge, 17 Cal. 67.

84. See, generally, Appeal and Error, 3 Cyc. 453 *et seq.* And see the following cases:

Alabama.— McRae *v.* Tillman, 6 Ala. 486; Murry *v.* Harper, 3 Ala. 744.

California.— Maxson *v.* Madera County Super. Ct., 124 Cal. 468, 57 Pac. 379, (1898) 54 Pac. 520. *Compare* Acker *v.* San Francisco Super. Ct., 68 Cal. 245, 9 Pac. 109, 10 Pac. 416, in which, however, the appeal was on questions of law and fact, and it was held that the court could not reverse and remand.

Georgia.— Tinsley *v.* Block, 98 Ga. 243, 25 S. E. 429; Curran *v.* Rome Iron Co., 96 Ga. 756, 22 S. E. 314.

Iowa.— Gates *v.* Knosby, 107 Iowa 239, 77 N. W. 863; Swan *v.* Bournes, 47 Iowa 501, 29 Am. Rep. 492; Gourley *v.* Carmody, 23 Iowa 212; Garvin *v.* Wells, 8 Iowa 286.

Mississippi.— Barkley *v.* Hanlan, 55 Miss. 606.

Missouri.— Baskowitz *v.* Guthrie, 99 Mo. App. 304, 73 S. W. 227.

Nebraska.— Rhodes *v.* Samuels, 67 Nebr. 1, 93 N. W. 148, to the effect that where the district court has given its decision in error from an attachment case, and the order discharging the attachment has been reversed, the justice is reinvested with complete jurisdiction of the ancillary proceeding, and it is then his right and duty to tax the attachment costs against the losing party.

New Hampshire.— Rigney *v.* Hutchins, 9 N. H. 257.

New York.— People *v.* Jeroloman, 139 N. Y. 14, 34 N. E. 726 [*affirming* 69 Hun 301, 23 N. Y. Suppl. 512]; De Bevoise *v.* Ingalls, 88 Hun 186, 34 N. Y. Suppl. 413; Smith *v.* Bingham, 9 N. Y. Suppl. 97; Velsey *v.* Velsey, 40 Hun 471; Tanner *v.* Marsh, 53 Barb. 438; Armstrong *v.* Craig, 18 Barb. 387; McCarthy *v.* Crowley, 1 Silv. Sup. 364, 5 N. Y. Suppl. 675; Samo *v.* Morrison, Sheld. 382; Williams *v.* McCauley, 3 E. D. Smith 120; Young *v.* Conklin, 3 Misc. 122, 23 N. Y. Suppl. 993.

North Carolina.— McKee *v.* Angel, 90 N. C. 60. *Compare* Faison *v.* Johnson, 78 N. C. 78.

South Carolina.— Jones *v.* Atlantic Coast Line R. Co., 70 S. C. 214, 49 S. E. 568; Wideman *v.* Patton, 64 S. C. 408, 42 S. E. 190; Du Bose *v.* Armstrong, 29 S. C. 290, 6 S. E. 934; Harris *v.* Ferguson, 2 Bailey 397. *Compare* Sams *v.* Hoover, 33 S. C. 401, 12 S. E. 8.

Texas.— Bell *v.* Walnitzch, 39 Tex. 132.

See 31 Cent. Dig. tit. "Justices of the Peace," § 734.

But see Flanagan *v.* Jerome, 29 N. J. L. 391; Forbis *v.* Inman, 23 Oreg. 68, 31 Pac. 204.

Remand on affirmance see Murry *v.* Harper, 3 Ala. 744.

Where the court decides that the magistrate had not acquired jurisdiction of defendant's person, it should dismiss the case, and not remand it for further action. Riley *v.* Mutual L. Ins. Co., 68 S. C. 383, 47 S. E. 708.

85. *California.*— Fabretti *v.* Santa Clara County Super. Ct., 77 Cal. 305, 19 Pac. 481;

15. Review of Appellate Decisions[86] — a. Decisions Reviewable and Proceedings For Review. The general subject of the right to have the decisions of intermediate appellate courts reviewed, and the proceedings therefor, is treated elsewhere in this work.[87] In some jurisdictions provision is made by statute for an appeal or writ of error to the supreme court or other higher court from the judgment of an intermediate appellate court on appeal or writ of error from a justice of the peace.[88] Such an appeal or writ or error will lie, however, only where it is authorized by statute and when the case comes within the terms of the statute.[89]

Lang *v.* San Francisco Super. Ct., 71 Cal. 491, 12 Pac. 306.

Missouri.— Schwoerer *v.* Christophel, 64 Mo. App. 81. *Compare* Masterson *v.* Ellington, 10 Mo. 712, in which the case was improperly tried at the return-term, and judgment rendered against the appellee, and it was held that it might be set aside at any subsequent term.

New York.— Armstrong *v.* Sandford, 60 Hun 356, 14 N. Y. Suppl. 840.

Ohio.— Beardsley *v.* Zacharias, 19 Ohio Cir. Ct. 637, 10 Ohio Cir. Dec. 259, in which the order of the appellate court had been transmitted to the justice.

Vermont.— A petition for a new trial cannot be entertained, unless made at the same term in which the judgment objected to was rendered. Foster *v.* Austin, 33 Vt. 615.

See 31 Cent. Dig. tit. "Justices of the Peace," § 733.

Contra.— Meister *v.* Russell, 53 Minn. 54, 54 N. W. 935.

86. As affected by: Amount in controversy see Appeal and Error, 2 Cyc. 542 *et seq.* Nature, scope, and effect of decision see Appeal and Error, 2 Cyc. 586 *et seq.* Finality of determination see Appeal and Error, 2 Cyc. 586.

87. See generally Appeal and Error, 3 Cyc. 389 *et seq.*; Courts, 11 Cyc. 801 *et seq.*

88. See the following cases:

California.— Winter *v.* Fitzpatrick, 35 Cal. 269.

Delaware.— Waples *v.* Gum, 5 Harr. 404.

District of Columbia.— An appeal lies to the general term when the record shows that the question presented to the court below was the jurisdiction of a justice of the peace to render the judgment. Stellwagen *v.* Sadler, 19 Wash. L. Rep. 450.

Indiana.— Moore *v.* Read, 1 Blackf. 177.

Kentucky.— An appeal lies to the court of appeals from the judgment of a county court dismissing an appeal from a justice of the peace. Miller *v.* Yocum, 12 B. Mon. 421; Evans *v.* Sanders, 10 B. Mon. 291; Waggener *v.* Highbaugh, 10 B. Mon. 196.

New Hampshire.— Moulton *v.* Fellows, 51 N. H. 421.

New York.— Crounse *v.* Whipple, 34 How. Pr. 333. And see the cases cited in the note following.

North Carolina.—Tarborough Bridge Com'rs *v.* Whitaker, 6 N. C. 184.

Ohio.— Aubrey *v.* Almy, 4 Ohio St. 524.

Vermont.— Bloss *v.* Kittridge, 4 Vt. 272.

Wisconsin.— Finlay *v.* Prescott, 104 Wis. 614, 80 N. W. 930, 47 L. R. A. 695; Allard *v.* Smith, 97 Wis. 534, 73 N. W. 50.

See 2 Cent. Dig. tit. "Appeal and Error," § 109; 31 Cent. Dig. tit. "Justices of the Peace," § 751.

Effect of set-off in lower court pending appeal.— Where a judgment has been rendered by a justice of the peace and defendant has applied for an order to allow an appeal, and from a refusal of such order an appeal has been taken to the supreme court, an order made in the court below, while the appeal is pending, setting off the judgment from which an appeal is sought against a like amount due on a judgment in favor of defendant in the former judgment against plaintiff therein, will have no effect upon the appeal. Brooks *v.* Harris, 42 Ind. 177.

89. See the following cases:

Connecticut.— Fuller *v.* Topliff, 10 Conn. 60.

District of Columbia.— Mitchell *v.* Evans, 17 App. Cas. 233; Luchs *v.* Jones, 1 MacArthur 345.

Indiana.— Kahl *v.* Madison Brewing Co., 14 Ind. App. 78, 42 N. E. 492. A justice of the peace having, under Burns Rev. St. (1901) § 5313 (Horner Rev. St. (1901) § 4026), exclusive original jurisdiction of actions against railroad companies for injuring stock where the damage does not exceed fifty dollars, and concurrent jurisdiction with the circuit court where it does exceed that sum, an appeal from a judgment in such an action is within the prohibition of Acts (1901), p. 565, § 6, declaring that except in certain cases no appeal shall be taken to the supreme or appellate court in any civil case within a justice's jurisdiction. Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443.

Iowa.— Whitmore *v.* Divilbis, 10 Iowa 68.

Kentucky.— No appeal or writ of error lies to the court of appeals from a judgment of the county court affirming or reversing a judgment rendered by a justice of the peace. Miller *v.* Yocum, 12 B. Mon. 421; Evans *v.* Sanders, 10 B. Mon. 291; Waggener *v.* Highbaugh, 10 B. Mon. 196. See also Moody *v.* Head, Ky. Dec. 333.

Louisiana.— West Baton Rouge Parish *v.* Robertson, 8 La. Ann. 69.

Maine.— Moore *v.* Dunlap, 33 Me. 227; Holt *v.* Barrett, 29 Me. 76; Putnam *v.* Oliver, 28 Me. 442; New Gloucester *v.* Danville, 25 Me. 492; Seiders *v.* Creamer, 22 Me. 558;

b. Presentation and Reservation of Objections in Lower Court. As a rule no objection will be considered on a review of the proceedings of an intermediate appellate court, on appeal or error from a justice of the peace, which was not presented and properly preserved in such intermediate court,[90] except an objec-

Phillips *v.* Friend, 11 Me. 411. *Compare* Spaulding *v.* Harvey, 14 Me. 97.

Maryland.— The decision of the circuit court upon an appeal from a judgment of a justice of the peace is ordinarily final; but if the justice, and consequently the circuit court on appeal, were without jurisdiction of the case, an appeal will lie to the court of appeals from the judgment of the circuit court. Darrell *v.* Biscoe, 94 Md. 684, 51 Atl. 410. See also Main *v.* Fessler, 89 Md. 468, 43 Atl. 917; Judefind *v.* State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721; Burrell *v.* Lamm, 67 Md. 580, 11 Atl. 56; Baltimore, etc., R. Co. *v.* Waltemyer, 47 Md. 328; Cole *v.* Hynes, 46 Md. 181; Randle *v.* Sutton, 43 Md. 64; Herzberg *v.* Adams, 39 Md. 309; Mears *v.* Remare, 33 Md. 246; Hough *v.* Kelsey, 19 Md. 451; Crockett *v.* Parke, 7 Gill 237. The circuit court having authority to entertain an appeal from a justice of the peace on the question of jurisdiction, as well as on other grounds, its decision is not subject to review. Judefind *v.* State, *supra*; Rayner *v.* State, 52 Md. 368.

Massachusetts.— Belcher *v.* Ward, 5 Pick. 278.

Michigan.— Evers *v.* Sager, 28 Mich. 47; Conrad *v.* Freeland, 18 Mich. 255.

Mississippi.— Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 551; Dismukes *v.* Stokes, 41 Miss. 430.

New Jersey.— Roston *v.* Morris, 25 N. J. L. 173.

New York.— Heinrich *v.* Kom, 47 N. Y. 658; Grover *v.* Coon, 1 N. Y. 536; Armstrong *v.* Smith, 44 Barb. 120; Burgart *v.* Stork, 12 How. Pr. 559; Howe *v.* Julien, 2 Hilt. 453; Moot *v.* Parkhurst, 2 Hill 372. See also Sweet *v.* Clinton Overseers of Poor, 3 Johns. 23. No appeal lies to the appellate division of the supreme court from a judgment of a county court on appeal from a justice of the peace in a special proceeding; Code Civ. Proc. § 1357, providing for an appeal from any court of record in proceedings "instituted therein," or "instituted before another judge and transferred to or continued before the judge who made the final order," and there being no other provision for appeals in special proceedings except from the supreme court. Matter of Rafferty, 14 N. Y. App. Div. 55, 43 N. Y. Suppl. 760.

Ohio.— Norton *v.* McLeary, 8 Ohio St. 205; Clark *v.* Hanna, 8 Ohio St. 199.

Pennsylvania.— Foster *v.* Erie County, 142 Pa. St. 407, 21 Atl. 877; Pennsylvania Pulp, etc., Co. *v.* Stoughton, 106 Pa. St. 458; Cozens *v.* Dewees, 2 Serg. & R. 112; Stewart *v.* Lindsay, 3 Pennyp. 85; Castor *v.* Cloud, 2 Wkly. Notes Cas. 252; Minogue *v.* Ashland Borough, 27 Pa. Super. Ct. 506.

Texas.— Gillmore *v.* Garrett, 42 Tex. 517; Peterson *v.* Johnson, 37 Tex. 436; Greer *v.* Osborne, 37 Tex. 430; Robertson *v.* Lackey, 36 Tex. 154; Trapp *v.* White, 35 Tex. 387; Bell *v.* Walnitzik, 35 Tex. 387; Nichols *v.* Page, 34 Tex. 333; De Young *v.* Patterson, Dall. 539; Welge *v.* Jackson, (Civ. App. 1895) 32 S. W. 371; Jones *v.* Jones, 1 Tex. App. Civ. Cas. § 200.

Utah.— Crooks *v.* State Fourth Judicial Dist. Ct., 21 Utah 98, 59 Pac. 529. See also Hodson *v.* Union Pac. R. Co., 14 Utah 381, 46 Pac. 270.

Washington.— State *v.* Freasure, 39 Wash. 198, 81 Pac. 688; State *v.* King County Super. Ct., 24 Wash. 605, 64 Pac. 778; State *v.* Spokane County Super. Ct., 22 Wash. 496, 61 Pac. 158.

See 2 Cent. Dig. tit. "Appeal and Error," § 109; 31 Cent. Dig. tit. "Justices of the Peace," § 751.

Retroactive operation of statute.— Ind. Acts (1901), p. 565, § 6, declaring that except in certain cases no appeal "shall hereafter be taken to the Supreme Court or to the Appellate Court" in civil cases within a justice's jurisdiction, applies to appeals from judgments rendered before it took effect, but taken thereafter. Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443.

90. *Alabama.*— Gresham *v.* Tucker, 28 Ala. 611.

California.— Howard *v.* Harman, 5 Cal. 78.

Iowa.— Iowa North Cent. R. Co. *v.* Ritter, 36 Iowa 568; Atkins *v.* McCready, 8 Iowa 214; Packer *v.* Cockayne, 3 Greene 111.

Kansas.— Gregg *v.* Garverick, 33 Kan. 190, 5 Pac. 751; Shuster *v.* Finan, 19 Kan. 114. *Compare* Shaffer *v.* Hohenschild, 2 Kan. App. 516, 43 Pac. 979, holding that when the district court, on a petition in error from a justice, reverses the judgment of the justice, it is not necessary to file a motion for a new trial in order to have the decision reviewed on petition in error.

Kentucky.—Kennedy *v.* Aldridge, 5 B. Mon. 141.

Michigan.— Tower *v.* Lamb, 6 Mich. 362.

Missouri.— Fisher *v.* Pacific R. Co., 46 Mo. 304; Terrell *v.* Hunter, 21 Mo. 436; Aiken *v.* Todd, 20 Mo. 276.

Nebraska.— Levi *v.* Fred, 38 Nebr. 564, 57 N. W. 386; Slaven *v.* Hellman, 24 Nebr. 646, 39 N. W. 843.

New Jersey.— Gould *v.* Brown, 9 N. J. L. 165.

North Carolina.— Spaugh *v.* Boner, 85 N. C. 208. See also Rush *v.* Halcyon Steamboat Co., 67 N. C. 47.

Ohio.— Hallam *v.* Jacks, 11 Ohio St. 692.

Texas— Silberberg *v.* Trilling, 82 Tex. 523, 18 S. W. 591.

See 31 Cent. Dig. tit. "Justices of the Peace," § 752.

tion to the jurisdiction of the justice over the subject-matter.[91] Objections growing out of defects in or insufficiency of the proceedings to obtain a review of or perfect an appeal from a justice of the peace cannot ordinarily be raised for the first time on appeal from the intermediate appellate court.[92]

c. Scope and Extent of Review — (I) *In General.* The general principles governing the review of the proceedings of inferior courts have been exhaustively treated elsewhere in this work, and apply to the review of the proceedings of a court to which a case has been transferred from a justice of the peace by appeal or error.[93]

(II) *Presumptions.* On review of the proceedings of an intermediate appellate court on appeal from a justice of the peace, the higher court will make every reasonable and warrantable presumption in favor of the justice's jurisdiction,[94] the regularity of the appeal to the intermediate court,[95] and the regularity of the proceedings in that court.[96]

Necessity of exceptions to ruling of appellate court see APPEAL AND ERROR, 2 Cyc. 714 *et seq.*

Necessity of motion for new trial see APPEAL AND ERROR, 2 Cyc. 740.

91. Hill *v.* Tionesta Tp., 129 Pa. St. 525, 19 Atl. 855. *Compare* Cox *v.* McGuire, 26 Ill. App. 315.

Amount in controversy.— The district court having jurisdiction of the subject-matter, the objection that it was without jurisdiction of an appeal from a justice in an action of trespass on real estate where the damages exceeded one hundred dollars cannot be taken for the first time in the supreme court. Western Union Tel. Co. *v.* Moyle, 51 Kan. 203, 32 Pac. 895.

92. *Arkansas.*— Crenshaw *v.* Bradley, 52 Ark. 318, 12 S. W. 578; Young *v.* King, 33 Ark. 745.

Colorado.— People *v.* Stitt, 14 Colo. App. 43, 59 Pac. 62.

Illinois.— Kirkpatrick *v.* Cooper, 89 Ill. 210.

Iowa.— Wood *v.* Bailey, 12 Iowa 46.

Mississippi.— Poston *v.* Mhoon, 49 Miss. 620.

Oregon.— Lancaster *v.* McDonald, 14 Oreg. 264, 12 Pac. 374.

South Carolina.— Dargan *v.* West, 27 S. C. 156, 3 S. E. 68.

Texas.— Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658; Cockrill *v.* Eason, (Civ. App. 1894) 26 S. W. 464.

Wyoming.— Redman *v.* Union Pac. R. Co., 3 Wyo. 678, 29 Pac. 88.

This rule has been applied, for example, to the objection that no notice of appeal was given (Redman *v.* Union Pac. R. Co., 3 Wyo. 678, 29 Pac. 88), or that it was insufficient (Lancaster *v.* McDonald, 14 Oreg. 264, 12 Pac. 374; Dargan *v.* West, 27 S. C. 156, 3 S. E. 68); that there was no affidavit for appeal or writ of error (Crenshaw *v.* Bradley, 52 Ark. 318, 12 S. W. 578), or that it was insufficient (Young *v.* King, 33 Ark. 745; Wood *v.* Bailey, 12 Iowa 46); that there were errors in the transcript of the record or bill of exceptions (Smith *v.* St. Louis, etc., R. Co., 91 Mo. 58, 3 S. W. 836); that the appeal-bond was insufficient (People *v.* Stitt, 14 Colo. App. 43, 59 Pac. 62; Kirkpatrick *v.* Cooper, 89 Ill. 210; Poston *v.* Mhoon, 49 Miss. 620; Cockrill *v.* Eason, (Tex. Civ. App. 1894) 26 S. W. 464); or that the judgment of the justice was not properly certified (Coleman *v.* Gordon, (Miss. 1894) 16 So. 340).

93. Scope and extent of review generally see APPEAL AND ERROR, 3 Cyc. 389 *et seq.* And see the following cases:

Alabama.— Martin *v.* Higgins, 23 Ala. 775.

Illinois.— Howitt *v.* Estelle, 92 Ill. 218; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 337.

Iowa.— Brock *v.* Barr, 70 Iowa 399, 30 N. W. 652; Shellenberger *v.* Ward, 8 Iowa 425.

Minnesota.— Barber *v.* Kennedy, 18 Minn. 216.

Missouri.— Hill *v.* St. Louis Ore, etc., Co., 90 Mo. 103, 2 S. W. 289; Leonard *v.* Sparks, 63 Mo. App. 585.

Ohio.— Hartman *v.* White, 7 Ohio Dec. (Reprint) 45, 1 Cinc. L. Bul. 79.

Texas.— Monroe *v.* Watson, 17 Tex. 625.

Wisconsin.— Pinger *v.* Vanclick, 36 Wis. 141.

See 31 Cent. Dig. tit. "Justices of the Peace," § 753.

94. Clagget *v.* Blanchard, 8 Dana (Ky.) 41; Wise *v.* Allen, 9 Pa. Cas. 561, 13 Atl. 544.

95. Maxam *v.* Wood, 4 Blackf. (Ind.) 297.

96. *Alabama.*— Jones *v.* Collins, 80 Ala. 108.

Arkansas.— Heflin *v.* Owens, 10 Ark. 265.

Indiana.— Congressional Tp. No. 19 *v.* Clark, 1 Ind. 139.

New Jersey.— Dallas *v.* Newell, 65 N. J. L. 172, 46 Atl. 783.

North Carolina.— Rush *v.* Halcyon Steamboat Co., 67 N. C. 47.

Texas.— Cason *v.* Laney, 82 Tex. 317, 18 S. W. 667.

See 31 Cent. Dig. tit. "Justices of the Peace," § 754.

Presumption overcome by record.— On an appeal from a justice in an action of account, final judgment by the circuit court, the record finding that there was no appearance by defendant, and not finding that there was a writ of inquiry, will be reversed; the

(III) *Discretion of Lower Court.* Matters within the discretion of an intermediate appellate court will not be reviewed on appeal from its judgment.[97]

(IV) *Harmless Error.* A judgment of an intermediate appellate court will not be reversed for harmless or non-prejudicial error.[98]

d. Determination and Disposition of Cause — (I) *Dismissal of Appeal.* In order to obtain a dismissal of an appeal from an intermediate to a higher court, on the ground that the suit in the intermediate court was a continuation of one brought before a justice, the affidavit must show in terms that the justice's jurisdiction was ousted by the giving of a proper undertaking.[99]

(II) *Affirmance.* The judgment of an intermediate appellate court, on an appeal from a justice of the peace, must be affirmed, if there is no statement or bill of exceptions or error apparent on the record;[1] and where the higher court affirms a judgment dismissing an appeal from a justice, the jurisdiction of the intermediate court over the case is at an end.[2]

(III) *Reversal.* The finding of an intermediate court on appeal from a justice is equivalent to a verdict, and, having been entered of record, the appellate court cannot enlarge it by intendment, but will reverse it, if it is insufficient;[3] and where the intermediate court, in a case triable *de novo*, refuses to pass on all the questions raised at the trial before the justice, and an appeal is taken, the judgment will be reversed, without regard to the merits of the objections.[4] So too where a judgment for plaintiff has been reversed below, the higher court on further appeal will reverse the decision of the intermediate court, if it appears that the justice had no jurisdiction of the case;[5] and if an intermediate court

presumption in favor of it being contravened by the record. Pirani *v.* Allhime, 4 Ark. 440.

97. *Michigan.*— Vincent *v.* Bowes, 78 Mich. 315, 44 N. W. 276; Mitchell *v.* Shuert, 16 Mich. 444.

Nebraska.— Cobbey *v.* Burks, 11 Nebr. 157, 8 N. W. 386, 38 Am. Rep. 364.

New York.— Reilly *v.* Murray, 6 N. Y. St. 720.

Ohio.— Price *v.* Orange, Wright 568.

Vermont.— Downs *v.* Reed, 32 Vt. 785; Houghton *v.* Slack, 10 Vt. 520.

See 31 Cent. Dig. tit. "Justices of the Peace," § 755.

98. *Alabama.*— Harsh *v.* Heflin, 76 Ala. 499.

Georgia.— Farkas *v.* Stewart, 73 Ga. 90.

Illinois.— Shea *v.* Wagner, 29 Ill. App. 193.

Indiana.— Lewis *v.* Morrison, 10 Ind. 394.

Iowa.— Hammitt *v.* Coffin, 3 Greene 205.

Minnesota.— Schroeder *v.* Harris, 43 Minn. 160, 45 N. W. 4.

Missouri.— Wenzell *v.* Erath, 48 Mo. App. 476.

West Virginia.— Johnson *v.* MacCoy, 32 W. Va. 552, 9 S. E. 887; Chancey *v.* Smith, 25 W. Va. 404, 52 Am. Rep. 217.

See 31 Cent. Dig. tit. "Justices of the Peace," § 756.

99. Lalliette *v.* Van Keuren, 7 How. Pr. (N. Y.) 409.

1. Southerland *v.* Warner, 21 Mo. 512; Sickles *v.* Abbott, 21 Mo. 443; Heath *v.* Walther, 21 Mo. 169; Aiken *v.* Todd, 20 Mo. 276; Elliott *v.* Pogue, 20 Mo. 263; Moore *v.* Turner, 19 Mo. 642.

2. Rudolph *v.* Herman, 4 S. D. 203, 56 N. W. 122.

3. Heeron *v.* Beckwith, 1 Wis. 17.

Grounds of judgment below.— When an appeal is taken from a judgment of a magistrate on several grounds, and the order of the circuit court merely recites that it sustains the appeal, without stating the grounds, such order will be reversed if any of the grounds assigned were untenable. Lookout Mountain Medicine Co. *v.* Hare, 56 S. C. 456, 35 S. E. 130.

Void order.— When a writ of error to a justice's court was pending in a circuit court, which, under Code, § 162, had exclusive jurisdiction of such writs, it was held that, although an order of change of venue to the district court was void, yet, to prevent a failure of justice, the order would be reversed on appeal at the cost of the movers for the change. Sayles *v.* Deluhrey, 64 Iowa 109, 19 N. W. 883.

Allowing a remittitur.— Where, on an appeal from a justice of the peace, the circuit court awards judgment on a set-off in favor of a defendant to a larger amount than the justice had jurisdiction over, the supreme court, on appeal, will not allow a remittitur to be entered there for the excess. Crow *v.* Cunningham, 5 Coldw. (Tenn.) 255.

4. Maxon *v.* Reed, 8 Hun (N. Y.) 618. If the common pleas should dismiss an action appealed from the judgment of a justice of the peace, where the appeal is regularly claimed and prosecuted, or should send the parties out of court, without proceeding to try any issues of law or fact which may have been joined, and without entering a formal judgment for either party, a reversal and venire facias de novo would be awarded on error. Keen *v.* Turner, 13 Mass. 265.

5. Glasby *v.* Prewitt, 26 Mo. 121.

reverses in a case in which it should modify an erroneous judgment, the appellate court will reverse its judgment, and render such judgment as it should have rendered.[6]

(iv) *Remand and New Trial.* Where, on appeal from a justice's court, the complaint has been amended so as to include a distinct cause of action, a new trial will be granted on further appeal, although the amount involved is small, since it affects the right, and not the amount of recovery.[7] But a higher court, on reversing a judgment rendered on appeal from a justice of the peace, will send the record back for amendment only where the error is clerical and trifling.[8]

e. Certiorari. In some states the judgment of an intermediate appellate court on an appeal from a justice of the peace may be corrected on certiorari;[9] but on such review only the decision of that court not that of the justice can be looked into,[10] although the court may inspect the transcript sent up by the justice in order to ascertain a fact that occurred before him.[11]

B. Certiorari, Recordari, and Writs of Review — 1. In General — a. Nature and Scope of Remedy. The common-law writ of certiorari is strictly a revisory remedy intended for the correction of errors of law apparent on the face of the record, and which go to the jurisdiction of the inferior tribunal. It is not a substitute for an appeal, and will not reach mere error or irregularity not affecting jurisdiction.[12] But writs of certiorari, recordari, and review, issued to review proceedings before justices of the peace, are now almost wholly regulated by statute,[13] and, while they cannot take the place of an appeal or writ of error,[14]

6. Kast *v.* Kathern, 3 Den. (N. Y.) 344.

7. Allen *v.* Woodruff, 63 Conn. 369, 28 Atl. 532.

8. Langer *v.* Parish, 8 Serg. & R. (Pa.) 134. *Compare* Morse *v.* Rector, 44 W. Va. 202, 28 S. E. 763, in which the record showed no pleadings in either the justice's or the circuit court, and the judgment was reversed and remanded to enable the parties to make up their pleadings properly, or to amend the record according to the truth.

9. Cheeseman *v.* Cade, 24 N. J. L. 632.

In Nevada, where a district court, acting under Const. art. 6, § 6, giving such a court final appellate jurisdiction in cases arising in justices' courts, dismissed an appeal from a justice's court, the action having been in the exercise of jurisdiction, it was held that it could not be reviewed on certiorari. Andrews *v.* Cook, (1905) 81 Pac. 303.

10. Moore *v.* Johnson, 58 N. J. L. 586, 34 Atl. 396; Vannoy *v.* Givens, 23 N. J. L. 201.

11. Dancer *v.* Patterson, 10 N. J. L. 255.

12. Guscott *v.* Roden, 112 Ala. 632, 21 So. 313 [*citing* Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; Dean *v.* State, 63 Ala. 153]. See also Gray *v.* Southern R. Co., 116 Ala. 654, 22 So. 973; White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60 [*affirming* 83 Ill. App. 592]; Fuller *v.* Tubbs, 115 Wis. 212, 91 N. W. 660; Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854; Combs *v.* Dunlap, 19 Wis. 591; Tallmadge *v.* Potter, 12 Wis. 317. See, generally, CERTIORARI.

13. **Particular statutes construed.** — *Alabama.*— Mahan *v.* Lester, 20 Ala. 162.

Colorado.— Wood *v.* Lake, 3 Colo. App. 284, 33 Pac. 80, construing Gen. St. (1883) § 1995.

Illinois.— Gibson *v.* Ackermann, 70 Ill. App. 399, holding that the act of July 1, 1895, did not repeal by implication the act of July 1, 1872, sections 75–80.

Pennsylvania.— Love *v.* Barton, 4 Serg. & R. 269, construing the act of March, 1810, section 22.

Tennessee.— Fisher *v.* Baldridge, 91 Tenn. 418, 19 S. W. 227, construing Milliken & V. Code, §§ 3843, 4093.

See 31 Cent. Dig. tit. "Justices of the Peace," § 760.

14. *Arizona.*— Territory *v.* Doan, 7 Ariz. 89, 60 Pac. 893.

District of Columbia.— Hendley *v.* Clark, 8 App. Cas. 165. *Compare* Warner *v.* Jenks, 12 App. Cas. 104.

Louisiana.— State *v.* Walker, 112 La. 429, 36 So. 482.

Michigan.— Computing Scale Co. *v.* Tripp, 138 Mich. 602, 101 N. W. 803.

New Jersey.— Clark *v.* Fulse, 2 N. J. L. 263.

Pennsylvania.— Com. *v.* Oakdale Mfg. Co., 6 Pa. Dist. 429; Hazleton City *v.* Schmidt, 9 Kulp 181; Hayk *v.* Walz, 7 North. Co. Rep. 100.

West Virginia.— Although certiorari does not lie from the circuit court to a judgment of a justice rendered on a verdict of a jury, yet until the decision in Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653 [*overruling* Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298; Vandervort *v.* Fouse, 30 W. Va. 326, 4 S. E. 660; Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; Barlow *v.* Daniels, 25 W. Va. 512], a petition for certiorari was the only form in which a protest against judgment could be made, and the writ awarded on such petition should be treated as an order granting an appeal, under Code (1899), c. 50, § 17. Schafer *v.* McJunkin, 54 W. Va. 14, 46 S. E.

they partake of their nature,[15] and will lie where an appeal or writ of error does not,[16] or where the right thereto has been denied or lost otherwise than by a party's own default.[17] If a judgment of a justice is void, relief may competently be obtained by writ of review.[18]

b. Jurisdiction. The jurisdiction to issue writs of certiorari, recordari, and review to justices of the peace is conferred by the constitutions and statutes of the various states, and does not exist in the absence of such authority.[19] Where the certiorari carries up the case for trial *de novo*, the jurisdiction of the higher court depends upon that of the justice,[20] and the court cannot upon the trial consider items not claimed below.[21]

2. Decisions and Proceedings Reviewable — a. In General. Beyond the broad statement that the proceedings must have been judicial,[22] and a final decision rendered,[23] it is impracticable to lay down any general rules as to the decisions and

153. See also Falconer *v.* Simmons, 51 W. Va. 172, 41 S. E. 193.

See 31 Cent. Dig. tit. "Justices of the Peace," § 759.

Justices' judgments may be reviewed both by certiorari and appeal, but not at the same time. The remedy by appeal is cumulative. Williams *v.* Burchinal, 3 Harr. (Del.) 83. See also Hibbert *v.* Scull, 9 Del. Co. (Pa.) 190.

Defendant cannot appeal after he has sued out a writ of certiorari on the same judgment. Mullen *v.* Phœnix Iron Works Co., 34 Pittsb. Leg. J. N. S. (Pa.) 127.

15. Hurd *v.* Tombes, 7 How. (Miss.) 229.

In substance a writ of error.— Munshower *v.* Evans, 2 Chest. Co. Rep. (Pa.) 489; Strohm *v.* Carrol, 11 Lanc. Bar (Pa.) 62.

In the nature of an audita querela.— Jones *v.* Williams, 2 Swan (Tenn.) 105.

A substitute for an appeal.— Burt *v.* Davidson, 5 Humphr. (Tenn.) 425.

In Texas the office of a writ of certiorari is simply to bring up to the district court the case tried by the justice, that it may be tried *de novo*. Hill *v.* Faison, 27 Tex. 428.

Where a magistrate is proceeding under a new jurisdiction the proceeding by certiorari is summary. Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. (Pa.) 411.

16. Moore *v.* Rennick, 1 Alaska 173; Loloff *v.* Heath, 31 Colo. 172, 71 Pac. 1113; Lehighton Borough *v.* Roth, 7 Pa. Dist. 426.

17. Marsh *v.* Cohen, 68 N. C. 283; Parlin, etc., Co. *v.* Bellows, (Tex. Civ. App. 1898) 44 S. W. 593. And see *infra*, V, B, 3, c, (III).

Where no real fault or negligence can be imputed to the party, courts will, in view of the extension of the jurisdiction of justices, by which a new trial by jury has become a matter of greater importance to the rights and interests of the parties, rather relax than render more stringent the practice regulating the remedy by certiorari. McCormack *v.* Murfree, 2 Sneed (Tenn.) 46.

18. Prickett *v.* Cleek, 13 Oreg. 415, 11 Pac. 49. But see Dickinson *v.* Hoffman, 90 Ill. App. 83, where it was held that defendant's remedy against a void judgment was by bill in chancery to vacate it, and not by certiorari.

19. *Alabama.*— Gray *v.* Southern R. Co., 116 Ala. 654, 22 So. 973; Gray *v.* Apperson, 3 Ala. 328.

Arkansas.— Sawyer *v.* Crawford, 9 Ark. 32.

District of Columbia.— McIntosh *v.* Johnson, 3 MacArthur 586.

Florida.— Halliday *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 304.

Idaho.— Nordyke, etc., Co. *v.* McConkey, 7 Ida. 562, 64 Pac. 893.

Louisiana.— State *v.* Voorhies, 51 La. Ann. 500, 25 So. 96.

Minnesota.— Goar *v.* Jacobson, 26 Minn. 71, 1 N. W. 799.

Mississippi.— McDugle *v.* Filmer, 79 Miss. 53, 29 So. 996, 89 Am. St. Rep. 582; Barlow *v.* Esterling, Walk. 302.

Missouri.— Boren *v.* Welty, 4 Mo. 250.

New York.— Bradner *v.* Orange County, 9 Wend. 433; Caledonian Co. *v.* Hoosick Falls, 7 Wend. 508; People *v.* Onondaga C. Pl., 4 Wend. 212. *Compare* Kellogg *v.* Church, 3 Den. 228; Comstock *v.* Porter, 5 Wend. 98.

North Carolina.— West *v.* Kittrel, 8 N. C. 493; Alexander *v.* Bateman, 1 N. C. 160.

Pennsylvania.— McGinnis *v.* Vernon, 67 Pa. St. 149; Burginhofen *v.* Martin, 3 Yeates 479; Evans *v.* Com., 5 Pa. Co. Ct. 362; Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. 411.

Tennessee.— Duggan *v.* McKinney, 7 Yerg. 21; Turner *v.* Farley, 3 Yerg. 300; Taul *v.* Collinsworth, 2 Yerg. 579.

West Virginia.— Fouse *v.* Vandervort, 30 W. Va. 327, 4 S. E. 298 [*overruled* in Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653].

Wisconsin.— May *v.* Keep, 2 Pinn. 301, 1 Chandl. 285; Judson *v.* Hindman, 1 Pinn. 94.

See 31 Cent. Dig. tit. "Justices of the Peace," § 761.

Whether the remedy is certiorari, recordari, or appeal or writ of error see *supra*, V, A, 1, text and note 3.

20. McQuoid *v.* Lamb, 19 Mo. App. 153; Dixon *v.* Caruthers, 9 Yerg. (Tenn.) 30.

21. Clark *v.* Snow, 24 Tex. 242.

22. Fitzgerald *v.* Leisman, 3 MacArthur (D. C.) 6; *In re* Rourke, 13 Nev. 253.

23. Singer Mfg. Co. *v.* McNeal Paint, etc., Co., 117 Ga. 1005, 44 S. E. 801; Nellis *v.* Turner, 4 Den. (N. Y.) 553; Kirk *v.* Graham, 14 Tex. 316. *Compare* People *v.* Perry, 16 Hun (N. Y.) 461. But see Ferriday *v.* Reinbold, 8 Pa. Dist. 637.

proceedings reviewable by certiorari or recordari. The question is determined by the statutes of the various jurisdictions, and to them reference must be had.[24]

24. *Alabama.*— Waddle *v.* Dumas, 13 Ala. 412 (does not lie to judgment in tort); Gilleland *v.* Ware, 4 Ala. 414 (lies to quash execution); Gregg *v.* Hinson, 9 Port. 631 (lies to judgment in claim proceedings).

Arkansas.— St. Louis, etc., R. Co. *v.* Barnes, 35 Ark. 95, holding that a judgment rendered without evidence is not void, or so irregular as to be quashable on certiorari.

California.— Elder *v.* Fresno County Justices' Ct., 136 Cal. 364, 63 Pac. 1082 (lies to annul judgment rendered without the required notice of trial); History Co. *v.* Light, 97 Cal. 56, 31 Pac. 627 (does not lie to decision which justice had jurisdiction to render); Reagan *v.* San Francisco Justices' Ct., 75 Cal. 253, 17 Pac. 195 (writ of review does not lie to judgment by default where justice has jurisdiction of parties and subject-matter); Coulter *v.* Stark, 7 Cal. 244 (does not lie to action of justice in granting appeals and staying proceedings).

Georgia.— Conyers *v.* Ford, 111 Ga. 754, 36 S. E. 947 (does not lie to review question arising subsequent to the granting of petition for writ); Gassett *v.* Duke, 108 Ga. 816, 34 S. E. 168 (does not lie to review a verdict in void proceedings); Stephens *v.* Wallis, 75 Ga. 726 (does not lie to proceedings to bind over to keep the peace); Gregory *v.* Clark, 73 Ga. 542 (lies to correct error in proceeding to require the strengthening of a garnishment bond); Miller *v.* Hensley, 65 Ga. 556 (one whose appeal to a jury from a judgment not exceeding fifty dollars has been dismissed on the trial is precluded from bringing certiorari to the original judgment).

Illinois.— Yunt *v.* Brown, 2 Ill. 264 (certiorari only lies where appeal would lie); Rielly *v.* Prince, 37 Ill. App. 102 (where defendant has appeared but fails to attend the proceedings, certiorari will not lie to review the judgment).

Massachusetts.— Certiorari is the proper remedy to review proceedings on a complaint to recover a fine under the militia law. Gleason *v.* Sloper, 24 Pick. 181; Cousins *v.* Cowing, 23 Pick. 208; Ball *v.* Brigham, 5 Mass. 406.

Michigan.— Under Howell Annot. St. § 7031, all judgments rendered by a justice, whether issue was joined or not, may be removed to the circuit or district court by certiorari. Proper *v.* Conkling, 67 Mich. 244, 34 N. W. 560. See also Eldridge *v.* Hubbell, 119 Mich. 61, 77 N. W. 631 (lies to review action of justice in allowing a peremptory challenge); Wedel *v.* Green, 70 Mich. 642, 38 N. W. 638 (lies to review proceedings before justice where a transcript has been filed in the circuit court, and execution has issued).

Minnesota.— St. Paul *v.* The Dr. Franklin, 1 Minn. 97, to the effect that where the mayor of a town is given the ordinary powers of a justice by a statute which provides that an appeal may be taken from his judgments, his proceedings can only be reviewed by appeal.

Mississippi.— Burrow *v.* Sanders, 57 Miss. 211, holding that certiorari lies in a case under the Agricultural Lien Law.

Missouri.— Fry *v.* Armstrong, 109 Mo. App. 482, 84 S. W. 1001, holding that certiorari does not lie to correct an error in rendering judgment prematurely.

Montana.— State *v.* Gallatin County Justice Ct., 31 Mont. 258, 78 Pac. 498 (defendants who appear, answer, and agree to time for trial cannot bring certiorari to review the judgment, although they do not appear at the trial); State *v.* Votaw, 18 Mont. 279, 44 Pac. 982 (where justice issues execution against a stranger and inserts his name in the execution, he acts judicially, and certiorari lies to review his proceedings).

Nevada.— Paul *v.* Armstrong, 1 Nev. 82, holding that certiorari lies to review judgment by default, or on confession, where there was no answer or issue.

New Jersey.— Stokes *v.* Schlacter, 66 N. J. L. 247, 49 Atl. 556 (lies to review proceedings for violation of city ordinances); Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855 (determination of justice on trial of facts on motion to quash attachment reviewable on certiorari); Hershoff *v.* Beverly, 43 N. J. L. 139 (proceeding so informal that it does not apprise defendant whether it is an action of debt or an information is reviewable by certiorari); Ritter *v.* Kunkle, 39 N. J. L. 259 (where justice has jurisdiction, a judgment by confession is reviewable by certiorari, and other judgments by appeal; where he has no jurisdiction, appeal and certiorari are concurrent); Krumeick *v.* Krumeick, 14 N. J. L. 39 (error in the awarding or issuing of execution in a cause is reviewable by certiorari).

New York.— Buffalo *v.* Schliefer, 25 Hun 275 (proceeding to recover penalty under a city ordinance is reviewable by appeal only); People *v.* Perry, 16 Hun 461 (summary proceeding reviewable by appeal or certiorari); Pugsley *v.* Anderson, 3 Wend. 468 (certiorari does not lie to review proceedings respecting encroachments on highways). See also generally People *v.* Onondaga Ct. C. Pl., 4 Wend. 212; Wheeler *v.* Roberts, 7 Cow. 536.

North Carolina.— A writ of recordari will lie to bring up the proceedings in a case of forcible entry and detainer, although no traverse was entered before the justice. Webb *v.* Durham, 29 N. C. 130. An attachment wrongfully issued from a justice's court, against a citizen of the state, transiently absent, is remedied by recordari. Merrell *v.* McHone, 126 N. C. 528, 36 S. E. 35.

Ohio.— Hartshorn *v.* Wilson, 2 Ohio 27, holding that an attachment may be set aside on certiorari, where defendant was a resident at the time it issued.

b. Issues of Law or Fact. On certiorari to review proceedings had before a justice of the peace, the court is confined to questions of law,[25] and the writ will not lie where questions of fact are involved.[26] In Georgia, where there has been an appeal to a jury in the justice's court, certiorari will lie to the judgment;[27] but it is proper to refuse the petition where the evidence authorized the verdict rendered, and there was no error in the justice's rulings.[28]

c. Amount or Value in Controversy. As in the case of appeal and error,[29] the right to review the judgment of a justice of the peace on certiorari is made dependent in some jurisdictions upon the amount or value in controversy.[30]

Oregon.— Union County *v.* Slocum, 16 Oreg. 237, 17 Pac. 876 (writ of review lies to judgment by default for want of an answer); Kearns *v.* Follansby, 15 Oreg. 596, 15 Pac. 478 (writ of review does not lie to judgment on demurrer).

Pennsylvania.— Spicer *v.* Rees, 5 Rawle 119, 28 Am. Dec. 648 (certiorari does not lie from supreme court to justice in any civil suit or action); Frick *v.* Patton, 2 Rawle 20 (to the same effect); Com. *v.* Fourteen Hogs, 10 Serg. & R. 393 (proceedings under the act relating to swine running at large reviewable on certiorari); Adams *v.* Hill, 29 Leg. Int. 126 (where a judgment is transferred to the docket of a justice of another court, certiorari will lie to such justice for jurisdictional defects appearing on the face of the judgment); Masters *v.* Turner, 10 Phila. 482 (on the revival of an erroneous judgment against defendant and garnishee jointly, the latter may have a review by certiorari).

Tennessee.— Simmons *v.* Harris, 7 Baxt. 325 (certiorari does not lie to quash judgment rendered on notes not due); Jones *v.* Williams, 2 Swan 105 (certiorari lies to quash levy of execution on exempt property); Gunn *v.* Benson, 5 Yerg. 221 (certiorari does not lie to quash execution issued on a judgment which has been dormant for one year); Linebaugh *v.* Rinker, Peck 362 (lies to bring up execution where petition alleges payment); Elders *v.* Johnston, Peck 204 (lies to bring up execution improperly issued).

Texas.— Wood *v.* Rich, 8 Tex. 280, holding that certiorari is not proper remedy to bring up a case for a new trial, where the justice issues execution after expiration of twelve months without reviving the judgment.

Vermont.— The proceedings of justice of the peace may be reviewed by certiorari. *In re* Kennedy, 55 Vt. 1.

Wisconsin.— Where a justice has jurisdiction of the subject-matter and the parties in garnishment, error in the proceedings cannot be reviewed by certiorari. Krueger *v.* Cone, 106 Wis. 522, 81 N. W. 984.

United States.— When the transcript of a justice contains nothing in the form of a judgment, but only the assertion that he gave one, the proceedings are a nullity, and certiorari lies to reverse them. Camp *v.* Price, 4 Fed. Cas. No. 2,347*a*, Hempst. 174.

See 31 Cent. Dig. tit. "Justices of the Peace," § 765.

25. **Questions of law reviewable on certiorari.**— Caudell *v.* Southern R. Co., 119 Ga. 21, 45 S. E. 712; Hargrove *v.* Turner, 108 Ga. 580, 34 S. E. 1; Grimsley *v.* Alexander, 106 Ga. 165, 32 S. E. 24; Toole *v.* Edmonson, 104 Ga. 776, 31 S. E. 25; North, etc., R. Co. *v.* Spullock, 88 Ga. 283, 14 S. E. 478; Greenwood *v.* Boyd, etc., Furniture Factory, 86 Ga. 582, 13 S. E. 128; Cruse *v.* Southern Express Co., 72 Ga. 184; Boroughs *v.* White, 69 Ga. 841; Wynn *v.* Knight, 53 Ga. 568; McDugle *v.* Filmer, 79 Miss. 53, 29 So. 996.

26. **Questions of fact not reviewable on certiorari.**— *Georgia.*— Benton *v.* Hynes, 100 Ga. 95, 26 S. E. 469; Samuels *v.* Briscoe, 94 Ga. 425, 19 S. E. 245; Johnson *v.* Cummings, 88 Ga. 12, 13 S. E. 819; Savannah, etc., R. Co. *v.* Holcombe, 72 Ga. 206; Goss *v.* Lord, 72 Ga. 206; Western, etc., R. Co. *v.* Dyar, 70 Ga. 723; Wynn *v.* Knight, 53 Ga. 568.

Illinois.— Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333.

Michigan.— Mero *v.* Button, 116 Mich. 680, 75 N. W. 89; McGraw *v.* Schwab, 23 Mich. 13.

Pennsylvania.— House *v.* Ziegler, 11 Pa. Co. Ct. 159.

Texas.— Clevenger *v.* Murray, (Civ. App. 1902) 67 S. W. 469 [*following* Adair *v.* Graham, 17 Tex. 175].

See 31 Cent. Dig. tit. "Justices of the Peace," § 766.

A question of law only is involved where, on consideration of the entire evidence, it would be proper, if the case were on trial, for the superior court to direct a verdict, and it is error to dismiss a petition for certiorari, on the ground that it is sought to review questions of both law and fact. Dotson *v.* Hawes, 120 Ga. 369, 47 S. E. 900.

27. Western, etc., R. Co. *v.* Dyer, 70 Ga. 723. See also Goss *v.* Lord, 72 Ga. 206.

28. Dye *v.* Napier, 117 Ga. 537, 43 S. E. 860; Weldon *v.* Ayres, 116 Ga. 181, 42 S. E. 473; Wall *v.* Macon, etc., R. Co., 115 Ga. 778, 42 S. E. 72; Osborne *v.* Sims, 115 Ga. 97, 41 S. E. 252.

29. See *supra*, V, A, 2, b.

30. *Alabama.*— Certiorari does not lie to review a justice's judgment in a proceeding instituted under Clay Dig. p. 358, § 3, to recover damages, where the amount claimed does not exceed twenty dollars. Winn *v.* Freele, 19 Ala. 171.

District of Columbia.— Certiorari lies from the supreme court to justices in civil actions

3. Grounds, Defenses, and Right of Review — a. Grounds — (i) *In General.* What will and what will not be held sufficient ground for issuing a writ of certiorari, recordari, or review depends so largely upon the facts and circumstances of the individual case, that an attempted enumeration of the grounds which have been held sufficient or otherwise would be not only impracticable, but useless. As a general proposition such a writ will be granted whenever it is shown that it is necessary to the attainment of substantial justice.[31]

before judgment, in all cases where the amount in controversy exceeds fifty dollars. Coleman *v.* Freedman, 1 MacArthur 160.

Georgia.— Where the amount involved is less than fifty dollars, certiorari does not lie (Brice *v.* Chapman, 95 Ga. 799, 22 S. E. 525; Blalock *v.* Smith, 95 Ga. 557, 22 S. E. 282; Bernstein *v.* Clark, 87 Ga. 148, 13 S. E. 336; Greenwood *v.* Boyd, etc., Furniture Factory, 86 Ga. 582, 13 S. E. 128; Central R., etc., Co. *v.* White, 86 Ga. 202, 12 S. E. 365; Dexter *v.* Glover, 62 Ga. 312; McDonald *v.* Dickens, 58 Ga. 77; Reedy *v.* Helms, 54 Ga. 121; Wright *v.* Rutledge, 51 Ga. 194), unless the case has been appealed to a jury in the justice's court (Brooks *v.* Baker, 85 Ga. 515, 11 S. E. 840; Thompson *v.* Dodd, 84 Ga. 264, 10 S. E. 739; Wynne *v.* Darden, 80 Ga. 730, 6 S. E. 470).

Mississippi.— The circuit court has jurisdiction of a cause removed from a justice's court by certiorari, although the principal sum in controversy does not exceed fifty dollars. Hurd *v.* Germany, 7 How. 675; Hurd *v.* Tombes, 7 How. 229.

Wisconsin.— Appeal not certiorari is the proper practice to review the decision of a justice in replevin, when the property recovered, or the val· and damages, exceed fifteen dollars. Dykens *v.* Munson, 2 Wis. 245; McCaffrey *v.* Nolan, 1 Wis. 361.

See 31 Cent. Dig. tit. "Justices of the Peace," § 767.

31. Grounds held sufficient.— *Georgia.*— Western, etc., R. Co. *v.* Poe, 112 Ga. 90, 37 S. E. 119 (in which plaintiff had recovered for the killing of an animal, without showing that it was in fact killed); Alabama, etc., R. Co. *v.* Redding, 112 Ga. 62, 37 S. E. 91 (in which plaintiff recovered without showing a fact essential to recovery); Farmers' Mut. Ins. Assoc. *v.* Austin, 109 Ga. 689, 35 S. E. 122 (in which the jury found for defendant on evidence demanding a verdict for plaintiff); Howard *v.* Strickland, 54 Ga. 112 (in which the judgment was without evidence to support it).

Louisiana.—State *v.* Voorhies, 49 La. Ann. 1717, 23 So. 107, in which a judgment had been reversed in the district court, and new cases, claimed by defendant to be on the same cause of action, were commenced before the justice, for amounts within his exclusive jurisdiction, and it was held that the district court had power, by writs of certiorari and prohibition, to compel the justice to send up his records, in order to decide whether it had jurisdiction.

New Jersey.— Roller *v.* Roller, 46 N. J. L. 511, in which the justice's judgment was not docketed in the manner required by statute, and it was held that the party aggrieved might on certiorari claim judgment of the supreme court as to the validity of the docketing without waiting until his lands were sold under it.

New York.— Green *v.* Armstrong, 1 Den. 550, in which plaintiff declared on a "verbal contract" in a case within the statute of frauds, and defendant pleaded specially, instead of demurring, and it was held that he could take advantage of the invalidity of the contract on certiorari.

North Carolina.— Lancaster *v.* Brady, 49 N. C. 79 (in which the merits were clearly for the losing party, and there were circumstances tending to show fraud and collusion between the successful party and the justice, who were brothers, to deprive the other party of a fair trial and of the right to appeal, and it was held that a recordari should issue); Lassiter *v.* Harper, 32 N. C. 392 (in which judgment was rendered against husband and wife on a bond, after which, and before satisfaction, the husband died, and the wife was not present at the rendition of judgment, and execution was levied upon, and a sale ordered of, her land, and it was held that she was entitled to a writ of certiorari). Where a warrant has been brought against an administrator for the debt of his intestate, and the justice before whom it is returned renders a judgment against him individually, it is error, for which a recordari, in the nature of a writ of error, is a proper remedy. Hare *v.* Parham, 49 N. C. 412.

Pennsylvania.—Rice *v.* Kitzelman, 1 Chest. Co. Rep. 173, to the effect that if a judgment, a transcript of which has been filed in the common pleas, was improperly entered against one of the defendants, the proper remedy is certiorari.

Texas.— McNeill *v.* Hallmark, 28 Tex. 157 (in which judgment was rendered on a note not due); Duncan *v.* Bullock, 18 Tex. 541; Reed *v.* Sieckenius, (Civ. App. 1901) 65 S. W. 487; Carroll *v.* Gilbert, 4 Tex. App. Civ. Cas. § 266, 17 S. W. 1086; Lindheim *v.* Davis, 2 Tex. App. Civ. Cas. § 108.

Wisconsin.— May *v.* Keep, 2 Pinn. 301, 1 Chandl. 285, to the effect that the supreme court will allow a common-law writ of certiorari, where execution has issued on a justice's judgment, returnable before the next term of the circuit court.

See 31 Cent. Dig. tit. "Justices of the Peace," § 768.

Grounds held insufficient see Aiken *v.* Haines, 110 Ga. 324, 35 S. E. 319; Miner *v.* Gose, 1 Tex. App. Civ. Cas. § 73.

(II) *Failure or Inability to Defend.* A party who has failed or been unable to defend in the justice's court, without default or negligence on his part, may upon a proper showing be granted a writ of certiorari;[32] but it is otherwise where his failure to make defense is due to his own carelessness or laches.[33]

(III) *Acts Without Jurisdiction.* Certiorari or recordari is the proper remedy for a review of proceedings before a justice of the peace, where he was without jurisdiction or exceeded his jurisdiction.[34]

(IV) *Errors and Irregularities.* Where a justice had jurisdiction, errors and irregularities in the proceedings before him are not in most jurisdictions reviewable by certiorari.[35]

b. Defenses and Grounds of Opposition. It is no objection to the issuance of a writ of certiorari that it was sued out after the expiration of the time allowed

Newly discovered evidence not ground for writ see Almand *v.* Maxwell, 100 Ga. 318, 27 S. E. 176.

Absence of a material witness at the trial is no ground for a writ of certiorari, unless it appears that a continuance was demanded for that cause. Robinson *v.* Lakey, 19 Tex. 139.

32. Heep *v.* Burr, 34 Ill. App. 70; West *v.* Williamson, 1 Swan (Tenn.) 277 (in which a continuance, ordered on the day of trial, without notice to defendant, was held to be good cause for granting a certiorari to a judgment afterward rendered in his absence, but not for quashing the execution issued on the judgment); Darling *v.* Neill, 15 Tex. 104; Ahrens *v.* Giesecke, 9 Tex. 432; Weihl *v.* Davy, 6 Tex. 168; Parlin, etc., Co. *v.* Bellows, (Tex. Civ. App. 1898) 44 S. W. 593; Smith *v.* Thomas, 1 Tex. App. Civ. Cas. § 677.

33. Rielly *v.* Prince, 37 Ill. App. 102; White *v.* Boyce, 88 Mich. 349, 50 N. W. 802; Pifer *v.* Loose, 5 Pa. Co. Ct. 657; White *v.* Casey, 25 Tex. 552; Arnold *v.* Raines, 25 Tex. Suppl. 244; Peabody *v.* Buentillo, 18 Tex. 313; Huntsman *v.* Jarvis, 17 Tex. 161; McDonald *v.* Cross, 16 Tex. 562; Inge *v.* Benson, 15 Tex. 315; Haley *v.* Villeneuve, 11 Tex. 617; Gulf, etc., R. Co. *v.* Coleman, 2 Tex. Civ. App. 548, 21 S. W. 936; Houston, etc., R. Co. *v.* Simon, 2 Tex. App. Civ. Cas. § 99; Wilson *v.* Griffin, 1 Tex. App. Civ. Cas. § 1313.

34. *Alabama.*— Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

Georgia.— Kenyon *v.* Brightwell, 120 Ga. 606, 48 S. E. 124; McCardle *v.* Fogarty, 41 Ga. 626; Marble *v.* Laney, 41 Ga. 624.

Michigan.— Harbour *v.* Eldred, 107 Mich. 95, 64 N. W. 1054.

Montana.— State *v.* Case, 14 Mont. 520, 37 Pac. 95.

New Jersey.— Vandervoort *v.* Fleming, 68 N. J. L. 507, 53 Atl. 225; Hillman *v.* Stanger, 49 N. J. L. 191, 6 Atl. 434; Drake *v.* Berry, 42 N. J. L. 60.

New York.— Tiffany *v.* Gilbert, 4 Barb. 320.

North Carolina.—King *v.* Wilmington, etc., R. Co., 112 N. C. 318, 16 S. E. 929.

Pennsylvania.— Barr *v.* Law, 11 Pa. Dist. 770; Herman *v.* Dubbs, 24 Pa. Co. Ct. 651; Pagett *v.* Truby, 1 Pa. Co. Ct. 596; Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. 411; Ziegler *v.* Hons, 6 Kulp 374; Stedman *v.* Bradford, 3 Phila. 258.

South Carolina.— State *v.* Cohen, 13 S. C. 198.

Tennessee.— Holmes *v.* Eason, 8 Lea 754; Arnold *v.* Embree, Peck 134.

Texas.— Hill *v.* Faison, 27 Tex. 428; Tillman *v.* Hood, 3 Tex. App. Civ. Cas. § 191; Braidfoot *v.* Taylor, 1 Tex. App. Civ. Cas. § 174.

Washington.—Woodbury *v.* Henningsen, 11 Wash. 12, 39 Pac. 243.

Wisconsin.— Starry *v.* State, 115 Wis. 50, 90 N. W. 1014; Crandall *v.* Bacon, 20 Wis. 639, 91 Am. Dec. 451.

See 31 Cent. Dig. tit. "Justices of the Peace," § 770.

35. *District of Columbia.*— Anderson *v.* Morton, 21 App. Cas. 444; Fidelity, etc., Co. *v.* Beck, 12 App. Cas. 237.

Louisiana.—State *v.* Sherrard, 47 La. Ann. 1085, 17 So. 590; Baton Rouge *v.* Cremonim, 35 La. Ann. 366.

Michigan.— Garvin *v.* Gorman, 63 Mich. 221, 29 N. W. 525; Galloway *v.* Corbitt, 52 Mich. 460, 8 N. W. 218; Erie Preserving Co. *v.* Witherspoon, 49 Mich. 377, 13 N. W. 781.

New Jersey.—Wahrman *v.* Horan, 46 N. J. L. 465; Perrine *v.* Little, 13 N. J. L. 248.

New York.— Miller *v.* Bush, 21 Wend. 651; People *v.* Schoharie C. Pl., 1 Wend. 315.

Oregon.— McAnish *v.* Grant, 44 Oreg. 57, 74 Pac. 396.

Pennsylvania.— Swain *v.* Brady, 19 Pa. Super. Ct. 459; Lozier *v.* Moffitt, 25 Pa. Co. Ct. 502.

Wisconsin.— Barnes *v.* Schmitz, 44 Wis. 482; Taylor *v.* Wilkinson, 22 Wis. 40; Talladge *v.* Potter, 12 Wis. 317.

See 31 Cent. Dig. tit. "Justices of the Peace," § 771.

But see Dougan *v.* Dunham, 115 Ga. 1012, 42 S. E. 390; White *v.* Mandeville, 72 Ga. 705; Homuth *v.* Zapp, 20 Tex. 807; Aycock *v.* Williams, 18 Tex. 392; Hooks *v.* Lewis, 16 Tex. 551; Von Koehring *v.* Schneider, 24 Tex. Civ. App. 469, 60 S. W. 277. *Compare* Martin *v.* Nix, 19 Tex. 93; Dimmit County *v.* Salmon, (Tex. Civ. App. 1896) 35 S. W. 752.

for taking an appeal,[36] that an appeal was taken and dismissed,[37] that the judgment has been paid,[38] that the appeal to the jury was void, unless its invalidity affirmatively appears,[39] or that defendant has waived costs on a judgment of nonsuit;[40] and any objection to the granting of the writ on account of the want of a showing of good cause supported by affidavit is waived by appearing in court and entering upon the trial without noticing or objecting to such defect.[41] But where an appeal has been entered from a judgment, the appellant cannot review the same judgment by certiorari;[42] and pending a right of appeal from a judgment of an intermediate court quashing a writ of review to a justice's judgment, certiorari will not lie to the supreme court to review the latter judgment.[43] Where the evidence was sufficient to support a verdict, there is no error in overruling a certiorari thereto.[44]

c. Right of Review — (I) *In General.* The writ of certiorari is not one of right, but its issuance lies in the sound discretion of the court authorized to grant it.[45] Any party to the judgment may bring certiorari,[46] but where a garnishee appeals from a judgment against him, the principal debtor cannot also bring up the garnishment proceedings by certiorari.[47]

(II) *Existence of Remedy by Appeal.* Where an adequate remedy by appeal exists, certiorari will not generally lie to review proceedings before a justice of the peace.[48]

36. Grantham *v.* Payne, 77 Ala. 584.

37. Smith *v.* Atlanta Guano Co., 132 Ala. 586, 31 So. 490; Wheeler, etc., Mfg. Co. *v.* Carty, 53 N. J. L. 336, 21 Atl. 851.

38. Clark *v.* Ostrander, 1 Cow. (N. Y.) 437, 13 Am. Dec. 546. But see Smith *v.* Patton, 128 Ala. 611, 30 So. 582. *Compare* Grantham *v.* Payne, 77 Ala. 584, to the effect that plaintiff is not barred from suing out certiorari by defendant's payment of the judgment to the justice, where plaintiff has not accepted the money.

39. Puett *v.* McCall Co., 121 Ga. 309, 48 S. E. 960.

40. Nellis *v.* Tucker, 5 Den. (N. Y.) 82.

41. Moore *v.* Ernst, 54 Miss. 642.

42. Neal *v.* Fox, 114 Ga. 164, 39 S. E. 860; Jones *v.* Delaware, etc., Canal Co., 31 Leg. Int. (Pa.) 173.

The mere allowance of an appeal, where it is never perfected, does not defeat the right of the same party to a writ of certiorari. Wilcox *v.* Knoxville Borough, 2 Pa. Dist. 721.

43. State *v.* Lenahan, 17 Mont. 518, 43 Pac. 712.

44. Southern R. Co. *v.* Fincher, 116 Ga. 966, 43 S. E. 370. And see *supra*, V, B, 2, b.

45. *Arizona.*— Territory *v.* Doan, 7 Ariz. 89, 60 Pac. 893.

Georgia.— Georgia R. Co. *v.* Potter, 120 Ga. 343, 47 S. E. 924.

Maryland.— Roth *v.* State, 89 Md. 524, 43 Atl. 769.

Texas.— O'Brien *v.* Dunn, 5 Tex. 570; Wilson *v.* Griffin, 1 Tex. App. Civ. Cas. § 1313. But *compare* Parlin, etc., Co. *v.* Bellows, (Civ. App. 1898) 44 S. W. 593, 595, where it is said: "The writ of certiorari is granted as a matter of right when the applicant brings himself within the rules by showing he was not guilty of laches, and has been deprived of presenting evidence in support of his cause of action or defense, if there is merit therein."

West Virginia.— Harrow *v.* Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926.

See 31 Cent. Dig. tit. "Justices of the Peace," § 773.

Recordari, for the purpose of reviewing proceedings of inferior tribunals, in a case of false judgment, is in the nature of a writ of error, and lies as a matter of right. Webb *v.* Durham, 29 N. C. 130.

46. The successful party may bring certiorari, if the justice, by erroneously rejecting evidence, has diminished the amount which he was otherwise entitled to recover. Bissell *v.* Marshall, 6 Johns. (N. Y.) 100.

One of two defendants may remove the cause by certiorari. *Ex p.* Bogatsky, 134 Ala. 384, 32 So. 727.

One not a party cannot bring certiorari. Leake *v.* Tyner, 112 Ga. 919, 38 S. E. 343.

47. Lichtenberg *v.* Wayne Cir. Judge, 106 Mich. 38, 63 N. W. 963.

48. *Alabama.*— Alabama, etc., R. Co. *v.* Christian, 82 Ala. 307, 1 So. 121. *Compare* Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; Memphis, etc., R. Co. *v.* Brannum, 96 Ala. 461, 11 So. 468, in which there was no adequate remedy by appeal.

Arkansas.— *Ex p.* Allston, 17 Ark. 580.

California.—Disque *v.* Herrington, 139 Cal. 1, 72 Pac. 336; Faut *v.* Mason, 47 Cal. 7; Coulter *v.* Stark, 7 Cal. 244; Gray *v.* Schupp, 4 Cal. 185.

Colorado.— The mere fact that an appeal lies is not conclusive against the right to a writ of certiorari, for, if, in the judgment of the court, the remedy by appeal is not plain, speedy, and adequate, certiorari may issue. Paul *v.* Rooks, 16 Colo. App. 44, 63 Pac. 711.

Florida.— Halliday *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 304.

(III) *Loss of Right to Appeal.* It is good cause for issuing a writ of certiorari, or recordari, that the party praying it has lost his remedy by appeal without inexcusable fault or negligence on his part.[49]

4. Presentation of Objections Before Justice. On certiorari to review proceedings before a justice of the peace the court will not consider objections which have not been made before the justice.[50]

Georgia.— Shirley *v.* Rounsaville, 78 Ga. 708, 3 S. E. 660.

Iowa.—Kent *v.* Crenshaw, (1903) 94 N. W. 1131.

Louisiana.— State *v.* Tully, 48 La. Ann. 1532, 21 So. 119 [*citing* State *v.* Riley, 43 La. Ann. 177, 8 So. 598; State *v.* Le Blanc, 42 La. Ann. 1190, 8 So. 441; State *v.* Perrault, 41 La. Ann. 180, 6 So. 18].

Minnesota.— State *v.* Hanft, 32 Minn. 403, 23 N. W. 308.

Montana.— State *v.* Laurendeau, 27 Mont. 522, 71 Pac. 754.

New Jersey.— Bartow *v.* Smyth, 14 N. J. L. 286.

New York.—People *v.* Moore, 1 N. Y. Suppl. 405; People *v.* Onondaga County Judges, 7 Cow. 492; Moody *v.* Gleason, 7 Cow. 482; Baldwin *v.* Goodyear, 4 Cow. 536.

North Dakota.— Lewis *v.* Gallup, 5 N. D. 384, 67 N. W. 137.

Oregon.— Summers *v.* Harrington, 14 Oreg. 480, 13 Pac. 300; Ramsey *v.* Pettengill, 14 Oreg. 207, 12 Pac. 439.

Pennsylvania.— Andres *v.* Avoca Borough, 8 Kulp 325; Brown *v.* Lacier, Wilcox 184. But *compare* Russell *v.* Shirk, 3 Pa. Co. Ct. 287; Teter *v.* Cook, 2 Pa. Co. Ct. 171; Stewart *v.* Thompson, 2 Ashm. 120.

South Carolina.— Meares *v.* Clamp, 48 S. C. 233, 26 S. E. 465.

South Dakota.— Perrott *v.* Owen, 7 S. D. 454, 64 N. W. 526.

Tennessee.— Simmons *v.* Harris, 7 Baxt. 325.

Utah.— Saunders *v.* Sioux City Nursery, 6 Utah 431, 24 Pac. 532; Duckeneau *v.* House, 4 Utah 363, 10 Pac. 427.

West Virginia.— Poe *v.* Marion Mach. Works, 24 W. Va. 517.

See 31 Cent. Dig. tit. "Justices of the Peace," § 774.

But see Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661 (where it is said, however, that certiorari will not be encouraged where the alleged errors are such as might be obviated on a trial *de novo*, and that no intendments will be made in favor of errors assigned on it); Quinn *v.* Elam, 1 Tex. App. Civ. Cas. § 1108.

Remedy by appeal to jury in Georgia.— Where, if a case had been on trial before a jury on the evidence introduced at the hearing before the magistrate, it would have been error to direct a verdict as an issue of fact was formed, a certiorari is properly dismissed on the ground that appeal to the jury in the justice's court is a proper remedy. Macon, etc., R. Co. *v.* Wright, 122 Ga. 654, 50 S. E. 466.

49. *Colorado.*— Small *v.* Bischelberger, 7 Colo. 563, 4 Pac. 1195; Ballinger *v.* Lepore, 10 Colo. App. 167, 50 Pac. 313.

Georgia.— Rogers *v.* Bennett, 78 Ga. 707, 3 S. E. 660.

Illinois.— McNerney *v.* Newberry, 37 Ill. 91; Cook *v.* Hoyt, 13 Ill. 144; Withers *v.* Bruntom, 83 Ill. App. 126; McDonald *v.* Williams, 41 Ill. App. 378; Pierce *v.* Wade, 19 Ill. App. 185.

Massachusetts.— Hutchinson *v.* Gurley, 8 Allen 23.

Michigan.— Withington *v.* Southworth, 26 Mich. 381.

New Mexico.— Lockhart *v.* Woollacott, 8 N. M. 21, 41 Pac. 536.

North Carolina.— Koonce *v.* Pelletier, 82 N. C. 236; Carmer *v.* Evers, 80 N. C. 55; Marsh *v.* Cohen, 68 N. C. 283; Critcher *v.* McCadden, 64 N. C. 262; North Carolina R. Co. *v.* Vinson, 53 N. C. 119; Bailey *v.* Bryan, 48 N. C. 357, 67 Am. Dec. 246.

Tennessee.— Snapp *v.* Thomas, 5 Lea 503; Fox *v.* Fields, 12 Heisk. 31; Hardin *v.* Williams, 5 Heisk. 385; Evans *v.* Evans, 4 Coldw. 600; Nance *v.* Hicks, 1 Head 624; Allen *v.* Primm, 2 Swan 337; Chappell *v.* Jones, 8 Humphr. 107; Smith *v.* White, 5 Humphr. 46.

But see People *v.* Sleight, 2 Hun (N. Y.) 632

See 31 Cent. Dig. tit. "Justices of the Peace," § 775.

Excuses held insufficient. — *Arkansas.* — Smith *v.* Parker, 25 Ark. 518.

Illinois.— White *v.* Frye, 7 Ill. 65; Cushman *v.* Rice, 2 Ill. 565.

North Carolina.— Boing *v.* Raleigh, etc., R. Co., 88 N. C. 62; Elliott *v.* Jordan, 44 N. C. 298; Satchwell *v.* Rispess, 32 N. C. 365.

Tennessee.— Cox *v.* Kent, 9 Baxt. 492; Brinkley *v.* Burney, 5 Coldw. 101; McMurry *v.* Milan, 2 Swan 176.

Texas.— O'Brien *v.* Dunn, 5 Tex. 570.

See 31 Cent. Dig. tit. "Justices of the Peace," § 775.

50. *Alabama.*— Gould *v.* Meyer, 36 Ala. 565.

Georgia.— Mitchell *v.* Bradberry, 76 Ga. 15.

Massachusetts.— Cousins *v.* Cowing, 23 Pick. 208.

Michigan.— Forbes Lith. Mfg. Co. *v.* Winter, 107 Mich. 116, 64 N. W. 1053; Hopkins *v.* Green, 93 Mich. 394, 53 N. W. 537. But see Harbour *v.* Eldred, 107 Mich. 95, 64 N. W. 1054.

New Hampshire.— Richardson *v.* Smith, 59 N. H. 517.

New York.— Jencks *v.* Smith, 1 N. Y. 90; Fulton *v.* Heaton, 1 Barb. 552; Potter *v.* Deyo, 19 Wend. 361; McNeil *v.* Scoffield, 3 Johns. 436.

Pennsylvania.— Douglass *v.* Lacey, 3 Leg. Gaz. 253; Heiler *v.* Spangler, 1 Leg. Gaz. 84.

5. PARTIES. A writ of certiorari must be brought by a party in interest,[51] and the justice of the peace is properly made the respondent to the petition.[52] Where one of two defendants wishes to prosecute a certiorari, he should summon his co-defendant, and, if the latter refuses to join, procure an order permitting him to prosecute the writ alone;[53] and where judgment has been rendered against a garnishee, the principal defendant may sue out certiorari in his own name,[54] and the writ will not be quashed because the garnishee is not joined therein, where it appears that the time for the allowance of the writ to the garnishee has passed.[55] The surety on the certiorari bond cannot become a party to the cause.[56]

6. PROCEEDINGS TO PROCURE WRIT — a. Time For Taking Proceedings. A writ of certiorari must be sued out within the time prescribed by statute,[57] unless good cause for delay is shown,[58] or unless the justice was without jurisdiction.[59] When

Texas.— Huston *v.* Clute, 19 Tex. 178.

See 31 Cent. Dig. tit. "Justices of the Peace," § 776.

Failure to move for a new trial will not preclude a resort to certiorari. Ward *v.* McRimmond, 12 Tex. 314.

51. Berendt *v.* McHugh, 121 Ga. 97, 48 S. E. 691; Kerschner *v.* Mountz, 4 Pa. Dist. 690.

52. Anderson *v.* Morton, 21 App. Cas. (D. C.) 444; Chamberlain *v.* Edmonds, 18 App. Cas. (D. C.) 332. But see Woodford *v.* Hull, 31 W. Va. 470, 7 S. E. 450, where it was held that a petition for mandamus to a justice to allow an appeal from his judgment on a jury verdict cannot be sustained as a proceeding by certiorari, the justice only, and not the real parties to the action, having been made defendant.

53. Hulick *v.* Casler, 57 N. J. L. 621, 31 Atl. 223; Ballinger *v.* Sherron, 14 N. J. L. 144.

54. Wilson *v.* Bartholomew, 45 Mich. 41, 7 N. W. 227.

55. Bloom *v.* Alexander, 5 Pa. Co. Ct. 553.

56. Gould *v.* Meyer, 36 Ala. 565.

57. *Alabama.*— Enis *v.* Ross, 19 Ala. 239; Mason *v.* Moore, 12 Ala. 578.

Georgia.— See Bonds *v.* Berdett, 113 Ga. 113, 38 S. E. 304, to the effect that it need not affirmatively appear in the petition that it was sanctioned within the time prescribed by law, if it was in fact so sanctioned, and the answer disclosed that fact.

Illinois.— Gallimore *v.* Dazey, 12 Ill. 143.

Michigan.— Jacobs *v.* Brooke, 132 Mich. 55, 92 N. W. 783.

Mississippi.— Under Code, § 89, certiorari will not lie to review a decision after the expiration of six months, but the justice may be compelled by mandamus to certify the record for review. *Ex p.* Grubbs, 80 Miss. 288, 31 So. 741.

North Carolina.— Boing *v.* Raleigh, etc., R. Co., 88 N. C. 62.

Pennsylvania.— Caughey *v.* Pittsburgh, 12 Serg. & R. 53; Strause *v.* Scheurman, 13 Pa. Co. Ct. 332; Fenner *v.* McDaid, 10 Pa. Co. Ct. 262; Brockway *v.* Tillotson, 6 Pa. Co. Ct. 31; Galley *v.* Davenport, 1 Ashm. 149; Tully *v.* Williamson, 3 Kulp 388; Lehigh Valley R. Co. *v.* Murphy, 2 Kulp 60; Garrahan *v.* Norton, 1 Kulp 513; Hildebrand *v.* Bowman, 12 Lanc. Bar 30; Bertz *v.* Troast, 17 Lanc. L. Rev. 169; French *v.* Pennsylvania, etc., Canal, etc., Co., 1 Leg. Chron. 66; Heiler *v.* Spangler, 1 Leg. Gaz. 84; Masters *v.* Turner, 30 Leg. Int. 337; Griffen *v.* Koch, 1 Leg. Rec. 47; Brookfield *v.* Hill, 1 Phila. 439.

Tennessee.— Greer *v.* Chickasaw Land Co., 107 Tenn. 46, 64 S. W. 12; King *v.* Williams, 7 Heisk. 303; Mason *v.* Hammons, 7 Coldw. 132; Lanier *v.* Sullivan, 1 Head 440; Johnson *v.* Deberry, 10 Humphr. 439; Newman *v.* Rodgers, 9 Humphr. 120; Dixon *v.* Caruthers, 9 Yerg. 30; Tipton *v.* Anderson, 8 Yerg. 222.

Texas.— Criswell *v.* Bledsoe, 22 Tex. 656; Haley *v.* Villeneuve, 11 Tex. 617; Kyle *v.* Richardson, 31 Tex. Civ. App. 101, 71 S. W. 399.

West Virginia.— Straley *v.* Payne, 43 W. Va. 185, 27 S. E. 359; Krell Piano Co. *v.* Kent, 39 W. Va. 294, 19 S. E. 409; Arnold *v.* Lewis County Ct., 38 W. Va. 142, 18 S. E. 476; State *v.* Larue, 37 W. Va. 828, 17 S. E. 397; Womer *v.* Ravenswood, etc., R. Co., 37 W. Va. 287, 16 S. E. 488; Bee *v.* Seaman, 36 W. Va. 381, 15 S. E. 173; Long *v.* Ohio River R. Co., 35 W. Va. 333, 13 S. E. 1010.

Wisconsin.— Petitt *v.* Pritchard, 1 Pinn. 484.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 778, 779.

But see Williams *v.* Quin, 7 Cow. (N. Y.) 539; Finch *v.* McDowall, 7 Cow. (N. Y.) 537.

58. See Greer *v.* Chickasaw Land Co., 107 Tenn. 46, 64 S. W. 12; Lanier *v.* Sullivan, 1 Head (Tenn.) 440; Johnson *v.* Deberry, 10 Humphr. (Tenn.) 439; Krell Piano Co. *v.* Kent, 39 W. Va. 294, 19 S. E. 409; Arnold *v.* Lewis County Ct., 38 W. Va. 142, 18 S. E. 476; State *v.* Larue, 37 W. Va. 828, 17 S. E. 397; Womer *v.* Ravenswood, etc., R. Co., 37 W. Va. 287, 16 S. E. 488; Long *v.* Ohio River R. Co., 35 W. Va. 333, 13 S. E. 1010.

In Michigan, "where the statutory remedy is gone, and the party aggrieved had no knowledge of the suit, it is held that the common-law writ may issue, in order to prevent a miscarriage of justice." Jacobs *v.* Brooke, 132 Mich. 55, 57, 92 N. W. 783.

59. Moore's Appeal, 2 Pa. Cas. 537, 5 Atl. 621; Brennan *v.* Miner's Mills Borough, 10 Pa. Dist. 64; Goldman *v.* Teitlebaum, 10 Pa. Dist. 53; Edwards *v.* Fonk, 6 Pa. Dist. 505; Heaney *v.* Faust, 20 Pa. Co. Ct. 73; Neff *v.* Gallagher, 16 Pa. Co. Ct. 219; Adler *v.* Patrick, 1 Chest. Co. Rep. (Pa.) 465; Rice *v.*

a cause is removed by certiorari, it should not be dismissed because the right of appeal was not lost when the certiorari was sued out.[60]

b. Affidavit or Petition — (I) *In General.* In order to secure a writ of certiorari, the party aggrieved, or someone in his behalf,[61] must file with the court or officer authorized to grant the writ an affidavit or verified petition setting out the matters required by law.[62] The affidavit must be made before an authorized officer,[63] must be served upon the justice within the time prescribed by law,[64] and must be filed in the proper court.[65]

(II) *Requisites and Sufficiency* — (A) *In General.* On a petition for a certiorari to a justice of the peace, there must be such fulness and certainty in the statement of the facts as to show what the case really was, and that some material error or injustice has been done the petitioner or that he has not been able to avail himself of a legitimate defense, without default or negligence on his part.[66] The petition or affidavit must show that he has been diligent in ascertaining and

Kitzelman, 1 Chest. Co. Rep. (Pa.) 174; Creveling *v.* Kindig, 3 Kulp (Pa.) 217; McGovern *v.* McTague, 13 Lanc. Bar (Pa.) 119; Bertz *v.* Troast, 17 Lanc. L. Rev. (Pa.) 169; Martin *v.* Wiggins, 1 Lanc. L. Rev. (Pa.) 141; Torbert *v.* Yocum, 2 Leg. Chron. (Pa.) 319; French *v.* Pennsylvania, etc., Canal, etc., Co., 1 Leg. Chron. (Pa.) 66; O'Malley *v.* Dempsey, 3 Leg. Gaz. (Pa.) 225; Paine *v.* Godshall, 29 Leg. Int. (Pa.) 12; Smith *v.* Noone, 1 Leg. Rec. (Pa.) 165; Heffner *v.* Beahler, 1 Leg. Rec. (Pa.) 118; Rodgers *v.* Carr, 2 Lehigh Val. L. Rep. (Pa.) 380; Stocker *v.* Hall, 2 Lehigh Val. L. Rep. (Pa.) 233; Stedman *v.* Bradford, 3 Phila. (Pa.) 258; McFaddin *v.* Spencer, 18 Tex. 440. But see Mason *v.* Westmoreland, 1 Head (Tenn.) 555.

60. Washington *v.* Parker, 60 Ala. 447.

61. Affidavit may be made by agent or attorney.— McAlpin *v.* Finch, 18 Tex. 831.

Justice unauthorized to prepare affidavit see People *v.* Suffolk C. Pl., 18 Wend. (N. Y.) 550.

62. *Illinois.*— Harrison *v.* Chipp, 25 Ill. 575.

Maryland.— Roth *v.* State, 89 Md. 524, 43 Atl. 769, where it was held that an agreement between attorneys to treat a record sent up to the circuit court by a justice as though it had been brought up by a writ of certiorari was a nullity.

New York.— Finch *v.* McDowall, 7 Cow. 537.

North Carolina.—Wilcox *v.* Stephenson, 71 N. C. 409.

Pennsylvania.— Lucas *v.* Smedley, 8 Del. Co. 18.

Tennessee.— May *v.* Campbell, 1 Overt. 61.

Texas.— O'Brien *v.* Dunn, 5 Tex. 570; Texas, etc., R. Co. *v.* Ballouf, 1 Tex. App. Civ. Cas. § 551.

See 31 Cent. Dig. tit. "Justices of the Peace," § 781.

Form of affidavit see Standard Carbonating, etc., Co. *v.* Capital City Guards, 99 Ga. 265, 25 S. E. 670.

Affidavit may be entitled in the cause in the court below, but not in the cause in the supreme court. Whitney *v.* Warner, 2 Cow. (N. Y.) 499.

Where the judge of the supreme court sanctions an unverified petition, and the justice in his answer corroborates the averments of the petition, it is too late to dismiss the writ on the ground that such averments were not sufficiently verified. Willims *v.* Mangum, 119 Ga. 628, 46 S. E. 835.

Amendment of jurat.— Where a notary omitted to add his name to the jurat in an affidavit for a writ of certiorari, the court may permit him to do so *nunc pro tunc.* State *v.* Cordes, 87 Wis. 373, 58 N. W. 771. See also Houston Ice, etc., Co. *v.* Edgewood Distilling Co., (Tex. Civ. App. 1901) 63 S. W. 1075.

Omission in affidavit supplied by additional affidavit see Phillips *v.* Brainard, 2 Cow. (N. Y.) 440.

Several judgments cannot be embraced in the same petition.— Galveston, etc., R. Co. *v.* Ware, 2 Tex. App. Civ. Cas. § 357.

63. Must be made before a judge or the prothonotary.— Miller *v.* Trumpore, 8 Kulp (Pa.) 459.

Justice cannot take affidavit.— People *v.* Tioga C. Pl., 7 Wend. (N. Y.) 516.

64. People *v.* Erie Ct. C. Pl., 6 Wend. (N. Y.) 549, in which it was held, however, that an objection to the time of service is waived by proceeding to trial.

65. People *v.* Cass Cir. Ct., 2 Dougl. (Mich.) 116.

66. McKensie *v.* Pitner, 19 Tex. 135. See also the following cases:

Georgia.— Lambert Floral Co. *v.* Lambert, 117 Ga. 188, 43 S. E. 436.

Illinois.— Davis *v.* Randall, 26 Ill. 243; Harrison *v.* Chipp, 25 Ill. 575; Clifford *v.* Waldrop, 23 Ill. 336; Chicago Stamping Co. *v.* Danly, 85 Ill. App. 322; Wehner *v.* Wehner, 77 Ill. App. 116; Gibson *v.* Ackermann, 70 Ill. App. 399; Kern *v.* Davis, 7 Ill. App. 407.

Louisiana.— State *v.* Davey, 39 La. Ann. 992, 3 So. 181.

Michigan.— Fowler *v.* Detroit, etc., R. Co., 7 Mich. 79.

Oregon.— Ferguson *v.* Byers, 40 Oreg. 468, 67 Pac. 1115, 69 Pac. 32.

Texas.— Oldham *v.* Sparks, 28 Tex. 425; Baldwin *v.* Hardin, 21 Tex. 443; Martin *v.* Nix, 19 Tex. 93; Peabody *v.* Buentillo, 18

asserting his rights,[67] or in pursuing other efficient remedies,[68] and if he claims to have been misled by the adverse party, it must be shown how.[69] It should show that it was attempted to make the grounds relied on available at the trial, or the reason why they were not then presented,[70] and it must negative all probable defenses.[71] Facts, and not opinions or conclusions, must be stated.[72]

(B) *Setting Out Errors and Want of Jurisdiction.* A petition for certiorari must set out plainly and distinctly the errors complained of;[73] and, where the writ is prayed on the ground that the justice had no jurisdiction, the want of jurisdiction must be clearly shown,[74] and some attempt to establish the plea to the jurisdiction below must be averred.[75]

(C) *Setting Out Evidence.* In Texas a petition for a writ of certiorari, based upon the ground that the justice has decided unjustly on the merits, must set out in substance all of the evidence, with an allegation that it has been done.[76] But in a case where this was evidently the intention of the petitioner, although without any distinct allegation that he has reported all the evidence, if the evidence reported shows the injustice of the judgment, it will be reversed;[77] nor is it necessary that the petition should set out the evidence verbatim, or give the exact contents of written documents.[78]

Tex. 313; Johnson *v.* Lane, 12 Tex. 179; Parlin, etc., Co. *v.* Bellows, (Civ. App. 1898) 44 S. W. 593.

Wisconsin.— Applications to the supreme court for writs of certiorari will not be entertained unless peculiar and satisfactory reasons are shown for not obtaining them from a circuit court or judge. Hurlbut *v.* Wilcox, 19 Wis. 419.

See 31 Cent. Dig. tit. "Justices of the Peace," §§ 782, 783.

Construction.— In some states the same rules are applied to a petition for a certiorari as to a motion for a new trial; but in Texas, if there is no appeal from the decision of a justice, less strictness is required. King *v.* Longcope, 7 Tex. 236.

In passing upon exceptions to a petition, the court should accept its obligations as true, and not hear evidence attacking the facts therein alleged. Odom *v.* Carmona, (Tex. Civ. App. 1904) 83 S. W. 1100.

67. Davis *v.* Randall, 26 Ill. 243.

68. Clifford *v.* Waldrop, 23 Ill. 336.

69. Davis *v.* Randall, 26 Ill. 243.

70. Ford *v.* Williams, 6 Tex. 311.

71. Johnson *v.* Lane, 12 Tex. 179.

Negativing tender.— In a petition to review a judgment for plaintiff for a portion of his claim, but allowing costs to defendant, it is not necessary to allege that defendant made no tender. Jones *v.* Nold, 22 Tex. 379.

72. Peabody *v.* Buentillo, 18 Tex. 313. See also Russell *v.* Pickering, 17 Ill. 31.

73. *Georgia.*—Clements *v.* McCormick Harvesting Mach. Co., 115 Ga. 851, 42 S. E. 222; Wing *v.* Blocker, 115 Ga. 778, 42 S. E. 67; Brown *v.* Alexander, 112 Ga. 247, 37 S. E. 368; Fouche *v.* Morris, 112 Ga. 143, 37 S. E. 182; Hunter *v.* Garrett, 104 Ga. 647, 30 S. E. 869; Western, etc., R. Co. *v.* Jackson, 81 Ga. 478, 8 S. E. 209.

Illinois.— The petition must show that the judgment was unjust and erroneous, and set forth wherein the injustice and error consists. Hough *v.* Baldwin, 16 Ill. 293; Chicago Stamping Co. *v.* Danly, 85 Ill. App. 322; Horrell *v.* Horrell, 52 Ill. App. 477. But see Wehner *v.* Wehner, 77 Ill. App. 116 [*following* Gallimore *v.* Dazey, 12 Ill. 143, and *disapproving* Chicago World Book Co. *v.* Brewer, 57 Ill. App. 526; McGeoch *v.* Hooker, 11 Ill. App. 649], to the effect that the petition need not show by allegations of facts wherein the judgment was unjust and erroneous.

Michigan.— Gilmore *v.* Lichtenberg, 129 Mich. 275, 276, 88 N. W. 629, where it is said that "if a party, instead of appealing a case, and thus affording his adversary an opportunity to try his case on the merits, resorts to certiorari, he must make his allegations of error specific."

Tennessee.— Johnson *v.* Deberry, 10 Humphr. 439. *Compare* King *v.* Williams, 7 Heisk. 303.

Texas.— Clay *v.* Clay, 7 Tex. 250; O'Brien *v.* Dunn, 5 Tex. 570; Cotton *v.* Gammon, 4 Tex. 83.

See 31 Cent. Dig. tit. "Justices of the Peace," § 784.

74. Gilmore *v.* Lichtenberg, 129 Mich. 275, 88 N. W. 629; Pearl *v.* Puckett, 8 Tex. 303.

Where petition does not deny justice's jurisdiction, it will be presumed that he had it. Hegenbaumer *v.* Heckenkamp, 202 Ill. 621, 67 N. E. 389.

Allegation of want of jurisdiction held sufficient see Texas, etc., R. Co. *v.* Ballouf, 1 Tex. App. Civ. Cas. § 551.

75. Spinks *v.* Mathews, 80 Tex. 373, 13 S. W. 1101.

76. Phillips *v.* Parr, 19 Tex. 91; Perdew *v.* Steadham, 8 Tex. 274; Beard *v.* Miller, (Tex. App. 1890) 16 S. W. 655; Gulf, etc., R. Co. *v.* Odom, (Tex. App. 1890) 16 S. W. 541; Stuart *v.* Mau, 2 Tex. App. Civ. Cas. § 784; Galveston, etc., R. Co. *v.* Jackson, 2 Tex. App. Civ. Cas. § 174; Miner *v.* Gose, 1 Tex. App. Civ. Cas. § 73.

77. Phillips *v.* Parr, 19 Tex. 91. See also Nelson *v.* Hart, (Tex. Civ. App. 1893) 23 S. W. 831.

78. Beard *v.* Miller, (Tex. App. 1890) 16

(D) *Allegations as to Defenses.* Except where certiorari is brought on the ground of want of jurisdiction in the justice,[79] the petitioner must show that he had a good cause of action or ground of defense, and that the same was properly presented to the justice, or a sufficient legal excuse must be assigned for the omission to do so.[80]

(E) *Excusing Negligence or Failure to Defend.* The petition for a writ of certiorari to remove a cause from a justice of the peace must negative any default or negligence on the part of the petitioner, and allege a valid excuse for his failure to defend in the justice's court.[81]

(F) *Excusing Failure to Appeal.* In most jurisdictions a petition for a writ of certiorari to a justice of the peace must show why the petitioner did not exercise his right of appeal.[82]

c. Payment of Fees and Costs. Payment of costs is a prerequisite, under some statutes, to the issuance of a writ of certiorari,[83] and in Georgia a party applying for a writ must produce a certificate from the justice whose judgment is complained of that all costs below have been paid,[84] while in North Carolina, before an application for recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees.[85]

d. Bond or Recognizance — (I) *Necessity.* As a condition to the allowance of a writ of certiorari, the petitioner, his agent, or attorney,[86] must enter into a bond or recognizance, conditioned as prescribed by law.[87]

(II) *Parties.* In Georgia the bond must be conditioned to pay the adverse party,[88] and the surety must be different from the surety on the bond given on appeal to a jury.[89]

(III) *Attestation.* That a certiorari bond is attested by a commercial notary instead of by the magistrate will not invalidate the certiorari.[90]

S. W. 665; Stuart *v.* Mau, 2 Tex. App. Civ. Cas. § 784.

79. Independent Pub. Co. *v.* American Press. Assoc., 102 Ala. 475, 15 So. 947; McFaddin *v.* Spencer, 18 Tex. 440; Aycock *v.* Williams, 18 Tex. 392.

80. Chicago World Book Co. *v.* Brewer, 57 Ill. App. 526; Pritchard *v.* Sanderson, 92 N. C. 41; Lyles *v.* Cox, 10 Lea (Tenn.) 738; Cordes *v.* Kauffman, 29 Tex. 179; Robinson *v.* Lakey, 19 Tex. 139; Hope *v.* Alley, 11 Tex. 259.

81. Chicago First Nat. Bank *v.* Beresford, 78 Ill. 391; Horrell *v.* Horrell, 52 Ill. App. 477; Darmstaedter *v.* Armour, 17 Ill. App. 285; Knox *v.* Carter, 11 Heisk. (Tenn.) 12.

Excuses held sufficient see Heep *v.* Burr, 34 Ill. App. 70; Cole *v.* Atkinson, 6 Ill. App. 353; Hail *v.* Magale, 1 Tex. App. Civ. Cas. § 852.

82. Wright *v.* Gray, 20 Ala. 363; Horrell *v.* Horrell, 52 Ill. App. 477; Darmstaedter *v.* Armour, 17 Ill. App. 285; O'Hara *v.* O'Brien, 4 Ill. App. 154; Mason *v.* Westmoreland, 1 Head (Tenn.) 555; Johnson *v.* Deberry, 10 Humphr. (Tenn.) 439; Moss *v.* Collins, 3 Humphr. (Tenn.) 148; Miner *v.* Gose, 1 Tex. App. Civ. Cas. § 73. But see Wagstaff *v.* Braden, 1 Baxt. (Tenn.) 304; Houser *v.* McKennon, 1 Baxt. (Tenn.) 287; Parlin, etc., Co. *v.* Keel, (Tex. Civ. App. 1904) 78 S. W. 1082; Von Koehring *v.* Schneider, 24 Tex. Civ. App. 469, 60 S. W. 277; Hail *v.* Magale, 1 Tex. App. Civ. Cas. § 852.

Excuse held sufficient see Heep *v.* Burr, 34 Ill. App. 70.

83. Shaffner *v.* Waters, 77 Ill. App. 254.

84. Western, etc., R. Co. *v.* Carder, 120 Ga. 460, 47 S. E. 930, construing Ga. Civ. Code (1895), § 4639, and holding that a receipt from the justice, showing that plaintiff in certiorari has paid to him a named sum in full for all costs to date of the application for certiorari, sufficiently meets the requirement of the statute.

85. Steadman *v.* Jones, 65 N. C. 388.

86. See Alabama Midland R. Co. *v.* Stevens, 116 Ga. 790, 43 S. E. 46, construing Ga. Civ. Code, § 4639, as to what agents may give bond.

87. John M. Miller Co. *v.* Anderson, 118 Ga. 432, 45 S. E. 365 [*citing* Alabama, etc., R. Co. *v.* Stevens, 116 Ga. 790, 43 S. E. 46; Dykes *v.* Twiggs Co., 115 Ga. 698, 42 S. E. 36; Stover *v.* Doyle, 114 Ga. 85, 39 S. E. 939]; Wingard *v.* Southern R. Co., 109 Ga. 177, 34 S. E. 275; Ballentine *v.* Weible, 14 N. J. L. 285; Cotton *v.* Gammon, 4 Tex. 83. *Contra*, Thomas *v.* Glasgow, 2 Pa. Dist. 711.

A failure to give bond is remediable, after a return of the writ, by a bond *nunc pro tunc*, in the discretion of the court. Carmer *v.* Evers, 80 N. C. 55.

Where a certiorari bond has been lost, and the party unreasonably neglects to furnish another, after an order to that effect, the court should merely dismiss the certiorari, without awarding a procedendo. Johnson *v.* McKissack, 20 Tex. 160.

88. John M. Miller Co. *v.* Anderson, 118 Ga. 432, 45 S. E. 365.

89. Southern R. Co. *v.* Goodrum, 115 Ga. 689, 42 S. E. 49.

90. Candler *v.* Mann, 70 Ga. 726; Hendrix *v.* Mason, 70 Ga. 523.

(iv) *Filing and Service.* The bond must be filed within the time prescribed by law or fixed by the officer granting the writ,[91] and, where the statutes so require, must be served on the justice, together with the writ, within the prescribed time.[92]

(v) *Sufficiency.* A bond in substantial compliance with the statutory requirement is sufficient,[93] and a certiorari will not be dismissed because of an immaterial variance between the name of the obligor as given in the bond and as signed thereto,[94] because the bond contains a superfluous condition,[95] or because it fails to show in what county or before what justice the judgment was rendered, where the petition fully describes the court and suit, and there is no variance between the description of the judgment in the bond and the transcript.[96] Where a number of judgments between the same parties have been rendered by a justice and removed by certiorari, it is competent for the court to direct that but one bond shall be executed.[97]

(vi) *Acceptance and Approval.* A certiorari bond is sufficient if it shows on its face its acceptance and approval by the justice who tried the case, although there is no certificate of such acceptance and approval;[98] and where a justice files the bond and the return, his approval of the sureties is sufficiently shown.[99] So too, where the clerk receives and files the bond and issues the writ, and the judge has indorsed his approval on the bond, the approval by the clerk will be presumed;[1] and where the clerk has neglected to fill in the blank approval, and sign the same, the court will permit him formally to indorse his approval thereon afterward, as of the date of actual approval.[2] But the mere fact that the justice entered on a certiorari bond a certificate that the costs in the case had been paid is not sufficient evidence of his approval of the bond to warrant the issuance of the writ by the clerk of the court.[3] A bond to which the name of the petitioner appears to have been signed by attorney, whose authority does not, however, appear, will be considered *prima facie* the bond of the petitioner, after it has been approved by the proper officer.[4]

7. Issuance and Service of Writ, and Supersedeas — a. Issuance of Writ. While the removal of a cause from a justice's court by certiorari is regularly effected when the writ is executed and returned,[5] the filing of the petition, with an order allowing the writ indorsed thereon, and an approved bond, will give the court jurisdiction without the issuance of the writ;[6] and where, after the granting of a certiorari, the justice delivers a proper transcript and the original papers to the clerk of the court, the court has jurisdiction, although the clerk has issued no writ requiring the justice to do as he has done.[7] The clerk has no authority to issue a writ of certiorari until it has been formally allowed by the proper officer,[8]

91. Under N. M. Comp. Laws (1884), § 2442, the time for filing the bond is within the discretion of the judge granting the writ. Lockhart *v.* Woollacott, 8 N. M. 21, 41 Pac. 536.

92. Sherwood *v.* Arnold, 80 Mich. 270, 45 N. W. 134, construing Howell St. § 7038.

93. Lockhart *v.* Woollacott, 8 N. M. 21, 41 Pac. 536.

94. Braidfoot *v.* Taylor, 1 Tex. App. Civ. Cas. § 174, in which the party was described in the bond as "Braidford," and the bond was signed "Braidfoot."

95. Nelms *v.* Draub, (Tex. Civ. App. 1893) 22 S. W. 995.

96. Nelson *v.* Hart, (Tex. Civ. App. 1893) 23 S. W. 831.

97. Cooper *v.* Maddan, 6 Ala. 431.

98. Lingo *v.* Harris, 74 Ga. 368.

The words "approved by," on a certiorari bond, signed in his official capacity by a justice of the peace, is a sufficient approval of the bond by him. Walker *v.* Hillyer, 119 Ga. 225, 46 S. E. 92.

99. People *v.* Judges Rensselaer County C. Pl., 2 How. Pr. (N. Y.) 189.

1. Nelms *v.* Draub, (Tex. Civ. App. 1893) 22 S. W. 995.

2. Gossett *v.* Devorss, 98 Mo. App. 641, 73 S. W. 731.

3. Wingard *v.* Southern R. Co., 109 Ga. 177, 34 S. E. 275.

4. McAlpin *v.* Finch, 18 Tex. 831.

5. Uhles *v.* Nolen, 2 Coldw. (Tenn.) 529.

6. Gallimore *v.* Dazey, 12 Ill. 143.

7. Beauchamp *v.* Schiff, 3 Tex. App. Civ. Cas. § 170. But *compare* Farrar *v.* Foote, 2 Stew. (Ala.) 442.

Neglect of clerk to issue writ cannot prejudice appellant.— Lindheim *v.* Davis, 2 Tex. App. Civ. Cas. § 108.

8. Talbot *v.* White, 1 Wis. 444.

and where a statute requires that the writ shall issue within a prescribed time after judgment, a writ issued after that time should be dismissed.[9] On a petition for a recordari and notice served on the adverse party, he should be allowed to be heard in opposition, without having to wait until the writ is granted and returned.[10] A writ which apprises the justice that he is required to return the record is sufficient, although it contains no express mandate to that effect.[11]

b. Service of Writ, and Notice. A writ of certiorari must be served upon the justice who tried the case,[12] and notice of its issuance must be given the adverse party.[13]

c. Supersedeas or Stay of Proceedings. Where a certiorari is sued out and served on the justice, and the required bond or recognizance is entered into, further proceedings before him are stayed,[14] and where an attachment has issued, the suing out of the writ and giving bond for the payment of any judgment that may be rendered dissolves the attachment.[15] But where the writ is not served until after the officer has begun to enforce execution, the certiorari will not supersede the execution,[16] and if execution has been levied, and the judgment is affirmed on certiorari, its lien is preserved.[17]

8. Return and Record — a. In General. Upon certiorari to a justice of the peace the case is not properly before the higher court for final adjudication until the certified transcript of the proceedings before the justice is returned,[18] and it is

9. Snyder *v.* Roper, Morr. (Iowa) 229.

10. Weaver *v.* Vein Mountain Min. Co., 89 N. C. 198.

11. Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609.

12. *Arkansas.*— The writ must be served on the justice by delivery. Foster *v.* Foster, 15 Ark. 399.

Michigan.— Monroe *v.* Reynells, 131 Mich. 259, 90 N. W. 1065, in which the writ was prepared in duplicate, and both instruments were signed and sealed, and it was held that the fact that the writ first prepared was filed with the clerk, and the copy served on the justice was immaterial.

Minnesota.— Under Comp. St. c. 59, § 130, the writ must be served on the justice within ten days after its allowance. Bunday *v.* Dunbar, 5 Minn. 444.

Missouri.— The writ may properly be served by a private person. Gossett *v.* Devorss, 98 Mo. App. 641. 73 S. W. 731.

New York.— Service within thirty days after rendition of judgment is sufficient. Brown *v.* Burdick, 18 Wend. 511.

Wisconsin.— The writ must be served within ten days after its allowance, and, if not, the case will be dismissed, even though the justice makes his return according to the mandate. Robson *v.* Nye, 4 Wis. 217.

See 31 Cent. Dig. tit. "Justices of the Peace," § 791.

13. *Alabama.*— Crownover *v.* Srygley, 19 Ala. 251.

Delaware.— Where there are two defendants, notice must be served on both. Westcoat *v.* Burbage, 2 Marv. 297, 40 Atl. 1116.

Georgia.— Written notice must be given the adverse party of the sanction of the writ, and of the time and place of hearing, at least ten days before the sitting of the court to which it is returnable. Bramlitt *v.* Kulman, 121 Ga. 91, 48 S. E. 713 (notice must identify the case); Snyder *v.* Vignaux, 93 Ga. 217, 18 S. E. 435; Anderson *v.* Montgomery, 84 Ga. 50, 10 S. E. 590; Sparks *v.* Burgheim, 44 Ga. 167.

Pennsylvania.— Teter *v.* Cook, 2 Pa. Co. Ct. 171.

Tennessee.— Hughes *v.* Bryan, 6 Yerg. 471.

Texas.— Houston *v.* Ward, 8 Tex. 124.

See 31 Cent. Dig. tit. "Justices of the Peace," § 791.

Mailing notice.—The mere fact that a written notice was mailed to an attorney of the adverse party, without proof that it was actually received by him, is not sufficient to show service. Butler *v.* Farley, 99 Ga. 631, 25 S. E. 853.

Waiver.—Where the required notice was not given, but the parties agreed in writing that the decision of the court in the certiorari should determine certain other cases on the same points, it was held a waiver of notice and an agreement that the certiorari should be decided on its merits. Scott *v.* Patrick, 44 Ga. 188.

14. Biggs *v.* Rickards, 3 Harr. (Del.) 283; McQuade *v.* Emmons, 38 N. J. L. 397; Wesley *v.* Sharpe, 19 Pa. Super. Ct. 600.

Until served on the justice a certiorari is no supersedeas. Biggs *v.* Rickards, 3 Harr. (Del.) 283.

Where a recognizance is required, a bond will not have the effect of a supersedeas. Thomas *v.* Glasgow, 2 Pa. Dist. 711.

15. Vanderhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. 792.

16. Macon *v.* Snaw, 14 Ga. 162; Blanchard *v.* Myers, 9 Johns. (N. Y.) 66.

17. *In re* Freeny, 2 Marv. (Del.) 114, 42 Atl. 422.

18. Perryman *v.* Burgster, 6 Port. (Ala.) 99; Dicus *v.* Bright, 23 Ark. 107; Payson *v.* Everett, 12 Minn. 216; Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609; Martin *v.* Beckwith, 4 Wis. 219.

It is the duty of the justice to make his

the duty of the plaintiff in certiorari to have the return duly made.[19] Where the justice has removed from the state, the return may be made by the party's taking from his docket a true copy of the record, annexing it to the writ, returning it to the court, and proving by competent evidence that it is a copy of the record.[20] A party waives all informalities in a justice's return to a writ sued out by him, where he goes to trial on it without objection.[21]

b. Scope and Contents of Return or Record. The original papers are not sent up in answer to a writ of certiorari,[22] but a transcript of his record, as of the date of the service of the writ,[23] which must state the cause of the action, proceedings, and judgment.[24] The evidence before the justice need not be returned,[25] unless its return is ordered by the court;[26] and generally the return need not show matters not called for by the petition.[27]

c. Sufficiency of Return or Record. While all the proceedings before the justice must be returned,[28] his return or record will be liberally construed and held sufficient if possible;[29] and even where the return is insufficient or incorrect, the writ will not be quashed or the proceedings dismissed, but the justice will be ordered to make an amended return.[30] In Georgia the magistrate may either set out the evidence, or adopt as correct the brief of evidence in the petition.[31]

d. Exceptions. A party dissatisfied with the return of a justice to a writ of certiorari must file exceptions, or a traverse, thereto within the time prescribed

return from his minutes and his best recollection. Martin *v.* Beckwith, 4 Wis. 219.

"The above is all the testimony," at the end of the report of testimony, is sufficient as a certificate. Payson *v.* Everett, 12 Minn. 216.

Certificate held insufficient see Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609.

19. Teter *v.* Cook, 2 Pa. Co. Ct. 171.

20. Ball *v.* Van Houten, 4 N. J. L. 32.

21. McGrew *v.* Adams, 2 Stew. (Ala.) 502.

22. Barfield *v.* McCombs, 89 Ga. 799, 15 S. E. 666. But *compare* Bell *v.* Killcrease, 11 Ala. 685, in which the original papers were sent up, and it was held that the court should require the appellant to assign errors, without awarding an alias certiorari to bring up copies.

23. "The law is well settled that in obedience to the writ the record must be certified and returned in the condition in which it was when the writ came to the court below. It must neither be increased nor diminished. As the writ finds it, so it must go." Bee *v.* Seaman, 36 W. Va. 381, 387, 15 S. E. 173.

24. Means *v.* Stephenson, Tapp. (Ohio) 283.

Cause of action must show justice's jurisdiction.— Ball *v.* Hall, (Del. 1904) 58 Atl. 1024; Groh *v.* Firestone, 16 Lanc. L. Rev. (Pa.) 382; Schaale *v.* Granat, 14 York Leg. Rec. (Pa.) 184.

Acceptance and approval of bond by justice must be shown.— Lowe *v.* Wallace, 74 Ga. 402; Hester *v.* Keller, 74 Ga. 369.

Security for costs.—A justice may, in connection with his answer, return the fact that security for costs was filed, and send up the undertaking. Monroe *v.* Heintzman, 46 Mich. 12, 8 N. W. 571; McLean *v.* Isbell, 44 Mich. 129, 6 N. W. 210.

25. New Jersey S. P. C. A. *v.* Mickeloit, (N. J. Sup. 1903) 54 Atl. 559; Lloyd *v.* Richman, 57 N. J. L. 385, 30 Atl. 432; Germantown *v.* Zinck, 1 Ashm. (Pa.) 64; Stohler *v.* Vogle, 17 Lanc. L. Rev. (Pa.) 126. But see Southern R. Co. *v.* Leggett, 117 Ga. 31, 43 S. E. 421, where it was held that the answer should incorporate the evidence at the trial or adopt the statement of such evidence contained in the petition.

26. Dodge *v.* Coddington, 3 Johns. (N. Y.) 146.

27. Ballard Transfer Co. *v.* Clark, 91 Ga. 234, 18 S. E. 138.

28. Cecil *v.* Barber, 3 Wis. 297.

29. Returns held sufficient see Sullivan *v.* Robinson, 39 Ala. 613; Jump *v.* Jones, 3 Pennew. (Del.) 163, 50 Atl. 539; Wright *v.* Moran, 43 N. J. L. 49; Lucas *v.* Smedley, 8 Del. Co. (Pa.) 18; French *v.* Pennsylvania, etc., Canal, etc., Co., 1 Leg. Chron. (Pa.) 66. See also Stone Imp. Co. *v.* Shank, 19 Lanc. L. Rev. (Pa.) 173. *Compare* Dancer *v.* Patterson, 10 N. J. L. 255. "It would be unreasonable to expect of justices of the peace a return to a certiorari drawn up with strict legal precision. It is obvious that they must be unacquainted with the forms of action. Care must be taken that they do not exceed their jurisdiction, but captious exceptions must not be allowed." Finney *v.* McMahon, 1 Yeates (Pa.) 248, 249.

30. St. Georges Marsh Co. *v.* Jefferson, 3 Pennew. (Del.) 241, 50 Atl. 58; Star Glass Co. *v.* Longley, 64 Ga. 576; Wells *v.* Flowers, 41 Ga. 327; State *v.* Kirby, 5 N. J. L. 835.

31. Tyner *v.* Leake, 117 Ga. 990, 44 S. E. 812; Proctor *v.* Rhodes, 112 Ga. 110, 37 S. E. 171; Davis *v.* Rhodes, 112 Ga. 106, 37 S. E. 169. *Compare* Southern R. Co. *v.* Leggett, 117 Ga. 31, 43 S. E. 421.

Form of answer held a sufficient verification of statements of fact in petition see Harris *v.* Daly, 121 Ga. 511, 49 S. E. 609.

by statute or rule of court, or his objections will not be considered.[32] Exceptions to the answer, founded on matters not referred to in the petition and not essential to the adjudication of the errors complained of, may be overruled or disregarded.[33]

e. Amendment and Further Return. Upon a proper showing of errors in, or diminution of, the record, made before the commencement of the hearing in the higher court,[34] the justice may be compelled to amend his return or make a new or further return.[35] So too the justice may be allowed to amend his return,[36] provided he does not thereby contradict his first return.[37]

f. Conclusiveness. In most jurisdictions the justice's return to a writ of certiorari is conclusive as to all facts required by law to be kept of record;[38] but as

32. Proctor *v.* Rhodes, 112 Ga. 110, 37 S. E. 171; Davis *v.* Rhodes, 112 Ga. 106, 37 S. E. 169; Western, etc., R. Co. *v.* Poe, 112 Ga. 90, 37 S. E. 119; Snyder *v.* Bauchman, 8 Serg. & R. (Pa.) 336; Dubosq *v.* Guardians of Poor, 1 Binn. (Pa.) 415; Com. *v.* Savery, 1 Chest. Co. Rep. (Pa.) 179; Lucas *v.* Smedley, 8 Del. Co. (Pa.) 18; Com. *v.* Blessington, 3 Lanc. L. Rev. (Pa.) 153; Sauser *v.* Werntz, 1 Leg. Chron. (Pa.) 249.

Exceptions need not be verified, unless verification is required by statute. Rumph *v.* Cleveland, 72 Ga. 189.

Traverse may be verified by attorney.— Georgia, etc., R. Co. *v.* Sizer, 121 Ga. 801, 49 S. E. 737.

33. Barfield *v.* McCombs, 89 Ga. 799, 15 S. E. 666.

34. **Time of amendment.—**Wyatt *v.* Turner, 40 Ga. 36; Beyerly *v.* Hunger, 1 Woodw. (Pa.) 354.

A clerical error in copying the record may be amended after judgment. Day *v.* Wilber, 2 Cai. (N. Y.) 134.

35. *Alabama.*— Perryman *v.* Burgster, 6 Port. 99.

Iowa.— Acres *v.* Hancock, 4 Iowa 568.

Michigan.— Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485.

New Jersey.— State *v.* Kirby, 5 N. J. L. 835; Farley *v.* Sergeant, 2 N. J. L. 141.

New York.— Cutler *v.* Gidney, 1 Cow. 571; Schuyler *v.* Warner, 1 Cow. 59. *Compare* Rudd *v.* Baker, 7 Johns. 548, in which contradictory supplementary returns were made by the justice and declined to be received by the court.

Pennsylvania.— Davenport *v.* Mahon, 6 Kulp 350.

Texas.— Shepard *v.* Duke, (Civ. App. 1894) 28 S. W. 567.

Wisconsin.— Cecil *v.* Barber, 3 Wis. 297.

See 31 Cent. Dig. tit. "Justices of the Peace," § 797.

The correct practice is to move for a rule against the justice to make certain amendments shown to be material, and if he fails to do so then to show cause; and if the cause shown is insufficient a mandamus should be awarded. Perryman *v.* Burgster, 6 Port. (Ala.) 99.

Where the justice is present, an amendment, allowed on oral motion in open court, will not afterward be stricken out. Burruss *v.* Smith, 75 Ga. 710.

Whether the original record can be ordered up see Prickett *v.* Herring, 4 Harr. (Del.) 365.

Statements not made a part of the record cannot be incorporated by amendment. Reed *v.* De Wolf, Wright (Ohio) 418.

Motion for second amendment refused see Simpson *v.* McBride, 78 Ga. 297.

36. Monroe *v.* Reynells, 131 Mich. 259, 90 N. W. 1065; Wertzler *v.* Herchelroth, 8 Pa. Dist. 423; Jervis *v.* McFarlan, 1 Chest. Co. Rep. (Pa.) 137.

37. Stambaugh *v.* Baker, 10 Pa. Dist. 79. See also Searing *v.* Lum, 5 N. J. L. 683, where it was held that after a justice has made up his record, and delivered a copy to a party, upon which a certiorari is brought, he cannot alter the record and send up a different transcript.

38. *Alabama.*— In certiorari to review the judgment of a justice of the peace, evidence that the recitals of the record that defendants appeared and that amendments were filed at a certain time were untrue is not admissible. Webb *v.* McPherson, 142 Ala. 540, 38 So. 1009.

Delaware.— Hudson *v.* Messick, 1 Houst. 275; Betts *v.* Warren, 5 Harr. 4; Runyan *v.* Dickenson, 4 Harr. 243.

Georgia.— The answer to the writ, when not excepted to or traversed, will alone be considered in ascertaining what occurred upon the trial below (Bonds *v.* Berdett, 113 Ga. 113, 38 S. E. 304; Artope *v.* Macon, etc., R. Co., 110 Ga. 346, 35 S. E. 657; Hopkins *v.* Southern R. Co., 110 Ga. 85, 35 S. E. 307); and when traversed, but sustained, the same is true (White *v.* Burnett, 113 Ga. 151, 38 S. E. 332).

Louisiana.— State *v.* Riley, 43 La. Ann. 177, 8 So. 598.

Michigan.— Wetmore *v.* Dean, 139 Mich. 627, 103 N. W. 166; Hinchman *v.* Spaulding, 137 Mich. 655, 100 N. W. 901; Nicolls *v.* Lawrence, 30 Mich. 395. See also Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 905, where it was held that when the return is as to facts not required by the statute to be entered on the docket, the return must be taken as true.

New Jersey.— Meirs *v.* Bussom, 57 N. J. L. 383, 40 Atl. 433.

New York.— People *v.* Powers, 19 Abb. Pr. 99. See also Post *v.* Black, 5 Den. 66.

Pennsylvania.— Ritter *v.* Keller, 2 Pa. Dist. 519; Haggerty *v.* Wurzburger, 6 Kulp 416;

between the record and return the former controls, and cannot be contradicted by the latter.[39]

g. Questions Presented For Review. On certiorari to review the judgment of a justice of the peace, nothing outside of the return or record can be considered by the reviewing court.[40]

9. Proceedings Preliminary to Hearing — a. Amendment of Process or Pleadings. On certiorari to a justice of the peace, neither process nor pleadings are amendable,[41] unless the amendment is allowed by statute.[42]

b. Assignment of Errors. In North Carolina, when a writ of recordari is sued out, plaintiff in the writ must, upon the return of the proceedings before the justice, assign his errors, and then the proceedings will be the same as on a writ of error.[43]

c. Dismissing or Quashing Writ — (i) *Grounds.* It is good ground for the dismissal of a writ of certiorari that it has been improvidently granted,[44] that the conditions on which it was granted have not been complied with,[45] that an invalid bond has been given,[46] that plaintiff in the writ has failed to prosecute it,[47] that the suit was dismissed before the petition was filed,[48] or that the judgment has been satisfied.[49] On the other hand it is no ground of dismissal that the justice has failed to file the original papers,[50] that the record on appeal fails to show that the

Saul *v.* Geist, 1 Woodw. 306. *Compare* Com. *v.* Blessington, 3 Lanc. L. Rev. 153, in which the record had been falsified, and parol evidence was admitted to prove the facts.

Wisconsin.— Fulton *v.* State, 103 Wis. 238, 79 N. W. 234, 74 Am. St. Rep. 854.

See 31 Cent. Dig. tit. "Justices of the Peace," § 798.

Contra, under Gantt Dig. Ark. §§ 1196, 1197. Hickey *v.* Matthews, 43 Ark. 341.

Where the record is ambiguous, equivocal, or inconclusive, it may be aided by parol evidence. Beyerly *v.* Hunger, 1 Woodw. (Pa.) 354.

Proof is allowed against the record of a fact which the justice was bound, but refused to enter on his record. Calaway *v.* Calaway, 3 Harr. (Del.) 84.

39. Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 905; Cassidy *v.* Millerick, 52 Wis. 379, 9 N. W. 165.

40. *Alabama.*— Bolin *v.* Sandlin, 124 Ala. 578, 27 So. 464, 82 Am. St. Rep. 209.

Arkansas.— Dicus *v.* Bright, 23 Ark. 107; Miller *v.* McCullough, 21 Ark. 426; Hill *v.* Steel, 17 Ark. 440.

Georgia.— If there are no exceptions or traverse to the return, nothing can be considered outside it. Childs *v.* Moran, 114 Ga. 320, 40 S. E. 271; Carter *v.* Garrett, 113 Ga. 1058, 39 S. E. 462; Knowles *v.* Coachman, 109 Ga. 356, 34 S. E. 607; Dunn *v.* Patterson, 108 Ga. 763, 33 S. E. 51; Gartrell *v.* Linn, 79 Ga. 700, 4 S. E. 918; Simpson *v.* McBride, 78 Ga. 297; Akridge *v.* Watertown Steam Engine Co., 77 Ga. 50; Warren *v.* Wilson, 63 Ga. 372. *Compare* Barnett *v.* Tant, 115 Ga. 659, 42 S. E. 65.

Michigan.— People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; McGraw *v.* Schwab, 23 Mich. 13.

Minnesota.— Taylor *v.* Bissell, 1 Minn. 225; Gervais *v.* Powers, 1 Minn. 45.

Pennsylvania.— Overseers of Coventry *v.* Cummings, 2 Dall. 114, 1 L. ed. 312; Missemer *v.* Trout, 17 Pa. Co. Ct. 317; Moore *v.* Messersmith, 12 Pa. Co. Ct. 575; Cartright *v.* Rooney, 1 Kulp 493; Schoendman *v.* Glanz, 2 Lanc. L. Rev. 358; Lancaster *v.* Hirsh, 1 Lanc. L. Rev. 209; Wilson *v.* Wilson, 3 Pa. L. J. Rep. 419.

Wisconsin.— Paulsen *v.* Ingersoll, 62 Wis. 312, 22 N. W. 477; Smith *v.* Bahr, 62 Wis. 244, 22 N. W. 438.

See 31 Cent. Dig. tit. "Justices of the Peace," § 799.

41. Ritter *v.* Daniels, 47 Mich. 617, 11 N. W. 409; Hildreth *v.* Reilly, 2 Kulp (Pa.) 270.

42. Harvey *v.* Rickett, 15 Johns. (N. Y.) 87; Bergstrom *v.* Bruns, (Tex. Civ. App. 1893) 24 S. W. 1098; Harris *v.* Parker, (Tex. Civ. App. 1898) 46 S. W. 844. *Compare* Hill *v.* Faison, 27 Tex. 428; Barrett *v.* Habern, 22 Tex. Civ. App. 207, 54 S. W. 644.

43. Swain *v.* Smith, 65 N. C. 211; Leatherwood *v.* Moody, 25 N. C. 129.

44. Elliott *v.* Mitchell, 3 Greene (Iowa) 237; Leech *v.* Irwing, 2 How. (Miss.) 887; Wood *v.* Rich, 8 Tex. 280; Perdew *v.* Steadham, 8 Tex. 274; O'Brien *v.* Dunn, 5 Tex. 570.

Upon recordari on appeal from a justice, if it appears that the proceedings in an action of forcible entry and detainer before the justice were regular, and that the jury found that the relators had a fee-simple estate in the land, and were forcibly ejected therefrom, the writ should be dismissed. Little *v.* Martin, 61 N. C. 240.

45. O'Brien *v.* Dunn, 5 Tex. 570.

46. Southern R. Co. *v.* Goodrum, 115 Ga. 689, 42 S. E. 49.

47. Johnson *v.* Grand Fountain U. O. of T. R., 135 N. C. 385, 47 S. E. 463.

48. Darby *v.* Davidson, 27 Tex. 432.

49. State *v.* Laurendeau, 27 Mont. 522, 71 Pac. 754.

50. Peck *v.* Reed, 3 Tex. App. Civ. Cas. § 265.

writ was served, or that the papers were produced,[51] or that the account sued on did not contain the full first name of plaintiff.[52] In Wisconsin the proper practice is for the appellate court to affirm or reverse the judgment, and not dismiss the writ.[53]

(II) *Time of Motion.* A motion to dismiss or quash a writ of certiorari must be made at the earliest moment,[54] usually the first term.[55]

(III) *Hearing on Motion.* In considering a motion to dismiss proceedings to carry up a case by certiorari, the transcript should be looked to in determining the merits of the motion.[56] Counter-affidavits controverting the statements of the petition are not admissible,[57] but the papers of the justice may be read to negative its allegations.[58]

(IV) *Judgment on Dismissal.* Independently of statute,[59] the court should not, on dismissing a writ of certiorari, affirm the judgment below,[60] or render judgment against the petitioner and his sureties for the amount of the justice's judgment.[61] But a judgment for costs and awarding a procedendo is proper.[62]

(V) *Effect of Dismissal.* The quashing or dismissal of a writ of certiorari is usually equivalent to a judgment that the writ ought never to have been granted, and revives the judgment of the court below;[63] but where the writ is dismissed because of the failure of plaintiff to prosecute, such dismissal does not revive a judgment in his favor in the lower court.[64] In Georgia a certiorari from a justice is a suit, which, if dismissed, may be renewed within six months after the dismissal,[65] unless the original certiorari was void.[66]

10. Hearing — a. Scope of Review. On certiorari to review the judgment of a justice of the peace, the court will only consider objections which go to the merits,[67] merely technical and formal objections being disregarded.[68] The act

51. Robinson *v.* Mhoon, 68 Miss. 712, 9 So. 887.

52. Lockhart *v.* Woollacott, 8 N. M. 21, 41 Pac. 536.

53. Owens *v.* State, 27 Wis. 456.

54. Hatterman *v.* Thompson, 83 Ill. App. 217; Harlan *v.* Tripp, 7 Pa. Dist. 382; Chappell *v.* Jones, 8 Humphr. (Tenn.) 107.

55. Wheelock *v.* Wright, 4 Stew. & P. (Ala.) 163; Uhles *v.* Nolen, 2 Coldw. (Tenn.) 529; Nance *v.* Hicks, 1 Head (Tenn.) 624; Holt *v.* McCasky, 14 Tex. 229; Mowery *v.* Lawson, 12 Tex. 31; Steinlein *v.* Dial, 10 Tex. 268; Brown *v.* Sphor, (Tex. App. 1890) 16 S. W. 866; Western Union Tel. Co. *v.* Blanton, 3 Tex. App. Civ. Cas. § 347; Peck *v.* Reed, 3 Tex. App. Civ. Cas. § 265; Park *v.* Sanger, 3 Tex. App. Civ. Cas. § 196.

Where the record does not show the required notice, the writ should not be dismissed at the first term for want of prosecution, but the cause should be continued until the next term, in order that the proper notice may be given. Kane *v.* Gammell, 50 Ala. 492.

A motion on the first day of the term is premature, since justices have the first day to make return to the writ. Hill *v.* Young, 3 Mo. 337.

56. Rea *v.* Raley, (Tex. Civ. App. 1896) 37 S. W. 169 [*citing* Seeligson *v.* Wilson, 58 Tex. 369; Darby *v.* Davidson, 27 Tex. 432; Jones *v.* Nold, 22 Tex. 379; Nelson *v.* Hart, (Tex. Civ. App. 1893) 23 S. W. 83]. See also Edde *v.* Cowan, 1 Sneed (Tenn.) 290; Hearn *v.* Foster, 21 Tex. 401; Crawford *v.* Crain, 19 Tex. 145.

57. Nance *v.* Hicks, 1 Head (Tenn.) 624; Von Koehring *v.* Schneider, 24 Tex. Civ. App. 469, 60 S. W. 277.

58. McCorkle *v.* Brooks, 6 Heisk. (Tenn.) 601.

59. Under Tenn. Code, §§ 3124, 3137, 3138, the proper practice, on dismissing a petition for a writ of certiorari and supersedeas, is to render judgment in the higher court for the amount of the justice's judgment, with interest at twelve and one-half per cent per annum, against the principal and sureties in the certiorari bond. Lownes *v.* Hunter, 2 Head (Tenn.) 343; Allen *v.* Wood, 1 Head (Tenn.) 438.

60. Ahrens *v.* Giesecke, 9 Tex. 432.

61. Ward *v.* McRimmond, 12 Tex. 314.

62. Jones *v.* Williams, 2 Swan (Tenn.) 105.

63. Standifer *v.* Bush, 8 Sm. & M. (Miss.) 383; Miller *v.* Holtz, 23 Tex. 138.

Dismissal as to all but one appellant.— Where a joint judgment against several defendants is taken up by certiorari, which is dismissed as to all but one, plaintiff may prosecute his claim against that one in the appellate court, unless the judgment is satisfied by the other defendants. Osborne *v.* Poe, 6 Humphr. (Tenn.) 111.

64. Miller *v.* Holtz, 23 Tex. 138, in which plaintiff failed to comply with a rule of the court ordering him to give security for costs.

65. Smith *v.* Bryan, 60 Ga. 628.

66. Southern R. Co. *v.* Goodrum, 115 Ga. 689, 42 S. E. 49 [*distinguishing* Grimes *v.* Jones, 48 Ga. 362].

67. Hart *v.* Port Huron Tp., 46 Mich. 428, 9 N. W. 481.

68. Wilkinson *v.* Williams, 51 Mich. 155,

complained of must have constituted a judgment,[69] and the court will not consider any error not alleged in the petition or affidavit,[70] unless of a substantial and fatal character.[71]

b. Mode of Review — (i) *In General.* The mode of review on certiorari to justices of the peace is largely dependent on statute. Under some statutes the court sits merely as a court of error,[72] while under others it reviews the case upon the merits.[73] As a rule neither parol evidence,[74] nor affidavits and depositions,[75] are admissible, the case being heard by the court on the return or record,[76] and it has no power to direct an issue to try disputed facts.[77]

(ii) *Trials De Novo.* In some jurisdictions the statutes provide that on certiorari to review the decision of a justice of the peace the case shall be tried *de novo* on the merits.[78]

16 N. W. 319; Picket *v.* Weaver, 5 Johns. (N. Y.) 122; Martin *v.* Beckwith, 4 Wis. 219. *Compare* Bullock *v.* Ueberroth, 121 Mich. 293, 80 N. W. 39, where it was held that the rule (Howell Annot. St. § 7044) does not relieve plaintiff from proving each essential part of his case.

Misjoinder of causes of action not a technical objection see Hibbard *v.* Bell, 3 Pinn. (Wis.) 190, 3 Chandl. 206.

69. Weedon *v.* Clark, 94 Ala. 505, 10 So. 307.

70. Richards *v.* Little, 88 Ga. 176, 14 S. E. 207; Westbrook *v.* Blood, 50 Mich. 443, 15 N. W. 544. On the hearing of a certiorari, the judge can decide such questions only as are raised by assignments of error in the petition and verified by the answer, and the judge on the hearing of a certiorari sued out by plaintiff in an action in a magistrate's court properly overruled a motion to dismiss plaintiff's original case. Casey *v.* Crane, 122 Ga. 318, 50 S. E. 92.

Reasons for judgment.—Where the payee of a note providing that title to the personalty sold shall remain in the seller until the price is paid attempts to foreclose it as a bill of sale, and the purchaser endeavors to arrest the proceedings by an affidavit of illegality, a judgment of the justice refusing to entertain jurisdiction of such affidavit should not be disturbed on certiorari without reference to the reason which he gave for such judgment. Berry *v.* Robinson, 122 Ga. 575, 50 S. E. 378.

71. Fraelich *v.* Mourer, 1 Lanc. L. Rev. (Pa.) 49; Paine *v.* Godshall, 29 Leg. Int. (Pa.) 12; Hunter *v.* Weidner, 1 Woodw. (Pa.) 6.

72. See Searl *v.* Richey, 5 Ind. 199, construing Rev. St. (1843).

73. Arnold *v.* Lewis County Ct., 38 W. Va. 142, 18 S. E. 476; Bee *v.* Seaman, 36 W. Va. 381, 15 S. E. 173; Natural Gas Co. *v.* Healy, 33 W. Va. 102, 10 S. E. 56 [all in effect *overruled* by Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653].

74. **In Mississippi** where, on certiorari to a justice because of his retention of and failure to approve an appeal-bond, the papers are ordered sent up to the circuit court, on production of the papers it should take evidence as to the retention of the appeal-bond and as to its solvency, and, if satisfied that such retention was illegal and the bond good, should try the case on the merits. Robinson *v.* Mhoon, 68 Miss. 712, 9 So. 887.

In Pennsylvania parol evidence is not admissible, except to establish the justice's want of jurisdiction, his corruption, his refusal to hear testimony, or the fact of his having given judgment on the oath of the party alone. Mill Creek Road Com'rs *v.* Fickinger, 51 Pa. St. 48. See also and *compare* Fisher *v.* Nyce, 60 Pa. St. 107; Heaney *v.* Faust, 20 Pa. Co. Ct. 73; Johnson *v.* Green, 17 Pa. Co. Ct. 77; Fronheiser *v.* Werner, 14 Pa. Co. Ct. 522; Myers *v.* Stauffer, 5 Pa. Co. Ct. 657; Bloom *v.* Alexander, 5 Pa. Co. Ct. 553; Parkes *v.* Diehm, 5 Pa. Co. Ct. 146; Dunfee *v.* Vargason, 3 Pa. Co. Ct. 207; Spidle *v.* Robison, 2 Pa. Co. Ct. 642; Light *v.* Ringler, 1 Pa. Co. Ct. 156; Knight *v.* Parry, 1 Ashm. 221; Dumber *v.* Jones, 1 Ashm. 215; Fitzsimmons *v.* Evans, 1 Ashm. 52 note; Curran *v.* Atkinson, 1 Ashm. 51; Com. *v.* King, 1 Chest. Co. Rep. 203; Tammany Furniture Co. *v.* Dewey, 10 Kulp 198; Beynon *v.* Peterson, 7 Kulp 259; Shultz *v.* Sweigart, 2 Lanc. Bar, June 4, 1870; Torbert *v.* Yocum, 2 Leg. Chron. 319; Carey *v.* Branch No. 2, 1 Leg. Chron. 170; Graham *v.* James, 13 Wkly. Notes Cas. 279.

75. Gildea *v.* Hill, 115 Ga. 136, 41 S. E. 492; Stroner *v.* Prokop, 30 Ill. App. 56; Morrison *v.* Lowry, 3 Lack. Leg. N. (Pa.) 190; City *v.* Hirsch, 1 Lanc. L. Rev. (Pa.) 209.

Where the justice dies before making return, the court will hear the case on affidavits. Seymour *v.* Webster, 1 Cow. (N. Y.) 168.

Want of jurisdiction shown by depositions see Shefler *v.* Hess, 5 Pa. Co. Ct. 145; Cummins *v.* Leopard, 4 Kulp (Pa.) 430; Goodman *v.* Moyer, 1 Woodw. (Pa.) 92; Rhoads *v.* Wesner, 1 Woodw. (Pa.) 79.

Matters not otherwise to be proved shown by affidavits or depositions see Olcott *v.* Jenkins, 14 N. J. L. 80; Henley *v.* Potter, 3 Pa. Co. Ct. 206; Jones *v.* Pettit, 4 Wkly. Notes Cas. (Pa.) 14.

Facts on which attachment was decided shown by affidavits see Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023.

76. See *supra*, V, B, 8, g.

77. Pool *v.* Morgan, 10 Watts (Pa.) 53.

78. Guscott *v.* Roden, 112 Ala. 632, 21 So. 313; Cofer *v.* Reinschmidt, 121 Ala. 252, 25

c. Presumptions and Burden of Proof — (I) *Presumptions.* While it is generally held that no presumptions will be made in favor of a justice's jurisdiction,[79] every reasonable intendment consistent with the record will be made by the court in favor of the regularity of his proceedings.[80]

(II) *Burden of Proof.* Primarily the burden of proof on certiorari is upon the petitioner,[81] but it is held that his affidavit or petition is sufficient to shift the burden upon the adverse party.[82] Where, however, the justice makes affidavit to facts contradictory to those stated in the petition, the onus is cast upon the petitioner.[83]

d. Parties Entitled to Allege Error. To entitle a party to sue out a writ of certiorari, judgment must have been rendered against him,[84] by which he is injured.[85]

e. Questions Reviewable. What questions are open to review on certiorari to a justice of the peace is entirely dependent upon the statutes. In some jurisdictions only the regularity of the proceedings before the justice can be looked into;[86] in others only questions of law going to the merits of the action;[87] while in Wisconsin the only question open to review is whether the act complained of was within the justice's jurisdiction.[88]

So. 769; Boyd *v.* Woodfin, 3 Stew. (Ala.) 357; Gayle *v.* Turner, Minor (Ala.) 204. It is only when, on examination of the record, the proceedings appear to be null and void, that they should be avoided, and the respondent directed to try them anew. State *v.* Koenig, 39 La. Ann. 776, 2 So. 559; Boyers *v.* Webb. 1 Lea (Tenn.) 696; Perry *v.* Rohde, 20 Tex. 729; O'Brien *v.* Dunn, 5 Tex. 570; Brown *v.* Reed (Tex. Civ. App. 1901) 62 S. W. 73; Nixon *v.* Padgett, (Tex. Civ. App. 1900) 57 S. W. 854.

And see *supra*, V, B, 1.

79. Wight *v.* Warner, 1 Dougl. (Mich.) 384; McQuoid *v.* Lamd, 19 Mo. App. 153; Allen *v.* Stone, 9 Barb. (N. Y.) 60; McGovern *v.* McTague, 13 Lanc. Bar (Pa.) 119. But see State *v.* Roberts, 87 Wis. 292, 58 N. W. 409; Baizer *v.* Lasch, 28 Wis. 268.

80. *Delaware.* — Millaway *v.* Wilds, 4 Houst. 283; Kinniken *v.* Kinney, 4 Harr. 313.

Michigan. — Brown *v.* Knop, 137 Mich. 234, 100 N. W. 466, 101 N. W. 227; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042; Hatch *v.* Christmas, 68 Mich. 84, 35 N. W. 833; Marquette, etc., Rolling-Mill Co. *v.* Morgan, 41 Mich. 296, 1 N. W. 1045; Cicotte *v.* Morse, 8 Mich. 424.

New Jersey. — Lloyd *v.* Richman, 57 N. J. L. 385, 30 Atl. 432; Dodge *v.* Butler, 42 N. J. L. 370; Hull *v.* Martin, 12 N. J. L. 187; McCauly *v.* Barnes, 1 N. J. L. 52.

New York. — Low *v.* Payne, 4 N. Y. 247; Prosser *v.* Secor, 5 Barb. 607; Warring *v.* Loomis, 4 Barb. 484; Stafford *v.* Williams, 4 Den. 182; McInstry *v.* Tanner, 9 Johns. 135; Cobb *v.* Curtiss, 8 Johns. 470; Day *v.* Wilber, 2 Cai. 134.

Pennsylvania. — Buckmyer *v.* Dubs, 5 Binn. 29; Gibbs *v.* Alberti, 4 Yeates 373; Cooper *v.* Carpenter, 8 Pa. Dist. 499; Evans *v.* Brobst, 5 Pa. Dist. 30; Piatt *v.* Mathers, 22 Pa. Co. Ct. 193; Jervis *v.* McFarlan, 1 Chest. Co. Rep. 137; Harshey *v.* Mylin, 18 Lanc. L. Rev. 172; Douglass *v.* Lacey, 3 Leg. Gaz. 253; Hawk *v.* Walz, 7 North. Co. Rep. 100; Brown *v.* Quinton, 2 Pa. L. J. Rep. 169.

Texas. — Peabody *v.* Buentillo, 18 Tex. 313.

Wisconsin. — Cassidy *v.* Millerick, 52 Wis. 379, 9 N. W. 165; Healy *v.* Kneeland, 48 Wis. 497, 4 N. W. 586; Martin *v.* Beckwith, 4 Wis. 219.

See 31 Cent. Dig. tit. "Justices of the Peace," § 812.

81. Harris *v.* Boyle, 130 Mich. 470, 90 N. W. 293; Hull *v.* Martin, 12 N. J. L. 187.

82. Vansciver *v.* Bolton, 2 Dall. (Pa.) 114, 1 L. ed. 312; McDowell *v.* Turney, 5 Sneed (Tenn.) 225. See also Spivy *v.* Latham, 8 Humphr. (Tenn.) 703, where it was held that it is not necessary for a party who brings a case into the court by certiorari to prove the facts stated in his petition, in order to entitle him to a trial in that court, where the papers do not negative the material facts stated in his petition, although there is an absence of proof of the facts stated from the papers.

83. Ezell *v.* Holloway, 2 Baxt. (Tenn.) 15.

84. Okerlind *v.* Fyke, 90 Ill. App. 192.

85. A party who gains his case completely cannot, by writ of certiorari, have a review of alleged error committed by the justice, which resulted in no injury to him on the trial. Shope *v.* Fite, 91 Ga. 174, 16 S. E. 990.

86. Elder *v.* Fresno County Third Tp. Justice's Ct., 136 Cal. 364, 68 Pac. 1022; Noel *v.* Brown, 3 Pa. Co. Ct. 204; Gidding's Appeal, 4 Leg. Gaz. (Pa.) 114; Thomas *v.* Philadelphia, etc., R. Co., 2 Woodw. (Pa.) 104; Greenleaf *v.* Haberacker, 1 Woodw. (Pa.) 436; Sunday *v.* Shuler, 12 York Leg. Rec. (Pa.) 134.

87. Gray *v.* Willcox, 56 Mich. 58, 22 N. W. 109; McGraw *v.* Schwab, 23 Mich. 13.

88. Krueger *v.* Cone, 106 Wis. 522, 81 N. W. 984; Varrell *v.* Church, 36 Wis. 318; Frederick *v.* Clark, 5 Wis. 191.

f. Review of Evidence and Questions of Fact. Neither the evidence nor questions of fact will be reviewed on certiorari to a justice of the peace,[89] unless there is a total want of evidence to support the verdict or finding.[90]

g. Matters of Discretion and Harmless Error. On certiorari to a justice of the peace, the court will not consider matters within his discretion,[91] or error which is harmless.[92]

11. Determination and Disposition of Cause — a. In General. The grounds upon which the reviewing court will act in determining and disposing of a case brought before it on certiorari to review the judgment of a justice of the peace are too numerous to make an enumeration either practicable or profitable. According to the facts and circumstances of the particular case it will either affirm,[93]

89. *Georgia.*— Southern R. Co. *v.* Rollins, 121 Ga. 436, 49 S. E. 290; Singer Mfg. Co. *v.* Falls, 119 Ga. 54, 45 S. E. 723; Georgia Southern, etc., R. Co. *v.* Giddens, 117 Ga. 799, 45 S. E. 67; Ford *v.* Price, etc., Cider, etc., Co., 116 Ga. 793, 43 S. E. 69; Macon, etc., R. Co. *v.* Currell, 114 Ga. 361, 40 S. E. 238; Shields *v.* Mills, 111 Ga. 836, 36 S. E. 51; Penland *v.* Bleckley, 111 Ga. 813, 35 S. E. 664; Whitaker *v.* Arnold, 110 Ga. 857, 36 S. E. 231; Smith *v.* Coker, 110 Ga. 650, 36 S. E. 105; Politte *v.* Dryer, 110 Ga. 327, 35 S. E. 321; Durham *v.* Cantrell, 103 Ga. 166, 29 S. E. 708; Steele *v.* Cochran, 88 Ga. 296, 14 S. E. 617; Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921. Where the issue was whether defendant had rented certain premises for a term which had not expired prior to the time he sued out a distress warrant for rent, and the evidence was conflicting, the court did not err in refusing on certiorari to set aside the verdict in favor of defendant returned in a magistrate's court. Williams *v.* Mangum, 122 Ga. 295, 50 S. E. 110.

Louisiana.— State *v.* Patin, 47 La. Ann. 1533, 18 So. 507.

Massachusetts.— *In re* Hayward, 10 Pick. 358.

Michigan.— Crawford *v.* Byrnes, 112 Mich. 599, 71 N. W. 152; Whaley *v.* Gale, 48 Mich. 193, 12 N. W. 33; Cicotte *v.* Morse, 8 Mich. 424; Webber *v.* Hanke, 4 Mich. 198.

Minnesota.—De Rochebrune *v.* Southeimer, 12 Minn. 78.

New Jersey.—Paterson, etc., R. Co. *v.* Ackerman, 24 N. J. L. 535.

New York.— Bort *v.* Smith, 5 Barb. 283; Noyes *v.* Hewitt, 18 Wend. 141.

Pennsylvania.— Rickets *v.* Goldstein, 24 Pa. Co. Ct. 1; McManaman *v.* Klock, 9 Pa. Co. Ct. 302; Stohler *v.* Vogle, 17 Lanc. L. Rev. 126. But see Buckmyer *v.* Dubs, 5 Binn. 29, where it was held that the court might, to prevent injustice, make inquiry into the evidence given before the magistrate.

South Carolina.— Morris *v.* Palmer, 44 S. C. 462, 22 S. E. 726.

West Virginia.— Wilson *v.* West Virginia Cent., etc., R. Co., 38 W. Va. 212, 18 S. E. 577.

Wisconsin.— Driscoll *v.* Smith, 59 Wis. 38, 7 N. W. 876; Callon *v.* Sternberg, 38 Wis. 539; Baizer *v.* Lasch. 28 Wis. 268; Persons *v.* Burdick, 6 Wis. 63; Frederick *v.* Clark, 5 Wis. 191.

See 31 Cent. Dig. tit. "Justices of the Peace," § 816.

90. Hyde *v.* Nelson, 11 Mich. 353; Berry *v.* Lowe, 10 Mich. 9; Bort *v.* Smith, 5 Barb. (N. Y.) 283.

In Georgia where there is no sufficient evidence to support the verdict of a jury in a justice's court, a certiorari setting up such want of evidence should be sustained. Hudgins *v.* Lampkin, 118 Ga. 842, 45 S. E. 679; Walker *v.* Crawford, 114 Ga. 316, 40 S. E. 254.

91. Galley *v.* Davenport, 1 Ashm. (Pa.) 149; O'Niel *v.* Whitecar, 1 Phila. (Pa.) 446.

92. Simpson *v.* McBride, 78 Ga. 297; Bowen *v.* Ferne, 16 Johns. (N. Y.) 161; Grube *v.* Getz, 3 Pa. Co. Ct. 124; Brown *v.* Quinton, 2 Pa. L. J. Rep. 169; Livingood *v.* Moyer, 2 Woodw. (Pa.) 65; Huntsman *v.* Jarvis, 17 Tex. 161. Error in admitting immaterial and irrelevant evidence not calculated to prejudice plaintiff would not require another hearing of the case in the magistrate's court. Willims *v.* Mangum, 122 Ga. 295, 50 S. E. 110.

93. *Georgia.*— Barnett *v.* Tant, 115 Ga. 659, 42 S. E. 65; Simpson *v.* McBride, 78 Ga. 297; Matthews *v.* Dawson, 75 Ga. 889.

Iowa.— The court may either affirm the judgment or render a new one, as the right of the matter may appear. Wright *v.* Phillips, 2 Greene 191.

New Jersey.— Where a copy of account or state of demand does not appear on certiorari, judgment cannot be affirmed. Satterly *v.* Brown, 2 N. J. L. 162; Addis *v.* Evans, 2 N. J. L. 142.

New York.—Where the sole object of a certiorari is to subject defendant in error to the costs thereof, he is entitled to judgment. Potter *v.* Smith, 14 Johns. 444.

Pennsylvania.— Morton *v.* Plowman, 1 Yeates 251; Kaniper *v.* Kreidler, 9 Pa. Co. Ct. 91; Germantown Poor Relief, etc., Managers *v.* Zinck, 1 Ashm. 64.

See 31 Cent. Dig. tit. "Justices of the Peace," § 819.

If it appears that the justice was without jurisdiction, the court will not affirm the judgment, since an exception which goes to the jurisdiction is never too late. Herrigas *v.* McGill, 1 Ashm. (Pa.) 152.

A judgment vacated by the justice cannot

modify,[94] or reverse,[95] and where the only question before it is as to the justice's jurisdiction, it must either affirm or reverse.[96] When the right of a party to the writ depends on the facts proved or admitted before the higher court, it is the duty of that court to find and state the facts on which it proceeds to act, so that, in case of an appeal from its decision, the appellate court may know the facts.[97] In Alabama the court may, at a subsequent term, amend its judgment *nunc pro tunc*.[98]

b. New Trial in Appellate Court on Reversal. In some jurisdictions, when a judgment is reversed on certiorari, the cause is retained in the appellate court for trial *de novo* on the merits.[99]

c. New or Final Judgment. In a number of jurisdictions the reviewing court, on certiorari to a justice of the peace, may, instead of remanding the case, enter final judgment or such judgment as the justice should have entered,[1] and where

be affirmed on certiorari to the vacating order. McEneaney *v.* Dart, 9 Wash. 682, 38 Pac. 764.

94. *Georgia.*— Seaboard Air Line, etc., R. Co. *v.* Christian, 115 Ga. 742, 42 S. E. 66; Hirt *v.* Linton, 59 Ga. 881.

Minnesota.— Walker *v.* McDonald, 5 Minn. 455, construing Comp. St. c. 59, § 133.

New York.— Staats *v.* Hudson River R. Co., 39 Barb. 298.

Pennsylvania.— Connors *v.* Wonder, 1 Pa. Co. Ct. 577.

Wisconsin.— Hurlbut *v.* Wilcox, 19 Wis. 419.

See 31 Cent. Dig. tit. "Justices of the Peace," § 820.

95. *Delaware.*— If the records do not show that there was a hearing by and before the justice, and at that hearing he heard the proofs and allegations, and upon that rendered judgment, the judgment will be reversed. Toomy *v.* Dale, 1 Marv. 303, 40 Atl. 1114 [*following* Hoffecker *v.* Eaton, 2 Houst. 157].

Georgia.— Sing Wah *v.* Singer, 110 Ga. 299, 34 S. E. 1027. *Compare* Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921.

Iowa.— Wilson *v.* Albright, 2 Greene 125.

Michigan.— See Pew *v.* Yoare, 12 Mich. 16, where it was doubted whether a judgment should be reversed because for a larger amount than that alleged in the *ad damnum* of the declaration.

Minnesota.— Snow *v.* Hardy, 3 Minn. 77, in which it appeared that the jury had been guilty of gross misconduct.

New Jersey.— Paterson, etc., R. Co. *v.* Ackerman, 24 N. J. L. 535; Combs *v.* Johnson, 12 N. J. L. 244. See also Pinkney *v.* Ayres, 21 N. J. L. 694.

New York.— Baldwin *v.* Delevan, 2 Hill 125; Richards *v.* Walton, 12 Johns. 434; Pease *v.* Alexander, 7 Johns. 25; Dodge *v.* Coddington, 3 Johns. 146; Nicoll *v.* Dunlap, 2 Johns. 195.

Oregon.— Union County *v.* Slocum, 16 Oreg. 237, 17 Pac. 876.

Pennsylvania.— Earle *v.* Howarth, 8 Pa. Dist. 610; Rea *v.* Titman, 3 Pa. Dist. 458; Strause *v.* Scheurman, 13 Pa. Co. Ct. 332; Bloom *v.* Alexander, 5 Pa. Co. Ct. 553; Morrison *v.* Lowry, 3 Lack. Leg. N. 190; Larue *v.* Hagerty, 5 Phila. 530.

Texas.— Clay *v.* Clay, 7 Tex. 250.

West Virginia.— Morgan *v.* Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588.

Wisconsin.— Combs *v.* Dunlap, 19 Wis. 591; Clark *v.* Wood, 2 Pinn. 29.

See 31 Cent. Dig. tit. "Justices of the Peace," § 821.

On common-law certiorari a justice's judgment cannot be reversed for errors and irregularities, if he has jurisdiction to render it. Lewis *v.* Larson, 45 Wis. 353. See also Johnson *v.* Moss, 20 Wend. (N. Y.) 145.

Where the return shows nothing within the justice's judicial knowledge which would affect the validity of the judgment, it cannot be reversed. Alt *v.* Lalone, 54 Mich. 302, 20 N. W. 52.

An execution will not be set aside on certiorari, unless it is itself void. Garrigues *v.* Jackson, 1 Ashm. (Pa.) 218.

Refusal to change venue is not ground for reversal, where the justice legally entertained jurisdiction originally. The court should do no more than remand the case for a change of venue. State *v.* Lockhart, 18 Wash. 531, 52 Pac. 315.

Where a judgment is not void, but erroneous, as where it is rendered before the return-day, a certiorari to retry the case does not authorize the court, without trial, to quash the execution. Glover *v.* Holman, 3 Heisk. (Tenn.) 519.

96. Bandlow *v.* Thieme, 53 Wis. 57, 9 N. W. 920; Healy *v.* Kneeland, 48 Wis. 497, 4 N. W. 586.

97. Collins *v.* Gilbert, 65 N. C. 135.

98. Dumas *v.* Hunter, 30 Ala. 188.

99. Clark *v.* Dunlap, 2 Ind. 551; Brayton *v.* Freese, 1 Ind. 121; Evans *v.* Southern R. Co., 74 Miss. 230, 21 So. 15 (provided the court cannot enter up such judgment as the justice should have entered); Rigney *v.* Hutchins, 9 N. H. 257; Leatherwood *v.* Moody, 25 N. C. 129. See also Moore *v.* Austin, 85 N. C. 179. *Contra*, Davis *v.* Curtis, 2 Greene (Iowa) 575.

1. *Alabama.*— Richmond, etc., R. Co. *v.* Hutto, 102 Ala. 575, 14 So. 875.

Arkansas.— See Wise *v.* Yell, 7 Ark. 11.

Georgia.— Final judgment may be entered where no issue of fact is involved, but not otherwise. E. E. Forbes Piano Co. *v.* Owens, 120 Ga. 449, 47 S. E. 938; Widgeon *v.* South-

the judgment is for the party who had judgment in the lower court, it is proper to add interest to that judgment.[2] On such a judgment execution may at once issue,[3] or in a proper case an order of restitution be made.[4]

d. Remand and New Trial. Whenever a case cannot be finally disposed of in the reviewing court, it should be remanded to the justice for such further proceedings as may be required under the appellate judgment;[5] and in Georgia this must always be done when the case turns on questions of fact, or such questions are involved.[6] Where the justice's court is dissolved after its trial of the cause, the circuit court must determine the case upon certiorari and has no power to remand it.[7]

e. Judgment For Costs.[8] Where a case is taken up on certiorari, the reviewing court, in rendering judgment, may give judgment for the costs of suit,[9] and in

ern Express Co., 118 Ga. 841, 45 S. E. 679; Patterson *v.* Georgia Cent. R. Co., 117 Ga. 827, 45 S. E. 250; Williams *v.* Bradfield, 116 Ga. 705, 43 S. E. 57; Maxwell *v.* Collier, 115 Ga. 304, 41 S. E. 620; Cone Export, etc., Co. *v.* McCalla, 113 Ga. 17, 38 S. E. 336; Alabama Great Southern R. Co. *v.* Austin, 112 Ga. 61, 37 S. E. 91; Grimsley *v.* Alexander, 106 Ga. 165, 32 S. E. 24; Greenwood *v.* Boyd, etc., Furniture Factory, 86 Ga. 582, 13 S. E. 128; Bush *v.* Rawlins, 80 Ga. 583, 5 S. E. 761; Rome R. Co. *v.* Ransom, 78 Ga. 705, 3 S. E. 626; Hallett *v.* Blain, 56 Ga. 525, 58 Ga. 142. *Compare* Joseph *v.* Continental Jersey Works, 92 Ga. 542, 17 S. E. 923.

Michigan.— Ringelberg *v.* Peterson, 76 Mich. 107, 42 N. W. 1080; McDermid *v.* Redpath, 39 Mich. 372.

Mississippi.— McDugle *v.* Filmer, 79 Miss. 53, 29 So. 996.

New Jersey.—Smith *v.* Ocean Castle, No. 11, 59 N. J. L. 198, 35 Atl. 917.

Pennsylvania.— Atkinson *v.* Crossland, 4 Watts 450.

Texas.— Hotchkiss *v.* Chevaillier, 12 Tex. 224; Erwin *v.* Austin, 1 Tex. App. Civ. Cas. § 1037.

See 31 Cent. Dig. tit. "Justices of the Peace," § 823.

But see St. Martin *v.* Desnoyer, 1 Minn. 41; Pickler *v.* Rainey, 4 Heisk. (Tenn.) 335; Officer *v.* Price, 5 Yerg. (Tenn.) 285; Starkweather *v.* Sawyer, 63 Wis. 297, 23 N. W. 566; Dykens *v.* Munson, 2 Wis. 245; Phillips *v.* Geesland, 2 Pinn. (Wis.) 120, 1 Chandl. 57.

2. Richmond, etc., R. Co. *v.* Hutto, 102 Ala. 575, 14 So. 875; McDermid *v.* Redpath, 39 Mich. 372.

3. Long *v.* Shelly, 10 Phila. (Pa.) 506. See also Wertzler *v.* Herchelroth, 8 Pa. Dist. 426.

4. Peebles *v.* Morris, 77 Ga. 536, 3 S. E. 89; People *v.* Jackson Cir. Ct., 1 Dougl. (Mich.) 302; Paul *v.* Armstrong, 1 Nev. 82; *In re* Shotwell, 10 Johns. (N. Y.) 304. But see Sullivan *v.* Robinson, 39 Ala. 613.

Fine and costs. — The court, on reversing the judgment of a justice, is powerless to order restitution of a fine and costs voluntarily paid by defendant before the issuing of the certiorari. Com. *v.* Shofnoski, 5 Pa. Dist. 784.

5. Stafford *v.* Wilson, 122 Ga. 32, 49 S. E. 800; Patterson *v.* Georgia R. Co., 117 Ga. 827, 45 S. E. 250; Meirs *v.* Bussom, 57 N. J. L. 383, 30 Atl. 433; Drake *v.* Berry, 42 N. J. L. 60; Welker *v.* Welker, 3 Penr. & W. (Pa.) 21; Thompson *v.* McMillan, 89 Tenn. 110, 14 S. W. 439. *Compare* Whitney *v.* Crim, 1 Hill (N. Y.) 61.

Procedendo.—*Alabama.*— Derrett *v.* Alexander, 25 Ala. 265.

Mississippi.— The writ of procedendo lies only where there has been a neglect or refusal of justice by an inferior court. McGilvry *v.* Jackson, 4 How. 245.

New York.— See Ranney *v.* Crary, 3 Cai. 126.

Tennessee.— Mallett *v.* Hutchinson, 1 Head 558; Kincaid *v.* Morris, 10 Yerg. 252.

United States.— Blagden *v.* Broadrup, 30 Fed. Cas. No. 18,238, 2 Hayw. & H. 278.

See 31 Cent. Dig. tit. "Justices of the Peace," § 827.

On a writ of recordari to review a judgment rendered against an administrator personally for a debt of his intestate, where it appears that plaintiff was entitled to the judgment against the assets in the hands of the administrator, the case will be remanded, that the question of assets may be tried. Hare *v.* Parham, 49 N. C. 412.

6. Pike *v.* Sutton, 115 Ga. 688, 42 S. E. 58; Davis *v.* Rhodes, 112 Ga. 106, 37 S. E. 169; Holt *v.* Licette, 111 Ga. 810, 35 S. E. 703; Hunter *v.* Garrett, 104 Ga. 647, 30 S. E. 869; Mathis *v.* Bagwell, 101 Ga. 167, 28 S. E. 638; Pinkston *v.* White, (Ga. 1897) 27 S. E. 665; Tison *v.* Savannah, etc., R. Co., 97 Ga. 366, 24 S. E. 456; Barfield *v.* McCombs, 89 Ga. 799, 15 S. E. 666; Holliday *v.* Poole, 77 Ga. 159; Akridge *v.* Watertown Steam Engine Co., 77 Ga. 50; Georgia R. Co. *v.* Bird, 76 Ga. 13; Smith *v.* Wade, 65 Ga. 753; Sapp *v.* Adams, 65 Ga. 600.

A new trial must be had by another jury, and not by the presiding justice. Hall *v.* Carlisle, 92 Ga. 318, 18 S. E. 293.

No formal evidence of the judgment of the superior court is necessary on the new trial. Odell *v.* Dozier, 104 Ga. 203, 30 S. E. 813.

7. Thorn *v.* Reed, 1 Ark. 480.

8. Costs on appeal or certiorari to a justice's court see COSTS, 11 Cyc. 244 *et seq.*

9. Baker *v.* U. S., 1 Minn. 207; Lownes *v.* Hunter, 2 Head (Tenn.) 343; Norton *v.*

some jurisdictions, by statutory provision, the court may also add a certain amount as damages on affirmance.[10]

f. Review of Decisions. In most jurisdictions the statutes provide for a review of a judgment on certiorari to a justice of the peace by either an appeal or writ of error.[11]

C. Liabilities on Bonds or Other Securities[12] — **1. Sufficiency of Undertaking — a. In General.** As a general rule a bond or other undertaking on appeal, writ of error, or certiorari is sufficient if it is in substantial compliance with the requirements of the statute.[13] It must, however, be conditioned as prescribed by law;[14] must show that the judgment was rendered against the principal[15] and the court to which the appeal is taken;[16] must be for a definite sum;[17] must be signed, sealed,[18] and witnessed;[19] and must be approved by the justice or other officer.[20]

b. Unnecessary or Excessive Bond. Where a bond is given which is not required by law, or which contains more onerous conditions than are required, it can be enforced neither as a statutory nor as a common-law obligation.[21]

2. Void or Defective Appeal or Other Proceeding. Where an appeal or certiorari from or to the judgment of a justice of the peace is for any reason void or fatally defective, the weight of authority is to the effect that no liability

Walker, 19 Tex. 192. But see Berry *v.* Lowe, 10 Mich. 9.

Against justice.— But it has been held that in certiorari directed to a justice of the peace, who is the only party to the proceedings in the district court, it is error, on reversal of the judgment of that court, to give costs against such justice. Hamilton *v.* Spiers, 2 Utah 225.

10. Norton *v.* Walker, 19 Tex. 192; Lane *v.* Brander, 19 Tex. 160. But see Hudnall *v.* McCarta, Minor (Ala.) 402.

11. See the following cases:

Georgia.— Singer Mfg. Co. *v.* Cole, 78 Ga. 353; Holliday *v.* Poole, 77 Ga. 159; Born *v.* Dallas, 54 Ga. 499.

Illinois.— Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 337.

Michigan.— Bigalow *v.* Barre, 30 Mich. 1; Zeller *v.* Harris, 23 Mich. 286.

North Carolina.— Perry *v.* Whitaker, 77 N. C. 102.

Pennsylvania.— Mahanoy City *v.* Wadlinger, 142 Pa. St. 308, 21 Atl. 823; Clark *v.* Yeat, 4 Binn. 185.

West Virginia.— Morgan *v.* Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588.

See 31 Cent. Dig. tit. "Justices of the Peace," § 830.

Contra.— Rice *v.* Rasbury, 41 Tex. 421.

12. See, generally, Appeal and Error.

13. *Illinois.*—Shattuck *v.* People, 5 Ill. 477.

Indiana.— Covert *v.* Shirk, 58 Ind. 264.

Iowa.— Atkins *v.* McCready, 8 Iowa 214.

Massachusetts.— Martin *v.* Campbell, 120 Mass. 126; Peck *v.* Thompson, 5 Allen 388.

New Hampshire.— Dickey *v.* Livermore, 34 N. H. 199.

New York.— Teall *v.* Van Wyck, 10 Barb. 376; Weisbrod *v.* Marquardt, 8 Abb. N. Cas. 243.

Oklahoma.— Richardson *v.* Penny, 9 Okla. 655, 60 Pac. 501.

Pennsylvania.—Okeson *v.* Shirlock, 9 Watts & S. 142; Stroud *v.* Ukel, 2 Ashm. 122.

Tennessee.— Ellis *v.* Kolsky, (Ch. App. 1898) 52 S. W. 471.

Vermont.— McGregor *v.* Balch, 17 Vt. 562.

See 31 Cent. Dig. tit. "Justices of the Peace," § 735.

There is a distinction between a bond which depends for its consideration solely upon the requirements of the statute, and one which rests upon a consideration of its own. The latter may be enforced as a common-law obligation. Stevenson *v.* Morgan, 67 Nebr. 207, 93 N. W. 180, 108 Am. St. Rep. 629.

14. *Alabama.*— Reynolds *v.* Cox, 108 Ala. 276, 19 So. 395.

Arkansas.— Martin *v.* Tennison, 56 Ark. 291, 19 S. W. 922.

District of Columbia.— Tenney *v.* Taylor, 1 App. Cas. 223.

Illinois.— Sharp *v.* Bedell, 10 Ill. 88.

Iowa.— Wilson *v.* Knight, 3 Greene 126.

Pennsylvania.— Meeker *v.* Brackney, 35 Pa. St. 276; Donley *v.* Brownlee, 7 Pa. St. 109; King *v.* Culbertson, 10 Serg. & R. 325.

Tennessee.— Albertson *v.* McGee, 7 Yerg. 106.

Texas.— Gregory *v.* Goldthwaite, 2 Tex. Civ. App. 287, 21 S. W. 413.

See 31 Cent. Dig. tit. "Justices of the Peace," § 736.

The misrecital of the day of rendition is fatal.— People *v.* Monroe C. Pl., 3 Wend. (N. Y.) 426.

15. Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657.

16. Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657.

17. Williamson *v.* Mitchell, 1 Penr. & W. (Pa.) 9.

18. Whelan *v.* Sherron, Ga. Dec. Pt. II, 54.

19. Picot *v.* Hardison, 9 N. C. 532.

20. Cockrill *v.* Owen, 10 Mo. 287.

21. Freeman *v.* Hill, 45 Kan. 435, 25 Pac. 870; Lane *v.* Crosby, 42 Me. 327; Wattles *v.* Fuller, 2 Lack. Leg. N. (Pa.) 117.

accrues upon the bond or other security, the reason being that in such a case there is in effect no appeal or certiorari.[22]

3. Accrual of Liability — a. In General. Liability upon an appeal or certiorari bond or recognizance accrues upon the breach of any of its conditions.[23]

b. Affirmance of Judgment. The condition of an appeal or certiorari bond is broken upon the affirmance of the judgment complained of,[24] and this is true, although the judgment of affirmance is not rendered by the immediate, but by a higher, appellate court.[25] Where two defendants against whom a joint judgment is rendered make a joint appeal, and plaintiff recovers judgment against one of them alone, the sureties on the joint bond are liable.[26]

4. Release or Discharge of Sureties. While the obligation of a surety on an appeal or certiorari bond cannot be extended beyond the strict limits of his contract,[27] yet within those limits his obligation is absolute, and as a rule nothing short of a performance of its conditions,[28] release or waiver,[29] payment,[30] or

22. *Illinois.*— Lamonte *v.* Montebello, 21 Ill. App. 186.

Iowa.— Martin *v.* Crocker, 62 Iowa 328, 17 N. W. 533.

Kansas.— McCarthy *v.* Holden, 54 Kan. 313, 38 Pac. 261.

Missouri.— Brown *v.* Missouri Pac. R. Co., 85 Mo. 123; Garnet *v.* Rodgers, 52 Mo. 145; Seaton *v.* Chicago, etc., R. Co., 51 Mo. 500. But see Skidmore *v.* Hull, 33 Mo. App. 41.

New York.— Beach *v.* Springer, 4 Wend. 519.

Ohio.— Burris *v.* Peacock, 2 Ohio Dec. (Reprint) 482, 3 West. L. Month. 264; Oaks *v.* Campbell, 3 Ohio S. & C. Pl. Dec. 706, 7 Ohio N. P. 314.

Pennsylvania.— Davis *v.* Mercantile Trust Co., 30 Pittsb. Leg. J. N. S. 371. But *compare* Morgan *v.* Soisson, 21 Pa. Super. Ct. 141, which was decided under the act of March 15, 1847.

Texas.— Parrott *v.* Craig, 3 Tex. App. Civ. Cas. § 453; Hutcheson *v.* Wells, 1 Tex. App. Civ. Cas. § 953.

See 31 Cent. Dig. tit. "Justices of the Peace," § 738.

But see Monroe *v.* Brady, 7 Ala. 59; Nowlin *v.* Tibbits, 44 Mich. 77, 6 N. W. 118; Adams *v.* Thompson, 18 Nebr. 541, 26 N. W. 316; Clark *v.* Miles, 2 Pinn. (Wis.) 432, 2 Chandl. 94.

23. **Failure to prosecute to effect.**— Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627]; Rock *v.* Gordon, 6 Blackf. (Ind.) 192; Erdman *v.* Hartman, 7 Pa. Co. Ct. 609. *Compare* Butler *v.* Ritter, 38 Ill. App. 189; Jeffers *v.* Forrest, 13 Fed. Cas. No. 7,251, 5 Cranch C. C. 674, in which the appellant died pending the appeal, and it was held that the sureties were not liable for his failure to prosecute.

Dismissal of the appeal is breach of condition to prosecute with effect. Bernhamer *v.* Hoffman, 23 Ind. App. 34, 54 N. E. 132; Pass *v.* Payne, 63 Miss. 239; Wooldridge *v.* Rawlings, (Tex. 1890) 14 S. W. 667. But see Sengpeil *v.* Spang, 47 Wis. 28, 1 N. W. 463.

Failure to file a further bond, upon being required, is a breach of an appeal-bond filed according to Ind. Rev. St. §§ 159, 160, 168. Davis *v.* Sturgis, 1 Ind. 213.

Abandonment of certiorari before service on the justice is not a breach of the recognizance. Biggs *v.* Rickards, 3 Harr. (Del.) 283.

Judgment in different capacity.—Where the judgment of the justice against an executor is *de bonis propriis*, and he appeals, and judgment is rendered against him for the same sum *de bonis testatoris*, the condition of the appeal-bond is not forfeited. Bowman *v.* Green, 6 T. B. Mon. (Ky.) 339.

24. *Illinois.*— Gregory *v.* Stark, 4 Ill. 611.

Missouri.— Nolte *v.* Farrelly, 34 Mo. App. 671.

North Carolina.— Walker *v.* Williams, 88 N. C. 7.

Ohio.— Drennen *v.* Shay, 6 Ohio S. & C. Pl. Dec. 341, 4 Ohio N. P. 240.

Texas.— Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742.

See 31 Cent. Dig. tit. "Justices of the Peace," § 740.

25. Humerton *v.* Hay, 65 N. Y. 380; Smith *v.* Crouse, 24 Barb. (N. Y.) 433.

26. Kincaid *v.* Halpern, 65 Ark. 616, 48 S. W. 87; Milburn Mfg. Co. *v.* Wilfong, 33 Mo. App. 561; Johnson *v.* Reed, 47 Nebr. 322, 66 N. W. 405; Moore *v.* Gore, 2 Tex. App. Civ. Cas. § 75. *Contra*, Lang *v.* Pike, 27 Ohio St. 498.

27. Lauer *v.* Griffith, 92 Ill. App. 388; Gildersleeve *v.* Adsit, 97 Mich. 660, 57 N. W. 187; J. H. Rothman Distilling Co. *v.* Kermis, 79 Mo. App. 111.

28. **Judgment on appeal for less sum.**—A bond conditioned on payment if the judgment of the justice is affirmed or more recovered on a trial *de novo* is discharged where a judgment for a less sum is recovered. Swanson *v.* Ball, 23 Fed. Cas. No. 13,676*a*, Hempst. 39.

29. **Taking judgment against appellant only** discharges the surety. Hodge *v.* Plott, 12 Fed. Cas. No. 6,561*a*, Hempst. 14.

Delaying execution beyond the time prescribed by statute will discharge a surety. Lipe *v.* Becker, 1 Den. (N. Y.) 568; Herrick *v.* Graves, 16 Wis. 157.

30. **A payment to the clerk of court** of the amount secured by an appeal-bond does not absolve the sureties from liability, unless

a discharge in bankruptcy[31] will operate to release or discharge him from liability thereon.[32]

5. EXTENT OF LIABILITY — a. In General. The undertaking of a surety upon an appeal or certiorari bond is in substance that he will satisfy any judgment against his principal which may result from a trial or from failure effectively to prosecute the appeal or certiorari.[33] His liability is limited to the penalty of his bond,[34] and in Arkansas judgment cannot be rendered against him in an amount exceeding the jurisdiction of the justice.[35]

b. On Dismissal of Appeal. On the dismissal of an appeal the sureties on the appeal-bond become liable for the judgment appealed from,[36] unless the bond is limited to the payment of the appellate judgment.[37]

c. In Claim Proceedings. Where a claimant or intervener appeals from an adverse judgment, no judgment can be rendered on the appeal-bond except for costs.[38]

it is made with the assent of appellee, or the money is paid over to him. Windham *v.* Coats, 8 Ala. 285.

31. **A discharge in bankruptcy,** acquired after the execution of the bond, must be interposed by the surety in the circuit court; if not, he cannot be relieved in chancery from a judgment on the bond. Jones *v.* Coker, 53 Miss. 195.

32. **Dismissal of the appeal by appellant** does not discharge the surety. Williams *v.* Lewis, 47 Mo. App. 657.

Dismissal of case.—Where a case was dismissed because of appellee's failure to appear on a day set for trial, but the order of dismissal was set aside, and the case tried, resulting in judgment for appellee, it was held that the surety was not discharged. King *v.* Bailey, 6 Kan. App. 186, 51 Pac. 298.

An amendment increasing the damages claimed does not discharge. Hare *v.* Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141.

An amendment changing form of action on appeal does not discharge. Block *v.* Blum, 33 Ill. App. 643.

A reference under rule of court does not discharge. McColley *v.* Hickman, 1 Houst. (Del.) 234.

Abandonment of an execution against the principal does not discharge the surety. Poll *v.* Murr, 7 Ohio Dec. (Reprint) 574, 3 Cinc. L. Bul. 1141.

Giving counter security, on notice from first surety, does not discharge the latter from any legal liability which has already become fixed upon him. Kincaid *v.* Sharp, 3 Head (Tenn.) 151.

33. Leidigh *v.* Pribble, 64 Nebr. 860, 90 N. W. 950. See also Woolum *v.* Kelton, 52 Ark. 445, 13 S. W. 78; Williams *v.* Vaughan, (Tex. Civ. App. 1897) 43 S. W. 850. *Compare* Maxwell *v.* Salts, 4 Coldw. (Tenn.) 233, in which the agreement was limited to the payment of "all such costs and damage as may be awarded by the Court, on failure to prosecute," and it was held that the sureties were only liable for costs, and not for the recovery. But see Hennion *v.* Kipp, 30 N. Y. App. Div. 288, 51 N. Y. Suppl. 960 [*affirming* 22 Misc. 437, 50 N. Y. Suppl. 760], to the effect that, under N. Y. Code Civ. Proc. § 3050, a surety's liability is specifically restricted to payment of the judgment appealed from with interest.

Liability for costs.—The bail is responsible for all the subsequent costs, including those of an arbitration and of the execution. Connell *v.* Flynn, 3 L. T. N. S. (Pa.) 42. In Tennessee, under Shannon Code, § 4935, providing that a surety on an appeal-bond shall undertake to pay all costs that may be at any time adjudged against his principal, a surety on a bond for appeal from a justice to the circuit court is bound for all the costs that may be adjudged against his principal at any time during the progress of the cause, to the extent of the penalty of the bond. Hite *v.* Rayburn, 114 Tenn. 463, 85 S. W. 1105.

Liability for statutory damages see Prewett *v.* Nash, 50 Miss. 584.

Surety for costs of suit.— If, on appeal by defendant, plaintiff is required on motion to give surety for the costs of the suit, such surety is not liable for the amount of a judgment given for appellant on his set-off. Bolinger *v.* Gordon, 11 Humphr. (Tenn.) 61.

34. *Alabama.*—Robertson *v.* King, 120 Ala. 459, 24 So. 929; Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220.

Arkansas.— Allen *v.* Grider, 24 Ark. 271.

Iowa.— See Freeman *v.* Hart, 61 Iowa 525, 16 N. W. 597, where it was held that a judgment for more than the penalty is erroneous, but not void, since the court has jurisdiction of the subject-matter and of the parties.

Kansas.— Shockman *v.* Davis, 6 Kan. App. 503, 50 Pac. 947.

Michigan.— Vreeland *v.* Loeckner, 99 Mich. 93, 57 N. W. 1093.

Missouri.— Pendergast *v.* Hodge, 21 Mo. App. 138.

See 31 Cent. Dig. tit. "Justices of the Peace," § 742.

35. Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740.

36. Lux *v.* McLeod, 19 Colo. 465, 36 Pac. 246; Prescott *v.* Bacon, 64 Iowa 702, 21 N. W. 151; Fitzgerald *v.* Wellington, 37 Kan. 460, 15 Pac. 582.

37. Keitzinger *v.* Reynolds, 11 Ind. 545.

38. Derrett *v.* Alexander, 25 Ala. 265;

6. Judgment Against Sureties on Appeal. By signing an appeal or certiorari bond the sureties submit themselves to the jurisdiction of the appellate court, which may enter up judgment against them upon the affirmance of the judgment below or the dismissal of the appeal or certiorari, or, if on trial *de novo*, judgment goes against the appellant.[39] Upon such a judgment execution may issue within the time and under the conditions prescribed by statute.[40]

7. Actions — a. In General. In an action on a recognizance to prosecute an appeal it must appear that the recognizance was returned to, and entered of record in, the court to which the appeal was allowed;[41] that the justice has jurisdiction of the cause in which it was taken;[42] and that it was entered into before the same justice who rendered the judgment.[43]

b. Jurisdiction. An action on a recognizance to prosecute an appeal must be brought in that court in which the record is.[44]

c. Conditions Precedent. In some jurisdictions it is a condition precedent to an action upon an appeal-bond that execution issue on the original judgment, and be returned unexecuted in whole or in part.[45]

d. Who May Sue. Where an appeal has been taken, and the judgment assigned pending the appeal, but the undertaking has not been assigned, the assignee cannot maintain an action on such undertaking.[46]

e. Defenses. Sureties on an undertaking for appeal may deny its execution, notwithstanding the justice's approval;[47] but it is no defense to an action on such an undertaking that the appeal was improperly taken,[48] that the appellate court

Bryan *v.* Simpson, 92 Ga. 307, 18 S. E. 547; Williams *v.* Vaughan, (Tex. Civ. App. 1897) 43 S. W. 850.

39. *Alabama.*— Neff *v.* Edwards, 81 Ala. 246, 2 So. 88.

Arkansas.— Freeman *v.* Mears, 35 Ark. 278 (judgment *nunc pro tunc* against sureties); Callahan *v.* Saleski, 29 Ark. 216.

Iowa.— Prescott *v.* Bacon, 64 Iowa 702, 21 N. W. 151.

Minnesota.— See Peterson *v.* Kjellin, 93 Minn. 422, 101 N. W. 948.

Mississippi.— Harper *v.* Barnett, (1895) 16 So. 533; Wright *v.* Simmons, 1 Sm. & M. 389.

Missouri.— Gwinnup *v.* Sibert, 106 Mo. App. 709, 80 S. W. 589.

Nebraska.— Banghart *v.* Lamb, 34 Nebr. 535, 52 N. W. 399. But see Drummond Carriage Co. *v.* Mills, 54 Nebr. 417, 74 N. W. 966, 69 Am. St. Rep. 719, 40 L. R. A. 761 [*following* Selby *v.* McQuillan, 45 Nebr. 512, 63 N. W. 855], to the effect that the district court has no such jurisdiction of the person of the surety that it may render the same judgment against him that it may against the appellant.

Tennessee.—Hamilton *v.* Henney Buggy Co., 102 Tenn. 714, 52 S. W. 160; Allen *v.* Wood, 1 Head 438.

Texas.— Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742; Hensel *v.* Kaufmann, (Civ. App. 1897) 40 S. W. 819; Franks *v.* Ware, (Civ. App. 1892) 24 S. W. 349.

Washington.— Cline *v.* Mitchell, 1 Wash. 24, 23 Pac. 1013.

West Virginia.— Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872, 11 L. R. A. 557.

See 31 Cent. Dig. tit. "Justices of the Peace," § 743.

But as to rendition of judgment against surety on the dismissal of an appeal see Miller *v.* Heard, 7 Ark. 50; Hooker *v.* Atlantic, etc., R. Co., 63 Mo. 449.

Entry of "judgment against defendant" carries judgment against the sureties. Harper *v.* Barnett, (Miss. 1895) 16 So. 533.

40. See Mount *v.* Stewart, 86 Ala. 365, 5 So. 582; Weiss *v.* Chambers, 50 Mich. 158, 15 N. W. 63.

A scire facias may issue in the appellate court on a recognizance to prosecute. Register *v.* Layman, 5 Harr. (Del.) 349.

41. Libby *v.* Main, 11 Me. 344.

The recognizance need not be recorded at length, but the clerk's certificate upon it, showing it to have been filed before suit brought, is a sufficient record. Leathers *v.* Cooley, 49 Me. 337.

42. Dodge *v.* Kellock, 13 Me. 136; Libby *v.* Main, 11 Me. 344.

43. Green *v.* Haskell, 24 Me. 180.

44. State *v.* Kinne, 39 N. H. 129.

An alderman has no authority to issue a scire facias on the recognizance after judgment recovered on the appeal. Smith *v.* Wilds, 2 Browne (Pa.) 190.

45. Nowlin *v.* Tibbits, 44 Mich. 77, 6 N. W. 118 (to the effect that it is not necessary that an effort be made to collect the judgment from real estate); Beach *v.* Springer, 4 Wend. (N. Y.) 519; Allison *v.* Wilkin, 1 Wend. (N. Y.) 153 (capias ad satisfaciendum unnecessary). *Contra*, Kirkpatrick *v.* McWilliams, 2 Mill (S. C.) 312.

46. Chilstrom *v.* Eppinger, 127 Cal. 326, 59 Pac. 696, 78 Am. St. Rep. 46 [*following* Moses *v.* Thorne, 6 Cal. 87].

47. Ford *v.* Albright, 31 Ohio St. 33.

48. Gudtner *v.* Kilpatrick, 14 Nebr. 347, 15 N. W. 708. See also Brewer *v.* Smith, 3 Gill (Md.) 299.

failed to enter judgment against the sureties,[49] that an appeal is pending to a higher court,[50] that after appeal the parties agreed to refer the action,[51] that the surety misunderstood the obligation assumed by reason of the misrepresentations of the justice,[52] that the justice had no jurisdiction,[53] that the judgment debtor was not indebted to plaintiff,[54] that the bond was delivered in violation of an understanding that it was not to be delivered until the appellant should have signed it,[55] or that the party who filed the bond only intended to appeal for himself and not for his co-defendants.[56]

f. Pleading — (I) *Declaration, Petition, or Complaint*[57] — (A) *In General.* In an action on an appeal or certiorari bond or recognizance the declaration, petition, or complaint must allege the suit in the justice's court,[58] the jurisdiction of the justice,[59] the rendition of final judgment,[60] that the recognizance was entered into before the justice who rendered the judgment,[61] that it was returned to and made a record of the appellate court,[62] the conditions of the undertaking,[63] and the breaches thereof.[64] The several acts constituting the appeal need not be set out,[65] nor is it necessary to allege that execution was issued and returned unsatisfied, that notice of the dismissal of the appeal was given, that demand was made before action brought, that a delivery of the property in suit could not be had, or that appellant had refused to obey an order of the court, unless a recovery is sought on such order.[66]

(B) *In Suit on Undertaking as Common-Law Obligation.* In an action on an undertaking which is insufficient as a statutory undertaking, the complaint should affirmatively set out the special facts constituting the agreement on which the undertaking was given, and also allege its delivery.[67]

(II) *Plea or Answer.* If a surety wishes to avail himself of any deficiency in the undertaking, he must show it specially and at large;[68] and where the fact that an appeal has been taken from the decision of the upper court is alleged, the answer must state that the appeal was perfected before the action on the bond was commenced.[69]

g. Evidence — (I) *Presumptions.* The fact that a person's name, given in the body of an appeal-bond, is not subscribed thereto, is presumptive evidence that he did not join in the undertaking.[70]

(II) *Admissibility* — (A) *In General.* In an action on a bond or recognizance on appeal, proof of an entry of the amount of the debt and costs recovered may be admitted as a record of plaintiff's judgment;[71] and a certified copy of the

49. Unterrein *v.* McLane, 10 Mo. 343.

50. Crandell *v.* Bickerd, 32 Misc. (N. Y.) 258, 66 N. Y. Suppl. 352.

51. Dickey *v.* Livermore, 34 N. H. 199.

52. Davenport *v.* Searfoss, 10 Pa. Cas. 340, 13 Atl. 956.

53. Tiedman *v.* Mayer, 58 S. C. 139, 36 S. E. 509.

54. Reed *v.* Palmer, 27 Pittsb. Leg. J. N. S. (Pa.) 310.

55. Butterfield *v.* Mountain Ice, etc., Storage Co., 11 Utah 194, 39 Pac. 824.

56. Moore *v.* Mulvane, 6 Kan. App. 191, 51 Pac. 569.

57. **Form of petition against sureties** see Freeman *v.* McAtee, 4 Kan. App. 695, 46 Pac. 40.

58. Marks *v.* Harris, 6 Ohio Dec. (Reprint) 1101, 10 Am. L. Rec. 481.

59. State *v.* Smith, 2 Me. 62; Bridge *v.* Ford, 4 Mass. 641, 7 Mass. 209. But see Smith *v.* Whitaker, 11 Ill. 417.

Setting forth the recovery of a judgment before the justice for a cause of action within his jurisdiction is a sufficient allegation of jurisdiction. McColley *v.* Hickman, 1 Houst. (Del.) 234.

60. Leathers *v.* Cooley, 49 Me. 337.

61. Needham *v.* Heath, 17 Vt. 223.

62. Dodge *v.* Kellock, 10 Me. 266; State *v.* Smith, 2 Me. 62; Bowler *v.* Palmer, 4 Gray (Mass.) 445 note; Tarbell *v.* Gray, 4 Gray (Mass.) 444; Bridge *v.* Ford, 7 Mass. 209. *Compare* Smith *v.* Whitaker, 11 Ill. 417.

63. State *v.* Smith, 2 Me. 62; Bridge *v.* Ford, 4 Mass. 641, 7 Mass. 209.

64. State *v.* Smith, 2 Me. 62; Bridge *v.* Ford, 4 Mass. 641, 7 Mass. 209. But see Cockrill *v.* Owen, 10 Mo. 287.

65. Moffat *v.* Greenwalt, 90 Cal. 368, 27 Pac. 296. But see Rudershauer *v.* Pagels, 14 Ohio Cir. Ct. 327, 8 Ohio Cir. Dec. 11.

66. Pieper *v.* Peers, 98 Cal. 42, 32 Pac. 700.

67. Smith *v.* Gale, 13 S. D. 162, 82 N. W. 385.

68. Allison *v.* Wilkin, 1 Wend. (N. Y.) 53.

69. Crandell *v.* Bickerd, 32 Misc. (N. Y.) 258, 66 N. Y. Suppl. 352.

70. Ford *v.* Albright, 31 Ohio St. 33.

71. Leathers *v.* Cooley, 49 Me. 337.

judgment of the appellate court is admissible to establish the identity of the judgment affirmed with that recited in the bond, without requiring at the same time a certified copy of all proceedings in the case.[72]

(B) *Under Plea of Nul Tiel Record.* Upon a plea of *nul tiel record* the issue must be tried by inspection of the transcript and recognizance filed, and not by the docket of the justice.[73]

(III) *SUFFICIENCY.* In an action on an undertaking on appeal it is not necessary that the evidence should show what disposition the judgment debtor has made of his property,[74] and a constable's return to the execution against him cannot be controverted.[75]

h. Appeal and Error. On error to review the action of the court in overruling a demurrer to a petition upon an undertaking on appeal, where no defects are pointed out by plaintiff in error, and the petition apparently alleges all the substantial and essential facts, setting out a copy of the bond and the final judgment, and the officer's return to the execution showing that he can find no property whereon to levy, the judgment will be affirmed.[76]

JUSTICIARII ITINERANTES. The name used in the ancient common law to designate the justices in eyre who were sent throughout the realm to try causes, in contradistinction to the resident judges.[1]

JUSTICIARII RESIDENTES. A name used in the ancient common law to designate the justices who resided at Westminster.[2]

JUSTICIARII, TANQUAM JUSTI IN CONCRETO, JUSTICIARII DE BANCO DICTI, NUNQUAM JUDICES DE BANCO. A Latin phrase rendered "Justices, from '*justi in concreto*,' called justices of the bench, never judges of the bench."[3]

JUSTIFIABLE. Rightful; warranted or sanctioned by law; that which can be shown to be sustained by law;[4] EXCUSABLE,[5] *q. v.* (Justifiable: Homicide, see HOMICIDE.)

JUSTIFICATION. The showing in court of a sufficient lawful reason why a party charged or accused did that for which he is called to answer;[6] the proceeding by which bail established their ability to perform the undertaking of the bond or recognizance.[7] (Justification: By Officer Acting Under Process, see SHERIFFS AND CONSTABLES. Defense to Action For — Arrest or Detention, see FALSE IMPRISONMENT; Assault or Battery, see ASSAULT AND BATTERY; Divorce, see DIVORCE; False Imprisonment, see FALSE IMPRISONMENT. Defense to Prosecution For — Assault or Battery, see ASSAULT AND BATTERY; Homicide, see HOMICIDE. Of Surety on Bond or Undertaking — For Bail, see BAIL; For Costs, see COSTS; For Injunction, see INJUNCTIONS; Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Of Trustee in Bankruptcy, see BANKRUPTCY; On Appeal, see APPEAL AND ERROR; JUSTICES OF THE PEACE; On Attachment, see ATTACHMENT.)

72. Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627].

73. Bell *v.* Murphy, 6 Watts & S. (Pa.) 50.

Copies of the appeal containing a minute of the recognizance are inadmissible under the plea of *nul tiel record.* Murdock *v.* Hicks, 50 Vt. 683.

74. Roberts *v.* Lovitt, 13 Ind. App. 281, 41 N. E. 554.

75. Burger *v.* Becket, 6 Blackf. (Ind.) 61.

76. Pratt *v.* Smith, 20 Nebr. 48, 28 N. W. 849.

1. *Ex p.* Fernandez, 10 C. B. N. S. 3, 27, 7 Jur. N. S. 571, 30 L. J. C. P. 321, 4 L. T. Rep. N. S. 324, 9 Wkly. Rep. 832, 100 E. C. L. 3.

2. *Ex p.* Fernandez, 10 C. B. N. S. 3, 27, 7 Jur. N. S. 571, 30 L. J. C. P. 321, 4 L. T. Rep. N. S. 324, 9 Wkly. Rep. 832, 100 E. C. L. 3.

3. Wharton L. Lex. [*citing* Coke Litt. 71*b*].

4. Black L. Dict.

"Justifiable cause" see U. S. *v.* Reed, 86 Fed. 308, 311; U. S. *v.* Coffin, 30 Fed. Cas. No. 14,824, 1 Sumn. 394.

"Justifiable conduct" see Dubenstein *v.* Dubenstein, 171 Ill. 133, 143, 49 N. E. 316.

5. State *v.* Row, 81 Iowa 138, 149, 46 N. W. 872.

6. Webster Int. Dict. See also Messler *v.* Fleming, 41 N. J. L. 108, 114.

7. Black L. Dict. See also State *v.* Bate-

JUSTITIA DEBET ESSE LIBERA, QUIA NIHIL INIQUIUS VENALI JUSTITIA; PLENA, QUIA JUSTITIA NON DEBET CLAUDICARE; ET CELERIS, QUIA DILATIO EST QUÆDAM NEGATIO. A maxim meaning "Justice ought to be free, because nothing is more iniquitous than venal justice; full, because justice ought not to halt; and speedy, because delay is a kind of denial."[8]

JUSTITIÆ SOROR FIDES. A maxim meaning "Faith is the sister of justice."[9]

JUSTITIA EST CONSTANS ET PERPETUA VOLUNTAS JUS SUUM CIUQUE TRIBUENDI. A maxim meaning "Justice is a steady and unceasing disposition to render to every man his due."[10]

JUSTITIA EST DUPLEX, VIZ., SEVERE PUNIENS ET VERE PRÆVENIENS. A maxim meaning "Justice is double; punishing severely, and truly preventing."[11]

JUSTITIA EST LIBERTATE PRIORE. A maxim meaning "Justice is prior to liberty."[12]

JUSTITIA EST VIRTUS EXCELLENS ET ALTISSIMO COMPLACENS. A maxim meaning "Justice is excellent virtue and pleasing to the Most High."[13]

JUSTITIA FIRMATUR SOLIUM. A maxim meaning "By justice the throne is strengthened."[14]

JUSTITIA NEMINI NEGANDA EST. A maxim meaning "Justice is to be denied to none."[15]

JUSTITIA NON EST NEGANDA NON DIFFERENDA. A maxim meaning "Justice is neither to be denied nor delayed."[16]

JUSTITIA NON NOVIT PATREM NEC MATREM; SOLAM VERITATEM SPECTAT JUSTITIA. A maxim meaning "Justice knows no father nor mother; justice looks at truth alone."[17]

JUSTLY. Equitably.[18] (See JUST.)

JUS TRIPLEX EST; PROPRIETATIS, POSSESSIONIS, ET POSSIBILITATIS. A maxim meaning "Right is threefold; of property, of possession, and of possibility."[19]

JUSTUM NON EST ALIQUEM ANTENATUM MORTUUM FACERE BASTARDUM, QUI PRO TOTA VITA SUA PRO LEGITIMO HABETUR. A maxim meaning "It is not just to make a bastard after his death one elder born who all his life has been accounted legitimate."[20]

JUST VALUE. Market value.[21]

JUS VENDIT QUOD USUS APPROBAVIT. A maxim meaning "The law dispenses what use has approved."[22]

JUVENILE DELINQUENT. A term which may include any juvenile convicted of a felony.[23]

KARTOFFELMEHL. A German word, literally meaning potato flour.[24]

KEEL. The principal timber in a ship or boat, extending from stem to stern at the bottom, supporting the whole frame, and consisting of a number of pieces

man, 102 N. C. 52, 57, 8 S. E. 882, 11 Am. St. Rep. 708.

8. Black L. Dict. [*citing* 2 Inst. 56].
9. Morgan Leg. Max.
10. Black L. Dict. [*citing* Dig. 1, 1, 10; Inst. 1, 1, pr.].
11. Black L. Dict.
12. Morgan Leg. Max.
13. Black L. Dict. [*citing* 4 Inst. 58].
14. Peloubet Leg. Max.
15. Black L. Dict. [*citing* Jenkins Cent. 178].
16. Black L. Dict. [*citing* Jenkins Cent. 93].
17. Black L. Dict.
18. See 15 Cyc. 1087.

"Act justly" see Mussoorie Bank *v.* Raymor, 7 App. Cas. 321, 325, 51 L. J. P. C. 72, 46 L. T. Rep. N. S. 633, 31 Wkly. Rep. 17.

"Justly due" see Rogers *v.* Abbott, 128 Mass. 102; Cassatt *v.* Vogel, 12 Mo. App. 323, 326.

"Justly due and owing" see Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511, 513.

"Justly entitled to recover" see Reed *v.* McCloud, 38 W. Va. 701, 705, 18 S. E. 924; Crim *v.* Harmon, 38 W. Va. 596, 599, 18 S. E. 753 [*citing* Ruhl *v.* Rogers, 29 W. Va. 779, 781, 2 S. E. 758].

"Justly" or "actually" incurred see *In re* Cullen, 53 Hun (N. Y.) 534, 539, 6 N. Y. Suppl. 625.

19. Wharton L. Lex.
20. Black L. Dict.
21. Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 67 N. H. 514, 517, 35 Atl. 945.
22. Wharton L. Lex.
23. People *v.* Park, 41 N. Y. 21, 33.
24. Union Nat. Bank *v.* Seeberger, 30 Fed. 429, 430.

scarfed together and bolted together; in iron vessels, the combination of plates corresponding to the keel of a wooden vessel.[25]

KEELSON. A line of jointed timbers in a ship laid on the middle of the floor timber over the keel, fastened with long bolts and clinched, thus binding the floor timbers to the keel; in iron ships, a combination of plates corresponding to the keelson timber of a wooden vessel.[26]

KEEP. To hold, to retain in one's power or possession, not to lose or part with, to preserve, to retain;[27] to preserve in the same state or tenor;[28] to maintain, carry on, conduct, or manage;[29] to have the control and management, as, for example, to have the control and management of places where liquors are sold,[30]

25. Century Dict. [*quoted* in Stetson *v.* Herreshoff Mfg. Co., 113 Fed. 952, 953].

26. Century Dict. [*quoted* in Stetson *v.* Herreshoff Mfg. Co., 113 Fed. 952, 953].

27. Webster Dict. [*quoted* in Philbrook *v.* New England Mut. F. Ins. Co., 37 Me. 137, 148; Benson *v.* New York, 10 Barb. (N. Y.) 223, 236].

Keep in a building, on premises, etc., in the sense in which the phrase is used in policies of fire insurance and certain criminal statutes, implies a permanent and habitual possession or storage of the prohibited articles and thus excludes the idea of possession for a mere temporary or incidental purpose. Long *v.* Portland, 151 Ind. 442, 443, 51 N. E. 917; Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 11, 81 Am. Dec. 521; Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219; Maryland F. Ins. Co. *v.* Whiteford, 31 Md. 219, 224, 100 Am. Rep. 45; Rockland First Congregational Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 478, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587; Com. *v.* Patterson, 138 Mass. 498, 500; Smith *v.* German Ins. Co., 107 Mich. 270, 280, 65 N. W. 236, 30 L. R. A. 368; Williams *v.* Fireman's Fund Ins. Co., 54 N. Y. 569, 572, 13 Am. Rep. 620; Hynds *v.* Schenectady County Mut. Ins. Co., 11 N. Y. 554, 561; Mears *v.* Humboldt Ins. Co., 92 Pa. St. 15, 19, 37 Am. Rep. 647 [*cited* and *approved* in Krug *v.* German F. Ins. Co., 147 Pa. St. 272, 274, 23 Atl. 572, 30 Am. St. Rep. 729]; Easley Town Council *v.* Pegg, 63 S. C. 98, 103, 41 S. E. 18; Nashville State Ins. Co. *v.* Hughes, 10 Lea (Tenn.) 461, 469; Springfield F. & M. Ins. Co. *v.* Wade, 95 Tex. 598, 68 S. W. 977, 93 Am. St. Rep. 870, 58 L. R. A. 714; Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 763, 18 Blatchf. 368 [*cited* and *approved* in American Cent. Ins. Co. *v.* Green, 16 Tex. Civ. App. 531, 537, 41 S. W. 74]; Washburn *v.* Miami Valley Ins. Co., 2 Fed. 633, 636, 2 Flipp. 664; U. S. *v.* Smith, 27 Fed. Cas. No. 16,329, 4 Cranch C. C. 659.

Keep or use.— Where a policy of fire insurance provides that it shall become void, if certain articles are kept or used on the premises, a temporary or occasional keeping of such articles may be sufficient to avoid the policy. Wheeler *v.* Traders' Ins. Co., 62 N. H. 326, 329, 13 Am. St. Rep. 582. But see Rockland First Congregational Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 478, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587 [*citing* Billings *v.* Tolland County Mut. F. Ins. Co., 20 Conn. 139, 50 Am. Dec. 277; Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219; Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469; O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122; Mears *v.* Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647; Putnam v. Com. Ins. Co., 4 Fed. 753, 18 Blatchf. 368; Dobson *v.* Sotheby, M. & M. 90, 31 Rev. Rep. 718, 22 E. C. L. 481], holding that such words cannot be so construed as to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose.

The words "Let me keep your wages, and I will pay you interest," etc., said by an employer to his servant, do not create any relation of trust, but merely one of debtor and creditor. Tucker *v.* Linn, (N. J. Ch. 1904) 57 Atl. 1017, 1020.

Keep up, in a town law providing that all hogs shall be kept up, means that they should not be allowed to go at large. Shepherd *v.* Hees, 12 Johns. (N. Y.) 433.

28. Johnson Dict. [*quoted* in Payne *v.* Haine, 16 L. J. Exch. 130, 16 M. & W. 541, 542].

29. State *v.* Hanchett, 38 Conn. 35, 38; Bryan *v.* State, 120 Ga. 201, 47 S. E. 574; State *v.* Cox, 52 Vt. 471; Century Dict. [*quoted* in State *v.* Irvin, 117 Iowa 469, 470, 91 N. W. 760]. But see Eubanks *v.* State, 17 Ala. 181, 183, holding that the word does not necessarily imply a business or employment, as in an indictment for keeping a tenpin alley without a license, but is entirely consistent with the idea of maintaining for private amusement.

"Keep open," as applied to places of business and other public houses, particularly saloons, implies a readiness to carry on business therein (though external appearances may point to a different conclusion). Seelig *v.* State, 43 Ark. 96, 98; Blahut *v.* State, 34 Ark. 447, 448; State *v.* Miller, 68 Conn. 373, 378, 36 Atl. 795; State *v.* Gregory, 47 Conn. 276, 277; Com. *v.* Harrison, 11 Gray (Mass.) 308, 309; Lynch *v.* People, 16 Mich. 472, 477; State *v.* Jacques, 69 N. H. 220, 40 Atl. 398; Richard *v.* Bayonne, 61 N. J. L. 496, 39 Atl. 708.

30. *Kentucky.*— Union Cent. L. Ins. Co. *v.* Hughes, 110 Ky. 26, 32, 60 S. W. 850, 22 Ky. L. Rep. 1549.

Massachusetts.—Com. *v.* Kimball, 105 Mass. 465, 467.

Michigan.— People *v.* Rice, 103 Mich. 350, 355, 61 N. W. 540.

of bawdy-houses,[31] of gambling establishments, etc.;[32] to have in possession, use, care or custody, hence to use and enjoy;[33] to maintain, support, as in a prison[34] or asylum;[35] so also, as applied to animals, to tend, to feed, to pasture, to board, to maintain, to supply with necessaries of life.[36] As an intransitive verb, to remain sound, sweet, fresh or the like.[37] (To Keep: Disorderly House, see DISORDERLY HOUSES. Gaming House, see GAMING. In Repair, see LANDLORD AND TENANT. The Peace, see BREACH OF THE PEACE.)

Vermont.— State *v.* Cox, 52 Vt. 471, 474.

Canada.— Reg. *v.* Hughes, 2 Can. Cr. Cases 5, 9.

31. State *v.* Main, 31 Conn. 572, 574; Melson *v.* Territory, 5 Okla. 512, 516, 49 Pac. 920; St. Johnsbury *v.* Thompson, 59 Vt. 300, 312, 9 Atl. 571, 59 Am. Rep. 731.

32. *Alabama.*— Bibb *v.* State, 84 Ala. 13, 4 So. 275.

Connecticut.—State *v.* Miller, 68 Conn. 373, 378, 36 Atl. 795.

Kentucky.— Vowells *v.* Com., 83 Ky. 193, 197.

Texas.— Kain *v.* State, 16 Tex. App. 282, 309.

Wisconsin.— Gallagher *v.* State, 26 Wis. 423, 425.

Intent and knowledge are implied by the term as used in criminal statutes relative to the keeping of gambling establishments, saloons, etc. Nicholson *v.* People, 29 Ill. App. 57, 65; State *v.* Cure, 7 Iowa 479, 481; State *v.* Ackerman, 62 N. J. L. 456, 41 Atl. 697; Wolz *v.* State, 33 Tex. 331, 335.

33. Worcester Dict. [*quoted* in Hasley *v.* Hasley, 25 La. Ann. 602, 603], in which case the court construed the following clause of a will, "I want my wife to keep and maneg all of my estate both reil and pursnel, duren her lif time and be lowed to sell eny of the land for not les than the apprsment, and I appoint my wife administrator," and used the following language: "We are bound to hold that the testator intended to give the usufruct of his estate to his wife. The plaintiff's counsel contends that the words 'keep and manage' only convey the idea of administration, or agency . . . 'Keep is a very general term, and is variously applied. A person keeps what is his own, and retains what is not taken from him. He keeps his farm or property, and retains an office.' When Paul tells Peter he can keep his gun, or cart, or farm during a certain period, he will be understood to give Peter the use and enjoyment of the property. And such, we think, was the meaning in which the word was used by [the testator]." See also Deans *v.* Gay, 132 N. C. 227, 230, 43 S. E. 643; Cheney *v.* Plumb, 79 Wis. 602, 48 N. W. 668.

34. Mitchell *v.* Leavenworth County Com'rs, 18 Kan. 188, 191.

35. People *v.* Hagen, 48 N. Y. App. Div. 203, 204, 62 N. Y. Suppl. 816.

36. Webster Dict. [*quoted* in Allen *v.* Ham, 63 Me. 532, 536]. See also Skinner *v.* Caughey, 64 Minn. 375, 377, 67 N. W. 203.

37. Standard Dict. And see Wurzburg *v.* Andrews, 28 Nova Scotia 387, construing a contract for delivery of canned goods.

In connection with various other words, the term has frequently undergone judicial consideration, as in the following instances: Keep for sale (State *v.* Wenzel, 72 N. H. 396, 56 Atl. 918; Valentine-Clark Co. *v.* Shawano County, 120 Wis. 310, 313, 97 N. W. 915), keep for sale and delivery (State *v.* Prescott, 67 N. H. 203, 204, 30 Atl. 342; State *v.* Havey, 58 N. H. 377, 379; State *v.* Murphy, 15 R. I. 543, 546, 10 Atl. 585; State *v.* Kane, 15 R. I. 395, 399, 6 Atl. 783; *In re* Hoxsie, 15 R. I. 241, 242, 3 Atl. 1), keep in repair (McChesney *v.* Hyde Park, 151 Ill. 634, 645, 37 N. E. 858; Blood *v.* Bangor, 66 Me. 154, 155; Tilden *v.* Tilden, 13 Gray (Mass.) 103, 109; McMahon *v.* Second Ave. R. Co., 75 N. Y. 231, 236; Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 377, 35 Atl. 718; Miller *v.* McCardell, 19 R. I. 304, 33 Atl. 445, 30 L. R. A. 682; *Ex p.* Witthers, 3 Brev. (S. C.) 83, 87; Armstrong *v.* Maybee, 17 Wash. 24, 28, 48 Pac. 737, 61 Am. St. Rep. 898; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50, 54, 19 L. ed. 594; Luxmore *v.* Robson, 1 B. & Ald. 584, 585, 19 Rev. Rep. 396; Crowe *v.* Crisford, 17 Beav. 507, 510, 2 Wkly. Rep. 45, 51 Eng. Reprint 1130; Payne *v.* Haine, 16 L. J. Exch. 130, 16 M. & W. 541, 545), keep in safe condition (Atlanta *v.* Buchanan, 76 Ga. 585, 589), keep in good fence (Hazlewood *v.* Pennybacker, (Tex. Civ. App. 1899) 50 S. W. 199, 202), keep a jail, as referring to its preservation in proper condition (Goff *v.* Douglas County, 132 Ill. 323, 24 N. E. 60), keep and use for team-work (Hickok *v.* Thayer, 49 Vt. 372), keep down interest (Reg. *v.* Hutchinson, 3 C. L. R. 104, 4 E. & B. 200, 211, 18 Jur. 1116, 24 L. J. M. C. 25, 3 Wkly. Rep. 70, 82 E. C. L. 200), keep records (State *v.* Wilson, 123 Ala. 259, 283, 26 So. 482, 45 L. R. A. 772; Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 493, 11 Pac. 3; Fuller *v.* U. S., 58 Fed. 329, 333), keep company, as referring to the relations of unmarried people (Durham *v.* People, 49 Ill. 233; State *v.* Brown, 86 Iowa 121, 123, 53 N. W. 92; State *v.* Payson, 71 Iowa 542, 32 N. W. 484), keep in operation (Jepherson *v.* Hunt, 2 Allen (Mass.) 417, 423), keep in reserve (Claypool *v.* Norcross, 42 N. J. Eq. 545, 9 Atl. 112), keep her course (The Britannia, 153 U. S. 130, 141, 14 S. Ct. 795, 38 L. ed. 660 [construing Navigation Rule 23]), keep a house (Stoltz *v.* People, 5 Ill. 168, 169), keep invested (Hammell *v.* Swan, 61 N. J. Eq. 179, 182, 47 Atl. 301), keep a dog (Com. *v.* Palmer, 134 Mass. 537), keep a man or woman, in the sense of criminal carnal conversation (Henicke *v.* Griffith, 29 Kan. 516, 518; McBrayer *v.* Hill, 26 N. C. 136, 138; Payne *v.* Tancil, 98 Va. 262, 264, 35 S. E. 725).

KEEPER. One who has the care, custody, or superintending of anything;[38] one who has something in charge.[39]

KEEPING DOWN INTEREST. An expression familiar in legal instruments, and means the payment of interest periodically as it becomes due, and not the payment of all arrears of interest which may have become due on any security from the time when it was executed.[40] (See, generally, INTEREST.)

KELSON. See KEELSON.

KENO BANK. A gaming bank or gambling device, at which money or property may be won or lost.[41] (See, generally, GAMING.)

KENTUCKY DRAWING. A game of chance.[42] (See, generally, GAMING; LOTTERIES.)

KEROSENE. A refined coal or earth oil.[43] (Kerosene: Inspection of, see INSPECTION. Keeping and Use of, see FIRE INSURANCE.)

38. State *v.* Rozum, 8 N. D. 548, 80 N. W. 477; Schultz *v.* State, 32 Ohio St. 276, 281; Webster Dict. [*quoted* in Stevens *v.* People, 67 Ill. 587, 590].

39. Worcester Dict. [*quoted* in Jennings *v.* Wayne, 63 Me. 468, 470].

In connection with various objects the term has frequently received judicial consideration, for example in the following instances: Keeper of animal (Jennings *v.* Wayne, 63 Me. 468), keeper of live stock (Fishell *v.* Morris, 57 Conn. 547, 552, 18 Atl. 717, 6 L. R. A. 82), keeper of a vicious animal (Lawlor *v.* French, 14 Misc. (N. Y.) 497, 499, 35 N. Y. Suppl. 1077), keeper of a dog (Strouse *v.* Leipf, 101 Ala. 433, 435, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622; Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867; Grant *v.* Ricker, 74 Me. 487; Boylan *v.* Everett, 172 Mass. 453, 52 N. E. 541; O'Donnell *v.* Pollock, 170 Mass. 441, 49 N. E. 745; Whittemore *v.* Thomas, 153 Mass. 347, 349, 26 N. E. 875; McLaughlin *v.* Kemp, 152 Mass. 7, 25 N. E. 18; Collingill *v.* Haverhill, 128 Mass. 218, 219; Jenkinson *v.* Coggins, 123 Mich. 7, 81 N. W. 974; Burnham *v.* Strother, 66 Mich. 519, 33 N. W. 410; Jacobsweyer *v.* Poggemoeller, 47 Mo. App. 560; Cummings *v.* Riley, 52 N. H. 368, 369; Bundschuh *v.* Mayer, 81 Hun (N. Y.) 111, 30 N. Y. Suppl. 622; Valentine *v.* Cole, 1 N. Y. St. 719; Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045, 76 Am. St. Rep. 757), keeper of a park (Schultz *v.* State, 32 Ohio St. 276, 281), keeper of a house (State *v.* Rozum, 8 N. D. 548, 80 N. W. 477), keeper of disorderly house (People *v.* Erwin, 4 Den. (N. Y.) 129; People *v.* Utica Bd. of Excise, 17 Misc. (N. Y.) 98, 100, 40 N. Y. Suppl. 741; Moore *v.* State, 4 Tex. App. 127), keeper of ferry (Covington Ferry Co. *v.* Moore, 8 Dana (Ky.) 158), keeper of gaming device (McLoy *v.* Zane, 65 Mo. 11) or house (Stevens *v.* People, 67 Ill. 587; Com. *v.* Hyde, Thatch. Cr. Cas. (Mass.) 19, 23), keeper of saloon (People *v.* Rice, 103 Mich. 350, 61 N. W. 540; Schultz *v.* State, 32 Ohio St. 276; Hofheintz *v.* State, (Tex. Cr. App. 1903) 74 S. W. 310), keeper of shop (St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731).

40. Reg. *v.* Hutchinson, 3 C. L. R. 104, 4 E. & B. 200, 211, 18 Jur. 1116, 24 L. J. M. C. 25, 3 Wkly. Rep. 70, 82 E. C. L. 200.

41. Portis *v.* State, 27 Ark. 360, 361, in which the game is described as follows: "The keeper of the game has a globe; there are put in it ninety balls, each numbered, from one to ninety, and then there are two hundred cards, with fifteen numbers on each card, five numbers in each row; then each player buys a card which contains the fifteen numbers, for which he pays the keeper of the game fifty cents, and others do likewise until several cards are sold; the roller, as he is called, turns the globe over and takes out one of the balls and calls out the number of such ball, and if any one of the players have a number on a card which they have purchased, corresponding to the number so called out, such player puts a check on such number on his card, and so on, at each call by the roller, until one of the players has five checks in a row on his card, and then he has made what they call 'keno,' and then the game stops. The globe, from which the balls are taken by the roller, sits upon a table, in one end of which is a drawer from which change is made by the collector, and chips, frequently issued in lieu of money, redeemable by the collector; and the person who collects the money from the parties who have bought cards, takes up the card that has 'kenoed' and calls its number, and if it is pegged, its number is also called by the roller. The collector then calls out the numbers on the card that are contained in the row that has 'kenoed,' and as he calls a number, the roller examines the balls that have come out, and if the numbers called out by the collector as being on the card, correspond with the balls that are out, the collector announces that 'keno is correct,' and the money that has been paid for the cards sold, is paid over to the holder of the lucky card." See also Miller *v.* State, 48 Ala. 122, 126; Overby *v.* State, 18 Fla. 178, 181; Brown *v.* State, 40 Ga. 689, 690; Com. *v.* Kemmerer, (Ky. 1900) 13 S. W. 108.

42. State *v.* Bruner, 17 Mo. App. 274, 275, holding that a court will not take judicial notice of the word.

43. Bennett *v.* North British, etc., Ins. Co., 81 N. Y. 273, 275, 37 Am. Rep. 501; Buchanan *v.* Exchange F. Ins. Co., 61 N. Y. 26, 29 (in which the court say: "Kerosene is not petroleum. It is made from the latter by a process of distillation and refinement . . . Kerosene is considered reasonably safe for lighting, and is in ordinary and general

KEY. An instrument for fastening or opening a lock;[44] a QUAY,[45] *q. v.*; a wharf to land or ship goods or wares at.[46] (See, generally, WHARVES.)

KEYAGE. The money or toll taken for lading or unlading wares at a key, or wharf.[47]

KICK. In railroad parlance, the operation of placing a car on a siding.[48] (See, generally, MASTER AND SERVANT; RAILROADS. See also FLYING SWITCH.)

KICKER. A device for opening the door of stoves by the use of the foot.[49]

KIDELLI. A proper name for open weirs whereby fish are caught;[50] the means usual, in ancient times, for appropriating and enjoying several fisheries in tidal waters.[51] It consists of a series of stakes forced into the ground, occupying some seven hundred feet in length, with a similar row approaching them at angles.[52] (See GURGES; and, generally, FISH AND GAME.)

use for lighting buildings in all parts of the country outside of cities where gas is used"); Morse *v.* Buffalo F. & M. Ins. Co., 30 Wis. 534, 536, 11 Am. Rep. 587.

Judicial notice cannot be taken that kerosene is explosive, since it is not necessarily and invariably so. Wood *v.* Northwestern Ins. Co., 46 N. Y. 421, 426.

44. Century Dict.

Skeleton key is comprehended by the term, within the meaning of a statute prohibiting persons from having in their possession at night burglars' tools, keys, picklocks, etc. Reg. *v.* Oldham, 14 Eng. L. & Eq. 568, 570.

The words "stole a key," as said of a person, are actionable, as a key may be the subject of larceny. Hoskins *v.* Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129.

45. Jacob L. Dict. [*quoted* in Rowan *v.* Portland, 8 B. Mon. (Ky.) 232, 253].

46. Jacob L. Dict. [*quoted* in Rowan *v.* Portland, 8 B. Mon. (Ky.) 232, 253].

47. Jacob L. Dict. [*quoted* in Rowan *v.* Portland, 8 B. Mon. (Ky.) 232, 253].

48. Erb *v.* Eggleston, 41 Nebr. 860, 861, 60 N. W. 98, in which the court said: "The car to be kicked standing between the engine and the switch, the switch is thrown to the proper position, the car uncoupled from the engine and the engine started, shoving the uncoupled car as it moves. When sufficient momentum has been given the car to move it to the desired point, the movement of the engine is stopped and the car allowed to move on, some one riding upon the car for the purpose of applying the brakes at the proper place for stopping." See also Chicago, etc., R. Co. *v.* O'Neil, 172 Ill. 527, 528, 50 N. E. 216; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 222, 53 Am. St. Rep. 357; Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108; Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214, 215, 20 N. W. 93; Marle *v.* St. Paul, etc., R. Co., 32 Minn. 208, 210, 20 N. W. 131; Pinney *v.* Missouri, etc., R. Co., 71 Mo. App. 577, 580.

Distinguished from "making flying switch" see Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 742, 36 S. E. 181.

Kick signal see Gulf, etc., R. Co. *v.* Hill, 29 Tex. Civ. App. 12, 15, 70 S. W. 103.

49. Lowman *v.* Excelsior Stove Pattern Co., 104 Ala. 367, 369, 16 So. 17.

50. Stroud Jud. Dict.

51. Neill *v.* Devonshire, 8 App. Cas. 135, 144, 31 Wkly. Rep. 622, where it is said: "These words meant more than the mere structures, projecting into the stream, from which the fishermen launched their boats and cast their nets, or conducted other fishing operations (Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 619, 620, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155. And see the Year Book of 14 Henry VIII there quoted)."

"**Weirs** ('kidelli' or 'gurgites') were the means usual, in ancient times, for appropriating and enjoying several fisheries in tidal waters." Neill *v.* Devonshire, 8 App. Cas. 135, 144, 31 Wkly. Rep. 622.

52. Atty.-Gen. *v.* Emerson, [1891] A. C. 649, 655, 55 J. P. 709, 61 L. J. Q. B. 79, 65 L. T. Rep. N. S. 564, where it is said: "The stakes are connected by network, and at the angle where the two rows approach a large net or bag is placed for the purpose of catching the fish. These stakes are not moved from tide to tide, the erection of a kiddle necessarily occupying a considerable time. They remain in the same place often for a lengthened period, sometimes until the stakes become decayed from exposure to the action of the sea."

KIDNAPPING

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CROSS-REFERENCES

For Matters Relating to:
Abduction, see Abduction.
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For Enticing Away Child, see Parent and Child.
For Enticing Away Ward, see Guardian and Ward.
False Imprisonment, see False Imprisonment.

I. Nature and Elements of Offense.

A. Nature in General — 1. At Common Law. At common law kidnapping consists in the forcible abduction or stealing away of a man, woman, or child from his or her own country and sending him or her into another country.[1] As

1. 4 Blackstone Comm. 219; State *v.* Rollins, 8 N. H. 550, 553; Click *v.* State, 3 Tex. 282, 285; Smith *v.* State, 63 Wis. 453, 457, 23 N. W. 879, 1 East P. C. 430, § 4; Black L. Dict.

Other definitions are: "A false imprisonment, which it always includes, aggravated by the carrying of the person imprisoned to some other place." 2 Bishop Cr. L. § 750.

"False imprisonment aggravated by carrying the imprisoned person to some other place." Eberling *v.* State, 136 Ind. 117, 35 N. E. 1023.

"Seizure and removal for the purpose of

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a common-law crime, kidnapping is to be regarded as an aggravated species of false imprisonment,[2] so that in addition to the essential elements of false imprisonment,[3] to constitute the common-law offense proper, another element was necessary, viz., that of sending away the person on whom the offense was committed from his own country into another.[4]

2. By Statute. The common-law definition of the offense has been modified by statute in many states so as to include forcibly seizing and confining another or by inveiglement and enticement causing him to be sent out of the state,[5] forcibly or fraudulently carrying away or decoying another from his place of residence,[6] enticing away or detaining another for the purpose of ransom.[7] Other statutes are designed especially to punish the kidnapping of children by force or enticement.[8]

B. Specific Elements — 1. In General. It is an essential element of the offense that the taking or detention of the person who is the subject thereof shall be without lawful authority,[9] and must be accompanied by the intent to unlaw-

transportation, enslavement, or involuntary service." 1 Wharton Cr. L. § 590.

"The unlawful removal of a person from his own country or state against his will." People *v.* Camp, 139 N. Y. 87, 90, 34 N. E. 755, 10 N. Y. Cr. 514.

2. 2 East Cr. L. 430; Click *v.* State, 3 Tex. 282; Castillo *v.* State, 29 Tex. App. 127, 14 S. W. 1011; Smith *v.* State, 63 Wis. 453, 23 N. W. 879; John *v.* State, 6 Wyo. 203, 44 Pac. 51.

3. See False Imprisonment, 19 Cyc. 376.

4. Click *v.* State, 3 Tex. 282.

5. *California.*— *Ex p.* Keil, 85 Cal. 309, 24 Pac. 742.

Louisiana.— State *v.* Backarow, 38 La. Ann. 316.

Montana.— State *v.* Stickney, 29 Mont. 523, 75 Pac. 201.

New York.— Hadden *v.* People, 25 N. Y. 373.

United States.— *In re* Kelly, 46 Fed. 653.

The California act of 1850, denouncing the crime of kidnapping, provides that the abduction must be accompanied with a removal into another county, state, or territory, or a design to remove the kidnapped person beyond the limits of the state, was not repealed by the act of 1856, amendatory of and supplementary to the act of 1850, by virtue of which the intent to detain and conceal was made the gist of the offense. People *v.* Chu Quong, 15 Cal. 332.

Unlawful arrest.— Where a warrant of arrest duly issued, directed generally to any sheriff, marshal, etc., authorizing and commanding the arrest of a certain person, was put in defendant's hands for execution, his arrest of the person named therein in a county other than that for which he was deputy sheriff, and that in which the warrant was issued, will not justify his commitment on the charge of kidnapping, although his act was unlawful. *Ex p.* Sternes, 82 Cal. 245, 23 Pac. 38.

The Massachusetts statute was violated when soldiers from Rhode Island acting under orders of the military authorities of that state in time of insurrection came into Massachusetts and seized and carried away citizens of Rhode Island. Com. *v.* Blodgett, 12 Metc. 56.

6. Eberling *v.* State, 136 Ind. 117, 35 N. E. 1023; John *v.* State, 6 Wyo. 203, 44 Pac. 51.

7. State *v.* Leuth, 128 Iowa 189, 103 N. W. 345.

8. *Alabama.*— Oliver *v.* State, 17 Ala. 587.

Georgia.— Sutton *v.* State, 122 Ga. 158, 50 S. E. 60.

Montana.— State *v.* Stickney, 29 Mont. 523, 75 Pac. 201.

Nebraska.— Gould *v.* State, (1904) 99 N. W. 541.

Pennsylvania.— Com. *v.* Myers, 146 Pa. St. 24, 23 Atl. 164.

Bringing kidnapped children into the state is also declared an offense by the Montana statute. State *v.* Stickney, 29 Mont. 523, 75 Pac. 201.

A United States statute (18 U. S. St. at L. 251 [U. S. Comp. St. (1901) p. 3647]) prohibits inveigling foreign-born children into the United States to be held to service. U. S. *v.* Ancarola, 1 Fed. 676, 17 Blatchf. 423.

Rights of parents.— It is not an offense for a parent to attempt peaceably and without violence to obtain possession of his own child. Com. *v.* Myers, 146 Pa. St. 24, 23 Atl. 164; People *v.* Congdon, 77 Mich. 351, 43 N. W. 986. If the custody of the child has been awarded to the father in divorce proceedings and the mother removes and conceals the child for the purpose of evading the decree she is guilty of kidnapping, although the father has never had actual separate possession of the child. *Re* Lovenz, 9 Can. Cr. Cas. 158, 7 Quebec Pr. 101.

9. People *v.* Fick, 89 Cal. 144, 26 Pac. 759; State *v.* Kimmerling, 124 Ind. 382, 24 N. E. 722; People *v.* Camp, 66 Hun (N. Y.) 531, 21 N. Y. Suppl. 741; Click *v.* State, 3 Tex. 282.

The phrase "without authority of law" is not synonymous with "without due process of law." People *v.* Camp, 66 Hun (N. Y.) 531, 21 N. Y. Suppl. 741.

Confinement under claim of insanity.— Where two reputable physicians, appointed by the county judge at the father's instance,

fully detain or carry away such person.[10] But the particular purpose to be accomplished by the unlawful act is immaterial.[11]

2. Force — a. Actual Force Not Necessary. To constitute the offense of kidnapping it is not necessary that actual physical force or violence should have been employed,[12] and this was true even at common law.[13] It is essential only that the taking or detention should be against the will of the person kidnapped.[14] Falsely exciting the fears of the person who is the subject of the offense by threats, or enticement or inveiglement by false and fraudulent representations amounting substantially to a coercion of the will is sufficient.[15]

b. What Constitutes Criminal Inveiglement. In determining whether the person was coerced by fraud and inveiglement, the nature of the artifice employed and the age, education, and condition of mind must be taken into consideration.[16]

3. Consent — a. Of Person Detained or Taken Away. The offense is not com-

certify to the daughter's insanity, and their certificate is duly approved by the county judge, as prescribed by N. Y. Laws (1874), c. 446, relating to the confinement of the insane, the father, who took no steps toward her restraint and removal to the hospital before such certificate and approval were placed in his hands, cannot be convicted on proof that the daughter was in fact sane, since, to constitute the crime of kidnapping, the confinement must be "without authority of law." People *v.* Camp, 66 Hun (N. Y.) 531, 21 N. Y. Suppl. 741 [*affirmed* in 139 N. Y. 87, 34 N. E. 755].

10. *Alabama.*— Oliver *v.* State, 17 Ala. 587.

California.— People *v.* Black, 147 Cal. 426, 81 Pac. 1099.

Indiana.— Boes *v.* State, 125 Ind. 205, 25 N. E. 218; State *v.* Sutton, 116 Ind. 527, 19 N. E. 602.

Nebraska.— Gould *v.* State, (1904) 99 N. W. 541.

New York.— People *v.* Camp, 66 Hun 531, 21 N. Y. Suppl. 741 [*affirmed* in 139 N. Y. 87, 34 N. E. 755]. And see Dehn *v.* Mandeville, 68 Hun 335, 22 N. Y. Suppl. 984, where the intent was held to be an essential element.

Intent subsequently formed.— Under Ohio Rev. St. § 6825, making the "intent unlawfully to detain or conceal" an essential element of the crime of child-stealing, the intent must accompany the act of taking the child; and it is error to instruct that if the child was taken away from the mother without her consent, and against her will, such taking was unlawful, and any intention thereafter completed the crime. Mayo *v.* State, 43 Ohio St. 567, 3 N. E. 712.

11. People *v.* Fick, 89 Cal. 144, 26 Pac. 759; State *v.* Backarow, 38 La. Ann. 316. And see John *v.* State, 6 Wyo. 203, 44 Pac. 51, where a child was taken out of the state to prevent her appearance as a witness in a criminal trial.

12. People *v.* De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444 [*affirming* 47 Hun 308]; State *v.* Rhoades, 29 Wash. 61, 69 Pac. 389; *In re* Kelly, 46 Fed. 653.

13. State *v.* Rollins, 8 N. H. 550; Desigey's Case, T. Raym. 474.

Arrest aided by artifice and fraud.— Where a citizen of New York who had committed a crime in Pennsylvania and to avoid arrest had fled to New York was induced by fraud and artifice to come back into Pennsylvania and was then arrested, this constituted the offense of kidnapping at common law. Norton's Case, 15 Wkly. Notes Cas. (Pa.) 395.

14. People *v.* Fick, 89 Cal. 144, 26 Pac. 759.

15. Sutton *v.* State, 122 Ga. 158, 50 S. E. 60; Moody *v.* People, 20 Ill. 315; Eberling *v.* State, 136 Ind. 117, 35 N. E. 1023. One who acts on a false representation, on a device or trick which misleads him, although apparently acting with his own free will, is acting against his will, and if he goes out of the state or is sent out of the state in pursuance of that inveiglement, he is sent out of it against his will. *In re* Kelly, 46 Fed. 653. It will hardly be contended that the crime of kidnapping as defined by statute is committed, if the person taken away, being capable in law of consenting, goes voluntarily, without objection, in the absence of fraud or deception. But if the party has been decoyed away fraudulently, the consent having been obtained by deception, the law will regard such consent as a nullity and the act will be treated as against the will of the person decoyed away. John *v.* State, 6 Wyo. 203, 44 Pac. 51.

16. Moody *v.* People, 20 Ill. 315; Eberling *v.* State, 136 Ind. 117, 35 N. E. 1023.

In the case of children any solicitation, promise, or allurement resorted to, for the purpose of inducing the child to leave its proper guardian, is generally regarded as constituting criminal inveiglement. People *v.* Congdon, 77 Mich. 351, 43 N. W. 986; Gould *v.* State, (Nebr. 1904) 99 N. W. 541; U. S. *v.* Ancarola, 1 Fed. 676, 17 Blatchf. 423.

Procuring the intoxication of a sailor with the design of getting him on shipboard without his consent, and taking him on board in that condition, is kidnapping under the New York statute. Hadden *v.* People, 25 N. Y. 373.

Promise of employment.— Where defendant induced a female voluntarily to take

mitted if the person taken away or detained, being capable in law of consenting, goes voluntarily without objection in the absence of fraud and deception.[17] But a child of tender years is regarded as incapable of consenting.[18]

b. Of Parent or Guardian. If a child is taken away with the consent of the parent or guardian entitled to the custody, no offense is committed.[19] But the offense is committed if the parent or guardian does not consent, without regard to the consent of the child,[20] and it is not necessary that the person committing the offense should have had notice of the unwillingness of the parent or guardian to part with the child.[21]

4. Detention. Under statutes making confinement or detention elements of the offense, there must exist an actual detention,[22] or an intent to detain[23] to con-

passage for a foreign port, under pretense that he had there obtained employment for her, but intending to place her in a house of prostitution, and it appears that she would not have consented to go but for such false pretense, he is guilty of the offense. People *v.* De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444 [*affirming* 47 Hun 308]. But inducing a person to go to a foreign country by the promise of work at a specified compensation, when the person making the promise knows that such compensation will not be obtained, is not an inveiglement. People *v.* Fitzpatrick, 57 Hun (N. Y.) 459, 10 N. Y. Suppl. 629, 8 N. Y. Cr. 81. The decision was based on the principle that a false representation essentially promissory in its nature cannot be the foundation of a criminal charge. Ranney *v.* People, 22 N. Y. 413. See also *In re* Kelly, 46 Fed. 653.

17. Cochran *v.* State, 91 Ga. 763, 18 S. E. 16; Olivarez *v.* State, (Tex. App. 1890) 14 S. W. 1012; Castillo *v.* State, 29 Tex. App. 127, 14 S. W. 1011; John *v.* State, 6 Wyo. 203, 44 Pac. 51.

18. *Massachusetts.*— Com. *v.* Nickerson, 5 Allen 518.

Nebraska.— Gould *v.* State, (1904) 99 N. W. 541.

New Hampshire.— State *v.* Farrar, 41 N. H. 53; State *v.* Rollins, 8 N. H. 550.

Virginia.— Davenport *v.* Com., 1 Leigh 588.

Washington.— State *v.* Rhoades, 29 Wash. 61, 69 Pac. 389.

Wyoming.— John *v.* State, 6 Wyo. 203, 44 Pac. 51.

United States.— U. S. *v.* Ancarola, 1 Fed. 676, 17 Blatchf. 423.

England.— Reg. *v.* Handley, 1 F. & F. 648; Reg. *v.* Kipps, 4 Cox C. C. 167; Reg. *v.* Biswell, 2 Cox C. C. 279; Reg. *v.* Wanktelow, 6 Cox C. C. 143, Dears. C. C. 159, 17 Jur. 352, 22 L. J. M. C. 115.

See 21 Cent. Dig. tit. "Kidnapping," § 4.

But see Castillo *v.* State, 29 Tex. App. 127, 14 S. W. 1011, where it was held that the fact that force is not an essential element of the offense if the person kidnapped is a female under fifteen years of age does not dispense with her non-consent. And see Cochran *v.* State, 91 Ga. 763, 18 S. E. 16, where it was held that, a female fourteen years old being competent to contract marriage, and the validity of her marriage not depending on the consent of her parents, it is not kidnapping for a man to take her away from her parents against their will, for the purpose of marrying her, where the contemplated marriage is actually consummated, and where the girl herself freely consents, and no force or fraud is used either against her or against her parents.

19. John *v.* State, 6 Wyo. 203, 44 Pac. 51, where a father took his child, who was of tender years, out of the state, with its consent and with the consent of its mother, who had been awarded the custody of the child in divorce proceedings.

20. Sutton *v.* State, 122 Ga. 158, 50 S. E. 60; Thweatt *v.* State, 74 Ga. 821; Gravett *v.* State, 74 Ga. 191.

The Georgia statute (Pen. Code (1895), § 100) relating to taking or enticing away children under eighteen years of age is regarded as defining two offenses — one where the child kidnapped has a parent or guardian and the other where it has neither. In the latter case, it must be taken away against its own consent; in the former if it is taken away against the will and without the consent of the parent or guardian, irrespective of that of the child, this alone will constitute the offense. Sutton *v.* State, 122 Ga. 158, 50 S. E. 60.

21. Gravett *v.* State, 74 Ga. 191; Com. *v.* Nickerson, 5 Allen (Mass.) 518.

22. People *v.* Black, 147 Cal. 426, 81 Pac. 1099; State *v.* Leuth, 128 Iowa 189, 103 N. W. 345.

Secrecy.— Under the New York statute, the confinement must be secret and hence one cannot be convicted of kidnapping who has had his daughter publicly committed to and confined in an insane asylum, although she is in fact sane. People *v.* Camp, 66 Hun (N. Y.) 531, 21 N. Y. Suppl. 741 [*affirmed* in 139 N. Y. 87, 34 N. E. 755].

23. Oliver *v.* State, 17 Ala. 587; Gould *v.* State, (Nebr. 1904) 99 N. W. 541. Where defendant induced two wilful girls bent on making a trip by themselves to San Francisco, to go instead to a respectable summer resort, furnishing them the means and leaving them free to act as they wished, but concealed their whereabouts from their parents, he was not guilty of the offense of enticing away a minor child with intent to detain her from her parents, in the absence of evi-

stitute the offense. But the length of the detention is immaterial[24] and an actual detention for any length of time is sufficient to make the offense complete.[25]

5. PLACE TO WHICH TRANSPORTED. Transportation to a foreign country is not necessary to the completion of the offense, even at common law; but it is sufficient if the person is carried into another state.[26] An actual carrying out of the state is not essential, but the offense is complete if the person is seized with intent to carry him out of the state.[27] Under some statutes the offense is complete if the person is carried from one part of the state to another.[28]

C. Attempts.[29] The attempt to commit the offense of kidnapping is indictable.[30]

II. DEFENSES.

It is not an absolute defense that defendant was acting under a warrant regular on its face,[31] or that he is the parent of the child kidnapped.[32] Where the prosecution is for enticing or inveigling a child the fact that the child consented is no defense.[33] A conviction of simple abduction is a bar to a subsequent prosecution for kidnapping.[34]

dence showing any intent to detain. People *v.* Black, 147 Cal. 426, 81 Pac. 1099.

24. John *v.* State, 6 Wyo. 203, 44 Pac. 51.

25. State *v.* Leuth, 128 Iowa 189, 103 N. W. 345.

26. State *v.* Rollins, 8 N. H. 550. But see Campbell *v.* Rankins, 11 Me. 103, where it was held that under the Maine statute prescribing a penalty for carrying or transporting "out of this State, any person under the age of twenty-one years . . . to any parts beyond sea, without the consent of his parents, master or guardian" the carrying must be to some foreign port or place, and not merely from one state to another.

27. State *v.* Farrar, 41 N. H. 53; State *v.* Rollins, 8 N. H. 550; Hadden *v.* People, 25 N. Y. 373.

Intent essential.— In Wisconsin where the statute provides for the punishment of any person who shall without lawful authority forcibly or secretly confine or imprison another within the state, against his will, or who shall forcibly carry or send another out of the state, or from place to place within the state against his will and without lawful authority, or who shall, without such authority, forcibly seize, confine, inveigle, or kidnap another, with intent to cause such person to be secretly confined or imprisoned in the state, or to be sent or carried out of the state against his will, the intent to send out of the state is essential to constitute the offense of kidnapping; otherwise, the offense is merely false imprisonment. Smith *v.* State, 63 Wis. 453, 23 N. W. 879. One employed to seize and forcibly detain a child, in ignorance of the intent of his employer, which actually existed, to cause the child to be sent out of the state, is not chargeable with such intent. Com. *v.* Nickerson, 5 Allen (Mass.) 518.

28. **Indiana.**— Under the Indiana statute it is not necessary that the person seized shall be carried out of the state or out of the county. If he is unlawfully and feloniously carried away from his residence the offense is complete. State *v.* Sutton, 116 Ind. 527, 19 N. E. 602. And "residence" within the statute is any place where the person has a right to be, and not necessarily legal residence or domicile. Wallace *v.* State, 147 Ind. 621, 47 N. E. 13.

Louisiana.— An indictment for the forcible seizure and carrying of a person from one part of the state to another is supported by proof that the carrying was from one part of the city to another. State *v.* Backarow, 38 La. Ann. 316.

Wyoming.— The place to which the person is transported need not be out of the state or even out of the county. The gravamen of the offense is the carrying away of the person from his place of residence. John *v.* State, 6 Wyo. 203, 44 Pac. 51.

California.— Where defendant and others went on board a schooner moored at a wharf in Los Angeles county and by force took two sailors and carried them to the island of Santa Catalina, twenty miles from the mainland, said island being in Los Angeles county, defendant was not guilty of kidnapping under Pen. Code, § 3207, declaring that "every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county . . . is guilty of kidnap[p]ing." *Ex p.* Keil, 85 Cal. 309, 24 Pac. 742; *Ex p.* Miller, (1890) 24 Pac. 743.

29. **Attempts** generally see CRIMINAL LAW, 12 Cyc. 176.

30. People *v.* Milne, 60 Cal. 71.

31. See People *v.* Fick, 89 Cal. 144, 26 Pac. 759, where defendant, a constable, had a warrant authorizing him to arrest prosecutrix and bring her before a justice of the peace, but did not take her before the justice, but left her at a certain house.

32. See *In re* Peck, 66 Kan. 693, 72 Pac. 265, where the child was alleged to have been taken from the person to whom its custody had been awarded.

33. See *supra*, I, B, 3, a.

34. Mason *v.* State, 29 Tex. App. 24, 14 S. W. 71.

III. Persons Liable.

A parent who has not parted with his right to the custody of his minor child,[35] or to whom the custody has been awarded in divorce proceedings,[36] cannot be guilty of kidnapping. One who advises or causes the commission of the offense is liable as well as the one who actually commits it,[37] and so too is one who aids and abets another in the commission of the crime.[38] And one who harbors and conceals a child kidnapped by others is guilty as principal.[39]

IV. Prosecution and Punishment.[40]

A. Indictment or Information[41] — **1. In General.** The essential elements of the offense[42] must be covered by the allegations of the indictment.[43]

2. Charge in Language of Statute. It is sufficient if the allegations in the indictment pursue the language of the statute defining the offense and prescribing its essential elements.[44]

3. Negativing Consent. An indictment for taking away a child whose parents are living is sufficient if it alleges the non-consent of the parents without negativing the consent of the guardian.[45]

4. Allegation of Intent. The intent which, under the statute defining the offense, renders the taking or detention criminal must be alleged.[46] But it is not

35. Hunt *v.* Hunt, 94 Ga. 257, 21 S. E. 515; State *v.* Angel, 42 Kan. 216, 21 Pac. 1075; Burns *v.* Com., 129 Pa. St. 138, 18 Atl. 756; Biggs *v.* State, 13 Wyo. 94, 77 Pac. 901.

36. Matter of Marceau, 32 Misc. (N. Y.) 217, 65 N. Y. Suppl. 717, 15 N. Y. Cr. 92.

37. Hadden *v.* People, 25 N. Y. 373.

38. Moody *v.* People, 20 Ill. 315. A person who assists a mother in leaving her husband and taking away the infant child of herself and husband is not guilty of kidnapping, since she is as much entitled to the custody of the child as its father. State *v.* Angel, 42 Kan. 216, 21 Pac. 1075.

39. Com. *v.* Westervelt, 11 Phila. (Pa.) 461.

40. Criminal law and procedure generally see 12 Cyc. 70.

Venue in such cases see 12 Cyc. 236.

41. Indictment or information generally see Indictments and Informations.

Forms of indictments or informations in whole or in part may be found in Sutton *v.* State, 122 Ga. 158, 50 S. E. 60; Dowda *v.* State, 74 Ga. 12; State *v.* Kimmerling, 124 Ind. 382, 24 N. E. 722; State *v.* Sutton, 116 Ind. 527, 19 N. E. 602; State *v.* Backarow, 38 La. Ann. 316; People *v.* Congdon, 77 Mich. 351, 43 N. W. 986; State *v.* George, 93 N. C. 567; Smith *v.* State, 63 Wis. 453, 23 N. W. 879.

42. Specific elements of offense see *supra*, I, B.

43. Com. *v.* Myers, 146 Pa. St. 24, 23 Atl. 164; Click *v.* State, 3 Tex. 282. But the indictment need not set out the evidence. Dowda *v.* State, 74 Ga. 12. Nor the means by which the offense was affected. State *v.* George, 93 N. C. 567.

Authority of law.— An indictment which fails to aver that the acts charged were not done in pursuance of the laws of the state or the United States charges no offense. State *v.* Kimmerling, 124 Ind. 382, 24 N. E. 722.

Force.— An indictment under the Louisiana statute prohibiting the forcible seizure and carrying of a person from one part of the state to another, or the imprisonment or secreting of any person, need not charge that he or she was forcibly imprisoned. State *v.* Backarow, 38 La. Ann. 316.

44. Dowda *v.* State, 74 Ga. 12; State *v.* McRoberts, 4 Blackf. (Ind.) 178; State *v.* George, 93 N. C. 567.

45. Pruitt *v.* State, 102 Ga. 688, 29 S. E. 437.

A count framed under Ga. Pen. Code (1895), § 110, charging that the accused took and enticed away a child under eighteen years of age, against its will and without its consent, is fatally defective in failing to allege that the child had no parent or guardian. Sutton *v.* State, 122 Ga. 158, 50 S. E. 60.

46. Smith *v.* State, 63 Wis. 453, 23 N. W. 879. Thus under the Indiana statute declaring that whoever kidnaps or forcibly or fraudulently carries off from his place of residence, or arrests or imprisons, any person, with intent to have such person carried away from his residence, is guilty of kidnapping, a count in an indictment charging an arrest but not alleging that it was with the intent of having the person carried away from his residence is bad, but a second count, charging that the felonious and fraudulent arrest was made with the felonious and fraudulent intention of carrying such person from his residence, is good. State *v.* Sutton, 116 Ind. 527, 19 N. E. 602. So too an information which charges in one count a forcible carrying away of a certain female from her place of residence, and in another a fraudulent decoying of said female from her place of resi-

necessary that the purpose for which the person was taken away or detained shall be alleged.[47]

5. Joinder of Counts and Duplicity.[48] A count for kidnapping a child may be joined with a count for harboring and concealing a child knowing it to have been enticed away.[49] So too kidnapping and abduction being offenses of like character, a count for kidnapping and a count for abduction may be joined in one indictment.[50] An information charging defendant and another with attempting to take and entice away two children is not objectionable as charging two offenses.[51]

B. Evidence.[52] The act of seizing a person and confining him is *prima facie* unlawful,[53] placing on the accused the burden of proving that the person was not detained against his will.[54] On a trial for kidnapping a child, the child may testify that she would not have gone away but for the inducements of defendant.[55] Precautions taken by the parent to prevent the decoying away of the child, and the fact that he was unwilling that it be taken away, may be put in evidence.[56] But defendant cannot show that the parent treated his family harshly.[57] Evidence tending to show the motive of defendant in his acts is, however, admissible.[58]

C. Trial. The intent of defendant in committing the acts with which he is charged is a fact to be inferred from the evidence and falls within the exclusive province of the jury.[59] It is also a question for the jury whether the name of the prosecutrix as alleged in the indictment is *idem sonans* with her true name as shown by the evidence.[60] An instruction as to the nature and effect of certain allurements or promises that might have been used to induce the child to go with defendant is erroneous where there was no evidence of any such promises or of fraud or flattery warranting such a reference.[61]

V. Civil Liability.

One may maintain an action for damages for his own abduction,[62] and a parent may maintain an action against one who entices away his minor child.[63] So too a

dence, need not charge a felonious intention in the commission of the acts alleged. Boes *v.* State, 125 Ind. 205, 25 N. E. 218.

47. People *v.* Fick, 89 Cal. 144, 26 Pac. 759; State *v.* Backarow, 38 La. Ann. 316.

48. Joinder of offenses generally see 22 Cyc. 376 *et seq.*

49. Com. *v.* Westervelt, 11 Phila. (Pa.) 461.

50. See Abduction, 1 Cyc. 157 note 5.

51. People *v.* Milne, 60 Cal. 71.

52. Sufficiency of the evidence to identify accused as the culprit was considered in State *v.* Leuth, 128 Iowa 189, 103 N. W. 345. The sufficiency of the evidence generally was considered in Com. *v.* Nickerson, 5 Allen (Mass.) 518.

53. Com. *v.* Robinson, Thach. Cr. Cas. (Mass.) 488; People *v.* Wolven, 7 N. Y. Leg. Obs. 89.

54. Com. *v.* Robinson, Thach. Cr. Cas. (Mass.) 488.

55. Gould *v.* State, (Nebr. 1904) 99 N. W. 541.

Letters written by accused to the person abducted, containing expressions tending to criminate accused, are admissible. Dowda *v.* State, 74 Ga. 12.

56. Gravett *v.* State, 74 Ga. 191.

57. Gravett *v.* State, 74 Ga. 191.

58. See People *v.* Fick, 89 Cal. 144, 26 Pac. 759, where defendant, a constable, had a warrant authorizing him to arrest prosecutrix and bring her before a justice of the peace, but left her at a certain house, evidence was admitted that this was a house of ill-fame.

59. Oliver *v.* State, 17 Ala. 587.

60. People *v.* Fick, 89 Cal. 144, 26 Pac. 759.

61. People *v.* Congdon, 77 Mich. 351, 43 N. W. 986.

62. Forcible deportation beyond the seas at the instance of a so-called vigilance committee is a marine tort. Gallagher *v.* The Yankee, 9 Fed. Cas. No. 5,196 [*affirmed* in 30 Fed. Cas. No. 18,124, McAllister 467].

Sufficiency of evidence.— An action to recover damages for abduction is not sustained by proof that defendant, by misrepresentations, threats of a criminal prosecution, and payment of money for expenses, but without using or threatening force, induced plaintiff to go to another place and remain in concealment for a time. Payson *v.* Macomber, 3 Allen (Mass.) 69.

63. Rice *v.* Wickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777; Stowe *v.* Heywood, 7 Allen (Mass.) 118; Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Kirkpatrick *v.* Lockhart, 2 Brev. (S. C.) 276. But where the agent of a children's aid society, being deceived by the false representations of a boy eighteen years of age, who gave a false name and pretended that he was an orphan, etc., sent the boy to a home in the west, an ac-

guardian may maintain an action for the benefit of his minor ward who was abducted.[64] It is no defense to an action by the parent that defendant acted in ignorance of the parent's rights,[65] or that the parent's treatment of his child contributed in any degree to produce the wrong complained of.[66] In an action by a parent he may recover reasonable and proper expenses incurred in regaining possession of the child,[67] and also for mental suffering consequent on defendant's wrongful acts.[68] So too in an action by the guardian for the benefit of his minor ward who was abducted, the mental pain suffered by the child is an element of damages.[69]

KIDNEY TROUBLE. A term whose meaning is not necessarily confined to organic diseases of the kidneys, but which may include a disordered condition of the kidneys due to accident or other temporary cause.[1]

KILL. As a noun, a Dutch word, signifying a channel or bed of a river, and hence the river or stream itself.[2] As a verb, to deprive of life.[3] (To Kill: Animal, see Animals; Railroads. Human Being, see Abortion; Homicide.)

KILLING. See Homicide.

KILO. An abbreviated form of kilogram.[4] (See Kilogram.)

KILOGRAM. A French measure of weight equal to about two and two-tenths (2.2) pounds avoirdupois;[5] a French weight equal to 2.206 pounds, and in Webster's Dictionary it is defined as "in the new system 1,000 grams, and equal in weight to 2 pounds 5 and a half drams";[6] "'in the metric system, a unit of mass (or weight), originally defined as the mass of one cubic decimeter of water at its maximum density, but now, practically, as the mass of a certain piece of platinum preserved in the archives of the International Metric Commission at Paris,' equaling 2.20462125 pounds, or 15,432.35 grains."[7] (See, generally, Weights and Measures.)

KIN. In its strictest sense, a term which includes only relations by blood; but in a general sense a term used to include both relations by blood and marriage.[8] (See Kindred.)

KIND. Sort;[9] class;[10] grade.[11] (See Class; Grade.)

KINDERGARTEN. Literally, a garden of children, a word devised by Friedrich W. A. Froebel, German philosopher and educator, to apply to a system which he

tion by the boy's parents to compel his return and for damages could not be sustained. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187.

One in loco parentis may sue in case *per quod servitium*, etc., for the abduction of his daughter's illegitimate child. Moritz *v.* Garnhart, 7 Watts (Pa.) 302, 32 Am. Dec. 762.

In admiralty a parent may maintain a libel in admiralty for the wrongful abduction of his minor child and carrying him beyond the seas. Tillmore *v.* Webb, 4 Fed. 231, 5 Hughes 217; Plummer *v.* Webb, 19 Fed. Cas. No. 11,233, 4 Mason 380; Steele *v.* Thacher, 22 Fed. Cas. No. 13,348, 1 Ware 85.

64. Brown *v.* Crockett, 8 La. Ann. 30.

65. Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

66. Stowe *v.* Heywood, 7 Allen (Mass.) 118.

67. Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

68. Stowe *v.* Heywood, 7 Allen (Mass.) 118; Magee *v.* Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

69. Brown *v.* Crockett, 8 La. Ann. 30.

1. Hogan *v.* Metropolitan L. Ins. Co., 164 Mass. 448, 449, 41 N. E. 663.

2. French *v.* Carhart, 1 N. Y. 96, 107.

3. Webster Int. Dict.

4. Standard Dict. [*quoted* in Richard *v.* Haebler, 36 N. Y. App. Div. 94, 103, 55 N. Y. Suppl. 583].

5. Imperial Dict. [*quoted* in Richard *v.* Haebler, 36 N. Y. App. Div. 94, 103, 55 N. Y. Suppl. 583].

6. Worcester Dict. [*quoted* in Richard *v.* Haebler, 36 N. Y. App. Div. 94, 103, 55 N. Y. Suppl. 583].

7. Standard Dict. [*quoted* in Richard *v.* Haebler, 36 N. Y. App. Div. 94, 103, 55 N. Y. Suppl. 583].

8. Hibbard *v.* Odell, 16 Wis. 633, 635. See also State *v.* Walton, 74 Mo. 270, 285.

9. Tait *v.* Carlisle Local Bd. of Health, 2 E. & B. 492, 511, 18 Jur. 374, 75 E. C. L. 492.

10. U. S. *v.* One Hundred and Thirty-Two Packages of Spirtuous Liquors, 65 Fed. 980, 982.

11. Whitehall Mfg. Co. *v.* Wise, 119 Pa. St. 484, 494, 13 Atl. 298.

elaborated for the instruction of children of very tender years.[12] (See, generally, Schools and School-Districts.)

KINDLE. To set fire to, set on fire, cause to burn, light.[13]

KINDRED. A term employed to designate a relation by birth or consanguinity.[14] (Kindred: Right of Inheritance — Generally, see Descent and Distribution; Under Will, see Wills.)

KINETOSCOPE. A mechanical contrivance producing continuous moving pictures.[15]

KINGDOM. In the strict sense of the term, territories belonging to the king.[16]

KING'S BENCH. See Court of King's Bench.

KINSMAN. See Kindred.

KISS MY FOOT. The phrase when written by a drawee, together with his signature, on a draft presented to him for acceptance, is to be construed as used in common parlance and implies, on the one hand, an express contempt for the person to whom it is addressed, and, on the other, a decided, unqualified and contemptuous refusal to comply with the request. It amounts to a refusal to accept.[17]

KITCHEN FURNITURE. See Furniture; Household Furniture.

KITING. The lending of one commercial firm to another of its credit; the borrowing by one friendly firm from another of its check, draft, note, bill or indorsement to tide over an immediate necessity for money, returning the favor when occasion arises.[18]

KITTY. A receptacle in a poker table into which a certain number of chips are dropped, when a hand of a certain value is held by a player, the contents of which, at the close of the game, go to the proprietor of the gambling establishment.[19] (See, generally, Gaming.)

KLEPTOMANIA. A well defined symptom of mania, consisting of an irresistible propensity or impulse to steal;[20] a species of insanity which renders its subject morally irresponsible for the crime of theft;[21] a morbid propensity to

12. Sinnott *v.* Colombet, 107 Cal. 187, 190, 40 Pac. 329, 28 L. R. A. 594 [*citing In re* Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L. R. A. 469].

13. Century Dict.

The words "coal for fuel, with sufficient wood to kindle or start the fire," as used in a policy of insurance, meant that wood was permitted to be used only with coal and for the one purpose of igniting the coal by aid of the more combustible quality of the wood, and that when the coal was once sufficiently ignited the use of wood was no longer allowed. Thurston *v.* Burnett, etc., Farmers' Mut. F. Ins. Co., 98 Wis. 476, 479, 74 N. W. 131, 41 L. R. A. 316.

14. Makea *v.* Nalua, 4 Hawaii 221, 230.

15. Barnes *v.* Miner, 122 Fed. 480, 487, in which the following description is given: "The Kinetoscope, briefly described, is a mechanical contrivance involving, among other things, a transparent or translucent narrow film of very great length, upon which is a series of photographs, very extensive in number, which photographs consecutively represent the continuous development of movement or action in the persons or things which are the subjects of such photographs. This film, by an electric device, is caused to pass in a dark room or theater with great rapidity, by a set of lenses, through which, by use of a powerful electric light, the scenes which are the subject of the series of photographs are much enlarged, thrown upon the white screen. As one picture or reproduction of the scene photographed succeeds another upon the screen, and with great rapidity, the impression produced upon the retina of the eye by the preceding picture continues longer than does the existence upon the screen of the picture which produces such impression. This is owing to the well-recognized defect of the eye known technically as 'persistence of impression.' As a result of this persistence of impression, the impression produced by one picture lasts or endures approximately until the impression produced by the next succeeding picture occurs. The result is substantially that one sees upon the kinetoscope screen a continuous moving picture reproducing the action and movement of the scenes photographed upon the film."

16. Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,494, 4 Wash. 148, 153.

17. Norton *v.* Knapp, 64 Iowa 112, 113, 19 N. W. 867.

18. Johnson *v.* Levy, 109 La. 1036, 1042, 34 So. 68. See also Wood *v.* American Nat. Bank, 100 Va. 306, 314, 40 S. E. 931.

19. Cochran *v.* State, 102 Ga. 631, 632, 29 S. E. 438.

20. Lowe *v.* State, 44 Tex. Cr. 224, 225, 70 S. W. 206 [*citing* 1 Cleavenger Insan. p. 177; 1 Bishop Cr. Law, § 388, subd. 3]; Looney *v.* State, 10 Tex. App. 520, 525, 38 Am. Rep. 646.

21. Harris *v.* State, 18 Tex. App. 287, 293.

steal, whether consciously or unconsciously;[22] the scientific name for the disease of stealing.[23] (Kleptomania: As Defense to Prosecution for Larceny, see LARCENY. See also, generally, INSANE PERSONS.)

KNAVE. A false, deceitful person; a dishonest person; one given to fraudulent tricks or practices; a rogue or scoundrel.[24] (See, generally, LIBEL AND SLANDER.)

KNEELING. As used in connection with religious services, touching the ground with the knee.[25]

KNIGHT-SERVICE. A tenure by which the greatest part of the lands in England were holden, and that principally of the king, *in capite*, till the last century.[26]

KNIT FABRICS. See KNIT GOODS.

KNIT GOODS. A term which, although frequently used interchangeably with "knit fabrics," more appropriately describes manufactured articles, while knit fabrics refer more especially to manufactured material as piece goods.[27] (See FABRIC.)

KNITTING MACHINE. A hand or power machine for knitting.[28]

KNOCK DOWN. In the language of the auction room, to signify to a bidder, by the fall of the auctioneer's hammer or other adequate or visible announcement, that he is entitled to the property on paying the amount of his bid according to the terms of the sale; the synonym of "strike off."[29] (See, generally, AUCTIONS AND AUCTIONEERS.)

KNOT. A synonym of marine or nautical mile.[30]

KNOW. To have knowledge; to possess information, instruction or wisdom;[31]

22. Lewis *v.* Lewis, 44 Minn. 124, 125, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505; Lowe *v.* State, 44 Tex. Cr. 224, 225, 70 S. W. 206 [*citing* Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351; Hurst *v.* State, 49 Tex. Cr. 378, 46 S. W. 635, 50 S. W. 719], holding that the "right and wrong" test may be applied to the defense of kleptomania.

23. State *v.* Reidell, 9 Houst. (Del.) 470, 474, 14 Atl. 550.

24. Century Dict. See also 14 Cyc. 1147 note 71.

25. Martin *v.* Mackonochie, L. R. 3 P. C. 52, 66.

26. 2 Blackstone Comm. 73.

27. Arnold *v.* U. S., 147 U. S. 494, 499, 13 S. Ct. 406, 37 L. ed. 253.

28. Century Dict. And see Holmes *v.* Plainville Mfg. Co., 9 Fed. 757, 759, 20 Blatchf. 123, in which the court say: "A knitting-machine has nothing in common with a loom, for weaving, except that each has a roller upon which the completed fabric is rolled, and a take-up. The office of the take-up, in each machine, is to regulate the tension of the cloth. In a loom, it is necessary that the warp should be kept taut between the yard-beam and the cloth-beam. A knitting-machine produces a fabric made by a succession of loops, and as the necessities of the manufacture do not require that the yarn or threads should be kept tightly drawn, a smaller expenditure of force is necessary than in a loom take-up."

29. Sherwood *v.* Reade, 7 Hill (N. Y.) 431, 439.

30. Rockland, etc., Steamboat Co. *v.* Fessenden, 79 Me. 140, 147, 8 Atl. 550.

31. Webster Dict. [*quoted* in State *v.* Ransberger, 106 Mo. 135, 139, 17 S. W. 290; Page *v.* Allen, 58 Pa. St. 338, 359, 98 Am. Dec. 272]; Worcester Dict. [*quoted* in Page *v.* Allen, 58 Pa. St. 338, 359, 98 Am. Dec. 272].

As used in statutes, imposing liability, be it civil or criminal, upon persons knowing certain facts, the word is to be construed as implying actual knowledge, and not merely constructive notice or lack of information by reason of neglect or inadvertence. Southern R. Co. *v.* Bryan, 125 Ala. 297, 309, 28 So. 445; De Vaughn *v.* Harris, 103 Ga. 102, 104, 29 S. E. 613; State *v.* McBarron, 66 N. J. L. 680, 51 Atl. 146, 147, in which the court said: "The word 'knowing' in N. J. Gen. St. p. 1334, which enacts that any person who shall cause or procure his name or that of any other person to be registered, knowing that he or the person whose name has procured to be registered is not entitled to vote, shall be punished, etc., means knowledge, mental assurance or scienter. It is positive, not negative. Such knowledge must be clearly proved, or shown by such circumstances as leave no reasonable doubt on a fair mind. The proof of the knowledge must be clear, not a mere inference that he could have found out by further inquiry. There must have been culpable intent shown, not mere ignorance." Bonnell *v.* Griswold, 89 N. Y. 122, 125; Pier *v.* Hanmore, 86 N. Y. 95, 102. But see *contra*, Morey *v.* Milliken, 86 Me. 464, 474, 30 Atl. 102; Tucker *v.* Constable, 16 Oreg. 407, 409, 19 Pac. 13, holding that mere information inducing a belief constitutes "knowing" within the sense of such statutes.

to have sexual connection with;[32] to understand, as, for example, to understand the dangerous character of one's duties or employment.[33]

KNOWINGLY.[34] With knowledge;[35] intentionally.[36]

KNOWLEDGE. The certain perception of truth; belief which amounts to or results in moral certainty; indubitable apprehension; information, intelligence, as to have knowledge of a fact;[37] information of fact;[38] information, intelligence, implying truth, proof and conviction;[39] the act or state of knowing; clear perception of fact; that which is or may be known;[40] acquaintance with things ascertainable; specific information;[41] settled belief; reasonable conviction;[42] anything which may be the subject of human instruction.[43] (Knowledge:

32. Webster Dict. [*quoted* in State *v.* Thomas, 53 Iowa 214, 221, 4 N. W. 908].

33. Chicago, etc., R. Co. *v.* Kinnare, 190 Ill. 9, 15, 60 N. E. 57.

34. **Distinguished from "belief"** see 5 Cyc. 680 note 74.

35. West *v.* Wright, 98 Ind. 335, 339.

36. Twycross *v.* Grant, L. R. 2 C. P. D. 469, 542, 46 L. J. C. P. 636, 36 L. T. Rep. N. S. 812, 25 Wkly. Rep. 701 [*cited* in Shepheard *v.* Broome, [1904] A. C. 342, 343, 73 L. J. Ch. 608, 91 L. T. Rep. N. S. 178, 11 Manson 283, 20 T. L. R. 540, 53 Wkly. Rep. 111].

As indicative of criminal intent see State *v.* Williams, 139 Ind. 43, 45, 38 N. E. 339, 47 Am. St. Rep. 255; Moeschke *v.* State, 14 Ind. App. 393, 42 N. E. 1029, 1030; Brown *v.* State, 14 Ind. App. 24, 42 N. E. 244, 245; State *v.* Stafford, 67 Me. 125; State *v.* Bixler, 62 Md. 354, 356; Mt. Morris Bank *v.* Gorham, 169 Mass. 519, 521, 48 N. E. 341; Com. *v.* Boynton, 12 Cush. (Mass.) 499, 500; Gibbs *v.* Hanchette, 90 Mich. 657, 660, 51 N. W. 691; State *v.* Stein, 48 Minn. 466, 470, 51 N. W. 474; State *v.* White, 96 Mo. App. 34, 39, 69 S. W. 684; State *v.* Smith, 18 N. H. 91, 94; People *v.* Root, 94 N. Y. App. Div. 84, 87, 87 N. Y. Suppl. 962, Pen. Code (1903), § 718; Verona Cent. Cheese Factory *v.* Murtaugh, 4 Lans. (N. Y.) 17, 22; Crofton *v.* State, 25 Ohio St. 249, 254; Thompson *v.* Ackerman, 12 Ohio Cir. Dec. 456, 465; Fry *v.* Hubner, 35 Oreg. 184, 186, 57 Pac. 420; State *v.* Davis, 14 R. I. 281, 284; McGuire *v.* State, 7 Humphr. (Tenn.) 54, 55; Welsh *v.* State, 11 Tex. 368, 374; Simon *v.* State, 31 Tex. Cr. 186, 203, 20 S. W. 399, 716, 37 Am. St. Rep. 802; Tynes *v.* State, 17 Tex. App. 123, 126; Bryne *v.* State, 12 Wis. 519, 527; Price *v.* U. S., 165 U. S. 311, 314, 17 S. Ct. 366, 41 L. ed. 727; Rosen *v.* U. S., 161 U. S. 29, 33, 16 S. Ct. 434, 40 L. ed. 606; Dunbar *v.* U. S., 156 U. S. 185, 192, 15 S. Ct. 325, 39 L. ed. 390; Cooper *v.* Schlesinger, 111 U. S. 148, 155, 4 S. Ct. 360, 28 L. ed. 382; U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 486, 19 L. ed. 278; U. S. *v.* Cassidy, 67 Fed. 698, 704; Newport News, etc., Co. *v.* U. S., 61 Fed. 488, 490, 9 C. C. A. 579; U. S. *v.* Terry, 42 Fed. 317, 318; U. S. *v.* Claypool, 14 Fed. 127, 128; U. S. *v.* Watkinds, 6 Fed. 152, 154, 7 Sawy. 85; Driskell *v.* Parish, 7 Fed. Cas. No. 4,087; Giltner *v.* Gorham, 10 Fed. Cas. No. 5,453, 4 McLean 402, 420; Gregory *v.* U. S., 10 Fed. Cas. No. 5,803, 17 Blatchf. 325, 328; U. S. *v.* McKim, 26 Fed. Cas. No. 15,693, 3 Pittsb. 155, 156.

37. Webster Dict. [*quoted* in Utley *v.* Hill, 155 Mo. 232, 264, 55 S. W. 1091, 78 Am. St. Rep. 569, 49 L. R. A. 323].

38. Anderson L. Dict.; Bouvier L. Dict. [*quoted* in State *v.* Ransberger, 106 Mo. 135, 139, 17 S. W. 290].

39. Worcester Dict. [*quoted* in State *v.* Ransberger, 106 Mo. 135, 139, 17 S. W. 290].

40. Webster Dict. [*quoted* in Ohio Valley Coffin Co. *v.* Goble, 28 Ind. App. 362, 62 N. E. 1025, 1027; State *v.* Ransberger, 106 Mo. 135, 139, 17 S. W. 290].

41. Century Dict. [*quoted* in Ohio Valley Coffin Co. *v.* Goble, 28 Ind. App. 362, 62 N. E. 1025, 1027].

42. State *v.* Ransberger, 106 Mo. 135, 139, 17 S. W. 290.

43. Cincinnati Bd. of Education *v.* Minor, 23 Ohio St. 211, 243, 13 Am. Rep. 233, holding that in the above sense religion and morality are comprehended within the meaning of the term.

Construed to mean actual as distinguished from constructive knowledge in Fidelity, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 638, 25 S. E. 392, 54 Am. St. Rep. 440, 33 L. R. A. 821; Utley *v.* Hill, 155 Mo. 232, 264, 55 S. W. 1091, 1099, 78 Am. St. Rep. 569, 49 L. R. A. 323; Peoples *v.* Carrol, 11 Heisk. (Tenn.) 417, 423; Chapman *v.* Tufts, 8 Can. Sup. Ct. 543, 548. But see, *contra*, Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042, 1043 [*citing* 2 Pomeroy Eq. Jur. § 592].

Distinguished from notice see Cleveland Woolen Mills *v.* Seibert, 81 Ala. 140, 146, 1 So. 773; Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 584, 63 Pac. 915; Clarke *v.* Ingram, 107 Ga. 565, 570, 33 S. E. 802; Levins *v.* W. O. Peeples Grocery Co., (Tenn. Ch. App. 1896) 38 S. W. 733, 740; Jones *v.* Van Zandt, 13 Fed. Cas. No. 7,502, 2 McLean 611, 618.

Distinguished from belief see Ohio Valley Coffin Co. *v.* Goble, 28 Ind. App. 362, 62 N. E. 1025, 1027; Hatch *v.* Carpenter, 9 Gray (Mass.) 271, 274; Iron Silver Min. Co. *v.* Reynolds, 124 U. S. 374, 382, 8 S. Ct. 598, 31 L. ed. 466.

Distinguished from suspicion in American Surety Co. *v.* Pauly, 72 Fed. 470, 477, 18 C. C. A. 644. But see May *v.* Chapman, 16 M. & W. 355, holding that "notice and knowledge" may mean not merely express notice, but knowledge, or the means of knowledge, to which a party wilfully shuts his eyes, — a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded.

Knowledge of a bank's insolvency.— Under

Actual, see NOTICE. Affecting — Accord and Satisfaction, see ACCORD AND SATISFACTION; Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS; Compromise and Settlement, see COMPROMISE AND SETTLEMENT; Contract, see CONTRACTS; COVENANTS; DEEDS; SALES; VENDOR AND PURCHASER; Election, see ELECTION OF REMEDIES. Laches, see EQUITY. By or Of — Affiant in General, see AFFIDAVITS; Affiant For Attachment, see ATTACHMENTS; Agent, see PRINCIPAL AND AGENT; Attorney, see ATTORNEY AND CLIENT; Creditor, see COMPOSITIONS WITH CREDITORS; INSOLVENCY; Grantee, see DEEDS; Grantor, see DEEDS; Insured, see FIRE INSURANCE, and the Insurance Titles; Inventor, see PATENTS; Partner, see PARTNERSHIP; Party to Negotiable Paper, see COMMERCIAL PAPER; Principal, see PRINCIPAL AND AGENT; Purchaser, see SALES; VENDOR AND PURCHASER; Vendor, see SALES; VENDOR AND PURCHASER; Witness, see WITNESSES; Construction, see NOTICE. Evidence of, see CRIMINAL LAW; EVIDENCE. In Criminal Law, see CRIMINAL LAW, and the Particular Criminal Titles. Judicial, see EVIDENCE. Of — Cause of Action, see LIMITATIONS OF ACTIONS; Contents of Baggage, see INNKEEPERS; Custom, see CUSTOMS AND USAGES; Defects, see BRIDGES; CARRIERS; LANDLORD AND TENANT; MASTER AND SERVANT; NEGLIGENCE; STREETS AND HIGHWAYS; Fraud, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUD; FRAUDULENT CONVEYANCES; Forgery, see COMMERCIAL PAPER; Injunction, see INJUNCTIONS; Pendency of Action, see LIS PENDENS; Usage, see CUSTOMS AND USAGES; Vicious Trait, see ANIMALS. Sufficient to Put Upon Inquiry, see COMMERCIAL PAPER; FRAUD; FRAUDULENT CONVEYANCES; NOTICE; SALES; VENDOR AND PURCHASER.)

KNOWN. Perceived; understood; recognized; familiar; especially, when used absolutely, familiar to all; generally understood or perceived.[44] (See KNOWLEDGE.)

enactments imposing criminal liability upon directors and officers of a bank, who receive deposits with knowledge of the bank's insolvency, knowledge means a guilty knowledge, and not a *bona fide* ignorance arising from negligence to keep posted or to inquire. Utley *v.* Hill, 155 Mo. 232, 264, 55 S. W. 1091, 78 Am. St. Rep. 569, 49 L. R. A. 323.

Knowledge of danger see Holwerson *v.* St. Louis, etc., Co., 157 Mo. 216, 242, 57 S. W. 770, 80 Am. St. Rep. 625, 50 L. R. A. 850; St. Louis South Western R. Co. *v.* Shiflet, 94 Tex. 131, 139, 58 S. W. 945.

Knowledge of one's legal rights expresses that degree of information upon both fact and law which enables a party to judge how far a demand can be enforced by him or against him. Light *v.* Light, 21 Pa. St. 407, 412.

Knowledge as foundation of expert testimony.— In Buffum *v.* Harris, 5 R. I. 243, 251 [*quoted* in Pendleton *v.* Saunders, 19 Oreg. 9, 26, 24 Pac. 506], the court says: "Knowledge of any kind, gained for and in the course of one's business as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion, founded on such knowledge, admissible in evidence."

44. Century Dict.

In connection with various other words the term has frequently been judicially construed, as in the following instances: "Known as" (People *v.* Dana, 22 Cal. 11, 21; Kneeland *v.* Van Valkenburgh, 46 Wis. 434, 438, 1 N. W. 63, 32 Am. Rep. 719), "known" channel (Los Angeles *v.* Pomeroy, 124 Cal. 597, 634, 57 Pac. 585; Medano Ditch Co. *v.* Adams, 29 Colo. 317, 326, 68 Pac. 431; Wyandot Club *v.* Sells, 9 Ohio S. & C. Pl. Dec. 106, 111, 6 Ohio N. P. 64; Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 757, 40 S. E. 27, 86 Am. St. Rep. 924, holding that in this connection "known" is not synonymous with "visible," nor restricted to knowledge derived from exposure of the channel by excavation, but refers to knowledge by reasonable inference), "known creditors" (Davis' Appeal, 39 Conn. 395, 399), "known defects" (Demars *v.* Glen Mfg. Co., 67 N. H. 404, 406, 40 Atl. 902), "known equivalent" (Morley Sewing Mach. Co. *v.* Lancaster, 129 U. S. 263, 290, 9 S. Ct. 299, 32 L. ed. 715), "known intemperate habits" (Com. *v.* Zelt, 138 Pa. 615, 619, 21 Atl. 7, 11 L. R. A. 602; Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102, 104; Zeigler *v.* Com., 10 Pa. Cas. 404, 407, 14 Atl. 237), "known lode or vein" (McConaghy *v.* Doyle, 32 Colo. 92, 95, 75 Pac. 419; Casey *v.* Thieviege, 19 Mont. 341, 347, 48 Pac. 394, 61 Am. St. Rep. 511; Butte, etc., Min. Co. *v.* Sloan, 16 Mont. 97, 100, 40 Pac. 217; Brownfield *v.* Bier, 15 Mont. 403, 414, 39 Pac. 461, 463; Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 143 U. S. 394, 404, 12 S. Ct. 543, 36 L. ed. 201 [*citing* Noyes *v.* Mantle, 127 U. S. 348, 353, 8 S. Ct. 1132, 32 L. ed. 168; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 536, 6 S. Ct. 481, 29 L. ed. 712]; Sullivan *v.* Iron Silver Min. Co., 143 U. S. 431, 433, 12 S. Ct. 555, 36 L. ed. 214 [*reversing* 16 Fed. 829, 831, 5 McCrary 274];

KNUCK. A synonym of knuckle.[45]

KNUCKLES. See BRASS KNUCKLES.

KUMSHAW. A present of any kind; a gift or douceur; bakshish.[46]

KUT KUBALA or **BYE-BIL-WAFFA.** In India, a deed of conditional sale, and one of the customary deeds or instruments of security.[47]

L. A Roman numeral standing for 50; in the English money, the sign for pounds; an abbreviation for *liber* (book), law, lord.[48]

LA. An abbreviation of Louisiana,[49] although not judicially recognized as such.[50]

LABEL. A placard or slip attached to an object to denote its contents, destination or ownership;[51] a slip of paper or any other material bearing a name, title, address, or the like, affixed to something to indicate its nature, contents, ownership, destination, or other particulars;[52] a small piece of paper, or other material, containing the name, title or description, and affixed to indicate its nature or contents;[53] a narrow slip of silk, paper, parchment, &c., affixed to anything denoting its contents, ownership, and the like.[54] (Label: On Harmful Drug or Medicine, see DRUGGISTS. On Inspected Article—Generally, see INSPECTION; Fertilizer, see AGRICULTURE. On Poison, see POISONS. Subject of—Copyright, see COPYRIGHT; Of Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.)

LABOR.[55] As a noun, manual, servile work, including the sale of liquors or

Davis *v.* Wiebbold, 139 U. S. 507, 524, 11 S. Ct. 628, 35 L. ed. 238; U. S. *v.* Iron Silver Min. Co., 128 U. S. 673, 683, 9 S. Ct. 195, 32 L. ed. 571; Montana Cent. R. Co. *v.* Migeon, 68 Fed. 811, 813), "known property" (Farnham *v.* Thomas, 56 Vt. 33, 34; Moore *v.* Quint, 44 Vt. 97, 104; Stoughton *v.* Dimick, 29 Vt. 535, 3 Blatchf. 356, 359, 23 Fed. Cas. No. 13,500; Wheeler *v.* Brewer, 20 Vt. 113, 117; Hill *v.* Bellows, 15 Vt. 727, 733; Tucker *v.* Wells, 12 Vt. 240, 243), "known violation of law" (Bradley *v.* Mutual Ben. L. Ins. Co., 45 N. Y. 422, 427, 6 Am. Rep. 115), "known attachable property" (Farnham *v.* Thomas, 56 Vt. 33), "known or used in this country, as referring to subjects of patents" (Illingworth *v.* Spaulding, 9 Fed. 611, 612, construing U. S. Rev. St. § 4886).

45. Mills *v.* State, 36 Tex. Cr. 71, 73, 35 S. W. 370.

46. Century Dict. And see Wilcocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47, in which the court said: "In the general Canton trade the kumshaw is a present made by the hong merchant or broker to the captain or supercargo of a vessel on the completing of a sale. It is voluntary on the part of the hong. It consists, not of money, but of shawls, fine teas, etc., and is always regarded as the perquisite and private profit of the person to whom it is made. But the kumshaw in the opium-trade differs in some respects from that in the ordinary Chinese trade. It is a money-fee, fixed in amount, and obligatory on the purchaser. . . . The kumshaw is paid only when the opium is delivered to a purchaser or smuggler, and not when it is trans-shipped." In the different opium ships at Canton, as between the owner and captain, the right to the kumshaw was usually, though not always, a matter of special agreement. In the British ships it was generally divided, while in the only American ship engaged in the opium store trade the captain received the whole kumshaw.

47. Chowdry *v.* Roy, 8 Wkly. Rep. 29, 30.

48. Bouvier L. Dict.

49. Lawyer Ref. Man. (1883) 429.

50. Russell *v.* Martin, 15 Tex. 238 [*citing* Ellis *v.* Park, 8 Tex. 205].

51. Webster Dict. [*quoted* in U. S. *v.* Marble, 3 Mackey (D. C.) 32, 34 (*citing* Knight Am. Dict.; Skeat Etymological Dict.)].

As commonly understood the word denotes a slip of paper or other suitable material attached to goods, giving a short description of their character, directions for their use, and other facts of interest to the purchaser. U. S. *v.* Marble, 3 Mackey (D. C.) 32, 41.

The most general idea of the word is not of a separate strip of paper or parchment, but a written description of the article upon which it is placed or made, as to its ownership, or character, or quality, or extent. Wilkins *v.* Earle, 44 N. Y. 172, 185, 4 Am. Rep. 655, where the court, in speaking of a package in a hotel room with the name of the owner on it, said: "The name of . . . [the owner] was a label. It indicated the ownership. . . . A similar indorsement of the word money, or valuables, would have been a label."

52. Century Dict. [*quoted* in Perkins *v.* Heert, 5 N. Y. App. Div. 335, 339, 39 N. Y. Suppl. 223].

53. Worcester Dict. [*quoted* in U. S. *v.* Marble, 3 Mackey (D. C.) 32, 34].

54. Webster Dict. [*quoted* in U. S. *v.* Marble, 3 Mackey (D. C.) 32, 41].

A label is only intended to indicate the article contained in the bottle, package, or box to which it is affixed, and not to distinguish it from articles of the same general nature manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given to it, as a trade-mark does. Higgins *v.* Keuffel, 140 U. S. 428, 433, 11 S. Ct. 731, 35 L. ed. 470.

55. "The word labor comes from the Latin verb *labo*, which is thus rendered in one of

goods;[56] manual exertion of a toilsome nature;[57] physical toil or bodily exertion; hard muscular effort directed to some useful end;[58] work done or to be done; that which requires wearisome exertion;[59] labor, pains combined with physical efforts; or, metonymically, activity, industry, hardship, misfortune, trouble, distress;[60] the act of doing what requires a painful exertion of strength; pains; toil; work to be done; work done; performance; exercise; motion with some degree of violence; child-birth, travail;[61] toilsome work; pains; travail, any bodily exercise which is attended with fatigue,[62] travail, the pangs and efforts of child-birth, the evils of life, trial, prosecution, etc.;[63] exertion of muscular strength, or bodily exertion which occasions weariness; particularly the exertion of the limbs; occupations by which subsistence is obtained as in agriculture and manufactures, in distinction from exertions of strength in play or amusements which are denominated exercise rather than labor;[64] heroic achievement;[65] and while the common and ordinary signification of the term is understood to be physical toil,[66] nevertheless, in some extended senses, it will include every possible human exertion, mental and physical;[67]

the most approved lexicons; to totter, to be ready to fall, to be on the point of falling, to waiver, to be at a loss, to hesitate." Riddle Lex. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

"The term labour is . . . of very extensive signification. The merchant labours; for there is mental as well as manual or corporeal labour; the farmer labours, the professional man labours, and judges labour." Heebner *v.* Chave, 5 Pa. St. 115, 117.

Distinguished from: "Business" see Richmond *v.* Moore, 107 Ill. 429, 438, 47 Am. Rep. 445. "Earnings" see Hoyt *v.* White, 46 N. H. 45, 48. "Laborer" see Paddock *v.* Balgord, 2 S. D. 100, 105, 48 N. W. 840, 844, where it is said: "'Labor,' either as a noun or a verb, is a comprehensive word, and does not seem to carry to its derivative 'laborer,' as ordinarily used, its full original meaning."

Not clearly distinguished from "employment" see Bockway *v.* Innes, 39 Mich. 47, 48, 33 Am. Rep. 348 [*quoted* in *In re* George T. Smith Middlings Purifier Co., 83 Mich. 513, 519, 47 N. W. 342].

"Common labor."—"Neither in common parlance, or in its strict philological sense, does the expression, 'common labor,' embrace the simple making of a bargain." Bloom *v.* Richards, 2 Ohio St. 387, 400. "In 'common language' the term 'common labor' is never understood to include such performances." Wirth *v.* Calhoun, 64 Nebr. 316, 320, 89 N. W. 785.

"Manual labour" see Cook *v.* North Metropolitan Tramways Co., 18 Q. B. D. 683, 684, 51 J. P. 630, 56 L. J. Q. B. 309, 56 L. T. Rep. N. S. 448, 57 L. T. Rep. N. S. 476, 35 Wkly. Rep. 577.

56. Cortesy *v.* Territory, 6 N. M. 682, 687, 30 Pac. 947, 19 L. R. A. 349.

Skill.—"In every form of useful labor, some degree of skill must enter; and so, in every application of skill, there must be some degree of physical labor." Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144.

57. Bloom *v.* Richards, 2 Ohio St. 387, 401; Anderson L. Dict. [*quoted* in Dewell *v.* Hughes County, 8 S. D. 452, 454, 66 N. W. 1079.

"This is its ordinary, popular, signification; the meaning that must be given to it, wherever it occurs in a statute, unless it is plainly used in a more enlarged, or restricted, sense." Bloom *v.* Richards, 2 Ohio St. 387, 401. To the same effect is Dewell *v.* Hughes County, 8 S. D. 452, 454, 66 N. W. 1079.

58. Webster Dict. [*quoted* in Dixon *v.* People, 168 Ill. 179, 190, 48 N. E. 108, 39 L. R. A. 116].

"The idea of toil, of that which does or may produce weariness, is inseparable from the idea conveyed by the word labor, or, more strictly speaking, is included in the idea it conveys." Bloom *v.* Richards, 2 Ohio St. 387, 401.

In its ordinary sense the term implies personal services and work by an individual. Balch *v.* New York, etc., R. Co., 46 N. Y. 521, 524 [*quoted* in Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. §§ 568, 571].

59. Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

60. Riddle Lex. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

61. Walker Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

62. Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

63. Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 401].

64. Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

65. "As the labor of Hercules." Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 401].

66. Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144.

67. Brockway *v.* Innes, 39 Mich. 47, 49, 33 Am. Rep. 348 [*quoted* in *In re* George T. Smith Middlings Purifier Co., 83 Mich. 513, 518, 47 N. W. 342].

Restricted and extended use of term.—"The exception of claims for labor [in a statute] would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad and other contractors, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill. On the other hand, there is a technical use of the term in pleading, which has

intellectual exertion; mental effort;[68] intellectual exertion, application of the mind which occasions weariness;[69] exertion of mental powers united with bodily employment.[70] As a verb, to exert muscular strength; to exert one's strength with painful effort, particularly in servile occupations; to work; to toil.[71] (Labor: As Consideration For Stock Issued, see Corporations. As Part of Punishment Imposed, see Criminal Law. Claim or Lien For, see Assignments For Benefit of Creditors; Bankruptcy; Corporations; Insolvency; Liens; Maritime Liens; Mechanics' Liens. Contract as Commerce, see Commerce. Convict, see Convicts. Hours of, see Counties; Master and Servant. On Sunday, see Sunday. Performed For Corporation, see Corporations. To Work Out Costs, see Costs. Union, see Labor Unions. See also Laborer.)

LABOR COMBINATION. See Labor Unions.

LABORER. Etymologically[72] and in a general sense, one who labors;[73] one who labors or works with either mind or body;[74] one who performs any kind

a much wider signification, and would embrace all sorts of services, whether physical or mental, or whether the main ingredient was manual toil or professional or other skill. It would embrace, indeed, all the classes we have mentioned, including the highest salaried officers, engineers, architects, sculptors, painters, stage players, master-builders or other contractors." Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144 [*cited* in Hoyt *v.* White, 46 N. H. 45, 48]. "The words 'labor or service' of any kind cannot be given a restricted meaning, so as to exclude the vocation of a minister of the gospel." U. S. *v.* Holy Trinity Church, 36 Fed. 303, 304.

"An assistant chief engineer would never have been classed as that of a laborer, nor his work as labor in the popular sense." Bockway *v.* Innes, 39 Mich. 47, 48, 33 Am. Rep. 348 [*quoted* in *In re* George T. Smith Middlings Purifier Co., 83 Mich. 513, 519, 47 N. W. 342].

"The official services of a mayor of a city, under an annual salary," comprehended within the terms "labor performed." See Robinson *v.* Aiken, 39 N. H. 211 [*cited* in Weymouth *v.* Sanborn, 43 N. H. 171, 175, 80 Am. Dec. 144].

In a criminal statute, the term does not apply to an officer engaged in the performance of his official duties. Stephens *v.* Porter, 29 Tex. Civ. App. 556, 559, 69 S. W. 423.

68. "As the labor of compiling a history." Webster Dict. [*quoted* in Dixon *v.* People, 168 Ill. 179, 190, 48 N. E. 108, 39 L. R. A. 116]. But *compare* Michigan Trust Co. *v.* Grand Rapids Democrat, 113 Mich. 615, 617, 71 N. W. 1102, 67 Am. St. Rep. 486.

69. "As, the labor of compiling and writing a history." Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

70. "As, the labors of the apostles in propagating Christianity." Webster Dict. [*quoted* in Bloom *v.* Richards, 2 Ohio St. 387, 400].

As used in connection with other words see the following phrases: "All labor" (Holden *v.* O'Brien, 86 Minn. 297, 299, 90 N. W. 531); "any labor or services" (Mabie *v.* Sines, 92 Mich. 545, 547, 52 N. W. 1007); "engaged in any labor" (Cortesy *v.* Territory, 6 N. M. 682, 687, 30 Pac. 947, 19 L. R. A. 349); "for labor performed by me for said corporation" (McLaren *v.* Byrnes, 80 Mich. 275, 278, 45 N. W. 143, 144); "labor and services" (Hogan *v.* Cushing, 49 Wis. 169, 170, 5 N. W. 490); "labor, business, or work" (Towle *v.* Larrabee, 26 Me. 464, 466; Fennell *v.* Ridler, 5 B. & C. 406, 8 D. & R. 204, 4 L. J. K. B. O. S. 207, 29 Rev. Rep. 278, 11 E. C. L. 517); "labor debts" (Lawton *v.* Richardson, 118 Mich. 669, 671, 77 N. W. 265); "labor on the public works" (Jamison *v.* Wimbish, 130 Fed. 351, 359); "labor or service" (U. S. *v.* Laws, 163 U. S. 258, 264, 16 S. Ct. 998, 41 L. ed. 151); "labor service" (Johnson *v.* Kimball, 170 Mass. 58, 60, 48 N. E. 1020; State *v.* Smith, 19 Wash. 644, 645, 54 Pac. 33); "labor upon any land timber or lumber" (Bailey *v.* Hull, 11 Wis. 289, 291, 78 Am. Dec. 706); "performs labor" (Knight *v.* Norris, 13 Minn. 473); "suing, labouring, and travailing" (Livie *v.* Janson, 12 East 648, 655, 11 Rev. Rep. 513).

71. Webster Int. Dict. [*quoted* in Stephens *v.* Porter, 29 Tex. Civ. App. 556, 559, 69 S. W. 423].

72. "Etymologically, a laborer is one who labors. He may labor physically or mentally, gratuitously or for reward, for himself or for another, freely or under control. However he labors he is in the broad sense a laborer. But that sense is never imputed in ordinary speech or writing, unless there is something in the context or the circumstances to imply that it is intended." *In re* Ho King, 14 Fed. 724, 725, 8 Sawy. 438 [*citing* Lee Yip, Seattle Chronicle, Jan. 4, 1883].

73. *In re* Ho King, 14 Fed. 724, 725, 8 Sawy. 438 [*citing* Lee Yip, Seattle Chronicle, Jan. 4, 1883]; Worcester Dict. [*quoted* in State *v.* Land, 108 La. 512, 513, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407; Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503; U. S. *v.* Ah Fawn, 57 Fed. 591, 592].

"Every man who works or labours may be called a labourer." Morgan *v.* London General Omnibus Co., 12 Q. B. D. 201, 206, 50 L. T. Rep. N. S. 687, 32 Wkly. Rep. 416.

In a general sense, the term may be applied to employes other than workingmen engaged in manual labor. Boyle *v.* Vanderhoof, 45 Minn. 31, 32, 47 N. W. 396.

74. Century Dict. [*quoted* in Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724].

of labor, physical or mental.[75] In a more restricted sense, one who performs manual, menial, or physical exertion, labor, or toil,[76] not requiring special accuracy, knowledge, skill or training,[77] for hire or wages,[78] under the direction of his employer, master, or superior,[79] and hence distinguished from an artisan, professional man, or skilled workman;[80] one who is engaged in or labors in some toil-

75. Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563, 564 [*quoted* in Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 245, 50 Pac. 347], per Brewer, J.

Etymologically the word may include any person who performs physical or mental labor under any circumstances; but its popular meaning is much more limited. Kansas City *v.* McDonald, 80 Mo. App. 444, 448, where it is said: "The farmer toiling on his own farm, the blacksmith working in his own shop, the tailor making clothes for his own customers, is not called a laborer. One who performs physical labor, however severe, in his own service or business, is not a laborer in the common business sense."

76. Adams *v.* Goodrich, 55 Ga. 233, 234; Butler *v.* Clark, 46 Ga. 466, 468; Epps *v.* Epps, 17 Ill. App. 196, 201; Littlefield *v.* Morrill, 97 Me. 505, 507, 54 Atl. 1109, 94 Am. St. Rep. 513; Wildner *v.* Ferguson, 42 Minn. 112, 114, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338; King *v.* Kelly, 25 Minn. 522, 524; Wirth *v.* Calhoun, 64 Nebr. 316, 320, 89 N. W. 785; Henderson *v.* Nott, 36 Nebr. 154, 157, 54 N. W. 87, 38 Am. St. Rep. 720; Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 391; Bristor *v.* Kretz, 22 Misc. (N. Y.) 55, 58, 49 N. Y. Suppl. 404; Milligan *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 918, 919; St. Louis, etc., R. Co. *v.* Lyle, 6 Tex. Civ. App. 753, 754, 26 S. W. 264; Standard Dict. [*quoted* in Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706].

In its ordinary and usual acceptation, the word carries with it the idea of actual physical and manual exertion or toil. Farinholt *v.* Luckhard, 90 Va. 936, 938, 21 S. E. 817, 44 Am. St. Rep. 953.

"**By universal consent,** this [term] had reference only to those who performed manual labor, of whatever nature." Weatherby *v.* Saxony Woolen Co., (N. J. Ch. 1894) 29 Atl. 326.

"**The terms 'laborers' and 'workmen'** were intended to include only such as were engaged in manual occupations." Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 171, 24 Am. Rep. 189 [*quoted* in Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 247, 50 Pac. 347].

77. Guise *v.* Oliver, 51 Ark. 356, 359, 11 S. W. 515; Epps *v.* Epps, 17 Ill. App. 196, 201; Century Dict. [*quoted* in Krebs *v.* Nicholson, 118 Iowa 134, 135, 91 N. W. 923, 96 Am. St. Rep. 370; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724]; Standard Dict. [*quoted* in Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706]; Webster Dict. [*quoted* in Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564, 567; Oliver *v.* Macon Hardware Co., 98 Ga. 249, 251, 25 S. E. 403, 58 Am. St. Rep. 300; Hinton *v.* Goode, 73 Ga. 233, 234; Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506, 511; State *v.* Land, 108 La. 512, 513, 514, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407; Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 245, 32 Atl. 890; Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 246, 50 Pac. 347; Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503; Bloom *v.* Richards, 2 Ohio St. 387, 401].

"**If the contract of employment** contemplated that the clerk's services were to consist mainly of work requiring mental skill, or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a 'laborer.'" Oliver *v.* Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300 [*quoted* in Toole *v.* Edmondson, 104 Ga. 776, 782, 31 S. E. 25].

78. Littlefield *v.* Morrill, 97 Me. 505, 507, 54 Atl. 1109, 94 Am. St. Rep. 513; Standard Dict. [*quoted* in Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706].

Every person who performs labor for compensation is not included within the meaning of the term. Wirth *v.* Calhoun, 64 Nebr. 316, 320, 89 N. W. 785; Henderson *v.* Nott, 36 Nebr. 154, 157, 54 N. W. 87, 38 Am. St. Rep. 720.

79. Littlefield *v.* Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. St. Rep. 513.

The term includes one who is responsible for no independent action, but who does a day's work or stated job under the direction of a superior. Wildner *v.* Ferguson, 42 Minn. 112, 114, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338.

"'**Laborer or apprentice**' are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed as before suggested without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another." Wakefield *v.* Fargo, 90 N. Y. 213, 219.

"**Does not embrace** one who may work in preparing something of his own to sell to a railway company after it has been rendered suitable through his toil to be used in the construction or repair of a railway." St. Louis, etc., R. Co. *v.* Lyle, 6 Tex. Civ. App. 753, 754, 26 S. W. 264, 265.

80. Guise *v.* Oliver, 51 Ark. 356, 359, 11 S. W. 515; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 245, 32 Atl. 890; Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 391; *In re* Ho King, 14 Fed. 724, 725, 8 Sawy. 438 [*quoting* Worcester Dict., and *citing* Webster Dict.]; Century Dict. [*quoted* in Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.)

some physical occupation;[81] one who is regularly employed at some hard work;[82] one who labors in a toilsome occupation;[83] one who performs labor with his own hands;[84] one who performs with his own hands the contract he makes with his employer;[85] one who subsists by physical toil in distinction from one who subsists by professional skill;[86] one who works with his hands rather than with his head;[87] one who literally earns his bread by the sweat of his brow;[88] an operative;[89] a workman;[90] one engaged especially in husbandry;[91] a servant in a husbandry or manufacture, not living *infra mœnia*.[92] The term is often used as synonymous with EMPLOYEE,[93] *q. v.*; or SERVANT.[94] The proper meaning to be

48, 49, 61 N. Y. Suppl. 724]; Webster Dict. [*quoted* in Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564, 567; Oliver *v.* Macon Hardware Co., 98 Ga. 249, 251, 25 S. E. 403, 58 Am. St. Rep. 300; Hinton *v.* Goode, 73 Ga. 233, 234; Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506, 511; State *v.* Land, 108 La. 512, 513, 514, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407; Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 246, 50 Pac. 347; Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503; Bloom *v.* Richards, 2 Ohio St. 387, 401; U. S. *v.* Ah Fawn, 57 Fed. 591, 592].

Excludes learned professions.— Gulf, etc., R. Co. *v.* Berry, 31 Tex. Civ. App. 408, 409, 72 S. W. 1049, 1050 [*citing* Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 171, 24 Am. Rep. 189].

Distinguished from "artisan" or mechanic see Taylor *v.* Hathaway, 29 Ark. 597, 601.

Mechanical engineers, electrical engineers, clerks, agents, cashiers of banks, bookkeepers, and all that class of employes whose employment is associated with mental labor and skill, are not considered as laborers. State *v.* Land, 108 La. 512, 514, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407.

"By 'other laborer' is meant one who labors by and with the aid of his team, and not by the aid of a pick and shovel, or an anvil, or a lapstone, or a jackplane, or a yardstick." Brusie *v.* Griffith, 34 Cal. 302, 307, 9 Am. Dec. 695. See also Branwell *v.* Penneck, 7 B. & C. 536, 541, 6 L. J. M. C. O. S. 47, 1 M. & R. 409, 14 E. C. L. 242.

81. Century Dict. [*quoted* in Krebs *v.* Nicholson, 118 Iowa 134, 135, 91 N. W. 923, 96 Am. St. Rep. 370; Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724].

82. *In re* Ho King, 14 Fed. 724, 725, 8 Sawy. 438.

83. Guise *v.* Oliver, 51 Ark. 356, 359, 11 S. W. 515; Webster Dict. [*quoted* in Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564, 567; Oliver *v.* Macon Hardware Co., 98 Ga. 249, 251, 25 S. E. 403, 58 Am. St. Rep. 300; Hinton *v.* Goode, 73 Ga. 233, 234; Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506, 511; State *v.* Land, 108 La. 512, 513, 514, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407; Meands *v.* Park, 95 Me. 527, 529, 50 Atl. 706; Blanchard *v.* Portland, etc., R. Co., 87 Me. 241, 245, 32 Atl. 890; Boyle *v.* Mountain Key Min. Co., 9 N. M. 237, 246, 50 Pac. 347; Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503; Bloom *v.* Richards, 2 Ohio St. 387, 401].

84. Farinholt *v.* Luckhard, 90 Va. 936, 938, 21 S. E. 817, 44 Am. St. Rep. 953.

"The term, 'laborer,' . . . is not applicable to any one who does not earn his living by the work of his hands; as, by plowing, hoeing, mowing, ditching, carrying a hod, feeding the fire of an engine," etc. Caraker *v.* Matthews, 25 Ga. 571, 576.

85. Johnston *v.* Barrills, 27 Oreg. 251, 258, 41 Pac. 656, 50 Am. St. Rep. 717 [*citing* Seider's Appeal, 46 Pa. St. 57]; Wentroth's Appeal, 82 Pa. St. 469, 471.

86. Williams *v.* Link, 64 Miss. 641, 643, 1 So. 907.

87. Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 391. See also Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316, 329.

88. Farinholt *v.* Luckhard, 90 Va. 936, 938, 21 S. E. 817, 44 Am. St. Rep. 953.

89. *In re* Ho King, 14 Fed. 724, 725, 8 Sawy. 438 [*quoting* Worcester Dict., and *citing* Webster Dict.]; Worcester Dict. [*quoted* in State *v.* Land, 108 La. 512, 513, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407].

Distinguished from "operative" see Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 391.

90. Leuffer *v.* Pennsylvania, etc., R. Co., 11 Phila. (Pa.) 548; *In re* Ho King, 14 Fed. 724, 725, 8 Sawy. 438 [*quoting* Worcester Dict., and *citing* Webster Dict.]; Worcester Dict. [*quoted* in State *v.* Land, 108 La. 512, 513, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407; U. S. *v.* Ah Fawn, 57 Fed. 591, 592].

91. Century Dict. [*quoted* in Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724].

92. Bouvier Dict. [*quoted* in Farinholt *v.* Luckhard, 90 Va. 936, 937, 21 S. E. 817, 44 Am. St. Rep. 953], where it is said: "And no doubt this was the original technical meaning of the word."

93. Pendergast *v.* Yandes, 124 Ind. 159, 162, 24 N. E. 724, 8 L. R. A. 849; Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588, 590. *Compare* Malcomson *v.* Wappoo Mills, 86 Fed. 192, 198.

The term is no more comprehensive than the term "employe." Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 738, 32 C. C. A. 31.

94. Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316, 329 (where it is said that the word is more distinctive than "servant," and embraces a smaller class, comprehending only such as perform labor with their hands); Farinholt *v.* Luckhard, 90 Va. 936, 937, 21 S. E. 817, 44 Am. St. Rep. 953 (where it is said that the term was usually applied to

given to the word in a particular case is frequently governed by the context or the evident intent with which it is employed.[95] (Laborer: Chinese, see ALIENS.

those employed in toilsome out-door work as distinguished from domestic servants).

Distinguished from "servant" see Wakefield *v.* Fargo, 90 N. Y. 213, 218.

"At common law, 'laborers constitute the third class of servants; they are generally hired by the day or week, and do not live *intra mœnia* as part of the family." Broom & H. Comm. 511 [*quoted* in State *v.* Peel Splint Coal Co., 36 W. Va. 802, 817, 15 S. E. 1000, 17 L. R. A. 385]. "The first sort of servants acknowledged by the law of England, are menial servants. Another species of servants are called apprentices. A third species of servants are laborers, who are only hired by the day or the week." 1 Blackstone Comm. c. 14 [*quoted* in Wakefield *v.* Fargo, 90 N. Y. 213, 218].

"In ancient English statutes, a distinction is made between servants, laborers and workmen, although in a large sense they are all servants." *Ex p.* Meason, 5 Binn. (Pa.) 167, 175 [*citing* 23 Edw. III, c. 2].

Distinguished from "journeyman" see Lowther *v.* Radnor, 8 East 113, 123.

95. Thus the term has been held to include: An architect (Hughes *v.* Torgerson, 96 Ala. 346, 348, 11 So. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600; Knight *v.* Norris, 13 Minn. 473; Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389, 397 [*citing* Commonwealth Bank *v.* Gries, 35 Pa. St. 423]; Stryker *v.* Cassidy, 76 N. Y. 50, 52, 32 Am. Rep. 262; Phœnix Furniture Co. *v.* Put-in-Bay Hotel Co., 66 Fed. 683, 685); a bartender (Lowenstein *v.* Meyer, 114 Ga. 709, 710, 40 S. E. 726 [*citing* Oliver *v.* Boehm, 63 Ga. 172]); a bookkeeper (Heckman *v.* Tammen, 184 Ill. 144, 148, 56 N. E. 361; Consolidated Coal Co. *v.* Keystone Chemical Co., 54 N. J. Eq. 309, 310, 35 Atl. 157; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724 [*citing* Laws (1891), c. 415, § 8]); a clerk and bookkeeper (Lamar *v.* Chisholm, 77 Ga. 306); a bookkeeper and overseer (Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316, 320); a civil engineer (Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723, 724); a civil engineer, and a rodman in his employ, and all others performing services not as officers and agents (Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87, 99); a clerk (Williams *v.* Link, 64 Miss. 641, 643, 1 So. 907); a clerk and bookkeeper (Lamar *v.* Chisholm, 77 Ga. 306); a cropper on land (Ward *v.* State, 70 Miss. 245, 246, 12 So. 249); a drayman (Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588, 591); farm laborers (Wilson *v.* Gibson, 10 Pa. Co. Ct. 191, 193); a foreman of a mine (Capron *v.* Strout, 11 Nev. 304, 310); a foreman or superintendent (Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. §§ 568, 570); house painters (Martine *v.* Nelson, 51 Ill. 422, 423); an iron puddler (Adcock *v.* Smith, 97 Tenn. 373, 376, 37 S. W. 91, 56 Am. St. Rep. 810); the keeper of stallion (Krebs *v.* Nicholson, 118 Iowa 134, 135, 91 N. W. 923, 96 Am. St. Rep. 370); a liveryman (Root *v.* Gay, 64 Iowa 399, 400, 20 N. W. 489); a mail carrier (Farinholt *v.* Luckhard, 90 Va. 936, 938, 21 S. E. 817, 44 Am. St. Rep. 953); the mayor of a city (Robinson *v.* Aiken, 39 N. H. 211, 212); a mechanic (Adams *v.* Goodrich, 55 Ga. 233, 234); an experienced miller in adjusting and starting machinery in mills supplied by the corporation (Black's Appeal, 83 Mich. 513, 522, 47 N. W. 342); a person retailing oil from a tank wagon (Consolidated Tank-Line Co. *v.* Hunt, 83 Iowa 6, 9, 48 N. W. 1057, 32 Am. St. Rep. 285, 12 L. R. A. 476); an overseer (Warner *v.* Hudson River R. Co., 5 How. Pr. (N. Y.) 454, 455); an overseer of miners (Flagstaff Silver Min. Co. *v.* Cullins, 104 U. S. 176, 177, 26 L. ed. 704); a plasterer (Parker *v.* Bell, 7 Gray (Mass.) 429, 430; Merrigan *v.* English, 9 Mont. 113, 124, 22 Pac. 454, 5 L. R. A. 837); a printer (Heckman *v.* Tammen, 184 Ill. 144, 148, 56 N. E. 361, 363); a reporter and an editor (Harris *v.* Norvell, 1 Abb. N. Cas. (N. Y.) 127, 132); a school-teacher (Hightower *v.* Slaton, 54 Ga. 108, 109, 21 Am. Rep. 273); a private secretary (Abrahams *v.* Anderson, 80 Ga. 570, 572, 5 S. E. 778, 12 Am. St. Rep. 274); service rendered in instructing the superintendent of the owner as to how to run a plant (Peatman *v.* Centerville Light, etc., Co., 105 Iowa 1, 8, 74 N. W. 689, 67 Am. St. Rep. 276); a steam cleaner (People *v.* Dalton, 49 N. Y. App. Div. 71, 74, 63 N. Y. Suppl. 258); stockholders of a corporation who were employed by the corporation on a salary (Conlee Lumber Co. *v.* Ripon Lumber, etc., Co., 66 Wis. 481, 488, 29 N. W. 285); superintendence of the digging of trenches and laying out pipes (Pendergast *v.* Yandes, 124 Ind. 159, 162, 24 N. E. 724, 8 L. R. A. 849); superintendent of mines (Rara Avis Gold, etc., Min. Co. *v.* Bouscher, 9 Colo. 385, 387, 12 Pac. 433); a teamster (McElwaine *v.* Hosey, 135 Ind. 481, 487, 35 N. E. 272; Mann *v.* Burt, 35 Kan. 10, 14, 10 Pac. 95); a telegraph operator (Boyle *v.* Vanderhoof, 45 Minn. 31, 32, 47 N. W. 396); a traveling salesman (Deering *v.* Ruffner, 32 Nebr. 845, 851, 854, 49 N. W. 771, 29 Am. St. Rep. 473); a workman with helpers (Pennsylvania Coal Co. *v.* Costello, 33 Pa. St. 241, 244).

The term has been held not to include: An agent who sells goods by sample (Wildner *v.* Ferguson, 42 Minn. 112, 114, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338 [*citing* Wakefield *v.* Fargo, 90 N. Y. 213, 214]); an architect (Mitchell *v.* Packard, 168 Mass. 467, 470, 47 N. E. 113, 60 Am. St. Rep. 404; Raeder *v.* Bensberg, 6 Mo. App. 445, 450; Price *v.* Kirk, 90 Pa. St. 47, 48; Commonwealth Bank *v.* Gries, 35 Pa. St. 423, 425); a Chinese or theatrical performer (*In re* Ho King, 14 Fed. 724, 726, 8 Sawy. 438 [*cited* in Wirth *v.* Calhoun, 64 Nebr. 316, 320, 89 N. W. 785]); a bookkeeper (Signor *v.* Webb, 44 Ill. App. 338, 339); a bookkeeper and auditor (Milligan *v.* San Antonio, etc., R.

Lien of, see Agriculture; Liens; Logging; Maritime Liens; Master and Servant; Mechanics' Liens; Seamen; Work and Labor. Combinations of Labor, see Conspiracy; Labor Unions. Exemptions of, see Exemptions. Farm, see Agriculture. Union of Laborers, see Labor Unions. See also Labor; and, generally, Apprentices.)

Co., (Tex. Civ. App. 1898) 46 S. W. 918, 919); a bookkeeper and general manager (Wakefield *v.* Fargo, 90 N. Y. 213, 218, 219); a Chinese laundryman (U. S. *v.* Kol Lee, 132 Fed. 136, 137); a clerk (Hinton *v.* Goode, 73 Ga. 233, 234); the clerk of a canal company (Crowell *v.* Cape Cod Ship Canal Co., 168 Mass. 157, 163, 46 N. E. 424); clerks or persons doing general service (Richardson *v.* Langston, 68 Ga. 658, 659); a civil engineer (Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 171, 24 Am. Rep. 189; Gulf, etc., R. Co. *v.* Berry, 31 Tex. Civ. App. 408, 409, 72 S. W. 1049); a civil engineer and a traveling agent (Williamson *v.* Wadsworth, 49 Barb. (N. Y.) 294, 298); a contractor (Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 186, 47 S. W. 196, 42 L. R. A. 334; Rogers *v.* Dexter, etc., R. Co., 85 Me. 372, 374, 27 Atl. 257, 21 L. R. A. 528; Peck *v.* Miller, 39 Mich. 594, 599; Heard *v.* Crum, 73 Miss. 157, 159, 18 So. 934, 55 Am. St. Rep. 520; Groves *v.* Kansas City, etc., R. Co., 57 Mo. 304, 307; Kansas City *v.* McDonald, 80 Mo. App. 444, 448; Henderson *v.* Nott, 36 Nebr. 154, 157, 54 N. W. 87, 38 Am. St. Rep. 720 [*quoted* in Wirth *v.* Calhoun, 64 Nebr. 316, 320, 89 N. W. 785]; Balch *v.* New York, etc., R. Co., 46 N. Y. 521, 524; Wentroth's Appeal, 82 Pa. St. 469, 471; Heebner *v.* Chave, 5 Pa. St. 115, 117; Lang *v.* Simmons, 64 Wis. 525, 529, 530, 25 N. W. 650; Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 738, 32 C. C. A. 31; Tod *v.* Kentucky Union R. Co., 52 Fed. 241, 243, 3 C. C. A. 60, 18 L. R. A. 305; Riley *v.* Warden, 2 Exch. 59, 67, 18 L. J. Exch. 120); a cook (Sullivan's Appeal, 77 Pa. St. 107, 108); an independent contractor (Fox *v.* McClay, 48 Nebr. 820, 823, 67 N. W. 888; Malcomson *v.* Wappoo Mills, 85 Fed. 912, 913); an employer (England *v.* Beatty Organ Co., 41 N. J. Eq. 470, 471, 4 Atl. 307); a consulting engineer (Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 391; a draftsman (Leinau *v.* Albright, 10 Pa. Co. Ct. 171, 173); farmer (Reg. *v.* Cleworth, 4 B. & S. 927, 933, 9 L. T. Rep. N. S. 682, 12 Wkly. Rep. 375, 116 E. C. L. 927); a farm overseer (Flournoy *v.* Shelton, 43 Ark. 168, 170; Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503); a general manager of a shop (Raynes *v.* Kokomo Ladder, etc., Co., 153 Ind. 315, 317, 54 N. E. 1061); a hotel cook (Sullivan's Appeal, 77 Pa. St. 107, 108); a person hauling lumber and timber (Wilson *v.* Whitcomb, 100 Pa. St. 547, 550); a lawyer (Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., 68 Fed. 105, 113, 15 C. C. A. 289, 34 L. R. A. 625; Latta *v.* Lonsdale, 107 Fed. 585, 47 C. C. A. 1, 52 L. R. A. 479); a locomotive engineer (State *v.* Land, 108 La. 512, 513, 32 So. 433, 58 L. R. A. 407, 92 Am. St. Rep. 392); a lumber inspector (*In re* Sayles, 92 Mich. 354, 356, 52 N. W. 637); the maker of article for sale (St. Louis, etc., R. Co. *v.* Mathews, 75 Tex. 92, 94, 12 S. W. 976); a materialman (Richards *v.* Shear, 70 Cal. 187, 189, 11 Pac. 607; Ames *v.* Dyer, 41 Me. 397, 400); members of an engineer corps (State *v.* Rusk, 55 Wis. 465, 478, 13 N. W. 452); any officer or employe working on an annual salary (State *v.* Martindale, 47 Kan. 147, 150, 27 Pac. 582 [*quoted* in Billingsley *v.* Marshall County, 5 Kan. App. 435, 49 Pac. 329]); overseers (Rust *v.* Billingslea, 44 Ga. 306, 318; Caraker *v.* Matthews, 25 Ga. 571, 576; Whitaker *v.* Smith, 81 N. C. 340, 342, 31 Am. Rep. 503; Isbell *v.* Dunlap, 17 S. C. 581, 583); hay packers and threshers (Wilson *v.* Gibson, 10 Pa. Co. Ct. 191, 193); one who furnishes a performance consisting of music, dancing, and feats of contortion (Henderson *v.* Nott, 36 Nebr. 154, 157, 54 N. W. 87, 38 Am. St. Rep. 720 [*quoted* in Wirth *v.* Calhoun, 64 Nebr. 316, 320, 89 N. W. 785]); a physician (Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144); the president of a corporation (Weatherby *v.* Saxony Woolen Co., (N. J. Ch. 1894) 29 Atl. 326); the secretary of a corporation (Coffin *v.* Reynolds, 37 N. Y. 640, 646); a school-teacher (Schwacke *v.* Langton, 12 Phila. (Pa.) 402; Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 201, 73 Pac. 954); a superintendent (Cole *v.* McNeill, 99 Ga. 250, 252, 25 S. E. 402); a superintendent or a bookkeeper (Malcomson *v.* Wappoo Mills, 86 Fed. 192, 198); a subcontractor (Kansas City *v.* McDonald, 80 Mo. App. 444, 448; Atcherson *v.* Troy, etc., R. Co., 6 Abb. Pr. N. S. (N. Y.) 329, 337; Krakauer *v.* Locke, 6 Tex. Civ. App. 446, 449, 25 S. W. 700 [*quoted* in Parks *v.* Locke, (Tex. Civ. App. 1894) 25 S. W. 702, 703]); a superintendent of a mine (Cocking *v.* Ward, (Tenn. Ch. App. 1898) 48 S. W. 287, 289); the superintendent of a mining corporation (Krauser *v.* Ruckel, 17 Hun (N. Y.) 463, 465 [*quoted* in Dean *v.* De Wolf, 16 Hun (N. Y.) 186, 187]); a teamster (Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293, 298); a threshing-machine operator (Johnston *v.* Barrills, 27 Oreg. 251, 260, 41 Pac. 656, 50 Am. St. Rep. 717; Henry *v.* Sheaffer, 14 Pa. Co. Ct. 237, 238); a traveling salesman (Eppstein *v.* Webb, 44 Ill. App. 341, 342; Clark's Appeal, 100 Mich. 448, 452, 59 N. W. 150 [*citing In re* Sayles, 92 Mich. 354, 355, 52 N. W. 637; Matter of George T. Smith Middlings Purifier Co., 83 Mich. 513, 518, 47 N. W. 342]; Jones *v.* Avery, 50 Mich. 326, 328, 15 N. W. 494; Witner *v.* Miller, 12 Pa. Co. Ct. 363, 364; Hand *v.* Cole, 88 Tenn. 400, 406, 12 S. W. 922, 7 L. R. A. 96); a watchman (Tabb *v.* Mallette, 120 Ga. 97, 101, 47 S. E. 587, 102 Am. St. Rep. 78 [*citing* Oliver *v.* Macon Hardware Co., 98 Ga. 249, 251, 25 S. E. 403, 58 Am. St. Rep. 300]); a well digger (Guise *v.* Oliver, 51 Ark. 356, 359, 11 S. W. 515); a workman on crops (Mohr *v.* Clark, 3 Wash. Terr. 440, 443, 19 Pac. 28.

LABOR UNIONS*

EDITED BY ALTON BROOKS PARKER
Former Chief Judge of the Court of Appeals of the State of New York

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* This article as submitted to MR. PARKER for editing was prepared by Peter B. McKenzie (author of "Joint Adventures," 23 Cyc. 452) and John Warren Edgerton (joint author of "Injunctions," 22 Cyc. 724).

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I. DEFINITION.*

A labor union, frequently spoken of as a trade union, is an association of workmen, usually, but not necessarily, employed in the same trade, for the purpose of combined action in securing the most favorable wages and conditions of labor.[1]

1. Cyclopedic L. Dict. tit. "Trade Union."
Other definitions are: "A combination or association of persons pursuing a particular trade, formed for the purpose of mutual aid, particularly in securing the highest prices for their labor." Abbott L. Dict.
"A combination by employers or employees to regulate the price of labor." Anderson L. Dict.
"Any combination, whether temporary or permanent, for regulating the relations between Workmen and Masters, or between Workmen and Workmen, or between Masters and Masters, or for imposing restrictive conditions on the conduct of any TRADE OR BUSINESS." Stroud Jud. Dict.
"An association of laborers for their mutual benefit." English L. Dict.
"An organized association of workmen skilled in any trade or industrial occupation, formed for the protection and promotion of their common interests, especially to secure remunerative wages for their labor." Standard Dict.
"Trade-unions were originally merely friendly societies, consisting of artisans, engaged in a particular trade, such as carpenters, bricklayers, &c.; but in course of time

* Sections I-VIII by Peter B. McKenzie

II. HISTORICAL.

A. At Common Law. Notwithstanding the adverse criticism and ridicule which have been uttered and written concerning the earliest reported case on the subject of labor unions,[2] and the unreported case cited to sustain it,[3] there can be no doubt that from the time of that decision in 1721 until the adoption of the statute of 1824 legalizing labor unions,[4] and giving laborers a right to organize for the purpose of maintaining wages and for mutual protection,[5] the law there announced continued to be the law of labor unions in England, and they were indictable as criminal conspiracies.[6] After the enactment of these statutes exempting

they acquired the character of associations for the perfection of the interests of workmen against their employers." Rapalje & L. L. Dict.

The act of congress of June 29, 1886, 24 U. S. St. at L. 86 [U. S. Comp. St. (1901) p. 3204], providing for national trade unions, defines such union as follows: "The term 'National Trade Union,' in the meaning of this act, shall signify any association of working people having two or more branches in the States or Territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit."

Association defined see 4 Cyc. 301.

Corporation defined see 10 Cyc. 143.

2. Rex *v.* Cambridge Journeymen-Taylors, 8 Mod. 11. See marginal notes in 3 Burr. 1326, 1 Burr. 386; *In re* Journeymen Cordwainers, Yates Sel. Cas. (N. Y.) 114 [reported as People *v.* Melvin, 2 Wheel. Cr. (N. Y.) 262], and argument of Mr. Sampson there reported in full, which is an epitome of English labor law; Tubwomen *v.* London [*cited* in Rex *v.* Cambridge Journeymen-Taylors, *supra*]. See also 3 Columbia L. Rev. 447 (article by William A. Purrington).

3. Tubwomen *v.* London [*cited* in Rex *v.* Cambridge Journeymen-Taylors, 8 Mod. 11, 12], which the best authorities identify with the case of Le Roy *v.* Starling, Sid. 174, in which a combination of brewers, for the purpose of evading the payment of revenue to the crown, was held to be a criminal conspiracy.

4. St. 5 Geo. IV, c. 95 (June 21, 1824), amended by 6 Geo. IV, c. 129 (July 6, 1825), which later act repeals all prior statutes so far as they prohibited the organization of laborers for their mutual advantage, but required that all means employed for the accomplishment of their several aims should be peaceable. In this statute will be found specific reference to those repealed.

5. Reg. *v.* Rowlands, 5 Cox C. C. 436.

6. 3 Chitty Cr. L. *1163 *et seq.* St. 5 Geo. IV, c. 95, § 2, expressly declares that persons who join labor unions for the purposes therein specified shall not be liable to indictment or prosecution for conspiracy under the common or statute law. Hawkins P. C. (2d ed.) § 1, c. 72, p. 190. In Rex *v.* Mawbey, 6 T. R. 619, 636, 2 Rev. Rep. 282, decided in 1796, Grose, J., says: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." In Hilton *v.* Eckersley, 6 E. & B. 47, 53, 59, 2 Jur. N. S. 587, 25 L. J. Q. B. 199, 4 Wkly. Rep. 326, 88 E. C. L. 47, decided in 1855, Crompton, J., says: "The precedents of indictments for combinations of two or more persons to raise wages, and for other offenses of this nature, which were all framed on the common law and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. In Rex *v.* Mawbey, 6 T. R. 619, 636, 2 Rev. Rep. 282, Grose, J., assumed the illegality of such combinations as well known law. Combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages were equally illegal." But in this case Lord Campbell, C. J., criticizes the *dictum* of Grose, J., and Erle, J., positively dissenting from it, says: "The Legislature, by various statutes, from the reign of Ed. I to that of G. 4, prohibited agreements, either of masters or of workmen, for the purpose either of lowering or raising wages, or of altering hours, or otherwise affecting their mutual relations. These agreements were by some statutes enacted to be . . . illegal; and the parties entering into them were liable to punishment. By Stat. 6 G. 4, c. 129. an entire change of the law was made. By sect. 2 all the statutes prohibiting such agreements are enumerated and absolutely repealed. By sect. 3 future prohibition is confined to endeavours, by force, threats, intimidation, molestation, or obstruction, to affect wages or hours, which

labor unions from prosecution as criminal conspiracies, they were still so far outlawed by the courts, as combinations in restraint of trade, as to be denied the aid of the law in enforcing their rules and the obligations of their members.[7] By legislation adopted in 1871 this anomalous position of labor unions was in a measure remedied, and they were given the right to register, the power to sue and be sued and to hold real and personal property; but the courts were still prohibited from entertaining any proceedings instituted for the purpose of enforcing those agreements most common and most vital to such organizations.[8] An amendment of this act in 1876 conferred some additional powers on such organizations, but the denial of the right to resort to the courts for the enforcement of their rules and regulations was not affected thereby.[9]

B. Early Cases in the United States. For a time the English doctrine was approved and followed by the courts of this country.[10]

III. MODERN DOCTRINE AS TO RIGHTS AND LIABILITIES.

A. Right to Combine — 1. In General. Eliminating these earlier cases it is well settled in this country and in England that a person has the right to work for and with whom he pleases;[11] that he may, by lawful means, secure employment for himself or another;[12] and that what he may legally do alone he may combine with others to do.[13]

2. Effect of Employment by Receiver on Right. The fact that persons are employed by a receiver will not prevent the exercise of their right of organization for legitimate purposes,[14] and the court having jurisdiction of the receiver may,

are made illegal and punishable: and by sects. 4 and 5, it is declared that neither masters nor workmen shall be punishable for any agreement in respect of wages or hours unless they infringe the prohibitions in the 3d section." See also arguments of counsel in *In re* Journeymen Cordwainers, Yates Sel. Cas. (N. Y.) 114; Erle Trade Unions 37, 38.

The declaration of Grose, J., that there are many cases supporting the doctrine he announces can hardly be taken to be disproved by the lack of reported cases extant and available. Considering the light penalties and the evident poverty of the wage-earners of the time it is more than probable that prosecutions there, as in this country at a later date, ended with a judgment of inferior courts where no records were kept.

Conspiracy generally see 8 Cyc. 615 *et seq.*

7. Farrer *v.* Close, L. R. 4 Q. B. 602, 10 B. & S. 533, 38 L. J. M. C. 132, 20 L. T. Rep. N. S. 802, 17 Wkly. Rep. 1129; Hornby *v.* Close, L. R. 2 Q. B. 153, 8 B. & S. 175, 10 Cox C. C. 393, 36 L. J. M. C. 43, 15 L. T. Rep. N. S. 563, 15 Wkly. Rep. 336; Hilton *v.* Eckersley, 6 E. & B. 47, 2 Jur. N. S. 587, 25 L. J. Q. B. 199, 4 Wkly. Rep. 326, 88 E. C. L. 47; Old *v.* Robson, 54 J. P. 597, 59 L. J. M. C. 41, 62 L. T. Rep. N. S. 282, 38 Wkly. Rep. 415; Mullett *v.* United French Polishers' London Soc., 91 L. T. Rep. N. S. 133, 20 T. L. R. 595.

8. St. 34 & 35 Vict. c. 31 (The Trade Union Act, 1871).

9. St. 39 & 40 Vict. c. 22.

10. People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501 (decided under a statute defining conspiracies but recognizing the common-law rule); *In re* Journeymen Cordwainers, Yates Sel. Cas. (N. Y.) 114 [reported as People *v.* Melvin, 2 Wheel. Cr. (N. Y.) 262]; People *v.* Trequier, 1 Wheel. Cr. (N. Y.) 142; Trial of Boot & Shoe Makers of Philadelphia, Pamphlet (1806); Journeymen Cordwainers of Pittsburg (1811). See also Twenty-four Journeymen Taylors, Phila. (1827).

11. *Massachusetts.*— Com. *v.* Hunt, 4 Metc. 111, 38 Am. Dec. 346.

New Jersey.—Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

New York.— National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, 51 N. Y. Suppl. 180.

United States.—Coeur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382; U. S. *v.* Kane, 23 Fed. 748.

England.— Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19.

12. National Protective Assoc. *v.* Cumming, 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946.

13. National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Wabash R. Co. *v.* Hannahan, 121 Fed. 563; Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19.

14. U. S. *v.* Weber, 114 Fed. 950; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

in the exercise of its equity power, direct him to treat and contract with such organization, although it is unincorporated.[15]

B. Rights of Employer. On the other hand an employer has the equal right to employ,[16] or continue in or discharge from his employment, whom he pleases,[17] and to manage, control, and use his property and conduct his business in any manner satisfactory to himself.[18] Subject to the restraint imposed by public policy,[19] an employer and employee may make and enforce such contract relating to labor as they may agree upon.[20] The former may by contract prohibit the latter from joining a labor union while in his employ or require withdrawal from such union, and a statute imposing a penalty upon the making of such contract is unconstitutional.[21] An employer whose workmen have gone out on a strike has the right to employ others to take their places, and such others have a right to accept the employment;[22] and legislation tending to fetter these rights by prohibiting employment agencies from furnishing lists of possible employees to such employer is unconstitutional and void.[23]

C. For What Purposes Combination Permissible. Legislatures as well as the courts now recognize the right of laboring people to organize for the purposes of promoting their common welfare, elevating their standard of skill, advancing and maintaining their wages, fixing the hours of labor and the rate of wages,[24]

15. Waterhouse *v.* Comer, 55 Fed. 149, 19 L. R. A. 403.

Receivership generally see RECEIVERS.

16. Coeur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382; U. S. *v.* Kane, 23 Fed. 748.

17. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; U. S. *v.* Kane, 23 Fed. 748.

18. Coeur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382. See also Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48, 50, where it is said: "All combinations and associations designed to . . . prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights,—are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable."

19. See CONTRACTS, 9 Cyc. 481.

20. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; People *v.* Marcus, 185 N. Y. 257, 77 N. E. 1073 [*affirming* 110 N. Y. App. Div. 255, 97 N. Y. Suppl. 322].

21. State *v.* Julow, 129 Mo. 163, 31 S. W. 781, 50 Am. St. Rep. 443, 29 L. R. A. 257; People *v.* Marcus, 185 N. Y. 257, 77 N. E. 1073 [*affirming* 110 N. Y. App. Div. 255, 97 N. Y. Suppl. 322]; Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. N. S. 292 [*reversing* 99 N. Y. App. Div. 481, 90 N. Y. Suppl. 854]. So statutes making it an offense for an employer to attempt to prevent his employees from joining a labor union (Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007, 80 Am. St. Rep. 176, 52 L. R. A. 283) or to discharge them because of their connection therewith (Gillespie *v.* People, *supra*; State *v.* Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 91 Am. St. Rep. 934, 58 L. R. A. 748) are unconstitutional.

22. Mathews *v.* People, 202 Ill. 389, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722.

23. Mathews *v.* People, 202 Ill. 389, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73.

24. *Connecticut.*— State *v.* Stockford, 77 Conn. 227, 58 Atl. 769; State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Illinois.— Beaton *v.* Tarrant, 102 Ill. App. 124.

Massachusetts.— Pickett *v.* Walsh, (1906) 78 N. E. 753; Snow *v.* Wheeler, 113 Mass. 179; Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Com. *v.* Hunt, 4 Metc. 111, 38 Am. Dec. 346, Thach. Cr. Cas. 609.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 17, 74 Am. St. Rep. 421, 42 L. R. A. 407; Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

Minnesota.— Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753.

New Jersey.— Mayer *v.* Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

New York.— Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. N. S. 292 [*reversing* 99 N. Y. App. Div. 481, 91 N. Y. Suppl. 854]; National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88

obtaining employment for their members,[25] securing control of the work connected with their trade,[26] or favorable terms to their employers in the purchase of material, and contracts for such persons as employ members of their society.[27] And others may combine with them for the accomplishment of these purposes.[28]

D. Means Permissible to Effect Purposes of Combination — 1. In General. In the accomplishment of their purposes labor unions must proceed only by lawful and peaceful means.[29] They may refuse to work for any particular employer,[30] or withdraw from the service of one whose terms are not satisfactory to them, or whose actions with respect to apprentices are objectionable.[31] They may obtain employment for the members of their union by solicitation, or by the promise of the support of the union and its members by those who employ them.[32] And they have the right to contract for the securing of certain classes of work to their members and such contract is not in contravention of public policy.[33]

2. Attitude and Acts Affecting Non-Union Laborers. The right to organize does not carry with it the right to make war on non-union laborers or illegally interfere with their rights and privileges.[34] It is lawful, however, for them to

Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802; Master Stevedores' Assoc. *v.* Walsh, 2 Daly 1 (where will be found an interesting discussion of the law on this subject); Rogers *v.* Evarts, 17 N. Y. Suppl. 264; Zeiger *v.* Nolan, 1 N. Y. City Ct. Suppl. 54; People *v.* Kostka, 4 N. Y. Cr. 429; People *v.* Wilzig, 4 N. Y. Cr. 403.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32; Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48; Parker *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

Oregon.—Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 47 Am. St. Rep. 640, 28 L. R. A. 464.

Pennsylvania.— Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

Virginia.— Everett Waddey Co. *v.* Richmond Typographical Union No. 90, (1906) 53 S. E. 273.

United States.— Wabash R. Co. *v.* Hannahan, 121 Fed. 563; U. S. *v.* Weber, 114 Fed. 950; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *In re* Charge to Grand Jury, 62 Fed. 828; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; Lake Erie, etc., R. Co. *v.* Bailey, 61 Fed. 494; Coeur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382; *In re* Higgins, 27 Fed. 443.

England.— Reg. *v.* Rowlands, 5 Cox C. C. 436; Reg. *v.* Hewitt, 5 Cox C. C. 162.

By 24 U. S. St. at L. 86 [U. S. Comp. St. (1901) p. 3204] provision is made for the incorporation of national labor unions.

25. Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802.

26. Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

27. Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

28. Reg. *v.* Rowlands, 5 Cox C. C. 436.

29. *Connecticut.*— State *v.* Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 17, 74 Am. St. Rep. 421, 42 L. R. A. 407, Grant, C. J., delivering the opinion of the court.

New Jersey.— Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492. Where the objects of a union interfere with the freedom of contract or trade, they are illegal and void. O'Brien *v.* Musical Mut. Protective, etc., Assoc., 64 N. J. Eq. 525, 54 Atl. 150.

New York.— Rogers *v.* Evarts, 17 N. Y. Suppl. 264; People *v.* Kostka, 4 N. Y. Cr. 429; People *v.* Wilzig, 4 N. Y. Cr. 403.

Ohio.— Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223 [*affirmed* in 51 Ohio St. 603].

United States.— Wabash R. Co. *v.* Hannahan, 121 Fed. 563.

England.— Reg. *v.* Rowlands, 5 Cox C. C. 436.

30. Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Atkins *v.* Fletcher, 65 N. J. Eq. 658, 55 Atl. 1074; Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

31. Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

32. Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802.

33. National Fireproofing Co. *v.* New York Mason Builders' Assoc., 145 Fed. 260.

34. *Maryland.*— Lucke *v.* Clothing Cutters', etc., Assembly No. 7507 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

New Jersey.— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

New York.— Davis *v.* United Portable

dissuade others from entering the trade,[35] to induce all those engaged in the same occupation to become members,[36] to regulate the number of apprentices and distribute them among various employers as they may desire,[37] or to refuse to teach any person the skill of their craft.[38] Labor unions or organizations may prohibit their members from working in places where non-union labor is employed.[39]

3. Strikes and Rights Incident Thereto.[40] Where not under contract to render service for a specified time, the members of a labor union may unite in refusing to work for an employer, who, after notice, continues in his employment one who is not a member of their society,[41] or who is a member of a rival organization;[42] and they may withdraw in a body from service under such conditions.[43] It is legal for them by such means to secure the discharge of such objectionable persons and procure the employment for their members, and neither the union

Hoisting Engineers, 28 N. Y. App. Div. 396, 51 N. Y. Suppl. 180.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

United States.— Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48.

England.— Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19.

35. Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

36. *Massachusetts.*— Com. *v.* Hunt, 4 Metc. 111, 38 Am. Dec. 346.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

Minnesota.— Gray *v.* Building Trades Co., 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Trevor *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 1118.

New York.— Zeiger *v.* Nolan, 1 N. Y. City Ct. Suppl. 54.

Ohio.— Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

Oregon.— Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

United States.— U. S. *v.* Weber, 114 Fed. 950.

37. Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. Rep. 640, 28 L. R. A. 464.

38. Snow *v.* Wheeler, 113 Mass. 179; Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

39. Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753.

40. Enjoining strike see *infra*, VIII, B, 3.

41. *Massachusetts.*— Com. *v.* Hunt, 4 Metc. 111, 38 Am. Dec. 346.

Minnesota.— Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Trevor *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 1118.

New Jersey.— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

New York.— Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. N. S. 292 [*reversing* 99 N. Y. App. Div. 481, 90 N. Y. Suppl. 854]; National Steam Fitters, etc., Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Wunch *v.* Shankland, 59 N. Y. App. Div. 482, 69 N. Y. Suppl. 349; Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, 57 N. Y. Suppl. 180; Tallman *v.* Gaillard, 27 Misc. 114, 57 N. Y. Suppl. 419.

Ohio.— Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

England.— But see Walsby *v.* Anley, 3 E. & E. 516, 7 Jur. N. S. 465, 30 L. J. M. C. 121, 3 L. T. Rep. N. S. 666, 9 Wkly. Rep. 271, 107 Wkly. Rep. 516.

42. National Steam Fitters, etc., Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258 [*overruling* Carrington *v.* Taylor, 2 Campb. 258, 11 East 571, 11 Rev. Rep. 270].

43. *Minnesota.*— Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Trevor *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 1118.

New York.— Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, 51 N. Y. Suppl. 180.

Ohio.— Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

Washington.— Jensen *v.* Cooks', etc., Union, 39 Wash. 531, 81 Pac. 1069.

United States.— Arthur *v.* Oaks, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

England.— Walsby *v.* Anley, 3 E. & E. 516, 7 Jur. N. S. 465, 30 L. J. M. C. 121, 3 L. T. Rep. N. S. 666, 107 E. C. L. 516.

Canada.— Perrault *v.* Gauthier, 28 Can. Sup. Ct. 241.

A threat to strike, made to coerce an employer to unionize his business, was held to be illegal. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219.

nor its members will be liable for any damages sustained by the person discharged.[44] But such act is legal only when its purpose is to secure employment or benefit for members of the union.[45] It becomes unlawful when its design is to coerce the non-union man to become a member of the society and come under its rules and conditions,[46] or to deprive him of the opportunity to labor.[47] If the officers of a labor union prevent a person from obtaining employment as a means of forcing him to pay a debt owing to the union they will be liable in damages,[48] and if the union ratifies their act by accepting the payment it becomes liable also.[49] Where not under contract for a specified time, the members of a labor union may singly or in a body leave the service of their employers in order to compel an advance of wages,[50] to reduce the hours of labor,[51] or secure any other lawful benefit to their several members;[52] and they may persuade others so to

44. National Steam Fitters, etc., Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Wunch *v.* Shankland, 59 N. Y. App. Div. 482, 69 N. Y. Suppl. 349; Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, 51 N. Y. Suppl. 180; Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258. Workmen who, in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation, or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged do not thereby incur liability to an action for damages. Gauthier *v.* Perrault, 6 Quebec Q. B. 65. See also Pickett *v.* Walsh, (Mass. 1906) 78 N. E. 753.

45. Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499; Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, 5 N. Y. Suppl. 180; Reg. *v.* Rowlands, 5 Cox C. C. 436.

46. Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 350, 51 L. R. A. 339; Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534. See also Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802; Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48, 50 (where it is said: "Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex, or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members . . . are *pro tanto* illegal"); Reg. *v.* Duffield, 5 Cox C. C. 404.

47. Lucke *v.* Clothing Cutters', etc., Assembly No. 7507 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408; Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802; Giblan *v.* Great Britain, etc., Nat. Amalgamated Labourers' Union, [1903] 2 K. B. 600, 72 L. J. K. B. 907, 87 L. T. Rep. N. S. 386. But see Wunch *v.* Shankland, 59 N. Y. App. Div. 482, 69 N. Y. Suppl. 349.

48. Giblan *v.* Great Britain, etc., Nat. Amalgamated Labourers' Union, [1903] 2 K. B. 600, 52 L. J. K. B. 907, 89 L. T. Rep. N. S. 386.

49. Giblan *v.* Great Britain, etc., Nat. Amalgamated Labourers' Union, [1903] 2 K. B. 600, 52 L. J. K. B. 907, 89 L. T. Rep. N. S. 386.

50. *Connecticut.*— State *v.* Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28.

Illinois.— Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

Minnesota.— Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Trevor *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 1118.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622.

New Jersey.— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

New York.— Mills *v.* U. S. Printing Co., 99 N. Y. App. Div. 605, 91 N. Y. Suppl. 185; Stearns *v.* Marr, 41 Misc. 252, 84 N. Y. Suppl. 36.

Pennsylvania.— Cook *v.* Dolan, 19 Pa. Co. Ct. 401.

United States.— Wabash R. Co. *v.* Hannahan, 121 Fed. 563; Union Pac. Co. *v.* Ruef, 120 Fed. 102; Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Lake Erie, etc., R. Co. *v.* Bailey, 61 Fed. 494; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,392, 2 Hask. 164.

England.— Farrer *v.* Close, L. R. 4 Q. B. 602, 10 B. & S. 533, 38 L. J. M. C. 132, 20 L. T. Rep. N. S. 802, 17 Wkly. Rep. 1129; Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19.

51. State *v.* Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; Everett Waddey Co. *v.* Richmond Typographical Union No. 90, (1906) 53 S. E. 273.

52. State *v.* Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; Pickett *v.*

do,[53] provided such other persons may do so without violating any contract with the employer,[54] and pay the expenses of those thus persuaded to leave,[55] and post in the place of their assembly the names of all persons contributing or refusing to contribute to such expenses.[56] They may also persuade others not to take their places.[57] Labor unions may present their cause to the public in newspapers and circulars in a peaceable way and with no attempt at coercion.[58] These rights are not affected by the fact that the employer is a receiver.[59] Nor is the legality of such acts affected by the fact that loss results to the employer.[60] Nevertheless members of a labor union cannot resort to force, intimidation, or threats to prevent others from entering the employment of their abandoned employers.[61]

E. Adoption and Enforcement of Constitutions, Rules, and By-Laws — 1. In General. Labor unions have the right to adopt constitutions, rules, and by-laws within the scope of the lawful purposes of the union and bind their member thereby.[62] Unions cannot enforce observance of their by-laws, rules, and regu-

Walsh, (Mass.) 78 N. E. 753; National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Atchison, etc., R. Co. *v.* Gee, 140 Fed. 153.

53. *Michigan.*— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

Minnesota.— Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622.

New York.— Robers *v.* Evarts, 17 N. Y. Suppl. 264.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Pennsylvania.— Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135.

Virginia.— Everett Waddey Co. *v.* Richmond Typographical Union No. 90, (1906) 53 S. E. 273.

United States.— Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Consolidated Steel, etc., Co. *v.* Murray, 80 Fed. 811.

But see Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 50 Wkly. Rep. 139.

54. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,392, 2 Hask. 164.

If employees are persuaded to break an existing contract by leaving the service of their employer, those inducing such act are liable in damages therefor. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230. See also O'Neil *v.* Behanna, 182 Pa. St. 236, 37 Atl. 843, 61 Am. St. Rep. 702, 38 L. R. A. 382.

55. Rogers *v.* Evarts, 17 N. Y. Suppl. 264; Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19.

56. Rogers *v.* Evarts, 17 N. Y. Suppl. 264.

57. Beaton *v.* Tarrant, 102 Ill. App. 124; Stearns *v.* Marr, 41 Misc. (N. Y.) 252, 84 N. Y. Suppl. 36; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; Everett Waddey Co. *v.* Richmond Typographical Union No. 90, (Va. 1906) 53 S. E. 273; Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264.

58. Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407; Butterick Pub. Co. *v.* Typographical Union No. 6, 100 N. Y. Suppl. 292.

59. U. S. *v.* Kane, 23 Fed. 748.

60. State *v.* Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; Beaton *v.* Tarrant, 102 Ill. App. 124; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

Distinction in case of railroad employees.— However, because of the peculiar character of the business a distinction is made with respect to those employed in operating a railroad, and it is illegal for them to quit the service of the employer under conditions which may jeopardize its property, do injury to the public, or subject other employees to oppression or extortion. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395.

61. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Everett Waddey Co. *v.* Richmond Typographical Union No. 90, (Va. 1906) 53 S. E. 273; U. S. *v.* Kane, 23 Fed. 748. And see CONSPIRACY, 8 Cyc. 656. See also Cook *v.* Dolan, 19 Pa. Co. Ct. 401.

Enjoining intimidation see *infra*, VIII, B, 2.

62. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430; Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492; Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223; Wabash R. Co. *v.* Hannahan, 121 Fed. 563.

A rule prohibiting an employer from selecting the superintendent and reserving this right to the union binds the members and absolves the employer from liability for the negligence of such superintendent or his employees. Farmer *v.* Kearney, 115 La. 722, 39 So. 967, 3 L. R. A. N. S. 1105.

lations by any means which operate to deprive those subject to them of perfect freedom of action.[63] Members present at a meeting when an amendment to the by-laws is illegally adopted and who fail to object thereto are not estopped to raise the question of its validity thereafter.[64]

2. PENALTIES AND THEIR ENFORCEMENT.[65] Labor unions may provide and impose penalties for the failure of any of their members to comply with regulations made to further the purposes of the union,[66] such as working for wages or prices below the scale fixed by the union;[67] and the payment of such penalties may be enforced in the courts.[68] Where under the by-laws a member in arrears for a specified time is prohibited from working until such arrearages are paid, he may be legally deprived of his pass card which evidences his good standing and right to work with union men.[69]

3. VALIDITY OF RULES, ETC. A union will not be denied legal redress of its wrongs where its main purposes are legal, although some of its purposes may be illegal.[70] But if a material part of its rules and regulations is illegal as being in restraint of trade or the freedom of its members, no appeal can be made to the court to enforce any of them.[71] A rule binding the members to decline to handle interstate business under certain conditions is illegal.[72]

F. Contracts For Members. A labor union ordinarily has no authority to make a contract with employers of its members in respect to the performance of work and the payment for it. In order to bind the individual members they must expressly assent to the terms of the contract. Such assent will not be implied from the fact that they have knowledge at the time of the contract.[73] It cannot maintain an action to enforce a contract made by it on behalf of its members.[74]

63. Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

In Canada a by-law prohibiting a member of a musical association from playing in a band with those not members was held to be unreasonable and in restraint of trade and illegal, and expulsion for a violation thereof was enjoined. Parker *v.* Toronto Musical Protective Assoc., 32 Ont. 305.

64. Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

65. Fines and expulsion of members see *infra*, VI, C, 1, b.

66. Moores *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48; Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

Validity of rules.— Rules of the character under consideration are not violative of a statute making it a misdemeanor for one by force, threats, or intimidation to prevent an employee from continuing or performing his work. Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

67. Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1.

68. Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1.

Defenses.— A member who has been fined for violating by-laws of a union cannot urge as a defense that a strike has been illegally declared against the job on which he was employed and in connection with which the violence occurred. Burns *v.* Bricklayers' Union No. 1, 14 N. Y. Suppl. 361, 27 Abb. N. Cas. 20 [*affirming* 10 N. Y. Suppl. 916, 24 Abb. N. Cas. 150].

69. Burns *v.* Bricklayers' Union No. 1, 14 N. Y. Suppl. 361, 27 Abb. N. Cas. 20 [*affirming* 10 N. Y. Suppl. 916, 24 Abb. N. Cas. 150].

70. Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508; Swaine *v.* Wilson, 24 Q. B. D. 252, 54 J. P. 484, 59 L. J. Q. B. 76, 62 L. T. Rep. N. S. 309, 38 Wkly. Rep. 261. *Compare* Snow *v.* Wheeler, 113 Mass. 179, where it was held that an association of workmen formed for a legal purpose can maintain an action for the recovery of money belonging to them, although in attempting to carry out such purpose they have been guilty of illegal acts.

71. Old *v.* Robson, 54 J. P. 597, 59 L. J. M. C. 41, 62 L. T. Rep. N. S. 282, 38 Wkly. Rep. 415; Cullen *v.* Elwin, 88 L. T. Rep. N. S. 686; Sayer *v.* Amalgamated Carpenters, etc., Soc., 19 T. L. R. 122.

72. Waterhouse *v.* Comer, 55 Fed. 149, 19 L. R. A. 403.

73. Burnetta *v.* Marceline Coal Co., 180 Mo. 241, 71 S. W. 136.

Release from liability for injuries.— Where by the rules of a labor union the contract is required to be made with its foreman and the right of selection of superintendent and fellow-servants is vested in such foreman, the employer is relieved from all liability for personal injury to any member of the union resulting from the negligence of a fellow-servant. Farmer *v.* Kearney, 115 La. 722, 39 So. 967, 3 L. R. A. N. S. 1105.

74. St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725. But *compare* Jacobs *v.* Cohen,

Nor is it liable to suit on such a contract, which is enforceable only against the individual members who are guilty of a breach of it.[75] An individual member of a labor union, not being bound by the terms of the contract made between the union and its employers as to the time of payment of his wages, has a right to sue therefor on the completion of his work, in the absence of any express contract with him.[76]

IV. General and Local Unions.

Where the charter of a local union is revoked by the general union, courts will not interfere to restore it, where no property rights are involved, until the remedies provided within the union have been exhausted.[77] The rights of membership evidenced by a charter granted by a general to a local union are not property rights,[78] nor does membership therein confer such property rights as are necessary to give the courts jurisdiction.[79] A subordinate lodge or society of a labor union which has a common label cannot maintain a suit to enjoin the unauthorized use of such label; the right of action, if any, being in the chief association.[80] Where such label stigmatizes without warrant or justice non-union laborers working in the same line of employment, the courts will not protect the union in the use thereof.[81]

V. Officers.

Labor unions have the right to elect or appoint officers to advise them in the conduct of their relations with their employers,[82] and such officers, or any other person to whom they choose to listen, may advise them in such matters.[83] Any one invested by them with such authority may order the members under penalty of expulsion to peaceably leave a service, any terms of which are unsatisfactory.[84] An officer of one trade union does not vacate his office merely by joining another similar union, the constitution of which provides that no member thereof shall remain a member of other like unions.[85] Where an officer's act is justified by the by-laws of the order, proof of a custom antagonistic to such law cannot be shown in order to justify the imposition of a penalty upon him for a violation of such custom.[86] There is no presumption that an officer of a trade union has authority to execute leases of the union's property; such authority must be affirmatively shown to make the lease binding.[87]

VI. Membership.

A. Qualifications. Labor unions may require such qualifications for membership and such formalities of election as they choose. They may restrict membership to the original promoters or limit it in any manner they may desire, and the

183 N. Y. 207, 76 N. E. 5, 2 L. R. A. N. S. 292 [*reversing* 99 N. Y. App. Div. 481, 90 N. Y. Suppl. 854], holding that a contract between an employer and a labor union is enforceable by the latter.

75. St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

76. Burnetta *v.* Marceline Coal Co., 180 Mo. 241, 79 S. W. 136.

77. O'Brien *v.* Musical Mut. Protective, etc., Union, 64 N. J. Eq. 525, 54 Atl. 150.

78. O'Brien *v.* Musical Mut. Protective, etc., Union, 64 N. J. Eq. 525, 54 Atl. 150.

79. O'Brien *v.* Musical Mut. Protective, etc., Union, 64 N. J. Eq. 525, 54 Atl. 150.

80. McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

Union label generally see TRADE-MARKS AND TRADE-NAMES.

81. McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

82. *In re* Charge to Grand Jury, 62 Fed. 828; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

83. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

84. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

85. Farrell *v.* Cook, 5 N. Y. Suppl. 5 [*affirmed* in 58 Hun 603, 11 N. Y. Suppl. 326].

86. Connell *v.* Stalker, 21 Misc. (N. Y.) 609, 48 N. Y. Suppl. 77.

87. United Order American Brick Layers, etc. *v.* Fitzgerald, 59 Ill. App. 362.

restriction may be based on citizenship, nationality, age, creed, or profession.[88] They may lawfully exclude employers and foremen.[89]

B. Must Be Voluntary. Like all other voluntary societies labor unions must depend for their membership upon the free and untrammeled choice of each individual member. No resort can be had to compulsory methods of any kind to increase, keep up, or retain such membership.[90] Injunction lies to restrain a labor union from committing any act designed to coerce others to become members of it;[91] and they will be enjoined from persuading apprentices or other workmen to join who are under contract with their employer not to join such organizations.[92] The courts will not undertake to compel a labor union to admit any one to its organization who is in any way objectionable to the union or its members.[93] An expelled apprentice who has never been recognized as a full member of a union is not entitled to injunctive relief against the refusal of the society to grant him full membership and a union card.[94]

C. Rights of Members[95] — **1. In Respect of Membership — a. In General.** So long as a labor union remains a voluntary one the courts have no jurisdiction over it, and will not interfere between it and a member except for the sole purpose of protecting any interest the member may have in the property of the association.[96]

b. Fines or Expulsion and Relief Against[97] — (1) *In General.* Where under the by-laws the union has the discretion to fine or expel a member, it cannot both fine and expel.[98] And where the by-laws provide that violations of certain sections shall be punishable by a fixed fine, there is no authority to impose a fine for the violation of each section.[99] If a by-law provides that any member violating it by inducing others to become employed at less than scale rates shall be bound for the fines imposed upon such others, he can only be required to pay on the failure of those fined to make payment, and then not until charges are preferred and heard.[1] Expulsion is justified where it appears that the member expelled secured admission by falsely representing that he possessed the qualifications therefor,[2] or where he persists in retaining membership after his disqualification has been established.[3] A member cannot, however, be expelled for the violation of a by-law not regularly and legally adopted in accordance with the fundamental laws of the union;[4] and merely circulating a manifesto criticizing the management and inviting members to attend a meeting for discussing the interests of the

88. Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

89. Snow *v.* Wheeler, 113 Mass. 179.

90. Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464. See also People *v.* Melvin, 2 Wheel. Cr. (N. Y.) 262; Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48.

91. Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339; Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534. But see National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]. See also Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. N. S. 292 [*reversing* 99 N. Y. App. Div. 481, 90 N. Y. Suppl. 854].

Enjoining intimidation see *infra*, VIII, B, 2.

92. Flaccus *v.* Smith, 199 Pa. St. 128, 48 Atl. 894. See also *infra*, VIII, B, 6.

93. Parker *v.* Bricklayers' Union, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

94. Potter *v.* Sheffer, 40 Misc. (N. Y.) 46, 81 N. Y. Suppl. 164.

95. Membership in local union see also *supra*, IV.

96. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383. See also *infra*, VI, C, 1, b.

Where members are entitled to a funeral benefit they have such a pecuniary interest in the society as will induce the court to act. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383; Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538.

97. Penalties and their enforcement see *supra*, III, E, 2.

Relief of expelled apprentice see *supra*, VI, B.

98. People *v.* New York Benev. Soc., 3 Hun (N. Y.) 361, 6 Thomps. & C. 85.

99. Fuerst *v.* Musical Mut. Protective Union, 95 N. Y. Suppl. 155.

1. Fuerst *v.* Musical Mut. Protective Union, 95 N. Y. Suppl. 155.

2. Beesley *v.* Chicago Journeymen Plumbers' Protective Assoc., 44 Ill. App. 278.

3. Beesley *v.* Chicago Journeymen Plumbers' Protective, etc., Assoc., 44 Ill. App. 278.

4. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383.

union will not justify expulsion.[5] So it has been held that by-laws which forbid a member to work at his trade at a price satisfactory to him and compel him to join in a strike are void as against public policy, and expulsion for a violation thereof is illegal.[6] And if the charter or laws of the union confer no power of expulsion, it can be exercised only when the member has been guilty of some infamous offense, or his conduct tends to the destruction of the society.[7]

(II) *Notice and Opportunity to Be Heard.* Although there is no provision in the by-laws for the trial of an accused member, he cannot be summarily suspended, but is entitled to reasonable notice of the charge and an opportunity to be heard.[8] And a law requiring notice to appear and show cause to be given must be complied with or the expulsion is illegal.[9]

(III) *Appeal to the Courts*—(A) *In General.* The decisions of a labor union in admitting, suspending, or expelling members are of a quasi-judicial character. In such cases the courts will not interfere except to ascertain whether or not the proceedings were in accordance with the rules and laws of the union, and whether or not the proceedings were in good faith, or if there was anything in the proceedings in violation of the laws of the land.[10] If the union is unlawful as being in restraint of trade the courts will not interfere.[11] But where a pecuniary or civil right is involved in the controversy, and the association is a lawful one, the court will interfere to protect a member from an unlawful or arbitrary suspension or expulsion,[12] or restore his membership by mandamus.[13] Where the proceedings for the expulsion of a member of a labor union appear to be fair and reasonable, in the absence of any clear showing of a violation of some rule or law of the union, he will not be reinstated by the courts,[14] but if illegally expelled, he may be restored to membership without resorting to the remedy provided by the by-laws for restoration,[15] especially where the conditions imposed on his right to such remedy, and those by which it could be made available, are

5. Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 189, 69 Am. St. Rep. 820.

6. People *v.* New York Benev. Soc., 4 Hun (N. Y.) 361, 6 Thomps. & C. 85.

7. Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 189, 69 Am. St. Rep. 820.

8. Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538; Cotton Jammers', etc., Assoc. *v.* Taylor, 23 Tex. Civ. App. 367, 56 S. W. 553.

9. People *v.* New York Benev. Soc., 3 Hun (N. Y.) 361, 6 Thomps. & C. 85.

Sufficiency of notice.—Where the by-laws provide that a copy of the charges shall be served on the accused, and that the member preferring them shall appear personally to make proof thereof, strict compliance therewith is essential to the validity of the expulsion of a member. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Musical Mut. Protective Union, 47 Hun (N. Y.) 273. And in such a case a notice to appear before the tribunal and show cause why he should not be expelled for violating a section of the by-laws providing for expulsion for certain causes therein specified is not a sufficient compliance with the law requiring service of a copy of the charges. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Musical Mut. Protective Union, 47 Hun (N. Y.) 273; Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

Waiver of notice.—The appearance of the accused on notice before the proper trial tribunal, for the purpose of objecting to their jurisdiction, will not constitute a waiver of service of the charges or of the absence of the accuser. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Musical Mut. Protective Union, 47 Hun (N. Y.) 273; Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

10. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383. And see Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 9 L. R. A. 428.

11. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383.

12. Froelich *v.* Musicians Mut. Ben. Assoc., 93 Mo. App. 383.

13. Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538; People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Musical Mut. Protective Union, 47 Hun (N. Y.) 273; People *v.* New York Benev. Soc., 3 Hun (N. Y.) 361, 6 Thomps. & C. 85; Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

14. Beesley *v.* Chicago, etc., Assoc., 44 Ill. App. 278.

15. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People

so burdensome as to practically amount to a denial of relief;[16] but he cannot be reinstated by interlocutory order, and the violation of such order cannot be made the foundation for proceedings in contempt.[17]

(B) *Exhaustion of Other Remedies.* The member must, however, exhaust the remedies afforded by the union before seeking redress in the courts;[18] but where he takes an appeal in accordance with the by-laws of the union he will be regarded as having exhausted such remedies, although an amendment to the by-laws may be pending.[19]

(C) *To Recover Damages* — (1) IN GENERAL. For an illegal suspension of a member the union is liable to him in damages for wages lost during such suspension by which he was deprived of the right and opportunity to work,[20] and he is under no obligation to leave the place of his residence in quest of work in order to protect it, or reduce its liability.[21]

(2) PLEADING.[22] In an action by a member against a union to recover damages for his wrongful suspension the complaint must allege in what manner his suspension affected his rights to engage in remunerative labor or prevented him from procuring work.[23]

(3) EVIDENCE.[24] Where a member sues a union for his illegal suspension or expulsion, and the union rules provide that no member shall permit himself to be employed with an expelled member, it is competent to show that a "black-list" was kept posted in the office of the union,[25] that his discharge was a consequence of such expulsion,[26] and what his earnings were before and after his expulsion and his inability to obtain employment after being expelled.[27]

(D) *To Recover Fine Paid.* If the payment of a fine is enforced by threats amounting to duress the member may recover it by suit.[28]

2. IN RESPECT OF PROPERTY RIGHTS AND BENEFITS — a. In General. The articles of agreement of a labor union, whether called a constitution, charter, by-laws, or any other name, constitute a contract between the members which the courts will enforce if not immoral or contrary to public policy or the law of the land.[29] A provision in the constitution of a union that no person who engages in the sale of intoxicating drinks can be admitted or retained as a member is not self-executing, and unless a member who engages in such business is expelled in accordance with the rules of the union he is entitled to the benefits conferred by membership.[30] Where the conditions on which a funeral benefit will be paid

v. Musical Mut. Protective Union, 47 Hun (N. Y.) 273.

16. Corregan *v.* Hay, 94 N. Y. App. Div. 71, 87 N. Y. Suppl. 956; Weiss *v.* Musical Mut. Protective Union, 185 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

17. Bachman *v.* Harrington, 184 N. Y. 458, 74 N. E. 657 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1113].

18. Harris *v.* Detroit Typographical Union No. 18, (Mich. 1906) 108 N. W. 362; Burns *v.* Bricklayers' Union, 14 N. Y. Suppl. 361, 27 Abb. N. Cas. 20 [*affirming* 10 N. Y. Suppl. 916, 24 Abb. N. Cas. 150], holding that where the executive committee has authority to impose punishment for a violation of the by-laws of the union, and there is a right of appeal to the union, the courts will require the exhaustion of the remedy afforded by the society before interfering to relieve one claiming to have been illegally expelled and deprived of his pass card.

19. Fuerst *v.* Musical Mut. Protective Union, 95 N. Y. Suppl. 155.

20. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Musical Mut. Protective Union, 47 Hun (N. Y.) 273; Connell *v.* Stalker, 21 Misc. (N. Y.) 609, 48 N. Y. Suppl. 77; Cotton Jammers', etc., Assoc. *v.* Taylor, 23 Tex. Civ. App. 367, 56 S. W. 553.

21. Connell *v.* Stalker, 21 Misc. (N. Y.) 609, 48 N. Y. Suppl. 77.

22. Pleading generally see PLEADING.

23. Cotton Jammers', etc., Assoc. No. 2 *v.* Taylor, 23 Tex. Civ. App. 367, 56 S. W. 553.

24. Evidence generally see EVIDENCE.

25. Merschiem *v.* Musical Mut. Protective Union, 8 N. Y. Suppl. 702, 24 Abb. N. Cas. 252 [*affirmed* in 55 Hun 608].

26. Merschiem *v.* Musical Mut. Protective Union, 8 N. Y. Suppl. 702, 24 Abb. N. Cas. 252 [*affirmed* in 55 Hun 608].

27. Merschiem *v.* Musical Mut. Protective Union, 8 N. Y. Suppl. 702, 24 Abb. N. Cas. 252 [*affirmed* in 55 Hun 608].

28. Fuerst *v.* Musical Mut. Protective Union, 95 N. Y. Suppl. 155.

29. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

30. Steinert *v.* United Brotherhood, etc., 91 Minn. 189, 97 N. W. 668.

are set forth in a single section of the by-laws, and are fully complied with by a member before death, other by-laws relating to conditions on which benefits generally will be granted cannot be invoked to deprive him of the funeral benefit.[31] A statute prohibiting the courts from enforcing the agreements for the application of the funds of the union does not preclude a member in the absence of action by the trustees from applying to the courts to restrain a misapplication of the funds of the society.[32] An application of the funds of a union to the support of members illegally on a strike will be enjoined at the instance of a member, where the officers charged with the due use of the revenues of the society refuse or fail to act.[33] Members in good standing may make an assignment of the funds of the union, and the contingent interest of suspended members who may be reinstated will not affect the validity of such assignment.[34]

b. Upon Dissolution of Union. On the dissolution of a labor union the accumulated funds should be distributed to those who are members at the time in proportion to their contributions thereto.[35]

VII. ACTIONS BY AND AGAINST LABOR UNIONS.[36]

A voluntary labor union, not being a partnership or corporation,[37] actions by or against it come within the rules governing actions by or against other voluntary associations;[38] hence at common law and in the absence of statutory provisions changing the common-law rule,[39] a voluntary labor union cannot sue in the names of only a portion of its members,[40] nor sue or be sued in its own name.[41] A complaint in behalf of a union must show a grievance of the organization as

31. Weiss *v.* Tennant, 2 Misc. (N. Y.) 213, 21 N. Y. Suppl. 252.

32. Yorkshire Miners' Assoc. *v.* Howden, [1905] A. C. 256, 74 L. J. K. B. 511, 92 L. T. Rep. N. S. 701, 21 T. L. R. 431, 53 Wkly. Rep. 667 [*affirming* [1903] 1 K. B. 308, 72 L. J. K. B. 176, 88 L. T. Rep. N. S. 134]; Wolfe *v.* Matthews, 21 Ch. D. 194, 51 L. J. Ch. 833, 47 L. T. Rep. N. S. 158, 30 Wkly. Rep. 838.

33. Howden *v.* Yorkshire Miners' Assoc., [1903] 1 K. B. 308, 72 L. J. K. B. 176, 88 L. T. Rep. N. S. 134.

34. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

35. *In re* Printers, etc., Amalgamated Trades Protection Soc., [1899] 2 Ch. 184, 68 L. J. Ch. 537, 47 Wkly. Rep. 619; Strick *v.* Swansea Tin-Plate Co., 36 Ch. D. 558, 57 L. J. Ch. 438, 57 L. T. Rep. N. S. 392, 35 Wkly. Rep. 831.

36. **Action:** By member who has been fined or expelled see *supra*, VI, C, 1, b, (III). To enforce penalty against member see *supra*, III, E, 2. To enjoin union or its members generally see *infra*, VIII. To enjoin use of union label see *supra*, IV.

37. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430; Taff Vale R. Co. *v.* Amalgamated Railway Servants' Soc., [1901] A. C. 426, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44.

Definition see *supra*, I.

38. See ASSOCIATIONS, 4 Cyc. 312 *et seq.*

39. **Right to sue and be sued** at common law and under the English statutes see *supra*, II, A. See also ASSOCIATIONS, 4 Cyc. 312 *et seq.*

In New Jersey, by the act of 1883 (Rev. Sup. p. 812, § 22), a labor union may be sued by its organized name in any action affecting the common property or the joint rights or liabilities thereof; but such act does not authorize it to sue in its adopted name. Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

Under the English and Canadian law a labor union registered under the Trade Union Act of 1871 may be sued in its registered name where it is given the power to own property (Taff Vale R. Co. *v.* Amalgamated Railway Servants' Soc., [1901] A. C. 426, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44); but in the absence of such power it cannot be sued (Metallic Roofing Co. *v.* Amalgamated Sheet Metal Workers' International Assoc., 5 Ont. L. Rep. 424).

Suits in equity see ASSOCIATIONS, 4 Cyc. 312. See also *infra*, VIII.

40. Atkins *v.* W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074.

41. Pickett *v.* Walsh, (Mass. 1906) 78 N. E. 753; St. Paul Typothetæ *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725; Seattle Brewing, etc., Co. *v.* Hansen, 144 Fed. 1011; American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 3, 90 Fed. 598; Oxley Stave Co. *v.* Coopers' International Union, 72 Fed. 695.

Effect of pleading in corporate capacity.— But where it appears, pleads, and consents to an order against it in an apparently corporate capacity, it cannot afterward object that it is not a corporation. Krug Furniture Co. *v.* Berlin Union, 5 Ont. L. Rep. 463.

such and not that of its individual members.[42] A complaint against an unincorporated union and a number of individuals jointly is defective as against the union where it fails to show that the individuals compose or are members of it.[43] Members of such union are properly sued in their individual capacity and in federal courts the associations themselves are properly made parties in order to locate the citizenship of their members.[44] The leaders of an organized strike may be sued as fairly representing the organization without regard to their official connection with it.[45]

VIII. INJUNCTIONS AGAINST.*

A. In General.[46] The rule that an injunction will not be denied merely because it may operate to restrain the commission of crime[47] has been applied on applications for injunctions against labor unions.[48] The fact that complainant himself belongs to an illegal association,[49] or that his complaint states a cause for closing his business different from that announced at the time of such closing,[50] does not constitute a ground for dissolving a temporary injunction. An injunction against a voluntary association need not be directed against it by name, but one against the individual members is effective to restrain illegal action by them in their associated capacity.[51] An injunction against a labor union or its members for illegal acts, such as picketing, need not be limited to the members of the union actually engaged therein, but where a conspiracy exists the entire membership may be enjoined.[52] On application for an injunction against the unlawful acts of a labor union a court may consider the proclamation of a state governor bearing upon such acts which is incorporated into the record before it.[53]

B. Grounds For — 1. In General. Capital and labor each have the right to organize to secure control of a trade or of the work connected therewith, and in the absence of a breach of contract, or the use of violence, intimidation, or coercion, acts by which either endeavors to effect such purpose will not be enjoined on the ground that they may be detrimental to trade or injurious to individual business.[54]

42. Atkins *v.* W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074.

43. American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 3, 90 Fed. 598. See also Curphey *v.* Terrell, (Miss. 1905) 39 So. 477.

44. Seattle Brewing, etc., Co. *v.* Hansen, 144 Fed. 1011.

45. Pickett *v.* Walsh, (Mass. 1906) 78 N. E. 753; American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 3, 90 Fed. 598.

46. Injunction generally see INJUNCTIONS.

Injunction to enjoin: Coercion of persons to become members of union see *supra*, VI, B. Refusal of membership see *supra*, VI, B.

47. See INJUNCTIONS, 22 Cyc. 757, 902.

48. *In re* Debs, 158 U. S. 564, 18 S. Ct. 900, 39 L. ed. 1092 [*affirming* 64 Fed. 724]; Coeur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382. See also *infra*, VIII, B, 4, b, text and note 81.

49. Cœur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

50. Cœur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

51. American Steel, etc., Co. *v.* Wire Drawers,' etc., Unions Nos. 1 & 3, 90 Fed. 598.

52. Where a labor organization whose members are engaged in a strike institute a system of picketing around the works of the former employer, which system results in the use of violence and intimidation, which the officers and men know of, but take no steps to prevent, an unlawful conspiracy exists, and not only those who participated in the unlawful acts of violence or intimidation, but all other members may be included in the injunction. Nor is it any defense that pickets were instructed not to commit such unlawful acts when no steps are taken to punish the guilty persons, or discontinue the picketing, or even to exclude such persons from further service as pickets. Union Pac. Co. *v.* Ruef, 120 Fed. 102. See also Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49. But those officers and members of unions, or persons not members, who have neither authorized, encouraged, known of, nor tacitly approved of the wrongful acts enjoined, will not be included in the decree (Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assoc., 59 N. J. Eq. 49, 46 Atl. 208), although they will be held chargeable with knowledge of the terms of the injunction and bound by it. (Union Pac. R. Co. *v.* Ruef, 120 Fed. 102).

Picketing enjoined see *infra*, VIII, B, 4.

53. Cœur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

54. *Colorado.*— Master Builders' Assoc. *v.* Domascio, 16 Colo. App. 25, 63 Pac. 782.

* By John Warren Edgerton

2. Intimidation.[55] Employees may refuse to work with any except members of their association and may by lawful means compel the discharge of other employees so long as no coercion or intimidation is used, and injunction against their acts will not be granted.[56] So an injunction will not issue against striking employees to prevent their using peaceful entreaty and persuasion to induce others to leave or not to enter the employ of another where no intimidation is used.[57] What constitutes intimidation must be determined in each case from all the circumstances attending it.[58] If the things done or the words spoken are such that they will excite fear or reasonable apprehension of damages, and so influence those for whom designed as to prevent them from freely doing what they desire, and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit or intent.[59] So the use of actual violence, such as assault and battery,[60] or the assembling in large numbers at or

Illinois.— Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176.

Massachusetts.— Pickett *v.* Walsh, (1906) 78 N. E. 753.

Minnesota.— Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753.

New Jersey.— Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

New York.— National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135; Tallman *v.* Gaillard, 27 Misc. 114, 57 N. Y. Suppl. 419; Dunlap's Cable News Co. *v.* Stone, 15 N. Y. Suppl. 2.

Pennsylvania.— Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534.

United States.— Francis *v.* Flinn, 118 U. S. 385, 6 S. Ct. 1148, 30 L. ed. 165; Wabash R. Co. *v.* Hannahan, 121 Fed. 563.

See 27 Cent. Dig. tit. "Injunction," § 174.

Rights and liabilities respectively see also *supra*, III.

55. Intimidation defined see 23 Cyc. 42.

Form of injunction against intimidation see Murdock *v.* Walker, 152 Pa. St. 595, 597, 25 Atl. 492, 34 Am. St. Rep. 678; Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49, 58 note.

Civil action for damages for causing employees to stop work see Conspiracy, 8 Cyc. 655 *et seq.*

56. Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492; National Protective Assoc. *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 [*affirming* 53 N. Y. App. Div. 227, 65 N. Y. Suppl. 946]; Tallman *v.* Gaillard, 27 Misc. (N. Y.) 114, 57 N. Y. Suppl. 419.

A non-union employee cannot enjoin his employer from discharging him because of his refusal to join a labor union. Mills *v.* U. S. Printing Co., 99 N. Y. App. Div. 605, 91 N. Y. Suppl. 185.

57. Reynolds *v.* Everett, 144 N. Y. 189, 39 N. E. 72; Foster *v.* Retail Clerks' International Protective Assoc., 39 Misc. (N. Y.) 48, 78 N. Y. Suppl. 860; Rogers *v.* Evarts, 17 N. Y. Suppl. 264; Johnston Harvester Co. *v.* Meinhardt, 60 How. Pr. (N. Y.) 168; Standard Tube, etc., Co. *v.* International Union, 9 Ohio S. & C. Pl. Dec. 692, 7 Ohio N. P. 87; Consolidated Steel, etc., Co. *v.* Murray, 80 Fed. 811.

Rule restated.— Defendants have the right to argue or discuss with the new employees the question whether the new employees should work for the company. They have the right to persuade them if they can. But in prosecuting the matter they have no right to use force or violence to terrorize or intimidate the new employees. The new employees have the right to come and go as they please without fear and molestation, and without being compelled to discuss this or any other question, and without being guarded or picketed; and persistent and continued objectionable persuasion by numbers is of itself intimidating and not allowable. Union Pac. R. Co. *v.* Ruef, 120 Fed. 102.

58. Bill sufficient.— A bill to restrain intimidation and picketing is sufficient which alleges that the strikers stationed themselves in the streets and alleys and approaches to complainant's place of business, and began to intimidate the employees, and began a systematic course of intimidation and warned the employees not to return to work and assumed a menacing and threatening attitude and continued to menace and threaten said employees, that the employees were willing to work but were so threatened and intimidated that they refused to continue in complainant's employ, and that the strikers had intercepted the employees and induced them by threats and unlawful persuasion not to enter complainant's employ. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219 [*affirming* 114 Ill. App. 40].

59. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395; Cœur d'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382. See also U. S. *v.* Kane, 23 Fed. 748.

60. *Illinois.*— Christensen *v.* Kellogg Switchboard, etc., Co., 110 Ill. App. 61.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622, threats of personal violence.

near the works of the employer, accompanied by jeering and hooting, and the use of vile epithets,[61] has been enjoined. Intimidation is, however, not limited to threats of violence or physical injury to person or property. There may also be a moral intimidation which is illegal.[62] Where a combination or organization of persons, by means of intimidation, prevent a person from employing labor, or prevent persons from remaining in, or entering, the employ of another, to his or their irreparable injury, such acts constitute an unlawful interference with occupation which equity will enjoin.[63]

New Jersey.— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230, personal molestation.

New York.— Master Horseshoers' Protective Assoc. *v.* Quinlivan, 83 N. Y. App. Div. 459, 82 N. Y. Suppl. 288, suit between different unions.

Pennsylvania.— State Line, etc., R. Co. *v.* Brown, 11 Pa. Dist. 509, threats of personal violence.

United States.— Blindell *v.* Hagan, 54 Fed. 40 [*affirmed* in 56 Fed. 696, 6 C. C. A. 86].

61. *Illinois.*— Beaton *v.* Tarrant, 102 Ill. App. 124.

New Jersey.— Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assoc., 59 N. J. Eq. 49, 46 Atl. 208.

New York.— Foster *v.* Retail Clerks' International Protective Assoc., 39 Misc. 48, 78 N. Y. Suppl. 860.

Pennsylvania.— O'Neil *v.* Behanna, 182 Pa. St. 236, 37 Atl. 843, 61 Am. St. Rep. 702, 38 L. R. A. 382; Murdock *v.* Walker, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678; Marietta Casting Co. *v.* Thuma, 12 Pa. Dist. 552, 28 Pa. Co. Ct. 248; Cook *v.* Dolan, 19 Pa. Co. Ct. 401; Beale *v.* Little, 2 Blair Co. Rep. 309, marching with brass bands to meet workmen going to and coming from their work.

United States.— Reinecke Coal Min. Co. *v.* Wood, 112 Fed. 477; Southern R. Co. *v.* Machinists Local Union No. 14, 111 Fed. 49; Consolidated Steel, etc., Co. *v.* Murray, 80 Fed. 811. See also Mackall *v.* Ratchford, 82 Fed. 41, where two hundred miners marching back and forth in front of mines for three days — halting in front of mines and taking positions on each side of road which miners must cross in going to and from the works — was deemed intimidation, which might be enjoined.

See 27 Cent. Dig. tit. "Injunctions," § 175.

62. Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32; Atchison, etc., R. Co. *v.* Gee, 139 Fed. 582.

Direct threat not necessary.— To constitute intimidation, it is not necessary that there should be any direct threat, still less any act of violence. It is enough if the mere attitude assumed by defendant is intimidating. Foster *v.* Retail Clerks' International Protective Assoc., 39 Misc. (N. Y.) 48, 78 N. Y. Suppl. 860.

Banners displayed in front of a person's premises, with inscriptions calculated to injure his business and to deter workmen from entering into or continuing in his employment, constitute a nuisance which equity will restrain by injunction. Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

Test restated.— The doctrine which supports that portion of the restraining order in this case which undertakes to interdict defendants from molesting applicants for employment as an invasion of a right of the complainant is applicable to a situation presenting either an employer or an employee as complainant, and containing the following elements: (1) Some person or persons desiring to exercise the right of employing labor or the right of being employed to labor. (2) A combination of persons to interfere with the right by molestation or annoyance of employers who would employ, or of employees who would be employed, in the absence of such molestation. (3) Such a degree of molestation as might constrain a person having reasonable fortitude, and not being unreasonably sensitive, to abandon his intention to employ or be employed in order to avoid such molestation. (4) As a result of the foregoing conditions, an actual pecuniary loss to the complaining party by the interference with his enjoyment of his probable expectancies in respect of the labor market. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 768, 53 Atl. 230.

63. *Illinois.*— Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219 [*affirming* 114 Ill. App. 40]. *Compare* Christensen *v.* State, 114 Ill. App. 40.

Kentucky.— Underhill *v.* Murphy, 117 Ky. 640, 78 S. W. 482, 25 Ky. L. Rep. 1731.

Massachusetts.— Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622.

New Jersey.— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

New York.— Beattie *v.* Callanan, 67 N. Y. App. Div. 14, 73 N. Y. Suppl. 518; Butterick Pub. Co. *v.* Typographical Union No. 6, 100 N. Y. Suppl. 292.

Ohio.— New York, etc., R. Co. *v.* Wenger, 10 Ohio Dec. (Reprint) 815, 17 Cinc. L. Bul. 306.

Pennsylvania.— Murdock *v.* Walker, 152

3. STRIKES[64] — a. In General. While ordinarily a strike will not be enjoined,[65] in a few recent cases strikes threatened for the purpose of preventing persons not members of the strikers' association from being employed or retained in employment have been enjoined as constituting intimidation,[66] as has an attempt to pre-

Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678; State Line, etc., R. Co. *v.* Brown, 11 Pa. Dist. 509; Erdmann *v.* Mitchell, 10 Pa. Dist. 701; Temple Iron Co. *v.* Carmanoskie, 10 Kulp 37.

United States.— Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Otis Steel Co. *v.* Iron Molders of North America, 110 Fed. 698; Mackall *v.* Ratchford, 82 Fed. 41; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Cœur d'Alene Consolidated, etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

See 27 Cent. Dig. tit. "Injunction," § 175.

Protection of freedom of contract.— The law upholds and will protect the right of freedom of contract between employer and employee, the right of every person or corporation to hire and discharge men at pleasure, subject to liability for damages for breach of contract and the right of every man to work or to quit work at his pleasure, subject to the same liability, making no distinction between union and non-union workmen. Union Pac. R. Co. *v.* Ruef, 120 Fed. 102.

Adequate remedy at law.— Equity does not undertake to grant injunctions in strike or boycott cases unless complainant has shown pecuniary loss in respect to his property or business, for which an action at law is an inadequate remedy, or where he has shown that he had been deprived of his right to make a living. Atkins *v.* W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074. See also Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

An injunction is not maintainable against all the members of a labor union because a part of the members during a strike drove away certain workmen from their employer's service by means of threats. Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

64. **Definition.**— A strike is "a combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 60 Fed. 803, 821. Other definitions are: "A combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode or manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like." Delaware, etc., R. Co. *v.* Bowns, 58 N. Y. 573, 582 [*quoted* in Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 541, 38 Pac. 547]. "A 'simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced, and on its objects." Farrer *v.* Close, L. R. 4 Q. B. 602, 612, 10 B. & S. 533, 38 L. J. M. C. 132, 20 L. T. Rep. N. S. 802, 17 Wkly. Rep. 1129. "The act of quitting work; specifically, such an act by a body of workmen, done as a means of enforcing compliance with demands made on their employer." It is not necessarily unlawful, and does not necessarily engender breach of the peace. Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 541, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

"A combination among employés having for its object their orderly withdrawal in large numbers or in a body from the service of their employers on account simply of a reduction in their wages, is not a 'strike,' within the meaning of the word as commonly used." Arthur *v.* Oakes, 63 Fed. 310, 327, 11 C. C. A. 209, 25 L. R. A. 414 [*cited* in State *v.* Kreutzberg, 114 Wis. 530, 535, 90 N. W. 1098, 91 Am. St. Rep. 934, 58 L. R. A. 748].

The term "legal strike" has been said to mean "a strike declared in pursuance to the rules of the order." Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 731, 19 L. R. A. 387.

65. Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387. See also *supra*, III, D, 3.

Assisting strikers with money will not be enjoined. Levy *v.* Rosenstein, 66 N. Y. Suppl. 101.

66. Coons *v.* Chrystie, 24 Misc. (N. Y.) 296, 53 N. Y. Suppl. 668 (injunction granted on the ground that they must have been coerced by the anticipation of some recognized penalty and the absence of threats would signify they were unnecessary); House Painters' Ben. Assoc. *v.* Feeney, 13 Pa. Dist. 335, 29 Pa. Co. Ct. 524; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395 (an arbitrary railroad strike without cause, merely for the purpose of enforcing a boycott against a connecting line, was enjoined). See also Plant *v.* Woods, 176 Mass. 492, 502, 57 N. E. 1011, 77 Am. St. Rep. 330, 51 L. R. A. 339, where the following statement is made: "It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded

vent others from entering the employ of another merely because he had refused to employ only union men.[67] It has also been held that the right of labor unions to strike is limited to strikes on persons with whom the organization has a trade dispute, and that a strike on one with whom no dispute exists to compel him to coerce another to discharge non-union men or to give work to members of the union is illegal and will be enjoined.[68] An injunction should not be granted in strike or boycott cases unless the complainant shows a substantial pecuniary loss in his business for which the law affords no adequate remedy, or that he has been deprived of the right to make a living.[69]

b. Interference With Interstate Commerce.[70] A court of equity has authority to issue an injunction restraining the officers of a labor union from ordering a strike where the bill alleges a malicious conspiracy on their part to interfere with the carrying of the mails by complainant and with interstate commerce,[71] especially where it appears that the members of the union employed by complainant are satisfied with the conditions of and wages for their services.[72] An injunction will issue to compel the rescission of such order after its issuance;[73] and an injunction will issue where the intimidation by a threatened strike is intended to and does operate to prevent the employment of persons for the purpose of handling interstate and foreign commerce.[74]

4. Picketing[75] — a. In General. While it has been held that the mere stationing persons near the premises of another for the mere purpose of observing and

and actually has that effect, is sufficient in cases like this."

A conspiracy by a number of persons that they will by threats and strikes deprive a mechanic of the right to work for others because he does not join a particular union will be restrained. A union has a right for reasons satisfactory to its members to cease work, but a combination by it to prevent others from obtaining work by threats of a strike, or to prevent an employer from employing others by threats of a strike, is unlawful, and will be enjoined. Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534.

The discontinuance of a strike has been held not to be sufficient ground for refusing an injunction to prevent illegal acts on the part of the strikers. U. S. *v.* Workingmen's Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158. *Contra*, Reynolds *v.* Everett, 144 N. Y. 189, 39 N. E. 72.

A preliminary injunction to prevent illegal acts by strikers will not be refused merely because it will have the practical effect of ending the strike and be equivalent to final relief. American Steel, etc., Co. *v.* Wire Drawers', etc., Makers' Unions Nos. 1 & 2, 90 Fed. 598.

67. W. P. Davis Mach. Co. *v.* Robinson, 41 Misc. (N. Y.) 329, 84 N. Y. Suppl. 837.

68. Pickett *v.* Walsh, (Mass. 1906) 78 N. E. 753.

69. Vam der Plaat *v.* Undertakers', etc., Assoc., (N. J. Ch.) 62 Atl. 453; Atkins *v.* W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074.

70. Interference with: Commerce generally see Commerce. Mails generally see Post-Office.

71. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Wabash R. Co. *v.* Hannahan, 121 Fed. 563; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. See also U. S. *v.* Elliott, 64 Fed. 27; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

Congress has full authority to confer upon the courts of the United States power to restrain by injunction threatened acts which will have such tendency. U. S. *v.* Elliott, 64 Fed. 27.

What does not amount to such interference. — Where a labor union, in order to coerce a manufacturer to unionize his factory, instituted a strike and persuaded others not to take their places, and through their affiliation with other unions in other states instituted a boycott in the latter states against him, it was held not to be any interference with interstate commerce within the meaning of the Sherman Act (26 U. S. St. at L. 209 [U. S. Comp. St. (1901) p. 3200]), and injunction was denied. Loewe *v.* Lawlor, 148 Fed. 924.

72. Wabash R. Co. *v.* Hannahan, 121 Fed. 563.

73. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

74. Workingmen's Amalgamated Council *v.* U. S., 57 Fed. 85, 6 C. C. A. 258 [*affirming* 54 Fed. 994, 26 L. R. A. 158], where it was held that the act of congress (26 U. S. St. at L. 209 [U. S. Comp. St. (1901) p. 3200] making illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations," applied to combinations of laborers as well as capitalists.

75. Definition.— "Picketing" is the placing of relays of guards in front of a factory or the place of business of the em-

obtaining information, for the purpose of conveying information to persons seeking or willing to receive the same,[76] or for the purpose of using orderly and peaceful persuasion with those willing to listen,[77] does not in itself constitute intimidation if done in a peaceful manner, the rule has been repeatedly laid down that the keeping of patrols in front of or about the premises of the employer, accompanied by violence or any manner of coercion to prevent others from entering into or remaining in his service, will be enjoined.[78]

ployer for the purpose of watching who should enter or leave the same. Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assoc., 59 N. J. Eq. 49, 46 Atl. 208.

A "picket" is "a body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress." Century Dict.; Webster Dict. This word had no such meaning originally, but this definition is the result of what has been done under it and the common application that had been made of it. Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 22, 74 Am. St. Rep. 421, 42 L. R. A. 407.

In England, picketing, that is, watching and besetting the house or place of business of any person, or the approach thereto, within the meaning of the Conspiracy Act of 1875, excepting when such picketing is for the limited purpose of obtaining or communicating information, according to the proviso, is illegal, and will be restrained by interlocutory injunction. Walters *v.* Green, [1899] 2 Ch. 696, 63 J. P. 742, 68 L. J. Ch. 730, 81 L. T. Rep. N. S. 151, 48 Wkly. Rep. 23; Charnock *v.* Court, [1899] 2 Ch. 35, 63 J. P. 456, 68 L. J. Ch. 550, 80 L. T. Rep. N. S. 564, 47 Wkly. Rep. 633; Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19.

Form of restraining order see Frank *v.* Herold, 63 N. J. Eq. 443, 445, 52 Atl. 152; Union Pac. Co. *v.* Ruef, 120 Fed. 102, 129; American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 2, 90 Fed. 608, 617.

76. Christensen *v.* Kellogg Switchboard, etc., Co., 110 Ill. App. 61; Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assoc. of U. S., etc., 59 N. J. Eq. 49, 46 Atl. 208; John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 175 N. Y. 1, 67 N. E. 136, 96 Am. St. Rep. 578, 62 L. R. A. 632; Mills *v.* U. S. Printing Co., 99 N. Y. App. Div. 605, 91 N. Y. Suppl. 185; Krebs *v.* Rosenstein, 31 Misc. (N. Y.) 661, 66 N. Y. Suppl. 42; Levy *v.* Rosenstein, 66 N. Y. Suppl. 101 [*affirmed* in 56 N. Y. App. Div. 618, 67 N. Y. Suppl. 630]; Union Pac. R. Co. *v.* Ruef, 120 Fed. 102.

77. *Indiana.*— Karges Furniture Co. *v.* Amalgamated Woodworkers' Local Union No. 131, 165 Ind. 421, 75 N. E. 877.

New Jersey.— W. & A. Fletcher Co. International Machinists' Assoc., (Ch. 1903) 55 Atl. 1077.

New York.— Butterick Pub. Co. *v.* Typographical Union No. 6, 100 N. Y. Suppl. 292; Foster *v.* Retail Clerks' International Protective Assoc., 39 Misc. 48, 78 N. Y. Suppl. 860.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Virginia.— Everett Waddey Co. *v.* Richmond Typographical Union No. 90, (1906) 53 S. E. 273.

England.— Reg. *v.* Hibbert, 13 Cox. C. C. 82; Reg. *v.* Druitt, 10 Cox C. C. 592, 16 L. T. Rep. N. S. 855.

78. *Illinois.*— Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; Christensen *v.* Kellogg Switchboard, etc., Co., 110 Ill. App. 61; Beaton *v.* Tarrant, 102 Ill. App. 124.

Massachusetts.— Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722.

Michigan.— Ideal Mfg. Co. *v.* Wayne Cir. Judge, 139 Mich. 92, 102 N. W. 372.

New Jersey.— George Jonas Glass Co. *v.* Glassblowers' Assoc. of U. S., etc., 64 N. J. Eq. 640, 54 Atl. 565; Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

New York.— Herzog *v.* Fitzgerald, 74 N. Y. App. Div. 110, 77 N. Y. Suppl. 366.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Pennsylvania.— Murdock *v.* Walker, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678; State Line, etc., R. Co. *v.* Brown, 11 Pa. Dist. 509; York Mfg. Co. *v.* Oberdick, 10 Pa. Dist. 463, 25 Pa. Co. Ct. 321, 15 York Leg. Rec. 29.

United States.— Atchison, etc., R. Co. *v.* Gee, 139 Fed. 582; Union Pac. R. Co. *v.* Ruef, 120 Fed. 102; Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49; Otis Steel Co. *v.* Iron Molders' Union of North America, 110 Fed. 698; American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 2, 90 Fed. 608; Hagan *v.* Blindell, 56 Fed. 696, 6 C. C. A. 86 [*affirming* 54 Fed. 40].

England.— Taff Vale R. Co. *v.* Amalgamated Railway Servants' Soc., [1901] A. C. 426, 65 J. P. 596, 70 L. J. K. B. 905, 85 L. T. Rep. N. S. 147, 50 Wkly. Rep. 44; Reg. *v.* Hibbert, 13 Cox C. C. 82; Reg. *v.* Druitt, 10 Cox C. C. 592, 16 L. T. Rep. N. S. 855.

Nuisance.— Picketing for the purpose of interfering with business is a private nuisance and the maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, either by threats and intimidation, or by persuasion and social pressure, any workmen from entering into, or continuing in, his employment, will be enjoined, although such work-

b. All Picketing Illegal and Should Be Enjoined. The doctrine that there may be a moral intimidation which is illegal announced by the supreme court of Massachusetts[79] was among the first judicial steps taken in this country toward overturning the rule permitting peaceable picketing laid down in the first clause of this paragraph, and was a forerunner of the later rule that there can be no such thing as peaceable picketing, and consequently that all picketing is illegal.[80] Picketing will be enjoined as a continuing injury to business notwithstanding it may be punishable as a crime,[81] and the right to injunction against it has been based upon the ground that the aggrieved person is entitled to protection of his "probable expectancy" which is defined as the right to enjoy a free and natural condition of the labor market.[82]

5. Boycotts.[83] It has been repeatedly held that boycotts, in the sense of organized attempts to coerce a person or party into compliance with some demand, by combining to abstain, or compel others (against their will) to abstain, from having any business relations with him,[84] are unlawful and will be

men are not under contract to work for plaintiff. Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722.

Protection of right to picket.— The right of a voluntary association engaged in supporting a strike to freedom in the labor market, so that it may readily employ pickets and other agents in carrying out its purposes, is not a proper subject of protection by injunction. Atkins *v.* W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074.

79. Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722. See also *supra*, VIII, B, 2, text and note 62.

80. Chicago Typothetæ *v.* Franklin Union No. 4, (Ill. App. Unreported) [*affirmed* in 220 Ill. 355, 77 N. E. 176], where Smith, P. J., said: "It is idle to talk of picketing for lawful purposes. Men do not form picket lines for the purpose of conversation and lawful persuasion. . . . In imagination and in theory a peaceable picket line may be possible, but in fact a picket line is never peaceable. It is always a formation of actual warfare and quite inconsistent with everything not related to force and violence. Its use is a form of unlawful coercion." In Atchison, etc., R. Co. *v.* Gee, 139 Fed. 582, 584, McPherson, J., said: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." There was a near approach to the same rule in the case of Franklin Union No. 4 *v.* People, 220 Ill. 355, 379, 77 N. E. 176, where Hand, J., said: "The citizen, when engaged in lawful pursuits, must be accorded the right to walk the public streets of our cities and our country highways in absolute security and to go to and return from his home and place of business or employment without being interfered with. To follow him, to spy after him, to stop him and threaten him, to put him in fear, to intimidate him or to coerce him are alike unlawful. Intimidation and coercion are relative terms. What would put in fear a timid girl or weak woman or man might not terrorize the strong and resolute. All are alike entitled to the protection of the law." See also Beck *v.* Railway Teamster's Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

81. Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Consolidating Steel, etc., Co. *v.* Murray, 80 Fed. 811; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

82. In Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230, it was said: "A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasing complex social order, will discover, define and protect from undue interference more of these 'probable expectancies.'"

Right to freedom from unreasonable restriction.— "At common law every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable restriction." Erle Trade Unions 6. And this rule applies to labor and capital. Erle Trade Unions 11, 12. See also Mathews *v.* People, 202 Ill. 389, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73; Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

83. **Form of complaint** for injunction see Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 498, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

Civil action for damages see Conspiracy, 8 Cyc. 650 *et seq.*

84. Century Dict.

Other definitions.— A boycott is a combination of several persons to cause a loss or injury to a third person by causing these against their will to withdraw from him their beneficial business intercourse, through

enjoined;[85] to justify the granting of an injunction, it is not necessary that actual violence shall have been used by defendants; it is sufficient that the means used are threatening and intended to overcome the will of others, and prevent customers from dealing with and laborers from working for the complainant.[86] Intimidation, coercion, or threats of injury to person or property are, however, necessary to jusify an injunction against a boycott.[87] And it is necessary that the complainant

threat that unless a compliance with their demand be made, the persons forming the combination will cause loss or injury to him, or an organization formed to exclude a person from business relations with others, by persuasion, intimidation, or other acts which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395. See also 8 Cyc. 651; 5 Cyc. 995.

85. *Illinois.*—Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802.

Maryland.— My Maryland Lodge No. 186 *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752, placing complainant on unfair list and threatening its customers with boycott.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407, circular commencing and ending with the words "Boycott Jacob Beck & Sons," and containing false statements was sent out and pickets intercepted complainant's teamsters and customers going to their place of business.

Minnesota.—Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753.

New Jersey.— Martin *v.* McFall, 65 N. J. Eq. 91, 55 Atl. 465; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881, circular calling on members and public to cease buying and advertising in complainant's paper.

New York.— Matthews *v.* Shankland, 25 Misc. 604, 56 N. Y. Suppl. 123; Butterick Pub. Co. *v.* Typographical Union No. 6, 100 N. Y. Suppl. 292.

Ohio.— Moores *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48.

Pennsylvania.— Purvis *v.* United Brotherhood of Carpenters, etc., Local No. 500, 214 Pa. St. 348, 63 Atl. 585; Patterson *v.* Building Trades Council, 11 Pa. Dist. 500, 11 Kulp 15; Brace *v.* Evans, 5 Pa. Co. Ct. 163.

Texas.— Olive *v.* Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428.

Washington.— Jensen *v.* Cooks', etc., Union, 39 Wash. 531, 81 Pac. 1069.

United States.— Seattle Brewing, etc., Co. *v.* Hansen, 144 Fed. 1011; Oxley Stave Co. *v.* Coopers' International Union of North America, 72 Fed. 695; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395 (strike to enforce boycott against a connecting line); Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193.

England.— Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, 37 L. J. Ch. 889, 19 L. T. Rep. N. S. 64, 16 Wkly. Rep. 1138.

See 27 Cent. Dig. tit. "Injunction," § 174.

86. Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407; Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 56 N. Y. Suppl. 123; Oxley Stave Co. *v.* Coopers' International Union of North America, 72 Fed. 695.

Force and violence are not necessary factors in the right to the remedy. Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

87. Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 103 Am. St. Rep. 477, 63 L. R. A. 753; Mills *v.* U. S. Printing Co., 99 N. Y. App. Div. 605, 91 N. Y. Suppl. 185; Cohen *v.* United Garment Workers, 35 Misc. (N. Y.) 748, 72 N. Y. Suppl. 341; Butterick Pub. Co. *v.* Typographical Union No. 6, 100 N. Y. Suppl. 292. See also Loewe *v.* Lawlor, 148 Fed. 924.

The sending of circulars informing the public that complainant discriminates against defendant's union, and requesting the public not to deal with him as long as he continues to discriminate, will not be enjoined. Sinsheimer *v.* United Garment Workers, 77 Hun (N. Y.) 215, 28 N. Y. Suppl. 321 [*reversing* 5 Misc. 448, 26 N. Y. Suppl. 152].

Malicious display of placards in front of complainant's business will not be enjoined. Riggs *v.* Cincinnati Waiters Alliance, 8 Ohio S. & C. Pl. Dec. 565, 5 Ohio N. P. 386.

Black-lists.— An employer may refuse to employ or may discharge persons belonging to labor unions, and may keep a list of such persons and send it to other employers. Worthington *v.* Waring, 157 Mass. 421, 32 N. E. 744, 34 Am. St. Rep. 294, 20 L. R. A. 342; Boyer *v.* Western Union Tel. Co., 124 Fed. 246. *Compare* Trollope *v.* London Bldg. Trades Federation, 72 L. T. Rep. N. S. 342, in which a trade union was enjoined from publishing a black-list containing names of non-union men employed by the complainant.

Irreparable injury.— Defendant published the following advertisement, "To Our Friends.— Persons intending having job printing done will bear in mind that the Longshore establishment . . . is a nonunion office. Ex Comm. T. U. No. 58." Complainant lost city printing and two private customers in ten months. An injunction was

shall have some established business which may be injured in order to enable him to maintain the bill.[88]

6. Interference With Contractual Relations.[89] Under the general rule that where persons, for the purpose of inflicting injury on another, attempt to induce others to violate a contract to render services, equity will interfere by injunction, if the damage is irreparable,[90] labor unions or their members may be enjoined under such circumstances.[91]

7. Trespass.[92] An injunction may be granted to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats, or intimidation, preventing complainant's employees from working the mines, where the threatened acts are such that their frequent occurrence may be expected, and defendants are insolvent.[93]

C. Punishment For Violation of Injunction — 1. What Constitutes a Violation. Acts of strikers in coercing, intimidating, and beating relator's employee was held to be a violation of a strike injunction sufficient to sustain a judgment for contempt against persons guilty thereof.[94] If the striking employees of a railroad company in unlawfully obstructing the latter's business and the operation of its trains also obstruct the operation of cars and engines in the custody of a receiver of another railroad, they are guilty of a contempt of the court by which the receiver was appointed.[95]

refused on the ground that no such irreparable injury was shown as justified an injunction. Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

88. Van der Plaat *v.* Undertakers', etc., Assoc., (N. J. Ch. 1905) 62 Atl. 453.

89. **Persuasion of workmen to break contract** of employment see *supra*, VI, B.

Form of injunction see Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49, 58 note.

Civil action for damages: For conspiring to cause employees to break contract of employment see Conspiracy, 8 Cyc. 655. For malicious interference with contractual relations see Torts.

90. See Injunctions, 22 Cyc. 852.

Restraining publishers of newspaper.— An injunction will not lie to restrain the publishers of a newspaper from advising and encouraging persons in the employment of others to violate their contract of employment on the ground that the common law forbids the enticement of a servant from the employ of his master. Rogers *v.* Evarts, 17 N. Y. Suppl. 264.

91. *New Jersey.*— Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

New York.— Beattie *v.* Callanan, 82 N. Y. App. Div. 7, 81 N. Y. Suppl. 413; W. P. Davis Mach. Co. *v.* Robinson, 41 Misc. 329, 84 N. Y. Suppl. 837, twenty-five to forty gathering, hooting, and yelling at employees, calling them "scabs."

Pennsylvania.— Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534; Flaccus *v.* Smith, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. Rep. 779, 54 L. R. A. 640; York Mfg. Co. *v.* Oberdick, 10 Pa. Dist. 463, 25 Pa. Co. Ct. 321.

United States.— Carroll *v.* Chesapeake, etc., Coal Agency Co., 124 Fed. 305, 61 C. C. A. 49; Knudsen *v.* Benn, 123 Fed. 636; U. S. *v.* Haggerty, 116 Fed. 510, walking delegates enjoined.

Canada.— Hynes *v.* Fisher, 4 Ont. 60.

Apprentices.— Under Tenn. Acts (1875), c. 93, making it unlawful to entice away any one in the employ of another, attempts by strikers to persuade apprentices under contract to leave their employer will be enjoined where, if successful, the injury to the employer would be irreparable. Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49.

Intimidation.— To entitle complainant to an injunction it does not seem to be necessary to show intimidation. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 756, 53 Atl. 230; Beattie *v.* Callanan, 82 N. Y. App. Div. 7, 81 N. Y. Suppl. 413; Flaccus *v.* Smith, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. Rep. 779, 54 L. R. A. 640.

92. **Trespass and civil liability** for see Trespass.

93. Cœur d'Alene Consol., etc., Min. Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382. See also Injunctions, 22 Cyc. 825 *et seq.*

The rule that a trespass cannot be enjoined unless on realty, and where the damage is irreparable, and after the right or title involved has been established at law, does not apply to such a case, as no title to realty is involved, and the acts complained of are not a direct trespass to realty, but only indirectly affect the enjoyment of property and other rights. Cœur d'Alene Consol., etc., Min. Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

The rule that equity will not interfere for the prevention of crime does not apply to such a case, the acts done or threatened not being criminal, although unlawful, and such as may lead to the commission of criminal acts. Cœur d'Alene Consol., etc., Min. Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

94. Cook *v.* Dolan, 19 Pa. Co. Ct. 401.

95. *In re* Doolittle, 23 Fed. 544.

2. Who May Be Punished. Officers and members of a labor organization who resort to unlawful means for the enforcement of their demands and continue to do so in violation of an injunction will be punished for contempt,[96] although not parties to the injunction proceedings.[97] An incorporated labor union may likewise be punishable by fine for the violation of an injunction issued against it.[98]

3. Contempt Proceedings[99] — a. Nature of Proceedings. Where a strike injunction was issued to protect private rights, proceedings to punish certain strikers for contempt thereunder are of a civil nature and not criminal.[1] Although the same act constitute a contempt and a crime, the contempt may be tried and punished by the court.[2]

b. Defenses. In proceedings for contempt in violating a strike injunction, defendants could not collaterally attack a bill on which the injunction was granted.[3] Nor is the fact that the terms of a strike injunction were broader than the allegations of the bill a defense in a proceeding to punish for contempt in violating the injunction.[4] The contempt proceedings not being in their nature criminal, sworn answers of strikers are insufficient to purge them of contempt for violating an injunction issued to protect private rights.[5] It is no defense for a union to say that it advised its members to obey the law and avoid resort to violence.[6]

c. Right to Bill of Particulars. In contempt proceedings for violation of a strike injunction, defendants are not entitled to a bill of particulars specifying the acts charged to constitute the contempt;[7] the allegations need not be made with all the particularity required in indictments, it being sufficient to set out the particular respects in which the injunction has been violated.[8]

d. Amount of Fine. A fine of one thousand dollars imposed upon a labor union for flagrant and repeated violations of an injunction restraining it from interfering with non-union employees and their employers was not considered excessive.[9]

96. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; Swaine *v.* Blackmore, 75 Mo. App. 74; U. S. *v.* Debs, 64 Fed. 724; Lake Erie, etc., R. Co. *v.* Bailey, 61 Fed. 494.

97. Anderson *v.* Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277; American Steel, etc., Co. *v.* Wire Drawers', etc., Union Nos. 1 & 3, 90 Fed. 598; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395.

Persons not parties to the suit or named in the injunction are bound thereby if they have notice of it. O'Brien *v.* People, 216 Ill. 354, 73 N. E. 108, 108 Am. St. Rep. 219 [*affirming* 114 Ill. App. 401]; Seattle Brewing, etc., Co. *v.* Hansen, 144 Fed. 1011; Huttig Sash, etc., Co. *v.* Fuelle, 143 Fed. 363; Employers' Teaming Co. *v.* Teamsters' Joint Council, 141 Fed. 679; American Steel, etc., Co. *v.* Wire Drawers', etc., Unions Nos. 1 & 3, 90 Fed. 598. And the order may so provide. U. S. *v.* Elliott, 64 Fed. 27.

98. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176.

99. **For matters relating to contempt** generally see Contempt.

1. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; Anderson *v.* Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277.

An attachment for contempt is not a criminal case within a constitutional prohibition as to a witness testifying against himself, and defendant, the secretary of a labor union, may be required to produce in evidence, books and papers material to the issue. Patterson *v.* Building, etc., Council, 12 Luz. Leg. Reg. (Pa.) 241, 9 North. Co. Rep. 330. *Compare Ex p.* Gould, 99 Cal. 360, 33 Pac. 1112, 37 Am. St. Rep. 57, 21 L. R. A. 751.

2. U. S. *v.* Debs, 64 Fed. 724 [*affirmed* in 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092].

3. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; U. S. *v.* Debs, 64 Fed. 724.

4. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; U. S. *v.* Debs, 64 Fed. 724.

5. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; Anderson *v.* Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277.

6. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; Union Pac. Co. *v.* Ruef, 120 Fed. 102.

7. O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219.

8. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176; O'Brien *v.* People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219.

9. Franklin Union No. 4 *v.* People, 220 Ill. 355, 77 N. E. 176.

LACE. A fabric of fine thread, of linen, silk, or cotton, interwoven with figures; a delicate tissue of thread, worn as an ornament by ladies.[1] (See Cotton; and, generally, Customs Duties.)

LACHES. In a general sense a neglect to do what in the law should have been done for an unreasonable or unexplained length of time under circumstances permitting diligence.[2] More specifically, inexcusable delay in asserting a right.[3] (Laches: In General, see Equity. Affecting Particular Rights — Inheritance, see Descent and Distribution; Interest, see Interest; Of Corporation, Its Officers or Stock-Holders, see Corporations; Of Heir or Distributee, see Descent and Distribution; Of Party to Negotiable Instrument, see Commercial Paper; Of Remainder-Man, see Estates; Under Covenant, see Covenants. Demurrer For, see Equity. Estoppel by, see Estoppel. Federal Court Practice, With Respect to, see Courts. Following Statute of Limitation by Analogy, see Equity. In Asserting an Estoppel, see Estoppel. In Particular Actions or Proceedings — Accounting, see Accounts and Accounting; Assignments For Benefit of Creditors; Partnership; Trusts; Administration, see Executors and Administrators; Appellate, see Appeal and Error; Application For Certiorari, see Certiorari; Application For Continuance, see Continuances in Civil Cases; Continuances in Criminal Cases; Application For Security For Costs, see Costs; Application For Writ of Assistance, see Assistance, Writ of; Arbitration, see Arbitration and Award; By or Against Corporation, Its Officers, or Stock-Holders, see Corporations; Condemnation, see Eminent Domain; Contempt, see Contempt; Creditors' Suits, see Creditors' Suits; Divorce, see Divorce; Dower, see Dower; Ejectment, see Ejectment; Election Contest, see Elections; Enforcement of Lien, see Mechanics' Liens; Vendor and Purchaser, and the Particular Lien Titles; Enforcement of Trust, see Trusts; For Cancellation or Rescission, see Cancellation of Instruments; Foreclosure, see Mortgages; For Infringement of Patent, see Patents; For Relief For Interference With Easement, see Easements; For Relief From Consequences of Unauthorized Appearance, see Appearances; For Reformation, see Reformation of Instruments; For Separate Maintenance, see Husband and Wife; For Specific Performance, see Specific Performance; In Admiralty, see Admiralty, and Particular Admiralty Titles; Injunction, see Injunctions; Interpleader, see Interpleader; Mandamus, see Mandamus; Probate of Will, see Wills; Quo Warranto, see Quo Warranto; Redemption, see Executions; Mortgages; Taxation; Revival of Action, see Abatement and Revival; To Attack Judicial Sale, see Judicial Sales; To Contest Will, see Wills; To Open or Vacate Judgment or Decree, see Equity; Judgments; To Quiet Title, see Quieting Title; To Set Aside Award, see Arbitration and Award; To Set Aside Compromise, see Compromise and Settlement; To Set Aside Conveyance as Fraudulent, see Fraudulent Conveyances; To Set Aside or Vacate Execution Sale, see Executions. See also Abandonment; Acquiescence.)

LA CONSCIENCE EST LA PLUS CHANGEANTE DES RÉGLES. A maxim meaning "Conscience is the most changeable of rules."[4]

LADEN. Past participle of lade.[5]

1. Ocean Steamship Co. *v.* Way, 90 Ga. 747, 755, 17 S. E. 57, 20 L. R. A. 123 (where the court said: "Thus, it will be seen that 'lace' derives its name not from the material which enters into its manufacture, but the term is designed to describe a certain peculiar and delicate texture into which may be woven indifferently any one or more of several materials"); Morrison *v.* Miller, 37 Fed. 82, 83 (holding that the term as used in a tariff act included silk spot nets and dotted nets). See also Sidenberg *v.* Robertson, 41 Fed. 763, 765; Claflin *v.* Robertson, 38 Fed. 92, 93, construing the term as used in tariff acts, and also construing the terms "cotton laces" and "laces made of cotton."

The term includes a lace corporal in a gilt frame, covered with glass, shipped in a packing case for exhibition purposes. Treadwin *v.* Great Eastern R. Co., 3 C. P. 308, 311, 313, 37 L. J. C. P. 83, 17 L. T. Rep. N. S. 601, 16 Wkly. Rep. 365.

"Lace-buyer" see Price *v.* Mouat, 11 C. B. N. S. 508, 511, 103 E. C. L. 510.

2. See Equity, 16 Cyc. 252.

3. See Equity, 16 Cyc. 252.

4. Bouvier L. Dict.

5. "Fully laden" may not be intended by

LADING. See Bill of Lading.

LADY. A woman of good breeding, education, and refinement of mind and manner.[6]

LAGER BEER or BIER. See Beer.

LAID. Put or set down; thrown down; prostrate.[7]

LAIRAGE. A building of brick and wood roofed over, and used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases.[8]

LAKE.[9] A body of water which occupies a basin of greater or less depth, and may or may not have a single prevailing direction.[10] In chemistry, a compound of animal or vegetable coloring matter and a metallic oxide.[11] (Lake: Admiralty Jurisdiction, see Admiralty. Artificial, see Waters. As Boundary, see Boundaries. Criminal Jurisdiction, see Criminal Law. Fishing Rights, see Fish and Game. Navigable, see Navigable Waters. Non-Navigable, see Waters. See also Bay; Bayou.)

LA LEY FAVOUR LA VIE D'UN HOME. A maxim meaning "The law favors a man's life."[12]

LA LEY FAVOUR L'INHERITANCE D'UN HOME. A maxim meaning "The law favors a man's inheritance."[13]

LA LEY VOIT PLUS TOST SUFFER UN MISCHIEFE QUE UN INCONVENIENCE. A maxim meaning "The law will sooner suffer a mischief than an inconvenience."[14]

LAME. A plate; a blade; a thin plate.[15] (See Lamina.)

LAME DUCK. A cant term on the stock exchange for a person unable to meet his engagements.[16]

LAMINA. A thin plate or scale; a thin plate of wood, metal, etc.; a leaf, layer, etc.[17] (See Lame.)

the use of the term "laden." Searight *v.* Stokes, 3 How. (U. S.) 151, 169, 11 L. ed. 537.

"**Laden under deck.**"— Joyce Ins. § 1725.

6. Century Dict.

Lady-day is the twenty-fifth of March; one of the usual quarter days in England. English L. Dict. "Lady-day" construed to mean "Old Lady-day" see Doe *v.* Benson, 4 B. & Ald. 588, 6 E. C. L. 613.

"**Ladies' notions**" see Chapin *v.* Garretson, 85 Iowa 377, 381, 52 N. W. 104.

"**Ladies' outfitter.**"— "The business of a ladies' outfitter appears to be one of modern invention." Stuart *v.* Diplock, 43 Ch. D. 343, 345, 59 L. J. Ch. 142, 62 L. T. Rep. N. S. 333, 38 Wkly. Rep. 223.

7. Century Dict.

"**Laid and distributed**" see 14 Cyc. 524 note 23.

"**Laid down**" as applied to a religious meeting. See White Lick Quarterly Meeting, etc. *v.* White Lick Quarterly Meeting, etc., 89 Ind. 136, 142.

"**Laid open to be worked**" see Myers *v.* Pownal, 16 Vt. 415, 416.

"**Laid out**" see Decker *v.* Washburn, 8 Ind. App. 673, 35 N. E. 1111, 1112 [*quoted* in Baltimore, etc., R. Co. *v.* Whiting, 30 Ind. App. 182, 65 N. E. 759, 761]; Fuller *v.* Springfield, 123 Mass. 289, 290; Mansur *v.* Aroostook County, 83 Me. 514, 520, 22 Atl. 358; Flint *v.* Long, 12 Wash. 342, 346, 41 Pac. 49; *In re* Chawner, [1892] 2 Ch. 192, 196, 61 L. J. Ch. 331, 66 L. T. Rep. N. S. 745, 40 Wkly. Rep. 538. See also Streets and Highways.

"**Laid up**" see Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45, 56; Dahlgren *v.* Whitaker, 124 Fed. 695, 696; Hunter *v.* Wright, 10 B. & C. 714, 716, 8 L. J. K. B. O. S. 259, 21 E. C. L. 301.

8. Mersey Docks, etc., Bd. *v.* Birkenhead Assessment Committee, [1900] 1 Q. B. 143, 144, 64 J. P. 36, 69 L. J. Q. B. 260, 81 L. T. Rep. N. S. 798, 48 Wkly. Rep. 259.

9. **Distinguished from "pond" or "stream"** see Ne-pee-nauk Club *v.* Wilson, 96 Wis. 290, 295, 71 N. W. 661.

10. Jones *v.* Lee, 77 Mich. 35, 40, 43 N. W. 855, where the term "river" is also defined.

"**Lake Erie**" in one sense, includes all the bays and harbors of the body of water referred to; in another sense the term embraces only the main water, excluding land-locked bays and harbors. Hogg *v.* Beerman, 41 Ohio St. 81, 98, 52 Am. Rep. 71.

11. Sykes *v.* Magone, 38 Fed. 494, 497. See also Standard Dict.

12. Bouvier L. Dict. [*citing* Y. B. Hen. VI, 51].

13. Bouvier L. Dict. [*citing* Y. B. Hen. VI, 51].

14. Bouvier L. Dict. [*citing* Littleton, § 231].

15. Century Dict. [*quoted* in Marsching *v.* U. S., 113 Fed. 1006, 1007, construing a tariff act].

16. Black L. Dict. See also Morris *v.* Langdale, 2 B. & P. 284, 288; Barnett *v.* Allen, 3 H. & N. 376, 382, 4 Jur. N. S. 483, 27 L. J. Exch. 412, 415.

17. Century Dict. [*quoted* in Marsching *v.* U. S., 113 Fed. 1006, 1007].

LAMMAS-FIELDS. Fields which are used during a certain portion of the year by all the tenants of the manor, and during a certain other time are lying waste.[18] (See Lammas-Lands.)

LAMMAS-LANDS. Lands which belong to a person who is absolutely the owner in fee simple, to all intents and purposes, for half the year, and the other half of the year he is still the owner in fee simple, subject to a right of pasturage over the lands by other people.[19] (See Lammas Fields.)

LAMP. A term whose meaning depends largely on the context, and on the time, place and habits of the people with reference to which it is used.[20]

LAND. As a noun, that species of property which, by its fixed situation and qualities, has engrossed the term "real" as its peculiar descriptive.[21] As a verb, to put on or bring to shore; disembark; debark; transfer to land in any way.[22] (Land: Certificate, see Public Lands. Champertous Conveyance of, see Champerty and Maintenance. Condemned For Public Purposes, see Eminent Domain. Contract or Agreement — In General, see Vendor and Purchaser; Within Statute of Frauds, see Frauds, Statute of. Conversion into Personalty, see Conversion. Conveyance of, see Deeds; Mortgages. Covenant Running With, see Covenants. Dedication of to Public Use, see Dedication. Deed For, see Deeds. Easement in, see Easements. Entry, see Public Lands. Forces, see Army and Navy; Militia. Grant, see Public Lands. Held in Common, see Common Lands. Held Under Lease, see Landlord and Tenant. Leased, see Landlord and Tenant. Mortgaged, see Mortgages. Negligent Use or Care of, see Negligence; Waste. Public, see Public Lands. Taxation of, see Taxation. See also, generally, Estates; Ground-Rents; Landlord and Tenant; Property; Shipping.)

LAND DEPARTMENT. A special tribunal of the United States intrusted with the power of determining what lands are subject to grants and exceptions therein.[23] (See, generally, Public Lands.)

LAND DISTRICT. As applied to mineral lands, and in reference to survey-

18. Warrick *v.* Queen's College, L. R. 6 Ch. 716, 724, 40 L. J. Ch. 780, 25 L. T. Rep. N. S. 254, 19 Wkly. Rep. 1098.

19. Baylis *v.* Tyssen-Amhurst, 6 Ch. D. 500, 507, 46 L. J. Ch. 718, 37 L. T. Rep. N. S. 493.

20. Saltsburg Gas Co. *v.* Saltsburg, 138 Pa. St. 250, 258, 20 Atl. 844, 10 L. R. A. 193, where it is said: "The word 'lamp,' considered with reference to the general idea conveyed, is as definite as any word in the language, but with regard to the particular form, material, and method of operation of the instrument itself, and the substance used as a light producer, it is as vague as the name of any concrete article in daily use can well be," and as used in a contract under which a gas company agreed to furnish natural gas to a village, free of charge, for all street lamps, it is held to mean open lights, such as had been in use previous to the time of making the contract. Saltsburg Gas Co. *v.* Saltsburg, 138 Pa. St. 250, 258, 20 Atl. 844, 10 L. R. A. 193. In this case the term as used in a contract under which a gas company agreed to furnish natural gas to a village free of charge for all street lamps was held to mean open lights such as had been in use previous to the time of making the contract.

21. Myers *v.* League, 62 Fed. 654, 659, 10 C. C. A. 571.

"Land adjoining" see 12 Cyc. 1021 note 1.

"Land claim" see Rogers *v.* Miller, 13 Wash. 82, 85, 42 Pac. 525, 52 Am. St. Rep. 20.

"Land delivered" as a return on an elegit is a legal satisfaction of the judgment. Hinesly *v.* Hunn, 5 Harr. (Del.) 236, 237. See Executions.

22. Century Dict.

"Landed" see Harvey *v.* Lyme Regis, L. R. 4 Exch. 260, 263, 38 L. J. Exch. 141, 17 Wkly. Rep. 892. As employed in a marine insurance policy see Crew-Levick Co. *v.* British, etc., Marine Ins. Co., 77 Fed. 858, 859.

"Landed in good safety" see Parsons *v.* Massachusetts F. & M. Ins. Co., 6 Mass. 197, 204.

"Landed or discharged" see Kingston-upon-Hull Dock Co. *v.* La Marche, 8 B. & C. 42, 52, 15 E. C. L. 30.

"Safely landed" see Houlder *v.* Merchants Mar. Ins. Co., 17 Q. B. D. 354, 355, 6 Aspin. 12, 55 L. J. Q. B. 420, 55 L. T. Rep. N. S. 244, 34 Wkly. Rep. 673. See also Brown *v.* Carstairs, 3 Campb. 161, 162.

23. Northern Pac. R. Co. *v.* Barden, 46 Fed. 592, 617.

The land department of the United States (including in that term the secretary of the interior and commissioner of the general land office and their subordinate officers) constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is

ing the same, a term which means a division of the state or territory, as the case may be, created by law, in which is located a land-office for the disposition of the public lands therein.[24] (See, generally, MINES AND MINERALS; PUBLIC LANDS.)

LANDED ESTATE. In the ordinary meaning of the words, an interest in and pertaining to lands.[25] (See LANDED PROPERTY; and, generally, ESTATES; PROPERTY.)

LANDED PROPERTY. Real estate;[26] real estate, whether in fee simple or leasehold, and whether improved or unimproved.[27]

LANDED PROPRIETOR. Any person having an estate in lands, whether highly improved or not.[28]

LAND GRANT. See PUBLIC LANDS.

LANDING.[29] Putting on the land;[30] taking from a ship and putting on land;[31] taking the cargo out of a vessel either with or without the intervention of a wharf;[32] a bank or wharf to or from which persons may go from or to some vessel in the contiguous waters;[33] a place on a river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers;[34] a place where vessels can be moored and loaded or discharged;[35] a wharfage place for crafts;[36] the terminus of a road on a river or other navigable water, for the use of travelers, and the loading and unloading of goods;[37] the yard or open place which is used for deposit and the convenient communication between the land and water.[38] (Landing: Alien, see ALIENS. Goods or Passenger, see CARRIERS; SHIPPING. Place, see CARRIERS; NAVIGABLE WATERS; WHARVES.)

LANDING-NET. A kind of scoop net used to bring to land or hand a fish which has been caught. Its use is not to catch fish separately as they are caught in drift nets and seines, but its use is to land the fish after it is hooked.[39] (See CRUIVE; and, generally, FISH AND GAME.)

authorized to dispose of, and also the power to execute its conveyance to the parties it decides are entitled to it. U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 955, 15 C. C. A. 96.

24. U. S. *v.* Smith, 11 Fed. 487, 491, 8 Sawy. 100.

25. St. Mary *v.* Harris, 10 La. Ann. 676, 677. See also Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602, 662.

"**Landed estates are of three kinds:** 1st. Those that are not limited by any precise bounds, but are only described by the quantity which they contain. 2d. Those which have fixed artificial limits — that is to say, boundaries made by the hand of man. 3d. Those which we call *arcifinies* — that is to say, which have natural boundaries, such as rivers, mountains or woods." Smith *v.* St. Louis Public Schools, 30 Mo. 290, 303 [*citing* Wolff, Pt. II, c. 3, § 252].

26. United R., etc., Co. *v.* Baltimore, 93 Md. 630, 633, 49 Atl. 655, 52 L. R. A. 772.

27. Baltimore *v.* Rosenthal, 102 Md. 298, 300, 62 Atl. 579.

The term is sometimes applied to rural property, in contradistinction to real estate located in the city, and for all practical purposes, any property before laid out in city lots. Sindall *v.* Baltimore, 93 Md. 526, 534, 49 Atl. 645.

28. St. Mary *v.* Harris, 10 La. Ann. 676, 677.

29. "**Shipping**" **distinguished** see Robertson *v.* Wilder, 69 Ga. 340, 345; Lesesne *v.* Young, 33 S. C. 543, 551, 12 S. E. 414.

"**Wharf**" **compared and distinguished.**— It is undoubtedly true that a "landing" does not necessarily include a wharf, but the difference is simply that a wharf is an improved landing, and no less landing because it is a wharf. Reighard *v.* Flinn, 194 Pa. St. 352, 356, 44 Atl. 1080.

30. Harvey *v.* Lyme Regis, L. R. 4 Exch. 260, 264, 38 L. J. Exch. 141, 17 Wkly. Rep. 892. See also U. S. *v.* Smith, 27 Fed. Cas. No. 16,343, 2 Wash. 310.

"**Landing in the United States**" as used in Chinese exclusion act see U. S. *v.* Wilson, 60 Fed. 890, 894. See also 2 Cyc. 123 note 61.

31. Lesesne *v.* Young, 33 S. C. 543, 551, 12 S. E. 414.

32. Robertson *v.* Wilder, 69 Ga. 340, 345.

33. State *v.* Graham, 15 Rich. (S. C.) 310 [*quoted* in Napa *v.* Howland, 87 Cal. 84, 88 25 Pac. 247; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 198, 12 Pac. 265, 58 Am. Rep. 299].

34. State *v.* Randall, 1 Strobh. (S. C.) 110, 111, 47 Am. Dec. 548 [*quoted* in Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 198, 12 Pac. 265, 58 Am. Rep. 299].

35. Waite *v.* O'Neil, 76 Fed. 408, 417, 22 C. C. A. 248, 34 L. R. A. 550.

36. Hays *v.* Briggs, 74 Pa. St. 373, 375.

37. State *v.* Randall, 1 Strobh. (S. C.) 110, 111, 47 Am. Dec. 548.

38. State *v.* Graham, 15 Rich. (S. C.) 310.

39. Com. *v.* Wetherill, 8 Pa. Dist. 653, 655 [*quoting* Century Dict., and *citing* Standard Dict.; Webster Dict.].

LAND LINE. A term sometimes used as synonymous with "boundary."[40] (See, generally, BOUNDARIES.)

LANDLOCKED. An expression sometimes applied to a piece of land belonging to one person and surrounded by land belonging to other persons, so that it cannot be approached except over their land.[41]

40. Henderson *v.* Dennis, 177 Ill. 547, 551, 53 N. E. 65.

41. Sweet L. Dict. [*citing* London Corp. *v.* Riggs, 13 Ch. D. 798, 44 J. P. 345, 49 L. J. Ch. 297, 42 L. T. Rep. N. S. 580, 28 Wkly. Rep. 610].

"**Landlocked salmon**" defined see Me. Rev. St. (1883) c. 49, § 32.

LANDLORD AND TENANT

EDITED BY DONALD J. KISER*

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* Joint author of "Indictments and Informations," 22 Cyc. 157, and of "Joinder and Splitting of Actions," 23 Cyc. 376.

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I. Creation and Existence of Relation.

A. Definitions. The relation of landlord and tenant may be defined in general terms as that which arises from a contract by which one person occupies the property of another with his permission, and in subordination to his rights,[1] the

1. Central Mills Co. *v.* Hart, 124 Mass. 123; Adams *v.* Gilchrist, 63 Mo. App. 639; Dixon *v.* Ahern, 19 Nev. 422, 14 Pac. 598; Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481. The "relation of landlord and tenant," strictly so called, is merely the relation which exists between two parties for the possession of lands or tenements by one in consideration of a certain rent to be paid therefor to the other. Bentley *v.* Adams, 92 Wis. 386, 66

occupant being known as the tenant,[2] and the person in subordination to whom he occupies as the landlord.[3] It is essential to the relation that the occupancy be both permissive and subordinate,[4] and liability as between landlord and tenant rests upon privity, both of estate and of contract.[5]

B. Essentials of Relation — 1. Contract. To create the relation of landlord and tenant there must be a valid contract between the parties, either express or implied,[6] which for its validity depends on the same principles as other contracts,[7] such as the presence of a sufficient legal consideration,[8] and which involves mere rights of property.[9]

2. Reservation of Rent. While the reservation of a rent is made an essential to a lease by many of the definitions,[10] it is well settled that the relation of land-

N. W. 505; 1 Bouvier L. Dict. 4; Taylor Landl. & Ten. 14. The relation of "landlord and tenant" is that which subsists by virtue of a contract for the possession of lands at will, for a definite period, or for life. Foss *v.* Stanton, 76 Vt. 365, 57 Atl. 942.

2. Bowe *v.* Hunking, 135 Mass. 380, 46 Am. Dec. 471; Becker *v.* Becker, 13 N. Y. App. Div. 342, 43 N. Y. Suppl. 17; Jackson *v.* Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517.

3. Becker *v.* Becker, 13 N. Y. App. Div. 342, 43 N. Y. Suppl. 17; Jackson *v.* Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517.

Under the Overholding Tenants Act (31 Vict. c. 26) the word "landlord" includes the assignee of the reversion. Sutton *v.* Bancroft, 6 Can. L. J. N. S. 40.

4. *Missouri.*— Adams *v.* Gilchrist, 63 Mo. App. 639.

Nevada.— Dixon *v.* Ahern, 19 Nev. 422, 14 Pac. 598.

Tennessee.— Walton *v.* Newsom, 1 Humphr. 140.

Texas.— Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481.

Vermont.— Bishop *v.* Babcock, 22 Vt. 295.

An agreement of compromise of a dispute as to the title of property, by which the rights of possession of the parties are settled, will not create the relation of landlord and tenant. Walton *v.* Newsom, 1 Humphr. (Tenn.) 140.

5. Ghegan *v.* Young, 23 Pa. St. 18.

Privity of estate as justifying distress for rent see *infra*, VIII, E, 2, b.

6. *Alabama.*— Crim *v.* Nelms, 78 Ala. 604; Tucker *v.* Adams, 52 Ala. 254.

Georgia.— Littleton *v.* Wynn, 31 Ga. 583.

Illinois.—Ballentine *v.* McDowell, 3 Ill. 28.

Massachusetts.— Leonard *v.* Kingman, 136 Mass. 123; Central Mills Co. *v.* Hart, 124 Mass. 123.

New York.— See Arnold *v.* Rothschild's Sons Co., 15 N. Y. App. Div. 606, 44 N. Y. Suppl. 676, holding the evidence insufficient to establish an agreement as to the amount of rent.

Oregon.— Twiss *v.* Boehmer, 39 Oreg. 359, 65 Pac. 18.

Pennsylvania.— Snyder *v.* Carfrey, 54 Pa. St. 90.

Wisconsin.—J. B. Alfree Mfg. Co. *v.* Henry, 96 Wis. 327, 71 N. W. 370.

United States.— Carpenter *v.* U. S., 17 Wall. 489; Madison Female Inst. *v.* U. S., 23 Ct. Cl. 188, holding that the relation of landlord and tenant did not exist between the United States and the owner of lands occupied by their troops by military force during the war of the rebellion.

Canada.— Cote *v.* Cantin, 21 Quebec Super. Ct. 432.

Leases and agreements in general see *infra*, II.

Necessity of contract to sustain action for use and occupation see Use and Occupation.

A statute authorizing the extension of leases occupied by the department of the interior, in case the premises are made fireproof to the satisfaction of the secretary of the interior, does not amount to a contract constituting a lease or requiring the continuance of the occupancy of the buildings until they are made fireproof. Semmes *v.* U. S., 14 Ct. Cl. 493.

One who becomes a member of a partnership which is a lessee does not become a tenant of the lessor, although by reason of his interest in the partnership he has an interest in the lease. Rees *v.* Andrews, 169 Mo. 177, 69 S. W. 4.

7. Crim *v.* Nelms, 78 Ala. 604. Contracts generally see Contracts, 9 Cyc. 213.

Negotiations for a lease, no agreement being consummated, are insufficient. Popers *v.* Meagher, 148 Ill. 192, 35 N. E. 805 [*affirming* 47 Ill. App. 593]; Hill *v.* Coal Valley Min. Co., 103 Ill. App. 41; Doe *v.* Quigley, 2 Campb. 505, 11 Rev. Rep. 780.

A contract for a lease made with a person who acts without authority from the owner will not create the relation of landlord and tenant. Johnson *v.* Park, 17 S. W. 273, 13 Ky. L. Rep. 437.

8. Crim *v.* Nelms, 78 Ala. 604; Brown *v.* Roberts, 21 La. Ann. 508; Chadbourn *v.* Rahilly, 34 Minn. 346, 25 N. W. 633; Byrne *v.* Romaine, 2 Edw. (N. Y.) 445. But see Drew *v.* Buck, 12 Hun (N. Y.) 267, holding that, where an agreement to give a lease was not founded upon a valid consideration, a tenant could not, after the agreement had been fully executed, assert that the lease was void and conveyed no estate.

9. Snyder *v.* Carfrey, 54 Pa. St. 90, holding that the statutory remedies given to the parties are purely civil and not in any degree penal.

10. See *infra*, II, A, 1, a.

lord and tenant may arise without a reservation of rent.[11] Rent when reserved may be in services,[12] or products of the soil.[13]

3. Transmission of Estate. A contract by which no estate passes cannot be considered as creating a tenancy,[14] the passing of an estate being one of the chief distinctions between a lease and a license.[15]

4. Transfer of Possession. The possession and control of the premises must pass to the tenant,[16] but such possession need not in all cases be complete or exclusive.[17]

5. Reversion in Landlord. It is necessary to the relation of landlord and tenant that a reversionary interest remain in the landlord,[18] a conveyance of the land-

11. *Mississippi.*— McKissack *v.* Bullington, 37 Miss. 535.

Missouri.— Gillespie *v.* Hendren, 98 Mo. App. 622, 73 S. W. 361; Wilkinson *v.* Wilkinson, 62 Mo. App. 249.

Pennsylvania.— Mitchell *v.* Com., 37 Pa. St. 187, construing a contract for the use of premises to be a lease and not a bailment for hire.

South Carolina.— State *v.* Page, 1 Speers 408, 40 Am. Dec. 608.

Texas.— Allen *v.* Koepsel, 77 Tex. 505, 14 S. W. 151.

England.—See Rex. *v.* Jobling, R. & R. 391; Rex *v.* Collett, R. & R. 371; Rex *v.* Fillongley, 1 T. R. 458.

Canada.—Reg. *v.* Clarke, 5 Ont. Pr. 337.

Nature and extent of liability for rent see *infra*, VIII, A.

12. Shaw *v.* Hill, 79 Mich. 86, 44 N. W. 422.

13. Renting on shares and cropping contracts see *infra*, XI.

14. Croade *v.* Ingraham, 13 Pick. (Mass.) 33 (a case in which a widow in return for an annual compensation agreed not to seek an assignment of dower); Presby *v.* Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317; Goldman *v.* New York Advertising Co., 29 Misc. (N. Y.) 133, 60 N. Y. Suppl. 275 (holding that a contract whereby a person was given the right to use the wall of a house for advertising purposes during a specified time, did not render him a tenant); Wilcox *v.* Bostick, 57 S. C. 151, 35 S. E. 496. And see Southern Cotton Seed Oil Co. *v.* Edwards, 113 Ga. 1031, 39 S. E. 463 (a case where no absolute control for any definite period was granted, nor was any fixed rental established); Stubbings *v.* Evanston, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839; Bowe *v.* Hunking, 135 Mass. 380, 46 Am. Rep. 471; Duxbury *v.* Sandiford, 78 L. T. Rep. N. S. 230.

Public lands subject to entry are not capable of lease. Turner *v.* Ferguson, 39 Tex. 505.

15. Stinson *v.* Hardy, 27 Oreg. 584, 41 Pac. 116; Christensen *v.* Borax Co., 26 Oreg. 302, 38 Pac. 127; Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, 73 L. J. P. C. 62, 90 L. T. Rep. N. S. 741, 20 T. L. R. 531.

Licenses in real estate law generally see Licenses.

16. Caldwell *v.* Center, 30 Cal. 539, 89 Am. Dec. 131; Pittsburgh, etc., R. Co. *v.* Thornburgh, 98 Ind. 201; St. Vincent R. C. Cong. *v.* Kingston Coal Co., 13 Luz. Leg. Reg. (Pa.) 117; Wilcox *v.* Bostick, 57 S. C. 151, 35 S. E. 496. And see Ault Woodenware Co. *v.* Baker, 26 Ind. App. 374, 58 N. E. 265; Selby *v.* Greaves, L. R. 3 C. P. 594, 37 L. J. C. P. 251, 19 L. T. Rep. N. S. 186, 16 Wkly. Rep. 1127; Upper Canada Bank *v.* Tarrant, 19 U. C. Q. B. 423.

An agreement to abandon the premises at a certain day, made by a person in possession, is not a lease. Miller *v.* McBrier, 14 Serg. & R. (Pa.) 382.

The possession of a right to enter upon premises and remove crops is not sufficient to create the relation of landlord and tenant. Janouch *v.* Pence, 3 Nebr. (Unoff.) 867, 93 N. W. 217.

Presumption of occupancy.— Where the occupation of premises is clearly a beneficial one, and a lease to the occupant at a nominal rent is found on the records of the county, the presumption is, in the absence of proof to the contrary, that the occupation is under the lease. Libbey *v.* Staples, 39 Me. 166. A prior possession cannot be presumed as having been taken under a subsequent lease. Howard *v.* Carpenter, 11 Md. 259. A defendant in ejectment relying upon a lease to a third person as showing title out of plaintiff need not show an entry by the lessee under the lease, for until someone else be shown in possession, holding out the lease, he must be regarded as possessed of the term. Doe *v.* Kennedy, 5 U. C. Q. B. 577.

17. There may be an implied or express reservation of a right to possession on the part of the landlord, for all purposes not inconsistent with the privileges granted to the tenant. Morrill *v.* Mackman, 24 Mich. 279, 9 Am. Rep. 124. *Compare* Wilson *v.* Tavener, [1901] 1 Ch. 578, 70 L. J. Ch. 263, 84 L. T. Rep. N. S. 48.

Where the subject of the lease is an incorporeal right, it is sufficient that the right of possession granted is such incidental possession as is necessary to the enjoyment and protection of such right. Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 [*reversing* (App. 1901) 61 N. E. 12].

18. Badger Lumber Co. *v.* Malone, 8 Kan. App. 121, 54 Pac. 692; State *v.* Bridge Proprietors, 21 N. J. L. 384 (holding, where a franchise was vested in a grantee for a limited term of years, a contract whereby the grantee granted the franchise for the entire

lord's entire term being an assignment rather than a lease.[19] Hence a taking and holding in perpetuity is contradictory of the relation of landlord and tenant.[20]

C. Subject-Matter. While a subject-matter susceptible of grant, no less than capable parties, is indispensable to the relation of landlord and tenant,[21] it may consist of anything corporeal or incorporeal, lying in livery or in grant,[22] for example, not only of lands and houses, but of commons,[23] ways,[24] fisheries,[25] franchises,[26] estovers,[27] annuities,[28] or other incorporeal hereditaments.[29] A mere personal right is not subject to demise.[30] In some cases the parties to a letting of personal property are spoken of as landlord and tenant;[31] but such a transaction is strictly speaking a bailment.[32]

D. The Relation as Distinguished From Other Relations[33] — **1. Lodger.** While an entire floor or a series of rooms, or even a single room in a house, may be let for lodgings, so separated from the rest of the house as to become a separate tenement of the lessee,[34] an ordinary agreement for board and lodging in a house, by which the keeper retains the legal possession, custody, and care of the whole

term to a third person, was not a lease); Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481; French *v.* Brewer, 9 Fed. Cas. No. 5,096, 3 Wall. Jr. 346. And see Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159 (holding an instrument to pass a base fee); Reg. *v.* Clarke, 5 Ont. Pr. 337.

19. McKee *v.* Howe, 17 Colo. 538, 31 Pac. 115; Craig *v.* Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236.

20. Langford *v.* U. S., 12 Ct. Cl. 338, holding that such relation did not exist where land was taken by a treaty of cession for a permanent Indian reservation, although where real property is taken by the government for temporary use an action may lie for the implied rent.

21. Sommer *v.* Bavarian Star Brewing Co., 8 Misc. (N. Y.) 268, 28 N. Y. Suppl. 571.

Property not in esse.— A lease of a pier and additions to be erected thereto, will take effect as to the additions when they are completed. People *v.* Kelsey, 38 Barb. (N. Y.) 269. And see Rice *v.* Brown, 81 Me. 56, 16 Atl. 334, holding a lease valid, although the property was not fully completed when the lease was made, but was finished when the lessee visited it to take possession.

Lands in Indian Territory may be the subject of a valid lease between persons not members of the Indian nations. Ellis *v.* Fitzpatrick, 3 Indian Terr. 656, 64 S. W. 567.

22. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950 ([*citing* 1 Washburn Real Prop. 310; Bouvier L. Dict. tit. "lease"], holding that a contract by which the railroad rolling-stock and franchises of a corporation were transferred to another amounted to a lease); Reg. *v.* Clarke, 5 Ont. Pr. 337; Bacon Abr. tit. "Leases and Terms for Years," (A).

Property for which ejectment may be brought may be the subject of a lease. Rooks *v.* Moore, 44 N. C. 1, 57 Am. Dec. 569. Property subject of ejectment see Ejectment, 15 Cyc. 15.

Turpentine trees may be the subject of a lease. Denton *v.* Strickland, 48 N. C. 61; Rooks *v.* Moore, 44 N. C. 1, 57 Am. Dec. 569. See also Milliken *v.* Faulk, 111 Ala. 658, 20 So. 594.

A water-right may be leased. Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 [*reversing* (App. 1901) 61 N. E. 12]. See, generally, Waters.

Leases of: Mineral and mining property see Mines and Minerals. Oil, gas, and salt wells see Mines and Minerals. Railroad property see Railroads. Vessels see Shipping. Wharves see Wharves.

Cropping contracts as distinguished from leases see *infra*, XI, A.

23. See Common Lands, 8 Cyc. 342.

24. See Easements, 14 Cyc. 1134.

25. See Fish and Game, 19 Cyc. 989.

26. See Franchises, 19 Cyc. 1451.

27. See Common Lands, 8 Cyc. 342.

28. See Annuities, 2 Cyc. 458.

29. Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950.

30. Croads *v.* Ingraham, 13 Pick. (Mass.) 33, so holding with regard to the right of a widow to have dower assigned to her.

31. See Raddin *v.* Kidder, 111 Mass. 44 (holding that the owner of a boiler in the building of another may recover compensation from a third person who has hired and used the boiler, whether it be a fixture or not); Billings *v.* Tucker, 6 Gray (Mass.) 368; Cadwallader *v.* Wagner, 7 Kulp (Pa.) 465; Newton *v.* Wilson, 3 Hen. & M. (Va.) 470.

32. **Hire of personalty** see Bailments, 5 Cyc. 157.

Bailment of animals see Animals, 2 Cyc. 312.

33. **Leases as distinguished from:** Chattel Mortgage see Chattel Mortgages, 6 Cyc. 996. License see Licenses. Mortgage of realty see Mortgages. Will see Wills.

Nature and incidents of ground-rents see Ground Rents, 20 Cyc. 1369.

Tenancy as essential to summary dispossession proceedings see *infra*, X, C, 1, b.

34. Porter *v.* Merrill, 124 Mass. 534; White *v.* Maynard, 111 Mass. 250, 15 Am. Rep. 28; Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244; Oliver *v.* Moore, 53 Hun (N. Y.) 472, 6 N. Y. Suppl. 413 [*affirmed* in 131 N. Y. 589, 30 N. E. 65]; Fenn *v.* Grafton, 2 Bing.

house and of every room therein, does not create the relationship of landlord and tenant.[35]

2. Servant or Agent. An agent placed in possession of the premises, by the owner, for the management thereof, is not a tenant;[36] nor, where an employee is allowed to occupy his employer's premises, does he become a tenant, in case the employer reserves general control and supervision over the premises so occupied,[37] or where the occupation by the servant is connected with the service, or is required by the employer for the necessary or better performance of the service.[38] But where the control is parted with, the tenant will not be regarded as occupying as a servant or agent, although other circumstances may point to such relation.[39] After termination of the contract of employment the relation may

N. Cas. 617, 2 Hodges 58, 3 Scott 56, 29 E. C. L. 687; Newman *v.* Anderton, 2 B. & P. N. R. 224; Monks *v.* Dykes, 4 M. & W. 567.

35. White *v.* Maynard, 111 Mass. 250, 15 Am. Rep. 28 (holding that such an agreement did not pass an interest in land within the statute of frauds); Wilson *v.* Martin, 1 Den. (N. Y.) 602; Bensing *v.* Ramsay, 62 J. P. 613. See also Reg. *v.* St. George's Union, L. R. 7 Q. B. 90, 41 L. J. M. C. 30, 25 L. T. Rep. N. S. 696, 20 Wkly. Rep. 179; Brewer *v.* McGowen, L. R. 5 C. P. 239, 1 Hopw. & C. 275, 39 L. J. C. P. 30, 21 L. T. Rep. N. S. 462, 18 Wkly. Rep. 167; Stamper *v.* Sunderland-Near-The-Sea, L. R. 3 C. P. 388, 37 L. J. M. C. 137, 18 L. T. Rep. N. S. 682, 16 Wkly. Rep. 1063; Doe *v.* Laming, 4 Campb. 73, 15 Rev. Rep. 728; Fludier *v.* Lombe, Cas. t. Hardw. 307; Cook *v.* Humber, 11 C. B. N. S. 33, 8 Jur. N. S. 698, K. & G. 413, 31 L. J. C. P. 73, 5 L. T. Rep. N. S. 838, 10 Wkly. Rep. 427, 103 E. C. L. 33; Greenslade *v.* Tapscott, 1 C. M. & R. 55, 3 L. J. Exch. 328, 4 Tyrw. 566; Smith *v.* St. Michael, 3 E. & E. 383, 107 E. C. L. 383.

36. Todhunter *v.* Armstrong, (Cal. 1898) 53 Pac. 446; Zinnel *v.* Bergdoll, 9 Pa. Super. Ct. 522, 44 Wkly. Notes Cas. 54; State *v.* Page, 1 Speers (S. C.) 408, 40 Am. Dec. 608 (in which a contract for the management of a hotel was construed not to operate as a lease); Letang *v.* Donohue, 6 Quebec Q. B. 160 [*affirming* decision of court of review which *reversed* 8 Quebec Super. Ct. 496]. And see Mayhew *v.* Suttle, 3 C. L. R. 59, 4 E. & B. 347, 1 Jur. N. S. 303, 24 L. J. Q. B. 54, 3 Wkly. Rep. 108, 82 E. C. L. 347. But see Page *v.* Street, Speers Eq. (S. C.) 159.

The principles governing the relation of landlord and tenant are, however, applicable. Farrow *v.* Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250. And see Miller *v.* Vaughan, 73 Ala. 312.

Where the house is not the master's the servant cannot be said to hold it as servant. Reg. *v.* Lynn, 8 A. & E. 379, 3 N. & P. 411, 35 E. C. L. 640.

37. Waller *v.* Morgan, 18 B. Mon. (Ky.) 136; White *v.* Bayley, 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. 253, 100 E. C. L. 227.

38. *Alabama.*—Davis *v.* Williams, 130 Ala. 530, 30 So. 488, 89 Am. St. Rep. 55, 54 L. R. A. 749.

Illinois.— Mead *v.* Pollock, 99 Ill. App. 151.

Kansas.— Snedaker *v.* Powell, 32 Kan. 396, 4 Pac. 869.

New Jersey.— McQuade *v.* Emmons, 38 N. J. L. 397; State *v.* Jewell, 34 N. J. L. 259.

New York.— Kerrains *v.* People, 60 N. Y. 221, 19 Am. Rep. 158 [*reversing* on other grounds 1 Thomps. & C. 333]; Doyle *v.* Gibbs, 6 Lans. 180; People *v.* Annis, 45 Barb. 304; Haywood *v.* Miller, 3 Hill 90; Hoffman *v.* Hoffman, 18 N. Y. Suppl. 387. And see Ofschlager *v.* Surbeck, 22 Misc. 595, 50 N. Y. Suppl. 862.

Pennsylvania.— Bowman *v.* Bradley, 151 Pa. St. 351, 24 Atl. 1062, 17 L. R. A. 213.

England.— Hughes *v.* Chatham, B. & Arn. 61, 7 Jur. 1136, 13 L. J. C. P. 44, 5 M. & G. 54, 7 Scott N. R. 581, 44 E. C. L. 39;; Doe *v.* Derry, 9 C. & P. 494, 38 E. C. L. 291; Rex *v.* Stock, 2 Taunt. 239. See also Rex *v.* Chesthunt, 1 B. & Ald. 473; Rex *v.* Langriville, 10 B. & C. 899, 21 E. C. L. 375; Rex *v.* Benneworth, 2 B. & C. 755, 9 E. C. L. 336; Rex *v.* Kelstern, 5 M. & S. 136; Rex *v.* Minster, 3 M. & S. 276; Rex *v.* Melkridge, 1 T. R. 598.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 36.

A clergyman occupying church property as a residence during his charge is not a tenant. Chatard *v.* O'Donovan, 80 Ind. 20, 41 Am. Rep. 782; East Norway Lake Church *v.* Froislie, 37 Minn. 447, 35 N. W. 260; Doe *v.* McKaeg, 10 B. & C. 721, 21 E. C. L. 304; Doe *v.* Jones, 10 B. & C. 718, 8 L. J. K. B. O. S. 310, 21 E. C. L. 303; Bigelow *v.* Norton, 3 Nova Scotia 283.

A school-teacher given possession by the school-district of the rooms in the school building, other than the school-room, for the purpose of enabling him better to perform his duties as teacher, does not occupy as tenant where there is no letting, in terms, or rent reserved. Alpine Tp. School Dist. No. 11 *v.* Batsche, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576.

A caretaker in charge of premises is not a tenant. Presby *v.* Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317; Reynolds *v.* Metcalf, 13 U. C. C. P. 382.

39. *Massachusetts.*— Fiske *v.* Framingham Mfg. Co., 14 Pick. 491, where a tenant agreed to operate the landlord's mill and manufacture goods for him at a specified price, no other rent being paid.

Minnesota.— See Gould *v.* Eagle Creek School Dist., 8 Minn. 427.

be that of tenant[40] and the servant subjected to the duties and liabilities of such relation.

3. Purchaser.[41] Where an instrument purports to grant property, without other words to control its meaning, it cannot be construed as a lease.[42] But the fact that a lease contains a condition whereby it may become an absolute sale does not prevent its operating as a lease, prior to the fulfilment of such condition;[43] and the same is true where the lease contains a conditional gift of the premises.[44] Where, however, the intent of the parties is obviously to the contrary, an instrument will not be considered as a lease, although it contains words of demise.[45] And where money reserved as rent is clearly intended to take the place of interest on purchase-money, the contract will be held to evidence a sale.[46] Where under the agreement the entry may, at the option of the tenant, be either as lessee or as vendee, it will be held to have been as lessee, in the absence of notice of an election to purchase.[47] A lease of personalty giving the lessee a right to purchase such personalty is, until the exercise of the right, to be regarded as a lease, and not as a sale,[48] unless, according to the weight of authority, the contract is such that the rent reserved is obviously intended to take the place of instalments of purchase-money, the intention being to reserve title in the seller until complete payment, in which case the transaction will be regarded as a sale.[49]

4. Trustee. The relation of landlord and tenant does not exist where lands are occupied by one as trustee;[50] hence a parent who has the occupancy of premises in trust for a child does not become the tenant of such child.[51]

5. Partner. The relationship of landlord and tenant is distinct from that of partners.[52] But where a person is allowed to take possession of and conduct a

New York.— Anderson *v.* Steinreich, 36 Misc. 845, 74 N. Y. Suppl. 920.

Pennsylvania.— Milton *v.* West Chillisquaque, 9 Pa. Super. Ct. 204.

South Carolina.— Whaley *v.* Jacobson, 21 S. C. 51.

Tennessee.— Colcord *v.* Hall, 3 Head 625.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 10.

Company boarding-houses.— A lessee of a boarding-house is not rendered a servant of the lessor by the fact that he agrees to board the employees of the lessor, at a specified price, and the lessor agrees to aid in the collection of the amount to be paid by such employees, by retaining the same from their wages. Lightbody *v.* Truelsen, 39 Minn. 310, 40 N. W. 67; Doyle *v.* Union Pac. R. Co., 147 U. S. 413, 13 S. Ct. 333, 37 L. ed. 223.

40. Snedaker *v.* Powell, 32 Kan. 396, 4 Pac. 869.

Tenancy by sufferance see *infra*, VI, B, 2, b.

41. See, generally, Sales; Vendor and Purchaser.

42. Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 54 N. W. 68. See also Hill *v.* Hill, 43 Pa. St. 528. *Compare* Horn *v.* Den, 25 N. J. L. 106.

Although the purchaser is given the right to quit the premises at the expiration of one year, upon having paid the first instalment of purchase-money, a contract of sale will not for that reason be construed as a lease authorizing a distress for rent. Moulton *v.* Norton, 5 Barb. (N. Y.) 286.

Contract of bail à rente partakes of the nature of a sale and lease; it is translative of property, and the rent is essentially redeemable. Clark *v.* Christ's Church, 4 La. 286.

43. *Georgia.*— Clifford *v.* Gressinger, 96 Ga. 789, 22 S. E. 399.

Indiana.— Jarvis *v.* Sutton, 3 Ind. 289.

Louisiana.— Sainet *v.* Duchamp, 14 La. Ann. 539; Municipality No. 1 *v.* New Orleans General Council, 5 La. Ann. 761.

North Carolina.— Crinkley *v.* Egerton, 113 N. C. 444, 18 S. E. 669.

Pennsylvania.— Christie's Appeal, 85 Pa. St. 463.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 6.

44. Davis *v.* Robert, 89 Ala. 402, 8 So. 114, 18 Am. St. Rep. 126.

45. Tuttle *v.* Harry, 56 Conn. 194, 14 Atl. 209, construing an instrument as a grant of an easement of flowage appendant to a mill. And see Irving *v.* Monchamps, 3 Quebec Pr. 430.

46. Walters *v.* Meyer, 39 Ark. 560; New Orleans *v.* Duplessis, 5 Mart. (La.) 309; Picaud *v.* Renaud, 15 Quebec Super. Ct. 358.

47. Hartwell *v.* Black, 48 Ill. 301. See also Barrett *v.* Johnson, 2 Ind. App. 25, 27 N. E. 983.

48. Miles *v.* Edsall, 7 Mont. 185, 14 Pac. 701; Neidig *v.* Eifler, 18 Abb. Pr. (N. Y.) 353; Otis *v.* Wood, 3 Wend. (N. Y.) 498; Dando *v.* Foulds, 105 Pa. St. 74; Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196. See, generally, Sales.

49. See, generally, Sales.

50. Hardin *v.* Pulley, 79 Ala. 381.

51. Hardin *v.* Pulley, 79 Ala. 381; Russell *v.* Irwin, 38 Ala. 44, holding, however, that the parent was estopped from denying the title of the child.

52. Norton *v.* Wiswall, 26 Barb. (N. Y.) 618.

business or manufacturing plant, under an agreement which involves the payment of a portion of the profits to the owner, the question of whether a partnership or a tenancy results may arise.[53] In case the owner is entitled merely to compensation measured by a portion of the profits, he is not to be regarded as a partner;[54] nor is he where there is no agreement by which he is to share losses,[55] or where he reserves no control over the premises.[56]

E. Tenancy Implied From or Incident to Relations of Parties — 1. In General. The relationship of landlord and tenant may be implied from circumstances authorizing an inference that the parties intend to assume such relation toward each other.[57] Where a lease is presumed, by statute in some jurisdictions nothing more than a tenancy from year to year will be presumed in the absence of any evidence of the duration of the term demised.[58]

2. Growing Out of Occupancy — a. General Rules. While the mere occupancy of the property of another is not in itself sufficient to create a tenancy,[59] a presumption of a tenancy arises where an entry and occupancy is with the permission of the owner,[60] and the entry is in recognition of and not adverse or hostile to the

53. See, generally, Partnership.

Cropping contracts and renting on shares see *infra*, XI, A.

54. Norton *v.* Wiswall, 26 Barb. (N. Y.) 618; Heimstreet *v.* Howland, 5 Den. (N. Y.) 68; Prestons *v.* McCall, 7 Gratt. (Va.) 121.

55. Barghman *v.* Portman, 14 S. W. 342, 12 Ky. L. Rep. 342; Smith *v.* Hubert, 83 Hun (N. Y.) 503, 31 N. Y. Suppl. 1076.

56. Ault Woodenware Co. *v.* Baker, 26 Ind. App. 374, 58 N. E. 265, so holding where the agreement was to return to the owner all profits over a fixed amount. See also Kellington *v.* Herring, 17 U. C. C. P. 639.

57. Rainey *v.* Capps, 22 Ala. 288; Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Van Arsdale *v.* Buck, 82 N. Y. App. Div. 383, 81 N. Y. Suppl. 1017, holding the evidence sufficient. And see Taylor *v.* Young, 6 L. J. K. B. 141.

Where one cultivates another's land, using the teams, implements, etc., of the owner, there is no presumption of the relation of landlord and tenant, but the nature of the relation is a question of fact to be determined by the jury on the evidence. Rawley *v.* Brown, 71 N. Y. 85.

58. See Brewster *v.* Striker, 1 E. D. Smith (N. Y.) 321 [*affirmed* in 2 N. Y. 19].

Tenancies from year to year see *infra*, V, A.

59. *Illinois.*— Cummings *v.* Smith, 114 Ill. App. 35. But see Pennsylvania Ins. Co. *v.* O'Connell, 34 Ill. App. 357.

Kentucky.— Hall *v.* Jacobs, 7 Bush 595, holding that the use of an unimproved bank of a river in mooring rafts will not create the relation of landlord and tenant between the riparian owner and the proprietor of the rafts.

Louisiana.— Jordan *v.* Mead, 19 La. Ann. 101.

Maine.— Curtis *v.* Treat, 21 Me. 525, holding that where premises have been occupied without the knowledge or consent of the owner, the state of landlord and tenant does not exist between him and the occupant, and an action for use and occupation cannot be sustained.

Missouri.— Edmonson *v.* Kite, 43 Mo. 176.

New York.— Alt *v.* Gray, 26 Misc. 843, 56 N. Y. Suppl. 657.

England.— Doe *v.* Quigley, 2 Campb. 505, 11 Rev. Rep. 780.

Canada.— See Osborne *v.* Jones, 15 U. C. Q. B. 294, so holding where the owner refused a lease because in doubt as to his title.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 33.

Creation of particular kind of tenancy: From year to year see *infra*, V, A, 2. From month to month see *infra*, V, B, 2. At will see *infra*, VI, A, 2. At sufferance see *infra*, VI, B, 2.

Where a lease has been terminated by the divesting of the title during the term, the relationship of landlord and tenant will not be created anew by occupancy of the tenant, although both the landlord and tenant believe that the lease remains in force. O'Brien *v.* Ball, 119 Mass. 28.

The fact that a county officer entitled to the possession and use of an office in a county building attends to private business while in such possession does not make him a tenant of the county, and raises no implied promise to pay rent. Cass County Sup'rs *v.* Cowgill, 97 Mich. 448, 56 N. W. 849, so holding, although prior to the appointment he occupied a portion of the office and paid rent for such privilege.

60. *Indiana.*— See Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93.

Kentucky.— Shean *v.* Withers, 12 B. Mon. 441; Baley *v.* Deakins, 5 B. Mon. 159, holding that one who settles upon land without claim of title, and subsequently agrees to hold possession and keep off trespassers, becomes a tenant.

Maine.— Sargent *v.* Ashe, 23 Me. 201.

Nebraska.— Skinner *v.* Skinner, 38 Nebr 756, 57 N. W. 534, holding that a husband would be presumed to be the tenant of his wife, where he was in the exclusive possession of her land, with her knowledge, and was living separate and apart from her.

title of the landlord.[61] A tenancy cannot be implied, however, when an express contract or an arrangement between the parties shows that it was not intended by them to occupy the relation of landlord and tenant,[62] as where there is permission to occupy without rent,[63] where the possession is not exclusive,[64] or where the parties intended to stand in the relation of donor and donee.[65] The landlord will not become the tenant of one from whom his tenant has accepted a lease, by reason of the fact that he accepts a surrender of his tenant's possession without knowledge of the facts.[66]

b. Under Void Lease. Where occupation is under a void lease, the relation of landlord and tenant nevertheless arises,[67] the relation being held to arise out of

New York.— Coit *v.* Planer, 7 Rob. 413, 4 Abb. Pr. N. S. 140.

Virginia.— Hanks *v.* Price, 32 Gratt. 107.

Washington.—McLennan *v.* Grant, 8 Wash. 603, 36 Pac. 682.

Wisconsin.— Wittman *v.* Milwaukee, etc., R. Co., 51 Wis. 89, 8 N. W. 6.

United States. — Carpenter *v.* U. S., 17 Wall. 489; Cobb *v.* Kidd, 8 Fed. 695, 19 Blatchf. 560.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 33.

Subsequent permission to continue in possession, given to one entering and afterward holding adversely, does not create the relation of landlord and tenant. Jackson *v.* Tyler, 2 Johns. (N. Y.) 444.

Where a lessee enters into a partnership and the partnership continues the occupation of the premises, the surviving partner will be regarded as the tenant, where he continues in possession, carrying on the business, and pays rent from month to month. Decker *v.* Hartshorne, 65 N. J. L. 87, 46 Atl. 755 [*affirmed* in (1901) 48 Atl. 1117].

A taking a key of the premises for the purposes of occupying them may create an implied tenancy (Levy *v.* Long Island Brewery, 26 Misc. (N. Y.) 410, 56 N. Y. Suppl. 242; Little *v.* Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688), but such a result has been held not to follow the receipt of the key alone (Levy *v.* Long Island Brewery, *supra*).

An express consent to a demand for rent is not necessary. Loring *v.* Taylor, 50 Mo. App. 80.

61. *Colorado.*—Hennessey *v.* Hoag, 16 Colo. 460, 27 Pac. 1061.

Illinois.— Hill *v.* Coal Valley Min. Co., 103 Ill. App. 41.

Indiana. — Nance *v.* Alexander, 49 Ind. 516.

Massachusetts. — Boston *v.* Binney, 11 Pick. 1, 22 Am. Dec. 353.

Michigan.— Marquette, etc., R. Co. *v.* Harlow, 37 Mich. 554, 557, 26 Am. Rep. 538.

Nevada.—.Dixon *v.* Ahern, 21 Nev. 65, 24 Pac. 337.

New York.— Biglow *v.* Biglow, 75 N. Y. App. Div. 98, 77 N. Y. Suppl. 716; Baxter *v.* West, 5 Daly 460; Dodin *v.* Dodin, 32 Misc. 208, 65 N. Y. Suppl. 851.

Pennsylvania.— McCullough *v.* McCall, 10 Watts 367.

Texas.— Victory *v.* Stroud, 15 Tex. 373.

England.— See Doe *v.* Boulton, 6 M. & S. 148.

Canada.— McDonald *v.* Brennan, 5 U. C. Q. B. 599.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 33.

But see Paulding *v.* Dowell, 2 La. 452, holding that one who enters on vacant premises and, when sued for rent, reconvenes for repairs, is not a usurper, but occupies for the owner, although unknown to him when he entered.

Where a demand for rent is resisted no tenancy is implied. Preston *v.* Hawley, 101 N. Y. 586, 5 N. E. 770.

A mere trespasser cannot by his own wrongful act of entry create the relation of landlord and tenant. Krug *v.* Davis, 101 Ind. 75.

The burden of proof rests upon the owner of land to show that a person who at first entered upon the land as a trespasser afterward became a tenant. The presumption is that he continued to hold the land in the same character as he first held it. Dixon *v.* Ahern, 19 Nev. 422, 14 Pac. 598.

Entry under holder of option.— One who for the purpose of prospecting for minerals enters upon land under one holding an option of purchase does not become the tenant of the owner in case he remains upon the land after the expiration of the option. Henry *v.* Perry, 110 Ga. 630, 36 S. E. 87, holding such person a mere trespasser.

Where the entry is under one holding adversely, the occupant does not become a tenant. Sims *v.* Price, 123 Ga. 97, 50 S. E. 961, so holding under Civ. Code (1895), § 3116.

Entry under a claim of a lease from another will not create an implied tenancy. Janouch *v.* Pence, 3 Nebr. (Unoff.) 867, 93 N. W. 217.

62. Carpenter *v.* U. S., 17 Wall. (U. S.) 489, 21 L. ed. 680.

63. Fisk *v.* Moores, 11 Rob. (La.) 279; Paige *v.* Scott, 12 La. 490; Collyer *v.* Collyer, 113 N. Y. 442, 21 N. E. 114.

64. Pittsburgh, etc., R. Co. *v.* Thornburgh, 98 Ind. 201.

65. Haley *v.* Hickman, Litt. Sel. Cas. (Ky.) 266.

66. Freeman *v.* Ogden, 40 N. Y. 105.

67. *Alabama.*— Hays *v.* Goree, 4 Stew. & P. 170, holding that an action for use and occupation will lie.

the occupation, irrespective of the lease.[68] But it has been held, in a summary proceeding to dispossess a tenant, that plaintiff cannot, after failure to prove the formal execution of a written lease, rely upon parol proof of possession and payment of rent.[69]

c. Under Agreement For Lease. While a mere agreement to give a lease at a future date does not create the relation of landlord and tenant,[70] a tenancy is nevertheless created where the owner permits another to go into possession of the premises under such an agreement.[71] One who enters upon premises in possession of a tenant with the understanding that he is to receive an assignment of the lease is not, upon the refusal of the owner to consent to the assignment, to be regarded as the tenant of the lessee.[72]

d. Under Contract of Purchase — (1) *Prior to Default or Rescission.* While in many cases a person in possession of premises under an executory contract of purchase has been said to be a tenant at will of the vendor,[73] the rule

Kentucky. — Brubaker *v.* Poage, 1 T. B. Mon. 123.

New York. — Bolles *v.* Duff, 54 Barb. 215, 37 How. Pr. 162.

England. — Denn *v.* Fearnside, 1 Wils. C. P. 176.

Canada. — Brewing *v.* Berryman, 15 N. Brunsw. 115.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 38.

Estoppel to deny landlord's title see *infra*, III, G, 4.

Nature of tenancy. — From year to year see *infra*, V, A, 2, e. At will see *infra*, VI, A, 2, e.

68. Emrich *v.* Union Stock Yard Co., 86 Md. 482, 38 Atl. 943; Vinz *v.* Beatty, 61 Wis. 645, 21 N. W. 787 (so holding where the lease was executed on Sunday, and the entry made on that day); Tress *v.* Savage, 2 C. L. R. 1315, 4 E. & B. 36, 18 Jur. 680, 23 L. J. Q. B. 339, 2 Wkly. Rep. 564, 82 E. C. L. 36; Elliott *v.* Rogers, 4 Esp. 59; Lyman *v.* Snarr, 10 U. C. C. P. 462; Galbraith *v.* Fortune, 10 U. C. C. P. 109. *Compare* Doe *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

69. Barry *v.* Ryan, 4 Gray (Mass.) 523. But see Emrich *v.* Union Stock Yard Co., 86 Md. 482, 38 Atl. 943, holding that, although an unrecorded lease was invalid as to third persons, yet, where the circumstances connected with it were such that the law implied a tenancy, the lease was admissible in evidence to show the terms of such tenancy.

70. Billings *v.* Conney, 57 Mich. 425, 24 N. W. 159; Neppach *v.* Jordan, 15 Oreg. 308, 14 Pac. 353; Proctor *v.* Benson, 149 Pa. St. 254, 24 Atl. 279; Helser *v.* Pott, 3 Pa. St. 179.

Distinction between lease and agreement for lease see *infra*, II, A, 1, f.

71. *California.* — Cheney *v.* Newberry, 67 Cal. 125, 126, 7 Pac. 444, 445.

Mississippi. — Schlicht *v.* Callicott, 76 Miss. 487, 24 So. 869.

Ohio. — A. H. Pugh Printing Co. *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 557.

Oregon. — Neppach *v.* Jordan, 15 Oreg. 308, 14 Pac. 353.

England. — Hamerton *v.* Stead, 3 B. & C. 478, 5 D. & R. 206, 3 L. J. K. B. O. S. 33, 27 Rev. Rep. 407, 10 E. C. L. 220; Weakly *v.* Bucknell, Cowp. 473; Anderson *v.* Midland R. Co., 3 E. & E. 614, 7 Jur. N. S. 411, 30 L. J. Q. B. 94, 3 L. T. Rep. N. S. 809, 107 E. C. L. 614; Chapman *v.* Towner, 9 L. J. Exch. 54, 6 M. & W. 100. And see Doe *v.* Stennett, 2 Esp. 717, 5 Rev. Rep. 769.

Canada. — Power *v.* Griffin, 20 Nova Scotia 52; McMullen *v.* Kendrick, 17 Nova Scotia 308; Lennox *v.* Westney, 17 Ont. 472.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 39.

But see Herbert *v.* Gallatin, 22 N. Y. App. Div. 623, 47 N. Y. Suppl. 778 [*affirmed* in 163 N. Y. 575, 57 N. E. 1112], holding that where parties are negotiating as to a long lease of certain premises, the act of the owner in allowing the proposed lessee to enter in the meantime to supervise repairs to be made in connection with the proposed lease is a mere accommodation, and does not establish an intermediate tenancy under an oral letting.

Tenancy from year to year see *infra*, V, A, 2, c.

Tenancy at will see *infra*, VI, A, 2, d.

Where it is agreed that the tenant shall erect a building and shall retain possession until the rents shall pay for the construction, the tenancy begins immediately on the completion of the building. Billings *v.* Canney, 57 Mich. 425, 24 N. W. 159.

72. Stibbs *v.* Agner, 65 Iowa 318, 21 N. W. 657.

73. *Maine.* — Patterson *v.* Stoddard, 47 Me. 355, 74 Am. Dec. 490; Millay *v.* Millay, 18 Me. 387.

Massachusetts. — Gould *v.* Thompson, 4 Metc. 224. But see Lyon *v.* Cunningham, 136 Mass. 532; White *v.* Livingston, 10 Cush. 259; Dakin *v.* Allen, 8 Cush. 33, holding that while the relation is in some respects like that of a tenant at will the occupant was not within the provision of a statute giving a summary process in event of a tenant holding over. And *compare* Township No. 6 *v.* McFarland, 12 Mass. 325, holding that the purchaser is a tenant at will or a licensee, and not the holder of a freehold.

Michigan. — Crane *v.* O'Reiley, 8 Mich.

supported by apparently the better authority is that, in a strict sense, the relation of landlord and tenant does not arise under such circumstances,[74] it being said

312; Dwight *v.* Cutler, 3 Mich. 566, 64 Am. Dec. 105. See also Rawson *v.* Babcock, 40 Mich. 330.

North Carolina. — Richardson *v.* Thornton, 52 N. C. 458; Dowd *v.* Gilchrist, 46 N. C. 353; Love *v.* Edmonston, 23 N. C. 152.

South Carolina.— Jones *v.* Jones, 2 Rich. 542.

England.— Doe *v.* Jackson, 1 B. & C. 448, 2 D. & R. 514, 8 E. C. L. 191; Ball *v.* Cullimore, 2 C. M. & R. 120, 1 Gale 96, 5 Tyrw. 753; Doe *v.* Miller, 5 C. & P. 595, 24 E. C. L. 725. And see Right *v.* Beard, 13 East 210.

Canada. — Lewer *v.* McCulloch, 10 Nova Scotia 315.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 407.

One who enters under a void agreement of purchase is a tenant at will. Hall *v.* Wallace, 88 Cal. 434, 26 Pac. 360.

A quasi-tenancy at will is said in some cases to be created. Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262; Venable *v.* McDonald, 4 Dana (Ky.) 336, holding the occupant not entitled to six months' notice to quit.

74. *Alabama.*— Tucker *v.* Adams, 52 Ala. 254; Bell *v.* Ellis, 1 Stew. & P. 294.

Arkansas. — Quertermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096; Watson *v.* Pugh, 51 Ark. 218, 10 S. W. 493; Mason *v.* Delancy, 44 Ark. 444; Walters *v.* Meyer, 39 Ark. 560; Byrd *v.* Chase, 10 Ark. 602.

Colorado.— See Denver Transfer, etc., Co. *v.* Swem, 8 Colo. 111, 5 Pac. 836.

Connecticut. — Vandenheuvel *v.* Storrs, 3 Conn. 203.

Delaware. — Redden *v.* Barker, 4 Harr. 179; Mariner *v.* Burton, 4 Harr. 69.

Florida.— Knox *v.* Spratt, 19 Fla. 817.

Georgia.— Blitch *v.* Edwards, 96 Ga. 606, 24 S. E. 147; Oxford *v.* Ford, 67 Ga. 362; Scofield *v.* McNaught, 52 Ga. 69; Brown *v.* Persons, 48 Ga. 60 (so holding under a statutory definition of the relation); Barnes *v.* Shinholster, 14 Ga. 131.

Illinois.— Green *v.* Dietrich, 114 Ill. 636, 3 N. E. 800; Dixon *v.* Haley, 16 Ill. 145; McNair *v.* Schwartz, 16 Ill. 24; Doe *v.* Cochran, 2 Ill. 209.

Indiana.— Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Kratemayer *v.* Brink, 17 Ind. 509; Miles *v.* Elkin, 10 Ind. 329; Newby *v.* Vestal, 6 Ind. 412. But *compare* Manchester *v.* Doddridge, 3 Ind. 360.

Iowa.— See Bemis *v.* Allen, 119 Iowa 160, 93 N. W. 50.

Kentucky. — See Reeder *v.* Bell, 7 Bush. 255; Johnson *v.* Beauchamp, 9 Dana 124; Jones *v.* Tipton, 2 Dana 295.

Maryland.— See Benson *v.* Boteler, 2 Gill 74.

Missouri. — Glascock *v.* Robards, 14 Mo. 350, 55 Am. Dec. 108.

New Jersey.—Den *v.* Westbrook, 15 N. J. L. 371, 29 Am. Dec. 692; Brewer *v.* Conover, 18 N. J. L. 214.

New York.— Thompson *v.* Bower, 60 Barb. 463; Sylvester *v.* Ralston, 31 Barb. 286; Kenada *v.* Gardner, 3 Barb. 589; Jackson *v.* Aldrich, 13 Johns. 106; Smith *v.* Stewart, 6 Johns. 46, 5 Am. Dec. 186.

North Dakota.— Moen *v.* Lillestal, 5 N. D. 327, 65 N. W. 694.

Pennsylvania. — Bardsley's Appeal, 4 Pa. Cas. 584, 10 Atl. 39. But *compare* Kaas's Estate, 2 Pa. Co. Ct. 55.

Texas.— Brown *v.* Randolph, 26 Tex. Civ. App. 66, 62 S. W. 981; Brown *v.* Engel, 2 Tex. App. Civ. Cas. § 103.

Vermont.— Stacy *v.* Vermont Cent. R. Co., 32 Vt. 551; Hough *v.* Birge, 11 Vt. 190, 34 Am. Dec. 682.

Wisconsin. — See Nightingale *v.* Barens, 47 Wis. 389, 2 N. W. 767.

United States. — Carpenter *v.* U. S., 17 Wall. 489, 21 L. ed. 680; Watkins *v.* Holman, 16 Pet. 25, 10 L. ed. 873; Carpenter *v.* U. S., 6 Ct. Cl. 157.

England. — Winterbottom *v.* Ingham, 7 Q. B. 611, 10 Jur. 4, 14 L. J. Q. B. 298, 53 E. C. L. 611; Kirtland *v.* Pounsett, 2 Taunt. 145, where the sale was not completed because of a defect in the vendor's title.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 23.

Although the contract of purchase may be void, the relation of landlord and tenant does not arise (Bell *v.* Ellis, 1 Stew. & P. (Ala.) 294); as for example, where the contract rests in parol (Kay *v.* Curd, 6 B. Mon. (Ky.) 100; Chilton *v.* Niblett, 3 Humphr. (Tenn.) 404. *Compare* Hall *v.* Wallace, 88 Cal. 434, 26 Pac. 360; Winnard *v.* Robbins, 3 Humphr. (Tenn.) 614, holding that where a tenant continued in possession after a verbal contract of purchase, he was a tenant at will).

An agreement to pay the purchase-price of the property in instalments, at stated periods corresponding to customary rental periods, will not show that the occupation is as a tenant. Green *v.* Dietrich, 114 Ill. 636, 3 N. E. 800; Bissell *v.* Erwin, 10 La. 524; Sackett *v.* Barnum, 22 Wend. (N. Y.) 605; Moen *v.* Lillestal, 5 N. D. 327, 65 N. W. 694. But *compare* Barrett *v.* Johnson, 2 Ind. App. 25, 27 N. E. 983; Nobles *v.* McCarty, 61 Miss. 456.

Purchase of conflicting claim.— Where one in the possession of and cultivating a part of a tract of land, claiming the whole, makes a parol contract to buy the land of another, and also sets up a claim to it, and afterward extends the fields which he had in cultivation, he cannot be considered the tenant of the other, so as to estop him from disputing the other's title. Hough *v.* Dumas, 20 N. C. 473.

Purchase from tenant.— The relation of landlord and tenant does not exist where defendant's grantors took a deed of the land without knowledge of an outstanding deed

that there can be no implied contract from which the relation of landlord and tenant may arise in opposition to the express contract of sale.[75]

(II) *After Default or Rescission.* After default in, or abandonment of, the contract of sale, further occupancy by the vendee may raise an implied tenancy[76] at will,[77] or according to some cases at sufferance.[78] But in the absence of a provision in the contract of sale for the creation of a tenancy,[79] such as an express agreement to pay rent upon default,[80] the failure of the purchaser to comply with his contract,[81] or of the vendor to fulfil upon his part,[82] will not cause the occupancy under the contract to be regarded as having been as tenant.[83] On rescission of a contract of sale the relation of landlord and tenant may of course be created by express contract.[84] The tenant of the vendee does not become the

from their grantor to plaintiff, or of an outstanding lease from plaintiff to their grantor. De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

75. Brown *v.* Randolph, 26 Tex. Civ. App. 66, 62 S. W. 981; Carpenter *v.* U. S., 17 Wall. (U. S.) 489, 21 L. ed. 680; Kirtland *v.* Pounsett, 2 Taunt. 145.

Liability for use and occupation see USE AND OCCUPATION.

76. Gould *v.* Thompson, 4 Metc. (Mass.) 224; Dwight *v.* Cutler, 3 Mich. 566, 64 Am. Dec. 105; Howard *v.* Shaw, 8 M. & W. 118. And see Watson *v.* Pugh, 51 Ark. 218, 10 S. W. 493.

77. Knight *v.* Hartman, 81 Mich. 462, 45 N. W. 1008 (entitled to notice to quit); Rawson *v.* Babcock, 40 Mich. 330 (so holding in the absence of covenants to surrender possession).

78. Sanders *v.* Richardson, 14 Pick. (Mass.) 522; Doe *v.* Lawder, 1 Stark. 308, 2 E. C. L. 121. And see Rawson *v.* Babcock, 40 Mich. 330.

79. Nobles *v.* McCarty, 61 Miss. 456; Nestal *v.* Schmid, 39 N. J. L. 686; Jackson *v.* Niven, 10 Johns. (N. Y.) 335.

80. *Alabama.*— Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895; Thornton *v.* Strauss, 79 Ala. 164; Wilkinson *v.* Roper, 74 Ala. 140.

Arkansas.— Block *v.* Smith, 61 Ark. 266, 32 S. W. 1070; Ish *v.* Morgan, 48 Ark. 413, 3 S. W. 440.

Delaware.— Redden *v.* Barker, 4 Harr. 179.

Georgia.— Griffith *v.* Collins, 116 Ga. 420, 42 S. E. 743.

Kentucky.— Eaton *v.* Hunt, 47 S. W. 763, 20 Ky. L. Rep. 860.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 26.

A parol contract to pay rent is sufficient.— Reddick *v.* Hutchinson, 94 Ga. 675, 21 S. E. 712; Vick *v.* Ayres, 56 Miss. 670.

Prior to default there is no relation of landlord and tenant. Oxford *v.* Ford, 67 Ga. 362.

A recital in a note given for the first instalment of the purchase-price that it is given in part payment for rent does not imply that upon default of payment at maturity, the contract of purchase is terminated, and that the relation of landlord and tenant becomes substituted for it. Quertermous *v.* Hatfield, 54 Ark. 16, 14 S. W. 1096.

81. *Alabama.*— Tucker *v.* Adams, 52 Ala. 254; Bell *v.* Ellis, 1 Stew. & P. 294.

Connecticut.— Vandenheuvel *v.* Storrs, 3 Conn. 203.

Illinois.— McNair *v.* Schwartz, 16 Ill. 24.

Kentucky.— Jones *v.* Tipton, 2 Dana 295.

New York.— Smith *v.* Stewart, 6 Johns. 46, 5 Am. Dec. 186.

Vermont.— Stacy *v.* Vermont Cent. R. Co., 32 Vt. 551.

England.— Hope *v.* Booth, 1 B. & Ad. 498, 9 L. J. K. B. O. S. 21, 20 E. C. L. 574.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 25.

82. *Delaware.*— Mariner *v.* Burton, 4 Harr. 69.

Kansas.— Garvin *v.* Jennerson, 20 Kan. 371.

Massachusetts.— Little *v.* Pearson, 7 Pick. 301, 19 Am. Dec. 289.

Missouri.— Coffman *v.* Huck, 24 Mo. 496.

New York.— Sylvester *v.* Ralston, 31 Barb. 286.

Pennsylvania.— Bardsley's Appeal, 4 Pa. Cas. 584, 10 Atl. 39.

Vermont.— Way *v.* Raymond, 16 Vt. 371.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 25.

83. Liability of purchaser for use and occupation see USE AND OCCUPATION.

84. Powell *v.* Hadden, 21 Ala. 745. And see Fowke *v.* Beck, 1 Speers (S. C.) 291.

Parol agreement.— A vendee may by parol agreement with the vendor, in consideration of rescinding a contract of purchase, become the tenant of the latter as to the land, without surrendering possession, provided no rights have intervened that would be defeated by such rescission; but the vendor must show an unconditional surrender by the vendee of his rights (Taylor *v.* Taylor, 112 N. C. 27, 16 S. E. 924; Durant *v.* Taylor, 89 N. C. 351; Riley *v.* Jordan, 75 N. C. 180); and the acts or conduct relied upon as evidence of abandonment must be unequivocal and inconsistent with the contract (Taylor *v.* Taylor, *supra*, holding that declarations of the vendee that he has agreed to pay rent were not evidence of abandonment to be submitted to the jury, where it appeared that he still held the bond for a conveyance and that the notes given therefor were held by the payee, and tnat after the declarations he had refused to surrender the bond or the notes as a condition to renting the premises for another year).

tenant of the vendor, upon a mere repudiation of the contract of sale and cancellation of the deed, where there is no reconveyance to the vendor.[85]

e. By Vendor After Sale. Where a conveyance of land reserves the right of possession in the grantor for a specified period, the vendor, during such term, is not the tenant of the vendee.[86] After the expiration of such period he becomes a tenant at sufferance,[87] the presumption being that he is in possession rightfully and as tenant of the grantee.[88]

f. After Execution or Judicial Sale. By the weight of authority there is no implied promise on the part of a judgment debtor, whose land has been sold under execution, to hold as a tenant of the purchaser in case he remains in possession,[89] although by some decisions it is held that the possessor of the land at the time of an execution or judicial sale is a quasi-tenant of the purchaser.[90] The purchaser of crops on execution against the tenant does not become the tenant of the landlord.[91]

g. Under Agreement to Support Owner. Agreements between the owner of land and children or other relations by which they are to have the enjoyment of the premises in consideration of care and support of the owner are not usually regarded as creating the relation of landlord and tenant,[92] unless the intent to create such relation is shown by the agreement.[93]

h. By Tenant in Common. The mere occupancy of the entire estate, or of more than his share, by a cotenant, will not render him the tenant of the other cotenants;[94] but the relation of landlord and tenant may arise between tenants in common by express contract.[95] An agreement settling controversies as to the

85. Bailey *v.* Campbell, 82 Ala. 342, 2 So. 646.

86. Sims *v.* Humphrey, 4 Den. (N. Y.) 185; Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Wood *v.* Hyatt, 4 Johns. (N. Y.) 313. And see Tew *v.* Jones, 14 L. J. Exch. 94, 13 M. & W. 12. But *compare* Prichard *v.* Tabor, 104 Ga. 64, 30 S. E. 415; Richardson *v.* Harvey, 37 Ga. 224; Hodges *v.* Gates, 9 Vt. 178.

87. Wood *v.* Hyatt, 4 Johns. (N. Y.) 313; Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258. *Contra*, Tew *v.* Jones, 14 L. J. Exch. 94, 13 M. & W. 12. See *infra*, VI, B, 2, a.

88. Prichard *v.* Tabor, 104 Ga. 64, 30 S. E. 415; Larrabee *v.* Lumbert, 34 Me. 79 (holding that the presumption if unrebutted would sustain assumpsit for use and occupation, but that the presumption might be repelled on parol evidence); Sherburne *v.* Jones, 20 Me. 70. *Contra*, Greenup *v.* Vernor, 16 Ill. 26, holding that a tenancy could not be implied from the mere circumstance of a vendor remaining in possession of the premises after a sale.

89. Tucker *v.* Byers, 57 Ark. 215, 21 S. W. 227; Griffin *v.* Rochester, 96 Ind. 545; Cole *v.* Gill, 14 Iowa 527; Chalfin *v.* Malone, 9 B. Mon. (Ky.) 496, 50 Am. Dec. 525. *Contra*, De Silva *v.* Flynn, 9 N. Y. Civ. Proc. 426.

90. Wood *v.* Turner, 7 Humphr. (Tenn.) 517; Siglar *v.* Malone, 3 Humphr. (Tenn.) 16.

91. McClellan *v.* Krall, 43 Kan. 216, 23 Pac. 100.

92. Story *v.* Epps, 105 Ga. 504, 31 S. E. 109; Rollins *v.* Riley, 44 N. H. 9; Matthews *v.* Matthews, 49 Hun (N. Y.) 346, 2 N. Y. Suppl. 121; Schreiber *v.* Goldsmith, 35 Misc. (N. Y.) 45, 70 N. Y. Suppl. 236. But see Allen *v.* Russell, 59 Ohio St. 137, 52 N. E. 121, holding that, where, after a homestead has been set off to a mother in real estate owned by her in fee-simple, her son already occupying the premises, agrees to support her in consideration of its rents and profits, and continues in possession of the premises, and to support her under the agreement during her lifetime, he is not liable after her death to account to the creditors of the mother who have judgment liens thereon for the rents and profits that accrued prior to his mother's death.

93. See Criswell *v.* Grumbling, 107 Pa. St. 408.

94. Bird *v.* Earle, 15 Fla. 447. The mere fact that one tenant in common who is permitted to have the exclusive occupation of the entire property agrees to pay his cotenant a reasonable compensation for the use of his undivided share is not in itself sufficient to make his occupancy constitute that of a tenant at will. Smith *v.* Smith, 98 Me. 597, 57 Atl. 999.

95. *Alabama.*— Evans *v.* English, 61 Ala. 416.

Illinois.— Chapin *v.* Foss, 75 Ill. 280, holding that where a firm occupies premises belonging to two of its members as tenants in common, and pays rent to them for its use, the relation of landlord and tenant arises.

Kentucky.— Barghman *v.* Portman, 14 S. W. 342, 12 Ky. L. Rep. 342.

Maine.— Smith *v.* Smith, 98 Me. 597, 57 Atl. 999, holding the evidence insufficient to establish the intention to create the relation of landlord and tenant.

Mississippi.— See Rives *v.* Nesmith, 64

mode of enjoyment of the estate is not, however, sufficient.[96] The lessee of one tenant in common is not liable to another tenant in common to whom he has not attorned.[97]

3. From Payment or Acceptance of Rent. Where a person in the possession of land pays rent to one claiming as owner, a presumption of the relation of landlord and tenant arises,[98] which, however, may be overcome by a showing that the payment was by mistake,[99] or by other circumstances proving it not to have been in recognition of the relation.[1] Conversely an acceptance of rent by the owner is *prima facie* proof that the occupant is his tenant,[2] which, however, may be rebutted by proof of other facts and circumstances.[3] The acceptance of rent from the assignee of an unexpired term does not create a new term by implication.[4]

4. As Incident to Mortgage or Deed of Trust — a. Where Legal Title Passes. Where the theory is followed that a mortgage passes the legal title to the mortgagee, the status of the mortgagor in possession is in the nature of that of a tenant at will or by sufferance to the mortgagee,[5] and the mortgagee is regarded as becoming the landlord of tenants holding under leases from the mortgagor prior to the mortgage,[6] an attornment under statutory modifications of the early com-

Miss. 807, 2 So. 174, holding that where one of two vendees decided not to complete the purchase, and the purchase-money notes were assumed by the other, the relinquishing purchaser became the tenant of the latter through an agreement by which he was to have the possession of the premises, for a specified period to reimburse him for the cash paid.

England.— Leigh *v.* Dickeson, 12 Q. B. D. 194, 53 L. J. Q. B. 120.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 21.

An oral agreement may be sufficient. Smith *v.* Smith, 98 Me. 597, 57 Atl. 999.

96. Corrigan *v.* Riley, 26 N. J. L. 79.

97. Austin *v.* Ahearne, 61 N. Y. 6.

98. *Alabama.*— See Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657.

Delaware.— Doe *v.* Jefferson, 5 Houst. 477.

Illinois.— Voigt *v.* Resor, 80 Ill. 331.

Indiana.— Cressler *v.* Williams, 80 Ind. 366; Duffy *v.* Carman, 3 Ind. App. 207, 29 N. E. 454.

Louisiana.— Brandagee *v.* Fernandez, 1 Rob. 260.

New Hampshire.— Hill *v.* Boutell, 3 N. H. 502.

New Jersey.— Joslin *v.* Ervien, 50 N. J. L. 39, 12 Atl. 136.

New York.— People *v.* Teed, 48 Barb. 424, 33 How. Pr. 238; Van Rensselaer *v.* Secor, 32 Barb. 469; Porter *v.* Bleiler, 17 Barb. 149; Dorschel *v.* Burkly, 18 Misc. 240, 41 N. Y. Suppl. 389 (so holding where the guardian of an infant heir permitted the lessee of a life-tenant to remain in possession after the death of the life tenant); Weinhaner *v.* Eastern Brewing Co., 85 N. Y. Suppl. 354.

Virginia.— Virginia Min., etc., Co. *v.* Hoover, 82 Va. 449, 4 S. E. 689.

England.— Dolby *v.* Iles, 11 A. & E. 335, 4 Jur. 432, 3 P. & D. 287, 9 L. J. Q. B. 51, 39 E. C. L. 195; Doe *v.* Wilkinson, 3 B. & C. 413, 5 D. & R. 273, 10 E. C. L. 192; Doe *v.* Clarke, Peake Add. Cas. 239; Jenkins *v.* Hill, 2 Wkly. Rep. 268.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 18.

Payment to agents of tenants in common is sufficient to raise an implication of a joint demise. Porter *v.* Bleiler, 17 Barb. (N. Y.) 149.

99. Robinson *v.* Troup Min. Co., 55 Mo. App. 662.

1. Hudson *v.* White, 17 R. I. 519, 23 Atl. 57 (where payment was made simply to prevent being evicted from the premises, and to gain time in which to bring suit to establish equitable title); Strahan *v.* Smith, 4 Bing. 91, 5 L. J. C. P. O. S. 95, 12 Moore C. P. 289, 13 E. C. L. 414; Pomeroy *v.* Dennison, 13 U. C. Q. B. 283. And see Magee *v.* Gilmour, 17 Ont. 620 [*affirmed* in 17 Ont. App. 27].

2. Weinhaner *v.* Eastern Brewing Co., 85 N. Y. Suppl. 354; Simmons *v.* Pope, 84 N. Y. Suppl. 973.

3. Doe *v.* Crago, 6 C. B. 90, 12 Jur. 705, 17 L. J. C. P. 263, 60 E. C. L. 89; Doe *v.* Francis, 2 M. & Rob. 57; Hurley *v.* Hanrahan, 15 Wkly. Rep. 990; Manning *v.* Dever, 35 U. C. Q. B. 294.

4. Hartnack *v.* James, 1 Leg. Gaz. (Pa.) 364.

5. Judd *v.* Woodruff, 2 Root (Conn.) 298; Beacher *v.* Cook, 1 Root (Conn.) 296 (both holding that a tenancy at will arises); Vance *v.* Johnson, 10 Humphr. (Tenn.) 214; Pope *v.* Riggs, 9 B. & C. 245, 7 L. J. K. B. O. S. 246, 4 M. & R. 193, 17 E. C. L. 116; Moss *v.* Gallimore, Dougl. (3d ed.) 279. But see Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354 (holding that while the mortgagee may consider the mortgagor as his tenant for some purposes, he is not such a tenant as to be entitled to notice to quit, and that he may also be considered as holding without right and as a trespasser); Bartlett *v.* Hitchcock, 10 Ill. App. 87.

6. Mansony *v.* U. S. Bank, 4 Ala. 735; Kimball *v.* Lockwood, 6 R. I. 138; Rogers *v.* Humphreys, 4 A. & E. 297, 1 Harr. & W. 625, 5 L. J. K. B. 65, 5 N. & M. 511, 31 E. C. L. 144. And see Reed *v.* Bartlett, 9 Ill. App. 267.

mon-law rule[7] being unnecessary;[8] although the tenant is protected in any payment of rent to the mortgagor, made before notice of the mortgagee's rights.[9] A lease executed after the mortgage by the mortgagor in possession, without privity of the mortgagee, does not render the lessee the tenant of the mortgagee,[10] unless the tenant has attorned to the mortgagee;[11] nor does the purchaser on foreclosure[12] or mortgagee's[13] sale become the landlord of the tenants of the mortgagor.[14]

b. Where Legal Title Does Not Pass. Where, however, the title is not regarded as passing to the mortgagee, the mortgagor cannot be regarded as the mortgagee's tenant.[15] So the tenant of the mortgagor is not the tenant of the mortgagee[16] or of his assignee;[17] nor is a purchaser from the mortgagor a tenant of the mortgagee.[18] After the expiration of the period of redemption from a foreclosure sale, the mortgagor by recognizing the mortgagee as owner and paying rent to him may create the relationship of landlord and tenant.[19]

c. Effect of Express Agreement. The relationship of landlord and tenant may be created between the mortgagee and mortgagor by express agreement,[20] an

7. See *infra*, I, F, 1, b.

8. Mansony *v.* U. S. Bank, 4 Ala. 735; Moss *v.* Gallimore, Dougl. (3d ed.) 279.

9. Mansony *v.* U. S. Bank, 4 Ala. 735, holding that the mortgagee of land, entitled to the possession, might recover from the tenant holding under the mortgagor, rents accruing subsequent to notice of the mortgagee's rights.

10. Bartlett *v.* Hitchcock, 10 Ill. App. 87; Den *v.* Stockton, 12 N. J. L. 322; Bridwell *v.* Barcroft, 2 Ohio Dec. (Reprint) 697; Keech *v.* Hall, Dougl. (3d ed.) 21, holding that, although the tenant took without notice of the mortgage, he was not entitled to notice to quit before ejectment brought by the mortgagee.

11. *Illinois.*— Reed *v.* Bartlett, 9 Ill. App. 267.

Michigan.— Hogsett *v.* Ellis, 17 Mich. 351.

New York.— See Jones *v.* Clark, 20 Johns. 51; McKircher *v.* Hawley, 16 Johns. 289.

Rhode Island.— Kimball *v.* Lockwood, 6 R. I. 138.

England.— Towerson *v.* Jackson, [1891] 2 Q. B. 484, 56 J. P. 21, 61 L. J. Q. B. 36, 65 L. T. Rep. N. S. 332, 40 Wkly. Rep. 37; Evans *v.* Elliot, 9 A. & E. 342, 8 L. J. Q. B. 51, 1 P. & D. 256, 1 N. W. & H. 144, 36 E. C. L. 193 [*overruling* in effect Pope *v.* Biggs, 9 B. & C. 245, 7 L. J. K. B. O. S. 246, 4 M. & R. 193, 17 E. C. L. 116; Waddilove *v.* Barnett, 2 Bing. N. Cas. 538, 4 Dowl. P. C. 348, 1 Hodges 395, 5 L. J. C. P. 145, 2 Scott 763, 29 E. C. L. 652] (holding that a mere notice by the mortgagee to the tenant that there was a mortgage and that it was unpaid did not render the tenant of the mortgagor tenant of the mortgagee); Rogers *v.* Humphreys, 4 A. & E. 299, 1 Harr. & W. 625, 5 L. J. K. B. 65, 5 N. & M. 511, 31 E. C. L. 144; Alchorne *v.* Gomme, 2 Bing. 54, 2 L. J. C. P. O. S. 118, 9 Moore C. P. 130, 9 E. C. L. 478.

Canada.— Brock *v.* Forster, 34 N. Brunsw. 262; Parker *v.* McIlwain, 17 Ont. Pr. 84 [*reversing* 16 Ont. Pr. 555]. See also McLennan *v.* Hannum, 31 U. C. C. P. 210.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 31.

Compare Massachusetts Hospital L. Ins. Co. *v.* Wilson, 10 Metc. (Mass.) 126, holding that upon entry the mortgagee was entitled to accruing rents.

Where the circumstances show a contrary intention, a new contract of tenancy will not be inferred from the fact of a notice by a mortgagee to pay rent to him, and acquiescence by the tenant by payment of the rent. Forse *v.* Sovereen, 14 Ont. App. 482.

12. Peters *v.* Elkins, 14 Ohio 344.

13. Bartlett *v.* Hitchcock, 10 Ill. App. 87; Reed *v.* Bartlett, 9 Ill. App. 267.

14. After such sale, in order to create a privity of contract, there must be some affirmative act by the parties evidencing an intention to recognize the lease as still subsisting, or a new holding under the same or different terms. Gartside *v.* Outley, 58 Ill. 210, 11 Am. Rep. 59. And the act of the mortgagee or purchaser in demanding rent of the tenant who holds under a lease subsequent to the mortgage will not create the relation of landlord and tenant when such demand has not been acted upon. Bartlett *v.* Hitchcock, 10 Ill. App. 87.

15. Ray *v.* Boyd, 96 Ga. 808, 22 S. E. 916; Anderson *v.* Smith, 103 Mich. 446, 61 N. W. 778.

16. Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Jackson *v.* Fuller, 4 Johns. (N. Y.) 215, so holding of a tenant of the mortgagor's interest on execution sale.

A power of attorney given by a mortgagor to his mortgagee to rent the mortgaged premises, collect the rents and apply them to the mortgage, and for the further purpose of selling and conveying the premises, does not place the mortgagee in possession so as to make him the landlord of a tenant to whom he had let the premises. Matter of Hosley, 56 Hun (N. Y.) 240, 9 N. Y. Suppl. 752.

17. Jackson *v.* Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557.

18. Jackson *v.* Chase, 2 Johns. (N. Y.) 84.

19. Steele *v.* Bond, 32 Minn. 14, 18 N. W. 830. But see Steele *v.* Bond, 28 Minn. 267, 9 N. W. 772.

20. *Ex p.* Voisey, 21 Ch. D. 442, 52 L. J. Ch. 121, 47 L. T. Rep. N. S. 362, 31 Wkly. Rep. 19.

agreement of this kind being frequently inserted by what is termed an attornment clause in the mortgage,[21] it being necessary to the validity of such clauses that they reserve a fixed rental[22] which is such an amount as to evidence that it is not a sham for the purpose of securing the mortgagee additional advantages over other creditors, but is a *bona fide* reservation of rent.[23] Agreements in mortgages by which the mortgagor is to become the tenant at will of the purchaser after sale thereunder are also regarded as valid,[24] and a constructive entry will be deemed to have been made by the purchaser at the time of his acquisition of title.[25] The parties to a trust deed, as in the case of mortgages, may agree that the grantor shall become the tenant of the grantee or trustee,[26] or the grantor may agree that one placed in possession by the trustee shall be regarded as the trustee's tenant.[27] Similarly by agreement of the parties, one entering under a mortgagee in possession may be regarded as his tenant,[28] or a lease made by the mortgagee out of possession may render the lessee the tenant of the mortgagor.[29]

F. Arising From Transfer or Devolution of Reversion and Attornment

— 1. Attornment — a. In General. The relation of landlord and tenant may arise from attornment,[30] which is the term applied to the consent of the tenant to hold under a transferee of the reversion.[31]

b. Necessity. Under the feudal system an attornment was essential to the validity of a grant of a reversion,[32] but this rule was altered by an early English statute[33] and has apparently never been regarded as a part of the law of the United

21. *Ex p.* Voisey, 21 Ch. D. 442, 52 L. J. Ch. 121, 47 L. T. Rep. N. S. 362, 31 Wkly. Rep. 19; Miller *v.* Imperial Loan, etc., Co., 11 Manitoba 247; Linstead *v.* Hamilton Loan, etc., Soc., 11 Manitoba 199.

22. Pegg *v.* Supreme Ct. I. O. F., 1 Ont. L. Rep. 97 [*distinguishing* Canada Trust, etc., Co. *v.* Lawrason, 10 Can. Sup. Ct. 679].

23. *Ex p.* Voisey, 21 Ch. D. 442, 52 L. J. Ch. 121, 47 L. T. Rep. N. S. 362, 31 Wkly. Rep. 19; *In re* Stockton Iron Furnace Co., 10 Ch. D. 335, 48 L. J. Ch. 417, 40 L. T. Rep. N. S. 19, 27 Wkly. Rep. 433; *Ex p.* Williams, 7 Ch. D. 138, 47 L. J. Bankr. 26, 37 L. T. Rep. N. S. 764, 26 Wkly. Rep. 274; Hobbs *v.* Ontario Loan, etc., Co., 18 Can. Sup. Ct. 483 [*reversing* 16 Ont. App. 255 (*reversing* 15 Ont. 440)].

24. Wade *v.* McCormack, 68 Mo. App. 12; Brewster *v.* McNab, 36 S. C. 274, 15 S. E. 233; Griffith *v.* Brackman, 97 Tenn. 387, 37 S. W. 273, 49 L. R. A. 435. See also Clowes *v.* Hughes, L. R. 5 Exch. 160, 39 L. J. Exch. 62, 22 L. T. Rep. N. S. 103, 18 Wkly. Rep. 459.

25. Griffith *v.* Brackman, 97 Tenn. 387, 37 S. W. 273, 49 L. R. A. 435.

26. Equity Bldg., etc., Assoc. *v.* Murphy, 75 Mo. App. 57; Sexton *v.* Hull, 45 Mo. App. 339. *Compare* Walker *v.* Giles, 6 C. B. 662, 13 Jur. 588, 18 L. J. C. P. 323, 60 E. C. L. 662.

A reservation to the grantor in a deed of trust of the right to possess and enjoy, and receive to his own use the rent and profits of the mortgaged property, amounts to a redemise of the premises. Loring *v.* Bartlett, 4 App. Cas. (D. C.) 1; Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. 225; Wilkinson *v.* Hall, 3 Bing. N. Cas. 508, 3 Hodges 56, 6 L. J. C. P. 82, 4 Scott 301, 32 E. C. L. 237.

27. Candler *v.* Mitchell, 119 Mich. 464, 78 N. W. 551.

28. Houston *v.* Smythe, 66 Miss. 118, 5 So. 520, in which a contract of lease and sale by the mortgagor, and rent and purchase notes made to the mortgagor or bearer and transferred to the mortgagee as was intended by the parties prior to their execution, were held sufficient to create the relation of landlord and tenant between the purchaser and the mortgagee.

29. Cramton *v.* Tarbell, 6 Fed. Cas. No. 3,349.

30. James *v.* Miles, 54 Ark. 460, 16 S. W. 195; Austin *v.* Ahearne, 61 N. Y. 6, holding that where a lessee occupying under a lease from one tenant in common of the premises attorns to the other tenant in common, with consent of his lessor, the lease thereby becomes valid as to the interests of both, and both are equally bound by its terms.

Right of tenant to attorn to third person see *infra*, III, G, 11.

31. Kimball *v.* Lockwood, 6 R. I. 138 [*citing* Coke Litt. 309*a*, Butler's note 272]; Doe *v.* Smith, 8 A. & E. 255, 2 Jur. 854, 7 L. J. Q. B. 158, 2 M. & R. 7, 3 N. & P. 335, 1 W. W. & H. 429, 35 E. C. L. 579; Doe *v.* Edwards, 5 A. & E. 95, 2 Harr. & W. 139, 5 L. J. K. B. 238, 6 N. & M. 633, 31 E. C. L. 538; Cornish *v.* Searell, 8 B. & C. 471, 6 L. J. K. B. O. S. 254, 1 M. & R. 703, 15 E. C. L. 234.

Attorn defined see 4 Cyc. 888.

Attornment defined see 4 Cyc. 1036.

32. Since the duties of the landlord and tenant were in a degree reciprocal, the tenant could not be compelled, without his assent, to discharge his duties of fealty and service to a new lord. Coke Litt. 310*b*. See also Vigers *v.* St. Paul, 14 Q. B. 909, 14 Jur. 1007, 19 L. J. Q. B. 84, 68 E. C. L. 909.

33. St. 4 Anne, c. 16, §§ 9, 10. See Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63; Moss *v.* Gallimore, Dougl. (3d ed.) 279; Doe *v.*

States,[34] express statutory provision in many of the states making an attornment unnecessary to constitute the tenant a tenant of the transferee of the reversion.[35] An assignment of the lease is not sufficient to create the relationship of landlord and tenant, entitling the transferee to recover rent, without an attornment.[36]

c. Sufficiency. Any act of the tenant by which he recognizes a change of the person to whom the rent is due is an attornment.[37] It is not necessary that the agreement to attorn should express a payment of rent,[38] but payment of rent is a sufficient attornment,[39] as is a promise to pay rent,[40] the taking of a lease,[41] or a promise to surrender the possession.[42] Conversely, where the tenant is dealt with by the vendee as his tenant, his possession becomes that of the vendee.[43]

d. Effect. After an attornment the tenant holds upon the same terms as under his former landlord,[44] a new tenancy arising only when the time and conditions in the original lease are departed from.[45] But the possession of the tenant is that of the new owner.[46] Although the tenant has attorned to the transferee of

Brown, 2 E. & B. 331, 17 Jur. 1161, 22 L. J. Q. B. 432, 77 E. C. L. 331; Williams *v.* Hayward, 1 E. & E. 1040, 5 Jur. N. S. 1417, 28 L. J. Q. B. 374, 7 Wkly. Rep. 563, 102 E. C. L. 1040.

Overlapping terms.— Where two leases are granted the tenant of the first expiring term must attorn to the holder of the longer term in order that he may be regarded as the holder of the reversion. Edwards *v.* Wickwar, L. R. 1 Eq. 403, 12 Jur. N. S. 158, 35 L. J. Ch. 309, 14 Wkly. Rep. 363; Rawlyns' Case, 4 Coke 52*a*.

34. *Kentucky.*— Breeding *v.* Taylor, 13 B. Mon. 477.

Maine.— Page *v.* Esty, 54 Me. 319.

Maryland.— Funk *v.* Kincaid, 5 Md. 404.

Massachusetts.— Keay *v.* Goodwin, 16 Mass. 1.

Minnesota.— Jones *v.* Rigby, 41 Minn. 530, 43 N. W. 390.

Nebraska.— Hendrickson *v.* Beeson, 21 Nebr. 61, 31 N. W. 266.

New York.— Griffin *v.* Barton, 22 Misc. 228, 49 N. Y. Suppl. 1021.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 13, 14.

35. See the statutes of the several states. And see Doe *v.* Clayton, 73 Ala. 359; McDonald *v.* Hanlon, 79 Cal. 442, 21 Pac. 861; Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; Woodbury *v.* Butler, 67 N. H. 545, 38 Atl. 379; Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.

Necessity of attornment to create liability for rent see *infra*, VIII, A, 7, b, (I), (C).

On eviction by a paramount title a tenancy does not arise. Allen *v.* Thayer, 17 Mass. 299; Codman *v.* Jenkins, 14 Mass. 93; Fletcher *v.* McFarlane, 12 Mass. 43.

36. Oswald *v.* Mollet, 29 Ill. App. 449.

37. Oswald *v.* Mollet, 29 Ill. App. 449. And see Moore *v.* Johnston, 2 Speers (S. C.) 288.

38. Austin *v.* Ahearne, 61 N. Y. 6.

39. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Flagg *v.* Geltmacher, 98 Ill. 293; Leitch *v.* Boyington, 84 Ill. 179; Hayes *v.* Lawyer, 83 Ill. 182; Fisher *v.* Dering, 60 Ill. 114; Cummings *v.* Smith, 114 Ill. App. 35; Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; Swope *v.* Hopkins, 119 Ind. 125, 21 N. E. 462; Wood *v.* Custer, 16 Montg. Co. Rep. (Pa.) 118. But see Hazeldine *v.* Heaton, Cab. & E. 40, holding that when a lease has been assigned in consideration of certain quarterly payments during the remainder of the term, the assignee by making one such payment does not attorn to the assignor so as to give him a right of distress for sums subsequently becoming due.

Payment under protest.— Where a lessee pays rent to the purchaser of the reversion, on threat of suit, it is an attornment, although the payment was expressed to be merely for the use and occupation of the premises, and was accompanied by a protest, and the denial of plaintiff's right to receive the money, and also a declaration that the lessee did not recognize the relation of landlord and tenant as existing between him and the purchaser. McCardell *v.* Williams, 19 R. I. 701, 36 Atl. 719.

40. Kimball *v.* Lockwood, 6 R. I. 138. And see Gladman *v.* Plumer, 10 Jur. 109, 15 L. J. Q. B. 79.

41. Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63.

42. Thompson *v.* Chapman, 57 Ga. 16.

43. McLean *v.* Spratt, 19 Fla. 97; Knorr *v.* Raymond, 73 Ga. 749.

A notice to quit is a recognition of the tenancy by the grantee. Rosebury *v.* Shields, 26 Ind. 153.

44. Oswald *v.* Mollet, 29 Ill. App. 449; Austin *v.* Ahearne, 61 N. Y. 6; Doe *v.* Smith, 8 A. & E. 255, 2 Jur. 854, 7 L. J. Q. B. 158, 3 N. & P. 335, 1 W. W. & H. 429, 35 E. C. L. 579; Doe *v.* Edwards, 5 A. & E. 95, 2 Harr. & W. 139, 5 L. J. K. B. 238, 6 N. & M. 633, 31 E. C. L. 538; Cornish *v.* Searell, 8 B. & C. 471, 6 L. J. K. B. O. S. 254, 1 M. & R. 703, 15 E. C. L. 234.

45. Austin *v.* Ahearne, 61 N. Y. 6; Tilford *v.* Fleming, 64 Pa. St. 300; Wood *v.* Custer, 16 Montg. Co. Rep. (Pa.) 118; Cornish *v.* Searell, 8 B. & C. 471, 6 L. J. K. B. O. S. 254, 1 M. & R. 703, 15 E. C. L. 234.

46. Mecham *v.* McKay, 37 Cal. 154. And see Mason *v.* Gray, 36 Vt. 308; Cooper *v.* Lands, 14 L. T. Rep. N. S. 287, 14 Wkly. Rep. 610.

the reversion, the transferee, by his acts, may be estopped from asserting that the possession of the tenant is not that of the original landlord.[47]

2. On Death of Reversioner.[48] Upon the death of the landlord his tenant continues in the same relation to those who are by law entitled to succeed to the rights of the deceased, until his disclaimer of such relation is made known to them.[49] And such relation cannot be altered by a collusive attornment to a stranger to the title.[50] Where, upon the death of the landlord, the tenant abandons the premises, his reëntry under one who has taken possession of the premises as owner does not render him the tenant of the original landlord or his representative.[51]

G. Creation by Estoppel. The parties may by their acts inconsistent with a subsequent contrary assertion estop themselves from denying that the relation of landlord and tenant exists, in the same manner as they may estop themselves from asserting other matters *in pais*,[52] as for example, by judicial admissions,[53]

47. Turner *v.* Davis, 48 Conn. 397.

48. **Rights of remainder-man concerning lease by life-tenant** see Estates, 16 Cyc. 640.

49. Kellum *v.* Balkum, 93 Ala. 317, 9 So. 463; Doe *v.* Clayton, 73 Ala. 359 (holding that by the provisions of the statute relating to transfer of the reversion an attornment was unnecessary); Chapin *v.* Foss, 75 Ill. 280; Howard *v.* Terry, 4 Sneed (Tenn.) 419. And see Syme *v.* Sanders, 4 Strobh. (S. C.) 341, holding that where one who entered on land as tenant *per autre vie* of his wife, leased the estate, the lessee, and his tenant, after the death of the tenant *per autre vie*, must attorn to the title under which such tenant entered, and not to such tenant's heirs. But *compare* Horsey *v.* Horsey, 4 Harr. (Del.) 517, holding that one coming in as tenant to a tenant for life does not upon his death become the tenant of the remainder-man without his assent, express or implied.

Where one entitled to a part interest has leased the entire estate, a person who at the lessor's death becomes entitled to the entire estate may hold the lessee as his tenant only as to the part interest to which the lessor was entitled. McGillick *v.* McAllister, 10 Ill. App. 40.

On refusal to attorn.— A tenant of a person deceased may, on the expiration of his lease, refuse to attorn to his heir at law. This refusal puts an end to the tenancy, and his possession thereon becomes adverse. Sampson *v.* Shaeffer, 3 Cal. 196.

50. Howard *v.* Terry, 4 Sneed (Tenn.) 419.

51. Wellborn *v.* Hood, 68 Ga. 824.

52. Schwarze *v.* Mahoney, 97 Cal. 131, 31 Pac. 908 (where a person occupied premises without a specific promise to pay rent); Goodman *v.* Jones, 26 Conn. 264 (where the mortgagee of a stock of goods acknowledged himself in possession of the premises and promised to pay the rent); King *v.* Cressap, 22 La. Ann. 211 (holding that while the lessor continued to collect rent he could not deny the tenancy); Bullis *v.* Presidio Min. Co., 75 Tex. 540, 12 S. W. 397. See also Jarman *v.* Hale, [1899] 1 Q. B. 994, 68 L. J. Q. B. 681; Allason *v.* Stark, 9 A. & E. 255, 1 P. & D. 183, 8 L. J. M. C. 13, 36 E. C. L. 151; Lee *v.* Smith, 2 C. L. R. 1079, 9 Exch. 662, 23 L. J. Exch. 198, 2 Wkly. Rep. 377; Archbold *v.* Scully, 9 H. L. Cas. 360, 7 Jur. N. S. 1169, 5 L. T. Rep. N. S. 160, 11 Eng. Reprint 769.

After an acceptance of a lease the tenant cannot afterward deny the relation. David Stevenson Brewing Co. *v.* Culbertson, 18 Misc. (N. Y.) 486, 41 N. Y. Suppl. 1039 (holding that where one holding premises under a lease from a person other than the owner assigns such lease to the owner and takes a new lease from him, he cannot thereafter claim to hold under the first mentioned lease); Hockenbury *v.* Snyder, 2 Watts & S. (Pa.) 240 (so holding, although a person in possession of the land of another was compelled by threats of a suit to accept a lease).

Submission to a distress for rent is an acknowledgment of the tenancy. Panton *v.* Jones, 3 Campb. 372, 14 Rev. Rep. 757.

Acceptance of rent may estop the owner from denying that a person in the possession of the land is his tenant. Gartside *v.* Outley, 58 Ill. 210, 11 Am. Rep. 59; Doe *v.* Taniere, 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49, 64 E. C. L. 998.

Service of notice to quit by the owner of land upon the party in possession is not an admission of a subsisting tenancy, especially where such notice is served at the same time as a declaration and notice in ejectment. Powers *v.* Ingraham, 3 Barb. (N. Y.) 576.

Taking liquor license for the rented premises in the name of one person does not estop the owner from asserting a tenancy in another. S. Liebmann's Sons Brewing Co. *v.* De Nicolo, 46 Misc. (N. Y.) 268, 91 N. Y. Suppl. 791.

53. Boniel *v.* Block, 44 La. Ann. 514, 10 So. 869 (where the landlord was held estopped by proceedings under the Landlord and Tenant Act); Hostetter *v.* Hykas, 3 Brewst. (Pa.) 162 (holding that a tenant who alleges an extension of the lease, in an action for possession by the landlord, cannot deny such lease on a distress for rent).

A statutory recognizance given in a landlord and tenant process, conditioned for the

or recitals in deeds.[54] But an erroneous disclaimer of the relation of landlord and tenant, made under a misapprehension of the landlord's rights, will not estop the landlord unless such disclaimer has been acted upon by the tenant or prejudiced him.[55]

H. Evidence as to Relation and Province of Jury. The existence of a tenancy or the relation of landlord and tenant with reference to particular property is in general a question of fact[56] and may be proved[57] or disproved[58] by parol or circumstantial evidence, such as the admissions or declarations of the

payment of rent in case a tenancy is found to exist, does not estop the tenant from denying the relation. Robinson *v.* Morgan, 58 N. H. 412.

A motion to dismiss on the ground that no notice to quit had been given, made in a previous trial of an action of ejectment between the parties, is not an admission for the purposes of a subsequent trial that defendant was tenant of plaintiff. Morton *v.* Lawson, 1 B. Mon. (Ky.) 45.

54. Third persons who take a deed expressly subject to a lease are bound by the recitals of the deed, and estopped from denying the validity of the lease (Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368), but such an estoppel does not arise where the lease itself is not recited (Earle *v.* McGoldrick, 15 Misc. (N. Y.) 135, 36 N. Y. Suppl. 803, so holding where the deed was subject to "any rights" of a certain person who claimed to be a lessee "or those claiming under him").

55. Chambers *v.* Ross, 25 N. J. L. 293.

56. *Connecticut.*— Branch *v.* Doane, 17 Conn. 402.

Delaware.— Doe *v.* Gray, 2 Houst. 135.

Michigan.— McKenzie *v.* Sykes, 47 Mich. 294, 11 N. W. 164.

New York.— Rawley *v.* Brown, 71 N. Y. 85; Ofschlager *v.* Surbeck, 22 Misc. 595, 50 N. Y. Suppl. 862.

Pennsylvania.— Milling *v.* Becker, 96 Pa. St. 182.

Vermont.— Chamberlin *v.* Donahue, 44 Vt. 57.

Canada.— Reynolds *v.* Metcalf, 13 U. C. C. P. 382.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 49.

But see Howard *v.* Carpenter, 22 Md. 10, holding that where all the facts upon which a tenancy is claimed to exist are admitted in writing, the court may determine the legal relation which they constitute, without submitting them to the jury.

In actions for rent see *infra*, VIII, B, 13, a.

In actions to recover possession see *infra*, X, B, 9; X, C, 19, 20, d.

57. Rainey *v.* Capps, 22 Ala. 288; Doe *v.* Gray, 2 Houst. (Del.) 135. Evidence that a person, when charged by the tenant in the presence of the landlord with having assumed the lease, made no denial, is evidence of such an assumption. Dulin *v.* Knechtel, (Tex. Civ. App. 1899) 51 S. W. 350.

Expired lease.— To show the former existence of the relation of landlord and tenant, and to raise the presumption of its continuance, a lease, the term of which has expired, may be introduced. Longfellow *v.* Longfellow, 54 Me. 240.

Where defendant is claiming to hold under a contract of purchase, a lease under which he was in possession at the time he claims the contract of purchase was made is admissible. Bemis *v.* Allen, 119 Iowa 160, 93 N. W. 50.

Evidence held sufficient to establish relation see Decatur Land Co. *v.* Cook, (Ala. 1900) 27 So. 559; Drew *v.* Billings-Drew Co., 132 Mich. 65, 92 N. W. 774; Brown *v.* Storey, 4 Jur. 319, 9 L. J. C. P. 225, 1 M. & G. 117, 1 Scott N. R. 9, 39 E. C. L. 674; Sturdee *v.* Merritt, 5 N. Brunsw. 641; Crow *v.* Lowden, 11 Nova Scotia 78.

58. Waller *v.* Morgan, 18 B. Mon. (Ky.) 136 (holding that where a person was employed as a teacher in a college at a fixed salary, with the privilege of occupying rooms in the president's house, for his family and servants, the fact that the employee kept up and maintained a separate establishment and table was not conclusive of the relation of tenant, but might be rebutted by other testimony showing that the separate establishment was not independent of the proprietor's control, but consistent with his right of supervision and entry); Larrabee *v.* Lumbert, 34 Me. 79 (holding that parol evidence may be sufficient to rebut the presumption that a grantor who remains in the possession of the premises conveyed, does so as tenant of the grantee); Jackson *v.* Vosburgh, 7 Johns. (N. Y.) 186.

Evidence of lack of title of the lessor does not tend to show the non-existence of a tenancy. Gage *v.* Campbell, 131 Mass. 566.

Unreasonableness or unlikelihood of a promise to pay rent is not evidence of its non-existence. Swann *v.* Kidd, 78 Ala. 173.

Evidence held insufficient to establish relation see Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175; Wickham *v.* Wickham, (Iowa 1902) 90 N. W. 527; Illinois Cent. R. Co. *v.* Ross, 83 S. W. 635, 26 Ky. L. Rep. 1251; Gillespie *v.* Hendren, 98 Mo. App. 622, 73 S. W. 361; Freschi *v.* Molony, 65 N. Y. App. Div. 516, 72 N. Y. Suppl. 819; Marcotte *v.* Sheridan, 91 N. Y. Suppl. 744; Walter *v.* Transue, 17 Pa. Super. Ct. 94; Majors *v.* Goodrich, (Tex. Civ. App. 1900) 54 S. W. 919.

Termination of relation.— The declaration of a landlord that his tenant had given up his lease, accompanied by an unsuccessful attempt to lease to another, is not conclusive evidence that the relation has ceased.

parties on the subject.[59] So evidence of a demand for rent,[60] or the payment of rent,[61] is admissible. Where defendant claims to be holding under a lease from another, plaintiff is entitled to introduce such evidence as may legitimately tend to discredit the lease, or to indicate a doubt on the part of defendant as to its authenticity.[62] In the absence of fraud, surprise, or mistake, parol evidence is inadmissible to show that a lease was in fact a mortgage.[63]

II. LEASES AND AGREEMENTS.

A. Requisites and Validity — 1. In General — a. Nature of Contract. The contract by which the relation of landlord and tenant is created is usually known as a lease,[64] which according to a commonly accepted definition is a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of the parties.[65] No particular

Milling *v.* Becker, 96 Pa. St. 182; Kiester *v.* Miller, 25 Pa. St. 481.

59. Doe *v.* Gray, 2 Houst. (Del.) 135; Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479, holding that as against the wife's contention that she was a tenant, a letter of which the wife had knowledge, written by her husband, remitting rent and asking for repairs, was admissible to show that the husband was the tenant.

Recitals in the rent notes that the maker was tenant of the payee and had been for ten years, while admissible to explain the present possession, are not competent proof of a tenancy in the past for any length of time. McKay *v.* Glover, 52 N. C. 41.

A record of a judgment confessed by a tenant to his landlord is evidence of the relation. Weidner *v.* Foster, 2 Penr. & W. (Pa.) 23.

Secondary evidence of lease see EVIDENCE, 17 Cyc. 465.

60. Doe *v.* Gray, 2 Houst. (Del.) 135.

61. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657 (holding a rent note admissible); Doe *v.* Jefferson, 5 Houst. (Del.) 477; Brandagee *v.* Fernandez, 1 Rob. (La.) 260. And see Phillips *v.* Mosely, 1 C. & P. 262, 12 E. C. L. 158, holding that evidence that plaintiff has paid defendant rent is not sufficient proof of a specific demise.

A receipt for rent is not conclusive as against direct evidence of time of beginning of tenancy. Colby *v.* Wall, 12 U. C. C. P. 95.

62. Freschi *v.* Molony, 65 N. Y. App. Div. 516, 72 N. Y. Suppl. 819.

63. Stewart *v.* Murray, 13 Minn. 426. See, generally, EVIDENCE, 17 Cyc. 622 *et seq.*

64. See Becker *v.* Becker, 13 N. Y. App. Div. 342, 43 N. Y. Suppl. 17. The contract employed in the creation of the relation of landlord and tenant is called a "lease," and with reference to this the parties are designated as "lessor" and "lessee." Foss *v.* Stanton, 76 Vt. 365, 57 Atl. 942.

Agreement for renewal and renewal lease see *infra*, IV, C.

65. 2 Bouvier L. Dict. See also the following cases::

California.— Walls *v.* Preston, 25 Cal. 59.

Indiana.— Heywood *v.* Fulmer, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491.

Kentucky.— Asher *v.* Johnson, 118 Ky. 702, 82 S. W. 300, 26 Ky. L. Rep. 586.

Missouri.— Edwards *v.* Noel, 88 Mo. App. 434.

Montana.— Pelton *v.* Minah Consol. Min. Co., 11 Mont. 281, 28 Pac. 310.

Nevada.— Paul *v.* Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.

New York.— Mack *v.* Patchin, Sheld. 67.

Pennsylvania.— Kunkle *v.* Philadelphia Rifle Club, 10 Phila. 52.

United States.— Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; U. S. *v.* Gratiot, 14 Pet. 526, 10 L. ed. 573, construing a mineral license.

Other definitions are: "A contract between lessor and lessee for the possession and profits of lands, &c., on the one side, and a recompense by rent or other consideration, on the other." Branch *v.* Doane, 17 Conn. 402, 411; Allen *v.* Lambden, 2 Md. 279, 282; Jackson *v.* Harsen, 7 Cow. (N. Y.) 323, 326, 17 Am. Dec. 517; Stinson *v.* Hardy, 27 Oreg. 584, 589, 41 Pac. 116; Christensen *v.* Pacific Coast Borax Co., 26 Oreg. 302, 304, 38 Pac. 127.

"A contract for the possession and profits of lands and tenements on one side, and a recompense of rent or other income on the other." Sawyer *v.* Hanson, 24 Me. 542, 545; Boone *v.* Stover, 66 Mo. 430 [*citing* 4 Cruise Dig. c. 5]; Becker *v.* Becker, 13 N. Y. App. Div. 342, 349, 43 N. Y. Suppl. 17; Dolittle *v.* Eddy, 7 Barb. (N. Y.) 74, 78; Voorhees *v.* Amsterdam Presb. Church, 5 How. Pr. (N. Y.) 58, 71.

"A conveyance by the owner of an estate to another of a portion of his interest therein, for a term less than his own, in consideration of a certain annual or stated rent or other recompense." Gray *v.* La Fayette County, 65 Wis. 567, 570, 27 N. W. 311.

"The conveyance of an estate in land, subordinate to that of the grantor, to a grantee, [made] upon a valid consideration and for a definite term." New York, etc., R. Co. *v.* Randall, 102 Ind. 453, 457, 26 N. E. 122.

words are necessary to create a lease, and whatever is sufficient to explain the intent of the parties that one shall divest himself of the possession, and the other come into it, for a determinate time, amounts to a lease.[66]

b. Authority to Execute. The authority of an agent to execute a lease under seal must be given under seal, but an agent appointed by parol may execute a

"A grant of the use and possession, in consideration of something to be rendered." O'Donnell *v.* Luskin, 12 Montg. Co. Rep. (Pa.) 109, 110. See also Andrews *v.* Erwin, 78 S. W. 902, 25 Ky. L. Rep. 1791, holding that the reservation of rent in some form and allegiance to the title are distinguishing characteristics of a contract by which the relation of landlord and tenant exists.

Statutory definitions.— A lease is defined by La. Rev. Civ. Code, art. 2669 (2639) to be a contract by which one party gives to the other the enjoyment of a thing at a fixed price. Viterbo *v.* Friedlander, 120 U. S. 707, 7 S. Ct. 962, 30 L. ed. 776. See also Walker *v.* Dohan, 39 La. Ann. 743, 2 So. 381.

Technical and ordinary meaning.— A lease, when we mean thereby the instrument, is in legal language an indenture of lease or a deed, and therefore authors treat of leases under the common or general title of deeds. But in common parlance, where it is said "a man has a lease for property," nothing more is meant than that he has a term or an estate for years in the premises, which may be by deed or a writing not under seal. Mayberry *v.* Johnson, 15 N. J. L. 116.

As conveyance.— A lease is a conveyance of real estate. Crouse *v.* Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; Shimer *v.* Phillipsburg, 58 N. J. L. 506, 33 Atl. 852; State *v.* Morrison, 18 Wash. 664, 52 Pac. 228. *Contra*, see *In re* Tuohy, 23 Mont. 305, 58 Pac. 722; Clark *v.* Hyatt, 55 N. Y. Super. Ct. 98, 8 N. Y. St. 134. A lease is a sale and conveyance of the property leased, which only differs from what is commonly called a "deed" in being limited to a term certain, and leaving a reversionary interest in the grantor. Wien *v.* Simpson, 2 Phila. (Pa.) 158. A lease is personal property. It bargains away a temporary possession, and does not dispose of any fee or title. A lease is held therefore not to be a conveyance of property within a statute prohibiting conveyances of realty by a married woman without the joinder of her husband as grantor. Heal *v.* Niagara Oil Co., 150 Ind. 483, 50 N. E. 482; Perkins *v.* Morse, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780. A lease from a married woman is a grant or instrument, within the meaning of Cal. Civ. Code, § 1093, providing that no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in a certain manner. Carlton *v.* Williams, 77 Cal. 89, 19 Pac. 185, 11 Am. St. Rep. 243. A lease is a conveyance or grant. Milliken *v.* Faulk, 111 Ala. 658, 660, 20 So. 594 [*citing* Bouvier L. Dict.; 2 Rapalje L. Dict. "Lease"].

"To lease is to let; to farm out; to rent." Atlanta, etc., Air-Line R. Co. *v.* Harrison, 76 Ga. 757.

A lease for a term of years is a chattel interest, with an implied covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease. Edwards *v.* Perkins, 7 Oreg. 149.

Demise distinguished.— The general signification of the word "demise" is that it is a conveyance in fee for life or for years. It denotes something more than a mere letting or a lease — as for instance a grant. It would seem that it means more to the lessee than a mere letting by the landlord, or the mere taking by the lessee, generally embraced in the mere terms "to lease" or "to let." These latter words, it would appear, can have relation only to the mere term. A "demise" embraces a fee, and it seems particularly designed for use to import to the agreement between a landlord and tenant implied covenants on the part of the lessor of good right and title to make the lease, and an implied covenant of quiet enjoyment. Mershon *v.* Williams, 63 N. J. L. 398, 44 Atl. 211.

The word "leased" may be used in two senses.— It is said that a landlord leased his lands to his tenant, and with almost equal propriety it may be said that the tenant leased an estate from his landlord. Zink *v.* Grant, 25 Ohio St. 352, 354. But see Gray *v.* La Fayette County, 65 Wis. 567, 27 N. W. 311, holding that it is hardly accurate to say that the act of leasing may be done by the lessee. It is not of the same meaning as "rented," for the word "rented" refers as well to the act of the lessee as to that of a lessor.

Usufruct and lease distinguished.— A usufruct and a lease are materially different; the former is a real right, a species of ownership, usually for life, with the obligation to pay for repairs and taxes, and may be mortgaged or transferred at pleasure. The latter is a right strictly personal, giving only the use of property, without legal possession or any proprietary interest. La. Civ. Code, art. 591. Hoffman *v.* Laurans, 18 La. 70.

An agreement to pay a certain sum for the past enjoyment of a thing which has not been under any contract of lease, express or implied, is not a lease. Balfour *v.* Balfour, 33 La. Ann. 297.

Lands let to lease.— Lands conveyed only for life, for years, or at will. Wright *v.* Hardy, 76 Miss. 524, 534, 24 So. 697 [*citing* 2 Blackstone Comm. *316, 317].

66. Williams *v.* Miller, 68 Cal. 290, 9 Pac. 166; Lacey *v.* Newcomb, 95 Iowa 287, 63 N. W. 704; Sawyer *v.* Hanson, 24 Me. 542.

written lease not under seal.[67] The power to lease, like any other power, may be implied by the general authority granted to an agent, and the recognition of his acts by his principal.[68] A lease for a period longer than is authorized by the agent's power has been held good *pro tanto* to the extent of the power.[69] In England a tenant for life or from year to year may make a lease for twenty-one years.[70]

c. Offer and Acceptance. Where a landlord offers to lease premises on certain specified terms, and such offer is unconditionally accepted, and a tender of performance of prerequisite conditions made, the contract of lease is complete and binding on both parties.[71] Where the offer of the landlord is neither accepted nor declined in terms, but the tenant proceeds to occupy and use the premises, such action on the part of the tenant will be construed as an acceptance of the terms of lease previously offered.[72] However, where there is no unqualified acceptance of the offer made by the owner of the land, there is no completed contract, and counter offers and modifications of the original offer upon the part

67. Clark *v.* Clark, 49 Cal. 586; Lake *v.* Campbell, 18 Ill. 106; McClain *v.* Doe, 5 Ind. 237.

An agreement for a lease made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, effectually binds the principal. Peers *v.* Sneyd, 17 Beav. 151, 51 Eng. Reprint 990; Hamilton *v.* Clanricarde, 1 Bro. P. C. 341, 1 Eng. Reprint 608.

68. Hitchins *v.* Rickett, 17 Ind. 625; Baxter *v.* West, 5 Daly (N. Y.) 460; Turner *v.* Hutchinson, 2 F. & F. 185 (holding, however, that a farm bailiff, or an agent accustomed to let farms upon the ordinary terms, and receive the rents, has no authority in law to let upon unusual terms, unknown to the owner, and the question was left to the jury as one of fact, whether he had express authority, or had been held out by the owner as having it); Doe *v.* Cockell, 4 A. & E. 478, 6 N. & M. 179, 31 E. C. L. 218; Peers *v.* Sneyd, 17 Beav. 151, 51 Eng. Reprint 990. See Hodges *v.* Howard, 5 R. I. 149, holding that where land is sold subject to a parol contract for a lease between the vendor and another, the grantor, after making the deed, has no right, as an implied agent of the grantee, to give to the proposed lessee a memorandum of the lease to be given, where it was not referred to in the memorandum of sale or in the deed given. See also Drogheda *v.* Holmes, 5 H. L. Cas. 460, 10 Eng. Reprint 979.

A naked power of sale does not imply a power to lease. Bowler *v.* Brush Electric Light Co., 10 Ohio Dec. (Reprint) 582, 22 Cinc. L. Bul. 136.

A steward has no general authority to enter into contracts, granting leases or farms for a term of years. Collen *v.* Gardner, 21 Beav. 540, 52 Eng. Reprint 968.

Church wardens only cannot execute leases as a body corporate of parish lands, under 59 Geo. III, c. 12, § 17. Phillips *v.* Pearce, 5 B. & C. 433, 8 D. & R. 43, 29 Rev. Rep. 284, 11 E. C. L. 529.

69. Chesebrough *v.* Pingree, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529; Griffen *v.* Ford, 1 Bosw. (N. Y.) 123 (holding that a lease of twenty-one years, with a right for the lessee to renew for two similar terms at the same rate, made under a power only to lease for twenty-one years, is not void, but a court of equity will sustain it for twenty-one years, and cut off the right to renew); Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408. See also Newcomb *v.* Ketteltas, 19 Barb. (N. Y.) 608.

70. Mackay *v.* Mackrath, 2 Chit. 461, 18 E. C. L. 737, 4 Dougl. 213, 26 E. C. L. 433; Story *v.* Johnson, 2 Y. & C. Exch. 586. See Mostyn *v.* Lancaster, 23 Ch. D. 583, 52 L. J. Ch. 848, 48 L. T. Rep. N. S. 715, 31 Wkly. Rep. 686 (where a lease by a tenant for life for ninety-nine years was held to be valid under his power); Smith *v.* Widlake, 3 C. P. D. 10, 47 L. J. C. P. 282, 26 Wkly. Rep. 52; Doe *v.* Yarborough, 1 Bing. 24, 7 Moore C. P. 258, 25 Rev. Rep. 575, 8 E. C. L. 384. See also Pennington *v.* Cardale, 3 H. & N. 656, 27 L. J. Exch. 438, 6 Wkly. Rep. 837.

A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the determination of a subsisting term; but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate. Moore *v.* Clench, 1 Ch. D. 447, 45 L. J. Ch. 80, 34 L. T. Rep. N. S. 13, 24 Wkly. Rep. 169.

71. *Colorado.*— Cochrane *v.* Justice Min. Co., 16 Colo. 415, 26 Pac. 780.

Connecticut.— Linsley *v.* Tibbals, 40 Conn. 522.

Illinois.— Springer *v.* Cooper, 11 Ill. App. 267.

Kentucky.— Calhoun *v.* Atchison, 4 Bush 261, 96 Am. Dec. 299.

New York.— Pettibone *v.* Moore, 75 Hun 461, 27 N. Y. Suppl. 455.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 53.

Compare Gifford *v.* King, 54 Iowa 525, 6 N. W. 735, where correspondence was held insufficient to establish a lease.

72. Smith *v.* Ingram, 90 Ala. 529, 8 So. 144; Springer *v.* Cooper, 11 Ill. App. 267; Berry *v.* Burnett, 23 Tex. Civ. App. 558, 56 S. W. 769; Lovett *v.* U. S., 9 Ct. Cl. 479. See Hammond *v.* Winchester, 82 Ala. 470, 2 So. 892. See also Baer *v.* Minock, 128 Mich. 676, 87 N. W. 1045.

of the other party to the negotiations, unaccepted by the landowner, will not constitute the transaction a lease.[73]

d. Necessity and Sufficiency of Consideration. A lease or an agreement for a lease must be supported by a sufficient consideration in order to be valid.[74] The demise of a leasehold estate is a sufficient consideration for the lessee's undertaking to pay rent;[75] and conversely payment of rent is a sufficient consideration for the demise.[76]

e. Lease or Agreement For. Where an agreement for a lease has been reduced to writing, and even though it contains a stipulation that a formal lease in writing shall be subsequently executed, the question has frequently arisen whether the written agreement operates as a lease *in præsenti*, or only as an agreement for a lease *in futuro*. The general rule is that effect will be given to the instrument according to the intention of the parties, to be ascertained from all the terms of the instrument itself, considered in the light of the surrounding circumstances.[77]

73. *Illinois.*— Koeffler *v.* Davidson, 66 Ill. App. 542, holding that an offer from one party to another is open for acceptance for a reasonable time, only and unless so accepted the parties are not bound by it.

Iowa.— See Culton *v.* Gilchrist, 92 Iowa 718, 61 N. W. 384, holding that a request by defendant in one of his letters for permission to build a cook-room to the farmhouse in case the lease was made did not constitute a condition which must be accepted by plaintiff before the contract of lease would be completed.

Kansas.— Erickson *v.* Wallace, 45 Kan. 430, 25 Pac. 898.

Maryland.— King *v.* Warfield, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384, where the offer for lease provided that the lease should not be binding on the lessee until he should be appointed to a certain office, and it was held that there was no binding contract, and that the lessor did not become bound, upon the lessee's election, notwithstanding his failure to obtain the office, to accept the lease.

Michigan.— Gilbert *v.* Kennedy, 22 Mich. 117, holding likewise that after a dispute has arisen between the parties as to the acceptance of an agreement for a lease, the tender of a sum of money as rent by the party affirming the lease is no evidence to prove the agreement.

New York.— Smith *v.* Caputo, 14 Misc. 9, 35 N. Y. Suppl. 127; Jackson *v.* Rode, 7 Misc. 680, 28 N. Y. Suppl. 147.

74. Brown *v.* Roberts, 21 La. Ann. 508; Drew *v.* Buck, 12 Hun (N. Y.) 267 (holding, however, that although an executory agreement to give a lease not founded on valuable consideration may not be valid, the lease duly executed in pursuance thereof is); Byrne *v.* Romaine, 2 Edw. (N. Y.) 445; Knatchbull *v.* Kissane, 5 Dow. 389; Keating *v.* Keating, Le. & G. t. S. 133 (holding that a lessee taking an unusual lease is bound to see that the consideration is fully stated on the face of the instrument); Atty.-Gen. *v.* Owens, 10 Ves. Jr. 555, 32 Eng. Reprint 960; McIntyre *v.* Kingston, 4 U. C. Q. B. 471.

Sufficiency of consideration.— An agreement by a tenant holding over to pay rent semi-monthly instead of monthly as specified in the original lease is a sufficient consideration for a parol lease for less rent. Goldsbrough *v.* Gable, 36 Ill. App. 363. The erection of valuable machinery upon the demised premises is sufficient to support a lease. Herrington *v.* Wood, 6 Ohio Cir. Ct. 326, 3 Ohio Cir. Dec. 475. A demise in writing, not under seal, of certain premises for a stipulated term, by one party, is a sufficient consideration for an agreement by the other party to pay rent. Hill *v.* Woodman, 14 Me. 38.

75. Hill *v.* Woodman, 14 Me. 38; Lucky *v.* O'Donnell, 2 Sch. & Lef. 471.

76. Goldsbrough *v.* Gable, 36 Ill. App. 363; Chadbourn *v.* Rahilly, 34 Minn. 346, 25 N. W. 633; Herrington *v.* Wood, 6 Ohio Cir. Ct. 326, 3 Ohio Cir. Dec. 475. See also *In re* King, L. R. 16 Eq. 521, 27 L. T. Rep. N. S. 288, 21 Wkly. Rep. 881, holding that the relation of landlord and tenant is a consideration; it is not necessary in a contract for a lease to pay any money; the fact that the lessee has agreed to take the lease is itself a consideration.

77. See the following cases in which the instrument was construed to be an agreement for a lease *in futuro* and not a lease *in præsenti*.

Alabama.— Harrison *v.* Parmer, 76 Ala. 157.

Connecticut.— Buell *v.* Cook, 4 Conn. 238.

Georgia.— Gibson *v.* Needham, 96 Ga. 172, 22 S. E. 702.

Iowa.— Martin *v.* Davis, 96 Iowa 718, 65 N. W. 1001.

Massachusetts.— Hinckley *v.* Guyon, 172 Mass. 412, 52 N. E. 523; McGrath *v.* Boston, 103 Mass. 369.

Missouri.— St. Louis Brewing Assoc. *v.* Niederluecke, 102 Mo. App. 303, 76 S. W. 645; Donovan *v.* Schoenhofen Brewery Co., 92 Mo. App. 341; Western Boot, etc., Co. *v.* Gannon, 50 Mo. App. 642.

New York.— Arnold *v.* R. Rothschild's Sons Co., 164 N. Y. 562, 58 N. E. 1085 [*affirming* 37 N. Y. App. Div. 564, 56 N. Y. Suppl. 161]; Pittsburgh Amusement Co. *v.* Ferguson, 100 N. Y. App. Div. 453, 91 N. Y. Suppl. 666; Becker *v.* De Forest, 1 Sweeny 528; Goldberg *v.* Wood, 45 Misc. 327, 90 N. Y. Suppl. 427; Foster *v.* Clifford, 42 Misc. 496, 86 N. Y.

The form of the instrument is not decisive of its character as a lease, and the mere use of technical words or phrases which have a definite legal signification cannot be allowed to defeat a contrary intention of the parties, if that intention be manifest from the whole contract.[78] If the instrument contain words of a present demise, it will be deemed a lease *in præsenti*, unless it appear from other portions of the instrument that such was not the intention of the parties,[79] while, if possession be given under the agreement, this will be a circumstance tending to prove that it was intended as a lease *in præsenti*.[80] The same rule may properly be

Suppl. 28; People *v.* Gillis, 24 Wend. 201; Jackson *v.* Delacroix, 2 Wend. 433.

Virginia.— Boisseau *v.* Fuller, 96 Va. 45, 30 S. E. 457.

Washington.— Schlumpf *v.* Sasake, 38 Wash. 278, 80 Pac. 457.

England.— Zimbler *v.* Abrahams, [1903] 1 K. B. 577, 72 L. J. K. B. 103, 88 L. T. Rep. N. S. 46, 51 Wkly. Rep. 343; Jones *v.* Reynolds, 1 Q. B. 506, 1 G. & D. 62, 10 L. J. Q. B. 193, 41 E. C. L. 646; Erskin *v.* Armstrong, L. R. 20 Ir. 296; Clayton *v.* Burtenshaw, 5 B. & C. 41, 7 D. & R. 800, 11 E. C. L. 360; John *v.* Jenkins, 1 Cromp. & M. 227, 2 L. J. Exch. 83, 3 Tyrw. 170; Chapman *v.* Towner, 9 L. J. Exch. 54, 6 M. & W. 100; Duxbury *v.* Sandiford, 78 L. T. Rep. N. S. 230; Morgan *v.* Bissell, 3 Taunt. 65.

Canada.— Cheney *v.* Taylor, 1 U. C. Q. B. 166. See also Hurley *v.* McDonell, 11 U. C. Q. B. 308.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 55.

78. *Indiana.*—Heywood *v.* Fulmer, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491; New York, etc., R. Co. *v.* Randall, 102 Ind. 453, 26 N. E. 122.

Mississippi.— Brookhaven *v.* Baggett, 61 Miss. 383.

Missouri.— Ver Steeg *v.* Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346.

Pennsylvania.— Lehigh, etc., Coal Co. *v.* Wright, 177 Pa. St. 387, 35 Atl. 919; Funk *v.* Haldeman, 53 Pa. St. 229; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760. See also Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. St. 583, 1 Atl. 394, 58 Am. Rep. 743.

England.— Taylor *v.* Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 164, 8 L. T. Rep. N. S. 356, 11 Wkly. Rep. 726, 113 E. C. L. 826; Hamlen *v.* Hamlen, 1 Bulstr. 189; Poole *v.* Bentley, 2 Campb. 286, 12 East 168; Stratton *v.* Pettit, 16 C. B. 420, 3 C. L. R. 925, 1 Jur. N. S. 662, 24 L. J. C. P. 182, 3 Wkly. Rep. 549, 81 E. C. L. 420; Montague's Case, Cro. Jac. 301; Doe *v.* Powell, 8 Jur. 1123, 14 L. J. C. P. 5, 7 M. & G. 980, 8 Scott N. R. 687, 49 E. C. L. 980; Lenthall *v.* Thomas, 2 Keb. 267; Morgan *v.* Bissell, 3 Taunt. 65; Goodtitle *v.* Way, 1 T. R. 735.

79. *Connecticut.*— Johnson *v.* Phœnix Mut. L. Ins. Co., 46 Conn. 92.

Illinois.— Merki *v.* Merki, 212 Ill. 121, 72 N. E. 9 [*affirming* 113 Ill. App. 518].

Maine.— Holley *v.* Young, 66 Me. 520.

Massachusetts.— Shaw *v.* Farnsworth, 108 Mass. 357; Kabley *v.* Worcester Gas Light Co., 102 Mass. 392; Bacon *v.* Bowdoin, 22 Pick. 401; Weed *v.* Crocker, 13 Gray 219.

New York.— Averill *v.* Taylor, 8 N. Y. 44; People *v.* St. Nicholas Bank, 3 N. Y. App. Div. 544, 38 N. Y. Suppl. 379; Hurlbut *v.* Post, 1 Bosw. 28 (holding that a written agreement on one part to lease premises at a rent payable quarterly to continue one year from date and on the other to pay the rent and signed by both parties, is a lease for one year from its date and not a mere agreement for lease); Hallett *v.* Wylie, 3 Johns. 44, 3 Am. Dec. 457.

United States.— Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,268, 3 Story 325.

England.— Hand *v.* Hall, 2 Ex. D. 355, 46 L. J. Exch. 603, 36 L. T. Rep. N. S. 765, 25 Wkly. Rep. 734; Doe *v.* Benjamin, 9 A. & E. 644, 8 L. J. Q. B. 117, 1 P. & D. 440, 2 W. W. & H. 96, 36 E. C. L. 341; Warman *v.* Faithful, 5 B. & Ad. 1042, 3 L. J. K. B. 114, 3 N. & M. 137, 27 E. C. L. 437; Hancock *v.* Caffyn, 8 Bing. 358, 1 L. J. Ch. 104, 1 Moore & S. 521, 21 E. C. L. 576; Doe *v.* Ries, 8 Bing. 178, 1 L. J. C. P. 73, 1 Moore & S. 259, 21 E. C. L. 496; Staniforth *v.* Fox, 7 Bing. 590, 9 L. J. C. P. O. S. 175, 5 M. & P. 589, 20 E. C. L. 264; Pinero *v.* Judson, 6 Bing. 206, 8 L. J. C. P. O. S. 19, 3 M. & P. 497, 31 Rev. Rep. 388, 19 E. C. L. 100; Wilson *v.* Chisholm, 4 C. & P. 474, 19 E. C. L. 608; Wright *v.* Trevezant, 3 C. & P. 441, 14 E. C. L. 653; Barry *v.* Nugent, 3 Dougl. 179, 5 T. R. 165, 26 E. C. L. 125; Doe *v.* Groves, 15 East 244; Alderman *v.* Neate, 1 H. & H. 369, 3 Jur. 171, 8 L. J. Exch. 89, 4 M. & W. 704; Curling *v.* Mills, 12 L. J. C. P. 316, 6 M. & G. 173, 7 Scott N. R. 709, 46 E. C. L. 173; Duxbury *v.* Sandiford, 80 L. T. Rep. N. S. 552; Doe *v.* Ashburner, 5 T. R. 163; Baxter *v.* Browne, 2 W. Bl. 973.

Canada.—Buckley *v.* Russell, 24 N. Brunsw. 205; Wolfe *v.* McGuire, 28 Ont. 45; Grant *v.* Lynch, 6 U. C. C. P. 178, 14 U. C. Q. B. 148.

An agreement to build a structure to be occupied, when finished, by the grantee, at a stipulated rent, accompanied by words of present demise, operates as a lease. People *v.* Kelsey, 14 Abb. Pr. (N. Y.) 372.

80. Cockerline *v.* Fisher, 139 Mich. 95, 103 N. W. 522; Jackson *v.* Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; Wilcox *v.* Bostick, 57 S. C. 151, 35 S. E. 496; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,268, 3 Story 325; Wilkinson *v.* Hall, 3 Bing. N. Cas. 508, 3 Hodges 56, 6 L. J. C. P. 82, 4 Scott 301, 32 E. C. L. 237; Curling *v.* Mills, 12 L. J. C. P.

applied in ascertaining the intention of the parties to a verbal agreement for a lease. In each case the object is to ascertain whether the parties intended a lease *in præsenti*, or an agreement for a lease *in futuro*; and the delivery of the possession becomes material only in so far as it may tend to throw light on the intention of the parties, and thus enable the court properly to construe the agreement.[81] In England, under the Judicature Acts, a tenant in possession under an executory agreement for a lease is treated by the courts as in all respects in the same position as if he held under a lease made pursuant to the terms of the agreement.[82]

f. Agreement For Lease — (I) *In General.* An agreement for a lease vests no estate in the proposed lessee, although an action for its breach may be maintained by the other party against the one in default.[83] A verbal agreement to give a lease is not binding unless all the terms of the lease are settled, so that no essential matters are left open for consideration.[84]

(II) *Performance or Breach.* An agreement to execute a lease for a given period, at a stated rental, payable in specified instalments, is not broken by a refusal to execute a lease which imposes terms and conditions not imposed by law, and of which no mention was made in the agreement.[85] The general rule is that where the lessor contracts to give a lease, it is his duty, and not that of the lessee, to make and tender the conveyance.[86]

316, 6 M. & G. 173, 7 Scott N. R. 709, 46 E. C. L. 173.

81. *California.*— Potter *v.* Mercer, 53 Cal. 667.

Louisiana.— Wolf *v.* Mitchell, 24 La. Ann. 433.

Missouri.— Center Creek Min. Co. *v.* Frankenstein, 179 Mo. 564, 78 S. W. 785.

New York.— Becar *v.* Flues, 64 N. Y. 518; Franke *v.* Hewitt, 56 N. Y. App. Div. 497, 68 N. Y. Suppl. 968; Goldberg *v.* Wood, 45 Misc. 327, 90 N. Y. Suppl. 427; Jenkelson *v.* Ruff, 31 Misc. 276, 64 N. Y. Suppl. 40.

Texas.— Scottish-American Mortg. Co. *v.* Taylor, (Civ. App. 1903) 74 S. W. 564; Stevens *v.* Stoner, (Civ. App. 1900) 54 S. W. 934.

Wyoming.— Gramm *v.* Sterling, 8 Wyo. 527, 56 Pac. 156.

82. *In re* Maughan, 14 Q. B. D. 956, 54 L. J. Q. B. 128, 2 Morr. Bankr. Cas. 25, 33 Wkly. Rep. 308; Lowther *v.* Heaver, 41 Ch. D. 248, 58 L. J. Ch. 482, 60 L. T. Rep. N. S. 310, 37 Wkly. Rep. 465; Allhusen *v.* Brooking, 26 Ch. D. 559, 53 L. J. Ch. 520, 51 L. T. Rep. N. S. 57, 32 Wkly. Rep. 657; Walsh *v.* Lonsdale, 21 Ch. D. 9, 52 L. J. Ch. 2, 46 L. T. Rep. N. S. 858, 31 Wkly. Rep. 109.

83. *Connecticut.*— Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586, where specific performance was decreed.

Maryland.— Vogeler *v.* Devries, 98 Md. 302, 56 Atl. 782, where, however, the evidence was held insufficient to show that a contract to execute a lease of premises had been broken by a refusal to perform, expressed to the agent of the prospective lessees before the date for performance.

Massachusetts.— White *v.* Wieland, 109 Mass. 291, holding that on the trial of an action to recover money paid in consideration of a promise of a lease, which defendant refused to fulfil, he cannot justify by proof that plaintiff refused to pay rent, without evidence that the rent fell due before his own refusal.

New York.— Pittsburgh Amusement Co. *v.* Ferguson, 100 N. Y. App. Div. 453, 91 N. Y. Suppl. 666.

Pennsylvania.— Sausser *v.* Steinmetz, 88 Pa. St. 324; Harris *v.* Harris, 70 Pa. St. 170; Weaver *v.* Wood, 9 Pa. St. 220; Henderson *v.* Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 56.

84. Griffin *v.* Knisely, 75 Ill. 411 (holding that where no time is fixed for the performance of a verbal contract to execute a written lease, and one party refuses to comply by executing a lease sent to him in a reasonable time thereafter, the other will have the right to rescind the agreement); Sourwine *v.* Truscott, 17 Hun (N. Y.) 432; Law *v.* Pemberton, 10 Misc. (N. Y.) 362, 31 N. Y. Suppl. 21; Pulse *v.* Hamer, 8 Oreg. 251.

If a tenant in tail makes an agreement not under seal to let lands for fourteen years and then dies the issue in tail cannot be compelled specifically to perform the agreement by granting a lease, under 32 Hen. VIII, c. 28. Osborn *v.* Marlborough, 12 Jur. N. S. 559, 14 L. T. Rep. N. S. 789, 14 Wkly. Rep. 886.

85. Bodman *v.* Murphy, 35 Md. 154; Hayden *v.* Lucas, 18 Mo. App. 325. See also Donovan *v.* Schoenhofen Brewing Co., 92 Mo. App. 341.

86. Freeland *v.* Ritz, 154 Mass. 257, 28 N. E. 226, 26 Am. Rep. 244, 12 L. R. A. 561; Bradley *v.* Mason, 1 Ohio Dec. (Reprint) 380, 8 West. L. J. 471; Cantley *v.* Powell, Ir. R. 10 C. L. 200. See Manning *v.* West, 6 Cush. (Mass.) 463.

Waiver.— Under an agreement to lease at a "fair rent," a tender of an agreement for a sufficient rent must precede the action for a breach of agreement to lease, unless defendant has waived a tender; and a leasing

(III) *Measure of Damages.* The measure of damages sustained by the owner in an action on a breach of agreement for a lease is the difference between the contract price of the premises as agreed upon and the amount plaintiff was able to realize upon the property after the breach of agreement.[87] In some jurisdictions the measure of damages of the prospective lessee for the owner's breach of agreement to perfect a lease is held to be the difference between the rent agreed on and the actual rental value of the premises.[88] While in other jurisdictions it is held that where the lessor was unable to carry out his part of the agreement, the rule or measure of damages for the breach of a contract to lease is the same as for a breach of a contract to sell land, and that only actual damages can be recovered, and not the value of the bargain.[89]

2. Formal Requisites of Contract — a. Parol Lettings and Contracts. A verbal agreement of lease may be proved, in the absence of a contrary provision of the

of the premises to another would be a waiver. Weaver *v.* Wood, 9 Pa. St. 220.

87. *Kansas.*— Post *v.* Davis, 7 Kan. App. 217, 52 Pac. 903.

New York.— Weinberg *v.* Greenberger, 47 Misc. 117, 93 N. Y. Suppl. 530 (where a deposit was made with a real estate owner, evidenced by a receipt showing that the deposit was made merely as security for the fulfilment of the depositor's agreement to take a lease, and not as a penalty or liquidated damages in case of refusal, and it was held that the deposit could be retained by the real estate owner only in case he suffered actual damages by the depositor's refusal to take a lease); Bacon *v.* Combes, 32 Misc. 704, 65 N. Y. Suppl. 510 (holding, however, that where the evidence showed that another tenant moved into the premises in the beginning of the month an allowance for such month was erroneous).

Ohio.— Elsas *v.* Meyer, 10 Ohio Dec. (Reprint) 518, 21 Cinc. L. Bul. 346, holding likewise that where the future lessor in a contract for a lease agreed to make certain improvements before occupancy was to begin, technical, unimportant, and inadvertent omissions and defects in making such improvements will not defeat his right to recover for a breach, although the other party to the contract may recoup for the same in damages. See also Kirland *v.* Wolf, 7 Ohio Dec. (Reprint) 436, 3 Cinc. L. Bul. 114.

South Carolina.— Cleveland *v.* Bryant, 16 S. C. 634.

Texas.— Massie *v.* State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797; Stoker *v.* Wilson, 3 Tex. App. Civ. Cas. § 10.

Washington.— Schlumpf *v.* Sasake, 38 Wash. 278, 80 Pac. 457.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 59.

88. *Illinois.*— North Chicago, etc., R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

Iowa.— Hall *v.* Horton, 79 Iowa 352, 44 N. W. 569, holding likewise that in such action the value of the lease is put in issue by a general denial of plaintiff's petition.

Minnesota.— Knowles *v.* Steele, 59 Minn. 452, 61 N. W. 557.

New York.— Shultz *v.* Brenner, 24 Misc. 522, 53 N. Y. Suppl. 972, holding, however, that the value of time spent by the lessees in looking for other premises is not an element of damages for the lessor's breach of contract to rent.

Texas.— Rogers *v.* McGuffey, 96 Tex. 565, 74 S. W. 753; Scottish-American Mortg. Co. *v.* Taylor, (Civ. App. 1905) 74 S. W. 564; Murphy *v.* Service, 2 Tex. App. Civ. Cas. § 746, holding that the lessee may likewise recover such special damage as the knowledge of the facts at the time of the making of the contract had brought to the notice of the lessor.

England.— Foster *v.* Wheeler, 38 Ch. D. 130, 57 L. J. Ch. 871, 59 L. T. Rep. N. S. 15, 37 Wkly. Rep. 40; Coe *v.* Clay, 5 Bing. 440, 7 L. J. C. P. O. S. 162, 3 M. & P. 57, 30 Rev. Rep. 699, 15 E. C. L. 660; Worthington *v.* Warrington, 8 C. B. 134, 18 L. J. C. P. 350, 65 E. C. L. 134; Robinson *v.* Harmon, 1 Exch. 850, 18 L. J. Exch. 202. See Wright *v.* Colls, 8 C. B. 150, 13 Jur. 1056, 19 L. J. C. P. 60, 65 E. C. L. 150. See also Ford *v.* Tiley, 9 D. & R. 443, 6 B. & C. 325, 5 L. J. K. B. O. S. 169, 30 Rev. Rep. 339, 13 E. C. L. 154.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 59.

Compare D'Orval *v.* Hunt, Dudley (S. C.) 180, holding that for the breach of an executory contract, without fraud or imposition, only such damages can be given as fairly and naturally result from it, and which can be measured by a pecuniary standard, and that remote and consequential damages cannot be allowed. See also Smiley *v.* Deweese, 1 Ind. App. 211, 27 N. E. 505.

89. Sausser *v.* Steinmetz, 88 Pa. St. 324; McClowry *v.* Croghan, 1 Grant (Pa.) 307; Douglas *v.* Wilbur, 6 Phila. (Pa.) 540. See Winton's Appeal, 111 Pa. St. 387, 5 Atl. 240, holding that if a claim for breach of contract by reason of leasing certain lands to third persons after a contract with plaintiff to give him the refusal of such lease were allowed, the measure of damages would be not more than the value of the subsequent lease at the time it was made. See, however, Garsed *v.* Turner, 71 Pa. St. 56, holding that in an action to recover for a breach of a contract to lease to plaintiff a dye-shop, furnishing wood, etc., he having put in fixtures, the measure of damages was the value of the bargain.

statute.[90] In some jurisdictions a parol contract for the lease of land for a year, to commence *in futuro*, although void under the statute of frauds, creates the relation of landlord and tenant, where followed by use and occupation.[91]

b. Form and Contents. To make a good lease, and thus create the relation of landlord and tenant, no particular words are necessary, but it is indispensable that it should appear to have been the intention of one party to dispossess himself of the premises, and of the other to enter and occupy as the former himself had the right to do pursuant to the agreement between them.[92] A memorandum expressing the consent of the owner that another shall have immediate possession of premises, and shall continue to occupy them at a specified rent and for a definite term, is a sufficient lease.[93] In general, any agreement under which one person obtains the right of enjoyment to property of another, with his consent, and in subordination to his right, may create the relation of landlord and tenant.[94] As between parties, an agreement may be a lease, while as to third persons it may be construed as a building contract.[95] Where an instrument has the effect of giving the holder an exclusive right of occupation of the land, although subject

90. People *v.* Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105 (holding that the term "lease," as used in the Illinois statute, includes a verbal letting); Hisey *v.* Troutman, 84 Ind. 115; Rachel *v.* Pearsall, 8 Mart. (La.) 702; Becar *v.* Flues, 64 N. Y. 518; Young *v.* Dake, 5 N. Y. 463, 55 Am. Dec. 356. See also Morrison *v.* Kerrick, 130 Ill. 631, 22 N. E. 537 [*affirming* 27 Ill. App. 339]; Trull *v.* Granger, 8 N. Y. 115; Whitney *v.* Allaire, 1 N. Y. 305. See, however, Bourk *v.* Cormier, 16 Quebec Super. Ct. 295, holding that a contract to pay an annual rent forever cannot be proved by mere parol testimony.

In Louisiana a purchaser of property subject to a lease is entirely unaffected by it, unless the lease is evidenced by a written contract, and where the lease is by parol the lessee must look to the vendor for damages. Brown *v.* Martin, 9 La. Ann. 504.

Statutory provisions requiring writing see FRAUDS, STATUTE OF, 20 Cyc. 214, *et seq.*

91. Howard *v.* Jones, 123 Ala. 488, 26 So. 129; Eubank *v.* May, etc., Hardware Co., 105 Ala. 629, 17 So. 109; Coffee *v.* Smith, 109 La. 440, 33 So. 554; Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496.

Tenancy at will see *infra*, VI, A, 2, f.

92. *Indiana.*— Emmons *v.* Kiger, 23 Ind. 483; Munson *v.* Wray, 7 Blackf. 403.

Kentucky.— Waller *v.* Morgan, 18 B. Mon. 136.

Maine.— Moshier *v.* Reding, 12 Me. 478.

Pennsylvania.— Moore *v.* Miller, 8 Pa. St. 272; Watson *v.* O'Hern, 6 Watts 362; Miller *v.* McBrier, 14 Serg. & R. 382; Pickering *v.* O'Brien, 23 Pa. Super. Ct. 125.

South Carolina.— Maverick *v.* Lewis, 3 McCord 211.

United States.— Mason *v.* Clifford, 4 Fed. 177.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 61.

See also Stanley *v.* Robbins, 36 Vt. 422.

93. *Iowa.*— Culton *v.* Gilchrist, 92 Iowa 718, 61 N. W. 384.

Louisiana.— McDonald *v.* Stewart, 18 La. Ann. 90.

Massachusetts.— Duncklee *v.* Webber, 151 Mass. 408, 24 N. E. 1082 (holding that a present lease is made by two writings, one signed by the landlord, and reading, "I have leased to," and the other by the tenant, reading, "I have leased of," each stating the name of the other party, a description of the premises, and the terms of the letting); Eastman *v.* Perkins, 111 Mass. 30.

New York.— Marcus *v.* Collins Bldg., etc., Co., 27 Misc. 784, 57 N. Y. Suppl. 737, holding that the validity of a writing containing an agreement for a lease, with all the terms necessary to a valid lease between the parties executing it, is not impaired by a mere failure to transcribe it into a more formal document.

England.— Duxbury *v.* Sandford, 80 L. T. Rep. N. S. 552.

See, however, Davis *v.* Thompson, 13 Me. 209, holding that a written authority to a person to give a lease to another on the terms before offered in writing by him is not in itself a lease.

94. *Indiana.*— New York, etc., R. Co. *v.* Randall, 102 Ind. 453, 26 N. E. 122, construing an agreement as a lease rather than a license.

Louisiana.— Orleans Theatre Ins. Co. *v.* Lafferanderie, 12 Rob. 472.

Minnesota.— Bradley *v.* Metropolitan Music Co., 89 Minn. 516, 95 N. W. 458.

Nevada.— Hyman *v.* Kelly, 1 Nev. 179.

New York.— Coyne *v.* Feiner, 16 N. Y. Suppl. 203; Hunt *v.* Comstock, 15 Wend. 665.

Oregon.— Eldridge *v.* Hoefer, 45 Oreg. 239, 77 Pac. 874.

Pennsylvania.— Read *v.* Kitchen, 1 Am. L. Reg. 635.

South Carolina.— Wilcox *v.* Bostick, 57 S. C. 151, 35 S. E. 496.

Texas.— Allen *v.* Koepsel, 77 Tex. 505, 14 S. W. 151; Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

Virginia.— Mickie *v.* Wood, 5 Rand. 571.

Creation of relation in general see *supra*, I.

95. Woodward *v.* Leiby, 36 Pa. St. 437.

to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.[96]

c. Recitals as to Term. It is generally held to be essential to the validity of a lease that it prescribe with reasonable certainty the date of commencement and the duration of term of the lease.[97]

d. Description of Property. The lease should likewise contain a sufficiently accurate description of the property demised as to clearly indicate just what property is intended to be covered by the lease;[98] although a technical misdescription will not invalidate the lease where the description is sufficiently definite to identify the property intended to be demised.[99]

e. Description of Parties. It has been held that a person whose name is not mentioned in the body of a lease is not a party thereto nor bound thereby, although he signs and acknowledges it as his deed.[1]

f. Incorporation of Terms of Prior Lease. The parties to a lease may adopt as a part thereof, by mere reference, the terms of a prior lease between one of them and a third person, if its terms are known to both.[2]

3. Execution, Delivery, and Acceptance — a. Execution. The formalities prescribed by statute in the execution of leases should be substantially followed,[3] and unless the contract or agreement, in whatever shape it may be, is signed by both parties thereto, it may not operate as a valid lease for want of mutuality.[4] In several jurisdictions, however, by usage or custom a lease may be executed by

96. Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, 17 L. J. P. C. 62, 90 L. T. Rep. N. S. 741, 20 T. L. R. 531.

97. *Maryland.*— Dailey *v.* Grimes, 27 Md. 440.

Missouri.— Cunningham *v.* Roush, 157 Mo. 336, 57 S. W. 769.

New York.— Kuntz *v.* Mahrenholz, 88 N. Y. Suppl. 1002; Lloyd *v.* Worrell, 37 How. Pr. 75.

Wisconsin.— Hammond *v.* Barton, 93 Wis. 183, 67 N. W. 412; Colclough *v.* Carpeles, 89 Wis. 239, 61 N. W. 836.

United States.— Reese *v.* Zinn, 103 Fed. 97, holding that a lease which puts it in the power of the lessee to terminate the lease at will is void for want of mutuality.

England.— Doe *v.* Clarke, 7 Q. B. 211, 9 Jur. 426, 14 L. J. Q. B. 233, 53 E. C. L. 211; Doe *v.* Benjamin, 9 A. & E. 644, 8 L. J. Q. B. 117, 1 P. & D. 440, 2 W. W. & H. 96, 36 E. C. L. 341; Warman *v.* Faithful, 5 B. & Ad. 1042, 3 L. J. K. B. 114, 3 N. & M. 37, 27 E. C. L. 437; Dunk *v.* Hunter, 5 B. & Ald. 322, 24 Rev. Rep. 390, 7 E. C. L. 181; Clayton *v.* Burtenshaw, 5 B. & C. 41, 7 D. & R. 800, 11 E. C. L. 360; Doe *v.* Ries, 8 Bing. 198, 1 L. J. C. P. 73, 1 Moore & S. 259, 21 E. C. L. 496; Wright *v.* Trevezant, 3 C. & P. 441, 14 E. C. L. 653; John *v.* Jenkins, 1 Cromp. & M. 227, 2 L. J. Exch. 83, 3 Tyrw. 170; Alderman *v.* Neate, 1 H. & H. 369, 3 Jur. 171, 8 L. J. Exch. 89, 4 M. & W. 704.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 62.

And see Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775 (holding that in the lease of interest in land the parties may provide for its termination on the happening of a contingency or condition subsequent); Myers *v.* Kingston Coal Co., 126 Pa. St. 582, 17 Atl. 891 (holding that a lease for a term certain and thereafter to continue at the will of the lessee is valid).

Necessity in order to create term for years see *infra*, IV, A, 2.

Duration of term see *infra*, IV, A, 3.

98. Patterson *v.* Hubbard, 30 Ill. 201; Dixon *v.* Finnegan, 182 Mo. 111, 81 S. W. 449; Bingham *v.* Honeyman, 32 Oreg. 129, 51 Pac. 735, 52 Pac. 755.

99. *Colorado.*— Andrew *v.* Carlile, 4 Colo. App. 336, 36 Pac. 66.

Georgia.— Fraser *v.* State, 112 Ga. 13, 37 S. E. 114.

Indiana.— Whipple *v.* Shewalter, 91 Ind. 114. See also Hunt *v.* Campbell, 83 Ind. 48.

Mississippi.— Gex *v.* Dill, 86 Miss. 10, 38 So. 193.

Missouri.— Hoyle *v.* Bush, 14 Mo. App. 408.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 64.

1. Barnsdall *v.* Boley, 119 Fed. 191. See also Devol *v.* Halstead, 16 Ind. 287. But see Montanye *v.* Wallahan, 84 Ill. 355 (holding that a party who signs a lease is bound thereby notwithstanding he may have been misnamed in the body of the writing); Schulte *v.* Schering, 2 Wash. 127, 26 Pac. 78 (holding that the omission from the granting clause of the lease of the name of one of the lessors is immaterial).

2. Eubank *v.* May, etc., Hardware Co., 105 Ala. 629, 17 So. 109.

3. Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a*.

4. *Georgia.*— Fleming *v.* King, 100 Ga. 449, 28 S. E. 239.

Louisiana.— Laroussini *v.* Werlein, 52 La. Ann. 424, 27 So. 89, 78 Am. St. Rep. 350; D'Argy *v.* Godefroi, 1 Mart. 75, holding that a lease in the lessor's handwriting unsigned by him is no proof in favor of the lessee, even if found in the latter's possession.

the exchange of duplicates, each of which is signed only by the other party.[5] However, a lessee by accepting a lease under seal and entering into the use and occupation of the premises may become liable for the performance of the conditions of the lease, although the same is not signed by him;[6] this is likewise true where the lease is executed by the lessee but not by the lessor.[7] A lease executed by a party purporting to be the agent of the lessor or the lessee, where there is no evidence that the party so signing the lease was a lawfully authorized agent, is invalid.[8]

Maine.— Rice *v.* Brown, 81 Me. 56, 16 Atl. 334.

Maryland.— Howard *v.* Carpenter, 11 Md. 259.

Missouri.— Clemens *v.* Broomfield, 19 Mo. 118; Combs *v.* Midland Transfer Co., 58 Mo. App. 112.

New Jersey.— Charlton *v.* Columbia Real Estate Co., 64 N. J. Eq. 631, 54 Atl. 444.

New York.— Whitford *v.* Laidler, 94 N. Y. 145, 46 Am. Rep. 131 (where a lease signed by the lessor was also signed by certain officers of the lessee, a corporation, and left with a third person to procure the signatures of the other officers, and then deliver it to the town-clerk, and it was held that it did not take effect until so signed by the other officers); Kuntz *v.* Mahrenholz, 88 N. Y. Suppl. 1002; Galewski *v.* Appelbaum, 32 Misc. 203, 65 N. Y. Suppl. 694. See People *v.* Green, 64 N. Y. 499, holding that the provision of the charter of 1873 of New York city (Laws (1873), c. 335, § 15), making the signature of the clerk of the common council necessary to all leases, etc., refers only to leases from the city, and does not include those executed to it. See, however, Fiske *v.* Ernst, 62 N. Y. Suppl. 429, holding that where all the terms of a lease were definitely agreed on between the parties, and nothing was left open, a formal execution of the lease was not necessary to the consummation of the contract.

Washington.— Browder *v.* Phinney, 37 Wash. 70, 79 Pac. 598.

United States.— Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635 [*reversing* 18 App. Cas. (D. C.) 438].

England.— Doe *v.* Wiggins, 4 Q. B. 367, 3 G. & D. 504, 7 Jur. 529, 12 L. J. Q. B. 177, 45 E. C. L. 367; Richardson *v.* Gifford, 1 A. & E. 52, 3 L. J. K. B. 122, 3 N. & M. 325, 28 E. C. L. 49.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 66.

Waiver.— Although a lease contains an independent covenant for execution by the lessee, where it was the intent of the parties that it should take effect as a lease without being signed by the lessee, and that his execution was waived by the lessor, it is valid. Braman *v.* Dodge, 100 Me. 143, 60 Atl. 799; Libbey *v.* Staples, 39 Me. 166.

5. Fields *v.* Brown, 188 Ill. 111, 58 N. E. 977; Ames *v.* Moir, 130 Ill. 582, 22 N. E. 535; Duncklee *v.* Webber, 151 Mass. 408, 24 N. E. 1082; Campbau *v.* Lafferty, 43 Mich. 429, 5 N. W. 648.

6. *Arkansas.*— Trapnell *v.* Merrick, 21 Ark. 503.

Colorado.— State Bd. of Land Com'rs *v.* Carpenter, 16 Colo. App. 436, 66 Pac. 165.

Illinois.— McFarlane *v.* Williams, 107 Ill. 33; Henderson *v.* Virden Coal Co., 78 Ill. App. 437.

Indiana.— Doxey *v.* Service, 30 Ind. App. 174, 65 N. E. 757.

Missouri.— Traylor *v.* Cabanne, 8 Mo. App. 131.

Nevada.— Fitton *v.* Hamilton City, 6 Nev. 196.

New York.— William Wicke Co. *v.* Kaldenberg Mfg. Co., 21 Misc. 79, 46 N. Y. Suppl. 937. See also Zink *v.* Bohn, 3 N. Y. Suppl. 4, holding that, where a tenant has remained in possession and enjoyed the use of the premises, and the trial court finds that he signed the lease, he is estopped from asserting the improper execution of the lease by the landlord.

Vermont.— First Cong. Meeting House Soc. *v.* Rochester, 66 Vt. 501, 29 Atl. 810.

United States.— Farmers' L. & T. Co. *v.* St. Joseph, etc., R. Co., 2 Fed. 117, 1 McCrary 247.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 66, etc.

7. Lagerfelt *v.* McKie, 100 Ala. 430, 14 So. 281; Nickolls *v.* Barnes, 39 Nebr. 103, 57 N. W. 990, 32 Nebr. 195, 49 N. W. 342 (holding that where a tenant holds premises and pays rent for several months under an instrument signed by himself only, purporting to be a lease for one year, and providing for monthly payment of rent, with a lien on the tenant's property therefor, the terms of the instrument may be enforced as a parol lease for one year); Evans *v.* Conklin, 71 Hun (N. Y.) 536, 24 N. Y. Suppl. 1081; Kaier *v.* Leahy, 15 Pa. Co. Ct. 243. See also Hays *v.* Moody, 2 N. Y. Suppl. 385; Dietz *v.* Winehill, 6 Wash. 109, 32 Pac. 1056 [*following* Isaacs *v.* Holland, 4 Wash. 54, 29 Pac. 976], holding that failure of a wife to join her husband in a lease of community property does not render the lease void so as to enable the lessee to disregard it and recover from the husband moneys paid on account of such lease, although the lessee never took possession of the premises.

By agent of owner.— One who has held possession of lands for more than a year, under a lease from an agent not authorized in writing, has executed the contract and cannot therefore plead that the lease is invalid under the statute of frauds. Toan *v.* Pline, 60 Mich. 385, 27 N. W. 557.

8. Sigmund *v.* Newspaper Co., 82 Ill. App. 178; Kiersted *v.* Orange, etc., R. Co., 69 N. Y.

b. Seal. The general rule at present, both in the United States and in England, is that it is not necessary to the validity of a lease that it be under seal.[9] There are, however, some early English cases to the effect that all leases for more than three years must be by deed.[10]

c. Necessity of Stamp. Under statutes requiring leases or agreements to lease to have a revenue stamp affixed, the omission to stamp the lease or agreement previously to its execution does not vitiate the instrument;[11] but until a proper stamp is affixed it cannot be received in evidence.[12]

d. Acknowledgment and Attestation. In practically every jurisdiction it is provided by statute that every lease of land for a term in excess of a period specified by the statute is invalid as to third parties unless such lease is duly acknowledged by the parties thereto.[13] However, under these statutes, the general

343, 25 Am. Rep. 199 (holding that a lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although the validity of the agency is recited therein, and although it appears by extrinsic evidence that the lessee acted as agent. The instrument can only be enforced against the party who appears upon the face of it to be the covenantor); Galewski *v.* Appelbaum, 32 Misc. (N. Y.) 203, 65 N. Y. Suppl. 694. See, generally, PRINCIPAL AND AGENT.

9. *California.*— Crescent City Wharf, etc., Co. *v.* Simpson, 77 Cal. 286, 19 Pac. 426.

Illinois.— Borggard *v.* Gale, 205 Ill. 511, 68 N. E. 1063 [*affirming* 107 Ill. App. 128]; Lake *v.* Campbell, 18 Ill. 106.

Maine.— Hill *v.* Woodman, 14 Me. 38.

Missouri.— De Loge *v.* Hall, 31 Mo. 473; Gay *v.* Ihm, 3 Mo. App. 588.

New Hampshire.— Hunt *v.* Hazelton, 5 N. H. 216, 20 Am. Dec. 575.

New Jersey.— Den *v.* Johnson, 15 N. J. L. 116.

New York.— Stoddard *v.* Whiting, 46 N. Y. 627; Warren *v.* Leland, 2 Barb. 613; O'Brien *v.* Smith, 13 N. Y. Suppl. 408; Fougera *v.* Cohn, 2 N. Y. City Ct. 253.

Pennsylvania.— Witman *v.* Reading, 191 Pa. St. 134, 43 Atl. 140.

Wisconsin.— Woolsey *v.* Henke, 125 Wis. 134, 103 N. W. 257.

England.— Beck *v.* Phillips, 5 Burr. 2827; Goodtitle *v.* Way, 1 T. R. 735; Baxter *v.* Browne, 2 W. Bl. 973; Farmer *v.* Rogers, 2 Wils. C. P. 26.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 69.

In Delaware by statute (Laws (1852), amended by Laws (1893), c. 120, § 3), no demise except it be by deed is effectual for a longer term than one year. Stewart *v.* Apel, 5 Houst. 189, 4 Houst. 314, where a lease for five years not under seal was held not to be binding except as a lease from year to year.

10. Rawlins *v.* Turner, 1 Ld. Raym. 736; Rex *v.* Little Dean, 1 Str. 555.

11. Rex *v.* Chester, 8 Mod. 364, 1 Str. 624. See also Allen *v.* Lambden, 2 Md. 279; Britenbaker *v.* Halter, 24 Pa. Co. Ct. 585 (holding that a motion to rule to set aside an execution to strike off a judgment on the ground that the lease on which it was entered had no revenue stamp attached as required by the act of congress of June 13, 1898, will be refused, where defendant was the only party complaining, and it was his duty, as the maker of the instrument, to affix the required stamp); Brown *v.* Tonkin, 4 Fed. Cas. No. 2,031, 1 Cranch C. C. 85 (holding that a stamp is not necessary to an acknowledgment of having hired a house); Mott *v.* Turnage, 1 F. & F. 6.

12. Harker *v.* Birkbeck, 3 Burr. 1556, 1 W. Bl. 482; Goodtitle *v.* Way, 1 T. R. 735. See also McGeary *v.* Raymond, 17 Pa. Super. Ct. 308, holding that where a lease properly stamped is offered in evidence, it will be presumed that the stamps were affixed at the time they purport to have been, unless that presumption be overcome by affirmative evidence which will rebut it.

13. *Iowa.*— Wihelm *v.* Mertz, 4 Greene 54; Hopping *v.* Burnam, 2 Greene 39.

Maryland.— Anderson *v.* Critcher, 11 Gill & J. 450, 32 Am. Dec. 72.

Massachusetts.— Toupin *v.* Peabody, 162 Mass. 473, 39 N. E. 280; Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780.

Pennsylvania.— Tatham *v.* Lewis, 65 Pa. St. 65, holding that where the acknowledgment of the lease is written on a separate sheet of paper it is invalid to pass the term.

United States.— Brohawn *v.* Van Nest, 4 Fed. Cas. No. 1,920, 1 Cranch C. C. 366, holding that under Va. Acts (1776), c. 14, which provides that no estate for more than seven years shall pass or take effect unless the deed be acknowledged and recorded, a lease for ninety-nine years, not acknowledged and recorded, is not good for seven years, but is evidence of the rate of renting in an action for use and occupation.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 71.

Compare Stone *v.* Stone, 1 R. I. 425.

Form and sufficiency of acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 506.

A lease for a term not exceeding three years need not be executed in the presence of two witnesses, as required by Minn. Comp. St. c. 35, § 8, of "deeds" of land or any interest in land, as they are taken out of the operation thereof by section 30, which provides that "conveyances," as used in the chapter, shall not be construed to embrace

rule is that a lease duly signed by the parties, but not witnessed or acknowledged, as required by the statute, will nevertheless be valid and binding as between the parties thereto, and third persons having actual notice of its existence.[14] Although in at least two jurisdictions it is held that a lease which is not properly attested and acknowledged, as prescribed by the statute, is invalid, even as between the parties thereto, and third persons with actual knowledge of its execution.[15]

e. Delivery and Acceptance. The general rule is that a lease takes effect so as to vest the estate or interest to be conveyed only from its delivery, and not from its date, or the time the signatures were affixed to it;[16] and there can be no delivery without an acceptance, express or implied.[17] While delivery, in the popular acceptation of the term, implies a manual transfer of possession from one person to another, yet, where the lessee by formal assent or unequivocal acts, such as entering into possession, treats the instrument as in his possession, it is sufficient to constitute a delivery.[18] The delivery is complete where the lessor

leases for a term not exceeding three years. Chandler *v.* Kent, 8 Minn. 524.

Acknowledgment before expiration of term. — In Vermont a lease for two years, reserving a lien for rent, is valid between the parties and against creditors of the lessee, if acknowledged and recorded before the expiration of the term. Buswell *v.* Marshall, 51 Vt. 87.

14. *California.*— Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111.

Connecticut.— Johnson *v.* Phœnix Mut. L. Ins. Co., 46 Conn. 92; Baldwin *v.* Walker, 21 Conn. 168.

Illinois.— Blake *v.* Campbell, 18 Ill. 106.

Iowa.— Wihelm *v.* Mertz, 4 Greene 54.

Nebraska.— Weaver *v.* Coumbe, 15 Nebr. 167, 17 N. W. 357; Kittle *v.* St. John, 10 Nebr. 605, 7 N. W. 271.

Vermont.— Lemington *v.* Stevens, 48 Vt. 38.

Washington.—Schulte *v.* Schering, 2 Wash. 127, 26 Pac. 78; McGlauflin *v.* Holman, 1 Wash. 239, 24 Pac. 439.

See, however, Wm. W. Kendall Boot, etc., Co. *v.* Bain, 55 Mo. App. 264, holding that a lease not acknowledged and recorded is invalid as to third persons, although they have notice.

15. Anderson *v.* Critcher, 11 Gill & J. (Md.) 450, 32 Am. Dec. 72; Langmede *v.* Weaver, 65 Ohio St. 17, 60 N. E. 992; Abbott *v.* Bosworth, 36 Ohio St. 605 (holding that where the signing and sealing of a lease for ninety-nine years is attested by but one witness, the lessee acquires only an equitable title); Richardson *v.* Bates, 8 Ohio St. 257; Patterson *v.* Pease, 5 Ohio 190; Johnston *v.* Haines, 2 Ohio 55, 15 Am. Dec. 533; Courcier *v.* Graham, 1 Ohio 330; Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621; Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251; Fulton *v.* Doty, 7 Ohio S. & C. Pl. Dec. 503, 3 Ohio N. P. 449.

16. *Alabama.*— Lawrence *v.* Bell, 132 Ala. 308, 31 So. 503, where the execution of the lease was held to be sufficient.

California.— Stetson *v.* Briggs, 114 Cal. 511, 46 Pac. 603; Davidson *v.* Ellmaker, 84 Cal. 21, 23 Pac. 1026.

Illinois.— Henderson *v.* Virden Coal Co., 78 Ill. App. 437.

New York.— Whitthaus *v.* Starin, 12 Daly 226; De Ronde *v.* Olmsted, 5 Daly 398; Goodrich *v.* Walker, 1 Johns. Cas. 250.

Ohio.— Green *v.* Robinson, Wright 436.

Pennsylvania.— Kelsey *v.* Tourtelotte, 59 Pa. St. 184.

England.— Miltown *v.* Goodman, Ir. R. 10 C. L. 27.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 72.

17. *Connecticut.*— Hinsdale *v.* Humphrey, 15 Conn. 431 (holding that the acceptance by the lessee of a lease, sealed by the lessor only, is not such assent to the stipulations contained as to make it his deed); Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Illinois.— Henderson *v.* Virden Coal Co., 78 Ill. App. 437. See Leiter *v.* Pike, 127 Ill. 287, 20 N. E. 23 [*affirming* 26 Ill. App. 530], where the transaction was held to amount to an acceptance of the lease.

New York.— Flomerfelt *v.* Englander, 29 Misc. 655, 61 N. Y. Suppl. 187; Steinfield *v.* Wilcox, 26 Misc. 401, 56 N. Y. Suppl. 217; Moore *v.* Chase, 26 Misc. 9, 55 N. Y. Suppl. 621 (where there was held to be an acceptance of the lease on the part of the lessee); Adams *v.* Doelger, 15 Misc. 140, 36 N. Y. Suppl. 801; Jackson *v.* Phipps, 12 Johns. 418.

North Carolina.— Burch *v.* Elizabeth City Lumber Co., 131 N. C. 830, 42 S. E. 1040, 134 N. C. 116, 46 S. E. 24.

Canada.— Prosser *v.* Henderson, 20 U. C. Q. B. 438.

Conditional acceptance.— Allegations by a lessee in a suit on a bond for breach of covenant in the lease that after the lease had been signed and delivered, but before he had taken possession, he learned of certain defects and refused to receive the lease, and would have rescinded had not plaintiff promised to remedy the defects, were held to substantially state the non-acceptance of the lease, except on condition that the defects should be remedied. Shelton *v.* Durham, 76 Mo. 434.

18. Oneto *v.* Restano, 89 Cal. 63, 26 Pac. 788; Reynolds *v.* Greenbaum, 80 Ill. 416 (where a lease was signed by both parties, but was left with the scrivener with the intention of having a copy made for the lessee, and it was held that there was a sufficient delivery); Rhone *v.* Gale, 12 Minn. 54 (hold-

has put it beyond his power to rescind the agreement or recall the instrument of lease.[19]

4. Record — a. Necessity of in General. In practically every jurisdiction, by statutory enactment, every lease of lands, or interest therein, for a period in excess of that designated by statute, must be recorded in the county where the land is situated, and a failure to so record will render the lease void as to subsequent encumbrancers and purchasers, without notice, and for a valuable consideration, who first duly record their conveyances.[20] However, as between parties thereto,[21] and persons having actual notice thereof, a lease is effectual to pass the

ing likewise that in a case of a written lease to take effect *in præsenti*, possession being averred, the *prima facie* presumption is that both the lease and possession were delivered on the day of its date); Witman *v.* Reading, 191 Pa. St. 134, 43 Atl. 140. See Jordan *v.* Davis, 108 Ill. 336, holding that the mere placing of a lease in the hands of the proposed lessee for the purpose of obtaining a guaranty for payment of rent is not a delivery of the lease.

19. Leiter *v.* Pike, 127 Ill. 287, 20 N. E. 23 [*affirming* 26 Ill. App. 530]; Maynard *v.* Maynard, 10 Mass. 456, 6 Am. Dec. 146; Brown *v.* Austen, 35 Barb. (N. Y.) 341; Scrugham *v.* Wood, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; Doe *v.* Knight, 5 B. & C. 671, 8 D. & R. 348, 4 L. J. K. B. O. S. 161, 29 Rev. Rep. 355, 11 E. C. L. 632.

20. *Alabama.*— Milliken *v.* Faulk, 111 Ala. 658, 20 So. 594, holding that a lease of growing trees for the purpose of gathering turpentine therefrom is a conveyance of an interest in real estate which must be recorded.

California.— Jones *v.* Marks, 47 Cal. 242; Odd Fellows' Sav. Bank *v.* Banton, 46 Cal. 603.

Connecticut.— Smith *v.* Simons, 1 Root 318, 1 Am. Dec. 48.

Iowa.— Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33; Wihelm *v.* Mertz, 4 Greene 54. See Bevier *v.* Bevier, 48 Iowa 609.

Kentucky.— Locke *v.* Coleman, 4 T. B. Mon. 315 (holding, however, that a lease of land for a term not exceeding five years need not be recorded); Clift *v.* Stockdon, 4 Litt. 215.

Louisiana.—Arent *v.* Bone, 23 La. Ann. 387; Brown *v.* Matthews, 3 La. Ann. 198; Flower *v.* Pearce, 45 La. Ann. 853, 13 So. 150.

Maryland.—Anderson *v.* Critcher, 11 Gill & J. 450, 32 Am. Dec. 72.

Massachusetts. — Toupin *v.* Peabody, 162 Mass. 473, 39 N. E. 280; Chapman *v.* Gray, 15 Mass. 439.

Missouri. — Carr *v.* Carr, 36 Mo. 408; Faxon *v.* Ridge, 87 Mo. App. 299. See also Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670.

New Jersey.— Lembeck, etc., Eagle Brewing Co. *v.* Kelly, 63 N. J. Eq. 401, 51 Atl. 794.

New York. — Westchester Trust Co. *v.* Hobby Bottling Co., 102 N. Y. App. Div. 464, 92 N. Y. Suppl. 482; Griffin *v.* Baust, 26 N. Y. App. Div. 553, 50 N. Y. Suppl. 905; Jokinisky *v.* Miller, 44 Misc. 239, 88 N. Y. Suppl. 928. See Beebe *v.* Coleman, 8 Paige 392, holding that a lease for less than three years under which the lessee takes possession, allowing him to cut down and remove timber during the term, is valid against a subsequent *bona fide* purchaser, although the lease is not recorded.

South Carolina. — Charleston *v.* Page, Speers Eq. 159.

United States. — Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. ed. 168 [*affirming* 28 Fed. Cas. No. 16,867, 5 Cranch C. C. 127]; Brohawn *v.* Van Nest, 4 Fed. Cas. No. 1,920, 1 Cranch C. C. 366. See Stone *v.* Stone, 1 R. I. 425; Semmes *v.* McKnight, 21 Fed. Cas. No. 12,653, 5 Cranch C. C. 539.

See, however, Thomas *v.* Blackemore, 5 Yerg. (Tenn.) 113, holding that a lease for more than a year is valid and passes the interest, although not proved and registered.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 76.

A lease of chattels for a specified rent, with an agreement that they should be the property of the lessee upon payment of the rent for a specified period, is not, under the New York statute, a chattel mortgage, nor an agreement intended to operate as such, requiring filing to give it validity as against subsequent purchasers. Neidig *v.* Eifler, 18 Abb. Pr. (N. Y.) 353.

In New Jersey, prior to 1898 (Pub. Laws (1898), p. 67, § 7), a lease for years under seal was not a deed or conveyance of lands within the meaning of the act concerning conveyances, and such a lease was not rendered invalid by failure to record it. Hodge *v.* Giese, 43 N. J. Eq. 342, 11 Atl. 484; Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 7 Atl. 873.

In Pennsylvania it has not been the practice to record all lands and tenements for terms of years or their assignments; nor do the acts of assembly require them to be recorded when the possession accompanies the lease, unless the lease is for a term exceeding twenty-one years. Marsh *v.* Nelson, 101 Pa. St. 51; Williams *v.* Downing, 18 Pa. St. 60.

21. *Connecticut.*— Johnson *v.* Phœnix Mut. L. Ins. Co., 46 Conn. 92; Barnum *v.* Landon, 25 Conn. 137.

Illinois.— Lake *v.* Campbell, 18 Ill. 106.

Massachusetts. — Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780; Smythe *v.* Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822; Earle *v.* Fiske, 103 Mass. 491; Dole *v.* Thurlow, 12 Metc. 157.

interest therein purported to be conveyed, even though it is not recorded as required by statute.[22]

b. Sufficiency of. Under the various recording statutes, where a duly acknowledged lease is delivered to the proper county officer for recording, it is notice to everybody of the existence of the lease, and a subsequent *bona fide* encumbrancer or purchaser takes subject to the lease, and is chargeable with notice of its existence, although as a matter of fact the officer failed to record it.[23]

5. Validity — a. Undue Influence and Duress. A lease effected by means of imposition or undue influence brought to bear upon one of the parties thereto is at least voidable, but the mere fact of advanced age and infirmity is not alone sufficient ground on which to predicate and presume undue influence.[24] A lease made by a party under duress is not absolutely void, but is voidable at his instance when he again becomes a free agent.[25]

b. Fraud and Mistake. The rule is elementary that fraud or deceit in the making of a lease will avoid the same;[26] and fraud sufficient to vitiate the agree-

South Carolina.— Davis *v.* Days, 42 S. C. 69, 19 S. E. 975.

Vermont.— Buswell *v.* Marshall, 51 Vt. 87.

22. *Iowa.*— Wihelm *v.* Mertz, 4 Greene 54.

Maine.— Porter *v.* Cole, 4 Me. 20.

Massachusetts.— Connecticut *v.* Braddish, 14 Mass. 296.

Michigan.— Arnold *v.* Whitcomb, 83 Mich. 19, 46 N. W. 1029.

Nebraska.— Weaver *v.* Coumbe, 15 Nebr. 167, 17 N. W. 357.

New Hampshire.— Clarke *v.* Merrill, 51 N. H. 415; Colby *v.* Kenniston, 4 N. H. 262.

New York.— Tuttle *v.* Jackson, 6 Wend. 213, 21 Am. Dec. 306; Jackson *v.* Phillips, 9 Cow. 94; Jackson *v.* Winslow, 9 Cow. 13.

Pennsylvania.— Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236.

Rhode Island.— McCardell *v.* Williams, 19 R. I. 701, 36 Atl. 719.

South Carolina.— Tart *v.* Crawford, 1 McCord 265.

United States.— West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 77, 78.

23. Lewis *v.* Klotz, 39 La. Ann. 259, 1 So. 539; Reid *v.* Long Lake, 44 Misc. (N. Y.) 370, 89 N. Y. Suppl. 993. See Thurlough *v.* Dresser, 98 Me. 161, 56 Atl. 654 (holding that the record of the lease, although prior in time to plaintiff's mortgage, was insufficient to give plaintiff constructive notice of defendant's equitable claim, being indefinite as to description, and misleading as to time); Westchester Trust Co. *v.* Hobby Bottling Co., 102 N. Y. App. Div. 464, 92 N. Y. Suppl. 482.

24. Waters *v.* Barral, 2 Bush (Ky.) 598; Ranken *v.* McBride, 127 N. Y. 651, 27 N. E. 857 [*affirming* 5 N. Y. Suppl. 771]; Lewis *v.* Pead, 1 Ves. Jr. 19, 30 Eng. Reprint 210. See Laughlin *v.* Mitchell, 14 Fed. 382, where it was held that the evidence failed to show undue influence in the execution of the lease.

Confidential relations.— The relationship of father and son will not of itself invalidate a lease by the former as agent or trustee to the latter or authorize the disaffirmance of the transaction by the principal or *cestui que trust.* The fact of relationship is a material one in determining the question whether there was fraud in fact in the transaction, but it does not *per se* constitute fraud in law or bring the case within the rule prohibiting an agent or trustee from dealing with the subject-matter of the agency or trust for his own benefit. Lingke *v.* Wilkinson, 57 N. Y. 445.

What constitutes duress in general see CONTRACTS, 9 Cyc. 443.

Undue influence in general see CONTRACTS, 9 Cyc. 454.

25. Gillespie *v.* Holland, 40 Ark. 28, 48 Am. Rep. 1; Barrett *v.* French, 1 Conn. 354, 6 Am. Dec. 241 (holding, however, that to avoid a deed on the ground of duress *per minas*, the threats must be such as to strike with fear a person of common firmness and constancy of mind; duress by mere advice, direction, influence, and persuasion being unknown to the law); Dickson *v.* Kempinsky, 96 Mo. 252, 9 S. W. 618; Whelpdale's Case, 5 Coke 119*a*; Thoroughgood's Case, 2 Coke 9*a*. See Andrew *v.* Carlile, 4 Colo. App. 336, 36 Pac. 66 (holding that an allegation that the tenant was induced to take a lease by duress is not sustained by evidence that he had to pay rent or vacate, no claim being made that he did not understand the terms of the lease, and it being shown that the lease was from month to month, and that the lessee occupied the premises thereunder for nearly a year); Pottsville Bank *v.* Cake, 12 Pa. Super. Ct. 61 (holding that where a party is about to be turned out of possession under a writ of habere facias possessionem, a lease signed under an alternative of so doing or a refusal to suspend the execution cannot be said to have been procured by fraud or duress).

26. *Colorado.*— Pursel *v.* Teller, 10 Colo. App. 488, 51 Pac. 436.

Illinois.— Haines *v.* Downey, 86 Ill. App. 373.

Iowa.— Martin *v.* Davis, 96 Iowa 718, 65 N. W. 1001.

Kentucky.— Ball *v.* Lively, 4 Dana 369,

ment may be shown by parol evidence.[27] However, in order to vitiate the lease the execution of the instrument must not only have been procured by fraud, deceit, or misrepresentation, but the party executing it must have been free from negligence in affixing his signature thereto.[28] Mere promissory statements and opinions of the lessor on which the lessee has no right to rely are insufficient to sustain a charge of false representations in procuring the lease.[29] It is the duty of a lessee, upon discovering that representations which induced him to execute the lease were fraudulent, to rescind the lease, if he desires to escape its obligations; failure to do so amounts to an election to continue the same in force, and to abide by its covenants.[30] The question as to whether there was fraud in the transaction is usually one of fact for the jury.[31] Under certain conditions the concealment by a party to the lease of material facts affecting the premises may be ground for avoiding the same.[32]

c. Legality of Object. The general rule is that a lease made with the knowl-

holding, however, that if there was fraud which would vitiate the lease, before defendant could avoid it for that reason, he must restore the possession of the property.

Massachusetts.— Beatty *v.* Fishel, 100 Mass. 448, holding, however, that where in an action on a written lease defendant sets up that its execution was procured by fraudulent representations as to its contents, the burden is on him to prove the fraud.

Nebraska.— Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196.

New York.— Powell *v.* F. C. Linde Co., 49 N. Y. App. Div. 286, 64 N. Y. Suppl. 153 [*reversing* 29 Misc. 419, 60 N. Y. Suppl. 1044]; McKey *v.* Lockner, 43 N. Y. App. Div. 43, 59 N. Y. Suppl. 640; Vogel *v.* Hemming, 84 N. Y. Suppl. 473; Jackson *v.* Hayner, 12 Johns. 469.

Pennsylvania.— Baskin *v.* Seechrist, 6 Pa. St. 154; Hockenbury *v.* Snyder, 2 Watts & S. 240; Morris *v.* Shakespeare, 9 Pa. Cas. 345, 12 Atl. 414.

Texas.— Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

Virginia.— Rorer Iron Co. *v.* Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Locke *v.* Frasher, 79 Va. 409.

England.— White *v.* Small, 2 Ch. Cas. 103, 22 Eng. Reprint 867; Shulter's Case, 12 Coke 90; Mauser's Case, 2 Coke 1*a*.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 82.

Fraud invalidating contract in general see CONTRACTS, 9 Cyc. 411 *et seq.*

27. Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490; Christie *v.* Blakeley, (Pa. 1888) 15 Atl. 874; Wolfe *v.* Arrott, 109 Pa. St. 473, 1 Atl. 333.

28. Robinson *v.* Glass, 94 Ind. 211; Binford *v.* Bruso, 22 Ind. App. 512, 54 N. E. 146; Lindley *v.* Hofman, 22 Ind. App. 237, 53 N. E. 471 (holding that it is not sufficient that the party executes the instrument when he thought he was executing an entirely different one, but he must be induced to execute it by fraud, deceit, etc., and he must be free from laches and negligence upon his part); Jack *v.* Brown, 60 Iowa 271, 14 N. W. 304; Lewis *v.* Clark, 86 Md. 327, 37 Atl. 1035; Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

29. *California.*— Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58.

Illinois.— Johnson *v.* Wilson, 33 Ill. App. 639; McCoull *v.* Herzberg, 33 Ill. App. 542.

Indiana.— Fry *v.* Day, 97 Ind. 348.

Iowa.— Boyer *v.* Commercial Bldg. Inv. Co., 110 Iowa 491, 81 N. W. 720.

Minnesota.— Wilkinson *v.* Clauson, 29 Minn. 91, 12 N. W. 147.

New York.— Schermerhorn *v.* Gouge, 13 Abb. Pr. 315.

West Virginia.— Love *v.* Teter, 24 W. Va. 741.

Untrue affirmations, by a landlord, as to the condition of the premises proposed to be hired, in a matter concerning which, by ordinary diligence, the tenant may obtain correct information, are not such a deception as to impose upon the landlord the obligation of a warranty. Schermerhorn *v.* Gouge, 13 Abb. Pr. (N. Y.) 315.

30. Little *v.* Dyer, 35 Ill. App. 85; Forgotson *v.* Becker, 39 Misc. (N. Y.) 816, 81 N. Y. Suppl. 319; Powell *v.* F. C. Linde Co., 29 Misc. (N. Y.) 419, 60 N. Y. Suppl. 1044; Kiernan *v.* Terry, 26 Oreg. 494, 38 Pac. 671. See also Lamb *v.* Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289, 21 S. W. 713, holding that where the tenant has not been disturbed in his possession of the premises leased by an adverse claimant, he cannot complain that he was induced to lease such premises by reason of false representations as to the title by the landlord.

31. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Baker *v.* Fawcett, 69 Ill. App. 300; Ladner *v.* Balsley, 103 Iowa 674, 72 N. W. 787. See Stein *v.* Rice, 23 Misc. (N. Y.) 348, 51 N. Y. Suppl. 320. See also Ward *v.* Philadelphia, 3 Pa. Cas. 233, 6 Atl. 263; Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

32. Staples *v.* Anderson, 3 Rob. (N. Y.) 327; Rhinelander *v.* Seaman, 13 Abb. N. Cas. (N. Y.) 455; Larkin *v.* U. S., 5 Ct. Cl. 526. See Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671, holding that where the tenant inspects the dwelling before leasing it, the failure of the landlord to disclose the fact that the cellar is liable to become

edge and intention of the lessor that the demised premises are to be used for immoral or illegal purposes is unenforceable and invalid.[33] Where, however, the lessor in good faith leases his premises without any knowledge that they are to be used for unlawful or immoral purposes, the fact that they are subsequently so used, without collusion or assent on his part, will not vitiate the lease, or impair his right to enforce any of the covenants therein contained.[34] Some of the cases go to the length of holding that actual knowledge on the part of the lessor of the illegality of the object of the lease will not invalidate it where there was no collusion or participation in the illegal act on his part.[35]

d. Limitation of Term. Where an estate is created vesting in possession, and there are annexed to it restraints and limitations not allowed by law, only the restraints and limitations are void.[36] The rule that prevails in respect to powers

flooded in case of rain does not entitle the tenant to avoid the lease.

33. *Colorado.*— Dougherty *v.* Seymour, 16 Colo. 289, 26 Pac. 823.

Georgia.— Ralston *v.* Boady, 20 Ga. 449.

Illinois.— Heineck *v.* Grosse, 99 Ill. App. 441; Harris *v.* McDonald, 79 Ill. App. 638; Ryan *v.* Potwin, 62 Ill. App. 134.

Louisiana.— Kathman *v.* Walters, 22 La. Ann. 54; Milne *v.* Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189.

Massachusetts.— Sherman *v.* Wilder, 106 Mass. 537 (upholding the above rule even where the lease contained an express covenant to make no unlawful use of the premises); Simpson *v.* Wood, 105 Mass. 263. See Rice *v.* Enwright, 119 Mass. 187.

Minnesota.— Berni *v.* Boyer, 90 Minn. 469, 97 N. W. 121, holding that a lease for a term of years, with a view to occupying the building as a house of prostitution, is wholly void and confers no right on defendants to continue in possession for such purposes as tenants from month to month, or otherwise.

Missouri.— Ashbrook *v.* Dale, 27 Mo. App. 649.

New Hampshire.— Mitchell *v.* Scott, 62 N. H. 596.

New York.—Edelmuth *v.* McGarren, 4 Daly 467, 45 How. Pr. 191; Updike *v.* Campbell, 4 E. D. Smith 570; Romano *v.* Bruck, 25 Misc. 406, 54 N. Y. Suppl. 935.

Ohio.— Canfield *v.* Vacha, 4 Ohio S. & C. Pl. Dec. 240, 3 Ohio N. P. 158; Goodall *v.* Gerke Brewing Co., 3 Ohio S. & C. Pl. Dec. 58, 1 Ohio N. P. 284.

Rhode Island.— Gorman *v.* Keough, 22 R. I. 47, 46 Atl. 37.

Texas.— Hunstock *v.* Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294.

Canada.— Vanbuskirk *v.* McNaughton, 34 N. Brunsw. 125.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 85.

The purchaser of the premises leased for unlawful purposes cannot enforce the lease, where he had an opportunity to ascertain about it and the use of the premises by the tenants, but did not avail himself thereof. Ernst *v.* Crosby, 140 N. Y. 364, 35 N. E. 603.

34. *Iowa.*— Whalen *v.* Leisy Brewing Co., 106 Iowa 548, 76 N. W. 842.

Louisiana.— Commagere *v.* Brown, 27 La. Ann. 314.

New York.— Shedlinsky *v.* Budweiser Brewing Co., 163 N. Y. 437, 57 N. E. 620; Updike *v.* Campbell, 4 E. D. Smith 570; Gibson *v.* Pearsall, 1 E. D. Smith 90; Burke *v.* Tindale, 12 Misc. 31, 33 N. Y. Suppl. 20 (holding that a provision inserted in a lease at the end thereof, authorizing the lessee to erect an unlawful structure, does not invalidate the lease so as to defeat the lessor's rights to rent, since such structure forms no part of the demised premises for which the rent was reserved); Kerley *v.* Mayer, 10 Misc. 718, 31 N. Y. Suppl. 818. See O'Brien *v.* Brietenbach, 1 Hilt. 304, holding that the intention of keeping a disorderly house, although avowed by the lessee, is no offense authorizing the lessor to repudiate his contract. If the lessee is guilty of keeping such house after taking possession, the statute gives a remedy. See also Arras *v.* Richardson, 5 N. Y. Suppl. 755, holding that it is no defense in an action for rent that the premises were hired to be used for illegal or immoral purposes to the knowledge of the agent of the landlord, unless such knowledge be brought to the notice of the landlord; such a hiring being criminal under N. Y. Pen. Code, § 322.

Ohio.— Zink *v.* Grant, 25 Ohio St. 352; Kittredge *v.* Allemania Soc., 3 Ohio S. & C. Pl. Dec. 217, 3 Ohio N. P. 312.

Texas.— Houston Ice, etc., Co. *v.* Keenan, (1905) 88 S. W. 197, holding that, although a lease provided that the premises should be used for the saloon business, a contract is not rendered illegal, or the lessee absolved, by the adoption of local option in the county.

Compare Talbott *v.* English, 156 Ind. 299, 59 N. E. 857.

Covenants against unlawful use see *infra*, VII, B, 3.

Recovery of rent see *infra*, VIII, A, 3, h.

35. Frank *v.* McDonald, 86 Ill. App. 336 (holding that it was not enough to defeat an action on the lease that the lessee intended to use the premises for gambling purposes, and that the lessor knew that he "wanted" to do so); Taylor *v.* Levy, (Md. 1892) 24 Atl. 608; Miller *v.* Maguire, 18 R. I. 770, 30 Atl. 966; Almy *v.* Greene, 13 R. I. 350.

36. Robertson *v.* Hayes, 83 Ala. 290, 3 So. 674. See DEEDS, 13 Cyc. 651.

The word "term" in a covenant in a lease may signify either the time or the estate

to lease is analogous, which is that when there is an affirmative power to lease, restrained by a negative limitation, such as not to exceed a prescribed number of years, the lease, although for a term exceeding the prescribed limit, will stand good for the time authorized by the power.[37] In several jurisdictions, by constitutional or statutory provisions, no lease or grant of agricultural land, for a longer period than the statute specifies, in which shall be reserved any rent or service of any kind, is valid;[38] and under such provisions it has been held that a lease of such lands for a longer period than twelve years is void, even as to the twelve years.[39]

6. Estoppel, Waiver, and Ratification — a. Of Lessee. A lessee, by the acceptance of the lease, is estopped to deny the lessor's power to execute it.[40] Where a lessee has entered under his lease and occupied and enjoyed the premises, he and his assignees are alike estopped to repudiate the lease on the ground of its invalidity.[41] The mere possession of demised premises will not estop the lessee from setting up fraud in the procurement of the lessee in an action on the lease,

granted. Evans *v.* Vaughan, 4 B. & C. 261, 6 D. & R. 349, 3 L. J. K. B. O. S. 217, 28 Rev. Rep. 250, 10 E. C. L. 571.

37. Robertson *v.* Hayes, 83 Ala. 290, 3 So. 674 (holding that under Ala. Code (1876), § 2190, which provides that no leasehold estate can be created for a longer period than twenty years, a lease for more is void only for the excess); Gomez *v.* Gomez, 81 Hun (N. Y.) 566, 31 N. Y. Suppl. 206.

A lease by a corporation for a term extending beyond the time of expiration of its charter is not thereby rendered void where the charter provides that it might be renewed from time to time, and the lease was made binding upon the successors of the parties. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 51 Fed. 309, 2 C. C. A. 174. See, generally, Corporations, 10 Cyc. 1.

38. Odell *v.* Durant, 62 N. Y. 524; Stephens *v.* Reynolds, 6 N. Y. 454 (holding, however, in this case, that the instrument was not within the prohibition of the constitution); Parish *v.* Rogers, 20 N. Y. App. Div. 279, 46 N. Y. Suppl. 1058 [*affirming* 40 N. Y. Suppl. 1014]; Hart *v.* Hart, 22 Barb. 606; Wegner *v.* Lubenow, 12 N. D. 95, 95 N. W. 442 (holding, however, that a gross sum paid for a life lease of agricultural lands is not rent within N. D. Rev. Code, § 3310, declaring all leases of agricultural lands for a longer period than ten years in which rent is reserved to be void). But see Massachusetts Nat. Bank *v.* Shinn, 163 N. Y. 360, 57 N. E. 611 [*affirming* 18 N. Y. App. Div. 276, 46 N. Y. Suppl. 329].

39. Clark *v.* Barnes, 76 N. Y. 301, 32 Am. Rep. 306 (decided on the ground that New York constitutional provision is not that no lease shall be valid for a longer term than twelve years, but that the kind of lease described shall be invalid); Odell *v.* Durant, 62 N. Y. 524; Parish *v.* Rogers, 20 N. Y. App. Div. 279, 46 N. Y. Suppl. 1058 [*affirming* 40 N. Y. Suppl. 1014] (holding, however, that a lease of a farm during the lifetime of the lessor and of his wife for rent payable to the lessor during his lifetime and after his death to his wife is not void *ab initio*, since the lease may terminate prior to the expiration of the constitutional limitation, but that it can be valid for twelve years only).

40. Morse *v.* Roberts, 2 Cal. 515; Oliver *v.* Gary, 42 Kan. 623, 22 Pac. 733; Northampton County's Appeal, 30 Pa. St. 305. See also Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74, holding that if a tenant enters into possession of the premises under a parol lease made by the attorney of a corporation, the tenant will not be permitted to dispute the agent's authority, if the company subsequently ratifies the agent's act.

Estoppel to deny lessor's title see *infra*, III, G.

41. *California.*— Pierce *v.* Minturn, 1 Cal. 470.

Connecticut.— Baldwin *v.* Walker, 21 Conn. 168.

Illinois.— Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330. See also Mackin *v.* Chicago, 93 Ill. 105.

Indiana.— McClain *v.* Malone, 5 Ind. 237.

Massachusetts.— Appleton *v.* O'Donnell, 173 Mass. 398, 53 N. E. 882; Ripley *v.* Cross, 111 Mass. 41.

New Hampshire.— Hall *v.* Spaulding, 42 N. H. 259.

New York.— New York *v.* Huntington, 114 N. Y. 631, 21 N. E. 998; New York *v.* Sonneborn, 113 N. Y. 423, 21 N. E. 121; New York *v.* Wylie, 43 Hun 547; New York *v.* Kent, 57 N. Y. Super. Ct. 109, 5 N. Y. Suppl. 567.

Oklahoma.— Pappe *v.* Trout, 3 Okla. 260, 41 Pac. 397.

Virginia.— Watson *v.* Alexander, 1 Wash. 340.

Washington.— Mounts *v.* Goranson, 29 Wash. 261, 69 Pac. 740; McLennan *v.* Grand, 8 Wash. 603, 36 Pac. 682.

England.— Monroe *v.* Kerry, 1 Bro. P. C. 67, 1 Eng. Reprint 421.

Compare Schenck *v.* Stumpf, 6 Mo. App. 381, holding that the fact that one's co-lessees entered under a void lease and occupied according to its terms does not estop him to dispute its validity. In this case the lease was void, being executed by a married woman after the death of the trustee to whom the land had been conveyed for her separate use, and it was held that she not being estopped

if possession is surrendered as soon as the fraud is discovered.[42] The rule is otherwise, however, where the lessee upon discovery of the fraud fails to rescind, or attempt to rescind, the lease, but continues to occupy and enjoy the premises.[43] The mere payment of rent by the lessee as it falls due will not estop him from setting up fraud in the procurement or execution of the lease, provided he seeks to avoid the same immediately upon discovery of the fraud.[44]

b. Of Lessor. Where a lessor has no title to the property which is the subject-matter of the lease, yet his lease will still operate by way of estoppel if he afterward acquires title to such property at any time before the expiration of the term.[45] However, a lessor is not estopped from setting up the invalidity of a lease procured by fraud because he accepted rent under it without knowledge of the fraud.[46]

c. Ratification of Defective or Invalid Lease. Occupation of the premises by the lessee, and payment of rent according to the terms of the lease, is usually held to be a ratification by the lessee of an invalid lease.[47] Likewise acquiescence in the occupancy of the premises by the lessee, and acceptance of rent from him, will as a rule amount to a ratification of the lease by the lessor.[48] In some juris-

thereby, neither was the lessee; estoppels being mutual.

42. Irving *v.* Thomas, 18 Me. 418; Milliken *v.* Thorndike, 103 Mass. 382.

Assignment by lessee.— Where the lease was originally void for illegality of the purpose for which it was made, an assignment of it by the lessee does not estop him to assert the invalidity. Sherman *v.* Wilder, 106 Mass. 537.

43. *Illinois.*— Morey *v.* Pierce, 14 Ill. App. 91.

Kentucky.— South *v.* Marcum, 22 S. W. 844, 15 Ky. L. Rep. 339.

Massachusetts.— Hall *v.* Ryder, 152 Mass. 528, 25 N. E. 970; Kendall *v.* Carland, 5 Cush. 74.

Minnesota.— Bell *v.* Baker, 43 Minn. 86, 44 N. W. 676, where a tenant under a lease for three years occupied the leased premises for more than two years, and it was held he could not set up as a defense to an action for rent for the balance of the term that he was induced to enter into the contract by false representations of plaintiff.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123 [*affirming* 7 N. Y. Suppl. 4, 1 N. Y. Suppl. 774]; Whitney *v.* Allaire, 1 N. Y. 305 [*affirming* 4 Den. 554]; McCarty *v.* Ely, 4 E. D. Smith 375; Rosenbaum *v.* Gunter, 3 E. D. Smith 203; Lynch *v.* Sauer, 16 Misc. 1, 37 N. Y. Suppl. 666 [*affirming* 14 Misc. 252, 35 N. Y. Suppl. 715]; Conklin *v.* White, 17 Abb. N. Cas. 315.

44. Hoyt *v.* Dengler, 54 Kan. 309, 39 Pac. 260; Irving *v.* Thomas, 18 Me. 418; Cramer *v.* Carlisle Bank, 2 Grant (Pa.) 267. See also Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123 [*affirming* 7 N. Y. Suppl. 4], holding that a tenant who has leased a house on the false representations of the landlord that the furnace will heat the house does not by payment of the rent waive his right to sue the landlord for damages sustained on account of such false representations.

45. *Iowa.*— Lee *v.* Lee, 83 Iowa 565, 50 N. W. 33, holding that one who demises lands belonging to another, but acquires title thereto before the term is to commence, cannot avoid the lease on the ground that the lessee knew at the time it was made that the lessor had no right to let the lands.

Michigan.— Lewis *v.* Brandle, 107 Mich. 7, 64 N. W. 734.

New York.— Austin *v.* Ahearne, 61 N. Y. 6.

United States.— Skidmore *v.* Pittsburg, etc., R. Co., 112 U. S. 33, 5 S. Ct. 9, 28 L. ed. 626.

England.— Hermitage *v.* Tomkins, 1 Ld. Raym. 729.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 91.

46. Chicago U. O. of A. B. L. & S. M. *v.* Fitzgerald, 59 Ill. App. 362, holding that a party to a conspiracy to practise a fraud upon another is not in a position to invoke the doctrine of estoppel against the person upon whom the fraud is practised. Kirkpatrick *v.* Lyster, 13 Grant Ch. (U. C.) 323 [*affirming* 16 Grant Ch. (U. C.) 17]. See Tisman *v.* St. Clair School Dist. No. 10, 90 Mich. 510, 51 N. W. 549, holding that in ejectment against a school-district for a school-house site, when defendant claims under a lease from plaintiff's grantor, plaintiff is estopped to question the legality of defendant organization at the time the lease was made, since his grantor received the consideration of the house, and defendant's possession was notice of its rights. See also Long *v.* Poth, 16 Misc. (N. Y.) 85, 37 N. Y. Suppl. 670.

47. West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. 839 [*affirming* 85 Ill. App. 497].

48. *Indiana.*— Conwell *v.* Jeger, 21 Ind. App. 110, 51 N. E. 733.

New Jersey.— Earl *v.* Steffens, 1 N. J. L. J. 53, holding that where, pursuant to a lease which is void because made on Sunday, the lessor delivers possession to the lessee, and accepts a payment of rent, the parties must be held to have ratified and adopted the agreement, and the relation of landlord and

dictions, however, it is held that mere occupancy of the premises will not amount to a ratification of a void lease, but some new promise or condition in respect thereto is necessary.[49] And some of the cases hold that mere acceptance of rent, without any further act of confirmation, will not amount to a ratification of a defective or void lease on the part of the lessor.[50]

7. Modification and Rescission or Cancellation — a. Modification — (i) *In General.* While an executory contract under seal cannot be modified by parol so as to introduce any new elements into the contract,[51] yet conditions in a lease under seal can be waived by parol, where the waiver is in the nature of a release or discharge.[52] An oral agreement, not forbidden by the statute of frauds, and based on a sufficient consideration, is valid to modify the terms of an existing

tenant will exist from the date of such ratification.

Wisconsin.— Hassard *v.* Tomkins, 108 Wis. 186, 84 N. W. 174; Martens *v.* O'Connor, 101 Wis. 18, 76 N. W. 774.

England.— Doe *v.* Taniere, 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49, 64 E. C. L. 998; Doe *v.* Jenkins, 5 Bing. 469, 7 L. J. C. P. O. S. 182, 3 M. & P. 59, 30 Rev. Rep. 700, 15 E. C. L. 676 (holding that an heir in tail having received for ten years rent under a demise for ninety-nine years granted by his ancestor is a confirmation of the lease); Doe *v.* Sybourn, Esp. 677. See also Doe *v.* Morse, 1 B. & Ad. 365, 20 E. C. L. 519; Story *v.* Johnson, 2 Y. & C. Exch. 586. See, however, Doe *v.* Collinge, 7 C. B. 939, 13 Jur. 791, 18 L. J. C. P. 305, 62 E. C. L. 939.

Canada.— Simmons *v.* Campbell, 17 Grant Ch. (U. C.) 612.

Allowing tenant to make improvements.— Where a tenant under a void lease makes great improvements with the knowledge and approbation of the landlord he is entitled in equity to a valid lease. Hardcastle *v.* Shafto, 1 Anstr. 184.

49. McIntosh *v.* Lee, 57 Iowa 356, 10 N. W. 895; Meyers *v.* Rosenback, 5 Misc. (N. Y.) 337, 25 N. Y. Suppl. 521. See Smith *v.* Genet, 2 N. Y. City Ct. 88.

50. Carlton *v.* Williams, 77 Cal. 89, 19 Pac. 185, 11 Am. St. Rep. 243 (holding that the fact that rent has been accepted under a lease insufficiently acknowledged does not validate it, but at most creates a tenancy terminable by notice); Galewski *v.* Appelbaum, 32 Misc. (N. Y.) 203, 65 N. Y. Suppl. 694; James *v.* Jenkins, Buller N. P. 96 (holding that acceptance of rent by a tenant in tail on coming into possession is not confirmation of the lease made by a tenant for life which is absolutely void at his death); Doe *v.* Collinge, 7 C. B. 939, 13 Jur. 791, 18 L. J. C. P. 305, 62 E. C. L. 939; Jenkins *v.* Church, Cowp. 482; Robson *v.* Flight, 4 De G. J. & S. 608, 34 L. J. Ch. 226, 11 Jur. N. S. 147, 11 L. T. Rep. N. S. 725, 13 Wkly. Rep. 393, 69 Eng. Ch. 608, 46 Eng. Reprint 1054; Doe *v.* Butcher, Dougl. (3d ed.) 50. See Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73.

Acceptance by an agent, authorized to lease property, of arrears of rent from an agent under an attempted lease by an agent whose only authority was to collect rents, who instructed the tenant to so pay the arrears, is not a ratification of such attempted lease. Fleming *v.* Ryan, 10 Misc. (N. Y.) 420, 31 N. Y. Suppl. 129.

51. Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88; Taylor *v.* Soldati, 68 Cal. 27, 8 Pac. 518; Erenberg *v.* Peters, 66 Cal. 114, 4 Pac. 1091 (holding that a written lease is within the provision of Cal. Civ. Code, § 1698, to the effect that a contract in writing cannot be altered otherwise than by a contract in writing, or an executed oral agreement); Florsheim *v.* Dullaghan, 58 Ill. App. 626 (holding, however, that if the lease is terminated the right of the lessee to make an independent oral agreement for the use of the premises for a term less than a year cannot be questioned); Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811. And see Hurd *v.* Whitsett, 4 Colo. 77, holding that in Colo. Rev. St. p. 333, § 7, allowing a landlord on giving fifteen days' written notice "to change the terms of the lease" to take effect at the end of the month, the word "terms" will not be held to import that he may thereby enlarge the term or duration of the tenancy. See also Lapp *v.* May, 14 U. C. Q. B. 47.

Where, at the expiration of a lease under seal for a year, the tenant holds over, the lease under seal has expired, and it is competent therefore for the parties to vary its terms by a parol contract; the rule that an executory contract under seal cannot be varied by another contract of less dignity not applying. Goldsbrough *v.* Gable, 36 Ill. App. 363.

52. Corson *v.* Berson, 86 Cal. 433, 25 Pac. 7; Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Starin *v.* Kraft, 174 Ill. 120, 50 N. E. 1059; Moses *v.* Loomis, 156 Ill. 392, 395, 40 N. E. 952, 47 Am. St. Rep. 194 (where the court said: "Rights arising under sealed instruments may be waived by parol. Thus, where a lease contains a condition of forfeiture in case the tenant underlets the premises without the written consent of the lessor, if, after such condition is broken, the lessor does any act which is clearly inconsistent with his reliance upon it, such as the acceptance of rent with full knowledge of all the facts, such conduct amounts to a waiver of the condition, so as to preclude the lessor from afterwards availing himself of the forfeiture"); Mc-

written lease.[53] Where the acts of the parties amount to an abandonment of the original contract, and a waiver of its terms, either party thereto may enforce his rights under the agreement as modified.[54] The surrender or abandonment of a written lease, and the substitution therefor of a modified agreement may be by parol, and need not be proven by express and direct evidence, but may be inferred from the acts and conduct of the parties.[55] A proposed modification of the lease, acted upon by one party and distinctly acquiesced in by the other, is sufficient to establish such modification.[56] Where, after the commencement of the term, the contract is modified by agreement, it does not vary or alter the terms or conditions of the original lease not specified in the modified agreement.[57]

(II) *Consideration.* In order to render valid a subsequent modification of a lease, it must be supported by a sufficient consideration.[58] A lessee's abandonment of his right to rescind the lease on the ground of fraud,[59] or his right to sue

Kenzie *v.* Harrison, 120 N. Y. 260, 24 N. E. 458, 17 Am. St. Rep. 638, 8 L. R. A. 257.

Waiver of forfeiture see *infra*, IX, B, 7, g.

53. Jackson *v.* Patterson, 4 Harr. (Del.) 534; Hastings *v.* Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462; Evers *v.* Shumaker, 57 Mo. App. 454; Palmer *v.* Sanders, 49 Fed. 144, holding that parol evidence of consent by the lessor to cut trees on the leased premises and on adjoining premises is not inadmissible as varying the written lease, which provides that trees should not be cut on the premises without the consent of the lessor.

Increase or reduction of rent see *infra*, VIII, A, 6, b.

54. Camarillo *v.* Fenlon, 49 Cal. 202.

55. Rector *v.* Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528 [*affirming* 92 Ill. App. 175]; Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Roach *v.* Cameron, 97 Iowa 312, 66 N. W. 194; Prior *v.* Kiso, 81 Mo. 241; Ossouski *v.* Wiesner, 101 Wis. 238, 77 N. W. 184. See, however, Stoppelkamp *v.* Mangeot, 42 Cal. 316, holding that the mode of changing the terms of the lease on notice by the landlord depends solely on the statute (Forcible Entry or Detainer Act (1863), § 6), and the cases in which such defense can be made are limited to those in which it is expressly authorized.

56. Tallman *v.* Fitch, 49 Wis. 197, 5 N. W. 492 (where a landlord proposed to the tenant by letter a change in the lease, and the tenant acquiesced for several months by payment of rent, and this was held to be sufficient to establish the change); Dougherty *v.* U. S., 5 Ct. Cl. 108 (where, at the expiration of the term, the monthly rent of premises was reduced by the lessee, and a request on the part of the lessor that it be restored to the original sum was refused, and it was held that the giving of receipts in full for the rent as reduced at the end of each month showed that the lessor assented to the modification).

Modification by agent.—A tenant for a year can take no advantage of a recital in a receipt of the landlord's agent, authorized to collect a month's rent, that the term would expire at the end of the next month, where the agent had no authority to change the provisions of the lease. Davidson *v.* Blumor, 7 Daly (N. Y.) 205.

57. Emerick *v.* Clemens, 26 Iowa 332 (where E let to C certain land and C agreed "to pay the following rents, to-wit, fifty dollars to be paid in money and fifteen dollars in labor." A supplemental agreement was subsequently entered into as follows: "By consent of the parties, the provision that does provide to be paid in money is to be paid in grain; the said Clemens is to give the said Emerick, one-third of all the produce that is raised on the farm." It was held that the stipulation in the lease in reference to the fifteen-dollar labor claim was not annulled by the supplemental contract); Taylor *v.* Winters, 6 Phila. (Pa.) 126.

Extension of term see *infra*, IV, C, 3, e.

58. *Georgia.*— Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. 886.

Illinois.— Loach *v.* Farnum, 90 Ill. 368, holding that an executory written agreement, without any new consideration to reduce the rent stipulated in the lease, is a mere *nudum pactum*, and not binding.

Indiana.— Hyler *v.* Humble, 100 Ind. 38.

Iowa.— Wheeler *v.* Baker, 59 Iowa 86, 12 N. W. 767, holding likewise that if such consideration cannot be presumed it must be proved.

New York.— Kaven *v.* Chrystie, 84 N. Y. Suppl. 470 (holding that an agreement that a tenant in possession of premises under a written lease, binding him to pay a fixed rent "might occupy the building rent free until it was torn down," was void for uncertainty and want of consideration); Tryon *v.* Mooney, 9 Johns. 358 (holding that an agreement after the execution of a lease that the lessee shall not use a pasture named in the lease without paying for it is without consideration). See also Like *v.* McKinstry, 41 Barb. 186.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 94.

Compare Hanson *v.* Hellen, (Me. 1886) 6 Atl. 837. And see Evans *v.* Lincoln Co., 204 Pa. St. 448, 54 Atl. 321.

Increase or reduction of rent see *infra*, VIII, A, 6, b, (III).

59. Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490. See also Ireland *v.* Hyde, 34 Misc. (N. Y.) 546, 69 N. Y. Suppl. 889.

the lessor for damages for breach of covenant, is a sufficient consideration to support an agreement by the lessor to perform certain acts not covenanted for in the lease.[60] Where, after breach, the lessor elects to waive the conditions of the lease, and the lessee consents to continue to occupy the premises under promise of a reduction of rent, there is a sufficient consideration for the promise.[61]

b. Rescission or Cancellation. A lease, even though it be under seal, may be abrogated, canceled, and surrendered by an executed parol agreement.[62]

B. Construction and Operation — 1. In General — a. Application of General Rules of Construction. The general rule is that a written lease is to be construed according to the intention of the parties thereto, and that such intention is to be gathered from the whole instrument rather than from a single clause thereof;[63] and where the language of the lease is not absolutely clear, the circum-

60. White *v.* Walker, 31 Ill. 422, holding that where a person leased premises to be used as a boarding-house, and by reason of occurrences subsequent to the leasing, a right to sue the lessor for damages occasioned thereby for loss of business, or otherwise, has arisen, such a right of action would be waived by a new agreement between the lessor and lessee in regard to such leasing, and this would be a sufficient consideration for the new agreement.

61. *Colorado.*— Doherty *v.* Doe, 18 Colo. 456, 33 Pac. 165; Hyman *v.* Jockey Club Wine, etc., Co., 9 Colo. App. 299, 48 Pac. 671.

Indiana.— Sargent *v.* Robertson, 17 Ind. App. 411, 46 N. E. 925.

Iowa.— Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775. See also Raymond *v.* Krauskopf, 87 Iowa 602, 54 N. W. 432, where plaintiff leased a farm to defendant by written lease, with a rent of sixteen bushels of corn per acre, the season being unfavorable, it was discovered that the land would probably not yield that much, and the parties then agreed orally that the rent should be one half of the crop, and it was held that the agreement rested upon a sufficient consideration and was binding.

Minnesota.— Ten Eyck *v.* Sleeper, 65 Minn. 413, 67 N. W. 1026.

New York.—Horgan *v.* Krumwiede, 25 Hun 116; Copper *v.* Fretnoransky, 16 N. Y. Suppl. 866.

And see Bowman *v.* Wright, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 580, holding that where a lessee has not covenanted and is not bound to remain in possession, continuing in possession at the request of the lessor, may be consideration for an agreement to reduce the rent.

62. Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678 (holding, however, that a lessor on whom, under Conn. Gen. St. (1875) p. 354, § 17, the possession of untenantable premises, quitted by his lessee, has fallen, and who erroneously understands the lessee's notice to him that he shall not reoccupy the premises, as a breach of the contract lease, does not, by accepting such possession and notice, consent to rescind the contract); Bloomquist *v.* Johnson, 107 Ill. App. 154. See Bruder *v.* Geisler, 47 Misc. (N. Y.) 370, 94 N. Y. Suppl. 2 (holding that a provision in a lease that in a certain contingency "the lessee agrees to cancel the lease" is an agreement by the lessee that the lease may in the contingency mentioned be canceled, and does not contemplate any action by the lessee to complete the cancellation); Beauchamp *v.* Brewster, 16 Quebec Super. Ct. 268 (holding that a lessee is not entitled to cancellation of the lease because of a defect in the leased premises of which he knew at the time of accepting the lease, and that the rule is not affected by the fact that the lessee has recovered damages from the lessor alleged to have resulted from such defect). See also Snyder *v.* Harding, 34 Wash. 286, 75 Pac. 812, holding that suit by a lessee against the lessor, in which the former claims to be equitable owner of a part of the land and seeks to specifically enforce an alleged contract of sale, is a rescission of the lease and commencement of suit by the landlord to recover the land and quiet title thereto as an acceptance of the rescission. And see Donaldson *v.* Wherry, 29 Ont. 552. For a full discussion of this subject see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

Abandonment.— Where the lessor and lessees had misunderstood each other as to the property leased, the lessees had the right to abandon the lease. Colston *v.* Louisville Trust Co., 44 S. W. 377, 19 Ky. L. Rep. 1758.

63. *Illinois.*—Walker *v.* Tucker, 70 Ill. 527.

Maine.— Union Water Power Co. *v.* Lewiston, 95 Me. 171, 49 Atl. 878.

Massachusetts.— See Shaw *v.* Appleton, 161 Mass. 313, 37 N. E. 372; Cumings *v.* Hackett, 98 Mass. 51.

Minnesota.— See Pond *v.* Holbrook, 32 Minn. 291, 20 N. W. 232.

New York.—Orphan Asylum Soc. *v.* Waterbury, 8 Daly 35.

North Carolina.— Grice *v.* Wright, 47 N. C. 184.

Ohio.— Allison *v.* Luhrig Coal Co., 22 Ohio Cir. Ct. 489, 12 Ohio Cir. Dec. 504, holding that where words and phrases found in a lease are vague, indefinite, and irreconcilable with other definite, unambiguous, and express words and phrases therein, and with its general scheme and purpose, the former will be held to be inoperative and must give way to the latter.

Canada.— Bazinet *v.* Collerette, 21 Quebec Super. Ct. 508.

stances attending its execution, and the acts of the parties subsequent thereto, may be scrutinized in ascertaining such intention.[64] Effect should be given to both the written and printed provisions of the lease, if consistent with each other;[65] but where there is an irreconcilable conflict between the written and printed clause of a lease, the former will prevail.[66]

b. What Law Governs. The rules as to conflict of laws applicable to contracts generally apply to leases and the construction thereof.[67]

c. Leases and Written Contracts in General. In construing a written lease the general rule is that the words employed are to be interpreted in the ordinary and popular sense,[68] unless the context clearly shows that it was the intention of the parties that they should be understood in a different sense.[69] There is a familiar canon of construction that all contracts, including leases of every description, shall be most strongly construed against the grantor, and that if there be any doubt and uncertainty as to the meaning of any such lease, it shall be construed most strongly in favor of the grantee.[70] Leases are not necessarily to be construed

Question for court.— The question whether or not an agreement between the parties is a valid lease for more than three years, or merely a lease at will, is one of law for the court, as the lease for more than three years could not exist without a writing; and the force and effect, as well as the interpretation and construction thereof, is for the court and not for the jury. Dumn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800.

64. Swigert *v.* Hartzell, 20 Pa. Super. Ct. 56; Millan *v.* Kephart, 18 Gratt. (Va.) 1 (where in an action depending on a stipulation of the lease which had been destroyed, that if the lessor should sell the demised premises during the term the lessee should surrender possession on proper notice, it was held that it was for the jury to determine the intent of the parties from parol evidence of the whole contract, and not of this provision merely, and by the subject-matter, and the condition and relation of the parties); Ladwig *v.* Haase, 54 Wis. 311, 11 N. W. 485.

65. Heiple *v.* Reinhart, 100 Iowa 525, 69 N. W. 871 (where a printed clause in a lease provided that a failure by the lessee to perform any of the covenants therein should authorize a reëntry, and it was held to apply to a written provision that the lessee should pay all taxes before they became delinquent); Ball *v.* Wyeth, 8 Allen (Mass.) 275; Barhydt *v.* Ellis, 45 N. Y. 107.

Marginal writings.— An agreement by a lessee in a memorandum signed by him at the foot of the lease before it was assigned constitutes a part of the lease. Norris *v.* Showerman, Walk. (Mich.) 206.

66. Seaver *v.* Thompson, 189 Ill. 158, 59 N. E. 553 [*affirming* 91 Ill. App. 500].

67. Genet *v.* Delaware, etc., Canal Co., 13 Misc. (N. Y.) 409, 35 N. Y. Suppl. 147, holding that the rights of parties under a lease of land in Pennsylvania must be determined by the laws of that state, although the lease was made at the residence of the parties in another state. See, generally, CONTRACTS, 9 Cyc. 664.

68. *Connecticut.*— Livingston *v.* Tyler, 14 Conn. 493.

Illinois.— Prettyman *v.* Hartly, 77 Ill. 265.

Iowa.— Webb *v.* Bailey, 89 Iowa 747, 56 N. W. 530; Hall *v.* Horton, 79 Iowa 352, 44 N. W. 569.

Massachusetts.— Walker Ice Co. *v.* American Steel, etc., Co., 185 Mass. 463, 70 N. E. 937.

Nevada.— Gallagher *v.* Holland, 20 Nev. 164, 18 Pac. 834.

Vermont.— Paris *v.* Vail, 18 Vt. 277.

England.— Clayton *v.* Gregson, 5 A. & E. 302, 6 N. & M. 694, 31 E. C. L. 623, holding that it cannot be inferred as matter of law that words occurring in the lease were used by the parties in a peculiar sense in which they are understood in the district in which the property demised is situated, but that it is a question for the jury in what sense the words were used in the particular case.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 101.

69. Michaels *v.* Fishel, 169 N. Y. 381, 62 N. E. 425, holding that where a purely technical term is found in the midst of the quaint language of ancient leases, a presumption arises that the parties used it in its strict common-law meaning, especially when the lease is drawn by one learned in the law. See Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775.

70. *California.*— Griffiths *v.* Henderson, 49 Cal. 566.

Illinois.— Schmohl *v.* Fiddick, 34 Ill. App. 190, holding that if the lease may be given two constructions, either of which is reasonable, the one most favorable to the grantee should be adopted.

Indiana.— Maggart *v.* Chester, 4 Ind. 124.

Massachusetts.— *In re* Wait, 7 Pick. 100, 19 Am. Dec. 262.

Rhode Island.— Reynolds *v.* Washington Real Estate Co., 23 R. I. 197, 49 Atl. 707.

A non-warranty clause in a lease can be made to extend to hidden defects, the seriousness of which the lessee could not then have well measured, if the lessor was ignorant of them, and it was understood that the lessee took the premises such as they were; but such clause can be set aside for fraud if the lessor knew of them, or could have foreseen them at the time of the contract. Pierce *v.* Hedden, 105 La. 294, 29 So. 734.

according to their strict letter, and this is especially so when such construction would defeat the manifest intent of the parties as gathered from the whole instrument.[71]

d. Construing Instruments Together. It is proper, and in many cases necessary, to construe the lease in connection with, and in the light of, the previous agreement which was its foundation, in order to arrive at and give effect to the actual intention and agreement of the parties.[72] Where two instruments, such as two leases,[73] or a lease and a mortgage relating to the same subject-matter, and between the same parties, are executed at the same time, they must be construed together.[74]

e. Practical Construction of Parties. Where there is uncertainty or ambiguity as to the meaning of any provisions of the lease, the practical construction put upon such provision by the parties to the lease should be given due weight by the court in construing the lease.[75]

f. Evidence in Aid of Construction. As a general rule, if the description of the property in a lease is ambiguous or doubtful, parol evidence of the practical construction given by the parties, by acts of occupancy, etc., is admissible for the purpose of identifying the property, and in aid of the interpretation of the lease.[76] Where, however, no ambiguity is found in the lease, the court in its construction

71. Thompson *v.* Stewart, 60 Iowa 223, 14 N. W. 247 (holding that a contract to furnish a room for the space of ten years "without rent from the government" is not violated by inserting in the lease to the government the nominal consideration of one dollar, and a provision for a forfeiture for the non-payment of such nominal rent); Summers *v.* Saunders, Litt. Sel. Cas. (Ky.) 329; Hall *v.* Spaulding, 42 N. H. 259.

72. *Alabama.*— Rainey *v.* Capps, 22 Ala. 288.

New York.— Ombony *v.* Jones, 19 N. Y. 234.

Pennsylvania.— *In re* Reading Iron Works, 150 Pa. St. 369, 24 Atl. 617; Cadwalader *v.* U. S. Express Co., 147 Pa. St. 455, 23 Atl. 775.

Washington.— Boston Clothing Co. *v.* Solberg, 28 Wash. 262, 68 Pac. 715.

England.— Moslyn *v.* Lancaster, 51 L. J. Ch. 696, 46 L. T. Rep. N. S. 648, 31 Wkly. Rep. 3.

Canada.— Mehr *v.* McNab, 24 Ont. 653.

73. Cook County Brick Co. *v.* Labahn Brick Co., 92 Ill. App. 526; Weak *v.* Escott, 9 Price 595. See Anderson *v.* Winton, 136 Ala. 422, 34 So. 962, where a lease was made of a certain farm on Jan. 11, 1899, and the lease of another farm was executed between the same parties on the 18th of May following, the latter lease not having been in contemplation of the parties at the time the first was executed, and neither referring to the other, and it was held that they could not be construed together, but should be treated as separate instruments.

74. New England L. & T. Co. *v.* Workman, 71 Mo. App. 275. See Woodbury *v.* Sparrell Print, 187 Mass. 426, 73 N. E. 547, where the same paper on which a lease was executed also contained a guaranty of payment of rent, and an agreement by the lessor to make certain improvements, and it was held that the guaranty and agreement were separate instruments, and not a part of the lease.

A bond for the performance of a covenant for renewal in a lease must be construed in connection with the lease. Polhemus Printing Co. *v.* Hallenbeck, 46 N. Y. App. Div. 563, 61 N. Y. Suppl. 1056.

Oral contemporaneous agreements.— Agreements contemporaneous with the execution of a written lease are unavailable to the lessee, since they are regarded as merged in the writing. Carey *v.* Kreizer, 26 Misc. (N. Y.) 755, 57 N. Y. Suppl. 79.

75. *Illinois.*— Siegel *v.* Colby, 61 Ill. App. 315.

Louisiana.— Frigerio *v.* Stillman, 17 La. Ann. 23.

Massachusetts.— Wood *v.* Edison Electric Illuminating Co., 184 Mass. 523, 69 N. E. 364.

New York.— Anzolone *v.* Paskusz, 96 N. Y. App. Div. 188, 89 N. Y. Suppl. 203; Matter of Coatsworth, 37 N. Y. App. Div. 295, 55 N. Y. Suppl. 753.

Virginia.— Oglesby *v.* Hughes, 96 Va. 115, 30 S. E. 439, holding that where the bill in answer in an action to rescind a lease is treated as a lease at will, the interpretation thus made must be accepted as conclusive. See Diamond Plate-Glass Co. *v.* Tennell, 22 Ind. App. 132, 52 N. E. 168 (where, under a mistake of law, the lessor of a gas lease had paid an annual rental higher than that provided by the plain terms of the lease, and it was held that there was not such a construction of the lease by the parties as would bind the court in construing it); St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607 (holding that the fact that the parties to the written instrument called it a lease is not conclusive where the instrument on its face shows that it was a different kind of contract for the operation of railroads).

76. Sargent *v.* Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718; Avery *v.* House, 2 Ohio Cir. Ct. 246, 1 Ohio Cir. Dec. 468. See also Fletcher *v.* Phelps, 28 Vt. 257.

cannot indulge in conjecture or resort to parol evidence, but the language of the instrument itself must control its construction.[77] It has been held in some jurisdictions that in respect to matters upon which the parties are silent, the lease may be fairly open to explanation by the general usage and customs of the country or district where the property lies.[78]

2. Parties to Lease or Agreement. The rule is well settled that an agent executing the lease makes himself liable if he contracts in his own name and without disclosing the name of his principal, even though the other party to the lease knew that he was acting as agent, if the name of the principal is not disclosed;[79] nor can such undisclosed principal enforce any of the covenants of such lease.[80] Where a party signs his name to an instrument, with the addition of the word "president" or "agent," the additional word is merely descriptive, and does not relieve him from personal liability thereon.[81] Likewise the covenants in a lease can only be enforced against the party who on the face of the lease appears to be the covenantor, although in fact he acts for another.[82] Where several persons become bound for the payment of rent, in contemplation of law, the lease is to all, where there is nothing in the body of the instrument to negative that conclusion, and the occupancy of one is the occupancy of all.[83]

3. Covenants and Conditions — a. Whether Express or Implied Covenant. All covenants between a lessor and his lessee are either covenants in law, that is, implied covenants, or express covenants.[84] An express covenant is a covenant

Evidence as to the condition, situation, and adaptation of land for a particular use, the declarations of the parties as to the use to which the land was to be put, and that it had no rental value for any other purpose, is admissible to show the intent of the parties in the use of the phrase "reasonable use." Bartels *v.* Brain, 13 Utah 162, 44 Pac. 715.

77. Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. 428; Wright *v.* Milne, 9 Pa. Dist. 170; Knoll *v.* Jones, 1 Pa. Co. Ct. 485, holding that an ambiguity as to the duration of the estate was patent, and not latent, and that the construction of the lease was for the court, without the aid of extrinsic evidence. See also Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

78. Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374. *Compare* Werner *v.* Footman, 54 Ga. 128, holding that in an action to recover land under a lease entitling the landlord to possession at a certain time, the tenant is not entitled to prove a general custom in the city where the lease is made that, if the tenant holds over for two weeks with the landlord's knowledge, without objection, he is tenant for another year on the same terms and conditions, since such custom is inadmissible to vary the rights of the landlord under the lease. See, generally, Customs and Usages, 12 Cyc. 1069.

79. Consolidated Coal Co. *v.* Peers, 150 Ill. 344, 37 N. E. 937; Ecker *v.* Chicago, etc., R. Co., 8 Mo. App. 223; Hunter *v.* Adoue, (Tex. Civ. App. 1905) 86 S. W. 622.

80. Schaefee *v.* Henkel, 57 How. Pr. (N. Y.) 97; Kiersted *v.* Orange, etc., R. Co., 55 How. Pr. (N. Y.) 51. See also Kennedy *v.* Duggan, 200 Pa. St. 284, 49 Atl. 781.

81. Soule *v.* Palmer, 49 N. Y. Suppl. 475; Grau *v.* McVicker, 10 Fed. Cas. No. 5,708, 8 Biss. 13. And see Stott *v.* Rutherford, 92 U. S. 107, 23 L. ed. 486, where the lessors executed a lease in their own names, and the covenants of the lessee were to them personally, and he entered upon the lands, and remained in possession during the time specified in the lease, and it was held that the lease was competent evidence in an action brought by the lessors in their individual right to recover rent, notwithstanding a recital therein that they were acting as a church extension committee on behalf of the general assembly of a church.

82. Kiersted *v.* Orange, etc., R. Co., 69 N. Y. 343, 25 Am. Rep. 199 [*affirming* 1 Hun 151, 3 Thomps. & C. 662]; Evans *v.* Conklin, 71 Hun (N. Y.) 536, 34 N. Y. Suppl. 1081; Whitford *v.* Laidler, 25 Hun (N. Y.) 136.

83. Magee *v.* Fisher, 8 Ala. 320; Howell *v.* Behler, 41 W. Va. 610, 24 S. E. 646.

84. Appleton *v.* O'Donnell, 173 Mass. 398, 53 N. E. 882 (holding that, although the covenant to pay rent in a lease did not bind a lessee, the law would imply a promise to pay at the promised rate, when he occupied the premises for the full term of the lease); Lovering *v.* Lovering, 13 N. H. 513; Hayes *v.* Bickerstaff, Vaughn 118. See also Greenleaf *v.* Allen, 127 Mass. 248.

Covenants and conditions as to: Assignment and subletting see *infra*, IV, B, 1, f. Renewal see *infra*, IV, C. Payment of rent see *infra*, VIII, A, 1, c. Encumbrances see *infra*, VII, C, 5. Improvements by landlord see *infra*, VII, D, 4. Improvements by tenant see *infra*, VII, D, 3, a. Insurance see *infra*, VII, D, 2. Payment of taxes and assessments see *infra*, VII, C, 2, b. Repairs see *infra*, VII, D, 1, a, (III). Quiet enjoyment see *infra*, VII, B, 2. Use of premises see *infra*, VII, B, 3, b. Surrender of possession at termination of tenancy see *infra*, VII, B, 1, a, (VII). Condition of property at termination of tenancy see *infra*, VII, D, 5. Renewal leases see *infra*, IV, C, 3, e.

explicitly stated in words.[85] Any words that amount to or import an agreement are sufficient to constitute a covenant; no precise or technical language is required by law.[86] An implied covenant has been defined to be such a covenant as is inferred or imputed in law from the words used.[87]

b. Dependent or Independent Covenants. Covenants are to be construed as dependent or independent according to the intention of the parties and the good sense of the case. Technical words should give way to such intention.[88] Some of the cases, however, lay down the rule that covenants in a lease will be considered and held as dependent conditions, to be performed by the respective parties, unless it fairly appears from the nature of the covenants they intended them to be independent.[89]

c. Covenant Not to Assign. According to the weight of authority an agreement to accept a lease of premises to contain all the usual covenants and provisos does not invalidate a covenant against assignment and cannot be enforced where the lease as drawn up contains such a covenant.[90]

d. Covenants Running With the Land. Covenants in leases extending to a thing *in esse*, parcel of the demise, and which directly touch or concern the thing demised, run with the land, and bind the assignee, although he be not named.[91]

Rights and liabilities: Of assignee see *infra*, IV, B, 4, c. Of mortgagee see *infra*, IV, 6, b. Of subtenant see *infra*, IV, B, 5, a.

Forfeiture by breach of covenant see *infra*, IX, B, 7, b, (I).

85. Anderson L. Dict.; 11 Cyc. 1042.

86. Lovering *v.* Lovering, 13 N. H. 513. See, generally, COVENANTS, 11 Cyc. 1035.

87. Anderson L. Dict. See COVENANTS, 11 Cyc. 1045.

"**Implied covenants depend for their existence** on the intendment and construction of law. There are some words which do not of themselves import an express covenant; yet, being made use of in certain contracts, have a similar operation and are called covenants in law, and are as effectually binding on the parties as if expressed in the most unequivocal terms. There may be implied covenants in a deed in which there are express covenants, but there can be none contradictory to or inconsistent with or repugnant to express covenants." Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541, 552 [*citing* Randel *v.* Chesapeake Canal Co., 1 Harr. (Del.) 233, 270].

88. Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127 [*affirming* 115 Ill. App. 565]; Davis *v.* Wiley, 4 Ill. 234; Thruston *v.* Minke, 32 Md. 487; Benson *v.* Hobbs, 4 Harr. & J. (Md.) 285 (where the covenants were held to be independent); Leonard *v.* Wall, 5 U. C. C. P. 9. See also COVENANTS, 11 Cyc. 1035.

89. Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223 [*affirming* 50 Ill. App. 629]; Sigmund *v.* Newspaper Co., 82 Ill. App. 178 (holding that a covenant in a lease by the lessor to repair and decorate, and a covenant of the tenant to pay rent, are mutual and dependent covenants, and a lease containing such covenants which is binding upon one only of the parties is wanting in the necessary requisites of mutuality); Hamilton *v.* Thrall, 7 Nebr. 210; Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 465, 7 L. ed. 219 (where the court said: "Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, that the inclination of courts has strongly favored the latter construction, as being obviously the most just").

90. Buckland *v.* Papillon, L. R. 2 Ch. 67, 12 Jur. N. S. 992, 36 L. J. Ch. 81, 15 L. T. Rep. N. S. 378, 15 Wkly. Rep. 92 [*affirming* L. R. 1 Eq. 477, 12 Jur. N. S. 155]; *In re* Lander, [1892] 3 Ch. 41, 61 L. J. Ch. 707, 67 L. T. Rep. N. S. 521; Hampshire *v.* Wickens, 7 Ch. D. 555, 47 L. J. Ch. 243, 38 L. T. Rep. N. S. 408, 26 Wkly. Rep. 491; Henderson *v.* Hay, 3 Bro. Ch. 632, 29 Eng. Reprint 738; Blacker *v.* Mathers, 1 Bro. P. C. 334, 1 Eng. Reprint 604; *Ex p.* Lucas, 3 Deac. & C. 144, 3 L. J. Bankr. 66, 1 Mont. & A. 93; Bishop *v.* Taylor, 55 J. P. 695, 60 L. J. Q. B. 536, 64 L. T. Rep. N. S. 529, 29 Wkly. Rep. 542; Eadie *v.* Addison, 52 L. J. Ch. 80, 47 L. T. Rep. N. S. 543, 31 Wkly. Rep. 320; Browne *v.* Raban, 15 Ves. Jr. 528, 33 Eng. Reprint 855. See also Vere *v.* Loveden, 12 Ves. Jr. 179, 10 Rev. Rep. 77, 33 Eng. Reprint 69. *Compare* Folkingham *v.* Croft, 3 Anstr. 700, 4 Rev. Rep. 844 (holding that on an agreement for a lease "with all usual and reasonable covenants" a covenant not to under-lease or assign is implied where the custom of the place is not generally against it); Bell *v.* Barchard, 16 Beav. 8, 21 L. J. Ch. 411, 51 Eng. Reprint 678; Morgan *v.* Slaughter, 1 Esp. 8, 5 Rev. Rep. 715; Haberdashers' Co. *v.* Isaac, 5 Wkly. Rep. 855 [*affirming* 3 Jur. N. S. 611] (holding that there is nothing unreasonable in a covenant not to sublet without license or in a proviso for reëntry on the whole premises on breach of any covenant in the lease).

91. *Alabama.*—Callan *v.* McDaniel, 72 Ala. 96.

California.— Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678.

Colorado.— Hayes *v.* New York Gold Min. Co., 2 Colo. 273.

If the covenant relates to a thing not *in esse*, but yet the thing to be done is upon the land demised — as, to build a new house or wall — the assignees, if named, are bound by the covenant;[92] although the rule is otherwise if they be not named.[93] But if the covenants in no manner touch or concern the thing demised — as, to build a house on other land, or to pay a collateral sum to the lessor — the assignee, although named, is not bound by such covenants.[94] And covenants running with the reversion, entered into by a lessor with his lessee, remain binding on the lessor

Illinois.— Scheidt *v.* Belz, 4 Ill. App. 431.
Iowa.— Kennedy *v.* Iowa State Ins. Co., 119 Iowa 29, 91 N. W. 831.
Missouri.— Blackmore *v.* Boardman, 28 Mo. 420; B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967.
New York.— Belden *v.* Union Warehouse Co., 11 N. Y. App. Div. 160, 42 N. Y. Suppl. 650; Wilkinson *v.* Pettit, 47 Barb. 230; Allen *v.* Culver, 3 Den. 284; Norman *v.* Wells, 17 Wend. 136; Demarest *v.* Willard, 8 Cow. 206; Van Horne *v.* Crain, 1 Paige 455.
Ohio.— See Masury *v.* Southworth, 9 Ohio St. 340.
Oregon.— McClung *v.* McPherson, (1905) 81 Pac. 567, 82 Pac. 13.
Pennsylvania.— Barclay *v.* Steamship Co., 6 Phila. 558.
Tennessee.— Shelby *v.* Hearne, 6 Yerg. 512.
United States.— Broadwell *v.* Banks, 134 Fed. 470; Weeks *v.* International Trust Co., 125 Fed. 370, 60 C. C. A. 236 [*reversing* 116 Fed. 898].
England.— Taite *v.* Gosling, 11 Ch. D. 273, 48 L. J. Ch. 397, 40 L. T. Rep. N. S. 251, 27 Wkly. Rep. 394; Simpson *v.* Clayton, 1 Arn. 299, 4 Bing. N. Cas. 768, 6 Scott 467, 33 E. C. L. 961; Vernon *v.* Smith, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13; Jourdain *v.* Wilson, 4 B. & Ald. 266, 23 Rev. Rep. 268, 6 E. C. L. 478; Easterby *v.* Sampson, 6 Bing. 644, 1 Cromp. & J. 105, 4 M. & P. 601, 19 E. C. L. 291 [*affirming* 9 B. & C. 505, 5 L. J. K. B. O. S. 291, 4 M. & R. 422, 17 E. C. L. 230]; Wagstaff *v.* Clinton, Cab. & E. 45; Tatem *v.* Chaplin, 2 H. Bl. 133, 3 Rev. Rep. 360; Athol *v.* Midland, etc., R. Co., Ir. R. 3 C. L. 333; Norval *v.* Pascoe, 10 Jur. N. S. 792, 34 L. J. Ch. 82, 10 L. T. Rep. N. S. 809, 4 New Rep. 390, 12 Wkly. Rep. 973; Mumford *v.* Walker, 71 L. J. K. B. 19, 85 L. T. Rep. N. S. 518.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 110.

92. Constantine *v.* Wake, 1 Sweeny (N. Y.) 239; Masury *v.* Southworth, 9 Ohio St. 340; Williams *v.* Earle, L. R. 3 Q. B. 739, 9 B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 1238, 16 Wkly. Rep. 1041; Doughty *v.* Bowman, 11 Q. B. 444, 12 Jur. 182, 17 L. J. Q. B. 111, 63 E. C. L. 444; Vernon *v.* Smith, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13; Spencer's Case, 6 Coke 9*b*; Bally *v.* Wells, 3 Wils. C. P. 25. See also West Shore R. Co. *v.* Wenner, 71 N. J. L. 682, 60 Atl. 1134 [*affirming* 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801]. *Compare* Tallman *v.* Coffin, 4 N. Y. 134.

93. *Alabama.*— Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 121 Ala. 672, 25 So. 720.
Illinois.— Hansen *v.* Meyer, 81 Ill. 321, 25 Am. Rep. 282.
New York.— Thompson *v.* Rose, 8 Cow. 266.
Tennessee.— Bream *v.* Dickerson, 2 Humphr. 126; Cronin *v.* Watkins, 1 Tenn. Ch. 119.
England.— Doughty *v.* Bowman, 11 Q. B. 444, 12 Jur. 182, 17 L. J. Q. B. 111, 63 E. C. L. 444; Walsh *v.* Fussell, 6 Bing. 163, 7 L. J. C. P. O. S. 261, 3 M. & P. 455, 19 E. C. L. 81; Grey *v.* Cuthbertson, 2 Chit. 482, 18 E. C. L. 747, 4 Dougl. 351, 26 E. C. L. 519, 1 Selw. 498; Spencer's Case, 5 Coke 16*a*; Doe *v.* Smith, 1 Marsh. 359, 5 Taunt. 795, 2 Rose 280, 15 Rev. Rep. 660. See Minshull *v.* Oakes, 2 H. & N. 793, 4 Jur. N. S. 170, 27 L. J. Exch. 194.
Canada.— Emmett *v.* Quinn, 7 Ont. App. 306.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 110.

A covenant for renewal is in itself a mere personal contract, and at law the only remedy which lies for a breach of it is a personal action; but a substantive independent covenant binds the covenantor and his representatives in respect to the assets transmitted. Chandos *v.* Brownlow, 2 Ridg. App. 405.

94. *Illinois.*— Postal Tel. Cable Co. *v.* Western Union Tel. Co., 155 Ill. 335, 40 N. E. 587 [*affirming* 51 Ill. App. 62].
Indiana.— Taylor *v.* Owen, 2 Blackf. 301, 20 Am. Dec. 115.
Maryland.— Thruston *v.* Minke, 32 Md. 487.
New York.— Dolph *v.* White, 12 N. Y. 296, where the agreement was held to be a collateral undertaking.
England.— Martyn *v.* Clue, 18 Q. B. 66, 22 L. J. Q. B. 147, 83 E. C. L. 661; Daniel *v.* Stepney, L. R. 7 Exch. 327, 41 L. J. Exch. 208, 27 L. T. Rep. N. S. 380, 21 Wkly. Rep. 17; Thomas *v.* Hayward, L. R. 4 Exch. 311, 38 L. J. Exch. 175, 20 L. T. Rep. N. S. 814; Stevens *v.* Copp, L. R. 4 Exch. 20, 38 L. J. Exch. 31, 19 L. T. Rep. N. S. 454, 17 Wkly. Rep. 166; Vernon *v.* Smith, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13 [*quoting* Spencer's Case, Moore 159] (where the court, by Gawdy, said: "By the terms collateral covenants, which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principle will reconcile all the cases"); Congleton Corp. *v.* Pattison, 10 East 130; Martyn *v.* Williams, 1 H. & N. 817, 26 L. J. Exch. 117, 5 Wkly. Rep. 351; Gower *v.* Postmaster-Gen., 57 L. T. Rep. N. S. 527. And see Eccles *v.* Mills, [1898] A. C. 360, 67 L. J. C. P. 25, 78 L. T. Rep. N. S. 206, 46 Wkly. Rep. 398.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 110.

notwithstanding the fact that he has assigned the reversion.[95] Thus covenants for quiet enjoyment,[96] to make repairs,[97] to make or pay for certain specified improvements,[98] to pay rent,[99] to insure,[1] to pay taxes or assessments,[2] or covenants restricting the use to which the premises shall be put,[3] are held to be covenants running with the land, and to bind the assignee of the reversion and of the lessee.

e. Whether Covenant or Condition. The intention of the parties when fairly ascertained will control as to whether a covenant or a condition was intended by the words used;[4] and, if a condition, whether precedent or subsequent.[5] If a

95. Stuart *v.* Joy, [1904] 1 K. B. 362, 73 L. J. K. B. 97, 90 L. T. Rep. N. S. 78, 22 T. L. R. 109.

96. Shelton *v.* Codman, 3 Cush. (Mass.) 318; Hamilton *v.* Wright, 28 Mo. 199.

97. Harris *v.* Goslin, 3 Harr. (Del.) 338; Myers *v.* Burns, 33 Barb. (N. Y.) 401; Allen *v.* Culver, 3 Den. (N. Y.) 284; Norman *v.* Wells, 17 Wend. (N. Y.) 136; Thompson *v.* Rose, 8 Cow. (N. Y.) 226; Pollard *v.* Shaaffer, 1 Dall. (Pa.) 210, 1 L. ed. 104, 1 Am. Dec. 239.

98. *California.*— Woodward *v.* Payne, 16 Cal. 444.

Iowa.— Frederick *v.* Callahan, 40 Iowa 311.

Maryland.— Stockett *v.* Howell, 34 Md. 121.

New York.— Lametti *v.* Anderson, 6 Cow. 302. See, however, *In re* Henshaw, 37 Misc. 536, 75 N. Y. Suppl. 1047.

United States.— Hunt *v.* Danforth, 12 Fed. Cas. No. 6,887, 2 Curt. 592.

England.— Mansel *v.* Norton, 22 Ch. D. 769, 52 L. J. Ch. 357, 48 L. T. Rep. N. S. 654, 31 Wkly. Rep. 325. See also Strickland *v.* Maxwell, 2 C. & M. 539, 3 L. J. Exch. 161, 4 Tyrw. 346. See, however, Gorton *v.* Gregory, 31 L. J. Q. B. 302, 3 B. & S. 90, 6 L. T. Rep. N. S. 656, 10 Wkly. Rep. 713, 113 E. C. L. 90, holding that a covenant relating to chattels does not run with the land.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 110.

Compare Peterson *v.* Haight, 1 Miles (Pa.) 250.

99. *California.*— Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104.

Indiana.— Carley *v.* Lewis, 24 Ind. 23.

Massachusetts.— Patten *v.* Deshon, 1 Gray 325.

Minnesota.— Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917.

New York.— Van Rensselaer *v.* Dennison, 35 N. Y. 393; Van Rensselaer *v.* Smith, 27 Barb. 104.

Ohio.— Smith *v.* Harrison, 42 Ohio St. 180.

Pennsylvania.— Fennell *v.* Guffey, 139 Pa. St. 341, 20 Atl. 1048; Bradford Oil Co. *v.* Blair, 113 Pa. St. 83, 4 Atl. 218, 57 Am. Rep. 442; Sandwith *v.* De Silver, 1 Browne 221.

Vermont.— Shaw *v.* Partridge, 17 Vt. 626.

England.— Vyvyan *v.* Arthur, 1 B. & C. 410, 2 D. & R. 670, 1 L. J. K. B. O. S. 138, 25 Rev. Rep. 437, 8 E. C. L. 175. Stevenson *v.* Lambard, 2 East 575, 6 Rev. Rep. 511. See, however, Milnes *v.* Branch, 5 M. & S. 411, 17 Rev. Rep. 373.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 110.

And see Doty *v.* Heth, 52 Miss. 530.

1. Vernon *v.* Smith, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13; Douglass *v.* Murphy, 16 U. C. Q. B. 113.

2. *California.*—Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104.

Colorado.— Hayes *v.* New York Gold Min. Co., 2 Colo. 273.

Massachusetts.— Torrey *v.* Wallis, 3 Cush. 442.

Minnesota.— Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917.

New York.— Post *v.* Kearney, 2 N. Y. 394, 51 Am. Dec. 303 [*affirming* 1 Sandf. 105]; Astor *v.* Hoyt, 5 Wend. 603.

Pennsylvania.— Sandwith *v.* De Silver, 1 Browne 221.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 110.

3. Wheeler *v.* Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41; De Forest *v.* Byrne, 1 Hilt. (N. Y.) 43; Norman *v.* Wells, 17 Wend. (N. Y.) 136; Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649; Fleetwood *v.* Hull, 23 Q. B. D. 35, 54 J. P. 229, 58 L. J. Q. B. 341, 60 L. T. Rep. N. S. 790, 37 Wkly. Rep. 714; Holloway *v.* Hill, [1902] 2 Ch. 612, 71 L. J. Ch. 818, 87 L. T. Rep. N. S. 201; Wilkinson *v.* Rogers, 10 Jur. N. S. 5, 9 L. T. Rep. N. S. 434, 12 Wkly. Rep. 119. See Wilson *v.* Hart, L. R. 1 Ch. 463, 12 Jur. N. S. 460, 35 L. J. Ch. 569, 14 L. T. Rep. N. S. 499, 14 Wkly. Rep. 748; Feilden *v.* Slater, L. R. 7 Eq. 523, 38 L. J. Ch. 379, 20 L. T. Rep. N. S. 112, 17 Wkly. Rep. 485, holding that while such covenants may not run with the land yet the covenantor is bound by them in equity. But see Wilson *v.* Twamley, [1904] 2 K. B. 99, 73 L. J. K. B. 703, 90 L. T. Rep. N. S. 751, 20 T. L. R. 440, 52 Wkly. Rep. 529.

4. *Alabama.*— Hill *v.* Bishop, 2 Ala. 320.

Illinois.— Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223 [*affirming* 50 Ill. App. 629]; Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233; White *v.* Naerup, 57 Ill. App. 114, where the words "to be occupied for a grocery store" in a lease for a term of years was held to constitute a condition, and not a covenant merely.

Maine.— Manning *v.* Brown, 10 Me. 49.

Maryland.— Moyer *v.* Mitchell, 53 Md. 171.

Massachusetts.— Howland *v.* Leach, 11 Pick. 151.

Minnesota.— Gardner *v.* Dakota County, 21 Minn. 33.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 112.

5. *Illinois.*— Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247.

power of reëntry for the breach of a covenant be added to such covenant, it has the force of a condition.[6] Where the stipulation in the lease contains no reëntry clause, it is not construed as a condition, but as a covenant the breach of which gives the lessor a right of action for damages only.[7]

4. Liability For Breach — a. Liability of Lessor — (i) *In General.* Upon a breach on the part of the lessor of a covenant or condition in a lease, a cause of action arises in favor of the lessee, and in such action he is entitled to recover the damages sustained by him by reason of such breach.[8] Although a lessee has assigned his lease for the remainder of the term, he may still sue for damages accruing to him from a breach occurring while he held the lease.[9] However, after the breach of contract by the lessor, the lessee's right of action may be waived or released by a new parol contract in relation to the same subject-matter, or by any valid parol executed contract.[10]

Indiana.— Trout *v.* Perciful, 105 Ind. 532, 5 N. E. 558. And see Indianapolis Natural Gas Co. *v.* Spaugh, 17 Ind. App. 683, 46 N. E. 691.

Massachusetts.— South Cong. Meetinghouse *v.* Hilton, 11 Gray 407.

New York.— Parmelee *v.* Oswego, etc., R. Co., 6 N. Y. 74 [*affirming* 7 Barb. 599] (holding that the precedency of conditions depends upon the order of time in which the intent of the transaction requires their performance); Plant *v.* Hernreich, 19 Misc. 308, 44 N. Y. Suppl. 477 (where the agreement was held not to be a condition precedent).

Ohio.— Elsas *v.* Meyers, 10 Ohio Dec. (Reprint) 518, 21 Cinc. L. Bul. 346.

Wyoming.— Frank *v.* Stratford, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571.

And see Livesley *v.* Muckle, (Oreg. 1905) 80 Pac. 901, where the conditions were held to be waived. See also Gatch *v.* Garretson, 100 Iowa 252, 69 N. W. 550; Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79.

6. Winn *v.* State, 55 Ark. 360, 18 S. W. 375; Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223 [*affirming* 50 Ill. App. 629] (where the covenant was not to assign); White *v.* Naerup, 57 Ill. App. 114; Doe *v.* Phillips, 2 Bing. 13, 2 L. J. C. P. O. S. 103, 9 Moore C. P. 46, 27 Rev. Rep. 539, 9 E. C. L. 460.

7. *Massachusetts.*— Wheeler *v.* Dascomb, 3 Cush. 285.

New Jersey.— Vanatta *v.* Brewer 32 N. J. Eq. 268.

Tennessee.— Sloan *v.* Cantrell, 5 Coldw. 571.

Texas.— Texas, etc., Coal Co. *v.* Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

Wisconsin.— Bergland *v.* Frawley, 72 Wis. 559, 40 N. W. 372.

England.— Shaw *v.* Coffin, 14 C. B. N. S. 372, 108 E. C. L. 372.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 113.

8. *Colorado.*— Knowles *v.* Leggett, 7 Colo. App. 265, 43 Pac. 154.

Iowa.— Swift *v.* East Waterloo Hotel Co., 40 Iowa 322.

Minnesota.— Cargill *v.* Thompson, 50 Minn. 211, 52 N. W. 644, where the complaint was held to sufficiently state a cause of action for breach.

New York.— Prince *v.* Jacobs, 80 N. Y. App. Div. 243, 80 N. Y. Suppl. 304; Edesheimer *v.* Quackenbush, 68 Hun 427, 23 N. Y. Suppl. 75; Barney *v.* Keith, 6 Wend. 555, holding that in such action the question of title to land cannot arise where the only plea put in is *non est factum.*

North Carolina.— McMahon *v.* Miller, 82 N. C. 317, holding that a lessee who has been prevented by the lessor from performing his part of the contract may recover on the common counts in assumpsit for the lessor's omission to perform his stipulations.

Tennessee.— Duncan *v.* Blake, 9 Lea 534.

Vermont.— Staples *v.* Flint, 28 Vt. 794.

Wisconsin.— Imler *v.* Baenish, 74 Wis. 567, 43 N. W. 490; La Point *v.* Cady, 2 Pinn. 515, 2 Chandl. 202.

Compare Anderson *v.* Swift, 106 Ga. 748, 32 S. E. 542, holding that a stipulation in the lease that the lessee should have the privilege of erecting houses on the premises "to be removed by [him] at the expiration of his lease, or to be sold to the [lessors] at eight per cent. less the costs of buildings," is not sufficiently certain and reciprocal of itself to support an action by the lessee against the lessor for such costs of the houses.

Quiet enjoyment see *infra,* VII, B, 2, d.

Repairs see *infra,* VII, D, 1.

Set off of claim in action for rent see *infra,* VIII, B, 8.

9. Cleveland, etc., R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619, holding likewise that the lease is admissible in evidence to show such damages.

10. Delacroix *v.* Bulkley, 13 Wend. (N. Y.) 71 (where, however, the breach was held not to have been waived by plaintiff); Steele *v.* Steele, 2 Tex. App. Civ. Cas. § 345; Kellogg *v.* Malick, 125 Wis. 239, 103 N. W. 1116. See also Chesterman *v.* Gardner, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265. And *compare* Stearns *v.* Lichtenstein, 48 N. Y. App. Div. 498, 62 N. Y. Suppl. 949 [leave to appeal *denied* in 63 N. Y. Suppl. 1117], where defendant agreed that, if plaintiffs would take a lease of certain lofts in defendant's building, he would put out of another loft tenants whose presence would prevent plaintiffs obtaining adequate fire insurance. Plaintiffs took a lease and entered into possession.

(II) *Damages.* The measure of the lessee's damages for the breach of a covenant in a lease is usually the difference between the market rental value of the premises and the rent agreed to be paid for the same.[11] The lessee is likewise entitled to recover such damages as result as an immediate consequence of the breach, such as injury to crops, goods, machinery, furniture, etc., together with any necessary expenditure of time or money.[12] Damages for loss of probable profits of business in which the lessee may be engaged on the leased premises are too remote and speculative to be recovered in an action on a covenant in a lease.[13]

b. Liability of Lessee — (I) *In General.* Upon the breach of a covenant in a lease by a lessee, a cause of action at once accrues to the lessor for the recovery of all damages sustained by reason of such breach,[14] and the fact that the lessor

Defendant failed to put out the other tenants, but plaintiffs remained in occupancy of the loft, although unable to obtain sufficient insurance, owing to the other tenancy, and it was held that, by remaining in the premises after knowledge that the objectionable tenancy had not been terminated as agreed, plaintiff did not waive the right to recover from the landlord damages incurred by reason of inadequate insurance.

11. North Chicago St. R. Co. *v.* La Grand Co., 95 Ill. App. 435; Alexander *v.* Bishop, 59 Iowa 572, 13 N. W. 714; Scottish-American Mortg. Co. *v.* Taylor, (Tex. Civ. App. 1903) 74 S. W. 564; Kellogg *v.* Malick, 125 Wis. 239, 103 N. W. 1116, holding that if a contract be made for a particular use by the lessee, the rental value will be the standard by which damages may be awarded, and the fact that such special circumstances came to the knowledge of the lessor after the execution of the lease will not take the case out of the general rule. See also People *v.* Brooks, 16 Cal. 11; Farr *v.* Griffith, 9 Utah 416, 35 Pac. 506, holding that where a person who has leased a pond for the purpose of harvesting ice fails to supply it with a sufficient quantity of water, according to agreement, the measure of the lessee's damages is the value of the ice he failed to put up because the lessor did not supply sufficient water, less the cost of putting it up. But see Dye *v.* Wagner, 49 Iowa 458, where a lessor contracted to furnish certain power to his lessee, and it was held that the latter was not entitled to recover as damages the difference between the value of the unexpired term of the lease and the rent agreed to be paid on failure of the lessor for one day to furnish the stipulated power, where no demand for the same was made by the lessor after such day.

Mitigation of damages.— Where a lessee, relying on a breach of some of lessee's covenants as a defense to an action on his covenant to pay for a building erected on the leased premises by the lessee, introduced no evidence to show what damages he sustained by such breach, the trial court did not err in making no allowance therefor. Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247 [*affirming* 88 Ill. App. 485].

12. Cleveland, etc., R. Co. *v.* Mitchell, 84 Ill. App. 206; Hall *v.* Horton, 79 Iowa 352, 44 N. W. 569; Wood *v.* Sharpless, 174 Pa. St. 588, 34 Atl. 319, 321; Walter *v.* Transue, 17 Pa. Super. Ct. 94; Richardson *v.* Chasen, 10 Q. B. 756, 11 Jur. 890, 16 L. J. Q. B. 341, 59 E. C. L. 756. See also Plumstead *v.* Conway, 2 Del. Co. (Pa.) 43.

13. Cleveland, etc., R. Co. *v.* Mitchell, 84 Ill. App. 206; Rhodes *v.* Baird, 16 Ohio St. 573; Hanslip *v.* Padwick, 5 Exch. 615, 19 L. J. Exch. 372. See also Knowles *v.* Leggett, 7 Colo. App. 265, 43 Pac. 154.

14. *Connecticut.*— Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678.

Idaho.— Porter *v.* Allen, 8 Ida. 358, 69 Pac. 105, 236.

Minnesota.— Kalkhoff *v.* Nelson, 60 Minn. 284, 62 N. W. 332.

New York.— McCready *v.* Lindenborn, 172 N. Y. 400, 65 N. E. 208 [*affirming* 63 N. Y. App. Div. 106, 71 N. Y. Suppl. 355] (holding that where plaintiff sued to recover the rent due for a specified month he could join with it a cause of action for the breach and recover as damages the deficiency ascertained in the manner provided by the lease for each month thereafter until the commencement of the action, but for any deficiency after that he must bring another action); Roe *v.* Conway, 74 N. Y. 201 (where a written lease was terminated by agreement, the lessor executing an instrument stating the lease to be canceled as of a particular date, and the lessee surrendered possession, and it was held that the lessee remained liable for any breach of his covenants occurring previous to the date of cancellation); Becar *v.* Flues, 64 N. Y. 518.

Pennsylvania.— Gibson *v.* Oliver, 158 Pa. St. 277, 27 Atl. 961. See also Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. St. 640, 64 Atl. 398; Winpenny *v.* Winner, 15 Wkly. Notes Cas. 127, where judgment for want of a sufficient affidavit was granted on the ground that the defense was evasive.

Texas.— See Johnson *v.* Gurley, 52 Tex. 222.

Wisconsin.— Academy of Music Co. *v.* Davidson, 85 Wis. 129, 55 N. W. 172.

Assignment and subletting see *infra*, IV, B, 1, f, (v).
Insurance see *infra*, VII, D, 2.
Rent see *infra*, VIII, B.
Repairs see *infra*, VII, D, 1, b.
Use of premises see *infra*, VII, B, 3.

could compel the lessee by injunction to fulfil the covenants of the lease does not deprive him of his remedy at law for their violation.[15] The lessor may, however, by express agreement or by acquiescence, waive the breach, and thus be estopped to claim damages resulting therefrom.[16]

(II) *DAMAGES.* Where a lessee repudiates or abandons his lease, the measure of the lessor's damages for the breach of contract is the difference between the rent stipulated in the lease and the sum for which the premises are rented to other parties for the remainder of the term;[17] and where, through no fault of the lessor, the premises remain vacant during the remainder of the term, the lessor is entitled to recover as damages the amount of rent reserved for the unexpired portion of the lease.[18]

III. LANDLORD'S TITLE AND REVERSION.

A. Title or Possession to Sustain Lease.[19] The relation of landlord and tenant may be created, although the landlord is not the owner of the property;[20]

15. U. S. Trust Co. *v.* O'Brien, 143 N. Y. 284, 38 N. E. 266.

16. Jones *v.* Daly, 175 N. Y. 520, 67 N. E. 1083 [*affirming* 73 N. Y. App. Div. 220, 76 N. Y. Suppl. 725]; Geddis *v.* Folliett, 16 S. D. 610, 94 N. W. 431 (where, by the cancellation of the lease and surrender of the possession by the lessee, and acceptance by the lessor, the damages sustained by the lessor by reason of the failure of the lessee to perform all the conditions of the lease were held to be waived, especially as to such conditions as might have been performed had the lessee retained possession); Wildey Lodge No. 21, I. O. O. F. *v.* Paris, 31 Tex. Civ. App. 632, 73 S. W. 69. See also Rice *v.* Brown, 81 Me. 56, 16 Atl. 334, where the question as to whether the acts of the lessor amounted to a waiver of the breach was held to be a question for the jury.

Waiver of forfeiture see *infra*, IX, B, 7, g.

17. *Minnesota.*— Minneapolis Baseball Co. *v.* City Bank, 74 Minn. 98, 76 N. W. 1024.

New York.— Nathan *v.* Gendron Iron Wheel Co., 18 Misc. 374, 41 N. Y. Suppl. 661. See also Cohen *v.* Wittemann, 100 N. Y. App. Div. 338, 91 N. Y. Suppl. 493.

North Carolina.— Scheelky *v.* Koch, 119 N. C. 80, 25 S. E. 713.

Ohio.— Kirland *v.* Wolf, 7 Ohio Dec. (Reprint) 436, 3 Cinc. L. Bul. 114.

Texas.—Dulin *v.* Knechtel, (Civ. App. 1899) 51 S. W. 350.

Virginia.— James *v.* Kibler, 94 Va. 165, 26 S. E. 417.

18. Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678; Gray *v.* Kaufman Dairy, etc., Co., 9 N. Y. App. Div. 115, 41 N. Y. Suppl. 173 (holding likewise that where a tenant abandons the demised premises, it is not the duty of the landlord to relet in order to reduce his claim for damages against the tenant); Cummings *v.* Hausen, 63 How. Pr. (N. Y.) 351 (holding that where a contract of rental has not been terminated by efflux of time, damages for its breach may be recovered to the time of the trial of the action therefor); Dulin *v.* Kneentel, (Tex. Civ. App. 1899) 51 S. W. 350. See also U. S. Trust Co. *v.* O'Brien, 143 N. Y. 284, 38 N. E. 266 [*reversing* 61 N. Y. Super. Ct. 1, 18 N. Y. Suppl. 798], holding that the measure of damages for breach of covenant on the part of the lessee to allow the lessor to put up the usual notice of "to let" on the building before the expiration of the lease, and also to permit the premises to be shown to persons proposing to rent, is the rental value of the building during the time it remains vacant on account of the lessee's act.

19. **Power of municipal corporation** to lease as dependent on its title see MUNICIPAL CORPORATIONS.

Estoppel to deny landlord's title see *infra*, III, G.

Implied covenant as to title see *infra*, VII, B, 2, a.

20. Strickland *v.* Stiles, 107 Ga. 308, 33 S. E. 85; Spence *v.* Wilson, 102 Ga. 762, 29 S. E. 713; Morgan *v.* Morgan, 65 Ga. 493; Burbank *v.* Harris, 30 La. Ann. 487; Paulding *v.* Dowell, 2 La. 452. But see Raddin *v.* Kidder, 111 Mass. 44.

One having the right to possession may lease the property to another, although he has not the title. Cheever *v.* Pearson, 16 Pick. (Mass.) 266; New York *v.* Hill, 13 How. Pr. (N. Y.) 280.

A title subsequently acquired by the lessor during the life of the lease validates a lease made at the time when the lessor had no title (Porch *v.* Fries, 18 N. J. Eq. 204) and inures to the benefit of the lessee (Iowa Sav. Bank *v.* Frink, 1 Nebr. (Unoff.) 14, 26, 92 N. W. 916; Geneva Mineral Springs Co. *v.* Coursey, 45 N. Y. App. Div. 268, 61 N. Y. Suppl. 98; Van Horne *v.* Crain, 1 Paige (N. Y.) 455. *Compare* Booth *v.* Alcock, L. R. 8 Ch. 663, 42 L. J. Ch. 557, 20 L. T. Rep. N. S. 231, 21 Wkly. Rep. 743).

A life-estate in the lessor is sufficient, although the lease is for a fixed term with the privilege of renewal for another fixed term. Olden *v.* Sassman, 67 N. J. Eq. 239, 57 Atl. 1075.

A purchaser of land, before payment of the price, where entitled to the profits of the income thereof in the meantime, has a right to lease it to another. Fitch *v.* Windram, 184 Mass. 68, 67 N. E. 965.

In Louisiana, by statute, the lease of another's property is valid in so far as the

but where the lessor has neither title nor possession the lease is of no effect.[21] The relation of landlord and tenant does not depend upon the landlord's title, but upon the agreement between the parties followed by the possession of the premises by the tenant under such agreement.[22] It is immaterial that the land was in the possession of a third person claiming title, at the time the lease was made, where the lessee obtains possession under the lease.[23]

B. Possession of Tenant as Possession of Landlord. The possession of the demised premises by the lessee is for many purposes considered to be the possession of the lessor,[24] until the tenancy is expressly repudiated and notice thereof given to the landlord.[25] This rule is most often applied in connection with a claim of title by adverse possession.[26] It is also applied in connection with constructive notice, it being held that possession by a tenant is constructive notice, as to third persons, of the title of the landlord.[27]

C. Rights and Powers in General — 1. Authority and Control Over Leased Premises. In the absence of a statute or an express agreement,[28] the general rule is that the landlord has no right to enter the premises leased by him, except to prevent waste,[29] or to perform acts to save himself from liability for negligence in

tenant is concerned. Dennistoun *v.* Walton, 8 Rob. 211.

21. Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939 (holding that where the owner of real estate executes an absolute deed as security for the payment of money and receives a defeasance in writing, the grantee is merely a mortgagee and has no such title or possession as will support a lease of the premises); Bidwell *v.* Evans, 25 Pittsb. Leg. J. (Pa.) 149 (holding that where one having no title induces the person in possession, by trick or artifice, to take a lease from him, the relation of landlord and tenant does not exist).

22. Wilcoxen *v.* Hybarger, 1 Indian Terr. 138, 38 S. W. 669, holding the relation of landlord and tenant created by an agreement whereby a member of an Indian tribe agreed to give possession of a tract of land which he, in common with other members of the tribe, had the right to occupy. See also *supra*, I, B.

23. Kinsman *v.* Greene, 16 Me. 60.

24. *Alabama.*— Lecatt *v.* Stewart, 2 Stew. 474.

California.— Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866; Lawrence *v.* Webster, 44 Cal. 385; Mecham *v.* McKay, 37 Cal. 154; Landers *v.* Bolton, 26 Cal. 393.

Indiana.—Vanduyn *v.* Hepner, 45 Ind. 589.

Kentucky.— West *v.* Price, 2 J. J. Marsh. 380; Owings *v.* Gibson, 2 A. K. Marsh. 515.

Louisiana.— Bright *v.* Bell, 113 La. 1078, 47 So. 976; Phelps *v.* Taylor, 23 La. Ann. 585; Metoyer *v.* Larenandiere, 6 Rob. 139; Le Breton *v.* McDonough, 2 Rob. 461; Tippet *v.* Jett, 10 La. 359.

Missouri.— Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032; Wilson *v.* Lerche, 90 Mo. 473, 2 S. W. 799. See Ayres *v.* Draper, 11 Mo. 548.

New York.—Whiting *v.* Edmunds, 94 N. Y. 309.

Pennsylvania.— Schuylkill, etc., R. Co. *v.* McCreary, 58 Pa. St. 304; McGinnis *v.* Porter, 20 Pa. St. 80; Vanderslice *v.* Donner, 26 Pa. Super. Ct. 319.

South Carolina.— Binda *v.* Benbow, 11 Rich. 24; Williams *v.* McAlilly, 3 Strobh. 477 note.

Virginia.— Allen *v.* Paul, 24 Gratt. 332.

Wisconsin.— Pulford *v.* Whicher, 76 Wis. 555, 45 N. W. 418.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 124. See also Champerty and Maintenance, 6 Cyc. 872 notes 88, 89.

Extent of possession.—Where the lessee is not restricted by certain bounds his possession is considered to be to the extent of the property of the landlord, of which he is in possession (Lee *v.* McDaniel, 1 A. K. Marsh. (Ky.) 234); but where the tenant takes possession of part of a tract of land by certain described limits, such occupancy gives possession to the landlord only to the extent of the leased premises (Owings *v.* Gibson, 2 A. K. Marsh. (Ky.) 515).

A judgment rendered against the tenants of another in trespass to try title does not of itself make the possession of the tenants that of the judgment plaintiffs. Cobb *v.* Robertson, (Tex. 1905) 86 S. W. 746; Thomson *v.* Weisman, 98 Tex. 170, 82 S. W. 503.

On the termination or surrender of the lease, the possession reverts to the lessor, notwithstanding the intrusions of trespassers. May *v.* Luckett, 48 Mo. 472; Walser *v.* Graham, 45 Mo. App. 629. See also Clemens *v.* Dryden, 6 Mo. App. 597.

25. Reichstetter *v.* Reese, (Tex. Civ. App. 1897) 39 S. W. 597. See also Adverse Possession, 1 Cyc. 1060.

26. See Adverse Possession, 1 Cyc. 1004, 1018, 1058, 1061, 1133.

27. See Vendor and Purchaser.

28. See *infra*, VII, B, 1, b, (I).

29. Sulzbacher *v.* Dickie, 51 How. Pr. (N. Y.) 500. See also Simpson *v.* Moorhead, 65 N. J. Eq. 623, 56 Atl. 887.

Search for stolen goods.— The right of a landlord to enter and terminate a lease at will will not justify an illegal search for stolen goods. Such acts make him a tres-

connection with the premises;[30] but a mere trespasser cannot complain that the lessor illegally interfered with the lessee's possession, where the latter makes no objection.[31]

2. Actions Against Third Persons. For an injury to the possession as distinguished from the freehold, the right of action is in the tenant, and the landlord cannot sue.[32] On the other hand, where the injury is to the freehold the landlord may sue, although his tenant is in possession.[33] An action will lie at the suit of a landlord against one who, by disturbing or threatening his tenants, causes them to abandon the premises.[34]

3. Right to Defend Action Against Lessee. Generally the landlord may defend an action brought against the tenant relating to the title to the demised premises,[35] such as an action of ejectment,[36] or an action of trespass to try title.[37]

D. Transfer of Reversion — 1. To Tenant.[38] The purchase by the lessee of the interest of the lessor, during the existence of the lease, merges the two estates.[39]

passer *ab initio*. Faulkner *v.* Alderson, Gilm. (Va.) 221.

Right to enter to make repairs or alterations see *infra*, VII, D, 1, a, (IV).

30. Dawson *v.* Brouse, Wils. (Ind.) 441 (holding that the owner will not be restrained from tearing down walls, where the building has become unfit and unsafe for occupancy by reason of fire or other defect); Anderson *v.* Dickie, 26 How. Pr. (N. Y.) 105.

31. Ebersol *v.* Trainor, 81 Ill. App. 645.

32. Southern R. Co. *v.* State, 116 Ga. 276, 42 S. E. 508; Warren *v.* Conn, 84 Ky. 312, 1 S. W. 537, 8 Ky. L. Rep. 281, 4 Am. St. Rep. 204; Eno *v.* Del Vecchio, 6 Duer (N. Y.) 17.

For instance a landlord cannot maintain an action for an injury to the growing crops belonging to the tenant (St. Louis, etc., R. Co. *v.* Trigg, 63 Ark. 536, 40 S. W. 579; Drake *v.* Chicago, etc., R. Co., 70 Iowa 59, 29 N. W. 804; Stoltz *v.* Kretschmar, 24 Wis. 283) unless he has an interest therein by virtue of the lease (Babley *v.* Vyse, 48 Iowa 481; Hatch *v.* Hart, 40 N. H. 93, holding that where a lease reserves a portion of the crops to be raised, and the tenant abandons the possession of the crops under the lease, or assents to a sale of his interest therein, and relinquishes further claim thereto, the landlord alone may maintain trespass for injury to the crops thus abandoned or sold with the assent of the tenant). The landlord cannot recover for a diversion of water where no damage to his interest is shown. Moody *v.* King, 74 Me. 497. Likewise, where the lessee is to keep the property in repair, the lessor cannot sue for an injunction to prevent interference with the use of the property in the hands of the lessee. Coney *v.* Brunswick, etc., Steamboat Co., 116 Ga. 222, 42 S. E. 498.

Right of landlord to maintain action for: Forcible entry or unlawful detainer see Forcible Entry and Detainer, 19 Cyc. 1112. For Trespass see Trespass. For Conversion see Trover and Conversion.

33. See *infra*, III, F, 1, a.

The lessor cannot recover for the conversion of property never delivered to him, where he has no lien on the property (Baker *v.* Cotney, 142 Ala. 560, 38 So. 131), or for a nuisance only temporarily obstructing access to the property (Van Siclen *v.* New York, 64 N. Y. App. Div. 437, 72 N. Y. Suppl. 209. See also McDonnell *v.* Cambridge R. Co., 151 Mass. 159, 23 N. E. 841). Nor can he sue a third person for the use and occupation of a portion of the leased premises during the time while the lessee was entitled to possession. Southern R. Co. *v.* State, 116 Ga. 276, 42 S. E. 508.

34. Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584; Aldridge *v.* Stuyvesant, 1 Hall (N. Y.) 210; Shadwell *v.* Hutchinson, 2 B. & Ad. 97, 22 E. C. L. 50, 4 C. & P. 333, 19 E. C. L. 540, 9 L. J. K. B. O. S. 142, M. & M. 350. See also *infra*, XII.

It has been held in Illinois that if a person interferes with a tenant so far as to disturb his enjoyment of the use of the premises leased, and thereby causes loss of rent or damage to the landlord, the landlord may have an action. Youngreen *v.* Shelton, 101 Ill. App. 89.

35. Greene *v.* Klinger, 10 Fed. 689, Texas statute. See also Buckner *v.* Pope, 1 B. Mon. (Ky.) 163.

Judgment.—Where the landlord is allowed to defend an action against a tenant for a forcible entry, the judgment should be entered against the tenant. Clark *v.* Stringfellow, 4 Ala. 353. Where suit is brought against several persons as tenants of the same lands, and the landlord is admitted to defend for all, and pleads not guilty, he cannot object that a judgment is rendered generally for the damages, without ascertaining the value of the rent of each tenant. McCaskle *v.* Amarine, 12 Ala. 17.

36. See Ejectment, 15 Cyc. 86.

37. See Trespass to Try Title.

38. **Option to purchase** see *infra*, IV, C, 5.

39. See *infra*, IX, B, 4, d.

Merger of estate under lease in fee see Ground-Rents, 20 Cyc. 1379.

Tenant as conduit of title.— The fact that the legal title to the leased property passes through the tenant, as a mere conduit of title, and that he holds under the person to whom he immediately transferred the title and who advanced the purchase-money, does not alter the rights of the tenant in crops grown by

He cannot take under the deed, however, until the expiration of the lease, where the deed is made subject to the lease.[40] The relationship of landlord and tenant may exist notwithstanding the tenant has an option to purchase, or is entitled to a conveyance at a future time.[41] A provision in a lease for the payment of a specified sum from the lessor to the lessee on a sale of the leased property, in consideration of a surrender of the premises, does not apply to a sale to the lessee.[42]

2. To Stranger[43] — a. Power to Transfer. The owner of leased property may sell it during the continuance of the lease,[44] and he may assign the reversion without a transfer of the rent;[45] but if there is no reservation, the grant conveys the lessor's interest in an unexpired lease.[46]

b. Rights and Liabilities — (i) *As Between Grantee and Tenant.* Where the lessee is in possession, the purchaser takes subject to the lease, although he has no actual knowledge thereof.[47] If the purchaser bought with knowledge of an agreement between the landlord and tenant to sell the property to the tenant, the tenant may enforce the contract against such purchaser.[48] Generally the rights and liabilities existing between the grantee and the lessee are the same as those existing between the grantor and the lessee,[49] after the lessee is given notice

him. Wintermute *v.* Light, 46 Barb. (N. Y.) 278.

Mortgage to lessee.—The lessee will be considered to elect to hold under the lease, although a mortgage conveying property to him in fee is executed to him until he has made his election to hold under the subsequent mortgage. Wood *v.* Felton, 9 Pick. (Mass.) 171. It will be presumed, where the lease is for the same number of years as is the time when the mortgage becomes due, and it is apparent that the lease and the mortgage were intended to execute one contract, that the mortgage was first executed. Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98.

40. Wilbur *v.* Nichols, 61 Vt. 432, 18 Atl. 154.

41. Rooney *v.* Gillespie, 6 Allen (Mass.) 74; Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; New York Bldg. Loan Banking Co. *v.* Keeney, 56 N. Y. App. Div. 538, 67 N. Y. Suppl. 505. See also *supra*, I, E, 2, d.

Validity of option.— A provision in the lease giving the lessee the first opportunity to purchase the premises, if the lessor desires to sell them, is not invalid for want of mutuality. Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290 [*affirming* 68 Ill. App. 83], holding in addition that the clause giving the lessee "the first opportunity to purchase said premises, provided he will pay as much as any other person," is not so vague, uncertain, and indefinite that it cannot be enforced.

42. Seaman *v.* Civill, 45 Barb. (N. Y.) 267, 31 How. Pr. 52.

43. **As terminating tenancy** see *infra*, IX, B, 4, b, c.

As creating implied relation of landlord and tenant see *supra*, I, F.

Attornment on transfer of reversion see *supra*, I, F, 1.

Estoppel of tenant to deny title of grantee of reversion see *infra*, III, B, G, 8.

Effect of pending action against tenant at time of purchase from landlord see Lis Pendens.

44. Crosby *v.* Loop, 13 Ill. 625; Marley *v.* Rodgers, 5 Yerg. (Tenn.) 217. See also Wright *v.* Burroughes, 3 C. B. 685, 4 D. & L. 438, 12 Jur. 968, 16 L. J. C. P. 6, 54 E. C. L. 685.

Validity of transfer.—A conveyance of a reversionary interest passes no right where no consideration is paid or fixed by agreement. Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584.

45. Beal *v.* Boston Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216; Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

46. Hatfield *v.* Lockwood, 18 Iowa 296. See also Putnam *v.* Stewart, 97 N. Y. 411; Burton *v.* Barclay, 7 Bing. 745, 9 L. J. O. S. C. P. 231, 5 M. & P. 785, 20 E. C. L. 331.

Right of grantee to rents see *infra*, VIII, A, 7, b.

47. Friedlander *v.* Ryder, 30 Nebr. 783, 47 N. W. 83, 9 L. R. A. 700; Chesterman *v.* Gardner, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265; O'Neil *v.* Davis, 1 Tex. App. Civ. Cas. § 415; Bailie *v.* Rodway, 27 Wis. 172.

Presumptions.— A purchaser of real estate, "subject to existing tenancies," who found tenants in actual possession, is presumed to have ascertained the nature, extent, and terms of the existing tenancies. Anderson *v.* Connor, 43 Misc. (N. Y.) 384, 87 N. Y. Suppl. 449.

48. Lazarus *v.* Heilman, 11 Abb. N. Cas. (N. Y.) 93.

49. Schiedt *v.* Belz, 4 Ill. App. 431; Houssiere Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 115 La. 197, 32 So. 932; Rising Sun Lodge *v.* Buck, 58 Me. 426; Hovey *v.* Walker, 90 Mich. 527, 51 N. W. 678, holding that where there is an agreement by a tenant to pay certain outstanding indebtedness of the landlord by way of payment of rent, such agreement is binding on a grantee of the landlord. See also Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22; Greenwood *v.* Bairstow, 5 L. J. Ch. 179.

The successors of the landlord coming into possession of the demised premises without

of the transfer of the property.[50] Covenants running with the land bind both grantee and lessee as against each other.[51] If the lease is voidable, certain acts of the grantee, such as acceptance of rent, may preclude him from thereafter attacking it.[52] So if the lease is voidable at its inception, and the lessee has paid rents and made improvements, a subsequent purchaser of the land, with knowledge of the facts, cannot avoid the lease.[53] The grantee may terminate the tenancy in accordance with the terms of the lease,[54] subject to conditions in the contract under which he purchased the land.[55] After the termination or surrender of the lease, the grantee has the same rights as the grantor would have had,[56] and holds the premises free from the encumbrance of the lease.[57] The grantee may sue to protect his rights as the assignee of the reversion.[58] For instance he may sue for damages to the land by the tenant after the sale,[59] or for a breach of covenant after the sale;[60] but not for a breach of covenant before the conveyance,[61] unless he has been injured thereby.[62]

(II) *As Between Grantor and Lessee.* The original lessor remains liable on his covenants in the lease, although he has conveyed the premises and his interest in the lease.[63] *A fortiori* the original lessor is liable for the sum stipulated in the lease to be paid to the lessee in case the land should be sold and the purchaser should require the lessee to give up possession before the end of the

having parted with any consideration therefor, and with notice of the lease, and having thereafter received the benefits accruing thereunder, are chargeable with the lessor's covenants. Schoellkopf *v.* Coatsworth, 55 N. Y. App. Div. 331, 66 N. Y. Suppl. 979.

But a mortgagee in possession is not liable to a lessee of the mortgagor on the covenants in a lease. Cargill *v.* Thompson, 57 Minn. 534, 59 N. W. 638.

The rights of the lessee are not affected by the transfer of the reversion. Simanek *v.* Nemetz, 120 Wis. 42, 97 N. W. 508.

50. Otis *v.* McMillan, 70 Ala. 46.

51. Frederick *v.* Callahan, 40 Iowa 311; Demarest *v.* Willard, 8 Cow. (N. Y.) 206; Van Horne *v.* Crain, 1 Paige (N. Y.) 454.

Particular covenants. — Covenant against subletting see *infra*, IV, B, 1, f. Covenant as to condition of premises at end of term see *infra*, VII, D, 5, d. Covenant as to renewals see *infra*, IV, C, 2, e, (I). Covenant to pay for improvements see *infra*, VII, D, 3, c, (VI).

52. Winestine *v.* Ziglatski-Marks Co., 77 Conn. 404, 59 Atl. 496; Anderson *v.* Connor, 43 Misc. (N. Y.) 384, 87 N. Y. Suppl. 449.

53. Schulte *v.* Schering, 2 Wash. 127, 26 Pac. 78; McGlauflin *v.* Holman, 1 Wash. 239, 24 Pac. 439.

54. Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696; Roberts *v.* McPherson, 63 N. J. L. 352, 43 Atl. 1098 [*affirming* 62 N. J. L. 165, 40 Atl. 630], statute giving heirs of grantees of leased land same rights that the lessors would have had. See also Verplanck *v.* Wright, 23 Wend. (N. Y.) 506; Municipal Permanent Bldg. Soc. *v.* Smith, 22 Q. B. D. 70, 58 L. J. Q. B. 61, 37 Wkly. Rep. 42.

Right to declare forfeiture see *infra*, IX, B, 7, c.

55. Engler *v.* Garrett, 100 Md. 387, 59 Atl. 648.

56. Marley *v.* Rodgers, 5 Yerg. (Tenn.) 217. See also Hooper *v.* Clark, L. R. 2 Q. B. 200, 8 B. & S. 150, 36 L. J. Q. B. 79, 16 L. T. Rep. N. S. 152, 15 Wkly. Rep. 347.

57. Page *v.* Esty, 54 Me. 319, holding that a surrender to the lessor after the conveyance gives him no interest in the premises.

58. Action for rent see *infra*, VIII, A, 7, b, (I).

Action to recover possession of demised premises see *infra*, X, B.

Action for forcible entry and detainer see *infra*, X, C, 4, f. See also FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1139.

59. Shinn *v.* Guyton, etc., Mule Co., 109 Mo. App. 557, 83 S. W. 1015.

60. Scheidt *v.* Belz, 4 Ill. App. 431; Shelby *v.* Hearne, 6 Yerg. (Tenn.) 512. See also Whitton *v.* Peacock, 3 Myl. & K. 325, 10 Eng. Ch. 325, 40 Eng. Reprint 124; Clegg *v.* Hands, 44 Ch. D. 503, 55 J. P. 180, 59 L. J. Ch. 477, 62 L. T. Rep. N. S. 502, 38 Wkly. Rep. 433.

At common law the assignee of a reversion could not maintain an action upon a covenant contained in a lease, against the lessee, although the covenant might run with the land. To remedy this the statute of 32 Hen. VIII, c. 34, was enacted, which gave generally to the assignee of the reversion the same right of action that the lessor had, upon the covenants in the lease. But this statute did not extend to mere personal and collateral covenants, but embraced those only which touched and concerned the thing demised. In Ohio the English statute is not in force, but an assignee of the reversion may sue on the covenants in the lease, where the covenants are specially assigned, whether they inhere in the land or are merely collateral. Masury *v.* Southworth, 9 Ohio St. 340.

61. Stoddard *v.* Emery, 128 Pa. St. 436, 18 Atl. 339; Shelby *v.* Hearne, 6 Yerg. (Tenn.) 512. See also Crane . Batten, 2 Wkly. Rep. 550.

62. Hendrix *v.* Dickson, 69 Mo. App. 197.

63. Jones *v.* Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485.

term, where the lessee was required by the purchaser to surrender the premises notwithstanding the land was sold subject to the lease.[64]

(III) *As Between Grantor and Grantee.*[65] Where a condition inserted in the lease is not intended for the benefit of the lessor as owner of the reversion in the property leased, it does not pass to the grantee of the reversion, but remains in the grantor.[66] On the other hand, where the covenant or condition is intended for the benefit of the reversion, the rights thereunder pass to the grantee.[67] If the grantee covenants to perform all the conditions of the lease and to indemnify the grantor against it, such covenant inures to the benefit of the assignee of such grantor.[68] If a lease has been agreed on before a sale of the land, but the terms have not been fixed, the grantor has no authority after the sale to sign a proper memorandum of the contract for a lease.[69] If the grantor collects rent after the tenant is notified of the transfer, the grantee may sue the grantor to recover the sum paid notwithstanding he could have sued the tenant therefor.[70]

E. Assignment of Lease or Rent — 1. Power to Assign.[71] The lessor may assign the rent and covenant for rent without the reversion.[72] It is immaterial that the rent assigned is not due.[73]

64. Hazen *v.* Hoyt, (Iowa 1898) 75 N. W. 647.

65. **Who entitled to rent** see *infra*, VIII, A, 7, b, (I).

Fraud.— The vendee has no cause of action against the vendor because of his reliance on false representations of the vendor as to when the tenant's term expires under an oral lease, which results in the vendee permitting the tenant to remain on the premises beyond the expiration of the term whereby he becomes a tenant for an additional year. Jalass *v.* Young, 3 Pa. Super. Ct. 422, 40 Wkly. Notes Cas. 40.

66. Thurston *v.* Minke, 32 Md. 487; Kingsley *v.* Sauer, 4 N. Y. App. Div. 507, 40 N. Y. Suppl. 7, holding that where premises were leased, on which there was some hay owned by the lessor, and the lessee covenanted to leave an equal amount on the premises at the expiration of the term, the right of the lessor did not pass under a deed of the premises as against an assignee of the lessor's claim.

67. Baltimore *v.* White, 2 Gill (Md.) 444.

68. Hallenbeck *v.* Kindred, 109 N. Y. 620, 15 N. E. 887.

69. Hodges *v.* Howard, 5 R. I. 149.

70. Wittmann *v.* Watry, 45 Wis. 491.

71. **Assignment of landlord's lien** see *infra*, VIII, D, 3, a, (VII).

Assignment of lease of land held adversely see Champerty and Maintenance, 6 Cyc. 874.

Lease in fee see Ground-Rents, 20 Cyc. 1375.

72. *Illinois.*—Wineman *v.* Hughson, 44 Ill. App. 22. But see Chapman *v.* McGrew, 20 Ill. 101.

Iowa.— Watson *v.* Hunkins, 13 Iowa 547.

Kansas.— Root *v.* Trapp, 10 Kan. App. 575, 62 Pac. 248.

Massachusetts.— Beal *v.* Boston Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216.

Michigan.— Brownson *v.* Roy, 133 Mich. 617, 95 N. W. 710.

Nebraska.— Iowa Sav. Bank *v.* Frink, 1 Nebr. (Unoff.) 14, 26, 92 N. W. 916.

New York.— Thomson *v.* Ludlum, 36 Misc. 801, 74 N. Y. Suppl. 875; Demarest *v.* Willard, 8 Cow. 206.

Tennessee.— Shelby *v.* Hearne, 6 Yerg. 512.

Texas.— Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 133.

But see Newbold *v.* Comfort, 4 Pa. L. J. 117.

Covenant of guaranty of rent.—While covenants for payment of rent are assignable, a covenant guaranteeing the payment of the rent is not assignable, and hence where both covenants are assigned the assignment is invalid. Potter *v.* Cronbeck, 117 Ill. 404, 7 N. E. 586.

Assignment by tenants in common to partnership.—A claim for rent belonging to two persons as tenants in common of lands may be assigned by them to a partnership consisting of one of the tenants and a third person. Chapman *v.* Plummer, 36 Wis. 262.

Effect of death of assignor.—An assignment of rents, with a power of attorney to collect them as they become due, is a valid assignment in equity, although the assignor dies before they are collected. Taylor *v.* Moore, 23 Fed. Cas. No. 13,798, 5 Cranch C. C. 317.

Effect of appointment of receiver.—A provision authorizing the appointment of a receiver does not affect the validity of a prior assignment of rents to the mortgagees, nor show that it was intended that the receiver should take them as against the mortgagees. Thomson *v.* Erskine, 36 Misc. (N. Y.) 202, 73 N. Y. Suppl. 166.

Assignment of rights under lease.—Where the lessor has reserved the right to enter on demised premises and sow a crop, his right to so enter is assignable, and may be conveyed to a tenant. Brewster *v.* Gracey, 65 Kan. 137, 69 Pac. 199.

73. Brownson *v.* Roy, 133 Mich. 617, 95 N. W. 710, holding that an assignment of rent made before the debt becomes due, and when the written lease has expired, is not

2. Mode and Sufficiency. The assignment need not be in any particular form.[74] It may be by parol,[75] by delivery of a rent note,[76] by appropriate words in a mortgage,[77] or by the appointment of a creditor to collect the rents and apply them on the lessor's debt.[78] There may be an assignment of the rent due without an assignment of the lease.[79] A lease under seal may be assigned by an instrument not under seal.[80] Notice of the assignment should be given the lessee; and knowledge obtained by the sublessee in possession of the premises is not notice to the lessee where at the time he obtained it he was not acting as agent of the lessee.[81] An assignment need not be recorded;[82] but if a mortgage which contains an assignment of rents is indexed and recorded only as a land mortgage, it is not constructive notice of the assignment to third persons.[83]

3. Operation and Effect.[84] Where the rent is assigned the relation of landlord and tenant is established between the assignee and the lessee.[85] The assignee, however, has no right of ownership or right of possession,[86] and no interest beyond

subject to the objection that it does not apply to such rent, where the parties have continued the existence of the tenancy, and treated the assignment as operative.

74. See Assignments, 4 Cyc. 37.

An assignment of all the lessor's right, title, and interest in and to a lease passes all his interest to the rents accruing under it. Keeley Brewing Co. *v.* Mason, 102 Ill. App. 381.

A guaranty of the grantor that the rents will amount to the quantity of grain stated therein does not constitute an assignment of the rent from the grantee to the grantor. West Shore Mills Co. *v.* Edwards, 24 Oreg. 475, 33 Pac. 987.

75. Bennett *v.* McKee, (Ala. 1905) 38 So. 129; Wells *v.* Cody, 112 Ala. 278, 20 So. 381 (holding that the code provision for assignment of rent applies to assignment by delivery merely as well as by writing); Oswald *v.* Mollet, 29 Ill. App. 449 (holding that the delivery of a copy of a lease and the assignment of notes given by the lessee to secure rent thereunder constitute a valid assignment of the lease where such was the intention of the parties).

76. Bennett *v.* McKee, (Ala. 1905) 38 So. 129.

77. Bennett *v.* McKee, (Ala. 1905) 38 So. 129; Thomson *v.* Ludlum, 36 Misc. (N. Y.) 801, 74 N. Y. Suppl. 875.

78. Bredell *v.* Fair Grounds Real Estate Co., 95 Mo. App. 676, 69 S. W. 635; Stephens *v.* Sessa, 50 N. Y. App. Div. 547, 64 N. Y. Suppl. 28.

Where a creditor of the lessee is made the assignee of rents due from a sublessee, it was his duty to apply the income of the property to the payment of rents before applying any portion thereof to his own debt; and where the creditor is required to first apply the rents to the claims of other creditors the trust is not terminated by his paying his own debt before the prior debts. Bredell *v.* Fair Grounds Real Estate Co., 95 Mo. App. 676, 69 S. W. 635.

Assignment of rents to tenant.—Where the lessee erects a building on the premises under an agreement with the lessor that he should buy it on the termination of the lease, and thereafter the lessor agreed that the tenant should collect the rents in his own interest to pay for the improvement, such agreement constituted an assignment of the rents to the lessee as security for the debt, and created an equitable lien on the property in his favor. Allen *v.* Gates, 73 Vt. 222, 50 Atl. 1092.

79. Ramsey *v.* Johnson, 8 Wyo. 476, 58 Pac. 755, 80 Am. St. Rep. 948.

80. Keeley Brewing Co. *v.* Mason, 102 Ill. App. 381.

Statutes.—An assignment of the lessor's interest in an expired lease but on which there is a stipulated sum due him for damages for breach thereof conveys a mere chose in action, and not an interest in land, and hence a statute requiring an assignment of an interest in land to be by a sealed and acknowledged deed does not apply. Indianapolis Natural Gas Co. *v.* Pierce, 25 Ind. App. 116, 56 N. E. 137.

81. Trulock *v.* Donahue, 76 Iowa 758, 40 N. W. 696.

82. Bennett *v.* McKee, (Ala. 1905) 38 So. 129.

83. Trulock *v.* Donahue, 76 Iowa 758, 40 N. W. 696.

84. Rights of assignee where renting is on shares see *infra*, X, C.

85. Iowa Sav. Bank *v.* Frink, 1 Nebr. (Unoff.) 14, 26, 92 N. W. 916; Rhoads *v.* Speers, 15 Pa. Dist. 335, 32 Pa. Co. Ct. 538.

A reservation of the right to terminate the lease at any time by giving thirty days' notice in writing does not inure to the benefit of the assignees of the lessor, they not having been named therein. McClintock *v.* Loveless, 5 Pa. Dist. 417.

Persons entitled to rent see *infra*, VIII, A, 7, b.

86. Thorn *v.* Sutherland, 123 N. Y. 236, 25 N. E. 362 [*reversing* 4 N. Y. Suppl. 694].

A grant of the rent does not pass the reversion.—Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654; West Shore Mills Co. *v.* Edwards, 24 Oreg. 475, 33 Pac. 987.

Right to maintain summary proceedings for possession see *infra*, X, C, 4, f.

Right to distrain for rent see *infra*, VIII, E, 6, e.

the term of the lease.[87] The assignee takes subject to any equities existing between his assignor and the lessee,[88] but is not chargeable with notice of the rights of a mortgagee merely because such mortgage is recorded.[89] The amount of rent collectable is the same amount the assignor could have collected;[90] and where all the lessor's interest in an expired lease is assigned the assignee may recover damages for a breach of covenant.[91] So the assignee has a lien the same as the assignor would have had.[92] Except where it is otherwise provided by statute,[93] the assignee acquires no right of action against the lessee upon covenants running with the land.[94] Misrepresentations by the assignor may create a cause of action against him in favor of the assignee.[95]

F. Injuries to the Reversion — 1. By Stranger — a. Right of Landlord to Sue — (i) *General Rule.* The landlord, even while a tenant is in possession, may sue for an injury to the reversion.[96] This rule has been reiterated by stat-

87. Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

88. Kost *v.* Theis, (Pa. 1888) 12 Atl. 262; Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124.

Covenants. — The assignee is chargeable with notice of express or implied covenants in the lease. Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124.

Where the lease is fraudulent, and the facts showing fraud are matters of observation and record, the assignee cannot recover the rent. Larkin *v.* U. S., 5 Ct. Cl. 526.

89. Riley *v.* Sexton, 32 Hun (N. Y.) 245, holding that a mortgage clause which mentioned merely the "rents, issues and profits" of the premises as being pledged by way of security for the mortgage debt was not sufficient notice of itself that the mortgage covered the rents.

90. Woolsey *v.* Abbett, 65 N. J. L. 253, 48 Atl. 949, holding that the assignee has the right to collect unpaid taxes and water-rents which the lessee had agreed to pay.

Right of assignee of rent to sue therefor see *infra*, VIII, A, 9, a.

91. Indianapolis Natural Gas Co. *v.* Pierce, 25 Ind. App. 116, 56 N. E. 137.

92. Bennett *v.* McKee, (Ala. 1905) 38 So. 129. See *infra*, VIII, D.

An assignment of the lease is not necessary to authorize the assignee to enforce a landlord's lien as provided for in the lease. Ramsey *v.* Johnson, 8 Wyo. 476, 59 Pac. 755, 80 Am. St. Rep. 948.

93. See Ecke *v.* Fetzer, 65 Wis. 55, 26 N. W. 266.

94. Bordereaux *v.* Walker, 85 Ill. App. 86 (holding that the right of action for breach of the covenant to return in good condition remains in the owner of the reversion); Allen *v.* Wooley, 1 Blackf. (Ind.) 148.

95. Harmon *v.* Armstrong, 5 Mo. 274, holding that the assignee in a proper case may recover of the assignor, without first suing the lessee, sums actually paid by the lessee as rent but which the assignor represented had not been paid.

96. *Illinois.*— Lachman *v.* Deisch, 71 Ill. 59 (construction of a drain permanently affecting the rental value of the premises); Cooper *v.* Randall, 59 Ill. 317 (deposit of dust and smoke on the house leased, caused by the erection of a mill near by).

Indian Territory.— Barbee *v.* Shannon, 1 Indian Terr. 99, 40 S. W. 584, erection of fence on land.

Iowa.— Brown *v.* Bridges, 31 Iowa 138.

Massachusetts.— Cushing *v.* Kenfield, 5 Allen 307.

Missouri.— Fitch *v.* Gosser, 54 Mo. 267; Arnold *v.* Bennett, 92 Mo. App. 156; Ridge *v.* Railroad Transfer Co., 56 Mo. App. 133.

New York.— Winthrop *v.* Manhattan R. Co., 17 N. Y. App. Div. 509, 45 N. Y. Suppl. 515, holding that, where the rent to be paid under a lease after a certain period, during which an elevated railway is erected in the street in front of the premises, is to be determined by appraisers appointed under the lease, the lessor is entitled to maintain an action for damages against the railroad company for the diminution in the amount at which, but for such occupation of the street by the railroad, the appraisers would have fixed the rent.

South Dakota.— Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Texas.— Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228.

West Virginia.— Johnson *v.* Chapman, 43 W. Va. 639, 28 S. E. 744, holding that the landlord has a cause of action for injuries by which the rental value of the property is diminished or destroyed, in the absence of a showing that the lessee covenanted to repair.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 136.

Actions by both landlord and tenant.—A tenant and landlord may both maintain actions at the same time for injuries done to an estate — the tenant for the interruption of his possession and the diminution of his profits; and the landlord for the more permanent injury to his property. George *v.* Fisk, 32 N. H. 32; Halsey *v.* Lehigh Valley R. Co., 45 N. J. L. 26.

Effect of provisions in the lease.—Where the lease stipulates against the lessee's removing any dirt from the land, and also that the land shall be delivered up at the end of the term in as good condition as when received, the lessors cannot sue during the term for damages to the land by the con-

ute in some states[97] to the effect that the owner of the reversion may sue for an injury to the inheritance notwithstanding an intervening estate for years.

(II) *FORM OF ACTION.* A qualification of the rule forbidding an owner out of possession to maintain trespass permits a landlord, while the tenant is in possession, to maintain trespass for permanent injuries to the freehold affecting its value;[98] but this remedy extends only to acts of trespass and not to acts done by lawful authority of the tenant.[99] The common-law remedy for injuries to the reversion is an action on the case.[1] Trespass *quare clausum fregit* cannot be maintained by the landlord except where the tenancy is one at will.[2]

b. What Constitutes Injury to Reversion. An injury to the reversion for which the landlord may sue may consist *inter alia* in the removal or destruction of a fence,[3] the flooding of lands,[4] the diversion of a natural watercourse,[5] the cutting of timber,[6] the burning of standing timber,[7] or like acts.[8]

c. Pleading.[9] It has been held that plaintiff must allege that the injury for which he sues is an injury to the reversion,[10] although the better rule seems to be that it is not necessary to state formally and explicitly that the reversion was injured where the facts pleaded as a cause of action are of such a nature as necessarily to work such injury.[11] The title and interest of the reversioner in the

struction of a railroad across it, since the lessee has the right to restore the land to its former condition at the end of the term. Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228.

Evidence.— In an action by a reversioner for an injury done to the freehold, the duration of the term of the tenant in possession is evidence admissible on behalf of defendant, as affecting the measure of damages. Uttendorffer *v.* Saegers, 50 Cal. 496.

Right to compensation for injuries from construction of elevated railroad see EMINENT DOMAIN, 15 Cyc. 791.

97. Taylor *v.* Wright, 51 N. Y. App. Div. 97, 64 N. Y. Suppl. 344 (holding that the landlord may maintain an action for trespass, consisting of injuries to a line fence and the closing of a right of way reserved for his use); Macy *v.* Metropolitan El. R. Co., 59 Hun 365, 12 N. Y. Suppl. 804; Ottinger *v.* New York El. R. Co., 15 N. Y. Suppl. 18; Korn *v.* New York El. R. Co., 15 N. Y. Suppl. 10; Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Effect of covenants in lease.—A covenant in a lease that the lessee should return the premises in as good condition and repair as they were in when he took possession does not preclude the lessor's recovery for injuries to the inheritance in tearing down a line fence and closing a right of way; the covenant not covering such injuries, and the lessor being in actual possession and use of the right of way under a reservation in the lease. Taylor *v.* Wright, 51 N. Y. App. Div. 97, 64 N. Y. Suppl. 344.

98. See TRESPASS.

99. Perry *v.* Bailey, 94 Me. 50, 46 Atl. 789.

1. See CASE, ACTION ON, 6 Cyc. 692 note 37.

2. See TRESPASS.

3. Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783; Gulf, etc., R. Co. *v.* Smith, 3 Tex. Civ. App. 483, 23 S. W. 89.

4. Ripka *v.* Sergeant, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214. *Compare* Noyes *v.* Stillman, 24 Conn. 15.

5. Heilbron *v.* Last Chance Water Ditch Co., 75 Cal. 117, 17 Pac. 65.

6. Bulkley *v.* Dolbeare, 7 Conn. 232; Cramer *v.* Groseclose, 53 Mo. App. 648.

7. Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321.

8. See cases cited *infra*, this note.

Fire destroying standing grass and injuring the sod gives the landlord a cause of action for damages. Missouri, etc., R. Co. *v.* Fulmore, (Tex. Civ. App. 1894) 26 S. W. 238.

Breaking down a board curbing and cutting furrows in the sod on delivering coal to the tenant do not constitute injuries of a permanent nature to the inheritance so as to entitle the landlord to recover therefor. Watson *v.* Harrigan, 112 Wis. 278, 87 N. W. 1079.

The erection of an elevated railway in front of the leased premises during the existence of the lease, where lessening the rental value, gives a cause of action to the landlord. Korn *v.* New York El. R. Co., 15 N. Y. Suppl. 10.

Continuing trespass.—A lessor may maintain a suit as for an injury to the reversion, where there is a continuing trespass, under a claim of right, which might ripen into an adverse title. Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Use of premises for quarantine purposes.— Where a leased building occupied by tenants at will was used without the landlord's consent for a smallpox hospital, without authority of law, and some of the tenements became vacant, and applicants refused to rent them on hearing that smallpox had been in the building, the landlord may recover damages from the board of health. Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442.

9. **Pleading** generally see PLEADING.

10. Bobb *v.* Syenite Granite Co., 41 Mo. App. 642; Potts *v.* Clarke, 20 N. J. L. 536; Jackson *v.* Pesked, 1 M. & S. 234, 14 Rev. Rep. 417.

11. Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

property should be stated as facts and not as conclusions, the usual rule of pleading being applicable.[12]

2. By Tenant — a. Liability. The question as to the liability of a tenant for injuries to the demised premises by his acts or negligence is so interwoven with the question of waste which is treated elsewhere in this work[13] that no more will be attempted in this connection than to lay down a few general rules, independent of the law of waste. Of course it is the duty of the tenant to so use the leased property as not unnecessarily to injure it.[14] A tenant is liable, in the absence of an express agreement to the contrary, for causing a permanent injury to the demised premises over and above the ordinary wear and tear, when such injury is caused by his wrongful act or negligence.[15] The measure of care which a tenant must use to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk was his own.[16] A tenant is not liable for such wear and tear as is incident to the business conducted on the premises,[17] nor is he liable for injury to, or destruction of, the premises by fire, where he has not been negligent.[18] The liability of the

12. Noyes *v.* Stillman, 24 Conn. 15; George *v.* Fisk, 32 N. H. 32; Davis *v.* Jewett, 13 N. H. 88, holding in addition that, where the property for a portion of the time is occupied by the owner, and subsequently he has a mere reversionary interest, separate counts should be inserted.

13. See Waste.

14. U. S. *v.* Bostwick, 94 U. S. 53, 24 L. ed. 65.

Duties as to condition of premises at termination of lease see *infra*, VII, D, 5.

Injuries to portions of building not leased. —Where a tenant uses due care he is not liable to the landlord for injuries to portions of the building not covered by the lease. Parrott *v.* Barney, 18 Fed. Cas. No. 10,773, 2 Abb. 197, 1 Sawy. 423 [*affirmed* in 15 Wall. 524, 21 L. ed. 206], holding that an express company which was the lessee of a part of the building was not responsible for an injury to other portions of the building owned by the landlord but not included in the lease to the company for injury caused by the explosion of nitroglycerine received by the company without knowledge of its contents.

Cutting timber as waste see Waste.

15. Sheer *v.* Fisher, 27 Ill. App. 464; Wilcox *v.* Cate, 65 Vt. 478, 26 Atl. 1105. *Compare* Lothrop *v.* Thayer, 138 Mass. 466, 52 Am. Rep. 286.

Overloading building.—A tenant who negligently causes a building to fall by putting into it a weight apparently and in fact excessive is liable in damages to the landlord. Brooks *v.* Clifton, 22 Ark. 54; Chalmers *v.* Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769.

Removal of machinery.— The landlord is entitled to reimbursement for injuries to his building caused by the removal of a tenant's machinery, on cancellation of the lease. *In re* Breck, 4 Fed. Cas. No. 1,822, 8 Ben. 93.

Excavations.— Under a statute providing that whenever an excavation is made on land near the boundary of adjoining land, the person causing such excavation to be made, if afforded the necessary license to enter on the adjoining lands, shall render the same safe from injury by reason of the excavation, it was held that a lessee of land who refuses such license is liable to his lessor for damages caused by the excavation. Mackenzie *v.* Hatton, 6 Misc. (N. Y.) 153, 26 N. Y. Suppl. 873 [*reversed* on other grounds in 9 Misc. 16, 29 N. Y. Suppl. 18].

Action may be based on the contract where it provides for the exercise of care by the tenant to prevent fire and waste. Carter *v.* George, 30 Kan. 45, 1 Pac. 58. An action will lie on the contract for injuries to the reversion irrespective of whether the injuries resulted before or after the termination of the lease. Stevens *v.* Pantlind, 95 Mich. 145, 54 N. W. 716, where it was held that the landlord was not required to resort to an action on the case.

The action may be brought before the expiration of the term (Ray *v.* Ayers, 5 Duer (N. Y.) 494), even though the tenant may have it in his power to restore the premises to their original state before its expiration (Moses *v.* Old Dominion Iron, etc., Co., 75 Va. 95; Queen's College *v.* Hallett, 14 East 489).

Persons liable.— If a tenant at sufferance, before entry of the landlord, takes a lease of the premises and a bond of indemnity from a third person, the latter is liable with him in an action by the landlord on the case for damages growing out of an interference with the property. Russell *v.* Fabyan, 34 N. H. 218. See also Waste.

Burden of proof.—If the tenant claims that the act causing the injury was done by the direction or permission of the landlord the burden is on the tenant to prove such facts. Olsen *v.* Webb, 41 Nebr. 147, 59 N. W. 520.

Effect of covenants to repair see *infra*, VII, D, 1.

16. Parrott *v.* Wells, 15 Wall. (U. S.) 524, 21 L. ed. 206.

17. Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. 957.

18. Wainscott *v.* Silvers, 13 Ind. 497; Schwartz *v.* Saiter, 40 La. Ann. 264, 4 So. 77. See also Stevens *v.* Pantlind, 95 Mich. 145, 54 N. W. 716. *Compare* Lothrop *v.* Thayer, 138 Mass. 466, 52 Am. Rep. 286; Shrewsbury's

tenant extends to the acts of his servants[19] and business associates.[20] The right to sue for injuries committed by the tenant or those for whose acts he is liable is not waived by the subsequent acceptance of rent,[21] nor by the execution of a new lease,[22] nor by the acceptance of a certain sum in consideration of the surrender of the lease.[23] But an agreement to stop the litigation for injuries and surrender the lease is based on a sufficient consideration to preclude the right to afterward recover damages.[24]

b. Injunction.[25] A landlord may enjoin his tenant from acts causing an injury to the reversion,[26] where such injury will probably be irreparable, or cannot be compensated in damages recoverable in an action at law.[27]

c. Trial.[28] The question of due care on the part of the tenant must be submitted to the jury,[29] by appropriate instructions.[30]

d. Criminal Responsibility.[31] In some states the statutes expressly make acts of the tenant wilfully injuring or damaging the demised premises an indictable offense.[32] Independent of statute, the common-law rule was that a tenant could not be guilty of arson in burning the leased buildings in his possession.[33]

Case, 5 Coke 13*a*; Salop *v.* Crompton, Cro. Eliz. 777.

A tenant at sufferance who has no right to build any fire upon the premises is liable for the loss of the property by fire whether his acts were wilful or merely negligent. Russell *v.* Fabyan, 34 N. H. 218.

A tenant must show the use of proper care as regards a stove in the premises, notwithstanding the landlord knew that the stovepipe passed through the weather boards where the fire had started. Moore *v.* Parker, 91 N. C. 275.

Evidence.— On an issue as to negligence, where the premises have been destroyed by fire, evidence is admissible to show that no water was kept in the building and that there was no watchman. Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682.

19. Caldwell *v.* Snow, 8 La. Ann. 392; Mason *v.* Stiles, 21 Mo. 374, 64 Am. Dec. 242. See also Watson *v.* Harrigan, 112 Wis. 278, 87 N. W. 1079.

20. Williams *v.* Schmidt, 54 Ill. 205.

21. Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386; Chalmers *v.* Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769.

22. Brooks *v.* Rogers, 101 Ala. 111, 13 So. 286. But see Matthews *v.* Alsworth, 45 La. Ann. 465, 12 So. 518, holding that unless a lessor timely claims damages suffered under the first lease, after a second has been made, with the same lessee, there is acquiescence, which precludes a claim for damages.

23. Marshall *v.* Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679.

24. Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

25. **Injunction** generally see INJUNCTIONS, 22 Cyc. 724.

26. *Maryland.*— Baugher *v.* Crane, 27 Md. 36.

Missouri.—Parker *v.* Raymond, 14 Mo. 535.

New York.— Kidd *v.* Dennison, 6 Barb. 9.

Oregon.— Davenport *v.* Magoon, 13 Oreg. 3, 4 Pac. 299, 57 Am. Rep. 1.

Pennsylvania.— Waln *v.* O'Connor, 1 Phila. 353.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 144. See also WASTE.

27. Atkins *v.* Chilson, 7 Metc. (Mass.) 398.

28. **Trial** generally see TRIAL.

29. Sheer *v.* Fisher, 27 Ill. App. 464; Moses *v.* Old Dominion Iron, etc., Co., 75 Va. 95.

30. Sheer *v.* Fisher, 27 Ill. App. 464 (holding that where a leased building fell because of alleged overloading, it was error to instruct that the tenants must show affirmatively that the fall was not due to their negligence, and also to so instruct as to in effect make the tenant liable for the damages that may have been caused by inherent weakness or unsound materials used in erecting the building); Machen *v.* Hooper, 73 Md. 342, 21 Atl. 67 (holding that it was proper to refuse to instruct that it was incumbent on the tenant to ascertain the limits of the capacity of the building for the purpose of storing the goods, where the building had fallen on account of alleged overloading, and that it was also proper to refuse to so instruct as to take from the jury the question whether the weight of the goods was unreasonable or excessive, or whether they were properly stored).

31. **Criminal law and criminal procedure** generally see CRIMINAL LAW, 12 Cyc. 70.

Indictment or information generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

32. See the statutes of the several states.

Removal of window sashes under a claim of right is not a violation of the statute declaring it a criminal offense for a tenant wilfully to injure or damage the leased house. State *v.* Whitener, 93 N. C. 590.

Cutting timber is indictable if the landlord's consent is disproved. State *v.* Jackson, 2 Harr. (Del.) 542.

Arson.— An indictment not alleging that defendant was a tenant of the building burned is insufficient to charge a misdemeanor under a statute making it a misdemeanor for any tenant to burn any building in his possession. State *v.* Jeter, 47 S. C. 2, 24 S. E. 889.

33. See ARSON, 3 Cyc. 999.

3. Damages.[34] Ordinarily the measure of damages for injuries to the premises while in the possession of the tenant is the depreciation in the market value of the reversion.[35] The cost of restoration does not necessarily govern the amount of damages where the alterations made by the tenant are in fact a benefit to the premises.[36] The tenant may be allowed, in mitigation of damages for the cutting of timber, the value of firewood and timber furnished by him for the farm from other premises.[37] Evidence of damages to the property as a whole is competent to show damage to the reversion;[38] but evidence as to like injuries inflicted after the suit was brought is not admissible as a means of measuring damages for injuries sustained thereby prior to that time.[39]

G. Estoppel of Tenant to Deny Title — 1. General Rule.[40] Subject to certain exceptions and qualifications to be hereafter noticed, no rule is better settled by the decisions than the general one that a tenant in undisturbed possession of the demised premises is estopped to deny the title of his landlord,[41] as such title

34 Damages generally see Damages, 13 Cyc. 2.

35. Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Agate *v.* Lowenbein, 6 Daly (N. Y.) 291; Dutro *v.* Wilson, 4 Ohio St. 101; Fagan *v.* Whitcomb, (Tex. App. 1889) 14 S. W. 1018. But see Moses *v.* Old Dominion Iron, etc., Co., 75 Va. 95, holding that the measure of damages on the refusal of the tenant to repair, as required by the lease, where the repairs have been made by the landlord, with the tenant's consent, is the sum necessarily expended in placing the property in its former condition or such sum as is necessary to compensate the lessor.

As dependent on time of right to reenter.— Where a landlord has the right of reëntry for condition broken, he may recover for injury to the reversion as of the time when the right of entry accrued, and not as of the time of the expiration of the term. Winston *v.* Franklin Academy, 28 Miss. 118, 61 Am. Dec. 540.

36. Aberle *v.* Fajen, 42 N. Y. Super. Ct. 217.

37. Sarles *v.* Sarles, 3 Sandf. Ch. (N. Y.) 601.

38. Chicago *v.* McDonough, 112 Ill. 85, 1 N. E. 337.

39. Cooper *v.* Randall, 59 Ill. 317.

40. Creation by estoppel of relation of landlord and tenant see *supra*, I, G.

Acquisition of title by tenant by adverse possession see Adverse Possession, 1 Cyc. 1004, 1018, 1058–1062, 1133.

Estoppel generally see Estoppel, 16 Cyc. 671.

41. *Alabama.* — Littleton *v.* Clayton, 77 Ala. 571; Griffith *v.* Parmley, 38 Ala. 393; Henley *v.* Mobile Branch Bank, 16 Ala. 552; Pope *v.* Harkins, 16 Ala. 321; Sims *v.* Glazener, 14 Ala. 695, 48 Am. Dec. 120.

Arkansas.— Mantooth *v.* Burke, 35 Ark. 540; Hughes *v.* Watt, 28 Ark. 153; Burke *v.* Hale, 9 Ark. 328.

California.— Sawyer *v.* Sargent, (1885) 7 Pac. 120; Ramires *v.* Kent, 2 Cal. 558; Morse *v.* Roberts, 2 Cal. 515; Hoen *v.* Simmons, 1 Cal. 119, 52 Am. Dec. 291.

Colorado.— Eckles *v.* Booco, 11 Colo. 522, 19 Pac. 465.

Connecticut.— Holmes *v.* Kennedy, 1 Root 77.

Delaware.— Reed *v.* Todd, 1 Harr. 138.

District of Columbia.— Morris *v.* Wheat, 11 App. Cas. 201.

Georgia.— Williams *v.* Cash, 27 Ga. 507, 73 Am. Dec. 739.

Illinois.— Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952; Tilghman *v.* Little, 13 Ill. 239; Knefel *v.* Daly, 91 Ill. App. 321; Pearce *v.* Pearce, 83 Ill. App. 77.

Indian Territory.— Turner *v.* Gilliland, 4 Indian Terr. 606, 76 S. W. 253; Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536; Thomas *v.* Sass, 3 Indian Terr. 545, 64 S. W. 531.

Iowa.— Bowdish *v.* Dubuque, 38 Iowa 341; Sullivan *v.* Finn, 4 Greene 544.

Kansas.— Pettigrew *v.* Mills, 36 Kan. 745, 14 Pac. 170; Brenner *v.* Bigelow, 8 Kan. 496.

Kentucky.— Hodges *v.* Shields, 18 B. Mon. 828; Lively *v.* Ball, 2 B. Mon. 53; Chambers *v.* Pleak, 6 Dana 426, 32 Am. Dec. 78; Million *v.* Riley, 1 Dana 359, 25 Am. Dec. 149; Conley *v.* Chiles, 5 J. J. Marsh. 302; Hamit *v.* Lawrence, 2 A. K. Marsh. 366; Connelly *v.* Chiles, 2 A. K. Marsh. 242; Hamel *v.* Lawrence, 1 A. K. Marsh. 330.

Louisiana.— Hanson *v.* Allen, 37 La. Ann. 732; Phelps *v.* Taylor, 23 La. Ann. 585; Sientes *v.* Odier, 17 La. Ann. 153; Paquetel *v.* Gauche, 17 La. Ann. 63; Dennistoun *v.* Walton, 8 Rob. 211; Metoyer *v.* Larenandière, 6 Rob. 139; Le Breton *v.* McDonough, 2 Rob. 461; Tippet *v.* Jett, 10 La. 359.

Maine.— Moshier *v.* Reding, 12 Me. 478.

Maryland.—Giles *v.* Ebsworth, 10 Md. 333; Vrooman *v.* McKaig, 4 Md. 450, 59 Am. Dec. 85; Mousley *v.* Wilson, 1 Md. Ch. 388.

Massachusetts.— Binney *v.* Chapman, 5 Pick. 124; Cobb *v.* Arnold, 8 Metc. 398; Watertown *v.* White, 13 Mass. 477; Fletcher *v.* McFarlane, 12 Mass. 43.

Michigan.—Bertram *v.* Cook, 32 Mich. 518; Ryerson *v.* Eldred, 18 Mich. 12.

Minnesota.— Allen *v.* Chatfield, 8 Minn. 386, 435.

Mississippi.— Frazer *v.* Robinson, 42 Miss. 121; Cummings *v.* Kilpatrick, 23 Miss. 106.

Missouri.— Green *v.* Missouri Pac. R. Co.,

of the landlord existed in him at the time of the creation or the inception of the

82 Mo. 653; Higgins *v.* Turner, 61 Mo. 249; Walker *v.* Harper, 33 Mo. 592; Shepard *v.* Martin, 31 Mo. 492; Hood *v.* Mathis, 21 Mo. 308; St. Louis *v.* Morton, 6 Mo. 476.

Nebraska.— Bartlett *v.* Robinson, 52 Nebr. 715, 72 N. W. 1053; Mosher *v.* Cole, 50 Nebr. 275, 70 N. W. 275; Courvoirsier *v.* Bouvier, 3 Nebr. 55.

New Hampshire.— Plumer *v.* Plumer, 30 N. H. 558; Russell *v.* Allard, 18 N. H. 222; Hill *v.* Boutwell, 3 N. H. 502.

New Jersey.— Horner *v.* Leeds, 25 N. J. L. 106; Howell *v.* Ashmore, 22 N. J. L. 261.

New York.— Van Vleck *v.* White, 66 N. Y. App. Div. 14, 72 N. Y. Suppl. 1026; Tompkins *v.* Snow, 63 Barb. 525; Hardy *v.* Ackerly, 57 Barb. 148; People *v.* Stiner, 45 Barb. 56, 30 How. Pr. 129; Corning *v.* Troy Iron, etc., Factory, 34 Barb. 485; George A. Fuller Co. *v.* Manhattan Constr. Co., 88 N. Y. Suppl. 1049; Burton *v.* Watson, 2 N. Y. Suppl. 661; Jackson *v.* Davis, 5 Cow. 123, 15 Am. Dec. 451; Jackson *v.* Vosburgh, 7 Johns. 186; Jackson *v.* Stewart, 6 Johns. 34; Jackson *v.* Reynolds, 1 Cai. 444; Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

North Carolina.— Hamer *v.* McCall, 121 N. C. 196, 28 S. E. 297; James *v.* Russell, 92 N. C. 194.

Ohio.— Moore *v.* Beasley, 3 Ohio 294; Devacht *v.* Newsam, 3 Ohio 57; Goodhue *v.* Jackson, 8 Ohio Dec. (Reprint) 356, 7 Cinc. L. Bul. 175.

Oklahoma.— Pappe *v.* Trout, 3 Okla. 260, 41 Pac. 397; Hamill *v.* Jalonick, 3 Okla. 223, 41 Pac. 139.

Pennsylvania.— Elliott *v.* Smith, 23 Pa. St. 131; Cooper *v.* Smith, 8 Watts 536; Lebanon School Dist. *v.* Lebanon Female Seminary, 9 Pa. Cas. 474, 12 Atl. 857.

South Carolina.— Givens *v.* Mullinax, 4 Rich. 590 55 Am. Dec. 706; Moorhead *v.* Barrett, Cheves 99; Love *v.* Dennis, Harp. 70; Darby *v.* Anderson, 1 Nott & M. 369.

Tennessee.— McIntire *v.* Patton, 9 Humphr. 447; Rogers *v.* Waller, 4 Hayw. 205, 9 Am. Dec. 758; Philip *v.* Robertson, 2 Overt. 399.

Texas.— King *v.* Maxey, (Civ. App. 1894) 28 S. W. 401; Allen *v.* Thompson, 2 Tex. App. Civ. Cas. § 106.

Vermont.— Steen *v.* Wardsworth, 17 Vt. 297; Robinson *v.* Hathaway, Brayt. 150.

Virginia.— Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802.

West Virginia.— Bodkin *v.* Arnold, 45 W. Va. 90, 30 S. E. 154.

Wisconsin.— Ricketson *v.* Galligan 89 Wis. 394, 62 N. W. 87; Strain *v.* Gardner, 61 Wis. 174, 21 N. W. 35; Lawson *v.* Mowry, 52 Wis. 219, 9 N. W. 280; Chase *v.* Dearborn, 21 Wis. 57; Tondro *v.* Cushman, 5 Wis. 279.

United States.— Walden *v.* Bodley, 14 Pet. 156, 10 L. ed. 398; Willison *v.* Watkins, 3 Pet. 43, 7 L. ed. 596; Hackett *v.* Marmet Co., 52 Fed. 268, 3 C. C. A. 76.

England.— Cook *v.* Whellock, 24 Q. B. D. 658, 59 L. J. Q. B. 329, 62 L. T. Rep. N. S. 675, 38 Wkly. Rep. 534; Dancer *v.* Hastings, 4 Bing. 2, 5 L. J. C. P. 3, 12 Moore C. P. 34, 29 Rev. Rep. 740, 13 E. C. L. 371; Cooper *v.* Blandy, 1 Bing. N. Cas. 45, 3 L. J. C. P. 274, 4 Moore & S. 562, 27 E. C. L. 537; Beckett *v.* Bradley, D. & L. 586, 14 L. J. C. P. 3, 7 M. & G. 994, 8 Scott N. R. 843, 49 E. C. L. 994; Doe *v.* Whitroe, D. & R. N. P. 1, 25 Rev. Rep. 769, 16 E. C. L. 409; Hawksbee *v.* Hawksbee, 23 L J. Ch. 521; Wood *v.* Day, 1 Moore C. P. 389, 7 Taunt. 646, 2 E. C. L. 530; Parker *v.* Manning, 7 T. R. 537; Wilkins *v.* Wingate, 6 T. R. 62; Doe *v.* Fuller, Tyrw. & G. 17; White *v.* Foljambe, 11 Ves. Jr. 337, 32 Eng. Reprint 1118; Wilson *v.* Townshend, 2 Ves. Jr. 693, 3 Rev. Rep. 31, 30 Eng. Reprint 846; Friend *v.* Eastabrook, 2 W. Bl. 1152.

Canada.— White *v.* Nelles, 11 Can. Sup. Ct. 587; Doe *v.* Brown, 8 N. Brunsw. 433; McDonald *v.* Arbuckles, 22 Nova Scotia 67; Cahuac *v.* Scott, 22 U. C. C. P. 551; Smith *v.* Modeland, 11 U. C. C. P 387; Cameron *v.* Todd, 22 U. C. Q. B. 390 [*affirmed* in 2 Grant Err. & App. 434]; Renalds *v.* Offitt, 15 U. C. Q. B. 221; Doe *v.* Simpson, 9 U. C. Q. B. 544; Municipal Council of Frontenac, etc. *v.* Chestnut, 9 U. C. Q. B. 365; Doe *v.* Kent, 5 U. C. Q. B. O. S. 437.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 166.

The sale of leased land during the term, the lessee not having been disturbed in his possession, is no defense to an action on a promissory note given for the rent to the lessor. Life *v.* Secrest, 1 Ind. 512.

Want of title in fee in the landlord is no bar to an action on a lease, where the tenant has not been evicted. Pence *v.* Williams, 14 Ind. App. 86, 42 N. E. 494; Crampton *v.* Van Ness, 6 Fed. Cas. No. 3,348, 4 Cranch C. C. 350.

Feudal origin.— The principle of estoppel of the tenant to deny the title of the landlord is of feudal origin. By the policy of that system the vassal, or tenant, after having received investiture, or livery of seizin, and vowed fidelity and homage to his lord, was not permitted to question the lord's title so long as that relation existed. He could not do so without breaking the faith which he had pledged. And though the feudal reasons of the rule have ceased, yet reasons of general policy have caused the rule to be preserved in its original vigor, wherever the relation of landlord and tenant exists by positive contract. Vance *v.* Johnson, 10 Humphr. (Tenn) 214; 1 Greenleaf Ev. § 25.

The fidelity required of a tenant to his landlord "is not merely a shadow and remnant of the ancient feudal fealty, but is essentially connected with the observance of good faith in contract, and the maintenance of that confidence and trust which is essential to a wholesome state of society. But while the principle is thus highly valued, care must be taken that it is not permitted

tenancy,[42] before a surrender of possession to the landlord.[43] The rule rests on the ground of an equitable and not a technical estoppel,[44] is based upon considerations of public policy,[45] and will not be applied where its allowance would contravene the public policy expressed in a positive statute.[46] The estoppel is mutual in its operation;[47] it extends to the landlord who cannot allege that he had no title at the time of the demise.[48]

2. To What Tenancies Applicable.[49] The estoppel to deny title applies not only to tenancies for a definite term of years, but also to a tenancy by sufferance or at will,[50] or a tenancy created by the tenant holding over after his lease has expired.[51] The estoppel also extends to a tenancy under the lessee, it being held that a subtenant is estopped to deny the title of his immediate landlord.[52]

to overcome the principles of law, equal and perhaps superior in solemnity and importance." Cravener *v.* Bowser, 4 Pa. St. 259, 261.

42. See *infra*, III, G, 10, b.

43. See *infra*, III, G, 9, b.

44. Den *v.* Ashmore, 22 N. J. L. 261; Moffat *v.* Strong, 9 Bosw. (N. Y.) 57.

45. Smythe *v.* Henry, 41 Fed. 705.

46. Smythe *v.* Henry, 41 Fed. 705.

47. Clemm *v.* Wilcox, 15 Ark. 102.

48. Davis *v.* Williams, 130 Ala. 530, 30 So. 488, 89 Am. St. Rep. 55, 54 L. R. A. 749.

49. Person estopped see *infra*, III, G, 7.

50. Kelley *v.* Kelley, 23 Me. 192; Towne *v.* Butterfield, 97 Mass. 105; Ezelle *v.* Parker, 41 Miss. 520; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Doe *v.* McEwen, 3 U. C. Q. B. O. S. 493.

Judgment or execution debtor.— The possessor of land at the time of a judicial or execution sale is a quasi-tenant of the purchaser, and is estopped from disputing his title. Wood *v.* Turner, 7 Humphr. (Tenn.) 517; Siglar *v.* Malone, 3 Humphr. (Tenn.) 16.

Vendee of premises.—A purchaser entering under an executory contract becomes a quasi-tenant, and is estopped to deny his landlord's title. Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262; Dubois *v.* Marshall, 3 Dana (Ky.) 336; Henderson *v.* Miller, 53 Mich. 590, 19 N. W. 197; Dowd *v.* Gilchrist, 46 N. C. 353; Winnard *v.* Robbins, 3 Humphr. (Tenn.) 614. See also McKibben *v.* Newell, 41 Ill. 461. See, generally, Vendor and Purchaser.

51. *Alabama.*— Anderson *v.* Anderson, 104 Ala. 428, 16 So. 14 (holding that the tenant cannot set up a superior legal title); Robinson *v.* Holt, 90 Ala. 115, 7 So. 441; King *v.* Bolling, 77 Ala. 594 (holding that the tenant is estopped from disputing plaintiff's prior possession).

Arkansas.— Thorn *v.* Reed, 1 Ark. 480.

California.— McKissick *v.* Ashby, 98 Cal. 422, 33 Pac. 729.

Kentucky.— Harrison *v.* Marshall, 4 Bibb 524.

Michigan.— Falkner *v.* Beers, 2 Dougl. 117, holding that a title in a third person cannot be set up.

New York.— Jackson *v.* Stiles, 1 Cow. 575.

Ohio.— Cahn *v.* Hammon Bldg. Co., 8 Ohio Dec. (Reprint) 656, 9 Cinc. L. Bul. 112.

Texas.— McShan *v.* Myers, 1 Tex. Unrep. Cas. 100.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 170. See also *infra*, III, G, 9, b.

Tenancy under parol demise.— A tenant who, after the expiration of, and payment of rent under, a parol demise, continues in possession without any new agreement with the landlord, cannot, in an action against him for the use and occupation of the premises, subsequent to the expiration of the former term, dispute the title of plaintiff; and his subsequent holding will be deemed to have been by the implied permission of the original lessor. Osgood *v.* Dewey, 13 Johns. (N. Y.) 240; Moore *v.* Beasley, 3 Ohio 294; Mineral R., etc., Co. *v.* Flaherty, 24 Pa. Super. Ct. 236; Fronty *v.* Wood, 2 Hill (S. C.) 367; Dorrill *v.* Stephens, 4 McCord (S. C.) 59.

52. *Arkansas.*— Fordyce *v.* Young, 39 Ark. 135.

Georgia.— Burnett *v.* Rich, 45 Ga. 211.

Massachusetts.—Colburn *v.* Palmer, 8 Cush. 124.

Missouri.— Stewart *v.* Miles, 166 Mo. 174, 65 S. W. 754.

North Carolina.— Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322.

South Carolina.— Milhouse *v.* Patrick, 6 Rich. 350.

England.— Wogan *v.* Doyle, L. R. 12 Ir. 69.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 173.

A covenant not to sublet, in the lease of the original tenant, does not prevent the operation of the estoppel of the subtenant to deny the title of his immediate lessor. Fordyce *v.* Young, 39 Ark. 135.

A purchase of the property by a sublessee in possession under a lessee does not authorize him to set up such title against his immediate lessor. Scott *v.* Levy, 6 Lea (Tenn.) 662.

Lessee holding over.—Where a lessee holding over underlets the premises, his lessee cannot dispute his title. Stoops *v.* Devlin, 16 Mo. 162.

Where the lessee assigns the lease, his sublessee who attorns to the assignee is estopped to deny the assignee's title. Dunshee *v.* Grundee, 15 Gray (Mass.) 314.

One acquiring possession through collusion with the sublessee is also estopped to deny

Furthermore the estoppel applies to a tenant of personal property as well as to a a tenant of real property;[53] and to a tenancy under a municipal corporation as well as under any other landlord.[54]

3. Possession as Basis of Estoppel — a. Necessity For — (I) *In General.* The foundation of the estoppel is the occupation of the premises by the permission of the landlord.[55] The estoppel is *in pais* and does not depend upon the lease but is founded upon the possession, and is as operative after the conclusion of the lease as before, and until that possession is ended.[56] A lessee who never takes possession under the lease is not estopped to deny the landlord's title.[57]

(II) *Possession as Tenant.*[58] Before an estoppel will arise in favor of the landlord as against the tenant there must be a tenancy in fact,[59] created by contract and not by operation of law.[60]

b. Possession as Admission of Title. Possession of itself creates no estoppel.[61] There must be an express or implied admission of title in the landlord,[62] which may be evidenced by the mere acceptance of the lease and going into possession thereunder,[63] or by written or oral acknowledgments that the tenant holds

the tenant's title. Sexton *v.* Carley, 147 Ill. 269, 35 N. E. 471 [*affirming* 47 Ill. App. 316].

But where the sublessee is not let into possession he may show that the lease to his lessor is void for want of consideration. Wright *v.* Graves, 80 Ala. 416.

53. Cranz *v.* Kroger, 22 Ill. 74; Ryder *v.* Mansell, 66 Me. 167.

54. Helena *v.* Turner, 36 Ark. 577.

55. Hussman *v.* Wilke, 50 Cal. 250 (holding that the fact that the tenant took possession by the permission of the owner given by his agent operates as an estoppel, notwithstanding the lease ran in the name of the agent); Tilyou *v.* Reynolds, 108 N. Y. 558, 15 N. E. 534.

56. Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

57. District of Columbia *v.* Johnson, 1 Mackey (D. C.) 51; Andrews *v.* Woodcock, 14 Iowa 397. See also Wright *v.* Graves, 80 Ala. 416; Ireton *v.* Ireton, 59 Kan. 92, 52 Pac. 74.

58. When tenancy will be implied see *supra*, I, E.

59. *California.*— Swift *v.* Goodrich, 70 Cal. 103, 11 Pac. 561, holding that a riparian proprietor who is the lessee of another riparian proprietor's right to use water is not a tenant within the meaning of a statute providing that the tenant is not permitted to deny the title of his landlord.

Georgia. — Cody *v.* Quarterman, 12 Ga. 386. See also Wilborn *v.* Whitfield, 44 Ga. 51.

Indiana.— Reese *v.* Caffee, 133 Ind. 14, 32 N. E. 720. See also Cambridge Lodge No. 9 *v.* Routh, 163 Ind. 1, 71 N. E. 148.

Mississippi.— Newman *v.* Mackin, 13 Sm. & M. 383.

New York.— Davis *v.* Delaware, etc., Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418; People *v.* Kelsey, 38 Barb. 269; Brown *v.* Dean, 3 Wend. 208.

Pennsylvania.— Stokes *v.* McKibbin, 13 Pa. St. 267.

Texas.— Maverick *v.* Flores, 71 Tex. 110, 8 S. W. 636.

Canada.— Crow *v.* Lowden, 11 Nova Scotia 78.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 151.

Compare Goodman *v.* Jones, 26 Conn. 264; Croade *v.* Ingraham, 13 Pick. (Mass.) 33; James *v.* Russell, 92 N. C. 194, holding that where a tenant admits the fact of tenancy it is immaterial, as between landlord and tenant, from what source the landlord derived his title.

Payment of rent.—Where the relation does not in fact exist, the gratuitous payment of rent by one in possession does not estop him from showing the true character in which he holds the premises. Shelton *v.* Carrol, 16 Ala. 148.

Possession obtained under an agreement to vacate on demand creates the relation of landlord and tenant so as to preclude the occupant setting up title in himself or in a third person. Hammond *v.* Blue, 132 Ala. 337, 31 So. 357.

On failure to prove a demise to defendant, in an action for use and occupation, he may prove that he held and occupied, not under plaintiff, but under a third person. Buell *v.* Cook, 4 Conn. 238.

60. Sands *v.* Hughes, 53 N. Y. 287; Hoffman *v.* Hoffman, 18 N. Y. Suppl. 387; Jackson *v.* Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; Vance *v.* Johnson, 10 Humphr. (Tenn.) 214; Baker *v.* Hale, 6 Baxt. (Tenn.) 46. But see Cobb *v.* Robertson, (Tex. 1905) 87 S. W. 1148, 86 S. W. 746.

61. Shew *v.* Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678.

62. Frye *v.* Gragg, 35 Me. 29. See also Norton *v.* Sanders, 7 J. J. Marsh. (Ky.) 12.

There is no entry as a tenant where one is carried on the premises by force, and he does not thereafter recognize the alleged landlord's title. Foust *v.* Trice, 53 N. C. 290.

63. *Illinois.*—Alwood *v.* Mansfield, 33 Ill. 452.

Maine.— Heath *v.* Williams, 25 Me. 209, 43 Am. Dec. 265.

Michigan.— Byrne *v.* Beeson, 1 Dougl. 179.

under the landlord.[64] No estoppel results where there is merely a conditional admission of title,[65] nor where the alleged tenant notifies his landlord before he takes possession that he will not take possession under him.[66] So there is no admission of title so as to create an estoppel where the tenant is already in possession asserting title in himself, and it is distinctly agreed that he is not to waive his right to do so by the agreement to pay rent.[67]

c. Tenant in Possession at Time Relation Arose. The fact that the tenant was in possession of the premises at the time of the creation of the tenancy does not affect the estoppel of the tenant to deny the title of his landlord.[68] To entitle

Mississippi. — Winston *v.* Franklin Academy, 28 Miss. 118, 61 Am. Dec. 540.

Missouri. — State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592.

North Carolina. — King *v.* Murray, 28 N. C. 62.

West Virginia. — Stover *v.* Davis, 57 W. Va. 196, 49 S. E. 1023.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 152.

Compare Houck *v.* Williams, (Colo. 1905) 81 Pac. 800.

Lease from mortgagee. — One who enters on land under a lease from a mortgagee in possession is estopped to deny the rightful possession of the mortgagee. Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576.

What constitutes lease within rule. — A sale by a town of a right of fishery for three years is in the nature of a lease, so that the purchaser is estopped to deny the town's right to sell. Eastham *v.* Anderson, 119 Mass. 526. Where two persons each claim title to the premises, and they agree that each should occupy one half of the premises, no rent being reserved by either nor time fixed for the termination of the agreement, there is no lease as a basis for an estoppel. Corrigan *v.* Riley, 26 N. J. L. 79. An agreement by a person in possession of land to abandon the premises at a certain day is not a lease, so as to estop him from controverting the title of the person with whom the agreement was made. Miller *v.* McBrier, 14 Serg. & R. (Pa.) 382.

Negotiations for lease. — There is no estoppel where there are merely negotiations for a lease but no lease is entered into and no rent is paid. Stokes *v.* McKibbin, 13 Pa. St. 267.

Lease fraudulent as to creditors. — It is immaterial that the lease was given to prevent the products of the land being taken by creditors. Rankin *v.* Simpson, 19 Pa. St. 471, 57 Am. Dec. 668.

Entry under particular title denied. — There must be proof that the tenants entered under the particular title which it is claimed they are estopped to deny. Martin *v.* Reynolds, 9 Dana (Ky.) 328.

64. Morrison *v.* Keller, 10 La. Ann. 542.

65. Frye *v.* Gragg, 35 Me. 29, holding that where one whose claim to a lot was disputed by another permitted a third person to occupy it under a stipulation that if his title should prove to be good he would sell it to the occupant for a price to be agreed on, the occupant is not estopped to deny his title.

66. Nerhooth *v.* Althouse, 8 Watts (Pa.) 427, 34 Am. Dec. 480.

67. Sartwell *v.* Young, 126 Mich. 304, 85 N. W. 729.

68. *Alabama.* — Blankership *v.* Blackwell, 124 Ala. 355, 27 So. 551; Miller *v.* Bonsadon, 9 Ala. 317. But see Shelton *v.* Carrol, 16 Ala. 148, where there was a gratuitous payment of rent.

Georgia. — Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794; Johnson *v.* Thrower, 117 Ga. 1007, 44 S. E. 846; Gleaton *v.* Gleaton, 37 Ga. 650; Richardson *v.* Harvey, 37 Ga. 224.

Kentucky. — Patterson *v.* Hansel, 4 Bush 654; Ball *v.* Lively, 1 Dana 60.

Maine. — Kelley *v.* Kelley, 23 Me. 192.

Maryland. — Isaac *v.* Clarke, 2 Gill 1.

Minnesota. — Sage *v.* Halverson, 72 Minn. 294, 75 N. W. 229.

Missouri. — Loring *v.* Harmon, 84 Mo. 123; Crockett *v.* Althouse, 35 Mo. App. 404.

Montana. — Parrott *v.* Hungelburger, 9 Mont. 526, 24 Pac. 14.

New Hampshire. — Killoren *v.* Murtaugh, 64 N. H. 51, 5 Atl. 769.

New York. — Jones *v.* Reilly, 174 N. Y. 97, 66 N. E. 649 [*reversing* on other grounds 68 N. Y. App. Div. 116, 74 N. Y. Suppl. 243]; Prevot *v.* Lawrence, 51 N. Y. 219; Sturges *v.* Van Orden, 37 Misc. 499, 75 N. Y. Suppl. 1007.

North Carolina. — Dixon *v.* Stewart, 113 N. C. 410, 18 S. E. 325; Farmer *v.* Pickens, 83 N. C. 549.

Pennsylvania. — Thayer *v.* United Brethren Soc., 20 Pa. St. 60. But see Anderson *v.* Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205.

Texas. — Tyler *v.* Davis, 61 Tex. 674.

Virginia. — Jordan *v.* Katz, 89 Va. 628, 16 S. E. 866; Locke *v.* Frasher, 79 Va. 409.

United States. — Lucas *v.* Brooks, 18 Wall. 436, 21 L. ed. 779.

England. — See Gravenor *v.* Woodhouse, 1 Bing. 38, 7 Moore C. P. 289, 25 Rev. Rep. 582, 8 E. C. L. 390.

Canada. — Doe *v.* Phillips, 3 N. Brunsw. 86; Smith *v.* Modeland, 11 U. C. C. P. 387.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 168.

But see Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122.

Compare Ireton *v.* Ireton, 59 Kan. 92, 52 Pac. 74; Tullis *v.* Tacoma Land Co., 19 Wash. 140, 52 Pac. 1017.

By such acceptance the lessor as effectually recognizes the title and possession of the lessor as if he had entered and taken posses-

such a lessee to deny his landlord's title there must be proof of fraud, unfairness, mistake, or misapprehension of fact;[69] and the mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud or accepted by mistake.[70]

4. Validity of Lease — a. Void Lease.[71] So long as the tenant retains possession and is not disturbed in his possession, it is immaterial to him that the lease itself, under which he holds, is void, provided there has been no fraud or mistake inducing him to become the tenant.[72] The fact that the lease is void does not affect the rule that a tenant is estopped to deny his landlord's title,[73] except

sion under and by virtue of the lease itself. Locke *v.* Frasher, 79 Va. 409.

In California the rule stated above in the text does not prevail, but it is held that if the tenant was in possession at the time of the lease he may deny his landlord's title (Davidson *v.* Ellmaker, 84 Cal. 21, 23 Pac. 1026; Peralta *v.* Ginochio, 47 Cal. 459; Franklin *v.* Merida, 35 Cal. 558, 95 Am. Dec. 129; Tewksbury *v.* Magraff, 33 Cal. 237); and it has been held that the rule is not changed by a clause in the lease whereby the lessee waives and renounces all title of any kind to the premises, other than the leasehold interest created in the lease, on the theory that the words "waive and renounce" are not words of conveyance (Davis *v.* McGrew, 82 Cal. 135, 23 Pac. 41). But the acceptance of such a lease, while not of itself working an estoppel, is *prima facie* evidence against the lessee, so as to compel him to show affirmatively a paramount title in himself or those under whom he claims (Peralta *v.* Ginochio, 47 Cal. 459); although if the acceptance of the lease is induced by fraud or imposition it is not *prima facie* evidence of the lessor's title (Johnson *v.* Chely, 43 Cal. 299). Furthermore the lessee cannot attack the title in actions where title is not involved, as in an action for unlawful detainer, in the absence of a showing of fraud or mistake (Mason *v.* Wolff, 40 Cal. 246). And where a debtor executes to a creditor a deed of certain property and retains possession under a lease from him, the deed and lease providing for a reconveyance to the tenant on his payment of the rent and the secured debt, he is estopped to deny such landlord's title in an action brought to recover the rent (Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111).

Consideration for lease.—A parol promise by one in possession of land to pay rent to one out of possession who has neither title nor right of possession is void for want of consideration, and cannot be invoked as an estoppel in favor of a landlord, as against a tenant. Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122; Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465.

69. *Alabama.*— Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175; Miller *v.* Bonsadon, 9 Ala. 317.

Illinois.— Young *v.* Heffernan, 67 Ill. App. 354.

Iowa.— See Andrews *v.* Woodcock, 14 Iowa 397, where the tenant asserted he did not get possession from the landlord.

Kentucky.— Ball *v.* Lively, 2 J. J. Marsh. 181.

Missouri.— Higgins *v.* Turner, 61 Mo. 249.

Pennsylvania.— Evans *v.* Bidwell, 76 Pa. St. 497; Thayer *v.* United Brethren Soc., 20 Pa. St. 60; Baskin *v.* Seechrist, 6 Pa. St. 154; Hockenbury *v.* Snyder, 2 Watts & S. 240; Berridge *v.* Glassey, 4 Pa. Cas. 581, 7 Atl. 749 (mutual mistake of facts); Bidwell *v.* Evans, 25 Pittsb. L. J. 149.

South Carolina.— Givens *v.* Mullinax, 4 Rich. 590, 55 Am. Dec. 706, mistake as to title.

Tennessee.—Hammons *v.* McClure, 85 Tenn. 65, 2 S. W. 37.

Virginia.— Alderson *v.* Miller, 15 Gratt. 279.

England.— Claridge *v.* Mackenzie, 4 M. & G. 143, 11 L. J. C. P. 72, 4 Scott N. R. 796, 43 E. C. L. 82.

Canada.— Hillock *v.* Sutton, 2 Ont. 548; Lynett *v.* Parkinson, 1 U. C. C. P. 144.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 154.

An assertion of title and a threat of eviction does not constitute such fraud as will relieve the lessee from the estoppel arising out of the relation of landlord and tenant. Harrisburg School-Dist. *v.* Long, 7 Pa. Cas. 337, 10 Atl. 769.

Estoppel to deny recital that lessee received possession from lessor arises where the lease itself recites such facts. Hall *v.* Haun, 5 Dana (Ky.) 55.

70. Thayer *v.* United Brethren Soc., 20 Pa. St. 60.

71. **Creation of relationship** by occupancy under a void lease see *supra*, I, E, 2, b.

72. Little *v.* Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; King *v.* Murray, 28 N. C. 62.

73. *Alabama.*— Crawford *v.* Jones, 54 Ala. 459, where the lease was void under the statute of frauds because not in writing, but the tenant obtained possession thereunder so as to create the relation of landlord and tenant.

California.— Mauldin *v.* Cox, 67 Cal. 387, 7 Pac. 804.

Maine.— Heath *v.* Williams, 25 Me. 209, 43 Am. Dec. 265.

Michigan.— Byrne *v.* Beeson, 1 Dougl. 179.

North Carolina.— King *v.* Murray, 28 N. C. 62.

Tennessee.— Phillips *v.* Robertson, 5 Hayw. 101.

United States.— Dupas *v.* Wassell, 8 Fed. Cas. No. 4,182, 1 Dill. 213.

where the lease is void as against public policy.[74] It has been held, however, on the ground that estoppels must be mutual that if the lessor has no authority to contract,[75] as where the lessor is a married woman and her lease is void,[76] or where the lease is void because executed by an infant or in his behalf,[77] the lessee is not estopped.

b. Voidable Lease. Inasmuch as the estoppel to deny title is based on an admission of title shown by the tenant in accepting or retaining possession as tenant, it follows that if the relationship of landlord and tenant was induced by fraud, duress, misrepresentation, or mistake, the tenant is not estopped to deny what he would not have admitted in the absence of fraud or mistake.[78] Especially is this true where the tenant was in possession of the land at the time he accepted

England.— Yellowly *v.* Gower, 11 Exch. 274, 24 L. J. Exch. 289.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 153.

Contra.— People *v.* Howlett, 76 N. Y. 574, holding that where a lease was void because executed in pursuance of a usurious agreement, a tenant was not estopped to dispute his landlord's title. This case is distinguished in Barnes *v.* Gilmore, 6 N. Y. Civ. Proc. 286, which holds that where a grantor becomes the tenant of his grantee, he cannot set up the invalidity of his deed as having been given to secure a usurious loan, the rule being different where the deed is void and where the lease is void.

74. Dupas *v.* Wassell, 8 Fed. Cas. No. 4,182, 1 Dill. 213, where public land was leased, it not being subject to lawful settlement. To the same effect see Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

75. Chicago, etc., R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33, holding that inasmuch as a lease executed by an unauthorized agent of the lessor does not bind him, it does not bind the lessee, and hence the lessee is not estopped because there could be no estoppel against the lessor.

76. Crockett *v.* Althouse, 35 Mo. App. 404; Schenck *v.* Stumpf, 6 Mo. App. 381. *Compare* Grant *v.* White, 42 Mo. 285.

77. Ross *v.* Cobb, 9 Yerg. (Tenn.) 463.

78. *Alabama.*— Farris *v.* Houston, 74 Ala. 162.

California.— Simon Newman Co. *v.* Lassing, 141 Cal. 174, 74 Pac. 761; Tewksbury *v.* Magraff, 33 Cal. 237.

Illinois.— Carter *v.* Marshall, 72 Ill. 609.

Louisiana.— Harvin *v.* Blackman, 108 La. 426, 32 So. 452.

Missouri.— Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151.

New York.— Ingraham *v.* Baldwin, 9 N. Y. 45; Bigler *v.* Furman, 58 Barb. 545.

Pennsylvania.— Boyer *v.* Smith, 5 Watts 55; Brown *v.* Dysinger, 1 Rawle 408; Miller *v.* McBrier, 14 Serg. & R 382; Hamilton *v.* Marsden, 6 Binn. 45.

Rhode Island.— Jenckes *v.* Cook, 9 R. I. 520.

Texas.— Hammers *v.* Hanrick, 69 Tex. 412, 7 S. W. 345; Bryan *v.* Hanrick, (1888) 8 S. W. 282; Cross *v.* Freeman, 19 Tex. Civ. App. 428, 47 S. W. 473; Franklin *v.* Hurlbert, 1 Tex. App. Civ. Cas. § 816.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 153.

But see Forgy *v.* Harvey, 151 Ind. 507, 51 N. E. 1066, holding that where a mortgagor, after a foreclosure sale of the property, leased the property of the foreclosure purchaser under the supposition that the lease contained a stipulation under which the property should belong to him if he made certain payments in addition to the rent, but the stipulation was omitted through the landlord's fraud, the fraud did not so relate to the character of the instrument nor the title as to prevent the lease working an estoppel.

Mistake of law.—Where both parties acted under a mutual mistake as to the law in regard to the title of the lessor, at the time of the acceptance of the lease, the lessee is not estopped. Tewksbury *v.* Magraff, 33 Cal. 237; Lakin *v.* Dolly, 53 Fed. 333.

False representations by the landlord, as to his ownership of the premises, precludes him from relying on the estoppel of the tenant to deny his title. Gleim *v.* Rise, 6 Watts (Pa.) 44; Hammers *v.* Hanrick, 69 Tex. 412, 7 S. W. 345; Bryan *v.* Hanrick, (Tex. 1888) 8 S. W. 282; Cross *v.* Freeman, 19 Tex. Civ. App. 428, 47 S. W. 473.

Fraud as to third persons.— The fraud must be practised on the tenant personally and not on third persons, in no way injuring the tenant. Smith *v.* Curdy, 3 Phila. (Pa.) 488.

Mistake as to effect.—A tenant who accepts a lease under an entire misapprehension of its purport and effect is not estopped to deny the title of his landlord. Wiggin *v.* Wiggin, 58 N. H. 235.

Ignorance of rights.—An owner of land, who takes a lease of it from a stranger in ignorance of his own rights, is not estopped from asserting his title. Cain *v.* Gimon, 36 Ala. 168.

Ignorance of the interest of a cestui que trust, the lease being made by a trustee, does not prevent the application of the estoppel. Baker *v.* Nall, 59 Mo. 265.

What constitutes duress.— Mere threats of injury to property without a power over it which would enable the person so threatening to carry out his threats do not in themselves constitute duress. Mineral R., etc., Co. *v.* Flaherty, 24 Pa. Super. Ct. 236.

Lease from receiver.—Where a tenant in

the lease.[79] But evidence of such fraud or duress or mistake must be introduced before the tenant can show title in himself or in a third person.[80] The fraud or mistake must be such as would justify a court of equity in setting aside the lease;[81] and the fraud must relate to the lease itself and not to prior transactions between the parties.[82]

5. Existence and Validity of Title of Landlord — a. Absence of Title. It is no objection to the estoppel to deny title that the landlord had no title at the time the relationship was created.[83] The fact that the property leased by a private person is public property does not prevent the operation of the estoppel,[84] although

possession takes a lease from a receiver who in fact has no authority because of failure to give a bond, the tenant is not estopped to show want of title of the lessor. Phillips *v.* Smoot, 1 Mackey (D. C.) 478.

79. See *supra*, III, G, 3, c.

80. People's Loan, etc., Assoc. *v.* Whitmore, 75 Me. 117; Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

81. Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768. See also Thayer *v.* United Brethren Soc., 20 Pa. St. 60.

82. Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

83. *Alabama.* — Vancleave *v.* Wilson, 73 Ala. 387; Terry *v.* Ferguson, 8 Port. 500.

Illinois.— Pearce *v.* Pearce, 83 Ill. App. 77.

Louisiana.— Morgan City *v.* Dalton, 112 La. 9, 36 So. 208.

Maryland.— Giles *v.* Ebsworth, 10 Md. 333.

Massachusetts. — Gage *v.* Campbell, 131 Mass. 566; Hawes *v.* Shaw, 100 Mass. 187.

Minnesota.— Morrison *v.* Bassett, 26 Minn. 235, 2 N. W. 851.

Missouri.— Helmes *v.* Stewart, 26 Mo. 529.

Nebraska.—Allen *v.* Hall, 64 Nebr. 256, 89 N. W. 803, 66 Nebr. 84, 92 N. W. 171.

New Hampshire. — Gray *v.* Johnson, 14 N. H. 414.

New York.— Tilyou *v.* Reynolds, 108 N. Y. 558, 15 N. E. 534 (holding that a tenant cannot deny his landlord's title, although the lease itself shows that the lessor has no valid title to a part of the term demised, and recites that he demised only such interest as he has in the premises); Brant *v.* Livermore, 10 Johns. 358.

North Carolina.— Hamer *v.* McCall, 121 N. C. 196, 28 S. E. 297. See also Pool *v.* Lamb, 128 N. C. 1, 37 S. E. 953, holding that the tenant of a house located on rented ground, and afterward moved to another lot also rented, is estopped to deny his landlord's title to the house during his tenancy.

Vermont.— Newport Cong. Soc. *v.* Walker, 18 Vt. 600.

England.— Agar *v.* Young, C. & M. 78, 41 E. C. L. 49; Francis *v.* Doe, 1 H. & H. 362, 4 M. & W. 331; Ward *v.* Ryan, Ir. R. 10 C. L. 17; Doe *v.* Abrahams, 1 Stark. 305, 2 E. C. L. 121.

Canada.— See Davey *v.* Cameron, 14 U. C. Q. B. 483.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 156.

But see Hall *v.* Benner, 1 Penr. & W. (Pa.) 402, 21 Am. Dec. 394, holding that a tenant in possession of land who takes a lease from one who has no interest, title, or right of possession is not estopped from disputing his landlord's title. *Compare* Thomas *v.* Black, 8 Houst. (Del.) 507, 18 Atl. 771.

Exception to rule.—Where a deed is void by statute the acceptance of a lease from the grantee will not work an estoppel where its allowance would contravene public policy, as where the leased land was granted to an Indian by the legislature which expressly withheld from him the right of conveying it. Smythe *v.* Henry, 41 Fed. 705.

Want of title to part of the premises cannot be set up by the tenant as a defense to the payment of rent. Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134.

Where the lessor signs as agent, disclosing no principal, the tenure being under the lessor, the lessee cannot contest his title. Belford *v.* Kelly, 61 Pa. St. 491.

Church committee.—A recital in the lease that the lessors were acting as a committee in behalf of a church does not entitle the lessees to thereafter dispute the title of the lessors. Stott *v.* Rutherford, 92 U. S. 107, 23 L. ed. 486.

Equitable estate.— The lessee cannot allege in an action for a breach of covenant, that the lessor has only an equitable estate in the premises. Blake *v.* Foster, 8 T. R. 487, 5 Rev. Rep. 419.

84. *Louisiana.*— Dennistoun *v.* Walton, 8 Rob. 211.

Michigan.—Cunning *v.* Tittabawassee Boom Co., 88 Mich. 237, 50 N. W. 141.

Minnesota. — St. Anthony Falls Water-Power Co. *v.* Morrison, 12 Minn. 249.

Oklahoma.— Shy *v.* Brockhause, 7 Okla. 35, 54 Pac. 306.

Washington.— Clancy *v.* Williams, 5 Wash. 492, 32 Pac. 770; Columbia, etc., R. Co. *v.* Braillard, 5 Wash. 492, 32 Pac. 221; Collins *v.* Hall, 5 Wash. 366, 31 Pac. 972; Clancy *v.* Reis, 5 Wash. 371, 31 Pac. 971; Hall, etc., Furniture Co. *v.* Wilbur, 4 Wash. 644, 30 Pac. 665.

United States.— See also Ellis *v.* Fitzpatrick, 118 Fed. 430, 55 C. C. A. 260, holding that a tenant who has been put in possession of a lot in the Indian Territory and has paid rent is estopped to deny his landlord's title, although the landlord has not made improvements on the property of the permanent substantial character required to enable him to obtain title to the lot.

it has been held that where the lands cannot be lawfully settled on no estoppel arises.[85]

b. Validity of Title. So long as the title of the landlord is the same as it was at the time the tenancy was created, and the tenant is not disturbed in his possession, it is immaterial whether the title of the landlord was a valid one, in so far as the estoppel of the tenant to attack it is concerned.[86]

6. Actions in Which Estoppel May Be Asserted — a. In General. The estoppel may be enforced both by courts of equity and by courts of law.[87] It can be asserted ordinarily only in actions involving the use or possession of the land,[88] and not in actions in which the title itself is put in issue, such as actions of trespass to try title and for partition.[89] The estoppel cannot be urged in actions not between the landlord and tenant or those claiming under them.[90]

b. Action For Rent. The estoppel may be asserted in an action for rent,[91] whether the action be brought upon the lease or upon a note given for rent,[92] or upon a bond.[93]

c. Action For Use and Occupation. A tenant cannot dispute the landlord's title in an action for use and occupation.[94]

d. Ejectment. An action of ejectment being one merely to recover possession, it follows that a tenant in such an action is estopped to deny his landlord's title.[95] However, a tenant may show that the landlord has no greater right than that of possession where the landlord claims the title to the fee in such an action.[96]

e. Unlawful Detainer. The tenant is estopped to deny title in actions of unlawful detainer to recover possession.[97] It has been held that the estoppel

See 32 Cent. Dig. tit. "Landlord and Tenant," § 157.

But see Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822, holding that a lessee is not estopped to deny his lessor's title where the land leased is public domain, not the subject of the lease, without right from the state.

85. Dupas *v.* Wassell, 8 Fed. Cas. No. 4,182, 1 Dill. 213.

86. *New Hampshire.* — Russell *v.* Fabyan, 27 N. H. 529.

Rhode Island. — Providence County Sav. Bank *v.* Phalen, 12 R. I. 495.

United States. — Goode *v.* Gaines, 145 U. S. 141, 12 S. Ct. 839, 36 L. ed. 654.

England. — Doe *v.* Baytu, 3 A. & E. 188, 1 Harr. & W. 270, 4 L. J. K. B. 263, 4 N. & M. 837, 30 E. C. L. 105; Parry *v.* House, Holt N. P. 489, 3 E. C. L. 195.

Canada. — Downey *v.* Crowell, 24 Nova Scotia 318.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 156.

Compare Satterlee *v.* Matthewson, 16 Serg. & R. (Pa.) 169; Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311.

Fraudulent conveyances.—A tenant is estopped to deny title irrespective of whether the deed under which the landlord holds was fraudulent as to the creditors of his grantor. Randolph *v.* Carlton, 8 Ala. 606; Palmer *v.* Melson, 76 Ga. 803.

87. Davis *v.* Williams, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749. See, generally, Estoppel, 16 Cyc. 725.

88. De Coursey *v.* De Coursey, 64 S. W. 912, 23 Ky. L. Rep. 1199; McKie *v.* Anderson, 78 Tex. 207, 14 S. W. 576; Bartley *v.* McKinney, 28 Gratt. (Va.) 750.

Trespass. — The rule is applicable in an action of trespass. Delaney *v.* Fox, 2 C. B. N. S. 768, 26 L. J. C. P. 248, 89 E. C. L. 768.

89. McKie *v.* Anderson, 78 Tex. 207, 14 S. W. 576. But see Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757 (holding that the estoppel applies when sole seizure is pleaded in a proceeding among tenants in common for partition); Tyler *v.* Davis, 61 Tex. 674.

90. South *v.* Deaton, 68 S. W. 137, 24 Ky. L. Rep. 196; State *v.* Griftner, 61 Ohio St. 201, 55 N. E. 612; Bartley *v.* McKinney, 28 Gratt. (Va.) 750.

91. Lataillade *v.* Santa Barbara Gas Co., 58 Cal. 4; Hill *v.* Williams, 41 S. C. 134, 19 S. E. 290. See also cases cited *supra*, III, G, 1.

92. Life *v.* Secrest, 1 Ind. 512.

93. Perkins *v.* Governor, Minor (Ala.) 352.

94. Cobb *v.* Arnold, 8 Metc. (Mass.) 398; Binney *v.* Chapman, 5 Pick. (Mass.) 124; Codman *v.* Jenkins, 14 Mass. 93; Osgood *v.* Dewey, 13 Johns. (N. Y.) 240; Moore *v.* Beasley, 3 Ohio 294; Fronty *v.* Wood, 2 Hill (S. C.) 367; Dorrill *v.* Stephens, 4 McCord (S. C.) 59. But see New London *v.* Emerson, 2 Root (Conn.) 372.

95. Jones *v.* Reilly, 174 N. Y. 97, 66 N. E. 649 [*reversing* 68 N. Y. App. Div. 116, 74 N. Y. Suppl. 243]; Cooper *v.* Smith, 8 Watts (Pa.) 536; Thompson *v.* Graham, 9 Phila. (Pa.) 53; Newport Cong. Soc. *v.* Walker, 18 Vt. 600.

96. Hubbard *v.* Shepard, 117 Mich. 25, 75 N. W. 92, 72 Am. St. Rep. 548; Jochen *v.* Tibbels, 50 Mich. 33, 14 N. W. 690.

97. *Alabama.* — Davis *v.* Pou, 108 Ala. 443, 19 So. 362; Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561.

in such an action extends not only to preclude the denial of title in general cases but also under circumstances under which the tenant would not be estopped in other actions, as where the tenant was induced by fraud or mistake to accept the lease,[98] or where the landlord's title has terminated.[99]

f. Summary Proceedings. The estoppel is applicable in summary proceedings to recover the possession of the leased property.[1]

7. Persons Estopped. Not only tenants[2] but their privies in blood or estate are estopped from disputing the title of the landlord.[3] The estoppel extends to subtenants,[4] assignees of the lessee,[5] a mere licensee holding under the les-

Arkansas.— Thorn *v.* Reed, 1 Ark. 480.

Florida.— McLean *v.* Spratt, 20 Fla. 515.

Indian Territory.— Thomas *v.* Sass, 3 Indian Terr. 545, 64 S. W. 531; Sass *v.* Thomas, 3 Indian Terr. 536, 64 S. W. 528.

Iowa.— Settle *v.* Henson, Morr. 111.

Kentucky.—Mefford *v.* Franklin County, 58 S. W. 993, 22 Ky. L. Rep. 833.

Nebraska.—Wilson *v.* Lyons, 4 Nebr. (Unoff.) 406, 94 N. W. 636.

Texas.— See Camley *v.* Stanfield, 10 Tex. 546, 60 Am. Dec. 219.

Virginia.— Emerick *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217.

West Virginia.—Stover *v.* Davis, 57 W. Va. 196, 49 S. E. 1023; First English Evangelical Lutheran Church *v.* Arkle, 49 W. Va. 92, 38 S. E. 486; Voss *v.* King, 33 W. Va. 236, 10 S. E. 402, 38 W. Va. 607, 18 S. E. 762.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 159.

98. Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561.

99. Davis *v.* Pou, 108 Ala. 443, 19 So. 362. See also Howard *v.* Jones, 123 Ala. 488, 26 So. 129; Thorn *v.* Reed, 1 Ark. 480; Voss *v.* King, 38 W. Va. 607, 18 S. E. 762.

1. Dilks *v.* Kelsey, (N. J. Sup. 1905) 59 Atl. 897; People *v.* Lockwood, 3 Hun (N. Y.) 304, 5 Thomps. & C. 526; People *v.* Kelsey, 38 Barb. (N. Y.) 269. See also White *v.* Bailey, 14 Conn. 271.

2. See *supra*, III, G, 2.

A pastor of a church who occupies a parsonage as a part of his compensation cannot deny title of the church to the premises. West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62, 49 N. W. 24.

Vendor who becomes tenant. — A vendor who after the conveyance has leased the lands from the vendee cannot while in possession dispute the vendee's title. Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 38 Am. St. Rep. 768. This rule applies, although the deed and lease are both executed merely as security for a debt (Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111), or although the conveyance from the vendor to the vendee is void (Vancleave *v.* Wilson, 73 Ala. 387). This estoppel does not, however, prevent the tenant from showing that the conveyance of the landlord is only intended to operate as a mortgage, or that it was made upon specified trusts (Smith *v.* Smith, 81 Tex. 45, 16 S. W. 637), nor is the vendor estopped, where the agreement to pay rent is expressly specified to be without prejudice to his rights pending a suit to have the conveyance set aside (Sartwell *v.* Young, 126 Mich. 304, 85 N. W. 729). Where the grantor refuses to deliver possession to the purchaser after the execution of a deed, and accepts an alleged lease from the latter, he is not estopped where it is merely an agreement for a kind of joint possession of the premises by the parties until their controversy is settled. Stevenson *v.* Campbell, 185 Ill. 527, 57 N. E. 414.

A tenant in common, in possession under his own title, is not estopped, by paying rent for the other moiety to the complainant whom he supposed had title to it, from disputing the complainant's title when sued in equity for rent and for partition. Shearer *v.* Winston, 33 Miss. 149. And a tenant in common is not estopped by his cotenant's attornment. Sulphine *v.* Dunbar, 55 Miss. 255.

Mortgagor as lessee.— The mortgagor who becomes the tenant of the purchaser at the foreclosure sale cannot deny his landlord's title (Buchanan *v.* Larkin, 116 Ala. 431, 22 So. 543); but if a mortgagor takes a lease from the mortgagee in possession he is not, after surrendering the possession, estopped from setting up his right to redeem (Atkinson *v.* Morrissy, 3 Oreg. 332).

3. Bishop *v.* Lalouette, 67 Ala. 197.

4. *Massachusetts.* — Patton *v.* Deshon, 1 Gray 325.

North Carolina.— Kluge *v.* Lachenour, 34 N. C. 180; Lunsford *v.* Alexander, 20 N. C. 166.

Pennsylvania.— Graham *v.* Moore, 4 Serg. & R. 467.

South Carolina.—Thomson *v.* Peake, 7 Rich. 353; Milhouse *v.* Patrick, 6 Rich. 350.

England.— Rennie *v.* Robinson, 1 Bing. 147, 1 L. J. C. P. O. S. 30, 7 Moore C. P. 539, 25 Rev. Rep. 604, 8 E. C. L. 446; Barwick *v.* Thompson, 7 T. R. 488, 4 Rev. Rep. 499.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 171.

Knowledge of the original tenancy is immaterial in so far as the estoppel of the subtenant to deny title of the original landlord is concerned. Reed *v.* Shepley, 6 Vt. 602.

5. *Arkansas.*— Earle *v.* Hale, 31 Ark. 470.

Illinois.— Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. 428.

Indian Territory.— Ikard *v.* Minter, 4 Indian Terr. 214, 69 S. W. 852; Sass *v.* Thomas, 3 Indian Terr. 536, 64 S. W. 528.

North Carolina.— Kluge *v.* Lachenour, 34 N. C. 180; Lunsford *v.* Alexander, 20 N. C. 166.

see,[6] or any one who succeeds to the possession to or from the tenant.[7] This includes heirs of a tenant who are in possession after his death,[8] purchasers of the leased premises from the lessee,[9] the wife of a tenant in possession with him,[10] and the husband of the tenant who is in possession in her right.[11] *A fortiori* a person obtaining possession through collusion with the tenant is estopped to deny the landlord's title until he surrenders possession.[12] On the other hand, the estoppel to deny title is not operative as against one who holds possession, neither under the landlord nor the tenant, nor in any privity thereto.[13]

Vermont.— Derrick *v.* Luddy, 64 Vt. 462, 24 Atl. 1050.

Washington.—McLennan *v.* Grant, 8 Wash. 603, 36 Pac. 682.

United States.—Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25.

England.— Johnson *v.* Mason, 1 Esp. 89 (applying the rule to an assignee of a void lease, who has, on coming into possession, had notice that the lease was held under a particular person, to whom the former tenant had paid rent); Taylor *v.* Needham, 2 Taunt. 279, 11 Rev. Rep. 572.

Canada.— Jones *v.* Todd, 22 U. C. Q. B. 37.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 171.

6. Kluge *v.* Lachenour, 34 N. C. 180. But see Tadman *v.* Henman, [1893] 2 Q. B. 168, 57 J. P. 664, 5 Reports 479, holding that a third person not claiming possession to the land who has brought goods on to the land by the license of the tenant is not estopped from disputing the lessor's title.

7. *Alabama.*— Russell *v.* Irwin, 38 Ala. 44.

California.— Standley *v.* Stephens, 66 Cal. 541, 6 Pac. 420; Rose *v.* Davis, 11 Cal. 133.

District of Columbia.— Housam *v.* Kunecke, 4 Mackey 297.

Illinois.— Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Sexton *v.* Carley, 147 Ill. 269, 35 N. E. 471; Hardin *v.* Forsythe, 99 Ill. 312; Doty *v.* Burdick, 83 Ill. 473.

Kentucky.— Chambers *v.* Pleak, 6 Dana 426, 32 Am. Dec. 78; Turly *v.* Rogers, 1 A. K. Marsh. 245.

Michigan.— Michigan Cent. R. Co. *v.* Bullard, 120 Mich. 416, 79 N. W. 635.

Mississippi.— Newman *v.* Mackin, 13 Sm. & M. 383.

New Jersey.— Den *v.* Gustin, 12 N. J. L. 42.

New York.— Jackson *v.* Stiles, 1 Cow. 575, holding that where a tenant who holds over after his lease has expired takes a lease from a third person, such person will not, on the tenant being ejected, be admitted to defend as landlord.

North Carolina.— Stewart *v.* Keener, 131 N. C. 486, 42 S. E. 935; Callender *v.* Sherman, 27 N. C. 711.

Oregon.— Jones *v.* Dove, 7 Oreg. 467.

Pennsylvania.— Garrison *v.* Moore, 1 Phila. 282.

Texas.— Swan *v.* Busby, 5 Tex. Civ. App. 63, 24 S. W. 303.

Vermont.— Reed *v.* Shepley, 6 Vt. 602.

Virginia.— Neff *v.* Ryman, 100 Va. 521, 42 S. E. 314. *Compare* Miller *v.* Williams, 15 Gratt. (Va.) 213, where the person to whom the tenant attorned had a right to possession by decree of court which had annulled the title of the original landlord, and it was held that he was not estopped as having acquired possession through the tenant.

West Virginia.— Genin *v.* Ingersoll, 2 W. Va. 558.

England.— Doe *v.* Mills, 2 A. & E. 17, 4 L. J. K. B. 10, 1 M. & Rob. 385, 4 N. & M. 25, 29 E. C. L. 30; Doe *v.* Austin, 9 Bing. 41, 1 L. J. C. P. 152, 2 Moore & S. 107, 23 E. C. L. 477; Cooper *v.* Blandy, 1 Bing. N. Cas. 45, 3 L. J. C. P. 274, 4 Moore & S. 562, 27 E. C. L. 537; Doe *v.* Mizzem, 2 M. & Rob. 56.

Canada.— White *v.* Nelles, 11 Can. Sup. Ct. 587; Pyatt *v.* McKee, 3 Ont. 151; Smith *v.* Aubrey, 7 U. C. Q. B. 90.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 177, 178.

A son of the tenant is not estopped, where he claims merely by his own naked possession. Emery *v.* Harrison, 13 Pa. St. 317 [*distinguishing* Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455, as a case where there was a clear case of privity between father and son].

A mortgagee of the lessee may become estopped to deny the landlord's title, where he goes into possession and promises to pay rent to the landlord. Goodman *v.* Jones, 26 Conn. 264. See also Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

8. Lewis *v.* Adams, 61 Ga. 559; Armstrong *v.* Armstrong, 21 U. C. C. P. 4.

9. Owen *v.* Brockport, 208 Ill. 35, 69 N. E. 952; Phillips *v.* Rothwell, 4 Bibb (Ky.) 33; Lane *v.* Osment, 9 Yerg. (Tenn.) 86; Lockwood *v.* Walker, 15 Fed. Cas. No. 8,451, 3 McLean 431.

10. Russell *v.* Irwin, 38 Ala. 44; Taylor *v.* Eckfor, 11 Sm. & M. (Miss.) 21. *Contra.* Shew *v.* Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678.

The wife of a deceased tenant, where remaining in possession, is estopped to deny the title of her husband's landlord. Love *v.* Dennis, Harp. (S. C.) 70.

11. Hubbard *v.* Shepard, 117 Mich. 25, 75 N. W. 92, 72 Am. St. Rep. 548.

12. Ragor *v.* McKay, 44 Ill. App. 79; Bertram *v.* Cook, 32 Mich. 518; Stewart *v.* Roderick, 4 Watts & S. (Pa.) 188, 39 Am. Dec. 71; Doe *v.* Tiffany, 5 U. C. Q. B. 79. *Compare* Cravener *v.* Bowser, 4 Pa. St. 259.

13. Merwin *v.* Camp, 3 Conn. 35; Doe *v.* Brown, 8 N. Brunsw. 433.

8. Persons as to Whom Tenant Is Estopped — a. In General. While the tenant is not estopped as against a stranger,[14] he is estopped not only against his landlord but as against any other person who has succeeded to the rights of the landlord,[15] so long as such tenant holds the possession derived originally from his landlord.[16] It follows that a tenant cannot deny the title of his landlord's assignee,[17] nor of the grantee of the demised premises.[18] This estoppel, however, extends only to a denial of what has once been admitted, that is the original landlord's title, and does not preclude the necessity of the assignee or grantee showing his derivative title, nor prevent the tenant from attacking the validity of the transfer from the original landlord.[19]

b. Heirs, Executors, and Administrators. The estoppel may be asserted by the heirs of the landlord, after his death, where the tenants remain in possession.[20] So where the tenant is sued by an executor or administrator advantage may be taken by him of the tenant's estoppel to deny the title of the deceased landlord.[21] Especially is this true where the tenant has attorned to the personal representa-

14. South *v.* Deaton, 113 Ky. 312, 68 S. W. 137, 1105, 24 Ky. L. Rep. 196, 533; Cole *v.* Maxfield, 13 Minn. 235; Baldwin *v.* Burd, 10 U. C. C. P. 511.

15. Henley *v.* Mobile Branch Bank, 16 Ala. 552; Cantwell *v.* Moore, 44 Ill. App. 656.

Lease by agent of owner.—Where agents of the owner leased the land in their own names, he cannot dispute their title. Taylor *v.* White, 86 Mo. App. 526. See also Melcher *v.* Kreiser, 28 N. Y. App. Div. 362, 51 N. Y. Suppl. 249.

Lease by receiver.— One accepting a lease made by a receiver and entering into possession thereunder is estopped from questioning the receiver's authority to make the lease or his title. Fields *v.* Brown, 89 Ill. App. 287.

16. Brenner *v.* Bigelow, 8 Kan. 496.

17. Hunt *v.* Thompson, 2 Allen (Mass.) 341; Whalin *v.* White, 25 N. Y. 462; People *v.* Angel, 61 How. Pr. (N. Y.) 157; Steen *v.* Wardsworth, 17 Vt. 297, so holding, although the assignment of the lease was fraudulent and void as to the landlord's creditors.

18. *Maryland.*— Funk *v.* Kincaid, 5 Md. 404.

Massachusetts.— Benedict *v.* Morse, 10 Metc. 223.

New York.— Clark *v.* Crego, 47 Barb. 599. See also Bohn *v.* Hatch, 15 N. Y. Suppl. 550.

Vermont.— Barton *v.* Learned, 26 Vt. 192.

England.—Cuthbertson *v.* Irving, 6 H. & N. 135, 6 Jur. N. S. 1211, 29 L. J. Exch. 485, 3 L. T. Rep. N. S. 335, 8 Wkly. Rep. 704; Ward *v.* Ryan, Ir. R. 10 C. L. 17; Rennie *v.* Robinson, 1 Bing. 147, 1 L. J. C. P. O. S. 30, 7 Moore C. P. 539, 25 Rev. Rep. 604, 8 E. C. L. 446; Gouldsworth *v.* Knights, 12 L. J. Exch. 282, 11 M. & W. 337; Carlton *v.* Bowcock, 51 L. T. Rep. N. S. 659. But see Seymour *v.* Franco, 7 L. J. K. B. O. S. 18, 31 Rev. Rep. 347.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 182.

Compare McKune *v.* Montgomery, 9 Cal. 575.

Attornment to grantee.— Even if the tenant was not otherwise estopped, he is estopped where he attorns to the grantee. Ingraham *v.* Baldwin, 12 Barb. (N. Y.) 9 [*affirmed* in 9 N. Y. 45].

Where the grantee claims the lease to be void and brings ejectment on such ground, he cannot claim that the tenant is estopped to set up a hostile title or an adverse possession. Sands *v.* Hughes, 53 N. Y. 287.

19. Tewksbury *v.* Magraff, 33 Cal. 237; Reay *v.* Cotter, 29 Cal. 168; Despard *v.* Walbridge, 15 N. Y. 374. See also Phillips *v.* Pearce, 5 B. & C. 433, 8 D. & R. 43, 29 Rev. Rep. 284, 11 E. C. L. 529.

Validity of assignment of lease.— Where the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title. Hilbourn *v.* Fogg, 99 Mass. 11; Steadman *v.* Jones, 65 N. C. 388 (assignment in bankruptcy); Doe *v.* Barton, 11 A. & E. 307, 4 Jur. 432, 9 L. J. Q. B. 57, 3 P. & D. 194, 39 E. C. L. 181; Doe *v.* Edwards, 5 B. & A. 1065, 27 E. C. L. 447, 6 C. & P. 208, 25 E. C. L. 397, 3 N. & M. 193; Mountnoy *v.* Collier, 1 E. & B. 630, 17 Jur. 503, 22 L. J. Q. B. 124, 1 Wkly. Rep. 179, 72 E. C. L. 630; England *v.* Slade, 4 T. R. 682, 2 Rev. Rep. 498. The tenant may show that an assignment of the lease by the lessor, absolute on its face, was intended merely to secure the payment of a debt, and that the debt has since been paid. Despard *v.* Walbridge, 15 N. Y. 374.

20. Bishop *v.* Lalouette, 67 Ala. 197; Blantin *v.* Whitaker, 11 Humphr. (Tenn.) 313; Weeks *v.* Birch, 69 L. T. Rep. N. S. 759. See also Wolf *v.* Holton, 104 Mich. 107, 62 N. W. 174, holding that where defendant goes into possession of land under the guardian of minor heirs he cannot question the title of such heirs.

A devise to a third person may be shown by the tenant, since such a showing is not a denial of the title of the deceased. Despard *v.* Walbridge, 15 N. Y. 374.

21. Clarke *v.* Clarke, 51 Ala. 498; Ronaldson *v.* Tabor, 43 Ga. 230; James *v.* Smith, 3 Indian Terr. 447, 58 S. W. 714; State *v.* Votaw, 13 Mont. 403, 34 Pac. 315.

tive.[22] And where the lease has been taken directly from the executor or administrator he may rely on the estoppel.[23]

c. Purchaser at Execution or Judicial Sale. The estoppel may be relied on by a purchaser of the landlord's title at a judicial sale,[24] especially where the tenant recognizes the title of the purchaser by paying rent to him.[25] So where one takes a lease from such a purchaser he cannot dispute his title.[26]

9. Duration of Estoppel — a. Termination of Landlord's Estate. The estoppel to deny title relates to the title as it existed when the tenancy commenced, and hence the estoppel does not operate to prevent the tenant showing that his landlord's title has terminated or expired since the relation arose.[27] In other words the estoppel is then at an end. This is true, however, only in a qualified sense. The estoppel is terminated in so far as the landlord is concerned, but still exists, while the tenant continues in the possession given him by the original landlord, as against the person succeeding to the landlord's title, where he is one other than the tenant himself.[28]

b. Surrender of Possession — (i) *Necessity.*[29] A tenant cannot deny his landlord's title until he is discharged from the estoppel arising out of his lease and possession by a yielding up of possession to his lessor.[30] A surrender is neces-

22. Howe *v.* Gregory, 2 Ind. App. 477, 28 N. E. 776.

23. *Alabama.*— Norwood *v.* Kirby, 70 Ala. 397, holding that a tenant entering under a lease from the administrator is estopped from setting up, as against the administrator *de bonis non,* a subsequent lease from the original administrator personally, under a claim of personal title, or title in opposition to the estate.

New York.— Rowland *v.* Dillingham, 83 N. Y. App. Div. 156, 82 N. Y. Suppl. 470 (holding that where the tenant admits the relation of landlord and tenant and that he knew that an agent represented an executor, he was estopped to allege disability of the executor to rent the premises); Steele *v.* Gilmour Mfg. Co., 77 N. Y. App. Div. 199, 78 N. Y. Suppl. 1078 (holding that the tenants were estopped to deny the title of the executor to the premises or his right to enforce the lease in the same capacity in which he executed it); Gregory *v.* Michaels, 1 Misc. 195, 20 N. Y. Suppl. 877.

North Carolina.— Shell *v.* West, 130 N. C. 171, 41 S. E. 65.

Ohio.— Bowler *v.* Erhard, 4 Ohio Dec. (Reprint) 256, 1 Clev. L. Rep. 174, holding that a tenant cannot set up that the administrator has no control over rents and profits of the real estate.

Canada.— Christie *v.* Clarke, 16 U. C. C. P. 544.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 184.

Want of title in the administrator cannot be set up by one who has accepted a lease from the administrator and promised to pay him rent. Terry *v.* Ferguson, 8 Port. (Ala.) 500; Caldwell *v.* Harris, 4 Humphr. (Tenn.) 24.

24. *Indiana.*— Murphy *v.* Teter, 56 Ind. 545.

Massachusetts.— Granger *v.* Parker, 137 Mass. 228. But see Holmes *v.* Turner's Falls Co., 142 Mass. 590, 8 N. E. 646.

New York.— Boynton *v.* Jackway, 10 Paige 307.

Pennsylvania.—Leshey *v.* Gardner, 3 Watts & S. 314, 38 Am. Dec. 764, holding that the tenant cannot set up any irregularity attending an execution sale, even though the purchaser's title was voidable; and that he cannot prove a fraudulent combination made by him with the purchaser at the execution sale to defraud the creditors of the judgment debtor.

South Carolina.—Thomson *v.* Peake, 7 Rich. 353.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 183.

25. Betts *v.* Wurth, 32 N. J. Eq. 82.

26. Buchanan *v.* Larkin, 116 Ala. 431, 22 So. 543.

Right of tenant to attorn to purchaser see *infra,* III, G, 11, c, (III).

27. See *infra,* III, G, 10, e.

28. See Syme *v.* Sanders, 4 Strobh. (S. C.) 196.

29. Surrender to initiate adverse possession see Adverse Possession, 1 Cyc. 1058 *et seq.*

30. *Alabama.*—Davis *v.* Williams, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749; Rogers *v.* Boynton, 57 Ala. 501; Russell *v.* Irwin, 38 Ala. 44.

Arkansas.— Bryan *v.* Winburn, 43 Ark. 28.

Colorado.— Milsap *v.* Stone, 2 Colo. 137.

Georgia.— Grizzard *v.* Roberts, 110 Ga. 41, 35 S. E. 291.

Illinois.— Doty *v.* Burdick, 83 Ill. 473; Tilghman *v.* Little, 13 Ill. 239; Merki *v.* Merki, 113 Ill. App. 518 [*affirmed* in 212 Ill. 121, 72 N. E. 9].

Indiana.— Pence *v.* Williams, 14 Ind. App. 86, 42 N. E. 494.

Louisiana.— Harvin *v.* Blackman, 112 La. 24, 36 So. 213. *Compare* Wykoff *v.* Miller, 48 La. Ann. 475, 19 So. 478; Burbank *v.* Harris, 30 La. Ann. 487.

Massachusetts.— Towne *v.* Butterfield, 97 Mass. 105. See also Cobb *v.* Arnold, 12 Metc.

sary even after the expiration of the term of the lease.[31] This rule applies not only to the tenant, but also to all who succeed to the possession from or through him.[32] So the rule applies, although the tenant did not enter under the landlord's title, where he subsequently took a lease from him.[33] Furthermore a tenant cannot assert a title claimed to have been held by him prior to the lease,[34] or a title acquired by him from a third person during the existence of the lease,[35] until he has surrendered possession of the demised premises to the landlord. On the other hand a tenant may dispute the title, as against the original landlord, without surrender of possession, where it has been legally extinguished or determined so that

39, holding that a tenant who holds over cannot defeat a writ of entry brought by the landlord to recover possession by setting up a conveyance of the premises made by himself to a third person, after the demise, and a subsequent holding by him under such third person.

Michigan.— Ryerson *v.* Eldred, 18 Mich. 12.

Nebraska.— Mattis *v.* Robinson, 1 Nebr. 3.

New York.— Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

North Carolina.— Pool *v.* Lamb, 128 N. C. 1, 37 S. E. 953; Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322; Springs *v.* Schenck, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; Pate *v.* Turner, 94 N. C. 47; Wilson *v.* James, 79 N. C. 349; Abbott *v.* Cromartie, 72 N. C. 292, 21 Am. Rep. 457; Freeman *v.* Heath, 35 N. C. 498; Belfour *v.* Davis, 20 N. C. 443.

Ohio.— Longworth *v.* Wolfinger, Wright 216.

Oregon.— Kiernan *v.* Terry, 26 Oreg. 494, 38 Pac. 671.

Pennsylvania.— Porter *v.* Mayfield, 21 Pa. St. 263; Kennedy *v.* Whalen, 5 Kulp 35; Tatham *v.* Jones, 1 Phila. 214.

South Carolina.— Milhouse *v.* Patrick, 6 Rich. 350.

Tennessee.— Wilson *v.* Smith, 5 Yerg. 379.

Texas.— Juneman *v.* Franklin, 67 Tex. 411, 3 S. W. 562.

Vermont.— Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605.

England.— Agar *v.* Young, C. & M. 78, 41 E. C. L. 49; Atty.-Gen. *v.* Hotham, 3 Russ. 415, 27 Rev. Rep. 101, 3 Eng. Ch. 415, 38 Eng. Reprint 631; Willoughby *v.* Chamberlaine, 5 Wkly. Rep. 328.

Canada.— Pyatt *v.* McKee, 3 Ont. 151; Fox *v.* Macaulay, 12 U. C. C. P. 298; Patterson *v.* Smith, 42 U. C. Q. B. 1; Doe *v.* Mill, 2 U. C. Q. B. 26.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 161.

In other words, one who has taken possession under a lease can do no act inconsistent with, or which would change, the relation between himself and his landlord, without first yielding and delivering up to the latter the possession acquired from him. Hughes *v.* Watt, 28 Ark. 153; Bertram *v.* Cook, 32 Mich. 518.

Where a surrender is impossible, as where the so-called lease is of a right of a riparian proprietor to use water, it seems that such act is not necessary to permit a denial of title. Swift *v.* Goodrich, 70 Cal. 103, 11 Pac. 561.

31. *Alabama.*— Shelton *v.* Eslava, 6 Ala. 230.

California.— McKissick *v.* Ashby, 98 Cal. 422, 33 Pac. 729; Tewksbury *v.* Magraff, 33 Cal. 237; Sawyer *v.* Sargent, (1885) 7 Pac. 120.

Massachusetts.— Miller *v.* Lang, 99 Mass. 13.

Tennessee.— Phillips *v.* Robertson, 5 Hayw. 101.

England.— London, etc., R. Co. *v.* West, L. R. 2 C. P. 553, 36 L. J. C. P. 245.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 161. And see *supra*, III, G, 2.

Compare Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

Contra.— Page *v.* Kinsman, 43 N. H. 328; Carpenter *v.* Thompson, 3 N. H. 204, 14 Am. Dec. 348.

32. Fleming *v.* Mills, 182 Ill. 464, 55 N. E. 373 (person obtaining possession by collusion with tenant); Mackin *v.* Haven, 88 Ill. App. 434 [*affirmed* in 187 Ill. 480, 58 N. E. 448].

33. Saunders *v.* Moore, 14 Bush (Ky.) 97. *Contra,* Tewksbury *v.* Magraff, 33 Cal. 237.

34. Hening *v.* Warner, 109 N. C. 406, 14 S. E. 317.

35. *Alabama.*— Barlow *v.* Dahm, 97 Ala. 414, 12 So. 293, 38 Am. St. Rep. 192.

Arkansas.— Clemm *v.* Wilcox, 15 Ark. 102.

Colorado.— Arnold *v.* Woodard, 4 Colo. 249.

Georgia.— Newton *v.* Roe, 33 Ga. 163.

Illinois.— Gable *v.* Wetherholt, 116 Ill. 313, 6 N. E. 453, 56 Am. Rep. 774; Lowe *v.* Emerson, 48 Ill. 160.

Kentucky.— Norton *v.* Sanders, 1 Dana 14.

Louisiana.— Metoyer *v.* Larenandière, 6 Rob. 139.

Maine.— Moshier *v.* Reding, 12 Me. 478.

New York.— Willis *v.* McKinnon, 165 N. Y. 612, 59 N. E. 1132 [*reversing* 35 N. Y. App. Div. 131, 54 N. Y. Suppl. 1079].

North Carolina.— Farmer *v.* Pickens, 83 N. C. 549.

South Carolina.— Milhouse *v.* Patrick, 6 Rich. 350.

Tennessee.— Wilson *v.* Smith, 5 Yerg. 379.

Vermont.— Reed *v.* Shepley, 6 Vt. 602.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 196.

But see Dodge *v.* Phelan, 2 Tex. Civ. App. 441, 21 S. W. 309.

In an action for rent a tenant cannot resist payment on the ground of a purchase by him of a superior outstanding title before

it no longer exists,[36] or where the tenant has been actually or constructively evicted.[37]

(II) *Sufficiency.* Nothing less than an actual surrender of the premises is sufficient to terminate the estoppel.[38] It is not sufficient for the tenant to merely notify the landlord before the expiration of the term that he claims as owner and will hold no longer as tenant.[39] So the mere abandonment of the premises, without notice to the landlord, where there is a subsequent reëntry under another title, is not sufficient as a surrender.[40] There must be an actual surrender and not a mere notice terminating the tenancy.[41] The mere surrender of the written lease, or an offer to surrender it, is not equivalent to a surrender of the premises.[42] A surrender, on the termination of the lease, of part of the leased premises, does not entitle the tenant to dispute the title of the landlord as to any part of the premises.[43]

(III) *Effect.* The surrender of possession by the tenant to the landlord terminates the estoppel.[44] After the tenancy has been thus terminated, the tenant may assert a paramount title,[45] whether acquired before the relation of landlord and tenant was entered into,[46] or during the tenancy.[47]

c. Eviction by Title Paramount. The estoppel is terminated by the eviction of the tenant by title paramount,[48] or by acts amounting to an ouster which

eviction or surrender of his lease. Lyles *v.* Murphy, 38 Tex. 75.

36. *Maine.*— Ryder *v.* Mansell, 66 Me. 167.
Maryland.— Presstman *v.* Silljacks, 52 Md. 647.
Texas.— Lang *v.* Crothers, 21 Tex. Civ. App. 118, 51 S. W. 271.
England.— Mountney *v.* Collier, 1 E. & B. 630, 22 L. J. Q. B. 124, 17 Jur. 503, 1 Wkly. Rep. 179, 72 E. C. L. 630; Claridge *v.* Mackenzie, 11 L. J. C. P. 72, 4 M. & G. 143, 4 Scott N. R. 796, 43 E. C. L. 82. But see Balls *v.* Westwood, 2 Campb. 11.
Canada.— Kelly *v.* Wolff, 12 Ont. Pr. 234; Patterson *v.* Smith, 42 U. C. Q. B. 1. But see Couse *v.* Cline, 19 U. C. Q. B. 58.

37. George *v.* Putney, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; Mountnoy *v.* Collier, 1 E. & B. 630, 17 Jur. 503, 22 L. J. Q. B. 124, 1 Wkly. Rep. 179, 72 E. C. L. 630; Robertson *v.* Bannerman, 17 U. C. Q. B. 508.
What constitutes eviction see *infra*, VII, F, 1.

38. See cases cited *infra*, notes 39–43.
It has been held, however, that the bringing of ejectment by the heir of a tenant is a sufficient recognition that the relation of landlord and tenant had been terminated, so as to entitle the heir to sue for possession under a patent, where the landlord was, and had been for years, in possession under a judgment against the tenant. Arnold *v.* Woodward, 14 Colo. 164, 23 Pac. 444.

39. Robinson *v.* Holt, 90 Ala. 115, 7 So. 441. See also Boyer *v.* Smith, 3 Watts (Pa.) 449.

40. Littleton *v.* Clayton, 77 Ala. 571; Juneman *v.* Franklin, 67 Tex. 411, 3 S. W. 562.

41. Longfellow *v.* Longfellow, 61 Me. 590; Graham *v.* Moore, 4 Serg. & R. (Pa.) 467.

42. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434].

43. Miller *v.* Turney, 13 Ark. 385; Longfellow *v.* Longfellow, 54 Me. 240.

44. *Alabama.*— Smith *v.* Mundy, 18 Ala. 182, 52 Am. Dec. 221.
California.— Willson *v.* Cleaveland, 30 Cal. 192.
Indiana.— Zimmerman *v.* Marchland, 23 Ind. 474.
Pennsylvania.— Boyer *v.* Smith, 3 Watts 449.
Virginia.— Wild *v.* Serpell, 10 Gratt. 405.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 163.
Surrender during term of lease.—But where no attempt is made to disturb the possession of the tenant, it has been held that he is estopped to deny title, although he has voluntarily left the premises during the term of the lease. Howard *v.* Murphy, 23 Pa. St. 173; Ewing *v.* Cottman, 9 Pa. Super. Ct. 444, 43 Wkly. Notes Cas. 525.

45. *Alabama.*— Smith *v.* Mundy, 18 Ala. 182, 52 Am. Dec. 221.
Georgia.— Williams *v.* Garrison, 29 Ga. 503.
Illinois.— Gable *v.* Wetherholt, 116 Ill. 313, 6 N. E. 453, 56 Am. Rep. 774.
Mississippi.— See also Rives *v.* Nesmith, 64 Miss. 807, 2 So. 174.
New York.— Utica Bank *v.* Mersereau, 3 Barb. 528, 49 Am. Dec. 189 note.
North Carolina.— Allen *v.* Griffin, 98 N. C. 120, 3 S. E. 837.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 163.

46. Smart *v.* Smith, 13 N. C. 258.

47. De Coursey *v.* De Coursey, 64 S. W. 912, 23 Ky. L. Rep. 1199.

48. *Alabama.*— Farris *v.* Houston, 74 Ala. 162.
California.— Tewksbury *v.* Magraff, 33 Cal. 237; Wheelock *v.* Warschauer, 21 Cal. 309.
Massachusetts.— Towne *v.* Butterfield, 97 Mass. 105; George *v.* Putney, 4 Cush. 351, 50 Am. Dec. 788.
New York.— Moffat *v.* Strong, 9 Bosw. 57.

authorize the tenant to attorn to the holder of the paramount title[49] as if actually evicted.

10. Matters as to Which Tenant Estopped — a. In General. Before surrender of possession, the tenant cannot set up an inconsistent title in himself acquired from a third person,[50] nor title in a third person.[51] He is estopped to claim that the landlord had no title,[52] or an invalid title,[53] at the time of the creation of the tenancy. He may, however, set up fraud or mistake in accepting the lease,[54] or deny that the relationship of landlord and tenant ever existed,[55] or show that the tenancy has been determined.[56] So he may show that the estoppel is at an end by reason of his surrender of the premises,[57] an actual or constructive eviction by paramount title,[58] or the termination of the landlord's estate.[59] The estoppel extends only to those facts which the tenant is deemed to have admitted by going into, or retaining, possession as a tenant of another.[60] The estoppel precludes the

North Carolina.— Gilliam *v.* Moore, 44 N. C. 95; Clapp *v.* Coble, 21 N. C. 177.

Texas.— Franklin *v.* Hurlbert, 1 Tex. App. Civ. Cas. § 816.

England.— Cuthbertson *v.* Irving, 6 H. & N. 135, 6 Jur. N. S. 1211, 29 L. J. Exch. 485, 3 L. T. Rep. N. S. 335, 8 Wkly. Rep. 704.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 164.

Eviction of the tenant by his landlord terminates the estoppel. Evans *v.* Lytle, 102 Ky. 146, 42 S. W. 1110, 19 Ky. L. Rep. 1137.

49. Jeffers *v.* Easton, 113 Cal. 345, 45 Pac. 680; Towne *v.* Butterfield, 97 Mass. 105; George *v.* Putney, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; Cobb *v.* Arnold, 12 Metc. (Mass.) 39; Delaney *v.* Fox, 2 C. B. N. S. 768, 26 L. J. C. P. 248, 89 E. C. L. 768; Watson *v.* Lane, 11 Exch. 769, 2 Jur. N. S. 119, 25 L. J. Exch. 101, 4 Wkly. Rep. 293. See also Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245. And see *infra*, III, G, 10, c.

What constitutes eviction by title paramount see *infra*, VII, F, 1.

50. See *supra*, III, G, 9, b, (I). And see *infra*, III, G, 10, f, (I).

51. *Alabama.*— Pope *v.* Harkins, 16 Ala. 321; Shelton *v.* Eslava, 6 Ala. 230.

Kentucky.— Chambers *v.* Pleak, 6 Dana 426, 32 Am. Dec. 78; Connelly *v.* Chiles, 2 A. K. Marsh. 242.

Massachusetts.—Boston *v.* Binney, 11 Pick. 1, 22 Am. Dec. 353; Bigelow *v.* Jones, 10 Pick. 161; Binney *v.* Chapman, 5 Pick. 124; Codman *v.* Jenkins, 14 Mass. 93.

Nebraska.— Wilson *v.* Lyons, 4 Nebr. (Unoff.) 406, 94 N. W. 636.

New York.— Kenada *v.* Gardner, 3 Barb. 589; Jackson *v.* Whedon, 1 E. D. Smith 141; Jackson *v.* Harper, 5 Wend. 246; Jackson *v.* Stewart, 6 Johns. 34.

Pennsylvania.— Cooper *v.* Smith, 8 Watts 536.

South Carolina.— Syme *v.* Sanders, 4 Strobh. 196.

England.— Bringloe *v.* Goodson, 1 Arn. 322, 4 Bing. N. Cas. 726, 8 L. J. C. P. 116, 6 Scott 502, 33 E. C. L. 944; Partington *v.* Woodcock, 4 L. J. K. B. 239; Roe *v.* Pegge, 4 Dougl. 309, 1 T. R. 760 note, 26 E. C. L. 493.

Canada.— Hughes *v.* Holmes, 6 N. Brunsw. 12.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 192.

Exception to rule. — The rule that a tenant cannot set up against his landlord in ejectment an adversary title in a stranger does not apply where the title set up by the tenant is a lease for life, from the person under whom plaintiff claimed to one under whom the tenant claimed, the validity of which plaintiff had admitted by the regular annual receipt of the rents stipulated therein, from defendant and those under whom he claimed, down to a period of two months before the institution of the suit. Smoot *v.* Marshall, 2 Leigh (Va.) 134.

52. See *supra*, III, G, 5, a.

53. See *supra*, III, G, 5, b.

54. See *supra*, III, G, 4, b.

55. Provost *v.* Donohue, 3 N. Y. Suppl. 299, holding that the tenant may also show that his occupancy is that of an equitable owner under a certain agreement with plaintiff.

Real relation of parties.— The tenant or those holding under him are not estopped to show the true relations of the parties to a lease. Oriental Inv. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80. And it follows that a grantor of land is not precluded from showing that the deed was intended only as a mortgage, or to place the land in trust, he having thereafter taken a lease from the grantee. Smith *v.* Smith, 81 Tex. 45, 16 S. W. 637.

As to one of lessors.— The tenant is not estopped to deny that as to one of the lessors the lease created that relation. Acklin *v.* McCalmont Oil Co., 201 Pa. St. 257, 50 Atl. 955; Swint *v.* McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. 1021, 63 Am. St. Rep. 791.

56. Wheelock *v.* Warschauer, 21 Cal. 309.

57. See *supra*, III, G, 9, b, (III).

58. See *supra*, III, G, 9, c.

59. See *infra*, III, G, 10, e.

60. See cases cited *infra*, this note.

Possession under lease.— One in possession of property leased to another will be presumed to have possession as assignee of the lease, or in such manner as to charge him with the stipulated rent, but no estoppel will apply to prevent him from showing that he was not in possession under the lease. Frank

lessee, while in possession, from suing to compel the lessor to specifically perform his contract to convey the demised premises to the tenant.[61]

b. To Show Character and Extent of Landlord's Title — (I) *Nature of Interest Immaterial.* The character of the landlord's title is generally immaterial, and hence the tenant is estopped to show that his landlord is not the sole owner of the demised property,[62] that he has only a dower interest,[63] that the lessor is a mere trustee,[64] or that his only title is a tax title.[65] Where the lease is made by one as agent, without stating for whom or for what, the tenant cannot show that the agency has been revoked.[66]

(II) *Denial of Title Greater Than Necessary to Support Lease.* It has been held that a tenant is not estopped to deny that the landlord had no greater estate than is necessary to support the lease.[67]

(III) *Denial of Title as to Part of Property.* The estoppel to deny title does not extend to property owned by the landlord but not included in the tenancy;[68] but the tenant is estopped to deny the title of his landlord to a part of the leased property.[69]

c. To Interplead Landlord.[70] Except where it arises on an act of the landlord subsequent to the lease,[71] a bill of interpleader cannot be filed by a tenant against his landlord, since it is in effect a dispute of his landlord's title.[72]

d. To Deny Title at Time Tenancy Created. Inasmuch as the tenant is only estopped to deny what he has once admitted, the estoppel merely precludes the tenant from disputing the title of the landlord at the time when the lease was made and possession given, or when the relation arose.[73]

v. New York, etc., R. Co., 7 N. Y. St. 814. The tenant may show, to rebut the presumption that a holding over was an implied acceptance of the original lessor's terms for a new lease, that he had already taken a lease of the premises from another. Nash *v.* Springstead, 72 Hun (N. Y.) 474, 25 N. Y. Suppl. 279.

Derivative title of landlord.— A showing that a deed of the premises by the tenant to the landlord, prior to the lease, was made under duress, is an attack on the landlord's title. Williams *v.* Wait, 2 S. D. 210, 49 S. W. 209, 39 Am. St. Rep. 768.

Where there are several lessors the tenant is estopped to deny the interest of any one of them. Doggett *v.* Norton, 20 Ill. 332.

A tenant cannot set up a prior lease by the landlord to a third person. Duke *v.* Ashby, 7 H. & N. 600, 8 Jur. N. S. 236, 31 L. J. Exch. 168, 10 Wkly. Rep. 273.

As affected by recitals in lease.— The tenant is not estopped by the lease to deny the power of the landlord to lease, where the recitals in the lease show what title the landlord had. Lyster *v.* Kirkpatrick, 26 U. C. Q. B. 217.

Illustrations of matters as to which there is no estoppel.— There is no denial of title where evidence is sought to be introduced merely to show who was the real party in interest entitled to sue on a note given for rent. Borland *v.* Box, 62 Ala. 87. A tenant, in order to show his status in the case, may testify as to his willingness to turn over possession to the party who had the best title, and would pay for his improvements, and as to an agreement with plaintiffs' attorney that he should be paid for his improvements if they gained the case. Davidson *v.* Wallingford, (Tex. Civ. App. 1895) 30 S. W. 286.

61. Davis *v.* Williams, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749.

62. Clark *v.* Aldrich, 4 N. Y. App. Div. 523, 40 N. Y. Suppl. 440.

63. Sommer *v.* Bavarian Star Brewing Co., 8 Misc. (N. Y.) 268, 28 N. Y. Suppl. 571 [*affirming* 6 Misc. 413, 26 N. Y. Suppl. 865].

64. Stagg *v.* Eureka Tanning, etc., Co., 56 Mo. 317; Jordan *v.* Katz, 89 Va. 628, 16 S. E. 866; Lucas *v.* Brooks, 18 Wall. (U. S.) 436, 21 L. ed. 779.

65. Pence *v.* Williams, 14 Ind. App. 86, 42 N. E. 494.

66. Holt *v.* Martin, 51 Pa. St. 499.

67. Palmer *v.* Bowker, 106 Mass. 317; Hilbourn *v.* Fogg, 99 Mass. 11; Weld *v.* Baxter, 11 Exch. 816, 25 L. J. Exch. 214. See also *supra*, III, G, 6, d.

68. Brenner *v.* Bigelow, 8 Kan. 496; State *v.* Boyce, 109 N. C. 739, 14 S. E. 98; Pederick *v.* Searle, 5 Serg. & R. (Pa.) 236; Swan *v.* Castleman, 4 Baxt. (Tenn.) 257.

69. Byrnes *v.* Douglass, 23 Nev. 83, 42 Pac. 798; Benton *v.* Benton, 95 N. C. 559.

70. **Interpleader** generally see INTERPLEADER, 23 Cyc. 1.

71. Cowtan *v.* Williams, 9 Ves. Jr. 107, 32 Eng. Reprint 542.

72. Whitaker *v.* Whitaker, (Tenn. Ch. App. 1900) 62 S. W. 664; Johnson *v.* Atkinson, 3 Anstr. 798; Dungey *v.* Angove, 2 Ves. Jr. 304, 2 Rev. Rep. 217, 30 Eng. Reprint 644.

73. *Indiana.*— Kinney *v.* Laman, 8 Blackf. 350.

Kansas.— Johnson *v.* Woodbury Trust Co., 63 Kan. 880, 64 Pac. 1030.

Maryland.— Giles *v.* Ebsworth, 10 Md. 333. See also Funk *v.* Kincaid, 5 Md. 404.

e. To Show Termination of Title — (i) *General Rule.* The rule that a tenant will not be permitted to deny his landlord's title so long as he holds the possession originally derived from him does not forbid the tenant from showing that the landlord's title has expired or been extinguished since the creation of the tenancy.[74] The tenant may show that the landlord's estate has expired by limitation since the creation of the tenancy,[75] as by the death of the land-

Massachusetts.— Towne *v.* Butterfield, 97 Mass. 105.

Mississippi.— Wolf *v.* Johnson, 30 Miss. 513.

Missouri.— Chaffin *v.* Brockmeyer, 33 Mo. App. 92, holding that the rule does not prevent an attornment to the reversioner or remainder-man.

Nebraska.— McAusland *v.* Pundt, 1 Nebr. 211, 93 Am. Dec. 358.

New York.— Vernam *v.* Smith, 15 N. Y. 327; Zink *v.* Bohn, 3 N. Y. Suppl. 4.

North Carolina.— Heyer *v.* Beatty, 76 N. C. 28.

Tennessee.— Wood *v.* Turner, 8 Humphr. 685.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 176.

74. *Alabama.*— Farris *v.* Houston, 74 Ala. 162; Randolph *v.* Carlton, 8 Ala. 606.

Florida.— Winn *v.* Strickland, 34 Fla. 610, 16 So. 606; Robertson *v.* Biddell, 32 Fla. 304, 13 So. 358.

Illinois.— St. John *v.* Quitzow, 72 Ill. 334; Tilghman *v.* Little, 13 Ill. 239; Born *v.* Stafford, 93 Ill. App. 10. *Contra*, Fortier *v.* Ballance, 10 Ill. 41.

Indiana.— Kinney *v.* Doe, 8 Blackf. 350.

Kansas.— Fry *v.* Boman, 67 Kan. 531, 73 Pac. 61.

Kentucky.— Casey *v.* Gregory, 13 B. Mon. 505, 56 Am. Dec. 581.

Maryland.— Presstman *v.* Silljacks, 52 Md. 647; Giles *v.* Ebsworth, 10 Md. 333.

Massachusetts.— Lamson *v.* Clarkson, 113 Mass. 348, 18 Am. Rep. 498.

Michigan.— Sherman *v.* Fisher, 138 Mich. 391, 101 N. W. 572.

Minnesota.—Tilleny *v.* Knoblauch, 73 Minn. 108, 75 N. W. 1039.

Mississippi.— Wolf *v.* Johnson, 30 Miss. 513.

Missouri.— Robinson *v.* Troup Min. Co., 55 Mo. App. 662.

New Hampshire.— Russell *v.* Allard, 18 N. H. 222.

New Jersey.— Horner *v.* Leeds, 25 N. J. L. 106; Howell *v.* Ashmore, 22 N. J. L. 261.

New York.— Bigler *v.* Furman, 58 Barb. 545; Ryerss *v.* Farwell, 9 Barb. 615; Hilton *v.* Bender, 4 Thomps. & C. 270; Lawrence *v.* Miller, 1 Sandf. 516; Jackson *v.* Rowland, 6 Wend. 666, 22 Am. Dec. 557; Evertson *v.* Sawyer, 2 Wend. 507.

Ohio.— Devacht *v.* Newsam, 3 Ohio 57.

Pennsylvania.— Market Co. *v.* Lutz, 4 Phila. 322.

South Carolina.— Harvey *v.* Harvey, 26 S. C. 608, 2 S. E. 3.

Tennessee.— Bowser *v.* Bowser, 10 Humphr. 49.

Texas.— Franklin *v.* Hurlbert, 1 Tex. App. Civ. Cas. § 816.

Wisconsin.—Chase *v.* Dearborn, 21 Wis. 57.

England.— Downs *v.* Cooper, 2 Q. B. 256, 1 G. & D. 573, 6 Jur. 622, 11 L. J. Q. B. 2, 42 E. C. L. 663; London, etc., R. Co. *v.* West, L. R. 2 C. P. 553, 36 L. J. C. P. 245; Neave *v.* Moss, 1 Bing. 360, 2 L. J. C. P. O. S. 25, 8 Moore C. P. 389, 25 Rev. Rep. 650, 8 E. C. L. 548; Doe *v.* Whitroe, D. & R. N. P. 1, 25 Rev. Rep. 769, 16 E. C. L. 409; Mountney *v.* Collier, 1 E. & B. 630, 17 Jur. 503, 22 L. J. Q. B. 124, 1 Wkly. Rep. 179, 72 E. C. L. 630; Langford *v.* Selmes, 3 Jur. N. S. 859, 3 Kay & J. 220, 69 Eng. Reprint 1089; Doe *v.* Ramsbotham, 3 M. & S. 516; England *v.* Slade, 4 T. R. 682, 2 Rev. Rep. 498.

Canada.— Thatcher *v.* Bowman, 18 Ont. 265; Kelly *v.* Wolff, 12 Ont. Pr. 234; Patterson *v.* Smith, 42 U. C. Q. B. 1; Robertson *v.* Bannerman, 17 U. C. Q. B. 508; Doe *v.* Watson, 4 U. C. Q. B. 398.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 189.

The burden of proof to show that the landlord's title has ceased is on the tenant. Ashton *v.* Golden Gate Lumber Co., (Cal. 1899) 58 Pac. 1.

Tenant not claiming under outstanding title. — A tenant may show that his landlord's title has terminated, although the outstanding title is in the landlord's trustee and the tenant does not claim under it. Hoag *v.* Hoag, 35 N. Y. 469.

Either a legal or equitable transfer to another may be shown by the tenant to controvert his landlord's title. Sparks *v.* Walton, 4 Phila. (Pa.) 72.

Adverse title.— The right of a tenant to show that the title of the landlord has expired does not permit him to show a latent defect in the line of the landlord's title, which would raise an outstanding title under which the tenant does not claim to hold, and to which he has not attorned. Howell *v.* Ashmore, 22 N. J. L. 261.

Independent title.—Where a landlord's title has expired or been extinguished, the tenant cannot in any proceedings defeat the title of his landlord by an independent title. The title alleged by way of defense must be connected with the title of the lessor or it must be shown that the title of the lessor has been divested by an act of his own or by descent from him. Newell *v.* Gibbs, 1 Watts & S. (Pa.) 496.

75. Chaffin *v.* Brockmeyer, 33 Mo. App. 92; Lane *v.* Young, 66 Hun (N. Y.) 563, 21 N. Y. Suppl. 838; Rooker *v.* Demerit, 1 Ohio Cir. Ct. 156, 1 Ohio Cir. Dec. 89; Newell *v.* Gibbs, 1 Watts & S. (Pa.) 496. But see

lord.[76] There is no estoppel after the landlord's title has expired, although the tenant pays rent thereafter to the landlord with knowledge thereof.[77]

(II) *By Act of Landlord.* The tenant is not estopped to show that the landlord conveyed his interest in the land, after the creation of the tenancy and before the commencement of the action against the tenant,[78] especially where the tenant has attorned to the purchaser.[79]

(III) *By Operation of Law.* A tenant may show that the title of his landlord under which he entered has passed by operation of law to a third person,[80] and that he holds under the new owner.[81]

(IV) *Title Reverted to State.* There is an apparent exception to the rule that the tenant is not estopped to show the termination of the landlord's title where the landlord's title has reverted to the state.[82]

f. To Show Title in Tenant — (I) *Adverse Title.* Without the landlord's consent,[83] a tenant in possession cannot set up against his landlord a title acquired by him before,[84] or during his tenancy, hostile in its character to the title which he

Ashton *v.* Golden Gate Lumber Co., (Cal. 1899) 58 Pac. 1, where it is held that where the lease was made by a trustee and the title of the beneficiary ceased on her death, the tenant could not deny the title of the trustee where he had not been disturbed in his possession nor other persons had claimed the rent.

Life-estate.— In ejectment by a landlord's heirs a tenant may show that the landlord had only a life-estate that terminated before suit brought. Heckart *v.* McKee, 5 Watts (Pa.) 385.

76. *Connecticut.*— Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Illinois.— Wells *v.* Mason, 5 Ill. 84.

Pennsylvania.— Heckart *v.* McKee, 5 Watts 385.

England.—Doe *v.* Seaton, 2 C. M. & R. 728, 1 Gale 303, 5 L. J. Exch. 73, 1 Tyrw. & G. 19.

Canada.— Thatcher *v.* Bowman, 18 Ont. 265.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 189.

Lessee entitled to reversion.— A lease by a life-tenant for a term certain to the reversioner containing a covenant by the lessee to pay rent to the lessor, "her heirs and assigns," does not estop the lessee from showing that he has become owner on the lessor's death. Thatcher *v.* Bowman, 18 Ont. 265.

77. Randolph *v.* Carlton, 8 Ala. 606; McDevitt *v.* Sullivan, 8 Cal. 592; Robinson *v.* Troup Min. Co., 55 Mo. App. 662; Fenner *v.* Duplock, 2 Bing. 10, 2 L. J. C. P. O. S. 102, 9 Moore C. P. 32, 23 E. C. L. 459. But see Young *v.* Severy, 5 Okla. 630, 49 Pac. 1024.

78. *Kentucky.*—Gregory *v.* Crab, 2 B. Mon. 234, ejectment.

Michigan.— McGuffie *v.* Carter, 42 Mich. 497, 4 N. W. 211, summary proceedings.

Nebraska.—Allen *v.* Hall, 66 Nebr. 84, 92 N. W. 171.

New York.— Boyd *v.* Sametz, 17 Misc. 728, 40 N. Y. Suppl. 1070, 26 N. Y. Civ. Proc. 29, summary proceedings.

Oregon.—West Shore Mills Co. *v.* Edwards, 24 Oreg. 475, 33 Pac. 987, action for rent.

England.— Doe *v.* Watson, 2 Stark. 230, 3 E. C. L. 389.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 189.

An assignment of an unexpired portion of a lease, on condition that the assignee pay the landlord or his representative the rent for the term, will not estop the assignor from showing that his landlord's title had terminated where the landlord has conveyed his interest in the premises to another. Ryerss *v.* Farwell, 9 Barb. (N. Y.) 615.

79. Pentz *v.* Kuester, 41 Mo. 447.

80. Farris *v.* Houston, 74 Ala. 162; Randolph *v.* Carlton, 8 Ala. 606; Rhyne *v.* Guevara, 67 Miss. 139, 6 So. 736.

For instance he may show that the landlord's title has been divested by an execution or judicial sale (Walker *v.* Fisher, 117 Mich. 72, 75 N. W. 144; Wolf *v.* Johnson, 30 Miss. 513; Lancashire *v.* Mason, 75 N. C. 455; Smith *v.* Crosland, 106 Pa. St. 413; Bowser *v.* Bowser, 10 Humphr. (Tenn.) 49; Wood *v.* Turner, 8 Humphr. (Tenn.) 685. But see Life *v.* Secrest, Smith (Ind.) 319, holding, where an administrator leased lands of the deceased, that the tenant could not resist the payment of the rent to the administrator on the ground that the premises were sold to pay a debt of the intestate, where it appeared that the tenant occupied the premises until the end of the term); or by a tax-sale of the landlord's interest in the property (Keys *v.* Forrest, 90 Md. 132, 45 Atl. 22; Jenkinson *v.* Winans, 109 Mich. 524, 67 N. W. 549. But see Chase *v.* Dearborn, 21 Wis. 57, holding that the tenant, where not disturbed in his possession, could not set up a tax deed to a third person).

Where the title of the landlord has been adjudged void after the creation of the tenancy, the tenant is not estopped. McAusland *v.* Dundt, 1 Nebr. 211, 93 Am. Dec. 358.

81. Rhyme *v.* Guevara, 67 Miss. 139, 6 So. 736.

82. Young *v.* Severy, 5 Okla. 630, 49 Pac. 1024. See also Ellis *v.* Fitzpatrick, 118 Fed. 430, 55 C. C. A. 260.

83. Hughes *v.* Watt, 28 Ark. 153.

84. Morrison *v.* Bassett, 26 Minn. 235, 2 N. W. 851; Tatham *v.* Jones, 1 Phila. (Pa.) 214.

acknowledged in accepting the demise.[85] This rule does not prevent, however, the assertion of the adverse title at the end of the term, after possession is surrendered to the landlord.[86] But if a judgment of eviction has been rendered against either the landlord or the tenant, although there has been no actual eviction, the tenant may purchase the title of the real owner and claim thereunder;[87] but not after the judgment has expired without being enforced.[88]

(II) *Acquisition of Landlord's Title* — (A) *By Voluntary Act or Operation of Law.* Ordinarily the tenant may show that he has acquired the title of his landlord.[89] He may show that the property has been decreed to him by an order of court requiring the landlord to convey it to him,[90] or that he has become the owner by a conveyance from the landlord,[91] or by a purchase at a judicial or

85. *Illinois.*—Lowe *v.* Emerson, 48 Ill. 160; Barkman *v.* Barkman, 107 Ill. App. 332.

Iowa.— Stout *v.* Merrill, 35 Iowa 47.

Kentucky.— Drane *v.* Gregory, 3 B. Mon. 619; Chambers *v.* Pleak, 6 Dana 426, 32 Am. Dec. 78.

Louisiana.— Morgan City *v.* Dalton, 112 La. 9, 36 So. 208.

Mississippi.— Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

New York.— Lambert *v.* Huber, 22 Misc. 462, 50 N. Y. Suppl. 793; Sharpe *v.* Kelley, 5 Den. 431; Rowan *v.* Lytle, 11 Wend. 616.

North Carolina.— Heyer *v.* Beatty, 76 N. C. 28.

Pennsylvania.— Russell *v.* Titus, 3 Grant 295; Galloway *v.* Ogle, 2 Binn. 468.

Tennessee.—Wood *v.* Turner, 8 Humphr. 685, 7 Humphr. 517.

Texas.— Smith *v.* Redden, 1 Tex. Unrep. Cas. 360; McShan *v.* Myers, 1 Tex. Unrep. Cas. 100.

United States.—Peyton *v.* Stith, 5 Pet. 485, 8 L. ed. 200.

England.— Doe *v.* Hawkes, 4 L. J. K. B. O. S. 216.

Canada.— Doe *v.* Molloy, 6 U. C. Q. B. 302.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 193.

Compare Houston *v.* Farris, 71 Ala. 570; Henley *v.* Mobile Branch Bank, 16 Ala. 552; Hatch *v.* Bullock, 57 N. H. 15.

Land patent.— A tenant, where sued in ejectment, cannot set up a United States patent issued to her after the commencement of the suit, where the possession has not been surrendered to the landlord. Arnold *v.* Woodard, 4 Colo. 249.

A certificate of homestead entry granted to the tenant during the tenancy cannot be set up against his landlord by the tenant. Silvey *v.* Summer, 61 Mo. 253. But see Pain *v.* Miller, 35 Tex. 79, where it was held that the tenant was not precluded from acquiring a homestead in the demised premises, where he supposed at the time of the lease that the land belonged to the landlord and was not public land which the landlord had taken initial steps to acquire.

A purchase from the landlord's partner cannot be set up as against the landlord. Burgess *v.* Rice, 74 Cal. 590, 16 Pac. 496.

Purchase as inuring to benefit of landlord. — The acquisition of title by a tenant for years, by a fair purchase of the land after the execution of the lease does not inure to the landlord's benefit. Hodges *v.* Shields, 18 B. Mon. (Ky.) 828. *Compare* Smith *v.* Smith, Harp. Eq. (S. C.) 160.

Exception to rule.— Where the landlord is guilty of fraud in the execution of the lease, and is unable by reason of insolvency to indemnify the tenant for rents wrongfully exacted, the tenant may, while in possession, purchase a superior title, if he does so in good faith, from a well grounded fear of eviction, and rely on the title thus acquired in resisting a suit by the landlord for possession. Gallagher *v.* Bennett, 38 Tex. 291.

86. See *supra*, III, G, 9, b, (III).

87. Gore *v.* Stevens, 1 Dana (Ky.) 201, 25 Am. Dec. 141; Clapp *v.* Coble, 21 N. C. 177. But see Farrow *v.* Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250.

88. Pleak *v.* Chambers, 5 Dana (Ky.) 60.

89. Silvey *v.* Summer, 61 Mo. 253.

Devise of demised premises to tenant.— But it has been held that the fact that the leased premises are devised to the tenant on the landlord's death does not prevent the tenant being estopped after the landlord's death to deny his title in an action for arrears in rent. Hatch *v.* Bullock, 57 N. H. 15.

90. Swan *v.* Wilson, 1 A. K. Marsh. (Ky.) 99.

91. Silvey *v.* Summer, 61 Mo. 253; McShan *v.* Myers, 1 Tex. Unrep. Cas. 100; Wade *v.* South Penn Oil Co., 45 W. Va. 380, 32 S. E. 169; Watson *v.* Lane, 11 Exch. 769, 2 Jur. N. S. 119, 25 L. J. Exch. 101, 4 Wkly. Rep. 293.

Title of part of landlords.— A widow who joins with the heirs in a lease of land in which she is entitled to dower becomes vested with all the rights of a lessor, as against the tenant, and the fact that the heirs afterward convey their interests to the tenant does not affect the widow's right to her share of the rents. Sommer *v.* Bavarian Star Brewing Co., 6 Misc. (N. Y.) 413, 26 N. Y. Suppl. 865 [*affirmed* in 8 Misc. 268, 28 N. Y. Suppl. 571].

Presumptions.— Where a tenant in possession orally contracts for the purchase of the leased premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown that he holds under the contract of purchase. Schields *v.* Horbach, 49 Nebr. 262, 68 N. W. 524.

execution sale during the existence of the tenancy,[92] or by purchase from one who purchased at such a sale during the tenancy.[93]

(B) *Tax Title.* A purchaser cannot acquire a title as against his landlord by a purchase of the premises at a tax-sale, where the duty to pay the taxes for which the premises were sold devolved upon the tenant, either by statute[94] or by an agreement.[95] Where the tenant is under no duty to pay the taxes, it has been held that he may purchase at a tax-sale and set up the title against his landlord,[96] although in several states the contrary rule is established.[97]

(III) *Purchase of Encumbrances.* A tenant in possession cannot purchase an encumbrance on demised premises and claim thereunder before a surrender of

92. *California.*— Tewksbury *v.* Magraff, 33 Cal. 237.

Illinois.— Tilghman *v.* Little, 13 Ill. 239; Carson *v.* Crigler, 9 Ill. App. 83.

Kentucky.— Casey *v.* Gregory, 13 B. Mon. 565, 56 Am. Dec. 581.

Michigan.— Niles *v.* Ransford, 1 Mich. 338, 51 Am. Dec. 95.

Missouri.— Higgins *v.* Turner, 61 Mo. 249.

Pennsylvania.— Elliott *v.* Smith, 23 Pa. St. 131.

Texas.— Camley *v.* Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Franklin *v.* Hurlburt, 1 Tex. App. Civ. Cas. § 816.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 194.

But see Lausman *v.* Drahos, 10 Nebr. 172, 4 N. W. 956, 35 Am. Rep. 468, holding that where the purchase was made while the landlord was absent from the state, without notifying the landlord, the presumption is that the purchase was made to protect his possession and the landlord will be permitted to redeem.

Purchase at tenant's sale.— A tenant who is also a lien creditor cannot obtain title to the estate by issuing execution and purchasing at the execution sale, without notice to the landlord. Matthews' Appeal, 104 Pa. St. 444.

Deed after, but sale before, lease.— The purchase must be during the tenancy. That the sheriff's deed is subsequent to the lease does not show that the purchase was made during the tenancy, since the deed relates back to the time of the sale. Wood *v.* Turner, 7 Humphr. (Tenn.) 517.

93. Casey *v.* Gregory, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581.

94. Smith *v.* Specht, 58 N. J. Eq. 47, 42 Atl. 599.

95. *Illinois.*— Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Busch *v.* Huston, 75 Ill. 343.

Kansas.— Duffitt *v.* Tuhan, 28 Kan. 292; Carithers *v.* Weaver, 7 Kan. 110; Rowley *v.* Wilkinson, 8 Kan. App. 435, 57 Pac. 42.

Maine.— Haskell *v.* Putnam, 42 Me. 244.

Michigan.— Bertram *v.* Cook, 32 Mich. 518.

West Virginia.— Williamson *v.* Russell, 18 W. Va. 612.

Wisconsin.—Shepardson *v.* Elmore, 19 Wis. 424.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 197.

Duty to redeem from tax-sale.— One who enters on lands as the tenant of a grantee of a dower interest, and agrees to redeem the lands from a prior tax-sale to the state, cannot acquire title by purchase from the state, but such purchase becomes a redemption in favor of his landlord. Lyebrook *v.* Hall, 73 Miss. 509, 19 So. 348.

Purchase by third person in collusion with tenant.— If there is collusion between the tenant and the purchaser at a tax-sale to suffer the taxes, which it was the duty of the tenant to pay, to remain unpaid, and thereby to cause a sale by the collector of taxes, so as to enable the purchaser to buy in the property for the benefit of the tenant, the title of the property is not changed by such tax-sale, and the tenant remains tenant to the original landlord. Semmes *v.* McKnight, 21 Fed. Cas. No. 12,653, 5 Cranch C. C. 539.

96. *Arkansas.*— Waggener *v.* McLaughlin, 33 Ark. 195; Ferguson *v.* Etter, 21 Ark. 160, 76 Am. Dec. 361; Bettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442.

Florida.— Brown *v.* Atlanta Nat. Bldg., etc., Assoc., 46 Fla. 492, 35 So. 403.

Kansas.— Smith *v.* Newman, 62 Kan. 318, 62 Pac. 1011, 53 L. R. A. 934; Weichselbaum *v.* Curlett, 20 Kan. 709, 27 Am. Rep. 204.

Missouri.— Silvey *v.* Summer, 61 Mo. 253; Higgins *v.* Turner, 61 Mo. 249.

New York.— Hilton *v.* Bender, 4 Thomps. & C. 270; Sharpe *v.* Kelley, 5 Den. 431.

Ohio.— Mexwell *v.* Griftner, 13 Ohio Cir. Ct. 616, 5 Ohio Cir. Dec. 323.

Texas.—Crosby *v.* Bonnowsky, 29 Tex. Civ. App. 455, 69 S. W. 212.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 197.

Tax-sale before creation of tenancy.— A tenant cannot purchase a title derived from a tax-sale which occurred before the creation of the tenancy, so as to be able to assert such title against his landlord. Sharpe *v.* Kelley, 5 Den. (N. Y.) 431.

97. Jackson *v.* King, 82 Ala. 432, 3 So. 232; Bailey *v.* Campbell, 82 Ala. 342, 2 So. 646; Morris *v.* Apperson, 13 S. W. 441, 11 Ky. L. Rep. 838; Williams *v.* Towl, 65 Mich. 204, 31 N. W. 835; Walker *v.* Harrison, 75 Miss. 665, 23 So. 392 (holding, however, that a tenant coming into possession of land subsequent to its sale for taxes is not precluded by buying paramount title from the state); Lyebrook *v.* Hall, 73 Miss. 509, 19 So. 348.

possession.[98] For instance a tenant cannot, by purchase of a mortgage on the premises, acquire the rights of a mortgagee in possession, without a surrender of possession.[99]

11. Attornment to Third Person[1] — a. General Rule. Subject to a few exceptions to be hereafter noticed,[2] the general rule is that a tenant, without surrendering possession to his original landlord, cannot attorn to a stranger, and that such attornment is void and in no way affects the possession of the landlord.[3] In many states this rule with its exceptions is reiterated by statute.[4] In other words a tenant in possession under one title can make no valid attornment to one not in privity with that title,[5] although the attornee is the owner of the land,[6] or has other paramount title.[7]

98. Thrall *v.* Omaha Hotel Co., 5 Nebr. 295, 25 Am. Rep. 488.

99. Mattis *v.* Robinson, 1 Nebr. 3; Constant *v.* Barrett, 13 Misc. (N. Y.) 249, 34 N. Y. Suppl. 163. *Compare* Barson *v.* Mulligan, 66 N. Y. App. Div. 486, 73 N. Y. Suppl. 262. *Contra,* Pierce *v.* Brown, 24 Vt. 165, holding that a surrender of possession is unnecessary.

1. As affecting adverse possession see Adverse Possession, 1 Cyc. 1058 *et seq.*

Necessity for and sufficiency of attornment see *supra,* I, F, 1.

Validity of contract inducing tenant to attorn to another see Contracts, 9 Cyc. 469 note 67.

2. See *infra,* III, G, 11, b–d.

3. *Alabama.*—Doe *v.* Reynolds, 27 Ala. 364.

Arkansas.— Hughes *v.* Watt, 28 Ark. 153; Simmons *v.* Robertson, 27 Ark. 50.

Georgia.— Grizzard *v.* Roberts, 110 Ga. 41, 35 S. E. 291.

Illinois.— Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187; Hardin *v.* Forsythe, 99 Ill. 312.

Kentucky. — Ratcliff *v.* Bellfonte Iron Works Co., 87 Ky. 559, 10 S. W. 365, 10 Ky. L. Rep. 643; Trabue *v.* Ramage, 80 Ky. 323; Payne *v.* Vandever, 17 B. Mon. 14; Chambers *v.* Pleak, 6 Dana 426, 32 Am. Dec. 78; Fowler *v.* Cravens, 3 J. J. Marsh. 428, 20 Am. Dec. 153; Terry *v.* Terry, 66 S. W. 1024, 23 Ky. L. Rep. 2242.

Louisiana.— Wells *v.* Hickman, 6 Rob. 1.

Michigan.— Bertram *v.* Cook, 32 Mich. 518; Byrne *v.* Beeson, 1 Dougl. 179.

Mississippi.— McNamee *v.* Relf, 52 Miss. 426.

Missouri.— Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Leach *v.* Koenig, 55 Mo. 451; Schultz *v.* Arnot, 33 Mo. 172.

Nebraska. — Perkins *v.* Potts, 53 Nebr. 444, 73 N. W. 936; Galligher *v.* Connell, 23 Nebr. 391, 36 N. W. 566.

New York.— Freeman *v.* Ogden, 40 N. Y. 105; Kenada *v.* Gardner, 3 Barb. 589; Jackson *v.* De Lancey, 13 Johns. 537, 7 Am. Dec. 403; Jackson *v.* Miller, 6 Wend. 228, 21 Am. Dec. 316; Jackson *v.* Harper, 5 Wend. 246.

North Carolina. — State *v.* Howell, 107 N. C. 835, 12 S. E. 569.

Pennsylvania. — Nehr *v.* Krewsberg, 187 Pa. St. 53, 40 Atl. 810; Rankin *v.* Tenbrook, 5 Watts 386.

Texas.— Reichstetter *v.* Reese, (Civ. App. 1897) 39 S. W. 597.

Vermont.— Swift *v.* Gage, 26 Vt. 224.

West Virginia.— Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

United States.— U. S. *v.* Sliney, 21 Fed. 894.

England.— Hall *v.* Butler, 10 A. & E. 204, 8 L. J. Q. B. 239, 2 P. & D. 374, 37 E. C. L. 128; Doe *v.* Brown, 7 A. & E. 447, 8 L. J. Q. B. 349, 2 N. & P. 592, W. W. & D. 677, 34 E. C. L. 244; Cornish *v.* Searell, 8 B. & C. 471, 6 L. J. K. B. O. S. 254, 1 M. & R. 703, 15 E. C. L. 234; Williams *v.* Bartholomew, 1 B. & P. 326, 4 Rev. Rep. 81; Rogers *v.* Pitcher, 1 Marsh. 541, 6 Taunt. 202, 1 E. C. L. 577.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 210.

Persons holding under tenant.— A tenant or quasi-tenant, or one who has entered under either, cannot legally attorn to a stranger. Chambers *v.* Pleak, 6 Dana (Ky.) 426, 32 Am. Dec. 78. After a sale of land in possession of the tenant, he becomes the tenant of the vendee, as do all others coming into possession under him; and an attornment by them to a stranger is illegal. Breeding *v.* Taylor, 13 B. Mon. (Ky.) 477.

Tenant in common.— One in possession as tenant in common, in privity and full recognition of the title of the undivided interest not owned by himself, as belonging to someone else, is bound to account to the latter, and a promise to pay rent to another, made by such tenant in possession on the assumption that said promisee had such outstanding interest, cannot be enforced without proof that he held such title; for if he had no title the attornment would be void and the promise without consideration. Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122.

Payment of taxes as rent.— A tenant, although only paying the taxes as rent, cannot renounce his allegiance and become the tenant of another, unless the latter has acquired the landlord's title. Elliott *v.* Dycke, 78 Ala. 150.

4. See the statutes of the several states.

5. Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187.

6. Thompson *v.* Pioche, 44 Cal. 508.

7. Simmons *v.* Robertson, 27 Ark. 50; Lowe *v.* Emerson, 48 Ill. 160; Bailey *v.* Moore, 21 Ill. 165; Ebersol *v.* Trainor, 81 Ill. App. 645; Stover *v.* Davis, 57 W. Va. 196, 49 S. E. 1023.

b. Consent of Landlord. An attornment is valid where made with the landlord's consent,[8] as where he acquiesces in the payment of rent by his tenant to a third person.[9]

c. Attornment to One in Privity With Landlord's Title — (i) *Validity in General.* A tenant may attorn to a person in privity with his landlord's title, such as a grantee of the property,[10] or the remainder-man or reversioner.[11]

(ii) *To Mortgagee After Forfeiture of Mortgage.* Both by statute,[12] and at common law,[13] a tenant of a mortgagor may attorn to the mortgagee after the mortgage has become forfeited. However, in states where the title is in the mortgagor until a sale under foreclosure,[14] or until the expiration of the time to redeem after the sale,[15] the tenant cannot attorn immediately after condition broken, nor until the sale or the expiration of the time to redeem.

(iii) *To Purchaser at Judicial or Execution Sale.* A tenant may attorn to the purchaser of his landlord's interest at an execution sale,[16] or at a foreclosure sale.[17]

(iv) *To Purchaser at Tax-Sale.* It has been held that a tenant may attorn, on demand, to the holder of a paramount tax title acquired during the existence of the tenancy,[18] although there are authorities to the contrary.[19]

Without defending his possession or giving his landlord notice that it is attacked, a tenant, when proceeded against as an intruder, cannot treat himself as evicted and attorn to another. Williams *v.* McMichael, 64 Ga. 445.

Tenant of vendee.— The tenant of a purchaser who took possession under a bond for title could not, until the purchaser was legally evicted by the vendor, attorn to the vendor on the purchaser's failure to pay the price at maturity, without first surrendering to the purchaser. Broxton *v.* Ennis, 96 Ga. 792, 22 S. E. 945.

8. Trabue *v.* Ramage, 80 Ky. 323; Payne *v.* Vandever, 17 B. Mon. (Ky.) 14; Fowler *v.* Cravens, 3 J. J. Marsh. (Ky.) 428, 20 Am. Dec. 153; Bertram *v.* Cook, 32 Mich. 518; Leach *v.* Koenig, 55 Mo. 451; Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316; Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Jackson *v.* Welden, 3 Johns. (N. Y.) 283.

The burden of proving title, where the landlord consents to an attornment, is on the landlord, as if the action were against a stranger holding adversely. Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

It is not sufficient for the tenant to show that the landlord has acknowledged by parol that the title was in another. Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

9. Jackson *v.* Brush, 20 Johns. (N. Y.) 5.

10. Rhyne *v.* Guevara, 67 Miss. 139, 6 So. 736. See also *supra*, I, F.

11. Chaffin *v.* Brockmeyer, 33 Mo. App. 92.

12. Jones *v.* Clark, 20 Johns. (N. Y.) 51; Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365.

13. Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70; Smith *v.* Shepard, 15 Pick. (Mass.) 147, 25 Am. Dec. 432.

14. Hogsett *v.* Ellis, 17 Mich. 351.

15. Mills *v.* Heaton, 52 Iowa 215, 2 N. W. 1112; Mills *v.* Hamilton, 49 Iowa 105.

16. Bowser *v.* Bowser, 8 Humphr. (Tenn.) 23; Texas Land Co. *v.* Turman, 53 Tex. 619. But see Clampitt *v.* Kelley, 62 Mo. 571.

17. Conley *v.* Schiller, 24 N. Y. Suppl. 473.

But in Alabama the attornment by a tenant to the purchaser at the foreclosure sale of a mortgage executed by his landlord prior to the execution of the lease is no defense in an action by the landlord against the tenant for unlawful detainer. Davis *v.* Pou, 108 Ala. 443, 19 So. 362; Pugh *v.* Davis, 103 Ala. 316, 18 So. 8, 49 Am. St. Rep. 30.

In Missouri the tenant may not only attorn to a purchaser under foreclosure, without the landlord's consent, but must attorn on exhibition of the purchaser's deed; and if after such attornment the landlord enter the premises without the purchaser's consent he is guilty of forcible entry and detainer. Holden Bldg., etc., Assoc. *v.* Wann, 43 Mo. App. 640. And under a statute expressly providing that a tenant may attorn to a purchaser at a sale under a deed of trust, the lessee of a purchaser at a sale under a second deed of trust may lawfully attorn to the purchaser at a subsequent sale under the prior deed of trust. Freeman *v.* Moffitt, 119 Mo. 280, 25 S. W. 87. But the statute refers only to a deed of trust given by the landlord or one claiming under him. Pierce *v.* Rollins, 60 Mo. App. 497.

18. Jenkinson *v.* Winans, 109 Mich. 524, 67 N. W. 549.

Voidable tax deed.— A tenant of an owner of the fee-simple title to real estate may attorn to the holder of a tax deed regular on its face, but voidable, for the reason that illegal taxes were included in the amount of the expressed consideration stated therein. Sheaff *v.* Husted, 60 Kan. 770, 57 Pac. 976.

19. See Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370, holding that, conceding that the tenant may attorn to the holder of title under a tax-sale, that he cannot attorn to the holder of a deed made by a tax-collector.

d. After Judicial Determination as to Title. Where a judgment of eviction has been obtained,[20] even though there has been no actual eviction,[21] the tenant may attorn to the paramount title while the judgment is in force.[22] This rule does not apply, however, where the lease is taken after the judgment.[23]

e. Effect — (i) *Void Attornment.* Although there are some authorities which seem to hold that where the attornment is void as to the original landlord, the tenant is not estopped as against the person to whom he has attorned,[24] the better rule would seem to be that the estoppel extends to both landlords on the ground that, although the attornment is void as between the original landlord and tenant, it is not necessarily void between the tenant and the person to whom he attorned, in the absence of fraud or mistake as to the title of the attornee.[25]

(ii) *Fraud or Mistake.* If a tenant in possession under one landlord attorns to another through mistake or misapprehension of the facts, or misrepresentations as to the title, he is not estopped to deny the title of the landlord to whom he has attorned.[26]

In New York, under a statute providing that an attornment by a tenant to a stranger is void, it is held that a purchaser at a tax-sale is a stranger within the statute and not in privity with the landlord's title. O'Donnell *v.* McIntyre, 118 N. Y. 156, 23 N. E. 455 [*affirming* 37 Hun 623]; Sperling *v.* Isaacs, 13 Daly 275.

20. Steinback *v.* Krone, 36 Cal. 303; Wheelock *v.* Warschauer, 21 Cal. 309; Foster *v.* Morris, 3 A. K. Marsh. (Ky.) 609, 13 Am. Dec. 205; Foss *v.* Van Driele, 47 Mich. 201, 10 N. W. 199; Shultes *v.* Sickles, 70 Hun (N. Y.) 479, 24 N. Y. Suppl. 145.

Notice to landlord of suit.— A tenant who fails to comply with the statutory requirement to notify his landlord of a suit in ejectment will not be permitted, after judgment against himself therein, to attorn to plaintiff. Wheelock *v.* Warschauer, 21 Cal. 309; Love *v.* Emerson, 48 Ill. 160.

Necessity for appeal.— After judgment for the possession of the premises, the tenant may attorn without appealing from the judgment. Pacific Express Co. *v.* Haven, 41 La. Ann. 811, 6 So. 650.

Effect of reversal of judgment.— The attornment remains valid, although the judgment is reversed on appeal, if not suspended by supersedeas; but if the conveyance made to the attornee is set aside, the original landlord will be entitled to the money paid by the tenant to the attornee for rent. McMurtry *v.* Adams, 3 Bush (Ky.) 70.

Whether the attornment was in good faith is a question for the jury, where, after a decree showing the title not to be in the lessor, but without a decree of ouster, the lessee attorned to the paramount title under threat of dispossession. Messinger *v.* Union Warehouse Co., 39 Oreg. 546, 65 Pac. 808.

21. Lunsford *v.* Turner, 5 J. J. Marsh. (Ky.) 104, 20 Am. Dec. 248; Clapp *v.* Coble, 21 N. C. 177.

22. Chambers *v.* Pleak, 6 Dana (Ky.) 426, 32 Am. Dec. 78, holding that the tenant cannot attorn while the judgment is enjoined.

23. Mason *v.* Bascom, 3 B. Mon. (Ky.) 269.

24. Payne *v.* Vandever, 17 B. Mon. (Ky.) 14; Norton *v.* Sanders, 7 J. J. Marsh. (Ky.) 12; Byrne *v.* Beeson, 1 Dougl. (Mich.) 179; Cook *v.* Farrah, 105 Mo. 492, 16 S. W. 692; Donelly *v.* O'Day, 1 Misc. (N. Y.) 165, 20 N. Y. Suppl. 688, holding that the attornment does not create the relation of landlord and tenant.

25. *Alabama.*— Knox *v.* Easton, 38 Ala. 345.

California.— Thompson *v.* Pioche, 44 Cal. 508.

Colorado.— Lyon *v.* Washburn, 3 Colo. 201.

Illinois.— Carter *v.* Marshall, 72 Ill. 609; Petterson *v.* Sweet, 13 Ill. App. 255. See also Heyen *v.* Ward, 67 Ill. App. 472.

New York.— Kenada *v.* Gardner, 3 Barb. 589.

Pennsylvania.— Hamilton *v.* Pittock, 158 Pa. St. 457, 27 Atl. 1079.

West Virginia.— Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

United States.— Piper *v.* Cashell, 122 Fed. 614, 58 C. C. A. 396.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 174.

26. *Alabama.*— Farris *v.* Houston, 74 Ala. 162; Pearce *v.* Nix, 34 Ala. 183.

Georgia.— Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708.

Illinois.— Anderson *v.* Smith, 63 Ill. 126; Petterson *v.* Sweet, 13 Ill. App. 255.

Kentucky.— Payne *v.* Vandever, 17 B. Mon. 14.

Missouri.— Schultz *v.* Arnot, 33 Mo. 172.

Pennsylvania.— Gleim *v.* Rise, 6 Watts 44; Goldsmith *v.* Smith, 3 Phila. 360.

Rhode Island.— De Wolf *v.* Martin, 12 R. I. 533.

Tennessee.— Washington *v.* Conrad, 2 Humphr. 562.

Vermont.— Swift *v.* Dean, 11 Vt. 323, 34 Am. Dec. 693.

England.— Cornish *v.* Searell, 8 B. & C. 471, 6 L. J. K. B. O. S. 254, 1 M. & R. 703, 15 E. C. L. 234; Jew *v.* Wood, 3 Beav. 579, 43 Eng. Ch. 579, 49 Eng. Reprint 228, Cr. & Ph. 185, 18 Eng. Ch. 185, 41 Eng. Reprint 461, 5 Jur. 952, 10 L. J. Ch. 261; Gregory *v.* Doidge, 3 Bing. 474, 4 L. J. C. P. O. S. 159, 11 Moore C. P. 394, 11 E. C. L. 234;

12. Waiver of Right to Urge Estoppel. The estoppel to deny title is for the benefit of the lessor and may be waived by him.[27]

IV. Terms For Years.[28]

A. Nature and Extent — 1. Nature.[29] Estates for years embrace all terms limited to endure for a definite and ascertained period, however short or long this period may be; that is to say, they embrace terms for a fixed number of weeks or months, or for a single year, as well as for any definite number of years, however great.[30] At common law terms for years, however long, are but chattel interests and not real property.[31]

2. Creation and Validity.[32] At common law a term for years, however long, being only a chattel interest, might be created by mere oral agreement;[33] but

Gravenor *v.* Woodhouse, 1 Bing. 38, 7 Moore C. P. 289, 25 Rev. Rep. 582, 8 E. C. L. 390; Brook *v.* Biggs, 2 Bing. N. Cas. 572, 5 L. J. C. P. 143, 2 Scott 803, 29 E. C. L. 667; Rogers *v.* Pitcher, 1 Marsh. 541, 6 Taunt. 202, 1 E. C. L. 577.

Canada.— Dauphinais *v.* Clark, 3 Manitoba 225. See also Tennery *v.* Burnham, 10 U. C. Q. B. 298. *Contra,* see Montreal Bank *v.* Gilchrist, 6 Ont. App. 659.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 158.

27. Wood *v.* Chambers, 3 Rich. (S. C.) 150; Downs *v.* Cooper, 2 Q. B. 256, 1 G. & D. 573, 6 Jur. 622, 11 L. J. Q. B. 2, 42 E. C. L. 663. See also Philadelphia *v.* Permanent Bridge Co., 4 Binn. (Pa.) 283, holding that, under an agreement between landlord and tenant, entered into at the time of the lease, that the title should be settled by an amicable action, the tenant could dispute his landlord's title.

The estoppel is not waived by the landlord because of his failure to object, in trespass to try title against a tenant holding over, to evidence which showed title in the tenant acquired after his entry. Milhouse *v.* Patrick, 6 Rich. (S. C.) 350.

28. **Attachment of leasehold** see Attachment, 4 Cyc. 565, 598 note 69.

Renting on shares see *infra,* XI.

Right of tenant: To emblements see *infra,* VII, B, 4, b. To surplus on foreclosure of mortgage of premises see Mortgages. Right to redeem premises from mortgage see Mortgages.

Tenancy for life or for life of another see Estates, 16 Cyc. 614 *et seq.*

29. **Nature of estate:** For purpose of attachment see Attachment, 4 Cyc. 565, 598 note 69. For purpose of inheritance see Descent and Distribution, 14 Cyc. 18, 105. Under lease in fee see Ground-Rents, 20 Cyc. 1369.

30. Brown *v.* Bragg, 22 Ind. 122; Harley *v.* O'Donnell, 9 Pa. Co. Ct. 56. See *In re* King, L. R. 16 Eq. 521, 29 L. T. Rep. N. S. 288, 21 Wkly. Rep. 881.

A tenancy for a specified period of one month is a tenancy for years, and not a tenancy from year to year, or from month to month. Stoppelkamp *v.* Mangeot, 42 Cal. 316. See also *infra,* V, B, 2, a.

Every estate which must expire at a period certain and prefixed is in legal contemplation an estate for years. Harley *v.* O'Donnell, 9 Pa. Co. Ct. 56.

"A lease for years is a contract, by which one agrees, for a valuable consideration, called rent, to let another have the occupation and profits of land for a definite time." Moring *v.* Ward, 50 N. C. 272, 274.

31. *California.*— Jeffers *v.* Easton, 113 Cal. 345, 45 Pac. 680.

Connecticut.— Goodwin *v.* Goodwin, 33 Conn. 314.

Georgia.— Field *v.* Howell, 6 Ga. 423.

Indiana.— Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803.

Massachusetts.— Chapman *v.* Gray, 15 Mass. 439.

New Hampshire.—Brewster *v.* Hill, 1 N. H. 350.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351, holding that improvements by a tenant for years cannot convert his tenancy into a freehold estate.

Ohio.— Northern Bank *v.* Roosa, 13 Ohio 334; Hazard Powder Co. *v.* Loomis, 2 Disn. 544, so holding, although the lease gives the tenant an option to purchase the premises.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 215.

By statute in some states terms exceeding a certain number of years, usually three, are classed as real property for some purposes. Westchester Trust Co. *v.* Hobby Bottling Co., 102 N. Y. App. Div. 464, 92 N. Y. Suppl. 482; State Trust Co. *v.* Casino Co., 19 N. Y. App. Div. 344, 46 N. Y. Suppl. 492; Northern Bank *v.* Roosa, 13 Ohio 334.

Nature of estate for purpose of: Attachment see Attachment, 4 Cyc. 565, 598 note 69. Inheritance see Descent and Distribution, 14 Cyc. 18, 105.

32. **Agreement for lease:** Generally see *supra,* II, A, 1, f. Specific performance of agreement see Specific Performance.

Constitutional or statutory limitation of term see *supra,* II, A, 5, d.

Requisites and validity of leases in general see *supra,* II, A.

33. Moring *v.* Ward, 50 N. C. 272, holding, however, that entry was required to execute the contract and vest an estate as a term for years.

since the enactment of the statutes of frauds[34] all leases for a term exceeding a certain number of years, usually three, are required to be reduced to writing and signed by the parties; otherwise an estate for years is not created.[35] If an intention to grant a term for years is apparent, no set form is necessary to create the estate.[36] To create an estate for years the lease must be certain or capable of being made certain as to the beginning, duration, and termination of the term.[37] A lease for a term to commence *in futuro* is valid.[38]

3. Commencement, Continuance, and Termination[39] — a. Commencement. The time of commencement of the term depends primarily upon the terms of the lease, and secondarily upon the circumstances surrounding the transaction.[40]

34. St. 29 Car. II, c. 3. And see the statutes of the several states.

35. See Frauds, Statute of, 20 Cyc. 214.

36. Duncklee *v.* Webber, 151 Mass. 408, 24 N. E. 1082 (holding that where an owner of property executes an instrument reciting that he has "leased" it to another, and describing it, the term, and the rent, and times of payment, and the other party executes a like instrument reciting that he has "leased" the property of the owner, and these papers are exchanged by the parties, they amount to a present lease); Moring *v.* Ward, 50 N. C. 272; Berridge *v.* Glassey, 112 Pa. St. 442, 455, 3 Atl. 583, 56 Am. Rep. 322 (holding that a grant to a man and his heirs for a term of years, reserving rent, is a lease for the term). See also *supra*, II, A, 2. See, however, Duxbury *v.* Sandiford, 78 L. T. Rep. N. S. 230, holding that there must be words of demise.

37. Gwynne *v.* Mainstone, 3 C. & P. 302, 14 E. C. L. 579 (holding that a lease providing that the lessee shall pay certain specified rents, varying in amount, at the end of every three years up to a specified date, and that from and after that date "he shall pay the clear annual rent of 9*l.* till the end of the lease," but which does not mention any time at which the lease is to determine, is good only for the time previous to the date at which the 9*l.* is to commence); Reeve *v.* Thompson, 14 Ont. 499. And see Collier *v.* Hyatt, 110 Ga. 317, 35 S. E. 271. See also Specific Performance.

Commencement or termination dependent on collateral event.— A lease of a room in a building in process of erection for a certain term from the completion of the building is a valid lease *in præsenti* for a term to commence *in futuro*; and the necessary element of certainty in the commencement of the term is satisfied by the completion of the building and the occupancy of the room and payment of rent at the stipulated rate from an agreed time by the lessee (Hammond *v.* Barton, 93 Wis. 183, 67 N. W. 412 [*following* Colclough *v.* Carpeles, 89 Wis. 239, 61 N. W. 836]); and the fact that there was something unsatisfactory about the manner of completion of the building, and something to be fixed by the lessor, did not affect the validity of the lease (Hammond *v.* Barton, *supra*). It is not essential that the precise date of termination be predetermined; the duration of the tenancy may be fixed by such collateral and extraneous circumstances as the agreement itself provides. Harley *v.* O'Donnell, 9 Pa. Co. Ct. 56. See, however, Reeve *v.* Thompson, 14 Ont. 499, holding that a lease for a term to continue during the occupation of the premises by a third person then in possession as a tenant from year to year does not create a term for years, owing to the uncertainty of the termination thereof.

Options as to continuance or termination of tenancy.— A lease for eight years provided that all buildings which the lessee should erect should be appraised at the end of the term, and the appraised value be paid by the lessor, or that the lessor might allow the lessee to retain the premises until said sum was realized by the lessee at the rent stipulated, or might, at any time after part of the sum had been liquidated, pay the balance and resume possession. It was held that the provision concerning the holding after the expiration of eight years created a tenancy for years, there being sufficient certainty as to the beginning, continuance, and termination of the term. Flagg *v.* Dow, 99 Mass. 18. A lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is a good lease for seven years, whatever it may be for the fourteen or twenty-one years. Ferguson *v.* Cornish, 2 Burr. 1032, 3 T. R. 463 note. A lease made in 1785 for three, six, or nine years, determinable in 1788, 1791, 1794, is a lease for nine years, determinable at the end of three or six years by either of the parties on giving reasonable notice to quit. Goodright *v.* Richardson, 3 T. R. 462.

38. Field *v.* Howell, 6 Ga. 423; Hammond *v.* Barton, 93 Wis. 183, 67 N. W. 412; Colclough *v.* Carpeles, 89 Wis. 239, 61 N. W. 836.

39. Certainty as to commencement, continuance, and duration of term as essential to creation of term for years see *supra*, IV, A, 2.

40. Carmichael *v.* Brown, 97 Ga. 486, 25 S. E. 357 (holding that a lease of all the "pine timber" on a given acre of land, "for the purpose of manufacturing spirits of turpentine," etc., "for the full term of three years from the time boxes are cut," does not necessarily mean that the term of the lease will expire at the end of three years from the date the first trees are boxed, the words "from the time boxes are cut" being ambiguous, and requiring extraneous evidence in explanation

Accordingly the lease may as to its commencement operate prospectively[41] or retrospectively[42] from the execution of the lease, according to the intention of the parties and the language employed by them. If the lease is "from" a certain day, the word "from" is inclusive[43] or exclusive[44] according to the context and subject-matter; and the court will construe the lease so as to effectuate the intention of the parties.[45] A lease from a blank date in a certain year runs from the last day of the year specified.[46] If the landlord at different times grants two leases of the same premises to different persons, and the terms overlap, the second lease takes effect on the expiration of the first for as many years as then remain of the second term.[47]

b. Continuance and Termination.[48] The duration of a term, as in the case of its commencement, is governed primarily by the provisions of the lease;[49] but if the duration is not definitely expressed in the lease resort may be had to collateral or extrinsic circumstances.[50] Thus where a lease is ambiguous as to the length of the term, the construction placed upon it by the acts of the parties will, if in itself admissible, be adopted as the true intent thereof.[51] The duration of the term may be ascertained by reference to the covenant as to rent,[52] or to the amount

of them); Pendill *v.* Neuberger, 67 Mich. 562, 35 N. W. 249; Bacon *v.* Combes, 32 Misc. (N. Y.) 704, 65 N. Y. Suppl. 510.

The time when the lessee took possession is a material circumstance to be considered. Feyreisen *v.* Sanchez, 70 Ill. App. 105; Pendill *v.* Neuberger, 67 Mich. 562, 35 N. W. 249.

The time fixed for payment of rent is a material circumstance to be considered. Meeks *v.* Ring, 51 Hun (N. Y.) 329, 4 N. Y. Suppl. 117; Deyo *v.* Bleakley, 24 Barb. (N. Y.) 9; Thornton *v.* Payne, 5 Johns. (N. Y.) 74.

The time for which rent was paid is a material circumstance to be considered. Feyreisen *v.* Sanchez, 70 Ill. App. 105; Pendill *v.* Neuberger, 67 Mich. 562, 35 N. W. 249.

Parol evidence as to commencement of term see EVIDENCE, 17 Cyc. 625.

41. Noyes *v.* Loughead, 9 Wash. 325, 37 Pac. 452; White *v.* Nicholson, 11 L. J. C. P. 264, 4 M. & G. 95, 4 Scott N. R. 707, 43 E. C. L. 58; Bell *v.* McKindsey, 23 U. C. Q. B. 162 [*affirmed* in 3 Grant Err. & App. 9], where a lease was held to operate prospectively from the day of its execution and not prospectively from the day of its date.

42. Johnson *v.* Stagg, 2 Johns. (N. Y.) 510 (where a lease for nineteen years and nine months, made on the 1st of August, pursuant to a prior parol agreement for a lease of twenty years, was considered as relating back to the 1st of May); Spring *v.* Lorimer, 25 Pa. Super. Ct. 340; Steele *v.* Mart, 4 B. & C. 272, 6 D. & R. 392, 28 Rev. Rep. 256, 10 E. C. L. 576 (where a lease was held to operate retrospectively from the day of its execution and not retrospectively from the day of its date); Bird *v.* Baker, 1 E. & E. 12, 4 Jur. N. S. 1148, 28 L. J. Q. B. 7, 7 Wkly. Rep. 8, 102 E. C. L. 12.

43. Fox *v.* Nathans, 32 Conn. 348; Keyes *v.* Dearborn, 12 N. H. 52. And see Meeks *v.* Ring, 51 Hun (N. Y.) 329, 4 N. Y. Suppl. 117; Deyo *v.* Bleakley, 24 Barb. (N. Y.) 9.

44. Atkins *v.* Sleeper, 7 Allen (Mass.) 487; Doe *v.* Smyth, Anth. N. P. (N. Y.) 243; Anonymous, Lofft 275. And see Thornton *v.* Payne, 5 Johns. (N. Y.) 74.

45. Pugh *v.* Leeds, Cowp. 714.

46. Huffman *v.* McDaniel, 1 Oreg. 259.

47. Doe *v.* Jenkins, 1 L. J. K. B. 190.

48. **Constitutional or statutory limitation of term** see *supra*, II, A, 5, d.

Duration of term as affected by extension or renewal, or option to renew, or covenant or option to purchase or sell, see *infra*, IV, C.

Perpetuities see PERPETUITIES.

Termination of term otherwise than by lapse of time fixed in lease see *infra*, IX, B, 1.

49. Surles *v.* Milikin, 97 Ga. 485, 25 S. E. 322; Burris *v.* Jackson, 44 Ill. 345; Diehl *v.* Lee, 7 Pa. Cas. 134, 9 Atl. 865 (holding that a lease "by the month," at a certain rate a month, "to be given over to the same" on a certain future day, extends to the day named); Fraser *v.* Drynan, 9 N. Brunsw. 74 (holding that where the owner of a ferry leased it in May "for the season of 1855," this was not a lease for a year, but it terminated at the closing of the river by ice, or on the 31st of December, 1855); Kaatz *v.* White, 19 U. C. C. P. 36.

50. Horner *v.* Leeds, 25 N. J. L. 106.

Reference to other lease.— When plaintiff, holding land under a lease for twenty years, with right to renew for like periods indefinitely on certain conditions, leases the same to defendant for nine hundred and ninety-nine years, but subject to "all the covenants, conditions, limitations, and restrictions" contained in the first lease, the second lease is not absolute for the term named, but for that term in the event that the prior lease should not be terminated prior to the expiration of the nine hundred and ninety-nine years. Illinois Starch Co. *v.* Ottawa Hydraulic Co., 23 Ill. App. 272 [*affirmed* in 125 Ill. 237, 17 N. E. 486].

51. Siegel *v.* Colby, 61 Ill. App. 315.

52. Jenkins *v.* Gastonia Cotton Mfg. Co., 115 N. C. 535, 20 S. E. 724, holding that the

of rent paid thereunder.[53] A lease for a year is not converted into a tenancy from month to month by the fact that receipts for rent paid thereunder recite that the letting is for one month only.[54] Leases of doubtful duration must be construed favorably to the tenant.[55] Thus if it is left doubtful on which of two days the lease is to terminate, the lessee may elect on which of the two days it shall end.[56] Where a lease is to run for one or more years "from" a certain day, the corresponding day in the year in which the lease terminates is to be excluded in computing the duration of the term,[57] in the absence of custom to the contrary.[58] So in the absence of custom to the contrary[59] a lease "to" a certain day ends with the expiration of that day.[60] But it has been held that a lease "to end on" a certain day continues till noon of that day.[61] It has been provided by statute that agreements for the occupation of lands or tenements in New York city which do not particularly specify the duration of the occupation shall extend to the first day of May next after possession under the agreement commences.[62] Obvious mistakes of the parties in computing the term or specifying the day of termination will be disregarded by the court.[63] A lease for a certain term which gives the lessor[64] or the lessee[65] an option to continue the tenancy for an additional term terminates with the expiration of the term first mentioned unless the option is

fact that the rent is payable quarterly tends to show a letting for a year.

A lease for an annual rent, no definite time being fixed, is in effect a lease for a year. Benfey *v.* Congdon, 40 Mich. 283; Knoll *v.* Jones, 1 Pa. Co. Ct. 485.

53. Barrett *v.* Johnson, 2 Ind. App. 25, 27 N. E. 983; Jenkins *v.* Gastonia Cotton Mfg. Co., 115 N. C. 535, 20 S. E. 724, holding that the fact that rent had been paid quarterly for three quarters tends to show a lease for a year.

54. Green *v.* Weckle, 16 Misc. (N. Y.) 76, 37 N. Y. Suppl. 652. See also *infra*, V, B, 2, a.

55. Com. *v.* Philadelphia County, 3 Brewst. (Pa.) 537.

56. Murrell *v.* Lion, 30 La. Ann. 255.

57. Fox *v.* Nathans, 32 Conn. 348; Buchanan *v.* Whitman, 151 N. Y. 253, 45 N. E. 556 [*affirming* 76 Hun 67, 27 N. Y. Suppl. 604]; Marys *v.* Anderson, 24 Pa. St. 272, 2 Grant 446. *Contra*, Ackland *v.* Lutley, 9 A. & E. 879, 8 L. J. Q. B. 164, 1 P. & D. 636, 36 E. C. L. 457; McCallum *v.* Snyder, 10 U. C. C. P. 191.

58. Marsh *v.* Masterson, 15 Daly (N. Y.) 114, 3 N. Y. Suppl. 414, holding that it is a custom which has become law that a lease for one year from the first of May expires at noon on the first of the following May.

59. Insurance Co. *v.* Myers, 4 Lanc. Bar (Pa.) 151, holding that a tenancy to a particular day expires by custom at noon of the day designated.

60. People *v.* Robertson, 39 Barb. (N. Y.) 9.

61. People *v.* Robertson, 39 Barb. (N.Y.) 9.

62. Spies *v.* Voss, 16 Daly (N. Y.) 171, 9 N. Y. Suppl. 532 (holding that an agreement to occupy a part of a house for "a long time, for five years or eight years," falls within the statute, although the rent was fixed at so much per month and payable monthly); Greaton *v.* Smith, 1 Daly (N. Y.) 380 (holding that the statute does not apply where a tenant held over his term under a parol promise of a ten-year lease at a rent stated, and moved out on the landlord's refusal to execute the lease, since the agreement, although void, specified the duration); Taggard *v.* Roosevelt, 2 E. D. Smith (N. Y.) 100, 8 How. Pr. 141 (holding that a lease void by the statute of frauds is deemed valid till the first day of May next after possession given); Jennings *v.* McCarthy, 16 N. Y. Suppl. 161 (holding that the statute has no application to an occupation determinable at the will of either party); Hart *v.* McConnell, 5 N. Y. St. 900 (holding that the statute does not apply to an agreement for holding over after the termination of a lease, whereby the lessee was to remain so long as he chose, paying rent up to the time he moved out).

Constitutional or statutory limitation of term see *supra*, II, A, 5, d.

63. Siegel *v.* Colby, 176 Ill. 210, 52 N. E. 917 [*affirming* 61 Ill. App. 315]; Biddle *v.* Vandeventer, 26 Mo. 500; Nindle *v.* State Bank, 13 Nebr. 245, 13 N. W. 275; Burchell *v.* Clark, 2 C. P. D. 88, 46 L. J. C. P. 115, 35 L. T. Rep. N. S. 690, 25 Wkly. Rep. 334.

64. Cutler *v.* Whitcher, 21 Minn. 373, where the option was held to have been exercised in favor of a continuance of the term. And see Harris *v.* Evans, Ambl. 329, 1 Wils. C. P. 262, 27 Eng. Reprint 221.

65. Williams *v.* Mershon, 57 N. J. L. 242, 30 Atl. 619; Gillion *v.* Finley, 9 Pa. Cas. 559, 13 Atl. 83 (holding that the lessee may quit at the end of the term first mentioned); James *v.* Kibler, 94 Va. 165, 26 S. E. 417 (holding that such a lease is not a present lease for a term equal to the aggregate of the term first mentioned and the additional term). And see Harris *v.* Evans, Ambl. 329, 1 Wils. C. P. 262, 27 Eng. Reprint 221, holding that a lease to hold for one year, and so for two or three years, or such term as the parties should think fit, is a lease for one year only, without subsequent agreement.

Time for notice of intention to continue tenancy see Shipman *v.* Grant, 12 U. C. C. P. 395.

exercised. Either party may be given the option of terminating the lease on notice,[66] in which case the term continues until the option is exercised [67] by giving notice of an intention to terminate the lease according to its provisions.[68] The lessor may by his conduct estop himself from asserting that the lease has expired.[69]

B. Assignment, Sublease, and Mortgage[70]— **1. Right to Assign, Sublet, or Mortgage**[71]— **a. Right of Lessee.** In the absence of statutory or contractual restrictions to the contrary,[72] a lessee for years may, without the lessor's consent, or an express provision in the lease, either assign,[73] sublet,[74] or mortgage or otherwise

Necessity of exercising option to renew in order to extend term see *infra*, IV, C, 2, e, (VI).

66. Anderson *v.* Critcher, 11 Gill & J. (Md.) 450, 32 Am. Dec. 72 (option of lessee); Pepper *v.* Butler, 37 U. C. Q. B. 253, 256 (per Wilson, J., holding, however, that a provision authorizing the lessor to terminate the lease on his selling the premises does not apply to a sale subject to the lease).

Termination as against purchaser of premises.— The lessor cannot, as against one to whom he has sold the premises subject to the lease, exercise an option given him to terminate the lease in case he should have an opportunity to sell the premises. Pepper *v.* Butler, 37 U. C. Q. B. 253, 256, per Richards, C. J.

67. Dix *v.* Atkins, 130 Mass. 171; Anderson *v.* Critcher, 11 Gill & J. (Md.) 450, 32 Am. Dec. 72, option of lessee. See also Brown *v.* Montgomery, 21 Pa. Super. Ct. 262; Knoll *v.* Jones, 1 Pa. Co. Ct. 485.

Extension by retention of possession.— A provision in a lease that "if the tenant should continue on the premises after the termination of the contract" it should "continue in force for another year, and so on," etc., means a lawful continuance, not one in violation of his covenant to surrender. MacGregor *v.* Rawle, 57 Pa. St. 184.

68. Woodbridge Co. *v.* Charles E. Hires Co., 19 N. Y. App. Div. 128, 45 N. Y. Suppl. 991 (holding that a provision in a lease that the lessee may cancel it "at and from the first day of September, 1895, by giving thirty days' written notice" to the lessor, fixed the day mentioned as the point of time from which the lease might be canceled; and hence it was not canceled by a notice given less than thirty days before that date); Jones *v.* Dorothea Co., 58 L. T. Rep. N. S. 80; Counter *v.* Morton, 9 U. C. Q. B. 253 (where plaintiff leased to defendant for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises and prior to the termination of a full year by either party so inclined, and it was held that defendant was bound to give three months' notice of his intention to quit at the end of the first year). See also Woolsey *v.* Donnelly, 5 N. Y. Suppl. 238.

69. Daniels *v.* Edwards, 72 Ga. 196, holding that where a lease of turpentine lands was executed for a term of three years, but it was not specified when it should begin, except that the inference was warranted that the parties may have intended the term to commence when the trees should be boxed, the lessor is estopped by his action in urging the boxing of the trees after the three years expired, from asserting that the lease terminated with the expiration of the three years.

70. **Assignment of mortgage of reversion or rent,** see *supra*, III, D.

71. **Assignment or sublease by tenant on shares** see *infra*, XI, A.

Parol evidence as to right: To assign leasehold see Evidence, 17 Cyc. 623. To sublet see Evidence, 17 Cyc. 624.

72. See *infra*, IV, B, 1, f.

73. *Alabama.*— Nave *v.* Berry, 22 Ala. 382.

Georgia.— Clark *v.* Herring, 43 Ga. 226; Garner *v.* Byard, 23 Ga. 289, 68 Am. Dec. 527; Robinson *v.* Perry, 21 Ga. 183, 68 Am. Dec. 455.

Illinois.— Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Howland *v.* White, 48 Ill. App. 236.

Indiana.—Jackson *v.* Hughes, 1 Blackf. 421.

Maine.— Esty *v.* Baker, 48 Me. 495.

Maryland.— Culbreth *v.* Smith, 69 Md. 450, 16 Atl. 112, 1 L. R. A. 538.

Minnesota.— Gould *v.* Eagle Creek School Sub-Dist. No. 3, 8 Minn. 427.

Mississippi.— Harris *v.* Frank, 52 Miss. 155.

New Hampshire.—Spear *v.* Fuller, 8 N. H. 174, 28 Am. Dec. 391.

New Jersey.— Simpson *v.* Moorhead, 65 N. J. Eq. 623, 56 Atl. 887.

New York.— Clarkson *v.* Skidmore, 46 N. Y. 297.

North Carolina.— Moring *v.* Ward, 50 N. C. 272.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20; Williams *v.* Downing, 18 Pa. St. 60.

Vermont.— Cooney *v.* Hayes, 40 Vt. 478, 94 Am. Dec. 425.

United States.— McBee *v.* Sampson, 66 Fed. 416.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 221, 222.

Although the lease does not mention "assigns," yet the lessee may assign it. Crowe *v.* Riley, 63 Ohio St. 1, 57 N. E. 956; Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113; Church *v.* Brown, 15 Ves. Jr. 258, 10 Rev. Rep. 74, 33 Eng. Reprint 752.

74. *Alabama.*— Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499. And see Nave *v.* Berry, 22 Ala. 382.

Georgia.— Garner *v.* Byard, 23 Ga. 289, 68 Am. Dec. 527.

encumber[75] the term granted by the lease. But he cannot of course encumber the reversion by his contracts.[76]

b. Right of Assignee. In the absence of statutory or contractual restriction, the assignee of a leasehold may assign the same.[77] A covenant on the part of the lessee not to assign the lease without the lessor's consent does not as a rule bind the lessee's assignee,[78] and this is especially true with reference to persons in whom the lessee's estate has become vested by operation of law.[79] If the lessor consents to an assignment by the lessee,[80] or if he waives the lessee's breach of condition against assigning,[81] the covenant is extinguished, in the absence of statute to the contrary,[82] and the assignee is accordingly at liberty to assign the lease. If, however, the covenant is so worded as to bind the lessee's assigns, then the assignee is precluded from assigning without the lessor's consent;[83] and the same is true

Illinois.—Martin *v.* Sexton, 112 Ill. App. 199.

Louisiana.— Weatherly *v.* Baker, 25 La. Ann. 229.

Minnesota.— Gould *v.* Eagle Creek School Sub-Dist. No. 3, 8 Minn. 427.

New Jersey.— Simpson *v.* Moorhead, 65 N. J. Eq. 623, 56 Atl. 887.

New York.— Schenkel *v.* Lischinsky, 45 Misc. 423, 90 N. Y. Suppl. 300.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 221, 222.

75. Harman *v.* Allen, 11 Ga. 45 (right to create lien); Menger *v.* Ward, 87 Tex. 622, 30 S. W. 853 [*affirming* (Tex. Civ. App. 1894) 28 S. W. 821], holding that a lessee holding under a lease which authorizes him to sublet any part of the leased premises has the right to mortgage his leasehold estate. And see Nave *v.* Berry, 22 Ala. 382; Hilton's Appeal, 116 Pa. St. 351, 9 Atl. 342, right to mortgage conferred by statute.

76. Harman *v.* Allen, 11 Ga. 45.

Mortgage of leasehold as encumbering reversion see *infra*, IV, B, 6, a.

77. *California.*— Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481.

Illinois.— Readey *v.* American Brewing Co., 60 Ill. App. 501.

Maryland.— Hintze *v.* Thomas, 7 Md. 346.

New York.— Carter *v.* Hammett, 18 Barb. 608.

Washington.— Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

England.— Vallian *v.* Dodemede, 2 Atk. 546, 26 Eng. Reprint 728; Taylor *v.* Shum, 1 B. & P. 21, 4 Rev. Rep. 759; Fagg *v.* Dobie, 2 Jur. 681, 3 Y. & C. Exch. 96.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 224.

78. Paul *v.* Nurse, 8 B. & C. 486, 7 L. J. K. B. O. S. 12, 2 M. & R. 525, 15 E. C. L. 241; Doe *v.* Smith, 1 Marsh. 359, 2 Rose 280, 15 Rev. Rep. 660, 5 Taunt. 795, 1 E. C. L. 406; Crawford *v.* Bugg, 12 Ont. 8.

If the lease is not under seal, a stipulation that it should not be assigned without the written consent of the lessor does not extend beyond the immediate parties, and does not bind the assignee. Dougherty *v.* Matthews, 35 Mo. 520, 88 Am. Dec. 126.

79. See cases cited *infra*, this note.

Assignees, commissioners, and receivers appointed for the lessee in bankruptcy or insolvency proceedings are not bound by a covenant against assigning. Fleming *v.* Fleming Hotel Co., (N. J. Ch. 1905) 61 Atl. 157; *In re* Bush, 126 Fed. 878; Allen *v.* Bennett, 1 Fed. Cas. No. 214; Rogers *v.* Bateman, Fl. & K. 432 (*semble*); Doe *v.* Bevan, 3 M. & S. 353, 2 Rose 456, 16 Rev. Rep. 293; Goring *v.* Warner, 7 Vin. Abr. pl. 9.

The personal representatives of the lessee may dispose of a lease for years as assets notwithstanding a proviso or covenant that the lessee shall not assign. Barron *v.* Duncan, 6 La. 100; Seers *v.* Hind, 1 Ves. Jr. 294, 30 Eng. Reprint 351. And see Lee *v.* Lorsch, 37 U. C. Q. B. 262, 267, per Richards, C. J.

The assignee of an assignee by operation of law is not bound by a covenant against assigning. *In re* Bush, 126 Fed. 878.

Covenants binding on assignee by operation of law see *infra*, note 83.

80. *California.*— Chipman *v.* Emeric, 5 Cal. 49, 63 Am. Dec. 80.

Illinois.— Kew *v.* Trainor, 50 Ill. App. 629 [*affirmed* in 150 Ill. 150, 37 N. E. 223].

Maryland.— Reid *v.* John F. Wiessner Brewing Co., 88 Md. 234, 40 Atl. 877.

Massachusetts.— Pennock *v.* Lyons, 118 Mass. 92; Gannett *v.* Albree, 103 Mass. 372.

New York.— Murray *v.* Harway, 56 N. Y. 337; Siefke *v.* Koch, 31 How. Pr. 383; Dakin *v.* Williams, 17 Wend. 447.

England.— Dumpor's Case, 4 Coke 119*b*, 1 Smith Lead. Cas. 15; Doe *v.* Bliss, 4 Taunt. 735; Brummell *v.* Macpherson, 14 Ves. Jr. 173, 33 Eng. Reprint 487.

Canada.— Baldwin *v.* Wanzer, 22 Ont. 612.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 224.

The covenant is extinguished in equity as well as at law, where the lessor consents to an assignment by the lessee. Macher *v.* Foundling Hospital, 1 Ves. & B. 188, 35 Eng. Reprint 74.

81. Randol *v.* Tatum, 98 Cal. 390, 33 Pac. 433; Murray *v.* Harway, 56 N. Y. 337; Heeter *v.* Eckstein, 50 How. Pr. (N. Y.) 445.

82. See the statutes of the different states and 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 28; 29 Vict. c. 28, §§ 1, 2. And see Baldwin *v.* Wanzer, 22 Ont. 612; Toronto Hospital *v.* Denham, 31 U. C. C. P. 203; Lee *v.* Lorsch, 37 U. C. Q. B. 262, 277, per Wilson, J.

83. Williams *v.* Earle, L. R. 3 Q. B. 739, 9

where the lessor's consent to an assignment by the lessee is conditioned against an assignment by the assignee.[84] It has been held that a condition for reëntry in case the lessee enters into liquidation runs with the land and is binding on the assignee of the lessee.[85] A covenant not to sublet the premises binds the assignee of the term if proper words to that effect are employed;[86] otherwise not.[87]

c. Right of Sublessee. In the absence of any restriction to the contrary, a sublessee may sublet the premises.[88]

d. Right of Mortgagee. A covenant against subletting may be so worded as to bind a mortgagee of the term,[89] and also a purchaser of the term at foreclosure sale.[90]

e. Right as Conferred by Lease or Consent of Lessor.[91] Although the lessee's right to assign or sublet may be restricted by statute or by the terms of the lease yet it is common for the lease to provide that the lessee may assign or sublet with the lessor's consent, in which case the consent of the lessor renders the assignment or sublease valid and operative.[92] The consent is sometimes required

B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 238, 16 Wkly. Rep. 1041; Crawford *v.* Bugg, 12 Ont. 8.

An assignee by operation of law may be bound by a covenant against assigning if the necessary words are employed. Jackson *v.* Groat, 7 Cow. (N. Y.) 285. And see Roe *v.* Harrison, 2 T. R. 425, 1 Rev. Rep. 513.

Reassignment to lessee as breach of restriction against assigning see *infra*, IV, B, 1, f, (III).

84. Springer *v.* Chicago Real Estate, etc., Co., 202 Ill. 17, 66 N. E. 850 [*affirming* 102 Ill. App. 294]; Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223 [*affirming* 50 Ill. App. 629]; Eyton *v.* Jones, 21 L. T. Rep. N. S. 789.

85. Horsey *v.* Steiger, [1899] 2 Q. B. 79, 68 L. J. Q. B. 743, 80 L. T. Rep. N. S. 851, 47 Wkly. Rep. 644.

86. West Shore R. Co. *v.* Wenner, 71 N. J. L. 682, 60 Atl. 1134 [*affirming* 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801]. Roe *v.* Harrison, 2 T. R. 425, 1 Rev. Rep. 513, holding that if a lease contains a proviso that the lessee and his administrators shall not set, let, or assign over the whole or part of the premises without leave in writing, on pain of forfeiting the lease, the administratrix of the lessee cannot underlet without incurring a forfeiture.

87. Crawford *v.* Bugg, 12 Ont. 8.

88. Goldsmith *v.* Wilson, 68 Iowa 685, 28 N. W. 16; Phelps *v.* Erhardt, 2 Silv. Sup. (N. Y.) 336, 5 N. Y. Suppl. 540.

89. Bacon *v.* Campbell, 40 U. C. Q. B. 517.

90. West Shore R. Co. *v.* Weener, 71 N. J. L. 682, 60 Atl. 1134 [*affirming* 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801].

91. **Consent to assignment by lessee as extinguishing restriction against assignment by assignee** see *supra*, IV, B, 1, b.

Subsequent consent as waiver of breach of restriction see *infra*, IV, B, 1, f, (IV).

Waiver of breach of restriction against assignment or subletting see *infra*, IV, B, 1, f, (V).

92. Cleveland, etc., R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619 [*affirming* 90 Ill. App. 551] (holding that where the provisions of a lease of land on which a hotel was to be erected and kept by the lessee contemplated the assignment thereof with the consent of the lessor, and the lessor did consent to an assignment, he cannot afterward object that the lease is a contract for personal services rendering skill, which cannot be assigned); Kansas City Elevator Co. *v.* Union Pac. R. Co., 17 Fed. 200, 3 McCrary 463 (holding that where a lease contained a provision that the lessee should "not sublet, nor assign or transfer this agreement, without the written consent thereto of the superintendent" of the lessor, a railroad company, the superintendent appointed by a receiver of the lessor is to be regarded as the superintendent, and his assent to a sublease will be sufficient); West *v.* Dobb, L. R. 5 Q. B. 460, 10 B. & S. 987, 39 L. J. Q. B. 190, 23 L. T. Rep. N. S. 76, 18 Wkly. Rep. 1167.

Consent obtained by fraud.— A lease forbade subletting without the consent of the lessor, and on the latter's consent for a portion of the term, the lessee, without his knowledge, sublet, with the privilege of renewal on notice, for the balance of his term, and the sublease was afterward transferred by the sublessee to another person for value, to which transfer the lessor gave his consent in writing, while ignorant of the provision for renewal. It was held that if the transferee for value was ignorant that the consent was obtained by fraud he would not be liable to forfeit his lease. Collins *v.* Hasbrouck, 1 Thomps. & C. (N. Y.) 36.

Evidence as to consent.— The assent of a lessor to an assignment by the lessee may, in the absence of evidence to the contrary, be implied from his charging the rent to the new tenant and accepting payment thereof from him. Nova Cesarea Harmony Lodge No. 2 *v.* White, 30 Ohio St. 569, 27 Am. Rep. 492. See also *infra*, IV, B, 1, f, (IV). So where a landlord knew that a lease was taken in the name of an individual pending the organization of a corporation for which the land was leased, his consent to an assignment of the lease by the individual lessee may be implied. Heckman's Estate, 3 Pa. Dist. 479.

by the terms of the lease to be expressed in writing.[93] A lease may provide that the lessor shall not withhold his consent except upon reasonable grounds,[94] in which case the lessor cannot impose unreasonable terms on the lessee as a condi-

However, proof of occupation of demised premises by a new firm of F. & Co., and that the rent was paid by checks of F. & Co., in the absence of proof that the landlord had knowledge of the formation of the new firm, is not evidence of his assent to an assignment to them by F., the original lessee, who had previously paid rent by checks in the same form. Drummond *v.* Fisher, 16 N. Y. Suppl. 867. And where a lease provided that the premises should not be sublet without the consent of the lessor expressed in writing on the back of the lease, the fact that the lease bears no such written consent is *prima facie* evidence that none was given. Berryhill *v.* Healey, 89 Minn. 444, 95 N. W. 314.

Scope of authority or consent.— Authority to sublet carries with it authority to mortgage the lease. Menger *v.* Ward, 87 Tex. 622, 30 S. W. 853 [*affirming* (Civ. App. 1894) 28 S. W. 821]. But the privilege given to a lessee "of subletting the premises to any responsible party in the same line of business, or in any line of business agreeable to the lessor," is a personal trust given to the lessee, and does not confer a general power to sublet. Boone *v.* Waxahachie First Nat. Bank, 17 Tex. Civ. App. 365, 43 S. W. 594. Consent to a sublease to one person does not authorize the lessee to make a second sublease to a different person. Wertheimer *v.* Wayne Cir. Judge, 83 Mich. 56, 47 N. W. 47; Fidelity Trust Co. *v.* Kohn, 27 Pa. Super. Ct. 374; Eastern Tel. Co. *v.* Dent, [1899] 1 Q. B. 835, 68 L. J. Q. B. 564, 80 L. T. Rep. N. S. 459 [*affirming* 78 L. T. Rep. N. S. 713]. Waiver of one subletting as waiver of subsequent subletting by lessee see *infra*, IV, B, 1, f, (IV). And under a lease of a three-story building, with the right to sublet the second and third floors, the lessee cannot sublet the roof. O. J. Gude Co. *v.* Farley, 28 Misc. (N. Y.) 184, 58 N. Y. Suppl. 1036. Where a lease provided that the lessee should not underlet without the lessor's consent in writing, and that the premises were to be used for the sale of certain articles only, except by the written assent of the lessor, the lessor's permission to use the premises for the sale of certain other articles was not a consent that the lessee might underlet, so long as the premises were not used for any of the purposes prohibited in the letter. Farr *v.* Kenyon, 20 R. I. 376, 39 Atl. 241.

As against third persons.— A void assignment cannot be validated by an oral consent given after a third party has obtained possession. Carter *v.* Russell, 101 Mass. 53.

93. Richardson *v.* Evans, 3 Madd. 218, 56 Eng. Reprint 490.

Requisites and sufficiency of writing.— Written notice of termination of the tenancy given by the lessor to an assignee of the lease is a sufficient written assent to the assignment, within Mo. Rev. St. § 4107, requiring such assent by the landlord to validate the assignment. B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967. Consent need not be indorsed on the assignment, where it is indorsed on the lease, pursuant to its terms. *In re* Ulster Permanent Bldg. Soc., L. R. 13 Ir. 67. The fact that the assent of the lessors to the transfer of a lease under seal was not under seal does not affect its validity. Stillman *v.* Harvey, 47 Conn. 26.

Written consent may be waived by parol.— Benson *v.* Suarez, 43 Barb. (N. Y.) 408, 19 Abb. Pr. 61, 28 How. Pr. 511; Dierig *v.* Callahan, 35 Misc. (N. Y.) 30, 70 N. Y. Suppl. 210 [*reversing* 34 Misc. 218, 68 N. Y. Suppl. 1131]; Weisbrod *v.* Dembosky, 25 Misc. (N. Y.) 485, 55 N. Y. Suppl. 1; Prevost *v.* Holland, 15 Quebec Super. Ct. 298 [*following* Cordner *v.* Mitchell, 9 L. J. Jur. 319, 1 L. C. L. J. 28]. See also *infra*, IV, B, 1, f, (IV). See, however, Roe *v.* Harrison, 2 T. R. 425, 1 Rev. Rep. 513. By accepting rent from the assignee and otherwise recognizing him as tenant the lessor waives the statutory requirement of written assent to an assignment. B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967. But the fact that a lessor received from the lessee the rent stipulated for in a lease cannot be construed as a waiver of any right of objection to a subletting of the demised premises without the consent of the lessor, when the lease especially provides that such consent must be obtained in writing. Meath *v.* Watson, 76 Ill. App. 516.

94. See cases cited *infra*, this note.

Grounds for refusing consent.— Where there is a covenant not to sublet without consent, but such consent must not be withheld except on reasonable objection, and a heavy rent is reserved by the lease, very strong ground for refusing the consent must be shown, as the refusal throws a heavy burden of rent on the lessees. Sheppard *v.* Hongkong, etc., Banking Corp., 20 Wkly. Rep. 459. So where a lease contained a covenant by the lessee not to assign without license, and the lessor covenanted not to withhold his license to assign unreasonably or vexatiously, it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing the license being avowedly his wish to get possession of the premises. Bates *v.* Donaldson, [1896] 2 Q. B. 241, 60 J. P. 596, 65 L. J. Q. B. 578, 74 L. T. Rep. N. S. 751, 44 Wkly. Rep. 659; Lehmann *v.* McArthur, L. R. 3 Eq. 746, 16 L. T. Rep. N. S. 196, 15 Wkly. Rep. 551. However, the burden of showing that the proposed assignee is a respectable person of responsibility is on the lessee. Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407; Harrison

tion of granting his consent.[95] If the right to assign or sublet is restricted by statute or by the terms of the lease, and the lessor does not covenant to give his consent to an assignment or subletting, the lessee has no remedy against the lessor for his refusal to consent thereto.[96] Under a permission to sublet, the lessee may mortgage the lease.[97]

f. Statutory or Contractual Restriction of Right — (i) *In General.*[98] In some states it is provided by statute that the lessee shall not assign the term or sublet the premises except by consent of the lessor;[99] and independently of statute the lessor may by the terms of the lease impose restrictions on the right of

v. Barrow-in-Furness Corp., 63 L. T. Rep. N. S. 834, 39 Wkly. Rep. 250.

Stipulation as dispensing with lessor's consent.— Consent of the lessor to an assignment or a sublease to a respectable person of responsibility has been held to be unnecessary where he has stipulated not to withhold his consent in such case. Hyde *v.* Warden, 3 Ex. D. 72, 47 L. J. Exch. 121, 37 L. T. Rep. N. S. 567, 26 Wkly. Rep. 201; Burford *v.* Unwin, Cab. & E. 494; Tobin *v.* Cleary, Ir. R. 7 C. L. 17.

Relief against forfeiture on ground that lessor's consent could not lawfully have been withheld see *infra*, IX, B, 7, h.

Parties to bill to compel lessor to grant license see Maule *v.* Beaufort, 1 Russ. 349, 46 Eng. Ch. 311, 38 Eng. Reprint 136.

Refusal of consent as defense to action for rent see *infra*, VIII, A, 2.

95. Young *v.* Ashley Gardens Properties, [1903] 2 Ch. 112, 72 L. J. Ch. 520, 88 L. T. Rep. N. S. 541, holding that where a lessor attaches to a license to assign the lease a condition which is in the opinion of the court unreasonable, the court can, in an action by the lessee asking for the declarations, make declarations that the lessor is not entitled to impose the condition in question as a condition of giving his license, and that the lessee is entitled to assign his lease to the proposed assignee without any further consent of the lessor.

The lessor may require a deposit as security for performance of the lease as a condition of granting his consent. *In re* Cosh, [1897] 1 Ch. 9, 66 L. J. Ch. 28, 75 L. T. Rep. N. S. 365, 45 Wkly. Rep. 117.

96. Hill *v.* Rudd, 99 Ky. 178, 35 S. W. 270, 18 Ky. L. Rep. 55 (holding that where the lease provided that the property should not be sublet without the lessor's written consent, it was not ground for cancellation that the lessor refused to give consent in writing to the subletting of the premises); Spota *v.* Hayes, 36 Misc. (N. Y.) 532, 73 N. Y. Suppl. 959 (holding that where a written lease forbids subletting, the tenant has no cause of action against the landlord for breach of his subsequent oral assent to such subletting, without any new consideration moving to him); Sear *v.* House Property, etc., Soc., 16 Ch. Div. 387, 45 J. P. 204, 50 L. J. Ch. 77, 43 L. T. Rep. N. S. 531, 29 Wkly. Rep. 192; Treloar *v.* Bigge, L. R. 9 Exch. 151, 43 L. J. Exch. 95, 22 Wkly. Rep. 843.

97. Menger *v.* Ward, 87 Tex. 622, 30 S. W. 853.

98. Rights and liabilities of lessor on breach of restriction: In general see *infra*, IV, B, 4, e, (IV), 5, c. Right to recover damages for breach see *infra*, IV, B, 1, f, (V). Right to reënter see *infra*, IX, B, 7, d, (I), (C).

Rights and liabilities of lessee on breach of restriction: In general see *infra*, IV, B, 4, c, (IV); IV, B, 5, c. Liability for damages for breach see *infra*, IV, B, 1, f, (V).

Rights and liabilities of assignee on breach of restriction: In general see *infra*, IV, B, 4, c, (IV). Right to take advantage of breach see *infra*, IV, B, 1, f, (II). Liability for damages for breach see *infra*, IV, B, 1, f, (V).

Rights and liabilities of subtenant on breach of restriction: In general see *infra*, IV, B, 5, c. Right to take advantage of breach see *infra*, IV, B, 1, f, (II).

99. See the statutes of the different states.

In Georgia, by Civ. Code (1895), § 3115, a tenant for a term less than five years has only a usufruct in the land, in the absence of agreement to the contrary, and he cannot convey it by assignment or sublease except by the landlord's consent. Bass *v.* West, 110 Ga. 698, 36 S. E. 244; Willingham *v.* Faircloth, 52 Ga. 126; Sealy *v.* Kuttner, 41 Ga. 594; McBurney *v.* McIntyre, 38 Ga. 261.

In Kansas by Gen. St. (1905) § 4061, if the term does not exceed two years, the tenant cannot assign or transfer his term or interest without the landlord's written assent. Gano *v.* Prindle, 6 Kan. App. 851, 50 Pac. 110.

In Kentucky by St. (1903) § 2292, if the term is for less than two years the lessee cannot assign or transfer his term or interest without the lessor's written consent. If the term fixed by the lease is for two years or more it may be assigned. Grizzle *v.* Pennington, 14 Bush (Ky.) 115; Pierce *v.* Meadows, 86 S. W. 1127, 27 Ky. L. Rep. 870; Connor *v.* Withers, 49 S. W. 309, 20 Ky. L. Rep. 1326.

In Missouri, by Rev. St. (1899) § 4107, if the term does not exceed two years the tenant cannot assign or transfer his term or interest without the landlord's written assent. A lease for one year, with a promise that after that time it may be ended by six months' notice from either party, is within the statute, and cannot be assigned without the lessor's consent (B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67

the tenant to assign the term,[1] or sublet the premises.[2] Where, however, lands are leased in fee, the lessor has no reversion or possibility of reversion, and hence he cannot impose restraints upon the lessee's power of alienation.[3] A covenant not to assign[4] or sublet[5] is to be construed strictly against the lessor. If a lease

S. W. 967); but a lease for one year with an option to the lessee to renew from year to year for five years is in effect a lease for more than two years, so as to be assignable without the landlord's consent (Jones *v.* Kansas City Bd. of Trade, 99 Mo. App. 433, 78 S. W. 843).

In Texas, by Rev. St. (1895) art. 3250, the tenant cannot "rent or lease" the premises without the landlord's consent. This statute precludes subleases (Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481; Waggoner *v.* Snody, 36 Tex. Civ. App. 514, 82 S. W. 355 [*reversed* on other grounds in 98 Tex. 512, 85 S. W. 1134]; Gartrell *v.* State, (Cr. App. 1901) 61 S. W. 487; Rose *v.* Riddle, 3 Tex. App. Civ. Cas. § 298), and also assignments (Forrest *v.* Durnell, *supra*; Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228; Slaughter *v.* Coke County, 34 Tex. Civ. App. 598, 79 S. W. 863; Matthews *v.* Whitaker, (Civ. App. 1893) 23 S. W. 538), by the tenant without the landlord's consent.

Subletting.— A statute prohibiting a tenant for a term not exceeding two years from assigning his lease without the written consent of the landlord, has been held not to prohibit him from subletting. Moore *v.* Guardian Trust Co., 173 Mo. 218, 73 S. W. 143.

1. *Illinois.*— Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223; Medinah Temple Co. *v.* Currey, 58 Ill. App. 433.

Massachusetts.— Porter *v.* Merrill, 124 Mass. 534; Austin *v.* Harris, 10 Gray 296; Shattuck *v.* Lovejoy, 8 Gray 204.

New Hampshire.— Upton *v.* Hosmer, 70 N. H. 493, 49 Atl. 96, where a term lease of land on which the lessee had erected a cottage authorized him to terminate the lease and remove the cottage at any time, and authorized the sale of the house to be used on the premises on the consent of the lessor, and the lease contained a covenant not to underlet, and all the rights thereunder were expressly granted to the lessee and his heirs, but no mention was made of his assigns, and it was held to prohibit an assignment of the lease without the consent of the lessor.

New York.— Chautauqua Assembly *v.* Alling, 46 Hun 582; Jackson *v.* Groat, 7 Cow. 285, holding that a covenant by a lessor that if the lessee or his assigns shall be minded to sell or dispose of their interest they may do so, first giving preëmption to the lessor and paying one tenth of the purchase-money to him, provided that if this be not done, the lease shall be forfeited, is valid.

North Carolina.— Hargrave *v.* King, 40 N. C. 430.

England.— Elliott *v.* Johnson, L. R. 2 Q. B. 120, 8 B. & S. 38, 36 L. J. Q. B. 41, 15 Wkly. Rep. 253; Doe *v.* Carter, 8 T. R. 57, 4 Rev. Rep. 586.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 225.

Repugnancy of proviso against assignment. — A proviso against assignment without license in a lease to the lessee, his executors, administrators, and assigns, is not repugnant, for the construction is that it extends to such assigns only as he may lawfully have, viz., by license or by law, as assignees in bankruptcy. Weatherall *v.* Geering, 12 Ves. Jr. 504, 8 Rev. Rep. 369, 33 Eng. Reprint 191.

Right of mortgage-lessor to impose restriction against assignment.— As against others than the mortgagee, the mortgagor is the legal owner of the estate, so that when making a lease he may reserve a covenant against assignment without written consent. Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25.

Operation as against taking for public use. — Where a railway company serves a notice, under the Lands Clauses Act, on a lessee to take land held under a lease containing a proviso against assignment without the license of the lessor, the necessity for such license is taken away by the operation of the act. Slipper *v.* Tottenham, etc., R. Co., L. R. 4 Eq. 112, 36 L. J. Ch. 841, 16 L. T. Rep. N. S. 446, 15 Wkly. Rep. 861.

What constitutes assignment within restriction see *infra*, IV, B, 2, a.

2. Meyer *v.* Rothschild, 46 La. Ann. 1174, 15 So. 383; Field *v.* Mills, 33 N. J. L. 254; Barrington Apartment Assoc. *v.* Watson, 38 Hun (N. Y.) 545; Lynde *v.* Hough, 27 Barb. (N. Y.) 415; McArthur *v.* Alison, 40 U. C. Q. B. 576.

Necessity of record.— An agreement not to sublet, contained in a lease which is not placed upon record, is inoperative as to one who subleases the property, as he is presumed to have acted upon La. Civ. Code, art. 2696, which gives lessees the right to underlease. Arent *v.* Bone, 23 La. Ann. 387.

What constitutes sublease within restriction see *infra*, IV, B, 2, b.

3. De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470.

4. Medinah Temple Co. *v.* Currey, 58 Ill. App. 433; Boyd *v.* Fraternity Hall Assoc., 16 Ill. App. 574; Livingston *v.* Stickles, 7 Hill (N. Y.) 253.

5. Boyd *v.* Fraternity Hall Assoc., 16 Ill. App. 574; Livingston *v.* Stickles, 7 Hill (N. Y.) 253. *Contra*, Cordeviolle *v.* Redon, 4 La. Ann. 40, holding that La. Civ. Code, art. 2696, declaring that a clause against under-leasing is always construed strictly, requires that a prohibition against subletting shall be construed strictly against the lessee.

A letting of the premises from year to year by the tenant is a breach of a covenant not to "underlease." Timms *v.* Baker, 49 L. T. Rep. N. S. 106.

prohibits subletting and the lessee alleges a contemporaneous parol agreement permitting subletting, the burden is on him to prove the agreement by a preponderance of evidence.[6]

(II) *Persons Entitled to Benefit of Restriction.* Restrictions against assignment or subleases, whether imposed by statute or by the terms of the lease, are intended for the benefit of the lessor[7] and his assigns,[8] and if neither of these object to a breach of the restriction no one else may do so.[9] One to whom the term has been assigned in breach of the restriction cannot set up the breach in defense of an action brought against him by the lessor on the lease,[10] or in defense of an action brought against him by the lessee on obligations incident to the assignment;[11] nor can a sublessee of the assignee set up the breach in defense of an action brought against him by the assignee on the sublease.[12]

(III) *What Constitutes Breach of Restriction*— (A) *In General.* The question of what acts amount to an assignment[13] or a sublease,[14] within the meaning of restrictions against assigning or subletting, is considered in another connection. The authorities are not in accord as to whether one to whom a lease containing a restriction against assignment has been assigned with the lessor's consent may without a new consent reassign the term to the lessee.[15] An invalid

6. Zeigler *v.* Lichten, 205 Pa. St. 104, 54 Atl. 489; Fidelity Trust Co. *v.* Kohn, 27 Pa. Super. Ct. 374, holding that such agreement is not established, where the only evidence in support of it is that of the lessee, while that of the lessor is in direct contradiction of it, and in addition it appears that a paper attached to the lease gave to the lessee permission only to sublet a portion of one story for a particular purpose.

7. Betts *v.* Dick, 1 Pennew. (Del.) 268, 40 Atl. 185; Chicago Attachment Co. *v.* Davis Sewing-Mach. Co., (Ill. 1890) 25 N. E. 669 [*affirming* 33 Ill. App. 362]; Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; Montecon *v.* Faures, 3 La. Ann. 43.

8. Cordeviolle *v.* Redon, 4 La. Ann. 40, holding that a restriction against subletting is not personal to the lessor, and in the absence of any stipulation to the contrary it may be enforced by one to whom the contract has been assigned by the lessor.

If, however, the reversion is severed by conveyance of a part to a stranger, the condition against assignment by the lessee without leave is destroyed *in toto*, since it cannot be apportioned (Wright *v.* Burroughes, 3 C. B. 685, 4 D. & L. 438, 12 Jur. 968, 16 L. J. C. P. 6, 54 E. C. L. 685; Dumpor's Case, 4 Coke 119*b*, Smith Lead. Cas. 49; Baldwin *v.* Wanzer, 22 Ont. 612), in the absence of statute to the contrary (see 44, 45 Vict. c. 41, § 12). But this rule does not apply to an apportionment by act of law or by wrongful act of the lessee. Dumpor's Case, *supra*. And see Baldwin *v.* Wanzer, *supra*.

9. Betts *v.* Dick, 1 Pennew. (Del.) 268, 40 Atl. 185 (holding that where plaintiff's chain of title in ejectment depended on a lease which provided that the lessee should not dispose of the premises without the written consent of the lessor, the failure to show such consent is not cause for nonsuit); Montecon *v.* Faures, 3 La. Ann. 43; Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200 (holding that where a creditor levies on crops growing on the debtor's homestead, who claims damages therefor, the creditor cannot in defense raise the issue whether the debtor, who is a sublessee of the premises, is occupying with the owner's consent); Teater *v.* King, 35 Wash. 138, 76 Pac. 688.

Effect of waiver of breach of restriction by lessor see *infra*, IV, B, 1, f, (IV).

10. *Illinois.*— Chicago Attachment Co. *v.* Davis Sewing Mach. Co., (1890) 25 N. E. 669 [*affirming* 33 Ill. App. 362]; Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274.

Massachusetts.— Blake *v.* Sanderson, 1 Gray 332.

Pennsylvania.— Oil Creek, etc., Petroleum Co. *v.* Stanton Oil Co., 23 Pa. Co. Ct. 153.

United States.— Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407, 105 Fed. 659, 44 C. C. A. 653.

England.— Williams *v.* Earle, L. R. 3 Q. B. 739, 9 B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 238, 16 Wkly. Rep. 1041; Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 60.

11. Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944; Brown *v.* Lennox, 22 Ont. App. 442.

12. Wogan *v.* Doyle, L. R. 12 Ir. 69.

13. See *infra*, IV, B, 2, a.

Restriction against sublease as precluding assignment see *infra*, IV, B, 2, c.

Voluntary assignment for creditors as breach of restriction against assignment see *infra*, IV, B, 2, a.

Purchaser at sale under mortgage as assignee of term see *infra*, IV, B, 6, e.

14. See *infra*, IV, B, 2, b.

Restriction against assignment as precluding sublease see *infra*, IV, B, 2, c.

Statutory restriction against "conveying" as precluding sublease see *supra*, page 966, note 99.

15. That a reassignment is a breach of the restriction see McEacharn *v.* Colton, [1902] A. C. 104, 71 L. J. C. P. 20, 85 L. T. Rep.

assignment does not constitute a breach of restriction against assigning.[16] A joint covenant by two lessees not to assign the term is not broken by an assignment, by one of the lessees, of his undivided interest therein;[17] and it has been held that a covenant against underletting the premises is not broken by an underletting of a part thereof.[18] A covenant not to sublet for longer than a year is broken by subletting for less than a year with the privilege of renewal where the exercise of the privilege would extend the sublease beyond a year;[19] but such a covenant is not violated by giving, during the life of a sublease for a year to one person, a second sublease for a year to another person to commence on expiration of the first sublease.[20] A covenant not to part with the premises is broken by an under-lease;[21] but a covenant not to part with the premises or the lease is not broken by a deposit of the lease as security;[22] nor is a covenant not to part with the lease or any estate or interest therein broken by granting a license to conduct a business on the premises in connection with the lessee's business.[23] However, a proviso that the lessee shall do no act whereby the premises shall become vested in another precludes a subletting of the premises.[24] A covenant not to let, set, or demise the premises, or any part, for all or any part of the term, without consent, restrains assignment.[25] A condition against subletting[26] or assignment[27] is not broken where the tenant takes another into partnership with him and lets such person into joint possession of the premises. Nor is such a condition in a lease to a partnership broken by a change in the firm by the admission or withdrawal of partners,[28] or by a dissolution of the firm and a transfer of the possession to one of the partners.[29] But the organization of a corporation by the partnership and a transfer of the lease to such corporation is a breach.[30]

N. S. 594 [*following* Doherty *v.* Allman, 3 App. Cas. 709, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513]; Munro *v.* Waller, 28 Ont. 29. To the contrary see McCormick *v.* Stowell, 138 Mass. 431.

16. *In re* Bush, 126 Fed. 878; Doe *v.* Powell, 5 B. & C. 308, 8 D. & R. 35, 4 L. J. K. B. O. S. 159, 29 Rev. Rep. 253, 11 E. C. L. 474 [*affirmed* in 2 Y. & J. 372].

17. Randol *v.* Scott, 110 Cal. 590, 42 Pac. 976.

18. Leduke *v.* Barnett, 47 Mich. 158, 10 N. W. 182; Noble *v.* Becker, 3 Brewst. (Pa.) 550, *semble*. And see Roosevelt *v.* Hopkins, 33 N. Y. 81 (holding that where a lessor proposed a provision against underletting the demised premises, or any part thereof, and the latter clause, on the objection of the lessees, was erased before execution, an underletting of part of the premises was not a breach of the agreement); Jackson *v.* Harrison, 17 Johns. (N. Y.) 66 (holding that a condition that the lessee should not "assign over, or otherwise part with, the indenture, or the premises thereby leased, or any part thereof, to any person," etc., is not broken by an underletting for a period short of the whole term); Spencer *v.* Commercial Co., 30 Wash. 520, 71 Pac. 53 (so holding where the lease provided that the tenant should "not sublet the whole of the premises" without written consent).

In a lease covenanting that the tenant shall not "let or assign over" the said premises, or any part thereof, without license of the lessor in writing, the word "over" is annexed to the word "assign," and the covenant necessarily means that if the lessee part with the premises, even for a part of the term, his lease should be vacated. Roe *v.* Harrison, 2 T. R. 425, 1 Rev. Rep. 513.

Letting lodgings is not a breach of a covenant not to underlet the premises or any part thereof. Doe *v.* Laming, 4 Campb. 73, 15 Rev. Rep. 728.

19. Cordeviolle *v.* Redon, 4 La. Ann. 40.

20. Croft *v.* Lumley, 6 H. L. Cas. 672, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459 [*affirming* 5 E. & B. 682, 85 E. C. L. 682 (*affirming* 5 E. & B. 648, 2 Jur. N. S. 275, 25 L. J. Q. B. 223, 4 Wkly. Rep. 357, 85 E. C. L. 648)].

21. Doe *v.* Worsley, 1 Campb. 20.

22. McKay *v.* McNally, L. R. 4 Ir. 438; Doe *v.* Hogg, 1 C. & P. 160, 4 D. & R. 226, 2 L. J. K. B. O. S. 121, R. & M. 36, 27 Rev. Rep. 512, 12 E. C. L. 102.

23. Daly *v.* Edwardes, 64 J. P. 295, 82 L. T. Rep. N. S. 372, 48 Wkly. Rep. 360 [*affirmed* in 83 L. T. Rep. N. S. 548, 49 Wkly. Rep. 244].

24. Dymock *v.* Showell's Brewery Co., 79 L. T. Rep. N. S. 329.

25. Greenaway *v.* Adams, 12 Ves. Jr. 395, 33 Eng. Reprint 149.

26. Boyd *v.* Fraternity Hall Assoc., 16 Ill. App. 574. *Contra*, Roe *v.* Sales, 1 M. & S. 297.

27. Hargrave *v.* King, 40 N. C. 430.

28. Roosevelt *v.* Hopkins, 33 N. Y. 81.

29. Bristol Corp. *v.* Westcott, 12 Ch. D. 461, 41 L. T. Rep. N. S. 117, 27 Wkly. Rep. 841. But *compare* Varley *v.* Coppard, L. R. 7 C. P. 505, 26 L. T. Rep. N. S. 882, 26 Wkly. Rep. 972.

30. Emery *v.* Hill, 67 N. H. 330, 39 Atl. 266.

(B) *Involuntary Alienation or Transfer by Operation of Law.* A restriction against transfer is not as a general rule regarded as broken by an involuntary alienation or transfer by operation of law.[31] Hence unless expressly so provided by the lease[32] a transfer of the leasehold upon execution[33] or foreclosure[34] sale, or in insolvency[35] or bankruptcy proceedings,[36] or a confession of judgment,[37] does not amount to a breach of a restriction against assigning or subletting unless it appear that the proceedings were voluntary and collusive on the part of the tenant with a view to defraud the landlord of his rights.[38]

(IV) *Waiver and Estoppel as to Breach of Restriction.*[39] The lessor may waive a breach of the restriction against assignment or subletting, whether imposed by statute or by the terms of the lease,[40] in which event the case stands as if no restriction had been imposed or as if the lessor had given his consent to the assignment or underletting.[41] If the lessor, with notice of a breach of the

31. Charles *v.* Byrd, 29 S. C. 544, 8 S. E. 1, so holding in case of the lessee's death, and the succession of his personal representative.

A devise of the term is not an assignment by operation of law, and is within the restriction against assigning or demising (Berry *v.* Taunton, Cro. Eliz. 331; Barry *v.* Stanton, Cro. Eliz. 330; Knight *v.* Mory, Cro. Eliz. 60; Parry *v.* Harbert, 1 Dyer 45*b*, *semble*. *Contra*, Fox *v.* Swann, Styles 482), unless the devisee is nominated executor by the lessee, in which case the restriction is not violated (Windsor *v.* Burry, 1 Dyer 45*b* note). A condition not to alien a lease to any but his children is not, however, broken by a devise of part of the term by the lessee to his son after the death of his wife. Horton *v.* Horton, Cro. Jac. 74.

32. Davis *v.* Eyton, 7 Bing. 154, 9 L. J. C. P. O. S. 44, 4 M. & P. 820, 20 E. C. L. 77; Doe *v.* Clarke, 8 East 185, 9 Rev. Rep. 402 (where the lease depended upon actual occupation by the lessee); Roe *v.* Galliers, 2 T. R. 133, 1 Rev. Rep. 455.

33. Farnum *v.* Hefner, 92 Cal. 542, 28 Pac. 602, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174; Medinah Temple Co. *v.* Currey, 58 Ill. App. 433; Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278; Jackson *v.* Corliss, 7 Johns. (N. Y.) 531; Doe *v.* Carter, 8 T. R. 57, 4 Rev. Rep. 586. See also Smith *v.* Putnam, 3 Pick. (Mass.) 221. *Compare* Munkwitz *v.* Uhlig, 64 Wis. 380, 25 N. W. 424, holding that where a lessee's stock of goods was sold on execution and bought by his father, who transferred it to another son, and the lessee was permitted to carry on the business in the same place, except that it was controlled by the father and the other son, there was no breach of the covenant not to assign or underlet.

34. Dunlop *v.* Mulry, 85 N. Y. App. Div. 498, 83 N. Y. Suppl. 477, 1104 [*affirming* 40 Misc. 131, 81 N. Y. Suppl. 260].

35. Randol *v.* Scott, 110 Cal. 590, 42 Pac. 976; Bemis *v.* Wilder, 100 Mass. 446.

36. *In re* Bush, 126 Fed. 878; Allen *v.* Bennett, 1 Fed. Cas. No. 214; *In re* Riggs, [1901] 2 K. B. 16, 70 L. J. K. B. 541, 84 L. T. Rep. N. S. 428, 8 Manson 233, 49 Wkly. Rep. 624; Philpot *v.* Hoare, 2 Atk. 219, 26 Eng. Reprint 535; Doe *v.* Smith, 1 Marsh. 359, 2 Rose 280, 5 Taunt. 795, 15 Rev. Rep. 660, 1 E. C. L. 406. *Contra*, *In re* Breck, 4 Fed. Cas. No. 1,822, 8 Ben. 93.

37. Jackson *v.* Corliss, 7 Johns. (N. Y.) 531; Croft *v.* Lumley, 6 H. L. Cas. 672, 4 Jur. N. S. 903, 77 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459; Doe *v.* Carter, 8 T. R. 300.

38. Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278; Jackson *v.* Corliss, 7 Johns. (N. Y.) 531; Doe *v.* Carter, 8 T. R. 300. And see Doe *v.* Hawke, 2 East 481.

39. **Prior consent, express or implied, to assignment or subletting** see *supra*, IV, B, 1, e.

Waiver of requirement that consent to assignment or sublease must be in writing see *supra*, IV, B, 1, e.

Waiver of restriction against assignment or subletting by lessee as releasing assignee or sublease therefrom see *supra*, IV, B, 1, b.

Waiver of right to terminate lease for breach of covenant not to assign or sublet see *infra*, IX, B, 7, g.

40. Chicago Attachment Co. *v.* Davis Sewing-Mach. Co., (Ill. 1890) 25 N. E. 669 [*affirming* 33 Ill. App. 362]; Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; Springer *v.* Chicago Real Estate L. & T. Co., 102 Ill. App. 294 [*affirmed* in 202 Ill. 17, 66 N. E. 850]; Wright *v.* Henderson, (Tex. Civ. App. 1905) 86 S. W. 799; Scott *v.* Slaughter, 35 Tex. Civ. App. 524, 80 S. W. 643; Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200; Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407, 105 Fed. 659, 44 C. C. A. 653.

A lessor who has sold the reversion, but who remains liable on the personal covenants in the lease, may waive a breach by the lessee of a covenant against assignment, and continue liable on such personal covenants, although the purchaser of the reversion has not waived the breach. Carpenter *v.* Pocasset Mfg. Co., 180 Mass. 130, 61 N. E. 816.

41. *California.*— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684.

Massachusetts.—Carpenter *v.* Pocasset Mfg. Co., 180 Mass. 130, 61 N. E. 816.

New York.— Garcewich *v.* Woods, 36 Misc. 201, 73 N. Y. Suppl. 154.

restriction against assigning, permits the assignee to remain in possession and accepts subsequently accruing rents from him, the breach is waived;[42] but the fact that the lessor with knowledge that the lessee has sublet part of the premises in violation of his covenant permits the lessee to remain in possession and accepts rents subsequently falling due, while it constitutes a waiver of the right to forfeit the lease,[43] does not constitute a waiver of the right to recover damages for the breach of covenant,[44] nor is the right to recover damages for breach of covenant not to assign waived by the lessor's accepting an assignment of the lease from the lessee's assignee.[45] It is no answer to a breach of a covenant not to underlet that the lessor had waived another and distinct breach of such covenant in the same lease.[46] The right to take advantage of the lessee's breach of restriction may be lost by lapse of time,[47] and by estoppel *in pais*.[48]

(v) *Action For Breach of Restriction*.[49] If the lessee covenants not to

Pennsylvania.— Oil Creek, etc., Petroleum Co. *v.* Stanton Oil Co., 23 Pa. Co. Ct. 153.

Virginia.— Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 230.

42. *California*.— Randol *v.* Tatum, 98 Cal. 390, 33 Pac. 433.

Massachusetts.—Carpenter *v.* Pocasset Mfg. Co., 180 Mass. 130, 61 N. E. 816; Porter *v.* Merrill, 124 Mass. 534; O'Keefe *v.* Kennedy, 3 Cush. 325.

Missouri.— B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967; Tyler *v.* Giesler, 74 Mo. App. 543.

New York.— Murray *v.* Harway, 56 N. Y. 337; Koehler *v.* Brady, 22 N. Y. App. Div. 624, 47 N. Y. Suppl. 984; Garcewich *v.* Woods, 36 Misc. 201, 73 N. Y. Suppl. 154; Heeter *v.* Eckstein, 50 How. Pr. 445.

United States.— Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25.

Canada.— Littlejohn *v.* Soper, 1 Ont. L. Rep. 172.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 230. And see *infra*, IX, B, 7, g.

The fact that the lessor had refused to consent to an assignment does not conclusively disprove a consent by subsequent conduct, such as accepting rent of the new tenant. Colton *v.* Gorham, 72 Iowa 324, 33 N. W. 76.

The fact that the landlord did not object to the assignee's taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignee. Elphinstone *v.* Monkland Iron, etc., Co., 11 App. Cas. 332, 35 Wkly. Rep. 17.

The fact that the lessor accepts the assignee's check for rent is not a recognition of the assignee as tenant where the receipt is made to the lessee. Emery *v.* Hill, 67 N. H. 330, 39 Atl. 266.

If the lessor has no notice of the breach, his subsequent acceptance of rents does not waive the breach. Baldwin *v.* Wanzer, 22 Ont. 612. However, if the lessor gives the assignee receipts for rent, they are evidence that he knew of the assignment. O'Keefe *v.* Kennedy, 3 Cush. (Mass.) 325.

43. See *infra*, IX, B, 7, g.

44. Rouiaine *v.* Simpson, 84 N. Y. Suppl. 875.

45. Hazlehurst *v.* Kendrick, 6 Serg. & R. (Pa.) 446.

46. Seaver *v.* Coburn, 10 Cush. (Mass.) 324; Fidelity Trust Co. *v.* Kohn, 27 Pa. Super. Ct. 374.

Consent to assignment or subletting by lessee as authorizing subsequent assignment or subletting by lessee see *supra*, IV, B, 1, e.

47. Wildey Lodge No. 21, I. O. O. F. *v.* Paris, 31 Tex. Civ. App. 632, 73 S. W. 69, where the right was held to be lost by the lapse of fifteen years.

48. Warner *v.* Cochrane, 128 Fed. 553, 63 C. C. A. 207 (holding that where a lessor, with knowledge that her lessees had assigned the lease in violation of covenant, treated the assignee as her tenant, and made no objection until after the lessees had changed their position to their prejudice, and deprived themselves of the ability to exercise an option of renewal contained in the lease, the lessor was estopped to deny that she had consented to the assignment); Littlejohn *v.* Soper, 1 Ont. L. Rep. 172 (where the lessors to a company in a lease containing the usual provision as to forfeiture in the event of an assignment for the benefit of creditors by the lessees held all the shares in the company except three, and the company made an assignment, one lessor moving and the other seconding the resolution authorizing this to be done, and both executing the assignment as assenting creditors, and it was held that the lessors were estopped from taking advantage of the forfeiture clause).

Knowledge as element of estoppel.— One to whom a lessee has contracted to sell the term under a lease providing against assignment without license cannot compel the lessor to grant his license to the sale on the ground that he permitted the prospective purchaser to make expenditures on the property, where the lessor was not aware of the provision against assignment or of the prospective purchaser's ignorance thereof. Willmott *v.* Barber, 15 Ch. D. 96, 43 L. T. Rep. N. S. 95, 28 Wkly. Rep. 911.

49. **Rights and liabilities of parties on breach of restriction:** Of lessor see *infra*, IV, B, 4, c, (IV), 5, c; IX, B, 7, d, (I), (C). Of assignee see *supra*, IV, B, 1, f, (II); *infra*, IV, B, 4, c, (IV). Of subtenant see *supra*, IV, B, 1, f, (II); *infra*, IV, B, 5, c.

assign or sublet, the lessor may maintain an action against him for damages for breach of the covenant;[50] and if the covenant is such that an assignee by consent is bound thereby, his subsequent breach of it renders him liable in damages to the lessor.[51]

(VI) *Injunction Against Breach of Restriction.* Where a tenant has covenanted not to sublease or underlet without the landlord's consent, he will be enjoined from breaking the covenant;[52] and if an assignee is bound by the covenant, he too may be enjoined from breaking it.[53]

2. What Constitutes Assignment, Sublease, or Mortgage — a. What Constitutes Assignment.[54] An assignment of a term for years occurs where the lessee transfers his entire interest therein without retaining any reversionary interest.[55] If an instrument so transfers the lessee's interest, it constitutes an assignment regardless of its character and form.[56] Thus if the lessee makes an assignment of his property, including the term, for the benefit of his creditors, it constitutes a

50. Rouiaine *v.* Simpson, 84 N. Y. Suppl. 875; Hazlehurst *v.* Kendrick, 6 Serg. & R. (Pa.) 446. And see Springer *v.* Chicago Real Estate L. & T. Co., 202 Ill. 17, 66 N. E. 850 [*affirming* 102 Ill. App. 294].

Measure of damages.— In the absence of a showing of special damages only nominal damages may be recovered for breach of a covenant not to underlet to any one whose business should be considered objectionable by the lessor. Importers, etc., Ins. Co. *v.* Christie, 5 Rob. (N. Y.) 169. An extra insurance premium, which the landlord has been compelled to pay by reason of the permission of extra-hazardous occupation of the premises in violation of covenant may be recovered from the tenant. Rouiaine *v.* Simpson, 84 N. Y. Suppl. 875. And where the lessee knowingly sublets to a person intending to use the premises for a dangerous purpose, damages to the premises from fire arising from such use may be recovered from him. Lepla *v.* Rogers, [1893] 1 Q. B. 31, 58 J. P. 55, 68 L. T. Rep. N. S. 584, 5 Reports 57. In England the rule has been stated that the measure of damages is such a sum as will, as far as money can, place the lessor in the same position as if he still had the lessee's liability instead of the liability of another of inferior pecuniary liabilities for breaches both past and future. Williams *v.* Earle, L. R. 3 Q. B. 739, 9 B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 238, 16 Wkly. Rep. 1041 [*followed* in Munro *v.* Waller, 28 Ont. 574]. Where the lessee assigns a few days prior to the accrual of a rent sum payable in advance, the lessor may recover the rent so payable in advance without deduction for rent realized during the period under new leases created by the lessor who has taken possession upon finding the property vacant. Patching *v.* Smith, 28 Ont. 201.

51. Williams *v.* Earle, L. R. 3 Q. B. 739, 9 B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 238, 16 Wkly. Rep. 1041.

52. Booth *v.* Gaither, 58 Ill. App. 263; Barrington Apartment Assoc. *v.* Watson, 38 Hun (N. Y.) 545; Sloan *v.* Martin, 54 N. Y. Super. Ct. 87; Jamieson *v.* Teague, 3 Jur. N. S. 1206. See, however, McBee *v.* Sampson, 66 Fed. 416, holding that equity will not enjoin the assignment of a lease on the ground that the proposed assignee is insolvent, where the assignor's responsibility for rent would continue.

53. McEacharn *v.* Colton, [1902] A. C. 104, 71 L. J. P. C. 20, 85 L. T. Rep. N. S. 594. See, however, Dyke *v.* Taylor, 7 Jur. N. S. 83, 30 L. J. Ch. 281, 3 L. T. Rep. N. S. 717, 9 Wkly. Rep. 403.

54. Assignment by one joint lessee as breach of restriction against assignment see *supra*, IV, B, 1, f, (III), (A).

Assignment by operation of law as breach of restriction against assignment see *supra*, IV, B, 1, f, (III), (B).

Breach of covenant not to do any act whereby premises become vested in another see *supra*, IV, B, 1, f, (III), (A).

Breach of covenant not to part with premises or lease see *supra*, IV, B, 1, f, (III), (A).

Devise of term as breach of restriction against assignment see *supra*, page 970, note 31.

Lease to partnership containing restriction against assignment: Assignment by one partner to another, or assignment to corporation formed by partners see *supra*, IV, B, 1, f, (III), (A).

Partial assignment as breach of condition against assignment see *supra*, IV, B, 1, f, (III), (A).

Reassignment to lessee as breach of restriction against assignment see *supra*, IV, B, 1, f, (III), (A).

Restriction against assignment as precluding lessee from taking in partner see *supra*, IV, B, 1, f, (III), (A).

Sufficiency of description to pass term see *infra*, IV, B, 3, a, (IV).

55. Hicks *v.* Martin, 25 Mo. App. 359; Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481. And see *infra*, IV, B, 2, c.

The assignment of a lease is properly the transfer of the interest of the tenant, not the interest of the landlord. Potts *v.* Trenton Water Power Co., 9 N. J. Eq. 592.

Transfer of entire interest in part of premises as assignment pro tanto see *infra*, IV, B, 2, c.

56. Indianapolis Mfg., etc., Union *v.* Cleve-

breach of a restriction against assignment.[57] There must, however, be an actual transfer of the lessee's interest, else there is no assignment of the term.[58] Accordingly an executory contract to assign the term is not in law an assignment thereof.[59] A mortgage of the term constitutes an assignment thereof if it passes the lessee's legal title;[60] otherwise not.[61]

land, etc., R. Co., 45 Ind. 281 (where the lessee sold the right to use and possess the premises as long as he might do so, the rent to be paid to the lessee, and he to pay the lessor); Trabue *v.* McAdams, 8 Bush (Ky.) 74; Clark *v.* Aldrich, 4 N. Y. App. Div. 523, 40 N. Y. Suppl. 440.

Assignment of bill of sale.— A bill of sale by a lessee of property on the leased premises, including the lease for its entire term, operates as an assignment of the lease. Clark *v.* Greenfield, 13 Misc. (N. Y.) 124, 34 N. Y. Suppl. 1.

Assignment by conveyance in fee.— It constitutes an assignment of the term where the lessee conveys the premises by deed in fee. Worthington *v.* Lee, 61 Md. 530; Jacques *v.* Short, 20 Barb. (N. Y.) 269; De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155. And see Esty *v.* Baker, 48 Me. 495.

A quitclaim deed may operate as an assignment. See Sharon Cong. Soc. *v.* Rix, (Vt. 1889) 17 Atl. 719.

The assignment need contain no habendum. — Strong *v.* Garfield, 10 Vt. 497.

Devise of term as breach of restriction against assignment see *supra*, page 970, note 31.

57. Medinah Temple Co. *v.* Currey, 162 Ill. 441, 44 N. E. 839, 53 Am. St. Rep. 320 [*reversing* 58 Ill. App. 433]; Holland *v.* Cole, 1 H. & C. 67, 8 Jur. N. S. 1066, 31 L. J. Exch. 48, 6 L. T. Rep. N. S. 503, 10 Wkly. Rep. 563; Magee *v.* Rankin, 29 U. C. Q. B. 257.

However, an assignment which is invalid as being an act of bankruptcy is not a breach of such restriction (*In re* Bush, 126 Fed. 878; Doe *v.* Powell, 5 B. & C. 308, 8 D. & R. 35, 4 L. J. K. B. O. S. 159, 29 Rev. Rep. 253, 11 E. C. L. 474 [*affirmed* in 2 Y. & J. 372]); nor is an assignment which is never delivered to the assignee (Farnum *v.* Hefner, 92 Cal. 542, 28 Pac. 602).

Bankruptcy as breach of restriction against assignment see *supra*, IV, B, 1, f, (III), (B).

Involuntary assignment as breach of restriction against assignment see *supra*, IV, B, 1, f, (III), (B).

58. Bedford *v.* Graybill, 7 Ky. L. Rep. 373 (holding that a cropping contract between the lessee and a third person is not an assignment of the lease); Brewer *v.* Dyer, 7 Cush. (Mass.) 337 (where there were no apt words of assignment); Gentle *v.* Faulkner, [1900] 2 Q. B. 267, 69 L. J. Q. B. 777, 82 L. T. Rep. N. S. 708 [*reversing* 68 L. J. Q. B. 848, 81 L. T. Rep. N. S. 294] (holding that a declaration by the lessee to stand possessed of the term for the benefit of a trustee for his creditors and assign it as the trustee should direct was not an assignment); West *v.* Dobb, L. R. 4 Q. B. 634, 9 B. & S. 755, 38 L. J. Q. B. 289, 20 L. T. Rep. N. S. 737, 17 Wkly. Rep. 879 [*affirmed* in L. R. 5 Q. B. 460, 10 B. & S. 987, 39 L. J. Q. B. 190, 23 L. T. Rep. N. S. 76, 18 Wkly. Rep. 1167] (where there was no formal assignment). See, however, Indianapolis Mfg., etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281 (holding that no formal assignment is necessary); Close *v.* Wilberforce, 1 Beav. 112, 3 Jur. 35, 8 L. J. Ch. 101, 17 Eng. Ch. 112, 48 Eng. Reprint 881 (holding that the equitable assignee of a lease by contract with a prior assignee, to which the original lessee was not a party and which stipulated that the purchaser under it should not be entitled to call for a legal assignment, having been in possession under such contract, he was liable to indemnify the lessee, after the expiration of the term, for breach of covenant committed while he, the equitable assignee, was in possession).

A license to a third person to enter on the premises is not an assignment of the term. Merchants' Ins. Co. *v.* Mazange, 22 Ala. 168; Edwardes *v.* Barrington, 85 L. T. Rep. N. S. 650, 50 Wkly. Rep. 358. See, however, Indianapolis Mfg., etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281.

59. Hartshorne *v.* Watson, 2 Arn. 70, 5 Bing. N. Cas. 477, 8 L. J. C. P. 299, 7 Scott 494, 35 E. C. L. 258; Taylor *v.* Sutton, 18 U. C. Q. B. 615.

This is so, although the prospective assignee is let into possession.— Livingston *v.* Stickles, 7 Hill (N. Y.) 253; Horsey *v.* Steiger, [1899] 2 Q. B. 79, 68 L. J. Q. B. 743, 80 L. T. Rep. N. S. 851, 47 Wkly. Rep. 644; Cox *v.* Bishop, 2 De G. M. & G. 815, 3 Jur. N. S. 499, 26 L. J. Ch. 389, 5 Wkly. Rep. 437, 57 Eng. Ch. 630, 44 Eng. Reprint 604; Doran *v.* Kenny, Ir. R. 3 Eq. 148; Peebles *v.* Crosthwaite, 13 T. L. R. 198.

60. Becker *v.* Werner, 98 Pa. St. 555; Serjeant *v.* Nash, [1903] 2 K. B. 304, 72 L. J. K. B. 630, 89 L. T. Rep. N. S. 112 [*approving* Grimwood *v.* Moss, L. R. 7 C. P. 360, 41 L. J. C. P. 239, 27 L. T. Rep. N. S. 268, 20 Wkly. Rep. 972].

Purchaser at foreclosure as assignee see *infra*, IV, B, 6, e.

61. Crouse *v.* Michell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; Riggs *v.* Pursell, 66 N. Y. 193; Dunlop *v.* Mulry, 85 N. Y. App. Div. 498, 83 N. Y. Suppl. 477, 1104.

An equitable mortgage by deposit of the lease is not an assignment of the term (McKay *v.* McNally, 1 L. R. 4 Ir. 438; *Ex p.* Cocks, 3 Deac. & C. 8 (*semble*); *Ex p.* Drake, 1 Mont. D. & De G. 539 (where the mortgagee does not take possession (Bowser *v.* Colby, 1 Hare 109, 5 Jur. 1106, 11 L. J. Ch. 132, 23 Eng. Ch. 109, 66 Eng. Reprint 969).

b. What Constitutes Sublease.[62] A sublease occurs where a lessee underlets the premises or a part thereof to a third person for a period less than the lessee's term.[63] A mere permissive use of land which amounts to nothing more than a license is not a breach of a restriction against underletting;[64] nor is such a restriction violated by the lessee's putting a person in possession as his servant or agent.[65]

c. Assignment and Sublease Distinguished. There is a well defined distinction between the assignment of a term for years and a sublease or underletting.[66] Accordingly a restriction in a lease against assigning is not violated by an underletting,[67] and a restriction against underletting is not violated by an assignment.[68]

62. **Breach of covenant not to do any act whereby premises become vested in another** see *supra*, IV, B, 1, f, (III), (A).

Breach of covenant not to part with premises or lease see *supra*, IV, B, 1, f, (III), (A).

Breach of covenant not to sublet beyond a prescribed period see *supra*, IV, B, 1, f, (III), (A).

Lease to partnership containing restriction against subletting: Right to take in new partner or to sublet to corporation formed by partners see *supra*, IV, B, 1, f, (III), (A).

Letting lodgings in premises as breach of restriction against subletting see *supra*, IV, B, 1, f, (III), (A).

Letting premises by the year or at sufferance as breach of restriction against subletting see *supra*, IV, B, 1, f, (III), (A).

Restriction against subletting as precluding lessee from taking in partner see *supra*, IV, B, 1, f, (III), (A).

Sublease of part of premises as breach of restriction against subletting see *supra*, IV, B, 1, f, (III), (A).

63. Hicks *v.* Martin, 25 Mo. App. 359; Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481. See Shumway *v.* Collins, 6 Gray (Mass.) 227. And see *infra*, IV, B, 2, c.

A cropping contract between the lessee and a third person is not a sublease. McLaughlin *v.* Kennedy, 49 N. J. L. 519, 10 Atl. 391; Guest *v.* Opdyke, 31 N. J. L. 552.

An agreement to sublet, if enforceable and followed by a change of possession, has been held to constitute a breach of restriction against subletting. Eastern Tel. Co. *v.* Dent, 78 L. T. Rep. N. S. 713 [*affirmed* in [1899] 1 Q. B. 835, 68 L. J. Q. B. 564, 80 L. T. Rep. N. S. 459]. See, however, Horsey *v.* Steeger, [1899] 2 Q. B. 79, 68 L. J. Q. B. 743, 80 L. T. Rep. N. S. 851, 47 Wkly. Rep. 644.

Sublease or assignment of reversion under prior sublease.— Where the holder of a leasehold interest in premises, part of which defendant held under a sublease for five years, executed to plaintiff an instrument which purported to be a lease of the portion of the premises held by defendant for the same five years, the instrument operated as an assignment of the reversion of the lease held by defendant, and was not a sublease to plaintiff. Stover *v.* Chasse, 6 Misc. (N. Y.) 394, 26 N. Y. Suppl. 740.

Subletting part of premises for full term as assignment pro tanto see *infra*, IV, B, 2, c.

64. Lowell *v.* Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; Pence *v.* St. Paul, etc., R. Co., 28 Minn. 488, 11 N. W. 80; Daly *v.* Edwardes, 83 L. T. Rep. N. S. 548, 49 Wkly. Rep. 244 [*affirming* 64 J. P. 295, 82 L. T. Rep. N. S. 372, 48 Wkly. Rep. 360]. And see Leduke *v.* Barnett, 47 Mich. 158, 10 N. W. 182. See, however, Aveline *v.* Ridenbaugh, 2 Ida. (Hasb.) 168, 9 Pac. 601, where a person purchased wood stored on land from the lessee of the land, with an agreement that he could have till the end of the lease to remove it, and it was held to amount to a sublease.

65. Vincent *v.* Crane, 134 Mich. 700, 97 N. W. 34; Presby *v.* Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317; Markowitz *v.* Greenwall Theatrical Cir. Co., (Tex. Civ. App. 1903) 75 S. W. 317; Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239.

66. See cases cited *infra*, note 77 *et seq.* And see Bryant *v.* Hancock, [1898] 1 Q. B. 716, 62 J. P. 324, 67 L. J. Q. B. 507, 78 L. T. Rep. N. S. 397, 46 Wkly. Rep. 386.

67. *New Jersey.*— Den *v.* Post, 25 N. J. L. 285.

New York.— Jackson *v.* Harrison, 17 Johns. 66; Jackson *v.* Silvernail, 15 Johns. 278.

North Carolina.— Hargrave *v.* King, 40 N. C. 430.

England.— Kinnersley *v.* Orpe, Dougl. (3d ed.) 56; Church *v.* Brown, 15 Ves. Jr. 258, 10 Rev. Rep. 74, 33 Eng. Reprint 752; Crusoe *v.* Bugby, 3 Wils. C. P. 234, 2 W. Bl. 766. *Contra*, Doe *v.* Worsley, 1 Campb. 20.

Canada.— Griffiths *v.* Canonica, 5 Brit. Col. 67.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 228, 235.

Statutory restriction against assigning as precluding sublease see *supra*, page 966, note 99.

A letting of the premises at sufferance by the lessee is not a breach of a restriction against letting or assigning. Leys *v.* Fiskin, 12 U. C. Q. B. 604.

68. Field *v.* Mills, 33 N. J. L. 254 [*overruling dictum* in Den *v.* Post, 25 N. J. L. 285, and *disapproving* Greenway *v.* Adams, 12 Ves. Jr. 395, 33 Eng. Reprint 149]; Lynde *v.* Hough, 27 Barb. (N. Y.) 415; Collins *v.* Hasbrouck, 1 Thomps. & C. (N. Y.) 36; *In re* Doyle, [1899] 1 Ir. 113 [*distinguishing* Greenaway *v.* Adams, *supra*].

Statutory restriction against subleasing as precluding assignment see Texas cases cited *supra*, page 967, note 99.

Generally speaking, if the lessee parts with his entire interest in the term it constitutes an assignment and not a subletting,[69] although the instrument of transfer is in form a sublease;[70] but if the lessee reserves to himself a reversionary interest in the term it constitutes a sublease,[71] whatever the form of the instrument of

69. *Michigan.*— Lee *v.* Payne, 4 Mich. 106.
Mississippi.— Doty *v.* Heth, 52 Miss. 530.
Missouri.— St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.
New Hampshire.— Dartmouth College *v.* Clough, 8 N. H. 22.
New Jersey.— State *v.* Proprietors Passaic, etc., Rivers Bridges, 21 N. J. L. 384.
New York.— Kernochan *v.* Whiting, 42 N. Y. Super. Ct. 490; Stover *v.* Chasse, 6 Misc. 394, 26 N. Y. Suppl. 740.
Pennsylvania.— Lloyd *v.* Cozens, 2 Ashm. 131, so holding, although covenants are introduced into the assignment.
Texas.— Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481; Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228.
Virginia.— Scott *v.* Scott, 18 Gratt. 150.
Washington.— Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 235.

70. *California.*— Smiley *v.* Van Winkle, 6 Cal. 605.
Minnesota.— Craig *v.* Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236.
New York.— Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Constantine *v.* Wake, 1 Sweeny 239.
Pennsylvania.— Lloyd *v.* Cozens, 2 Ashm. 131; Adams *v.* Beach, 1 Phila. 99.
Texas.— Campbell *v.* Cates, (Civ. App. 1899) 51 S. W. 268.
England.— Beardman *v.* Wilson, L. R. 4 C P. 57, 38 L. J. C. P. 91, 19 L. T. Rep. N. S. 232, 17 Wkly. Rep. 54; Palmer *v.* Edwards, Dougl. (3d ed.) 187 note.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 235.

If a lessee underlets for a period exceeding his entire term, it constitutes an assignment. Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Mulligan *v.* Hollingsworth, 99 Fed. 216; Thorn *v.* Woollcombe, 3 B. & Ad. 586, 23 E. C. L. 260; Wollaston *v.* Hakewill, 10 L. J. C. P. 303, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161; Selby *v.* Robinson, 15 U. C. C. P. 370.

Estoppel.— The original lessor is not estopped to treat a lease granted by the tenant for his entire term as an assignment by having refused to release his lessee from his liability for rent, or to accept the amount of rent reserved in the second lease, where he has not interfered with the assignee's possession of the premises. Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274.

71. *Iowa.*— Collamer *v.* Kelley, 12 Iowa 319, where the sublessee, if he kept his covenants, had ten days after the expiration of the term within which to remove his improvements.
Massachusetts.— McNeil *v.* Kendall, 128 Mass. 245, 35 Am. Rep. 373, holding that where a lessee makes a lease for the remainder of his term of a building standing on a portion of the leasehold premises, and by the terms of the lease grants easements appurtenant to the building of light and air, and of passing and repassing over other portions of the leasehold premises, in common with him and those claiming under him, it is an underlease.
Missouri.— St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.
New Hampshire.— Dartmouth College *v.* Clough, 8 N. H. 22.
New Jersey.— State *v.* Proprietors Passaic, etc., River Bridges, 21 N. J. L. 384.
New York.— Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Ganson *v.* Tifft, 71 N. Y. 48; Post *v.* Kearney, 2 N. Y. 394, 51 Am. Dec. 303 [*affirming* 1 Sandf. 105]; Schenkel *v.* Lischinsky, 45 Misc. 423, 90 N. Y. Suppl. 300; Stover *v.* Chasse, 6 Misc. 394, 26 N. Y. Suppl. 740.
Ohio.— Fulton *v.* Stuart, 2 Ohio 215, 15 Am. Dec. 542.
Texas.— Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481; Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228.
Washington.— Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 235.

Reservation of rent.— The fact that a sublease of the entire term reserves a new rent to the original lessee does not render it a sublease (Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274 [*reversing* 30 Ill. App. 95]; Craig *v.* Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131; Palmer *v.* Edwards, Dougl. (3d ed.) 187 note; Wollaston *v.* Hakewill, 10 L. J. C. P. 303, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161. *Contra,* Collamer *v.* Kelley, 12 Iowa 319; Dunlap *v.* Bullard, 131 Mass. 161. And see Wray-Austin Mach. Co. *v.* Flower, 140 Mich. 452, 103 N. W. 873; Martin *v.* O'Conner, 43 Barb. (N. Y.) 514; Berney *v.* Moore, 2 Ridgw. App. 323), except as between the parties to the sublease (Collins *v.* Hasbrouck, 56 N. Y. 157, 15 Am. Rep. 407; Adams *v.* Beach, 1 Phila. (Pa.) 99. And see Townsend *v.* Read, 15 Abb. N. Cas. (N. Y.) 285), or as between the parties to the orignal lease (Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538).

Provision for reëntry by original lessee for breach of condition.— The fact that a sub-

transfer.[72] And as between the parties to the original lease,[73] or as between the lessee and his transferee, if the instrument is in form a sublease it will operate as such,[74] although the lessee parts with the entire term. The distinction between an assignment and a sublease depends not upon the extent of the premises transferred but upon the quantity of interest which passes. When therefore a lessee of property for a term of years demises a part of it to another for the whole of his term, it is not an underlease but an assignment *pro tanto*.[75]

d. What Constitutes Mortgage.[76] A mortgage of the term may consist in an

lease for the entire term authorizes the original lessee to reënter before the expiration of the term on breach of condition by the sublessee does not render it a sublease (Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274 [*reversing* 30 Ill. App. 95]; Craig *v.* Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131; Palmer *v.* Edwards, Dougl. (3d ed.) 187 note. *Contra*, Dunlap *v.* Bullard, 131 Mass. 161. And see Martin *v.* O'Conner, 43 Barb. (N. Y.) 514; Koppel *v.* Tilyou, 70 N. Y. Suppl. 910, 31 N. Y. Civ. Proc. 185), except as between the parties to the sublease (Collins *v.* Hasbrouck, 56 N. Y. 157, 15 Am. Rep. 407; Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668. And see Townsend *v.* Read, 15 Abb. N. Cas. (N. Y.) 285) or as between the parties to the original lease (Drake *v.* Lacoe, 157 Pa St. 17, 27 Atl. 538).

Provision for surrender of term to original lessee on expiration of term.—Although a sublease for the entire term provides for surrender to the original lessee on the expiration of the term, it is an assignment (Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274 [*reversing* 30 Ill. App. 95.]; Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844, where the sublease was for a period exceeding the original term. *Contra*, Collamer *v.* Kelley, 12 Iowa 319; Dunlap *v.* Bullard, 131 Mass. 161; Hicks v. Martin, 25 Mo. App. 359. And see Koppel *v.* Tilyou, 70 N. Y. Suppl. 910, 31 N. Y. Civ. Proc. 185), except as between the parties to the sublease (Collins *v.* Hasbrouck, 56 N. Y. 157, 15 Am. Rep. 407). Where, however, the provision is for surrender "on the last day" of the sublessee's term (Post *v.* Kearney, 2 N. Y. 394, 51 Am. Dec. 303 [*affirming* 1 Sandf. 105]), or on the expiration of the term or other sooner determination of the sublease (Ganson *v.* Tifft, 81 N. Y. 48), the sublease is not an assignment, since the entire original term is not parted with.

The reservation of a day generally, without stating it to be the last day of the term, is insufficient to give the instrument the character of a sublease. Jameson *v.* London, etc., Loan, etc., Co., 27 Can. Sup. Ct. 435 [*reversing* 23 Ont. App. 602].

An estate to arise in futuro cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between him and the person to whom he has assigned his term, so far as strictly reversionary rights are concerned, or prevent that relation from existing between such person and the original landlord. Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844.

72. *Maine.*— Wheeler *v.* Hill, 16 Me. 329.
Maryland.— Mayhew *v.* Hardesty, 8 Md. 479.
Mississippi.— Doty *v.* Heth, 52 Miss. 530.
New York.— Constantine *v.* Wake, 1 Sweeny 239.
England.— Derby *v.* Taylor, 1 East 502, 6 Rev. Rep. 337.
See 32 Cent. Dig. tit. "Landlord and Tenant, § 235.

73. Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538.

74. Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844. And see *supra*, note 70. See also Preece *v.* Corrie, 5 Bing. 24, 6 L. J. C. P. O. S. 205, 2 Moore C. P. 57, 30 Rev. Rep. 536, 15 E. C. L. 453.

Right of original lessee to distrain for rent see *infra*, VIII, E, 2, j.

Right of original lessee to recover rent see see *infra*, VIII, A, 7, c.

Right of original lessee to reënter see *infra*, X, A, 2.

75. *Kentucky.*— Cook *v.* Jones, 96 Ky. 283, 28 S. W. 960, 16 Ky. L. Rep. 469; Alford *v.* Jones, 30 S. W. 1013, 17 Ky. L. Rep. 356.
Michigan.— Lee *v.* Payne, 4 Mich. 106.
Mississippi.— Doty *v.* Heth, 52 Miss. 530.
New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382; Stover *v.* Chasse, 6 Misc. 394, 26 N. Y. Suppl. 740; Van Rensselaer *v.* Gallup, 5 Den. 454; Prescott *v.* De Forest, 16 Johns. 159. See, however, Koppel *v.* Tilyou, 70 N. Y. Suppl. 910, 31 N. Y. Civ. Proc. 185.
Pennsylvania.— Jackson *v.* O'Hara, 183 Pa. St. 233, 38 Atl. 624.
Texas.— Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481; Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228.
England.— Wollaston *v.* Hakewill, 10 L. J. C. P. 303, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161.
See 32 Dig. Cent. tit. "Landlord and Tenant," § 235.
Contra.— Fulton *v.* Stuart, 2 Ohio 215, 15 Am. Dec. 542; Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123. And see Robinson *v.* Freret, 9 La. Ann. 303; Hicks *v.* Martin, 25 Mo. App. 359; Berney *v.* Moore, 2 Ridgw. App. 323.

76. **Assignment as chattel mortgage** see CHATTEL MORTGAGES, 6 Cyc. 990 note 22.

assignment of the lease by way of security,[77] accompanied by a bond executed at the same time, reciting the assignment, and stating it to have been made to secure the payment of a sum of money to the assignee, and an agreement to reassign on payment of such money.[78]

e. Evidence of Assignment, Sublease, or Mortgage. Where one not the lessee of premises is found in possession thereof, the presumption is that he holds as assignee of the lessee,[79] and not as under-tenant.[80] An assignment of a lease is not proved by an indorsement thereon purporting to assign the lease where there is no acknowledgment of the execution or proof thereof by the subscribing witness.[81]

3. Requisites and Validity of Assignment, Sublease, or Mortgage — a. Formal Requisites — (i) *In General.* If the assignee of a leasehold accepts the benefit of the assignment he is liable in equity to the covenants on his part contained in the assignment, although he did not execute it.[82] In some states the assignment must be attested[83] and acknowledged.[84] A seal is not requisite to the validity of

What constitutes breach of covenant "not to charge or incumber" see *supra*, IV, B, 1, f, (III) (A).

77. Providence, etc., Steamboat Co. *v.* Fall River, 187 Mass. 45, 72 N. E. 338.

Parol evidence that assignment absolute in form was intended as security see Evidence, 17 Cyc. 635.

78. Jackson *v.* Green, 4 Johns. (N. Y.) 186.

79. Ecker *v.* Chicago, etc., R. Co., 8 Mo. App. 223; Foster *v.* Oldham, 8 Misc. (N. Y.) 331, 28 N. Y. Suppl. 559 [*affirming* 4 Misc. 201, 23 N. Y. Suppl. 1024]. And see Roberts *v.* Stodder, 3 Stew. & P. (Ala.) 215 (holding that in an action by the payee, on a contract stipulating for the payment of a certain sum whenever the transfer of a lease should be made by plaintiff to defendant, the fact that a stranger had possession of the leased premises under a tenancy under defendant raised the presumption that the lease had been transferred, until the contrary appeared); Prettyman *v.* Wallston, 34 Ill. 175; Van Rensselaer *v*, Secor, 32 Barb. (N. Y.) 469 (holding that a mortgage to a stranger by an alleged assignee of a lease, recognizing the lessor's title and the mortgagor's liability for rent, together with proof of possession by the mortgagor, is sufficient proof that he is the assignee); Howard *v.* Ellis, 4 Sandf. (N. Y.) 369; Durando *v.* Wyman, 2 Sandf. (N. Y.) 597 (holding that a person not the lessee being in the occupation of leasehold premises in subordination to the lease will be presumed to be an assignee of the lease, in favor of the lessors); Benson *v.* Bolles, 8 Wend. (N. Y.) 175; Williams *v.* Heales, L. R. 9 C. P. 177, 43 L. J. C. P. 80, 30 L. T. Rep. 20, 22 Wkly. Rep. 317; Buckworth *v.* Simpson, 1 C. M. & R. 834, 1 Gale 38, 4 L. J. Exch. 104, 5 Tyrw. 344. *Contra*, Doe *v.* Payne, 1 Stark. 86, 18 Rev. Rep. 747, 2 E. C. L. 41.

The presumption is rebutted by proof of a surrender of the lease by the lessee to the lessors during the possession of the third person. Durando *v.* Wyman, 2 Sandf. (N. Y.) 597.

Presumption in action for rent see *infra*, VIII, B, 11, a.

80. Foster *v.* Oldham, 8 Misc. (N. Y.) 331, 28 N. Y. Suppl. 559 [*affirming* 4 Misc. 201, 23 N. Y. Suppl. 1024].

It has been held, however, that where there is a right of entry given for underletting, if a person is found in the premises appearing as the tenant, it is *prima facie* evidence of an underletting sufficient to call upon defendant to show in what character such person was in possession, as tenant or as servant to the lessee. Doe *v.* Rickarby, 5 Esp. 4. And see Ward *v.* Burgher, 90 Hun (N. Y.) 540, 35 N. Y. Suppl. 961. But see Doe *v.* Payne, 1 Stark. 86, 18 Rev. Rep. 747, 2 E. C. L. 41.

Assignee or under-tenant — Question for jury. — If a person comes in as an under-tenant before any lease was granted to the person of whom he took the premises, and that person afterward takes a lease, and if there is no evidence that he knew of the lease, it will be for the jury to say whether he is an under-tenant and not an assignee of the lease, although he paid to the superior landlord the rent reserved in the lease. Torriano *v.* Young, 6 C. & P. 8, 25 E. C. L. 295.

81. Drummond *v.* Fisher, 16 N. Y. Suppl. 867.

However, an assignment of a term to defendant of certain premises indorsed on the back of the lease, which was executed by plaintiff but not by defendant, is evidence for plaintiff to show that he has performed his part of an agreement to assign the lease. Hawkins *v.* Sherman, 3 C. & P. 459, 14 E. C. L. 662.

82. Wilson *v.* Leonard, 3 Beav. 373, 43 Eng. Ch. 373, 49 Eng. Reprint 146.

83. Bisbee *v.* Hall, 3 Ohio 449, holding, however, that before the statute of 1824 an assignment attested by one witness was good.

84. Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113, holding, however, that St. § 2220, which requires the acknowledgment of an assignment of a lease for a longer term than one year, does not apply to a lease for so long as the lessors shall continue in ownership, which might be for less than a year.

an assignment,[85] unless the lease is under seal.[86] Where a lease is held at a full or substantial rent, and contains onerous covenants on the part of the lessee, an assignment to one who subjects himself to the performance of the covenants is not voluntary.[87] In some states mortgages of leaseholds depend wholly upon statutes for their validity as liens.[88]

(II) *Delivery and Acceptance.* To become effectual, an assignment of a leasehold must be delivered[89] and accepted;[90] but where a mortgage is made of leasehold premises, it is not necessary to deliver the lease itself to the mortgagee.[91]

(III) *Recordation.* In some states there are statutes providing for the recordation of assignments,[92] subleases,[93] and mortgages of leaseholds.[94]

(IV) *Description of Leasehold.* A conveyance by a lessee for years need not particularly mention the leasehold in order to pass the term,[95] but the

Parol assignment of leasehold see FRAUDS, STATUTE OF, 20 Cyc. 218.

85. Holliday *v.* Marshall, 7 Johns. (N. Y.) 211. And see Barrett *v.* Trainor, 50 Ill. App. 420.

86. Brewer *v.* Dyer, 7 Cush. (Mass.) 337, holding that a sealed lease cannot be assigned by an unsealed writing. See, however, Troxell *v.* Wheatly, 2 Luz. Leg. Reg. (Pa.) 37, holding that a lease under seal may be assigned by writing not under seal, if signed by the parties, or by the party assigning, and accepted by the other.

87. *In re* Greer, Ir. R. 11 Eq. 502.

88. Hilton's Appeal, 116 Pa. St. 351, 9 Atl. 342.

89. Canale *v.* Copello, 137 Cal. 22, 69 Pac. 698; Farnum *v.* Hefner, 92 Cal. 542, 28 Pac. 602 (otherwise there is no breach of restriction against assignment); Brewer *v.* Dyer, 7 Cush. (Mass.) 337; Rudd *v.* Beardsley, 2 N. Y. Suppl. 800 (holding that a delivery after the assignor's death was inoperative).

90. Canale *v.* Copello, 137 Cal. 22, 69 Pac. 698.

91. Johnson *v.* Stagg, 2 Johns. (N. Y.) 510.

92. *Maryland.*—Mayhew *v.* Hardesty, 8 Md. 479, assignment of term for more than seven years.

Massachusetts.—Collins *v.* Pratt, 181 Mass. 345, 63 N. E. 946, assignment of term for more than seven years.

New York.— Putnam *v.* Stewart, 97 N. Y. 411, holding, however, that where an assignment indorsed on a recorded lease refers to the lease for a description of the premises and of the interest conveyed by the lease, the assignment is sufficiently recorded if its record is accompanied by a memorandum referring to the book and page where the lease is recorded.

Pennsylvania.— Williams *v.* Downing, 18 Pa. St. 60, holding, however, that assignments of leases for less than twenty-one years, if accompanied by possession, need not be recorded. See *In re* Speer, 28 Pittsb. Leg. J. N. S. 410.

Vermont.— Sowles *v.* Butler, 71 Vt. 271, 44 Atl. 355, holding, however, that the assignment of a lease by the lessee is admissible to show that his interest has vested in his assignee, although the assignment was not recorded until after the suit was brought.

United States.— Cooke *v.* Myers, 6 Fed. Cas. No. 3,174, 1 Cranch C. C. 6, holding, however, that in debt by the lessor against the assignee of the lessee, plaintiff is not bound to show a recorded assignment.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 239.

In Washington recordation is unnecessary. Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

A sheriff's deed of a leasehold need not be registered. Thomas *v.* Blackemore, 5 Yerg. (Tenn.) 113.

93. Talley *v.* Alexander, 10 La. Ann. 627, holding, however, that no registry is necessary to subject an under-tenant to the lessee's obligations under the original lease.

94. Hilton's Appeal, 116 Pa. St. 351, 9 Atl. 342, holding that the omission to refer, in such a mortgage, to the record of the lease, or, if not recorded, to record it with the mortgage, is fatal.

Mortgage of tenant's fixtures see FIXTURES, 19 Cyc. 1065.

95. *California.*— Scheerer *v.* Goodwin, 125 Cal. 154, 57 Pac. 789, holding that a lessee selling and assigning the lease, together with all his right and interest in the property, thereby conveys all the title that he may have in the property.

Illinois.— Chicago Attachment Co. *v.* Davis Sewing Mach. Co., (1890) 25 N. E. 669, holding that where one who has bought out the business of another takes possession of the leased premises in which the business is carried on, and receives the lease from his vendor and pays rent thereunder, the fact that the bill of sale of the business does not mention the lease is not conclusive evidence that the lease was not sold with the business.

Indian Territory.— Lewis *v.* Richardson, 2 Indian Terr. 341, 51 S. W. 969.

Massachusetts.—Martin *v.* Tobin, 123 Mass. 85, holding that a bequest of all testator's interest in a certain described estate operates as an assignment of his rights as lessee.

Missouri.— Boyce *v.* Bakewell, 37 Mo. 492, holding that an assignment by a lessee of a storehouse of all his property, "of every nature, kind and description, consisting of goods, wares and merchandise . . . contained in the store-house now occupied" by him, transfers the lease.

New York.— Jacques *v.* Short, 20 Barb.

description must be certain, or else the conveyance is not effectual[96] for that purpose.

b. Validity.[97] If a lease is invalid, an assignment of the term[98] or a sublease[99] is also ineffectual. An assignment of a lease which has terminated is inoperative.[1] An assignment is not vitiated by the assignee's failure to enter into possession of the premises,[2] or by the fact that it is to take effect *in futuro*.[3] If the assignee intends to use the premises for an immoral purpose and the lessee is aware of that fact the assignment is void.[4] An assignment or sublease may be avoided for fraud.[5]

4. Construction and Operation of Assignments — a. In General.[6] The assignment of a lease creates the relation of landlord and tenant between the assignee and the lessor,[7] and the rights and liabilities of those parties are such as are incident to that relation.[8] The rights of an assignee are superior to those of a person

269 (where a conveyance of the premises by the lessee contained no reference to the lease); Kearny *v.* Post, 1 Sandf. 105 [*affirmed* in 2 N. Y. 394] (where a mortgage of the premises by the lessee contained no reference to the lease); Provost *v.* Calder, 2 Wend. 517 (holding that a transfer of an estate, to which a water privilege granted by lease is appurtenant, is sufficient to charge the transferee as assignee of the leasehold interest). See, however, Davis *v.* Morris, 35 Barb. 227.

Assignment of crop.—Where a judgment debtor merely assigns a growing crop on land leased by him, the leasehold interest remains in him, and is subject to execution. Strawhacker *v.* Ives, 114 Iowa 661, 87 N. W. 669.

96. Kirsley *v.* Duck, 2 Vern. Ch. 684, 23 Eng. Reprint 1044, holding that where one possessed of a term for two thousand years in land grants the land to A, without mentioning any term, it is void for uncertainty.

97. **Validity and effect of agreements to assign or sublet** see *infra*, IV, B, 7.

Where premises are adversely held see Champerty and Maintenance, 6 Cyc. 874.

98. Andrew *v.* Pearce, 1 B. & P. N. R. 158, 8 Rev. Rep. 776.

99. People *v.* Stiner, 45 Barb. (N. Y.) 56, 30 How. Pr. 129.

1. Carter *v.* Russell, 101 Mass. 53 (as against subsequent tenant of landlord); Carnegie Natural Gas Co. *v.* Philadelphia Co., 158 Pa. St. 317, 27 Atl. 951 (as against landlord).

2. Williams *v.* Downing, 18 Pa. St. 60.

3. Williams *v.* Downing, 18 Pa. St. 60.

4. Smith *v.* White, L. R. 1 Eq. 626, 35 L. J. Ch. 454, 14 L. T. Rep. N. S. 350, 14 Wkly. Rep. 510.

5. Cunningham *v.* Wathen, 14 N. Y. App. Div. 553, 43 N. Y. Suppl. 886, holding that an attempt by an assignee to rescind one month after taking possession for fraudulent representations as to the length of the term was made within a reasonable time after discovering the fraud, although he was informed of the falsity of the representations soon after taking possession, if on subsequent inquiry he was told by the assignor that the representations were true, and the lease itself was not delivered to him. And see Burlock *v.* Cook, 20 Ill. App. 154. However, a subtenant cannot avoid a contract for the hiring of part of the premises because of fraudulent representations by the lessee as to the amount paid by the latter under his lease, where it was within the power of such subtenant to ascertain the value by a personal examination. Rosenbaum *v.* Gunter, 3 E. D. Smith (N. Y.) 203. And it is no ground for the rescission of an assignment of a lease that the pendency of an action for forcible entry and detainer, brought against three of the common employees of the assignors not residing on the land, by one who claimed a superior title, was concealed from the assignee, as the assignors were not parties to the action, which was possessory in its character and did not involve title, and was not therefore concluded, although they assisted in the defense of the action. Chamberlain *v.* Fox Coal, etc., Co., 92 Tenn. 13, 20 S. W. 345.

Assignment by assignee to escape liability to lessor see *infra*, IV, B, 4, c, (III).

6. **Assignment by tenant renting on shares** see *infra*, XI, D, 3.

Assignment to lessor as merging term see *infra*, IX, B, 5.

Construction of instrument as to whether term is included in assignment see *supra*, IV, B, 3, a, (IV).

Rights and liabilities as between assignee and mortgagee see *infra*, IV, B, 6, a.

Substitution of assignee as surrender see *infra*, IX, B, 8, c, (IV), (B).

What constitutes assignment see *supra*, IV, B, 2, a, c.

7. McTeran *v.* Benton, 43 Cal. 467; Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481.

8. *Indian Territory.*— Thomas *v.* Sass, 3 Indian Terr. 545, 64 S. W. 531, holding that an assignee acquires no further rights than the tenant held.

Kentucky.— Pierce *v.* Meadows, 86 S. W. 1127, 27 Ky. L. Rep. 870.

Texas.— Dozier *v.* Pillot, 79 Tex. 224, 14 S. W. 1027, holding that the assignment passes absolute control of the premises to the assignee.

Virginia.— McClenahan *v.* Gwynn, 3 Munf. 556, holding that the landlord is liable to the assignee for damages wherever he would have been similarly liable to the original lessee.

claiming under a prior contract by the lessor to assign the term.[9] The relation of landlord and tenant does not exist as between different persons to whom the lessee severally assigns different parts of the premises.[10]

b. Between Lessor and Assignor. An assignment of the term and the acceptance of the assignee as tenant discharges the lessee from all obligations arising from privity of estate, but not from those arising from privity of contract,[11] notwithstanding the assignee may have become liable by privity of estate,[12] unless there is an agreement by which a new tenancy is created.[13] The acceptance of the assignee is not in general regarded as a surrender.[14] The assignee is entitled to possession of the premises as against a receiver appointed for his assignor after the lessor's assent to the assignment.[15]

c. Between Lessor and Assignee — (I) *In General.* In the absence of agreement to the contrary,[16] the assignee of a lease has the same privileges that were secured to the assignor.[17] He is not, however, entitled to the benefit of other contracts outside the lease.[18] The right to the benefits of covenants of the lessor, running with the land, passes to the assignee upon assignment of the lease,[19] and

United States.—Willison *v.* Watkins, 3 Pet. 43, 7 L. ed. 596, holding that a direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes all the tenant's original relations to his landlord.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 249.

Estoppel to deny title of assignor or lessor see *supra*, III, G, 7.

Property of assignee subject to distress for rent see *infra*, VIII, E, 13, a, (III).

Restriction against assignment: Right of assignee to take advantage of breach see *supra*, IV, B, 1, f, (II). Effect of waiver of breach on rights and liabilities of parties see *supra*, IV, B, 1, f, (IV). Right of assignee to assign term see *supra*, IV, B, 1, b. Right to sue for wrongful eviction see *infra*, VII, F, 3.

9. Taylor *v.* Sutton, 18 U. C. Q. B. 615.

10. Woodhull *v.* Rosenthal, 61 N. Y. 382, holding accordingly that they owe no special duties of fiduciary nature the one to the other.

11. *Illinois.*— Bradley *v.* Walker, 93 Ill. App. 609.

Indiana.— Heller *v.* Dailey, 28 Ind. App. 555, 63 N. E. 490.

New Jersey.— Hunt *v.* Gardner, 39 N. J. L. 530.

New York.— Damb *v.* Hoffman, 3 E. D. Smith 361; Ranger *v.* Bacon, 3 Misc. 95, 22 N. Y. Suppl. 551; Frank *v.* New York, etc., R. Co., 7 N. Y. St. 814.

Pennsylvania.— Ghegan *v.* Young, 23 Pa. St. 18.

Rhode Island.— Almy *v.* Greene, 13 R. I. 350.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 251.

Liability for rent see *infra*, VIII, A, 8, b, (I).

12. Way *v.* Reed, 6 Allen (Mass.) 364; Gerken *v.* Smith, 11 N. Y. Suppl. 685.

13. Bradley *v.* Walker, 93 Ill. App. 609; Damb *v.* Hoffman, 3 E. D. Smith (N. Y.) 361.

14. See *infra*, IX, B, 8, c, (IV), (B).

15. Garcewich *v.* Woods, 36 Misc. (N. Y.) 201, 73 N. Y. Suppl. 154.

16. Halbert *v.* Bruce, 2 A. K. Marsh. (Ky.) 59.

17. Halbert *v.* Bruce, 2 A. K. Marsh. (Ky.) 59, privilege to quit at the end of any year upon three months' notice. And see Weltman *v.* August, 11 Tex. Civ. App. 604, 33 S. W. 158, holding that where a lessee builds show windows in such a manner as would make them part of the realty if built by the owner, but by agreement with the owner the lessee has the right to remove them, an assignee of the lease is entitled to their use for the unexpired term, without compensation to his lessor.

Right to exercise option to renew lease see *infra*, IV, C, 2, e, (I), (E), (2).

Right to exercise option to buy premises see *infra*, IV, C, 5, c, (V), (B).

18. Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77.

19. *California.*— Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678.

Illinois.— Cleveland, etc., R. Co. *v.* Mitchell, 74 Ill. App. 602.

Kentucky.— See Thomas *v.* Conrad, 114 Ky. 841, 71 S. W. 903, 24 Ky. L. Rep. 1630. 74 S. W. 1084, 25 Ky. L. Rep. 169, holding that where a landlord asserts a claim under the lease, any defense available to the lessee is available to the assignees.

Massachusetts.— Shelton *v.* Codman, 3 Cush. 318.

Missouri.— Blackmore *v.* Boardman, 28 Mo. 420; B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967.

New York.— Wilkinson *v.* Pettit, 47 Barb. 230.

Pennsylvania.— Lloyd *v.* Cozens, 2 Ashm. 131; Barclay *v.* Steamship Co., 6 Phila. 558.

United States.— Hunt *v.* Danforth, 12 Fed. Cas. No. 6,887, 2 Curt. 592.

England.— Palmer *v.* Edwards, Dougl. (3d ed.) 187 note.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 250.

he is correspondingly bound thereby,[20] after acceptance of the leasehold estate,[21] in

What covenants run with land see *supra*, II, B, 3, d.

An assignee by operation of law is within the rule stated in the text. Shelton *v.* Codman, 3 Cush. (Mass.) 318.

An assignee of an undivided part of leasehold premises can maintain an action in his own name upon a covenant of warranty contained in the original lease. Van Horne *v.* Crain, 1 Paige (N. Y.) 455.

Refusal of other leases.— Where a privilege of refusal of other leases was given to a lessee, in a lease providing against an assignment without the lessor's consent, who assigned, with the assent of the lessor, to third parties, who subsequently assigned, without the consent of the lessor, another lease to the last assignees by the executors of the original lessor was not a breach for which the original lessees were entitled to damages, because the privilege of refusal was inseparable from the lease, and lost when the lease was assigned. Winton's Appeal, 111 Pa. St. 387, 5 Atl. 240.

20. *California.*—Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104.

Illinois.— St. Louis Consol. Coal Co. *v.* Peers, 97 Ill. App. 188; Peck *v.* Christman, 94 Ill. App. 435.

Indiana.— Indiana Natural Gas, etc., Co. *v.* Hinton, 159 Ind. 398, 64 N. E. 224; Carley *v.* Lewis, 24 Ind. 23.

Kentucky.— McCormick *v.* Young, 2 Dana 294. See also Trabue *v.* McAdams, 8 Bush 74.

Louisiana.— Walker *v.* Dohan, 39 La. Ann. 743, 2 So. 381.

Massachusetts.— Torrey *v.* Wallis, 3 Cush. 442, holding that a parol promise to pay rent, made by the assignee of a lease under seal, with a surety, to the executor of a lessor, and indorsed on the lease, does not affect the liability of the assignee for the performance of the other covenants in the lease.

Minnesota.— Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917.

Mississippi.— Doty *v.* Heth, 52 Miss. 530.

Missouri.— Hicks *v.* Martin, 25 Mo. App. 359.

New York.— Stewart *v.* Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Van Rensselaer *v.* Bonesteel, 24 Barb. 365; Jacques *v.* Short, 20 Barb. 269; Graves *v.* Porter, 11 Barb. 592; Kernochan *v.* Whiting, 42 N. Y. Super. Ct. 490; Kearny *v.* Post, 1 Sandf. 105 [*affirmed* in 2 N. Y. 394, 51 Am. Dec. 303]; Journeay *v.* Brackley, 1 Hilt. 447; Waller *v.* Thomas, 42 How. Pr. 337.

Ohio.— Masury *v.* Southworth, 9 Ohio St. 340.

Pennsylvania.— Fennell *v.* Guffey, 139 Pa. St. 341, 20 Atl. 1048; Bradford Oil Co. *v.* Blair, 113 Pa. St. 83, 4 Atl. 218, 57 Am. Rep. 442; Pollard *v.* Shaaffer, 1 Dall. 210, 1 Am. Dec. 239, 1 L. ed. 104; Lloyd *v.* Cozens, 2 Ashm. 131; Brolaskey *v.* Hood, 6 Phila. 193.

Texas.— Harvey *v.* McGrew, 44 Tex. 412; Campbell *v.* Cates, (Civ. App. 1899) 51 S. W. 268; Sansing *v.* Risinger, 2 Tex. App. Civ. Cas. § 713.

West Virginia.— West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

Wisconsin.— De Pere Co. *v.* Reyen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

England.— Palmer *v.* Edwards, Dougl. (3d ed.) 187 note. See Vyvyan *v.* Arthur, 1 B. & C. 410, 2 D. & R. 670, 1 L. J. K. B. O. S. 138, 25 Rev. Rep. 437, 8 E. C. L. 175.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 250.

Rights and liabilities on particular covenants: As to condition of premises at end of term see *infra*, VII, D, 5, d. Repairs see *infra*, VII, D, 1, a. Use of premises see *infra*, VII, B, 3, c. To pay for improvements see *infra*, VII, D, 3, c, (v). To pay rent see *infra*, VIII, A, 8, b, (II). To pay taxes and assessments see *infra*, VII, C, 2, b, (VI).

Assignees of a sublease are within the rule. **Adams *v.* Beach, 1 Phila. (Pa.) 99.** The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, although he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee, as a ground for refusing the performance of a covenant in the original lease. Jenkins *v.* Portman, 1 Keen 435, 5 L. J. Ch. 313, 15 Eng. Ch. 435, 48 Eng. Reprint 374.

Equitable assignment.— An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease. Cox *v.* Bishop, 8 De G. M. & G. 815, 3 Jur. N. S. 499, 26 L. J. Ch. 389, 5 Wkly. Rep. 437, 57 Eng. Ch. 630, 44 Eng. Reprint 604. The liability of an equitable assignee of a leasehold rests on simple contract and not on covenant. Sanders *v.* Benson, 4 Beav. 350, 49 Eng. Reprint 374.

Assignment in trust.—Where a lease is assigned with the lessor's consent, to one person for the benefit of another, who goes into possession, the lessor and the beneficial assignee are mutually estopped to deny that their rights and obligations are governed by the terms of the lease. American Cent. Ins. Co. *v.* Chicago, etc., R. Co., 74 Mo. App. 89.

21. Bonetti *v.* Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104; Darmstaetter *v.* Hoffman, 120 Mich. 48, 78 N. W. 1014.

An assignee by operation of law is not in general bound until he does some act showing an acceptance of the lease. Whitcomb *v.* Starkey, 63 N. H. 607, 4 Atl. 793.

the absence of a contrary agreement.[22] In case there has been an absolute assignment accepted by the landlord, the assignee need not have taken possession.[23] The rules governing the liability of an assignee apply only where the party to be charged is an assignee of the whole term,[24] or where he occupies such a position to the leasehold estate that equity would compel him to take an assignment.[25] Assignees, although in unequal proportions, of the whole of the demised premises are jointly and severally liable on all covenants and obligations of the assignors,[26] except perhaps the payment of rent.[27] The assignee is not bound at law by personal covenants of the lessee,[28] but he may be held liable in equity where he takes with notice,[29] and he is bound to take notice of the terms of the lease.[30]

(II) *Breaches Prior to Assignment.* The assignee is not liable for breaches occurring prior to the assignment,[31] in the absence of an agreement to the contrary.[32]

(III) *Termination of Liability.* The assignee cannot release himself from liability by a mere abandonment of the premises,[33] nor by a sublease;[34] but he may by an assignment,[35] although the assignment is to an irresponsible party,[36] without

22. Benedict *v.* Everard, 73 Conn. 157, 46 Atl. 870.

23. Benedict *v.* Everard, 73 Conn. 157, 46 Atl. 870; Tate *v.* Neary, 52 N. Y. App. Div. 78, 65 N. Y. Suppl. 40; Walker *v.* Reeves, Dougl. (3d ed.) 461 note.

24. *Alabama.*— Merchants' Ins. Co. *v.* Mazange, 22 Ala. 168.

Maryland.—Mayhew *v.* Hardesty, 8 Md. 479.

Nebraska.— Hogg *v.* Reynolds, 61 Nebr. 758, 86 N. W. 479, 87 Am. St. Rep. 522.

United States.— May *v.* Sheehy, 16 Fed. Cas. No. 9,335, 4 Cranch C. C. 135.

England.— Chandos *v.* Brownlow, 2 Ridgw. App. 405.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 250.

25. Merchants' Ins. Co. *v.* Mazange, 22 Ala. 168.

Merely permissive possession.— One who enters by consent of the lessor and lessee, without a formal assignment, is not bound by the covenants in the lease. West *v.* Dobb, L. R. 4 Q. B. 634, 9 B. & S. 755, 38 L. J. Q. B. 289, 20 L. T. Rep. N. S. 737, 17 Wkly. Rep. 879 [*affirmed* in L. R. 5 Q. B. 460, 10 B. & S. 987, 39 L. J. Q. B. 190, 23 L. T. Rep. N. S. 76, 18 Wkly. Rep. 1167].

26. Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75.

27. **Liability of assignee for rent** in general see *infra*, VIII, A, 8, b, (II).

28. Peck *v.* Christman, 94 Ill. App. 435; Kribbs *v.* Alford, 120 N. Y. 519, 24 N. E. 811; Dolph *v.* White, 12 N. Y. 296; Grey *v.* Cuthbertson, 2 Chit. 482, 18 E. C. L. 747, 4 Dougl. 351, 26 E. C. L. 519.

29. Luker *v.* Dennis, 7 Ch. D. 227, 47 L. J. Ch. 174, 37 L. T. Rep. N. S. 827, 26 Wkly. Rep. 167 [not *following* Keppell *v.* Bailey, 2 Myl. & K. 517, 7 Eng. Ch. 517, 39 Eng. Reprint 1042].

30. Barroilhet *v.* Battelle, 7 Cal. 450; Indianapolis Mfg., etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281. See also Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553.

31. Townsend *v.* Scholey, 42 N. Y. 18; Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 516; Dananberg *v.* Rheinheimer, 24 Misc. (N. Y.) 712, 53 N. Y. Suppl. 794; Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Prestons *v.* McCall, 7 Gratt. (Va.) 121; Farmers' Bank *v.* Mutual Assur. Soc., 4 Leigh (Va.) 69; St. Saviour *v.* Smith, 3 Burr. 1271, 1 W. Bl. 351; Grescot *v.* Green, 1 Salk. 199. And see Lewes *v.* Ridge, Cro. Eliz. 863.

32. Allison *v.* Luhrig Coal Co., 22 Ohio Cir. Ct. 489, 12 Ohio Cir. Dec. 504; Farmers' Bank *v.* Mutual Assur. Soc., 4 Leigh (Va.) 69, holding that a covenant by the assignee to pay all the rents and perform all the covenants in the lease contained and required to be performed by the lessee will bind him to a full performance of the covenants and he will be liable for a breach of each.

33. Oil Creek, etc., Petroleum Co. *v.* Stanton Oil Co., 23 Pa. Co. Ct. 153.

34. Carter *v.* Hammett, 18 Barb. (N. Y.) 608; McClaren *v.* Citizens' Oil, etc., Co., 14 Pa. Super. Ct. 167.

35. Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Readey *v.* American Brewing Co., 60 Ill. App. 501 [*distinguishing* Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223; St. Louis Consol. Coal Co. *v.* Peers, 39 Ill. App. 453]; Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Valliant *v.* Dodemede, 2 Atk. 546, 26 Eng. Reprint 728; Paul *v.* Nurse, 8 B. & C. 486, 7 L. J. K. B. O. S. 12, 2 M. & R. 525, 15 E. C. L. 241.

Sufficiency of assignment.—A contract of even date with the assignment of a lease of land by the original lessee, by which the assignee agrees to make improvements on the premises, to be paid for by the lessee, and to reassign the lease to him, on such payment being made in full, does not amount to a present reassignment, so as to relieve the assignee of liability on the covenants of the lease. Simonds *v.* Turner, 120 Mass. 328.

36. Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Washington Natural Gas Co.

notice to the lessor[37] or for the purpose of avoiding the obligation of the lease,[38] unless the assignee has entered into privity of contract as well as of estate with the lessor.[39] Where an assignment has been taken in trust the privity of estate is dissolved where the assignee has parted with his beneficial interest and has yielded possession to the beneficial owner, and he is no longer liable upon the covenants of the lease.[40] The liability for breaches accruing while the assignee is in privity of estate continues after such privity is terminated by assignment.[41]

(iv) *Assignment Against Restriction.* A covenant against assignment may be waived,[42] and if waived the relation of landlord and tenant exists between the lessor and the assignee.[43] A waiver of the forfeiture attendant upon a breach

v. Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Borland's Appeal, 66 Pa. St. 470; Negley *v.* Morgan, 46 Pa. St. 281; Fagg *v.* Dobie, 2 Jur. 681, 3 Y. & C. Exch. 96.

37. Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

38. Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Taylor *v.* Shum, 1 B. & P. 21, 4 Rev. Rep. 759, holding that there is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession nor receives the lease.

A colorable and fictitious assignment has been held insufficient to release a liability for rent. Springer *v.* Chicago Real Estate L. & T. Co., 202 Ill. 17, 66 N. E. 850.

39. Springer *v.* Chicago Real Estate L. & T. Co., 202 Ill. 17, 66 N. E. 850 [*affirming* 102 Ill. App. 294]; Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223; Springer *v.* De Wolf, 93 Ill. App. 260; St. Louis Consol. Coal Co. *v.* Peers, 39 Ill. App. 453 [*affirmed* in 150 Ill. 344, 37 N. E. 937]; Lindsley *v.* Joseph Schnaide Brewing Co., 59 Mo. App. 271.

Sufficiency of agreement.—An assignment reciting that it is made in consideration "of the assumption by the assignee of all the obligations and liabilities of the assignor" is sufficient (Springer *v.* De Wolf, 194 Ill. 218, 62 N. E. 542, 88 Am. St. Rep. 155, 56 L. R. A. 465 [*affirming* 93 Ill. App. 260]), as is an assent to an assignment upon the condition that the assignment should be subject to all the conditions of the lease (Springer *v.* Chicago Real Estate L. & T. Co., 202 Ill. 17, 66 N. E. 850 [*affirming* 102 Ill. App. 294). A mere recital that the assignment is subject to the covenants and conditions of the original lease is not sufficient. Dassori *v.* Zarek, 71 N. Y. App. Div. 538, 75 N. Y. Suppl. 841.

Consideration.—The lessor's assent to an assignment of the lease is a sufficient consideration for covenants assumed by the assignee where such assent is essential to the validity of the assignment. Lindsley *v.* Joseph Schnaide Brewing Co., 59 Mo. App. 271.

Release.—An assumption of the terms of the lease sufficient to create a privity of contract between the assignee and the lessor cannot be afterward released by the lessee. Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25.

Primary and secondary liability.—Where there have been several successive assignments, each one of which creates a privity of contract between the assignee and the lessor, the last grantee is bound primarily for the performance of the conditions while the lessee and the other assignees are each secondarily liable. Borgman *v.* Spellmire, 7 Ohio S. & C. Pl. Dec. 344, 4 Ohio N. P. 416.

40. Astor *v.* L'Amoreux, 4 Sandf. (N. Y.) 524 [*reversed* on other grounds in 8 N. Y. 107].

41. McClaren *v.* Citizens' Oil, etc., Co., 14 Pa. Super. Ct. 167; Harley *v.* King, 2 C. M. & R. 18, 1 Gale 100, 4 L. J. Exch. 144, 5 Tyrw. 692. But see Hintze *v.* Thomas, 7 Md. 346, holding that since the liability at law of the assignee of a lessee depends upon privity of estate, an action at law will not lie after he has assigned over for a previous breach of covenants, the remedy being in equity.

42. Restriction against assignment: Effect of waiver of breach on rights and liabilities of parties see *supra*, IV, B, 1, f, (iv). Right of assignee to take advantage of breach of restriction see *supra*, IV, B, 1, f, (ii). Right of assignee to assign term see *supra*, IV, B, 1, b.

43. Tyler *v.* Giesler, 74 Mo. App. 543; Koehler *v.* Brady, 22 N. Y. App. Div. 624, 47 N. Y. Suppl. 984; Benson *v.* Suarez, 43 Barb. (N. Y.) 408, 19 Abb. Pr. 61, 28 How. Pr. 511 (holding that the assignee may recover for the landlord's breach of condition to keep the premises in repair); Dierig *v.* Callahan, 35 Misc. (N. Y.) 30, 70 N. Y. Suppl. 210 [*reversing* 34 Misc. 218, 68 N. Y. Suppl. 1131] (holding that in the absence of reëntry the lessor is liable to the assignee on his covenants in the lease); Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481 (holding that where consent is not given the assignee or under-tenant, so far as the rights of the landlord are concerned, must be treated simply as an employee of the lessee). See also Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.

After transfer of reversion.—The fact that the purchaser of the reversion has not waived a breach by the lessee of a covenant against assignments will not prevent the original lessor from waiving such breach and thereby continuing liable under his personal covenants. Carpenter *v.* Pocasset Mfg. Co., 180 Mass. 130, 61 N. E. 816.

of the covenant is not, however, of necessity a consent to the assignment.[44] Notwithstanding a covenant not to assign, an assignment in breach thereof passes the estate;[45] for example the assignee takes such title as will support ejectment.[46] And while holding under the assignment, the assignee cannot set up its irregularity in an action on the lease.[47] In a like manner an assignment over terminates liabilities of the assignee resting upon privity of estate, although the lease contains a covenant against assignment.[48] Where the landlord has not waived a breach of a covenant against assignment, the assignee is liable to the lessee for rent.[49]

d. Between Assignor and Assignee.[50] While it has been held by some authorities that there are no covenants implied in an assignment of a lease,[51] it would seem the better rule that unless there is a stipulation to the contrary there is an implied undertaking to make out the lessor's title to the demised premises,[52] and also the assignor's title to the lease itself.[53] Apart from any question of implied covenants, it is competent for the parties to introduce into the assignment any covenant or stipulation which they have agreed upon.[54] Where an assignee covenants to perform all the covenants in the original lease, he is liable to the lessee

44. Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407, 105 Fed. 659, 44 C. C. A. 653, holding that the lessor may treat the assignee as in possession under the lessee, and hold the lessee to his direct liability under the contract for the payment of rent. See also *supra*, IV, B, 1, f, (IV).

45. Oil Creek, etc., Petroleum Co. *v.* Stanton Oil Co., 23 Pa Co. Ct. 153; Williams *v.* Earle, L. R. 3 Q. B. 739, 9 B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 238, 16 Wkly. Rep. 104; Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 60.

46. Hague *v.* Ahrens, 53 Fed. 58, 3 C. C. A. 426.

47. See *supra*, IV, B, 1, f, (II).

48. Paul *v.* Nurse, 8 B. & C. 486, 7 L. J. K. B. O. S. 12, 2 M. & R. 525, 15 E. C. L. 241.

49. Darmstaetter *v.* Hoffman, 120 Mich. 48, 78 N. W. 1014, so holding, although the rent had not been paid by the lessee to the landlord.

Liability of assignee for rent in general see *infra*, VIII, A, 8, b, (II).

50. **Right of assignor to vendor's lien** see VENDOR AND PURCHASER.

51. Waldo *v.* Hall, 14 Mass. 486; Blair *v.* Rankin, 11 Mo. 440.

52. *California.*— Jeffers *v.* Easton, 113 Cal. 345, 45 Pac. 680.

Illinois.— Krause *v.* Kraus, 58 Ill. App. 559.

New York.— Bensel *v.* Gray, 38 N. Y. Super. Ct. 447. See also Burwell *v.* Jackson, 9 N. Y. 535.

Ohio.— Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

England.— Souter *v.* Drake, 5 B. & Ad. 992, 3 L. J. K. B. 31, 3 N. & M. 40, 27 E. C. L. 417; Purvis *v.* Rayer, 9 Price 488, 23 Rev. Rep. 707.

53. Jeffers *v.* Easton, 113 Cal. 345, 45 Pac. 680; Bensel *v.* Gray, 38 N. Y. Super. Ct. 447; Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004; Souter *v.* Drake, 5 B. & Ad. 992, 3 L. J. K. B. 31, 3 N. & M. 40, 27 E. C. L. 417. But *compare* Alford *v.* Cobb, 35 Hun (N. Y.) 651, holding that where the assignee of a leasehold agrees, as part of the consideration, to pay an encumbrance on the leasehold and subsequently assigns without having done so, his assignee on paying off the encumbrance cannot recover the amount thereof from the lessee.

54. Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

Covenants of warranty and indemnity.—A covenant that the assignor has good and lawful right to bargain and transfer the premises, in connection with a clause granting the right to have and to hold the premises in as ample a manner, to all intents and purposes, as the assignor might or could hold the same, is a qualified covenant limited to the acts of the assignor and does not amount to a warranty of the landlord's title. Knickerbocker *v.* Killmore, 9 Johns. (N. Y.) 106. A covenant that the premises are free from outstanding leases will not be regarded as broken by the existence of leases not considered by the parties as being within the covenant. Pease *v.* Christ, 31 N. Y. 141. An agreement that the assignor will refund any charge incurred by the assignee by reason of the assignment, includes an increased rent which the assignee is compelled to pay under a new lease taken from the owner after the owner has recovered against the assignee in ejectment. Wray *v.* Lemon, 81* Pa. St. 273. Under a covenant to indemnify against all claims in respect to the covenants of the lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. Murrell *v.* Fysh, Cab. & E. 80.

Covenant of seizin and peaceable enjoyment.—A stipulation in a collateral agreement that the lease is in full force and effect at the time of its assignment and delivery to the assignee, and a guaranty to him of "the rights and title of said lease," amounts to an express covenant of the assignor's title to the term demised, and for

in the same manner as the lessee is liable to the original lessor,[55] and a covenant by the assignee to assume the lessee's liabilities may be enforced by the lessor.[56] An assignee for valuable consideration and without notice takes free from collateral agreements by his assignors.[57] The assignee is liable to the lessee for breach of covenants running with the land,[58] although there has been an intermediate assignment;[59] and the lessee is also liable in the nature of a surety as between himself and the assignee for the performance of the same covenants.[60] A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, although he has no reversion.[61] Where the lessor has waived a forfeiture, the assignee cannot assert it in order to relieve himself from liability to his assignor.[62]

its quiet enjoyment by the assignee. Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

Agreement to refund purchase-money.—An agreement to refund a portion of a sum paid for the lessee's improvements if the lessor exercises the power of determining the lease in accordance with its terms, and if the assignee then left the premises, justifies a recovery of such sum, where the assignee does not leave the premises, although the lease is terminated, but a new lease is granted to a third person with whom the assignee continues to reside. Rideout *v.* Lucas, 4 L. T. Rep. N. S. 738.

Collateral undertaking.— An instrument of guaranty executed by the lessees and delivered to the assignee contemporaneously with the delivery of the assigned lease has been held to become a part of the contract. Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004. An assignee who at the time of the assignment orally agrees to hold part of the premises in trust for the assignor, although the deed of assignment does not mention the agreement, will be enjoined from ejecting the assignor from the part covered by the trust agreement. Booth *v.* Turle, L. R. 16 Eq. 182, 21 Wkly. Rep. 72. Where the assignee executed an assignment absolute in terms and gave a separate writing to surrender possession on a future day, and the assignee at the same time contracted in writing to pay a sum of money on a day before the time of such stipulated surrender, it was held that on the refusal of the assignor to surrender according to the contract the assignee might maintain ejectment for the premises without having made such payment. Strong *v.* Garfield, 10 Vt. 497.

Additional payment on securing extension. —An agreement by the assignee to pay the assignor an additional sum if, after the expiration of the lease a new one for five years was obtained, does not contemplate that the payment of the additional sum should depend upon the obtaining of one lease for five years, but on defendant's securing the right to occupy the premises for that time. The agreement, however, contemplates a new lease on the same terms as the existing lease and the assignee is not liable for the additional payment where he was allowed to occupy the premises for the five years but had to pay an increased rental part of the time. Newman *v.* Tolmie, 81 N. Y. App. Div. 111, 80 N. Y. Suppl. 990.

55. Rawlings *v.* Duvall, 4 Harr. & M. (Md.) 1.

56. Van Schaick *v.* Third Ave. R. Co., 38 N. Y. 346 [*affirming* 49 Barb. 409]; Prestons *v.* McCall, 7 Gratt. (Va.) 121, holding that where a factory was leased for two thirds of the manufactured products, and the lease was transferred to a third person who assumed the lessee's liabilities, the lessor was entitled to two thirds of the stock left by the lessee.

An assignment of all the assignor's right, title, and interest does not carry with it the obligations of the assignor. Sprague *v.* Bartholdi Hotel Co., 56 N. Y. Super. Ct. 608, 3 N. Y. Suppl. 828 [*affirmed* in 130 N. Y. 662, 29 N. E. 1034], holding that such an assignee was not bound by his assignor's agreement to employ a prior assignor as manager of the hotel property leased.

57. Springer *v.* Citizens' Natural Gas Co., 145 Pa. St. 430, 22 Atl. 986; Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236; Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649.

58. Burnett *v.* Lynch, 5 B. & C. 589, 8 D. & R. 368, 4 L. J. K. B. O. S. 274, 29 Rev. Rep. 343, 11 E. C. L. 597; Close *v.* Wilberforce, 1 Beav. 112, 3 Jur. 35, 8 L. J. Ch. 101, 17 Eng. Ch. 112, 48 Eng. Reprint 881; Humble *v.* Langston, 7 M. & W. 517.

Right to indemnity.— In a suit by an assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the court will direct merely payment on account of breaches of covenant already committed, and will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach. Lloyd *v.* Dimmack, 7 Ch. D. 398, 47 L. J. Ch. 398, 38 L. T. Rep. N. S. 173, 26 Wkly. Rep. 458.

59. Moule *v.* Garrett, L. R. 5 Exch. 132, 39 L. J. Exch. 69, 22 L. T. Rep. N. S. 343, 18 Wkly. Rep. 697 [*affirmed* in L. R. 7 Exch. 101, 41 L. J. Exch. 62, 26 L. T. Rep. N. S. 367, 20 Wkly. Rep. 416].

60. Humble *v.* Langston, 7 M. & W. 517. See Borgman *v.* Spellmire, 7 Ohio S. & C. Pl. Dec. 344, 4 Ohio N. P. 416.

61. Clements *v.* Welles, L. R. 1 Eq. 200, 11 Jur. N. S. 991, 35 L. J. Ch. 265, 13 L. T. Rep. N. S. 548, 14 Wkly. Rep. 187.

62. Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944.

5. CONSTRUCTION AND OPERATION OF SUBLEASES — a. Between Lessor and Sublessee. Subtenants are charged with notice of the terms of the lease,[63] and are bound by its conditions.[64] There is, however, no privity of contract between the landlord and a subtenant.[65] Hence under-tenants are not liable to the original lessor on covenants running with the land.[66] In equity, however, the landlord has the same remedy upon covenants relating to the use of the property against a subtenant as against any other purchaser with notice.[67] Where after a surrender of the lease by the tenant a subtenant continues in possession and attorns to the landlord, he becomes the tenant of the landlord.[68] The landlord is not liable for the acts of the tenant in subletting unless he has represented him in the transaction.[69]

b. Between Lessee and Sublessee. After subletting the tenant has no right of possession during the life of the sublease.[70] A covenant in a sublease to perform the conditions of the lease is as binding upon the lessee as if the covenants were repeated in the sublease.[71] The tenant is liable to the subtenant in case of fraud.[72]

Right of lessee to urge forfeiture in general see *infra*, IX, B, 7, c.

63. *Iowa.*— Foster *v.* Reid, 78 Iowa 205, 42 N. W. 649, 16 Am. St. Rep. 437.

Minnesota.— Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241, so holding, although the lease is not recorded, and they have in fact no notice of its contents.

Nebraska.— Blachford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101.

New Jersey.— Peer *v.* Wadsworth, 67 N. J. Eq. 191, 58 Atl. 379.

Texas.— Missouri, etc., R. Co. *v.* Keahey, (Civ. App. 1904) 83 S. W. 1102.

Washington.— Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.

England.— Cosser *v.* Collinge, 1 L. J. Ch. 130, 3 Myl. & K. 283, 10 Eng. Ch. 283, 40 Eng. Reprint 108.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 256.

64. Foster *v.* Reid, 78 Iowa 205, 42 N. W. 649, 16 Am. St. Rep. 437; Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241; Blachford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101; Silcock *v.* Farmer, 46 L. T. Rep. N. S. 404.

The cancellation of a lease pursuant to its terms operates as a cancellation of a sublease. Bruder *v.* Geisler, 47 Misc. (N. Y.) 370, 94 N. Y. Suppl. 2; Bove *v.* Coppola, 45 Misc. (N. Y.) 636, 91 N. Y. Suppl. 8.

65. Wray-Austin Mach. Co. *v.* Flower, 140 Mich. 452, 103 N. W. 873; Williams *v.* Michigan Cent. R. Co., 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458, holding that a provision in a lease that, on reëntry for non-payment of rent, the subleases should belong to the lessor, did not create such a relation between the landlord and a subtenant as to entitle the latter to hold the premises during the term, or make it liable to the landlord as tenant.

Liability for rent see *infra*, VIII, A, 8, c, (II).

The landlord cannot be affected by covenants in the sublease. Goelet *v.* Roe, 14 Misc. (N. Y.) 28, 35 N. Y. Suppl. 145, 25 N. Y. Civ. Proc. 86, 2 N. Y. Annot. Cas. 141, holding that where a lease contains no covenant for renewal, the rights of the landlord to the premises at the end of the term cannot be affected by the lessee subletting with covenant of renewal.

66. Doty *v.* Heth, 52 Miss. 530; Hicks *v.* Martin, 25 Mo. App. 359; Coles *v.* Marquand, 2 Hill (N. Y.) 447; Quakenboss *v.* Clarke, 12 Wend. (N. Y.) 555; Harvey *v.* McGrew, 44 Tex. 412; Missouri, etc., R. Co. *v.* Keahey, (Tex. Civ. App. 1904) 83 S. W. 1102; Sansing *v.* Risinger, 2 Tex. App. Civ. Cas. § 713.

67. Peer *v.* Wadsworth, 67 N. J. Eq. 191, 58 Atl. 379; Cosser *v.* Collinge, 1 L. J. Ch. 130, 3 Myl. & K. 283, 10 Eng. Ch. 283, 40 Eng. Reprint 108.

68. Schilling *v.* Holmes, 23 Cal. 227; Hessel *v.* Johnson, 129 Pa. St. 173, 18 Atl. 754, 15 Am. St. Rep. 716, 5 L. R. A. 851. See Appleton *v.* Ames, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206; Snyder *v.* Parker, 75 Mo. App. 529.

Effect of surrender upon subtenant see *infra*, IX, B, 8, f, (I).

Liability for rent see *infra*, VIII, A, 8, c, (II), (A), (3).

Liability to distress see *infra*, VIII, E, 7.

69. The fact that a landlord has consented that his tenant may sublet the premises does not render him liable for a breach by the tenant of his contract, the tenant having no authority to act as his agent. Purdom *v.* Brussels, 66 S. W. 22, 23 Ky. L. Rep. 1796.

70. Austin *v.* Kimball, 167 Mass. 300, 45 N. E. 627, holding that he cannot maintain ejectment against the lessor, who has reëntered, whether such reëntry was lawful or unlawful.

71. Piggott *v.* Stratton, 1 De G. F. & J. 33, 6 Jur. N. S. 129, 29 L. J. Ch. 1, 1 L. T. Rep. N. S. 111, 8 Wkly. Rep. 13, 62 Eng. Ch. 25, 45 Eng. Reprint 271. And see Doughty *v.* Bowman, 11 Q. B. 444, 12 Jur. 182, 7 L. J. Q. B. 111, 63 E. C. L. 444.

72. Calvert *v.* Hobbs, 107 Mo. App. 7, 80 S. W. 681, holding that a tenant who sublet without the written consent of his landlord, which his lease required, and induced the sublessee to believe that he could occupy under the letting, and, after it was too late for the sublessee to get other lands, procured the landlord to take advantage of the lack of written consent and to oust the sublessee, was liable to action by the sublessee.

The lessee is not liable to the subtenants for an eviction occasioned without fault on his part.[73]

c. Sublease Against Restriction. A subtenant under a tenant who has covenanted not to sublet,[74] or where by statute subletting is expressly prohibited without consent of the landlord,[75] has in the absence of a waiver of the covenant or the statute no rights as against the lessor.[76] After a waiver of a restriction, the subtenant has a right to protect his possession against intruders.[77]

6. Construction and Operation of Mortgage — a. In General. The mortgagee of a leasehold takes it subject to all the conditions and covenants of the lease,[78] and upon the termination[79] or forfeiture[80] of the lease, the mortgage so far as it affects the reversion falls with it. The rights of an equitable mortgagee are superior to those of a subsequent assignee with notice.[81] The assignment of an original lease to a sublessee does not merge the original leasehold in the subleasehold in favor of a prior mortgagee of the latter so as to enlarge the estate subject to the mortgage.[82] But if the sublease names a higher rent than that named in the original lease, such assignment discharges the mortgagee from paying the higher rent as against one to whom the sublessee afterward assigned the original lease.[83]

b. As to Covenants in Lease. At common law a mortgagee is liable upon real

Fraud as affecting validity of assignment or sublease see *supra*, IV, B, 3, b.

73. Matter of Strasburger, 56 Hun (N. Y.) 164, 9 N. Y. Suppl. 204 [*affirmed* in 132 N. Y. 128, 30 N. E. 379]; Rosenquist *v.* Canary, 20 Misc. (N. Y.) 46, 45 N. Y. Suppl. 342.

Renewal in fraud of right of subtenants see *infra*, IV, C, 4, a.

74. Henderson *v.* Meyers, 45 La. Ann. 791, 13 So. 191; Shermer *v.* Paciello, 161 Pa. St. 69, 28 Atl. 995, holding that where the lessee under a lease with a covenant against subletting surrenders it, and procures a like one to be issued to another, the possession of a subtenant, although begun before the issue of the new lease, may be terminated by a judgment of ejectment entered under a power in the new lease.

75. Bass *v.* West, 110 Ga. 698, 36 S. E. 244; Brown *v.* Pope, 27 Tex. Civ. App. 225, 65 S. W. 42, holding that under Rev. St. art. 3250, prohibiting the subletting of leased premises without the landlord's consent, the lease is forfeited by such a subletting, and the sublessee does not become the landlord's tenant, and that hence he is liable as a trespasser.

76. **Right of subtenant to take advantage of breach of restriction against assignment of subletting** see *supra*, IV, B, 1, f, (II).

Effect of waiver of breach of restriction on rights and liabilities of parties see *supra*, IV, B, 1, f, (IV).

Persons entitled to benefit of restriction see *supra*, IV, B, 1, f, (II).

77. Feeley *v.* Thewlis, 25 Ill. App. 582, holding that the subtenant can maintain trespass for the value of crops harvested by one who went into possession in derogation of his right.

78. Abrahams *v.* Tappe, 60 Md. 317.

79. Rogers *v.* Herron, 92 Ill. 583, holding that the mortgage cannot be foreclosed as against the reversioner, although the bill may have been filed before the term expired.

Effect of renewal upon rights of mortgagee see *infra*, IV, C, 4, a.

Effect of surrender of lease see *infra*, IX, B, 8, f, (I).

80. Abrahams *v.* Tappe, 60 Md. 317, holding that foreclosure might be enjoined. And see Shultes *v.* Sickles, 147 N. Y. 704, 41 N. E. 574 [*affirming* 70 Hun 479, 24 N. Y. Suppl. 145], holding that where a lessor obtained a judgment of reëntry against the lessee, and before the execution of such judgment the lessee's interest in the premises was purchased by a mortgagee thereof on foreclosure, and the judgment of reëntry was assigned to one who, after executing it against the lessee and his owner, conveyed the lands to the latter, the mortgagee was not entitled to possession in the absence of any evidence showing a redemption of the premises from the judgment and execution thereof.

Where the tenant retains an equity of redemption after dispossession for non-payment of rent, the landlord may sell such equity under a mortgage upon the lease which he holds. People *v.* Stuyvesant, 3 Thomps. & C. (N. Y.) 179.

81. Upon an assignment of a lease to a purchaser, the absence of the counterpart of an under-lease of a portion of the property comprised in the lease is notice to the purchaser of the title of a person holding such counterpart by way of equitable mortgage, and if the purchaser does not inquire, or obtain possession of such counterpart, he will be guilty of gross negligence, and will therefore be postponed to the equitable mortgagee. Franklin *v.* Howes, 24 L. T. Rep. N. S. 348, 19 Wkly. Rep. 581.

82. Collamer *v.* Kelley, 12 Iowa 319.

Merger of greater into less estate see, generally, Estates, 16 Cyc. 665.

83. Collamer *v.* Kelley, 12 Iowa 319.

Liability of mortgagee for rent see *infra*, VIII, A, 8, b, (II), (D), (4).

covenants in the lease, although he has not taken possession.[84] Where, however, the equitable theory that a mortgage does not operate to pass the legal estate prevails, it has been held that the mortgagee is not so liable,[85] unless he has taken possession.[86] An equitable mortgage by deposit of the lease does not impose liability upon its covenants.[87] A mortgagee is entitled to the benefit of covenants running with the land,[88] although it has been held that the lessee and not the mortgagee is the real party in interest entitled to sue for a breach of the lease.[89]

c. Right of Mortgagee to Protect Lease. The mortgagee is entitled to redeem from a forfeiture for non-payment of rent,[90] or he may pay rent or taxes due under the lease to protect his interest and to prevent a forfeiture,[91] and upon such payment is subrogated to the lessor's claim against the lessee.[92]

d. Assignment Subject to Mortgage. An assignee of the lease by assuming the mortgage becomes personally the debtor of the mortgagee.[93] An assignee

84. Farmers' Bank *v.* Mutual Assur. Soc., 4 Leigh (Va.) 69; Haig *v.* Homan, 4 Bligh N. S. 380, 5 Eng. Reprint 136; Williams *v* Bonsanquet, 1 Ball & B. 238, 3 Moore C. P. 500, 21 Rev. Rep. 585 [*overruling* Eaton *v.* Jacques, Dougl. (3d ed.) 455]; Stone *v.* Evans, Peake Add. Cas. 94; Pilkington *v.* Shaller, 2 Vern. Ch. 374, 23 Eng. Reprint 836. And see Traherne *v.* Sadleir, 5 Bro. P. C. 179, 2 Eng. Reprint 611.

After foreclosure. — Where the original lessee assigned to one but did not execute an assignment, but assigned to one by way of mortgage reciting the prior assignment, the mortgagee is liable on the covenants and continues liable notwithstanding the mortgage has been foreclosed and the land sold to the original lessee as the highest bidder and he has entered into possession, no order having been made, however, vesting the property in him and he having paid nothing and received no conveyance. Magrath *v.* Todd, 26 U. C. Q. B. 87.

Release.—A mortgagee of a lease may relieve himself from liability to the lessor of the assignment by way of mortgage, with the latter's consent, by releasing his debt and reconveying the security. Jamieson *v.* London, etc., Loan, etc., Co. & Canadian, 30 Can. Sup. Ct. 14.

85. Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Engels *v.* McKinley, 5 Cal. 153; Tallman *v.* Bresler, 65 Barb. (N. Y.) 369; Astor *v.* Miller, 2 Paige (N. Y.) 68; Worthington *v.* Ballauf, 6 Ohio Dec. (Reprint) 1121, 10 Am. L. Rec. 505, 7 Cinc. L. Bul. 46, so holding, although after condition broken.

After forfeiture of the mortgage, however, it has been held that the whole legal estate passes to the mortgagee and he becomes liable on the real covenants, whether or not he becomes possessed of or occupies the premises in fact or not. Mayhew *v.* Hardesty, 8 Md. 479.

86. Tallman *v.* Bresler, 65 Barb. (N. Y.) 369.

87. Lucas *v.* Commerford, 3 Bro. Ch. 166, 29 Eng. Reprint 469, 8 L. J. Ch. 131, 8 Sim. 499, 8 Eng. Ch. 499, 59 Eng. Reprint 198, 1 Ves. Jr. 235, 30 Eng. Reprint 318; Moore *v.* Greg, 12 Jur. 952, 18 L. J. Ch. 15, 2 Phil. 717, 22 Eng. Ch. 717, 41 Eng. Reprint 1120 [*affirming* 2 De G. & Sm. 304, 64 Eng. Reprint 136]; Moores *v.* Choat, 3 Jur. 220, 8 L. J. Ch. 128, 8 Sim. 508, 8 Eng. Ch. 508, 59 Eng. Reprint 202. And see *Ex p.* Fletcher, 1 Deac. & C. 318, 1 L. J. Bankr. 44, where on an application by the equitable mortgagee of leasehold premises for an order directing the lessee's assignees in bankruptcy to sell the leasehold, the court refused to order him to indemnify the assignees against any breach of covenant in the lease, but gave the assignees time to reject or accept the lease.

The taking of a legal assignment cannot be compelled in equity in order to impose liability upon the covenants. Moore *v.* Greg, 12 Jur. 952, 18 L. J. Ch. 15, 2 Phil. 717, 22 Eng. Ch. 717, 41 Eng. Reprint 1120 [*overruling* Lucas *v.* Commerford, 3 Bro. Ch. 166, 29 Eng. Reprint 469, 8 L. J. Ch. 131, 8 Sim. 499, 8 Eng. Ch. 499, 59 Eng. Reprint 198, 1 Ves. Jr. 235, 30 Eng. Reprint 318].

88. Stockett *v.* Howard, 34 Md. 121, holding that the mortgagee was entitled to a sum agreed to be paid for improvements as against judgment creditors who did not sell upon execution until after the expiration of the term.

Covenants which run with land see *supra*, II, B, 3, d.

89. Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952.

90. Campbell *v.* McElevey, 2 Disn. (Ohio) 574. And see Holdridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 30.

Relief against forfeiture generally see *infra*, IX, B, 7, h.

91. Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60 [*affirming* 70 N. Y. App. Div. 71, 76 N. Y. Suppl. 65 [*affirming* 34 Misc. 708, 70 N. Y. Suppl. 1019)].

92. Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60 [*affirming* 70 N. Y. App. Div. 71, 75 N. Y. Suppl. 65 (*affirming* 34 Misc. 708, 70 N. Y. Suppl. 1019)].

93. Zapp *v.* Miller, 3 Dem. Surr. (N. Y.) 266. See, generally, MORTGAGES.

Reassignment.— The mortgagee is not discharged from his liability by a contract of even date with the assignment, in which he agrees to reassign upon payment being made in full, since such agreement does not amount

subject to the mortgage is not, however, personally liable upon a collateral agreement by his assignor to deposit rents to meet ground-rents and payments upon the mortgage, where he did not assume the liability of his assignor thereunder nor receive the money loaned upon the mortgage.[94]

e. Enforcement. The mortgage of a lease being regarded as a chattel mortgage, the mortgagee has the right to take possession upon default;[95] and after taking such possession he is accountable to the mortgagor for the rents and profits,[96] his duty being to exercise such care and diligence in respect to the property as a provident owner would exercise.[97] The mortgagee cannot, however, sell the lease at private sale.[98] A purchaser at foreclosure becomes an assignee of the lease.[99] The mortgagee cannot maintain covenant against the mortgagor where the mortgage contains no personal covenant for the repayment of the debt.[1] The mortgagor may be compelled to pay an occupation rent to the mortgagee while he remains in possession pending foreclosure, in case it is shown that the mortgagee has scanty security and the mortgagor is insolvent.[2]

7. Contracts For Assignment or Subletting.[3] An agreement to assign a lease of premises which are to be used for an unlawful purpose is void.[4] The rules as to what constitutes a sufficient performance of a contract of sale of a leasehold are closely analogous to those governing the sale of other interests in realty.[5] The vendee will not be compelled to take a doubtful title;[6] and where the vendor

to a present reassignment. Simonds *v.* Turner, 120 Mass. 328.

94. Dunlop *v.* James, 70 N. Y. App. Div. 615, 75 N. Y. Suppl. 78 [*affirmed* in 174 N. Y. 549, 68 N. E. 1115].

95. North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435. See also State Trust Co. *v.* Casino Co., 19 N. Y. App. Div. 344, 46 N. Y. Suppl. 492.

96. North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

97. North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

Conversion.—A mortgagee of a leasehold is guilty of conversion if he sells a building on the premises erected by the tenant and not included in the assignment, or if the building was included in the assignment but the tenant reserved a right to redeem it within the expiration of the term, and before that time the mortgagee sells the building. Dillon *v.* McMahon, 6 N. Y. St. 723.

98. North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435, holding that a purchaser at such sale, with knowledge of the fact, participates in the fraud, and by taking possession of the demised premises claiming to own them and appropriating them to his own use becomes chargeable as a mortgagee wrongfully in possession.

99. Ozark *v.* Adams, 73 Ark. 227, 83 S. W. 920 (holding that the purchaser acquired the rights of the lessee in the premises, including machinery placed thereon by him); West Shore R. Co. *v.* Wenner, 71 N. J. L. 682, 60 Atl. 1134 [*affirming* 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801]; Kearny *v.* Post, 1 Sandf. (N. Y.) 105. And see People *v.* Stuyvesant, 1 Hun (N. Y.) 102, 3 Thomps. & C. 179, holding that the purchaser of a tenant's equity of redemption from dispossession for non-payment of rent takes subject to all the conditions of the original lease.

1. Salisbury *v.* Philips, 10 Johns. (N. Y.) 57, so holding where the assignment was conditioned that the assignor might redeem the lease by a certain day, in which case the assignment should be void, but otherwise the assignee was to sell the lease and repay himself.

2. Astor *v.* Turner, 3 How. Pr. (N. Y.) 225 (holding that a tenant in possession would be required to attorn to a receiver for that purpose); Reid *v.* Middleton, Turn. & R. 455, 37 Eng. Reprint 1176.

3. Whether contract constitutes assignment or merely an agreement to assign see *supra*, IV, B, 2, a.

Parol agreement to assign leasehold see Frauds, Statute of, 20 Cyc. 230.

Specific performance of contract to assign or sublet see Specific Performance.

Agreement to lease in general see *supra*, II, A, 1, f.

4. Riley *v.* Jordan, 122 Mass. 231.

5. See Vendor and Purchaser.

Notice.—Where a subsequent lease refers to a former one, an assignee of the subsequent lessee will be held to have taken with notice of the prior lease, and his rights against the first lessee will be governed accordingly. Aye *v.* Philadelphia Co., 193 Pa. St. 457, 44 Atl. 556. One taking an assignment of a lease containing on its face notice of liability to forfeiture is bound to ascertain whether it has been forfeited. Carnegie Natural Gas Co. *v.* Philadelphia Co., 158 Pa. St. 317, 27 Atl. 951.

6. Murray *v.* Harway, 56 N. Y. 337, holding that where a lease contains a covenant on the part of a lessor not to assign, with a forfeiture of the lease in case of breach, the fact that parol proof of the circumstances constituting a waiver of the forfeiture is necessary to show a valid title in the assignee does not render his title so doubtful as to

cannot transfer a good title the vendees may refuse to perform and recover the money paid in part fulfilment or as security for performance.[7] Where the lease contains a restriction against alienation, a vendor is bound to obtain the lessor's consent to the assignment.[8] One who enters into an agreement for an under-lease and takes possession, there being no agreement as to covenants, is bound to accept a lease with unusual covenants contained in the original lease,[9] unless there has been a representation that there are no such covenants.[10] An agreement to take an assignment of a lease does not impose an obligation to accept a lease containing a covenant on the part of the assignee to perform the covenants and agreement of the assignor.[11] Unless explicitly made so in terms, time will not be regarded as of the essence of a contract of purchase of a leasehold.[12] Where in the absence of fraud the lessee grants an under-lease for a longer time than that of the lease, the under-lessee is not entitled to compensation in the absence of an express contract.[13]

C. Extensions, Renewals, and Options to Purchase and Sell — 1. Nature of Right to Renew in General. As between the immediate parties to a lease the lessee has no legal or equitable right to a renewal in the absence of an express contract or covenant,[14] and the contract for a renewal is controlled by the general

authorize one who has contracted to purchase to refuse to accept an assignment and to maintain an action to recover back a payment of purchase-money; and that to defend such an action defendant need make no higher or other proof than he would have been required to make in case the original lessor or his successors in interest sought to dispossess him on the ground of forfeiture of the lease. But see Sanborn *v.* Cree, 3 Colo. 149, holding that in an action on a note given in consideration of the assignment of a lease without warranty, the assignee cannot set up a defect of title; he stands like a purchaser under a quitclaim deed.

An agreement to take an assignment "without requiring the lessor's title" prevents the purchaser from inquiring into the title of the party granting the leases, and compels an acceptance of them, although granted under a void power. Spratt *v.* Jeffery, 10 B. & C. 249, 8 L. J. K. B. 114, 5 M. & W. 188, 21 E. C. L. 112.

On the refusal of the assignor to produce his lease, the intended assignee or lessee may recover a deposit where the contract is to sell and assign the term of years derived out of a leasehold interest in land, or to grant a lease for a term of years to be derived out of a leasehold interest with the leasehold reversion. Gosling *v.* Woolf, [1893] 1 Q. B. 39, 68 L. T. Rep. N. S. 89, 41 Wkly. Rep. 106.

7. Murray *v.* Harway, 56 N. Y. 337. And see Hall *v.* Hoagland, 38 N. J. L. 350, holding that a suit will not lie on a check given in part payment of the consideration for the assignment of a lease, a legal tender having been made of such assignment, if before suit brought the assignor has parted with the leased premises to a third party.

Duty to deliver lease.— The assignors are bound to procure and deliver the lease to the assignee, and cannot recover on the contract of assignment where the lease has been deposited as security for a loan and they have not procured it. Burton *v.* Banks, 2 F. & F. 213.

Damage.—Where by false representations to the owner that certain land was not included in an assignment of the lease, the lessees deprive their assignee of the possession of the premises, they become liable to the assignee for the rental value for the term. Lewis *v.* Richardson, 2 Indian Terr. 341, 51 S. W. 969.

Fraud as affecting validity of assignment see *supra*, IV, B, 3, b.

8. Austin *v.* Harris, 10 Gray (Mass.) 296; Mason *v.* Corder, 2 Marsh 332, 7 Taunt. 9, 17 Rev. Rep. 427, 2 E. C. L. 237; Lloyd *v.* Crispe, 5 Taunt. 249, 14 Rev. Rep. 744, 1 E. C. L. 136.

Rescission.—Where the lessors refuse to consent to an assignment, but offer a new lease for the same terms and at the same rent but containing different covenants, the purchaser does not by having applied to the lessor for the new lease rescind his original contract, and is therefore entitled to have the lessor's assent to the assignment agreed to be made to him, or to have a return of his deposit. Winter *v.* Dumergue, 12 Jur. N. S. 726, 14 Wkly. Rep. 699.

9. Cosser *v.* Collinge, 1 L. J. Ch. 130, 3 Myl. & K. 283, 10 Eng. Ch. 283, 40 Eng. Reprint 108.

Under an agreement to take a lease containing common and usual covenants the intended purchaser may recover a deposit where a lease is tendered to him, containing an unusual covenant. Brookes *v.* Drysdale, 3 C. P. D. 52, 37 L. T. Rep. N. S. 467, 26 Wkly. Rep. 331.

10. Flight *v.* Barton, 3 Myl. & K. 282, 10 Eng. Ch. 282, 40 Eng. Reprint 108.

11. Hall *v.* Hoagland, 38 N. J. L. 350.

12. Pedrick *v.* Post, 85 Ind. 255.

13. Clayton *v.* Leech, 41 Ch. D. 103, 61 L. T. Rep. N. S. 69, 37 Wkly. Rep. 663; Besley *v.* Besley, 9 Ch. D. 103, 38 L. T. Rep. N. S. 844, 27 Wkly. Rep. 184.

14. McDonald *v.* Fiss, 54 N. Y. App. Div. 489, 67 N. Y. Suppl. 34; Phyfe *v.* Wardell, 5 Paige (N. Y.) 268, 28 Am. Dec. 430

rules of contract law.[15] The intention of the parties must control the interpretation of the language,[16] but if there is any uncertainty in the provisions relating to renewals, the construction will be in favor of the tenant rather than in favor of the landlord.[17] If a lease is void as to the excess of a term granted beyond that authorized by law, a covenant to renew contained therein is void.[18]

2. Option and Election to Extend or Renew — a. Sufficiency and Construction of Agreement — (i) *In General.* Generally any contract relating to real estate must be definite in its terms in order to bind the parties so that a court of equity would enforce it by judgment for specific performance.[19] A general covenant to renew, however, is sufficiently certain because it imports a new lease like the old one upon the same terms and conditions.[20] But where the agreement for the renewal

[*affirming* 2 Edw. 47]; Gibbes *v.* Jenkins, 3 Sandf. Ch. (N. Y.) 130, in which cases it was held, however, that even if there is no contract provision and the renewal depends upon the mere volition of the landlord, the lessee has an interest in the renewable quality of the lease, in regard to third persons such as a court of equity considers valuable and vendible. See also Leys *v.* Baldwin, 2 U. C. C. P. 488 (distinguishing a covenant to renew and a contract to execute a lease containing such covenant); Watson *v.* Hemsworth Hospital Master, 14 Ves. 324 (holding that the circumstance of having been for a long time tenant of the land cannot amount to a positive right to remain forever in the same relation).

Damages to rental value.—Where the option is for an extension of the lease, which extension is to be perfected by the subsequent mutual agreement of the parties, the lessee has no immediate right to hold the premises and cannot recover damages to their rental value after the expiration of the original term. Pause *v.* Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

15. See, generally, Contracts, 9 Cyc. 213.

Without consideration.—A covenant for renewal, like other contracts, must be founded upon a consideration, and a covenant gratuitously entered into subsequent to the execution of the lease will not be enforced. Redshaw *v.* Bedford Level, 1 Eden 346, 28 Eng. Reprint 718; Dowling *v.* Mill, 1 Madd. 541, 56 Eng. Reprint 198. A promise to renew in consideration of money already laid out by the tenant is *nudum pactum* and will not be specifically enforced. Robertson *v.* St. John, 2 Bro. Ch. 140, 29 Eng. Reprint 81.

Mutuality of contract see *infra*, IV, C, 2, e, (i), (a).

Oral agreement merged in written lease.—An oral agreement for a renewal is merged in the subsequent written lease. Stuebben *v.* Granger, 63 Mich. 306, 29 N. W. 716.

Under the statute of frauds.—Under a statute of frauds which makes leases for three years, not in writing, to have the effect of the estates at will only, there can be no term of fourteen years granted except by a lease executed and signed by the lessors. Sears *v.* St. John, 18 Can. Sup. Ct. 702.

16. Boyle *v.* Peabody Heights Co., 46 Md. 623; Whitlock *v.* Duffield, 2 Edw. (N. Y.) 366.

17. Kaufmann *v.* Liggett, 209 Pa. St. 87, 58 Atl. 129, 103 Am. St. Rep. 988, 67 L. R. A. 353 [*affirming* 34 Pittsb. Leg. J. N. S. 119].

18. Hart *v.* Hart, 22 Barb. (N. Y.) 606 (holding that a covenant for renewal for twelve years in a lease of agricultural lands for a term of twelve years is in contravention of a constitutional provision that no lease of agricultural lands for a longer period than twelve years, etc., shall be valid); Moore *v.* Clench, 1 Ch. D. 447, 45 L. J. Ch. 80, 34 L. T. Rep. N. S. 13, 24 Wkly. Rep. 169.

On the other hand a covenant to renew, being independent, may fall without impairing the original grant. Hart *v.* Hart, 22 Barb. (N. Y.) 606.

Suspension of power of alienation.—A lease providing for renewals cannot be said to be void on the ground that it is a suspension of the power of alienation for more than two lives in being, contrary to the statute against perpetuities, because to give a lease does not prevent the alienation of the property. Gomez *v.* Gomez, 81 Hun (N. Y.) 566, 31 N. Y. Suppl. 206.

Statute of frauds as preventing oral lease with agreement for renewal see Frauds, Statute of, 20 Cyc. 214.

19. Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776. See also Specific Performance.

20. See the cases cited *infra*, IV, C, 3, b, (ii).

Provisions construed — *In general.*— Where a written lease provided for the commencement of a term on a particular date, without fixing the duration of the term, but it was originally understood between the parties that the term was for one year, and also provided that the lessee should have the privilege of continuing the lease, if he fulfils the contract, at the same rent, it was held that the lessee was entitled to a renewal for another year. Lyons *v.* Osborn, 45 Kan. 650, 26 Pac. 31.

Option of renewal.— The words "with the option of renewal" are sufficiently definite to be enforced by a decree for specific performance, requiring a renewed lease for a like term, etc. Lewis *v.* Stephenson, 67 L. J. Q. B. 296, 78 L. T. Rep. N. S. 165. A covenant "that the party of the second part [lessee] shall have the privilege and option of renewal of this lease," etc., is a valid and operative covenant for a renewal of the original lease for another term.

contains language other than that appropriate to the general promise to renew, so that by resort to the settled rules of construction the language of the covenant and conditions of the renewal cannot be made certain, it fails for want of certainty.[21]

(II) *Terms Left For Future Determination*— (A) *In General.* A contract need not presently fix all of the terms of the new lease; it may furnish a certain and definite method for their ascertainment and determination in the future.[22]

(B) *Future Arbitration, Valuation, and Appraisal.* It is not uncommon to leave some of the provisions of the contract to be completed by future actions, as where the rent of the new term, or the value of the lessee's improvements, is

Kolasky *v.* Michels, 120 N. Y. 635, 24 N. E. 278.

"*Privilege*" *of further term.*— A clause, with the "privilege of six years more at the same rent," is equivalent to a covenant to renew. Crawford *v.* Kastner, 26 Hun (N. Y.) 440, 63 How. Pr. 90.

"*Refusal.*"—A covenant giving the lessee "the refusal of the premises, at the expiration of this lease, for three years longer," binds the lessor to renew at the same rent. Tracy *v.* Albany Exch. Co., 7 N. Y. 472, 57 Am. Dec. 538; McAdoo *v.* Callum, 86 N. C. 419.

Agreement to lease with covenant to renew.—An agreement to execute a lease and that at the expiration of the term a further specified term would be granted would be binding, and although the original lease was not executed the agreement would still hold for the expiration of the term. But where the stipulation is not that at the end of the term the lessors will execute another lease, but that during the first term a lease will be executed which shall contain a renewal covenant, the lessee cannot at the expiration of the original term sue as for a breach of a covenant to renew. Leys *v.* Baldwin, 2 U. C. C. P. 488.

Commencement.— It is usual in a lease for ninety-nine years, renewable forever, to expressly stipulate that the new lease should be made to commence and take effect from the expiration of the original term. The insertion of these words, however, is not essential if other terms and provisions and the character of the instrument make the same intention appear. Boyle *v.* Peabody Heights Co., 46 Md. 623. The more correct construction of the term "renewal" is that which makes the renewal commence, not by way of interruption of the currency or existence of the subject while it endures, but *eo instanti* that the subject determines. Rickards *v.* Rickards, 7 Jur. 715, 12 L. J. Ch. 460, 2 Y. & Coll. 419, 21 Eng. Ch. 419, 36 Eng. Reprint 187.

21. Morrison *v.* Rossignol, 5 Cal. 64 (where the clause provided that the rent should be according to the value of the property, without providing who should fix such value); Gelston *v.* Sigmund, 27 Md. 345; Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776; Price *v.* Assheton, 1 Y. & C. Exch. 441.

To grant a new lease is not to renew, and where a contract is of the former kind without fixing the terms of the new lease or providing a certain method for their ascertainment, it is too uncertain to be enforced. Reed *v.* Campbell, 43 N. J. Eq. 406, 4 Atl. 433 (where the stipulation was that the lessee should have "the first right to lease said premises for the next succeeding year or years"); Whitlock *v.* Duffield, Hoffm. (N. Y.) 110 [*reversed* on other grounds in 26 Wend. 55] (where the covenant was to grant a new lease upon said terms as the lessor should think proper and the lessee approve); Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377.

Terms to be fixed by parties.—A covenant to make a new lease "under and subject to certain covenants, provisos, and agreements, to be decided upon at that time, between the said parties, not embodying in said agreement for a further lease, any of the conditions or agreements contained in this present lease," is void for uncertainty. Howe *v.* Larkin, 119 Fed. 1005, 1006. But where the covenant was that if the lessor should not abide by and pay the amount of the valuation of the lessee's improvements he should "renew the lease, or redemise the lot, at such rents, and upon such terms, as might be agreed upon between the parties," it was held that upon refusal to accept a re-demise a tender of a renewal of the lease for the same term and at the same rent was good. Rutgers *v.* Hunter, 6 Johns. Ch. (N. Y.) 215.

Privilege of renting or continuing longer without fixing the term or the rent is void for uncertainty. Delashmutt *v.* Thomas, 45 Md. 140; Howard *v.* Tomicich, 81 Miss. 703, 33 So. 493. So in Western Transp. Co. *v.* Lansing, 49 N. Y. 499, it was held that a privilege given the lessee to keep the premises for such further time as he shall choose or elect, paying the same rent, created at most a tenancy from year to year terminable at the pleasure of either party by giving the necessary notice.

22. Arnot *v.* Alexander, 44 Mo. 25, 100 Am. Dec. 252, holding that a covenant for a renewal "provided said parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give," is no more uncertain than those in which the rent is left to be deter-

left to be fixed by valuation, arbitration, or appraisal. Such stipulations bind the parties;[23] but if the arbitration provided for should in fact fail, this does not give the lessor the right to dispossess the tenant during the extended term,[24] and the lessor's delay in having the property valued, upon which valuation the new rent depends, will not preclude him from collecting the new rent for any part of the new term.[25]

b. Right Dependent Upon Conditions. The right to a renewal or extended term may be conditioned expressly upon definite contingencies, and such a provision is binding upon the parties.[26]

c. Option to Renew or Pay For Improvements. Where the lessor covenants for a renewal or to pay for improvements, the option rests with him to do one or

mined by the valuation of third parties. But in Gelston *v.* Sigmund, 27 Md. 334, it was held that a contract to let the tenant retain possession for a certain period, upon his paying the same rent the landlord "might be able to obtain from other parties," was void for uncertainty.

23. For enforcement of such provisions see *infra*, IV, C, 2, f, (II).

Appraisal and arbitration distinguished.— A provision for the fixing of future rent by the selection of valuers contemplates an appraisal and not an arbitration under a statute providing that persons may submit to arbitration in a controversy existing between them at the time of the submission which might be the subject of an action, since the value of the land is not the subject of an action and there is no controversy at the time of the agreement. Wurster *v.* Armfield, 67 N. Y. App. Div. 158, 73 N. Y. Suppl. 609.

Ascertainment of value of rent.— Where the rent is to be fixed by arbitration, it should be based upon the value of the land at the time of the renewal (Hegan Mantel Co. *v.* Cook, 57 S. W. 929, 22 Ky. L. Rep. 427); and the value of buildings erected by the tenant during the first term should not be considered (*In re* Allen, 27 Ont. App. 536; Van Brocklin *v.* Brantford, 20 U. C. Q. B. 347).

Increased rent required.— Under a provision that a renewal shall be at such "increased" rent as shall be determined by arbitrators, they are bound to award an increased rent, to be based upon the rent reserved for the whole term, and not for any particular year or years of it, although the increase may be nominal. *In re* Geddes, 32 Ont. 262; *In re* Geddes, 3 Ont. L. Rep. 75.

Ascertainment of value of improvements.— Where the lease provides specifically for the method of appointing arbitrators for the ascertainment of the new rent and further provides that if a renewal is refused the lessor shall pay the value of improvements "to be ascertained by three disinterested persons . . . to be chosen as aforesaid" the value of the improvements is to be ascertained in the same manner as that of the land in fixing the rent. Brown *v.* Lyddy, 11 Hun (N. Y.) 451.

Costs of renewal include costs of arbitration.— Fitzsimmons *v.* Mostyn, [1904] App. Cas. 46, 73 L. J. K. B. 72, 89 L. T. Rep. N. S. 616, 20 T. L. R. 134, 52 Wkly. Rep. 337. But see Smith *v.* Fleming, 12 Ont. Pr. 657.

24. Kaufman *v.* Liggett, 209 Pa. St. 87, 58 Atl. 129, 103 Am. St. Rep. 988, 67 L. R. A. 353. See also Graham *v.* James, 7 Rob. (N. Y.) 468; McDonell *v.* Boulton, 17 U. C. Q. B. 14.

25. Hegan Mantel Co. *v.* Cook, 57 S. W. 929, 22 Ky. L. Rep. 427.

26. Seaver *v.* Thompson, 189 Ill. 158, 59 N. E. 553; Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560; Leppla *v.* Mackey, 31 Minn. 75, 16 N. W. 470.

Not a personal right subject to defeasance. — In Werlein *v.* Janssen, 112 La. 31, 36 So. 216, it was held that where the lessee had the privilege at the expiration of the lease to a renewal if the lessor did not wish to occupy the property for his own purposes, there was no present right subject to defeasance.

Construction and compliance.—Where the privilege depends upon the lessor's not desiring possession of the premises for building purposes, he is not authorized to lease to a third person with covenant to build on the premises, so as to cut off the original lessee's right to the additional term. Broadway, etc., R. Co. *v.* Metzger, 15 N. Y. Suppl. 662, 27 Abb. N. Cas. 160. So where a tenant went upon a farm and paid a year's rent upon an agreement to demise for a year and that the tenant should have the premises from year to year as long as the farm was to be let, and was turned out at the expiration of the year, under the Landlord and Tenant Act, for holding over, and the landlord let the premises to a third person, he was liable in an action for a breach of his covenant notwithstanding the proceedings against the tenant for his removal because in those proceedings the intention of the landlord was not traversable. Walley *v.* Radcliff, 11 Wend. (N. Y.) 22. Where, at the time of executing a lease for five years, the lessor informed the lessee that he gave no leases for ten years, a clause giving the lessee "the first privilege of a renewal" must be construed to mean that a renewal would be made to the lessee on the same terms, provided the lessor made a lease. Holloway *v.* Schmidt, 33 Misc. (N. Y.) 747, 67 N. Y. Suppl. 169.

the other;[27] the lessee cannot compel a renewal,[28] even though the lessee is not bound to accept either but may elect to decline the lease and lose the value of the improvements.[29] On the other hand, if the lessor elects to renew the tenant cannot require payment for improvements.[30]

d. Option to Sell or Renew. If the covenant to renew or for an additional term is made subject to an express reservation of a right in the lessor to sell the premises, the lessee's privilege is defeated by a sale in accordance with such reserved right.[31] A sale, however, which will operate to defeat the lessee's privi-

27. Orphan Asylum Soc. *v.* Waterbury, 8 Daly (N. Y.) 35 (construing a covenant requiring the lessor to take different kinds of improvements at different times); Kelso *v.* Kelly, 1 Daly (N. Y.) 419; Hopkins *v.* Gilman, 22 Wis. 476 (where it was held further, under the terms of the covenant, that it was also the duty of the lessor to do one or the other); Farley *v.* Sanson, 5 Ont. L. Rep. 105 (holding that where the lessor has the option to take the improvements at a valuation or grant a new lease, the valuation of improvements or renewal rent to be ascertained by an award prior to the making of the election, the instrument is a continuing one permitting either party to take the initiative, and until either does move it is valid for a further term if proceedings are taken to work out the new term in the proper way). See also *infra*, VII, D, 3, c, (IV).

Dependent on not reletting.—Where a lease provided that the lessor at the end of the term should pay for improvements, "provided the said premises shall not be relet to the lessee," a mere holding over by the lessee is not a "reletting" so as to relieve the lessor from the obligation to pay for improvements. Moseley *v.* Allen, 138 Mass. 81.

28. Hutchison *v.* Boulton, 3 Grant Ch. (U. C.) 391 (where the covenant was for a renewal of the term or in default for payment for improvements); Roaf *v.* Garden, 23 U. C. C. P. 59.

Constructions.— In Neiderstein *v.* Cusick, 178 N. Y. 543, 71 N. E. 100, the language of the renewal clause, so far as it related to the tenant, was not a mere covenant to take a new lease, but was a present renting; being that the said party "hereby leases the property . . . for the further term of five years," etc., and this was followed by the provision that the lessor agreed that within one year of the expiration of the lease, on a certain notice from the lessee, he would institute proceedings for leave to execute a lease for the said further term of five years. In a separate and distinct clause of the lease there was a provision for the payment by the lessor for improvements in case he could not legally give or should refuse to give the renewal lease. It was held that this independent clause in no way affected the rights of the parties under the renewal clause so-called, and that under the latter both parties were bound and there was no option in the lessor. Where the lessor elects to renew, under the provisions of the lease that the lessee might retain possession on condition that within three months a new rent should be ascertained by arbitration and that if the lessor should desire to resume possession he might do so upon paying the value of the improvements, to be ascertained as therein provided for, and that if at the end of the expiration of the next or any subsequent term no new rent should be ascertained as aforesaid, or if the lessor should not resume possession, then the lessee should continue "upon payment of the rent last ascertained to be payable," the lessor could not maintain ejectment upon the tenant's refusal to accept at a new rent fixed by arbitration after the expiration of the first term and after the time provided for such arbitration. McDonell *v.* Boulton, 17 U. C. Q. B. 14.

Payment as condition to right of possession.— Under a covenant by the landlord that, at the expiration of the term, unless he gives a certain notice for the purposes of renewing, he will pay the lessee the value of the buildings then standing on the premises, etc., such value to be ascertained by appraisement, the value cannot be ascertained until after the expiration of the term, and the lease contemplates an appraisement after such termination and therefore the payment of the value of improvements is not a condition precedent to the landlord's right of possession upon the expiration of the term. *In re* Coatsworth, 160 N. Y. 114, 54 N. E. 665. But it is otherwise under provisions requiring payment within a particular time, which upon refusal to renew entitles the tenant to compensation as provided and to a constructive renewal in default of such payment (Nudell *v.* Williams, 15 U. C. C. P. 348), although the time for such payment may be extended (Roaf *v.* Garden, 23 U. C. C. P. 59).

29. Zorkowski *v.* Astor, 156 N. Y. 393, 50 N. E. 983; Rutgers *v.* Hunter, 6 Johns. Ch. (N. Y.) 215; Sears *v.* St. John, 18 Can. Sup. Ct. 702 [*affirming* 28 N. Brunsw. 1]. See also Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545.

30. Ward *v.* Hall, 34 N. Brunsw. 600; Ward *v.* Toronto, 29 Ont. 729 [*affirmed* in 26 Ont. App. 225].

31. Knowles *v.* Hull, 97 Mass. 206, holding that under a provision giving a privilege of two additional years unless the lessor "shall sell said store, in which case the privilege of two years in addition shall be null and void," the privilege of the two years will be void in case of a sale at any time, either before the two years commence or

lege must be open and *bona fide*, and it would seem that the lessee must have notice.[32]

e. Exercise of Option and Election — (I) *Persons By and Against Whom Right May Be Exercised* — (A) *In General.* A covenant to renew, in the absence of a covenant to accept, confers a privilege, which is an executory contract, and until the exercise of the privilege by the party upon whom it is conferred he cannot be held for the additional term. And so a mere option or privilege to extend or continue for another term is not binding upon either party until the option is exercised by an election,[33] and the fact that a covenant of renewal is binding only upon the lessor does not deprive the lessee of electing whether he will enforce or decline the renewal.[34]

(B) *Corporations.* A corporation having under its charter the power to hold and convey land without restriction upon its right to lease may covenant to renew, and is liable for a breach of such covenant notwithstanding the particular lease was improperly granted.[35]

(C) *Principal and Agent.* A provision for renewal in a lease to an agent acting for an undisclosed principal may be enforced, notwithstanding a provision in the lease against underletting or occupancy by others than the lessee.[36]

(D) *Where There Is More Than One Lessee.* A covenant to renew a lease to more than one lessee cannot be enforced by one of them for himself.[37]

while they are running. See also *infra*, IV, C, 5, d, as to reservation of an option in the lessor to sell.

Sufficiency of disposition to defeat option.— A contract of sale, with possession thereunder, is a sale within the meaning of a provision for renewal if the property is not sold by the lessor within the time fixed for renewing. Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560. So a conveyance to a son by way of advancement, in good faith, is a disposal of property within the meaning of the covenant to renew by the lessor "should he not dispose of" the premises during the term. Elston *v.* Schilling, 42 N. Y. 79. And under a privilege for a renewal unless the lessors shall sell the premises, a sale by one of two lessors of his interest will not defeat the right to renew. Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235.

32. Starkey *v.* Horton, 65 Mich. 96, 31 N. W. 626, holding that the lessee is not affected by a sale and conveyance to the lessor's wife, of which the lessee had no notice when he exercised his option of holding over.

33. *Illinois.*— Pearce *v.* Turner, 150 Ill. 116, 36 N. E. 962.

Iowa.— Andrews *v.* Marshall Creamery Co., 118 Iowa 595, 92 N. W. 706, 96 Am. St. Rep. 412, 60 L. R. A. 399.

Minnesota.— Swank *v.* St. Paul City R. Co., 72 Minn. 380, 75 N. W. 594.

New York.— Zorkowski *v.* Astor, 156 N. Y. 393, 50 N. E. 983; Bruce *v.* Fulton Nat. Bank, 79 N. Y. 154, 35 Am. Rep. 505 [*affirming* 16 Hun 615].

North Carolina.— McAdoo *v.* Callum, 86 N. C. 419, under a provision that the lessee should "have the refusal of the premises for another year."

Canada.— Ward *v.* Toronto, 26 Ont. App. 225 [*affirming* 29 Ont. 729]; Hutchison *v.* Boulton, 3 Grant Ch. (U. C.) 391.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 276 *et seq.*

General option means option of tenant.— If the renewal of a lease is left optional, without saying at whose option, it means at the option of the tenant. Com. *v.* Philadelphia County, 3 Brewst. (Pa.) 537.

34. Bruce *v.* Fulton Nat. Bank, 79 N. Y. 154, 35 Am. Rep. 505 [*affirming* 16 Hun 615]; Morgan *v.* Gurley, 1 Ir. Ch. 482.

Mutuality.—A covenant to renew forming an integral part of a lease and founded upon adequate consideration has been considered more than a mere privilege, and as having all the elements of a mutual contract, because it might well be considered as a material inducement which led to the execution of the lease. Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735.

The covenant to pay rent is a consideration for the right to renew as well as for the use and occupation, all being rented in the same lease, and there can be no objection to the right of renewal for want of consideration. Hunter *v.* Silvers, 15 Ill. 174.

35. Wade *v.* Brantford, 19 U. C. Q. B. 207.

36. Daniels *v.* Straw, 53 Fed. 327, in which case one plaintiff was the agent of a business house in its trade-name, and the other plaintiff was the sole owner of the business. The lease was executed to the former, and recited that the premises were to be occupied by the business, designating it by its trade-name, and contained covenants against subletting and occupancy by persons other than the lessee. It was held that the option to renew was enforceable, but that defendant at his option might make the lease to the agent, the owner or the business by its trade-name.

37. Howell *v.* Behler, 41 W. Va. 610, 24 S. E. 646 (where the lease contains a

(E) *Successors to Parties in Interest* — (1) In General. Covenants to renew are not personal, and the legal successors of the lessee,[38] as well as of the lessor, are entitled to the benefits and are burdened with the duties and obligations which such covenants confer and impose upon the original parties.[39] But a covenant to renew by one holding a limited interest does not bind the estate beyond that interest,[40] and such a covenant by a life-tenant will not bind the inheritance.[41]

(2) Assignee of Lessee — (a) In General. The benefit of a covenant to renew, or a clause in a lease conferring the option to renew, passes by assignment of the lease and the assignee acquires the rights of the lessee,[42] although there is no

privilege to the several lessees to extend the term, and it was held that the purchaser of the lease at a sale of the estate of one of the deceased lessees could not require an extension); Finch *v.* Underwood, 2 Ch. Div. 310, 45 L. J. Ch. 522, 34 L. T. Rep. N. S. 779, 34 Wkly. Rep. 657.

38. Kolasky *v.* Michels, 120 N. Y. 635, 24 N. E. 278 [*distinguishing* Western Transp. Co. *v.* Lansing, 49 N. Y. 499, in which the lessee was given the privilege of continuing the occupancy for an indefinite period determinable at the pleasure of either party], holding that under a covenant giving the lessee the privilege and option of renewal, one succeeding to his rights after his death may enforce the renewal.

The executor of a lessee may compel performance of such covenant. Hyde *v.* Skinner, 2 P. Wms. 196, 24 Eng. Reprint 697. So specific performance of a covenant to take a renewed lease will be decreed against the lessee's executor. Stephens *v.* Hotham, 3 Eq. Rep. 571, 1 Jur. N. S. 842, 1 Kay & J. 571, 24 L. J. Ch. 665, 3 Wkly. Rep. 340, 69 Eng. Reprint 587.

A devisee of an insolvent debtor may procure himself to be appointed assignee, under a bill filed by him as devisee, and as such assignee compel a renewal. Doyle *v.* Callow, 12 Ir. Eq. 241.

39. See cases cited *infra*, this note.

An executor of a lessor, under the Devolution of Estates Act in Canada can make a valid renewal under the testator's covenant. *Re* Canadian Pac. R. Co., 24 Ont. 205.

A devisee of the lessor must perform his covenant to renew. Swan *v.* Colclough, Hayes & J. 807.

Glebe lands.— A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. Shaw *v.* Phœnix Ins. Co., 20 U. C. C. P. 170.

40. Muller *v.* Trafford, [1901] 1 Ch. 54, 70 L. J. Ch. 72, 49 Wkly. Rep. 132; Brereton *v.* Tuohey, 8 Ir. Ch. 190; Dowling *v.* Mill, 1 Madd. 541, 56 Eng. Reprint 198.

41. Sadlier *v.* Biggs, 4 H. L. Cas. 435, 10 Eng. Reprint 531, holding, however, that while the covenantor was only life-tenant at the date of the covenant, yet up to a short time before the execution of the lease he had been seized in fee and had previously bound himself to grant the lease in question, and therefore his renewal covenant in the lease was operative.

One renewal — Devisee of reversion.—When the owner in fee demised to hold for one life or thirty-one years, with covenant to renew, subject to like rents and covenants, his devisee for life is bound to execute one renewal only, and having executed a second it does not bind the remainder-man. Swan *v.* Colclough, Hayes & J. 807.

Action against representatives.—Where the heirs of a covenantor refuse to renew under his covenant, alleging that he was a bare tenant for life, this refusal is a breach of covenant, for which an action at law will lie against the representatives of the covenantor. Macartney *v.* Blundell, 2 Ridg. App. 113.

42. *Illinois.*— Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560.

Kentucky.— Connor *v.* Withers, 49 S. W. 309, 20 Ky. L. Rep. 1326.

Louisiana.— Mossy *v.* Mead, 2 La. 157.

Mississippi.— McClintock *v.* Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541.

Missouri.— Blackmore *v.* Boardman, 28 Mo. 420; Blount *v.* Connolly, 110 Mo. App. 603, 85 S. W. 605.

Oklahoma.— Whitaker *v.* Hughes, 14 Okla. 510, 78 Pac. 383.

Pennsylvania.— Barclay *v.* Steamship Co., 6 Phila. 558.

United States.— Warner *v.* Cochrane, 128 Fed. 553, 63 C. C. A. 207.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 277.

The assignee of a part is entitled to recover *pro tanto* if the covenant be in its nature divisible. Piggot *v.* Mason, 1 Paige (N. Y.) 412; McVean *v.* Woodell, 2 U. C. Q. B. O. S. 33.

Assignees in bankruptcy take an option to renew, and may pass it to a purchaser if the tenant is not restrained from alienation. Buckland *v.* Papillon, L. R. 1 Eq. 477, 12 Jur. N. S. 155 [*affirmed* in L. R. 2 Ch. 67, 12 Jur. (N. S.) 992, 36 L. J. Ch. 81, 15 L. T. Rep. N. S. 378, 15 Wkly. Rep. 92].

Assignment after the expiration of the lease gives the assignee no right of entry under a covenant for renewal in the lease. Clason *v.* Rankin, 1 Duer (N. Y.) 337.

Holding adversely to the lessor's title will

express reference in the assignment to the covenant of renewal, if there is no express reservation.[43]

(b) CONSENT OF LESSOR TO ASSIGNMENT. In the absence of such a restriction in the lease, the right to assign so as to confer the renewal privilege upon the assignee is not dependent upon the consent of the lessor.[44] But if the assignment of a lease is contrary to a provision therein prohibiting an assignment without the lessor's consent, the assignee acquires no rights under a covenant to renew.[45] The lessor may waive such a provision in the lease, however, and if he does so the lessee is entitled to the benefit of the covenant to renew as if the landlord had consented to the assignment.[46]

(3) AGAINST GRANTEE OR ASSIGNEE OF REVERSION. A covenant to renew runs with the land and binds a grantee or assignee of the reversion.[47]

(F) *Trustees.* Where land, subject to the right of another to a renewal, is deeded in trust for particular purposes, and upon a certain event to be deeded in fee, the trustee may be compelled to execute a renewal lease.[48] But such power in the trustee is confined to the life of the trust, and after the termination of the trust the trustee cannot execute a renewal lease, nor can he make such a covenant without special authority, which will entitle the lessee to demand and receive a renewal after the expiration of the trust.[49] And a covenant by a trustee to renew, in breach of his trust, will not be enforced.[50]

(G) *Under Subleases* — (1) IN GENERAL. A mere subletting by a lessee does

not operate to renew the lease. Kemp *v.* Jennings, 4 Indian Terr. 64, 64 S. W. 616. But it is held that a recital in a deed of conveyance of the leasehold that the rent reserved in the original lease has become lapsed and barred because not demanded does not constitute a disaffirmance of the landlord's title so as to forfeit a covenant for renewal in the original lease, although the deed to the assignee purports to convey the fee. Worthington *v.* Lee, 61 Md. 530.

A privilege to continue the lease in force is held to be of the same nature as a covenant to renew, running with the land, and inures to the benefit of an assignee of the lease. Wilkinson *v.* Pettit, 47 Barb. (N. Y.) 230.

An assignee becomes tenant of the lessor (Worthington *v.* Lee, 61 Md. 530); and if he elects to exercise an option for extension, he is liable for the unexpired portion of the extended term, although before its expiration he has assigned the lease and abandoned the premises. Probst *v.* Rochester Steam Laundry Co., 171 N. Y. 584, 64 N. E. 504.

43. Downing *v.* Jones, 11 Daly (N. Y.) 245.

44. Phelps *v.* Erhardt, 2 Silv. Sup. (N. Y.) 336, 5 N. Y. Suppl. 540. And as to right to assign lease see *supra*, IV, B, 1, a.

45. Upton *v.* Hosmer, 70 N. H. 493, 49 Atl. 96; Drummond *v.* Fisher, 16 N. Y. Suppl. 867.

Consent to an assignment containing a renewal of clause.—Where the lessor writes his consent to a transfer which contains a stipulation for a renewal of the lease, the purchaser is entitled to the renewal although the stipulation was not in the original lease and the lessor did not know of the provision in the transfer to which he consented. Lieuteaud *v.* Jeanneaud, 20 La. Ann. 327.

46. Barclay *v.* Steamship Co., 6 Phila. (Pa.) 558 (holding that by receiving rent from and accepting the assignee as tenant the lessor ratifies the assignment); Warner *v.* Cochrane, 128 Fed. 553, 63 C. C. A. 207.

Knowledge of assignment is necessary before the lessor can be charged with having waived the breach of the condition against assigning. Upton *v.* Hosmer, 70 N. H. 493, 49 Atl. 96.

47. Leppla *v.* Mackey, 31 Minn. 75, 16 N. W. 470; Hart *v.* Hart, 22 Barb. (N. Y.) 606; Piggot *v.* Mason, 1 Paige (N. Y.) 412; Richardson *v.* Sydenham, 2 Vern. Ch. 447, 23 Eng. Reprint 885. A subsequent lessee of the entire premises, a part of which had been leased with an option to renew, took a lease made subject to the said prior lease and providing for attornment to him by the prior lessee. The subsequent lessee accepted rent from the prior lessee. It was held that the subsequent lessee could not refuse a renewal. A. G. Corre Hotel Co. *v.* Wells-Fargo Co., 128 Fed. 587, 63 C. C. A. 23.

Liability of assignee upon covenants running with land in general see *supra*, IV, B, 4, c.

48. Gomez *v.* Gomez, 147 N. Y. 195, 41 N. E. 420.

A direction in a will, to a trustee, to renew, leaves the trustee to do only what the testator himself would have done, and notwithstanding such direction, if the lessee has without legal excuse failed to renew in time his right is lost. Reid *v.* Blagrave, 9 L. J. Ch. O. S. 245.

49. Gomez *v.* Gomez, 81 Hun (N. Y.) 566, 31 N. Y. Suppl. 206 [*affirmed* in 147 N. Y. 195, 41 N. E. 420]; Salamon *v.* Sopwith, 35 L. T. Rep. N. S. 826.

50. Bellringer *v.* Blagrave, 1 De G. & Sm. 63, 11 Jur. 407, 63 Eng. Reprint 972.

not affect his right to call for a renewal under a covenant with him in the original lease.[51] On the other hand, the right of the sublessee to a renewal or extension depends upon the covenant or agreement in his lease,[52] and the fact that a lessee who subleases with a covenant to renew takes a new lease at an increased rent or upon more onerous conditions than the first will not relieve him from his obligation under his contract or justify him in charging an increased rent or imposing greater burdens upon the sublessee than those contained in the first lease to the sublessor.[53]

(2) Right to Renewal Dependent Upon Renewal by Lessee. If the lessee's covenant with his subtenant is conditioned upon the former's obtaining an extension or renewal, the subtenant acquires no right unless his lessor obtains such renewal or extension.[54]

51. Piggot *v.* Mason, 1 Paige (N. Y.) 412, holding that a release by a sublessee of a part of the premises to the lessor is no bar to the lessee's claim for a renewal; that if the sublease gives the right to renew the surrender to the lessor gives him that right.

52. See cases cited *infra*, this note.

Lessee's privileges conferred on sublessee.— A lease contained a covenant for a renewal for a like term, the renewal lease to provide that at its termination the lessor might grant a new lease, or buy the buildings on the land leased. The lessee made a sublease expiring at the same time as the principal lease, and providing for a like renewal lease which should give the sublessor the option of making a second renewal lease, or of buying the buildings, and which should contain the same covenants as the first sublease, except that for renewal. The sublease, and a renewal thereof, both provided that any rights or privileges at any time granted to the principal lessee by his lessor, in regard to the renewal of the lease made by the latter, should inure to the benefit of the sublessees. It was held that the right of election in the lessee in respect to granting a third sublease was qualified by this last clause, by which the sublessees were entitled to as many terms of lease as their lessors should obtain by virtue of the covenants in the lease to him. Robinson *v.* Beard, 140 N. Y. 107, 35 N. E. 441.

Reliance upon renewal under lessee's option.—Where a lessee with an option to renew sublets a portion of the premises with a privilege of renewal under the original lease and the sublessee was informed by the original landlord that the renewal would be made, and relying thereon the sublessee failed to request his lessor to exercise the option, the sublessee is entitled to possession under his exercise of the option without offering to renew for the entire premises. Fitzgerald *v.* Jones, 96 Ky. 296, 28 S. W. 963, 16 Ky. L. Rep. 474; Cook *v.* Jones, 96 Ky. 283, 28 S. W. 960, 16 Ky. L. Rep. 469; Alford *v.* Jones, 30 S. W. 1013, 17 Ky. L. Rep. 356.

Assignee.— The right of a sublessee to a renewal may be assigned and the assignee may enforce the right against the original lessee. Phelps *v.* Erhardt, 2 Silv. Sup. (N. Y.) 336, 5 N. Y. Suppl. 540.

53. Cunningham *v.* Pattee, 99 Mass. 248 [*citing* Revell *v.* Hussey, 2 Ball & B. 288, 12 Rev. Rep. 87]; Thomas *v.* Burne, Dr. & W. 657; Hackett *v.* McNamara, Ll. & G. t. Pl. 283; Evans *v.* Walshe, 2 Sch. & Lef. 519; Lawder *v.* Blackford, Beatty 522.

Action for damages on bond to renew.— Where a lessee sublet with the privilege of renewal at the same rent, "when a new lease is given . . . by owner of the building," and gave a bond conditioned absolutely upon the giving of such renewal, and before the original term expired notified the subtenant that the rent for the renewal term would be larger, the subtenant may take a lease for the further term directly from the owner and sue him upon the bond for damages. Polhemus Printing Co. *v.* Wynkoop, 30 N. Y. App. Div. 524, 52 N. Y. Suppl. 420.

54. Lumley *v.* Timms, 28 L. T. Rep. N. S. 608, 21 Wkly. Rep. 494.

If a lessee takes a new lease instead of an extension, his covenant to grant a renewal in the event he obtains an extension of his lease will bind him and he cannot avoid it because he took a new lease instead of an extension. Hausauer *v.* Dahlman, 18 N. Y. App. Div. 475, 45 N. Y. Suppl. 1088 [*affirmed* in 163 N. Y. 567, 57 N. E. 1111].

Right as against successor.—A lessee of a term for years with a *toties quoties* covenant for renewal having died intestate, his administratrix sub-demised the premises at an increased rent, with a covenant that she, her executors, administrators, and assigns, would renew to the sublessee at the same rent, as often as she should herself procure a renewal from her head landlord. Upon the death of the administratrix, administration *de bonis non* was obtained, and it was held that the sublessee was entitled as against the administrator *de bonis non* to a specific performance of the covenant for renewal. Hackett *v.* McNamara, Ll. & G. t. Pl. 283.

Right against assign of sublessee.—Where a lessor, himself a sublessee, covenants with his lessee to grant a new lease if he should obtain an extension of his term from the freeholder, it is personal only and does not bind his assign. The covenant is not one for rental and does not run with the land. Muller *v.* Trafford, [1901] 1 Ch. 54, 70 L. J. Ch. 72, 49 Wkly. Rep. 132.

(II) *Time For Exercise of Election or Right to Renew.* In the absence of a specific provision in a lease fixing the time for exercise of an election to renew, the option continues during the whole of the original term, or tenancy.[55] But the election must be declared within that time,[56] unless by holding over the parties may conclude themselves for another term even upon failure to exercise actively the election as required by the lease,[57] and where the lease fixes the time when the renewal shall be taken and given, such provision controls, and in the absence of a compliance therewith the right to the renewal is lost.[58]

(III) *Election Confined to Terms of Lease.* In the exercise of an option given in a lease, the lessee is confined strictly to the terms of the lease in respect of the scope of the privilege conferred.[59]

55. Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545; McClintock *v.* Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541.

56. Renoud *v.* Darkam, 34 Conn. 512; Thiebaud *v.* Vevay First Nat. Bank, 42 Ind. 212; Perry *v.* Rockland, etc., Lime Co., 94 Me. 325, 47 Atl. 534 (where the provision was that the tenant might elect at the expiration of the term); Nicholson *v.* Smith, 22 Ch. D. 191, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471. But see Moss *v.* Barton, L. R. 1 Eq. 574, 35 Beav. 197, 13 L. T. Rep. N. S. 623, 55 Eng. Reprint 870 (holding that where no time is fixed to exercise the option, the lessee may elect at any time if the landlord does not call upon him to do so sooner); Buckland *v.* Papillon, L. R. 2 Ch. 67, 12 Jur. (N. S.) 992, 36 L. J. Ch. 81, 15 L. T. Rep. N. S. 378, 15 Wkly. Rep. 92.

Election before expiration of term.— If a tenant exercises his option by notice that he does not desire to hold for another term, he cannot afterward change his mind, especially if the landlord has acted upon such election. Chandler *v.* McGinning, 8 Kan. App. 421, 55 Pac. 103; Grenier *v.* Cota, 92 Mich. 23, 52 N. W. 77. But the fact that the lessee promised to surrender at the end of the term, knowing that one of the lessors intended thereafter to use the premises and to make purchases in connection with such use, will not estop the lessee from demanding a renewal under the lease in the absence of evidence that such purchases were made. Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235. See also Hughes *v.* Windpfennig, 10 Ind. App. 122, 37 N. E. 432, where similar conduct on the part of one of two lessees was held not to amount to a relinquishment of the right of renewal.

Where the rector of a religious society was lessor in a lease entitling the society to elect at the expiration of the term to make improvements or grant further term, and under the belief that the premises had depreciated in value and that the rents were high, and that it would be a hardship to compel the lessees to accept a further term, said he would lay the matter before the board of ordinance and that they would deal generously, this does not show an agreement to terminate the lease at the end of the original term. Farley *v.* Sanson, 5 Ont. L. Rep. 105.

57. See *infra*, IV, C, 3, f, (II), (E).

58. Emery *v.* Hill, 67 N. H. 330, 39 Atl. 266.

At fixed periods during term.— Under a covenant for renewals "at any time within one year after the expiration of twenty years of the said term of sixty-one years. . . . And so in like manner at the end and expiration of every twenty years," etc., it was held that the words "and so in like manner," meant that the lessee could not claim a further term of twenty years at the expiration of the last term of twenty years, having omitted to claim a further term at the end of the first and second twenty years in the lease. Rubery *v.* Jervoise, 1 T. R. 229, 1 Rev. Rep. 191. But under a provision in a lease for sixty-one years that the lessee might renew at the end of each and every term of fourteen years upon giving a designated notice, it was held that the lessee or those claiming under him each might renew at the expiration of the last fourteen years, although no earlier renewal had been taken. Bogg *v.* Midland R. Co., 36 L. J. Ch. 440, 16 L. T. Rep. N. S. 113.

Renewals upon falling of lives.— Under a lease for lives, renewable upon fixed terms upon the dropping out of the lives, the application must be made upon the dropping out of the particular lives as provided. Thus, if the covenant is to renew on the expiration of one life, the lessor is not bound if application is not made until two drop out. Bayley *v.* Leominster Corp., 3 Bro. Ch. 529, 29 Eng. Reprint 683, 1 Ves. Jr. 476, 30 Eng. Reprint 446. To the same effect see McAlpine *v.* Swift, 1 Ball & B. 285; Bateman *v.* Murray, 5 Bro. P. C. 20, 1 Ridg. App. 187, 2 Eng. Reprint 506; Hussey *v.* Domville, [1903] 1 Ir. 265; Maxwell *v.* Ward, McClell. 458, 13 Price 674, 28 Rev. Rep. 725. And where a lease determinable on the deaths of three persons contains a covenant that upon the death of either of the lives the lessee should within a fixed time renew, etc., the lessee must renew upon the death of the first life, otherwise he is not entitled to renew on the death of the second. Reid *v.* Blagrave, 9 L. J. Ch. O. S. 245; Eaton *v.* Lyon, 3 Ves. Jr. 690, 30 Eng. Reprint 1223. See also Ruhery *v.* Jervoise, 1 T. R. 229, 1 Rev. Rep. 191, where the lease was renewable at the end of certain periods of years.

59. Mershon *v.* Williams, 62 N. J. L. 779, 42 Atl. 778, holding that the privilege of four more years gave the lessee no right to elect to take for one more year, and that the landlord might consider a notice to take for

(IV) *Number of Elections.* Under a single right conferred to elect to take an additional term, the lessee can exercise his election but once.[60]

(V) *Number of Renewals*—(A) *In General.* A covenant to renew is satisfied by one renewal,[61] unless further renewals are expressly provided for.[62]

(B) *Perpetual Renewals.* As already stated, a covenant to renew, without more, gives but one renewal, because otherwise a perpetuity is provided for;[63] and the rule of construction became settled at an early date that a covenant for renewal or for an additional term should not be held to create a right to repeated grants in perpetuity, unless by plain and unambiguous terms the parties have expressed such intention.[64] On the other hand while the law discourages perpe-

one year as an election not to extend according to the terms of the lease.

After a voluntary surrender of a part of the premises the tenant cannot insist upon a renewal of the lease as to the balance. Barge *v.* Schiek, 57 Minn. 155, 58 N. W. 874.

The landlord is restricted and cannot claim a term to which the lease does not entitle him. Moore *v.* Sayers, Beatty 530.

60. Falley *v.* Giles, 29 Ind. 114; Swigert *v.* Hartzell, 20 Pa. Super. Ct. 56.

As to election before expiration of term see *supra*, IV, C, 2, e, (II).

61. *Michigan.*— Brand *v.* Frumveller, 32 Mich. 215.

New York.— Banker *v.* Braker, 9 Abb. N. Cas. 411.

Pennsylvania.— Swigert *v.* Hartzell, 20 Pa. Super. Ct. 56.

Virginia.— King *v.* Wilson, 98 Va. 259, 35 S. E. 727; Peirce *v.* Grice, 92 Va. 763, 24 S. E. 392.

United States.— Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 265.

Construction of clauses.— A lease for one year with privilege of four more does not mean that the lessee has the right to extend the time from year to year for four additional years. Mershon *v.* Williams, 62 N. J. L. 779, 42 Atl. 778. Under a provision for an extension "of one, two or three years," only one extension privilege is conferred. Austin *v.* Stevens, 38 Hun (N. Y.) 41. Where a lessee remained in possession after the expiration of a renewal of ten years under a lease for one or ten years with the privilege of a renewal, he held from year to year because the lessor was required to grant but one renewal. King *v.* Wilson, 98 Va. 259, 35 S. E. 727.

62. See Syms *v.* New York, 105 N. Y. 153, 11 N. E. 369; Orphan Asylum Soc. *v.* Waterbury, 8 Daly (N. Y.) 35, in which cases the language of the original leases was construed to give the lessee the right to two renewals.

In renewals by trustees under covenants by their testators, the trustees will not be required to covenant to renew, but the proper form is a demise by the trustee for the new term reciting the original covenant. Hodges *v.* Blagrave, 18 Beav. 404, 52 Eng. Reprint 160; Copper Min. Co. *v.* Beach, 13 Beav. 478, 51 Eng. Reprint 184. See also Morley *v.* Frampton, 5 Hare 560, 10 Jur. 1092, 16 L. J. Ch. 102, 26 Eng. Ch. 560, 67 Eng Reprint 1033.

63. Piggot *v.* Mason, 1 Paige (N. Y.) 412; King *v.* Wilson, 98 Va. 259, 35 S. E. 727; Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635.

64. *California.*— Morrison *v.* Rossignol, 5 Cal. 64, holding that a covenant for a lease to be renewed indefinitely at the option of the lessee is in effect the creation of a perpetuity, putting it in the power of one party to renew forever, and is therefore against the policy of the law.

Michigan.— Brush *v.* Beecher, 110 Mich. 597, 68 N. W. 420, 64 Am. St. Rep. 373, where a lease, the covenant for renewal in which bound the heirs of neither party, was construed not to intend to provide for perpetual renewals.

New York.— Syms *v.* New York, 105 N. Y. 153, 11 N. E. 369; Muhlenbrinck *v.* Pooler, 40 Hun 526; Abeel *v.* Radcliff, 13 Johns. 297, 7 Am. Dec. 377; Piggot *v.* Mason, 1 Paige 412; Rutgers *v.* Hunter, 6 Johns. Ch. 215.

Washington.— Tischner *v.* Rutledge, 35 Wash. 285, 77 Pac. 388.

United States.— Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635.

England.— Brown *v.* Tighe, 8 Bligh N. S. 272, 5 Eng. Reprint 944, 2 Cl. & F. 396, 6 Eng. Reprint 1203; Dowling *v.* Mill, 1 Madd. 541, 56 Eng. Reprint 198; Hyde *v.* Skinner, 2 P. Wms. 196, 24 Eng. Reprint 697; Moore *v.* Foley, 6 Ves. Jr. 232, 5 Rev. Rep. 270, 31 Eng. Reprint 1027; Baynham *v.* Guy's Hospital, 3 Ves. Jr. 295, 3 Rev. Rep. 96, 30 Eng. Reprint 1019. See also Swinburne *v.* Milburn, 9 App. Cas. 844, 54 L. J. Q. B. 6, 52 L. T. Rep. N. S. 222, 33 Wkly. Rep. 325. In early English cases covenants to renew with general covenants, expressed in more general terms than would be so enforced at the present time, were construed to give the lessee the right to succeeding lease with covenants to renew, according to which he could demand successive leases in perpetuity. In Bridges *v.* Hitchcock, 5 Bro. P. C. 6, 2 Eng. Reprint 498, this effect was given to a covenant to renew "under the same rent and covenants only, as in this lease." The authority of this case was followed in Furnival *v.* Crew, 3 Atk. 83, 26 Eng. Reprint 851, and in Cooke *v.* Booth, Cowp. 819. These cases were distinguished from Bridges *v.* Hitchcock, *supra*, in Iggulden *v.* May, 2 B. & P.

tuities and does not favor such covenants, yet when they are clearly made their binding obligation is recognized and enforced.[65]

(vi) *Conditions Precedent, Waiver, and Forfeiture* — (a) *In General.* Where the right to continue the tenancy,[66] or the right of option to take a renewal is dependent upon the performance of covenants or conditions, performance of such conditions or covenants is a prerequisite to the exercise of the right to require a renewal, and a breach of dependent covenants will defeat the option.[67] The landlord is not precluded from insisting upon the forfeiture of the right to renew by failing to declare a forfeiture of the original lease or by accepting rent after

N. R. 449, 7 East 237, 3 Smith K. B. 269, 9 Ves. Jr. 325, 8 Rev. Rep. 623, 32 Eng. Reprint 628, upon the words of the covenants, where, however, it was held that a perpetual renewal is not to be inferred from a general provision for like covenants.

Renewable forever.— A demise to hold for lives named "and renewable forever," taken in conjunction with the lessee's covenant to pay a fine on inserting a new life in the case of any that should fail was held to confer a right of renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew. Clinch *v.* Pernette, 24 Can. Sup. Ct. 385.

As to continuing renewal covenants see *infra*, IV, C, 3, e, (II), (B).

65. Blackmore *v.* Boardman, 28 Mo. 420; Diffenderfer *v.* St. Louis Public Schools, 120 Mo. 447, 25 S. W. 542; Copper Min. Co. *v.* Beach, 13 Beav. 478, 51 Eng. Reprint 184, where it was held that a covenant to renew "always at any time, when and as often" as the covenantor should be requested, was sufficient to give the right to perpetual renewals.

Reasonable certainty of intent.— The right to a perpetual renewal will be enforced where the intention is made reasonably clear, and it was held to appear sufficiently where the original lease provided that the new lease should "contain all the covenants, etc., herein contained, including this present covenant." Hare *v.* Burges, 3 Jur. N. S. 1294, 4 Kay & J. 45, 27 L. J. Ch. 86, 6 Wkly. Rep. 144.

66. See cases cited *infra*, this note.

Security being required as a condition to the right must be given. McFadden *v.* McCann, 25 Iowa 252.

Tender of rental.— Where the lessor agreed to purchase improvements or in default thereof the lease should continue, and it was provided that if he should refuse to accept the rent he should purchase the improvements, if the yearly rental is tendered at the expiration of the contract, and if not so tendered the improvements should be removed and possession surrendered, the lessor need not demand the yearly rental, but in order that the tenant's right and continued possession should be preserved he must tender the rental and demand a renewal. Kemp *v.* Jennings, 4 Indian Terr. 64, 64 S. W. 616.

New terms.— Under a provision requiring a new contract as to a part of the premises upon the exercise of an option to continue the lease, the election is not effective until such new agreement is made. Cammack *v.* Rogers, 32 Tex. Civ. App. 125, 74 S. W. 945.

67. See cases cited *infra*, this note.

Breach of covenant not to sublet will defeat the right to renew. McIntosh *v.* St. Philip's Church, 120 N. Y. 7, 23 N. E. 984.

Breach of covenant to pay taxes and assessments will defeat the right to a renewal. Behrman *v.* Barto, 54 Cal. 131.

Tender of solvent surety.— Under a lease renewable upon the same terms, which is secured by a solvent surety, a lessee can renew only upon tendering a surety equally solvent, and if he announces his inability to furnish any security except that which the lessor was justified in rejecting, the latter is released from his liability to renew. Piper *v.* Levy, 114 La. 544, 38 So. 448.

Payment of collateral debts.— Where there is a lease with a covenant for renewal, the landlord cannot insist that the tenant shall pay collateral debts as a condition for granting a renewal. Fitzgerald *v.* Carew, 1 Ir. Eq. 346.

Particular use of premises.— The right to renew dependent upon the lessee's undertaking to do particular things upon the premises or to use the premises in a particular manner is defeated by a failure to comply with such conditions. Swift *v.* Occidental Min., etc., Co., 141 Cal. 161, 74 Pac. 700; Gannett *v.* Albree, 103 Mass. 372; McIntosh *v.* St. Philip's Church, 120 N. Y. 7, 23 N. E. 984.

Covenant to repair.— Where a lease contains a proviso for reëntry in case the tenant should not observe and perform all the covenants and agreements on his part, and also a covenant by the lessee to keep in repair and by the lessor to grant a new lease in case the lessee's covenants should have been duly performed, the keeping of the premises in repair is a condition precedent to the right to call for a renewal. Bastin *v.* Bidwell, 18 Ch. D. 238, 44 L. T. Rep. N. S. 742; Finch *v.* Underwood, 2 Ch. D. 310, 45 L. J. Ch. 522, 34 L. T. Rep. N. S. 779, 24 Wkly. Rep. 657; Job *v.* Banister, 3 Jur. N. S. 93, 26 L. J. Ch. 125, 5 Wkly. Rep. 177. But it is also held that the lessor cannot refuse to renew for a breach of covenant to repair, no notice to repair having been given, or at least no notice having been given until after notice to renew, and the breach not being gross. Hare *v.* Burges, 5 Wkly. Rep. 585 [*citing* Gourlay *v.* Somerset, 1 Ves. & B. 68, 35 Eng. Reprint 27, 19 Ves. Jr. 429, 34 Eng. Reprint 576, 13 Rev. Rep. 234].

the breach of such covenants. The right to declare a forfeiture of the lease and the right to refuse to renew are separate and distinct.[68]

(B) *Payment of Rent.* Where a covenant to renew is independent of the other covenants in the lease, as that for the payment of rent, the breach of the latter will not affect the right to insist upon the former.[69] It is otherwise, however, where the right to a renewal is made to depend upon the performance by the lessee of his undertaking to pay rent.[70]

(C) *Payment of Fines.* Under a lease for lives renewable under a covenant by the lessee, upon the fall of any life by insertion of a new life and payment of a fine, the right of renewal depends upon compliance with the requirement as to the payment of the fine.[71]

(D) *Notice or Request* — (1) NECESSITY — (a) IN GENERAL. Notice of election is not necessary under a lease providing for an extension, in the absence of a provision therein requiring such notice.[72] On the other hand it is held that under an agreement by the lessor to renew at the expiration of the term, the implication is that it is to be done at the request of the tenant or upon notice by him that he desires a renewal,[73] and where the option to continue or renew is expressly condi-

68. Swift *v.* Occidental Min., etc., Co., 141 Cal. 161, 74 Pac. 700; Gannett *v.* Albree, 103 Mass. 372; McIntosh *v.* St. Philip's Church, 120 N. Y. 7, 23 N. E. 984. But see Garnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303; Finch *v.* Underwood, 2 Ch. D. 310, 45 L. J. Ch. 522, 34 L. T. Rep. N. S. 779, 24 Wkly. Rep. 657.

Effect of waiver.— If, after a forfeiture has been incurred, the landlord declares himself willing to renew, upon the condition of the tenants using expedition, this waiver does not set the matter open again *ab initio*, and the tenant must use the utmost diligence in taking advantage of it, otherwise his right will be barred. Townley *v.* Bond, 2 C. & L. 393, 4 Dr. & War. 240. Where after judgment in ejectment an arrangement was made whereby certain bills at three months, drawn by the tenant, were received by the master on the part of the landlord, who was a minor and ward of the court, in payment of the rent, with a promise that if the bills were not paid the forfeiture was to be complete, it was held that the arrangement was binding but that the bills not having been paid the court could not decree redemption. Mulloy *v.* Goff, 1 Ir. Ch. 27.

Forfeiture of lease in general see *infra*, IX, B, 7.

69. Tracy *v.* Albany Exch. Co., 7 N. Y. 472, 57 Am. Dec. 538; Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235; Rawstorne *v.* Bentley, 4 Bro. Ch. 415, 29 Eng. Reprint 966.

Payments made but not at times required. — The fact that rents, all of which were paid during the term, were not paid at the dates as required in the lease, will not defeat the right to an additional or continued term. Lyons *v.* Osborn, 45 Kan. 650, 26 Pac. 31; Selden *v.* Camp, 95 Va. 527, 28 S. E. 877.

70. Behrman *v.* Barto, 54 Cal. 131.

71. Clinch *v.* Pernette, 24 Can. Sup. Ct. 385.

Strict performance excused.— Where the lessee in a lease containing a covenant by the lessor to grant a further or renewed lease upon due and punctual payment of fines, etc., at the times appointed for such payment, assigned a part of the premises for the same term, subject to the payment of a proportional part of the fines, etc., and a third person afterward purchased of the original lessor a reversion of the premises expectant on the lease to the original lessee and subsequently purchased the original lessee's interest under the original lease, not assigned by him, on one of the gross sums of fines becoming due and being unpaid, it was held that the double character filled by the original lessee relieved his assignee from strict performance of the covenant, and that the non-payment by the latter of the proportion of the gross fine was not under the circumstances a refusal to pay for such a breach of the covenant as would deprive him of his claim to a renewed lease of the property assigned to him. Statham *v.* Liverpool Docks, 3 Y. & J. 565.

Payment not a condition.— Where the lease contained a covenant by the lessor for renewal for a further term upon the payment of a fine for each renewal, even though the requisition for a renewal must be made before the expiration of the term, the stipulation requires only that the fine shall be paid on the execution of the lease and not before the expiration of the term. Nicholson *v.* Smith, 22 Ch. Div. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471.

72. Cusack *v.* Gunning System, 109 Ill. App. 588; Chandler *v.* McGinning, 8 Kan. App. 421, 55 Pac. 103; Clarke *v.* Merrill, 51 N. H. 415; Mershon *v.* Williams, 62 N. J. L. 779, 42 Atl. 778.

73. See cases cited *infra*, this note.

Option of extension "if so desired."— A lease for a year with the option to keep the premises three years "if so desired" requires the lessee to give notice if he should elect to hold for the additional time, but no election is necessary if he does not intend to continue. Storch *v.* Harvey, 45 Kan. 39, 25 Pac. 220. But Brewer *v.* Conger, 27 Ont. App. 10, under a covenant by the lessor to renew pro-

tioned upon a request or notice, the right cannot be enforced over the objection of a failure or omission in this regard.[74]

(b) Waiver. The provisions of a lease requiring notice from the lessee of an election or intention to renew or extend the term are for the benefit of the lessor and therefore the notice itself,[75] or any other matter going to the sufficiency thereof, may be waived,[76] and the continuance in possession with the payment by the lessee and the reception by the lessor of rent will constitute a waiver of the notice and a renewal or extension under the provision of the lease.[77]

viding the lessee "should desire to take a further lease," etc., it was held that no notice of demand of the lessee was necessary; that the provision of the lease required no notice or demand.

"Whenever required."— Under a covenant that the lessor would renew at any time before the expiration of the term, and also before the expiration of every succeeding term to be granted by every future or renewed lease, whenever required by the lessee or the person interested in the term or any succeeding term, it was held that notice of intention to renew should be given before the end of the term. Nicholson *v.* Smith, 22 Ch. D. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471.

Tenant as lessor to subtenant.— The lessor being himself a tenant, under a lease for lives renewable forever, who makes a sub-demise, and covenants that every life added by his own landlord shall be also added to the sub-demise, should, on obtaining a new life in his own lease, give notice to his tenant that he is ready to renew. Wallace *v.* Patten, 1 Ir. Eq. 338. See also Lawless *v.* Grogan, Dr. & Wal. 53; John *v.* Armstrong, Ll. & G. t. Pl. 392.

For renewal and extension distinguished see *infra*, IV, C, 3, f, (II), (E), (3).

74. *Iowa.*— McFadden *v.* McCann, 25 Iowa 252.

Louisiana.— Abadie *v.* Berges, 41 La. Ann. 281, 6 So. 529; Mossey *v.* Mead, 4 La. 195.

Massachusetts.— Bradford *v.* Patten, 108 Mass. 153.

Michigan.— Cooper *v.* Joy, 105 Mich. 374, 63 N. W. 414.

Missouri.— Gerhart Realty Co. *v.* Brecht, 109 Mo. App. 25, 84 S. W. 216.

Ohio.— Keppler Bros. Co. *v.* Heinrichsdorf, 26 Ohio Cir. Ct. 16.

Pennsylvania.— Murtland *v.* English, 214 Pa. St. 325, 63 Atl. 882.

England.— Job *v.* Banister, 3 Jur. N. S. 93, 26 L. J. Ch. 125, 5 Wkly. Rep. 177; Bastin *v.* Bidwell, 18 Ch. D. 238, 44 L. T. Rep. N. S. 742.

Withdrawal of notice terminating lease.— Where under a provision requiring notice from either party to terminate the lease, notice is given the tenant, a request by him subsequently that he be permitted to remain is sufficient evidence to bind him to a continuation of the tenancy. Supplee *v.* Timothy, 124 Pa. St. 375, 16 Atl. 864.

Excuse for failure — denial of covenant.— Where under a lease perpetually renewable upon certain notice before the expiration of each term, the lessee sues to compel a particular renewal, and the landlord pleads a forfeiture of the lease for breach of covenants, pending which suit the parties negotiate about a draft of a renewal, and pending which negotiations the time arrives for the giving of another notice of renewal of another term by the lessee, which he does not give, the lessee is excused from making demand for a further renewal while the *lis pendens* as to the existence of the former lease exists, as it would be inequitable to permit the lessor to insist upon compliance with the covenant, the existence of which he denies. Hunter *v.* Hopetoun, 13 L. T. Rep. N. S. 130.

75. Wood *v.* Edison Electric Illuminating Co., 184 Mass. 523, 69 N. E. 364; Stone *v.* St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Kramer *v.* Cook, 7 Gray (Mass.) 550; Probst *v.* Rochester Steam Laundry Co., 171 N. Y. 584, 64 N. E. 504; Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Crouch *v.* Trimby, etc., Shoe Co., 83 Hun (N. Y.) 276, 31 N. Y. Suppl. 932; Schuck *v.* Schwab, 84 N. Y. Suppl. 896; *In re* Thompson, 205 Pa. St. 555, 55 Atl. 539.

Subsequent memorandum omitting provision.— Where the landlord signed a memorandum merely to show that the tenant holds under a lease, which memorandum recites the rental of the premises for a certain term with the privilege of renewal, omitting any reference to the necessity of notice of intention to renew, the landlord did not waive that provision in the original lease. Morgan *v.* Goldberg, 9 Misc. (N. Y.) 156, 29 N. Y. Suppl. 52.

76. An untimely notice may serve the purpose of the notice required if the lessor sees fit to accept and act upon it as such. Sheppard *v.* Rosenkrans, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886.

Parol waiver of a written notice is effective. Matter of Rubenstein, 13 N. Y. St. 891; McClelland *v.* Rush, 150 Pa. St. 57, 24 Atl. 354.

Notice by lessor.— A provision requiring notice by the lessor of his intention not to build is for the lessee's benefit, under a lease entitling the lessee to a renewal in case the lessor should decide not to build, and he may waive it. Seaver *v.* Thompson, 189 Ill. 158, 59 N. E. 553, in which case it was held further that the right of the lessee did not depend upon notice but upon the fact of the lessor's decision not to build.

77. Lewis *v.* Perry, 149 Mo. 257, 50 S. W. 821; Probst *v.* Rochester Steam Laundry Co.,

(2) SUFFICIENCY. Where notice is required it must convey information of the definite and unconditional determination[78] of the party who is entitled to the right,[79] and must be of the character and quality prescribed by the terms of the lease,[80] and given within the period limited in that instrument,[81] although as will be seen from the adjudications set out in the notes, a substantial compliance with the contract requirements in these respects is sufficient.

(3) EFFECT. Where a timely notice is given or request made for a renewal or extension under the provisions of the lease, the rights and obligations of the parties become mutually fixed.[82]

(E) *Surrender of Possession.* Where the lessee voluntarily surrenders the premises he cannot insist upon a right to renew.[83]

171 N. Y. 584, 64 N. E. 504 [*affirming* 69 N. Y. Suppl. 1144]; Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Crouch *v.* Trimby, etc., Shoe Co., 83 Hun (N. Y.) 276, 31 N. Y. Suppl. 932; Bailie *v.* Plaut, 11 Misc. (N. Y.) 30, 31 N. Y. Suppl. 1015; Schuck *v.* Schwab, 84 N. Y. Suppl. 896.

78. Caggiano *v.* Gallorenzi, 26 Misc. (N. Y.) 819, 57 N. Y. Suppl. 2, holding that evidence of a mere inquiry of the son of the tenant, in a conversation between such son and the landlord, as to the renewal, rather than of a request or notice for renewal, is not sufficient.

A suggestion of a longer term in a notice of a desire to extend the terms of the lease will not destroy the effect of the notice for the extension provided for in the lease. Chamberlain *v.* Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807.

79. See cases cited *infra*, this note.

A notice signed by a third person wrongfully in possession that the lessees elect to have the lease extended is not sufficient. Emery *v.* Hill, 67 N. H. 330, 39 Atl. 266.

Notice by assignor.— But where a lessee upon assigning the lease notifies the lessor that the assignees desire additional terms, the notice is sufficient under the terms of the lease providing for additional terms on notice that such additional terms are desired. House *v.* Burr, 24 Barb. (N. Y.) 525.

Notice by assignee.— Where an assignment of a lease containing a covenant of renewal was valid as against the lessor, a demand for such renewal was properly made by the assignee to whom such covenant to renew passed by the assignment. Warner *v.* Cochrane, 128 Fed. 553, 63 C. C. A. 207.

Signature in name of firm.— Where a partnership, the lessee, was reorganized, one of its members becoming a special, and its firm-name was changed, a notice signed in the name of the reorganized firm is in proper form. Sherwood *v.* Gardner, 2 N. Y. City Ct. 64.

80. An informal notice by the secretary of a corporation, upon being advised by the lessor that the lease was about to expire on the next day, that the directors of the company "would of course renew the lease," is sufficient. Nicholson *v.* Smith, 22 Ch. D. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471.

Service of notice.— Under a provision requiring the lessees to "advise the owner or his agents of their intention" to continue the tenancy, the receipt of such notice is a purely mechanical act which may be delegated by the agents to a clerk, and service upon such clerk authorized by his employer to receive such notice is good. Broadway, etc., R. Co. *v.* Metzger, 15 N. Y. Suppl. 662, 27 Abb. N. Cas. 160.

Oral notice is sufficient where no particular form of notice is prescribed in the lease. Broadway, etc., R. Co. *v.* Metzger, 15 N. Y. Suppl. 662, 27 Abb. N. Cas. 160. See also Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545.

Notice by mail.— Where the lessor directs that any communication respecting the tenants should be addressed to him by mail, a notice of intention to renew served by depositing it in the post-office addressed according to the said directions of the lessor, with the postage paid, the day before the time for giving notice expired, is good. Reed *v.* St. John, 2 Daly (N. Y.) 213.

Notice by lessor.— A notice by a lessor that he intends to take possession "pursuant to the provisions of the said lease" is sufficient without stating that he would pay for the buildings, under an option conferred upon him to renew the lease or pay for the buildings. *In re* Coatsworth, 160 N. Y. 114, 54 N. E. 665.

81. Emery *v.* Hill, 67 N. H. 330, 39 Atl. 266; Keppler Bros. Co. *v.* Heinrichsdorf, 26 Ohio Cir. Ct. 16.

82. Nicholson *v.* Smith, 22 Ch. D. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471. See also in this connection, *infra*, IV, C, 2, e, (VII), as to the effect of an election; and *infra*, IV, C, 3, f, (II), (E), as to the effect of holding over.

Covenant becomes mutual.—Where the tenant gives a notice that he elects to renew, the covenant to renew ceases to be unilateral and may be enforced by the landlord. Dawson *v.* Lepper, L. R. 29 Ir. 211.

83. Jackson *v.* Doll, 109 La. 230, 33 So. 207; Barge *v.* Schiek, 57 Minn. 155, 58 N. W. 874.

Dispossession by landlord.— But where the failure of the tenant to continue possession results from the fact that he was dispossessed at the instance of the landlord, the latter cannot claim any forfeiture of the right to renew. Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235.

(VII) *Effect of Election.* When an election is once made both parties to the lease become bound thereby.[84]

f. Remedies For Enforcement of Right to Renewal — (I) *Damages or Specific Performance.* A breach of a covenant to renew is actionable at law for the recovery of damages,[85] or a specific performance will be decreed in equity,[86] unless in the case of laches by the party applying and the intervention of cir-

84. *Indiana.*— Falley *v.* Giles, 29 Ind. 114.
Kansas.— Chandler *v.* McGinning, 8 Kan. App. 421, 55 Pac. 103.
Louisiana.— Jackson *v.* Doll, 109 La. 230, 33 So. 207.
Michigan.— Grenier *v.* Cota, 92 Mich. 23, 52 N. W. 77; Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545.
Minnesota.— Caley *v.* Thornquist, 89 Minn. 348, 94 N. W. 1084.
New York.— Hausauer *v.* Dahlman, 72 Hun 607, 25 N. Y. Suppl. 277; Viany *v.* Ferran, 54 Barb. 529; Kelso *v.* Kelly, 1 Daly 419.
North Carolina.— McAdoo *v.* Callum, 86 N. C. 419.

Effect of request for change in terms.— The fact that after a lessee makes his election he requests changes to be made in the lease does not destroy the effect of the election, the lessor refusing to assent to the change, but the original lease is extended under its terms providing for the election to extend. Chamberlain *v.* Dunlop, 5 Silv. Sup. (N. Y.) 98, 8 N. Y. Suppl. 125. So where a lessee exercises his option to hold for an additional term, he cannot refuse to pay the rent stipulated in the lease because the lessor had demanded a higher rent. Jones *v.* James, (Tex. App. 1892) 19 S. W. 434. And on the other hand, where the lessee requests a renewal before the expiration of the lease, which the lessor refuses except on the payment of an increased rent, and the lessee afterward takes a lease at an increased rent, insisting, however, upon his right to renew under the old lease, it was held that he did not waive the lessor's covenant of renewal. Tracy *v.* Albany Exch. Co., 7 N. Y. 472, 57 Am. Dec. 538.

Effect upon assignee.— Upon the election by an assignee of a lease to take an extended term under an option granted in the lease, he is liable for the unexpired portion of the extended term, although he assigned the lease before the expiration of such term. Probst *v.* Rochester Steam Laundry Co., 171 N. Y. 584, 64 N. E. 504.

Holding over after election to surrender.— See *infra*, IV, C, 3, f, (II), (E), (2).

Tender of deed.—If the lessor exercises his option by electing to renew, either party may thereafter require a deed, although the tender of a deed at the time the election is made is not a prerequisite to an effectual exercise of the election. Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545. See also Nicholson *v.* Smith, 22 Ch. Div. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471.

85. McClintock *v.* Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541; Garnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303; Walcott *v.* McNew, (Tex. Civ. App. 1901) 62 S. W. 815.

An action brought before the expiration of the lease for a breach of a contract to renew made during the original term is not premature. Laroussini *v.* Werlein, 48 La. Ann. 13, 18 So. 704.

Where the possession is given it is held that the tenant cannot recover damages for a refusal to execute a lease. Neel *v.* McCreery, 17 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 434. After occupancy by the tenant for the full renewal term he cannot recover damages for the lessor's refusal to execute a renewal. Hegan Mantel Co. *v.* Cook, 57 S. W. 929, 22 Ky. L. Rep. 427, which proceeds in part upon the theory that the notice of the exercise of the option *ipso facto* extends the lease.

The measure of damages is the value of the new lease. Garnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303; Van Brocklin *v.* Brantford, 20 U. C. Q. B. 347 (holding that where the tenant places buildings on the land he is entitled to recover the value of the occupation of the premises, with the buildings, above the probable ground-rent); Walcott *v.* McNew, (Tex. Civ. App. 1901) 62 S. W. 815 (holding that the landlord was liable for the difference between the rental value of the land for the renewal term and the amount which the tenant had agreed to pay for the lease). See also North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435, where the value of the new term was assessed in a suit in equity, the conditions being such that the parties could not be restored to their relations under the lease. But where a life-tenant leased for a term and afterward agreed with a purchaser of the balance of the term to grant him a renewal, but died before executing such renewal, and the remainder-man refused to renew, it was held in a suit against the life-tenant's administrator that the measure of damages is the price paid for the lease and its interest, and not the value of the contract. McClowry *v.* Croghan, 31 Pa. St. 22.

86. See Crawford *v.* Kastner, 26 Hun (N. Y.) 440; Neel *v.* McCreery, 17 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 434; Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776; Sadlier *v.* Biggs, 4 H. L. Cas. 435, 10 Eng. Reprint 531; Mortimer *v.* Orchard, 2 Ves. Jr. 243, 30 Eng. Reprint 615. But see otherwise in Louisiana. Laroussini *v.* Werlein, 48 La. Ann. 13, 18 So. 704.

After judgment in ejectment.— If a lease for lives renewable forever expires without renewal, and the landlord brings ejectment, the tenant ought not to dispute his title, but

cumstances changing the condition of the parties, and rendering an enforcement of the covenant inequitable,[87] or where the contract is accompanied with fraud.[88] These remedies are concurrent, and the party may elect which he will pursue.[89]

(II) *Enforcement of Stipulations For Appraisal or Arbitration.* Upon the question of the propriety of specifically enforcing such stipulations, the courts are not in entire accord except upon the general proposition that a court of equity will not decree a specific performance of an agreement to arbitrate. In some of the cases this general rule is applied to such stipulations in leases.[90] In others the courts, while recognizing the same general rule, adopt midway expedients to prevent the working of injustice and have stayed proceedings at law until the covenant should be performed.[91] But the better rule seems to be that a court of equity will secure to either party the benefit of such clauses in a lease, and that, even in the face of the rule against the specific performance of an agreement to submit to arbitration, when the arbitration has failed the court may make the appraisement itself or direct it to be done by its own officer and thereafter enforce performance of the contract upon the terms so found.[92]

(III) *Relief Against Forfeiture.* Courts of equity will relieve a lessee if he has lost his right to renew by fraud on the part of the lessor or by unavoidable accident on his own part; they will not assist him where his failure to renew is

should give consent for judgment, and file a bill for renewal. Wallace *v.* Patten, 1 Ir. Eq. 338.

Payment of penalty.— Where a lease has been granted upon lives renewable forever, with a *nomine pœnæ* in case of the lessee's neglect to renew, equity will not decree the lessor to renew, except upon the terms of paying the penalty. Doneraile *v.* Chartres, 1 Ridg. App. 122.

Restraining interference with possession.— The court may enjoin the prosecution of an action by the lessor, pending the lessee's suit, where the lessee cannot rely on the covenant in the lessor's action. Hunter *v.* Silvers, 15 Ill. 174.

87. London *v.* Mitford, 14 Ves. Jr. 42, 9 Rev. Rep. 234, 33 Eng. Reprint 437, where there were circumstances of laches and an alteration of the property so that it could not be enjoyed according to the stipulations. See also Pilson *v.* Spratt, L. R. 25 Ir. 5; Walker *v.* Jeffreys, 1 Hare 341, 6 Jur. 336, 11 L. J. Ch. 209, 23 Eng. Ch. 341, 66 Eng. Reprint 1064; Drew *v.* Norbury, 3 J. & L. 267, 9 Ir. Eq. 171, 524.

Mental incapacity of the defendant when the time for renewal arrives is no defense to an action for specific performance of the covenant to renew, the rent having been established in the manner agreed on. Wurster *v.* Armfield, 67 N. Y. App. Div. 158, 73 N. Y. Suppl. 609.

88. Blakeney *v.* Bagott, 3 Bligh N. S. 237, 4 Eng. Reprint 1326, 1 Dow. & Cl. 405, 6 Eng. Reprint 576; Davies *v.* Oliver, 1 Ridg. App. 1.

89. Arnot *v.* Alexander, 44 Mo. 25, 100 Am. Dec. 252; Finney *v.* List, 34 Mo. 303, 84 Am. Dec. 82; Carr *v.* Ellison, 20 Wend. (N. Y.) 178.

The reason of this rule is that the covenant to renew does not amount to a present demise. Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560; Hunter *v.* Silvers, 15 Ill. 174; Swank *v.* St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088; Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776.

90. Greason *v.* Keteltas, 17 N. Y. 491; Hopkins *v.* Gilman, 22 Wis. 476; Gourlay *v.* Somerset, 1 Ves. & B. 68, 35 Eng. Reprint 27, 19 Ves. Jr. 429, 34 Eng. Reprint 576, 13 Rev. Rep. 234.

91. Holsman *v.* Abrams, 2 Duer (N. Y.) 435; Tscheider *v.* Biddle, 24 Fed. Cas. No. 14,210, 4 Dill. 58, where an order was entered staying proceedings at law until the lessor should appoint an impartial assessor.

Exercise of jurisdiction once acquired.— In Hopkins *v.* Gilman, 22 Wis. 476, the lessor had an option to have improvements appraised, and to pay the appraised value thereof or to renew the lease for a further time at a rental of a fixed per cent upon the appraised value of the premises, and it was held that in an action to restrain the prosecution of a suit by the lessor for possession, a judgment decreeing specific performance was improper, but that the court having obtained jurisdiction would render appropriate relief, and upon reversing the judgment the court remanded the cause with directions to ascertain the value of the improvements and permitted plaintiff to retain possession until defendant had paid for said improvements.

92. Biddle *v.* Ramsey, 52 Mo. 153 (where a bill by a lessor asking for a judicial ascertainment of the value of rentals was sustained on demurrer, upon allegations of fraud); Smith *v.* St. Philip's Church, 107 N. Y. 610, 14 N. E. 825; Weir *v.* Barker, 104 N. Y. App. Div. 112, 93 N. Y Suppl. 732; Van Beuren *v.* Wotherspoon, 12 N. Y. App. Div. 421, 42 N. Y. Suppl. 404; Graham *v.* James, 7 Rob. (N. Y.) 468; Kelso *v.* Kelly, 1 Daly (N. Y.) 419; Viany *v.* Ferran, 5 Abb. Pr. N. S. (N. Y.) 110; Johnson *v.* Conger, 14 Abb. Pr. (N. Y.) 195; Piggot *v.* Mason, 1 Paige (N. Y.) 412; Whitlock *v.* Duffield, 2 Edw. (N. Y.) 366; Kaufmann *v.* Liggett, 209

on account of his own gross laches or negligence.[93] On the other hand it is held that upon the question of the right to relief against a forfeiture for failure to renew time is not essential where there is mere neglect; but that in the case of gross or wilful negligence relief will not be granted.[94]

3. The Renewal or Extension — a. In General. A renewal contract to be effective should be completed so as to show a meeting of the minds of the parties.[95]

b. Necessity of New Lease — (i) *Under Covenant to Renew.* A covenant

Pa. St. 87, 58 Atl. 129, 103 Am. St. Rep. 988, 67 L. R. A. 353; Davis *v.* Lewis, 8 Ont. 1.

Setting aside renewal lease.— A lessee who is induced to take a renewal lease, stipulating for a certain rent under a mistaken idea as to her rights, and on account of erroneous representations of the lessor, may have the renewal lease set aside, and the rent fixed by arbitration. Terry *v.* Moore, 3 Misc. (N. Y.) 290, 22 N. Y. Suppl. 788.

93. Cusack *v.* Gunning System, 109 Ill. App. 588; Rawstorne *v.* Bentley, 4 Bro. Ch. 415, 29 Eng. Reprint 966; Mountnorris *v.* White, 2 Dow 459, 3 Eng. Reprint 931; Reid *v.* Blagrave, 9 L. J. Ch. O. S. 245; Harries *v.* Bryant, 4 Russ. 89, 28 Rev. Rep. 15, 4 Eng. Ch. 89, 38 Eng. Reprint 738. See also Firman *v.* Ormond, Beatty 347, where a lessee had been surprised by misinformation of the lessor's agent and therefore could not insert a life at the proper time.

Landlord holding draft of lease.— Where the duty of a tenant is the payment of a fine if he furnishes a draft of a renewal, a delay in returning it will prevent the time running against him so long as that delay occurs by the fault of the landlord; but it will not exempt the tenant for any length of time from looking after his renewal. Cullen *v.* Leonard, 5 Ir. Eq. 134.

Ignorance of rights conferred by an instrument actually in the party's possession or power, where the other party is innocent of concealment or of any conduct contributing to such ignorance, cannot excuse the nonperformance of conditions imposed under the instrument. Maxwell *v.* Ward, McClell. 458, 13 Price 674, 28 Rev. Rep. 725.

Concealing death of cestui que vie.— Where a lessee wilfully conceals the death of any of the *cestui que vies*, and acts under such concealment for his own advantage, the lessor is not obliged to renew, but may take advantage of the forfeiture and enter upon and hold the estate. Pendred *v.* Griffith, 1 Bro. P. C. 314, 1 Eng. Reprint 590.

In Ireland the courts granted relief upon slight circumstances, on failure to renew leases with covenants of perpetual renewal. Ross *v.* Worsop, 1 Bro. P. C. 281, 1 Eng. Reprint 568; Magrath *v.* Muskerry, 1 Ridg. App. 477, Vern. & S. 171. This was so before the Tenantry Act and until the question was settled otherwise on appeals to the house of lords, where it was held that a lessee having lost his right by a neglect could not be entitled to a renewal except upon proving fraud on the part of the lessor or some accident or misfortune which he could not prevent. Bateman *v.* Murray, 5 Bro. P. C. 20, 1 Ridg. App. 187, 2 Eng. Reprint 506; Kane *v.* Hamilton, Ridg. App. 180. Soon afterward, on account of the effect of the decision upon the interests of Irish tenants the Irish Tenantry Act was passed, which provided in effect that in all cases of mere neglect where no fraud appeared to have been intended on the part of the tenant, courts of equity should relieve, an adequate compensation being made to the landlord. See Banks *v.* Haskie, 45 Md. 207. See also under the Tenantry Act Moore *v.* Sayers, Beatty 530; Trant *v.* Dwyer, 2 Bligh N. S. 11, 4 Eng. Reprint 1034, 1 Dow & Cl. 125, 6 Eng. Reprint 471 (where renewals were decreed notwithstanding mere neglect on the part of the tenant); Butler *v.* Mulvihill, 1 Bligh 137, 4 Eng. Reprint 49 (where under the peculiar circumstances the right of renewal of a lease for lives was enforced notwithstanding the extinction of all the lives and neglect to pay fines after notice).

94. Worthington *v.* Lee, 61 Md. 530; Myers *v.* Silljacks, 58 Md. 319 (where the relief was refused on account of gross and wilful negligence); Banks *v.* Haskie, 45 Md. 207 (in which case the decisions were based upon the peculiar circumstances and the construction of the covenants according to the intention of the parties); Selden *v.* Camp, 95 Va. 527, 28 S. E. 877; Lennon *v.* Napper, 2 Sch. & Lef. 682.

Failure to comply with a condition requiring notice of the intention to renew will be relieved against in equity if the party has acted fairly and no injury was done to the other by failure to do the act required strictly within the time. But it will not relieve from the consequences of gross laches or wilful neglect. Thiebaud *v.* Vevay First Nat. Bank, 42 Ind. 212; Reed *v.* St. John, 2 Daly (N. Y.) 213; New York L. Ins., etc., Co. *v.* St. George's Church, 12 Abb. N. Cas. (N. Y.) 50; Keppler Bros. Co. *v.* Heinrichsdorf, 26 Ohio Cir. Ct. 16.

95. See McClave *v.* McAinsh, 33 Misc. (N. Y.) 776, 67 N. Y. Suppl. 1071; Steinhardt *v.* Buel, 1 Misc. (N. Y.) 295, 20 N. Y. Suppl. 706 (in which cases the evidence was held insufficient to show a new or completed contract of renewal); Crooke Smelting, etc., Co. *v.* Towle, 13 N. Y. Suppl. 520.

Suggestions after the contract is completed, as where the lessee agreed to cut the lessor's crops, and the lessor in consideration thereof agreed that the lessee could have for an extended period land which he held, and subsequently suggested that the lessee could summer fallow the land which the lessee did not do, are not a part of the consideration

to renew is a covenant to grant an estate.[96] It is not a present demise (as distinguished from a covenant to extend) so as of itself and alone to continue the tenancy for the renewal period,[97] but calls for a new lease,[98] without which the tenant cannot strictly retain possession as against the lessor in a court of law, by relying merely upon the covenant to renew.[99] On the other hand, under a privilege or option to renew, it is held that by exercising the election, as by giving proper notice, the tenant must be considered as in for the extended term,[1] and while the execution of the new lease is not necessary under these decisions it may nevertheless be required by either of the parties after the election has been exercised.[2]

(II) *UNDER COVENANT TO EXTEND.* A covenant or agreement to extend the term of a lease for a time specified is not a covenant to renew, but a present demise which becomes operative immediately upon the exercise of the option conferred.[3]

for an extension, and the binding force of the contract does not depend thereon. Schweikert *v.* Seavey, (Cal. 1900) 62 Pac. 600.

A new consideration will be required to support the renewal of an unexpired lease. Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 N. W. 957.

Formal execution of a lease is unnecessary where the terms for the renewal have been offered by one of the parties and accepted by the other, but the execution of the lease and the performance of one of the conditions mentioned in the accepted offer was prevented by the illness and death of the lessee who, however, until his death continued in the possession of the premises after the termination of the first tenancy. American Security, etc., Co. *v.* Walker, 23 App. Cas. (D. C.) 583.

96. Vance *v.* Ranfurley, 1 Ir. Ch. 322.

97. Steen *v.* Scheel, 46 Nebr. 252, 64 N. W. 957. But see *infra*, IV, C, 3, f, (II), (E), as to renewal or extension by holding over.

98. Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560; Hunter *v.* Silvers, 15 Ill. 174; North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435; Swank *v.* St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088; Orton *v.* Noonan, 27 Wis. 272.

Extension of the terms of the old lease does not satisfy a covenant to renew, and the tenant may compel the making of a new lease. Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776.

99. Hunter *v.* Silvers, 15 Ill. 174; Finney *v.* Cist, 34 Mo. 303, 84 Am. Dec. 82; Fenny *v.* Child, 2 M. & S. 255.

If the tenant is not in possession his only remedy is by action on the covenant for damages or suit for specific performance. Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560.

1. *Kentucky.*— Cook *v.* Jones, 96 Ky. 283, 28 S. W. 960, 16 Ky. L. Rep. 469; Hegan Mantel Co. *v.* Cook, 57 S. W. 929, 22 Ky. L. Rep. 427.

Massachusetts.— Ferguson *v.* Jackson, 180 Mass. 557, 62 N. E. 965, where it was said that the covenant might be set up as an equitable defense because equity would enjoin an action.

Michigan.— Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545.

New York.—Hausauer *v.* Dahlman, 72 Hun 607, 25 N. Y. Suppl. 277 (in which the option is spoken of as an option to renew, but is treated as equivalent to an option to extend); Sherwood *v.* Gardner, 2 N. Y. City Ct. 64.

Pennsylvania.— Kaufmann *v.* Liggett, 209 Pa. St. 87, 58 Atl. 129, 103 Am. St. Rep. 988, 67 L. R. A. 353 [*affirming* 34 Pittsb. Leg. J. N. S. 119].

Texas.— Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235.

Present demise.— A privilege of re-leasing for a particular term is held to be a present demise to take effect in the future upon the exercise of the option by the lessee. Willoughby *v.* Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612; Holley *v.* Young, 66 Me. 520; Sweetser *v.* McKenney, 65 Me. 225; Ranlet *v.* Cook, 44 N. H. 512, 84 Am. Dec. 92. In Eichorn *v.* Peterson, 16 Ill. App. 601, it was held that such a lease is not a lease for the original and extended terms, but entitles the lessee to a renewal, and that he may defend upon the covenant at law, upon this last point *distinguishing* Hunter *v.* Silvers, 15 Ill. 174, upon the terms of the two statutes under which the decisions were made.

2. Darling *v.* Hoban, 53 Mich. 599, 19 N. W. 545.

3. Cusack *v.* Gunning System, 109 Ill. App. 588; Connor *v.* Withers, 49 S. W. 309, 20 Ky. L. Rep. 1326; House *v.* Burr, 24 Barb. (N. Y.) 525; Broadway, etc., R. Co. *v.* Metzger, 15 N. Y. Suppl. 662, 27 Abb. N. Cas. 160; Orton *v.* Noonan, 27 Wis. 272, 572.

The holding is under the original grant, and not under the election. Clarke *v.* Merrill, 51 N. H. 415. It has been held therefore that the holding is not within the objection of a provision of a statute of frauds that one cannot be charged upon a contract for the sale of lands or any interest therein, etc., unless such contract shall be in writing, and signed by the party to be charged, because the holding is not under the notice of the election. Sheppard *v.* Rosenkrans, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886.

c. Parol Evidence. A written lease may be extended by parol.[4]

d. Indorsement on Original Lease. A lease may be renewed or extended by an indorsement on the original instrument.[5]

e. Terms and Covenants — (I) *In General.* One is not bound to enter into a covenant in a renewal lease which he did not make in the original.[6]

(II) *Under General Covenant* — (A) *In General.* The right to renew *ex vi termini* imports a new lease at the old rent, and with the same terms, conditions, and essential covenants, except the covenant to renew,[7] and under a covenant to renew a new lease or the renewal term will be of this quality unless there are express changes designated in the covenant.[8] And the privilege of renting

Failure to exercise option to terminate.— Where the continuance in possession depends upon an option to terminate the lease, it is not contemplated that a new lease should be given at the expiration of each term. Chretien *v.* Doney, 1 N. Y. 419; McDonell *v.* Boulton, 17 U. C. Q. B. 14.

For duration of term as affected by failure to exercise option to terminate see *supra*, IV, A, 3, b.

4. Johnson *v.* Foreman, 40 Ill. App. 456; Whalen *v.* Leisy Brewing Co., 106 Iowa 548, 76 N. W. 842 (where it was held that where the renewal was executed but the lessor refused to allow the lessee to use the premises until certain conditions had been complied with and after compliance the lessor verbally agreed that the lessee should occupy the premises, the verbal agreement is in effect a renewal of the prior lease, or if not, it was an agreement that the written renewal should apply to the changed conditions); Mossy *v.* Mead, 2 La. 157. See also Frauds, Statute of, 20 Cyc. 215.

Remaining in possession and paying increased rent is a sufficient part performance to prevent the application of the statute of frauds in a suit for specific performance. Nunn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. N. S. 868, 35 L. J. Ch. 140, 13 L. T. Rep. N. S. 343; Miller *v.* Sharp, [1899] 1 Ch. 622, 68 L. J. Ch. 322, 80 L. T. Rep. N. S. 77, 47 Wkly. Rep. 268.

Oral renewal for term within statute of frauds see Frauds, Statute of, 20 Cyc. 215.

5. Wood *v.* Edison Electric Illuminating Co., 184 Mass. 523, 69 N. E. 364; Northwestern Ohio Natural Gas Co. *v.* Browning, 15 Ohio Cir. Ct. 84, 8 Ohio Cir. Dec. 188 (holding that such an indorsement need not be recorded under a statute requiring "leases, licenses and assignments thereof" to be recorded); Witman *v.* Reading, 191 Pa. St. 134, 43 Atl. 140.

Indorsement by attorney on lessor's copy.— An indorsement by the lessor's attorney in fact of an extension of a lease, on the back of the original lease in his possession, is valid and binding. Pittsburg Mfg. Co. *v.* Fidelity Title, etc., Co., 207 Pa. St. 223, 56 Atl. 436 [*affirming* 33 Pittsb. Leg. J. 37].

By arbitrators.— Where the lease provided for the taking of improvements by the lessor on appraisal, or to give a new lease at a rent to be fixed by arbitrators, and at the end of the term arbitrators were appointed and indorsed on the lease that the lease "is renewed by arbitration," etc., it was held that as against the lessee he had entered upon the second term, this was a good renewal upon the original terms, with the exceptions made by the arbitrator, and also of the provision for a renewal. Brand *v.* Frumveller, 32 Mich. 215.

Extension of extended term.— Where one extension at an increased rent had been indorsed on a lease, and before the expiration of the extended term another indorsement was made extending the "within lease" for a further period, the terms "within lease" referred to the prior indorsement as well as to the original lease and the rental fixed in the first indorsement was thereby reserved. Cram *v.* Dresser, 2 Sandf. (N. Y.) 120.

6. Bellringer *v.* Blagrave, 1 De G. & Sm. 63, 11 Jur. 407, 63 Eng. Reprint 972.

7. See *infra*, IV, C, 3, e, (II), (B).

8. *Illinois.*— North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

Iowa.— Andrews *v.* Marshall Creamery Co., 118 Iowa 595, 92 N. W. 706, 96 Am. St. Rep. 412, 60 L. R. A. 399.

Massachusetts.— Cunningham *v.* Pattee, 99 Mass. 248.

New York.— Western New York, etc., R. Co. *v.* Rea, 83 N. Y. App. Div. 576, 81 N. Y. Suppl. 1093; Rutgers *v.* Hunter, 6 Johns. Ch. 218; Whitlock *v.* Duffield, Hoffm. 110; Tracy *v.* Albany Exch. Co., 3 Seld. 472, 57 Am. Dec. 538, Seld. notes 29; Bamman *v.* Binzen, 65 Hun 39, 19 N. Y. Suppl. 627.

Pennsylvania.— Creighton *v.* McKee, 7 Phila. 324.

Wisconsin.— Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776 [*overruling* Laird *v.* Boyle, 2 Wis. 431].

England.— Vance *v.* Ranfurley, 1 Ir. Ch. 322; Lewis *v.* Stephenson, 67 L. J. Q. B. 296, 78 L. T. Rep. N. S. 165; Price *v.* Assheton, 1 Y. & C. Exch. 82, 4 L. J. Exch. 3.

Canada.— See Dawson *v.* Graham, 41 U. C. Q. B. 532.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 281.

The term "renewal" means a renovation, a restoration of something to a former or original state — a repetition, a beginning again; it may mean each or either of these things, so far as there is any difference between them; it must, however, be a renewal, a renovation, or repetition, or restoration of the same subject, as far as it is possible to restore that subject. A renewal of a lease,

for a designated additional term,[9] or a lease for a term with a privilege of continuing longer, is construed like a general renewal covenant as providing for additional holding upon the same terms as in the original lease.[10]

(B) *Covenant For Further Renewals.* A general covenant to renew or a covenant to renew with like terms, conditions, and covenants does not import a renewal covenant in the renewal lease. A new covenant of renewal depends upon express covenant or a stipulation clearly indicating that to be the intention of the parties.[11] And where the new lease recites that it is granted upon the same terms and covenants, it does not thereby incorporate the original covenant to renew.[12] On the other hand it seems that a covenant to renew need not be inserted in a new lease in order to entitle the lessee to a subsequent renewal provided for in the original lease.[13]

(III) *CHANGE IN TERMS.* A new lease is a fulfilment of a covenant to renew, although the subject-matter is not identical, as where a part of the property by mutual agreement is not included in the renewal,[14] and in the exercise of the option to renew it is competent for the parties to agree upon modifications of the original terms.[15]

where the context does not require any different interpretation to be given to it, must therefore mean the obtaining a lease as near as possible in every practicable circumstance to the existing lease — as if the subject, worn or wearing out, was to begin again. Rickards *v.* Rickards, 7 Jur. 715, 12 L. J. Ch. 460, 2 Y. & Coll. 419, 21 Eng. Ch. 419, 63 Eng. Reprint 187.

Non-essential covenants. — A covenant to renew does not import the incorporation of all covenants which are accidental and not essential parts of a lease. Rutgers *v.* Hunter, 6 Johns. Ch. (N. Y.) 215.

A covenant to renew or pay for buildings erected by the lessee need not be incorporated in a renewal lease given under such covenant. Muhlenbrinck *v.* Pooler, 40 Hun (N. Y.) 526; Leary *v.* Hatton, 12 N. Y. Suppl. 476.

A covenant for quiet enjoyment in an original lease need not be incorporated in a renewal, under a covenant to renew. Ryder *v.* Jenny, 2 Rob. (N. Y.) 56.

9. Hughes *v.* Windpfennig, 10 Ind. App. 122, 37 N. E. 432; Cairns *v.* Llewellyn, 2 Pa. Super. Ct. 599, 39 Wkly. Notes Cas. 251.

A covenant to grant a new lease is not the same as a general covenant to renew, and does not import a lease with like terms and provisions (Whitlock *v.* Duffield, Hoffm. (N. Y.) 110); or with like covenants (Willis *v.* Astor, 4 Edw. (N. Y.) 594). See also Muller *v.* Trafford, [1901] 1 Ch. 54, 70 L. J. Ch. 72, 49 Wkly. Rep. 132.

10. Brown *v.* Parsons, 22 Mich. 24; Western New York, etc., R. Co. *v.* Rea, 83 N. Y. App. Div. 576, 81 N. Y. Suppl. 1093.

At same "rates." — A provision for a privilege of a number of years more at the same "rates" means upon the same terms and conditions. Neel *v.* McCreery, 17 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 434.

11. *Massachusetts.* — Cunningham *v.* Pattee, 99 Mass. 248.

Missouri. — Diffenderfer *v.* St. Louis Public Schools, 120 Mo. 447, 28 S. W. 542.

New York. — Ryder *v.* Jenny, 2 Rob. 56; Carr *v.* Ellison, 20 Wend. 178; Piggot *v.* Mason, 1 Paige 412; Rutgers *v.* Hunter, 6 Johns. Ch. 215.

Pennsylvania. — Swigert *v.* Hartzell, 20 Pa. Super. Ct. 56.

Wisconsin. — Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776.

United States. — Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635.

England. — Tritton *v.* Foote, 2 Bro. Ch. 636, 29 Eng. Reprint 352; Lewis *v.* Stephenson, 67 L. J. Q. B. 296, 78 L. T. Rep. N. S. 165.

12. Sears *v.* St. John, 18 Can. Sup. Ct. 702.

13. Gomez *v.* Gomez, 81 Hun (N. Y.) 566, 31 N. Y. Suppl. 206 [*affirmed* in 147 N. Y. 195, 41 N. E. 420].

14. Atty.-Gen. *v.* Wemyss, 13 App. Cas. 192, 57 L. J. P. C. 62, 58 L. T. Rep. N. S. 358.

Changed condition of premises. — A lease for lives renewable forever was made of certain lands except the bogs and turf-mosses. The tenant reclaimed portions of the bog, and converted them into arable land, and afterward filed a bill for renewal, and it was held that the description of the demised premises in the renewal ought not to be in the same terms as in the original lease, but ought to be so altered that such portions of the lands as have been reclaimed from the bog should not pass thereby to the tenant. Boyle *v.* Olpherts, 4 Ir. Eq. 241, Longf. & T. 320.

15. Wood *v.* Edison Electric Illuminating Co., 184 Mass. 523, 69 N. E. 364; Neel *v.* McCreery, 17 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 434; Atty.-Gen. *v.* Wemyss, 13 App. Cas. 192, 57 L. J. P. C. 62, 58 L. T. Rep. N. S. 358.

Where a lease was renewed by ordinance of a borough council, which ordinance changed the original lease so as to require one year's notice for the surrender of possession by the lessees, it was held that the parties were bound by the change even though the effect of it was to create a lease from

f. Implied Contracts — Holding Over — (I) *Rule Permitting Presumption of Relation.* Ordinarily the relation of landlord and tenant is founded upon express contract, but the relation may be presumed from the conduct of the parties toward each other.[16]

(II) *Holding Over* — (A) *Continuance of Tenancy* — (1) In General. While the inference of the existence of the relation of landlord and tenant from the holding over should be supported by the established relation of landlord and tenant previously existing,[17] a tenant holding over after the expiration of his lease continues tenant,[18] and without any other or new agreement with his landlord the law implies a continuance of the tenancy upon the same terms, and subject to the same covenants,[19] which are applicable to the new situation, as those

year to year. Phœnixville *v.* Walters, 184 Pa. St. 615, 39 Atl. 490.

16. Steen *v.* Scheel, 46 Nebr. 252, 64 N. W. 957; Webber *v.* Shearman, 3 Hill (N. Y.) 547. See also Waring *v.* King, 11 L. J. Exch. 49, 8 M. & W. 571.

Tenancy implied from relation of parties see *supra*, I, E.

Creation of particular tenancy: From year to year see *infra*, V, A, 2, f. From month to month see *infra*, V, B, 2, c. At will see *infra*, VI, A, 2, g.

The common-law idea that rent is only due when there is a demise has long since been changed both in England and the United States by statute, under which if a tenant holds over without a new agreement as to rent, the law implies that he holds at the original rent. Harkins *v.* Pope, 10 Ala. 493.

A municipal corporation may make itself liable under a holding over, to the extent as an individual. Davies *v.* New York, 93 N. Y. 250; Davies *v.* New York, 83 N. Y. 207; Witt *v.* New York, 6 Rob. (N. Y.) 441. *Contra*, San Antonio *v.* French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763.

17. Balfour *v.* Balfour, 33 La. Ann. 297.

Definition.— Holding over is defined to be the act of keeping possession of the premises. Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449, 37 N. Y. Suppl. 374 [*citing* Bouvier L. Dict.].

18. Schuylkill, etc., Imp., etc., Co. *v.* McCreary, 58 Pa. St. 304.

19. *Alabama.*— Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318; Robinson *v.* Holt, 90 Ala. 115, 7 So. 441; Abraham *v.* Nicrosi, 87 Ala. 173, 6 So. 293; Wolffe *v.* Wolff, 69 Ala. 549, 44 Am. Rep. 526; Parker *v.* Hollis, 50 Ala. 411; Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499; Ames *v.* Schuesler, 14 Ala. 600.

California.— Blumenberg *v.* Myers, 32 Cal. 93, 91 Am. Dec. 560.

Colorado.— Hurd *v.* Whitsett, 4 Colo. 77.

Connecticut.— Bacon *v.* Brown, 9 Conn. 334.

Delaware.— Jackson *v.* Patterson, 4 Harr. 534.

Illinois.— Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; McKinney *v.* Peck, 28 Ill. 174; Prickett *v.* Ritter, 16 Ill. 96; Quinlan *v.* Bonte, 25 Ill. App. 240; Miller *v.* Ridgley, 19 Ill. App. 306; Wolz *v.* Sanford, 10 Ill. App. 136.

Indiana.— Böllenbacker *v.* Fritts, 98 Ind. 50; Rothschild *v.* Williamson, 83 Ind. 387.

Louisiana.— Foucher *v.* Leeds, 2 La. 403; Mossy *v.* Mead, 2 La. 157

Maryland.— De Young *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156.

Massachusetts.— Faxon *v.* Jones, 176 Mass. 138, 57 N. E. 360; Weston *v.* Weston, 102 Mass. 514; Dimock *v.* Van Bergen, 12 Allen 551; Brewer *v.* Knapp, 1 Pick. 332. See also Ellis *v.* Paige, 1 Pick. 43.

Michigan.— Mason *v.* Wierengo, 113 Mich. 151, 71 N. W. 489, 67 Am. Dec. 461; Scott *v.* Beecher, 91 Mich. 590, 52 N. W. 20.

Missouri.— Insurance, etc., Co. *v.* Missouri Nat. Bank, 71 Mo. 58; Finney *v.* St. Louis, 39 Mo. 177; Quinette *v.* Carpenter, 35 Mo. 502; Wilgus *v.* Lewis, 8 Mo. App. 336.

Nebraska.— Bradley *v.* Slater, 50 Nebr. 682, 70 N. W. 258.

New York.— Ackley *v.* Westervelt, 86 N. Y. 448; Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609; Elwood *v.* Forkel, 35 Hun 202; Mack *v.* Burt, 5 Hun 28; Witt *v.* New York, 6 Rob. 441; Hunt *v.* Wolfe, 2 Daly 298; Johnson *v.* Doll, 11 Misc. 345, 32 N. Y. Suppl. 132; Flomerfelt *v.* Dillon, 88 N. Y. Suppl. 132; Pierson *v.* Hughes, 87 N. Y. Suppl. 223; Zink *v.* Bohn, 3 N. Y. Suppl. 4; Thorp *v.* Philbin, 13 N. Y. St. 723; Park *v.* Castle, 19 How. Pr. 29; Conway *v.* Starkweather, 1 Den. 113; Webber *v.* Shearman, 3 Hill 547; Abeel *v.* Radcliff, 13 Johns. 297, 7 Am. Dec. 377.

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344.

Oregon.— Parker *v.* Page, 41 Oreg. 579, 69 Pac. 822.

Pennsylvania.— Schuylkill, etc., Imp., etc., Co. *v.* McCreary, 58 Pa. St. 304; Laguerenne *v.* Dougherty, 35 Pa. St. 45; Hemphill *v.* Flynn, 2 Pa. St. 144; Phillips *v.* Monges, 4 Whart. 226; Diller *v.* Roberts, 13 Serg. & R. 60, 15 Am. Dec. 578; Kaier *v.* Leahy, 15 Pa. Co. Ct. 243; Creighton *v.* McKee, 2 Brewst. 383.

South Carolina.— Fronty *v.* Wood, 2 Hill 367; Dorrill *v.* Stephens, 4 McCord 59.

Tennessee.—Noel *v.* McCrory, 7 Coldw. 623.

Texas.— San Antonio *v.* French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763; Abeel *v.* McDonnell, (Civ. App. 1905) 87 S. W. 1066; Woodward *v.* Ft. Worth, etc., R. Co., 35 Tex. Civ. App. 14, 79 S. W. 896; Minor *v.* Kilgore, (Civ. App. 1896) 38 S. W. 539.

by which the parties to the lease have bound themselves in the original instrument.[20]

(2) Lessor's Option to Recognize — (a) General Rule. When a tenant under a lease for a definite term holds over his term without a new agreement, the landlord may treat him as a trespasser and turn him out, or as tenant.[21] But a tenant has no such election. If he holds over, although for a short time without any equivocal act at the time to give his holding the character of a trespass, he is not at liberty to deny that he is a tenant if the landlord chooses to hold him to that relation;[22] the tenant's intention at the time he holds over is entirely

West Virginia.— Voss *v.* King, 38 W. Va. 607, 18 S. E. 762.

Wisconsin.— Peehl *v.* Bumbalek, 99 Wis. 62, 74 N. W. 545; Brown *v.* Kayser, 60 Wis. 1, 18 N. W. 523.

United States.— Hoof *v.* Ladd, 12 Fed. Cas. No. 6,669, 1 Cranch C. C. 167; Kugler *v.* U. S., 4 Ct. Cl. 407.

England.— Legg *v.* Strudwick, 2 Salk. 414; Doe *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 284.

The fact that the lease is under seal does not change the rule stated in the text. Miller *v.* Ridgely, 19 Ill. App. 306; Webber *v.* Shearman, 3 Hill (N. Y.) 547.

20. *Illinois.* — Roley *v.* Crabtree, 72 Ill. App. 581.

Maryland.— De Young *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156.

New York.— Baylies *v.* Ingram, 84 N. Y. App. Div. 360, 82 N. Y. Suppl. 891 [*affirmed* in 181 N. Y. 518, 73 N. E. 1119].

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344.

England.— Doe *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

For rent upon holding over, see *infra*, VIII, A, 1, d, 6, c.

The rule extending the provisions of the old lease does not apply where such lease requires the performance of conditions which can be performed only during the first term. Diller *v.* Roberts, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578. So where the rent reserved in the original lease consisted for the most part of the performance by the tenant of labor on the premises of such a nature that, being once performed becomes incapable of further performance, the rule extending the provisions of the original lease does not apply. Martin *v.* Hamersky, 63 Kan. 360, 65 Pac. 637.

Changed conditions.— The terms of the lease are not continued, as a matter of law, where the tenant remains against the landlord's will and seeks to bind him by provisions which have become inapplicable to the changed condition of the premises. Ives *v.* Williams, 50 Mich. 100, 15 N. W. 33.

A void lease, as to the term, being good for a year, will regulate the terms of the tenancy, in other respects, upon a holding over. Adams *v.* Cohoes, 127 N. Y. 175, 28 N. E. 25; Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567; Shepherd *v.* Cummings, 1 Coldw. (Tenn.) 354.

21. *Georgia.*— Cavanaugh *v.* Clinch, 88 Ga. 610, 15 S. E. 673.

Illinois.— Condon *v.* Brockway, 157 Ill. 90, 41 N. E. 634; Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]; Peck *v.* Christman, 94 Ill. App. 435.

Indiana.— Tolle *v.* Orth, 75 Ind. 298, 39 Am. Rep. 147; Alleman *v.* Vink, 28 Ind. App. 142, 62 N. E. 461.

Michigan.— Benfey *v.* Congdon, 40 Mich. 283.

Nebraska.— Rosenberg *v.* Sprecher, (1905) 103 N. W. 1045; Bradley *v.* Slater, 50 Nebr. 682, 70 N. W. 258.

New York.— Haynes *v.* Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Adams *v.* Cohoes, 127 N. Y. 175, 28 N. E. 25; Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609; Pilot Com'rs *v.* Clark, 33 N. Y. 251; Vosburgh *v.* Corn, 23 N. Y. App. Div. 147, 48 N. Y. Suppl. 598; Goldberg *v.* Mittler, 23 Misc. 116, 50 N. Y. Suppl. 733; Regan *v.* Fosdick, 19 Misc. 489, 43 N. Y. Suppl. 1102; Thorp *v.* Philbin, 13 N. Y. St. 723; Conway *v.* Starkweather, 1 Den. 113; Sherwood *v.* Phillips, 13 Wend. 479; Rowan *v.* Lytle, 11 Wend. 616.

Ohio.— Gladwell *v.* Holcomb, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724; Wheeler *v.* Crouse, 1 Ohio Cir. Ct. 234, 1 Ohio Cir. Dec. 127; Rosenbaum *v.* Pendleton, 9 Ohio S. & C. Pl. Dec. 642, 7 Ohio N. P. 364.

Oregon.— Parker *v.* Page, 41 Oreg. 579, 69 Pac. 822.

Pennsylvania.— Kaier *v.* Leahy, 15 Pa. Co. Ct. 243.

Rhode Island.— Providence County Sav. Bank *v.* Hall, 16 R. I. 154, 13 Atl. 122.

South Dakota.— Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

Tennessee.— Noel *v.* McCrory, 7 Coldw. 623.

West Virginia.— Voss *v.* King, 38 W. Va. 607, 18 S. E. 762.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 289.

Bringing suit for rent is a sufficient election by the landlord to treat the holding as a tenancy. Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151.

22. Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; Chicago Theological Seminary *v.* Chicago Veneer Co., 94 Ill. App. 492; Conway *v.* Starkweather, 1 Den. (N. Y.) 113;

immaterial in determining the effect of his act and cannot operate to change the rule.[23]

(b) Exercise of Option. On the other hand where a tenant holds over his term the landlord must treat him as a trespasser or as a tenant; he cannot do both,[24] and he must elect to treat him as a trespasser unless he would not refuse to accord to him the rights of a tenant.[25] If the landlord, on the other hand, assumes to act inconsistently with the theory of the continuance of the original tenancy, he will waive his option and cannot then treat the tenant as holding over for another term.[26] But once having recognized a tenancy the landlord cannot thereafter

Parker *v.* Page, 41 Oreg. 579, 69 Pac. 822. But see Scott *v.* Wasson, 2 Ohio Dec. (Reprint) 460, 3 West. L. J. 148.

23. *Alabama.*— Robinson *v.* Holt, 90 Ala. 115, 7 So. 441; Ames *v.* Schuesler, 14 Ala. 600.

Illinois.— Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; Chicago Theological Seminary *v.* Chicago Veneer Co., 94 Ill. App. 492; Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711]; Quinlan *v.* Bonte, 25 Ill. App. 240; Wolz *v.* Sanford, 10 Ill. App. 136.

Indiana.— Alleman *v.* Vink, 28 Ind. App. 142, 62 N. E. 461.

Michigan.— Mason *v.* Wierengo, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461.

New York.— Witt *v.* New York, 6 Rob. 441.

Contra, Jones *v.* Shears, 4 A. & E. 832, 2 Harr. & W. 43, 5 L. J. K. B. O. S. 153, 6 N. & M. 428, 31 E. C. L. 365.

As to whether the holding is wrongful in the particular instance, however, the intention of the lessee has been considered material. See Scott *v.* Beecher, 91 Mich. 590, 52 N. W. 20 (where it appears to be considered that where there is a clear intention to vacate, the holding over for a day will not support the presumption of a continuance of the tenancy). Ketcham *v.* Ochs, 34 Misc. (N. Y.) 470, 70 N. Y. Suppl. 268 [*affirmed* in 74 N. Y. App. Div. 626, 77 N. Y. Suppl. 1130]. And in this connection see *infra,* IV, C, 3, f, (II), (C).

Notice by the tenant to the landlord that he does not intend to hold for another term will not protect him, in the absence of any assent by or new agreement with the landlord, if the tenant remains in possession. Wolffe *v.* Wolff, 69 Ala. 549, 44 Am. Rep. 526; Cavanaugh *v.* Clinch, 88 Ga. 610, 15 S. E. 673; Smith *v.* Bell, 44 Minn. 524, 47 N. W. 263; Bradley *v.* Slater, 50 Nebr. 682, 70 N. W. 258; Haynes *v.* Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Davies *v.* New York, 83 N. Y. 207; Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609; Valentine *v.* Healey, 1 N. Y. App. Div. 502, 37 N. Y. Suppl. 287; Lubetkin *v.* Henry Elias Brewing Co., 4 N. Y. Suppl. 195, 21 Abb. N. Cas. 304; Conway *v.* Starkweather, 1 Den. (N. Y.) 113; Strong *v.* Schmidt, 13 Ohio Cir. Ct. 302, 7 Ohio Cir. Dec. 233; Smith *v.* Snyder, 168 Pa. St. 541, 32 Atl. 64 (holding that the failure of the lessor's agent to convey his principal's answer to the lessee's proposition to hold over from month to month will not release the lessee from the effect of his holding over); Hunter *v.* Karcher, 8 S. D. 554, 67 N. W. 621; Abeel *v.* McDonnell, (Tex. Civ. App. 1905) 87 S. W. 1066. But see Canal Elevator, etc., Co. *v.* Brown, 36 Ohio St. 660.

Where year to year tenancies are not recognized, mutual consent is necessary to create the relation of landlord and tenant. Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151 [*quoting* Taylor Landl. & Ten. 7th ed. § 22]. See also *infra,* V, VI.

24. Chicago Theological Seminary *v.* Chicago Veneer Co., 94 Ill. App. 492 (holding that where a tenant holds over under a lease providing for a penalty as liquidated damages, and pays rent which is accepted by the landlord, the latter cannot insist upon the penalty); Rosenberg *v.* Sprecher, (Nebr. 1905) 103 N. W. 1045 (holding that the landlord cannot treat the tenant as a trespasser and at the same time require of him thirty days' notice of his intention to vacate); Goldberg *v.* Mittler, 23 Misc. (N. Y.) 116, 50 N. Y. Suppl. 733.

The landlord's resuming possession under an agreement between the parties that their rights shall be preserved, having already refused to recognize the holding over except under the tenancy for another term, does not affect his right to hold the tenant for another term. Wolffe *v.* Wolff, 69 Ala. 549, 44 Am. Rep. 526; Haynes *v.* Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636. But see Worthington *v.* Globe Rolling Mill, 6 Ohio Dec. (Reprint) 1038, 6 Cinc. L. Bul. 235.

25. The length of time during which the landlord has allowed the tenant to remain in unmolested possession is a fact which might support an inference of the landlord's election to treat the holding as a tenancy. Hately *v.* Myers, 96 Ill. App. 217; Classen *v.* Carroll, 18 La. Ann. 267 (where the silence of the landlord is held to complete the mutual obligation for continuing the tenancy); Usher *v.* Moss, 50 Miss. 208; Witt *v.* New York, 6 Rob. (N. Y.) 441; Conway *v.* Starkweather, 1 Den. (N. Y.) 113; Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344; Providence County Sav. Bank *v.* Hall, 16 R. I. 154, 13 Atl. 122.

26. Peck *v.* Christman, 94 Ill. App. 435 (where the landlord having sued for the penalty provided for in the lease for a wrongful withholding of the premises after the term expired was held to have elected to treat the tenant as a trespasser and could not thereafter recover against him as a tenant holding

deny the relationship,[27] or otherwise alter the rights of the tenants by imposing new conditions.[28] When the tenant pays and the landlord accepts rent, it creates a tenancy for another term which cannot be terminated by either party within the period of the term without the consent of the other, and renews all the rights and obligations incident to the relationship of landlord and tenant under the original lease.[29]

(B) *Presumption of Tenancy Not Conclusive.* The presumption of a continuance of the tenancy upon the same terms, or of the character of the tenancy, from remaining in possession after the expiration of the term, is a rebuttable one,[30]

over for a new term); Coleman *v.* Fitzgerald Bros. Brewing Co., 29 Misc. (N. Y.) 349, 60 N. Y. Suppl. 460; Goldberg *v.* Mittler, 23 Misc. (N. Y.) 116, 50 N. Y. Suppl. 733; Drake *v.* Wilhelm, 109 N. C. 97, 13 S. E. 891.

27. Parker *v.* Page, 41 Oreg. 579, 69 Pac. 822.

28. Rosenberg *v.* Sprecher, (Nebr. 1905) 103 N. W. 1045; Amsden *v.* Atwood, 69 Vt. 527, 38 Atl. 263.

29. *Colorado.*— Zippar *v.* Reppy, 15 Colo. 260, 25 Pac. 164.

Georgia.— Roberson *v.* Simons, 109 Ga. 360, 34 S. E. 604.

Illinois.— Hately *v.* Myers, 96 Ill. App. 217.

Indiana.— Rothschild *v.* Williamson, 83 Ind. 387.

Michigan.— Scott *v.* Beecher, 91 Mich. 590, 52 N. W. 20.

New York.— Laughran *v.* Smith, 75 N. Y. 205; Cole *v.* Sanford, 77 Hun 198, 28 N. Y. Suppl. 353; Adams *v.* Cohoes, 53 Hun 260, 6 N. Y. Suppl. 617 [*affirmed* in 127 N. Y. 175, 28 N. E. 25]; Conway *v.* Starkweather, 1 Den. 113. See also Garrick *v.* Menut, 17 N. Y. Suppl. 455.

North Carolina.— Stedman *v.* McIntosh, 27 N. C. 571.

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344.

South Dakota.— Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

Vermont.—Amsden *v.* Atwood, 67 Vt. 289, 31 Atl. 448.

Wisconsin.— Brown *v.* Kayser, 60 Wis. 1, 18 N. W. 523.

Under statutes against holding-over doctrine.— In Kentucky, under a statute providing that in tenancies for a year or more if the tenant holds over eviction proceedings may be brought within ninety days and if delayed beyond that time the tenant shall hold for another year, the mere holding over will not create a tenancy for another year unless the holding over continues longer than ninety days without proceedings to remove, or unless there is a contract for another year express or implied, as by a receipt of rent. Unger *v.* Bamberger, 85 Ky. 11, 2 S. W. 498, 8 Ky. L. Rep. 746; Mendel *v.* Hall, 13 Bush (Ky.) 232. See also Irvine *v.* Scott, 85 Ky. 260, 3 S. W. 163, 8 Ky. L. Rep. 911, holding under this statute that the landlord was estopped by acceptance of rent and permitting the tenant to store provender sufficient to last another year. So under the statute in Minnesota providing that the holding over of possession of urban real estate will not create, by implication or otherwise, a contract for the leasing of the premises for any greater period than the shortest interval between the times of payment of rents under the terms of the expired lease, where a tenant remained in possession for six months and paid an increased rent fixed by a landlord's notice prior to the expiration of the lease, it was held that such notice and payment of rent created an express contract for another term. Stees *v.* Bergmeier, 91 Minn. 513, 98 N. W. 648.

Statute requiring full payment.— In Oklahoma under a statutory provision providing that a tenant shall be deemed to hold over his term when he has failed or refused to pay the rent or any part of it, it was held that a payment of a sum less than the monthly rent, after the expiration of the lease, will not operate as a renewal. Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337.

30. Quinlan *v.* Bonte, 25 Ill. App. 240; Wolz *v.* Sanford, 10 Ill. App. 136; Rosenberg *v.* Sprecher, (Nebr. 1905) 103 N. W. 1045; Wheeler *v.* Crouse, 1 Ohio Cir. Ct. 234, 1 Ohio Cir. Dec. 127. See also Eastman *v.* Richard, 17 Can. T. L. Occ. Notes 315.

Notice of increase of rent.— If the lessor gives notice that a continuance of tenancy must be upon certain terms the tenant holding over will be bound thereby. Despard *v.* Walbridge, 15 N. Y. 374. As to notice of increase in rent see *infra*, VIII, A, 6, c. But a notice to quit is evidence to rebut the inference arising from the tenant's holding over that the landlord acquiesces in the continuance at the rent reserved in the lease. Bachelder *v.* Dean, 20 N. H. 467. And if the terms proposed by the landlord are not accepted by the tenant his mere holding over will give him no right to retain possession. Canning *v.* Fibush, 77 Cal. 196, 19 Pac. 376; Lautman *v.* Miller, 158 Ind. 382, 63 N. E. 761.

Payment and receipt of rent.— The payment and receipt of rent is not conclusive of the continuance of the tenancy under the original lease, or of the character of the new tenancy as against the intention of both parties. Johnson *v.* Foreman, 40 Ill. App. 456; Tolle *v.* Orth, 75 Ind. 298, 39 Am. Rep. 147; Atlantic Nat. Bank *v.* Demmon, 139 Mass. 420, 1 N. E. 833; Pusey *v.* Presbyterian Hospital, (Nebr. 1903) 97 N. W. 475; Montgomery *v.* Willis, 45 Nebr. 434, 63 N. W. 794; Wilcox *v.* Montour Iron, etc., Co., 147 Pa. St. 540, 23 Atl. 840; Fitzpatrick *v.* Childs, 6

although it will not be overcome merely by the intention of the tenant,[31] and it will not conclude either party as against proof of a different agreement between the landlord and the tenant or of facts which are inconsistent with the presumption.[32]

(c) *What Constitutes Holding Over* — (1) In General. Whether a tenant has or has not a right to reënter to remove his goods,[33] he has no right to remain in possession for that purpose.[34]

Phila. (Pa.) 135. See also Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

Holding by mistake.— Where a lessee held over for a month under the mistaken impression that his term continued that long, with the assurance of the assignees of the lease that it expired at a later date, it was held that the lessee was not liable for another year's rent. Davis *v.* Brown, (Miss. 1900) 29 So. 172. A similar ruling was made in Campau *v.* Mitchell, 103 Mich. 617, 61 N. W. 890, where the lessor's agent made representations to a subtenant that the premises had been released to the original lessee which induced the subtenant to remain when he was about to move out, and it was held that the lessee could not be held as upon the holding over. A tenant cannot establish a right to renew by making an application of a payment to the rent of the new term where the landlord demanded and received such rent as in arrears on the old term, although the payment thus demanded and received was by mistake. Sizer *v.* Russett, 11 Pa. Super. Ct. 108. But see Wood *v.* Gordon, 18 N. Y. Suppl. 109.

A new contract made during the original term, although void, differing in terms from the original lease, destroys the implication of the renewal of the original lease, from an unexplained holding over. Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

31. See *supra*, IV, C, 3, f, (II), (A), (2), (a).

32. *Indiana.* — Hoffman *v.* McCollum, 93 Ind. 326.

Minnesota.— Smith *v.* Bell, 44 Minn. 524, 47 N. W. 263.

Nebraska.— Bradley *v.* Slater, 50 Nebr. 682, 70 N. W. 258.

New York.— Luger *v.* Goerke, 18 N. Y. App. Div. 291, 45 N. Y. Suppl. 839; Moore *v.* McCarthy, 4 Hun 261.

Texas.— Shipman *v.* Mitchell, 64 Tex. 174; Abeel *v.* McDonnell, (Civ. App. 1905) 87 S. W. 1066.

United States.— U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a* [*affirmed* in 91 U. S. 367, 23 L. ed. 449].

Where the parties are negotiating for a new lease and the tenant remains with the express or tacit acquiescence of the landlord pending such negotiations the landlord cannot treat him as a tenant holding over for another term. Wilcox *v.* Raddin, 7 Ill. App. 594; Pusey *v.* Presbyterian Hospital, (Nebr. 1903) 97 N. W. 475; Burckle *v.* Adams Bros. Co., 59 N. Y. App. Div. 109, 69 N. Y. Suppl. 40; Smith *v.* Allt, 7 Daly (N. Y.) 492. The lessee is not a trespasser during such possession. Schilling *v.* Klein, 41 Ill. App. 209; Doe *v.* Stennett, 2 Esp. 717, 5 Rev. Rep. 769. But see Mastin *v.* Metzinger, 99 Mo. App. 613, 74 S. W. 431.

33. Witt *v.* New York, 6 Rob. (N. Y.) 441, where the court refers to the proposition based upon a statement in Taylor Landl. & Ten. to the effect that after a tenant has quit possession he may reënter and remove his goods, and the authorities cited in support of it, to wit: 2 Blackstone Comm. 147, and Ellis *v.* Paige, 1 Pick. (Mass.) 43, and points out that these authorities do not support the statement inasmuch as the question therein was confined to the right of tenants whose terms depended upon an uncertainty, among them tenants at will.

Right to remove property see *infra*, VII, D, 6.

34. Witt *v.* New York, 6 Rob. (N. Y.) 441.

The mere length of time that a tenant holds over the term is not the test of liability. Sullivan *v.* Ringler, 59 N. Y. App. Div. 184, 69 N. Y. Suppl. 38 [*affirmed* in 171 N. Y. 693, 64 N. E. 1126]. And although the possession beyond the term is for a short time, it will nevertheless constitute a holding over. Oussani *v.* Thompson, 19 Misc. (N. Y.) 524, 43 N. Y. Suppl. 1061; Frost *v.* Akron Iron Co., 12 Misc. (N. Y.) 348, 33 N. Y. Suppl. 654; McCabe *v.* Evers, 9 N. Y. Suppl. 541. And see *supra*, IV, C, 3, f, (II), (A), (2), (a), for the cases cited to the proposition that it is the lessor's option to treat the holding-over tenant as tenant or trespasser.

Partial removal of property.— The litter or worthless fragments of articles which tenants may leave on the premises will not constitute a continuance of the tenancy. Gibbons *v.* Dayton, 4 Hun (N. Y.) 451. See also Thomas *v.* Frost, 29 Mich. 336. On the other hand where there is not a complete removal of property on the last day of the term, whether the leaving of articles on the premises was intended as a wrongful continuance in possession, has been held in some circumstances to be a question of fact (Excelsior Steam Power Co. *v.* Halsted, 5 N. Y. App. Div. 124, 39 N. Y. Suppl. 43; Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449, 37 N. Y. Suppl. 374; Hammond *v.* Eckhardt, 16 Daly (N. Y.) 113, 9 N. Y. Suppl. 508; McCabe *v.* Evers, 9 N. Y. Suppl. 541); or as otherwise stated it cannot be held that where the tenant does not entirely remove all his property on the last day but runs over into the next day, or where there is a clear intention to vacate, that the failure to remove all of his property on the last day is as a matter of law a holding over (Scott *v.* Beecher, 91

(2) After Reëntry. If the lessor accepts a surrender of the premises, even after the holding over begins, the lease is terminated,[35] and a subsequent occupation upon a reëntry without the landlord's consent is not as tenant.[36]

(3) Occupancy by Others Than Lessee. If the tenant permits a third person to occupy the premises, it is in law considered to be the tenant's occupancy and is followed by the same consequences,[37] and this rule applies to the occupancy of subtenants.[38] The holding over by an assignee of the lessee will bind such assignee as a tenant under the terms of the original lease.[39]

(4) Tenants Under Lease to More Than One. Where the lease is to two, only one of whom occupies, it is held that his holding after the expiration of the lease may be presumed to be by both unless the other gives notice that he ceases to hold.[40]

Mich. 590, 52 N. W. 20; Ketcham *v.* Ochs, 34 Misc. (N. Y.) 470, 70 N. Y. Suppl. 268 [*affirmed* in 74 N. Y. App. Div. 626, 77 N. Y. Suppl. 1130]; Manly *v.* Clemmens, 14 N. Y. Suppl. 366; Canal Elevator, etc., Co. *v.* Brown, 36 Ohio St. 660. See also Lindsay *v.* Robertson, 30 Ont. 229).

Mere difficulty in procuring the facilities for moving will not prevent the continuance from operating as a holding over. Haynes *v.* Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636.

Sickness of the lessee will not excuse him from vacating. Mason *v.* Wierengo, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461.

Involuntary continuance in possession, as where one of the lessee's family was confined to one of the rooms with a severe sickness, will not constitute a holding over (Herter *v.* Mullen, 159 N. Y. 28, 53 N. E. 700, 70 Am. St. Rep. 517, 44 L. R. A. 703); and where the tenant is restrained from moving by an order of the board of health officers, his possession will not be a holding over (Regan *v.* Fosdick, 19 Misc. (N. Y.) 489, 43 N. Y. Suppl. 1102).

The mere detention of the key or failure to deliver it at the expiration of the lease will not of itself necessarily constitute a holding over. Steen *v.* Scheel, 46 Nebr. 252, 64 N. W. 957; Brennan *v.* New York, 80 N. Y. App. Div. 251, 80 N. Y. Suppl. 247; Schloss *v.* Huber, 21 Misc. (N. Y.) 28, 46 N. Y. Suppl. 921; McCabe *v.* Evers, 9 N. Y. Suppl. 541; Gray *v.* Bompas, 11 C. B. N. S. 520, 5 L. T. Rep. N. S. 841, 103 E. C. L. 520.

35. Hayes *v.* Goldman, 71 Ark. 251, 72 S. W. 563; Terstegge *v.* First German Mut. Benev. Soc., 92 Ind. 82, 47 Am. Rep. 135.

Termination of tenancy by surrender see *infra*, IX, B, 8.

36. Walls *v.* Preston, 28 Cal. 224; Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449, 37 N. Y. Suppl. 374, holding that the resuming of possession under an agreement with the agent of the landlord, although the agent was without authority to grant such permission, would not impose on him the liability of a tenant holding over after expiration of his term. But see Thomas *v.* Frost, 29 Mich. 336.

After refusal to vacate.— But where a tenant under the terms of a written lease for a year at first refused to deliver the premises on a demand therefor by the lessor at the end of the term, but subsequently on the same day, without notice to the lessor, left the premises and returned on the following day, continuing in possession thereof for nearly two years, without any further contract or demand for payment of rent, it was held that there was a holding over. Montanye *v.* Wallahan, 84 Ill. 355.

37. Bacon *v.* Brown, 9 Conn. 334; Dimock *v.* Van Bergen, 12 Allen (Mass.) 551; Brewer *v.* Knapp, 1 Pick. (Mass.) 332; Vosburgh *v.* Corn, 23 N. Y. App. Div. 147, 48 N. Y. Suppl. 598.

38. Roberson *v.* Simons, 109 Ga. 360, 34 S. E. 604; Berkowsky *v.* Cahill, 72 Ill. App. 101; Sullivan *v.* Ringler, 171 N. Y. 693, 64 N. E. 1126 [*affirming* 59 N. Y. App. Div. 184, 69 N. Y. Suppl. 38]; Manheim *v.* Seitz, 21 N. Y. App. Div. 16, 47 N. Y. Suppl. 282; Hall Steam Power Co. *v.* Campbell Printing Press, etc., Co., 5 Misc. (N. Y.) 264, 25 N. Y. Suppl. 106 [*affirmed* in 8 Misc. 430, 28 N. Y. Suppl. 662]; Lubetkin *v.* Henry Elias Brewing Co., 4 N. Y. Suppl. 195. But see Moore *v.* McCarthy, 4 Hun (N. Y.) 261, 6 Thomps. & C. 451; Ketcham *v.* Ochs, 34 Misc. (N. Y.) 470, 70 N. Y. Suppl. 268 [*affirmed* in 74 N. Y. App. Div. 626, 77 N. Y. Suppl. 1130] (where it was held that where a subtenant abandoned mortgaged chattels on the premises and surrendered the possession to the chattel mortgagee and the mortgagee failed to surrender the premises to the landlord and to remove the property for some days, the original tenant was not made liable for another term, upon the theory that there was an involuntary holding over); Lindsay *v.* Robertson, 30 Ont. 229, which cases do not appear to be entirely in accord with the cases cited in support of the text.

39. Webster *v.* Nichols, 104 Ill. 160; Tolle *v.* Orth, 75 Ind. 298, 39 Am. Rep. 147; Kugler *v.* U. S., 4 Ct. Cl. 407.

40. Fronty *v.* Wood, 2 Hill (S. C.) 367.

One member of a partnership, holding over, does not thereby become a tenant for another year under the terms of the lease. Mason *v.* Tietig, 23 Misc. (N. Y.) 443, 52 N. Y. Suppl. 249, where, however, it is held that the party holding over will continue for another year, the original contract coming within the provisions of 2 N. Y. Rev. St. (9th ed.) p. 1818, § 1,

(D) *The New Term.* Except as otherwise modified by statute,[41] and in those jurisdictions where implied tenancies from year to year are not recognized,[42] if a tenant under a lease for a year or longer, without any other agreement with his landlord in that regard, holds over his term, then, upon the theory that he becomes a tenant from year to year[43] he may be held for another year, and if he pays and the landlord accepts rent, neither can terminate the tenancy for that year before its expiration.[44] If the original term is for a period less than a year, how-

that agreements for the occupation of land in New York city which do not specify the duration shall be deemed valid until the first of May next after possession commenced, a holding after the first of May being for another year. See also Buchanan *v.* Whitman, 151 N. Y. 253, 45 N. E. 556; James *v.* Pope, 19 N. Y. 324, which cases hold that a lease to partners providing for a renewal is not renewed by the holding over of one of the parties after the dissolution of the firm.

As between tenants in common, there can be no holding over of the term under the lease from one to the other, but the holding will be held to be under the tenant's title and not under the lease unless he has excluded his cotenant. Fort *v.* McGrath, 4 Ill. App. 233. But in Valentine *v.* Healey, 86 Hun (N. Y.) 259, 33 N. Y. Suppl. 246 [*affirmed* in 1 N. Y. App. Div. 502, 37 N. Y. Suppl. 287], it is held that where tenants in common lease to a firm of which one of them is a member, the lease providing that the rent shall be payable to each of the lessors in proportion to his interest in the property, and the lessees hold over, the possession of the cotenant who is a member of the firm is under the lease and therefore the holding over continues the tenancy for another year. See, generally, TENANCY IN COMMON.

41. See the statutes of the several states.

In Kentucky, under Gen. St. p. 66, art. 4, § 1, when the term for a year or more expires on a certain day, the landlord has ninety days to bring eviction proceedings, and if he delays beyond that time the tenant holds over for another year, and if the holding is for less than ninety days, the tenant is not in for another year unless there is a contract for another term express or implied. See Irvine *v.* Scott, 85 Ky. 260, 3 S. W. 163, 8 Ky. L. Rep. 911; Unger *v.* Bamberger, 85 Ky. 11, 2 S. W. 498, 8 Ky. L. Rep. 746; Mendel *v.* Hall, 13 Bush (Ky.) 232.

In Louisiana a tenant in a lease for a year holding over his term was held, under the statute, to have created a tacit reconduction of the lease by the month. Armstrong *v.* Bach, 20 La. Ann. 190.

In Minnesota, under Minn. Laws (1901), p. 31, c. 31, holding over of possession of urban real estate without an express contract will not constitute a leasing for other or greater period than the shortest interval between the times of payment of rents. See Quade *v.* Fitzloff, 93 Minn. 115, 100 N. W. 660; Stees *v.* Bergmeier, 91 Minn. 513, 98 N. W. 648.

42. For tenancies from year to year see *infra,* V, A; tenancies at will see *infra,* VI, A.

43. See *infra,* V, A, 2, f.

After the termination of a year to year tenancy by notice, if the tenant holds over he will be held for another year. Cavanaugh *v.* Clinch, 88 Ga. 610, 15 S. E. 673.

44. *Alabama.*— Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318; Robinson *v.* Holt, 90 Ala. 115, 7 So. 441; Wolffe *v.* Wolff, 69 Ala. 549, 44 Am. Rep. 526; Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

Colorado.— Zippar *v.* Reppy, 15 Colo. 260, 25 Pac. 164.

Connecticut.—Bacon *v.* Brown, 9 Conn. 334.

Illinois.— Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; McKinney *v.* Peck, 28 Ill. 174; Prickett *v.* Ritter, 16 Ill. 96; Quinlan *v.* Bonte, 25 Ill. App. 240; Wolz *v.* Sanford, 10 Ill. App. 136.

Michigan.— Mason *v.* Wierengo, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461; Scott *v.* Beecher, 91 Mich. 590, 52 N. W. 20.

New York.— Davies *v.* New York, 83 N. Y. 207; Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609; Hester *v.* Mullen, 52 N. Y. App. Div. 325, 65 N. Y. Suppl. 279; Johnson *v.* Doll, 11 Misc. 345, 32 N. Y. Suppl. 132; Flomerfelt *v.* Dillon, 88 N. Y. Suppl. 132; Pierson *v.* Hughes, 87 N. Y. Suppl. 223; Park *v.* Castle, 19 How. Pr. 29.

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344; Strong *v.* Schmidt, 13 Ohio. Cir. Ct. 302, 7 Ohio Cir. Dec. 233.

Pennsylvania.— Harvey *v.* Gunzberg, 148 Pa. St. 294, 23 Atl. 1005; Hemphill *v.* Flynn, 2 Pa. St. 144.

South Dakota.— Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723, under a statute fixing the term in such cases.

Texas.— Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51; San Antonio *v.* French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763; Abeel *v.* McDonnell, (Civ. App. 1905) 87 S. W. 1066; Minor *v.* Kilgore, (Civ. App. 1896) 38 S. W. 539.

Vermont.— Amsden *v.* Atwood, 69 Vt. 527, 38 Atl. 263, 67 Vt. 289, 31 Atl. 448, 68 Vt. 322, 35 Atl. 311.

United States.— Kugler *v.* U. S., 4 Ct. Cl. 407.

England.— Legg *v.* Strudwick, 2 Salk. 414; Doe *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

Waiver of option to extend.— A waiver by a lessee of the privilege in the lease to extend the term for additional years does not relieve him of liability for holding over after the expiration of his term. Berkowsky *v.* Cahill, 72 Ill. App. 101; Hays *v.* Moody, 2 N. Y.

ever, then the holding over will operate to renew the tenancy for the original period and not for a year.[45]

(E) *Under Options to Extend or Renew* — (1) In General. Where a lease provides that the tenant may at his option have an extension for a specified time after the expiration of the term of the lease, or may occupy for an extended term, including that specified in the lease, the mere holding over after the expiration of the specified time will constitute an election to hold for the additional or extended term.[46] The same effect is given to a holding over on an option to

Suppl. 385; Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 42 S. W. 774. But see Lindsay *v.* Robertson, 30 Ont. 299.

Lease by tenants in common.— Where the lessors are tenants in common one of whom is a member of the firm which is the lessee, the lease providing that rent shall be payable to each of the lessors in proportion to his interest in the property, the legal effect of a hold over by the firm cannot be changed as against the rights of the lessor who is not a member of the firm, by the others giving the firm permission to remain in possession for a short time after the term upon payment of a *pro rata* rental for the period of such occupancy. Valentine *v.* Healey, 1 N. Y. App. Div. 502, 37 N. Y. Suppl. 287

Effect of agreement in lease to pay double rent on holding over.— A clause in a lease providing for redelivery of the premises, and obligating the lessees to pay the lessor "double rent for all such time as they shall hold over after expiration of the term," while it does not deprive the lessor of his option to retake the premises at the expiration of the lease, deprives him, if he fails so to do, or to make a new agreement with the lessees, of the power to do more than recover double rent for the time the lessees hold over, and does not prevent a surrender by the latter at any time. Green *v.* Kroeger, 67 Mo. App. 621.

45. *California.*— Blumenberg *v.* Myres, 32 Cal. 93, 91 Am. Dec. 560.

Colorado.— Hurd *v.* Whitsett, 4 Colo. 77.

Illinois.—Clapp *v.* Noble, 84 Ill. 62; Prickett *v.* Ritter, 16 Ill. 96.

Indiana.— Bollenbacker *v.* Fritts, 98 Ind. 50; Rothschild *v.* Williamson, 83 Ind. 387; Bright *v.* McQuat, 40 Ind. 521.

New York.— Ketcham *v.* Ochs, 34 Misc. 470, 70 N. Y. Suppl. 268 [*affirmed* in 74 N. Y. App. Div. 626, 77 N. Y. Suppl. 1130]; Wood *v.* Gordon, 18 N. Y. Suppl. 109.

Tennessee.— Noel *v.* McCrory, 7 Coldw. 623.

No longer term than the original can be created by the mere holding over of the original term where that is less than a year. Schneider *v.* Curran, 19 Ohio Cir. Ct. 224, 10 Ohio Cir. Dec. 239. But under N. Y. Rev. St. (9th ed.) p. 1818, § 1, that "agreements for the occupation of land or tenements, in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence," a tenant remaining in possession after the first of May is held to hold for another year. Mason *v.* Tietig, 23 Misc. (N. Y.) 443, 52 N. Y. Suppl. 249; Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 41 N. Y. Suppl. 289.

Contract permitting surrender.— Where the premises are rented for a month, under an oral contract under which rent is to be deducted if the premises are vacated sooner, a mere failure to deliver possession at the end of the term will not raise the presumption of a contract for another month. Neumeister *v.* Palmer, 8 Mo. App. 491.

46. *Arkansas.*— Hays *v.* Goldman, 71 Ark. 251, 72 S. W. 563.

Illinois.— Cusack *v.* Gunning System, 109 Ill. App. 588.

Indiana.— Terstegge *v.* First German Mut. Benev. Soc., 92 Ind. 82, 47 Am. Rep. 135; Montgomery *v.* Hamilton County, 76 Ind. 362, 40 Am. Rep. 250.

Iowa.—Andrews *v.* Marshall Creamery Co., 118 Iowa 595, 92 N. W. 706, 96 Am. St. Rep. 412, 60 L. R. A. 399.

Kentucky.— Brown *v.* Samuels, 70 S. W. 1047, 24 Ky. L. Rep. 1216.

Maine.— Holley *v.* Young, 66 Me. 520.

Massachusetts.— Kimball *v.* Cross, 136 Mass. 300.

Michigan.— Delashman *v.* Berry, 20 Mich. 292, 4 Am. Rep. 392.

New Hampshire.— Clarke *v.* Merrill, 51 N. H. 415.

New Jersey.— Mershon *v.* Williams, 62 N. J. L. 779, 42 Atl. 778.

New York.—Kelly *v.* Varnes, 52 N. Y. App. Div. 100, 64 N. Y. Suppl. 1040; Voege *v.* Ronalds, 83 Hun 114, 31 N. Y. Suppl. 353.

Pennsylvania.— Harding *v.* Seeley, 148 Pa. St. 20, 23 Atl. 1118; Lipper *v.* Bouve, 6 Pa. Super. Ct. 452. See also Naill *v.* Hanover Market Town Hall Co., 20 York Leg. Rec. 85.

Wisconsin.— Peehl *v.* Bumbalek, 99 Wis. 62, 74 N. W. 545.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 288.

Payment and acceptance of rent conformably with the due exercise of an option to extend will affect the continuance of the lease after the option. Curtis *v.* Sturgis, 64 Mo. App. 535; Schroeder *v.* Gemeinder, 10 Nev. 355; Gilbert *v.* Price, 18 Pa. Super. Ct. 359.

If a choice of several terms is given, as under an option to extend one, two, or three years, the mere holding over without notice can at most operate as an election to extend for one year. Falley *v.* Giles, 29 Ind. 114.

Notice.— See *supra*, IV, C, 2, e, (VI), (D).

renew for a specified additional term.[47] On the other hand such holding over will not be sufficient to continue the lease if the facts show that it was under and by virtue of other arrangements between the parties.[48]

(2) Intention. In some cases it appears that the effect of a continuance of the possession will depend upon intention and an affirmative election must be shown,[49] or circumstances other than the mere occupancy,[50] although it is also held that the holding over itself may be evidence of an intention to occupy under a privilege of extension, which may be overcome by evidence of a contrary intention.[51]

(3) Renewal and Extension Distinguished. Upon this question some of the authorities draw a distinction between a privilege of extension and a right to renew, in this, that the extension for an additional term is provided for in the lease itself and its enjoyment by continuing the possession brings the extended occupancy within the original contract, while an agreement for an option to renew implies the contemplation of some affirmative act in addition to the mere continuance of possession, by way of an additional term.[52]

47. *Minnesota.*—Quade *v.* Fitzloff, 93 Minn. 115, 100 N. W. 660 (holding that the statute in that state providing that the holding over the term of urban property shall not constitute a lease for a greater period than the shortest interval between the times of payments of rent under the expired lease did not apply to leases which provided for renewal); Caley *v.* Thornquist, 89 Minn. 348, 94 N. W. 1084.

Missouri.— Insurance, etc., Co. *v.* State Bank, 5 Mo. App. 333.

New Hampshire.—Ranlet *v.* Cook, 44 N. H. 512, 84 Am. Dec. 92, where the tenant continued and paid rent and the holding for the renewal term was treated as under a present demise.

New York.—Clendinning *v.* Lindner, 9 Misc. 682, 30 N. Y. Suppl. 543.

Pennsylvania.— Harvey *v.* Gunzberg, 148 Pa. St. 294, 23 Atl. 1005 (where it was held that the holding over under a lease giving the right of renewal for three years with a reservation of rent by the year was for another year); McBrier *v.* Marshall, 126 Pa. St. 390, 17 Atl. 647; Cairns *v.* Llewellyn, 2 Pa. Super. Ct. 599; Creighton *v.* McKee, 2 Brewst. 383. See also O'Neal *v.* Sneeringer, 12 York Leg. Rec. 141.

Texas.— Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235.

A holding by a member of a dissolved firm will not operate as a renewal under a provision for renewal of the lease. Buchanan *v.* Whitman, 151 N. Y. 253, 45 N. E. 556; James *v.* Pope, 19 N. Y. 324.

Waiver of forfeiture in non-payment of rent.— Where the landlord permits the tenant to remain in possession after the failure to pay rent, for which failure a forfeiture of the lease could have been declared, such possession after the expiration of the term will create a tenancy for another year. Kelly *v.* Varnes, 52 N. Y. App. Div. 100, 64 N. Y. Suppl. 1040.

Invalid option.— An option to hold for a further term of two years in a verbal lease for one year is invalid, but if the tenant holds over the first year with the lessor's consent the tenancy continues for a year and if he holds into the third year another yearly tenancy is implied. Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51.

The holding over is not from year to year, where the lease contains an option to renew, under the general doctrine of holding over, but the continued possession is referred to the renewal. Insurance, etc., Co. *v.* State Bank, 71 Mo. 58.

48. Storch *v.* Harvey, 45 Kan. 39, 25 Pac. 220; Crouch *v.* Trimby, etc., Shoe Co., 83 Hun (N. Y.) 276, 31 N. Y. Suppl. 932.

49. Stevenson *v.* Almes, 8 Ohio Dec. (Reprint) 566, 9 Cinc. L. Bul. 17. In Zorkowski *v.* Astor, 156 N. Y. 393, 50 N. E. 983, where the tenant in possession under a claim that the rent had not been fixed by a valid appraisal, under the terms of the lease in which the lessor covenanted to renew if he did not purchase improvements, but in which there was no covenant by the lessee to accept a lease, it was held that election depended upon intention and that the holding over in this case is not a renewal.

50. Canal Elevator, etc., Co. *v.* Brown, 36 Ohio St. 660.

51. Atlantic Nat. Bank *v.* Demmon, 139 Mass. 420, 1 N. E. 833.

Payment and acceptance of rent will sufficiently show an exercise of the election. Kimball *v.* Cross, 136 Mass. 300; Kramer *v.* Cook, 7 Gray (Mass.) 550; Powell *v.* Harrison, 6 Ohio Dec. (Reprint) 36, 10 Cinc. L. Bul. 215.

After election by the tenant that he will not continue the lease a holding over cannot be considered as an election to hold under the option. Barnett *v.* Feary, 101 Ind. 95 (where the ruling was in favor of the landlord against the right set up by the tenant); Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 42 S. W. 774. The same rule has been applied in favor of the tenant where the landlord attempted to hold him, under similar circumstances, to an election by holding over. Lindsay *v.* Robertson, 30 Ont. 229.

52. Renoud *v.* Daskam, 34 Conn. 512; Terstegge *v.* First German Mut. Benev. Soc., 92 Ind. 82, 47 Am. Rep. 135; Thiebaud *v.* Vevay

4. Effect of Renewal or Extension — a. As New Lease or Continuance of Old. In point of legal operation each renewed lease is a new lease,[53] and the taking of it operates as a surrender of the old one.[54] But a renewed lease may be considered as a continuance of the original lease to some intents: that is, for the protection of legal interests carved out of it, which once created the law will not permit to be destroyed,[55] and if a trustee, mortgagee, or other person interested obtain a renewal, the renewal lease will be considered as a mere continuance of the old one and subject to its trust and limitations.[56] So the grant of a right in demised premises by one having a terminable lease with a right of renewal will not cease to have effect on the termination of the lease if there is in fact a renewal, but the renewal will be deemed to be a mere continuance of the original term for the protection and preservation of rights acquired therein.[57]

b. Under Provisions Continuing Original Terms. Where a lease is renewed under a contract expressly providing that the tenant shall hold under the original lease, and subject to its conditions and privileges, it will be deemed to be a con-

First Nat. Bank, 42 Ind. 212; Spangler *v.* Rogers, 123 Iowa 724, 99 N. W. 580; Andrews *v.* Marshall Creamery Co., 118 Iowa 595, 92 N. W. 706, 96 Am. St. Rep. 412, 60 L. R. A. 399; Caggiano *v.* Gallorenzi, 26 Misc. (N. Y.) 819, 57 N. Y. Suppl. 2.

53. Phelps *v.* New York, 61 Hun (N. Y.) 521, 16 N. Y. Suppl. 321, holding that where the covenant for a new term contains a statement in detail as to what covenants the renewal shall contain, the renewal is a new grant, and all the covenants are to be read as though it was the first inception of the relation between parties.

Novation.— The mere granting of a new lease to the same lessee after a former lease expires does not impair the rights and obligations of the parties under the first lease and will not work a novation. Hill *v.* Bourcier, 29 La. Ann. 841.

Every new lease is not necessarily a "renewal." See Rickards *v.* Rickards, 7 Jur. 715, 12 L. J. Ch. 460, 2 Y. & Coll. 419, 21 Eng. Ch. 419, 63 Eng. Reprint 187.

54. Collett *v.* Hooper, 13 Ves. Jr. 255, 33 Eng. Reprint 290. See also Walsh *v.* Martin, 69 Mich. 29, 37 N. W. 40, in which there was no covenant to renew and the new lease granted a term extending from the date of the lease.

Surrender of term see *infra*, IX, B, 8, c, (III).

55. Kearney *v.* Metropolitan El. R. Co., 129 N. Y. 76, 29 N. E. 70; Witmark *v.* New York El. R. Co., 76 Hun (N. Y.) 302, 27 N. Y. Suppl. 777 (where it was said that it has long been the policy of England to permit the surrender of a lease for the purpose of obtaining renewals without terminating the estate created by the original leases, and the point of decision in this and the preceding case was that a lessee of lots under leases executed before the construction of a railroad in the streets on which the lots abutted, the leases requiring the erection of buildings and covenanting to renew, were entitled to recover damages by reason of the construction of the railroad before the expiration of the original lease, in actions brought after the taking of renewals); Ely *v.* Collins, 45 Misc. (N. Y.) 255, 92 N. Y. Suppl. 160; *In re* Allen, 27 Ont. App. 536; Collett *v.* Hooper, 13 Ves. Jr. 255, 33 Eng. Reprint 290.

56. Mitchell *v.* Reed, 61 N. Y. 123, 19 Am. Rep. 252; Struthers *v.* Pearce, 51 N. Y. 357; Wunderlich *v.* Reis, 31 Hun (N. Y.) 1; Spiess *v.* Rosswogg, 48 N. Y. Super. Ct. 135; Bennett *v.* Vansyckel, 4 Duer (N. Y.) 462; Phyfe *v.* Wardell, 5 Paige (N. Y.) 268, 28 Am. Dec. 430 [*affirming* 2 Edw. 47]; Holridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 30; Gibbes *v.* Jenkins, 3 Sandf. Ch. (N. Y.) 130; Burrell *v.* Bull, 3 Sandf. Ch. (N. Y.) 15; Rawe *v.* Chichester, 2 Ambl. 715, 27 Eng. Reprint 463; *Ex p.* Grace, 1 B. & P. 376; Holt *v.* Holt, 1 Ch. Cas. 190, 22 Eng. Reprint 756, 2 Vern Ch. 322, 23 Eng. Reprint 808; Clements *v.* Hall, 2 De G. & J. 173, 4 Jur. N. S. 494, 27 L. J. Ch. 349, 6 Wkly. Rep. 358, 59 Eng. Ch. 173, 44 Eng. Reprint 954; Clegg *v.* Fishwick, Hall & T. 390, 13 Jur. 993, 19 L. J. Ch. 49, 1 Macn. & G. 294, 47 Eng. Ch. 235, 41 Eng. Reprint 1278; Witter *v.* Witter, 3 P. Wms. 99, 24 Eng. Reprint 985; Keech *v.* Sandford, 2 Eq. Cas. Abr. 741, 22 Eng. Reprint 629, Sel. Cas. Ch. 61, 13 Eng. Ch. 164; Palmer *v.* Young, Vern. 276; Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 11 Rev. Rep. 77, 34 Eng. Reprint 115; Waters *v.* Bailey, 2 Y. & Coll. 219, 21 Eng. Ch. 219, 63 Eng. Reprint 96. *Compare* McDonald *v.* Fiss, 54 N. Y. App. Div. 489, 67 N. Y. Suppl. 34.

And where a lessee rented a sublease with a covenant that if he should obtain an extension or renewal he would grant an extension or renewal, and a renewal was thereafter taken in the name of a trustee for the wife of the original lessee, it was held that the question was whether the trustee was in reality the trustee for the lessee or for his wife; that in the former case the parties would be bound by the covenant to renew and in the latter case they would not. Lumley *v.* Timms, 28 L. T. Rep. N. S. 608, 21 Wkly. Rep. 494.

57. Newhoff *v.* Mayo, 48 N. J. Eq. 619, 23 Atl. 265, 27 Am. St. Rep. 455; Hausauer *v.* Dahlman, 18 N. Y. App. Div. 475, 45 N. Y. Suppl. 1088 [*affirmed* in 163 N. Y. 567, 57

tinuance of the original lease and the rights and privileges of the parties are to be determined by the terms thereof,[58] unless in some particular which is to be governed by different provisions as indicated by the intention of the parties in the original instrument itself.[59]

c. Upon Other Covenants or Accrued Causes of Action. The taking of a new lease will not defeat a cause of action already accrued under the old lease,[60] or destroy any right or privilege reserved to either party at the expiration of the original term,[61] and a renewal lease executed in pursuance of a covenant to renew will not satisfy any of the covenants of the old lease except the covenant to renew.[62]

5. Options to Purchase or Sell — a. Nature of Contract in General. An option to purchase, being an integral part of a lease, is a substantial part of the whole contract, and is not obnoxious to the objection that there is a want of mutuality, and the agreement to pay rent or do other acts will support the option as well as the right to occupy under the lease, and bind the lessor notwithstanding the lessee is not bound to purchase,[63] and the lessor cannot withdraw his offer

N. E. 1111, and *citing* Smith *v.* Chichester, 1 C. & L. 486, 2 Dr. & War. 393, 4 Ir. Eq. 580].

58. Towle *v.* Weise, 64 Kan. 760, 68 Pac. 637; Quidort *v.* Bullitt, 60 N. J. L. 119, 36 Atl. 881, holding that where a lease which gave the lessor the option of terminating it on a certain notice was extended upon the same "terms," the provision authorizing the lessor to terminate was one of the "terms" and became one of the provisions of the extended lease. See also *infra*, VI, A, 2, f, (III).

Scope.— An extension of a term, subject to the covenants in the original lease, will apply such covenants to subjects within their scope existing at the extension, although they were unknown when the term was created. Kearny *v.* Post, 1 Sandf. (N. Y.) 105.

Question for jury.— Where the tenant was given an option of retaining the premises for another term at such a price as any one else would give, and the tenant exercised the option and gave notes for the rent of the term, but the contract for the extended term was otherwise in parol, it was held to be a question for the jury whether there was an agreement to apply certain terms of the previous rent contract to the second year's occupation. Powers *v.* Cope, 93 Ga. 248, 18 S. E. 815.

59. Thus where a renewal lease provided that it should be subject to all the conditions of the original lease in which the rent is fixed at a certain amount payable at certain times, and that the lessee might renew for another term, the rent to be seven per cent on the appraised value of the premises, both to be paid in the manner aforesaid, subject to all the conditions aforesaid, the parties did not intend that a renewal lease should stipulate for the payment of rent at the amount fixed in the original lease without regard to an appraisement of the premises. Eldred *v.* Sherman, 81 Wis. 182, 51 N. W. 441.

60. McGregor *v.* Bd. of Education, 107 N. Y. 511, 14 N. E. 420; Buhler *v.* Gibbons, 3 N. Y. Suppl. 815.

61. Hooker *v.* Banner, 76 Cal. 116, 18 Pac. 136 (holding that where the lessee was permitted to make changes upon condition that he restore the premises and afterward procure another lease with stipulations requiring him to restore the premises, he was required to restore the premises to their original condition at the date of his lease); Livingston *v.* Sulzer, 19 Hun (N. Y.) 375 (holding that where the lessee was to be paid for his improvements at the end of the term his taking renewal leases will not affect his right to the value of his improvements at the end of the term).

62. Walker *v.* Seymour, 13 Mo. 592; Lord *v.* Vreeland, 15 Abb. Pr. (N. Y.) 122.

63. *Arizona.*— Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735.

California.— Hall *v.* Center, 40 Cal. 63; De Rutte *v.* Muldrow, 16 Cal. 505.

Indiana.— Souffrain *v.* McDonald, 27 Ind. 269.

Kansas.— Bras *v.* Sheffield, 49 Kan. 702, 31 Pac. 306, 33 Am. St. Rep. 386.

Kentucky.— Louisville Bank *v.* Baumeister, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845.

Maryland.— Maughlin *v.* Perry, 35 Md. 352; Stansbury *v.* Fringer, 11 Gill & J. 149.

Nevada.— Schroeder *v.* Gemeinder, 10 Nev. 355.

New Jersey.— McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25; Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613.

New York.— Matter of Hunter, 1 Edw. 1.

Oregon.— House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027.

Pennsylvania.— Newell's Appeal, 100 Pa. St. 513.

Utah.— Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689.

Wyoming.— Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571.

United States.— Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501.

Canada.— Yuill *v.* White, 5 Terr. L. Rep. 275.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 290 *et seq.*

before the time for its acceptance has expired.[64] The interest of the lessee by reason of such an option is not a right in land,[65] and he is a purchaser only upon the due exercise of the option.[66]

b. Sufficiency and Construction of Covenant. A provision of a lease giving an option to purchase will be construed so as to effectuate the intention of the parties, when construction is necessary.[67] The provision must be complete in order to be enforceable,[68] and if no price is fixed the lessor is not bound to accept the offer to purchase.[69] If the covenant giving the option to purchase does not describe the estate to be conveyed an estate in fee-simple will be implied,[70] and if

The demised premises and other lands may be included in such option and the agreement to pay rent is a sufficient consideration. Walker *v.* Edmundson, 111 Ga. 454, 36 S. E. 800; Heyward *v.* Willmarth, 87 N. Y. App. Div. 125, 84 N. Y. Suppl. 75.

Omission of option in renewal lease. — Where the original lease contains an option of extension from year to year as well as an option to purchase at the end of any year, the omission by agreement of the clause containing the option to buy, from the lease of the second year, the parties mutually understanding that the option is to continue, will not deprive the tenant of his option under the second lease. Abbott *v.* Seventy-six Land, etc., Co., 87 Cal. 323, 25 Pac. 693.

A change in the value of the property occurring subsequently will not change the liability of the parties, although a court of equity may impose terms as a condition of enforcing the option, where the change was without fault of the parties and the literal enforcement would work great hardship. King *v.* Raab, 123 Iowa 632, 99 N. W. 306.

64. Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689; Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571.

Invalid contract of sale. — Where plaintiff had orally leased certain lands to defendant for a fixed rental, with an option to purchase, an agreement to give him the rent and the wheat grown on a certain field if he would surrender the option to purchase was without consideration, the contract being only a lease, and not a valid contract of sale. Jarvis *v.* Sutton, 3 Ind. 289.

65. Sweezy *v.* Jones, 65 Iowa 272, 21 N. W. 603, holding that such interest could not be subjected to a judgment lien.

66. When the contract becomes complete. — See *infra*, IV, C, 5, c.

67. See cases cited *infra*, this note.

"At the option of the parties" means at the option of the lessee. Mack *v.* Dailey, 67 Vt. 90, 30 Atl. 686.

Instruments construed as granting an option. — A lease conferring the option to purchase which contains specific covenants and stipulations relative to the obligations of the parties in the relation of lessor and lessee, or in the relation of vendor and vendee, in the event of the purchase, will be construed as a lease and an option to purchase so as to preserve the rights of the parties under the contract in either case. Gilbert *v.* Port, 28 Ohio St. 276. Where the contract provided that one party agreed to give to the other an option to purchase, and in their correspondence the parties treated the contract as granting an option, it was held that the instrument should be construed as granting an option regardless of the literal interpretation of the terms of the instrument. Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689. An instrument reciting that one party has rented from the other a farm for a certain time "with the refusal of buying it," etc., and providing that if the second party did not take the place the buildings which he should be compelled to erect should be paid for by the other at a reasonable price if the parties "do not trade," was held to be the granting of an option of purchasing at the time and place fixed in the instrument. Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436.

68. Buckmaster *v.* Thompson, 36 N. Y. 558.

69. Smoyer *v.* Roth, 10 Pa. Cas. 32, 13 Atl. 191.

"At a price not to exceed" a fixed amount is not fatally ambiguous as to the purchase-price because the right to purchase for the full sum mentioned is absolute. Heyward *v.* Willmarth, 87 N. Y. App. Div. 125, 84 N. Y. Suppl. 75.

At a price others will pay. — A provision reserving the right of the lessor to sell but requiring him first to give the lessee the privilege of purchasing "upon such terms and at the same price per acre as any other person or purchaser might have offered" is sufficient and the contract is enforceable. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

Price fixed binding only as to lessee. — Under a privilege of purchasing at a fixed price if the lessee refuses to purchase at that price the lessor may sell to others at any price he sees fit. Schroeder *v.* Gemeinder, 10 Nev. 355.

70. McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25.

"Liberty to purchase." — A provision that the lessee shall have "liberty to purchase" is construed as giving a right to a clear title free from claim of dower and all other encumbrances. Matter of Hunter, 1 Edw. (N. Y.) 1. In Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613, it is held that a similar expression is sufficient to entitle the lessee to a conveyance of the estate at the time of the contract.

from the words employed the description of the land can be made certain by evidence *aliunde*, it will be sufficient.[71]

c. Exercise of Option — (I) *Necessity and Effect* — (A) *In General.* The mere option to purchase binds only the lessor and must be accepted before a completed and enforceable contract of sale is effected. The option and the acceptance constitute the complete contract.[72]

(B) *Effect as to Relation of Landlord and Tenant.* When the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises. The lessor is not entitled to rent thereafter,[73] and the lessee continues to occupy as owner subject to his compliance with the contract,[74] and will be entitled to such other rights as may be said to attach to his character as vendee, in so far as the rights of the parties are not peculiarly controlled by express stipulations in the lease.[75]

71. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Heyward *v.* Willmarth, 87 N. Y. App. Div. 125, 84 N. Y. Suppl. 75; House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027. See further Specific Performance.

72. *Georgia.*— Walker *v.* Edmundson, 111 Ga. 454, 36 S. E. 800.

Illinois.— Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

Iowa.— King *v.* Raab, 123 Iowa 632, 99 N. W. 306; Conn *v.* Tonner, 86 Iowa 577, 53 N. W. 320; Sweezy *v.* Jones, 65 Iowa 272, 21 N. W. 603.

Kansas.— Bras *v.* Sheffield, 49 Kan. 702, 31 Pac. 306, 33 Am. St. Rep. 386; Bell *v.* Wright, 31 Kan. 236, 1 Pac. 595.

Maryland.— Maughlin *v.* Perry, 35 Md. 352.

Nevada.— Schroeder *v.* Gemeinder, 10 Nev. 355.

New York.— Church *v.* Standard R. Signal Co., 60 N. Y. App. Div. 613, 69 N. Y. Suppl. 726.

Pennsylvania.— Knerr *v.* Bradley, 105 Pa. St. 190; Newell's Appeal, 100 Pa. St. 513; Thuemler *v.* Brown, 18 Pa. Super. Ct. 117.

Utah.— Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689.

United States.— Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501.

England.— *In re* Adams, etc., Vestry, 27 Ch. D. 394, 54 L. J. Ch. 87, 51 L. T. Rep. N. S. 382, 32 Wkly. Rep. 883; Lawes *v.* Bennett, 1 Cox Ch. 167, 29 Eng. Reprint 1111; Weston *v.* Collins, 11 Jur. N. S. 190, 34 L. J. Ch. 353, 12 L. T. Rep. N. S. 4, 5 New Rep. 345, 13 Wkly. Rep. 510.

The acceptance need not be in writing, the contract conferring the option being written and signed by the lessor. Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360.

73. Knerr *v.* Bradley, 105 Pa. St. 190; Newell's Appeal, 100 Pa. St. 513; Wade *v.* South Penn. Oil Co., 45 W. Va. 380, 32 S. E. 169.

Suspension of landlord's right to distrain.— A lease is not determined at law by a contract by the lessee to purchase the reversion; but in equity the landlord's right to distrain is suspended pending completion of the contract, so long as the contract is subsisting and enforceable by action for specific performance; if, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain. Ellis *v.* Wright, 76 L. T. Rep. N. S. 522.

Liability for rent after termination of tenancy see *infra*, VIII, A, 3, j.

74. Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360. See also Forge *v.* Reynolds, 18 U. C. C. P. 110.

75. Thus where a ten-year lease provided for a conveyance of the property when all payments should be made, the lessee agreeing to keep the property insured, and being at liberty after a certain date before the expiration of the term to pay the rent reserved in one gross sum, and the lease providing that as a part of such gross payment the amount of the annual tax for each of the then unexpired years of the term should be allowed and the lessor agreeing to pay the water tax, it was held, upon the exercise of the option by the lessor to pay the rent reserved in one gross sum, that the lessor was not bound to pay the rebate of insurance for the unexpired term; that the lessee was entitled to have the amount of the tax and the water tax for the remainder of the term deducted from the gross sum. Wilbour *v.* Trow's Printing, etc., Co., 1 N. Y. St. 231. Where the lease provided that if the sale was made before the date fixed for the payment of the second instalment of rent, said instalment need not be paid, it was held that the lessor was entitled to recover the full instalment where the sale was completed after the date fixed for its payment. Granger *v.* Riggs, 118 Ga. 164, 44 S. E. 983.

Credit for insurance money.— Where the lease required the lessee to keep the premises insured and provided for the crediting of rent, paid prior to the exercise of the option on the purchase-price, but made no provision for the application of the proceeds of insurance in case of loss, and the lessee insured in the lessor's name and the latter collected the insurance money upon a loss and spent a part of it in restoring the premises, it was held that the lessee, upon exercising his option, was entitled to have the balance of the insurance money in the lessor's hands credited on the purchase-price, being entitled to it as a part and parcel of the property

(II) *Confined to Precise Option Conferred.* The lessee cannot exercise an option different in scope from the precise option conferred in the lease.[76]

(III) *Conditions, Waiver, and Forfeiture*—(A) *Conditions Precedent in General.* The acceptance of an option to purchase must be in accordance with the terms of the provisions granting the option, and the lessee, in order to create a completed contract of sale, must perform all conditions upon which the right to exercise the option is made to depend,[77] unless a strict performance thereof has been waived by the lessor,[78] and if the lessor refuses to perform upon the lessee's offer to exercise the option, the latter need go no further by way of perfecting his right.[79]

(B) *Estoppel.* If with full knowledge of the facts which should impel him to proceed to perfect the contract of sale, the lessee permits others to acquire the property and recognizes their rights, he will be estopped to claim the option thereafter.[80]

to be conveyed. Williams *v.* Lilley, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150.

76. Hitchcock *v.* Page, 14 Cal. 440, holding that a lease giving the tenant the option to buy the premises gives him no right to purchase a portion of the entire property but is limited to the whole thereof.

Counter proposition.— A clause giving the lessee the right to buy the premises in a named case is not a mere option, in the nature of a first invitation, to purchase, which, being without consideration, must be accepted in the terms of the offer, and which may be held to be rejected by a counter proposition. McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25. But see Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689, where the general rule that a conditional acceptance amounts to a rejection is stated, but the acceptance in this case was the only one made within the time limited for the exercise of the option.

77. Bras *v.* Sheffield, 49 Kan. 702, 31 Pac. 306, 33 Am. St. Rep. 386; Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689; Ball *v.* Canada Co., 24 Grant Ch. (U. C.) 281. See also McLellan *v.* Rogers, 12 U. C. Q. B. 571.

The intention of the grantor, to be gathered from the instrument and the existing facts, will determine whether a particular provision amounts to a condition precedent. Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, holding that an agreement for the letting of property on consideration of the payment of taxes as rental, and giving the lessee the privilege of purchasing, and containing certain restrictive covenants as to the use of the premises, and concluding with an agreement for the deposit of a certain amount of money for the faithful performance of the covenants and the payment of the taxes, which latter would not fall due until a short time before the expiration of the term, made the deposit mentioned a condition precedent to the exercise of the option to purchase.

Notice.— Where the lessee was given the privilege of purchasing the fee at a fixed price at any time within five years, upon giving thirty days' notice of his intention and paying one fourth of the purchase-money, the thirty days' notice was of the essence of the contract, and a notice given two days before the expiration of the five years was too late. Mason *v.* Payne, 47 Mo. 517.

Performance as to part of land to be conveyed.— Under a lease providing that at any time during its term, all taxes and assessments being paid, the lessors would convey, at a specified price per acre, to the lessee, any part of the land leased containing not less than eight thousand five hundred square feet, it is not necessary, in order to entitle the lessee to a deed to any particular portion of the tract, that the taxes and assessments levied upon the whole tract should have been paid, but only those levied upon the particular portion for which a deed is asked. Reid *v.* Mathers, 4 S. & C. Pl. Dec. 81, 3 Ohio N. P. 13.

78. See cases cited *infra*, this note.

An extension of time in which the lessee may purchase is a waiver of the particular notice required in the original lease. Wilson *v.* Herbert, 76 Md. 489, 25 Atl. 685.

Waiver of forfeitures of lease.— Where the lessor waives breaches for which he could have forfeited the lease, the lessee will be entitled to exercise his option to purchase. Bell *v.* Wright, 31 Kan. 236, 1 Pac. 595.

Acceptance of rent after it is due waives the condition of prompt payment of rent. Mack *v.* Dailey, 67 Vt. 90, 30 Atl. 686.

Waiver by grantee of lessor.— A vendee of a lessor, not being a party to the lease contract, could not, by recognizing the lease after her purchase by giving notice of her right to declare it forfeited, render the lease effective, so as to make an obligation contained therein to convey the premises to the lessee binding upon the lessor. Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571.

79. Butler *v.* Threlkeld, 117 Iowa 116, 90 N. W. 584.

Invalid acceptance.— But such refusal on the part of the lessor will not excuse a tender of performance of other conditions where the offer of the lessee to accept is not consistent with the terms of the option conferred. Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689.

80. Race *v.* Groves, 43 N. J. Eq. 284, 7 Atl. 667; Kruegel *v.* Berry, 75 Fed. 230, 9 S. W. 863.

(c) *Breach of Independent Covenants or Conditions.* Where the lease and the option to renew are independent, a breach of the conditions of the lease by the lessee, although justifying a forfeiture of the lease, will not affect the option to purchase.[81]

(d) *Taking New Lease—Surrender.* The taking of a new lease is not necessarily a surrender of the first lease and the option to purchase therein contained.[82]

(iv) *Time to Exercise Option*—(a) *In General.* An option in a lease to purchase the land demised is a continuing obligation on the part of the lessor which the lessee may accept at any time within the period limited,[83] or at any time within the period of the tenancy if no time for exercise of the option is otherwise prescribed,[84] and if the time is not limited within the period of the lease the existence or non-existence of the lease at the time of the election is immaterial.[85]

(b) *Express Limitations as to Time.* If the time within which the acts to be done in order to perfect the right to a conveyance is expressly limited and made a condition of the right, the lessee must comply with the condition in that regard, and if the option is not accepted within the time so limited it expires unless further time be granted.[86] But if the limitation as to time refers only to

81. Mathews Slate Co. *v.* New Empire Slate Co., 122 Fed. 972. See also Green *v.* Low, 22 Beav. 625, 2 Jur. N. S. 848, 4 Wkly. Rep. 669, 52 Eng. Reprint 1249; Hunt *v.* Spencer, 13 Grant Ch. (U. C.) 225.

Forfeiture of lease see *infra*, IX, B, 7.

82. Lester Agricultural Chemical Works *v.* Selby, (N. J. Ch. 1904) 59 Atl. 247, holding that where the new lease was for the same term as the first, and the first instrument is retained by the lessee, the second lease describing the premises more specifically and containing a restriction on the use of the premises not contained in the first and omitting the clause giving the option to purchase, it does not operate as a surrender of the first with all the provisions therein; that in so far as the contract provisions of the second instrument respecting collateral matters are consistent with those of the first, they will be held to abrogate them.

Surrender by taking new lease in general see *infra*, IX, B, 8, c, (III).

83. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

First privilege.—A covenant in a lease to convey the property to the lessee, when the covenantor "should find a purchaser," if such lessee desired the property at a certain price, becomes obligatory when the covenantor finds some person who is able and willing to pay the covenantor's price and to purchase the property. McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25.

84. Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763; Schroeder *v.* Gemeinder, 10 Nev. 355.

Reasonable time under contract to lease.—Where the lessor made a proposition in writing to the lessee to sell the premises to him on certain terms, offering to him also that he might occupy the same on rental for a year, and that, in case of opportunity to sell, the lessor would give him the refusal on the terms stated, and the lessee occupied the premises under this offer until nearly a year after it was made, when he notified the lessor that he had decided to purchase under the terms proposed, to which the lessor refused to accede, it was held that, as no time was expressed for the acceptance of the lessor's proposition, the acceptance must be within a reasonable time, and that the court might determine as matter of law that the acceptance was not tendered within a reasonable time. Stone *v.* Harmon, 31 Minn. 512, 19 N. W. 88.

85. Prout *v.* Roby, 15 Wall. (U. S.) 471, 21 L. ed. 58; Edwards *v.* West, 7 Ch. D. 858, 47 L. J. Ch. 463, 38 L. T. Rep. N. S. 481, 26 Wkly. Rep. 507.

86. *Iowa.*—Usher *v.* Livermore, 2 Iowa 117.

Kentucky.—Page *v.* Hughes, 2 B. Mon. 439.

Minnesota.—Steele *v.* Bond, 32 Minn. 14, 18 N. W. 830.

Texas.—Kruegel *v.* Berry, 75 Tex. 230, 9 S. W. 863.

Utah.—Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689.

The first day of the term is excluded and the last day is included in determining the expiration of the time for exercising the option. Lorillard *v.* Keyport Brick, etc., Mfg. Co., 48 N. J. Eq. 295, 22 Atl. 203 [*affirming* (Ch. 1890) 19 Atl. 381]; Sutherland *v.* Buchanan, 9 Grant Ch. (U. C.) 135. And an option to purchase at the expiration of a lease may be exercised at any time during that day. Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689.

Computation of time see, generally, Time.

Equitable relief by way of extending the time cannot be granted, unless in cases where the jurisdiction can be invoked on the ground of fraud or mistake (Steele *v.* Bond, 32 Minn. 14, 18 N. W. 830); but on the other hand it is held that, although the purchase-money has not been paid in full within the prescribed time, the purchaser will be entitled to relief if full payment was prevented by the

the act of accepting the option and not to the performance of other conditions to require a conveyance, if the election is made in time it is immaterial that the other acts are performed afterward.[87]

(v) *Parties Bound by and Entitled to Exercise* — (a) *In General.* The grantee of a lessor in a lease conferring an option to purchase acquires no greater rights than those of the lessor,[88] and the option is not defeated by the death of the lessor[89] or by the death of the lessee.[90]

(b) *Assignee.* An option to purchase is not merely personal, and an assignment of the lease transfers the option to the assignee.[91]

conduct of the lessor (Wilkins *v.* Evans, 1 Md. Ch. 156). Where the assignee of a lease makes large improvements, thereby indicating an intention to purchase, and the lessor dies, and the heirs are infants or non-residents, and the administrator refuses to receive the purchase-money, a forfeiture will not be declared because the suit for performance was not brought until twenty-one days after the expiration of the lease. Page *v.* Hughes, 2 B. Mon. (Ky.) 439.

Sufficient compliance by filing bill.— Where the lessor in a lease granting an option to purchase within the term conveyed the premises to another and thereafter died, it was held that the filing of a bill for specific performance by an assignee against the administrator of the lessor alleging the readiness of the complainant to pay the stipulated sum was a sufficient compliance. It was especially proper to invoke the aid of a court of equity under these circumstances in order to procure such title as the original lessor had contracted to convey. Maughlin *v.* Perry, 35 Md. 352.

87. Hartman *v.* McAlister, 5 N. C. 207.

Default in payment of money at a stipulated time admits in general of compensation, and hence time of payment is seldom treated as of the essence of the contract unless it appears to be made so by the express agreement of the party. D'Arras *v.* Keyser, 26 Pa. St. 249. But payment within the time limited was held to be a condition of the contract under a provision granting an option to purchase at any time before the expiration of the lease for a fixed sum "to be paid down in cash . . . upon the demand of a deed prior to the expiration of this lease." Steele *v.* Bond, 32 Minn. 14, 18 N. W. 830. So also under a provision granting the option of purchasing at any time within seven years by giving three months' notice and paying a certain sum at the expiration of such notice. Ranelagh *v.* Melton, 2 Dr. & Sm. 278, 10 Jur. N. S. 1141, 34 L. J. Ch. 227, 11 L. T. Rep. N. S. 409, 13 Wkly. Rep. 150, 62 Eng. Reprint 627. And under a provision that if the lessee should be desirous at the expiration of the term of purchasing the premises, and should give to the lessor six calendar months' notice in writing of such desire, and should pay to him £2,000, the lessor would sell and convey the premises to the lessee. Weston *v.* Collins, 11 Jur. N. S. 190, 34 L. J. Ch. 353, 12 L. T. Rep. N. S. 4, 5 New Rep. 345, 13 Wkly. Rep. 510.

88. Maughlin *v.* Perry, 35 Md. 352.

89. Buckwalter *v.* Klein, 5 Ohio Dec. (Reprint) 55, 2 Am. L. Rec. 347; Woods *v.* Hyde, 31 L. J. Ch. 295, 6 L. T. Rep. N. S. 317, 10 Wkly. Rep. 339 (holding that where a lessor died, devising all his real estate to trustees who disclaimed and leaving an infant heir, a notice by the lessees of their election to purchase served on the infant and his guardian is sufficient, and the court will not refuse to enforce the contract on the ground that the infant could not give a discharge for purchase-money); Yuill *v.* White, 5 Terr. L. Rep. 275 (holding that a provision granting an option to purchase binds the lessor's representative, although not so expressed).

90. *In re* Adams, etc., Vestry, 27 Ch. D. 394, 54 L. J. Ch. 87, 51 L. T. Rep. N. S. 382, 32 Wkly. Rep. 883, holding that the option passed to the administrator as a part of the personal estate and that the administrator could not make a good title to a purchaser without the concurrence in the sale of the next of kin of the lessee. But see Henrihan *v.* Gallagher, 2 Grant Err. & App. (U. C.) 338 [*overruling* Sampson *v.* McArthur, 8 Grant Ch. (U. C.) 72], holding that the right to purchase goes to the heir at law of the lessee.

Conversion.— Rents until the option is made belong to the heir. From that time the conversion takes place and the purchase-money belongs to the personal representative. Townley *v.* Bedwell, 14 Ves. Jr. 591, 33 Eng. Reprint 648. In Lawes *v.* Bennett, 1 Cox Ch. 167, 29 Eng. Reprint 1111, under the election made the lessor was to be treated as vendor and subsequently the benefit of the agreement went to the heir of the purchaser from whose personal estate the purchase-money was withdrawn, the lessee being considered owner *ab initio*. But the principle of this case that the exercise of an option relates back to the date of the contract so as to affect a conversion of the property as between the real and personal representative of the party creating the option is not to be extended to affect the position of the party in whose favor the option is created. *In re* Adams, etc., Vestry, 27 Ch. D. 394, 54 L. J. Ch. 87, 51 L. T. Rep. N. S. 382, 32 Wkly. Rep. 883.

As to the doctrine of constructive conversion by the exercise of an option in a lease to purchase the demised premises see CONVERSION, 9 Cyc. 828 note 16.

91. Blakeman *v.* Miller, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120; Laffan *v.*

(c) *Mortgagee.* An option to purchase will pass to a mortgagee of the lessee upon the theory that every kind of interest in realty may be mortgaged if it be subject to sale and assignment.[92]

d. Reservation of Option to Sell or to Renew or Extend — (i) *In General.* If the lessor reserves to himself the privilege of selling the premises to the lessee or of extending the term of the lease, he cannot be compelled to do either,[93] and if the covenant of the lessor is to renew the lease or sell the property to the lessee, the option to do one or the other rests with the lessor.[94]

(ii) *First Privilege of Purchasing.* Although the privilege of selling is reserved to the lessor,[95] if the first privilege of purchasing is conferred on the lessee, the lessor must offer the premises to the lessee before selling to others.[96] The privilege of purchasing, however, will depend upon the lessor's election to sell.[97]

V. TENANCIES FROM YEAR TO YEAR, MONTH TO MONTH, OR WEEK TO WEEK.

A. Tenancy From Year to Year — 1. Nature and Incidents of Tenancy. Tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were ancient tenancies at will, termi-

Naglee, 9 Cal. 662, 70 Am. Dec. 678; House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027; Napier *v.* Darlington, 70 Pa. St. 64; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; Albert Brick, etc., Co. *v.* Nelson, 27 N. Brunsw. 276.

An equitable assignee cannot exercise the option. Holroyd, etc., Breweries *v.* Singleton, [1899] 2 Ch. 261, 68 L. J. Ch. 622, 81 L. T. Rep. N. S. 101, 47 Wkly. Rep. 662.

Option expressly personal.— Under a lease giving a lessee "but to no other person" the option of trespass, the right does not pass to an assignee. Myers *v.* Stone, 128 Iowa 10, 102 N. W. 507. See also Menger *v.* Ward, 87 Tex. 622, 30 S. W. 853, set out in the next succeeding note.

The right is not divisible and an assignee of a part cannot elect to purchase that part. Hitchcock *v.* Page, 14 Cal. 440.

92. Louisville Bank *v.* Baumeister, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845, under a statutory provision that "any interest in or claim to real estate may be disposed of by deed or will in writing." See also Halsted *v.* Colvin, 51 N. J. Eq. 387, 26 Atl. 928. *Contra,* Conn *v.* Tonner, 86 Iowa 577, 53 N. W. 320, holding that a mortgage by the lessee does not pass the option because such option constitutes no interest in the land.

Where personal confidence is reposed by the lessor in the lessee, as where the privilege to purchase is partly on credit, it has been said that this consideration should take the case out of the general rule that the option is not merely a personal one, because to permit the enforcement of the option by an assignee would be to give the lessor a debtor whom he would not himself choose. Upon this theory it was held that an option to purchase, partly on credit, did not pass under a mortgage. Menger *v.* Ward, 87 Tex. 622, 30 S. W. 853.

93. Pearce *v.* Turner, 150 Ill. 116, 36 N. E. 962.

94. Bamman *v.* Binzen, 65 Hun (N. Y.) 39, 19 N. Y. Suppl. 627. See also *supra,* IV, C, 2, d.

Failure of lessor to elect.— Under a provision for the erection of a building by the lessee, and that at the end of the term the lessor could elect to renew the lease, or buy the building, or sell the lot at a price to be fixed by referees, where the lessor fails to elect, the lessee may elect to purchase. Coles *v.* Peck, 96 Ind. 333, 49 Am. Rep. 161.

95. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

96. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Schroeder *v.* Gemeinder, 10 Nev. 355; Elston *v.* Schilling, 42 N. Y. 79.

Sale subject to lessee's rights.—But a stipulation reserving the right in the lessor to sell, or giving the lessee a designated notice and the privilege of purchasing at the price offered, is held to be merely enabling and not restrictive, the purpose being to protect the lessee in the enjoyment of his full term, and a sale subject to the lease without notice is not a breach of the covenant entitling the lessee to maintain an action. Callaghan *v.* Hawkes, 121 Mass. 298. To the same effect see Blanchard *v.* Ames, 60 N. H. 404. In Thuemler *v.* Brown, 18 Pa. Super. Ct. 117, a conveyance of a part of the demised premises subject to the rights of the lessee is held to be a breach of the contract giving the lessee the option to purchase, where the lessee duly exercises his election.

97. De Vitt *v.* Kaufman County, 27 Tex. Civ. App. 332, 66 S. W. 224, holding that under a lease which reserved to the lessor the right to sell the land and terminate the lease at the end of any rental year on six months' notice, and gave the lessee the privilege of buying the land at a price to be set by the lessor, and which might be offered for the land by any other party, the option to buy applied only in case the lessor elected to terminate the lease by making a sale.

nable at any time by either party without notice.[98] Such tenancies, although indeterminate as to duration until notice given, have most of the qualities and incidents of a term for years; and, when notice has been given, the term is as much fixed for a definite period as any term for years.[99] A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it.[1] But, although it has many of the qualities of a term for years, the tenancy is substantially a tenancy at will, except that such will cannot be determined by either party without due notice to quit.[2] Tenancies from year to year have been abolished in some states;[3] but they will be held to still exist in the absence of any express provisions of statute abolishing them, or any provision from which such result can be claimed to be implied.[4]

2. Creation of Tenancy — a. In General. A tenancy from year to year may arise either expressly, as when land is let from year to year, or by a general parol demise, without any determinate interest, but reserving the payment of annual rent; or by implication, as when property is occupied generally under a rent payable yearly, half yearly, or quarterly; or when a tenant holds over, after the expiration of his term, without having entered into any new contract, and pays rent.[5] Such a tenancy, however, will not be created contrary to the intent of both parties, and payment of rent is merely a fact bearing on the question of intent.[6]

b. By Lease For Indefinite Term. A lease for no definite term, with an annual rent, which may be payable quarterly or monthly, is a lease from year to year.[7]

98. Sullivan *v.* Enders, 3 Dana (Ky.) 66; Hunter *v.* Frost, 47 Minn. 1, 49 N. W. 327.

99. Hunter *v.* Frost, 47 Minn. 1, 49 N. W. 327; Parrott *v.* Barney, 18 Fed. Cas. No. 10,773*a*, Deady 405, where it is said that a tenancy from year to year is a tenancy for a definite recurring period, and not at will; and during each of such periods it is a tenancy for the time or term of one year. How often it may be renewed and how long continued by such renewal depends upon the future conduct of such parties and is therefore uncertain. But for the current year, such tenants hold the premises independent of the will of their landlord. They are tenants for a term, a time certain, and not at will.

1. Hunter *v.* Frost, 47 Minn. 1, 49 N. W. 327; Cattley *v.* Arnold, 1 Johns. & H. 651, 5 Jur. N. S. 361, 28 L. J. Ch. 352, 7 Wkly. Rep. 245.

Not continuous tenancy.— A tenancy from year to year is not considered as a continuous tenancy, but as recommencing every year. Gandy *v.* Jubber, 5 B. & S. 78, 10 Jur. N. S. 652, 33 L. J. Q. B. 151, 9 L. T. Rep. N. S. 800, 12 Wkly. Rep. 526, 117 E. C. L. 78; Tomkins *v.* Lawrence, 8 C. & P. 729, 34 E. C. L. 987. *Compare* Hayes *v.* Fitzgibbon, Ir. R. 4 C. L. 500.

2. Hunter *v.* Frost, 47 Minn. 1, 49 N. W. 327. See *infra*, IX, C, 5.

3. Semmes *v.* U. S., 14 Ct. Cl. 493, holding that D. C. Rev. St. § 680, providing that a tenancy at will shall not arise except by express agreement, and that all occupation, possession, or holding of real estate without express contract or lease, or after such a contract or lease has expired, shall be deemed and held to be tenancies by sufferance, abolishes tenancies from year to year.

4. Hunter *v.* Frost, 47 Minn. 1, 49 N. W. 327.

5. Black L. Dict.

6. Johnson *v.* Foreman, 40 Ill. App. 456; Pusey *v.* Omaha Presb. Hospital, (Nebr. 1903) 97 N. W. 475; Doe *v.* Wood, 9 Jur. 1060, 15 L. J. Exch. 41, 14 M. & W. 682. See also Atkinson *v.* Orr, 83 Ga. 34, 9 S. E. 787.

A payment of sums other than rent will not create a tenancy from year to year. Camden *v.* Batterbury, 7 C. B. N. S. 864, 5 Jur. N. S. 1405, 28 L. J. C. P. 335, 7 Wkly. Rep. 616, 97 E. C. L. 864 [*affirming* 5 C. B. N. S. 808, 5 Jur. N. S. 627, 28 L. J. C. P. 187, 94 E. C. L. 808].

Great disproportion between the rent reserved and the real value is evidence against the creation of a tenancy from year to year. Roe *v.* Prideaux, 10 East 158, 10 Rev. Rep. 258. See also Smith *v.* Widlake, 3 C. P. D. 10, 47 L. J. Q. B. 282, 26 Wkly. Rep. 52.

Rent received under a mistake does not create a tenancy from year to year. Smith *v.* Widlake, 3 C. P. D. 10, 47 L. J. Q. B. 282, 26 Wkly. Rep. 52.

Repairs not equivalent to payment of rent. — Repairs, if made in compensation for the use of property, are not a payment of yearly rent, so as to make the tenancy one from year to year. Rich *v.* Bolton, 46 Vt. 84, 14 Am. Rep. 615.

An admission that rent is due is equivalent to a payment of so much rent. Cox *v.* Bent, 5 Bing. 185, 7 L. J. C. P. O. S. 68, 2 M. & P. 281, 30 Rev. Rep. 566, 15 E. C. L. 533; Doe *v.* Pelletier, 9 N. Brunsw. 33.

7. *Illinois.*— Tanton *v.* Van Alstine, 24 Ill. App. 405.

Maryland.— Hall *v.* Hall, 6 Gill & J. 386.

The fact that rent is payable monthly does not make it any the less a yearly holding.[8]

c. By Occupation Under Agreement For Lease. Where one enters into an agreement for a lease, is let into possession, and pays the stipulated rent, a tenancy from year to year is created.[9] The tenant in such case holds upon such of the

Missouri.— Ridgely *v.* Stillwell, 25 Mo. 570.

New Jersey.— Snowhill *v.* Snowhill, 23 N. J. L. 447.

New York.— Pugsley *v.* Aikin, 11 N. Y. 494; Stein *v.* Sutherland, 92 N. Y. Suppl. 314; Jackson *v.* Bryan, 1 Johns. 322, holding that a person entering on land with the permission of the owner, as an occupant, without reserving rent, with leave to make improvements, is, after eighteen years' possession, a tenant from year to year.

North Carolina.— Patton *v.* Axley, 50 N. C. 440; Kitchen *v.* Pridgen, 48 N. C. 49, 64 Am. Dec. 593.

Pennsylvania.— Hey *v.* McGrath, 81* Pa. St. 310; Lesley *v.* Randolph, 4 Rawle 123; Thomas *v.* Wright, 9 Serg. & R. 87; Lloyd *v.* Cozens, 2 Ashm. 131. *Compare* Hess' Estate, 2 Woodw. 339.

Vermont.— Boudette *v.* Pierce, 50 Vt. 212; Hall *v.* Wadsworth, 28 Vt. 410.

Wisconsin.— Beloit Second Nat. Bank *v.* O. E. Merrill Co., 69 Wis. 501, 34 N. W. 514.

United States.— Connecticut Mut. L. Ins. Co. *v.* U. S., 2 Ct. Cl. 195.

England.— Reg. *v.* St. Giles, 4 B. & S. 509, 11 E. C. L. 509; Doe *v.* Watson, 8 L. J. K. B. O. S. 12.

Canada.— Reeve *v.* Thompson, 14 Ont. 499; Davis *v.* McKinnon, 31 U. C. Q. B. 564.

Tenancy at will where periodical rent is not reserved see *infra*, VI, A, 2, c.

A lease to continue as long as a certain royalty is paid vests in the lessee a tenancy from year to year, and not a tenancy at will. Heck *v.* Borda, 3 Pa. Cas. 324, 6 Atl. 392.

One occupying premises under a covenant for the renewal of a lease is a tenant from year to year and not a tenant according to the terms of the agreement to renew. Huger *v.* Dibble, 8 Rich. (S. C.) 222.

A lessee who takes possession of more land than he is entitled to by his lease and pays rent for the entire premises in his possession becomes a tenant from year to year. Jackson *v.* Wilsey, 9 Johns. (N. Y.) 267. But see Sheldon *v.* Davey, 42 Vt. 637.

Where trustees lease to a cestui que trust, who remains in possession for many years, a tenancy from year to year is all that will be presumed. Brewster *v.* Striker, 1 E. D. Smith (N. Y.) 321.

Lease for definite term — preference thereafter.—A lease for one year, providing that the tenant shall have the preference each succeeding year thereafter, does not mean a tenancy from year to year so as to entitle the tenant to a legal notice to quit. Crawford *v.* Morris, 5 Gratt. (Va.) 90.

A demise for one year, and so on from year to year, with a proviso that either party may determine the tenancy by a three months' notice in writing, is a demise for two years certain. Doe *v.* Green, 9 A. & E. 658, 8 L. J. Q. B. 100, 1 P. & D. 454, 36 E. C. L. 348.

An agreement not to turn out a tenant so long as he pays rent creates more than a tenancy from year to year; it gives the tenant a right to possession so long as the landlord's interest exists. *In re* King, L. R. 16 Eq. 521, 29 L. T. Rep. N. S. 288, 21 Wkly. Rep. 881.

In Georgia where no time is specified for the duration of a tenancy the law construes it to be for the calendar year. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

Under the Indiana statute providing that "all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord" shall be deemed tenancies from year to year, the words "all general tenancies" mean such tenancies only as are not fixed and made certain in point of duration by the agreement of the parties. Brown *v.* Bragg, 22 Ind. 122.

In New York, under Laws (1896), c. 547, § 202, agreements for the occupation of land or tenements in the city of New York which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence. Under such statute a tenancy under an oral agreement to pay a stipulated monthly rental is a tenancy for an indefinite term, and continues until the first day of the next May. Bernstein *v.* Lightstone, 36 Misc. 193, 73 N. Y. Suppl. 151; Klingenstein *v.* Goldwasser, 27 Misc. 536, 58 N. Y. Suppl. 342; Douglass *v.* Seiferd, 18 Misc. 188, 4 N. Y. Suppl. 289. *Compare* Olson *v.* Schevlovitz, 91 N. Y. App. Div. 405, 86 N. Y. Suppl. 834; Wilson *v.* Taylor, 8 Daly 253.

8. Schneider *v.* Lord, 62 Mich. 141, 28 N. E. 773. *Compare* Johnson *v.* Albertson, 51 Minn. 333, 53 N. W. 642.

9. Cox *v.* Bent, 5 Bing. 185, 7 L. J. C. P. O. S. 68, 2 M. & P. 281, 30 Rev. Rep. 566, 15 E. C. L. 533; Knight *v.* Benett, 3 Bing. 361, 4 L. J. C. P. O. S. 94, 11 Moore C. P. 222, 28 Rev. Rep. 640, 11 E. C. L. 181; Doe *v.* Foster, 3 C. B. 215, 15 L. J. C. P. 263, 54 E. C. L. 215; Braithwaite *v.* Hitchcock, 2 Dowl. P. C. N. S. 444, 6 Jur. 976, 12 L. J. Exch. 38, 10 M. & W. 494; Doe *v.* Smith, 6 L. J. K. B. O. S. 44, 1 M. & R. 137; Mann *v.* Lovejoy, R. & M. 355, 21 E. C. L. 765.

Creation of tenancy at will see *infra*, VI, A, 2, d.

Entering into possession under a promise of a lease if a certain condition is performed does not create a tenancy from year to year. Doe *v.* Pullen, 2 Bing. N. Cas. 749, 2 Hodges

terms in the agreement for a lease as are not inconsistent with such a tenancy.[10]

d. By Parol Lease or Contract. As a general rule a parol lease of lands for years is construed as creating only a tenancy at will,[11] unless under the saving clause of the statute of frauds it may be good for a year.[12] Such tenancy, however, will be subsequently changed into a tenancy from year to year, by payment and acceptance of the rent annually, and by other circumstances indicating that to be the intention of the parties,[13] so that the almost universal rule at present is that a parol lease for years, under which possession is taken and rent paid, creates a tenancy from year to year.[14] A similar rule applies when one enters into possession of the premises under a verbal agreement for a life-tenancy,[15] or under a parol agreement for a written lease.[16] The reservation of annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year;[17] but this rule does not apply to a parol tenancy for years, void under

39, 5 L. J. C. P. 229, 3 Scott 271, 29 E. C. L. 745.

Since the English Judicature Acts, the rule no longer holds that a person occupying under an executory agreement for a lease is only made a tenant from year to year by the payment of rent, but he is to be treated as holding on the terms of the agreement. Walsh *v.* Lonsdale, 21 Ch. D. 9, 52 L. J. Ch. 2, 46 L. T. Rep. N. S. 858, 31 Wkly. Rep. 109.

Breach of promise to give a lease will not alter the relation of the parties in respect to the nature of the tenancy. Scully *v.* Murray, 34 Mo. 420, 86 Am. Dec. 116.

10. Doe *v.* Amey, 12 A. & E. 476, 4 P. & D. 177, 40 E. C. L. 239; Tooker *v.* Smith, 1 H. & N. 732; Brocklington *v.* Saunders, 13 Wkly. Rep. 46.

11. See *infra*, VI, A, 2, f.

12. Shepherd *v.* Cummings, 1 Coldw. (Tenn.) 354. See also Pleasants *v.* Claghorn, 2 Miles (Pa.) 302; Matthews *v.* Hipp, 66 S. C. 162, 44 S. E. 577. Where a tenant by entering under a void lease for years becomes a tenant for a year, if he holds over the year he will be a tenant from year to year so long as he continues to hold over through the term of the original lease, and if he holds over the last year into the year succeeding, the landlord may then treat him as a trespasser or as a tenant for another year. Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344. See also Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318.

13. Talamo *v.* Spitzmiller, 120 N. Y. 37, 23 N. E. 980, 17 Am. St. Rep. 607, 8 L. R. A. 221; Dumn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800; Matthews *v.* Hipp, 66 S. C. 162, 44 S. E. 577; Hellams *v.* Patton, 44 S. C. 454, 22 S. E. 608.

14. *Connecticut.*— Lockwood *v.* Lockwood, 22 Conn. 425; Strong *v.* Crosby, 21 Conn. 398.

Delaware.— Stewart *v.* Apel, 5 Houst. 189, 4 Houst. 314.

Georgia.— Western Union Tel. Co. *v.* Fain, 52 Ga. 18; Cody *v.* Quarterman, 12 Ga. 386.

Indiana.— Nash *v.* Berkmeir, 83 Ind. 536; Swan *v.* Clark, 80 Ind. 57; Michigan City *v.* Leeds, 24 Ind. App. 271, 55 N. E. 799; Elliott *v.* Stone City Bank, 4 Ind. App. 155, 30 N. E. 537.

Michigan.— Coan *v.* Mole, 39 Mich. 454; Morrill *v.* Mackman, 24 Mich. 279, 9 Am. Rep. 124.

Missouri.— Cunningham *v.* Roush, 157 Mo. 336, 57 S. W. 769; Ridgley *v.* Stillwell, 28 Mo. 400; Goodfellow *v.* Noble, 25 Mo. 60; Kerr *v.* Clark, 19 Mo. 132; Davies *v.* Baldwin, 66 Mo. App. 577; Tiefenbrun *v.* Tiefenbrun, 65 Mo. App. 253; Hosli *v.* Yokel, 58 Mo. App. 169; Delaney *v.* Flanagan, 41 Mo. App. 651.

New Jersey.— Drake *v.* Newton, 23 N. J. L. 111.

New York.— Laughran *v.* Smith, 75 N. Y. 205; Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567 [*affirming* 6 Hun 562]; Lounsbery *v.* Snyder, 31 N. Y. 514; Craske *v.* Christian Union Pub. Co., 17 Hun 319; Dorr *v.* Barney, 12 Hun 259; People *v.* Rickert, 8 Cow. 226; Schuyler *v.* Leggett, 2 Cow. 660. *Compare* Unglish *v.* Marvin, 128 N. Y. 380, 28 N. E. 634 [*affirming* 55 Hun 45, 8 N. Y. Suppl. 283]; Thomas *v.* Nelson, 69 N. Y. 118; Prial *v.* Entwistle, 10 Daly 398.

England.— Tress *v.* Savage, 2 C. L. R. 315, 4 E. & B. 36, 18 Jur. 680, 23 L. J. Q. B. 339, 2 Wkly. Rep. 564, 82 E. C. L. 36; Roe *v.* Lees, 2 W. Bl. 1171.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 374.

A parol promise to pay rent made preliminarily to the entry, and not distinguishable from the parol lease, is not sufficient to support an inference of a new contract from year to year. Talamo *v.* Spitzmiller, 120 N. Y. 37, 23 N. E. 980, 17 Am. St. Rep. 607, 8 L. R. A. 221.

15. Leavitt *v.* Leavitt, 47 N. H. 329.

16. Huntington *v.* Parkhurst, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146; Scully *v.* Murray, 34 Mo. 420, 86 Am. Dec. 116.

17. McIntosh *v.* Hodges, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; Williams *v.* Deriar, 31 Mo. 13; Talamo *v.* Spitzmiller, 120 N. Y. 37, 23 N. E. 980, 17 Am. St. Rep. 607, 8 L. R. A. 221; Jackson *v.* Bradt, 2 Cai. (N. Y.) 169; Carson *v.* Baker, 15 N. C. 220, 25 Am. Dec. 706; Rich *v.* Bolton, 46 Vt. 84, 14 Am. Rep. 615. In Barlum *v.* Berger,

the statute of frauds, where the entire rent has been paid in advance.[18] The fact that no annual rent is reserved is not conclusive of the character of the tenancy.[19] The rights of the parties must be judged by the relations that they assume with each other independently of the void contract, and it has been generally held that, where a tenant enters and occupies under a parol lease for more than a year, the agreement may be looked to as showing the terms under which the tenancy subsists in all respects, except as to the duration of the term.[20]

e. By Void or Defective Lease. An entry under a void or defective lease for a term of years creates a tenancy at will,[21] and if periodical rent be paid, the tenancy becomes one from year to year.[22]

f. By Tenant Holding Over After Expiration of Term For Years[23] — (i) *In General.* According to the great weight of authority, where a tenant under a demise for a year or more holds over at the end of his term without any new agreement with the landlord, he may be treated as a tenant from year to year.[24]

125 Mich. 504, 84 N. W. 1070, it was held that where a tenant held over after the expiration of a parol lease for five years, the rent being payable monthly, the tenancy created was from month to month, and that the parol lease having been performed will not be treated as a void one and as creating a tenancy from year to year.

18. Brant *v.* Vincent, 100 Mich. 426, 59 N. W. 169.

19. Brown *v.* Vincent, 100 Mich. 426, 59 N. W. 169; Jackson *v.* Bryan, 1 Johns. (N. Y.) 322.

20. *Connecticut.*— Lockwood *v.* Lockwood, 22 Conn. 425.

Michigan.— Huntington *v.* Parkhurst, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146.

Missouri.— Hitt *v.* Greeser, 71 Mo. App. 206.

New York.— Laughran *v.* Smith, 75 N. Y. 205; Greton *v.* Smith, 33 N. Y. 245; Dorr *v.* Barney, 12 Hun 259; People *v.* Rickert, 8 Cow. 226; Schuyler *v.* Leggett, 2 Cow. 660.

England.— Clayton *v.* Blakey, 8 T. R. 3, 4 Rev. Rep. 575; Doe *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

A term to keep open a shop, and use the best endeavors to promote the trade of it, is a term applicable to a tenancy from year to year. Sanders *v.* Karnell, 1 F. & F. 356.

21. See *infra,* VI, A, 2, e.

22. *Connecticut.*— Lockwood *v.* Lockwood, 22 Conn. 425.

Nebraska.— Farley *v.* McKeegan, 48 Nebr. 237, 67 N. W. 161.

New York.— Coudert *v.* Cohn, 118 N. Y. 309, 23 N. E. 298, 16 Am. St. Rep. 761, 7 L. R. A. 69; Laughran *v.* Smith, 75 N. Y. 205; Kernochan *v.* Wilkens, 3 N. Y. App. Div. 596, 38 N. Y. Suppl. 236; Fougera *v.* Cohn, 43 Hun 454.

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344; Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251.

Rhode Island.— Thurber *v.* Dwyer, 10 R. I. 355.

Washington.—Snyder *v.* Harding, 38 Wash. 666, 80 Pac. 789.

West Virginia.—Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957.

England.— Doe *v.* Taniere, 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49, 64 E. C. L. 998; Tress *v.* Savage, 2 C. L. R. 1315, 4 E. & B. 36, 18 Jur. 680, 23 L. J. Q. B. 339, 2 Wkly. Rep. 564, 82 E. C. L. 36; Lee *v.* Smith, 2 C. L. R. 1079, 9 Exch. 662, 23 L. J. Exch. 198, 2 Wkly. Rep. 377; Doe *v.* Watts, 2 Esp. 501, 7 T. R. 83, 4 Rev. Rep. 387; Wood *v.* Beard, 2 Ex. D. 30, 46 L. J. Q. B. 100, 35 L. T. Rep. N. S. 866.

Canada.— Caverhill *v.* Orvis, 12 U. C. C. P. 392; White *v.* Nelson, 10 U. C. C. P. 158; Gibboney *v.* Gibboney, 36 U. C. Q. B. 236; Doe *v.* Coutts, 5 U. C. Q. B. O. S. 499.

When an instrument cannot legally operate as a perpetual lease, as intended by the parties, the premises will be presumed to be held upon a tenancy from year to year. Doe *v.* Gardiner, 12 C. B. 319, 21 L. J. C. P. 222, 74 E. C. L. 319.

23. Creation of tenancy at will see *infra,* VI, A, 2, g.

Creation of tenancy at sufferance see *infra,* VI, B, 2, a.

24. *Alabama.*— Singer Mfg. Co. *v.* Sayre, 75 Ala. 270; Harkins *v.* Pope, 10 Ala. 493; Ames *v.* Schuesler, 14 Ala. 600.

Arkansas.— Belding *v.* Texas Produce Co., 61 Ark. 377, 33 S. W. 421.

California.— Stoppelkamp *v.* Mangeot, 42 Cal. 316.

Colorado.— Hurd *v.* Whitsett, 4 Colo. 77; Strousse *v.* Clear Creek County Bank, 9 Colo. App. 478, 49 Pac. 260.

Georgia.—Roberson *v.* Simons, 109 Ga. 360, 34 S. E. 604.

Illinois.— Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; Baltimore, etc., R. Co. *v.* Illinois Cent. R. Co., 137 Ill. 9, 27 N. E. 38; Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; Prickett *v.* Ritter, 16 Ill. 96; Johnson *v.* Foreman, 40 Ill. App. 456; Miller *v.* Ridgely, 19 Ill. App. 306.

Indiana.— Burbank *v.* Dyer, 54 Ind. 392; Ridgeway *v.* Hannum, 29 Ind. App. 124, 64 N. E. 44; Kleespies *v.* McKenzie, 12 Ind. App. 404, 40 N. E. 648.

Kansas.— Intfen *v.* Foster, 8 Kan. App. 336, 56 Pac. 1125; Wheat *v.* Brown, 3 Kan. App. 431, 48 Pac. 807.

Maine.— Moshier *v.* Reding, 12 Me. 478.

It is held, however, that a tenancy from year to year cannot be inferred from the mere fact of holding over by the tenant; the landlord must in some manner recognize the tenancy.[25] Thus the receipt of rent by the landlord from one so

Maryland.— Hall *v.* Myers, 43 Md. 446.

Michigan.— Ganson *v.* Baldwin, 93 Mich. 217, 53 N. W. 171; Schneider *v.* Lord, 62 Mich. 141, 28 N. W. 773.

Minnesota.— Gardner *v.* Dakota County Com'rs, 21 Minn. 33.

Mississippi.— Usher *v.* Moss, 50 Miss. 208.

Missouri.— Insurance, etc., Bldg. Co. *v.* State Nat. Bank, 71 Mo. 58; Hammon *v.* Douglas, 50 Mo. 434; Grant *v.* White, 42 Mo. 285; Finney *v.* St. Louis, 39 Mo. 177; Tiernan *v.* Johnson, 7 Mo. 43 (holding that where a tenant is in possession under a lease from the guardian of a single woman, who afterward married, the acceptance of rent by the husband after the expiration of the guardianship raises an implied tenancy from year to year); St. Louis, etc., R. Co. *v.* Ludwig, 6 Mo. App. 584.

Nebraska.— West *v.* Lungren, (1905) 103 N. W. 1057; Montgomery *v.* Willis, 45 Nebr. 434, 63 N. W. 794; Critchfield *v.* Ramaley, 21 Nebr. 178, 31 N. W. 687.

New York.— Davies *v.* New York, 83 N. Y. 207; Witt *v.* New York, 6 Rob. 441; Holsman *v.* Abrams, 2 Duer 435; Furman *v.* Galanopulo, 92 N. Y. Suppl. 730; Coatsworth *v.* Ray, 52 N. Y. Suppl. 498; Laimbeer *v.* Tailer, 4 N. Y. Suppl. 588; Conway *v.* Starkweather, 1 Den. 113; Sherwood *v.* Phillips, 13 Wend. 479; Jackson *v.* Salmon, 4 Wend. 327; Abeel *v.* Radcliff, 13 Johns. 297, 7 Am. Dec. 377.

Ohio.— Moore *v.* Beasley, 3 Ohio 294; Strong *v.* Schmidt, 13 Ohio Cir. Ct. 302, 7 Ohio Cir. Dec. 233.

Oregon.— Parker *v.* Page, 41 Oreg. 579, 69 Pac. 822.

Pennsylvania.— Laguerenne *v.* Dougherty, 35 Pa. St. 35; Hemphill *v.* Flynn, 2 Pa. St. 144; Phillips *v.* Monges, 4 Whart. 226; Pickering *v.* O'Brien, 23 Pa. Super. Ct. 125; Hughes *v.* Lillibridge, 8 Pa. Dist. 358, 22 Pa. Co. Ct. 185.

South Carolina.— Hart *v.* Finney, 1 Strobh. 250. See also State *v.* Fort, 24 S. C. 510.

Tennessee.— Noel *v.* McCrory, 7 Coldw. 623; Shepherd *v.* Cummings, 1 Coldw. 354.

Vermont.— Amsden *v.* Atwood, 69 Vt. 527, 38 Atl. 263, holding further that the landlord cannot make such holding contingent upon the performance by the tenant of new duties not required in the expired lease.

Virginia.— Baltimore Dental Assoc. *v.* Fuller, 101 Va. 627, 44 S. E. 771; Williamson *v.* Paxton, 18 Gratt. 475; Emerick *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217.

West Virginia.— Allen *v.* Bartlett, 20 W. Va. 46.

Wisconsin.— Peehl *v.* Bumbalek, 99 Wis. 62, 74 N. W. 545; Brown *v.* Kayser, 60 Wis. 1, 18 N. W. 523.

United States.— Kugler *v.* U. S., 4 Ct. Cl. 407.

England.— Doe *v.* Smaridge, 7 Q. B. 957, 9 Jur. 781, 14 L. J. Q. B. 327, 53 E. C. L. 957; Bishop *v.* Howard, 2 B. & L. 100, 3 D. & R. 293, 1 L. J. K. B. 243, 26 Rev. Rep. 291, 9 E. C. L. 52; Doe *v.* Stennett, 2 Esp. 717, 5 Rev. Rep. 769.

Canada.— Johnson *v.* McLellan, 21 U. C. C. P. 304.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 378.

District of Columbia.— Since the act of July 4, 1864, a tenancy at will cannot arise without an express contract, yet if prior thereto a tenant for years held over by consent, given expressly or constructively after the determination of the lease, this, although technically an estate at will, was a tenancy from year to year. Spalding *v.* Hall, 6 D. C. 123.

If one holds under successive renewals, he is a tenant for years, and not one from year to year. Biggs *v.* Stueler, 93 Md. 100, 48 Atl. 727.

Where a tenant from year to year leases the same premises for a single year, and holds over after the expiration of his term, his former occupancy of the premises does not inure to his benefit so as to constitute him a tenant from year to year. Brandenburg *v.* Reithman, 7 Colo. 323, 3 Pac. 577.

A corporation holding over after the expiration of a lease with the assent of the lessor becomes a tenant from year to year. In this respect there is no difference between corporations and private individuals. Witt *v.* New York, 5 Rob. (N. Y.) 248. But see San Antonio *v.* French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763.

Holding over pending treaty for lease.— If a tenant whose lease has expired is permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but so strictly a tenant at will that he may be turned out of possession without notice. Doe *v.* Stennett, 2 Esp. 717, 5 Rev. Rep. 769.

Change by statute.— Iowa Code, § 2014, providing that any person in possession of land "with the assent **at** the owner is presumed to be a tenant **of** will until the contrary is shown," changes the common-law rule that, where a tenant for years holds over, and continues to pay rent, a tenancy from year to year is established; and, in the absence of special contract, a mere tenancy at will is thus created. O'Brien *v.* Troxel, 76 Iowa 760, 40 N. W. 704.

25. Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230 (in which case the lessee was attempting to give his holding over the effect of a tenancy from year to year as against the landlord's right to regain possession); Leighton *v.* Vanwart, 17 N. Brunsw. 489. See also Rowan *v.* Lytle, 11 Wen. (N. Y.) 616. But in this connection see *supra*, IV, C, 3, f, (II), (A), (2), (B).

holding over indicates with certainty a design to continue the relation of landlord and tenant, and a tenancy from year to year will arise.[26] Such intention should in each case be found and determined as a question of fact by the jury, and in so doing they may take into consideration the character of the property and the use to which the same is to be put, as well as the periods at which the rent is to be paid.[27] The presumption of law that a tenant who by permission of his landlord holds over is a tenant from year to year may be rebutted by proof that the holding over is in some other character or for some other purpose;[28] but proof of a contrary intention on the part of the tenant alone is not sufficient for this purpose.[29]

(II) *Landlord's Right to Consider Tenant Trespasser.* A landlord may treat a tenant holding over after a term as a tenant from year to year or as a trespasser, at his election.[30]

(III) *Terms and Conditions of Tenancy.* Where a lessee for years holds over after the expiration of his term, and becomes a tenant from year to year, the tenancy is subject to all the covenants and stipulations contained in the original lease, so far as they are applicable to the new condition of things.[31]

Circumstances may be sufficient to imply acquiescence, and if the holding over is wilful, it cannot be with assent. Grant *v.* White, 42 Mo. 285.

26. Singer Mfg. Co. *v.* Sayre, 75 Ala. 270; Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Condon *v.* Barr, 47 N. J. L. 113, 54 Am. Rep. 121; Amsden *v.* Atwood, 69 Vt. 527, 38 Atl. 263.

A demand for rent by a landlord, on a tenant holding over, is not conclusive evidence of such consent as to convert the tenancy into one from year to year. Condon *v.* Barr, 47 N. J. L. 113, 54 Am. Rep. 121.

27. Grant *v.* White, 42 Mo. 285; Withnell *v.* Petzold, 17 Mo. App. 669; Phoenixville *v.* Walter, 147 Pa. St. 501, 23 Atl. 776 (holding that whether defendant is in possession as a tenant from year to year or under the renewal of a former lease, is a question for the jury); Vance *v.* Vance, Ir. R. 5 C. L. 363.

28. *Illinois.*— Goldsbrough *v.* Gable, 49 Ill. App. 554.

Nebraska.— West *v.* Lungren, (1905) 103 N. W. 1057; Montgomery *v.* Willis, 45 Nebr. 434, 63 N. W. 794, holding where before the expiration of a lease, the tenant informs the landlord that he will remain but for a short period after such expiration, during which he will pay rent at the old rate, and the landlord acquiesces, a tenant from year to year is not created.

New York.— Witt *v.* New York, 6 Rob. 441; Greaton *v.* Smith, 1 Daly 380.

North Carolina.— Harty *v.* Harris, 129 N. C. 408, 27 S. E. 90.

Pennsylvania.— Lipper *v.* Bouve, 6 Pa. Super. Ct. 452, 41 Wkly. Notes Cas. 566.

Virginia.— Williamson *v.* Paxton, 18 Gratt. 475.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 378.

29. Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711 [*affirming* 98 Ill. App. 434]; Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151.

30. See *supra*, IV, C, 3, f, (II), (A), (2).

31. *Illinois.*— Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; Webster *v.* Nichols, 104 Ill. 160; Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; McKinney *v.* Peck, 28 Ill. 174; Prickett *v.* Ritter, 16 Ill. 96.

Maryland.— Vrooman *v.* McKaig, 4 Md. 450, 59 Am. Dec. 85; De Young *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156.

Minnesota.— Gardner *v.* Dakota County Com'rs, 21 Minn. 33.

New York.— Evertson *v.* Sawyer, 2 Wend. 507; Bradley *v.* Covel, 4 Cow. 349.

Pennsylvania.— Laguerenne *v.* Dougherty, 35 Pa. St. 45.

England.— Dougal *v.* McCarthy, [1893] 1 Q. B. 736, 57 J. P. 597, 62 L. J. Q. B. 462, 68 L. T. Rep. N. S. 699, 4 Reports 402, 41 Wkly. Rep. 484; Hyatt *v.* Griffiths, 17 Q. B. 505, 79 E. C. L. 505; Kelly *v.* Patterson, L. R. 9 C. P. 681, 43 L. J. C. P. 320, 30 L. T. Rep. N. S. 842; Cornish *v.* Stubbs, L. R. 5 C. P. 334, 39 L. J. C. P. 202, 22 L. T. Rep. N. S. 21, 18 Wkly. Rep. 547; Martin *v.* Smith, L. R. 9 Exch. 50, 43 L. J. Exch. 42, 30 L. T. Rep. N. S. 268, 22 Wkly. Rep. 336; Digby *v.* Atkinson, 4 Campb. 275, 16 Rev. Rep. 792; Doe *v.* Samuel, 5 Esp. 173, 8 Rev. Rep. 845; Hutton *v.* Warren, 2 Gale 71, 5 L. J. Exch. 234, 1 M. & W. 466, 1 Tyrw. & G. 646; Johnston *v.* Reardon, 2 Ir. Eq. 123; Rigge *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

Canada.— Isaacs *v.* Ferguson, 26 N. Brunsw. 1; Hilliard *v.* Gemmell, 10 Ont. 504; McClenaghan *v.* Barker, 1 U. C. Q. B. 26.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 381. See also *supra*, IV, C, 4.

Offer and conditional acceptance do not constitute agreement for new lease.— An offer by a landlord, made after the expiration of the term of a written lease, to grant a new lease, and a conditional agreement on the part of the tenant to accept such offer, do not constitute an agreement for a new lease, preventing the application of the terms and conditions of the old lease to a tenancy from year to year, created by the tenant remaining in possession and the land-

g. Conversion of Tenancy From Month to Month Into Tenancy From Year to Year. A tenant from month to month does not become a tenant from year to year by continuing in possession for more than a year. The character of the tenancy remains unchanged.[32]

h. Conversion of Tenancy at Will Into Tenancy From Year to Year. An estate at will is converted into a tenancy from year to year by the payment of rent;[33] and the conversion is wrought, not by the length of time the tenant holds and pays rent, but by the fact that he enters and holds under a stipulation to pay annual rent, and pays accordingly.[34] This implication of law, resulting from a payment of rent under a tenancy at will, is, however, not strong enough to overcome the fact of a distinct understanding between the parties as to the nature of the tenancy.[35] Mere lapse of time, however, will not turn a tenancy at will into one from year to year.[36]

B. Tenancy From Month to Month — 1. Nature and Incidents of Tenancy. A tenancy from month to month which may be determined on notice is in the nature of a tenancy at will.[37] The tenant cannot, without the consent and agreement of his landlord, create a new tenancy or make the existing one different from that agreed upon in the original contract;[38] nor can the interest of a tenant from month to month be transferred on execution without the assent of the landlord.[39]

2. Creation of Tenancy — a. In General. To constitute a tenancy from month to month a special agreement to that effect may be made, or the tenancy may be implied from the manner in which the rent is paid.[40] Thus a lease for an indefinite term, with monthly rent reserved, creates a tenancy from month to month.[41] Such a tenancy is a continuing one, and not a new tenancy at the

lord receiving rent. Gardner *v.* Dakota County Com'rs, 21 Minn. 33.

Agreement to reduce rent.— Where a tenant, who has taken a lease for one year, holds over after the expiration of his term, and pays the monthly rent provided in the lease, he becomes a tenant from year to year, and if he afterward induces the lessor to agree to a reduced rent, the provisions of the expired lease to remain the same in other respects, such an agreement is void for want of consideration. Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294.

Assent to increase of rent.— Where a tenant retains the premises after notice from the landlord that he would require an increase of rent, he must be held to have assented to such increase, and to this extent the terms of the old lease do not apply. Gardner *v.* Dakota County Com'rs, 21 Minn. 33.

Obligation to repair.— Where a lessee continues in possession after expiration of a lease containing a covenant by him to repair, a similar obligation will be implied. Hett *v.* Janzen, 22 Ont. 414.

A proviso for reëntry for non-payment of rent is a term applicable to a tenancy from year to year. Thomas *v.* Packer, 1 H. & N. 669, 3 Jur. N. S. 143, 26 L. J. Exch. 207, 5 Wkly. Rep. 316.

Question of fact.— Whether he does hold on any such terms or not is a question for the jury on the facts proved. Hyatt *v.* Griffiths, 17 Q. B. 505, 79 E. C. L. 505; Oakley *v.* Monck, L. R. 1 Exch. 159, 4 H. & C. 251, 35 L. J. Exch. 87, 12 Jur. N. S. 253, 14 L. T. Rep. N. S. 20, 14 Wkly. Rep. 406 [*affirming* 3 H. & C. 706].

32. Jones *v.* Willis, 53 N. C. 430; Hollis *v.* Burns, 100 Pa. St. 206, 45 Am. Rep. 379; Spidle *v.* Hess, 20 Lanc. L. Rev. (Pa.) 385.

33. Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122; Dumn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800; Magaw *v.* Cannon, 3 Watts (Pa.) 139; McDowell *v.* Simpson, 3 Watts (Pa.) 129, 27 Am. Dec. 338; Hellams *v.* Patton, 44 S. C. 454, 22 S. E. 608; Silsby *v.* Allen, 43 Vt. 172; Barlow *v.* Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

34. Silsby *v.* Allen, 43 Vt. 172.

35. Waring *v.* Louisville, etc., R. Co., 19 Fed. 863. See also Larkin *v.* Avery, 23 Conn. 304.

36. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293.

Illinois.— Herrell *v.* Sizeland, 81 Ill. 457.

Rhode Island.— Johnson *v.* Johnson, 13 R. I. 467.

Vermont.— Rich *v.* Bolton, 46 Vt. 84, 14 Am. Rep. 615.

England.— Doe *v.* Groves, 10 Q. B. 486, 11 Jur. 558, 16 L. J. Q. B. 297, 59 E. C. L. 486.

37. Banks *v.* Carter, 7 Daly (N. Y.) 417.

38. Blair *v.* Mason, 64 N. H. 487, 13 Atl. 871 (holding that a tenant from month to month cannot, without an agreement, apply a balance due him from the landlord for board to the payment of rent in advance, so as to extend his right of occupancy beyond that month); Simpson *v.* Masson, 11 Misc. (N. Y.) 351, 32 N. Y. Suppl. 136.

39. Holliday *v.* Aehle, 99 Mo. 273, 12 S. W. 797.

40. Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 41 N. Y. Suppl. 289.

41. *Louisiana.*—Paquetel *v.* Gauche, 17 La. Ann. 63.

beginning of each month.[42] A tenancy for a specified period of one month is a term for years, and not a tenancy from month to month or year to year;[43] nor does the mere payment of one month's rent, with nothing further said or done, create a tenancy from month to month.[44] A tenant who enters by an implied license becomes a tenant by sufferance, and out of this relation a tenancy from month to month may arise by the monthly demand and payment of rent.[45] So also a lease creating an estate at will only may be converted into one from month to month by entry thereunder and payment of monthly rent.[46]

b. By Parol Lease or Contract. Where a party enters into possession of premises under a verbal letting, which is void under the statute of frauds, agreeing to pay rent monthly, and pays rent under the contract for a time, he becomes a tenant from month to month.[47] If the agreement is in the nature of a license or a permissive use only, a tenancy from month to month is not established.[48]

Minnesota.— Rogers *v.* Brown, 57 Minn. 223, 58 N. W. 981.

New York.— Olson *v.* Schevlovitz, 91 N. Y. App. Div. 405, 86 N. Y. Suppl. 834; Hungerford *v.* Wagoner, 5 N. Y. App. Div. 590, 39 N. Y. Suppl. 369. But see Cohen *v.* Green, 21 Misc. 334, 47 N. Y. Suppl. 136.

Ohio.— Rivett *v.* Brown, 8 Ohio Dec. (Reprint) 225, 6 Cinc. L. Bul. 398.

Pennsylvania.— Wall *v.* Ullman, 2 Chest. Co. Rep. 178; Hollis *v.* Burns, 13 Wkly. Notes Cas. 241.

Washington.— Schreiner *v.* Stanton, 26 Wash. 563, 67 Pac. 219; London, etc., Bank *v.* Curtis, 27 Wash. 656, 68 Pac. 329, holding that where a building is rented for an indefinite period under an agrement requiring monthly payments of rent in advance, the payment and acceptance of rent quarterly in advance, for the convenience of the tenant and without any agreement changing the manner of payment, does not change the tenancy to one for an indefinite period with quarterly payments of rent instead of monthly payments, as contemplated by the original lease.

Canada.— Orser *v.* Vernon, 14 U. C. C. P. 573; Corbeil *v.* Marleau, 14 Quebec Super. Ct. 201.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 391.

But see Waters *v.* Williamson, 59 N. J. L. 337, 36 Atl. 665.

Where a lease is for one year with a provision that after that time it may be ended by six months' notice by either party, it is not void for uncertainty, so as to create a tenancy from month to month. B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967.

42. Ward *v.* Hinkleman, 37 Wash. 375, 79 Pac. 956. *Contra,* Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385; Borman *v.* Sandgren, 37 Ill. App. 160.

43. Stoppelkamp *v.* Mangeot, 42 Cal. 316. See also *supra,* IV, A, 3, b.

44. Alworth *v.* Gordon, 81 Minn. 445, 84 N. W. 454. But see Gibbons *v.* Dayton, 4 Hun (N. Y.) 451.

45. Washington Real Estate Co. *v.* Roger Williams Silver Co., 25 R. I. 483, 56 Atl. 686. See also McCrillis *v.* Benoit, 26 R. I. 421, 59 Atl. 108.

46. Lehman *v.* Nolting, 56 Mo. App. 549.

47. Marr *v.* Ray, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799 [*affirming* 50 Ill. App. 415]; Brownell *v.* Welch, 91 Ill. 523; Warner *v.* Hale, 65 Ill. 395; Donohue *v.* Chicago Bank Note Co., 37 Ill. App. 552; Squire *v.* Ferd Heim Brewing Co., 90 Mo. App. 462; Pacific Express Co. *v.* Tyler Office Fixture Co., 72 Mo. App. 151; Valle *v.* Kramer, 4 Mo. App. 570; Lawrence *v.* Hasbrouck, 21 Misc. (N. Y.) 39, 46 N. Y. Suppl. 863; Schloss *v.* Huber, 21 Misc. (N. Y.) 28, 46 N. Y. Suppl. 921; Gilfoyle *v.* Cahill, 18 Misc. (N. Y.) 68, 44 N. Y. Suppl. 29; Bent *v.* Renken, 86 N. Y. Suppl. 110; Utah L. & T. Co. *v.* Garbutt, 6 Utah 342, 23 Pac. 758.

Verbal contracts for lease of buildings in cities.— Under Mo. Rev. St. (1899) § 4110, providing that all verbal contracts for the leasing of buildings in cities shall be held to be tenancies from month to month, a verbal lease for eleven months of city buildings constitutes a tenancy from month to month. Gerhart Realty Co. *v.* Weiter, 108 Mo. App. 248, 83 S. W. 278. This statute has no application in a case where the lessee is the owner of the building and leases only the ground on which it stands. Delaney *v.* Flanagan, 41 Mo. App. 651.

Question for jury.— The question whether the tenant has taken possession of the premises, and is therefore liable under a verbal lease as a tenant from month to month, is for the jury. Pacific Express Co. *v.* Tyler Office Fixture Co., 72 Mo. App. 151.

A parol lease which does not fix the term and reserve monthly rent creates a tenancy from month to month. Corbett *v.* Cochrane, 67 Conn. 570, 35 Atl. 509; Hollis *v.* Burns, 100 Pa. St. 206, 45 Am. Rep. 379.

Agreement to lease for more than one year. — Where a person is in possession of land under a written agreement to lease the same for more than one year, he occupies under a verbal lease and his tenancy is one from month to month. Blake *v.* Kurrus, 41 Ill. App. 562. See also Sebastian *v.* Hill, 51 Ill. App. 272.

48. Sterling *v.* Heiman, 108 Mo. App. 40, 82 S. W. 539, holding further that the fact that the landlord's agent, who granted the license, had no authority to do so, did not

c. By Tenant Holding Over After Expiration of Term — (i) *In General.* A tenant, leasing premises at a stipulated price per month, who holds over with the consent of his landlord, and pays rent, thereby becomes a tenant from month to month.[49] Where there is a distinct agreement that if the tenant holds over it must be as a tenant from month to month, no contract to the contrary will be implied.[50] Where a tenant holds over without the consent of his landlord, no tenancy from month to month is created.[51] A tenant remaining in possession after the issue of a warrant of dispossession does not bear to his landlord the relation of tenant from month to month.[52]

(ii) *Terms and Conditions of Tenancy.* A holding over by a tenant from month to month with the assent of his landlord will, in the absence of a new lease, be presumed to be on the same terms as the prior letting.[53] A statute providing that the landlord may change the terms of the lease by giving notice in writing is mandatory, and must be strictly complied with in order to make a change effectual.[54]

C. Tenancy From Week to Week. A weekly tenancy is a reletting of the premises by the landlord at the beginning of each successive week.[55]

VI. TENANCIES AT WILL AND AT SUFFERANCE.

A. Tenancy at Will — 1. Nature and Incidents of Tenancy. An estate at will in lands is that which a tenant has by an entry made thereon under a demise to hold during the joint wills of the parties to the estate.[56] Tenancies of indeterminate duration which were anciently deemed and denominated tenancies at will are now considered as from year to year;[57] but tenancies at will may still arise by express agreement, or by implication of law arising from the voluntary acts and relations of the parties.[58] A tenant at will is in possession by right, with the consent of the landlord either express or implied,[59] and he does not begin to hold

transform such license to a letting from month to month.

49. *California.*— Stoppelkamp *v.* Mangeot, 42 Cal. 316.

Louisiana.— Marmiche *v.* Roumieu, 11 La. Ann. 477; Dolese *v.* Barberot, 9 La. Ann. 352; Bowles *v.* Lyon, 6 Rob. 262.

Minnesota.— Backus *v.* Sternberg, 59 Minn. 403, 61 N. W. 335; Shirk *v.* Hoffman, 57 Minn. 230, 58 N. W. 990.

Missouri.— Smith *v.* Smith, 62 Mo. App. 596; Drey *v.* Doyle, 28 Mo. App. 249.

New Jersey.— Baker *v.* Kenney, 69 N. J. L. 180, 54 Atl. 526.

North Carolina.— Simmons *v.* Jarman, 122 N. C. 195, 29 S. E. 332; Branton *v.* O'Briant, 93 N. C. 99.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 393.

50. McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438; Blumenberg *v.* Myres, 32 Cal. 93, 91 Am. Dec. 560 (holding that where a tenant before the expiration of his term paid a month's rent, taking a receipt therefor, commencing at the expiration of his term, the new tenancy is one from month to month and not a renewal for a term); Pappe *v.* Trout, 3 Okla. 260, 41 Pac. 397; Shipman *v.* Mitchell, 64 Tex. 174.

51. Stoppelkamp *v.* Mangeot, 42 Cal. 316, holding that a landlord, by giving notice of a change of terms before a tenancy from month to month commenced, and following it up by a demand of rent and immediately thereafter of possession, repudiated the holding over of the original terms, and the claims of the parties were adverse and actually hostile from the moment of the expiration of the term and there never was a tenancy from month to month.

52. Seigel *v.* Neary, 38 Misc. (N. Y.) 297, 77 N. Y. Suppl. 854.

53. Hurd *v.* Whitsett, 4 Colo. 77.

54. Stoppelkamp *v.* Mangeot, 42 Cal. 316.

55. Sandford *v.* Clarke, 21 Q. B. D. 398, 52 J. P. 773, 57 L. J. Q. B. 507, 59 L. T. Rep. N. S. 226, 37 Wkly. Rep. 28. See also Towne *v.* Campbell, 3 C. B. 921, 16 L. J. C. P. 128, 54 E. C. L. 921.

56. *Indiana.*— Bright *v.* McOuat, 40 Ind. 521 [*quoting* 1 Washb. 370; Doe *v.* Richards, 4 Ind. 374].

Iowa.— Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721.

Massachusetts.— Cheever *v.* Pearson, 16 Pick. 266.

Michigan.— Shaw *v.* Hoffman, 25 Mich. 162.

North Carolina.— Mhoom *v.* Drizzle, 14 N. C. 414.

Texas.— Beauchamp *v.* Runnels, 35 Tex. Civ. App. 212, 79 S. W. 1105.

57. Sullivan *v.* Enders, 3 Dana (Ky.) 66; Squires *v.* Huff, 3 A. K. Marsh (Ky.) 17; Den *v.* Drake, 14 N. J. L. 523. See *supra*, V, A, 1.

58. See *infra*, VI, A, 2, a.

59. *Georgia.*— Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

unlawfully until the determination of his tenancy.[60] A tenant at will is the owner of the premises he occupies, until his tenancy has been terminated by notice from his landlord to vacate;[61] but he has no certain and indefeasible estate which he can assign or grant to any other person.[62] If he assigns his estate to another who enters upon the land, the latter is a disseizor and the landlord may bring trespass against him,[63] but a sublease is good between the parties thereto.[64] A tenant at will of a farm is bound to work it in a husband-like manner,[65] and whether he does so or not is a question of fact.[66] He is entitled to its annual fruits,[67] and may maintain trespass for breaking down the fence of his inclosure.[68]

2. Creation of Tenancy — a. In General. An estate at will, in the primary and technical sense of that expression, is created by grant or contract, whereby one man lets land to another to hold at the will of the lessor.[69] While generally created by express agreement, such a tenancy may arise by operation of law,[70] unless it is provided by statute that a tenancy at will cannot arise or be created without an express contract.[71] In some states no estate or interest in lands can be created or conveyed without writing, but an estate at will.[72] A tenancy at will is not created until the lessee enters.[73]

b. By Mere Permissive Occupancy. A permissive occupation of real estate, without rent reserved or paid, and without any time agreed upon to limit the occupation, is a tenancy at will,[74] and even if rent is reserved, but is not referable

Maine.— Smith *v.* Smith, 98 Me. 597, 57 Atl. 999; Wheeler *v.* Wood, 25 Me. 287.

Missouri.—Center Creek Min. Co. *v.* Frankenstein, 179 Mo. 564, 78 S. W. 785.

New York.— Marquart *v.* La Farge, 5 Duer 559.

South Carolina.— Jones *v.* Jones, 2 Rich. 542.

England.— Goodtitle *v.* Herbert, 4 T. R. 680.

60. Wheeler *v.* Wood, 25 Me. 287; Jones *v.* Jones, 2 Rich. (S. C.) 542.

61. Elliott *v.* State, 39 Tex. Cr. 242, 45 S. W. 711.

62. *Illinois.*— Packard *v.* Cleveland, etc., R. Co., 46 Ill. App. 244.

Maine.— Cunningham *v.* Holton, 55 Me. 33.

Massachusetts.— Holbrook *v.* Young, 108 Mass. 83; Cooper *v.* Adams, 6 Cush. 87.

New Hampshire.— Austin *v.* Thomson, 45 N. H. 113; Whittemore *v.* Gibbs, 24 N. H. 484.

New York.— Reckhow *v.* Schanck, 43 N. Y. 448.

Ohio.— Say *v.* Stoddard, 27 Ohio St. 478.

Tennessee.— Doak *v.* Donelson, 2 Yerg. 249, 24 Am. Dec. 485.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 401.

63. King *v.* Lawson, 98 Mass. 309; Reckhow *v.* Schanck, 43 N. Y. 448. But see Cunningham *v.* Holton, 55 Me. 33, holding that, although a tenancy at will is not assignable, the assignee becomes a tenant at will if the landlord sues him for use and occupation, and he pays the rent claimed.

64. Holbrook *v.* Young, 108 Mass. 83; Meier *v.* Thiemann, 15 Mo. App. 307.

65. Tuttle *v.* Langley, 68 N. H. 464, 39 Atl. 488.

66. Tuttle *v.* Langley, 68 N. H. 464, 39 Atl. 488.

67. St. Louis, etc., R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293; Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721; Tuttle *v.* Langley, 68 N. H. 464, 38 Atl. 488.

68. Brown *v.* Bates, Brayt. (Vt.) 230.

69. Den *v.* Drake, 14 N. J. L. 523.

70. *Georgia.*— Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

Kentucky.— Sullivan *v.* Enders, 3 Dana 66.

New Jersey.— Den *v.* Drake, 14 N. J. L. 523.

Utah.— Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155.

England.— Doe *v.* Cox, 11 Q. B. 122, 17 L. J. Q. B. 3, 63 E. C. L. 122.

All general and undefined tenancies, whether they originate simply by permission of the owner, or where the tenant has entered under a void lease or been let in pending an agreement for a purchase, or wherever there has been no express agreement between the parties as to the terms of the occupancy, provided the entry was a lawful one or with the privity and consent of the owner, are tenancies at will. Den *v.* Drake, 14 N. J. L. 523.

71. Blum *v.* Robertson, 24 Cal. 127; Bright *v.* McOuat, 40 Ind. 521.

72. Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228.

73. Hardy *v.* Winter, 38 Mo. 106; Pollock *v.* Kitrell, 4 N. C. 585.

74. *California.*— Jones *v.* Shay, 50 Cal. 508.

Connecticut.— Michael *v.* Curtiss, 60 Conn. 363, 22 Atl. 949; Perkins *v.* Perkins, (1886) 5 Atl. 373.

Illinois.— Herrell *v.* Sizeland, 81 Ill. 457, holding that a man and his wife, moving into the house of another, taking care of him until his death, paying no rent, and not agreeing upon any payment or term, are mere tenants at will.

Louisiana.— Bailey *v.* Ward, 32 La. Ann. 839.

Michigan.— Wilson *v.* Merrill, 38 Mich.

to a year or any aliquot part of a year, the tenancy is still one at will, and not from year to year.[75] In some states it is provided by statute that any person in possession of real estate with the assent of the owner is presumed to be a tenant at will until the contrary is shown.[76] Consent to the occupancy of land may be inferred from the actual possession for a long time without objection by the owner who has knowledge thereof.[77] Possession with the assent of the owner raises merely a presumption of a tenancy at will which may be rebutted.[78] When it is shown that the person in possession does not recognize the owner as landlord, but holds adversely, either as owner, or as the tenant of another whom he recognizes as owner, such presumption is rebutted.[79]

c. By Occupancy Under Agreement Indefinite as to Term. A leasehold interest for an uncertain and indefinite term is, unless converted into a periodical tenancy by a provision for the payment of rent at fixed times, an estate at will.[80]

707, holding that a divorced wife who with her husband's consent keeps possession of land to which he holds the legal title is at least a tenant at will.

New York.— Larned *v.* Hudson, 60 N. Y. 102; Sarsfield *v.* Healy, 50 Barb. 245; Jackson *v.* Bradt, 2 Cai. 169.

North Carolina.— Humphries *v.* Humphries, 25 N. C. 362.

Pennsylvania.— Keisel *v.* Earnest, 21 Pa. St. 90, holding that where permission is given by some of several cotenants to another cotenant to enter upon the premises held in common, no terms being fixed, it does not constitute him a tenant from year to year, but the most that can be made of such permission is that it constitutes a tenancy at will of the shares of those granting it.

Rhode Island.— Maher *v.* James Hanley Brewing Co., 23 R. I. 323, 50 Atl. 330; Johnson *v.* Johnson, 13 R. I. 467.

Utah.— Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155.

Wisconsin.— Cross *v.* Upson, 17 Wis. 618, holding that where a third party enters without an assignment of the lease, and without any agreement as to time of holding, or the rate and times of paying rent, he may be properly called an under-tenant at will as to the lessee.

England.— Lynes *v.* Snaith, [1899] 1 Q. B. 486, 68 L. J. Q. B. 275, 80 L. T. Rep. N. S. 122, 47 Wkly. Rep. 411; Braithwaite *v.* Hitchcock, 2 Dowl. P. C. N. S. 444, 6 Jur. 976, 12 L. J. Exch. 38, 10 M. & W. 494; Doe *v.* Wood, 14 M. & W. 682; Richardson *v.* Langridge, 4 Taunt. 128, 13 Rev. Rep. 570.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 403.

One occupying a house rent free by the sufferance of the owner is a tenant at will. Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195; Rex *v.* Jobling, R. & R. 391; Rex *v.* Collett, R. & R. 371.

A person entering on lands as a squatter, disclaiming title, holds as a tenant at will to the true owner, until something happens which may serve to notify him that the holder has ceased to hold as such tenant, and is holding adversely to him. Stamper *v.* Griffin, 20 Ga. 312, 65 Am. Dec. 628. See also Mattox *v.* Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64.

Under agreement to purchase or sell see *supra*, I, E, 2, d, e.

75. Braithwaite *v.* Hitchcock, 2 Dowl. P. C. N. S. 444, 6 Jur. 976, 12 L. J. Exch. 38, 10 M. & W. 494; Richardson *v.* Landridge, 4 Taunt. 128, 13 Rev. Rep. 570.

76. German State Bank *v.* Herron, 111 Iowa 25, 82 N. W. 430; Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721.

77. Perkins *v.* Perkins, (Conn. 1886) 5 Atl. 373; Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658; Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721. *Contra*, Center Creek Min. Co. *v.* Frankenstein, 179 Mo. 564, 78 S. W. 785, holding that a mere occupancy of land with the knowledge but without the consent of the owner does not create a tenancy at will.

78. Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721.

79. Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721; Bodwell Granite Co. *v.* Lane, 83 Me. 168, 21 Atl. 829, holding further that the fact that such tenant is allowed to remain in possession a year does not make him a tenant at will.

80. *Indiana.*— Doe *v.* Richards, 4 Ind. 374.

Massachusetts.— Gardner *v.* Hazleton, 121 Mass. 494; Murray *v.* Cherrington, 99 Mass. 229; Cheever *v.* Pearson, 16 Pick. 266.

Michigan.— Haines *v.* Beach, 90 Mich. 563, 51 N. W. 644; Holmes *v.* Wood, 88 Mich. 435, 50 N. W. 323; Hilsendegen *v.* Scheich, 55 Mich. 468, 21 N. W. 894.

Minnesota.— Sanford *v.* Johnson, 24 Minn. 172.

Missouri.— Amick *v.* Brubaker, 101 Mo. 473, 14 S. W. 627; Tarlotting *v.* Bokern, 95 Mo. 541, 8 S. W. 547 (holding that where defendant leased premises to plaintiff, but subsequently, by permission of plaintiff, took possession of them for no specified time, defendant became a tenant at will or by sufferance); Corby *v.* McSpadden, 63 Mo. App. 648 (holding that a lease "until the party of the first part is prepared to improve the ground with new buildings" creates only a tenancy at will).

New York.— Pfanner *v.* Sturmer, 40 How. Pr. 401, holding that a lease of a farm for "one year, with the privilege of five years . . . which term will end at the end of each (either) year if the same is sold any time

d. By Occupancy Under Agreement to Lease.[81] A party who goes into possession of land under an agreement to take a lease and without paying rent becomes a tenant at will.[82]

e. By Occupancy Under Invalid Lease or Sale.[83] Where one goes into possession of land under an invalid lease, his tenancy, at its inception, is a tenancy at will.[84] And so it is held that the status of one holding under an invalid lease,

during said term, without notice," creates a tenancy the duration of which is so uncertain that it is practically a tenancy at will.

Ohio.— Say *v.* Stoddard, 27 Ohio St. 478.

Pennsylvania.— Lyons *v.* Philadelphia, etc., R. Co., 209 Pa. St. 550, 58 Atl. 924.

Texas.— Beauchamp *v.* Runnels, 35 Tex. Civ. App. 212, 79 S. W. 1105.

Virginia.—Harrison *v.* Middleton, 11 Gratt. 527, holding that where a tenant agrees by a writing under seal that he will surrender possession when requested by a purchaser, he becomes a mere tenant at will or sufferance.

Wisconsin.—Webb *v.* Seekins, 62 Wis. 26, 21 N. W. 814.

United States.— Mitchell *v.* Murphy, 43 Fed. 425.

England.— Braithwaite *v.* Hitchcock, 2 Dowl. P. C. N. S. 444, 6 Jur. 976, 12 L. J. Exch. 38, 10 M. & W. 494; Richardson *v.* Langridge, 4 Taunt. 128, 13 Rev. Rep. 570.

Canada.— Reeve *v.* Thompson, 14 Ont. 499.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 404.

Tenancy from year to year see *supra*, V, A, 2, b.

Tenancy from month to month see *supra*, V, B, 2, a.

Lease as long as tenant pleases.—Where the owner of land agrees that another shall cultivate it during his life, or so long as he pleases, with a restriction as to the sale of it, a tenancy at will is created. Mhoon *v.* Drizzle, 14 N. C. 414.

A lease of land to be held until it is sold creates a tenancy at will only. Lea *v.* Hernandez, 10 Tex. 137.

The words "I give you a close . . . to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will. Rex *v.* Fillongley, 1 T. R. 458.

Occupancy until happening of a future contingent event.—A person occupying a house under a contract to pay rent until his wife recovers from a certain sickness is not a tenant at will. Doyle *v.* Gibbs, 6 Lans. (N. Y.) 180.

A lease of land so long as it may be used for a certain purpose does not constitute a tenancy at will nor a license. It is a grant to use and occupy. Gilmore *v.* Hamilton, 83 Ind. 196.

81. Tenancy from year to year see *supra*, V, A, 2, c.

82. *Georgia.*—Weed *v.* Lindsay, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33.

Illinois.— Dunn *v.* School Trustees, 39 Ill. 578.

Massachusetts.— Lyon *v.* Cunningham, 136 Mass. 532, holding that where the occupant has been let into possession under an oral contract for a written lease, solely in anticipation of the delivery of the lease, and without any other facts and circumstances from which an agreement can be inferred that he will hold as an ordinary tenant at will until its delivery, it is a fair legal construction of the contract and acts of the parties that the possession is taken and held on the condition that such a written lease as the contract calls for shall be delivered; and if the landlord refuses to execute and deliver such written lease, the tenant can then treat the contract as at an end, and the tenancy is thus determined by the non-performance of the condition as one of the incidents of the contract.

South Carolina.— Morris *v.* Palmer, 44 S. C. 462, 22 S. E. 726.

England.—Hamerton *v.* Stead, 3 B. & C. 478, 2 D. & R. 206, 3 L. J. K. B. O. S. 33, 27 Rev. Rep. 407, 10 E. C. L. 220; Pollen *v.* Brewer, 7 C. B. N. S. 371, 6 Jur. N. S. 509, 1 L. T. Rep. N. S. 9, 97 E. C. L. 371; Braithwaite *v.* Hitchcock, 2 Dowl. P. C. 444, 6 Jur. 976, 12 L. J. Exch. 38, 10 M. & W. 494; Anderson *v.* Midland R. Co., 3 El. & El. 614, 7 Jur. N. S. 411, 30 L. J. Q. B. 94, 3 L. T. Rep. N. S. 809, 107 E. C. L. 614; Chapman *v.* Towner, 9 L. J. Exch. 54, 6 M. & W. 100; Coatsworth *v.* Johnson, 55 L. J. Q. B. 220, 54 L. T. Rep. N. S. 520; Clayton *v.* Blakey, 8 T. R. 3, 4 Rev. Rep. 575.

Effect of payment of rent see *supra*, V, 2, A, c.

83. Tenancy from year to year see *supra*, V, A, 2, e.

84. *Michigan.*— McIntosh *v.* Hodges, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550.

Minnesota.— Goodwin *v.* Clover, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517.

Mississippi.— Ezelle *v.* Parker, 41 Miss. 520.

Missouri.—Lehman *v.* Nolting, 56 Mo. App. 549; Hoover *v.* Pacific Oil Co., 41 Mo. App. 317.

Nebraska.— Nickolls *v.* Barnes, 32 Nebr. 195, 49 N. W. 342.

Pennsylvania.— Jennings *v.* McComb, 112 Pa. St. 518, 4 Atl. 812.

One holding under a lease made by a receiver having no power to grant a lease, subject to the power of the state to determine the receivership at pleasure, is merely a tenant at will. State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369.

Entry into possession under an agreement voidable at the landlord's pleasure makes one a tenant at will. Smith *v.* Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122.

made pending occupation under a valid one, to take effect *in futuro*,[85] or under a void sale, is that of tenant at will.[86] The invalid lease in such a case governs as to the rent to be paid, but not as to the term or character of the tenancy.[87]

f. By Parol Lease or Contract.[88] A parol lease for more than one year, which is void under a statute of frauds, is ineffectual to vest any term whatever in the lessee named, and when he goes into possession under it, with the consent of the lessor, without any further agreement, he is a tenant at will merely.[89]

g. By Tenant Holding Over — (i) *After Expiration of Term.* Where a lease has expired by its own limitations, it is also held in some jurisdictions and under statutory provisions that the lessee holding over becomes a tenant at will,[90] provided such holding is with the assent of the landlord, so as to relieve it of the

85. Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

86. Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536; Bay St. Louis *v.* Hancock County, 80 Miss. 364, 32 So. 54.

87. Goodwin *v.* Clover, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517.

88. **Tenancy from year to year** see *supra*, V, A, 2, d.

89. *Alabama.* — Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499. But see since this case, under the statute in Alabama, Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318.

Georgia.— Nicholes *v.* Swift, 118 Ga. 922, 45 S. E. 708; Petty *v.* Kennon, 49 Ga. 468.

Illinois.— Packard *v.* Cleveland, etc., R. Co., 46 Ill. App. 244.

Maine.— Danforth *v.* Cushing, 77 Me. 182; Thomas *v.* Sanford Steamship Co., 71 Me. 548; Goodenow *v.* Allen, 68 Me. 208; Robinson *v.* Deering, 56 Me. 357; Withers *v.* Larrabee, 48 Me. 570; White *v.* Elwell, 48 Me. 360, 77 Am. Dec. 231.

Massachusetts.— Sprague *v.* Quinn, 108 Mass. 553; Howard *v.* Merriam, 5 Cush. 563; Kelly *v.* Waite, 12 Metc. 300; Hingham *v.* Sprague, 15 Pick. 102 (holding that where a town by vote authorized the selectmen to lease certain premises, and the selectmen leased the same by parol, the lessee became a tenant at will); Ellis *v.* Paige, 1 Pick. 43.

Michigan.— Barrett *v.* Cox, 112 Mich. 220, 70 N. W. 446; Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122 (holding that an arrangement by parol between the owner of an undivided half of premises, which is in the possession of a tenant in common, and another, for the letting by the latter to the former of an undivided fourth of said premises at a specified rental per annum, payable quarterly in advance without specifying any period of time, if it can be likened at all to an ordinary lease and be governed by analogies, is at most but a lease at will in its origin); Huyser *v.* Chase, 13 Mich. 98; Woodrow *v.* Michael, 13 Mich. 187.

Missouri.—Allen *v.* Mansfield, 82 Mo. 688.

New York.— Talamo *v.* Spitzmiller, 120 N. Y. 37, 23 N. E. 980, 17 Am. St. Rep. 607, 8 L. R. A. 221.

North Carolina.— Richardson *v.* Thornton, 52 N. C. 458.

Pennsylvania.— Dumn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800; Clark *v.* Smith, 25 Pa. St. 137; Stover *v.* Cadwallader, 2 Pennyp. 117.

Tennessee.— Duke *v.* Harper, 6 Yerg. 280, 27 Am. Dec. 462.

Vermont.— Blanchard *v.* Bowers, 67 Vt. 403, 31 Atl. 848.

England.— Dossee *v.* East India Co., 1 L. T. Rep. N. S. 345, 8 Wkly. Rep. 245; Goodtitle *v.* Herbert, 4 T. R. 680.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 409. See also *supra*, V, A, 2, d.

A parol license to build a bridge on the land of another has only the effect of a tenancy at will. Couch *v.* Burke, 2 Hill (S. C.) 534.

A parol gift of land creates only a tenancy at will. Jackson *v.* Rogers, 1 Johns. Cas. (N. Y.) 33; Jackson *v.* Rogers, 2 Cai. Cas. (N. Y.) 314.

Verbal agreement for lease.—Where one verbally agrees to lease a room for one year providing he himself obtains a renewal of his ground lease, and under this agreement the tenant takes possession, but the lease is never executed or tendered to him, he is a tenant at will only and not a tenant from year to year. Childers *v.* Lee, 5 N. M. 576, 25 Pac. 781, 12 L. R. A. 67.

In Massachusetts under Laws (1783), c. 37, § 1, all parol leases, whether for a certain or uncertain time, or whether an annual rent be reserved or not, will have the effect of leases at will. Ellis *v.* Paige, 1 Pick. 43.

In Pennsylvania where land is sold under a judgment against the lessor, a parol lease not exceeding three years is as valid as any other, notwithstanding the statute of frauds; and a lessee of a part of the land becomes as completely a tenant at will of the purchaser at the sheriff's sale as he would be if the subject of the demise were the lessor's entire interest. Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183.

90. *Iowa.*— German State Bank *v.* Herron, 111 Iowa 25, 82 N. W. 430.

Maine.— Kendall *v.* Moore, 30 Me. 327; Bennock *v.* Whipple, 12 Me. 346, 28 Am. Dec. 186.

Michigan.— Benfey *v.* Congdon, 40 Mich. 283.

Pennsylvania.— Overdeer *v.* Lewis, 1 Watts & S. 90, 37 Am. Dec. 440.

South Carolina.— Matthews *v.* Hipp, 65 S. C. 162, 44 S. E. 577, wherever it appears that holding over the term of a year under

character of a mere holding by sufferance,[91] or to rebut any presumption that the tenancy is continued for another year.[92]

(II) *After Forfeiture of Lease.* Where a lease contains a condition that on a breach of any of its covenants it shall become void, a tenant remaining in possession after a breach, by permission of his landlord, is a tenant at will;[93] but if it is provided that the lease shall not thereby become void but voidable at the election of the landlord, the estate of the tenant still continues subject to the right of reëntry.[94]

h. Grantor or Mortgagor Continuing in Possession After Conveyance. A grantor or mortgagor continuing in possession of the premises after the conveyance or mortgage is a tenant at will of the grantee or mortgagee.[95]

i. Mortgagor in Possession After Foreclosure. After the foreclosure of a mortgage, the mortgagor becomes a tenant at will to the mortgagee.[96]

j. Judgment Debtor Holding Over After Sale. Where a judgment debtor whose land had been sold on execution against him holds over after the sale with the consent of the purchaser, he is a tenant at will.[97]

k. Lessee Holding Over After Sale Under Execution. A lessee of lands, encumbered with a judgment lien prior to the lease, becomes a tenant at will to the sheriff's vendee, after a sale under such lien.[98]

B. Tenancy at Sufferance — 1. Nature and Incidents of Tenancy. A tenancy at sufferance arises where one comes into possession of land by a lawful title, but keeps it afterward without any title at all.[99] It differs from a tenancy at will in that a tenant at sufferance enters lawfully and holds over wrongfully without the landlord's assent or dissent, whereas the tenant at will holds over by the landlord's permission.[1] A tenant at sufferance is a wrong-doer, and in possession as a

a parol lease for a longer term, which lease is invalid as to the term beyond one year, is at its inception a holding at will. See also Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 410.

Creation of tenancy from year to year see *supra*, V, A, 2, f.

91. Kuhn *v.* Smith, 125 Cal. 615, 58 Pac. 204, 73 Am. St. Rep. 79; Perine *v.* Teague, 66 Cal. 446, 6 Pac. 84; Salas *v.* Davis, 120 Ga. 95, 47 S. E. 644. But see Dubuque *v.* Miller, 11 Iowa 583.

Tenancy at sufferance see *infra*, VI, B, 2, a.

The English rule required assent of the landlord, or some new agreement, express or implied, to continue the tenancy under the lease, and has been adopted in other jurisdictions. See Neumeister *v.* Palmer, 8 Mo. App. 491; Jones *v.* Shears, 4 A. & E. 832, 2 Harr. & W. 43, 5 L. J. K. B. 153, 6 N. & M. 428, 31 E. C. L. 365; Waring *v.* King, 11 L. J. Exch. 49, 8 M. & W. 571; Leighton *v.* Vanwart, 17 N. Brunsw. 489. Thus where the holding over was wrongful (that is, without the landlord's consent), and the lease was for a definite term, it was considered that the landlord could recover only for use and occupation, but if the tenancy was from year to year and the tenant held over a part, the landlord could recover for the whole year (Ibbs *v.* Richardson, 9 A. & E. 849, 3 Jur. 102, 8 L. J. Q. B. 126, 1 P. & D. 618, 36 E. C. L. 443); and under a parol demise good for two years, if the lessee held over into the third year, he was liable for that year's rent (Legg *v.* Strudwick, 2 Salk. 414); but if the tenant held over a term of a year with the landlord's consent, the parties were supposed to have renewed the old lease which was to hold for a year (Right *v.* Darby, 1 T. R. 159, 1 Rev. Rep. 169).

In **Massachusetts** while a mere continuance in possession under the old lease makes a party a tenant at sufferance, if there is a new contract shown or inferable from the dealings of the parties, the estate becomes one at will. Emmons *v.* Scudder, 115 Mass. 367; Edwards *v.* Hale, 9 Allen 462.

92. Landsberg *v.* Tivoli Brewing Co., 132 Mich. 651, 94 N. W. 197; Benfey *v.* Congdon, 40 Mich. 283. See also *supra*, IV, C, 3, f, (II); and *infra*, IX, A.

93. Garner *v.* Hannah, 6 Duer (N. Y.) 262. See also Kuhn *v.* Kuhn, 70 Iowa 682, 28 N. W. 541.

94. Garner *v.* Hannah, 6 Duer (N. Y.) 262.

95. Currier *v.* Earl, 13 Me. 216; Bennett *v.* Robinson, 27 Mich. 26; Pettengill *v.* Evans, 5 N. H. 54; Doe *v.* Maisey, 8 B. & C. 767, 3 M. & R. 107, 15 E. C. L. 377.

96. Waller *v.* Harris, 7 Paige (N. Y.) 167.

97. Munson *v.* Plummer, 59 Iowa 120, 12 N. W. 806; Dobbins *v.* Lusch, 53 Iowa 304, 5 N. W. 205; Nichols *v.* Williams, 8 Cow. (N. Y.) 13; Jackson *v.* Sternbergh, 1 Johns. Cas. (N. Y.) 153.

98. Kane *v.* Mink, 64 Iowa 84, 19 N. W. 852; Bittinger *v.* Baker, 29 Pa. St. 66, 70 Am. Dec. 154.

99. 2 Blackstone Comm. 150; and cases cited *infra*, note 8 *et seq.*

1. Willis *v.* Harrell, 118 Ga. 906, 45 S. E.

result of his landlord's laches or neglect,[2] and acquires no permanent rights because the latter neglects to disturb his possession.[3] A tenant at sufferance has no estate which he can assign, and if he does so to one who enters upon the land, the latter is a disseizor, and the landlord may have an action of trespass against him.[4] At common law a tenant at sufferance was not liable for the rents and profits,[5] but this rule has been changed by statute in some states.[6]

2. Creation of Tenancy — a. In General. A tenancy by sufferance arises only when a person comes into possession lawfully, but holds over wrongfully after the termination of his interest.[7] This holding over may, however, arise in a variety of instances, the most common of which is when a tenant for a term certain holds over after his term without his landlord's assent.[8] A lessee at will, holding over after the determination of his estate, is likewise a tenant at sufferance.[9] Since a tenancy at sufferance exists not by the consent, but by the laches of the owner, where there has been no laches, there can be no tenancy at sufferance.[10] Other examples of tenancies at sufferance are: Tenants at will whose estates have been determined by alienation,[11] by a demise for years,[12] or by the death of the

794; Finney *v.* St. Louis, 39 Mo. 177. But for the general rule as to the option of the landlord to treat a tenant who holds over his term as a trespasser or as tenant see *supra*, IV, C, 3, f, (II), (A), (2).

2. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

3. International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515; Texas, etc., R. Co. *v.* Torrey, (Tex. App. 1891) 16 S. W. 547.

4. Reckhow *v.* Schanck, 43 N. Y. 448.

5. Martin *v.* Allen, 67 Kan. 758, 74 Pac. 249; Flood *v.* Flood, 1 Allen (Mass.) 217; Delano *v.* Montague, 4 Cush. (Mass.) 42.

6. Martin *v.* Allen, 67 Kan. 758, 74 Pac. 249; Flood *v.* Flood, 1 Allen (Mass.) 217.

7. See *supra*, VI, B, 1.

8. *California.*— Hauxhurst *v.* Lobree, 38 Cal. 563; Uridias *v.* Morrell, 25 Cal. 31, holding further that an agreement made between a landlord and a tenant at sufferance, that the latter shall keep possession of the premises for a fixed term, and, if a certain contingency happens, shall pay rent thereafter, gives the tenant a right to the possession of the premises to the end of the term, and may set up any defense of an action against the tenant for holding over.

District of Columbia.— Spalding *v.* Hall, 6 D. C. 123.

Georgia.— Willis *v.* Harrell, 118 Ga. 906, 25 S. E. 794; Kimbrough *v.* Kimbrough, 99 Ga. 134, 25 S. E. 176; Sutton *v.* Hiram Lodge, 83 Ga. 770, 10 S. E. 585, 6 L. R. A. 703.

Illinois.— Brown *v.* Smith, 83 Ill. 291.

Massachusetts.— Sanders *v.* Richardson, 14 Pick. 522.

New Hampshire.— Russell *v.* Fabyan, 34 N. H. 218.

New Jersey.— Poole *v.* Engelke, 61 N. J. L. 24, 38 Atl. 823; Moore *v.* Smith, 56 N. J. L. 446, 29 Atl. 159.

New York.— Jackson *v.* McLeod, 12 Johns. 182; Jackson *v.* Parkhurst, 5 Johns. 128; Wood *v.* Hyatt, 4 Johns. 313; Hyatt *v.* Wood, 4 Johns. 150, 4 Am. Dec. 258. In New York it is now provided by statute that a tenant who holds over a definite term for a brief period without the consent of his landlord does not thereby become a tenant at sufferance, but a trespasser. Smith *v.* Littlefield, 51 N. Y. 539; Livingston *v.* Tanner, 14 N. Y. 64 [*reversing* 12 Barb. 481].

Ohio.— Worthington *v.* Globe Rolling Mill, 6 Ohio Dec. (Reprint) 1038, 9 Am. L. Rec. 693, 6 Cinc. L. Bul. 235.

Pennsylvania.—Williams *v.* Ladew, 171 Pa. St. 369, 33 Atl. 329 (holding that tenants holding over after the expiration of a lease for a fixed term of years are strictly tenants at sufferance, although the lessors may treat them either as trespassers or as tenants from year to year, or, by permitting a holding over to run on, may turn the tenancy into one at will); Fitzpatrick *v.* Childs, 2 Brewst. 365, 6 Phila. 135.

Rhode Island.—Wood *v.* Page, 24 R. I. 594, 54 Atl. 372.

Texas.— International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515; Texas, etc., R. Co. *v.* Torrey, (App. 1891) 16 S. W. 547.

Wyoming.— McNamara *v.* O'Brien, 2 Wyo. 447.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 429.

9. Brown *v.* Smith, 83 Ill. 291; Creech *v.* Crockett, 5 Cush. (Mass.) 133; Rising *v.* Stannard, 17 Mass. 282; Keay *v.* Goodwin, 16 Mass. 1.

10. Moore *v.* Morrow, 28 Cal. 551, holding that a tenant under a written lease does not become a tenant at sufferance immediately upon the expiration of his term, when his lessor enters at that time upon the premises to assert his rights as owner.

11. Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616; Marsters *v.* Cling, 163 Mass. 477, 40 N. E. 763; Winter *v.* Stevens, 9 Allen (Mass.) 526; Benedict *v.* Morse, 10 Metc. (Mass.) 223; Hollis *v.* Pool, 3 Metc. (Mass.) 350 (holding that where a lease for years is made by parol, and the lessee agrees to quit within the term, if the demised premises shall be sold, he becomes a tenant at sufferance if he holds over after the sale); Kinsley *v.* Ames, 2 Metc. (Mass.) 29.

12. Hooton *v.* Holt, 139 Mass. 54, 29 N. E.

lessor;[13] under-tenants after expiration of the original lease;[14] a grantor holding over after a conveyance;[15] a mortgagor in possession after condition broken, or foreclosure;[16] one in possession of land under a parol contract for its purchase;[17] and one who enters upon land under a contract with the owner's agent, which is never ratified.[18]

b. By Occupancy of Premises as Incident to Employment. Where one occupies a house as an employee, without the relation of landlord and tenant being created, the continued occupancy of the premises after the termination of the employment is sufficient to create a tenancy at sufferance.[19] In some cases, however, the duration of the holding seems to enter into the question, and it is held that a tenancy at will or by sufferance does not spring up immediately upon the termination of the service. To have that effect the subsequent occupancy must be sufficiently long to warrant an inference of consent to a different holding.[20]

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

A. Description, Extent, and Condition — 1. Sufficiency of Description. Where the words employed to describe a tract of land leased, together with the situation of parties, the subject-matter, and the circumstances, do not show what

221; Hildreth *v.* Conant, 10 Metc. (Mass.) 298.

13. Reed *v.* Reed, 48 Me. 388.

14. *Illinois.*— Brown *v.* Smith, 83 Ill. 291.

Maine.— Wheeler *v.* Wood, 25 Me. 287.

Massachusetts.— Evans *v.* Reed, 5 Gray 308.

Missouri.— Meier *v.* Thiemann, 15 Mo. App. 307.

Nebraska.— Guthmann *v.* Vallery, 51 Nebr. 824, 71 N. W. 734, 66 Am. St. Rep. 475.

New York.— Reckhow *v.* Schanck, 43 N. Y. 448.

Wisconsin.— Cross *v.* Upson, 17 Wis. 618, holding that if a third party enters without an assignment of the lease, and without any agreement as to the time of holding or the rate or times of paying rent, he may, by reason of a covenant against subletting without consent in writing, and a condition for forfeiture in case of violation thereof, be regarded as a quasi-tenant at sufferance.

The lessee of a tenant for life is charged with notice of his landlord's title, and on the termination of the life-estate he becomes a tenant at sufferance. Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

15. Work *v.* Brayton, 5 Ind. 396; Bennett *v.* Robinson, 27 Mich. 26, holding further that the right of possession transferred to the grantee by a deed absolute by its face is not defeated by a subsequent contract to reconvey in the future upon certain conditions, which is silent upon the subject of possession; and the grantor, holding over, becomes a tenant either at sufferance or at will of his grantee.

16. Jackson *v.* Warren, 32 Ill. 331 (holding that where a mortgagor is left in possession after condition broken, and conveys the property, the purchaser is a tenant at sufferance); Johnson *v.* Donaldson, 17 R. I. 107, 20 Atl. 242; Stedman *v.* Gassett, 18 Vt. 346; Wilson *v.* Hooper, 13 Vt. 653 (holding that a mortgagor is a tenant by mortgage, and not strictly a tenant at will or at sufferance); Tucker *v.* Keeler, 4 Vt. 161; Doe *v.* Maisey, 8 B. & C. 767, 3 M. & R. 107, 15 E. C. L. 377.

District of Columbia.— Under the Landlord and Tenant Act of the District of Columbia, in case of the sale of real property under a deed of trust, the purchaser as matter of law becomes vested with the title; and if the person who executes the trust deed remains in possession of the premises, without any agreement to that effect, he becomes, by operation of said act, tenant by sufferance to such purchaser. Luchs *v.* Jones, 1 McArthur 345.

After a sale of mortgaged premises by the mortgagee or his assigns pursuant to a power of sale contained in the conveyance, the mortgagor, if he thereafter remains in possession, is a tenant at sufferance. Kinsley *v.* Ames, 2 Metc. (Mass.) 29.

17. Dail *v.* Freeman, 92 N. C. 351.

18. Smith *v.* Singleton, 71 Ga. 68.

19. Eichengreen *v.* Appel, 44 Ill. App. 19; People *v.* Annis, 45 Barb. (N. Y.) 304. See also McGee *v.* Gibson, 1 B. Mon. (Ky.) 105, holding that after a cessation of his services he becomes a strict tenant at will, who has by his own act terminated the tenancy, and is at most entitled only to a reasonable time for removing from the house.

Relation of landlord and tenant from contract of employment see *supra*, I, D, 2.

20. Alpine Tp. School Dist. No. 11 *v.* Batsche, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576; Kerrains *v.* People, 60 N. Y. 221, 19 Am. Rep. 158; Jennings *v.* McCarthy, 16 N. Y. Suppl. 161; Bristor *v.* Burr, 12 N. Y. St. 638 (holding that a pastor of a church, occupying a parsonage without objection, for two months after he was suspended, becomes a tenant by sufferance). See also Doyle *v.* Gibbs, 6 Lans. (N. Y.) 180, holding that where the duration of the occupancy depends upon a contingent future event the relation of tenancy by sufferance does not arise between the parties.

tract was intended, the lease will be held to be void for the uncertainty of the description.[21]

2. Extent of Premises. The general rule is that a description of premises in a lease of a building by the street number includes so much of the lot upon which the building is situated as is necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more.[22]

3. Property Included — a. In General. The general rule is that the lease of a building *eo nomine* is a lease of the land on which the building stands.[23] The question whether a particular place is a part of the demised premises does not depend exclusively upon the question of boundary, but also upon the question of intention, which may be determined by bringing in aid of the words of the demise such extrinsic facts explanatory of the subject and of the rights of the parties as may show the meaning of the instrument and the intention of the parties.[24] But a reservation in the lease in favor of the lessor must be so construed as to enable

21. Bingham *v.* Honeyman, 32 Oreg. 129, 51 Pac. 735, 52 Pac. 755; Goodsell *v.* Rutland-Canadian R. Co., 75 Vt. 375, 56 Atl. 7, where a lease granted the right to quarry stone from a parcel of land "beginning eighty rods easterly of the southwest part of my farm, and extending northerly to the north line of land owned by me, eighty rods east of the lake shore," and it was held that the lease was void for uncertainty of the description of the point of beginning. See also *supra*, II, A, 2, d.

22. *Alabama.*— McMillan *v.* Solomon, 42 Ala. 356, 94 Am. Dec. 654.

Illinois.— Cluett *v.* Sheppard, 131 Ill. 636, 23 N. E. 589 (holding that in the lease of the first loft of a building, the clause "tenant to have privilege of storing a reasonable number of cases in the basement" does not amount to a lease of any part of the basement); Hosher *v.* Hestermann, 58 Ill. App. 265 (holding, however, that the rule that a demise of premises by street numbers includes stables on the rear end of the lot is not applicable to corner lots in a business portion of the city occupying frontage on two streets, and on which are situated dwellings and business houses, separate and distinct, fronting upon the different streets); Patterson *v.* Graham, 40 Ill. App. 399 [*affirmed* on other grounds in 140 Ill. 531, 30 N. E. 460].

Massachusetts.— Houghton *v.* Moore, 141 Mass. 437, 6 N. E. 517; Sargent *v.* Adams, 3 Gray 72, 63 Am. Dec. 718, holding that parol evidence is admissible to show that the lease of the "Adams House" for a term of years includes only so much of the building as is used as a hotel, and does not include shops occupying all the ground floor.

Michigan.— Brown *v.* Schiappacasse, 115 Mich. 47, 72 N. W. 1096, where it was held that under the circumstances the cellar alone was rented to the lessee and a mere license given to occupy the side of the store.

Minnesota.— Lanpher *v.* Glenn, 37 Minn. 4, 33 N. W. 10.

New Jersey.—Morris *v.* Kettle, 56 N. J. Eq. 826, 34 Atl. 376 [*affirmed* in 42 Atl. 1117]; Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879. And see Hill *v.* Shultz, 40 N. J. Eq. 164.

New York.— Tumbridge *v.* Read, 109 N. Y. 641, 16 N. E. 534. See also Jackson *v.* Gardner, 8 Johns. 394.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 435.

Compare Harris *v.* Dub, 57 Ga. 77.

23. McMillan *v.* Solomon, 42 Ala. 356, 94 Am. Dec. 654; Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893 [*affirming* 70 Ill. App. 349]; Hooper *v.* Farnsworth, 128 Mass. 487; Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401; Lanpher *v.* Glenn, 37 Minn. 4, 33 N. W. 10. And see Sherman *v.* Williams, 113 Mass. 481, 18 Am. Rep. 522, holding that the lease of a "building" conveys the land under the eaves, if such land is owned by the lessor.

By the "curtilage" which passes with the demise of a house is meant the courtyard in the front or rear, or at the side thereof, or any piece of ground lying near, and inclosed and used with the same, and necessary for its convenient occupation. People *v.* Gedney, 10 Hun (N. Y.) 151.

24. *Georgia.*— McBurney *v.* McIntyre, 38 Ga. 261.

Kentucky.—Trimble *v.* Ward, 14 B. Mon. 8.

Louisiana.— Wood *v.* Sala y Fabrigas, 105 La. Ann. 1, 29 So. 367, holding that a name such as "Zeringue's Landing, under Nine Mile Point" sufficiently describes, between the parties to an agreement of lease, the object leased, when other contracts for the same thing have been made between them, or the name has come to designate a particular thing in the community.

Massachusetts.— Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741; Houghton *v.* Moore, 141 Mass. 437, 6 N. E. 517; Oliver *v.* Dickinson, 100 Mass. 114.

Michigan.— Hamilton *v.* Ames, 74 Mich. 298, 41 N. W. 930; Chesebrough *v.* Pingree, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529. See also Hartford Iron Min. Co. *v.* Cambria Min. Co., 80 Mich. 491, 45 N. W. 351.

Nebraska.— Sweesey *v.* Durnall, 23 Nebr. 531, 37 N. W. 459.

New York.— Lush *v.* Druse, 4 Wend. 313.

Tennessee.— Swan *v.* Castleman, 4 Baxt. 257.

Vermont.— Alger *v.* Kennedy, 49 Vt. 109, 24 Am. Rep. 117.

the lessee to conduct the business for which he leased the premises.[25] Where it is shown by the terms of the lease or by the surrounding circumstances that it was the intention of the parties that the building only, or an apartment or room therein, should pass, the lessee takes no interest in the land.[26] The lease of part of a building as a rule passes with it as incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised.[27] Thus, if a building consisting of several apartments is so constructed that all the occupants must enter and depart by the same hall and stairway, such hall and stairway are appurtenant to the apartments leased and become a way of necessity upon the lease of part of the building.[28] The rule is otherwise, however, if the building is so constructed that the lessee can readily use another entrance and stairway, or can construct one in his own part of the building.[29] However, a lease demising a portion of a building does not give the lessee any interest in the land, beyond that directly connected with the leased apartments, as such a lease is a letting of the apartments and not of land.[30]

United States.— Brown *v.* Spillman, 45 Fed. 291.

England.— Doe *v.* Bent, 1 T. R. 701, 1 Rev. Rep. 367.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 435.

For sufficient descriptions of property demised see Indianapolis Natural Gas Co. *v.* Pierce, 25 Ind. App. 116, 56 N. E. 137; Diamond Plate-Glass Co. *v.* Tennell, 22 Ind. App. 132, 52 N. E. 168; Rankin County *v.* Busick, (Miss. 1897) 22 So. 801; Dyne *v.* Nutley, 14 C. B. 122, 2 C. L. R. 81, 78 E. C. L. 122; Kingsmill *v.* Millard, 3 C. L. R. 1022, 11 Exch. 313; Maitland *v.* Mackinnon, 1 Hopw. & C. 607, 9 Jur. N. S. 255, 32 L. J. Exch. 49, 7 L. T. Rep. N. S. 427, 11 Wkly. Rep. 237; Kerslake *v.* White, 2 Stark. 508, 20 Rev. Rep. 731, 3 E. C. L. 508.

25. Dexter *v.* Manley, 4 Cush. (Mass.) 14; Hay *v.* Cumberland, 25 Barb. (N. Y.) 594; Dodson *v.* Hall, 11 Heisk. (Tenn.) 198. And see Hinton *v.* Fox, 3 Litt. (Ky.) 380; Combs *v.* Vanhorne, 3 Litt. (Ky.) 187 (holding that where a tenant enters under a lease on which the lessor reserves a right of selling or leasing a part of the premises to others, the tenant until such subsequent sale is in possession of the whole land leased); Jewett *v.* Steer, 6 Cush. (Mass.) 99; Myers *v.* Bolton, 89 Hun (N. Y.) 342, 35 N. Y. Suppl. 577; Jackson *v.* Barringer, 15 Johns. (N. Y.) 471; Baldwin *v.* Richardson, (Tex. Civ. App. 1905) 87 S. W. 746.

26. Shawmut Nat. Bank *v.* Boston, 118 Mass. 125; Stockwell *v.* Hunter, 11 Metc. (Mass.) 448, 45 Am. Dec. 220, where there was a demise of the basement rooms of a building several stories in height, without a stipulation by the lessor or lessee for rebuilding in case of fire or other casualty, and it was held that this gave the lessee no interest in the land, although he paid all the rent in advance.

27. Kearines *v.* Cullen, 183 Mass. 298, 67 N. E. 243 (holding that a tenant at will has possession and control of the demised premises, including the steps leading thereto, making the house accessible from the public way); Miller *v.* Fitzgerald Dry-Goods Co., 62 Nebr. 270, 86 N. W. 1078; Kitchen Bros. Hotel Co. *v.* Philbin, 2 Nebr. (Unoff.) 340, 96 N. W. 487; Dwyer *v.* Rich, Ir. R. 6 C. L. 144; Carlisle Café Co. *v.* Muse, 67 L. J. Ch. 53, 77 L. T. Rep. N. S. 515, 46 Wkly. Rep. 107 (holding that a lease of rooms on a floor is a lease of a separate dwelling and includes the outer wall so far as it is solely appropriate to the rooms to let); Curling *v.* Mills, 12 L. J. C. P. 316, 6 M. & G. 173, 7 Scott N. R. 709, 46 E. C. L. 173; Doe *v.* Osborne, 9 L. J. C. P. 313, 4 Jur. 941.

28. Gooch *v.* Furman, 62 Ill. App. 340 (holding, however, that the fact that a tenant of premises has a right to the use of a passageway for purposes incidental to ordinary housekeeping does not give him the right to use the same as a way of access to a gymnasium used by a school of boys, or to put it to use as an adjunct to any obnoxious business contrary to the wish of others having the right also to use such way); Browning *v.* Dalesme, 5 Sandf. (N. Y.) 13. See also Spies *v.* Damm, 54 How. Pr. (N. Y.) 293 (holding that the iron grating in front of a city building which protects the windows of and admits light and air to the basement is an incident to the tenancy of the basement and necessary to a beneficial enjoyment of it, and that the tenant of the basement has an action against the tenant of the ground floor if the latter obstructs the grating by putting a show-case before it); Cowen *v.* Truefitt, [1898] 2 Ch. 551, 67 L. J. Ch. 695, 79 L. T. Rep. N. S. 348, 47 Wkly. Rep. 29.

29. Vidvard *v.* Cushman, 23 Hun (N. Y.) 434; Agate *v.* Lowenbein, 4 Daly (N. Y.) 62; Weil *v.* Munro, 3 N. Y. Suppl. 825.

30. *Kansas.*— Guild *v.* Ohio Lodge No. 132, I. O. O. F., 6 Kan. App. 67, 49 Pac. 684.

Missouri.— Seidel *v.* Bloeser, 77 Mo. App. 172.

New Jersey.— Klie *v.* Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

New York.— Rhein *v.* Miller, 31 Misc. 816, 63 N. Y. Suppl. 959.

England.— Minton *v.* Geiger, 28 L. T. Rep. N. S. 449.

b. Appurtenances.[31] The general rule is that by the lease of a building everything which belongs to it, or is used with and appurtenant to it, and which is reasonably essential to its enjoyment, passes as incident to the principal thing, and as a part of it, unless specially reserved.[32] However, it has been held that the mere presence of water mains upon the leased premises does not bind the landlord to furnish water to the tenant,[33] or the presence of machinery on the leased premises bind the lessor to furnish power therefor,[34] or the presence of an elevator in the building require the lessor to permit the use thereof by the lessee,[35] in the absence of a special stipulation to that effect.[36]

31. Implied right of lessees to easements see EASEMENTS.

Wharf as appurtenant to leased premises see WHARVES.

Lessors and lessees as parties to actions for injuries to easements see EASEMENTS.

32. *Illinois.*—Parish *v.* Vance, 110 Ill. App. 50.

Indiana.— Bell *v.* Golding, 27 Ind. 173, holding that the word "furniture" employed in a lease of "a hotel with the furniture therein" includes that which furnishes or with which anything is furnished or supplied, whatever must be supplied to a house or room or the like, to make it habitable, convenient, or agreeable; goods, vessels, utensils, and other appendages necessary or convenient for housekeeping; whatever is added to the interior of a house or apartment for use or convenience.

Kentucky.— Patteson *v.* Garret, 7 J. J. Marsh. 112.

Louisiana.— New Orleans City R. Co. *v.* McCloskey, 35 La. Ann. 784, right to ingress and egress.

Massachusetts.— Hooper *v.* Farnsworth, 128 Mass. 487, holding that a lease of a "store" includes to the middle of a private way in the rear, the fee of which is in the lessor.

New Hampshire.— Riddle *v.* Littlefield, 53 N. H. 503, 16 Am. Rep. 388.

New York.— Hall *v.* Irvin, 78 N. Y. App. Div. 107, 79 N. Y. Suppl. 614 [*reversing* 38 Misc. 123, 77 N. Y. Suppl. 91]; Grauel *v.* Soeller, 52 Hun 375, 5 N. Y. Suppl. 254; Newman *v.* Metropolitan El. R. Co., 10 N. Y. St. 12.

Ohio.— A. H. Pugh Printing Co. *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 557, 5 Ohio N. P. 332.

Pennsylvania.— See Jackson *v.* Boggs, 28 Pittsb. Leg. J. N. S. 364.

South Dakota.— Edmison *v.* Lowry, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275.

United States.— Philadelphia, etc., Coal, etc., Co. *v.* New York, 21 Fed. 97.

England.— Kooystra *v.* Lucas, 5 B. & Ald. 830, 1 D. & R. 506, 24 Rev. Rep. 575, 7 E. C. L. 451; Civil Service Musical Instrument Assoc. *v.* Whiteman, 63 J. P. 441, 68 L. J. Ch. 484, 80 L. T. Rep. N. S. 685; Skull *v.* Glenister, 11 Wkly. Rep. 368.

Canada.— Jones *v.* Hunter, 1 N. Brunsw. Eq. 250.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 437.

Trade fixtures.— Where the lease from plaintiff to defendant in renewal of a former lease was of land and buildings only, making no mention of trade fixtures upon the premises, which belonged to defendant, it was held that the lease should not be construed to cover such fixtures. Beloit Second Nat. Bank *v.* O. E. Merrill Co., 69 Wis. 501, 34 N. W. 514.

A restaurant conducted by the lessor of an apartment in the same building is not such an incidental and indispensable appurtenance to the leased premises that its mismanagement or removal would constitute an infraction of the lease, the instrument itself being silent in regard thereto. Gale *v.* Heckman, 16 Misc. (N. Y.) 376, 38 N. Y. Suppl. 85.

In Ohio it has been held that a lease conveys no right to a private way, although it may adjoin the premises. Taylor *v.* Bailey, Wright 646.

33. Sheldon *v.* Hamilton, 22 R. I. 230, 47 Atl. 316, 84 Am. St. Rep. 839.

Bakery.—A lease of a portion of certain premises "to be used as a bakery" includes the right to water as incidental and necessary to the business of a bakery; and the landlord, having permitted the lessee to connect the leased part of the premises with the water main in the part not leased, will be enjoined from afterward cutting off such connection. Gans *v.* Hughes, 14 N. Y. Suppl. 930.

34. Shorey *v.* Farrell, 114 Mass. 441; Penn Iron Co. *v.* Diller, 113 Pa. St. 635, 6 Atl. 272. Watkins *v.* Greene, 22 R. I. 34, 46 Atl. 38, holding that the word "appurtenances" used in a lease will not be construed to include the furnishing of steam and forced air to the lessee. *Compare* Thomas *v.* Wiggers, 41 Ill. 470; Wyman *v.* Farrar, 35 Me. 64, holding that a lease of a factory containing machinery carried by water grants by implication all the right to use water which the lessor had.

35. Cummings *v.* Perry, 177 Mass. 407, 15 N. E. 1083; Cummings *v.* Perry, 169 Mass. 150, 47 N. E. 618, 38 L. R. A. 149. And see People *v.* Chicago, etc., R. Co., 57 Ill. 436.

36. West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393; Shorey *v.* Farrell, 114 Mass. 441; Fisher *v.* Barrett, 4 Cush. (Mass.) 381; Thropp *v.* Field, 26 N. J. Eq. 82; Jourgensen *v.* Traitel, 20 N. Y. Suppl. 33; Russell *v.* Giblin, 8 N. Y. St. 336.

c. Use of Outside Walls. According to the weight of authority, the lease of a portion of a building for a store or other business purposes gives the lessee the exclusive right to the use of the outer walls of that portion of the building so leased by him for the purpose of posting advertisements and notices thereon.[37]

4. Condition of Premises — a. Tenantable Condition in General. It may be broadly stated that in the absence of fraud or concealment by the lessor of the condition of the property at the date of the lease, the rule of *caveat emptor* applies, since there is no implied warranty on the part of the landlord that the premises are tenantable, or even reasonably suitable for occupation.[38] It is held, however, that there is an implied obligation on the part of the lessor that the leased premises shall be completed and ready for occupancy at the commencement of the

37. Lowell *v.* Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; Riddle *v.* Littlefield, 53 N. H. 503, 16 Am. Rep. 388; Baldwin *v.* Morgan, 43 Hun (N. Y.) 355 (upholding the above rule where the lease does not preclude the lessee from placing advertisements of his business on the outer wall of the premises); Law *v.* Haley, 9 Ohio Dec. (Reprint) 785, 17 Cinc. L. Bul. 242. And see Garrett *v.* Mulligan, 10 Phila. (Pa.) 339; Carlisle Café Co. *v.* Muse, 67 L. J. Ch. 53, 77 L. T. Rep. N. S. 515, 46 Wkly. Rep. 107. *Compare* Booth *v.* Gaither, 58 Ill. App. 263, holding that the fact that a person is occupying a store-room of a one-story building does not give him the right to control the space on the front above the top of the ceiling joists, so as to prevent his lessor from leasing such space to another person for advertising purposes. The right to such space is a property right, and the owner may grant the use of it to another, who will be entitled to protection by injunction in his use of the same.

Several lessees of same building.—Where a lease of offices in a building contains no privileges or direction as to the lessee's right to place his sign in any particular locality at the entrance, he cannot, as against the other lessees, arbitrarily place his sign in a particular spot selected by him. Knoeppel *v.* Kings County F. Ins. Co., 48 How. Pr. (N. Y.) 208. Where the premises are leased with the privilege of erecting signs in front of certain portion of the property, the lessee of another part of the same building cannot impair plaintiff's rights. Snyder *v.* Hersberg, 11 Phila. (Pa.) 200.

A provision "that the lessee may have the right to place signs upon the outer wall of said rooms" imports a privilege and not an exclusive right, and *prima facie* is to be exercised in reference to the condition of the premises at the time the lease was given, especially as affected by license to older tenants. Pevey *v.* Skinner, 116 Mass. 129.

38. *District of Columbia.* — Howell *v.* Schneider, 24 App. Cas. 532.

Illinois.— Lazarus *v.* Parmly, 113 Ill. App. 624.

Louisiana.— Lorenzen *v.* Woods, McGloin 373.

Maine.— Bennett *v.* Sullivan, 100 Me. 118, 60 Atl. 886.

Massachusetts.—Rand *v.* Adams, 185 Mass. 341, 70 N. E. 445; Dutton *v.* Gerrish, 63 Mass. 89, 55 Am. Dec. 45.

Montana.— York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

New Hampshire.— Davis *v.* George, 67 N. H. 393, 39 Atl. 979.

New York.— Jaffe *v.* Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Robbins *v.* Mount, 4 Rob. 553; Lynch *v.* Speed, 15 Daly 207, 4 N. Y. Suppl. 556; Bloomer *v.* Merrill, 1 Daly 485, 29 How. Pr. 259 (holding that N. Y. St. (1860) c. 346, permitting lessees to surrender buildings rendered untenantable by the elements applies only where the injury or destruction occurs after the lessee's entry, and not where it existed at the time of making the lease); Mayer *v.* Moller, 1 Hilt. 491; Post *v.* Vetter, 2 E. D. Smith 248 (holding likewise that there is no implied agreement that the landlord should keep the premises in a tenantable condition); Carey *v.* Kreizer, 26 Misc. 755, 57 N. Y. Suppl. 79; Alsheimer *v.* Krohn, 45 How. Pr. 127. And see McDonald *v.* Flamme, 13 Abb. N. Cas. 456.

North Carolina.— Gaither *v.* Hascall-Richards Steam Generator Co., 121 N. C. 384, 28 S. E. 546.

Oklahoma.— Tucker *v.* Bennett, 15 Okla. 187, 81 Pac. 423; Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664, holding that this rule extends to parts of the premises not expressly demised, but which are necessary to the lessee's convenience or protection.

Pennsylvania.— Sutton *v.* Foulke, 2 Pa. Co. Ct. 529.

England.— Chappell *v.* Gregory, 34 Beav. 250, 55 Eng. Reprint 631.

Canada.—Gillis *v.* Morrison, 22 N. Brunsw. 207.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 441.

Liability for rent as dependent on tenantable condition see *infra*, VIII, A, 4, a.

Set-off of damages in action for rent see *infra*, VIII, B, 8, c, d.

Estoppel.—Where a lessee for one year renews by holding over and then abandons the premises, he is estopped to deny that the drainage was in good condition when he entered. Hays *v.* Moody, 2 N. Y. Suppl. 385.

Covenants and conditions as to repairs see *infra*, VII, D, 1, a, (III).

Eviction by untenantable condition see *infra*, VII, F, 1, e.

term.[39] And where the lessor conceals defects in the premises which the lessee could not have discovered by reasonable diligence, it constitutes fraud; and where the lessee is compelled to remove from the premises by reason of such defects, he can recover from the lessor the rent paid in advance and the loss occasioned by such removal.[40] So notwithstanding a covenant by the tenant to keep the premises in a cleanly and healthy condition, he may abandon the same where the landlord renders the premises uninhabitable after the tenant has frequently cleaned them.[41]

b. Suitability of Premises For Purpose For Which They Were Leased. The rule is well settled that in the absence of an express stipulation,[42] there is no implied covenant on the part of the lessor that the demised premises are suitable or fit for the particular use for which they are intended by the lessee.[43] The same

39. Taylor *v.* Chase, 18 La. 88 (holding, however, that while the lessee is not bound to receive the premises in an unfinished state, yet if he does so, he must require the lessor to complete them before he can recover damages for his neglect to do so); La Farge *v.* Mansfield, 31 Barb. (N. Y.) 345; Meyers *v.* Liebeskind, 46 Misc. (N. Y.) 272, 91 N. Y. Suppl. 725; Pough *v.* Cerimedo, 44 Misc. (N. Y.) 246, 88 N. Y. Suppl. 1054; Wilson *v.* Hatton, 2 Ex. D. 336, 46 L. J. Exch. 489, 36 L. T. Rep. N. S. 473, 25 Wkly. Rep. 537. See also Thompson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7, holding that the fact that the tenant occupied the leased premises does not bar his right to recover for a breach of the covenant by the lessor to deliver the premises in good condition.

Construction of clause "in perfect order."— A clause in a lease that "the owner shall not be liable for any repairs on the premises during the term, the house being now in perfect order" has respect only to the condition of the house as an edifice in perfect repair, and not to the present or future purity of the air within it. Foster *v.* Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43.

40. Tyler *v.* Disbrow, 40 Mich. 415 (holding likewise that when a landlord rents the premises with the distinct understanding that they are in good condition that becomes a part of the consideration); Steefel *v.* Rothschild, 179 N. Y. 273, 72 N. E. 112; Pryor *v.* Foster, 1 N. Y. Suppl. 774 (holding likewise that a lessee who, notwithstanding false representations by the lessor as to the heat power of the furnace in the leased premises, nevertheless retained possession and paid rent, did not thereby waive his claim for damages for the deceit); Keates *v.* Cadogan, 10 C. B. 591, 15 Jur. 428, 20 L. J. C. P. 76, 70 E. C. L. 591; Laurier *v.* Turcotte, 9 Quebec Super. Ct. 86.

Waiver of fraud.—Where a tenant, after having abandoned the premises, with knowledge of their condition, resumes possession, he waives any right to avoid the lease on account of concealments by the landlord at the time of the execution of the lease as to their condition. Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

41. Sully *v.* Schmitt, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659 [*reversing* 11 N. Y. Suppl. 694].

42. Vaughan *v.* Matlock, 23 Ark. 9; Bentley *v.* Taylor, 81 Iowa 306, 47 N. W. 58 [*reversing* (1888) 39 N. W. 267]; Swift *v.* East Waterloo Hotel Co., 40 Iowa 322; La Farge *v.* Mansfield, 31 Barb. (N. Y.) 345, holding that where it appears from the terms of a lease of a store in a building being erected by the lessor, and from the subsequent acts of the parties, that they understood the property rented was to be a finished store, a covenant will be implied that the store should be fit for use at the time of the commencement of the term.

43. *Illinois.*— Rubens *v.* Hill, 115 Ill. App. 565 [*affirmed* in 213 Ill. 523, 72 N. E. 1127].

Indiana.— Lucas *v.* Coulter, 104 Ind. 81, 3 N. E. 622.

Maine.— Libbey *v.* Tolford, 48 Me. 316, 77 Am. Dec. 229.

Massachusetts.— Dutton *v.* Gerrish, 9 Cush. 89, 55 Am. Dec. 45.

Minnesota.— Wilkinson *v.* Clauson, 29 Minn. 91, 12 N. W. 147.

Missouri.— Kerr *v.* Merrill, 4 Mo. App. 592.

Montana.— Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307.

New York.— Jaffe *v.* Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Ducker *v.* Del Genovese, 93 N. Y. App. Div. 575, 87 N. Y. Suppl. 889; McGlashan *v.* Tallmadge, 37 Barb. 313; Robbins *v.* Mount, 4 Rob. 553; Roosevelt *v.* Abbatt, 2 Rob. 156 (holding that a recital in a lease that the leased premises are to be used as a "boarding-house," even if it implies a covenant that the premises are suitable for occupation as a boarding-house, cannot be so extended by implication as to apply to any particular description of boarding-house not expressly designated in the lease); Lynch *v.* Speed, 15 Daly 207, 4 N. Y. Suppl. 556; Meeks *v.* Bowerman, 1 Daly 99; Schermerhorn *v.* Gouge, 13 Abb. Pr. 315.

Pennsylvania.— Hazlett *v.* Powell, 30 Pa. St. 293; Twibill *v.* Brown, 1 Pa. Co. Ct. 350, 17 Wkly. Notes Cas. 221.

West Virginia.— Clifton *v.* Montague, 40 W. Va. 207, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449.

England.— Hart *v.* Windsor, 8 Jur. 150, 13 L. J. Exch. 129, 12 M. & W. 68; Sutton *v.* Temple, 7 Jur. 1065, 13 L. J. Exch. 17, 12 M. & W. 52. See also Erskine *v.* Adeane,

general rule applies in the lease of a dwelling-house as in the case of the lease of premises for other purposes, and there is no implied covenant on the part of the lessor that the premises are fit for habitation.[44]

B. Possession, Enjoyment, and Use — 1. Possession — a. Rights and Duties of Tenant — (I) *Duty to Take Possession.* The general rule is that a lease becomes complete and takes effect upon its execution, unless otherwise specified therein, and an entry by the lessee is not necessary to give it effect.[45]

(II) *Right of Entry and Possession.* Where the lease contains no stipulation to the contrary, there is an implied covenant on the part of the lessor that the premises shall be open to entry by the lessee at the time fixed by the lease for him to take possession;[46] and if possession is then withheld from the lessee, he

L. R. 8 Ch. 756, 42 L. J. Ch. 835, 29 L. T. Rep. N. S. 234, 21 Wkly. Rep. 802.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 442.

See, however, Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434, holding that where an agreement to lease refers to the premises described as a "cold storage building" as a description of the place and designation of its character, and contains a stipulation that its use shall be restricted to such articles as are ordinarily stored for preservation in such a place, an implied warranty of fitness arises.

Concealment of defects.—Where a landlord knows of secret defects in a building rendering it unfit for the purpose for which a tenant wishes it, and fraudulently conceals their existence from him, the tenant is not liable if for such cause he abandons the premises. Meyers *v.* Rosenbock, 5 Misc. (N. Y.) 337, 25 N. Y. Suppl. 521.

44. *District of Columbia.*—Fisher *v.* Lighthall, 4 Mackey 82, 54 Am. Dec. 258.

Indiana.— Lucas *v.* Coulter, 104 Ind. 81, 3 N. E. 622.

Massachusetts.— McKeon *v.* Cutter, 156 Mass. 296, 31 N. E. 389 (holding that the letting of several rooms in a tenement house does not imply that they are fit or will continue fit for the purposes for which they are let, where they pass into the exclusive possession of the tenant); Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006; Foster *v.* Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43. *Compare* Ingalls *v.* Hobbs, 156 Mass. 348, 31 N. E. 286, 32 Am. St. Rep. 460, 16 L. R. A. 51, holding that in a lease of a completely furnished house for a single season there is an implied agreement that the house is fit for immediate habitation. In this case the defect was in the furniture, and not in the house itself.

Montana.— Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

New York.— Daly *v.* Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; Franklin *v.* Brown, 118 N. Y. 110, 23 N. E. 126, 16 Am. St. Rep. 744, 6 L. R. A. 770; Coulson *v.* Whiting, 12 Daly 408 (holding that a statement by the landlord that the plumbing was in good order will be deemed ordinarily a mere expression of opinion); Jackson *v.* Odell, 9 Daly 371; Cleves *v.* Willoughby, 7 Hill 83; Wallace *v.* Lent, 1 Daly 481, 29 How. Pr. 289), holding, however, that where the landlord knows that a cause exists which renders the house unfit for habitation, it is a wrongful act on his part to rent it without notice of its condition, and if, after discovering and experiencing its injurious effects, the tenant is compelled to quit the house, the landlord cannot enforce the contract for payment of rent).

See 32 Cent. Dig. tit. "Landlord and Tenant," § 443.

Contra.— Showaker *v.* Boyer, 3 Pa. Co. Ct. 271.

45. *California.*— Clark *v.* Clark, 49 Cal. 586, holding that even where the lessee has agreed that he will personally occupy the land leased, the entry of the lessee upon the premises, and their occupancy by him by his agent, is a compliance with the agreement.

Missouri.— Moore *v.* Guardian Trust Co., 173 Mo. 218, 73 S. W. 143, holding that unless the lease by its terms expressly stipulates to that effect the lessee is not required to enter upon, use, or occupy the leased premises, but may sublet to any person he chooses, and for any purposes not prohibited by the terms of the lease.

New York.— Segal *v.* Ensler, 16 Misc. 43, 37 N. Y. Suppl. 694, holding, however, that a lessee cannot, after breach of the lease, before commencement of the term, by giving notice of refusal to take possession or pay rent under it, put the lessor in default by tendering performance during the term.

Oregon.— Chung Yow *v.* Hoh Chong, 11 Oreg. 220, 4 Pac. 326.

Vermont.— Cooney *v.* Hayes, 40 Vt. 478, 94 Am. Dec. 425, holding that the lessee has a right to occupy by himself, his agent or assignee, where the lease contains no stipulations to the contrary.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 444.

Liability for rent as dependent on possession and enjoyment of premises see *infra*, VIII, A, 3.

Termination by entry of landlord.—Where the tenant has not entered into possession and the landlord puts an end to the contract of lease, by entry, the tenant is not thereby released from liability for such damages as the landlord may have sustained by a breach of the contract. Tully *v.* Dunn, 42 Ala. 26.

46. *Alabama.*— King *v.* Reynolds, 67 Ala. 229, 42 Am. Rep. 107, holding, however, that if after the time fixed for the delivery of pos-

may maintain an appropriate action against the lessor, or any other person wrongfully withholding them, or at his option repudiate the contract and bring an action for damages for its breach.[47] In some jurisdictions it has been held that an incoming tenant has a right from custom and necessity to enter the premises before his term begins for such purposes as harvesting ice,[48] or sowing wheat upon the demised premises.[49]

(III) *Failure to Deliver Possession or Waiver Thereof.* According to the rule adopted in the majority of the states, the lessor is not bound to put his lessee into actual possession, but is bound only to put him into legal possession so that no obstacle in the form of a superior right of possession will be interposed to prevent the lessee from obtaining actual possession.[50] But according to the

session a stranger trespasses on the premises and holds them adversely the lessor is not responsible.

California.— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Flynn *v.* Hite, 107 Cal. 455, 40 Pac. 749.

Illinois.— Chapman *v.* Cawrey, 50 Ill. 512; Henderson *v.* Virden Coal Co., 78 Ill. App. 437; Ratkowski *v.* Masolowski, 57 Ill. App. 525.

Indiana.— Clark *v.* Butt, 26 Ind. 236; Spencer *v.* Burton, 5 Blackf. 57.

Kentucky.— Haupt *v.* Pittaluga, 6 Bush 493.

Missouri.— Michau *v.* Walsh, 6 Mo. 346, holding, however, that the lessee is entitled to the premises leased, but has no right forcibly to enter and eject the lessor. And see Rieger *v.* Welles, 110 Mo. App. 166, 84 S. W. 1136.

New York.— Trull *v.* Granger, 8 N. Y. 115; Harris *v.* Greenberger, 50 N. Y. App. Div. 439, 64 N. Y. Suppl. 136.

South Carolina.— Wilson *v.* Douglas, 2 Strobh. 97, holding, however, that a lease does not give the lessee constructive possession of the whole of a tract of land, where a stranger occupies a part thereof at the time of the demise.

Texas.— Jones *v.* Hutchinson, 21 Tex. 370, holding that a defaulting vendee may lease the land purchased and receive rent therefor, if the same is not rescinded, but such lease gives the tenant no right to possession after he has received notice of a rescission of the same.

West Virginia.— Chancey *v.* Smith, 25 W. Va. 404, 52 Am. Rep. 217.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 446.

Where a lease was procured by the fraudulent representations of the lessee, it was held that the lessee will be enjoined from taking possession of and cultivating the leased premises after notice that the contract was at an end. Newcome *v.* Ewing, 42 S. W. 105, 19 Ky. L. Rep. 821.

Agreement to lease.—A notice not to take possession of the premises agreed to be leased until a lease is made and security for rent is given is all that is requisite to prevent the lessor from being dispossessed of the premises. Crotty *v.* Collins, 13 Ill. 567.

Condition precedent.—Where a lessee has entered into possession under a contract making its rights dependent on a condition precedent, its possession is subject to this condition, and the lessor will not be estopped to set it up by accepting the rent. New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 18 S. Ct. 875, 43 L. ed. 178. Defendant leased to plaintiff for three years from the first of May; and plaintiff covenanted that on or before the first of May he would give to defendant two sufficient securities for the performance of his covenants in the lease, and it was held that the giving of such security was a condition precedent to plaintiff's right of possession under the lease. Murphy *v.* Scarth, 16 U. C. Q. B. 48. See also Harvey *v.* Fergusson, 9 U. C. Q. B. 431.

The grantee in a tax deed cannot convey them as against the possessory rights of the tenant. Chase *v.* Dearborn, 21 Wis. 57.

47. *Illinois.*— Berrington *v.* Casey, 78 Ill. 317.

Indiana.— Clark *v.* Butt, 26 Ind. 236; Spencer *v.* Burton, 5 Blackf. 57.

Missouri.— Hughes *v.* Hood, 50 Mo. 350; L'Hussier *v.* Zallee, 24 Mo. 13.

New York.— Trull *v.* Granger, 8 N. Y. 115; Olendorf *v.* Cook, 1 Lans. 37.

England.— Coe *v.* Clay, 5 Bing. 440, 7 L. J. C. P. O. S. 162, 3 M. & P. 57, 30 Rev. Rep. 699, 15 E. C. L. 660; Jenks *v.* Edwards, 11 Exch. 775.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 446.

48. State *v.* McClay, 1 Harr. (Del.) 520.

49. Stephenson *v.* Elliott, 2 Ind. App. 233, 28 N. E. 326.

50. Cobb *v.* Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Gazzolo *v.* Chambers, 73 Ill. 75 (holding that where the lessee is kept out of possession by any act of the landlord, or by one holding a paramount title, his remedy is doubtless by appropriate action); Palmer *v.* Young, 108 Ill. App. 252; Sigmund *v.* Howard Bank, 29 Md. 324 (holding that under the implied covenants of the lease the lessor is not required to give the lessee possession, nor is it the duty of the landlord when the demised premises are wrongfully held by third persons to take the necessary steps to put his lessee in possession); Mirsky *v.* Horowitz, 46 Misc. (N. Y.) 257, 92 N. Y. Suppl. 48; Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 4 Misc. (N. Y.) 207, 23 N. Y. Suppl. 900; Becker *v.* De Forest, 1 Sweeny

English doctrine,[51] which has been followed by some of the American courts, where there is a contract of lease and no stipulations to the contrary, there is an implied covenant on the part of the lessor that when the time comes for the lessee to take possession under the lease, according to the terms of the contract, the premises shall be open to his entry. In other words that there shall then be no impediment to his taking possession.[52] Where the lease contains express covenants to put the lessee in possession, a subsequent trespass by a third person before the lessee has entered, or continuance in possession of the premises by a tenant of the lessor, will constitute a breach of the contract for which the lessor is liable,[53] unless the lessee elects to waive full performance of the contract.[54]

(iv) *Actions For Failure to Deliver Possession*[55] — (a) *In General.* Where possession of the demised premises is withheld from the lessee, he may maintain an action of ejectment against any person, including the lessor, who so wrongfully withholds the possession from him;[56] or if possession is withheld by

(N. Y.) 528; Gardner *v.* Keteltas, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; Cozens *v.* Stevenson, 5 Serg. & R. (Pa.) 421. See also Rhodes *v.* Purvis, (Ark. 1895) 85 S. W. 235, holding that where a unilateral contract to lease provided that possession should be given when the present occupants vacated, and defendant was unable to eject them, as contemplated, when the contract was made, he was not liable for a failure to deliver possession prior to such vacation.

Title and possession of landlord see *supra*, III.

Where, by failure to terminate a prior tenancy, the lessor is unable to give right of entry at commencement of a lease with covenants of title and quiet enjoyment, the lessee is not bound to accept the premises on a subsequent tender; and hence, not having become a tenant, action to dispossess him will not lie. Goerl *v.* Damrauer, 27 Misc. (N. Y.) 555, 58 N. Y. Suppl. 297.

Eviction of tenant see *infra*, VII, F.

51. Coe *v.* Clay, 5 Bing. 440, 7 L. J. C. P. O. S. 162, 3 M. & P. 57, 30 Rev. Rep. 699, 15 E. C. L. 660.

52. King *v.* Reynolds, 67 Ala. 229, 42 Am. Rep. 107 (holding, however, that if after the time when the lessee is entitled to have the possession, according to the terms of the contract, a stranger trespasses thereon and holds them, this is a wrong done to the lessee for which the lessor is in no way responsible); Clark *v.* Butt, 26 Ind. 236; Dougherty *v.* Wilson, 1 Blackf. (Ind.) 478; Hertzberg *v.* Beisenbach, 64 Tex. 262. See also Hays *v.* Porter, 27 Tex. 92.

53. *Alabama.*— Snodgrass *v.* Reynolds, 79 Ala. 452, 58 Am. Rep. 601.

California.— Rice *v.* Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479.

Connecticut.— Cohn *v.* Norton, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; Reed *v.* Reynolds, 37 Conn. 469.

Indiana.— Spencer *v.* Burton, 5 Blackf. 57.

New Jersey.— Kerr *v.* Whitaker, 3 N. J. L. 670, holding that it is no defense to an action for a breach of the covenant to let a house to plaintiff at a particular day that the tenant in possession of the house held over against the will of defendant.

New York.— Grauel *v.* Soeller, 52 Hun 375, 5 N. Y. Suppl. 254; Hay *v.* Cumberland, 25 Barb. 594 (holding that where a lessor fails to put his lessee in possession of the whole of the leased premises according to the contract, the lessee is under no obligation to accept a part, and will be justified in abandoning the land); O'Brien *v.* Smith, 13 N. Y. Suppl. 408.

Wisconsin.— Poposkey *v.* Munkwitz, 68 Wis. 322, 32 N. W. 35, 60 Am. St. Rep. 858.

England.— Thompson *v.* Crawford, 13 U. C. C. P. 53.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 449.

54. Prior *v.* Kiso, 81 Mo. 241 (holding that where a lessee had received a less part of the premises than he was entitled to, and occupied it for fifteen months, it was for the jury to say whether he had waived full performance of the contract); Rieger *v.* Welles, 110 Mo. App. 166, 84 S. W. 1136; Hertzberg *v.* Beisenbach, 64 Tex. 262.

55. **Action against tenant in possession** see *infra*, VII, B, 1, a, (v).

56. Berrington *v.* Casey, 78 Ill. 317; Gazzolo *v.* Chambers, 73 Ill. 75; Olendorf v. Cook, 1 Lans. (N. Y.) 37; Mechanics', etc., F. Ins. Co. *v.* Scott, 2 Hilt. (N. Y.) 550; Gardner *v.* Keteltas, 3 Hill (N. Y.) 330, 38 Am. Dec. 637. *Compare* Freeborn *v.* La Londe, 118 Mich. 662, 77 N. W. 269, holding that under 2 Howell Annot. St. § 8295, authorizing summary proceedings for the possession of realty when one holds over after the time for which the premises were demised to him, or when a tenant at will or sufferance holds over after notice to quit, such proceedings will not lie by a tenant who has never been in possession to recover possession from the owner, who has refused to let him go in under the lease.

A lessee who has never been in possession cannot maintain unlawful detainer against the lessor, either at common law or under the Missouri statute. Long *v.* Noe, 49 Mo. App. 19.

Forcible entry and detainer proceedings see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1140.

the lessor, or one claiming under him, the lessee may at his option repudiate the contract, or bring an action for damages against the lessor for a breach of his agreement.[57]

(B) *Pleading.*[58] In an action for damages for a breach of the contract, a complaint or petition which alleges a lease in writing,[59] describes the property,[60] properly assigns the breach,[61] and alleges the damages sustained by reason thereof is good as against a general demurrer.[62]

(C) *Damages.*[63] In an action by the lessee against the lessor for refusal or failure to give possession of the demised premises, the measure of damages is ordinarily the difference between the rent reserved and the rental value of the premises for the term;[64] and if its value be no greater than the rent reserved only nominal damages can be recovered.[65] Where, however, other damages have

57. *California.*— Rice *v.* Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479.

Connecticut.— Bernhard *v.* Curtis, 75 Conn. 476, 54 Atl. 213.

Indiana.— Clark *v.* Butt, 26 Ind. 236; Spencer *v.* Burton, 5 Blackf. 57; Loufer *v.* Stettlemyer, 16 Ind. App. 221, 44 N. E. 1008.

Missouri.— Hughes *v.* Hood, 50 Mo. 350; Jackson *v.* Eddy, 12 Mo. 209; Shoemaker *v.* Crawford, 82 Mo. App. 487; Kean *v.* Kolkschneider, 21 Mo. App. 538; Smith *v.* Thurston, 19 Mo. App. 48.

New Jersey.— Albey *v.* Weingart, 71 N. J. L. 92, 58 Atl. 87; Drischman *v.* McManemin, 68 N. J. L. 337, 53 Atl. 548.

New York.— Trull *v.* Granger, 8 N. Y. 115; Meyers *v.* Liebeskind, 46 Misc. 272, 91 N. Y. Suppl. 725; Driggs *v.* Dwight, 17 Wend. 71, 31 Am. Dec. 283, holding that in an action against a landlord for failure to execute a lease and give possession of the property, plaintiff was not bound to prove that he demanded a lease, if it appears that the landlord had refused to give possession and did not intend to comply with his contract.

Texas.— Murphy *v.* Service, 2 Tex. App. Civ. Cas. § 746.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 450.

58. **Pleading** generally see PLEADING.

59. Avan *v.* Frey, 69 Ind. 91; Loufer *v.* Settlemyer, 16 Ind. App. 221, 44 N. E. 1008;

60. Avan *v.* Frey, 69 Ind. 91.

61. Bernhard *v.* Curtis, 75 Conn. 476, 54 Atl. 213; Avan *v.* Frey, 69 Ind. 91; Loufer *v.* Settlemyer, 16 Ind. App. 221, 44 N. E. 1008; McFarland *v.* Owens, (Tex. 1901) 63 S. W. 530; Carroll *v.* Peake, 1 Pet. (U. S.) 18, 7 L. ed. 34, where the assignment of breaches was held to be sufficient.

62. McFarland *v.* Owens, (Tex. 1901) 63 S. W. 530.

Allegation of entry under lease.— A lessee has no estate in the land before entering into possession, and therefore in an action to recover possession of the lessor he must allege the entry under the lease. Wilcox *v.* Bostick, 57 S. C. 151, 35 S. E. 496.

63. **Damages** generally see DAMAGES, 13 Cyc. 1.

64. *Alabama.*— Snodgrass *v.* Reynolds, 79 Ala. 452, 58 Am. Rep. 601, holding that in an action for breach of a covenant to put the lessee in possession, where the leased premises consist of a meadow in "Johnson grass," plaintiff may prove how many crops the land would produce each year with ordinary seasons, and the probable quantity and market value for each crop as a basis for estimating the value of the lease.

Arkansas.— Andrews *v.* Minter, (1905) 88 S. W. 822; Rose *v.* Wynn, 42 Ark. 257.

Connecticut.— Bernhard *v.* Curtis, 75 Conn. 476, 54 Atl. 213.

Georgia.— Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58.

Illinois.— Dobbins *v.* Duquid, 65 Ill. 464; Greene *v.* Williams, 45 Ill. 206; Birch *v.* Wood, 111 Ill. App. 336.

Iowa.— Alexander *v.* Bishop, 59 Iowa 572, 13 N. W. 714; Adair *v.* Bogle, 20 Iowa 238.

Michigan.— Taylor *v.* Cooper, 104 Mich. 72, 62 N. E. 157.

Missouri.— Hughes *v.* Hood, 50 Mo. 350.

New York.— Mack *v.* Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Trull *v.* Granger, 8 N. Y. 115; Williamson *v.* Stevens, 84 N. Y. App. Div. 518, 82 N. Y. Suppl. 1047, 13 N. Y. Ann. Cas. 197; Giles *v.* O'Toole, 4 Barb. 261; Dean *v.* Roesler, 1 Hilt. 420; Price *v.* Eisen, 31 Misc. 457, 64 N. Y. Suppl. 405; Belding *v.* Blum, 88 N. Y. Suppl. 178; Rosenblum *v.* Riley, 84 N. Y. Suppl. 884.

Virginia.— Newbrough *v.* Walker, 8 Gratt. 16, 56 Am. Dec. 127.

Washington.— Engstrom *v.* Merriam, 25 Wash. 73, 64 Pac. 914.

West Virginia.— Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827.

Wisconsin.— Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952; Serfling *v.* Andrews, 106 Wis. 78, 81 N. W. 991.

England.— Lock *v.* Furze, L. R. 1 C. P. 441, Harr. & R. 379, 35 L. J. C. P. 141, 15 L. T. Rep. N. S. 161, 14 Wkly. Rep. 403 [*affirming* 19 C. B. N. S. 96, 11 Jur. N. S. 726, 115 E. C. L. 96]; Robinson *v.* Harman, 1 Exch. 850, 18 L. J. Exch. 202.

Canada.— Marrin *v.* Graver, 8 Ont. 39; Van Brocklin *v.* Brantfort, 20 U. C. Q. B. 347.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 453.

65. Rose *v.* Wynn, 42 Ark. 257; Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58; Goldman *v.* Gainey, 67 N. Y. App. Div. 330, 73 N. Y.

resulted as the direct and necessary or natural consequence of the lessor's conduct, such as losses incurred in the expense and preparation to carry out the lessee's agreement under the lease, they are also recoverable in the action.[66] But the probable profits in the business or undertaking which might have resulted to the lessee had the terms of the lease been complied with cannot be taken into consideration in estimating his damages, as they are too speculative and conjectural.[67]

(v) *Action Against Former Tenant in Possession.* Where the lessee is prevented from obtaining possession of the demised premises by a former tenant whose tenancy has expired, the general rule is that he may bring an action of

Suppl. 738 (where a verdict allowing plaintiff ninety dollars damages was held to be contrary to the evidence); Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952. See also Flureau *v.* Thornhill, 2 W. Bl. 1078, holding that a lessor who fails to give possession to his lessee is only liable for nominal damages for his breach of contract.

66. *Arkansas.*—Rose *v.* Wynn, 42 Ark. 257.

Connecticut.—Bernhard *v.* Curtis, 75 Conn. 476, 54 Atl. 213 (holding, however, that in an action for failure to deliver possession plaintiff cannot recover for expenditures made by him for the occupancy of a store after the time when he was notified of the situation as to a tenant in possession claiming to be entitled to occupy the store); Cohn *v.* Norton, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572.

Florida.— Hodges *v.* Fries, 34 Fla. 63, 15 So. 682.

Illinois.— Cilley *v.* Hawkins, 48 Ill. 308; Greene *v.* Williams, 45 Ill. 206.

Indiana.— Williams *v.* Oliphant, 3 Ind. 271.

Iowa.— Adair *v.* Bogle, 20 Iowa 238.

Louisiana.— Grace *v.* Haas, 20 La. Ann. 73.

New Hampshire.— Woodbury *v.* Jones, 44 N. H. 206.

New York.— Deluise *v.* Long Island R. Co., 174 N. Y. 516, 66 N. E. 1106 [*affirming* 65 N. Y. App. Div. 487, 72 N. Y. Suppl. 988]; Whitney *v.* Allaire, 1 N. Y. 305 [*affirming* 4 Den. 554]; Williamson *v.* Stevens, 84 N. Y. App. Div. 518, 82 N. Y. Suppl. 1047, 13 N. Y. Ann. Cas. 197; McCleary *v.* Edwards, 27 Barb. 239; Lawrence *v.* Wardwell, 6 Barb. 423; Driggs *v.* Dwight, 17 Wend. 71, 31 Am. Dec. 283.

Pennsylvania.— Yeager *v.* Weaver, 64 Pa. St. 425.

Texas.— De la Zerda *v.* Korn, 25 Tex. Suppl. 188.

West Virginia.— Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827.

Wisconsin.— Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 453.

See, however, Hughes *v.* Hood, 50 Mo. 350, holding that in an action for damages for the withholding of the possession of the leasehold property, where plaintiff, a nonresident, has removed to the state in which the premises are situated for the purpose of occupying them, he cannot on the covenant to deliver possession recover the expenses incurred in the removal, where the contract contains no provision to that effect.

67. *Connecticut.*—Cohn *v.* Norton, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572.

Florida.— Hodges *v.* Fries, 34 Fla. 63, 15 So. 682.

Illinois.— Greene *v.* Williams, 45 Ill. 206; Birch *v.* Wood, 111 Ill. App. 336.

Iowa.— Adair *v.* Bogle, 20 Iowa 238.

Kentucky.— Smith *v.* Phillips, 29 S. W. 358, 16 Ky. L. Rep. 615.

Massachusetts.— Townsend *v.* Nicherson Wharf Co., 117 Mass. 501, holding that the lessee cannot recover damages sustained in his business, in the absence of evidence that the use to which the premises were to be put was known to the lessor.

Michigan.— See also Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157.

New Jersey.— Drischman *v.* McManemin, 68 N. J. L. 337, 53 Atl. 548.

New York.— Deluise *v.* Long Island R. Co., 174 N. Y. 516, 66 N. E. 1106 [*affirming* 65 N. Y. App. Div. 487, 72 N. Y. Suppl. 988]; Lowenstein *v.* Chappell, 30 Barb. 241; Lawrence *v.* Wardwell, 6 Barb. 423; Giles *v.* O'Toole, 4 Barb. 261; Price *v.* Eisen, 31 Misc. 457, 64 N. Y. Suppl. 405.

West Virginia.— Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827.

Wisconsin.— Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952.

Canada.— Marrin *v.* Graver, 8 Ont. 39.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 453.

Value of bargain.— In an action by the lessee for damages for the lessor's failure to put him in the possession of the land desired, the measure of damages is what the lessee could have made by the cultivation of the land; that is, "the value of the bargain." Shoemaker *v.* Crawford, 82 Mo. App. 487. And see Bartram v. Hering, 18 Pa. Super. Ct. 395, holding that where the lessor, under a valid agreement, arbitrarily, and without reasonable excuse, in order to escape the effects of a bad bargain refuses to comply with his contract, the lessee is entitled not only to compensatory damages, but to damages arising from the loss of the bargain, or the money which he would have derived from the completion of the contract; but that where, through no fault of his own, the lessor is unable to carry out his contract, the lessee cannot recover the value of his bargain, and the measure of damages is limited to the consideration paid and expenses incurred.

ejectment to recover possession of the premises,[68] and in such action the lessor is not a necessary party.[69] Likewise a lessee may bring an action of forcible entry and detainer against a tenant remaining in possession after the expiration of his lease.[70]

(vi) *Duty of Tenant to Surrender on Termination of Lease.* Upon the expiration of a lease, it is the tenant's duty to surrender possession, although no demand therefor is made;[71] and this is true even where the lease provides that improvements put on the premises by the tenant shall be paid for by the lessor.[72] The measure of damages in an action by the lessor against the lessee for breach of covenant to deliver up the leased premises at the end of the term is presumptively the amount of rent stipulated in the lease computed with reference to the time during which the lessor is kept out of possession.[73]

68. Berrington *v.* Casey, 78 Ill. 317; Gazzolo *v.* Chambers, 73 Ill. 75; Beidler *v.* Fish, 14 Ill. App. 29; Boyce *v.* Graham, 91 Ind. 420 (holding likewise that defendant could not invoke the statute of frauds against plaintiff's lease); Mechanics', etc., F. Ins. Co. *v.* Scott, 2 Hilt. (N. Y.) 550; Gardner *v.* Keteltas, 3 Hill (N. Y.) 330, 38 Am. Dec. 637.

Summary proceedings.—As to the right to bring summary proceedings in such cases see Spalding *v.* Hall, 6 D. C. 123; Imbert *v.* Hallock, 23 How. Pr. (N. Y.) 456.

69. Boyce *v.* Graham, 91 Ind. 420.

70. Ball *v.* Chadwick, 46 Ill. 28; Webb *v.* Heyman, 40 Ill. App. 335; Marsters *v.* Cling, 163 Mass. 477, 40 N. E. 763; Casey *v.* King, 98 Mass. 503; Alexander *v.* Carew, 13 Allen (Mass.) 70; Hildreth *v.* Conant, 10 Metc. (Mass.) 298; Burton *v.* Rohrbeck, 30 Minn. 393, 15 N. W. 678; Hardy *v.* Ketchum, 67 Fed. 282, 14 C. C. A. 398. See also Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266.

Notice of the lease should first be given the former tenant. Casey *v.* King, 98 Mass. 503; Furlong *v.* Leary, 8 Cush. (Mass.) 409.

A reasonable opportunity to remove from the leased premises should first be given the former tenant. Casey *v.* King, 98 Mass. 503.

71. *Arkansas.*— Stoddard *v.* Waters, 30 Ark. 156, holding that where a tenant holds over after the termination of his lease and interferes with the reletting of the premises, he is liable for the damages sustained by the landlord.

California.— Coburn *v.* Goodall, 72 Cal. 498; 14 Pac. 190, 1 Am. St. Rep. 75; McCreary *v.* Marston, 56 Cal. 403; Schilling *v.* Holmes, 23 Cal. 227.

Georgia.— Sloat *v.* Rountree, 87 Ga. 470, 13 S. E. 637 (holding, however, that it is a sufficient defense that the landlord consented that defendant should hold over); Visage *v.* Schofield, 60 Ga. 680.

Illinois.— Poppers *v.* Meagher, 148 Ill. 192, 35 N. E. 805.

Louisiana.— Richardson *v.* Scott, 6 La. 54.

Massachusetts.— Danforth *v.* Sargeant, 14 Mass. 491.

Missouri.— Mitchell *v.* Blossom, 24 Mo. App. 48.

New Jersey.— Earl *v.* Steffens, 1 N. J. L. 53.

New York.— Witt *v.* New York, 6 Rob. 441, 5 Rob. 248, holding that a tenant is not entitled to remain in possession after the expiration of his term, even for the purpose of removing the goods.

Ohio.— Rosenbaum *v.* Pendleton, 9 Ohio S. & C. Pl. Dec. 642, 7 Ohio N. P. 364.

South Carolina.— Milhouse *v.* Patrick, 6 Rich. 350.

Tennessee.—Noel *v.* McCrory, 7 Coldw. 623.

Texas.— Texas-Mexican R. Co. *v.* Cahill, (Tex. Civ. App. 1893) 23 S. W. 232.

Canada. — Doe *v.* Kent, 5 U. C. Q. B. O. S. 437.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 458.

Reëntry and recovery of possession by landlord see *infra*, X.

Whether the tenant's delay in vacating the leased premises is unreasonable is for the jury. Browning *v.* Garvin, 48 N. Y. App. Div. 140, 62 N. W. Suppl. 564.

Tenant by sufferance — Reasonable time to remove.— A tenant by sufferance cannot be sued as a trespasser or for possession until he has been given reasonable time to remove his possessions, and where the facts are not disputed the question of what is a reasonable time is for the court. Lash *v.* Ames, 171 Mass. 487, 50 N. E. 906.

In Kentucky, however, it is held that a tenant covenanting to deliver possession at the end of the term is not bound to abandon the possession before it is demanded. Kyle *v.* Proctor, 7 Bush (Ky.) 493; Allison *v.* Thompson, 1 Litt. (Ky.) 31; Bowling *v.* Ewing, 3 A. K. Marsh. (Ky.) 616.

Excuse for failure to remove.— An order of health officers forbidding removal excuses failure to perform a previous covenant by a tenant to remove from and surrender the premises. Regan *v.* Fosdick, 19 Misc. (N. Y.) 489, 43 N. Y. Suppl. 1102, 3 N. Y. Ann. Cas. 376.

Where a subtenant holds over after expiration of the lessee's interest, the lessee is not liable in damages unless he has been a party to the trespass. Levine *v.* Lindenthall, 1 Tex. App. Civ. Cas. § 1149, unless he has collected rents from the subtenant for the time during which he held over, or the like.

72. Speers *v.* Flack, 34 Mo. 101, 84 Am. Dec. 74; Tallman *v.* Coffin, 4 N. Y. 134.

73. Otto *v.* Jackson, 35 Ill. 349; Watrigant

b. Disturbance of Tenant's Possession — (i) *By Landlord.* Any disturbance of the lessee's possession of the premises by the landlord, such as a wrongful and unlawful entry thereon by the landlord, or the removal of personalty appurtenant thereto, entitles the lessee to recover from the lessor for the damage sustained thereby.[74] Unless the tenant consents[75] a demise to a third person of the premises

v. Dufort, 28 La. Ann. 892 (holding, however, that plaintiff is not entitled to recover damages, in addition to rent at the contract price, for the time the tenant has occupied since the expiration of the lease, on the ground that the property was returned at a time when it was difficult to procure a tenant); D'Armand *v.* Pullin, 16 La. Ann. 243; Sargent *v.* Smith, 78 Mass. 426; Russel *v.* Killion, 7 Phila. (Pa.) 110. See also Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75.

Permitting subtenant to hold over.— In an action of covenant on a lease to recover damages for failure to surrender possession, where it appeared that the lessor before the expiration of the lease sued on had again leased to another party, who permitted a subtenant under the original lease to hold over, with the understanding that possession should be held by such subtenant, a recovery could not be had, defendant not being privy to the arrangement between the second lessee and the subtenant. Kennicott *v.* Sherwood, 22 Ill. 190.

74. *Alabama.*— Abrams *v.* Watson, 59 Ala. 524.

Georgia.— Ivey *v.* Hammock, 68 Ga. 428.

Illinois.— Northern Trust Co. *v.* Palmer, 171 Ill. 383, 49 N. E. 553. See Taylor *v.* Frohock, 85 Ill. 584.

Indiana.— Teagarden *v.* McLaughlin, 86 Ind. 476, 44 Am. Rep. 332. *Compare* Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680, holding that, although the law is more strict against the lessor than a stranger, still a mere entry, although wrongful and unlawful, will not constitute a breach of covenant, unless it be shown that the act was in the nature of a total or partial eviction.

Iowa.— See Haller *v.* Squire, 91 Iowa 10, 58 N. E. 921.

Louisiana.— State *v.* De Baillon, 113 La. 572, 37 So. 481.

Maine.— Bryant *v.* Sparrow, 62 Me. 546; Cunningham *v.* Holton, 55 Me. 33.

Massachusetts.— Dickinson *v.* Goodspeed, 8 Cush. 119. And see Pratt *v.* Paine, 119 Mass. 439.

Michigan.— Maney *v.* Lamphere, 139 Mich. 429, 102 N. W. 974.

Nebraska.— Gaffey *v.* Northwestern Mut. L. Ins. Co., (1904) 98 N. W. 826.

New York.— Shannon *v.* Burr, 1 Hilt. 39; Hessler *v.* Schafer, 20 Misc. 645, 46 N. Y. Suppl. 1076; Neiman *v.* Butler, 19 N. Y. Suppl. 403; Cooley *v.* Cummings, 1 N. Y. Suppl. 631; Behrens *v.* Miller, 2 N. Y. City Ct. 427.

North Carolina.— Barneycastle *v.* Walker, 92 N. C. 198; State *v.* Piper, 89 N. C. 551, holding that a landlord has no right to remove a fence on the land leased to his tenant without the tenant's consent.

Ohio.— Wilber *v.* Paine, 1 Ohio 251. See also Bass Lake Co. *v.* Hollenbeck, 11 Ohio Cir. Ct. 508, 5 Ohio Cir. Dec. 242.

Texas.— Jenner *v.* Carpenter, (Civ. App. 1898) 48 S. W. 46. See also Williams *v.* Yoe, 22 Tex. Civ. App. 446, 54 S. W. 614.

Vermont.— Amsden *v.* Atwood, 69 Vt. 527, 38 Atl. 263.

Wisconsin.— Shaft *v.* Carey, 107 Wis. 273, 83 N. W. 288.

England.— Newby *v.* Harrison, 1 Johns. & H. 393, 4 L. T. Rep. N. S. 397, 9 Wkly. Rep. 849 [*affirmed* 4 L. T. Rep. N. S. 424, 9 Wkly. Rep. 849].

See 32 Cent. Dig. tit. "Landlord and Tenant," § 460.

Tenant holding over.—A tenant who holds over after the expiration of his lease, although the premises are not in proper condition by reason of the acts of the landlord in having made alterations, is obliged to put the premises in good condition, and cannot recover damages for injury to his business by reason of such acts. Ives *v.* Williams, 50 Mich. 100, 15 N. W. 33.

Obstruction of light and view.—Where defendants leased to complainants the upper part of a building whose windows looked into an open air space, and then leased the entire building, subject to complainant's lease, to third persons, with permission to put in electric apparatus and to build a chimney therefor, and such third persons built a chimney which obstructed complainant's windows, it was held that the complainants had a cause of action against defendants therefor, although their lease contained no express covenants by defendants. Case *v.* Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536.

Action by subtenant.—An interference by the owner or chief landlord with the possession of a subtenant is a trespass for which an action against him by the subtenant is maintainable, but the intermediate tenant is not liable for such acts. Luckey *v.* Frantzkee, 1 E. D. Smith (N. Y.) 47. See also Krider *v.* Ramsay, 79 N. C. 354.

On the death of a tenant for one year only, leaving a widow, she, and not the administrator, is entitled to the possession of the dwelling-house, and the outhouses appurtenant thereto, for the residue of the term, and the landlord will not be an intruder as to these, if he resumes possession of them with the widow's consent. Riddle *v.* Hodge, 83 Ga. 173, 9 S. E. 786.

Eviction see *infra*, VII, F.

75. Pausch *v.* Guerrard, 67 Ga. 319, holding that where a tenant agreed to make no opposition to his landlord's leasing the

in possession of tenants under a valid lease is void, being neither effectual to disturb those in possession, nor to enable the lessee to evict them.[76]

(II) *By Third Persons.* Where a lessee in possession of premises is ousted by a third person, he may maintain an action to recover possession of the premises, and may likewise recover damages suffered by him by reason of such disturbance of his possession.[77]

(III) *Actions.* In an action by a lessee for damages caused by the disturbance of his possession, he is entitled to recover the amount that will compensate him for the detriment proximately caused by the trespass.[78] However, the lessee cannot recover from the landlord for injuries committed by strangers, since the land-

premises for a term of years, and the landlord made such a lease, and a month thereafter dispossessed him and put the new tenant in, he was estopped to maintain trespass for such dispossession.

Title or possession to sustain lease see *supra*, III, A.

76. *Illinois.*— Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112.

Indiana.— Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626.

Louisiana.— State *v.* De Baillon, 113 La. 572, 37 So. 481.

Nebraska.— Schneider *v.* Patterson, 38 Nebr. 680, 57 N. W. 398.

New York.— Post *v.* Martens, 2 Rob. 437.

Vermont.— Stern *v.* Sawyer, 78 Vt. 5, 61 Atl. 36.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 461.

Abandonment of premises.—Where a lease for a term of twenty-five years with the privilege of renewal was given in 1858, and the lessee did not enter upon the land and ceased the payment in 1871, it was held that the owners had a right to regard the abandonment of the premises as final, and to relet the same. Porter *v.* Noyes, 47 Mich. 55, 10 N. W. 77.

77. *Arkansas.*— Kansas City, etc., R. Co. *v.* King, 63 Ark. 251, 38 S. W. 13; Crane *v.* Patton, 57 Ark. 340, 21 S. W. 466.

California.— Kirsch *v.* Brigard, 63 Cal. 319; Schilling *v.* Holmes, 23 Cal. 227.

Illinois.— Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; Hubner *v.* Feige, 90 Ill. 208; J. B. Sanborn Co. *v.* Marquette Bldg. Co., 86 Ill. App. 681.

Massachusetts.— See Kelly *v.* Waite, 12 Metc. 300.

Michigan.— Stebbins *v.* Demorest, 138 Mich. 297, 101 N. W. 528.

Missouri.— Kelly *v.* Clancy, 15 Mo. App. 519.

Nebraska.— Gaffey *v.* Northwestern Mut. L. Ins. Co., 98 N. W. 826.

New Hampshire.— George *v.* Fiske, 32 N. H. 32.

New Jersey.— Kaufman *v.* Longworth, 4 N. J. L. J. 228.

New York.— Tobias *v.* Cohn, 36 N. Y. 363; Baker *v.* Hart, 52 Hun 363, 5 N. Y. Suppl. 345; Avery *v.* New York Cent., etc., R. Co., 7 N. Y. Suppl. 341; Newman *v.* Metropolitan El. R. Co., 10 N. Y. St. 12. See also Knoepfel *v.* Kings County F. Ins. Co., 66 N. Y. 639; Dumois *v.* Hill, 2 N. Y. App. Div. 525, 37 N. Y. Suppl. 1093; Beir *v.* Cooke, 37 Hun 38.

Pennsylvania.— Schmoele *v.* Betz, 212 Pa. St. 32, 61 Atl. 525, 108 Am. St. Rep. 845; Mine Hill, etc., R. Co. *v.* Lippincott, 86 Pa. St. 468; Brown *v.* Powell, 25 Pa. St. 229.

South Carolina.— Childers *v.* Verner, 12 S. C. 1.

Texas.—Holland *v.* San Antonio, (Civ. App. 1893) 23 S. W. 756, holding that the right of a tenant to maintain trespass to try a title against one who makes an unauthorized entry on the leased land cannot be defeated by a deed given by the lessor to the trespasser after the tenant has brought action.

United States.— Howard *v.* La Crosse, etc., R. Co., 12 Fed. Cas. No. 6,760, Woolw. 49.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 465.

A mortgagee of property leased subject to the mortgage is not liable for any damages resulting to the tenant from the exercise of the mortgagee's legal right of foreclosure. Penn. *v.* Citizen's Bank, 32 La. Ann. 195.

A mere tenant at sufferance cannot maintain trespass against a third person for a peaceable entry. Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616.

Estoppel in pais.—Where tenants of chattels were present and made no objection when an arrangement between their landlord and a hostile claimant was made as to the disposal of the chattels, it was held to amount to an estoppel *in pais*. Hibbard *v.* Stewart, 1 Hilt. (N. Y.) 207.

78. *California.*— Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

Illinois.— Dearlove *v.* Herrington, 70 Ill. 251 (where the damages awarded were held not to be excessive); Dobbins *v.* Duquid, 65 Ill. 464; Chapman *v.* Kirby, 49 Ill. 211; Tobin *v.* French, 93 Ill. App. 18.

Maryland.—McHenry *v.* Marr, 39 Md. 510.

Massachusetts.—Dexter *v.* Manley, 4 Cush. 14.

New York.— Shannon *v.* Burr, 1 Hilt. 39, holding that where a complainant has removed from the leased premises and is not in actual possession, and the landlord enters during the term, the tenant is entitled to nominal damages only, in the absence of actual damage. See also Kelly *v.* Miles, 58 N. Y. Super. Ct. 495, 12 N. Y. Suppl. 915.

Texas.— De la Zerda *v.* Korn, 25 Tex. Suppl. 188.

lord is not bound to defend the demised premises against trespassers and the wrongful acts of third persons.[79]

2. Covenants For Quiet Enjoyment — a. Implied Covenants. The general rule is that the use of the word "lease" or "demise" in an instrument of lease imports a covenant for quiet enjoyment.[80] So it has been held that a covenant for quiet enjoyment is implied from the words "agrees to let"[81] or the words "grant and demise."[82] And the rule is sometimes broadly stated that a lease contains of necessity an implied covenant[83] for quiet enjoyment.[84] Nevertheless it is only for so long as the lessor has the term that the law implies a warranty of quiet enjoy-

See 32 Cent. Dig. tit. "Landlord and Tenant," § 465.

Set-off or recoupment. — A landlord who forcibly dispossesses the tenant before the expiration of the lease cannot, when sued for possession in forcible entry and detainer, claim rents or damages by way of set-off, or set up a breach of the contract of letting by way of recoupment. Johnson *v.* Hoffman, 53 Mo. 504; Robinson *v.* Walker, 50 Mo. 19.

Enjoining nuisance.—Where the upper story of a building is leased, the obstruction or attempted obstruction of the stairway leading to the upper rooms interfering with or impairing the easement of the tenants on the upper floor, is in the nature of a nuisance and may be enjoined. Miller *v.* Fitzgerald Dry-Goods Co., 62 Nebr. 270, 86 N. W. 1078.

Obstruction of lights.—Where a tenant for a year brings an action on the case against his landlord during the term for a nuisance in obstructing the lights of his tenement, damages can only be given for the time which had elapsed before the commencement of the suit, and not for the whole term. Blunt *v.* McCormick, 3 Den. (N. Y.) 283.

Evidence of damage necessary.—Where a tenant claims damages for loss of the use of water and improvements, and there is no evidence as to the amount of damages sustained thereby, he is not entitled to recover therefor. Riggs *v.* Gray, 31 Tex. Civ. App. 268, 72 S. W. 101.

79. Talbott *v.* English, 156 Ind. 299, 59 N. E. 857; Huiest *v.* Marx, 67 Mo. App. 418; Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881.

80. Hamilton *v.* Wright, 28 Mo. 199; Maeder *v.* Carondelet, 26 Mo. 112 (holding, however, that this implication will not be raised where it is expressly stipulated in the lease that nothing therein contained shall be construed to imply a covenant for quiet enjoyment); Crouch *v.* Fowle, 9 N. H. 219, 32 Am. Dec. 350; Baynes *v.* Lloyd, [1895] 2 Q. B. 610, 59 J. P. 710, 64 L. J. Q. B. 787, 73 L. T. Rep. N. S. 250, 14 Reports 678, 44 Wkly. Rep. 328. *Compare* Mershon *v.* Williams, 63 N. J. L. 398, 44 Atl. 211, holding that the mere use of the words "to let" and "to lease" in a written agreement of letting or leasing will not give rise to an implied covenant for quiet enjoyment or other covenants for title; that in order to give rise to such a covenant or covenants, the words "demise," "grant" or other words of like import must be used and contained in the lease, and that an implied covenant for quiet enjoyment does not arise from the mere relation of landlord and tenant, even if such relation be created by lease under seal.

81. Budd-Scott *v.* Daniel, [1902] 2 K. B. 351, 71 L. J. K. B. 706, 87 L. T. Rep. N. S. 392, 51 Wkly. Rep. 134. *Contra*, Baynes *v.* Lloyd, [1895] 2 Q. B. 610, 59 J. P. 710, 64 L. J. Q. B. 787, 73 L. T. Rep. N. S. 250, 14 Reports 678, 44 Wkly. Rep. 328.

82. Barney *v.* Keith, 4 Wend. (N. Y.) 502.

83. Whether covenant is express or implied in general see *supra*, II, B, 3, a.

84. *Alabama.*—Abrams *v.* Watson, 59 Ala. 524.

Arkansas.— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

Illinois.— Berrington *v.* Casey, 78 Ill. 317; Wade *v.* Halligan, 16 Ill. 507 (both holding that the law will imply covenants for quiet possession and enjoyment against paramount title and against such acts of the landlord as destroy the beneficial enjoyment of the lease); Field *v.* Herrick, 10 Ill. App. 591.

Indiana.— Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.

Maryland.— Baugher *v.* Wilkins, 16 Md. 35, 77 Am. Dec. 279.

Massachusetts.— Duncklee *v.* Webber, 151 Mass. 408, 24 N. E. 1082; Dexter *v.* Manley, 4 Cush. 14.

Nebraska.— Kitchen Bros. Hotel Co. *v.* Philbin, 2 Nebr. (Unoff.) 340, 96 N. W. 487; Herpolsheimer *v.* Funke, 1 Nebr. (Unoff.) 471, 95 N. W. 688.

New York.— Lynch *v.* Onondaga Salt Co., 64 Barb. 558; Conley *v.* Schiller, 24 N. Y. Suppl. 473; Tone *v.* Brace, 11 Paige 566, holding that section 140 of the article of the Revised Statutes of New York relative to alienation by deed, which provides that no covenant shall be implied in any deed of conveyance of real estate, does not extend to implied covenants of warranty as to the quiet enjoyment of the demised premises, in a lease for years; such lease not being a conveyance of land, but only of a mere chattel interest therein. See, however, Kinney *v.* Watts, 14 Wend. 38.

Ohio.— Mains *v.* Henkle, 2 Ohio Dec. (Reprint) 530, 3 West. L. Month. 593; Tooker *v.* Grotenkemper, 1 Cinc. Super. Ct. 88, holding, however, that where there is a covenant for quiet enjoyment the words "grant, demise, and lease" do not imply a general warranty.

ment,[85] and an express covenant to aid the lessee in keeping possession of the premises[86] or for quiet enjoyment "without molestation or disturbance from the lessor, his successors or assigns"[87] excludes the implication of a covenant for quiet enjoyment.

b. Construction and Operation. The general rule is that an express or implied covenant for quiet enjoyment should be interpreted to mean a covenant to secure the lessee against the acts or hindrances of the lessor and persons deriving their right or title through him, or from a paramount title,[88] and it will not be regarded

Oklahoma.— Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664.

Vermont.— Knapp *v.* Marlboro, 29 Vt. 282.

England.— Hall *v.* City of London Brewery Co., 2 B. & S. 737, 9 Jur. N. S. 18, 21 L. J. Q. B. 257, 110 E. C. L. 737; Bandy *v.* Cartwright, 8 Exch. 913, 22 L. J. Exch. 285, 1 Wkly. Rep. 415, holding that on a parol demise the law will imply an agreement for quiet enjoyment but not for good title.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 471.

But see Black *v.* Gilmore, 9 Leigh (Va.) 446, 33 Am. Dec. 253, holding that where a conveyance is of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment.

85. Brookhaven *v.* Baggett, 61 Miss. 383; Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124; Shaft *v.* Carey, 107 Wis. 273, 83 N. W. 288; Iggulden *v.* May, 2 B. & P. N. R. 49, 7 East 237, 3 Smith K. B. 269, 9 Ves. Jr. 325, 8 Rev. Rep. 623, 32 Eng. Reprint 628.

86. O'Connor *v.* Memphis, 7 Lea (Tenn.) 219.

87. Burr *v.* Stenton, 43 N. Y. 462. See also Stannard *v.* Forbes, 6 A. & E. 572, 6 L. J. K. B. 185, 1 N. & P. 633, W. W. & D. 321; Lyon *v.* Stephenson, 4 Bing. N. Cas. 678, 6 Scott 447, 33 E. C. L. 920 [*affirmed* in 1 Arn. 385, 5 Bing. N. Cas. 183, 7 L. J. C. P. 263, 7 Scott 69, 35 E. C. L. 106].

88. *California.*— McAlester *v.* Landers, 70 Cal. 79, 11 Pac. 505.

Massachusetts.— Ellis *v.* Welch, 6 Mass. 246, 4 Am. Dec. 122.

Nebraska.— Blodgett *v.* Jensen, 2 Nebr. (Unoff.) 543, 89 N. W. 399.

New York.— Doupe *v.* Genin, 45 N. Y. 119, 6 Am. Rep. 47 [*affirming* 37 How. Pr. 5] (holding likewise that such covenant does not render the landlord liable to keep the premises in repair); Connor *v.* Bernheimer, 6 Daly 295; Edgerton *v.* Page, 1 Hilt. 320, 5 Abb. Pr. 1; Ramsay *v.* Wilkie, 13 N. Y. Suppl. 554; Coddington *v.* Dunham, 45 How. Pr. 40.

Utah.— Groome *v.* Ogden City Corp., 10 Utah 54, 37 Pac. 90.

United States.— Pabst Brewing Co. *v.* Thorley, 127 Fed. 439.

England.— Shaw *v.* Stenton, 2 H. & N. 858, 27 L. J. Exch. 253, 16 Wkly. Rep. 327; Hunt *v.* White, 37 L. J. Ch. 326, 16 Wkly. Rep. 478, holding that covenants for title for quiet enjoyment do not extend to protect the purchaser against defects of title which the recitals in his own purchase deed are sufficient to disclose.

Canada.— Maclennan *v.* Royal Ins. Co., 39 U. C. Q. B. 515.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 472.

The covenant runs with the land and passes to any person as assignee in law who becomes possessed of the term. Shelton *v.* Codman, 3 Cush. (Mass.) 318; Ellis *v.* Welch, 6 Mass. 246, 4 Am. Dec. 122.

Duration of covenant.— If the lease is for the term of three years, with the privilege of two more if the lessor does not sell the demised premises before the end of three years, and the lessor has not sold at the end of the three years, and the lessee elects to keep the premises two years more, and the lease contains a covenant for quiet enjoyment, the covenant at the time of the election becomes a covenant for the full term of five years. Levitzky *v.* Canning, 33 Cal. 299.

In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the landlord's interest, and if on such determination the tenant is evicted by the superior landlord, he has in the absence of express agreement, no claim against his landlord for damages for such eviction by the superior landlord. Wallis *v.* Hands, [1893] 2 Ch. 75, 62 L. J. Ch. 586, 68 L. T. Rep. N. S. 428, 5 Reports 351, 41 Wkly. Rep. 471; Penford *v.* Abbott, 9 Jur. N. S. 517, 32 L. J. Q. B. 67, 7 L. T. Rep. N. S. 384, 11 Wkly. Rep. 169; Schwartz *v.* Locket, 61 L. T. Rep. N. S. 719, 38 Wkly. Rep. 142.

Where the lessor has, at the time of giving the lease, no title to the land leased and enters into no covenant, express or implied, for quiet enjoyment, except against his own acts, his subsequently acquired title does not inure to the lessee by virtue of the lease: but the latter holds the premises as against the lessor by virtue of the latter's personal covenant, which operates by way of estoppel only to prevent his interference with the lessee's possession, and in no way binds him to protect the lessee against the foreclosure of previous liens upon the property. Burr *v.* Stenton, 43 N. Y. 462.

Effect of subsequent covenants.— A general covenant for quiet enjoyment in a lease is not controlled or limited by a subsequent covenant to defend the lessee's title against certain interests, unless the two covenants are inconsistent, or it expressly appears that it was intended that the second should limit

as operating to protect the tenant from the acts of strangers disturbing him in his quiet enjoyment and possession.[89]

c. What Constitutes Breach of Covenant. At common law the rule was that an actual eviction or physical dispossession or some actual disturbance in the possession of the lessee was necessary to constitute a breach of covenant for quiet enjoyment.[90] Now, according to the great weight of authority, a constructive eviction is sufficient to constitute a breach of covenant, and the lessee may after a demand, or other hostile assertion of a paramount title, yield thereto, although a constructive eviction cannot be deemed to exist without a surrender of the premises.[91]

the first. Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Construction of particular covenant.— In a lease of lands irrigated by a ditch maintained and owned in common by those having lands to be irrigated, each landowner being entitled to a certain part of the water in the proportion that the number of acres owned bore to the number irrigated, a covenant to defend the lessee in the peaceful and quiet possession of the premises, and every part thereof, does not require the lessor to maintain the ditch; and therefore he is not liable to the lessee for damages caused by the temporary destruction of the ditch by floods. Stevens *v.* Wadleigh, 5 Ariz. 90, 46 Pac. 70.

89. *Alabama.*— Abrams *v.* Watson, 59 Ala. 524.

California.— Branger *v.* Manciet, 30 Cal. 624; Playter *v.* Cunningham, 21 Cal. 229.

Illinois.— Field *v.* Herrick, 14 Ill. App. 181.

Maryland.— Baugher *v.* Wilkins, 16 Md. 35, 77 Am. Dec. 279.

Massachusetts.— Kimball *v.* Masters, etc., of G. L. M., 131 Mass. 59.

Mississippi.— Surget *v.* Arighi, 11 Sm. & M. 87, 49 Am. Dec. 46.

New York.— Loughran *v.* Ross, 45 N. Y. 792, 6 Am. Rep. 173; Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881; Mortimer *v.* Brunner, 6 Bosw. 653; Butterworth *v.* Volkening, 4 Thomps. & C. 650, holding that under a covenant for quiet enjoyment contained in a lease it is no part of the landlord's obligation to protect the tenant against the consequences of fruitless suits brought against him for his interest in the leasehold estate.

Pennsylvania.— Tucker *v.* Du Puy, 210 Pa. St. 461, 60 Atl. 4; Frost *v.* Earnest, 4 Whart. 86.

Vermont.— Underwood *v.* Birchard, 47 Vt. 305.

England.— Anonymous, Lofft 460.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 475.

Liability for rent as dependent on enjoyment of premises see *infra*, VIII, A, 3.

90. St. John *v.* Palmer, 5 Hill (N. Y.) 599; Webb *v.* Alexander, 7 Wend. (N. Y.) 281; Kerr *v.* Shaw, 13 Johns. (N. Y.) 236; Kortz *v.* Carpenter, 5 Johns. (N. Y.) 120; Waldron *v.* McCarty, 3 Johns. (N. Y.) 471; Schuylkill, etc., R. Co. *v.* Schmoele, 57 Pa. St. 271, holding that an action of ejectment, followed by a writ of estrepement, is no breach of a covenant in a lease for quiet enjoyment; this result not being produced by the action until it has its point in actual or virtual eviction.

What constitutes eviction see *infra*, VII, F.

91. *Alabama.*— Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73.

California.— McDowell *v.* Hyman, 117 Cal. 67, 48 Pac. 984.

Illinois.— Berrington *v.* Casey, 78 Ill. 317; Ankeny *v.* Pierce, 1 Ill. 262; Chicago Warehouse, etc., Co. *v.* Illinois Phneumatic Tool Co., 35 Ill. App. 144, where there was held to be no constructive eviction.

Iowa.— Boyer *v.* Commercial Bldg. Inv. Co., 110 Iowa 491, 81 N. W. 720; Kane *v.* Mink, 64 Iowa 84, 19 N. W. 852.

Louisiana.— King *v.* Grant, 43 La. Ann. 817, 9 So. 642.

Maine.— Ware *v.* Lithgow, 71 Me. 62.

Massachusetts.— International Trust Co. *v.* Schumann, 158 Mass. 287, 33 N. E. 509 (holding that where a tenant remained in occupation of the premises until the expiration of the lease the fact that during the term the landlord induced the liquor commissioners to refuse the tenant a license does not constitute a breach of an implied covenant for quiet enjoyment, although the premises were valuable to the tenant chiefly for the purpose of selling liquor); Brown *v.* Holyoke Water-Power Co., 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844; Duncklee *v.* Webber, 151 Mass. 408, 24 N. E. 1082; King *v.* Bird, 148 Mass. 572, 20 N. E. 196; Sherman *v.* Williams, 113 Mass. 481, 18 Am. Rep. 522, holding that a lessor's consent to the erection of a wall upon the land under the eaves of a leased building is a breach of the covenant for quiet enjoyment, since where a tenant is evicted from a material portion of the premises he may treat it as an eviction from the whole.

New York.— New York *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Mason *v.* Lenderoth, 88 N. Y. App. Div. 38, 84 N. Y. Suppl. 740 (holding that a mere foreclosure sale of leased premises does not constitute a breach of the landlord's covenant for quiet enjoyment, and the tenant's possession must be actually disturbed); Edesheimer *v.* Quackenbush, 68 Hun 427, 23 N. Y. Suppl. 75; Doupe *v.* Gennin, 1 Sweeny 25; Moffat *v.* Strong, 9 Bosw. 57; Sefton *v.* Julliard, 46 Misc. 68, 91 N. Y. Suppl. 348 (where there was held to be no eviction); Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. 219, 88 N. Y.

d. Actions For Breach of Covenant. The most usual remedy for a breach of covenant for quiet enjoyment is an action of covenant,[92] in which damages are sought and recovered in proportion to the injuries sustained.[93] In a declaration in such action the covenant is sufficiently described if it be stated according to the

Suppl. 1049; Lynch *v.* Sauer, 16 Misc. 1, 37 N. Y. Suppl. 666 [*affirming* 14 Misc. 252, 35 N. Y. Suppl. 715]; Hyde *v.* Wilmore, 14 Misc. 340, 35 N. Y. Suppl. 681; Burke *v.* Tindale, 12 Misc. 31, 33 N. Y. Suppl. 20; Greenwood *v.* Wetterau, 84 N. Y. Suppl. 287.

Ohio.— Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

Pennsylvania.— Tucker *v.* Du Puy, 210 Pa. St. 461, 60 Atl. 4; Brennan *v.* Jacobs, (1888) 15 Atl. 685; Steel *v.* Frick, 56 Pa. St. 172; Jackson *v.* Stewart, 31 Pa. Super. Ct. 58; Market Co. *v.* Lutz, 4 Phila. 322.

England.— Tebb *v.* Cave, [1900] 1 Ch. 642, 69 L. J. Ch. 282, 82 L. T. Rep. N. S. 115, 48 Wkly. Rep. 318; Cohen *v.* Tannar, [1900] 2 Q. B. 609, 69 L. J. Q. B. 904, 83 L. T. Rep. N. S. 64, 48 Wkly. Rep. 642. See Davies *v.* Town Properties Inv. Corp., [1902] 2 Ch. 635, 71 L. J. Ch. 900, 87 L. T. Rep. N. S. 430, 51 Wkly. Rep. 42; Newby *v.* Sharpe, 8 Ch. D. 39, 47 L. J. Ch. 617, 38 L. T. Rep. N. S. 583, 26 Wkly. Rep. 685; Shaw *v.* Stenton, 2 H. & N. 858, 27 L. J. Exch. 253, 6 Wkly. Rep. 327; Hartcup *v.* Bell, 1 Cab. & E. 19; Carpenter *v.* Parker, 3 C. B. N. S. 206, 27 L. J. C. P. 78, 6 Wkly. Rep. 98, 91 E. C. L. 206; Williams *v.* Burrell, 1 C. B. 402, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 473.

Entry of the city in the exercise of its power of eminent domain is not a breach of a covenant for quiet enjoyment. Pabst Brewing Co. *v.* Thorley, 127 Fed. 439.

A temporary inconvenience caused by the interference of the lessor with the access of his tenant to the demised premises, or which does not affect the estate or title or possession of the tenant, is not a breach of a covenant for quiet enjoyment. Manchester, etc., R. Co. *v.* Anderson, [1898] 2 Ch. 394, 67 L. J. Ch. 568, 78 L. T. Rep. N. S. 821.

Condemnation of the premises by the health board as unfit for habitation is not a breach of the covenant for quiet enjoyment where the lessee remains in possession until the end of the term. Roth *v.* Adams, 185 Mass. 341, 70 N. E. 445.

The removal of a party-wall by an adjoining owner, even though the leased premises become uninhabitable by the tenant, does not constitute such an eviction under a paramount title as will relieve the tenant from the payment of rent. Barns *v.* Wilson, 116 Pa. St. 303, 9 Atl. 437.

Entering upon demised premises to make repairs required by the building department is not a breach of the covenant of quiet enjoyment. White *v.* Thurber, 55 Hun (N. Y.) 447, 8 N. Y. Suppl. 661.

92. *California.*— McAlester *v.* Landers, 70 Cal. 79, 11 Pac. 505.

New York.— Grannis *v.* Clark, 8 Cow. 36, holding that such action will lie even where plaintiff has been prevented from taking possession.

Virginia.— Hubble *v.* Cole, 88 Va. 236, 13 S. E. 441, 29 Am. St. Rep. 716, 13 L. R. A. 311, holding that where the lessor prevents the lessee from enjoying the leased property by a preliminary injunction, which is afterward dissolved, the fact that the lessee has a right of action on the injunction bond will not bar his action of covenant.

United States.— Owens *v.* Wight, 18 Fed. 865, 5 McCrary 642, holding further that an action in equity for an accounting is not the proper remedy.

England.— Campbell *v.* Lewis, 3 B. & Ald. 392, 21 Rev. Rep. 520, 5 E. C. L. 230; Morris *v.* Edgington, 3 Taunt. 24, 12 Rev. Rep. 579, holding that an action on a covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. See also Ireland *v.* Bircham, 2 Bing. N. Cas. 90, 4 L. R. C. P. 305, 2 Scott 207, 29 E. C. L. 451; Dawson *v.* Dyer, 5 B. & Ad. 584, 2 N. & M. 559, 27 E. C. L. 248.

Canada.— See Arnold *v.* White, 5 Grant Ch. (U. C.) 371.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 476.

Set-off of damages in action for rent see *infra*, VIII, B, 8, c.

93. *Alabama.*— Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73.

California.— Levitzky *v.* Canning, 33 Cal. 299.

Maine.— Hardy *v.* Nelson, 27 Me. 525.

Massachusetts.— Riley *v.* Hale, 158 Mass. 240, 73 N. E. 491; Duncklee *v.* Webber, 151 Mass. 408, 24 N. E. 1082; Jewett *v.* Brooks, 134 Mass. 505; Dexter *v.* Manley, 4 Cush. 14; Smith *v.* Strong, 14 Pick. 128; Caswell *v.* Wendell, 4 Mass. 108; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182.

New York.— Clarkson *v.* Skidmore, 46 N. Y. 297; Hyman *v.* Boston Chair Mfg. Co., 59 N. Y. Super. Ct. 116, 13 N. Y. Suppl. 609. And see Wolff *v.* Hvass, 11 Misc. 561, 32 N. Y. Suppl. 798.

Texas.— Buck *v.* Morrow, 2 Tex. Civ. App. 361, 21 S. W. 398.

Wisconsin.— Blossom *v.* Knox, 3 Pinn. 262, 3 Chandl. 295.

England.— Lock *v.* Furze, L. R. 1 C. P. 441, Harr. & R. 379, 15 L. J. C. P. 141, 14 Wkly. Rep. 403. See also Williams *v.* Burrell, 1 C. B. 402, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402.

Canada.— Fisher *v.* Grace, 27 U. C. Q. B. 158.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 479.

The former rule of damages in such action was to give nominal damages and costs only,

legal effect of the instrument.[94] Special damages are not recoverable unless alleged in the complaint.[95] In an action on the covenants of title for quiet enjoyment implied in a lease by the words "grant and demise" eviction need not be alleged.[96]

8. Use of Premises — a. Mode of Use in General. Where the contract of lease is silent on the subject, the lessees have by implication the right to put the premises to such use and employment as they please, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed.[97] The law, however, implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed,[98] or apparently violative of the spirit and

with such mesne profits as the tenant was compelled to pay to the real owner. Conger *v.* Weaver, 20 N. Y. 140; Kelly *v.* Schenectady Dutch Church, 2 Hill (N. Y.) 105; Moak *v.* Johnson, 1 Hill (N. Y.) 99; Baldwin *v.* Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; Bender *v.* Fromberger, 4 Dall. (Pa.) 441, 1 L. ed. 901; Flureau *v.* Thornhill, 2 W. Bl. 1078.

Loss caused by destruction of perishable goods.— The lessee cannot recover for a loss occasioned by his purchase of a quantity of perishable goods for use in the business to be conducted on the premises shortly in advance of the commencement of his term, where the market is in the same city and he would have sustained no special loss by deferring their purchase until he had acquired possession. Friedland *v.* Myers, 139 N. Y. 432, 34 N. E. 1055 [*affirming* 19 N. Y. Suppl. 741].

Action against remainder-man and executor of lessee.— Where the tenant for life executes a lease for years, with a covenant for quiet enjoyment, an action for a breach of such covenant occasioned by the death of the life-tenant, and consequent termination of the lease prior to the expiration of the term, will not lie against the remainder-man, since no tenure and no relation exists between the remainder-man of the tenant and the life-tenant (Coakley *v.* Chamberlain, 38 How. Pr. (N. Y.) 483), nor will such action lie against the executor of the life-tenant and the remainder-man jointly (Coakley *v.* Chamberlain, *supra*).

Where the agreed consideration for the expired term exceeds any possible profit which the lessee can reasonably hope to derive from the use of the leased premises during such term there can be no recovery for the breach of the covenant for quiet enjoyment contained in the lease. O'Connor *v.* Memphis, 7 Lea (Tenn.) 219.

94. Dexter *v.* Manley, 4 Cush. (Mass.) 14.

95. Hyman *v.* Boston Chair Mfg. Co., 59 N. Y. Super. Ct. 116, 13 N. Y. Suppl. 609.

96. Grannis *v.* Clark, 8 Cow. (N. Y.) 36.

97. Nave *v.* Berry, 22 Ala. 382; Union Water Power Co. *v.* Lewiston, 95 Me. 171, 49 Atl. 878; Anderson *v.* Miller, 96 Tenn. 35, 33 S. W. 615, 54 Am. St. Rep. 812, 31 L. R. A. 604; Keith *v.* Reid, L. R. 2 H. L. Sc. 39.

98. *Alabama.*— Nave *v.* Berry, 22 Ala. 382.

Georgia.— Miles *v.* Lauraine, 99 Ga. 402, 27 S. E. 739.

Illinois.— Drda *v.* Schmidt, 47 Ill. App. 267, holding that a tenant without authority from his landlord cannot grant a valid easement over the leased premises.

Kansas.— Fogarty *v.* Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756, where the landowner leased the land to a company for the manufacture of pressed brick, and the company used a process in burning that generated noxious gases, that injured and destroyed his growing crops, and it was held that the lessor was not estopped from claiming damages for the injury, as he had a right to presume that the process used would be a reasonable and lawful one.

Louisiana.— Druhan *v.* Adam, 9 La. Ann. 527.

Maryland.— Grabenhorst *v.* Nicodemus, 42 Md. 236; Adams *v.* Brereton, 3 Harr. & J. 124.

Massachusetts.— Hersey *v.* Chapin, 162 Mass. 176, 38 N. E. 442 (holding that a tenant at will in possession cannot, as against the owner, authorize the board of health to use the property for a small-pox hospital); Richardson *v.* Richardson, 9 Gray 213.

Mississippi.— See Warren County *v.* Gans, 80 Miss. 76, 31 So. 539.

Missouri.— Murphy *v.* St. Louis Type Foundry, 29 Mo. App. 541.

Nebraska.— Herpolsheimer *v.* Funke, 1 Nebr. (Unoff.) 471, 95 N. W. 688.

New Jersey.— Klie *v.* Von Broock, 56 N. J. Eq. 18, 37 Atl. 469; McKelway *v.* Cook, 4 N. J. Eq. 102.

New York.— Guth *v.* Mehling, 84 N. Y. App. Div. 586, 82 N. Y. Suppl. 1018; Smith *v.* American Inst., 7 Daly 526; Chase *v.* Traitel Marble Co., 32 Misc. 376, 66 N. Y. Suppl. 29; Trenkmann *v.* Schneider, 27 Misc. 808, 57 N. Y. Suppl. 652; Fash *v.* Kavanagh, 24 How. Pr. 347. See Carhart *v.* French, Lalor 17.

Pennsylvania.— Heise *v.* Pennsylvania R. Co., 62 Pa. St. 67; Walsh *v.* Bourse, 15 Pa. Super. Ct. 219.

purpose of the lease as such spirit and purpose is evidenced by the recitals therein.[99]

b. Restrictions in Lease as to Mode of Use. Express conditions or covenants are frequently embodied in leases to the effect that the premises shall only be used for purposes specified therein,[1] and such covenants run with the land.[2] A recital

Tennessee.— Anderson *v.* Miller, 96 Tenn. 35, 33 S. W. 615, 54 Am. St. Rep. 812, 31 L. R. A. 604.

Vermont.— Leonard *v.* Judd, Brayt. 230.

England.— Wood *v.* Cooper, [1894] 3 Ch. 671, 63 L. J. Ch. 845, 71 L. T. Rep. N. S. 222, 8 Reports 517, 43 Wkly. Rep. 201; White *v.* Nicholson, 11 L. J. C. P. 264, 4 M. & G. 95, 4 Scott N. R. 707, 43 E. C. L. 58.

Canada.— Provost *v.* Holland, 15 Quebec Super. Ct. 298.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 482.

Where the tenant has expressly contracted to repair, there is no implied contract to use demised premises in a tenant-like manner. Standen *v.* Chrismas, 10 Q. B. 135, 11 Jur. 694, 16 L. J. Q. B. 265, 59 E. C. L. 135.

Covenant not to commit waste — measure of damages.— A covenant by a tenant not to commit waste on the demised property is not, with regard to the measure of damages for the breach of it, the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it. Therefore, in an action by the reversioner against the tenant for waste, the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste; the true measure of damages is the diminution in the value of the reversion, less a discount for immediate payment. Whitham *v.* Kershaw, 16 Q. B. D. 613, 54 L. T. Rep. N. S. 124, 34 Wkly. Rep. 340.

99. Sibley *v.* Hoar, 4 Gray (Mass.) 222; Clementson *v.* Gleason, 36 Minn. 102, 30 N. W. 400; Lovett *v.* U. S., 9 Ct. Cl. 479, holding that, where premises are leased for the purpose of a hospital, their use as a burial ground is a misuse for which the landlord may recover damages, but that where they are so leased, their use as a small-pox hospital is not a misuser.

1. *California.*— Heywood *v.* Berkeley Land, etc., Imp. Assoc., (1886) 11 Pac. 246.

Illinois.— Bryden *v.* Northrup, 58 Ill. App. 233; White *v.* Naerup, 57 Ill. App. 114.

New York.— Thousand Island Park Assoc. *v.* Tucker, 173 N. Y. 203, 65 N. E. 975 [*reversing* 69 N. Y. Suppl. 1149] (holding, however, that where a residence association leased its property under an instrument expressly reciting certain regulations previously adopted, and containing a covenant that the lessee should conform to such regulations as the association should from time to time impose, this did not give the association absolute power of adopting regulations which were unreasonable); Weil *v.* Abrahams, 53 N. Y. App. Div. 313, 66 N. Y. Suppl. 244 (holding that covenants in a lease that a building is to be used and occupied as an oil-cloth store and dry-goods store, and that the lessees will place no sign at the entrance except as may be indicated and consented by the lessor, prohibit the lessees from displaying an auctioneer's flag and carrying on an auction business on the premises, and from selling goods therein, although there is no express covenant that the premises are not to be used for any other purpose); Chautauqua Assembly *v.* Alling, 46 Hun 582; Jackson *v.* Rich, 7 Johns. 194; Jackson *v.* Brownell, 1 Johns. 267, 3 Am. Dec. 326.

Ohio.— Linwood Park Co. *v.* Van Dusen, 63 Ohio St. 183, 58 N. E. 576.

England.— St. Albans *v.* Battersby, 3 Q. B. D. 359, 47 L. J. Q. B. 571, 38 L. T. Rep. N. S. 685, 26 Wkly. Rep. 678; Toleman *v.* Portbury, L. R. 5 Q. B. 288, 39 L. J. Q. B. 136, 22 L. T. Rep. N. S. 33, 18 Wkly. Rep. 579; Fitz *v.* Iles, [1893] 1 Ch. 77, 62 L. J. Ch. 258, 68 L. T. Rep. N. S. 108, 2 Reports 132; Buckle *v.* Fredericks, 44 Ch. D. 244, 55 J. P. 165, 62 L. T. Rep. N. S. 884, 38 Wkly. Rep. 742; Stuart *v.* Diplock, 43 Ch. D. 343, 59 L. J. Ch. 142, 62 L. T. Rep. N. S. 333, 38 Wkly. Rep. 223; Portman *v.* Home Hospital Assoc., 27 Ch. D. 81 note; 50 L. T. Rep. N. S. 599 note; Rolls *v.* Miller, 27 Ch. D. 71, 53 L. J. Ch. 682, 50 L. T. Rep. N. S. 597, 32 Wkly. Rep. 806 [*affirming* 48 J. P. 357, 518]; Evans *v.* Davis, 10 Ch. D. 747, 48 L. J. Ch. 223, 39 L. T. Rep. N. S. 391, 27 Wkly. Rep. 285; Bramwell *v.* Lacy, 10 Ch. D. 691, 48 L. J. Ch. 339, 40 L. T. Rep. N. S. 361, 27 Wkly. Rep. 463; Jones *v.* Bone, L. R. 9 Eq. 674, 39 L. J. Ch. 405, 23 L. T. Rep. N. S. 304, 18 Wkly. Rep. 489; Doe *v.* Spry, 1 B. & Ald. 617, 19 Rev. Rep. 404; Wickenden *v.* Webster, 6 E. & B. 387, 2 Jur. N. S. 590, 25 L. J. Q. B. 264, 4 Wkly. Rep. 562, 85 E. C. L. 387; Kemp *v.* Sober, 15 Jur. 458, 20 L. J. Ch. 602, 1 Sim. N. S. 517, 40 Eng. Ch. 517, 61 Eng. Reprint 200; Devonshire *v.* Brookshaw, 63 J. P. 569, 81 L. T. Rep. N. S. 83; Hobson *v.* Tulloch, 67 L. J. Ch. 205; Harmann *v.* Powell, 56 J. P. 150, 60 L. J. Q. B. 628, 65 L. T. Rep. N. S. 255; Timms *v.* Baker, 49 L. T. Rep. N. S. 106; Doe *v.* Keeling, 1 M. & S. 95, 14 Rev. Rep. 405. See Vale *v.* Moorgate-Street, 80 L. T. Rep. N. S. 487, in which case the landlord was the covenantor.

Forfeiture of lease for breach of covenant or condition see *infra*, IX, B, 7.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 482 *et seq.*

A prior oral agreement, restricting the use of the leased premises, not inserted in the written lease, cannot be enforced. Kramer *v.* Amberg, 3 N. Y. Suppl. 240.

2. *Connecticut.*— Malley *v.* Thalheimer, 44 Conn. 41, where a lessee covenanted to use

in a lease of the purposes for which the demised premises are let is often held to constitute an express covenant on the part of the tenant to use them for no other purpose.[3] Where, however, such restrictive conditions or covenants are incorporated into a lease, the general rule of interpretation is that they should be so construed as to carry into effect the intention of the parties, and when considered in connection with other parts of the instrument will tend to support rather than defeat it.[4] Such covenant, however, may be expressly waived or waived by impli-

the premises only to keep a lager beer saloon, and after the beginning of the term fitted up a restaurant thereon, at considerable expense and with no objection by the lessor, although the lessor's representative under a power of attorney knew thereof, and the covenant was deemed to have been waived in that regard.

Florida.— Dunn *v.* Barton, 16 Fla. 765.

Massachusetts.— Miller *v.* Prescott, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434.

New York.— Round Lake Assoc. *v.* Kellogg, 20 N. Y. Suppl. 261.

Ohio.— Wright *v.* Heidorn, 6 Ohio S. & C. Pl. Dec. 151, 4 Ohio N. P. 124; Nova Cæsarea Harmony Lodge *v.* White, 2 Cinc. Super. Ct. 6.

Covenants running with land in general see *supra*, II, B, 3 d.

3. *Arkansas.*— Brooks *v.* Clifton, 22 Ark. 54, holding that the terms of a special agreement to lease a house for the storage of furniture are not waived merely by the lessor's knowledge of its use for the storage of other articles and his failure to dissent.

Kentucky.— Cleve *v.* Mazzoni, 45 S. W. 88, 19 Ky. L. Rep. 2001, holding that under a lease of a building to be used "for mercantile purposes and dwelling" and not otherwise, and providing for forfeiture in case of violation, the lessee forfeited his right by subletting such premises for a barber shop.

Massachusetts.— Allen *v.* Howe, 105 Mass. 241; Gannett *v.* Albree, 103 Mass. 372.

Michigan.— Wertheimer *v.* Wayne Cir. Judge, 83 Mich. 56, 47 N. W. 47.

Minnesota.— Spalding Hotel Co. *v.* Emerson, 69 Minn. 292, 72 N. W. 119.

New York.— De Forest *v.* Byrne, 1 Hilt. 43; Gillian *v.* Norton, 33 How. Pr. 373.

Ohio.— Nova Cæsarea Harmony Lodge *v.* White, 2 Cinc. Super. Ct. 6.

Pennsylvania.— See also Fidelity Trust Co. *v.* Kohn, 27 Pa. Super. Ct. 374.

South Carolina.— Independent Steam F. Engine Co. *v.* Richland Lodge, 70 S. C. 572, 50 S. E. 499.

England.— Wilkinson *v.* Rogers, 10 Jur. N. S. 5, 9 L. T. Rep. N. S. 434, 12 Wkly. Rep. 119; Macher *v.* Foundling Hospital, 1 Ves. & B. 188, 35 Eng. Reprint 74; Bray *v.* Fogarty, Ir. R. 4 Eq. 544, 18 Wkly. Rep. 1151.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 483.

And see White *v.* Kane, 53 Mo. App. 300; Brugman *v.* Noyes, 6 Wis. 1, holding that the words "to be used as cabinet warerooms" following a description of the premises in a lease for years do not imply a covenant on the part of the lessee not to use the premises for any other purposes than as cabinet warerooms; that equity will not raise an implied covenant in restraint of a beneficiary use of the property.

4. *Illinois.*— Bryden *v.* Northrup, 58 Ill. App. 233, holding that a condition in a lease that the premises were to be occupied for studio, sales-room and dwelling purposes, and for no other purpose whatever, could not be construed so as to allow the use of the premises for a dram shop or liquor saloon.

Indiana.— Reed *v.* Lewis, 74 Ind. 433, 39 Am. Rep. 88.

Massachusetts.— Shumway *v.* Collins, 6 Gray 227, holding that the use for the manufacture of caps on premises leased "to be occupied for the same purpose they now are," and which were occupied at the time of the lease for the manufacture of carpet bags, is not such an alteration in occupation as will avoid the lease.

New York.— Kerley *v.* Mayer, 10 Misc. 718, 31 N. Y. Suppl. 818, holding that a provision in a lease that the premises are "to be used and occupied only as a strictly first-class liquor saloon" does not restrict the use to the saloon business, but merely restricts the character of that business.

Texas.— San Antonio Brewing Assoc. *v.* Brents, (Civ. App. 1905) 88 S. W. 368.

England.— Haywood *v.* Brunswick Permanent Bldg Soc., 8 Q. B. D. 403, 51 L. J. Q. B. 73, 45 L. T. Rep. N. S. 699, 30 Wkly. Rep. 299; Wadham *v.* Postmaster-Gen., L. R. 6 Q. B. 644, 40 L. J. Q. B. 310, 24 L. T. Rep. N. S. 545, 19 Wkly. Rep. 1082; Toleman *v.* Portbury, L. R. 5 Q. B. 288, 39 L. J. Q. B. 136, 22 L. T. Rep. N. S. 33, 18 Wkly. Rep. 579; Stuart *v.* Diplock, 43 Ch. D. 343, 59 L. J. Ch. 142, 62 L. T. Rep. N. S. 333, 38 Wkly. Rep. 223 [*distinguishing* Feilden *v.* Slater, L. R. 7 Eq. 523, 38 L. J. Ch. 379, 20 L. T. Rep. N. S. 485, 17 Wkly. Rep. 485]; Hall *v.* Ewin, 37 Ch. D. 74, 57 L. J. Ch. 95, 57 L. T. Rep. N. S. 831, 36 Wkly. Rep. 84; Austerberry *v.* Oldham Corp., 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch. 633, 53 L. T. Rep. N. S. 543, 33 Wkly. Rep. 807; Holt *v.* Collyer, 16 Ch. D. 718, 45 J. P. 456, 50 L. J. Ch. 311, 44 L. T. Rep. N. S. 214, 29 Wkly. Rep. 502; Kemp *v.* Bird, 5 Ch. D. 974, 46 L. J. Ch. 828, 37 L. T. Rep. N. S. 53, 25 Wkly. Rep. 838; Grand Canal Co. *v.* McNamee, L. R. 29 Ir. L. 131; Doe *v.* Bird, 2 A. & E. 161, 4 L. J. K. B. 52, 4 N. & M. 285, 29 E. C. L. 92; Jones *v.* Thorne, 1 B. & C. 715, 3 D. & R. 152, 1 L. J. K. B. O. S. 200, 25 Rev. Rep. 546, 8 E. C. L. 302; Gutteridge *v.* Munyard,

cation by the conduct or acquiescence of the lessor.[5] The purpose for which premises are leased when expressly recited in the lease, followed by the actual occupation of the premises for that purpose, estops the landlord and those claiming under him from acts defeating such purpose.[6]

c. Duties of Assignees and Subtenants. A covenant in a lease against the use of the premises by the lessee for certain purposes, or restricting the use of the premises to certain specified purposes, is binding on sublessees and subtenants, as in the nature of a condition affecting the estate granted, restricting and limiting the rights of the lessee.[7]

d. Injunction[8] to Restrain Objectionable Use. Where the lessor has no adequate remedy at law, an injunction will lie to restrain the lessee from an objectionable use of the premises, or from a use in violation of the restrictions contained in the lease.[9]

7 C. & P. 129, 1 M. & Rob. 334, 32 E. C. L. 534; Wilkinson *v.* Rogers, 2 De G. J. & S. 62, 10 Jur. N. S. 162, 9 L. T. Rep. N. S. 696, 3 New Rep. 347, 12 Wkly. Rep. 284, 67 Eng. Ch. 50, 46 Eng. Reprint 298; Bird *v.* Lake, 1 Hem. & M. 338; Croft *v.* Lumley, 6 H. L. Cas. 672, 27 L. J. Q. B. 321, 4 Jur. N. S. 903, 6 Wkly. Rep. 523, 16 Eng. Reprint 1459; Lumley *v.* Metropolitan R. Co., 34 L. T. Rep. N. S. 774; Hickman *v.* Isaacs, 4 L. T. Rep. N. S. 285; Ranken *v.* Hunt, 10 Reports 249; Reeves *v.* Cattell, 24 Wkly. Rep. 485. See Birmingham Breweries *v.* Jameson, 67 L. J. Ch. 403, 78 L. T. Rep. N. S. 512 [*reversing* 46 Wkly. Rep. 375].

5. Gibson *v.* Doeg, 2 H. & N. 615, 27 L. J. Exch. 37, 6 Wkly. Rep. 107.

Waiver of forfeiture see *infra*, IX, B, 7, g.

6. Cleveland, etc., R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619; McDonald *v.* Starkey, 42 Ill. 442 (where a lessor demised land to the trustees of a school for the purposes of a school, and it was held that the beneficiaries took a vested interest, and that neither the lessor nor the trustees had any power to change the uses declared by the lease, as for example to provide that the school-house should be used for religious worship on Sundays); Snyder *v.* Hersberg, 11 Phila. (Pa.) 200; Hudson *v.* Cripps, [1896] 1 Ch. 265, 60 J. P. 393, 65 L. J. Ch. 328, 73 L. T. Rep. N. S. 741, 44 Wkly. Rep. 200, holding that where a landlord enters into an agreement to let a residential flat to a tenant, under conditions and regulations which show on the face of them that the building in which the flat is situated was intended to be used for residential flats only, and the building has in fact been so used, the landlord will be restrained at the suit of the tenant from converting a large part of the building into a club during the tenancy.

7. *Florida.*— Dunn *v.* Barton, 16 Fla. 765.

Massachusetts.— Miller *v.* Prescott, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434.

Minnesota.— Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241.

New York.— Howard *v.* Ellis, 4 Sandf. 369; De Forest *v.* Byrne, 1 Hilt. 43.

Ohio.— Crowe *v.* Riley, 63 Ohio St. 1, 57 N. E. 956.

Pennsylvania.— Brolaskey *v.* Hood, 6 Phila. 193.

Tennessee.— Anderson *v.* Miller, 96 Tenn. 35, 33 S. W. 615, 54 Am. St. Rep. 812, 31 L. R. A. 604, holding that a sublessee is equally liable with the lessee for a violation of a stipulation in the original lease, even where the sublease authorized him to do the particular thing prohibited, and he in good faith believed the lessee had authority to so authorize him in a sublease.

England.— Weston *v.* Metropolitan Asylum Dist., 9 Q. B. D. 404, 46 J. P. 564, 51 L. J. Q. B. 399, 46 L. T. Rep. N. S. 580, 30 Wkly. Rep. 623; Holloway *v.* Hill, [1902] 2 Ch. 612, 71 L. J. Ch. 818, 87 L. T. Rep. N. S. 201; White *v.* Southend Hotel Co., [1897] 1 Ch. 767, 66 L. J. Ch. 387, 76 L. T. Rep. N. S. 273, 45 Wkly. Rep. 434; Clements *v.* Welles, L. R. 1 Eq. 200, 11 Jur. N. S. 991, 35 L. J. Ch. 265, 13 L. T. Rep. N. S. 187, 14 Wkly. Rep. 187; Maunsell *v.* Hort, L. R. 1 Ir. 88; Parker *v.* Whyte, 1 Hem. & M. 167, 32 L. J. Ch. 520, 8 L. T. Rep. N. S. 446, 2 New Rep. 157, 11 Wkly. Rep. 683; Mumford *v.* Walker, 71 L. J. K. B. 19, 85 L. T. Rep. N. S. 518; Spencer *v.* Bailey, 69 L. T. Rep. N. S. 179.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 485.

Covenants running with the land see *supra*, II, B, 3, d.

8. **Injunctions** generally see INJUNCTIONS, 22 Cyc. 724.

9. *Alabama.*— Parkman *v.* Aicardi, 34 Ala. 393, 73 Am. Dec. 457.

Illinois.— Bryden *v.* Northrup, 58 Ill. App. 233.

Kansas.— Godfrey *v.* Black, 39 Kan. 193, 17 Pac. 849, 7 Am. St. Rep. 544.

Louisiana.— New Orleans, etc., R. Co. *v.* Darms, 39 La. Ann. 766, 2 So. 230.

Maryland.— Maddox *v.* White, 4 Md. 72, 59 Am. Dec. 67.

Michigan.— Wertheimer *v.* Hosmer, 83 Mich. 56, 47 N. W. 47.

New York.— Ambler *v.* Skinner, 7 Rob. 561; Gillilan *v.* Norton, 6 Rob. 546; Dodge *v.* Lambert, 2 Bosw. 570; Howard *v.* Ellis, 4 Sandf. 369; Neiman *v.* Butler, 19 N. Y. Suppl. 403; Steward *v.* Winters, 4 Sandf. Ch. 587. See Importers, etc., Ins. Co. *v.* Christie, 5 Rob. 169, where from the wording

4. Farm Leases — a. In General — (1) *Cultivation of Land.* A tenant of farming land under a lease which does not restrict the use he is to make of the land has a right to pasture cattle upon it and make any other reasonable and usual use of it he may see fit.[10] By a demise of farming lands a covenant is raised by implication of law that they shall be used as such; and, in the absence of express covenants in reference thereto, the law also implies covenants on the part of the lessee that no waste shall be committed, that the land shall be farmed in a husband-like manner, that the soil shall not be unnecessarily exhausted by negligent or improper tillage, and that repairs shall be made.[11]

of the lease it was held that an injunction will lie only against the sublessees.

West Virginia.— Frank *v.* Brunnemann, 8 W. Va. 462.

Wisconsin.— Brugman *v.* Noyes, 6 Wis. 1, recognizing the principle, but denying its application to the particular state of facts in the case.

England.— Spicer *v.* Martin, 14 App. Cas. 12, 53 J. P. 516, 58 L. J. Ch. 309, 60 L. T. Rep. N. S. 546, 37 Wkly. Rep. 689; Tod-Heatly *v.* Benham, 40 Ch. D. 80, 58 L. J. Ch. 83, 60 L. T. Rep. N. S. 241, 37 Wkly. Rep. 38; Craig *v.* Greer, [1899] 1 Ir. 258; Jay *v.* Richardson, 30 Beav. 563, 8 Jur. N. S. 689, 31 L. J. Ch. 398, 6 L. T. Rep. N. S. 177, 10 Wkly. Rep. 412, 54 Eng. Reprint 1008; Hodson *v.* Coppard, 29 Beav. 4, 30 L. J. Ch. 20, 9 Wkly. Rep. 9, 54 Eng. Reprint 525; Parker *v.* Whyte, 1 Hem. & M. 167, 32 L. J. Ch. 520, 8 L. T. Rep. N. S. 446, 2 New Rep. 157, 11 Wkly. Rep. 683; Foundling Hospital *v.* Garrett, 47 L. T. Rep. N. S. 230; Barret *v.* Blagrave, 5 Ves. Jr. 555, 31 Eng. Reprint 735.

Canada.— Cockburn *v.* Quinn, 20 Ont. 519.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 486.

Dissolution of injunction.— An order dissolving an injunction to restrain a lessee from committing waste by erecting a stable on the leased premises, without the consent of the lessor, was not erroneous, it providing that the stable should be removed at the expiration of the lease should the lessor so insist. Hubble *v.* Cole, 85 Va. 87, 7 S. E. 242.

Effect of special covenant on right to injunction.— A lessor who lets premises with full knowledge of the lessee's business, where the actual use of the premises is such only as is incidental to the business, cannot enjoin the lessee from such use on the ground of maintaining a nuisance, where there is a covenant that the lessee may pay all damages for any nuisance made or suffered on the premises. Browne *v.* Niles, 165 Mass. 276, 43 N. E. 90.

Mere change in the character of the neighborhood cannot defeat the right to enforce a restrictive covenant by injunction, unless there is an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction. Craig *v.* Greer, [1899] 1 Ir. 258.

10. *Colorado.*— Gilpin *v.* Adams, 14 Colo. 512, 24 Pac. 566, holding that the lease showed an ample consideration for the privilege exercised by plaintiff of raising a large amount of stock upon the land.

Maine.— Dyer *v.* Haley, 29 Me. 277, holding that an action of replevin cannot be maintained by the lessor of a farm, lying upon the banks of the river, for driftwood which has been taken from the river and piled up on the farm by the lessee, as he has no property in such wood, unless there be some provision in the lease giving him a right to it.

Michigan.— Piper *v.* Piper, 122 Mich. 662, 81 N. W. 554.

Pennsylvania.— Irwin *v.* Mattox, 138 Pa. St. 466, 21 Atl. 209.

South Carolina.— Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 487.

11. *Illinois.*— Walker *v.* Tucker, 70 Ill. 527.

Indiana.— Walters *v.* Hutchins, 29 Ind. 136, holding that a covenant to "seed" certain land with clover is fulfilled where the ground was properly prepared, and the proper seed sown, whether natural causes prevent the growth of the crop or not.

Maryland.— Bullitt *v.* Musgrave, 3 Gill 31, holding that a lessee cannot set up any claim for voluntarily farming land in a more beneficial manner than the lease required, and evidence thereof is not admissible to diminish or mitigate a claim for damages for waste committed by him.

Michigan.— Chapel *v.* Hull, 60 Mich. 167, 26 N. W. 874, where the action of the lessee in sowing all the arable lands to wheat shortly prior to the end of his term, and thus leaving the farm practically worthless for the coming season, was held to be an act of waste which a court of equity will properly enjoin.

New Jersey.— Manly *v.* Pearson, 1 N. J. L. 377.

Pennsylvania.— Aughinbaugh *v.* Coppenheffer, 55 Pa. St. 347; Lewis *v.* Jones, 17 Pa. St. 262, 55 Am. Dec. 550; Hunt *v.* Scott, 3 Pa. Co. Ct. 411.

Vermont.— Wing *v.* Gray, 36 Vt. 261.

Virginia.— Hubble *v.* Cole, 85 Va. 87, 7 S. E. 242.

England.— Pratt *v.* Brett, 2 Madd. 62, 17 Rev. Rep. 187, 56 Eng. Reprint 258, where an injunction was granted to stay waste from sowing land with pernicious crops.

(II) *Live Stock on Premises.* The general rule is that in the absence of stipulations to the contrary,[12] the natural increase of stock leased with a farm accrues to the tenant.[13] This of course is not the case if the lease is void.[14] To entitle a person to recover for the death of cattle in the tenant's possession he must show negligence on the part of the tenant.[15] If a lessee for years of a farm and stock sells part of the stock contrary to the terms of the lease, the purchaser, after the termination of the lease by agreement of the parties thereto, although within the term named therein, is liable to the lessor in trover for the stock so sold.[16]

(III) *Rights of Tenant as to Use and Sale of Timber.* The common-law rule obtains in practically every jurisdiction that, in the absence of express stipulation to the contrary, a tenant for life or for years may lawfully cut timber trees necessary for firewood and repairs to houses, fences, etc.,[17] even where he has agreed to make repairs at his own charge.[18] However, in the absence of express stipulations to that effect, a tenant has no right to cut and sell timber from the land, and such cutting and sale will constitute waste.[19]

Canada.— Lundy *v.* Tench, 16 Grant Ch. (U. C.) 597.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 488.

The remedy of the lessor for bad husbandry is by suit and not by confiscation of the tenant's rights under the lease. Clark *v.* Harvey, 54 Pa. St. 142.

Continuing covenant.— A covenant on the part of a lessee to plant a certain number of apple trees on the demised premises, and to replace those that decay or are destroyed, so as always to preserve the given number during the term, is a continuing covenant. Bleecker *v.* Smith, 13 Wend. (N. Y.) 530.

Renting on shares see *infra*, XI.

12. Briggs *v.* Oaks, 26 Vt. 138.

13. Moore *v.* Mohney, 1 Mich. N. P. 143 (where plaintiff leased her farm to defendant and agreed among other things to furnish defendant with two or more cows, he to deliver to plaintiff "one-half of all the butter made from said cows," and it was held that defendant was entitled to the increase of the cows during the term); Woods *v.* Charlton, 62 N. H. 649.

14. Foster *v.* Gorton, 5 Pick. (Mass.) 185.

15. Conklin *v.* Cooper, 12 N. Y. St. 632.

16. Billings *v.* Tucker, 6 Gray (Mass.) 368.

17. *Delaware.*— Harris *v.* Goslin, 3 Harr. 340.

Indiana.— Walters *v.* Hutchins, 29 Ind. 136.

Iowa.— Anderson *v.* Cowan, 125 Iowa 259, 101 N. W. 92, 106 Am. St. Rep. 303, 68 L. R. A. 641.

Kentucky.— Loudon *v.* Warfield, 5 J. J. Marsh. 196 (holding that a tenant may of common right take sufficient estovers for plowbote, firebote, and other housebote, unless restrained by particular covenants or exceptions); Hinton *v.* Fox, 3 Litt. 380.

Massachusetts.—Hubbard *v.* Shaw, 12 Allen 120; Dorrell *v.* Johnson, 17 Pick. 263.

New York.— Van Deusen *v.* Young, 29 N. Y. 9; Gardiner *v.* Derring, 1 Paige 573.

Wisconsin.— Wright *v.* Roberts, 22 Wis. 161.

England.— Chamon *v.* Patch, 5 B. & C. 897, 8 D. & R. 651, 4 L. J. K. B. O. S. 316, 11 E. C. L. 729; De Salis *v.* ——, 2 Molloy 516. *Compare* Simmons *v.* Norton, 7 Bing. 640, 9 L. J. C. P. O. S. 185, 5 M. & P. 645, 20 E. C. L. 280.

Canada.— Campbell *v.* Shields, 44 U. C. Q. B. 449. See St. Paul's Church *v.* Titus, 6 N. Brunsw. 278.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 490.

Waiver or surrender of right.— Where a lease securing to the tenant a right of common of estovers is impliedly surrendered by the acceptance of a new lease granting no such right, the right is extinguished by the surrender. Leyman *v.* Abeel, 16 Johns. (N. Y.) 30.

Extinguishment of right.— Where land to which common of estovers is appurtenant is divided between the tenants without any provision in respect to the common of estovers, the right is extinguished as to both tenants. Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

18. Harder *v.* Harder, 26 Barb. (N. Y.) 409, Coke Litt. 54*b*.

19. *Alabama.*— Ladd *v.* Shattock, 90 Ala. 134, 7 So. 764, holding that a tenant of a farm, instructed to take care of the timber, with permission to cut and use the wood from such part as he wanted to clear for cultivation, has no authority to sell timber from land which he is not clearing for cultivation.

Georgia.— Jones *v.* Gammon, 123 Ga. 47, 50 S. E. 982.

Kentucky.— Loudon *v.* Warfield, 5 J. J. Marsh. 196.

New York.— Van Deusen *v.* Young, 29 N. Y. 9; Clarke *v.* Cummings, 5 Barb. 339; Schermerhorn *v.* Buell, 4 Den. 422; Mooers *v.* Wait, 3 Wend. 104, 20 Am. Dec. 667.

South Carolina.— Hill *v.* Burgess, 37 S. C. 604, 15 S. E. 963.

Texas.— Johnson *v.* Gurley, 52 Tex. 222.

England.— See Raymond *v.* Fitch, 2 C. M. & R. 588, 1 Yale 337, 5 L. J. Exch. 45, 5

(iv) *Rights of Tenant as to Manure Made on Premises.* The general rule is that manure made by a tenant upon leased farm lands in the ordinary course of husbandry is, in the absence of special agreement to the contrary,[20] the property of the lessor, and belongs to the farm as an incident necessary for its improvement and cultivation, and the tenant has no right to remove it from the premises or apply it to any other use.[21] However, manure made in livery stables, or in buildings unconnected with agricultural property, belongs to the tenant, unless there be a contract to the contrary;[22] and it has been held that a tenant is entitled to manure made from fodder grown elsewhere and bought by him.[23]

b. Crops[24] — (i) *Right or Title to in General.* As between the landlord and the tenant, the annual crop raised on the leased property constitutes no part of the freehold, and when matured or severed from the soil during the term of the tenant's lease, it becomes his personal property which he may dispose of as he sees fit,[25] in the absence of a provision in the contract for the rental that the crop

Tyrw. 985; Goulin *v.* Caldwell, 13 Grant Ch. (U. C.) 493.

Canada.— Campbell *v.* Shields, 44 U. C. Q. B. 449; Chestnut *v.* Day, 6 U. C. Q. B. O. S. 637.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 490.

A mere demise of bog, as such, will not give the lessee a right to cut turf for sale, particularly where the demise is of the bog, together with other property. But if nothing but bog be demised, and it is not convertible to any other use save being cut for sale, or if it were, at the time of the demise, used by cutting it for sale, the lessee may cut turf for sale. Coppinger *v.* Gubbins, 9 Ir. Eq. 304, 3 J. & L. 397; Courtown *v.* Ward, 1 Sch. & Lef. 8.

Limitations of rule.— A covenant in a lease against cutting timber is not violated where the lessee, who is authorized by the lease to cut timber for fencing purposes, sells timber from the land, and uses the proceeds to buy other materials for repairing fences. Matter of Williams, 1 Misc. (N. Y.) 35, 22 N. Y. Suppl. 906.

Waste by tenant in general see Waste.

20. Corey *v.* Bishop, 48 N. H. 146.

21. *Indiana.*— Bonnell *v.* Allen, 53 Ind. 130.

Maine.— Lassell *v.* Reed, 6 Me. 222, holding this to be true where the manure is lying in heaps in the farmyard, and although it was made by the tenant's cattle, and from his own fodder.

Maryland.— Gallagher *v.* Shipley, 24 Md. 418, 87 Am. Dec. 611.

Massachusetts.— Nason *v.* Tobey, 182 Mass. 314, 65 N. E. 389, 94 Am. St. Rep. 659; Brown *v.* Magorty, 156 Mass. 209, 30 N. E. 1021; Lewis *v.* Lyman, 22 Pick. 437; Daniels *v.* Pond, 21 Pick. 367, 32 Am. Dec. 269.

New Hampshire.— Hill *v.* De Rochemont, 48 N. H. 87; Perry *v.* Carr, 44 N. H. 118; Plumer *v.* Plumer, 30 N. H. 558.

New York.— Elting *v.* Palen, 60 Hun 306, 14 N. Y. Suppl. 607; Middlebrook *v.* Corwin, 15 Wend. 169. See Fobes *v.* Shattuck, 22 Barb. 568.

Pennsylvania.— Lewis *v.* Jones, 17 Pa. St. 262, 55 Am. Dec. 550; Hunt *v.* Scott, 3 Pa. Co. Ct. 411; Pearson *v.* Friedensville Zinc Co., 1 Pa. Co. Ct. 660; Donnan *v.* Moore, 1 Chest. Co. Rep. 65; Barrington *v.* Justice, 2 Pa. L. J. Rep. 501, 4 Pa. L. J. 289 (holding that a farm tenant will be restrained by writ of estrepement, under the act of March 20, 1822, from removing from the premises manure which has accumulated in the barnyard); Waln *v.* O'Connor, 1 Phila. 353. *Contra*, Hart *v.* Thomas, 4 Pa. L. J. 289.

South Carolina.— Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240.

Vermont.— Wetherbee *v.* Ellison, 19 Vt. 379.

England.— Hindle *v.* Pollitt, 9 L. J. Exch. 288, 6 M. & W. 529.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 491.

Compare Smithwick *v.* Ellison, 24 N. C. 326, 38 Am. Dec. 697, holding that a tenant who is about to remove has a right, where there is no covenant nor custom to the contrary, to take with him all the manure made by him on the farm; but if he leaves it when he quits the farm the manure ceases to be his.

22. Daniels *v.* Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Corey *v.* Bishop, 48 N. H. 146; Plumer *v.* Plumer, 30 N. H. 558; Needham *v.* Allison, 24 N. H. 355; Carroll *v.* Newton, 17 How. Pr. (N. Y.) 189, where a lessee, renting a house and barn, where he kept eighteen to twenty horses, told the lessor that he might have the manure to be made at the barn if he would furnish the straw to be used there, which the lessor declined and afterward claimed the manure as part of the realty, and it was held that it belonged to the lessee, since it was not made from produce of the place, and the lessor so understood it at the time the premises were rented.

23. Nason *v.* Tobey, 182 Mass. 314, 65 N. E. 389, 94 Am. St. Rep. 659; Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

24. **Crops** generally see Crops.

Renting on shares see *infra*, XI.

25. *Alabama.*— Albright *v.* Mills, 86 Ala. 324, 5 So. 591.

Arkansas.— Robinson *v.* Kruse, 29 Ark. 575.

shall be the property of the landlord until rent is paid or secured.[26] And where the rental is to be paid in a portion of the crop, the landlord is not entitled to take his portion until it is either delivered to him by the tenant or severed and set apart for his use.[27]

(II) *Lessee of Mortgaged Premises.* In many jurisdictions, following the common-law rule, it is held that the lessee of mortgaged premises under a lease executed subsequent to the mortgage is not entitled as against the mortgagee to the crops growing on the mortgaged premises at the time of foreclosure and sale.[28] In other jurisdictions, however, it is held that a tenant of the mortgagor

Georgia.— Taylor *v.* Coney, 101 Ga. 655, 28 S. E. 974; Flournoy *v.* Wardlaw, 67 Ga. 378.

Illinois.— Cheney *v.* Bonnell, 58 Ill. 268 (holding that a landlord forcibly entering upon the demised premises and harvesting and selling a crop of wheat sold by the tenant, fails to acquire title thereto, unless he can establish a forfeiture of the lease); Holmes *v.* Holifield, 97 Ill. App. 185 (holding that a tenant who is in the legal possession of land has the right to mortgage the growing crops).

Indiana.— Perry *v.* Hamilton, 138 Ind. 271, 35 N. E. 836; Chicago, etc., R. Co. *v.* Linard, 94 Ind. 319, 48 Am. Rep. 155; Heavilon *v.* Farmers' Bank, 81 Ind. 249; Hubbard *v.* Berry, 10 Ind. App. 594, 38 N. E. 77.

Kansas.— Holderman *v.* Smith, 3 Kan. App. 423, 43 Pac. 272. See also Winkler *v.* Gibson, 2 Kan. App. 621, 42 Pac. 937.

Maine.— Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711; Freeman *v.* Underwood, 66 Me. 229.

Michigan.— Stadden *v.* Hazzard, 34 Mich. 76.

Minnesota.— Goodwin *v.* Clover, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517, 63 L. R. A. 753; Woodcock *v.* Carlson, 41 Minn. 542, 43 N. W. 479.

Missouri.— Meffert *v.* Dyer, 107 Mo. 462, 81 S. W. 643; Hall *v.* Shannon, 19 Mo. 401; Horman *v.* Cargill, 100 Mo. App. 466, 73 S. W. 1101.

Nebraska.— McKean *v.* Smoyer, 37 Nebr. 694, 56 N. W. 492.

New Jersey.— Doremus *v.* Howard, 23 N. J. L. 390.

New York.— Colville *v.* Miles, 127 N. Y. 159, 27 N. E. 809, 24 Am. St. Rep. 433, 12 L. R. A. 848 [*reversing* 45 Hun 236]; Hawkins *v.* Giles, 45 Hun 318.

North Carolina.— Lewis *v.* McNatt, 65 N. C. 63.

Pennsylvania.— Wain *v.* O'Connor, 1 Phila. 353. And see Staats *v.* Simpson, 19 Pa. Super. Ct. 164, where a lease of a farm for a money rental payable quarterly contained this clause: "Lessee to harvest the winter wheat, thresh and haul same to mill, leave straw on place; lessee to have one-half of wheat for labor." The winter wheat was in the ground when the lessee went into possession, and it was held that the clause quoted applied only to the winter wheat then in the ground, and that the lessee had a right to the straw of the crop which he himself put in.

Vermont.— Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39; Willey *v.* Conner, 44 Vt. 68.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 492.

A tenant at will of land has a right to the grass thereon. St. Louis, etc., R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293.

26. Crotty *v.* Collins, 13 Ill. 567; Andrew *v.* Newcomb, 32 N. Y. 417; McCombs *v.* Becker, 3 Hun 342, 5 Thomps. & C. 550; Fox *v.* McKinney, 9 Oreg. 493; Young *v.* Watters, 5 Pa. Co. Ct. 127; Hunt *v.* Scott, 3 Pa. Co. Ct. 411. See also Baker *v.* McInturff, 49 Mo. App. 505 (holding that where a tenant wrongfully retains possession of land after his term has expired, the crops planted by him so long as they remain unsevered, belong to the landlord); Vedder *v.* Davis, 1 N. Y. Suppl. 886.

Death of tenant before crop matures.— Where an owner rents land for a year to a tenant, who contracts in writing that title to all the crops shall remain in the landlord until the rent and all advances are paid, and the tenant dies before the cultivation of the crop is finished, the landlord, by himself or his agent, may enter and finish the cultivation without being an intruder if under all the circumstances such entry be reasonably necessary to protect his interest. Riddle *v.* Hodge, 83 Ga. 173, 9 S. E. 786.

Special covenant as to removal of crop — breach.— A covenant that the lessee will not carry off any hay from the farm leased is not broken by a removal of the hay on a civil process by the creditors of the lessee without his consent. Smith *v.* Putnam, 3 Pick. (Mass.) 221.

Lien for rent see *infra*, VIII, D, 3, c, (II).

27. Dockham *v.* Parker, 9 Me. 137, 23 Am. Dec. 547; Reeves *v.* Hannan, 65 N. J. L. 249, 48 Atl. 1018; McLellan *v.* Whitney, 65 Vt. 510, 27 Atl. 117, where a lease of a farm provided that the lessee should pay to the lessor as rent "the annual sum of one-half the income of said farm," and that the grain raised on the farm should be fed out there, and what feed was bought should be paid for out of the undivided profits of the farm, and it was held that the lease was not on the shares, but for an annual sum, and therefore the lessor had no title to the crop raised during the term. See, however, Kelley *v.* Weston, 20 Me. 232.

28. Jones *v.* Thomas, 8 Blackf. (Ind.) 428; Howell *v.* Schenck, 24 N. J. L. 89; Samson *v.* Rose, 65 N. Y. 411; Harris *v.* Frink, 49 N. Y. 24, 10 Am. Rep. 318; Sherman *v.* Willett, 42 N. Y. 146; Gardner *v.* Finley, 19 Barb.

in possession at the time of the foreclosure of the mortgage is entitled to the crops growing on the land to the extent of his interest under the lease as against the purchaser at the foreclosure sale.[29] Where the foreclosure is instituted and a sale ordered after the severance of the crop, the title thereto will not pass under such proceedings to the mortgagee or purchaser.[30]

(III) *Right to Emblements or Waygoing Crop*—(A) *In General.*[31] At common law, where land is leased for a number of years, and consequently the period of its determination is fixed, and the lease is silent as to who shall be entitled to the growing crops on the land at the end of the term, the outgoing tenant is not entitled to such crops.[32] Where, however, the lease, expressly or by implication, recognizes the right of the tenant to sow in the last year of the term, the general rule is that he has a right to harvest the waygoing crop, where the lease is silent as to who is entitled thereto,[33] and where there is an express agreement that the tenant shall have the waygoing crop he is of course entitled thereto.[34] So in several jurisdictions, by general custom, the tenant is entitled to the waygoing crop, even where such right is not stipulated in the lease.[35] Where a tenant has a right to waygoing crops, whether by reservation in the lease or otherwise, he

(N. Y.) 317; Jewett *v.* Keenholts, 16 Barb. (N. Y.) 193; Gillett *v.* Balcom, 6 Barb. (N. Y.) 370; Simers *v.* Saltus, 3 Den. (N. Y.) 214; Shepard *v.* Philbrick, 2 Den. (N. Y.) 174; Lane *v.* King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; Aldrich *v.* Reynolds, 1 Barb. Ch. (N. Y.) 613. See, however, St. John *v.* Swain, 14 N. Y. Suppl. 743, holding that a sale of land under a mortgage does not affect the right of a tenant of the mortgagor to crops growing on the mortgaged land, where such tenant was not made a party to the foreclosure proceedings.

29. *Illinois.*— Johnson *v.* Camp, 51 Ill. 219.

Iowa.— Richards *v.* Knight, 78 Iowa 69, 42 N. W. 584, 4 L. R. A. 453; Everingham *v.* Braden, 58 Iowa 133, 12 N. W. 142; Hecht *v.* Dettman, 56 Iowa 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131.

Kansas.— Clay Centre First Nat. Bank *v.* Beegle, 52 Kan. 709, 35 Pac. 814, 39 Am. St. Rep. 365.

Louisiana.— Porche *v.* Bodin, 28 La. Ann. 761.

Missouri.— Reed *v.* Swan, 133 Mo. 100, 34 S. W. 483 (holding, however, that the act of March 30, 1893 (Laws (1893), p. 210), which amended Rev. St. (1889) § 7091, making foreclosure sales under power of sale in the mortgage binding on the mortgagor and all claiming under him, by a proviso exempting from its effects the rights of tenant to crops growing on the land to the extent of his interest under the lease, is prospective in operation, and does not apply to a mortgage in which default had been made prior to the passage of the act); Gray *v.* Worst, 129 Mo. 122, 31 S. W. 585; Walton *v.* Fudge, 63 Mo. App. 52, to the same effect.

Nebraska.— Monday *v.* O'Neil, 44 Nebr. 724, 63 N. W. 32, 48 Am. St. Rep. 760.

Pennsylvania.— Bittinger *v.* Baker, 29 Pa. St. 66, 70 Am. Dec. 154.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 493.

30. Buckout *v.* Swift, 27 Cal. 438, 87 Am. Dec. 90; Codrington *v.* Johnstone, 1 Beav. 520, 3 Jur. 528, 8 L. J. Ch. 282, 17 Eng. Ch. 520, 48 Eng. Reprint 1042.

31. **Emblements defined** see Emblements.

32. *Maine.*— Chesley *v.* Welch, 37 Me. 106.

Missouri.— Gossett *v.* Drydale, 48 Mo. App. 430.

New York.— Clarke *v.* Rannie, 6 Lans. 210 (holding that crops sown during a lease, which cannot mature until after the term, may not then be gathered by the lessee); Bain *v.* Clark, 10 Johns. 424; Whitmarsh *v.* Cutting, 10 Johns. 360.

North Carolina.— Sanders *v.* Ellington, 77 N. C. 255.

South Carolina.— Sharp *v.* Kinsman, 18 S. C. 108.

Texas.— Andrews *v.* Jones, 36 Tex. 149.

Virginia.— Mason *v.* Moyers, 2 Rob. 606; Harris *v.* Carson, 7 Leigh 632, 30 Am. Dec. 510.

West Virginia.— Kelley *v.* Todd, 1 W. Va. 197.

England.— Flanagan *v.* Seaver, 9 Ir. Ch. 230; Doe *v.* Turner, 7 M. & W. 226; Davis *v.* Connop, 1 Price 53, 15 Rev. Rep. 693; Gilmore *v.* Lockhart, (Hil. T. 6 Vict.) R. & J. Dig. 2075.

Canada.— Kaatz *v.* White, 19 U. C. C. P. 36; Burrowes *v.* Cairns, 2 U. C. Q. B. 288.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 495, 498.

33. Lewis *v.* Klotz, 39 La. Ann. 259, 1 So. 539; Baldwin *v.* Curth, 17 Ohio Cir. Ct. 174, 9 Ohio Cir. Dec. 594; Kelley *v.* Todd, 1 W. Va. 197; Murton *v.* Scott, 7 U. C. C. P. 481; Campbell *v.* Buchanan, 7 U. C. C. P. 179.

34. Miller *v.* Clement, 40 Pa. St. 484.

35. *Delaware.*—Ellison *v.* Dolbey, 3 Pennew. 45, 49 Atl. 178; Clark *v.* Banks, 6 Houst. 584; Templeman *v.* Biddle, 1 Harr. 522, holding that by a general custom the waygoing tenant is entitled to a wheat crop maturing after his term ends but not to a crop of oats.

New Jersey.— Reeves *v.* Hannan, 65 N. J. L. 249, 48 Atl. 1018: Debow *v.* Colfax, 10

has likewise the right to free ingress and egress, so far as is necessary to gather and remove the crops.[36]

(B) *As Affected by Character of Tenancy.* By the common law, a tenant of lands for an uncertain term, such as a tenant for life or at will, is entitled by way of emblements to the annual productions of his annual labor, although his estate may have been terminated by the act of God or of the law before he shall have harvested the same.[37] Where the tenant for life makes a lease for years, and dies

N. J. L. 128; Howell *v.* Schenck, 24 N. J. L. 89; Smith *v.* Clayton, 29 N. J. L. 357; Van Doren *v.* Everitt, 5 N. J. L. 460, 8 Am. Dec. 615; Corle *v.* Monkhouse, 47 N. J. Eq. 73, 20 Atl. 367.

Ohio.— Foster *v.* Robinson, 6 Ohio St. 90.

Pennsylvania.— Shaw *v.* Bowman, 91 Pa. St. 414; Clark *v.* Harvey, 54 Pa. St. 142; Bittinger *v.* Baker, 29 Pa. St. 66, 70 Am. Dec. 154; Demi *v.* Bossler, 1 Penr. & W. 224; Biggs *v.* Brown, 2 Serg. & R. 14 (holding that the tenant is entitled to waygoing crops maturing after the end of the term, even where he has surrendered possession to the landlord); Stultz *v.* Dickey, 5 Binn. 285, 6 Am. Dec. 411; Diffedorffer *v.* Jones, 5 Binn. 289; Carson *v.* Blazer, 2 Binn. 475, 4 Am. Dec. 463; Whorley *v.* Karper, 20 Pa. Super. Ct. 347; Comfort *v.* Duncan, 1 Miles 229. And see Craig *v.* Dale, 1 Watts & S. 509, 37 Am. Dec. 477, holding that the waygoing crop includes as well the straw as the grain which the tenant may remove and dispose of as he pleases, being subject only to the terms of his contract, and not to any supposed custom of the country on the subject.

England.— Holding *v.* Pigott, 7 Bing. 465, 9 L. J. C. P. O. S. 125, 5 M. & P. 427, 20 E. C. L. 210; Wigglesworth *v.* Dallison, Dougl. (3d ed.) 201; Boraston *v.* Green, 16 East 71, 14 Rev. Rep. 297; *In re* Constable, 80 L. T. Rep. N. S. 164.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 495, 498.

Rights of purchaser of crop.— A tenant sold his right to a waygoing crop, and the purchaser so notified the landlord. Subsequently the lessee and the lessor concluded a settlement, whereby the lease was canceled, and possession of the premises surrendered, but the purchaser of the crop was not a party to this settlement, and it was held that he was not thereby precluded from claiming the crop. Shaw *v.* Bowman, 91 Pa. St. 414.

Right as affected by time of sowing.— The custom which allows a tenant to enter after his term and reap the waygoing crop is confined to crops sown in the autumn, where the lease expires in the spring. Howell *v.* Schenck, 24 N. J. L. 89; Demi *v.* Bossler, 1 Penr. & W. (Pa.) 224.

Vendor and purchaser.— A usage between landlord and tenant by which the tenant is entitled to the waygoing crop has no application as between the vendor and purchaser, whose rights are entirely governed by the contract of purchase. Hendrickson *v.* Ivins, 1 N. J. Eq. 562.

36. *Arkansas.*— Stoddard *v.* Waters, 30 Ark. 1[illegible], holding, however, that this right does not authorize the tenant to hold over and exclude the landlord after the time at which he was to surrender.

Connecticut.— Hudson *v.* Porter, 13 Conn. 59.

Illinois.— See Van Valkenburgh *v.* Peyton, 7 Ill. 44.

Maryland.— Bevans *v.* Briscoe, 4 Harr. & J. 139, holding that the tenant was entitled to enter on the land for the purpose of harvesting the wheat, and for the time it was growing and until it was taken off he was not liable to pay for the use and occupation of the land.

New Hampshire.— Davis *v.* Brocklebank, 9 N. H. 73.

North Carolina.— Humphries *v.* Humphries, 25 N. C. 362.

Pennsylvania.— Biggs *v.* Brown, 2 Serg. & R. 14.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 495.

37. *Georgia.*— Morgan *v.* Morgan, 65 Ga. 493, holding that a tenant at will or his legal representative is entitled to emblements, whether the tenancy was terminated on notice, or by death of the tenant.

Iowa.— Reilly *v.* Ringland, 39 Iowa 106.

Maine.— Brown *v.* Thurston, 56 Me. 126, 96 Am. Dec. 438; Sherburne *v.* Jones, 20 Me. 70; Davis *v.* Thompson, 13 Me. 209.

Massachusetts.— Rising *v.* Stannard, 17 Mass. 282.

Missouri.— Towne *v.* Bowers, 81 Mo. 491. See also Brown *v.* Turner, 60 Mo. 21.

New Hampshire.— Davis *v.* Brocklebank, 9 N. H. 73.

New York.— Harris *v.* Frink, 49 N. Y. 24, 10 Am. Rep. 318 [*reversing* 2 Lans. 35]; Bain *v.* Clark, 10 Johns. 424; Whitmarsh *v.* Cutting, 10 Johns. 360; Stewart *v.* Doughty, 9 Johns. 108; Pfanner *v.* Sturmer, 40 How. Pr. 401.

Pennsylvania.— Reiff *v.* Reiff, 64 Pa. St. 134; Bittinger *v.* Baker, 29 Pa. St. 66, 70 Am. Dec. 154; Jaquett's Estate, 13 Lanc. Bar 13.

Tennessee.— See Hendrixson *v.* Cardwell, 9 Baxt. 389, 40 Am. Rep. 93.

Vermont.— See Gould *v.* Webster, 1 Tyler 409.

Virginia.— Mason *v.* Meyers, 2 Rob. 606; Harris *v.* Carson, 7 Leigh 632, 30 Am. Dec. 510.

England.— Graves *v.* Weld, 5 B. & Ad. 118, 2 L. J. K. B. 176, 2 N. & M. 725, 27 E. C. L. 53; Evans *v.* Roberts, 5 B. & C. 832, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700; Oland's Case, 5 Coke 116*a*; Latham *v.* Atwood, Cro. Car. 515; Oland *v.*

before the expiration of the term, the under-tenant or tenant for years is likewise entitled to emblements.[38]

(c) *As Dependent on Good Faith of Tenant.* A tenant who takes possession of land or plants a crop with notice of the pendency of an action affecting the title of his lessor is not entitled to the waygoing crops after the eviction of his lessor by title paramount.[39]

(d) *As Affected by Cause of Termination of Tenancy.* Where a tenant before the expiration of his term surrenders to the landlord, or by breach of condition forfeits his lease, and the landlord reënters, the latter is entitled to the growing crops upon the land, and no right or title therein remains in the tenant.[40]

(e) *Rights of Incoming Tenant.* Where no prior tenant has a valid claim to the growing crops as emblements, such crops pass to the lessee having the right to immediate possession under his lease,[41] unless the same are expressly reserved by the lessor.[42]

(f) *Criminal Liability*[43] *of Landlord For Unlawful Seizure.* Under a statute making it an offense for the lessor to unlawfully and knowingly seize the crop when there is nothing due him, it is not essential that the landlord should take forcible or manual possession thereof. It will be sufficient if he exercised

Burdwick, Cro. El. 460; Coke Litt. 55*b*; 2 Blackstone Comm. 122.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 497.

Uncut grass.— A testator devised to his wife a life-interest in his real estate, and the wife leased the property. At her death the crop of grass was standing ready for cutting, and it was held that the grass was not emblements, and went to the executor of the testator. Reiff *v.* Reiff, 64 Pa. St. 134.

38. Bradley *v.* Bailey, 56 Conn. 374, 15 Atl. 746, 7 Am. St. Rep. 316, 1 L. R. A. 427 (holding that the right of the lessee of a life-tenant to gather after the latter's death crops sown before the death is not affected by the fact that the lessee knew the life-tenant would die before the crop matured, or that the crop was not sown in a husband-like manner); Dorsett *v.* Gray, 98 Ind. 273; Bevans *v.* Briscoe, 4 Harr. & J. (Md.) 139; King *v.* Foscue, 91 N. C. 116; Haines *v.* Welch, L. R. 4 C. P. 91, 38 L. J. C. P. 118, 19 L. T. Rep. N. S. 422, 17 Wkly. Rep. 163; Kingsbury *v.* Collins, 4 Bing. 202, 13 E. C. L. 467; Doe *v.* Witherwick, 3 Bing. 11, 3 L. J. C. P. O. S. 126, 10 Moore C. P. O. S. 126, 11 E. C. L. 16; Coke Litt. 50; 2 Blackstone Comm. 145.

39. McGinnis *v.* Fernandes, 32 Ill. App. 424 (holding that where a party leased land pending an appeal by his lessor from an adverse judgment in ejectment, and cultivated crops on the land, he was not after affirmance of the judgment in ejectment entitled to the crops, although they had been severed from the soil); Yates *v.* Smith, 11 Ill. App. 459; Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

When a lessor takes possession of the leased premises at the termination of an action of ejectment, his possession relates back to the commencement of the action, and therefore crops put in by the tenant or sub-tenant having notice subsequent to the commencement of the action will belong to the lessor after judgment in his favor in the action. Samson *v.* Rose, 65 N. Y. 411.

40. *Alabama.*— Shahan *v.* Herzberg, 73 Ala. 59.

Illinois.— Carpenter *v.* Jones, 63 Ill. 517.

Maryland.— Dircks *v.* Brant, 56 Md. 500.

Michigan.— Carney *v.* Mosher, 97 Mich. 554, 56 N. W. 935. See, however, Dayton *v.* Vandoozer, 39 Mich. 749.

Missouri.— See Dillon *v.* Wilson, 24 Mo. 278.

New Jersey.— Debow *v.* Colfax, 10 N. J. L. 128.

New York.— Bain *v.* Clark, 10 Johns. 424.

Pennsylvania.— Stultz *v.* Dickey, 5 Binn. 285, 6 Am. Dec. 411; Hunter *v.* Jones, 2 Brewst. 370, 7 Phila. 233.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 502.

Where on the tenant's failure to pay the rent, the landlord under the terms of the lease reënters and takes possession of the premises, the tenant's right to the growing crop is lost, and his mortgagee cannot recover the property from the landlord. Gregg *v.* Boyd, 69 Hun 588, 23 N. Y. Suppl. 918.

41. Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721 (holding that one becoming a tenant at will takes the premises in their then condition, and is entitled to the crops growing on the premises at the beginning of his tenancy); Hosli *v.* Yokel, 57 Mo. App. 622; Tuttle *v.* Langley, 68 N. H. 464, 39 Atl. 488; Edwards *v.* Perkins, 7 Oreg. 149; Emery *v.* Fugina, 68 Wis. 505, 32 N. W. 236.

42. W. T. Wilton, etc., Land, etc., Co. *v.* Philips, 90 Ill. App. 573; Northern Trust Co. *v.* Palmer, 70 Ill. App. 93; Hisey *v.* Troutman, 84 Ind. 115; Herbst *v.* Hafner, 7 Pa. Super. Ct. 363; Kretzer *v.* Wysong, 5 Gratt. (Va.) 9. See also Benedict *v.* International Banking Corp., 88 N. Y. App. Div. 488, 85 N. Y. Suppl. 188.

43. **Criminal law** generally see CRIMINAL LAW.

that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner.[44]

5. Injuries to Premises — a. By Landlord. The lessor is answerable in damages to his lessee for injuries to the premises which prevent his use or occupation, or diminish the value thereof for the purposes of the lease, where such injuries arise from the culpable negligence or deliberate act of the lessor.[45] The lessor is, however, in the absence of contractual obligation, as regards his tenant, only liable for acts of misfeasance and not for acts of non-feasance.[46] And he is not liable for injuries to crops done by his or other tenants' cattle, where such injuries are the result of the tenant's non-compliance with an agreement to remove the crops before a designated time.[47] Nor was he liable for the closing of a doorway, where the use thereof was merely permissive and revocable at any time.[48]

b. By Third Person — (i) *Liability of Third Person.* An action will lie by a tenant for life, for years, or at will for an injury by a third person to his use or possession of the leased premises,[49] particularly where he is liable in an action

Indictments and informations generally see Indictments and Informations.

44. State *v.* Ewing, 108 N. C. 755, 13 S. E. 10.

45. *Illinois.*— Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544.

Massachusetts.— Smith *v.* Faxon, 156 Mass. 589, 31 N. E. 687 [*distinguishing* Fera *v.* Child, 115 Mass. 32].

Minnesota.— Knapheide *v.* Eastman, 20 Minn. 478.

New Jersey.— Hall *v.* Brewster, 2 N. J. L. J. 84.

Rhode Island.— Railton *v.* Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246.

See 31 Cent. Dig. tit. "Landlord and Tenant," § 508.

Injuries by tenant see *supra*, III, F, 2.

Enjoining injuries.— The lessee has been held entitled to an injunction restraining the lessor from defacing and otherwise injuring the leased premises, notwithstanding the lessor was willing and able to respond in damages. Horton *v.* Carhart, 14 N. Y. St. 546.

Removal of buildings under ordinance.— Where the lessor removes a building from the leased premises because of an ordinance requiring him to do so, he is not liable in damages to the tenant, and it is immaterial that the legislative enactment under which the ordinance was passed, was unconstitutional. Dunn *v.* Mellon, 147 Pa. St. 11, 23 Atl. 210, 30 Am. St. Rep. 706.

46. Ward *v.* Fagin, 101 Mo. 669, 14 S. W. 738, 20 Am. St. Rep. 650, 10 L. R. A. 147. See also Stevenson *v.* Lick, 1 Cal. 128; McKenzie *v.* Hatton, 141 N. Y. 6, 35 N. E. 929 [*affirming* 70 Hun 142, 24 N. Y. Suppl. 88], holding that a lessee cannot maintain an action against the lessor for the trespass of a third party.

47. Jurgensmeyer *v.* Householder, 109 Ill. App. 163.

48. Shaft *v.* Carey, 107 Wis. 273, 82 N. W. 288.

49. *Georgia.*— Bass *v.* West, 110 Ga. 698, 36 S. E. 244; Bently *v.* Atlanta, 92 Ga. 623, 18 S. E. 1013.

Illinois.— Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558.

Iowa.— Morrison *v.* Chicago, etc., R. Co., 117 Iowa 587, 91 N. W. 793; Foster *v.* Elliott, 33 Iowa 216.

Kentucky.— Fischer-Leaf Co. *v.* Caldwell, 15 Ky. L. Rep. 542.

Maine.— Hayward *v.* Sedgley, 14 Me. 439, 31 Am. Dec. 64; Bartlett *v.* Perkins, 13 Me. 87; Little *v.* Palister, 3 Me. 6.

Maryland.— Baugher *v.* Wilkins, 16 Md. 35, 77 Am. Dec. 279; Tyson *v.* Shueey, 5 Md. 540.

Massachusetts.— Richards *v.* Gauffret, 145 Mass. 486, 14 N. E. 535; Cutts *v.* Spring, 15 Mass. 135; Sherman *v.* Fall River Iron Works Co., 2 Allen 524, 79 Am. Dec. 799.

Missouri.— McKee *v.* St. Louis, etc., R. Co., 49 Mo. App. 174. See McKinley *v.* Chicago, etc., R. Co., 40 Mo. App. 449.

New York.— Bly *v.* Edison Electric Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500; Austin *v.* Hudson River R. Co., 25 N. Y. 334; Hardrop *v.* Gallagher, 2 E. D. Smith 523; Gourdier *v.* Cormack, 2 E. D. Smith 200; Dumois *v.* New York, 37 Misc. 614, 76 N. Y. Suppl. 161; Holmes *v.* Seely, 19 Wend. 507.

Oregon.— Townley *v.* Oregon, R., etc., Co., 33 Oreg. 323, 54 Pac. 150.

South Carolina.— Davis *v.* Clancy, 3 McCord 422.

Wisconsin.— Jolly *v.* Single, 16 Wis. 280.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 509.

A lessee of riparian land has the same right as an owner in possession to prevent threatened diversion of water. Crook *v.* Hewitt, 4 Wash. 749, 31 Pac. 28.

Abating nuisance.— A tenant is entitled to restrain a nuisance affecting health and comfort in the use of the premises. State *v.* King, 46 La. Ann. 78, 14 So. 423.

Obstruction of street or way.— Where a tenement is leased out, injury caused by obstructing a private way to the tenement is to the leasehold, and not to the reversion. McDonnell *v.* Cambridge R. Co., 151 Mass. 159, 23 N. E. 841; Newman *v.* Metropolitan El. R. Co., 10 N. Y. St. 12.

by the landlord for such injury to the premises.[50] And the fact that the landlord has recovered damages for the injury to the freehold will not preclude the tenant from recovery for the injury to his use and occupation of the premises.[51] Where, however, the injury is to the freehold, and not to the possession, no action therefor lies in favor of the tenant.[52] A tenant likewise has a cause of action for the destruction of, or injury to, his crops, caused by the wrongful act or negligence of a third person.[53] In an action by the tenant against a third person for damages for trespass upon the leased property, or for injury to his crops, it is not necessary to make the landlord a party thereto.[54]

(II) *Liability of Landlord.* The landlord is not liable to the tenant for injuries resulting from the acts of third persons,[55] especially where the lease binds the tenant to make all repairs;[56] and the fact that the injury necessitates the tenant's removal before the expiration of the term does not alter the rule.[57]

c. Damages.[58] A tenant in possession suing to recover damages for injury to his use or occupation of the leased premises is as a general rule entitled to recover

A tenant who had voluntarily occupied property subject to the danger of overflow cannot recover for damages to his personal property caused by the overflow from an improperly constructed culvert on adjoining land. Chicago, etc., R. Co. *v.* Smith, 17 Ill. App. 58.

50. Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. 780; Ulrich *v.* McCabe, 1 Hilt. (N. Y.) 251; Le Salg *v.* Dougherty, 30 Misc. (N. Y.) 455, 62 N. Y. Suppl. 510; Cook *v.* Champlain Transp. Co., 1 Den. (N. Y.) 91; California Dry-Dock Co. *v.* Armstrong, 17 Fed. 216, 8 Sawy. 523, holding that the tenant is answerable to the landlord, or reversioner, for waste done by a stranger; that he has his remedy over against a stranger, but the tenant's recovery against the stranger for injuries to the freehold or reversion is dependent on his first having satisfied the landlord's claim by payment, or repair of the injured premises, and that in such case the stranger is liable only for the payment or expense necessarily incurred.

Action by landlord see *supra*, III, F.

51. Halsey *v.* Lehigh Valley R. Co., 45 N. J. L. 26; Central R. Co. *v.* Valentine, 29 N. J. L. 561 (holding that an agreement with the landlord affecting the use of the premises in the tenant's possession, or releasing damages sustained by previous injury to the property, will not affect tenant's right to damages for an injury to his possession which occurred prior to delivery of the release or agreement); Matter of Water Com'rs, 4 Edw. (N. Y.) 545; Nashville, etc., R. Co. *v.* Heikens, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298. See Vance *v.* San Antonio Gas Co., (Tex. Civ. App. 1900) 60 S. W. 317.

52. McLaughlin *v.* Long, 5 Harr. & J. (Md.) 113 (holding that a lessee for years cannot maintain an action for waste); Ridge *v.* Railroad Transfer Co., 56 Mo. App. 133 (holding that the breaking of a window of a store is an injury to the freehold, and not to the possession, and therefore no action therefor lies in favor of the tenant); Sposato *v.* New York, 178 N. Y. 583, 70 N. E. 1109 [*affirming* 75 N. Y. App. Div. 304, 78 N. Y. Suppl. 168], holding that damages for the drawing of waters from lands by a pumping station near by being a diminution in the rental value, action therefor can be maintained only be the landlord, the operations having commenced before the lease.

Tenant out of possession.— Trespass cannot be maintained by a tenant for years not in possession, against one who enters upon the land, without objection on the part of the subtenants actually in possession. McDougall *v.* Campbellton Water Supply Co., 34 N. Brunsw. 467.

53. St. Louis, etc., R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293; Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251; Baltimore, etc., R. Co. *v.* Hackett, 87 Md. 224, 39 Atl. 510; Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570; Gulf, etc., R. Co. *v.* Smith, 3 Tex. Civ. App. 483, 23 S. W. 89. And see Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, 26 S. W. 43.

As to injury for failure of railroad company to fence right of way see RAILROADS.

As to right of tenant to sue for penalty for failure of railroad company to build fences along right of way see RAILROADS.

54. Dale *v.* Southern R. Co., 132 N. C. 705, 44 S. E. 399; Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767; Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570.

55. Stevenson *v.* Lick, 1 Cal. 128.

License given by a lessor to contractor to enter upon the premises.— A landlord is not liable to a tenant for damages to the leasehold by a contractor who entered the premises to preserve the walls while excavating on the adjoining lot, merely because the landlord gave the contractor license to so enter, under a statute which requires the adjoining lot owner to preserve the party or other wall when he desires to excavate to a designated depth below the curb. McKenzie *v.* Hatton, 70 Hun (N. Y.) 142, 24 N. Y. Suppl. 88 [*affirmed* in 141 N. Y. 6, 35 N. E. 929].

56. Serio *v.* Murphy, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316.

Duty of tenant to repair see *infra*, VII, D, 1.

57. Serio *v.* Murphy, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316.

58. Damages generally see DAMAGES.

the depreciation in the rental value of the premises occasioned thereby from the date of such injury to the end of his term;[59] and where the lessee is bound to make repairs to the premises, it is proper to allow for such repairs in estimating the lessee's damages.[60]

C. Encumbrances, Taxes, and Assessments — 1. Encumbrances. In the absence of covenant or agreement to the contrary the lessee takes the property subject to all servitudes or other encumbrances resting upon it at the time of the lease.[61] Where the lessor covenants that the premises at the date of the lease are free from encumbrances, he is liable for the payment of taxes which have been imposed prior to the commencement of the term, although they are not then due and payable.[62]

2. Taxes and Assessments — a. Liability For in General. In the absence of agreement or special covenant, the duty to pay all state, municipal, and county taxes and assessments which during the term of the lease become chargeable upon the premises is imposed by law upon the landlord.[63] In some jurisdictions,

59. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293.

Illinois.— Scanland *v.* Musgrove, 91 Ill. App. 184.

Kansas.— Elliott *v.* Missouri Pac. R. Co., 8 Kan. App. 191, 55 Pac. 490.

Massachusetts.— See Sherman *v.* Fall River Iron Works Co., 2 Allen 524, 79 Am. Dec. 799.

Michigan.— Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308, holding, however, that no damages should be given for any permanent injury to the lands. And see Conlon *v.* McGraw, 66 Mich. 194, 33 N. W. 388.

Missouri.— Schlemmer *v.* North, 32 Mo. 206.

New York.— McPhillips *v.* Fitzgerald, 177 N. Y. 543, 69 N. E. 1126 [*affirming* 76 N. Y. App. Div. 15, 78 N. Y. Suppl. 631]; Bly *v.* Edison Electric Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500 [*reversing* 51 N. Y. App. Div. 427, 66 N. Y. Suppl. 737]; Avery *v.* New York Cent., etc., R. Co., 121 N. Y. 31, 24 N. E. 20 [*reversing* 2 N. Y. Suppl. 101]. See, however, Terry *v.* New York, 8 Bosw. 504, holding that in an action by the owner of leasehold premises for damages for an injury thereto, without malice, and from a cause which could be ascertained and its continuance prevented at a moderate expense, it was error to estimate the damages at the difference between the value of the lease before and after the injury.

Vermont.— Weston *v.* Gravlin, 49 Vt. 507.

Texas.— See Texas, etc., R. Co. *v.* Torrey, (App. 1891) 16 S. W. 547.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 515.

60. Buddin *v.* Fortunato, 16 Daly (N. Y.) 195, 10 N. Y. Suppl. 115; Weston *v.* Gravlin, 49 Vt. 507.

61. Hobson *v.* Silva, (Cal. 1902) 70 Pac. 619; Thompson *v.* Flathers, 45 La. Ann. 120, 12 So. 245; Taylor *v.* Mohan, 19 La. Ann. 324. See also Bellamy *v.* Barnes, 44 U. C. Q. B. 315.

62. Woodburn *v.* Renshaw, 32 Mo. 197 (holding, however, that such covenant does not run with the land); McManus *v.* Fair Shoe, etc., Co., 60 Mo. App. 216.

The easement of the public over flats not built upon or inclosed is not an encumbrance within the usual covenant against encumbrances, and a judgment in a civil action declaring certain erections upon flats to be a nuisance does not constitute an eviction of the party in possession of such flats. Montgomery *v.* Reed, 69 Me. 510.

Right to use party-wall.— A covenant in a lease against all former or other grants and encumbrances is broken by a former grant to a third party of the right to use a wall upon the demised premises as a party-wall; and upon the proof of such use of the wall, in an action on the covenant, the rule of damages is the proportionate value of such an easement of the value of the demised premises. Giles *v.* Dugro, 1 Duer (N. Y.) 331.

63. *Alabama.*— Freeman *v.* State, 115 Ala. 208, 22 So. 560.

Illinois.— McFarlane *v.* Williams, 107 Ill. 33.

Iowa.— Clinton *v.* Shugart, 126 Iowa 179, 101 N. W. 785.

Louisiana.— Connell *v.* Female Orphan Asylum, 18 La. Ann. 513.

New York.— People *v.* Barker, 153 N. Y. 98, 47 N. E. 46. See Purssell *v.* New York, 85 N. Y. 330 [*reversing* 43 N. Y. Super. Ct. 348]; Trinity Church *v.* Cook, 11 Abb. Pr. 371, 21 How. Pr. 89.

Pennsylvania.— Caldwell *v.* Moore, 11 Pa. St. 58; Mattson *v.* Oliver, 2 Leg. Op. 48; Biddle *v.* Blackburn, 5 Pa. L. J. 419. See also Gormley's Appeal, 27 Pa. St. 49; Morgret *v.* McNaughton, 3 Pa. Co. Ct. 606.

Tennessee.—East Tennessee, etc., R. Co. *v.* Morristown, (Ch. App. 1895) 35 S. W. 771.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890.

England.— Dawson *v.* Linton, 5 B. & Ald. 521, 1 D. & R. 117, 7 E. C. L. 285; Watson *v.* Atkins, 3 B. & Ald. 647, 5 E. C. L. 372; Stubbs *v.* Parsons, 3 B. & Ald. 516, 5 E. C. L. 299; Carter *v.* Carter, 5 Bing. 406, 7 L. J. C. P. O. S. 141, 2 M. & P. 723, 30 Rev. Rep. 677, 15 E. C. L. 643; Jones *v.* Morris, 3 Exch. 742, 18 L. J. Exch. 477; Graham *v.* Allsopp, 3 Exch. 186, 18 L. J. Exch. 85; Taylor *v.* Zamira, 2 Marsh. 220, 6 Taunt. 524, 16 Rev. Rep. 668, 1 E. C. L. 736.

by statute, it is the duty of the tenant holding any leasehold estate to pay in the first instance the taxes levied on the demised premises, and the tenant so paying has a right of action to recover such money of the landlord as money paid for his use, or the right to deduct the same from the rent reserved, unless otherwise agreed.[64] However, even where there is no covenant by the lessee to pay taxes, so much of the taxes as are levied on account of improvements put on the land by the lessee are chargeable to him.[65]

b. Covenant or Agreement to Pay — (i) *In General.* A lessee may by covenant or agreement contract to pay specified taxes or assessments, or all taxes or assessments which may be levied on the demised premises during the term, and clauses to this effect are now frequently inserted in leases.[66] The lessee of a por-

Canada.— Dove *v.* Dove, 18 U. C. C. P. 424.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 519.

Taxation of leased property see TAXATION.

64. *Arkansas.*— Waggener *v.* McLaughlin, 33 Ark. 195.
Kansas.— Weichselbaum *v.* Curlett, 20 Kan. 709, 27 Am. Rep. 204, holding that a tenant may purchase the leased premises at a tax-sale thereof, and set up his tax title as a defense to the landlord's action for rent.
Maryland.— Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Ct., 50 Md. 397. *Compare* Hughes *v.* Young, 5 Gill & J. 67.
Mississippi.— Walker *v.* Harrison, 75 Misc. 665, 23 So. 392.
Missouri.— McPherson *v.* Atlantic, etc., R. Co., 66 Mo. 103; Leach *v.* Goode, 19 Mo. 501; Anderson *v.* Harwood, 47 Mo. App. 660.
Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.
Virginia.— Mayo *v.* Carrington, 19 Gratt. 74, holding, however, that the lessee can only deduct such rent as the land was chargeable with in its condition as rented, and not such as his own subsequent improvements have caused.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 519.

65. *Maryland.*— Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Ct., 50 Md. 397.
Mississippi.— Walker *v.* Harrison, 75 Miss. 665, 23 So. 392.
Missouri.— Leach *v.* Goode. 19 Mo. 501.
Ohio.— Joslyn *v.* Spellman, 9 Ohio Dec. (Reprint) 258, 12 Cinc. L. Bul. 7.
England.— Watson *v.* Home, 7 B. & C. 285, 6 L. J. K. B. O. S. 73, 1 M. & R. 191, 31 Rev. Rep. 200, 14 E. C. L. 133; Smith *v.* Humble, 15 C. B. 321, 3 C. L. R. 225, 80 E. C. L. 321; Yeo *v.* Leman, 2 Str. 1191; Hyde *v.* Hill, 3 T. R. 377.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 519.

66. *Connecticut.*— Hart *v.* Cornwall, 14 Conn. 228.
Indiana.— Hammon *v.* Sexton, 69 Ind. 37.
Kentucky.— Gedge *v.* Shoenberger, 83 Ky. 91.
Louisiana.— Boutte *v.* Dubois, 11 La. Ann. 755.
Massachusetts.— Derumple *v.* Clark, Quincy 38.
Missouri.— Soulard *v.* Peck, 49 Mo. 477 (where a lessee agreed to pay the lessor at a future day the amount of a certain tax bill, on condition that the latter would pay it in the first instance, and it was held that the lessee would be liable to the lessor for the amount in an action for money paid, although, before suit was brought, the bill proved to have been illegal and uncollectable); Knight *v.* Orchard, 92 Mo. App. 466.
New York.— Trinity Church *v.* Higgins, 48 N. Y. 532; Lehmaier *v.* Jones, 100 N. Y. App. Div. 495, 91 N. Y. Suppl. 687 (holding that such covenants run with the land); Gridley *v.* Einbigler, 98 N. Y. App. Div. 160, 90 N. Y. Suppl. 721; Arthur *v.* Harty, 17 Misc. 641, 40 N. Y. Suppl. 1091.
Ohio.— See Davis *v.* Cincinnati, 36 Ohio St. 24.
Pennsylvania.— Fernwood Masonic Hall Assoc. *v.* Jones, 102 Pa. St. 307; Delaware, etc., Canal Co. *v.* Von Storch, 5 Lack. Leg. N. 89.
Utah.— Bacon *v.* Park, 19 Utah 246, 57 Pac. 28.
West Virginia.— West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.
United States.— Broadwall *v.* Banks, 134 Fed. 470; Semmes *v.* McKnight, 21 Fed. Cas. No. 12,653, 5 Cranch C. C. 539.
England.— Parish *v.* Sleeman, 1 De G. F. & J. 326, 6 Jur. N. S. 385, 29 L. J. Ch. 96, 1 L. T. Rep. N. S. 506, 8 Wkly. Rep. 166, 62 Eng. Ch. 250, 45 Eng. Reprint 385; Payne *v.* Burridge, 13 L. J. Exch. 190, 12 M. & W. 727.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 520.

Exemption from taxation for benefit of lessor.— Where a lease to a city provided that the tenant should pay all taxes, and afterward the legislature exempted the property from taxation as long as used for certain charitable purposes, it was held that the city was still liable to pay the amount of the taxes to the landlord, the act being passed for the benefit of the charitable society and not for the city. German Soc. *v.* Philadelphia, 9 Phila. (Pa.) 245.

Property subject to tax.— Where a lessee of land covenants to pay all taxes and assessments on the premises, and an assessment is imposed thereon by the city for widening a street, resort must be had to the lessee's property before levy is made on the land for the assessment. Gouverneur *v.* New York, 2 Paige (N. Y.) 434.

tion of premises who has covenanted to pay taxes is liable for the taxes in proportion to his rent.[67] However, by such covenant the lessee does not obligate himself to pay taxes which may be illegal or void.[68]

(II) *Taxes or Assessments Within the Covenant.* The distinction between a tax and a special assessment is well recognized in law, and it is well settled that an agreement on the part of the lessee to pay the taxes on the demised property does not include a special assessment for permanent improvements to the reversion.[69] And on the other hand a stipulation in a lease that the lessee should pay all assessments whatsoever levied, etc., on the premises does not bind him to pay state, county, and municipal taxes for general purposes.[70] Some of the decisions in construing covenants in leases to pay all taxes, assessments, and duties which may be laid upon the premises during the term have held that such covenants do not include permanent improvements of an extraordinary character, which inure to the benefit of the estate in the increased value thereof, and in the increased rent which it would thereafter permanently command.[71] Yet, since the

Failure to pay taxes as ground for dispossession see *infra*, X, C, 6, d.

Forfeiture of lease on failure to pay taxes see *infra*, IX, B, 7, d, (I), (E).

67. Codman *v.* Hall, 9 Allen (Mass.) 335; Wall *v.* Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64. And see Williams *v.* Craig, 2 Edw. (N. Y.) 297, where the lessee of land was bound by his covenants to pay so much of the expenses of laying out a street as should be assessed upon him, but the report of the commissioners showed only the aggregate amount assessed upon the lessor for the lot leased in connection with other land of such lessor, and it was held that the court might compel contribution by the lessee.

68. Clark *v.* Coolidge 8 Kan. 189; Scott *v.* Russian Israelites Soc., 59 Nebr. 571, 81 N. W. 624.

Effect of exemption from taxation. — A covenant in a lease from a city to "pay all taxes, assessments, and public dues, . . . that may hereafter be levied, charged, or assessed on the premises, or the yearly rent issuing therefrom" does not require the lessee to pay taxes on the reversionary interest of the city, as such interest is exempt by statute from taxation. Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Taxes Ct., 50 Md. 397.

69. De Clercq *v.* Barber Asphalt Pav. Co., 167 Ill. 215, 47 N. E. 367 (holding that an assessment for street and sidewalk improvements is not within the covenant of a lessee to pay the water tax and half of all other taxes on the property); Chicago *v.* Baptist Theological Union, 115 Ill. 245, 2 N. E. 254; Municipality No. 2 *v.* Curell, 13 La. 318; Ittner *v.* Robinson, 35 Nebr. 133, 52 N. W. 846, holding that a promise by a lessee to pay all taxes does not apply to special assessments for the construction of a sewer. See also Torrey *v.* Wallis, 3 Cush. (Mass.) 442, holding that a covenant to pay the costs, charges, and expenses upon the premises related exclusively to additions and repairs which the tenants had permission to make, and did not include an assessment laid by the state for paving the way in front of the estate. *Compare* Cassady *v.* Hammer, 62 Iowa 359, 17 N. W. 588, holding that an agreement in a lease to pay "all taxes assessed . . . during the continuance of the lease" includes assessments for paving an adjacent street. *Contra*, Matter of Michie, 11 U. C. C. P. 379.

70. Stephani *v.* Chicago Catholic Bishop, 2 Ill. App. 249, holding that the popular understanding of the word "assessment" is that it refers specifically to charges to defray the expense of local improvements in proportion to benefits received; and therefore a condition in a lease that the lessee should pay all assessments levied on the premises is to be construed in the light of such popular understanding, as the parties are conclusively presumed to have so employed it.

71. *Massachusetts.*— Twycross *v.* Fitchburg R. Co., 10 Gray 293.

New York.— Ten Eyck *v.* Protestant Episcopal Church, 141 N. Y. 588, 36 N. E. 739 [*affirming* 65 Hun 194, 20 N. Y. Suppl. 157, 29 Abb. N. Cas. 150]; Garner *v.* Hannah, 6 Duer 262; Sharpe *v.* Speir, 4 Hill 76.

Ohio.— Boers *v.* Barrett, 2 Cinc. Super. Ct. 67. See Borgman *v.* Spellmire, 7 Ohio S. & C. Pl. Dec. 344, 4 Ohio N. P. 416, holding that a covenant in a lease that the lessee will pay all taxes and assessments levied or assessed during the demise, embraces assessments for street improvements not differing from assessments for such purposes authorized by law at the time of the execution of the lease, and not differing in nature from the settled policy of the state relating to such assessments; and assessments under the Granite Paving Act of 1885 are covered thereby.

Pennsylvania.—Pray *v.* Northern Liberties, 31 Pa. St. 69.

Rhode Island.— Beals *v.* Providence Rubber Co., 11 R. I. 381, 23 Am. Rep. 472; Second Universalist Soc. *v.* Providence, 6 R. I. 235; Love *v.* Howard, 6 R. I. 116.

Virginia.— Bolling *v.* Stokes, 2 Leigh 178, 21 Am. Dec. 606.

England.— Baylis *v.* Jiggens, [1898] 2 Q. B. 315, 67 L. J. Q. B. 793, 79 L. T. Rep. N. S. 78; Valpy *v.* St. Leonard's Wharf Co., 67 J. P. 402, 1 Loc. Gov. 305.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 521.

liability of the lessee on the covenant in his lease depends largely upon the language of the covenant, he will be held to have obligated himself to assume every burden imposed on the demised premises where the language of the covenant is broad enough to require that interpretation. Thus, where it is stipulated that the lessee shall pay all taxes, rates, duties, and assessments whatsoever which shall be taxed, assessed, or imposed upon the demised premises during the continuance of the lease, special assessments for permanent improvements or betterments are included, even where the statute authorizing the levy of such assessment contains a clause empowering the tenant to deduct it from the rent.[72]

(III) *Rent Reserved.* However, a covenant in a lease binding the lessee to pay all taxes, charges, and assessments, ordinary and extraordinary, which shall be taxed, charged, imposed, or assessed on the demised premises, or any part thereof, does not bind the lessee to pay a tax imposed on rents reserved under the lease.[73]

(IV) *Liability as Affected by Time of Assessment or Levy.* Where, by the terms of the lease, the lessee covenants to pay all taxes or assessments on the premises during the continuance of the lease, the general rule is that he is liable for all taxes and assessments which have been duly assessed, charged, and confirmed during the term, although they may be payable thereafter;[74] but it

72. *Massachusetts.*— Simonds *v.* Turner, 120 Mass. 328; Blake *v.* Baker, 115 Mass. 188; Curtis *v.* Pierce, 115 Mass. 186; Walker *v.* Whittemore, 112 Mass. 187; Codman *v.* Johnson, 104 Mass. 491.

Missouri.— Lucas *v.* McCann, 50 Mo. App. 638; Thomas *v.* Hooker-Colville Steam Pump Co., 22 Mo. App. 8.

New York.— Post *v.* Kearney, 2 N. Y. 394, 51 Am. Dec. 303 [*affirming* 1 Sandf. 105]; Arthur *v.* Harty, 17 Misc. 641, 40 N. Y. Suppl. 1091 (holding that the fact that the commissioners, in a proceeding to widen a street, apportion an assessment between the lessor and the lessee of the property assessed does not affect the rights of the lessor under a covenant in the lease requiring the lessee to pay all assessments on the leased property); Trinity Church *v.* Cook, 11 Abb. Pr. 371, 21 How. Pr. 89; Oswald *v.* Gilfert, 11 Johns. 443; New York *v.* Cashman, 10 Johns. 96; Astor *v.* Miller, 2 Paige 68.

Pennsylvania.— Delaware, etc., Canal Co. *v.* Von Storch, 5 Lack. Leg. N. 89.

United States.— See Jersey City Gas-Light Co. *v.* United Gas Imp. Co., 46 Fed. 264, where the assessment was held to be a license-fee for the exercise of a corporate franchise, and not a tax on property, and therefore not chargeable to the lessee.

England.— Stockdale *v.* Ascherberg, [1903] 1 K. B. 873, 67 J. P. 435, 72 L. J. K. B. 492, 1 Loc. Gov. 548, 88 L. T. Rep. N. S. 767, 52 Wkly. Rep. 13; Foulger *v.* Arding, [1902] 1 K. B. 700, 71 L. J. K. B. 499, 86 L. T. Rep. N. S. 488, 50 Wkly. Rep. 417; Wix *v.* Rutson, [1899] 1 Q. B. 474, 68 L. J. Q. B. 298, 80 L. T. Rep. N. S. 168; Brett *v.* Rogers, [1897] 1 Q. B. 525, 66 L. J. Q. B. 287, 76 L. T. Rep. N. S. 26, 45 Wkly. Rep. 334; *In re* Warriner, [1903] 2 Ch. 367, 67 J. P. 351, 72 L. J. Ch. 701, 1 Loc. Gov. 765, 88 L. T. Rep. N. S. 766; Farlow *v.* Stevenson, [1900] 1 Ch. 128, 69 L. J. Ch. 106, 81 L. T. Rep. N. S. 589, 48 Wkly. Rep. 213; Budd *v.* Marshall, 5 C. P. D. 481, 44 J. P. 584, 50 L. J. Q. B. 24, 42 L. T. Rep. N. S. 793, 29 Wkly. Rep. 148; Thompson *v.* Lapworth, L. R. 3 C. P. 149, 37 L. J. C. P. 74, 17 L. T. Rep. N. S. 507, 16 Wkly. Rep. 312 (where tenant was held liable for assessment for street paving, as a "duty" within the covenant in his lease); Antil *v.* Godwin, 63 J. P. 441; Payne *v.* Burridge, 13 L. J. Exch. 190, 12 M. & W. 727; George *v.* Coates, 88 L. T. Rep. N. S. 48; Weld *v.* Clayton-le-Moors Urban Dist. Council, 86 L. T. Rep. N. S. 584. See, however, Tidswell *v.* Whitworth, L. R. 2 C. P. 326, 36 L. J. C. P. 103, 15 L. T. Rep. N. S. 574, 15 Wkly. Rep. 427, where a tenant in a lease covenanted to pay all taxes, rates, assessments, and impositions payable in respect to the demised premises, and he was held not to be liable to pay money paid by the owner in respect of pavement laid down before the commencement of the tenancy, by a corporation under the powers of a local act, which empowered them to call upon the owner to pay, and in his default, to pave the street opposite to his premises and recover the expense from the owner.

Canada.— *In re* Canadian Pac. R. Co., 4 Ont. L. Rep. 134.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 521.

73. Woodruff *v.* Oswego Starch Factory, 70 N. Y. App. Div. 481, 74 N. Y. Suppl. 961; Van Rensselaer *v.* Dennison, 8 Barb. (N. Y.) 23.

74. *California.*— Blythe *v.* Gately, 51 Cal. 236.

Iowa.— Vorse *v.* Des Moines Marble, etc., Co., 104 Iowa 541, 73 N. W. 1064.

Massachusetts.— Richardson *v.* Gordon, 188 Mass. 279, 74 N. E. 344; Wilkinson *v.* Libbey, 1 Allen 375.

Minnesota.— Craig *v.* Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236.

Missouri.— Elliot *v.* Gantt, 64 Mo. App.

has been held that a covenant that the lessor shall pay all taxes to be "levied" during the term does not bind him to pay taxes "assessed" during the term but which do not become due and collectable until after its expiration.[75] In the absence of a stipulation to the contrary, a covenant in a lease binding the lessee to pay all taxes during the existence of the term extends only to taxes assessed after the commencement of the lease.[76] Some of the English cases go the length of holding that under such a covenant the lessee is not liable for such assessments where the work was done before but the apportionment was made after the granting of the lease.[77]

(v) *Effect of Destruction of Building.* Where a lessee covenants to pay all taxes assessed during the term, he is not entitled to a proportionate return of taxes so paid by him to the lessor, even where the premises are afterward, and during the year for which the taxes are assessed, destroyed by fire, and the lease thereby terminated, no provision being made in the lease for the apportionment of taxes in any event.[78]

(vi) *Liability of Assignees, Mortgagees, and Subtenants.* Covenants to pay taxes run with the land, and upon an assignment of the lease by the lessee the assignee becomes liable to the landlord for all taxes which may thereafter become due and payable, under the terms of the lease, while the assignee continues in possession of the property under the assignment; his liability being supported by the privity of estate existing between himself and the lessor during that period.[79] A mortgagee of a leasehold is likewise liable on a covenant for the

248; Waterman *v.* Harkness, 2 Mo. App. 494. See also Clemens *v.* Knox, 31 Mo. App. 185.

New York.— Ogden *v.* Getty, 100 N. Y. App. Div. 430, 91 N. Y. Suppl. 664. *Compare* McKeon *v.* Wendelken, 25 Misc. 711, 55 N. Y. Suppl. 626.

Tennessee.— Allen *v.* Dent, 4 Lea 676.

Canada.— Macnaughton *v.* Wigg, 35 U. C. Q. B. 111.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 522.

A release of a lessee from "further" liability for taxes is not a release from liability for taxes already accrued, and which under the lease the lessee had assumed to pay. O'Fallon *v.* Nicholson, 56 Mo. 238.

75. Valle *v.* Fargo, 1 Mo. App. 344.

76. McManus *v.* Fair Shoe, etc., Co., 60 Mo. App. 216; Cleveland *v.* Spencer, 73 Fed. 559, 19 C. C. A. 559. See also Cram *v.* Munro, 1 Edw. (N. Y.) 123; Shepardson *v.* Elmore, 19 Wis. 424. *Compare* Skidmore *v.* Hart, 13 Hun (N. Y.) 441 (holding that a covenant that a tenant shall pay all taxes which shall be levied, assessed, imposed, or grow due, includes the taxes for the entire year during which the lease is made, if the examination of the assessment rolls is not completed, and the amount of the tax determined past review, until after the making of the lease); Surtees *v.* Woodhouse, [1903] 1 K. B. 396, 67 J. P. 232, 72 L. J. K. B. 302, 1 Loc. Gov. 227, 88 L. T. Rep. N. S. 407, 51 Wkly. Rep. 275.

77. Surtees *v.* Woodhouse, [1903] 1 K B. 396, 67 J. P. 232, 72 L. J. K. B. 302, 1 Loc. Gov. 227, 88 L. T. Rep. N. S. 407, 51 Wkly. Rep. 275; Stock *v.* Meakin, [1900] 1 Ch. 683, 69 L. J. Ch. 401, 82 L. T. Rep. N. S. 248, 48 Wkly. Rep. 420; Lumby *v.* Faupel, 67 J. P. 202, 1 Loc. Gov. 492, 88 L. T. Rep. N. S. 562, 51 Wkly. Rep. 522 [*following* Baylis *v.* Jiggins, [1898] 2 Q. B. 315, 67 L. J. Q. B. 796, 79 L. T. Rep. N. S. 78, and *distinguishing* Foulger *v.* Arding, [1902] 1 K. B. 700, 71 L. J. K. B. 499, 86 L. T. Rep. N. S. 488, 50 Wkly. Rep. 417]. See Mile End Old Town Vestry *v.* Whitby, 78 L. T. Rep. N. S. 80.

78. Minot *v.* Joy, 118 Mass. 308 (holding that taxes assessed during the term after a fire destroying the building, although it was not rebuilt, are chargeable against the lessee in a lease of an entire building for a term of years, in which such lessee covenants to pay rent, "except only in case of fire or other casualty, and also all taxes and assessments whatsoever whether in the nature of taxes now in being or not, which may be payable for or in respect of the premises or any part thereof during the said term," and further providing that, in case of the destruction of the building by fire, the rent shall be suspended until the lessor shall rebuild); Howe *v.* Bryant, 117 Mass. 273 (note); Carnes *v.* Hersey, 117 Mass. 269; Sargent *v.* Pray, 117 Mass. 267; Paul *v.* Chickering, 117 Mass. 265; Wood *v.* Bogle, 115 Mass. 30. See also Patterson *v.* Boston, 20 Pick. (Mass.) 159.

79. *California.*— Ellis *v.* Bradbury, 75 Cal. 234, 17 Pac. 3 (holding that where a lease contains a covenant by the lessee to pay taxes, an assignee of a portion of the leased premises which are assessed as a whole is liable for the taxes assessed thereon, in the proportion that the value of the land assigned to him bears to the whole of the leased premises); Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104.

Maryland.— Abrahams *v.* Tappe, 60 Md. 317.

payment of taxes and assessments.[80] However, the liability of the assignee continues only during the time he holds the legal title to the leasehold estate under the assignment; when the privity of the estate ceases his liability to the lessor ceases.[81] The above rule, however, does not apply to a sublessee, and he is not liable to the original lessor upon a covenant in the original lease to pay taxes.[82]

(VII) *PERFORMANCE OR BREACH.* Under a lease requiring the lessee to pay all taxes on the demised premises, without stating the time of payment, they must be paid when due, the time being fixed by law, or paid so as to avoid any sale of the property, in order to prevent a forfeiture.[83] However, where the lease provides for forfeiture on failure of the lessee to pay the taxes, if payment is made before the forfeiture is taken advantage of by reëntry on the part of the landlord the forfeiture will be saved.[84]

(VIII) *ACTIONS FOR BREACH OF.* The lessor can maintain an action for breach of covenant to pay all taxes and assessments imposed upon the demised premises during the term, without first paying the tax or assessment, since such covenant is not simply a contract of indemnity, but by it the tax or assessment,

Massachusetts.— Torrey *v.* Wallis, 3 Cush. 442.

Minnesota.— Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917; Wills *v.* Summers, 45 Minn. 90, 47 N. W. 463.

Missouri.— Fontaine *v.* Schulenburg, etc., Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648.

New York.— Post *v.* Kearney, 2 N. Y. 394, 51 Am. Dec. 303 [*affirming* Sandf. 105]; Constantine *v.* Wake, 1 Sweeny 239; McKeon *v.* Wendelken, 25 Misc. 711, 55 N. Y. Suppl. 626.

Tennessee.— State *v.* Martin, 14 Lea 92, 52 Am. Rep. 167.

England.— Bennett *v.* Womack, 7 B. & C. 627, 14 E. C. L. 283, 3 C. & P. 96, 14 E. C. L. 468, 6 L. J. K. B. O. S. 175, 1 M. & R. 644, 31 Rev. Rep. 270.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 527.

Where a lease is assigned in violation of its terms without the lessor's consent, the assignee is not liable in an action by the lessor for taxes due under the lease. Hynes *v.* Ecker, 34 Mo. App. 650.

Liability of assignee on covenants in general see *supra*, IV, B, 4, c.

80. Abrahams *v.* Tappe, 60 Md. 317; Astor *v.* Hoyt, 5 Wend. (N. Y.) 603 [*reversing* 2 Paige 68], holding that where a mortgagor, who was lessee of the mortgaged premises, had covenanted with the lessor to pay all assessments upon the premises, but no time was fixed for the payment, a mortgagee, who took possession subsequently to an assignment upon the premises, and before payment, was liable for payment of the assessment.

Construction and operation of mortgage in general see *supra*, IV, B, 6.

81. Mason *v.* Smith, 131 Mass. 510; Patten *v.* Deshon, 1 Gray (Mass.) 325; Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917; McKeon *v.* Wendelken, 25 Misc. (N. Y.) 711, 55 N. Y. Suppl. 626; Tyler *v.* Giesler, 74 Mo. App. 543.

82. Dunlap *v.* Bullard, 131 Mass. 161; Martin *v.* O'Conner, 43 Barb. (N. Y.) 514; Constantine *v.* Wake, 1 Sweeny (N. Y.) 239. See also Hendrix *v.* Dickson, 69 Mo. App. 197.

Operation and effect of subleases in general see *supra*, IV, B, 5.

83. *Illinois.*— McFarlane *v.* Williams, 107 Ill. 33.

Louisiana.— Ricou *v.* Hart, 47 La. Ann. 1370, 17 So. 878.

New York.— Trinity Church *v.* Vanderbilt, 98 N. Y. 170; Trinity Church *v.* Higgins, 48 N. Y. 532, holding that a covenant in a lease, whereby the lessee agrees to bear, pay, and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed.

Utah.—Bacon *v.* Park, 19 Utah 246, 57 Pac. 28, holding that where the due payment of taxes is one of the covenants of the lease, and the taxes are allowed to become delinquent by the lessee or his assigns, no demand for their payment by the lessor is necessary before declaring a forfeiture on the ground of nonpayment thereof.

Canada.— Taylor *v.* Jermyn, 25 U. C. Q. B. 86.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 129.

Covenant to pay promptly.— Where a lease provided that the lessee should pay the taxes "promptly when the same became due and payable" under penalty of forfeiture, a failure to pay taxes due September 1, until November 12, authorized the forfeiture, although penalty did not accrue until January 1. Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696.

84. Burnes *v.* McCubbin, 3 Kan. 221, 87 Am. Dec. 468 (holding that a stipulation in a lease that the lessee shall refund the taxes paid by the lessor is complied with by a tender of such taxes before the commencement of a suit by the lessor to forfeit the lease and recover the premises); Goode *v.* Ruehle, 23 Mich. 30 (holding that a sale of the tenant's leasehold interest, made by virtue of a warrant for collection of his unpaid residue of an assessment, is not a breach of his covenant to pay the taxes, the undertaking that the landlord should not have to pay the taxes being

as between the parties, becomes the debt of the lessee;[85] and the measure of damages is the amount of such tax or assessment with interest thereon.[86]

(IX) *ACTIONS BY LESSOR TO RECOVER TAXES PAID.* Where, by the contract of a lease, the lessee undertakes to pay the taxes to be thereafter assessed upon the leased property, if he fails to do so, the lessor, having an interest as owner in discharging the debt, would, upon the payment of the same, become legally subrogated to the rights of the state or municipality against such lessee and may maintain an action against him therefor.[87] In actions of this character the general rules governing pleadings[88] and evidence[89] apply.

c. Liability For Water-Rates. The general rule is that in the absence of statute or special agreement[90] a landlord is not bound to pay the water-rates for water furnished by the city and used by the tenant, even where the premises are piped therefor; the landlord being under no greater obligation to pay such rates than he would be to pay for gas furnished by the municipality, or a private corporation, because the demised premises are piped for gas.[91] Where, however, by stat-

fulfilled); Planters Ins. Co. *v.* Diggs, 8 Baxt. (Tenn.) 563.

Proceedings to enforce forfeiture see *infra*, IX, B, 7, e.

85. *Iowa.*— Vorse *v.* Des Moines Marble, etc., Co., 104 Iowa 541, 73 N. W. 1064.

Massachusetts.— Richardson *v.* Gordon, 188 Mass. 279, 74 N. E. 344.

Missouri.— Fontaine *v.* Schulenburg, etc., Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648.

New York.— Trinity Church *v.* Higgins, 48 N. Y. 552.

Utah.— Bacon *v.* Park, 19 Utah 246, 57 Pac. 28.

United States.— Broadwell *v.* Banks, 134 Fed. 470, holding likewise that the devisee of the lessor may sue therefor in his own name.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 531.

Demand.— It has been held in Missouri that it is not necessary to demand of the lessee that he perform his covenant before bringing a suit against him. Hendrix *v.* Dickson, 69 Mo. App. 197.

Defense to action for breach.— A lease for two years with the privilege of renewing for five was assigned after the first term, the lessor indorsed his assent, and the assignee had promised to perform its covenant. The latter held to the end of the five years under the terms of the lease, but made default in payment of the last year's taxes. In a suit for this breach it was alleged that the lessor falsely stated that the lease had been renewed for the five years, whereby the assignee suffered pecuniary loss. It was held not a good defense, the assignee having full means of knowledge, and the indorsement on the lease being in effect a performance of the covenant to renew. Clemens *v.* Knox, 31 Mo. App. 185.

86. Fontaine *v.* Schulenburg, etc., Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648; Trinity Church *v.* Higgins, 48 N. Y. 532 [*reversing* 4 Rob. 1]. And see Webster *v.* Nichols, 104 Ill. 160.

87. *California.*— Ellis *v.* Bradbury, 75 Cal. 234, 17 Pac. 3.

Louisiana.— Will's Succession, 15 La. Ann. 381 [*cited* with approval in Ricou *v.* Hart, 47 La. Ann. 370, 17 So. 878].

Massachusetts.— Bowditch *v.* Chickering, 139 Mass. 283, 30 N. E. 92.

Minnesota.— Wills *v.* Summers, 45 Minn. 90, 47 N. W. 463.

Mississippi.— Roberts *v.* Sims, 64 Miss. 597, 2 So. 72.

Pennsylvania.— See Case *v.* Davis, 15 Pa. St. 80, holding that where, by the terms of a lease, a tenant was to pay the taxes assessed upon the premises, the landlord does not have a preferred claim on the proceeds of an execution sale of the tenant's goods for taxes paid after the levy.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 534.

Limitations.— Where a lessee agreed to pay taxes on the premises or pay the amount thereof to the lessor on a day specified, the debt becomes due and the statute of limitations commences to run on such day. Trinity Church *v.* Vanderbilt, 98 N. Y. 170.

88. See Ellis *v.* Bradbury, 75 Cal. 234, 17 Pac. 3 (complaint); Haynes *v.* Synnott, 160 Pa. St. 180, 28 Atl. 832 (affidavit of defense).

89. See Blumenthal *v.* Mugge, 43 Mo. 427.

90. Direct Spanish Tel. Co. *v.* Shepherd, 13 Q. B. D. 202, 48 J. P. 550, 53 L. J. Q. B. 420, 54 L. T. Rep. N. S. 124, 32 Wkly. Rep. 717.

Water for trade purposes.— Where the lessor covenants to pay the water-rates assessed on the demised premises, such covenant is usually construed to apply to the rate payable for the supply of water for domestic purposes, and not to the rate payable by agreement for water supplied for trade purposes. *In re* Floyd, [1897] 1 Ch. 633, 66 L. J. Ch. 350, 76 L. T. Rep. N. S. 251, 45 Wkly. Rep. 435.

91. McCarthy *v.* Humphrey, 105 Iowa 535, 75 N. W. 314; Leighton *v.* Ricker, 173 Mass. 564, 54 N. E. 254; Turner *v.* Revere Water Co., 171 Mass. 329, 50 N. E. 634, 68 Am. St. Rep. 432, 40 L. R. A. 657; Sheldon *v.* Hamilton, 22 R. I. 230, 47 Atl. 316, 84 Am. St. Rep. 839; Badcock *v.* Hunt, 22 Q. B. D. 145, 53 J. P. 340, 58 L. J. Q. B. 134, 60 L. T. Rep. N. S. 314, 37 Wkly. Rep. 205; Valpy *v.* St. Leonard's Wharf Co., 67 J. P. 402, 1 Loc. Gov. 305.

ute, water-rates are general and annual, and imposed for a public purpose, and from the time of their imposition they become both ordinary and yearly burdens, they constitute a lien on the property and are collectable in the same manner as ordinary taxes; and in such cases, as between the lessor and the lessee, the lessee is not bound to pay either the extra or the regular water-rate, except upon covenant, or unless there are circumstances which raise an implied promise so to do.[92] Even under such statutes, however, the lessee frequently obligates himself by a covenant in the lease to pay such rates, in whole or in part, and such covenant is as binding as any other covenant in the lease.[93] Where a lessee of a building sublets a portion to a club with which he has no connection whatever, he is not liable for the rates assessed against it;[94] and a recital in a lease that the premises "are from now on occupied and to be occupied as a lumber yard" is a covenant running with the land, and on the erection of buildings by an assignee of the lease rendering the property subject to water-rates, the assignee is liable therefor.[95]

D. Repairs, Insurance, and Improvements — 1. Repairs — a. Rights and Duties — (i) *In General.* In the absence of statute, or of express covenant or stipulation in the lease, the lessor is not bound to make ordinary repairs to the leased property, nor to pay for such repairs made by the tenant.[96] Nor under

Order by lessor to turn on water and payment by him.— Where a lease of premises in a city is silent as to who shall pay the water-rent and the lessor orders the water to be turned on and it is used by the lessee, but paid for by the lessor, there is no liability on the lessee to account to the lessor for such payments. Jamesin *v.* Thomen, 24 Cinc. L. Bul. (Ohio) 334.

92. Williams *v.* Kent, 67 Md. 350, 10 Atl. 228 (holding, however, that there is no implied obligation on the part of the landlord to pay for extra water used for the exclusive benefit of the tenant); Moffat *v.* Henderson, 50 N. Y. Super. Ct. 211; Garner *v.* Hannah, 6 Duer (N. Y.) 262; Darcey *v.* Steger, 23 Misc. (N. Y.) 145, 50 N. Y. Suppl. 638. And see Henderson *v.* Arbuckle, 54 N. Y. Super. Ct. 141.

93. Kingsbury *v.* Powers, 131 Ill. 182, 22 N. E. 479, 20 N. E. 3 (holding, however, that under such covenant the tenant of a portion of the building cannot be required to pay a part of the water assessment in gross against the whole block, when there is no way of assessing it to each separate room); Whitman *v.* Nicol, 38 N. Y. Super. Ct. 528 (holding, however, that such a covenant does not require the lessee to pay the water-rates before they become due and payable to the proper authorities); Garner *v.* Hannah, 6 Duer (N. Y.) 262; Hackett *v.* Richards, 3 E. D. Smith (N. Y.) 13; Martin *v.* Martin, 1 Misc. (N. Y.) 181, 20 N. Y. Suppl. 685.

Apportioning assessment.— Defendants had leased certain premises of plaintiff and covenanted to pay the annual water-rent imposed "according to law." The premises were a part of the building, the other portions of which were also occupied by tenants. There was only one water-meter for the building, and the evidence showed that at least one of the other tenants used more water than defendants, and it was held that as the act [Consol. Acts, §§ 330–352] authorized water-meters to be placed in such buildings and scales of rent fixed, defendants were not liable until such water-rent was lawfully assessed to the portion occupied by them. Bristol *v.* Hammacher, 30 Misc. (N. Y.) 426, 62 N. Y. Suppl. 517.

What included in term "premises."—A tenant who leases a front building and agrees to pay the water tax assessed against "said premises" cannot be charged with the water tax imposed on a rear building, since "said premises" embrace only the building leased. Steinhardt *v.* Burt, 27 Misc. (N. Y.) 782, 57 N. Y. Suppl. 751.

94. Stein *v.* McArdle, 24 Ala. 344.

95. De Forest *v.* Byrne, 1 Hilt. (N. Y.) 43.

96. *California.*— Sieber *v.* Blanc, 76 Cal. 173, 18 Pac. 260; Brewster *v.* De Fremery, 33 Cal. 341.

Colorado.— Lewis *v.* Hughes, 12 Colo. 208, 20 Pac. 621.

Connecticut.—Gallagher *v.* Button, 73 Conn. 172, 46 Atl. 819.

District of Columbia.— Kaufman *v.* Clark, 7 D. C. 1.

Georgia.— Brunswick Grocery Co. *v.* Spencer, 97 Ga. 764, 25 S. E. 764.

Illinois.— Carpenter *v.* Stone, 112 Ill. App. 155; Fowler Cycle Works *v.* Fraser, 110 Ill. App. 126; Borggard *v.* Gale, 107 Ill. App. 128 [*affirmed* in 205 Ill. 511, 68 N. E. 1063]; Robinson *v.* Henaghan, 92 Ill. App. 620; Trower *v.* Wehner, 75 Ill. App. 655.

Indiana.— Biddle *v.* Reed, 33 Ind. 529; Estep *v.* Estep, 23 Ind. 114.

Iowa.— Flaherty *v.* Nieman, 125 Iowa 546, 101 N. W. 280.

Kentucky.— Thomas *v.* Conrad, 71 S. W. 903, 24 Ky. L. Rep. 1630, 74 S. W. 1084, 25 Ky. L. Rep. 169.

Maine.— Bennett *v.* Sullivan, 100 Me. 118, 60 Atl. 886.

Maryland.— Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496.

Massachusetts.— Kearines *v.* Cullen, 183 Mass. 298, 67 N. E. 243; Daly *v.* Demmon,

such circumstances can there be any recovery from the landlord for injuries resulting from such defects, unless they were of such a character at the beginning of the lease as to amount to a nuisance.[97]

(II) *STATUTORY PROVISIONS.* In several jurisdictions the landlord is by statutory enactment bound to keep the leased premises in ordinary repair so as to render them suitable for the purposes for which they were leased, in the absence

181 Mass. 543, 63 N. E. 943; Dutton *v.* Gerrish, 9 Cush. 89, 55 Am. Dec. 45.

Michigan.— Rhoades *v.* Seidel, 139 Mich. 608, 102 N. W. 1025; Petz *v.* Voigt Brewery Co., 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531, holding that the above rule applies even where the premises become defective from decay.

Missouri.— Ward *v.* Fagin, 101 Mo. 669, 14 S. W. 738, 20 Am. St. Rep. 650, 10 L. R. A. 147; Morse *v.* Maddox, 17 Mo. 569; Vai *v.* Weld, 17 Mo. 232; Hughes *v.* Vanstone, 24 Mo. App. 637; Rogan *v.* Dockery, 23 Mo. App. 313.

Montana.— Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307.

Nebraska.— Murphey *v.* Illinois Trust, etc., Bank, 57 Nebr. 519, 77 S. W. 1102; Turner *v.* Townsend, 42 Nebr. 376, 60 N. W. 587.

New Jersey.— Lyon *v.* Buerman, 70 N. J. L. 620, 57 Atl. 1009; Klie *v.* Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

New York.— Thomas *v.* Nelson, 69 N. Y. 118; Doupe *v.* Genin, 45 N. Y. 119, 6 Am. Rep. 47 (holding that the rule that upon injury by fire to a building the landlord is not under obligation to rebuild or repair it for the benefit of the tenant, unless he has expressly covenanted to do so, applies to a case where the upper part of the building is partially destroyed and damage results to a tenant in the basement from delay in making repairs); Prahar *v.* Tousey, 93 N. Y. App. Div. 507, 87 N. Y. Suppl. 845; Wynne *v.* Haight, 27 N. Y. App. Div. 7, 50 N. Y. Suppl. 187; Sherwood *v.* Seaman, 2 Bosw. 127; Howard *v.* Doolittle, 3 Duer 464; Bloomer *v.* Merrill, 1 Daly 485, 29 How. Pr. 259; Weber *v.* Lieberman, 47 Misc. 593, 94 N. Y. Suppl. 460; Kennedy *v.* Fay, 31 Misc. 776, 65 N. Y. Suppl. 202; Hudson *v.* Tarlton, 24 Misc. 770, 53 N. Y. Suppl. 552; Lichtig *v.* Poundt, 23 Misc. 632, 52 N. Y. Suppl. 136; Mayer *v.* Laux, 18 Misc. 671, 43 N. Y. Suppl. 743 (holding that the landlord is not bound to keep in repair, except for the purpose for which it was erected, the balcony of a fire-escape attached to the premises, and used in common by neighboring tenants for domestic purposes, under license from the landlord); Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048; Van Buskirk *v.* Gordon, 10 N. Y. St. 351; Mumford *v.* Brown, 6 Cow. 475, 16 Am. Dec. 440. And see Sheary *v.* Adams, 18 Hun 181.

Ohio.— Linke *v.* Walcutt, 26 Ohio Cir. Ct. 10 [*affirmed* without opinion 69 Ohio St. 531, 70 N. E. 1125]; McNeal *v.* Emery, 8 Ohio Dec. (Reprint) 513, 8 Cinc. L. Bul. 265; Burns *v.* Luckett, 7 Ohio Dec. (Reprint) 483, 3 Cinc. L. Bul. 517.

Oregon.— Kahn *v.* Love, 3 Oreg. 206.

Pennsylvania.— Medary *v.* Cathers, 161 Pa. St. 87, 28 Atl. 1012; Moore *v.* Weber, 71 Pa. St. 429, 10 Am. Rep. 708; Hitner *v.* Ege, 23 Pa. St. 305; Long *v.* Fitzimmons, 1 Watts & S. 530; Smith *v.* Chappell, 25 Pa. Super. Ct. 81; Hess *v.* Weingartner, 5 Pa. Dist. 451, 12 Montg. Co. Rep. 105; Scheerer *v.* Dickson, 3 Brewst. 276 (holding that while ordinary repairs must be paid for by the tenant, unless he covenants otherwise, yet extraordinary repairs, as the cleaning of a cess-pool, ought to be paid for by the landlord); Russell *v.* Rush, 2 Pittsb. 434.

Rhode Island.— Whitehead *v.* Comstock, 25 R. I. 423, 56 Atl. 446.

Texas.— Weinsteine *v.* Harrison, 66 Tex. 546, 1 S. W. 626.

Washington.— Ward *v.* Hinkleman, 37 Wash. 375, 79 Pac. 956.

West Virginia.— Windom *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

Wisconsin.— Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585.

England.— Arden *v.* Pullen, 11 L. J. Exch. 359, 10 M. & W. 321; Murray *v.* Mace, Ir. R. 8 C. L. 396.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 536.

Failure to repair as affecting liability for rent see *infra*, VIII, A, 4.

97. *Illinois.*— Borggard *v.* Gale, 205 Ill. 511, 68 N. E. 1063 [*affirmed* in 107 Ill. App. 128]; Lazarus *v.* Parmly, 113 Ill. App. 624; Carpenter *v.* Stone, 112 Ill. App. 155.

Indiana.— Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. 481.

Minnesota.— Beneteau *v.* Stubler, 79 Minn. 259, 82 N. W. 583.

Missouri.— Roberts *v.* Cottey, 100 Mo. App. 500, 74 S. W. 886, holding that in the absence of contractual obligations the landlord is liable to his tenant only for acts of misfeasance.

New York.— O'Brien *v.* Greenbaum, 1 Silv. Sup. 56, 4 N. Y. Suppl. 852; Klausner *v.* Herter, 36 Misc. 869, 74 N. Y. Suppl. 924; Reissman *v.* Jacobwitz, 22 Misc. 551, 49 N. Y. Suppl. 1006; Miller *v.* Rinaldo, 21 Misc. 470, 47 N. Y. Suppl. 636; Laird *v.* McGeorge, 16 Misc. 70, 37 N. Y. Suppl. 631.

Ohio.— Shinkle, etc., Co. *v.* Birney, 68 Ohio St. 328, 67 N. E. 715; McNeal *v.* Emery, 8 Ohio Dec. (Reprint) 513, 8 Cinc. L. Bul. 265.

Rhode Island.— Whitehead *v.* Comstock, 25 R. I. 423, 56 Atl. 446.

Wisconsin.— Dowling *v.* Nuebling, 97 Wis. 350, 72 N. W. 871; Cole *v.* McKey, 66 Wis. 500, 29 N. W. 279, 57 Am. St. Rep. 293.

England.— Lane *v.* Cox, [1897] 1 Q. B. 415, 66 L. J. Q. B. 193, 76 L. T. Rep. N. S. 135, 45 Wkly. Rep. 261.

Injuries from dangerous or defective condition see *infra*, VII, E.

of a stipulation to the contrary.[98] However, under such statute, in the absence of an agreement to that effect, the landlord is not bound to repair patent defects in a building, of the existence of which the tenant was cognizant when he leased the premises.[99] In several jurisdictions it is provided by statute that where a leased building is intended for the occupation of human beings, the lessor must, in absence of agreement to the contrary, put the same in a condition fit for habitation, and repair subsequent dilapidations, etc. Such statutes, however, are construed as being limited in their application to property used for dwelling-house purposes, and do not apply to business property.[1] And in some jurisdictions it is provided by statute that the tenant is not liable for repairs where the demised premises are injured by accident through no fault of the tenant.[2]

(III) *Covenants or Agreements as to Repairs*—(A) *General Rule.* The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended, and a covenant is ordinarily not implied that the lessor will make any repairs to the demised premises.[3]

98. White *v.* Montgomery, 58 Ga. 204; Driver *v.* Maxwell, 56 Ga. 11; Whittle *v.* Webster, 55 Ga. 180; Guthman *v.* Castleberry, 48 Ga. 172; Marshall *v.* Cohen, 44 Ga. 489, 9 Am. Rep. 170; Center *v.* Davis, 39 Ga. 210. See also Lewis *v.* Chisholm, 68 Ga. 40; Jackson *v.* Doll, 109 La. 230, 33 So. 207; Pargoud *v.* Tourne, 13 La. Ann. 292; Perret *v.* Dupré, 19 La. 341; Perrett *v.* Dupré, 3 Rob. (La.) 52.

99. Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93; White *v.* Montgomery, 58 Ga. 204; Driver *v.* Maxwell, 56 Ga. 11.

1. Edmison *v.* Aslesen, 4 Dak. 145, 27 N. W. 82 (holding that the cellar and first story of a building in a store block is not "a building intended for the occupation of human beings," within Civ. Code, § 1114, which imposes on the lessor the duty of keeping such building in repair); Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307; Torreson *v.* Walla, 11 N. D. 481, 92 N. W. 834 (holding, however, that the absence of a sewer connecting with the cellar of a dwelling-house, in consequence of which water ran into the cellar, does not render the house not fit for occupation by human beings, within Rev. Codes, § 4080, requiring landlords, in the absence of agreements to the contrary, to put such buildings in a condition fit for occupation); Tucker *v.* Bennett, 15 Okla. 187, 81 Pac. 423.

2. *Louisiana.*— Payne *v* James, 45 La. Ann. 381, 12 So. 492, holding that overflows are unavoidable accidents within the meaning of Civ. Code, art. 2719, and relieve the tenant from repairing damages caused directly by them. *Compare* Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77, holding that where the inundation or leased land along a river is usual the lessor is not liable for the repairs made necessary thereby.

New Jersey.— Allen *v.* Fisher, 66 N. J. L. 261, 49 Atl. 477; Dorr *v.* Harkness, 49 N. J. L. 571, 10 Atl. 400, 60 Am. Rep. 656.

Pennsylvania.— Earle *v.* Arbogast, 180 Pa. St. 409, 36 Atl. 923.

United States.— U. S. *v.* Bostwick, 94 U. S. 53, 24 L. ed. 65.

Canada.—Allan *v.* Fortier, 20 Quebec Super. Ct. 50, where the accident occurred through faulty construction.

3. *Connecticut.*— Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852.

Illinois.— Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127.

Indiana.—Kellenberger *v.* Foresman, 13 Ind. 475.

Maryland.— Moyer *v.* Mitchell, 53 Md. 171.

Nebraska.— Turner *v.* Townsend, 42 Nebr. 376, 60 N. W. 587.

New York.— Witty *v.* Matthews, 52 N. Y. 512; Read *v.* Bolger, 62 N. Y. App. Div. 411, 70 N. Y. Suppl. 757; Watson *v.* Almirall, 61 N. Y. App. Div. 429, 70 N. Y. Suppl. 662 (holding that where a lease contained no covenants to repair, a partial compliance with the tenant's demand for repairs, made after the signing of the lease, did not create a new contract to repair so as to make failure to repair a defense to an action for rent); Everson *v.* Heffernan, 59 N. Y. App. Div. 533, 69 N. Y. Suppl. 268; Post *v.* Vetter, 2 E. D. Smith 248; Lyons *v.* Gavin, 43 Misc. 659, 88 N. Y. Suppl. 252.

Oregon.— Kahn *v.* Love, 3 Oreg. 206.

Pennsylvania.— Moore *v.* Weber, 71 Pa. St. 429, 10 Am. Rep. 708 (holding that voluntary repairs made by a landlord raise no presumption of a contract to repair); Frey *v.* Zabinski, 10 Kulp 36.

West Virginia.— Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; Clifton *v.* Montague, 40 W. Va. 207, 21 S. E. 855, 52 Am. St. Rep. 872, 33 L. R. A. 449, holding that where a written lease of property provides that the lessee shall keep the same in repair, except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents.

United States.— Sheets *v.* Selden, 7 Wall. 416, 19 L. ed. 166.

England.— Pomfret *v.* Ricroft, 1 Saund. 321. See also Aspdin *v.* Austin, 5 Q. B. 671, Dav. & M. 515, 8 Jur. 355, 13 L. J. Q. B. 155, 48 E. C. L. 671; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 538.

Fences.— A landlord is not liable to a tenant for rebuilding and repairing of fences,

(B) *Limitation of Rule.* An apparent exception to this rule is found in the case of hallways, staircases, elevators, etc., used in common by other tenants of a building, and under the control of the landlord. In such cases it is the duty of the landlord to make the necessary repairs, even in the absence of express covenants on his part to this effect,[4] and his failure to do so will render him liable for injuries resulting therefrom.[5] In some jurisdictions it is held that in the absence of contract the landlord is not liable for injuries to a tenant, caused by defects in halls or stairways used in common by several tenants, where such defects occur after the beginning of the term, and the landlord is guilty of no active misfeasance or negligence in the premises.[6] And a landlord who lets an entire tenement is not liable for injuries to the lessee, or to a subtenant of one of the tenements, through defects in a hallway or stairway used as a common entrance for several of the tenants, since he is not legally in possession of it, and is not obliged to make repairs.[7]

necessity for which was caused by rains during the tenancy, where there was no agreement to pay therefor. Jones *v.* Felker, 72 Ark. 405, 80 S. W. 1088.

4. *Indiana.*— La Plante *v.* La Zear, 31 Ind. App. 433, 68 N. E. 312.

Maine.— Sawyer *v.* McGillicuddy, 81 Me. 318, 17 Atl. 124, 10 Am. St. Rep. 260, 3 L. R. A. 458.

Massachusetts.— Watkins *v.* Goodall, 138 Mass. 533; Looney *v.* McLean, 129 Mass. 33, 37 Am. Rep. 295.

Minnesota.— Olson *v.* Schultz, 67 Minn. 494, 70 N. W. 779, 64 Am. St. Rep. 437, 36 L. R. A. 790.

New Jersey.— Gleason *v.* Boehm, 58 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645 (holding, however, that the landlord is not obliged to furnish light for the halls and stairways at night); Gillvon *v.* Reilly, 50 N. J. L. 26, 11 Atl. 481.

New York.— Bogendoerfer *v.* Jacobs, 97 N. Y. App. Div. 355, 89 N. Y. Suppl. 1051; Clarke *v.* Welsh, 93 N. Y. App. Div. 393, 87 N. Y. Suppl. 697; Levine *v.* Baldwin, 87 N. Y. App. Div. 150, 84 N. Y. Suppl. 92; Donohue *v.* Kendall, 50 N. Y. Super. Ct. 386; Estey *v.* Corn, 46 Misc. 270, 91 N. Y. Suppl. 745; Feinstein *v.* Jacobs, 15 Misc. 474, 37 N. Y. Suppl. 345; Schmidt *v.* Cook, 12 Misc. 449, 33 N. Y. Suppl. 624 [*affirming* 10 Misc. 787, 30 N. Y. Suppl. 1135]; Canavan *v.* Stuyvesant, 7 Misc. 113, 27 N. Y. Suppl. 413; Wagner *v.* Welling, 84 N. Y. Suppl. 979 (holding that a covenant in a lease that the lessee should make repairs does not extend to an elevator in the building which under the terms of the lease the landlord bound himself to furnish, and over which he had control, and which he used in part for his own purposes); O'Sullivan *v.* Norwood, 8 N. Y. St. 388; Brennan *v.* Lachat, 5 N. Y. St. 882.

Pennsylvania.— Lewin *v.* Pauli, 19 Pa. Super. Ct. 447.

United States.— Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 11 C. C. A. 521.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 629 *et seq.*

See, however, Platt *v.* Farney, 16 Ill. App. 216 (holding that in the absence of a contract of special circumstances it is not a landlord's duty to keep an outside stairway safe for his tenant); Dee *v.* Emery, 10 Ohio Dec. (Reprint) 92, 18 Cinc. L. Bul. 349.

5. Sawyer *v.* McGillicuddy, 81 Me. 318, 17 Atl. 124, 10 Am. St. Rep. 260, 3 L. R. A. 458; Lindsey *v.* Leighton, 150 Mass. 285, 22 N. E. 901, 15 Am. St. Rep. 199; Looney *v.* McLean, 129 Mass. 33, 37 Am. Rep. 295; Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922 [*reversing* 47 N. Y. App. Div. 70, 62 N. Y. Suppl. 364]; Dollard *v.* Roberts, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238 [*affirming* 5 Silv. Sup. 435, 8 N. Y. Suppl. 432]; Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Totten *v.* Phipps, 52 N. Y. 354; Brennan *v.* Lachat, 14 Daly (N. Y.) 197, 6 N. Y. St. 278; Feinstein *v.* Jacobs, 15 Misc. (N. Y.) 474, 37 N. Y. Suppl. 345; Railton *v.* Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246, holding that a provision in a lease that the property of the lessee is to be kept on the premises at the risk of the lessee in regard to damage by fire, water, or otherwise is not a bar to an action by the lessee for damage to his goods from smoke and excessive heat arising from the negligent management by the lessor of a steam-heating apparatus.

6. Purcell *v.* English, 86 Ind. 34, 44 Am. Rep. 255; Humphrey *v.* Wait, 22 U. C. C. P. 580. See, however, Brunker *v.* Cummins, 133 Ind. 443, 32 N. E. 732. See also *infra* VII, E, 1, b, (II).

7. Kearines *v.* Cullen, 183 Mass. 298, 67 N. E. 243; Marley *v.* Wheelwright, 172 Mass. 530, 52 N. E. 1066; McKeon *v.* Cutter, 156 Mass. 296, 31 N. E. 389. O'Dwyer *v.* O'Brien, 13 N. Y. App. Div. 570, 43 N. Y. Suppl. 815 (holding that the rule that it is the duty of a landlord leasing different parts of a building to several tenants to keep in a reasonably safe condition the avenues by which each tenant may reach the part occupied by him does not apply to the keeping in repair of an alley by which a tenant reaches a house occupied solely by him although another tenant who does not use the alley occupies a house on the same lot); Schwartz *v.* Apple, 21 Misc. (N. Y.) 513, 48 N. Y. Suppl. 253 (holding that the principles regulating the duty and liability of landlords in respect to

(c) *Consideration.* A promise to repair, made by a landlord to his tenant during the tenancy, with no other consideration than such tenancy, is a *nudum pactum*, and cannot be enforced.[8] An acceptance of a lease, containing a covenant to deliver up the premises at the end of the term in as good order and repair "as the same now are or may be put into by the lessor," is a sufficient consideration for a contemporaneous agreement, a part of the same transaction, in which the lessor binds himself to make certain repairs forthwith;[9] and where a tenant refuses to pay rent unless repairs are made, and is notified to quit, he may regard the lease as ended, and a subsequent promise of the landlord to make repairs if the tenant will stay at the same rental is based on a sufficient consideration.[10]

(d) *Construction and Operation.* Where the parties to a lease of real property have expressly covenanted as to the repairs, the express covenant takes the place of any implied covenant, and becomes the measure of liability of the respective parties thereto.[11] A general covenant to repair is binding on the tenant

the safe condition of the common hallways of the apartment of a tenement house are inapplicable to the case of walls and ceilings within those portions of the building which are leased to and under the exclusive control of the tenants). See also Haizlip *v.* Rosenberg, 63 Ark. 430, 39 S. W. 60; Kushes *v.* Ginsberg, 99 N. Y. App. Div. 417, 91 N. Y. Suppl. 216.

8. *Illinois.*— Fowler Cycle Works *v.* Fraser, 110 Ill. App. 126; Watson *v.* Moulton, 100 Ill. App. 560; Blake *v.* Ranous, 25 Ill. App. 486.

Indiana.— Purcell *v.* English, 86 Ind. 34, 44 Am. Rep. 255; Taylor *v.* Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230.

Kentucky.— Altsheler *v.* Conrad, 118 Ky. 647, 82 S. W. 257, 26 Ky. L. Rep. 538; Eblin *v.* Miller, 78 Ky. 371 (holding that a landlord's mere promise to repair the premises before the term expires on an agreement that the tenant will not previously abandon it is without consideration and cannot be enforced); Proctor *v.* Keith, 12 B. Mon. 252.

Maine.— Bennett *v.* Sullivan, 100 Me. 118, 60 Atl. 886; Libbey *v.* Tolford, 48 Me. 316, 77 Am. Dec. 229.

Michigan.— Rhoades *v.* Seidel, 139 Mich. 608, 102 N. W. 1025.

New Jersey.— Clyne *v.* Helmes, 61 N. J. L. 358, 39 Atl. 767.

New York.— Hall *v.* Beston, 165 N. Y. 632, 59 N. E. 1123 [*affirming* 26 N. Y. App. Div. 105, 49 N. Y. Suppl. 811]; Wynne *v.* Haight, 27 N. Y. App. Div. 7, 50 N. Y. Suppl. 187; Bronner *v.* Walters, 15 N. Y. App. Div. 295, 44 N. Y. Suppl. 583; Gottsberger *v.* Radway, 2 Hilt. 342; Speckels *v.* Sax, 1 E. D. Smith 253 (holding that neglect of the landlord to repair does not authorize an abandonment by the tenant so as to render a waiver of the right to abandon a good consideration for a subsequent agreement by the landlord to repair). See also Bickart *v.* Hoffman, 19 N. Y. Suppl. 472, where a lease provided that the lessor should put the premises in good order and before the lessee entered the lessor cut down a decayed flagpole, and it was held that the lessee was not bound by an agreement to pay one half of the cost of replacing it, the promise being without consideration.

Rhode Island.— Whitehead *v.* Comstock, 25 R. I. 423, 56 Atl. 446.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 539.

9. Vass *v.* Wales, 129 Mass. 38.

10. Conkling *v.* Tuttle, 52 Mich. 630, 18 N. W. 391.

11. *California.*— Frey *v.* Vignier, 145 Cal. 251, 78 Pac. 733.

Iowa.— Piper *v.* Fletcher, 115 Iowa 263, 88 N. W. 380. See also Packer *v.* Cockayne, 3 Greene 111.

Massachusetts.— Ball *v.* Wyeth, 8 Allen 275, holding that under a lease of buildings containing a written clause providing that they "are to be kept in repair and maintained in good condition by the lessee" and printed clauses providing that at the end of the term the lessee will quit and deliver up the premises "in as good order and condition (reasonable use and wearing thereof, fire and other unavoidable casualties, excepted,) as the same now are or may be put into" by the lessor and that the lessee should keep the buildings insured against loss by fire in a specified sum payable to the lessor, the lessee is not liable to repair injuries which occur through ordinary wear or fire or other unavoidable casualties.

New Jersey.— Allen *v.* Fisher, 66 N. J. L. 261, 262, 49 Atl. 477, where a lease of a hotel contained a printed clause providing that the lessee was to peaceably deliver up the premises demised, at the end of the term, in the same good order and condition that he received the same, reasonable wear and tear and damage by accidental fire alone excepted. It also contained a written clause providing that "all repairs are to be made and paid for by the said tenant and lessee . . . and agreed that the said lessor shall be exempt and relieved from the making of any repairs, alterations, additions or improvements, during the continuance of this lease, the said lessee hereby covenanting to make and do the same;" and it was held that the clause which exempted the lessee from liability for damages due to reasonable wear and tear or to accidental fire, was intended to qualify not only the lessee's covenant to deliver up possession of the premises at the end of the term, but also his covenant to make

under all circumstances, and, if he desires to relieve himself from certain liabilities, he must take the precaution to specifically exclude them from the operation of his covenant;[12] and such covenants run with the land and bind heirs and assigns.[13] A covenant by a lessor to repair likewise runs with the land, and the

repairs and to relieve him from obligation to replace a part of the premises which had been destroyed by accidental fire.

New York.— Hancox *v.* Jaques, 10 N. Y. 347.

United States.— California Dry-Dock Co. *v.* Armstrong, 17 Fed. 216, 8 Sawy. 523.

England.— Standen *v.* Chrismas, 10 Q. B. 135, 11 Jur. 694, 16 L. J. Q. B. 265, 59 E. C. L. 135.

Canada.— Crawford *v.* Bugg, 12 Ont. 8; Miller *v.* Kinsley, 14 U. C. C. P. 188.

12. *Illinois.*— Barnhart *v.* Boyce, 102 Ill. App. 172, holding that where a tenant agrees to keep the premises in repair and prevent their deterioration, he must do so irrespective of the cause of such deterioration.

Mississippi.— Waddell *v.* De Jet, 76 Miss. 104, 23 So. 437.

New Jersey.— Ashby *v.* Ashby, 59 N. J. Eq. 547, 46 Atl. 522, holding that an obligation on the part of the tenant to keep the premises in good repair, and to pay for all new repairs, will prevent him from recovering for expenditures which were necessary for the proper repairs of the building, whether they were of a permanent nature or not.

New York.— Lynch *v.* Sauer, 16 Misc. 1, 37 N. Y. Suppl. 666 [*affirming* 14 Misc. 252, 35 N. Y. Suppl. 715]; Green *v.* Eden, 2 Thomps. & C. 582; Cohn *v.* Hill, 9 Misc. 326, 30 N. Y. Suppl. 209; Ramsay *v.* Wilkie, 13 N. Y. Suppl. 554; Buhler *v.* Gibbons, 3 N. Y. Suppl. 815; Hays *v.* Moody, 2 N. Y. Suppl. 385; Heintze *v.* Erlacher, 1 N. Y. City Ct. 465; Achlers *v.* Rehlenger, 1 N. Y. City Ct. 79.

England.— Allardice *v.* Disten, 11 U. C. C. P. 278; McDonald *v.* Cochrane, 6 U. C. C. P. 134.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 540, 541.

Compare Harris *v.* Goslin, 3 Harr. (Del.) 338.

Possession after expiration of lease.—Where a lessee continues in possession as a yearly tenant after the expiration of a lease, containing a covenant by him to repair, a similar obligation will be implied. Hett *v.* Janzeh, 22 Ont. 414.

Tenant in common — Contribution. — One tenant in common of a house, who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his cotenant for contribution. Leigh *v.* Dickeson, 15 Q. B. D. 60, 54 L. J. Q. B. 18, 52 L. T. Rep. N. S. 790, 33 Wkly. Rep. 538.

Repairs in excess of amount stipulated for. — The lessee is liable to pay for repairs made on the premises at his request, although in excess of the amount stipulated in the lease by him to be paid for. Benjamin *v.* Heeney, 51 Ill. 492.

Waiver.— A stipulation in a lease providing that the expense of keeping the building in repair shall be borne equally by the parties, but before any repairs are made the cost shall be submitted by each party to the other and mutually approved, may be waived so far as to require the cost to be submitted and approved, such waiver will result by the tenants requesting repairs to be made and allowing the landlord to have them made without submitting the cost. Parker *v.* Brown House Co., 117 Ga. 1013, 44 S. E. 807.

Limitations of rules.— It will not be presumed that the lessee assumed the risk and consequences of defects so radical as to call for the condemnation of the premises as dangerous to the public safety, thereby dissolving the lease. Pierce *v.* Hedden, 105 La. Ann. 294, 29 So. 734.

Suit for breach.— The assignment of a lease on the date does not authorize the assignee in his own name to sue the lessee for a breach of the covenant. Allen *v.* Wooley, 1 Blackf. (Ind.) 148.

13. Harris *v.* Goslin, 3 Harr. (Del.) 338; Lehmaier *v.* Jones, 100 N. Y. App. Div. 495, 91 N. Y. Suppl. 687; Morrogh *v.* Alleyne, Ir. R. 7 Eq. 487; Thistle *v.* Union Forwarding, etc., Co., 29 U. C. C. P. 76; Perry *v.* Upper Canada Bank, 16 U. C. C. P. 404.

Suit for breach.— The assignment of a lease on the day of its date does not authorize the assignee in his own name to sue the lessee for a breach of the covenant. Allen *v.* Wooley, 1 Blackf. (Ind.) 148.

A covenant to repair made by a subtenant is not a mere covenant of indemnity, but, in the case of non-performance, it renders him liable to his lessor, whether such lessor has paid the original landlord or not. Smith *v.* Coe, 1 Sweeny (N. Y.) 332.

Beneficial interest in a lease of premises, accompanied by occupation and payment of rent by a widow, a party to the lease, but whose husband, also a party, had alone entered into covenants to repair and had died before the expiration of the term, creates no contract between the widow and the lessor legally binding her to perform the covenants in the lease, nor does it create any like equitable liability, notwithstanding a declaration in the lease by the husband that he held the premises as trustee for his wife as part of her separate estate. Ramage *v.* Womack, [1900] 1 Q. B. 116, 69 L. J. Q. B. 40, 81 L. T. Rep. N. S. 526.

Breach of original lessee.— An under-tenant who covenants to keep leased premises in repair is not liable for a breach of a similar covenant made by the original lessee of the premises long before the under-tenant took possession. Gordon *v.* George, 12 Ind. 408; St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

assignee of the lessee is entitled to the benefit of all such covenants, and may sue the lessor for a breach.[14] However, a covenant forthwith to put the demised property in good and tenantable repair can only be broken once.[15] The lessee is bound by his covenant to repair, notwithstanding latent defects in the leased property at the time he took possession, in the absence of fraud or concealment on the part of the lessor in the execution of the contract.[16] As a lessor is under no general obligation to put or keep the demised premises in repair, his covenants to do so are not to be enlarged beyond their fair intent.[17] But where he expressly covenants in a lease to make certain specified repairs, such as repairing and maintaining fences on the leased premises, he will be held liable for a breach thereof.[18]

14. Myers *v.* Burns, 33 Barb. (N. Y.) 401; Allen *v.* Culver, 3 Den. (N. Y.) 284 (holding that a covenant by a lessor to repair in case of damage by fire will run with the land and bind the grantee of the reversion); Norman *v.* Wells, 17 Wend. (N. Y.) 136; Pasteur *v.* Jones, 1 N. C. 306; Kershaw *v.* Supplee, 1 Rawle (Pa.) 131 (holding, however, that such action could not be maintained by the lessee's assignee against the lessor's executor).

Waiver.— Where a landlord after breach of his contract to repair conveys the premises away, and after his grantee's refusal to recognize any liability to repair the tenant with notice of such refusal attorns to the grantee and continues in possession and pays him the rent, the tenant waives any claim against the grantee on the landlord's claim. Mirick *v.* Bashford, 38 Barb. (N. Y.) 191. See, however, McDougall *v.* Ridout, 9 U. C. Q. B. 239.

Right of assignee to benefit of covenants generally see *supra*, IV, B, 4, c.

15. Gerzebek *v.* Lord, 33 N. J. L. 240 (holding that a covenant by a landlord to do certain repairs, which are specified, will not run with the land after breach); Jacob *v.* Down, [1900] 2 Ch. 156, 64 J. P. 552, 69 L. J. Ch. 493, 83 L. T. Rep. N. S. 191, 48 Wkly. Rep. 441; Coward *v.* Gregory, L. R. 2 C. P. 153, 12 Jur. N. S. 1000, 36 L. J. C. P. 1, 15 L. T. Rep. N. S. 279, 15 Wkly. Rep. 170.

16. Bullock-McCall-McDonnell Electric Co. *v.* Coleman, 136 Ala. 610, 33 So. 884; Simkins *v.* Cordele Compress Co., 113 Ga. 1050, 39 S. E. 407; Bosworth *v.* Thomas, 67 Ga. 640; Larguier *v.* White, 29 La. Ann. 156; Lockrow *v.* Horgan, 58 N. Y. 635. And see Jackson *v.* Stewart, 31 Pa. Super. Ct. 58.

17. *California.*— Cowell *v.* Lumley, 39 Cal. 151, 2 Am. Rep. 430, holding that a covenant by a lessor to build on the leased premises does not by implication impose on him the obligation to rebuild in case of the destruction of the building by fire during the tenancy.

District of Columbia.— Howell *v.* Schneider, 24 App. Cas. 532.

Illinois.— See John Morris Co. *v.* Southworth, 154 Ill. 118, 39 N. E. 1099 [*reversing* 50 Ill. App. 429].

Kansas.— Vale *v.* Trader, 5 Kan. App. 307, 48 Pac. 458, holding that where a tenant rents a farm of three hundred and twenty acres and the only reference to the dwelling-house is "that said V hereby agrees to repair the tenant house . . . for the use of said T." and said house is during the term destroyed by fire without the fault of either party, the tenant cannot recover the value of its use for the remainder of the term.

Maine.— Bennett *v.* Sullivan, 100 Me. 118, 60 Atl. 886.

Maryland.— Middlekauff *v.* Smith, 1 Md. 329, holding that a covenant by the lessor of a mill to keep it in repair does not embrace the usual duties of the miller in operating the mill, such as dressing the stones, regulating the general machinery of the mill, and cleaning the race of ordinary deposits; that he is only bound to make good deteriorations arising from natural wear and decay, and inevitable accident.

Massachusetts.— Rogers *v.* Snow, 118 Mass. 118, holding, however, that under a covenant by the lessor to repair, the erection of a more expensive building after its destruction by fire inures to the benefit of the lessee during the term.

Michigan.— Clark *v.* Babcock, 23 Mich. 164.

Minnesota.— McCormick *v.* Milburn, etc., Co., 57 Minn. 6, 58 N. W. 600.

Missouri.— Fisher *v.* Chitty, 62 Mo. App. 405.

New York.— Witty *v.* Matthews, 52 N. Y. 512.

Texas.— See Lovejoy *v.* Townsend, 25 Tex. Civ. App. 385, 61 S. W. 331.

Canada.— Maillet *v.* Roy, 12 Quebec Super. Ct. 375.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 541.

18. Culver *v.* Hill, 68 Ala. 66, 44 Am. Rep. 134; Neglia *v.* Lielouka, 32 Misc. (N. Y.) 707, 65 N. Y. Suppl. 500. See also Wood *v.* Sharpless, 174 Pa. St. 588, 34 Atl. 319, 321.

Renewal of covenant.— Where a written lease provides that a holding over by the lessee for thirty days shall be construed as a renewal of the lease on the same terms and conditions for another twelve months, such holding over is a renewal upon the part of the lessor of his covenant to make repairs. Harthill *v.* Cooke, 43 S. W. 705, 19 Ky. L. Rep. 1524.

Waiver.— Where the lessor has covenanted to put the fences of a farm in good repair, and does repair them, the lessee's acceptance of the farm thereafter without objection estops him to set up a breach of this covenant. Williamson *v.* Miller, 55 Iowa 86, 7

A clause in a lease exempting the lessee from making repairs rendered necessary by reason of certain specified causes does not as a rule, in the absence of express covenant, obligate the landlord to make such repairs.[19] A lease stipulating that the tenant will make all necessary repairs, with certain specified exceptions, exempts the landlord from the duty of making all repairs other than those expressly excepted, and which he thereby covenants to make.[20]

(E) *Nature of Repairs Included in Covenant.* A covenant to keep the premises in repair is generally construed to mean and to impose on the covenantor the legal obligation to keep the premises in as good repair as when the agreement was made;[21] but does not require him to make repairs necessitating radical changes in

N. W. 416. Where on a making of a lease of certain premises for five years, plaintiff agreed to repair a stable on the premises, and had not done so at the end of the first year, although the improvement was to be made as early as practicable during that year, as the agreement was fully breached at the end of the first year, its execution thereafter during the term of the lease was waived. Deuster *v.* Mittag, 105 Wis. 459, 81 N. W. 643.

19. *Kentucky.*— Thomas *v.* Conrad, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084, 24 Ky. L. Rep. 1630, 25 Ky. L. Rep. 169.

Louisiana.— Jackson *v.* Doll, 109 La. 230, 33 So. 207.

Nebraska.— Turner *v.* Townsend, 42 Nebr. 376, 60 N. W. 587.

New York.— Castagnette *v.* Nicchia, 76 N. Y. App. Div. 371, 78 N. Y. Suppl. 498; Carter *v.* Rockett, 8 Paige 437. *Compare* Woodward *v.* Jones, 15 Misc. 1, 36 N. Y. Suppl. 775.

Tennessee.— Olmstead *v.* Tennessee Fixture, etc., Co., 1 Tenn. Ch. App. 653.

West Virginia.— Kline *v.* McLain, 33 W. Va. 32, 10 S. E. 11, 5 L. R. A. 400.

England.— Weigall *v.* Waters, 6 T. R. 488; Pindar *v.* Ainsley, 1 T. R. 312 note.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 540.

Compare Vass *v.* Wales, 129 Mass. 38.

Damages by elements.— Where a lease contained a covenant to make repairs, and also a covenant to surrender the premises in good condition, "damages by the elements excepted," it was held that the first covenant was not qualified by the second, and that the lessor could recover damages for the omission on the part of the lessee to repair damages caused by the elements. Kling *v.* Dress, 5 Rob. (N. Y.) 521. "Damages by the elements," excepted from a lessee's covenant to keep in repair covers destruction by fire occurring without fault or negligence of the lessee. Van Wormer *v.* Crane, 51 Mich. 363, 16 N. W. 686, 47 Am. St. Rep. 582.

20. Polack *v.* Uioche, 35 Cal. 416, 95 Am. Dec. 115 (where a lessee's covenant to repair excepted "damages by the elements or acts of Providence," and it was held that damages to which human agency contributed in any way did not come within the exception); Powers *v.* Cope, 93 Ga. 248, 18 S. E. 815. See also Taul *v.* Shanklin, 1 Tex. App. Civ. Cas. § 1135.

21. *Iowa.*— Piper *v.* Fletcher, 115 Iowa 263, 88 N. W. 380.

Maryland.— Machen *v.* Hooper, 73 Md. 342, 21 Atl. 67 (holding, however, that the lessees were not liable for injuries to the building arising from its imperfect construction by reason of which it fell to the ground); Stultz *v.* Locke, 47 Md. 562.

Massachusetts.— Leavitt *v.* Fletcher, 10 Allen 119, where by an indenture between the lessor and the lessee, the lessor agreed to make all necessary repairs on the outside of the building, and the lessee to make all necessary repairs on the inside of such building. The building fell from the weight of snow upon the roof, injuring the lessee's carriages kept therein; and the lessor refused to rebuild it, and it was held that the lessee might recover damages for failure of the lessor to rebuild the outside. See also Prager *v.* Bancroft, 112 Mass. 76.

Michigan.— Vincent *v.* Crane, 134 Mich. 700, 97 N. W. 34.

Missouri.— St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

New Jersey.— Naye *v.* Noezel, 50 N. J. L. 523, 14 Atl. 750, holding likewise that such a covenant on the part of the lessee does not embrace labor by the lessee, under a special promise by the lessor to pay him therefor, in building a barn, using in part an old house on the premises, and in removing three kitchens adjoining the house in which he lived to another part of the farm, and converting them into tenements.

New York.— Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7 [*affirming* 4 Misc. 207, 23 N. Y. Suppl. 900]; Ward *v.* Kelsey, 38 N. Y. 80, 97 Am. Dec. 773; Myers *v.* Burns, 35 N. Y. 269 [*affirming* 33 Barb. 401] (holding that a covenant by the lessor to keep a leased hotel "in good necessary repairs" obligates the covenantor to make and to maintain the premises fit for use as a hotel, and among other things to provide new chimney flues if necessary to carry off the smoke and gas from the rooms); Markham *v.* David Stevenson Brewing Co., 104 N. Y. App. Div. 420, 93 N. Y. Suppl. 684; Lehmaier *v.* Jones, 100 N. Y. App. Div. 495, 91 N. Y. Suppl. 687 (holding likewise that under a covenant in a lease to "keep" and surrender the premises "in as good state and condition as reasonable use and wear thereof will permit" requires the

the structure, of a permanent, substantial, and unusual character.[22] Where the tenant covenants to keep the demised premises in repair, it being first put in repair by the landlord, the repairs to be made by the landlord are a condition precedent to the obligation on the part of the tenant to keep the premises in repair.[23] In some jurisdictions the covenant to keep in good repair imposes an obligation to put in repair premises which at the time of the demise were not in repair.[24]

(F) *Duty to Rebuild on Destruction of Property.* According to the common-law rule, which has been followed generally in this country, a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire or other casualty, even where he is without fault.[25] However, where there is no express

tenant not only to keep the premises in as good repair as when he entered, but to put, keep, and leave them in good repair having regard to the age and class of the buildings); White *v.* Albany R. Co., 17 Hun 98.

Pennsylvania.— Ardesco Oil Co. *v.* Richardson, 63 Pa. St. 162. See also Huston *v.* Springer, 2 Rawle 97.

Rhode Island.— Miller *v.* McCardell, 19 R. I. 304, 33 Atl. 445, 30 L. R. A. 682.

South Carolina.— Mitchell *v.* Nelson, 13 S. C. 105.

United States.— Brown *v.* Reno Electric Light, etc., Co., 55 Fed. 229.

England.— Openshaw *v.* Evans, 50 L. T. Rep. N. S. 156.

Canada.— Holderness *v.* Lang, 11 Ont. 1.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 541.

Compare Hinckley *v.* Beckwith, 23 Wis. 328.

Fences.— Under a lease providing that the lessee shall use the premises in a farmer-like manner and shall keep the fences in good repair, the tenant is liable for damages to fruit trees by sheep let into them by reason of dilapidated fences. Elbert *v.* Wilson, 3 Greene (Iowa) 520.

Work done by landlord without request.— Where a lease stipulated that the lessees should take the premises in the condition they were then in, and that whatever work the lessees should need and desire should be done at their own expense, it was held that they were not liable for work done by the landlord without their request. Wicker *v.* Lewis, 40 Ill. 251.

22. Street *v.* Central Brewing Co., 101 N. Y. App. Div. 3, 91 N. Y. Suppl. 547 (where a lessee covenanted to keep the premises generally in good repair during the term of the lease and also to repair the plumbing work, pipes, glass, fences, etc., and surrender the premises in as good a condition as reasonable use and wear thereof would permit, damages by the elements excepted, and it was held that the covenant covered only ordinary repairs and did not require the tenant to rebuild a gable wall of the building which had become dilapidated as the result of time and wear); Scott *v.* Brown, 68 J. P. 181, 2 Loc. Gov. 441; Wright *v.* Lawson, 68 J. P. 34.

New fences.— A tenant under a lease requiring the lessee to keep the fences in good repair and entitling him to payment for improvements is entitled to payment for new fences around the land not inclosed when the lease was executed. Hazlewood *v.* Pennybacker, (Tex. Civ. App. 1899) 50 S. W. 199.

23. Neale *v.* Ratcliff, 15 Q. B. 916, 15 Jur. 166, 20 L. J. Q. B. 130, 69 E. C. L. 916; Counter *v.* Macpherson, 5 Moore P. C. 83, 13 Eng. Reprint 421. See also Coombe *v.* Greene, 2 Dowl. P. C. N. S. 1023, 12 L. J. Exch. 291, 10 M. & W. 480.

Waiver.— Where the lessor's agreement to make improvements on the leased premises and to accept rent merely nominal until the lessee's business should become profitable was a condition precedent to the taking effect of the lease, it was waived by the lessor's paying full rent from the commencement of the term, and continuing in possession. Lynch *v.* Sauer, 16 Misc. (N. Y.) 1, 37 N. Y. Suppl. 666.

24. Hull *v.* Burns, 17 Abb. N. Cas. (N. Y.) 317; Proudfoot *v.* Hart, 25 Q. B. D. 42, 55 J. P. 20, 59 L. J. Q. B. 129, 389, 63 L. T. Rep. N. S. 171, 38 Wkly. Rep. 730; Jacob *v.* Down, [1900] 2 Ch. 156, 64 J. P. 552, 69 L. J. Ch. 493, 83 L. T. Rep. N. S. 191, 48 Wkly. Rep. 441; Payne *v.* Haine, 16 L. J. Exch. 130, 16 M. & W. 541.

25. *California.*— Polack *v.* Pioche, 35 Cal. 416, 95 Am. Dec. 115.

District of Columbia.— Schmidt *v.* Pettit, 1 MacArthur 179, holding likewise that if, after the destruction of the premises, the tenant abandons them, and the landlord takes possession and erects a more costly and commodious structure, the tenant cannot maintain an action to compel him to pay the difference between the rental value of the property before and after the fire.

Georgia.— Meyers *v.* Myrrell, 57 Ga. 516.

Illinois.— Reno *v.* Mendenhall, 58 Ill. App. 87.

Iowa.— David *v.* Ryan, 47 Iowa 642, holding likewise that the fact that after the execution of the lease the construction of similar buildings to those leased was prohibited by city ordinance does not release the lessee from his obligations under the lease to rebuild in case of destruction of the buildings by fire.

Massachusetts.— Phillips *v.* Stevens, 10 Mass. 238.

Michigan.— Cordes *v.* Miller, 39 Mich. 581, 33 Am. Rep. 430.

covenant in the lease requiring the lessee to repair the premises or keep them in repair, an express stipulation binding the lessee to surrender the premises at the expiration of the term in as good order and condition as the same now are, reasonable use and wear and tear excepted, is construed to be merely the expression of an obligation which the law would imply in its absence, and does not impose upon the lessee a liability to repair or to restore in the event of a destruction of the premises, or a material part thereof, during the term, by fire or other unavoidable accident.[26] Now, however, in some jurisdictions, by statutory enactment or judicial construction, no covenant or promise by a lessee to keep and leave the demised premises in good repair will require him to rebuild if the premises are destroyed by fire or other casualty, without fault or negligence on his part, unless the language of the lease shows plainly that it was the intention of the parties that he should be so bound.[27]

Mississippi.— Fowler *v.* Payne, 49 Miss. 32; Abby *v.* Billups, 35 Miss. 618, 72 Am. Dec. 143.

New York.— McIntosh *v.* Lown, 49 Barb. 550; Allen *v.* Culver, 3 Den. 284; Cook *v.* Champlain Transp. Co., 1 Den. 91; Hallett *v.* Wylie, 3 Johns. 44, 3 Am. Dec. 457.

Pennsylvania.— Gettysburg Electric R. Co. *v.* Electric Light, etc., Co., 200 Pa. St. 372, 49 Atl. 952; Hoy *v.* Holt, 91 Pa. St. 88, 36 Am. Rep. 659.

Tennessee.— See Hayes *v.* Ferguson, 15 Lea 1, 54 Am. Rep. 398.

Vermont.— Priest *v.* Foster, 69 Vt. 417, 38 Atl. 78.

Virginia.— Scott *v.* Scott, 18 Gratt. 150; Ross *v.* Overton, 3 Call 309, 2 Am. Dec. 552.

England.— Jacob *v.* Down, [1900] 2 Ch. 156, 64 J. P. 552, 69 L. J. Ch. 493, 83 L. T. Rep. N. S. 191, 48 Wkly. Rep. 441; Bullock *v.* Dommitt, 2 Chit. 608, 6 T. R. 650, 3 Rev. Rep. 300, 18 E. C. L. 809; Clark *v.* Glasgow Assur. Co., 1 Macq. H. L. 668; Rook *v.* Worth, 1 Vesey 460, 27 Eng. Reprint 1142, holding that a tenant for years is subject to waste where the premises have been burnt, although there is no covenant to repair or rebuild.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 545.

Fences.— A covenant by a lessee to keep the fences in repair during his tenancy will oblige him to rebuild the fences destroyed by a flood. Spafford *v.* Meagley, 1 Ohio Dec. (Reprint) 364, 8 West. L. J. 323.

Insured premises.— Where a lease binds a tenant to rebuild in case of loss by fire, and the landlord's wife as owner of the property insured the same, and the tenant refuses to pay the premium on the policy, but after loss voluntarily rebuilds, he is not entitled to any of the insurance money. Ely *v.* Ely, 80 Ill. 532.

Release by municipal covenant.— A covenant in a lease of a wooden building, binding the covenantor to rebuild in case it is burned down, is released by the passage of a municipal ordinance forbidding the erection of wooden buildings. Cordes *v.* Miller, 39 Mich. 581, 33 Am. Rep. 430.

26. *Alabama.*— Warren *v.* Wagner, 75 Ala. 188, 51 Am. Rep. 446; Nave *v.* Berry, 22 Ala. 382.

Indiana.— Wainscott *v.* Silvers, 13 Ind. 497.

Kentucky.— West *v.* Hart, 7 J. J. Marsh. 258, holding that such covenant does not bind the tenants to leave the premises in better repair than they were at the date of the covenant.

Maryland.— Hess *v.* Newcomer, 7 Md. 325.

New York.— Ducker *v.* Del Genovese, 93 N. Y. App. Div. 775, 87 N. Y. Suppl. 889; Warner *v.* Hitchins, 5 Barb. 666. See also Allen *v.* Culver, 3 Den. 284.

Texas.— Miller *v.* Morris, 55 Tex. 412, 40 Am. Rep. 814; Howeth *v.* Anderson, 25 Tex. 557, 78 Am. Dec. 538.

Virginia.— Maggort *v.* Hansbarger, 8 Leigh 532.

United States.— U. S. *v.* Bostwick, 94 U. S. 53, 24 L. ed. 65.

Canada.— Murphy *v.* Labbé, 27 Can. Sup. Ct. 126 [*affirming* 5 Quebec Q. B. 88]; Wolfe *v.* McGuire, 28 Ont. 45; Ford *v.* Phillips, 21 Quebec Super. Ct. 1. See also Counter *v.* Macpherson, 5 Moore P. C. 83, 13 Eng. Reprint 421; Klock *v.* Lindsay, 28 Can. Sup. Ct. 453.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 629.

See, however, Peck *v.* Scoville Mfg. Co., 43 Ill. App. 360, holding that a window broken by a stone accidentally kicked by a passing team is not broken by "inevitable accident," within the meaning of a lease whereby the tenant agrees to restore the premises in good order, loss by "inevitable accident" excepted.

Destruction by municipal authority.— A lessee who has covenanted to surrender the premises at the expiration of the term in good condition is not liable for the partial destruction of the same by municipal authority, where he promptly invoked the aid of the courts in endeavoring to prevent such injury. Beekman *v.* Van Dolsen, 63 Hun (N. Y.) 487, 18 N. Y. Suppl. 376.

27. *Kentucky.*— Thomas *v.* Conrad, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084, 24 Ky. L. Rep. 1630, 25 Ky. L. Rep. 169; Sun Ins. Office *v.* Varble, 103 Ky. 758, 46 S. W. 486, 20 Ky. L. Rep. 556, 41 L. R. A. 792, holding that the statute applies, even though the buildings be merely injured or partially destroyed by fire.

(G) *Agreement by Landlord to Pay For Repairs.* An agreement by the landlord to pay for repairs, or a certain portion of the cost, where the lease does not require the tenant to make repairs, is based on a sufficient consideration and is binding on the landlord.[28]

(H) *Right of Tenant to Repair or Rebuild and Recover Cost.* In the absence of statute or special agreement, the landlord is not liable to his tenant for repairs made by the latter to the demised premises, and is under no obligation to reimburse him for such expenditures.[29] However, where the landlord has

Mississippi.— Levey *v.* Dyess, 51 Miss. 501.
Missouri.—O'Neil *v.* Flanagan, 64 Mo. App. 87.
Nebraska.— Wattles *v.* Southern Omaha Ice, etc., Co., 50 Nebr. 251, 69 N. W. 785, 61 Am. St. Rep. 554, 36 L. R. A. 424; Turner *v.* Townsend, 42 Nebr. 376, 60 N. W. 587.
Virginia.— Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 239, 37 S. E. 851.
Washington.— Armstrong *v.* Maybee, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898, recognizing the above rule but holding that the wording of the covenant in this case required the tenant to rebuild.
United States.— Waite *v.* O'Neil, 72 Fed. 348.

Accident by fire.— A fire in leased premises, the cause of which is unknown or not legally proved, is an "accident," within a provision in a lease that the tenant shall deliver up the premises at the expiration of the lease in as good order, state, and condition as at the commencement of the same, "accidents by fire excepted." Ford *v.* Phillips, 22 Quebec Super. Ct. 296.

28. *Alabama.* — Mobile County *v.* Hagan, 48 Ala. 54.
Connecticut.— Frederick *v.* Daniels, 74 Conn. 710, 52 Atl. 414; King *v.* Woodruff, 23 Conn. 56, 60 Am. Dec. 625.
Georgia.— Lightfoot *v.* West, 98 Ga. 546, 25 S. E. 587.
Indiana.— Beck *v.* Venable, 59 Ind. 408; Reed *v.* Dougan, 54 Ind. 306.
Louisiana.— Pierce *v.* Hedden, 105 La. 294, 29 So. 734.
Missouri.— Hughes *v.* Vanstone, 24 Mo. App. 637.
Nebraska.— Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450.
New York.— Oettinger *v.* Levy, 4 E. D. Smith 288; McCulloch *v.* Dobson, 15 N. Y. Suppl. 602; Benson *v.* Bolles, 8 Wend. 175.
North Carolina.— Wilson *v.* Murphey, 14 N. C. 352.
Pennsylvania.— Mattocks *v.* Cullum, 6 Pa. St. 454; Cornell *v.* Vanartsdalen, 4 Pa. St. 364; Caulk *v.* Everly, 6 Whart. 303; Kost *v.* Theis, 9 Pa. Cas. 336, 12 Atl. 262.
Rhode Island.— Miller *v.* McCardell, 19 R. I. 304, 33 Atl. 445, 30 L. R. A. 682.
Texas.— Peticolas *v.* Thomas, 9 Tex. Civ. App. 442, 29 S. W. 166. See Riggs *v.* Gray, 31 Tex. Civ. App. 268, 72 S. W. 101, holding that where there was no evidence of a promise on the part of the landlord that he would reimburse his tenant for the amount expended in repairing a house occupied by such tenant, the value of such repairs cannot be recovered.
Washington. — Sheehan *v.* Winehill, 18 Wash. 447, 51 Pac. 1065.
Canada.— Sulte *v.* Bell, 8 Rev. Lég. 535.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 549.

Waiver.— An agreement by a lessor to repair the premises before the term begins is waived where the lessee, with knowledge that the repairs had not been made, goes into occupation under the lease and continues in occupation without complaint until long after the repairs are made. Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127 [*affirming* 115 Ill. App. 565]; McNichol *v.* Ryan, 34 N. Brunsw. 391.

29. *Illinois.*—Smith *v.* Kinkaid, 1 Ill. App. 620.
Indiana.— Biddle *v.* Reed, 33 Ind. 529.
Michigan.— Hovey *v.* Walker, 90 Mich. 527, 51 N. W. 678, where a lease provided that the tenant should keep the premises in good repair, "reasonable use and wear thereof and damage by the elements excepted," and there was no evidence that repairs made by the tenant were occasioned by reasonable use and wear, or by damage by the elements, and it was held that the tenant could not recover for such repairs without the agreement of the landlord.
Nebraska.— Powell *v.* Beckley, 38 Nebr. 157, 56 N. W. 974.
New Jersey.— Heintze *v.* Bentley, 34 N. J. Eq. 562.
New York.— Hartford, etc., Steamboat Co. *v.* New York, 78 N. Y. 1 [*affirming* 12 Hun 550]; McCarty *v.* Ely, 4 E. D. Smith 375; Mumford *v.* Brown, 6 Cow. 475, 16 Am. Dec. 440.
Pennsylvania.— Hitner *v.* Ege, 23 Pa. St. 305.
South Carolina.— Cantrell *v.* Fowler, 32 S. C. 589, 10 S. E. 934; Charleston *v.* Moorhead, 2 Rich. 430.
Texas.—Goedeke *v.* Baker, (Civ. App. 1894) 28 S. W. 1039.
Vermont.— Brown *v.* Burrington, 36 Vt. 40.
United States.— Warren *v.* U. S., 4 Ct. Cl. 526.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 555.

A tenant in common of premises took a lease of his cotenant's interest therein. During the term of the lease he made extensive and permanent repairs, which the property required, with the knowledge and consent of the cotenant, and it was held that the co-

stipulated to keep the demised premises in repairs, and fails to do so according to the terms of the lease, the tenant may, after reasonable notice to the landlord, make the repairs himself, and recover the expense thereof from the landlord,[30] or deduct the amount from the rent.[31] However, the fact that the lease authorizes the lessee to apply the rents to reimburse himself for moneys expended for necessary repairs does not deprive him of any other remedy to recover money so expended;[32] and the lessee is not bound to make such repairs himself, but may recover the damages sustained by him from the failure of the landlord to make them according to the agreement.[33]

(IV) *Landlord's Right of Entry to Make Repairs or Alterations.* In the absence of a stipulation in the lease to that effect,[34] the landlord cannot enter on the leased premises during the term to make repairs, although such repairs are necessary from the unsafe condition of the premises, where no obligation is imposed upon the landlord to make such repairs,[35] either by

tenant was bound to contribute, notwithstanding no covenant as to repairs was contained in the lease. Grannis *v.* Cook, 3 Thomps. & C. (N. Y.) 299.

30. *Georgia.*— Lewis *v.* Chisholm, 68 Ga. 40.

Indiana.— Ross *v.* Stockwell, 19 Ind. App. 86, 49 N. E. 50.

Maryland.— Thompson *v.* Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580.

New York.— Hexter *v.* Knox, 63 N. Y. 561 [*affirming* 39 N. Y. Super. Ct. 109]; Myers *v.* Burns, 35 N. Y. 269 [*affirming* 33 Barb. 401] (holding that a tenant in making repairs which his landlord is bound but refuses to make may use new methods and material, although they may be more expensive than those previously used, and may recover therefor from the landlord, provided he acts with reasonable prudence and discretion); Ward *v.* Kelsey, 42 Barb. 582; Chadwick *v.* Woodward, 1 N. Y. City Ct. Suppl. 94.

West Virginia.— Cheuvront *v.* Bee, 44 W. Va. 103, 28 S. E. 751.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 555.

Heirs and assigns.— A provision in a lease, giving the lessee the right to repair and deduct the cost from the rent, or charge the same to the landlord, would bind a subsequent grantee, or the heirs of the lessor. Mitchell *v.* McNeal, 4 Colo. App. 36, 34 Pac. 840; King *v.* Woodruff, 23 Conn. 56, 60 Am. Dec. 125.

31. Diggs *v.* Maury, 23 La. Ann. 59; Westermeier *v.* Street, 21 La. Ann. 714; Perrett *v.* Dupré, 3 Rob. (La.) 52; Lorenzen *v.* Wood, McGloin (La.) 373; Fillebrown *v.* Hoar, 124 Mass. 580; Myers *v.* Burns, 35 N. Y. 269. See also Torreson *v.* Walla, 11 N. D. 481, 92 N. W. 834; Mattocks *v.* Cullum, 6 Pa. St. 454.

In **Louisiana** it is provided by Rev. Civ. Code, art. 2694, that where a lessor after notice has failed to make repairs which it is his duty to make, the lessee may himself make such repairs and deduct the price from the rent, and it has been held under this statute that the lessee cannot maintain an action against the lessor for damages resulting from the failure of the latter to repair, and that it is his duty to pursue the method provided by statute, and to make the necessary repairs himself, and deduct their cost from the rent. Lewis *v.* Pepin, 33 La. Ann. 1417; Welham *v.* Lingham, 28 La. Ann. 903; Pesant *v.* Heartt, 22 La. Ann. 292; Scudder *v.* Paulding, 4 Rob. 428.

Liability for rent as dependent on condition of premises see *infra*, VIII, A, 4.

32. McKenna *v.* Rowlett, 68 Ala. 186.

33. *Indiana.*— Ross *v.* Stockwell, 19 Ind. App. 86, 49 N. E. 50.

Michigan.— Mason *v.* Howes, 122 Mich. 329, 81 N. W. 111 (holding that if a lessee from month to month continues to occupy the premises for more than thirty days after the landlord's refusal to make promised repairs, this does not release the latter from liability for failure to perform the same); Bostwick *v.* Losey, 67 Mich. 554, 35 N. W. 246.

Missouri.— Green *v.* Bell, 3 Mo. App. 291.

New York.— Hexter *v.* Knox, 63 N. Y. 561 [*affirming* 39 N. Y. Super. Ct. 109]; Chadwick *v.* Woodward, 1 N. Y. City Ct. Suppl. 94. See also Marks *v.* Delaglio, 27 Misc. 652, 59 N. Y. Suppl. 707.

Rhode Island.— McCardell *v.* Williams, 19 R. I. 701, 36 Atl. 719.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 555.

Interruption of business during repairs.— Where a lease contained an agreement that the lessor may make all repairs becoming necessary during the term, and the lessee makes such repairs upon refusal of the lessor to make the same, the latter is not liable for any damages caused to the lessee by the interruption of the business while such repairs are going on. Ward *v.* Kelsey, 42 Barb. (N. Y.) 582.

34. Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852.

35. *Indiana.*— Spades *v.* Murray, 2 Ind. App. 401, 28 N. E. 709.

Massachusetts.— See Kansas Inv. Co. *v.* Carter, 160 Mass. 421, 36 N. E. 63.

Minnesota.— Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847, holding likewise that where the right is reserved in the lease to enter and make certain repairs at a certain time during the term the lessor cannot do so at any other time.

statute,[36] or the terms of the lease.[37] A covenant on the part of the landlord to make certain specified repairs implies a license by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing such repairs.[38] However, the landlord's right to make needed repairs does not extend to the disturbance of the tenants in the enjoyment of the premises further than is absolutely necessary to put and keep them in the same condition they were in when the lease was made, and if he goes beyond this limit he is a trespasser.[39]

(v) *Notice That Repairs Are Necessary.* Where the duty is imposed upon the landlord by statute or otherwise the general rule is that due notice by

New York.— Bedlow *v.* New York Floating Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629; Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; White *v.* Mealio, 63 N. Y. 609; McKenzie *v.* Hatton, 70 Hun 142, 24 N. Y. Suppl. 88; Barnum *v.* Fitzpatrick, 27 Abb. N. Cas. 334 [*reversed* on other grounds in 16 N. Y. Suppl. 934]. *Compare* Sulzbacher *v.* Dickie, 51 How. Pr. 500, where the landlord was not bound by covenant to make repairs, and it was held that he had a right, during the tenancy, to enter and make such permanent repairs as were necessary to prevent waste, and indispensable to the due protection of his reversionary interest, and this right extended to putting a new roof upon the building leased to prevent it going to ruin.

Pennsylvania.— Wunder *v.* McLean, 134 Pa. St. 334, 19 Atl. 749, 19 Am. St. Rep. 702.

England.— Barker *v.* Barker, 3 C. & P. 557, 14 E. C. L. 713; Stocker *v.* Planet Bldg. Soc., 27 Wkly. Rep. 877.

Canada.— Ferguson *v.* Troop, 17 Can. Sup. Ct. 527; Ferguson *v.* Troop, 25 N. Brunsw. 440.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 547.

Compare Kaufman *v.* Clark, 7 D. C. 1; Comstock *v.* Oderman, 18 Ill. App. 326, where the justification on the part of the landlord on the ground that the repairs were necessary to prevent the building from falling was held to be improperly pleaded. See, however, Reeder *v.* Purdy, 41 Ill. 279.

Right of landlord to enter in general see *supra*, III, C, 1.

Reëntry to repair as affecting liability for rent see *infra*, VIII, A, 3, f.

36. Dwyer *v.* Carroll, 86 Cal. 298, 24 Pac. 1015 (holding, however, that the authority given by Civ. Code, § 1941, to a lessor of a building to enter and make repairs necessary to make it tenantable does not give the lessor the right to reënter for the purpose of making extensive alterations); Bonnecaze *v.* Beer, 37 La. Ann. 531; Caffin *v.* Redon, 6 La. Ann. 487; Pontalba *v.* Domingon, 11 La. 192. See also Days *v.* Doyle, 99 Ga. 62, 24 S. E. 405; Kaiser *v.* New Orleans, 17 La. Ann. 178, holding that a lessor has no right to make alterations during the term of the lease.

In New York city neither the landlord nor the contractor is liable to a tenant of the former for damages occasioned by the interruption of his business necessarily caused by the proper prosecution by the contractor of the work of repairing the leased premises, where the making of such repairs was required by an order of the department of buildings, whose orders the statutes make it obligatory on the owner to obey. Campbell *v.* Porter, 46 N. Y. App. Div. 628, 61 N. Y. Suppl. 712; Ackerman *v.* New York, etc., Bridge, 10 N. Y. App. Div. 22, 41 N. Y. Suppl. 810; Dexter *v.* King, 8 N. Y. Suppl. 489.

37. Marks *v.* Cartside, 16 Ill. App. 177 (holding that in an action for trespass by a tenant against the landlord for entering the premises and making repairs, it was error to exclude the lease to plaintiff in which the right to reënter for the purpose of repairs was reserved to the lessor, and that in such an action the burden is upon the tenant to show that his consent to the repairs was obtained through fraud); White *v.* Mealio, 37 N. Y. Super. Ct. 72; Turner *v.* McCarthy, 4 E. D. Smith (N. Y.) 247 (holding likewise that where such right is reserved in the lease the landlord is not liable in damages to the tenant for an interruption of his business, etc., unless it appears that the work was done in a negligent and unskilful manner). See also Bloomingdale *v.* Steubing, 12 Misc. (N. Y.) 429, 33 N. Y. Suppl. 584.

Alterations.— A tenant who gives his landlord a license to make such alterations on the demised premises as he wishes may revoke it at any time before the commencement of the work. Fargis *v.* Walton, 107 N. Y. 398, 14 N. E. 303.

38. Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484; Schutz *v.* Corn, 5 N. Y. St. 19; Clark *v.* Lindsay, 7 Pa. Super. Ct. 43 (holding that a reservation in a lease of the right to make any changes or alterations to the mansion house during the year carries with it the incidental right to cast upon the lessee the reasonable consequences of exercising it, and that it was error to instruct that the lessor is limited to such reasonable alterations as would not interfere with the lessee's enjoyment); Saner *v.* Bilton, 7 Ch. D. 815, 47 L. J. Ch. 267, 38 L. T. Rep. N. S. 281, 26 Wkly. Rep. 394.

39. Kaufman *v.* Clark, 7 D. C. 1; Sulzbacher *v.* Dickie, 51 How. Pr. (N. Y.) 500; Saner *v.* Bilton, 7 Ch. D. 815, 47 L. J. Ch. 267, 38 L. T. Rep. N. S. 281, 26 Wkly. Rep. 394.

the tenant to make such repairs is requisite to put the landlord in default;[40] but where the requisite notice has been given to the landlord, it is his duty to make the necessary repairs within a reasonable time thereafter.[41]

(VI) *Right of Tenant to Make Alterations.* In the absence of express stipulation, a tenant has no right to make material or permanent alterations in the demised premises;[42] and since the lessor has the right to restrict the use and enjoyment of his property in the hands of the lessee, where by express stipulation the lessee is prohibited from making any alterations without the consent of

40. *California.*— Green *v.* Redding, 92 Cal. 548, 28 Pac. 599; Tatum *v.* Thompson, 86 Cal. 203, 24 Pac. 1009; Sieber *v.* Blanc, 76 Cal. 173, 18 Pac. 260.

Louisiana.— Favorot *v.* Mettler, 21 La. Ann. 220; Caldwell *v.* Snow, 8 La. Ann. 392; Hennen *v.* Hayden, 5 La. Ann. 713 (holding that the lessee has no right to have repairs made at the landlord's expense, unless he first puts him in default, pursuant to art. 2664, by calling on him to make them); Taylor *v.* Chase, 18 La. 88.

Maryland.— Cook *v.* England, 27 Md. 14.

Massachusetts.— Cummings *v.* Ayer, 188 Mass. 292, 74 N. E. 336; Marley *v.* Wheelwright, 172 Mass. 530, 52 N. E. 1066. See also Hutchinson *v.* Cummings, 156 Mass. 329, 31 N. E. 127. *Contra,* Hayden *v.* Bradley, 6 Gray 425, 66 Am. Dec. 421, holding that a lessee may maintain an action on a covenant of his lessor to repair without previous notice to him of want of repair, especially if the lease contains a covenant that the lessor may enter "to view and make improvements."

Michigan.— Kenny *v.* Barns, 67 Mich. 336, 34 N. W. 587.

Missouri.— Ploen *v.* Staff, 9 Mo. App. 309.

New Jersey.— Vorrath *v.* Burke, 63 N. J. L. 188, 42 Atl. 838; Gerzebek *v.* Lord, 33 N. J. L. 240.

New York.— Thomas *v.* Kingsland, 108 N. Y. 616, 14 N. E. 807 [*affirming* 12 Daly 315]; Spellman *v.* Banningan, 36 Hun 174; O'Connor *v.* Gouraud, 14 Daly 64, 3 N. Y. St. 555; Wolcott *v.* Sullivan, 6 Paige 117.

England.— Manchester Bonded Warehouse Co. *v.* Carr, 5 C. P. D. 507, 45 J. P. 7, 49 L. J. C. P. 809, 43 L. T. Rep. N. S. 476, 29 Wkly. Rep. 354; Makin *v.* Watkinson, L. R. 6 Exch. 25, 40 L. J. Exch. 33, 23 L. T. Rep. N. S. 592, 19 Wkly. Rep. 286; Hugall *v.* McLean, 53 L. T. Rep. N. S. 94, 33 Wkly. Rep. 588 [*affirming* 1 Cab. & E. 391].

Canada.— Holland *v.* De Gaspe, 7 Montreal Super. Ct. 440; Acheson *v.* Poet, 29 L. C. Jur. 206.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 548.

Actual knowledge on the part of the landlord of the necessity of repairs, or reasonable opportunity for the acquisition of such knowledge, has sometimes been held to dispense with the necessity of notice to the landlord. White *v.* Montgomery, 58 Ga. 204; Guthman *v.* Castleberry, 49 Ga. 272.

Notice to lessee.— A notice to repair given by a landlord to his tenant in pursuance of a provision of the lease requiring the lessee to keep the premises in good repair need not particularly state the extent of the repairs required, as the lessee is supposed to know the effect of the covenants in his lease, and to determine for himself what is necessary to fulfil them. Foss *v.* Stanton, 76 Vt. 365, 57 Atl. 942.

41. *California.*— Tatum *v.* Thompson, 86 Cal. 203, 24 Pac. 1009.

Georgia.— See Gavan *v.* Norcross, 117 Ga. 356, 43 S. E. 771; Brunswick Grocery Co. *v.* Spencer, 97 Ga. 764, 25 S. E. 764; Whittle *v.* Webster, 55 Ga. 180.

Illinois.— Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233.

New York.— Coleman *v.* Central Trust Co., 25 Misc. 295, 54 N. Y. Suppl. 561; Nimmo *v.* Harway, 23 Misc. 126, 50 N. Y. Suppl. 686 (holding that in a covenant by a landlord to make repairs "forthwith" after notice of damage, the word "forthwith" means within a reasonable time, or without unnecessary delay); O'Gorman *v.* Harby, 18 Misc. 228, 41 N. Y. Suppl. 521.

Wisconsin.— Young *v.* Burhans, 80 Wis. 438, 50 N. W. 343.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 548.

Compare Forrest *v.* Buchanan, 203 Pa. St. 454, 53 Atl. 267.

42. Denechaud *v.* Trisconi, 26 La. Ann. 402; Agate *v.* Lowenbein, 57 N. Y. 604; Wotton *v.* Wise, 47 N. Y. Super. Ct. 515 (holding that the mere acceptance of rent during the term of the lease does not amount to an acquiescence in alterations in the nature of waste, and that the landlord may presume that the tenant will restore the premises to their original condition before the end of the term); Trenor *v.* Jackson, 15 Abb. Pr. N. S. (N. Y.) 115, 46 How. Pr. 389; Douglass *v.* Wiggins, 1 Johns. Ch. (N. Y.) 435; Brock *v.* Dole, 66 Wis. 142, 28 N. W. 334. See Chase *v.* Hall, 41 Mo. App. 15, where plaintiff's only means of access to the second story of a building held by him under a lease was by a stairway partly built over a third person's property, and it was held that, on the removal of such stairway, plaintiff was entitled to construct another over the premises of the landlord, although injurious to the premises below, but that the landlord's convenience and interests should be considered with reference to the location of the stairway. See also Bickmore *v.* Dimmer, [1903] 1 Ch. 158, 72 L. J. Ch. 96, 88 L. T. Rep. N. S. 78, 51 Wkly. Rep. 180.

the landlord, the latter is entitled to damages sustained by him by reason of alterations in the premises without his consent, and to an injunction to prevent the lessee from making further alterations.[43]

b. Actions — (I) *Nature and Form of Remedy.* Upon the breach of a covenant to make repairs, the proper remedy of the covenantee is an action on the contract.[44]

(II) *Right of Action and Defenses.* A landlord's covenant in a lease to make specified repairs, upon a breach thereof, becomes at once a chose in action in the tenant's favor upon which he may immediately sue;[45] and the fact that the tenant continued to occupy the leased premises,[46] or has failed to pay rent, does not bar his right of action for the lessor's breach of covenant.[47] Nor can a lessor excuse non-performance of his contract to repair by proof of the lessee's negligence and want of care. He can only be discharged from liability where he is prevented from performing his contract by act or default of the lessee.[48] The general rule is that where a tenant covenants to keep the premises in repair during the term, and at the expiration thereof to surrender them in like condition, and he omits to make the necessary repairs, the landlord's right of action accrues forthwith, and he need not wait until the end of the term.[49] But the rule is

43. Denechaud *v.* Trisconi, 26 La. Ann. 402; Kunemann *v.* Boisse, 19 La. Ann. 26 (holding that where the lessor requires that his written consent to alterations in the leased premises shall be obtained, he is presumed to have had in view those changes which the tenant might otherwise make without consent of the owner); Whitwell *v.* Harris, 106 Mass. 532; Lametti *v.* Anderson, 6 Cow. (N. Y.) 302; Webster *v.* Nosser, 2 Daly (N. Y.) 186, 33 How. Pr. 136 (holding that an action for breach of a covenant in a lease that the lessee will make no alterations in the leased premises without the lessor's consent may be brought by the lessor without awaiting the expiration of the term). See also Atkins *v.* Chilson, 9 Metc. (Mass.) 52 (where it was held that the lessee had not broken his covenant that no alterations should be made on the demised premises); Engle *v.* Thorn, 3 Duer (N. Y.) 15.

Waiver.— Where a lease contains a provision that alterations in the demised premises made by the tenant without the landlord's consent in writing shall work a forfeiture of the lease, and the landlord makes a parol request of the tenant to make an alteration, it was a waiver of the condition of the lease. Moses *v.* Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194 [*reversing* 55 Ill. App. 342].

44. Barnhart *v.* Boyce, 102 Ill. App. 172; Tibbits *v.* Percy, 24 Barb. (N. Y.) 39; Mathis *v.* McCord, Wright (Ohio) 647.

Assumpsit will lie to recover a tenant's share of the expense of repairs on the leased premises, under lease sealed by plaintiff, but unsealed by defendant (First Cong. Meeting-house Soc. *v.* Rochester, 66 Vt. 501, 29 Atl. 810); and in cases of breach of contract to repair by the landlord, where injury results to the lessee, the action should be in assumpsit and not trespass (Hahn *v.* Roach, 7 North Co. Rep. (Pa.) 21).

45. Block *v.* Ebner, 54 Ind. 544 (holding that a landlord's covenant to repair is a continuing covenant liable to successive breaches for each of which as they occur the tenant may sue); Ganson *v.* Tifft, 71 N. Y. 48 (holding likewise that a sublease by the lessee to a third person does not transfer his right of action); Mirick *v.* Bashford, 38 Barb. (N. Y.) 191; Snarr *v.* Beard, 21 U. C. C. P. 473. See Shall *v.* Banks, 8 Rob. (La.) 168; Scudder *v.* Paulding, 4 Rob. (La.) 428, both holding that the lessee, to recover for repairs he has made, must show that the lessor would not make them, although requested, but that they were indispensable, and such as he was bound to make, and that the cost was reasonable.

Counter-claim.— Where the lease provides for payment for repairs by the lessor, and that the lessee shall return the premises in good repair, defendant may show, as a counter-claim to an action by the lessee for money expended by him in making repairs, that the premises were burned by plaintiff's carelessness. Zigler *v.* McClellan, 15 Oreg. 499, 16 Pac. 179.

46. Lewis *v.* Chisholm, 68 Ga. 40; Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7 [*reversing* 4 Misc. 207, 23 N. Y. Suppl. 900].

47. Piper *v.* Fletcher, 115 Iowa 263, 88 N. W. 380 (holding that the fact that the lessee failed to pay rent due on abandonment of the premises will not preclude a recovery in a suit for cancellation of the lease on account of the premises being untenantable, where a tender was made before commencement of the suit, and the petition averred a readiness to pay all unpaid rent due); Ganson *v.* Tifft, 71 N. Y. 48; Drago *v.* Mead, 30 N. Y. App. Div. 258, 51 N. Y. Suppl. 360.

48. Flynn *v.* Trask, 11 Allen (Mass.) 550; Sherman *v.* Fall River Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799. See also Gallagher *v.* Button, 73 Conn. 172, 46 Atl. 819.

49. Webster *v.* Nosser, 2 Daly (N. Y.) 186; Schieffelin *v.* Carpenter, 15 Wend.

otherwise where the covenant is merely to leave the premises in good repair.[50] To sustain an action for damages caused by a breach of covenant to repair, previous demand on the covenantor is usually necessary.[51] But where the time within which the covenant was to have been performed has lapsed, the covenantor need not be put in default by a demand for performance, to entitle the covenantee to damages.[52]

(III) *PLEADING.*[53] In an action for breach of a covenant to repair, it is unnecessary for the complaint or petition to set out the contract *in totidem verbis.* It is sufficient if the agreement be stated according to its legal force and effect.[54] The time when the lease expired should be alleged,[55] but judgment for plaintiff will not be arrested for want of this allegation.[56] Although the covenant is followed by an exception in a distinct clause, the exception need not be noticed.[57] A breach of covenant by the lessee to pay for repairs made by the lessor may be pleaded by negativing the words of the covenant.[58] In an action to recover for repairs made by plaintiff which it was defendant's duty to make, it should be alleged that defendant had notice of plaintiff's making the repairs and the amount of his liability.[59]

(IV) *EVIDENCE.*[60] In an action for breach of covenant to repair, any evidence tending to prove the covenant or agreement,[61] or to show the condition of the premises at the commencement of the lease or at the time of the alleged breach,[62]

(N. Y.) 400; Buck *v.* Pike, 27 Vt. 529; Luxmore *v.* Robson, 1 B. & Ald. 584, 19 Rev. Rep. 396; Kelly *v.* Moulds, 22 U. C. Q. B. 467. See also Gange *v.* Lockwood, 2 F. & F. 115; Vivian *v.* Champion, 2 Ld. Raym. 1125.

Question for jury.— Where defendant in an action on a lease became a partner in the business conducted on the premises by the lessee and denies that he ever heard of the lease or saw the premises, it is a question for the jury whether the lease was assigned to him so as to render him liable on a covenant to repair. Dey *v.* Greenebaum, 152 N. Y. 641, 46 N. E. 1146 [*affirming* 82 Hun 533, 31 N. Y. Suppl. 610].

50. *California.*— Fratt *v.* Hunt, 108 Cal. 288, 41 Pac. 12.

Massachusetts.— Atkins *v.* Chilson, 9 Metc. 52.

New York.— Schieffelin *v.* Carpenter, 15 Wend. 400.

Pennsylvania.— Hoskinson *v.* Bradford, 1 Pittsb. 165.

Virginia.— Colhoun *v.* Wilson, 27 Gratt. 639.

51. Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

52. Payne *v.* James, 42 La. Ann. 230, 7 So. 457. See Young *v.* Burhans, 80 Wis. 438, 50 N. W. 343, where plaintiff leased certain premises of defendants. The premises were in a bad condition and defendants covenanted to repair. After plaintiff had been in possession over a month he abandoned the premises because of a failure to make such repairs, and sued for damages. Defendants claimed that they repaired as soon as the weather would permit, and competent workmen could be employed. It appeared that in making repairs defendants would be compelled to drain the premises, and that this could be done only through a sewer, which was being constructed, and it was held that as defendants were entitled to reasonable time to repair it was for the jury to say whether they had kept their covenant and as to whether the lessee was justified in abandoning the premises.

53. Pleading generally see PLEADING.

54. Stultz *v.* Locke, 47 Md. 562. And see Cairnes *v.* Walter, 7 Misc. (N. Y.) 431, 27 N. Y. Suppl. 973.

Surplusage.— The addition of irrelevant matter will not make demurrable a petition which sufficiently alleges a breach of a covenant to repair. Bailey *v.* Lindsay, 35 Mo. App. 675.

55. Shelby *v.* Hearne, 6 Yerg. (Tenn.) 512.

56. Shelby *v.* Hearne, 6 Yerg. (Tenn.) 512.

57. New Castle Common *v.* Stevenson, 1 Houst. (Del.) 451.

58. McGeehan *v.* McLaughlin, 1 Hall (N. Y.) 37.

59. Norfleet *v.* Cromwell, 64 N. C. 1.

60. Evidence generally see EVIDENCE.

61. Weil *v.* Kahn, 16 Daly (N. Y.) 286, 10 N. Y. Suppl. 236; Caulk *v.* Everly, 6 Whart. (Pa.) 303.

62. Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618; Middlekauff *v.* Smith, 1 Md. 329 (holding that testimony in regard to the want of repairs which a party covenanted to make is not to be admitted, unless it is shown to relate to the time during which the covenantee was to keep the property in repair); Daly *v.* Demmon, 181 Mass. 543, 63 N. E. 943; Stern *v.* Brauer, 62 N. Y. App. Div. 388, 70 N. Y. Suppl. 832 (holding that a landlord who sues his tenant for breach of covenants binding the tenant to do certain repairing and to leave the premises in as good condition as at the commencement of the term may show the work which was done by him to repair damages caused by the negligence of the tenant). See also Smith *v.* Douglas, 16 C. B. 31, 3 C. L. R. 752, 81 E. C. L. 31.

or to show the damages directly resulting to the covenantee by reason of the breach, is admissible.[63]

(v) *DAMAGES.*[64] The general rule is that, on a breach of covenant by the landlord to make repairs, the measure of damages to which the lessee is entitled is the difference between the rental value of the premises as they were and what it would have been if the premises had been put and kept in repair, taking into consideration the purposes for which they were to be used.[65] In many cases the measure of damages for breach of the landlord's agreement to keep the demised premises in repair has been held to be expenses of making the repairs, and the value of the use of the premises during the time the tenant was deprived thereof by the landlord's default.[66] However, a tenant cannot recover of the landlord as damages for breach of covenant to repair profits which he might have made, or

63. Ganson *v.* Tifft, 71 N. Y. 48; Hinckley *v.* Beckwith, 17 Wis. 413.

Burden of proof.— In an action for damages for failure to repair, by a tenant against a landlord, who had succeeded a prior landlord of the tenant, the burden is on the tenant to show that he sustained damages after the contract with the second landlord was entered into, and the amount of such damages. Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93.

Weight and sufficiency of evidence see Clapper *v.* Kells, 78 Hun (N. Y.) 34, 28 N. Y. Suppl. 1018; Bien *v.* Hess, 102 Fed. 436, 42 C. C. A. 421.

64. **Damages** generally see DAMAGES.

65. *Illinois.*— Stufflebeam *v.* Reece, 42 Ill. App. 587, where the damages allowed were held to be excessive.

Indiana.— Taylor *v.* Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230.

Iowa.— Winne *v.* Kelley, 34 Iowa 339.

Maryland.—Biggs *v.* McCurley, 76 Md. 409, 25 Atl. 466.

New York.— Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7 [*affirming* 4 Misc. 207, 23 N. Y. Suppl. 900] (holding that where a building is rented as a whole, without any specific reference to its use by way of subletting, or where such a use is not the primary use contemplated by the parties, the damages for the breach of the covenant for repairs are the difference in the rental value of the premises as they are and as they were to be, regarding the premises as a whole, and not the loss by reason of tenant's inability to partially let portions to subtenants); Cook *v.* Soule, 56 N. Y. 420 [*affirming* 45 How. Pr. 340]; Godfrey *v.* India Wharf Brewing Co., 87 N. Y. App. Div. 123, 84 N. Y. Suppl. 90; Huber *v.* Ryan, 57 N. Y. App. Div. 34, 67 N. Y. Suppl. 972; Rose *v.* Butler, 69 Hun 140, 23 N. Y. Suppl. 375; Beakes *v.* Holzman, 47 Misc. 384, 94 N. Y. Suppl. 33; Saffer *v.* Levy, 88 N. Y. Suppl. 144; Cantwell *v.* Burke, 6 N. Y. St. 308.

Pennsylvania.— Rogers *v.* Bemus, 69 Pa. St. 432; Jackson *v.* Farrell, 6 Pa. Super. Ct. 31. And see Ehinger *v.* Bahl, 208 Pa. St. 250, 57 Atl. 572.

Washington.— Kohne *v.* White, 12 Wash. 199, 40 Pac. 794, holding that the lessee was entitled to recover, in addition, all damage to furniture sustained by reason of lessor's failure to repair.

United States.— Bien *v.* Hess, 102 Fed. 436, 42 C. C. A. 421.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 563.

66. *Connecticut.*— Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852.

Iowa.— Leick *v.* Tritz, 94 Iowa 322, 62 N. W. 855, holding that the measure of damages for the loss of the use of the leased premises through the failure of the lessor to repair is "the full rental value" of the premises for the term, and if the rent has not been paid the measure of damages is the difference between "the actual rental value, that is, the value of the use of the premises, and the rent reserved, estimated for the term of the lease."

Maryland.— Middlekauff *v.* Smith, 1 Md. 329.

Michigan.— Bostwick *v.* Losey, 67 Mich. 554, 35 N. W. 246.

New York.— Ganson *v.* Tifft, 71 N. Y. 48; Hexter *v.* Knox, 63 N. Y. 561; Myers *v.* Burns, 35 N. Y. 269 [*affirming* 33 Barb. 401]; Clenighan *v.* McFarland, 16 Daly 402, 11 N. Y. Suppl. 719, holding, however, that the amount paid by the tenant for rooms and meals at a hotel, while the demised premises remained untenantable by reason of the making of repairs during the term, was not recoverable. See also Daly *v.* Piza, 45 Misc. 608, 90 N. Y. Suppl. 1071 (holding that, where premises are rented to be used as a boarding-house, a tenant is entitled to recover from the landlord for breach of a contract to repair prior to the beginning of the term, the rental value of the rooms during the time he is deprived of them by defendant's default); Flynn *v.* Hatton, 43 How. Pr. 333; Dorwin *v.* Potter, 5 Den. 306.

Wisconsin.— Raynor *v.* Valentin Blatz Brew. Co., 100 Wis. 414, 76 N. W. 343.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 563.

And see Vandegrift *v.* Abbott, 75 Ala. 487 (holding that the measure of damages for a breach by a landlord of an agreement to keep the leased premises in repair is the amount which is the natural and proximate result of such breach, and is not gauged by the expense of the repairs if they have been made by the tenant); Culver *v.* Hill, 68 Ala. 66,

remote, contingent, or speculative damages, or such as might have been avoided by the lessee if he had made the repairs himself and charged their cost to the lessor.[67] In a few cases it has been held that the true measure of damages in such actions is the sum necessary to place the premises in that state of repair in which they were to be put according to the agreement, and not the detriment which the lessee suffered by their remaining out of repair during the term;[68] and that it is the duty of the covenantee, being in the care and use of the property, to take such measures in the matter of repairs as to reduce the damage to a minimum.[69] A lessee, knowing that his property if left upon the premises will be exposed to injury by failure of the lessor to repair, has no right to take the hazard, and if he does, and his property is injured, he cannot recover of his lessor therefor.[70] In an

44 Am. Rep. 134; Buck *v.* Rodgers, 39 Ind. 222.

Interest.— Where the damages are unliquidated it is error to allow interest thereon. Chamberlain *v.* Dunlop, 5 Silv. Sup. (N. Y.) 98, 8 N. Y. Suppl. 125.

67. *Indiana.*— Block *v.* Ebner, 54 Ind. 544.

Iowa.— Ladner *v.* Balsley, 103 Iowa 674, 72 N. W. 787.

Kentucky.— Cundiff *v.* Cundiff, 39 S. W. 433, 18 Ky. L. Rep. 1059.

Maryland.— Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618; Middlekauff *v.* Smith, 1 Md. 329.

Missouri.— Fisher *v.* Goebel, 40 Mo. 475; Wisdom *v.* Newberry, 30 Mo. App. 241; Green *v.* Bell, 3 Mo. App. 291, holding that the measure of damages for a breach of the lessor's covenant to repair, where the lessee neglected to repair in the lessor's place, is the proximate unavoidable injury to the lessee resulting from the breach.

New York.— Godfrey *v.* India Wharf Brew. Co., 87 N. Y. App. Div. 123, 84 N. Y. Suppl. 90; Drago *v.* Mead, 30 N. Y. App. Div. 258, 51 N. Y. Suppl. 360 (holding that, in an action by the lessee for breach of the lessor's covenant to repair, special damages measured by plaintiff's total loss of estimated business profits, if recoverable at all, are recoverable only where his eviction from the demised premises prevents him from carrying on business, either there or elsewhere); Chadwick *v.* Woodward, 12 Daly 399, 1 N. Y. City Ct. Suppl. 94 [*affirming* 13 Abb. N. Cas. 441]. See also Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7 [*affirming* 4 Misc. 207, 23 N. Y. Suppl. 900].

Rhode Island.— Miller *v.* McCardell, 19 R. I. 304, 33 Atl. 445, 30 L. R. A. 682.

South Carolina.— Cantrell *v.* Fowler, 32 S. C. 589, 10 S. E. 934.

Tennessee.— Fort *v.* Orndoff, 7 Heisk. 167. See also Parker *v.* Meadows, 86 Tenn. 181, 6 S. W. 49.

United States.— Bien *v.* Hess, 102 Fed. 436, 42 C. C. A. 421.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 563.

See, however, Spencer *v.* Hamilton, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611, holding that for breach of a lessor's covenant in a lease to clean out certain ditches on the leased premises, failure to do which caused the land to be flooded, and prevented the lessee from making a full crop, the lessee's measure of damages is not merely what it would have cost him to put the ditches in good order, but he is entitled to recover for the consequent decrease in the net yield of his land.

Damage to health.— Damages for breach of contract by landlord to repair obvious defects do not include damages to health of the tenant by exposure from absence of the repairs, such damages being too remote. Hanson *v.* Cruse, 155 Ind. 176, 57 N. E. 904. But see Hinckley *v.* Beckwith, 13 Wis. 31.

68. Park *v.* Ensign, 10 Kan. App. 173, 63 Pac. 280 (holding, however, that where a landlord whose fences are down refuses to rebuild the same or to permit his tenant to do so, he cannot insist in an action for damages by the tenant that his liability would be limited by the amount required to rebuild the fence); Dorwin *v.* Potter, 5 Den. (N. Y.) 306. See also Sparks *v.* Bassett, 49 N. Y. Super. Ct. 270 (where a landlord covenanted to make certain repairs before a certain date, but failed to do so, and sometime afterward an accident resulted, which would have been avoided had the repairs been made, and tenant was obliged to pay damages to the third person who sustained the injury, and it was held that the tenant could not recover the amount so paid from his landlord); Ladd *v.* Hawkes, 41 Oreg. 247, 68 Pac. 422 (holding that the value of repairs, in the lease of a wharf providing the lessor should pay the lessee the value of repairs, if he is not allowed to remove them, is their value as obtained in the wharf, and not what the material, if taken out, would sell for); Wood *v.* Sharpless, 174 Pa. St. 588, 34 Atl. 319, 321; Jenkins *v.* Stone, 14 Montg. Co. Rep. (Pa.) 27, holding that, where a tenant has kept fences in repair, under a covenant under which the landlord was bound to furnish the necessary new material, the tenant's measure of damages for the landlord's breach is the value of the new material.

69. Hamilton *v.* McPherson, 28 N. Y. 72, 84 Am. Dec. 330 [*cited* with approval in Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469]; Beakes *v.* Holzman, 47 Misc. (N. Y.) 384, 94 N. Y. Suppl. 33.

70. Hendry *v.* Squier, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 798; Cook *v.* Soule, 56 N. Y.

action by the lessor on a breach of covenant to repair brought before the expiration of the lease, the measure of damages to which the lessor is entitled is not the cost of repairing, but the injury done to the reversion.[71] However, where such action is brought after the end of the term, the measure of damages is held to be such a sum as will put the premises in the condition in which the tenant is bound by his covenant to leave them.[72]

2. Covenants to Insure — a. In General. In the absence of express agreement, there is no implied covenant on the part of the tenant to insure the demised premises.[73]

b. Construction and Operation of. Where a lessee expressly covenants to insure the leased premises in a specified amount, his covenant will be construed to mean a policy with a duly incorporated insurance company, and issued at an office where insurance against fire is usually and in the ordinary course of business effected;[74] and a policy on the leased property covering the amount stipulated, for the benefit of both the lessor and the lessee, according to their respective interests, sufficiently complies with the covenant to insure.[75] Where the lessee covenants

420; Huber *v.* Ryan, 57 N. Y. App. Div. 34, 67 N. Y. Suppl. 972.

A tenant who, with knowledge that his personal property is exposed to the risk of injury because of the landlord's failure to repair the demised premises, leaves it in that situation, cannot recover from the landlord any damages for injuries thereby resulting to the personal property. Goldberg *v.* Besdine, 76 N. Y. App. Div. 451, 78 N. Y. Suppl. 776.

71. Watriss *v.* Cambridge First Nat. Bank, 130 Mass. 343; Buck *v.* Pike, 27 Vt. 529; Conquest *v.* Ebbetts, [1896] A. C. 490, 65 L. J. Ch. 808, 75 L. T. Rep. N. S. 36, 45 Wkly. Rep. 50; Williams *v.* Williams, L. R. 9 C. P. 659, 43 L. J. C. P. 382, 30 L. T. Rep. N. S. 638, 22 Wkly. Rep. 706; Mills *v.* East London Union, L. R. 8 C. P. 79, 42 L. J. C. P. 46, 27 L. T. Rep. N. S. 557, 21 Wkly. Rep. 142; Coward *v.* Gregory, L. R. 2 C. P. 153, 12 Jur. N. S. 1000, 36 L. J. C. P. 1, 15 L. T. Rep. N. S. 279, 15 Wkly. Rep. 170; Young *v.* Mantz, 1 Arn. 198, 4 Bing. N. Cas. 451, 7 L. J. C. P. 204, 6 Scott 277, 33 E. C. L. 800; Smith *v.* Peat, 2 C. L. R. 424, 9 Exch. 161, 23 L. J. Exch. 84; Davies *v.* Underwood, 2 H. & N. 570, 3 Jur. N. S. 1223, 27 L. J. Exch. 113, 6 Wkly. Rep. 105; Bell *v.* Hayden, 9 Ir. C. L. 301; Turner *v.* Lamb, 14 M. & W. 412; Atkinson *v.* Beard, 11 U. C. C. P. 245. See also Marriott *v.* Cotton, 2 C. & K. 553, 61 E. C. L. 553; Metge *v.* Kavanagh, Ir. R. 11 C. L. 431; Cole *v.* Buckle, 18 U. C. C. P. 286.

72. Watriss *v.* Cambridge First Nat. Bank, 130 Mass. 343; Ward *v.* Kelsey, 38 N. Y. 80, 97 Am. Dec. 773; Lehmaier *v.* Jones, 100 N. Y. App. Div. 495, 91 N. Y. Suppl. 687; Green *v.* Eden, 2 Thomps. & C. (N. Y.) 582; Heintze *v.* Erlacher, 1 N. Y. City Ct. 465; Loughlin *v.* Carey, 21 Pa. Super. Ct. 477 (holding that, where a tenant covenants to make repairs and improvements and to complete certain work mentioned, and he fails to perform his covenant and in consequence the building falls into a dilapidated and untenantable condition, and the landlord is compelled by the building inspectors to put the building into proper condition, the landlord is entitled to recover from the tenant the cost of repairing the injury resulting from the non-performance of the covenant, and in addition, the rental value of the building during the period occupied in making repairs); Henderson *v.* Thorn, [1893] 2 Q. B. 164, 57 J. P. 679, 62 L. J. Q. B. 586, 69 L. T. Rep. N. S. 430, 5 Reports 404, 41 Wkly. Rep. 509; Joyner *v.* Weeks, [1891] 2 Q. B. 31, 55 J. P. 725, 60 L. J. Q. B. 510, 65 L. T. Rep. N. S. 16, 39 Wkly. Rep. 583; Proudfoot *v.* Hart, 25 Q. B. D. 42, 55 J. P. 20, 59 L. J. Q. B. 129, 389, 63 L. T. Rep. N. S. 171, 38 Wkly. Rep. 730; Burdett *v.* Withers, 7 A. & E. 136, 1 Jur. 514, 6 L. J. K. B. 219, 2 N. & P. 122, W. W. & D. 444, 34 E. C. L. 92; Newcastle *v.* Broxtowe, 4 B. & Ad. 273, 2 L. J. M. C. 47, 1 N. & M. 598, 24 E. C. L. 126; Rawlings *v.* Morgan, 18 C. B. N. S. 776, 11 Jur. N. S. 564, 34 L. J. C. P. 185, 12 L. T. Rep. N. S. 348, 13 Wkly. Rep. 746, 114 E. C. L. 776; Yates *v.* Dunster, 11 Exch. 15, 24 L. J. Exch. 226; Davies *v.* Underwood, 2 H. & N. 570, 3 Jur. N. S. 1223, 27 L. J. Exch. 113, 6 Wkly. Rep. 105; Douse *v.* Earle, 3 Lev. 264; Payne *v.* Haine, 16 L. J. Exch. 130, 16 M. & W. 541; Penley *v.* Watts, 10 L. J. Exch. 229, 7 M. & W. 601; Ebbetts *v.* Conquest, 82 L. T. Rep. N. S. 560.

73. Roesch *v.* Johnson, 69 Ark. 30, 62 S. W. 416 (holding likewise that where the lessor insures his premises at his own expense, without any agreement with the lessee to share the benefits with him, the latter can claim nothing by reason of any money received from the lessor on account of such insurance); Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890.

74. Keteltas *v.* Coleman, 2 E. D. Smith (N. Y.) 408 (holding, however, that a covenant to insure is not complied with by an insurance effected by the lessee in his own name and for his own benefit); Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515; Doe *v.* Shewin, 3 Campb. 134. See also Quincy *v.* Carpenter, 135 Mass. 102.

75. Sherwood *v.* Harral, 39 Conn. 333 (holding likewise that under such covenant

to be responsible for any increase of insurance over a specified per cent per annum imposed on the premises, his liability is generally construed to be absolute, and in no way dependent upon the cause which produced the increase in the rate.[76]

c. Performance or Breach. A covenant to insure and keep insured from a specified date is broken on failure to effect the insurance by the date named, or by the premises being left uninsured for any period of time during the term, of however short duration.[77]

d. Measure of Damages For Breach. In some jurisdictions the rule is that the measure of damages for breach of a covenant by a tenant to insure is the loss sustained by the landlord, not exceeding the amount of the policy which the tenant covenanted to procure.[78] In at least one jurisdiction, however, it is held

the lessee was not bound to renew a policy previously taken out by the lessor of his own interest merely); Guetzkow Bros. Co. *v.* Breese, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83, where a lease contained an agreement that the lessee should keep the buildings on the premises and the machinery in them insured for not less than six thousand two hundred dollars, payable to the lessor as his interest might appear. The lessee procured policies on all the property on the premises payable to himself and the lessor as interest might appear. Under these policies the buildings of the lessor were insured for four thousand one hundred and sixty-six dollars and seventy-six cents, and the machinery of the lessee contained in them for three thousand three hundred and thirty-three dollars and twenty-six cents, and it was held that this fulfilled the agreement of the lease, and that, one of the buildings having been destroyed by fire, the lessor was only entitled to receive the insurance placed on it, although it was not insured to its value.

76. Noel *v.* H. Bencke Lith. Co., 134 N. Y. 617, 32 N. E. 649 [*affirming* 58 N. Y. Super. Ct. 587, 11 N. Y. Suppl. 589]; Thomson-Houston Electric Co. *v.* Durant Imp. Co., 4 Misc. 207, 23 N. Y. Suppl. 900; Quincy *v.* Carpenter, 135 Mass. 102 (holding, however, that the lessee, in a lease requiring him to pay all extra insurance occasioned by any use to which he may put the premises, who pays a certain sum to the lessor for extra insurance for a certain year, and takes a receipt "in full settlement of all extra insurance," is not liable therefor, where, during the year, the companies all fail, and the lessor reinsures, and pays a further sum as extra insurance). See Watson *v.* Sparrow, 16 Quebec Super. Ct. 459.

77. Rhone *v.* Gale, 12 Minn. 54; Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696 (holding, however, that the lessee will be excused therefrom where the insurance was prevented by acts of the lessor's grantee); Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515 (holding that the fact that a lessee was told by two or three insurance agents, to whom it applied for insurance on the property, that such property was not insurable, does not show such impossibility of performance of its contract to insure as to excuse its non-performance thereof); Doe *v.* Ulph, 13 Q. B. 204, 13 Jur. 276, 66 E. C. L. 204, 18 L. J. Q. B. 106; Penniall *v.* Harborne, 11 Q. B. 368, 12 Jur. 159, 17 L. J. Q. B. 94, 63 E. C. L. 368; Doe *v.* Peck, 1 B. & Ad. 428, 9 L. J. K. B. O. S. 60, 20 E. C. L. 546; Vernon *v.* Smith, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13; Doe *v.* Shewin, 3 Campb. 134; Price *v.* Worwood, 4 H. & N. 512, 5 Jur. N. S. 472, 28 L. J. Exch. 329, 7 Wkly. Rep. 506. See Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588 (where there was a covenant to "write four hundred dollars insurance on the building, and deduct from rent," but there was no covenant in the lease that the insurance was to be maintained by lessee for any time, or that it was to be rewritten); Doe *v.* Laming, 4 Campb. 73, 15 Rev. Rep. 728 (where there was held to be no breach of covenant); Doe *v.* Sutton, 9 C. & P. 706, 38 E. C. L. 409 (holding that the lessor could not recover if he by his conduct had led the lessee to believe that the premises were properly insured by himself); Havens *v.* Middleton, 10 Hare 641, 17 Jur. 271, 22 L. J. Ch. 746, 1 Wkly. Rep. 256, 44 Eng. Ch. 620, 68 Eng. Reprint 1085 (where there was held to have been a sufficient compliance with the covenant to insure, as to prevent the lessor from taking advantage of a reëntry clause for non-performance of the covenant). See also Sherwood *v.* Harral, 39 Conn. 333; Chaplin *v.* Reid, 1 F. & F. 315.

Waiver.— Where a tenant under a lease containing a covenant to insure had in consequence of his agent's embezzlement failed to pay a premium and so the premises were left for the time uninsured, but the landlord had on discovering this afterward paid the premium and allowed the tenant to repay him, it was held that this was such a waiver of the forfeiture under the covenant as to bring the tenant within the exception of 22 & 23 Vict. c. 35, § 6, and preclude him from obtaining relief under 23 & 24 Vict. c. 126, § 2. Mills *v.* Griffiths, 45 L. J. Q. B. 771.

Presumption as to insurance.— Where the original lessee covenants to keep the premises insured and afterward a sublease is granted by his executors without any covenant to insure, undisturbed possession under this sublease for twenty years will entitle a court to presume that no breach of covenant took place during the life of the original lessee. Montresor *v.* Williams, 1 L. J. Ch. O. S. 151.

78. Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed.

that the measure of damages for breach of a covenant by a lessee to keep the demised premises insured for the benefit of the lessor is the cost in effecting the insurance, and not the amount of the insurance.[79]

3. Improvements by Tenant — a. Covenant to Make. Where the lessee covenants to make certain improvements on the demised premises, but the lease contains no stipulation as to the time within which such improvements are to be made, the lessee has the whole term within which to comply with such covenant.[80] Where the lease provides for the erection of buildings of a certain specified character by the lessee, and that the lessor should pay the value thereof at the end of the term, the buildings erected must conform to the specifications in the lease to enable the lessee to enforce the terms of recovery as to payment for such buildings.[81]

b. Ownership of and Right of Removal — (i) *In General.* The general rule is, in the absence of express stipulations to the contrary, that improvements made by a tenant on the demised premises in furtherance of the purpose of the lease may be removed by him before or at the expiration of the term, provided he leaves

515; Douglass *v.* Murphy, 16 U. C. Q. B. 113. See also Hey *v.* Wyche, 2 G. & D. 569, 6 Jur. 559, 12 L. J. Q. B. 83.

79. National Mahaiwe Bank *v.* Hand, 89 Hun 329, 35 N. Y. Suppl. 449 [*affirming* 80 Hun 584, 30 N. Y. Suppl. 508], holding that the lessee, by his covenant to insure, does not become an insurer of the property, and that upon the failure of the lessee to take out the policy according to agreement, the lessor should take out the same, and charge the lessee with the cost thereof.

80. *California.*— Chipman *v.* Emeric, 5 Cal. 49, 63 Am. Dec. 80.

Indian Territory.— Wilson *v.* Owens, 1 Indian Terr. 163, 38 S. W. 976.

Louisiana.— Givens *v.* Caudle, 34 La. Ann. 1025.

New York.— Gates *v.* Hendrick, 54 Hun 92, 70 N. Y. Suppl. 229.

Pennsylvania.— Palethorp *v.* Bergner, 52 Pa. St. 149.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 571.

And see Lent *v.* Curtis, 24 Ohio Cir. Ct. 592 (where a lease provided that the lessor should purchase at the expiration of the term, all buildings which the lessee might have erected on the land, and it was held that the word "term" referred to the time provided by the lease for the lessee's term to expire if there was no default and that no right of action accrued to the lessee on such covenant to purchase until that time); Bulmer *v.* Brumwell, 13 Ont. App. 411; Castle *v.* Rohan, 9 U. C. Q. B. 400.

Covenants to build within specified period.— A builder agreed to take some land on a building lease and to erect houses within a specified period, the landlord making him an advance; there was a clause of forfeiture in default of their being completed within the time and relief against the forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract. Croft *v.* Goldsmid, 24 Beav. 312, 53 Eng. Reprint 378.

81. McIntosh *v.* St. Philip's Church, 120 N. Y. 7, 23 N. E. 984; Pike *v.* Butler, 4 N. Y. 360 [*reversing* 4 Barb. 650]; Ostrander *v.* Livingston, 3 Barb. Ch. (N. Y.) 416; Smith *v.* Cooley, 5 Daly (N. Y.) 401 (where a lease provided that in case the lessee should take down and remove the buildings then on the land, or any part thereof, and erect upon said land in place thereof a substantial building, at the expiration of his lease he should be paid by the lessor for the value of such building so erected by him, and it was held that the lessee could not claim payment for improvements made to the building already on the land, although the nature and style of the building was wholly changed); *In re* Building Lease, 5 Ohio S. & C. Pl. Dec. 556, 7 Ohio N. P. 666 (where a lease contained a provision that the lessor should pay the cash value of all good and fitting permanent brick buildings suitable to the location that might be on said leased premises at the end of the term, and it was held that the provision contemplated only such brick buildings as were of good materials, well put together, and which in point of construction, architecture, height, appearance, age, and adaptability compared favorably with buildings in that locality); London *v.* Nash, 3 Atk. 512, 26 Eng. Reprint 1095, 1 Ves. 12, 27 Eng. Reprint 859. See Roper *v.* Williams, Turn. & R. 18, 23 Rev. Rep. 169, 12 Eng. Ch. 17, 37 Eng. Reprint 999, where an injunction to restrain the breach of a covenant to erect a building on a general plan was refused, the covenantee having acquiesced in a deviation from the plan and delayed in application to the court. See also Livingston *v.* Sulzer, 19 Hun (N. Y.) 375; Franklyn *v.* Tuton, 5 Madd. 469, 56 Eng. Reprint 975. But see Low *v.* Innes, 4 De G. J. & S. 286, 10 Jur. N. S. 1037, 11 L. T. Rep. N. S. 217, 69 Eng. Ch. 222, 46 Eng. Reprint 929.

Waiver of objection.— A lease stipulated that if the lessee erected a certain building upon the premises the lessor would at the expiration of the term pay the lessee the value thereof affixed by appraisers chosen by the parties. Appraisers were chosen, who made a valuation. The lessor refused to pay the appraised value, and the lessee brought suit

the premises in as good condition as when he received them.[82] And where the tenant is given the right to make improvements and remove them during the term, the right to remove includes the right to do such damage to the freehold as such removal will naturally cause, and the tenant is only liable for such damages as are unnecessarily or wantonly caused by him.[83] The lessee's interest in such improvements is such that he may mortgage the same.[84]

(II) *NATURE OF IMPROVEMENTS.* Where the lease provides that all improvements made by the tenant shall at the expiration of the term become the property of the lessor, the improvements are not confined to merely such property as the law designates as improvements, and embrace all additions, erections, or alterations made by the tenant during the term.[85]

(III) *CONDITION PRECEDENT.* Where the lease provides that the lessee may at the end of the term remove all improvements placed upon the demised premises by him, all covenants in the lease on the part of the lessee being complied with, performance of such covenants is a condition precedent to the right of such removal, and the mere tender of performance at the end of the term is insufficient.[86]

to compel payment, and it was held that the lessor could not introduce evidence of damages sustained by the lessee's failure to erect a more substantial building, having made no objection to the character of the building until after the award. Yeatman *v.* Clemens, 6 Mo. App. 210.

82. *Louisiana.*— Pecoul *v.* Auge, 18 La. Ann. 614.

Maine.— Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 322, where a tenant at will erected a dwelling-house and other buildings on the land, with the express consent of the landlord, and died, and his administrator sold them to a stranger, and it was held that the purchaser might maintain trover for them against the owner of the land, who had converted them to his own use. See also Stockwell *v.* Mark, 17 Me. 455, 35 Am. Dec. 266.

Massachusetts.— Union Bank *v.* Emerson, 15 Mass. 159.

Missouri.— Bircher *v.* Parker, 43 Mo. 443. See also Neiswanger *v.* Squier, 73 Mo. 192.

New York.— Howe's Cave Assoc. *v.* Houck, 141 N. Y. 606, 36 N. E. 740 [*affirming* 66 Hun 205, 21 N. Y. Suppl. 40]; Ombony *v.* Jones, 19 N. Y. 234; Mott *v.* Palmer, 1 N. Y. 564; Beardsley *v.* Sherman, 1 Daly 325; Holmes *v.* Tremper, 20 Johns. 29, 11 Am. Dec. 238.

Ohio.— Haflick *v.* Stober, 11 Ohio St. 482; Bates *v.* Neski, 6 Ohio Dec. (Reprint) 1064, 10 Am. L. Rec. 50.

Pennsylvania.— Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209.

Wisconsin.— Platto *v.* Gettelman, 85 Wis. 105, 55 N. W. 167; Keogh *v.* Daniell, 12 Wis. 163.

England.— Mears *v.* Callender, [1901] 2 Ch. 388, 65 J. P. 615, 70 L. J. Ch. 621, 84 L. T. Rep. N. S. 618, 49 Wkly. Rep. 584; Poole's Case, 1 Salk. 368.

Canada.— Townsley *v.* Neil, 10 Grant Ch. (U. C.) 72. See also Davy *v.* Lewis, 18 U. C. Q. B. 21.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 574, 577.

Property of tenant on premises at end of lease in general see *infra*, VII, D, 6.

83. Hunt *v.* Potter, 47 Mich. 197, 10 N. W. 198. See also Pendill *v.* Maas, 97 Mich. 215, 56 N. W. 597.

84. *California.*— Barroilhet *v.* Battelle, 7 Cal. 450.

Massachusetts.— Hartwell *v.* Kelly, 117 Mass. 235.

New Hampshire.— French *v.* Prescott, 61 N. H. 27.

Rhode Island.— Pawtucket Inst. *v.* Almy, 13 R. I. 68.

Wisconsin.— Platto *v.* Gettelman, 85 Wis. 105, 55 N. W. 167.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 574 *et seq.*

85. Parker *v.* Wulstein, 48 N. J. Eq. 94, 21 Atl. 623; Loeser *v.* Liebmann, 137 N. Y. 163, 33 N. E. 147 [*reversing* 14 N. Y. Suppl. 569]; Coster *v.* Peters, 7 Rob. (N. Y.) 620, 5 Rob. 192; French *v.* New York, 16 How. Pr. (N. Y.) 220; Carver *v.* Gough, 153 Pa. St. 225, 25 Atl. 1124; Agnew *v.* Whitney, 10 Phila. (Pa.) 77; Miller *v.* Gray, 29 Tex. Civ. App. 183, 68 S. W. 517. See, however, Metropolitan Concert Co. *v.* Sperry, 9 N. Y. St. 342, where a lease of a theater provided that at the end of the term all additions, alterations, and improvements made on the premises should remain a part thereof, and should be surrendered to the lessor at the expiration or termination of the demise, and in connection therewith the first subdivision provided for such alterations, additions, and improvements as should convert the premises into a theater, and it was held that it was apparently not the intention that other additions, etc., than those made to the building itself, should be included under the first clause referred to, and hence it did not include chairs placed in the auditorium by the lessee.

86. *Maine.*— Parker *v.* Goddard, 39 Me. 144.

Missouri.— Clemens *v.* Murphy, 40 Mo. 121. But see Strohmeyer *v.* Zeppenfeld, 28 Mo. App. 268 [*following* Butler *v.* Manny, 52 Mo. 497], holding that covenants in a lease that the lessee shall pay taxes, and that the lessor shall permit the removal of the lessee's

(iv) *Forfeiture or Waiver of Right.* In some jurisdictions, where the lease contains a stipulation that any improvements put upon the premises during the term shall become the property of the tenant at the expiration thereof, a subsequent acceptance by the tenant of another lease, without any reservation of his right to remove the improvements, deprives him of such right.[87] In other jurisdictions, however, it is held that where the lessee reserves to himself the right to remove any improvements put upon the premises by himself at the end of the term he does not lose such right by a renewal of the lease, or by taking a lease from a subsequent purchaser of the premises, which fails to specifically reserve the improvements.[88] A tenant cannot remove improvements made by him on the premises after a forfeiture, or reëntry for covenant broken.[89]

(v) *Time of Removal.* Where by express covenant, or by construction of law, the tenant is entitled to remove the improvements made by him at the end of the term, he is entitled to a reasonable time after the expiration of the term during which to remove such improvements, and to the right of ingress and egress for that purpose, although he cannot for that reason retain possession of the property.[90]

improvements, are independent of each other, and the lessee may enforce the lessor's covenant in equity, without showing payment of the taxes.

New York.—Bates *v.* Johnston, 58 Hun 528, 12 N. Y. Suppl. 403 [*distinguishing* Finkelmeier *v.* Bates, 92 N. Y. 172]; Paine *v.* Trinity Church, 7 Hun 89.

North Carolina. — Stamps *v.* Cooley, 91 N. C. 316.

Ohio.— Mathinet *v.* Giddings, 10 Ohio 364.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 577.

Compare Rooney *v.* Crary, 8 Ill. App. 329. But see Estabrook *v.* Hughes, 8 Nebr. 496, 1 N. W. 132, where a tenant was in possession under a lease which contained a clause providing that he should "have the privilege of removing, at the end of said term, all improvements placed by him on said premises only on condition that the conditions of this lease are fully complied with." He allowed one-quarter rent, which by the terms of the lease was required to be paid in advance, to be in arrear for thirteen days when the same was tendered and refused, and it was held that equity would not enforce a forfeiture of the right to remove such improvements.

87. Junjerman *v.* Bovee, 19 Cal. 354; Unz *v.* Price, 58 S. W. 705, 22 Ky. L. Rep. 791; St. Louis *v.* Nelson, 108 Mo. App. 210, 83 S. W. 271; Exchange Real Estate, etc., Co. *v.* Schuchman Realty Co., 103 Mo. App. 24, 78 S. W. 75; Stephens *v.* Ely, 162 N. Y. 79, 56 N. E. 499; Talbot *v.* Cruger, 151 N. Y. 117, 45 N. E. 364; Loughran *v.* Ross, 45 N. Y. 792, 6 Am. Rep. 173; Hayes *v.* Schultz, 38 Misc. (N. Y.) 137, 68 N. Y. Suppl. 340. See also Gardner *v.* Samuels, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135 (where a lease contained a provision that "it is . . . covenanted and agreed" by and between the parties that the lessee may make improvements, and the lessor, for himself, his heirs, administrators and assigns, agrees to pay the lessee therefor at the expiration of the lease, and it was held that such provision gave the lessee no claim therefor against one to whom the land was conveyed after termination of the lease and surrender by the lessee, and no lien on the premises, but merely a personal claim against the lessor); Little Falls Water Power Co. *v.* Hausdorf, 127 Fed. 442; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301 [*affirming* 3 N. Y. Suppl. 911]. *Compare* Lewis *v.* Perry, 149 Mo. 257, 50 S. W. 821; Clarke *v.* Howland, 85 N. Y. 204; Devin *v.* Dougherty, 27 How. Pr. (N. Y.) 455.

88. *Iowa.*— Daly *v.* Simonson, 126 Iowa 716, 102 N. W. 780; McCarthy *v.* Trumacher, 108 Iowa 284, 78 N. W. 1104.

Michigan.— Kerr *v.* Kingsbury, 39 Mich. 150, 33 Am. Rep. 362.

Texas.— Wright *v.* Macdonnell, 88 Tex. 140, 30 S. W. 907; Hertzberg *v.* Witte, 22 Tex. Civ. App. 320, 54 S. W. 921. See also Hazlewood *v.* Pennypacker, (Civ. App. 1899) 50 S. W. 199, holding that the power contained in a lease giving the lessee authority to make improvements, to be paid for by the lessor, is not revoked by the death of the lessor, but may be recovered against his heirs, who have collected the rents accruing under the lease.

Utah.— Young *v.* Consolidated Implement Co., 23 Utah 586, 65 Pac. 720.

England.— Lane *v.* Moeder, 1 Cab. & E. 548.

89. Whipley *v.* Dewey, 8 Cal. 36, holding likewise that a promise by a lessor that if the tenant who has forfeited his lease will not interfere with the sale of the premises, the value of his erection shall be saved to him is without consideration if no sale take place.

90. *Colorado.*— Hughes *v.* Ford, 15 Colo. 330, 25 Pac. 555, holding, however, that where the lessee wrongfully allows the improvements to remain in the premises after the expiration of the lease, he cannot recover rent for such improvements.

Illinois.— Wright *v.* Lattin, 38 Ill. 293.

Indiana.— Cromie *v.* Hoover, 40 Ind. 49.

Kentucky.— Caperton *v.* Stege, 91 Ky. 351,

c. Compensation — (I) *Right to in Absence of Covenant.* A landlord is not liable to his tenant for the value of improvements voluntarily made by the latter, in the absence of an agreement creating such liability; the tenant's right extending no further than that of removal of them before the expiration of his term.[91] This is especially true where such improvements are made without the consent of or against the protest of the lessor.[92] Nor can the lessor be held liable

15 S. W. 870, 16 S. W. 84, 12 Ky. L. Rep. 947.

Michigan.— Davidson *v.* Crump Mfg. Co., 99 Mich. 501, 58 N. W. 475.

Pennsylvania.— See Donnelly *v.* Frick, etc., Co., 207 Pa. St. 597, 57 Atl. 60, holding that where, by permission of the landlord, without formal extension of the lease, the tenant remains on the premises for an indefinite time, the right that he had at the termination of the lease to remove his trade fixtures is not affected.

Tennessee.— Cheatham *v.* Plinke, 1 Tenn. Ch. 576.

Texas.— Wright *v.* Macdonnell, 88 Tex. 140, 30 S. W. 907. See also Bermea Land, etc., Co. *v.* Adoue, 20 Tex. Civ. App. 655, 50 S. W. 131.

Vermont.— Waterman *v.* Clark, 58 Vt. 601, 2 Atl. 578 (where a lease of land to a corporation engaged in manufacturing cheese and butter provided that they should have a year after "discontinuing and abandoning said business" within which to remove buildings, etc., and it was held that a vote of the directors of such corporation to sell did not amount to such discontinuance, and that the year began to run, not from the vote, but from the date of actual sale); Preston *v.* Briggs, 16 Vt. 124 (holding that if the tenant who has erected buildings on the leased premises or one erecting buildings by license on the land of another permits the buildings to remain in possession of the owner of the freehold for more than six years after the expiration of the term or the abandonment of possession, the statute of limitations will bar all claims for their recovery).

United States.— Kutter *v.* Smith, 2 Wall. 491, 17 L. ed. 830.

Canada.— Argles *v.* McMath, 23 Ont. App. 44. See also Harrison *v.* Smith, 8 Can. L. T. 58, 19 Nova Scotia 516.

See 32 Cnt. Dig. tit. "Landlord and Tenant," § 578.

Duty to surrender possession at termination of lease see *supra*, VIII, B, 1, a, (VII).

91. *Arkansas.*— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377 [*quoting* with approval Robertson *v.* Read, 52 Ark. 381, 14 S. W. 387, 20 Am. St. Rep. 188], holding, however, that the lessee should not be charged an increased rent because of improvements upon the land for which he is denied compensation.

California.— Lawrence *v.* Knight, 11 Cal. 298. See also Woodward *v.* Payne, 16 Cal. 444.

Colorado.— Hughes *v.* Ford, 15 Colo. 330, 25 Pac. 555.

Illinois.— Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192 [*affirming* 18 Ill. App. 386].

Indiana.— Hopkins *v.* Ratliff, 115 Ind. 213, 17 N. E. 288.

Kentucky.— Guthrie *v.* Guthrie, 78 S. W. 474, 25 Ky. L. Rep. 1701.

New Hampshire.— Guay *v.* Kehoe, 70 N. H. 151, 46 Atl. 688. See also Upton *v.* Hosmer, 70 N. H. 493, 49 Atl. 96.

New Jersey.— Berry *v.* Van Winkle, 2 N. J. Eq. 390. See also Ames *v.* Trenton Brewing Co., 57 N. J. Eq. 347, 45 Atl. 1090 [*affirming* 56 N. J. Eq. 309, 38 Atl. 858].

New York.— Walton *v.* Meeks, 41 Hun 311. See also Cosgriff *v.* Foss, 65 Hun 184, 19 N. Y. Suppl. 941.

North Carolina.— Pomeroy *v.* Lambeth, 36 N. C. 65, 36 Am. Dec. 33.

Ohio.— Davis *v.* Porter, 10 Ohio Cir. Ct. 243, 6 Ohio Cir. Dec. 607.

Tennessee.— Wilson *v.* Scruggs, 7 Lea 635. See also State *v.* McMinnville, etc., R. Co., 6 Lea 369.

Texas.— Randolph *v.* Mitchell, (Civ. App. 1899) 51 S. W. 297, holding that under a lease requiring the tenant to make certain improvements to be designated by the landlord in lieu of rent, the tenant is not entitled to credit on improvements made by him without the request of the landlord.

West Virginia.— Windon *v.* Stewart, 48 W. Va. 711, 28 S. E. 776.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890.

United States.— Kutter *v.* Smith, 2 Wall. 491, 17 L. ed. 830.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 585.

Improvements by landlord.—Where a lessor during the term of the lease and at the request of the lessee put an elevator in the building at his own expense, he is not entitled to be reimbursed therefor, by the lessee, because his lease was shortly thereafter terminated where the only liability the lessee assumed with respect to the elevator was to pay an additional yearly rent equal to ten per cent of its cost. Willoughby *v.* Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612.

The Market Gardeners Compensation (Scotland) Act (1897), § 4 (which corresponds with section 4 of the English act of 1895) is not retrospective, and does not entitle tenants under leases current at the commencement of the act to compensation in respect of market-garden improvements executed prior to the commencement of the act. Smith *v.* Callander, [1901] A. C. 297, 70 L. J. P. C. 53, 84 L. T. Rep. N. S. 801.

92. *Arkansas.*— Jones *v.* Hoard, 59 Ark. 42, 26 S. W. 193, 43 Am. St. Rep. 17.

by a third party for improvements made for the benefit of, or at the direction of, the lessee,[93] although the lessor silently acquiesced in the putting up of the improvements.[94] The tenant, however, who makes improvements on the demised premises upon a consideration from the lessor may recover the value of such improvements upon the failure of the consideration.[95] Any improvements made by the tenant after the expiration of his term are at his own risk, and he is not entitled to their value as an offset;[96] and a tenant who enters under a mortgagor pending foreclosure proceedings cannot be allowed compensation for improvements made on the premises by him.[97]

(II) *Payment of as Condition Precedent to Surrender of Premises.* In a lease stipulating that the landlord shall pay for the improvements put upon the premises by the lessee whenever the tenancy should cease, where the landlord refuses to renew the lease, the tenant is entitled to possession of the property until the landlord pays for the improvements.[98] And where the lease provides that the lessee may set off against the rent the value of such improvements as he shall put upon the property, he cannot be lawfully evicted for non-payment of the rent without being first reimbursed for the improvements.[99] However, in

Indiana.— Mull *v.* Graham, 7 Ind. App. 561, 35 N. E. 134.

Louisiana.— Sigur *v.* Lloyd, 1 La. Ann. 421; McWilliams *v.* Hagan, 4 Rob. 374.

Pennsylvania.— Kline *v.* Jacobs, 68 Pa. St. 57.

South Carolina.— Smith *v.* Brown, 5 Rich. Eq. 291.

United States.— Gay *v.* Joplin, 13 Fed. 650, 4 McCrary 459.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 593.

93. Read *v.* Bolger, 62 N. Y. App. Div. 411, 70 N. Y. Suppl. 757; Belisle *v.* Marier, 23 Quebec Super. Ct. 521, holding that one who has furnished materials to a lessee of premises for work performed on a house occupied by the latter as such cannot maintain an action for the purchase-price against the owner of such premises.

94. Gocio *v.* Day, 51 Ark. 46, 9 S. W. 433; Woolley *v.* Osborne, 39 N. J. Eq. 54; Dunn *v.* Bagby, 88 N. C. 91.

95. Lewis *v.* Effinger, 30 Pa. St. 281; Cornell *v.* Van Artsdalen, 4 Pa. St. 364. See, however, Yates *v.* Bachley, 33 Wis. 185, holding that a tenant in possession under a verbal lease, who puts permanent and valuable improvements on the land under the promise of a written lease, is not entitled to recover the value of such improvements merely because the landlord refused to execute the written lease, where there has been no eviction.

96. Gunn *v.* Pollock, 6 Cal. 240.

97. Haven *v.* Adams, 8 Allen (Mass.) 363. See also Penn *v.* Citizens' Bank, 32 La. Ann. 195, holding that the right of a lessee, whose lease is subordinate to a mortgage, to claim on the foreclosure for improvements, is not that of a "third possessor" proper.

98. *Indiana.*—Mullen *v.* Pugh, 16 Ind. App. 337, 45 N. E. 347.

Kentucky.— Oneal *v.* Orr, 5 Bush 649.

Maine.— Franklin, etc., Co. *v.* Card, 84 Me. 528, 24 Atl. 960.

Massachusetts.—Carpenter *v.* Pocasset Mfg. Co., 180 Mass. 130, 61 N. E. 816, holding that under a covenant giving lessees a right of renewal for such rental as they might agree with the lessor "or in case of a failure so to agree, the said lessor shall purchase the improvements," etc., the lessees were entitled to compensation for the improvements, although not wishing to renew the lease.

New York.— Holsman *v.* Abrams, 2 Duer 435. See also Smith *v.* Cooley, 5 Daly 401. *Contra,* Tallman *v.* Coffin, 4 N. Y. 134.

Wisconsin.— Ecke *v.* Fetzer, 65 Wis. 55, 26 N. W. 266, where the right was asserted against the assignee of the lease.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 601.

Compare Bales *v.* Gilbert, 84 Mo. App. 675 (holding that where a tenant erects buildings under a contract that the landlord will purchase at a price to be fixed by arbitrators and the arbitration fails without tenant's substantial fault, the court will fix the value); Batchelder *v.* Dean, 16 N. H. 265; McVicker *v.* Dennison, 45 Pa. St. 390 (where under a lease providing for a purchase at its termination, by the lessee, at his option, and for the erection of a bark-shed, which in case he did not purchase the lessor was to pay for, it was held that the lessee had the right to build the shed, although notified by the lessor not to do so, and that it would not be paid for, and that the lessee was entitled to set off the appraised cost thereof against the rent).

99. Brockway *v.* Thomas, 36 Ark. 518. See also State *v.* Passmore, 61 Ark. 363, 33 S. W. 214. *Compare* Gray *v.* Cornwall, 95 Ky. 566, 26 S. W. 1018, 16 Ky. L. Rep. 223, where a lease for ten years provided that the lessee should be compensated for improvements made by him, and should continue in possession at the end of the term if the lessor was unable to pay for improvements, and it was held that the lessee did not have perpetual right to possession until the lessor should pay for the improvements, but it was

some jurisdictions it is held that, in the absence of reservation in the lease of the right to retain possession of the leased premises as security for the performance of the lessor's covenant to pay for improvements, the lessee has no right to retain possession of the premises after the expiration of the lease, and that his remedy is by action on the lease.[1] A landlord cannot escape liability under a covenant to pay for improvements made by the tenant by a conveyance of the reversion to a third person;[2] nor can he avoid the obligation by declaring a forfeiture of the lease for non-payment of rent or for other cause.[3]

(III) *Lien For Value of Improvements.* The general rule is that a covenant by the landlord to pay for improvements put upon the demised premises by the tenant gives the latter no lien upon the premises for the value of such improvements, in the absence of a stipulation that the tenant shall have such lien.[4] It has been held, however, in some jurisdictions that a lease which requires the tenant to erect certain buildings, the value of which is to be paid him by the lessor on the termination of the lease, gives the tenant an ownership in the premises to the extent of the value of the buildings so erected by him, and an equitable lien for such value on the whole premises.[5] A stipulation in a lease for a lien by the lessee on improvements made by him passes to an assignee of the lease.[6]

proper to divide the property between the owners at the end of twenty-five years.

1. Speers *v.* Flack, 34 Mo. 101, 84 Am. Dec. 74. See also Bresler *v.* Darmstaetter, 57 Mich. 311, 23 N. W. 825 (where a lease for years stipulated that after the expiration of the term an appraiser might be appointed to appraise the value of the improvements, and that, within thirty days after the surrender of the building, the lessor must pay the appraised value, the amount of which should be a lien on the premises until paid, and it was held that while the appraisal was in progress the lessee was not entitled to remain in possession); Manigault *v.* Carroll, 1 McCord (S. C.) 91.

2. Smyth *v.* Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314 [*modifying* 105 Ill. App. 510]; Carpenter *v.* Pocasset Mfg. Co., 180 Mass. 130, 61 N. E. 816. See also Palmer *v.* Meriden Britannia Co., 88 Ill. App. 485; Bream *v.* Dickerson, 2 Humphr. (Tenn.) 126, where a lessor reserved in the lease the right to buy improvements made by the lessee and to pay for the same with annual deferred instalments or at his election out of the rents; and it was held that a conveyance by him of the reversion extinguished his power of election and made him liable to pay as provided, in deferred instalments.

3. Goodwin *v.* Perkins, 134 Cal. 564, 66 Pac. 793; Lawrence *v.* Knight, 11 Cal. 298 (holding, however, that upon eviction for non-payment of rent the lessor had no action for the value of the improvements; while he must at least wait until the end of the term as he could not put himself in a better position by his own fault than he was in by his contract); Zugg *v.* Turner, 8 Iowa 223 (holding that the lessor may set off the rent against the cost of improvements); Knight *v.* Orchard, 92 Mo. App. 466. See also Taylor *v.* Maule, 2 Walk. (Pa.) 539; Merriam *v.* Ridpath, 16 Wash. 104, 47 Pac. 416. But see Gudgell *v.* Duvall, 4 J. J. Marsh. 229 (holding that where a tenant, under a parol lease of not more than five years, voluntarily leaves the premises at the request of the landlord before the expiration of the time, he cannot recover for improvements); Forbus *v.* Watkins, (Tenn. Ch. App. 1901) 62 S. W. 36 (holding that where a lessee for a term of years under an oral contract requiring construction of a building on the property and authorizing him to remain on the premises and retain the land without paying rent until the rent at an agreed rate should equal the value of the building voluntarily abandoned the property, he cannot recover the value of such building, although he might set off the improvements against the landlord's claim for use and occupation).

4. *California.*— Gardner *v.* Samuels, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135.

Georgia.— Mitchell *v.* Printup, 48 Ga. 455.

Kansas.— Beck *v.* Birdsall, 19 Kan. 550.

Tennessee.—Bream *v.* Dickerson, 2 Humphr. 126; Hite *v.* Parks, 2 Tenn. Ch. 373.

Washington.— Phillip *v.* Reynolds, 20 Wash. 374, 55 Pac. 316, 72 Am. St. Rep. 107.

United States.— Conrad *v.* U. S., 20 Wall. 115, 22 L. ed. 328; Confiscation Cases, 20 Wall. 92, 22 L. ed. 320 [*reversing* 6 Fed. Cas. No. 3,097, 1 Woods 221]; U. S. *v.* Six Lots of Ground, 22 L. ed. 326.

England.— Millard *v.* Harvey, 34 Beav. 237, 10 Jur. N. S. 1167, 13 Wkly. Rep. 125, 55 Eng. Reprint 626.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 600.

5. Conover *v.* Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247; Matter of Coatsworth, 37 N. Y. App. Div. 295, 55 N. Y. Suppl. 753; Ecke *v.* Fetzer, 65 Wis. 55, 26 N. W. 266; Hopkins *v.* Gilman, 22 Wis. 476; Swift *v.* Sheehy, 88 Fed. 924. *Contra*, New York Dyeing, etc., Establishment *v.* De Westenberg, 46 Hun (N. Y.) 281; Whitlock *v.* Duffield, 2 Edw. (N. Y.) 366.

6. Anderson *v.* Ammonett, 9 Lea (Tenn.) 1.

(iv) *Option to Make or Renew Lease.* Where by the terms of the lease the lessor has the option to renew the lease or pay for improvements, the lessee is not entitled to the value of improvements made on the property after the lessor has exercised his option by a renewal of the lease,[7] and he may waive his claim for the value of the improvements.[8] The lessor must, however, exercise his option on the day the term expires or he will lose his right to enforce a renewal of the lease and become bound for the value of the improvements.[9] Nor can he escape liability by extending the term for one day.[10] Where the lessee covenants to make certain improvements on the demised premises, and the lessor agrees either to pay for them at the end of the term or renew the lease, the improvements at the end of the renewal term to belong to the lessor, the title to such improvements vests at once in the lessor, although subject to all the lessee's rights under the lease.[11]

(v) *Rights of Assignee of Lessee.* The general rule is that a covenant by the lessor to pay the lessee the value of all improvements made upon the demised premises during the term runs with the land, and an action on such a covenant may be maintained by the assignee of the lessee.[12]

Right of assignee to benefit of conditions and covenants in general see *supra*, IV, B, 4, c.

7. Kash *v.* Huncheon, 1 Ind. App. 361, 27 N. E. 645; Smith *v.* St. Phillips' Church, 107 N. Y. 610, 14 N. E. 825 (holding, however, that under such a covenant the lessee might compel the lessor to exercise his option either to renew the lease or purchase the improvements); Pearce *v.* Colden, 8 Barb. (N. Y.) 522; Powell *v.* Pierce, 103 Va. 526, 49 S. E. 666 (where, the lessee having failed, at the end of the first term, to exercise his right to refuse the second term on default of notice of renewal, it was held that he thereby waived such notice, and could not, after having accepted all the benefits of a formal renewal for the full period of the second term, assert that he was a tenant from year to year, and thus obtain pay for the buildings); King *v.* Wilson, 98 Va. 259, 35 S. E. 727; Ward *v.* Toronto, 26 Ont. App. 225. See also Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 N. W. 957. See, however, Howe's Cave Assoc. *v.* Houck, 141 N. Y. 606, 36 N. E. 740 [*affirming* 66 Hun 205, 21 N. Y. Suppl. 40].

Arbitration to determine value.—Where the lease contained a covenant that the lessor should renew at a rent to be fixed by umpires or that at his option he should instead of renewing pay for the building at a price to be similarly fixed, it was held that the election of the lessor to take the buildings bound him, and that the lessee was entitled to the benefit of the findings of the umpires. Crosby *v.* Moses, 48 N. Y. Super. Ct. 146.

Operation and effect of covenant to renew or pay for improvements in general see *supra*, IV, C, 2, c.

8. St. John *v.* Sears, 28 N. Brunsw. 1.

9. Bullock *v.* Grinstead, 95 Ky. 261, 24 S. W. 867, 15 Ky. L. Rep. 663.

10. Phillips *v.* Reynolds, 20 Wash. 374, 55 Pac 316, 72 Am. St. Rep. 107.

11. Pearson *v.* Sanderson, 128 Ill. 88, 21 N. E. 200; Miller *v.* Michoud, 11 Rob. (La.) 225 (holding that where buildings erected by the lessee or by the lease at its termination were to be the lessor's without compensation therefor, the lessee has but a right of use and possession incapable of being mortgaged); Hood *v.* Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Lesser *v.* Rayner, 21 Misc. (N. Y.) 666, 47 N. Y. Suppl. 1102 (holding that under such circumstances removal of the improvements by the lessee will amount to a violation of his covenant and constitute conversion); Tuttle *v.* Leiter, 82 Fed. 947 (where the lessor in a twenty-one-year lease covenanted to purchase the improvements erected on the premises at an appraised valuation on the termination of the lease, and it was held that his agreement applied to buildings erected by sublessees or assignees of the lease after the building erected by the original lessees had been burned); Bass *v.* Metropolitan West Side El. R. Co., 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711. See also Hall *v.* Rudd, 7 S. W. 252, 9 Ky. L. Rep. 863.

12. *California.*— California M. E. Church Annual Conference *v.* Seitz, 74 Cal. 287, 15 Pac. 839.

Iowa.— Pelan *v.* De Bevard, 13 Iowa 53.

Louisiana.— Talley *v.* Alexander, 10 La. Ann. 627, holding conversely that a sublessee, with notice of a stipulation in the original lease that the lessee may make any improvements he chooses on condition of leaving them at the expiration of the lease free of charge, is bound thereby, and can claim nothing for his improvements.

Maryland.— Stockett *v.* Howard, 34 Md. 121.

Minnesota.— See Day *v.* Minneapolis Mill Co., 23 Minn. 334.

Nebraska.— Estabrook *v.* Stevenson, 47 Nebr. 206, 66 N. W. 286.

New York.— Wray *v.* Rhinelander, 52 Barb. 553; Larnetti *v.* Anderson, 6 Cow. 302. See, however, Johnston *v.* Bates, 48 N. Y. Super. Ct. 180.

Tennessee.— See Cronin *v.* Watkins, 1 Tenn. Ch. 119, where a lease provided that improvements made by the lessee during the term might be removed, or sold to the lessor upon valuation, and at the expiration of the lease they were valued and paid to the lessee, and

(VI) *Rights and Liabilities of Assignee of Reversion.* The decisions are not harmonious upon the question as to whether a covenant on the part of the landlord to pay for improvements made by the lessee is binding upon the assignees of the lessor where they are not named in the covenant, some of the cases holding that such covenants run with the land, and bind the lessor's assignees;[13] while another line of decisions hold that such covenants, relating as they do to a thing not *in esse*, do not run with the land, or bind the assignee, unless he be named in the covenant.[14]

(VII) *Upon Termination of Tenancy by Sale of Premises.* Where the lease stipulates that the lessor shall pay for improvements put upon the premises by the lessee during the term, provided the premises are sold during the term, such covenant contemplates a perfected sale during the term,[15] and where the sale is not thus perfected, or the possession of the lessee is not disturbed, the latter is not entitled to the value of the improvements under such covenants.[16]

(VIII) *Appraisement.* The general rule is that if a lease contains an agreement for the submission of the question of the value of the improvements made by the lessee to third parties as appraisers, such agreement, although binding upon the parties, is not a submission to arbitration, nor subject to the same rules, such as requiring the appraisers to be sworn and the giving of due notice of the hearing to the parties.[17] There are, however, decisions to the effect that unless the agreement to submit the question of the value of the improvements to appraisers expressly shows that the parties intended that the appraisers should decide the questions in dispute without the aid or presence of the parties, or it is evident that such was the intention, as where the matter is one merely of appraisal, there

no notice given of a previous assignment of the lease by the lessee to the complainant for the tenant of the lessee's wife, and it was held that a bill filed by the complainant more than a year after the expiration of the lease, for the value of the improvements, could not be maintained.

United States.— Hunt *v.* Danforth, 12 Fed. Cas. No. 6,887, 2 Curt. 592.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 588.

See, however, Peterson *v.* Haight, 1 Miles (Pa.) 250, holding that where real estate was leased on condition that the landlord is to pay for part of the improvements, the assignee of the assignee of such lease cannot take advantage of such condition, there being no privity between him and the original landlord.

Right of assignee as to conditions and covenants in general see *supra*, IV, B, 4, c.

13. Frederick *v.* Callahan, 40 Iowa 311; Ecke *v.* Fetzer, 65 Wis. 55, 26 N. W. 266; Mansel *v.* Norton, 22 Ch. D. 769, 52 L. J. Ch. 357, 48 L. T. Rep. N. S. 654, 31 Wkly. Rep. 325; Gorton *v.* Gregory, 3 B. & S. 90, 31 L. J. Q. B. 302, 6 L. T. Rep. N. S. 656, 10 Wkly. Rep. 713, 113 E. C. L. 90; Berrie *v.* Woods, 12 Ont. 693.

14. Hansen *v.* Meyer, 81 Ill. 321, 25 Am. Rep. 282; Coffin *v.* Talman, 8 N. Y. 465; Tallman *v.* Coffin, 4 N. Y. 134; Ovington Bros. Co. *v.* Henshaw, 47 Misc. (N. Y.) 167, 93 N. Y. Suppl. 380; Bream *v.* Dickerson, 2 Humphr. (Tenn.) 126 (holding that a covenant by a lessor to pay for any improvements, if there should be any left on the land by the lessee at the termination of the lease, there being no covenant by the lessee to make improvements, does not bind the assignee of the reversion); Grey *v.* Cuthbertson, 2 Chit. 482, 18 E. C. L. 747, 4 Dougl. 351, 26 E. C. L. 519, 1 Selw. 498; Spencer's Case, 5 Coke 16*a*; McClary *v.* Jackson, 13 Ont. 310.

Rights and liabilities of transferee of reversion in general see *supra*, III, D, 2.

15. Pintard *v.* Irwin, 20 N. J. L. 497; Morton *v.* Weir, 70 N. Y. 247 [*affirming* 5 Hun 177]; Smith *v.* Farnworth, 6 Hun (N. Y.) 598.

16. Stewart *v.* Pier, 58 Iowa 15, 11 N. W. 711 (where the lessee was held not to be entitled to compensation for improvements, where the lessor entered into an optional contract of sale to be consummated after the expiration of the lease); Chandler *v.* Oldham, 55 Mo. App. 139; McAllister *v.* Reel, 53 Mo. App. 81 (holding that the condemnation of leased premises does not constitute a sale, within a provision of the lease for the payment to the lessee of the value of the improvements erected by him in case of the sale of the premises by the lessor during the term of the lease). See also Butterworth *v.* Bliss, 52 Barb. (N. Y.) 430.

17. California M. E. Church Annual Conference *v.* Seitz, 74 Cal. 287, 15 Pac. 839; Pearson *v.* Sanderson, 128 Ill. 88, 21 N. E. 200 [*affirming* 28 Ill. App. 571] (holding that the proceedings in such appraisals are not an arbitration in which it is contemplated that the parties shall be heard, but that the appraisers are merely to examine the property and make an appraisement according to their own judgment, and no notice of their meeting is necessary); Pintard *v.* Irwin, 20 N. J. L. 497; Gilbert *v.* Smith, 18 N. Brunsw. 211. See also Whitlock *v.* Duf-

must be a hearing, and the appraisers must give both parties notice of time and place of meeting.[18] Where, however, the lessor refuses to appoint an appraiser, according to the agreement, the lessee cannot have an *ex parte* appraisement made, but must resort to his action on the covenant, and have his damages ascertained by a jury.[19]

d. Action For Breach of Covenant — (i) *Right and Nature of.* The general rule is that the remedy of a covenantee on a breach of a covenant to make improvements is an action at law;[20] although it has been held that where a lessee covenants to make certain improvements, upon a breach thereof, equity will compel him either to make the improvements, or to pay the value thereof.[21]

(ii) *Pleading.*[22] In an action for breach of a covenant to make improvements, if the liability of defendant depends upon the performance of a prior covenant or condition on the part of plaintiff, the performance or tender of performance of such condition must be averred.[23]

(iii) *Damages.*[24] The general rule is that upon a lessee's breach of covenant to make improvements, a lessor can recover only what it would cost to make them, and the difference in the rental value of the land until they could be made after the expiration of the term,[25] although in some jurisdictions it has been held that the proper compensation to be paid for improvements made by a tenant on the leased premises is their actual cost.[26] Where the lessor covenants to pay the lessee the cash value of the improvements on the premises at the expiration of the term, the measure of the lessee's damages for breach of covenant is the value of the improvements at the time of the expiration of the lease, and not their value when made.[27]

field, Hoffm. (N. Y.) 110 [*affirmed* in 26 Wend. 55]. *Compare* Zorkowski *v.* Astor, 13 Misc. (N. Y.) 507, 34 N. Y. Suppl. 948.

18. Janney *v.* Goehringer, 52 Minn. 423, 54 N. W. 481 (holding that it being necessary for the appraisers to construe the contract for the purpose of determining the basis upon which the value is to be estimated, that an appraisal made without opportunity afforded to the parties to be heard was invalid); Brown *v.* Lyddy, 11 Hun (N. Y.) 451; Van Corlandt *v.* Underhill, 17 Johns. (N. Y.) 405 [*reversing* 2 Johns. Ch. 339]. See also Wood *v.* Helme, 14 R. I. 325.

19. Berry *v.* Van Winkle, 2 N. J. Eq. 390; Holliday *v.* Marshall, 7 Johns. (N. Y.) 211, where the lessor and lessee covenanted that at the expiration of the term the buildings and improvements on the demised premises should be valued by a certain number of persons to be chosen by the parties, which valuation the lessor would pay to the lessee, and on the expiration of the term the lessor refused to agree on appraisers, and the lessee appointed them and had the appraisement made, and it was held that the valuation thus made, being *ex parte*, was not conclusive as to the amount of damages, but that they were to be ascertained by the jury. See also Hood *v.* Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Providence *v.* St. John's Lodge, 2 R. I. 46, where it was held that if the parties could not agree upon an appraisement, or upon the appointment of appraisers, to ascertain the value of the improvements according to the provisions of the deed, appraisers might be appointed for the purpose by the court.

20. Hollidge *v.* Moriarty, 17 App. Cas. (D. C.) 520; Newby *v.* Eckersley, (1899) 1 Q. B. 465, 68 L. J. Q. B. 261, 80 L. T. Rep. N. S. 314, 47 Wkly. Rep. 245; Brace *v.* Wehnert, 25 Beav. 348, 4 Jur. N. S. 549, 27 L. J. Ch. 572, 6 Wkly. Rep. 425, 53 Eng. Reprint 670; Thomas *v.* Jennings, 66 L. J. Q. B. 5, 75 L. T. Rep. N. S. 274, 45 Wkly. Rep. 93.

An agreement by the lessee to build a house of a certain value on the demised premises is not one which a court of equity will direct to be specifically performed. Barnes *v.* Ludington, 51 Ill. App. 90.

21. Pasteur *v.* Jones, 3 N. C. 215.

Agreement by lessor to pay for improvements.— A lessee having made permanent improvements upon the demised premises and a covenant that he shall be repaid their value, may seek relief in equity as well as at law. Conover *v.* Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247.

22. **Pleading** generally see Pleading.

23. Handschy *v.* Sutton, 28 Ind. 159, where however, the performance of the agreement of the lessor was held not to be a condition precedent.

Allegation of demand.— A claim that the complainant in an action on a covenant in a lease to irrigate the demised premises failed to allege any demand therefor is without merit, where it appears from the complaint that defendant totally failed to furnish or supply any water whatever upon such premises, although often requested to do so. Durkee *v.* Carr, 38 Oreg. 189, 63 Pac. 117.

24. **Damages** generally see Damages.

25. Raybourn *v.* Ramsdell, 78 Ill. 622.

26. Ross *v.* Zuntz, 36 La. Ann. 888; Penn *v.* Citizens' Bank, 32 La. Ann. 195.

27. Berry *v.* Van Winkle, 2 N. J. Eq. 390; *In re* Building Lease, 5 Ohio S. & C. Pl. Dec.

4. Improvements by Landlord — a. In General. In the absence of express stipulation or agreement to that effect the tenant is not liable to the landlord for permanent improvements upon the demised premises made by the latter.[28] Where the lessor agrees to make certain improvements, but fails to do so, the lessee is not bound to make them and look to the lessor for reimbursement; but he may recoup the difference between the rental value of the property with and without the stipulated improvements.[29] Where by the terms of the lease the lessor stipulates to make certain improvements prior to the occupancy of the lessee, a notice by the lessee that he will not comply with the terms of the lease, and take possession of the property, is sufficient to absolve the lessor from his obligation to make such improvements.[30]

b. Actions For Breach of Covenant. In an action for breach of covenant on the part of the lessor to make specified improvements, the measure of damages to the lessee is the difference between the rental value of the premises with the improvements and its rental value without them.[31]

5. Condition of Premises at Termination of Tenancy — a. In General. Independently of express covenant, the law imposes upon the lessee an obligation to so treat the premises that no substantial injury be done thereto during his occupancy, and that the property be restored to the landlord at the end of the term unimpaired by the negligence of the tenant.[32]

556, 7 Ohio N. P. 666; Hart Lumber Co. *v.* Everett Land Co., 20 Wash. 71, 54 Pac. 767; Hopkins *v.* Gilman, 47 Wis. 581, 3 N. W. 382. See also Baxter *v.* State, 56 Ark. 312, 19 S. W. 923; Wisehart *v.* Grose, 71 Ind. 260; Edwards *v.* Van Patten, 46 Kan. 509, 26 Pac. 958; Yeatman *v.* Clemens, 6 Mo. App. 210 (holding that the lessor could not independently of the appraiser's report show the value of the building); Chautauqua Assembly *v.* Alling, 46 Hun (N. Y.) 582 (holding that where the lease stipulates that the value of the improvements shall be fixed by appraisers to be chosen by the parties, the court cannot fix such a value in an action by the lessor to have the lease declared forfeited); Oliver *v.* Bredl, 25 Pa. Super. Ct. 653.

28. Central City First Nat. Bank *v.* Lucas, 21 Nebr. 280, 31 N. W. 805; Hackett *v.* Richards, 3 E. D. Smith (N. Y.) 13. See also Welcome *v.* Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, holding that where a landlord builds for his tenant a storeroom, which does not add to the value of the premises, and which is to be paid for by rents reserved in the lease, if the landlord accepts the surrender of the premises he cannot recover for building such storeroom.

29. McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208. See also Pewaukee Milling Co. *v* Howitt, 86 Wis. 270, 56 N. W. 784, holding that a provision in a lease by a corporation of a mill that the lessor would put in a fifty-horse power water wheel if required by the lessee does not require the lessee to give the lessor's board of directors a formal notice that the wheel is required, but it is enough that request is made of its officers in charge of its business.

30. Floyd *v.* Maddux, 68 Ind. 124; Kirland *v.* Wolf, 7 Ohio Dec. (Reprint) 436, 3 Cinc. L. Bul. 114. See Elsas *v.* Meyer, 10 Ohio Dec. (Reprint) 518, 21 Cinc. L. Bul. 346, where a lessor agreed to make certain improvements on premises to be leased before the occupancy by the lessee began, and it was held that an inadvertent omission in making the stipulated improvements would not defeat the right of the lessor to recover for a breach of the contract to lease.

31. Berrian *v.* Olmstead, 4 E. D. Smith (N. Y.) 279; Prescott *v.* Otterstatter, 79 Pa. St. 462; Gorman *v.* Miller, 27 Pa. Super. Ct. 62; Pewaukee Milling Co. *v.* Howitt, 86 Wis. 270, 56 N. W. 784. See also Kimball *v.* Doggett, 62 Ill. App. 528 (holding that the damages sustained by a tenant in not having the necessary finishings of the building done, which the landlord is under contract to do, but does not, are the necessary cost to the tenant in making such finishing himself); Edwards *v.* Gale, 52 Me. 360; Turner *v.* Strange, 56 Tex. 141 (holding that in an action for breach of a contract in not building a cistern on land rented by defendant to plaintiff, no damages can be recovered for loss of plaintiff's crops, or for sickness and inconvenience to his family).

32. Bryan *v.* French, 20 La. Ann. 366 (holding that where a person hired a lot of land for the purpose of erecting a stable for horses, he has a right to remove a stone pavement therefrom which is found to be injurious to the horses, and on the termination of the lease is bound to restore the pavement in as good condition as it was before the removal); Sigur *v.* Lloyd, 1 La. Ann. 421; Genau *v.* District of Columbia, 20 Ct. Cl. 389. See also Cartwright *v.* Carpenter, 7 How. (Miss.) 328, 40 Am. Dec. 66.

Where a tenant holds over after the expiration of a written lease, the law implies, in the absence of express covenant, that he holds subject to the terms of the lease so far as they are applicable to a monthly letting, and he is not liable as on the express covenant in the lease for failure to restore the premises in the condition they were in when originally

b. Covenants in Relation Thereto. A covenant to surrender the premises at the expiration of the term in as good condition as the reasonable wear and tear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste resulting from accidents occurring without his fault.[33] Where a lease permits the lessee to make such alterations as are requisite to his business, but stipulates that the lessee shall surrender the premises at the end of the term in as good state and condition as reasonable use and wear thereof will permit, where such alterations injuriously affect the condition of the premises, it is the duty of the lessee to restore the premises to their former condition in respect to the changes so made.[34] A covenant to surrender the premises in as good condition as when granted, usual wear and tear excepted, only requires the tenant to leave the premises in as good condition as when he received them, and does not require him to repair injuries caused by a former tenant.[35]

leased. Haeussler *v.* Holman Paper-Box Co., 49 Mo. App. 631.

33. *Massachusetts.*— Jaques *v.* Gould, 4 Cush. 384.

Minnesota.— See also Boardman *v.* Howard, 90 Minn. 273, 96 N. W. 84, 101 Am. St. Rep. 409, 64 L. R. A. 648.

New York.— Fleischman *v.* Toplitz, 134 N. Y. 349, 31 N. E. 1089 [*affirming* 57 Hun 126, 10 N. Y. Suppl. 471, 25 Abb. N. Cas. 304]; Downing *v.* De Klyn, 1 E. D. Smith 563; Myers *v.* Hussenbuth, 32 Misc. 717, 65 N. Y. Suppl. 1026, holding that the implied covenant to surrender premises in as good condition as when received, reasonable wear and tear and damages by the elements excepted, extends to accidental injuries, and the landlord may recover against a tenant under an ordinary lease for accident and injuries to the premises by third persons. See also McGregor *v.* New York Bd. of Education, 107 N. Y. 511, 14 N. E. 420; Allen *v.* Culver, 3 Den. 284.

Pennsylvania.— Darlington *v.* De Wald, 194 Pa. St. 305, 45 Atl. 57.

Tennessee.— Shelby *v.* Hearne, 6 Yerg. 512, holding likewise that such covenants run with the land.

Vermont.— Sturges *v.* Knapp, 31 Vt. 1.

United States.— Nitro-Glycerine Case, 82 U. S. 524, 21 L. ed. 206; Parrott *v.* Barney, 18 Fed. Cas. No. 10,773, 2 Abb. 197, 1 Sawy. 423. See also Davenport *v.* U. S., 26 Ct. Cl. 338, holding that under a covenant in a lease, agreeing to surrender the leased premises in as good condition as reasonable use and wear will permit, and a renewal of such lease providing that the premises shall be delivered up in as good order as when first occupied, reasonable wear and tear excepted, the lessor is entitled to have his property returned to him in good condition, wear and tear excepted, but he cannot charge the lessee with damage and decay incidental to a long continued occupancy.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 613.

34. Hooker *v.* Banner, 76 Cal. 116, 18 Pac. 136 (where a lessee was permitted to make changes in the premises, if he would restore them, and afterward his lease was twice renewed with stipulations that any changes made by him should be restored, and the premises left in their original condition, and it was held that such stipulations included the changes made under the first lease and that the lessor, being obliged to make the restoration, could recover therefor); Scott *v.* Haverstraw Clay, etc., Co., 135 N. Y. 141, 31 N. E. 1102 [*affirming* 16 N. Y. Suppl. 670]; Lazarus *v.* Ludwig, 45 N. Y. App. Div. 486, 61 N. Y. Suppl. 365 (holding likewise that such covenant was not waived by the landlord's allowing the lessee to remain in possession after the end of his term under a lease for month to month, where it appeared that the lessor notified the lessee to comply with said agreement before his term expired, and also during the pendency of the eviction proceedings against him); Buhler *v.* Gibbons, 3 N. Y. Suppl. 815 (where after the execution of the lease the tenant was given permission to make certain alterations, and he promised to restore the premises thirty days before the termination of the lease and the tenant afterward obtained a lease for an additional term, but nothing was said as to restoring the premises, and it was held that the covenants of the first lease were not waived by the second lease and that the tenant was liable for the cost of the restoration contemplated by the first lease); Webb *v.* Daggett, (Tex. Civ. App. 1905) 87 S. W. 743; *In re* Jewell, 13 Fed. Cas. No. 7,302. See also Murray *v.* Moross, 27 Mich. 203.

Notice by lessor.— A lease obligated the lessees to restore the demised premises to their original condition at the expiration of the term if required by lessor, but specified no time when he should give them notice of such requirement, and it was held that the lessor's failure to give such notice until three weeks after the expiration of the term did not relieve the lessees from their obligation to restore the premises to their original condition. Reed *v.* Harrison, 196 Pa. St. 337, 46 Atl. 415.

35. Coppinger *v.* Armstrong, 8 Ill. App. 210; West *v.* Hart, 7 J. J. Marsh. (Ky.) 258. See also Haeussler *v.* Holman Paper-Box Co., 49 Mo. App. 631; Davenport *v.* U. S., 26 Ct. Cl. 338. See, however, Brashear *v.* Chandler, 6 T. B. Mon. (Ky.) 150, holding that a covenant to deliver the premises at the expiration of the term in good tenantable repair in every respect binds the covenantor to restore the

c. Performance or Breach of Covenant. Where a tenant covenants to leave the demised premises in good repair at the expiration of the term, there is no breach of such covenant until the end of the term, and no right of action accrues to the landlord prior to that time.[36]

d. Persons By and Against Whom Covenants May Be Enforced. A covenant on the part of the tenant to surrender the premises at the expiration of the term in as good condition as when received, or to surrender certain personal property on the premises at the end of the term, is binding on the tenant's assignee,[37] and inures to the benefit of the assignee of the reversion.[38]

e. Actions For Breach of Covenant — (i) *NATURE OF.* An action for breach of covenant is an action upon the covenant and not an action in tort.[39]

(ii) *EVIDENCE.*[40] In an action on a breach of covenant to surrender the premises in good repair, the only question is as to the condition of the premises when surrendered, and whether the tenant has complied with his contract; hence evidence is not admissible to prove the condition of the premises when leased.[41] In an action by a landlord for breach of his tenant's contract to return the premises in as good repair as received, evidence tending to show the difference between the value of the premises as received by the lessees and their value at the expiration of the lease is admissible, and is sufficient to take the question of damages to the jury.[42]

premises in such tenantable condition, without any reference to the condition in which he received them.

36. Fratt *v.* Hunt, 108 Cal. 288, 41 Pac. 12; Payne *v.* James, 42 La. Ann. 230, 7 So. 457; Reed *v.* Snowhill, 51 N. J. L. 162, 16 Atl. 679 [*reversing* 49 N. J. L. 292, 10 Atl. 737, 60 Am. Rep. 615] (holding that where a lease is ended before the expiration of the term by an agreement in writing for delivery of possession and payment of a sum certain, fully executed by surrender of possession, payment of the sum named, and acceptance, a covenant to deliver up possession in good repair on the expiration of the lease, not having matured and become actionable during the continuance of the term, is cut off by the surrender); Agate *v.* Lowenbein, 4 Daly (N. Y.) 262; Rosenbloom *v.* Finch, 37 Misc. (N. Y.) 818, 76 N. Y. Suppl. 902; Haas *v.* Brown, 21 Misc. (N. Y.) 434, 47 N. Y. Suppl. 606 [*affirming* 20 Misc. 672, 46 N. Y. Suppl. 540]; Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400; Amiot *v.* Bonin, 23 Quebec Super. Ct. 42. See, however, Marshall *v.* Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679, holding that where a lease is surrendered before the end of the term by agreement of the parties, it expires at the time of the surrender, within the meaning of a covenant that the lessee will turn the property over to the lessor "at the expiration of this lease," in as good condition as when received.

New leases.— Plaintiff leased a building to defendant, to be surrendered in the same condition as at the time of the lease, reasonable wear and tear excepted. New leases were made from time to time, the tenancy extending over seven years, and it was held that there was no waiver of the right of action for the breach of this covenant by making the consecutive leases, and the question of the breach should relate to the final and actual surrender, and not to the technical surrenders during the tenancy. McGregor *v.* New York Bd. of Education, 107 N. Y. 511, 14 N. E. 420 [*reversing* 13 Daly 195].

37. Coppinger *v.* Armstrong, 5 Ill. App. 637; Blache *v.* Aleix, 15 La. Ann. 50; Pollard *v.* Shaaffer, 1 Dall. (Pa.) 210, 1 L. ed. 104, 1 Am. Dec. 239. *Contra,* Allen *v.* Culver, 3 Den. (N. Y.) 284; Smith *v.* Kellogg, 46 Vt. 560.

Rights and liabilities of assignee in general see *supra,* IV, B, 4, c.

38. Hayes *v.* New York Gold Min. Co., 2 Colo. 273; Demarest *v.* Willard, 8 Cow. (N. Y.) 206; Shelby *v.* Hearne, 6 Yerg. (Tenn.) 512. See also Payne *v.* James, 42 La. Ann. 230, 7 So. 457 (holding that the lessor who has sold the leased premises with the express reservation of the right to recover from the lessee for any damages done the property during the term may, at its expiration, sue for the breach of a covenant by the lessee to surrender the premises at the end of the term in as good repair as he received them); Palmer *v.* Brooklyn, 8 N. Y. Suppl. 6. *Contra,* Allen *v.* Culver, 3 Den. (N. Y.) 284.

Rights of assignee of reversion in general see *supra,* III, D, 2, b.

39. Bourdette *v.* Board School Directors, McGloin (La.) 4; Hatch *v.* Wolfe, 1 Abb. Pr. N. S. (N. Y.) 77.

40. Evidence generally see EVIDENCE.

41. Grayson *v.* Buie, 26 La. Ann. 637; *In re* Jewell, 13 Fed. Cas. No. 7,302, holding, however, that on the question as to how much the building has been injured by the alterations, the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent.

42. Browning *v.* Garvin, 48 N. Y. App. Div. 140, 62 N. Y. Suppl. 564; Lazarus *v.* Ludwig, 45 N. Y. App. Div. 486, 61 N. Y. Suppl. 365;

(III) *Damages.*[43] In an action by the lessor for breach of covenant in a lease to deliver up the premises in as good condition as they were in at the inception of the lease, the measure of damages is the amount required to restore the premises to the condition they were in at the beginning of the lease, due allowance being made for reasonable use and wear.[44]

(IV) *Trial.*[45] As to whether the injury to the demised premises was caused by reasonable use and wear thereof is a question for the jury.[46]

6. Property of Tenant on Premises at Termination of Lease — a. Rights as to. A tenant has a reasonable time after the termination of the tenancy to remove all personal property belonging to him from the premises, and is entitled to free ingress and egress for that purpose.[47] Where the landlord prevents an outgoing tenant from removing personal property belonging to the tenant, the latter may treat such conduct as a conversion by the landlord, and sue for the value of the property.[48]

b. Care of. Where a tenancy has been legally terminated, the landlord, or one entitled to the possession of the premises, may, after reasonable opportunity has been given the tenant to remove his goods, and he neglects to do so, remove such property from the premises, if he exercises such care in so doing as the nature of the property demands, and leaves it in such a condition that the owner by reasonable diligence can take it uninjured.[49]

Daggett *v.* Webb, 30 Tex. Civ. App. 415, 70 S. W. 457.

Burden of proof as to waiver.— Where the lessor of land, who has also mortgaged it to the lessee, takes it back at the end of the term in a condition inferior to that required by the lease, without any claim for damages, there is a presumption of undue influence, arising from their relation of mortgagor and mortgagee, which puts on the lessee the burden of proving that the land was accepted as a compliance with the lease, and without any such influence. Hines *v.* Outlaw, 121 N. C. 51, 27 S. E. 1006.

43. **Damages** generally see Damages.

44. Watriss *v.* Cambridge First Nat. Bank, 130 Mass. 343; Scott *v.* Haverstraw Clay, etc., Co., 135 N. Y. 141, 31 N. E. 1102 [*affirming* 16 N. Y. Suppl. 670]; Burke *v.* Pierce, 83 Fed. 95, 27 C. C. A. 462, holding likewise that where the tenant fails to make the necessary repairs, the landlord is entitled to a sum sufficient to make the repairs, and if this can only be done by using new materials, no deduction can be allowed the tenant on that account, and that in such case the landlord is not restricted to the difference between the value of the property received by the tenant and when surrendered. See also Willoughby *v.* Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612.

45. **Trial** generally see Trial.

46. McGregor *v.* Bd. of Education, 107 N. Y. 511, 14 N. E. 420. See also Kelly *v.* Duffy, 8 Pa. Cas. 214, 11 Atl. 244. And *compare* Thompson *v.* Cummings, 39 Mo. App. 537.

47. *Maine.*— Moore *v.* Boyd, 24 Me. 242; Folsom *v.* Moore, 19 Me. 252.

Michigan.— Hayward *v.* Hope Tp. School Dist. No. 9, 139 Mich. 539, 102 N. W. 999.

Nebraska.— Smith *v.* Boyle, 66 Nebr. 823, 92 N. W. 1018, 103 Am. St. Rep. 745.

Pennsylvania.— See Linden Oil Co. *v.* Jennings, 207 Pa. St. 524, 56 Atl. 1074.

Texas.— Bermea Land, etc., Co. *v.* Adoue, 20 Tex. Civ. App. 655, 50 S. W. 131.

Vermont.— Briggs *v.* Oaks, 26 Vt. 138, holding, however, that where a lease provides that property shall remain on the farm till the expiration of the term of the lease, and then be divided, the tenant has no absolute vested right in the property till the expiration of the lease.

Canada.— Laidlaw *v.* Taylor, 14 Nova Scotia 155. See Smalley *v.* Gallagher, 26 U. C. C. P. 531.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 627.

48. *Louisiana.*— Morris *v.* Pratt, 114 La. 98, 103, 38 So. 70, 72.

Nebraska.— Smith *v.* Boyle, 66 Nebr. 823, 92 N. W. 1018, 103 Am. St. Rep. 745.

Pennsylvania.— Watts *v.* Lehman, 107 Pa. St. 106; Heiser *v.* Withers, 32 Pa. Co. Ct. 385, 4 **Just.** L. **Rep.** 276, 23 Lanc. L. Rev. 276. See also Weitzel *v.* Marr, 46 Pa. St. 463, holding that where lumber is left by the lessee on demised premises at the expiration of the lease, trespass *vi et armis* is not the proper remedy against a subsequent purchaser of the premises who entered upon and held the full, peaceable, and exclusive possession of the land and the lumber.

Texas.— Schwulst *v.* Neely, (Civ. App. 1899) 50 S. W. 608 (holding that although, if a demand for the delivery of property left on the premises by the tenant after he has vacated them is made by the tenant without tender of the rent due, the refusal by the landlord to deliver would not constitute a conversion, yet the landlord should then resort to legal proceedings to collect his claim); Voss *v.* Bassett, (App. 1890) 15 S. W. 503.

Wisconsin.— Vilas *v.* Mason, 25 Wis. 310.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 627.

49. Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442; Rollins *v.* Mooers, 25 Me. 192;

E. Injuries From Dangerous or Defective Condition — 1. Injuries to Tenants, Occupants, and Employees — a. Defective or Dangerous Condition of Premises. In the absence of covenant on the part of the landlord to repair, no active duty is imposed on him to disclose apparent defects which are equally within the knowledge of the tenant, or which the latter might ascertain by due diligence, the rule of *caveat emptor* applying in such cases with full force; and in such cases the landlord is not liable for subsequent injuries resulting from such defects.[50] However, even in the absence of express covenant to repair, where the landlord leases the premises with the knowledge of latent defects therein, which he conceals from the tenant, he is liable for all injuries resulting to the tenant from such defects in the premises.[51]

U. S. Manufacturing Co. *v.* Stevens, 52 Mich. 330, 17 N. W. 934; Whitney *v.* Sweet, 22 N. H. 10, 53 Am. Dec. 228. See also Preston *v.* Neale, 12 Gray (Mass.) 222, holding that while, in the absence of any agreement, the landlord, not an innkeeper, has no lien for storage on the chattels left by an outgoing tenant, yet he is entitled to a reasonable compensation for storing them until they are demanded.

A landlord who allows the tenant to leave his property on the premises, after surrender of the lease, on the understanding that it will be kept for the tenant, is liable for a loss of it, attributable to the landlord's neglect, although there may have been no agreement to pay storage. Blackwell *v.* Baily, 1 Mo. App. 328.

Where the tenant abandons property upon the premises which the landlord never accepted, the latter is not liable as a purchaser for its value. Hindman *v.* Edgar, 24 Oreg. 581, 17 Pac. 862.

Due notice. — On condemnation of land occupied by a tenant at will, where he is given reasonable notice to remove his goods and fixtures and fails to do so, the railroad company is not liable for injuries caused to the tenant's property by the destruction of the building. Lyons *v.* Philadelphia, etc., R. Co., 209 Pa. St. 550, 58 Atl. 924.

After dispossession proceedings see *infra*, X, C, 24.

50. *District of Columbia.* — Howell *v.* Schneider, 24 App. Cas. 532.

Georgia.— Alexander *v.* Rhodes, 104 Ga. 807, 30 S. E. 968.

Illinois.— Borggard *v.* Gale, 205 Ill. 511, 68 N. E. 1063 [*affirming* 107 Ill. App. 128]; Merchants L. & T. Co. *v.* Boucher, 115 Ill. App. 101; Watson *v.* Moulton, 100 Ill. App. 560.

Indiana.— Hamilton *v.* Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485.

Kentucky.— Franklin *v.* Tracy, 117 Ky. 267, 77 S. W. 1113, 78 S. W. 1112, 25 Ky. L. Rep. 1409, 1909, 63 L. R. A. 649.

Massachusetts.— Phelan *v.* Fitzpatrick, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469; Moynihan *v.* Allyn, 162 Mass. 270, 38 N. E. 497; Bertie *v.* Flagg, 161 Mass. 504, 37 N. E. 572; Booth *v.* Merriam, 155 Mass. 521, 30 N. E. 85 [*distinguishing* Cowen *v.* Sunderland, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469].

Michigan.— Rhoades *v.* Seidel, 139 Mich. 608, 102 N. W. 1025.

Minnesota.— Harpel *v.* Fall, 63 Minn. 520, 65 N. W. 913.

New Hampshire.— Towne *v.* Thompson, 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 748.

New Jersey.—Land *v.* Fitzgerald, 68 N. J. L. 28, 52 Atl. 229.

New York.— Akerley *v.* White, 58 Hun 362, 12 N. Y. Suppl. 149; Donner *v.* Ogilvie, 49 Hun 229, 1 N. Y. Suppl. 633.

Ohio.— Shinkle *v.* Birney, 23 Ohio Cir. Ct. 525.

Pennsylvania.— Wodock *v.* Robinson, 9 Pa. Co. Ct. 503. See also Sheridan *v.* Krupp, 141 Pa. St. 564, 21 Atl. 670.

United States.— See Schwalbach *v.* Shinkle, etc., Co., 97 Fed. 483.

Canada.— Tennant *v.* Hall, 27 N. Brunsw. 499; Cartier *v.* Durocher, 22 Quebec Super. Ct 255.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 630. See also *supra*, VII, D, 1, a, (I).

Covenants as to repairs see *supra*, VII, D, 1, a, (III).

Set-off of damages in action for rent see *infra*, VIII, B, 8, d.

51. *District of Columbia.* — Howell *v.* Schneider, 24 App. Cas. 532.

Illinois.— Lazarus *v.* Parmly, 113 Ill. App. 624; Fowler Cycle Works *v.* Fraser, 110 Ill. App. 126; Donk Bros. Coal, etc., Co. *v.* Leavitt, 109 Ill. App. 385; Blake *v.* Ranous, 25 Ill. App. 486, holding that in order to recover against a landlord for injuries to health arising from defective plumbing which existed when the lease was made, a tenant must prove fraudulent misrepresentations in regard thereto, relied upon without personal examination.

Kansas.— Moore *v.* Parker, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778.

Kentucky.— Coke *v.* Gutkese, 80 Ky. 598, 44 Am. Rep. 499.

Michigan.— Maywood *v.* Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431.

New York.— Smith *v.* Donnelly, 45 Misc. 447, 92 N. Y. Suppl. 43.

Rhode Island.— Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478.

Tennessee.— Willcox *v.* Hines, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770.

b. Failure to Repair — (I) *General Rule.* Since as a general rule there must be some actual negligence or misfeasance to support an action in tort, a tenant cannot recover from a landlord for personal injuries caused by his failure to make repairs on the demised premises which he had covenanted to make;[52] some of the cases holding that the landlord must have had due notice of the defects calling for repairs in order to render him liable on the ground of negligence.[53] Where repairs are voluntarily made by the landlord, such fact is not an admission of liability on the part of the landlord to make repairs generally and to keep the premises in repair.[54]

(II) *Portions of Premises in Landlord's Control.* The rule relieving the landlord, in the absence of a special agreement, from making ordinary repairs during the term, does not release him from liability in cases of injuries resulting from his failure to keep in proper repair such portions of a house as are not leased to any particular tenant, but are retained in the control of the landlord

Canada.— Snodgrass *v.* Newman, 10 Quebec Super. Ct. 433.

Contracting disease from infected house.— A lessee of premises who without contributory negligence catches a contagious or infectious disease by reason of the lessor's wilful neglect to disclose the fact that the premises were infected therewith may recover damages therefor from the lessor. Minor *v.* Sharon, 112 Mass. 477, 17 Am. Rep. 122.

52. *California.*— Gately *v.* Campbell, 124 Cal. 520, 57 Pac. 567, holding that under Civ. Code, § 1941, declaring that the lessor of a building intended for occupation of human beings must put it in a condition for occupation, and section 1942, declaring that if the landlord does not do so the tenant may vacate, or spend a month's rent for repairs, the landlord is not liable for injury to the tenant from such lack of condition.

Indiana.— Hedekin *v.* Gillespie, 33 Ind. App. 650, 72 N. E. 143; Hamilton *v.* Feary, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485.

Massachusetts.—Consolidated Hand-Method Lasting-Mach. Co. *v.* Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409; Tuttle *v.* Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465, holding that an action of tort could not be maintained, since there had been no warranty or misrepresentation on defendant's part as to the condition of the premises.

New York.—Sherlock *v.* Rushmore, 99 N. Y. App. Div. 598, 91 N. Y. Suppl. 152; Kushes *v.* Ginsberg, 99 N. Y. App. Div. 417, 91 N. Y. Suppl. 216; Frank *v.* Mandel, 76 N. Y. App. Div. 413, 78 N. Y. Suppl. 855; Schick *v.* Fleischauer, 26 N. Y. App. Div. 210, 49 N. Y. Suppl. 962 (where the court said: "It is well settled in this state that no duty rests upon the landlord to repair premises which he has demised, or to keep them in tenantable condition, and that there can be no obligation to repair except such as may be created by the agreement of the landlord so to do. Witty *v.* Matthews, 52 N. Y. 512. Where such agreement has been made, the measure of damages for the breach of the contract is the expense of doing the work which the landlord agreed to do, but did not. A contract to repair does not contemplate that, as damages for the failure to keep it, any personal injuries shall grow out of the defective condition of the premises; because the duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself, and recover the cost in an action for that purpose, or upon a counter-claim in an action for the rent, or, if the premises are made untenantable by reason of the breach of the contract, the tenant may move out, and defend in an action for the rent as upon an eviction. Myers *v.* Burns, 35 N. Y. 269; Sparks *v.* Bassett, 49 N. Y. Super. Ct. 270; 1 Taylor Landl. & Ten. (8th ed.) 380"); Kabus *v.* Frost, 50 N. Y. Super. Ct. 72; Arnold *v.* Clark, 45 N. Y. Super. Ct. 252; Folsom *v.* Parker, 31 Misc. 348, 64 N. Y. Suppl. 263; Miller *v.* Rinaldo, 21 Misc. 470, 47 N. Y. Suppl. 636 [*reversing* 20 Misc. 714, 45 N. Y. Suppl. 1145]; Sanders *v.* Smith, 5 Misc. 1, 25 N. Y. Suppl. 125. And see Schanda *v.* Sulzberger, 7 N. Y. App. Div. 221, 40 N. Y. Suppl. 116 (where there was no covenant on the part of the lessor to repair); Lichtig *v.* Poundt, 23 Misc. 632, 52 N. Y. Suppl. 136.

Canada.— Brown *v.* Toronto Gen. Hospital, 23 Ont. 599.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 631.

And see Collings *v.* Karatopsky, 36 Ark. 316, holding that damages sustained by the lessee by reason of the death of a member of his family which was caused by the lessor's neglect to repair and improve the premises as contracted in the lease to be done are too remote, and cannot be pleaded in recoupment in an action for rent.

Contra.— Sontag *v.* O'Hare, 73 Ill. App. 432.

53. Marley *v.* Wheelwright, 172 Mass. 530, 52 N. E. 1066; Schimanski *v.* Higgins, 13 Quebec Super. Ct. 348. See, however, Troude *v.* Meldrum, 21 Quebec Super. Ct. 75.

54. Phelan *v.* Fitzpatrick, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469; Galvin *v.* Beals, 187 Mass. 250, 72 N. E. 969; Kearines *v.* Cullen, 183 Mass. 298, 67 N. E. 243; McLean *v.* Fiske Wharf, etc., Co., 158 Mass. 472, 33 N. E. 499; McKeon *v.* Cutter, 156 Mass. 296, 31 N. E. 389; Whitehead *v.* Comstock, 25 R. I. 423, 56 Atl. 446.

for the common use of several tenants.[55] Although in several jurisdictions it is held that the same rule applies in the lease of a portion of a building as in the lease of the whole, and a lessee cannot fix the liability to repair portions of the building not leased upon his lessor by some supposed implied covenant to that effect, when he had it in his power to create this covenant expressly in the written contract, and failed to do so.[56] However, the general rule is that in the absence of statute[57] the owner of a tenement is under no legal obligation to keep lights in the hallways of the tenement, and that the absence of lights does not prove negligence.[58]

c. Negligence in Making Repairs. Where the landlord undertakes to make repairs upon the demised premises, he is liable for injuries resulting from negligence of himself or his servants in making such repairs;[59] and this is true even where the landlord is under no obligation to make such repairs, but undertakes

55. *Connecticut.*— Gallagher *v.* Button, 73 Conn. 172, 46 Atl. 819.

Delaware.— Hysore *v.* Quigley, 9 Houst. 348, 32 Atl. 960.

Georgia.— Marshall *v.* Cohen, 44 Ga. 489, 9 Am. Rep. 170.

Illinois.— Payne *v.* Irvin, 144 Ill. 482, 33 N. E. 756; Bissell *v.* Lloyd, 100 Ill. 214; Johns *v.* Eichelberger, 109 Ill. App. 35; Trower *v.* Wehner, 75 Ill. App. 655. See, however, Mendel *v.* Fink, 8 Ill. App. 378.

Indiana.— See also Indianapolis Abattoir Co. *v.* Temperly, 159 Ind. 651, 64 N. E. 906, 95 Am. St. Rep. 330.

Maine.— Toole *v.* Beckett, 67 Me. 544, 24 Am. Rep. 54.

Massachusetts.— Harrinson *v.* Jelly, 175 Mass. 292, 56 N. E. 283; Coupe *v.* Platt, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; Wilcox *v.* Zane, 167 Mass. 302, 45 N. E. 923; Moynihan *v.* Allyn, 162 Mass. 270, 38 N. E. 497; Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; Looney *v.* McLean, 129 Mass. 33, 37 Am. Rep. 295.

New York.— Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Levine *v.* Baldwin, 87 N. Y. App. Div. 150, 84 N. Y. Suppl. 92; Bold *v.* O'Brien, 12 Daly 160; Kimmell *v.* Burfeind, 2 Daly 155 (where the landlord was held to be guilty of negligence and liable for the injury caused thereby, in the absence of contributory negligence on plaintiff's part); Levy *v.* Korn, 30 Misc. 199, 61 N. Y. Suppl. 1109; Phillips *v.* Ehrmann, 8 Misc. 39, 28 N. Y. Suppl. 519; Rubenstein *v.* Hudson, 86 N. Y. Suppl. 750; Stapenhorst *v.* American Mfg. Co., 15 Abb. Pr. N. S. 355. See, however, Doupe *v.* Genin, 45 N. Y. 119, 6 Am. Rep. 47 (holding likewise that the maxim "*sic utere tuo ut alienum non lædas*" has no application in such a case); Simons *v.* Seward, 54 N. Y. Super. Ct. 406; Walker *v.* Gilbert, 2 Rob. 214.

North Dakota.— Kneeland *v.* Beare, 11 N. D. 233, 91 N. W. 56.

56. *Alabama.*—Buckley *v.* Cunningham, 103 Ala. 449, 15 So. 826, 49 Am. St. Rep. 42.

California.— Brewster *v.* De Fremery, 33 Cal. 341.

Indiana.— See Purcell *v.* English, 86 Ind. 34, 44 Am. Rep. 255.

Michigan.— Cooper *v.* Lawson, 139 Mich. 628, 103 N. W. 168.

Minnesota.—Rosenfield *v.* Newman, 59 Minn. 156, 60 N. W. 1085; Krueger *v.* Ferrant, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223.

Mississippi.— Jones *v.* Millsaps, 71 Miss. 10, 14 So. 440, 23 L. R. A. 155.

Missouri.— Ward *v.* Fagin, 101 Mo. 669, 14 S. W. 738, 20 Am. St. Rep. 650, 10 L. R. A. 147.

Wisconsin.— Cole *v.* McKey, 66 Wis. 500, 29 N. W. 279, 57 Am. Rep. 293.

England.— Chauntler *v.* Robinson, 4 Exch. 163, 19 L. J. Exch. 170; Pomfret *v.* Ricroft, 1 Saund. 321, note by Sergeant Williams.

57. Brown *v.* Wittner, 43 N. Y. App. Div. 135, 59 N. Y. Suppl. 385; Gillick *v.* Jackson, 40 Misc. (N. Y.) 627, 83 N. Y. Suppl. 29, holding that Laws (1895), p. 1111, c. 567, § 9, providing for lights in hallways in tenement houses, unless the hallways are otherwise sufficiently lighted, remained in force, until glass panels were substituted, under Laws (1901), c. 334, for the wooden panels in the doors at the end of public halls and openings into rooms; and where a tenant was injured prior to the time such law took effect, by falling over a board in an unlighted hallway in a tenement house, where it was so dark he could not see his way, the landlord was liable for the injuries received.

58. Halpin *v.* Townsend, 107 N. Y. 683, 14 N. E. 611 [*affirming* 2 N. Y. City Ct. 417]; Brugher *v.* Buchtenkirch, 29 N. Y. App. Div. 342, 51 N. Y. Suppl. 464 (holding, however, that the rule is otherwise where the construction of the halls and stairways is so unusual or peculiar as to render artificial light essential for reasonable safety); Brancato *v.* Kors, 36 Misc. (N. Y.) 776, 74 N. Y. Suppl. 891; Muller *v.* Minken, 5 Misc. (N. Y.) 444, 26 N. Y. Suppl. 801; Jucht *v.* Behrens, 7 N. Y. Suppl. 195; Hildebrand *v.* Schenck, 2 N. Y. City Ct. 249. See also Gorman *v.* White, 19 N. Y. App. Div. 324, 46 N. Y. Suppl. 1 (holding that it is not negligence under all circumstances for a landlord to fail to keep the halls and stairways of his tenement house lighted, and the presence of a stick of wood on the stairway is not such a probable danger as to call upon the landlord to protect his tenant against it by lighting the gas). See, however, O'Sullivan *v.* Norwood, 14 Daly (N. Y.) 286, 8 N. Y. St. 388.

59. *Georgia.*— Roach *v.* Trottie, 50 Ga. 251; Dempsey *v.* Hertzfield, 30 Ga. 866.

to make them gratuitously.[60] In some jurisdictions, where the landlord employs an independent contractor to make repairs, it is held that he is not liable for injuries resulting from the negligence of such contractor in making the repairs, where no negligence is shown by reason of the employment of the particular contractor.[61] In other jurisdictions, however, it is held that the landlord in making repairs and improvements to demised premises owes a duty of reasonable care to the occupying tenants, which he cannot escape by placing the work with an independent contractor, especially if the work to be done is attended with danger to the tenant.[62]

Illinois.— Glickauf *v.* Maurer, 75 Ill. 289, 20 Am. Rep. 238; Mitchell *v.* Plaut, 31 Ill. App. 148.

Indiana.— Barman *v.* Spencer, (1898) 49 N. E. 9; Aldag *v.* Ott, 28 Ind. App. 542, 63 N. E. 480.

Louisiana.— Smith *v.* Female Orphan Asylum, 1 La. 547.

Maryland.— Evans *v.* Murphy, 87 Md. 498, 40 Atl. 109.

Massachusetts.— See Galvin *v.* Beals, 187 Mass. 250, 72 N. E. 969; Robbins *v.* Atkins, 168 Mass. 45, 46 N. E. 425.

New York.— Willard *v.* Bunting, 34 N. Y. 153; Blumenthal *v.* Prescott, 70 N. Y. App. Div. 560, 75 N. Y. Suppl. 710; O'Dwyer *v.* O'Brien, 13 N. Y. App. Div. 570, 43 N. Y. Suppl. 815; Hine *v.* Cushing, 53 Hun 519, 6 N. Y. Suppl. 850; Judd *v.* Cushing, 50 Hun 181, 2 N. Y. Suppl. 836, 22 Abb. N. Cas. 358; Randolph *v.* Feist, 23 Misc. 650, 52 N. Y. Suppl. 109; Butler *v.* Cushing, 2 N. Y. Suppl. 39 [*affirming* 46 Hun 521]. See Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577, 81 N. Y. Suppl. 400, holding that a landlord who is not shown to have actual knowledge of the piling of iron work in a public hallway by the servants of a subcontractor is not chargeable with negligence in permitting the material to remain there, where it appeared that the injury to the tenant which was complained of was caused thereby only a few hours after the deposit.

Tennessee.— Willcox *v.* Hines, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770, 41 L. R. A. 278.

England.— Burt *v.* Victoria Graving Dock Co., 47 L. T. Rep. N. S. 378; Leslie *v.* Pounds, 4 Taunt. 649.

Canada.— Engley *v.* McIlreith, 3 Nova Scotia Dec. 511; Cagne *v.* Vallee, 13 Quebec Super. Ct. 112.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 632.

Covenants by landlord to repair see *supra*, VII, D, 1, a, (III).

60. *California.*— Callahan *v.* Loughran, 102 Cal. 476, 36 Pac. 835.

Illinois.— Glickauf *v.* Maurer, 75 Ill. 289, 20 Am. Rep. 238.

Kansas.— Mann *v.* Fuller, 63 Kan. 664, 66 Pac. 627.

Maine.— Gregor *v.* Cady, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466.

Massachusetts.— Martin *v.* Richards, 155 Mass. 381, 29 N. E. 591; Watkins *v.* Goodall, 138 Mass. 533; Gill *v.* Middleton, 105 Mass. 477, 7 Am. Rep. 548.

Missouri.—Little *v.* McAdaras, 38 Mo. App. 187.

New York.— Blumenthal *v.* Prescott, 70 N. Y. App. Div. 560, 75 N. Y. Suppl. 710; Wynne *v.* Haight, 27 N. Y. App. Div. 7, 50 N. Y. Suppl. 187 (holding that where a landlord who is under no obligation to make any repairs undertakes to and does make partial repairs, he is not thereby rendered liable for injuries resulting from the fact that the repairs were not complete, but only for active and direct negligence in doing what he undertook, if negligence is the real cause of the injury); Benson *v.* Suarez, 43 Barb. 408; Blake *v.* Fox, 17 N. Y. Suppl. 508.

Texas.— Lynch *v.* Ortlieb, (Civ. App. 1894) 28 S. W. 1017.

Wisconsin.— Wertheimer *v.* Saunders, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146.

England.— Leslie *v.* Pounds, 4 Taunt. 649.

61. *Connecticut.*—Lawrence *v.* Shipman, 39 Conn. 586.

Florida.— Mumby *v.* Bowden, 25 Fla. 454, 6 So. 453, holding, however, that where it appears that the landlord and not the contractor had the control and direction of the work the former is liable.

Illinois.— Jefferson *v.* Jameson, etc., Co., 165 Ill. 138, 46 N. E. 272 [*reversing* 60 Ill. App. 587].

Kentucky.— Eblin *v.* Miller, 78 Ky. 371.

New York.— Morton *v.* Thurber, 85 N. Y. 550; Rotter *v.* Goerlitz, 16 Daly 484, 12 N. Y. Suppl. 210; Turner *v.* McCarthy, 4 E. D. Smith 247; Roulston *v.* Clark, 3 E. D. Smith 366; Fitzgerald *v.* Timoney, 13 Misc. 327, 34 N. Y. Suppl. 460; O'Conner *v.* Schnepel, 12 Misc. 356, 33 N. Y. Suppl. 562; Mahon *v.* Burns, 9 Misc. 223, 29 N. Y. Suppl. 682; Sterger *v.* Van Siclen, 7 N. Y. Suppl. 805. See, however, O'Rourke *v.* Feist, 42 N. Y. App. Div. 136, 59 N. Y. Suppl. 157 [*affirming* 24 Misc. 762, 53 N. Y. Suppl. 1110]; Worthington *v.* Parker, 11 Daly 545; Sulzbacher *v.* Dickie, 6 Daly 469; Blake *v.* Fox, 17 N. Y. Suppl. 508.

Pennsylvania.— Meany *v.* Abbott, 6 Phila. 256.

Texas.— See Lasher Real-Estate Assoc. *v.* Hatcher, (Civ. App. 1894) 28 S. W. 404.

England.— Blake *v.* Woolf, [1898] 2 Q. B. 426, 62 J. P. 569, 67 L. J. Q. B. 813, 79 L. T. Rep. N. S. 188, 47 Wkly. Rep. 8. See also Mills *v.* Holton, 2 H. & N. 14.

Liability for acts of independent contractors in general see NEGLIGENCE.

62. Nahm *v.* Register Newspaper Co., 87 S. W. 296, 27 Ky. L. Rep. 887; Curtis *v.*

d. Accumulation of Ice or Snow on Walks or Steps. According to the weight of authority, there is no duty on the part of a landlord to a tenant to remove from the roof, steps, or walk the ice which naturally accumulates thereon, and he is not liable for injuries caused thereby.[63]

e. Failure to Provide Fire-Escape. In some jurisdictions the landlord is by statute required to provide suitable fire-escapes to certain designated classes of buildings, and is liable for injuries resulting from his failure to provide such fire-escapes, or to have them in proper condition for use by the occupants of the building.[64]

Kiley, 153 Mass. 123, 26 N. E. 421; Peerless Mfg. Co. *v.* Bagley, 126 Mich. 225, 85 N. W. 568, 86 Am. St. Rep. 537, 53 L. R. A. 285; Dorse *v.* Fisher, 10 Ohio Dec. (Reprint) 163, 19 Cinc. L. Bul. 106 (holding that a landlord, charged with the duty of keeping in repair and free from danger a common passageway for a number of his tenants, cannot escape liability for an injury caused by the dangerous condition thereof, on the ground that its condition was produced by the negligence of an independent contractor to whom he had given the contract to make improvements on or near it); Wilber *v.* Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; Wertheimer *v.* Saunders, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146.

63. *Georgia.*— Gardner *v.* Rhodes, 114 Ga. 929, 41 S. E. 63, 57 L. R. A. 749, 88 Am. St. Rep. 749.

Indiana.— Purcell *v.* English, 86 Ind. 34, 44 Am. Rep. 255.

Maine.— Lee *v.* McLaughlin, 86 Me. 410, 30 Atl. 65, 26 L. R. A. 197.

Massachusetts.— Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; Watkins *v.* Goodall, 138 Mass. 533; Woods *v.* Naumkeag Steam Cotton Co., 134 Mass. 357, 45 Am. Rep. 344; Leonard *v.* Storer, 115 Mass. 86, 15 Am. Rep. 76. See, however, Shipley *v.* Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346; Kirby *v.* Boylston Market Assoc., 14 Gray 249, 74 Am. Dec. 682.

New York.— Rochester *v.* Campbell, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; Moore *v.* Gadsden, 93 N. Y. 12; Wenzlick *v.* McCotter, 87 N. Y. 122, 41 Am. Rep. 358; Fuchs *v.* Schmidt, 8 Daly 317; Harkin *v.* Crumbie, 20 Misc. 568, 46 N. Y. Suppl. 453; Little *v.* Wirth, 6 Misc. 301, 26 N. Y. Suppl. 1110.

Ohio.— Shindelbeck *v.* Moon, 32 Ohio St. 264, 30 Am. Rep. 584.

Wisconsin.— Atwill *v.* Blatz, 118 Wis. 226, 95 N. W. 99.

United States.— Lumley *v.* Bachus Mfg. Co., 73 Fed. 767, 20 C. C. A. 1.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 634.

In Canada, the proprietor of a building is responsible for an injury to a person on the street by the fall of snow and ice from its roof, although it is rented, and the laws of the municipality impose on tenants the duty of keeping the roof free from snow, where there is another provision that the roof of any building erected on or in close proximity to the line of any street shall be so constructed as to prevent the fall of snow and ice therefrom into the street. Jackson *v.* Vanier, 18 Quebec Super. Ct. 244. See also Organ *v.* Toronto, 24 Ont. 318.

64. McAlpin *v.* Powell, 70 N. Y. 126, 26 Am. Rep. 555 [*reversing* 1 Abb. N. Cas. 427 (holding, however, that the landlord owes no duty to the tenant to keep in repair the platform on the fire-escape so that it may be used as a balcony, and is not therefore liable for injury to a tenant's child, who goes upon the fire-escape, without the landlord's permission, and is injured in consequence of its being out of repair); McLaughlin *v.* Armfield, 58 Hun (N. Y.) 376, 12 N. Y. Suppl. 164; Willy *v.* Mulledy, 6 Abb. N. Cas. (N. Y.) 97; Rose *v.* King, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 160; Lee *v.* Smith, 42 Ohio St. 458, 51 Am. Rep. 839 [*affirming* 9 Ohio Dec. (Reprint) 99, 10 Cinc. L. Bul. 449, 9 Ohio Dec. (Reprint) 184, 11 Cinc. L. Bul. 166] (holding, however, that the owner in fee of a lot and building thereon, which he does not in any way himself use or occupy, but which is let to a firm, which keeps and uses the same as a factory or workshop, is not the owner of the factory within the meaning of the Ohio statute [Act, April 19, 1883] making it the duty "of any owner or agent for an owner of any factory" to provide a convenient exit from the different upper stories of such building, so as to subject him to liability for causing the death of another from the neglect of such duty). See also Schmalzried *v.* White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782, holding that at common law a landlord is not obliged to furnish fire-escapes.

Me. Rev. St. c. 26, § 26, as amended by Pub. Laws (1891), c. 89, provides that every building in which any trade or business is carried on, as well as certain other buildings, shall be provided with sufficient fire-escapes from every story above the level of the ground. And this statute has been held to impose on the owner of the building, notwithstanding it was in the possession of a tenant, the duty of providing such fire-escapes. Carrigan *v.* Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163.

In Pennsylvania the statute (Act, June 11, 1878) requires that certain factories, etc., shall be provided with fire-escapes by the "owners," and it is held that a tenant under the lease, and not the landlord, is the owner within the meaning of the act. Keely *v.* O'Connor, 106 Pa. St. 321; Schott *v.* Harvey, 105 Pa. St. 222, 51 Am. Rep. 201.

f. Injury to Subtenant, Guest, or Servant. The general rule is that a subtenant,[65] guest, or servant of the tenant is regarded as so far identified with the tenant that his right to recover against the landlord is the same as the tenant's right would be had the accident happened to him;[66] but he can have no greater claim against the landlord than the tenant himself would have under like circumstances.[67] In some jurisdictions the rule is laid down that an action by a sublessee or servant of the lessee against the lessor for damages for injuries caused the

65. *Maryland.*—Smith *v.* State, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772.

Massachusetts.— McLean *v.* Fiske Wharf, etc., Co., 158 Mass. 472, 33 N. E. 499.

Michigan.— Donaldson *v.* Wilson, 60 Mich. 86, 26 N. W. 842, 1 Am. St. Rep. 487, holding that the owner of a building is not liable to a subtenant for injury to his goods caused by a falling wall, where the subtenancy is without the knowledge, notice, or assent of the landlord, and in violation of a covenant not to sublet.

Missouri.— Peterson *v.* Smart, 70 Mo. 34.

New York.— Dood *v.* Rothschild, 31 Misc. 721, 65 N. Y. Suppl. 214; Jaffe *v.* Harteau, 14 Abb. Pr. N. S. 263.

Ohio.— Burns *v.* Luckett, 7 Ohio Dec. (Reprint) 483, 3 Cinc. L. Bul. 517.

66. *California.*— Davis *v.* Pacific Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156.

Illinois.— Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598 [*affirming* 30 Ill. App. 91]; Schwandt *v.* Metzger Linseed Oil Co., 93 Ill. App. 365; Springer *v.* Ford, 88 Ill. App. 529; Reichenbacher *v.* Pahmeyer, 8 Ill. App. 217.

Iowa.— See Burner *v.* Higman, etc., Co., 127 Iowa 580, 103 N. W. 802.

Kansas.— Copley *v.* Balle, 9 Kan. App. 465, 60 Pac. 656.

Louisiana.— Leithman *v.* Vaught, 115 La. 249, 38 So. 982.

Massachusetts.— Wilcox *v.* Zane, 167 Mass. 302, 45 N. E. 923; Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; Curtis *v.* Kiley, 153 Mass. 123, 26 N. E. 421; Stewart *v.* Harvard College, 12 Allen 58.

Minnesota.— Widing *v.* Penn Mut. L. Ins. Co., 95 Minn. 279, 104 N. W. 239.

New York.— Henkel *v.* Murr, 31 Hun 28; O'Sullivan *v.* Norwood, 14 Daly 286, 8 N. Y. St. 388; Markin *v.* Crumbie, 14 Misc. 439, 35 N. Y. Suppl. 1027; Wagner *v.* Welling, 84 N. Y. Suppl. 979; Montieth *v.* Finkbeiner, 21 N. Y. Suppl. 288.

Ohio.— Defiance Water Co. *v.* Olinger, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736; Burns *v.* Solomon, 4 Ohio S. & C. Pl. Dec. 232, 3 Ohio N. P. 222.

Pennsylvania.— Godley *v.* Hagerty, 20 Pa. St. 387, 59 Am. Dec. 731.

Wisconsin.— Anderson *v.* Hayes, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930.

United States.— Moore *v.* Steljes, 69 Fed. 518; Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 11 C. C. A. 521.

Injuries to third persons see *infra*, VII, E, 2.

67. *California.*— Willson *v.* Treadwell, 81 Cal. 58, 22 Pac. 304.

Georgia.— Ocean Steamship Co. *v.* Hamilton, 112 Ga. 901, 38 S. E. 204; Crusselle *v.* Pugh, 67 Ga. 430, 44 Am. Rep. 724.

Indiana.— Barman *v.* Spencer, (1898) 49 N. E. 9; Deller *v.* Hofferberth, 127 Ind. 414, 26 N. E. 889.

Iowa.— Flaherty *v.* Nieman, 125 Iowa 546, 101 N. W. 280; Holton *v.* Waller, 95 Iowa 545, 64 N. W. 633.

Kentucky.— King *v.* Creekmore, 117 Ky. 172, 77 S. W. 689, 25 Ky. L. Rep. 1292; Lovitt *v.* Creekmore, 80 S. W. 1184, 26 Ky. L. Rep. 234.

Louisiana.— McConnor *v.* Lemley, 48 La. Ann. 1433, 20 So. 887, 55 Am. St. Rep. 319, 34 L. R. A. 609.

Maine.— Whitmore *v.* Orono Pulp, etc., Co., 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377; McKenzie *v.* Cheetham, 83 Me. 543, 22 Atl. 469.

Massachusetts.— Phelan *v.* Fitzpatrick, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469; Cummings *v.* Ayer, 188 Mass. 292, 74 N. E. 336; Dalin *v.* Worcester Consol. St. R. Co., 188 Mass. 344, 74 N. E. 597; Jordan *v.* Sullivan, 181 Mass. 348, 63 N. E. 909; Roche *v.* Sawyer, 176 Mass. 71, 57 N. E. 216; Freeman *v.* Hunnewell, 163 Mass. 210, 39 N. E. 1012.

Missouri.— Eyre *v.* Jordan, 111 Mo. 424, 19 S. W. 1095, 33 Am. St. Rep. 543.

New Jersey.— Clyne *v.* Helmes, 61 N. J. L. 358, 39 Atl. 767.

New York.— Hilsenbeck *v.* Guhring, 131 N. Y. 674, 30 N. E. 580 [*reversing* 15 N. Y. Suppl. 162]; Ryan *v.* Wilson, 87 N. Y. 471, 41 Am. Rep. 384, 63 How. Pr. 172 [*affirming* 45 N. Y. Super. Ct. 273]; Leaux *v.* New York, 87 N. Y. App. Div. 398, 84 N. Y. Suppl. 514; Speckman *v.* Boehm, 36 N. Y. App. Div. 262, 56 N. Y. Suppl. 758; Edwards *v.* New York, etc., R. Co., 25 Hun 634; O'Brien *v.* Capwell, 59 Barb. 497; Kaiser *v.* Hirth, 36 N. Y. Super. Ct. 344, 46 How. Pr. 161; Mulcahy *v.* New York Floating Dry Dock Co., 8 Daly 93; Roulston *v.* Clark, 3 E. D. Smith 366; Heath *v.* Metropolitan Exhibition Co., 11 N. Y. Suppl. 357.

Pennsylvania.— Moore *v.* Logan Iron, etc., Co., 3 Pa. Cas. 143, 7 Atl. 198.

Rhode Island.— Henson *v.* Beckwith, 20 R. I. 165, 37 Atl. 702, 73 Am. St. Rep. 847, 38 L. R. A. 716.

Texas.— Perez *v.* Rabaud, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620; Oriental Inv. Co. *v.* Sline, (Civ. App. 1897) 41 S. W. 130. See Marshall *v.* Heard, 59 Tex. 266.

Washington.— Glass *v.* Coleman, 14 Wash. 635, 45 Pac. 310; Johnson *v.* Tacoma Cedar Lumber Co., 3 Wash. 722, 29 Pac. 451.

former by reason of the defective condition of the premises cannot be maintained if based upon a contract of the lessor with the lessee to keep the premises in repair.[68] In other jurisdictions, however, it is held that where the landlord has by an express agreement between the tenant and himself agreed to keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then to avoid circuity of action the party injured by the defect and want of repair may have his action in the first instance against the landlord; but such express agreement must be distinctly proved.[69]

g. Liability as Dependent on Knowledge or Notice of Defect. Where it is the landlord's duty to make repairs, whether such duty arises out of contract, or is implied by law, in order to put him in default it is necessary to show actual notice of such defect, or to show that it had existed for such a length of time prior to the injury complained of as to charge him with constructive notice.[70] In

Wisconsin.— Fellows *v.* Gilhuber, 82 Wis. 639, 52 N. W. 307, 17 L. R. A. 577.

United States.— Dyer *v.* Robinson, 110 Fed. 99.

England.— Robbins *v.* Jones, 15 C. B. N. S. 221, 10 Jur. N. S. 239, 33 L. J. C. P. 1, 9 L. T. Rep. N. S. 523, 12 Wkly. Rep. 248, 109 E. C. L. 221.

Canada.— Mehr *v.* McNab, 24 Ont. 653.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 639.

68. *Michigan.*— Brady *v.* Klein, 133 Mich. 422, 95 N. W. 557, 103 Am. St. Rep. 455, 62 L. R. A. 909.

Missouri.— Quay *v.* Lucas, 25 Mo. App. 4.

New York.— Stelz *v.* Van Dusen, 93 N. Y. App. Div. 358, 87 N. Y. Suppl. 716.

Ohio.— Burdick *v.* Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767.

England.— Robbins *v.* Jones, 15 C. B. N. S. 221, 10 Jur. N. S. 239, 33 L. J. C. P. 1, 9 L. T. Rep. N. S. 523, 12 Wkly. Rep. 248, 109 E. C. L. 221.

Canada.— Marshall *v.* Toronto Industrial Exhibition Assoc., 1 Ont. L. Rep. 319.

69. Gridley *v.* Bloomington, 68 Ill. 47; Schwandt *v.* Metzger Linseed Oil Co., 93 Ill. App. 365.

70. *California.*— Gately *v.* Campbell, 124 Cal. 520, 57 Pac. 567; Angevine *v.* Knox-Goodrich, (1892) 31 Pac. 529, 18 L. R. A. 264; Sieber *v.* Blanc, 76 Cal. 173, 18 Pac. 260.

Colorado.— Thum *v.* Rhodes, 12 Colo. App. 245, 55 Pac. 264.

Georgia.— Savannah Ocean Steamship Co. *v.* Hamilton, 112 Ga. 901, 38 S. E. 204; Guthman *v.* Castleberry, 49 Ga. 272, where, however, the landlord was held to have constructive notice of the defective condition of the premises.

Illinois.— Greene *v.* Hague, 10 Ill. App. 598.

Maine.— Shackford *v.* Coffin, 95 Me. 69, 49 Atl. 57.

Maryland.— Thompson *v.* Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; State *v.* Boyce, 73 Md. 469, 21 Atl. 322.

Massachusetts.— Galvin *v.* Beals, 187 Mass. 250, 72 N. E. 969; Lynch *v.* Swan, 167 Mass. 510, 46 N. E. 51; Booth *v.* Merriam, 155 Mass. 521, 30 N. E. 85; Martin *v.* Richards, 155 Mass. 381, 29 N. E. 591; Bowe *v.* Hunking, 135 Mass. 380, 46 Am. Rep. 471.

Missouri.— Whiteley *v.* McLaughlin, 183 Mo. 160, 81 S. W. 1094, 16 L. R. A. 484; Udden *v.* O'Reilly, 180 Mo. 650, 79 S. W. 691.

New Jersey.— Vorrath *v.* Burke, 63 N. J. L. 188, 42 Atl. 838.

New York.— Idel *v.* Mitchell, 158 N. Y. 134, 52 N. E. 740 [*reversing* 5 N. Y. App. Div. 268, 39 N. Y. Suppl. 1]; Dollard *v.* Roberts, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238 [*affirming* 5 Silv. Sup. 435, 8 N. Y. Suppl. 432]; Boden *v.* Scholtz, 101 N. Y. App. Div. 1, 91 N. Y. Suppl. 437; Smith *v.* Donnelly, 93 N. Y. App. Div. 569, 87 N. Y. Suppl. 893; Wesener *v.* Smith, 89 N. Y. App. Div. 211, 85 N. Y. Suppl. 837 (where the landlord was held to have had constructive notice of the defect); Rouillon *v.* Wilson, 29 N. Y. App. Div. 307, 51 N. Y. Suppl. 430 (holding, however, that notice to an owner of an apartment house that a part of an appliance or appurtenance furnished for general use by the tenants, such as a slat platform on the roof, is insecure and unsafe from a cause which would naturally operate to impair the whole of it, puts him upon inquiry as to the condition of all the appurtenances); Alperin *v.* Earle, 55 Hun 211, 8 N. Y. Suppl. 51; Spellman *v.* Bannigan, 36 Hun 174; Joshua *v.* Breithaupt, 90 N. Y. Suppl. 1053; Sternberg *v.* Burke, 84 N. Y. Suppl. 862; Evers *v.* Weil, 17 N. Y. Suppl. 29 [*affirmed* in 135 N. Y. 649, 32 N. E. 647]. See also Victory *v.* Foran, 56 N. Y. Super. Ct. 507, 4 N. Y. Suppl. 392; Wessel *v.* Gerken, 36 Misc. 221, 73 N. Y. Suppl. 192 (in which it was shown that the landlord had actual notice of the defect); Kennedy *v.* Fay, 31 Misc. 776, 65 N. Y. Suppl. 202; Flood *v.* Huff, 29 Misc. 351, 60 N. Y. Suppl. 517; Feinstein *v.* Jacobs, 15 Misc. 474, 37 N. Y. Suppl. 345; Brennan *v.* Lachat, 5 N. Y. St. 882; Spatz *v.* Scheiner, 1 N. Y. City Ct. Suppl. 78.

Ohio.— Sinton *v.* Butler, 40 Ohio St. 158.

Tennessee.— See Hines Willcox, 96 Tenn. 328, 34 S. W. 420, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832; Stenberg *v.* Willcox, 96 Tenn. 163, 33 S. W. 917, 34 L. R. A. 615, 96 Tenn. 328, 34 S. W. 420.

England.— Tredway *v.* Machin, 91 L. T. Rep. N. S. 310, 20 T. L. R. 726, 53 Wkly.

some cases it has been held that a landlord failing to exercise due care in keeping the demised premises safe, where it is his duty to do so, is liable to a tenant injured by reason of a defect in the premises, although the landlord had no actual knowledge of the defect.[71]

h. Contributory Negligence of Injured Party — (i) *In General.* A landlord is not liable for injuries sustained by a tenant or occupant of the leased premises for failure to make necessary repairs where such injury is due to contributory negligence on the part of such tenant or occupant.[72] Thus, if a tenant by ordinary care could have avoided the consequences to himself caused by the landlord's negligence, he is not entitled to recover.[73]

(ii) *Knowledge of Defective Condition of Premises.* The general rule is that where a tenant has knowledge of the defective condition of the premises, and continues thereafter to use or occupy the same, he is presumed to assume the risk, and in case of injury resulting from such defects he is held to be guilty of contributory negligence, and hence cannot recover therefor.[74] However, mere

Rep. 136. See, however, Troude *v.* Meldrum, 21 Quebec Super. Ct. 75, holding that a landlord is liable for injury to the tenant's wife by the giving way of a defective railing around the roof of a shed which the tenants were entitled to use, although the landlord was not notified of the defective condition of such railing, as it is the landlord's duty to inspect his property from time to time to ascertain if repairs are necessary.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 641.

71. Leydecker *v.* Brintnall, 158 Mass. 292, 33 N. E. 399; Lindsey *v.* Leighton, 150 Mass. 285, 22 N. E. 901, 15 Am. St. Rep. 199; Wilber *v.* Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; Wertheimer *v.* Saunders, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146.

72. *District of Columbia.*— Dashiell *v.* Washington Market Co., 10 App. Cas. 81.

Georgia.— Miller *v.* Smythe, 95 Ga. 288, 22 S. E. 532.

Illinois.— McGinnis *v.* Berven, 16 Ill. App. 354.

Massachusetts.— McCarthy *v.* Foster, 156 Mass. 511, 31 N. E. 385.

New York.— Lissa *v.* Goodkind, 57 N. Y. Super. Ct. 60, 5 N. Y. Suppl. 835; Walker *v.* Globe Mfg., etc., Co., 56 N. Y. Super. Ct. 431, 4 N. Y. Suppl. 193; Moore *v.* Goedel, 7 Bosw. 591 [*affirmed* in 34 N. Y. 527].

See 32 Cent. Dig. tit. "Landlord and Tenant," § 642.

Compare Gallagher *v.* Button, 73 Conn. 172, 46 Atl. 819; Rosenfield *v.* Arrol, 44 Minn. 395, 46 N. W. 768, 20 Am. St. Rep. 584, where the evidence was held not to show contributory negligence on the part of the tenant.

Defects caused by acts of other tenants.— The rule that the obligation of ordinary care on the part of a landlord does not extend to danger created by the tenants themselves does not apply to obstructions created by the acts of tenants other than the person injured, when the landlord has undertaken to provide safe access to a particular portion of the building. Wesener *v.* Smith, 89 N. Y. App. Div. 211, 85 N. Y. Suppl. 837.

73. *Georgia.*— Miller *v.* Smythe, 95 Ga. 288, 22 S. E. 532.

Illinois.— Taylor *v.* Bailey, 74 Ill. 173, holding that where water-pipes furnished by a landlord are properly constructed and sufficient, a tenant who has access to a crank by which the water may be turned off cannot sue the landlord for damages caused by the freezing of the pipes.

New Jersey.—Gleason *v.* Boehm, 58 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645.

New York.— Hilsenbeck *v.* Guhring, 131 N. Y. 674, 30 N. E. 580 [*reversing* 15 N. Y. Suppl. 162]; O'Connor *v.* Gouraud, 14 Daly 64, 3 N. Y. St. 555 [*affirming* 2 N. Y. City Ct. 278].

Wisconsin.— McGinn *v.* French, 107 Wis. 54, 82 N. W. 724.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 642.

74. *California.*— Daley *v.* Quick, 99 Cal. 179, 33 Pac. 859.

Colorado.— Davidson *v.* Fischer, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 267.

Georgia.— Gavan *v.* Norcross, 117 Ga. 356, 43 N. E. 771.

Maine.— Shackford *v.* Coffin, 95 Me. 69, 49 Atl. 57.

Massachusetts.— Quinn *v.* Perham, 151 Mass. 162, 23 N. E. 735.

Michigan.— Town *v.* Armstrong, 75 Mich. 580, 42 N. W. 983.

New Jersey.—Mullen *v.* Rainear, 45 N. J. L. 520; Vorrath *v.* Burke, 63 N. J. L. 188, 42 Atl. 838.

New York.— Brown *v.* Wittner, 43 N. Y. App. Div. 135, 59 N. Y. Suppl. 385; Reiner *v.* Jones, 38 N. Y. App. Div. 441, 56 N. Y. Suppl. 423; Van Tassel *v.* Read, 36 N. Y. App. Div. 529, 55 N. Y. Suppl. 502; Klausner *v.* Herter, 36 Misc. 869, 74 N. Y. Suppl. 924; Anderson *v.* Steinreich, 32 Misc. 237, 66 N. Y. Suppl. 498 [*reversing* 32 Misc. 680, 65 N. Y. Suppl. 799]; Schwartz *v.* Apple, 21 Misc. 513, 48 N. Y. Suppl. 253; Mahon *v.* Burns, 13 Misc. 19, 34 N. Y. Suppl. 91 [*confirming* 9 Misc. 223, 29 N. Y. Suppl. 682]; Kampinsky *v.* Hallo, 3 Misc. 623, 23 N. Y. Suppl. 114; Margolius *v.* Muldberg, 88 N. Y. Suppl. 1048; Loring *v.* Clark, 2 N. Y. City

knowledge of the defective condition of the premises is not conclusive evidence of contributory negligence as a matter of law.[75]

i. Injuries Due to Negligence of Cotenant — (i) *In General.* A landlord is not liable for injuries to a tenant resulting from the negligence or misfeasance of a cotenant, where he is guilty of no negligence or omission of duty.[76] However, if injury results to a tenant from the negligence of the landlord, either in constructing the building or in maintaining repairs on the premises, where it is his duty to do so, he is liable, and cannot divest himself of such liability by letting the portion of the premises upon which the nuisance or other cause of injury exists.[77]

(ii) *Liability of Cotenant.* As between different tenants under a common landlord, the question of liability for injuries from the condition of the premises is always one of negligence in the use of the premises; and this negligence may consist in the careless use of a well constructed apparatus, or the use of apparatus which the tenant had reason to know was unfit for use;[78] and it is

Ct. 252 note; Hildebrand *v.* Schenck, 2 N. Y. City Ct. 249.

Ohio.— Jones *v.* Roberts, 32 Cinc. L. Bul. 118.

Pennsylvania.— Hahn *v.* Roach, 7 North. Co. Rep. 21; Wien *v.* Simpson, 2 Phila. 158.

Rhode Island.— Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 67 L. R. A. 478.

Wisconsin.— McGinn *v.* French, 107 Wis. 54, 82 N. W. 724.

Canada.— Beauchamp *v.* Brewster, 16 Quebec Super. Ct. 268.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 643.

75. Stillwell *v.* South Louisville Land Co., 58 S. W. 696, 22 Ky. L. Rep. 785, 52 L. R. A. 325; Looney *v.* McLean, 129 Mass. 33, 37 Am. Rep. 295 (holding that the fact that tenant uses a defective stairway, knowing that it is in a dangerous condition, is not conclusive evidence that he is not in the exercise of due care); Mason *v.* Howes, 122 Mich. 329, 81 N. W. 111; Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Keating *v.* Mott, 92 N. Y. App. Div. 156, 86 N. Y. Suppl. 1041; Blumenthal *v.* Prescott, 70 N. Y. App. Div. 560, 75 N. Y. Suppl. 710; Karlson *v.* Healy, 38 N. Y. App. Div. 486, 56 N. Y. Suppl. 361; Reiner *v.* Jones, 38 N. Y. App. Div. 441, 56 N. Y. Suppl. 423; Speckman *v.* Boehm, 36 N. Y. App. Div. 262, 56 N. Y. Suppl. 758. See also Quigley *v.* H. W. Johns Mfg. Co., 26 N. Y. App. Div. 434, 50 N. Y. Suppl. 98, holding that a tenant is not necessarily guilty of contributory negligence in not appreciating a danger for a neglect to ascertain which the owner would be guilty of negligence.

76. *Colorado.*— Lewis *v.* Hughes, 12 Colo. 208, 20 Pac. 621.

Georgia.— Freidenburg *v.* Jones, 63 Ga. 612; White *v.* Montgomery, 58 Ga. 204.

Illinois.— Greene *v.* Hague, 10 Ill. App. 598, holding that a landlord who has not expressly covenanted to repair is not liable to his tenant for damages caused by water negligently allowed to run by another tenant of the story above.

Maine.— McCarthy *v.* York County Sav. Bank, 74 Me. 315, 43 Am. Rep. 591.

Michigan.— Kenny *v.* Barns, 67 Mich. 336, 34 N. W. 587.

New York.— Leonard *v.* Gunther, 47 N. Y. App. Div. 194, 62 N. Y. Suppl. 99; Spencer *v.* McManus, 82 Hun 318, 31 N. Y. Suppl. 185 (holding that the landlord is not liable for the acts of his tenants, at least in the absence of notice); Becker *v.* Bullowa, 36 Misc. 524, 73 N. Y. Suppl. 944.

Canada.— Beaulieu *v.* Beaudry, 16 Quebec Super. Ct. 475.

77. Ingwersen *v.* Rankin, 47 N. J. L. 18, 54 Am. Rep. 109; Levin *v.* Habicht, 45 Misc. (N. Y.) 381, 90 N. Y. Suppl. 349; Eakin *v.* Brown, 1 E. D. Smith (N. Y.) 36; Brunswick-Balke-Collender Co. *v.* Rees, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748. See also Dunn *v.* Robins, 20 N. Y. Suppl. 341.

78. *Louisiana.*— Martin *v.* Washburn, 23 La. Ann. 427, holding that the obligation of a lessee to a lessor to keep in repair the premises leased does not authorize one cotenant to sue another for damages occasioned by defects inherent in a cistern on the leased premises.

Maine.— Simonton *v.* Loring, 68 Me. 164, 28 Am. Rep. 29.

Minnesota.— Rosenfield *v.* Arrol, 44 Minn. 395, 46 N. W. 768, 20 Am. St. Rep. 584.

New York.— Quigley *v.* H. W. Johns Mfg. Co., 26 N. Y. App. Div. 434, 50 N. Y. Suppl. 98; Brown *v.* Elliott, 4 Daly 329; Eakin *v.* Brown, 1 E. D. Smith 36; Olin P. Ely Co. *v.* Rhoads, 30 Misc. 111, 61 N. Y. Suppl. 817; Simon-Reigel Cigar Co. *v.* Gordon-Burnham Battery Co., 20 Misc. 598, 46 N. Y. Suppl. 416; Steinweg *v.* Biel, 16 Misc. 47, 37 N. Y. Suppl. 678; Slater *v.* Adler, 8 Misc. 310, 28 N. Y. Suppl. 729; Curran *v.* Weiss, 6 Misc. 138, 26 N. Y. Suppl. 8; Rantenberg *v.* Barsotti, 3 N. Y. St. 271; Rudolphy *v.* Fuchs, 44 How. Pr. 155; Clarke *v.* Anderson, 2 N. Y. City Ct. 115. See also Peiser *v.* Schanning, 14 Daly 399, 13 N. Y. St. 63.

Pennsylvania.— Killion *v.* Power, 51 Pa. St. 429, 91 Am. Dec. 127.

Vermont.— Lane *v.* Scagle, 67 Vt. 281, 31 Atl. 289.

no objection to a recovery by a tenant against his cotenant that a recovery may be had for the same wrong against the landlord.[79]

j. Actions — (I) *Pleading.*[80] In an action by a tenant against a landlord for injury to his person or property by reason of breach of contract or duty, the complaint should clearly and specifically set forth the breach complained of.[81] And, applying the well recognized rule that a pleading is to be construed most strongly against the pleader, and that no intendments can be indulged in its aid, a failure to aver in the petition or complaint the facts showing negligence on the part of defendant must be construed as implying that they do not exist, and renders the petition or complaint bad on demurrer.[82] The complaint should likewise sufficiently allege knowledge or notice of the defective condition of the premises on the part of defendant.[83]

(II) *Evidence.*[84] In an action for damages for injuries caused to the person or property of a tenant, any evidence is admissible which tends to show the defective condition of the property at the time of the injury,[85] or which has a bearing upon the question of contributory negligence on the part of plaintiff.[86] In an action by a tenant for injuries sustained, the burden of proof is upon him to show negligence on the part of defendant, and an absence of contributory negligence on his part.[87]

79. Brunswick-Balke Collender Co. *v.* Rees, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748.

80. Pleading generally see Pleading.

81. Bentley *v.* Taylor, 81 Iowa 306, 47 N. W. 58 (where the breach was held to have been sufficiently charged); Valois *v.* Tompkins, 2 N. Y. City Ct. 407; Brunswick-Balke-Collender Co. *v.* Rees, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748.

82. *California.*— Callahan *v.* Loughran, 102 Cal. 476, 36 Pac. 835; Smith *v.* Buttner, 90 Cal. 95, 27 Pac. 29, holding that, although negligence may be charged in general terms, yet it must appear from the facts averred that the negligence caused or contributed to the injury, and it is not sufficient merely to aver that the injury was caused by reason of the negligence averred, if no fact is stated which shows how the injury was caused, or that it was not caused through a patent defect.

Kentucky.— Franklin *v.* Tracey, 77 S. W. 1113, 78 S. W. 1112, 25 Ky. L. Rep. 1409, 1909, 63 L. R. A. 649.

Massachusetts.— Cummings *v.* Ayer, 188 Mass. 292, 74 N. E. 336.

Missouri.— See Sheridan *v.* Forsee, 106 Mo. App. 495, 81 S. W. 494, where the allegations were held to be sufficient to sustain a judgment.

New Jersey.—Lyon *v.* Buerman, 70 N. J. L. 620, 57 Atl. 1009.

New York.— Golob *v.* Pasinsky, 72 N. Y. App. Div. 176, 76 N. Y. Suppl. 388; Casey *v.* Mann, 5 Abb. Pr. 91; Corey *v.* Mann, 14 How. Pr. 163. See Wesener *v.* Smith, 89 N. Y. App. Div. 211, 85 N. Y. Suppl. 837, where defendant's negligence was held to have been sufficiently alleged.

Rhode Island.— Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478. See Ellis *v.* Waldron, 19 R. I. 369, 33 Atl. 869, where the complaint was held to be good on demurrer.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 644.

83. Stack *v.* Harris, 111 Ga. 149, 36 S. E. 615; Franz *v.* Mulligan, 18 Misc. (N. Y.) 411, 42 N. Y. Suppl. 509; Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478. See also Schwalbach *v.* Shinkle, etc., Co., 97 Fed. 483. *Compare* Sunasack *v.* Morey, 196 Ill. 569, 63 N. E. 1039 [*reversing* 98 Ill. App. 505], where the declaration was held to be sufficient on demurrer.

84. Evidence generally, see Evidence.

85. Martin *v.* Richards, 155 Mass. 381, 20 N. E. 591; Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Brennan *v.* Lachat, 14 Daly (N. Y.) 197, 6 N. Y. St. 278 [*affirming* 5 N. Y. St. 882].

86. Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; Stewart *v.* Harvard College, 12 Allen (Mass.) 58; Godley *v.* Hagerty, 20 Pa. St. 387, 59 Am. Dec. 731.

87. Moore *v.* Goedel, 34 N. Y. 527 [*affirming* 7 Bosw. 591]; Spencer *v.* McManus, 82 Hun (N. Y.) 318, 31 N. Y. Suppl. 185 [*reversing* 5 Misc. 267, 27 N. Y. Suppl. 896]; Lansing *v.* Stone, 37 Barb. (N. Y.) 15, 14 Abb. Pr. 199; Denton *v.* Kernochan, 13 N. Y. Suppl. 889; Shugio *v.* Hunting, 9 N. Y. St. 286. See also Warren *v.* Kauffman, 2 Phila. (Pa.) 259; Inman *v.* Potter, 18 R. I. 111, 25 Atl. 912.

Evidence held sufficient to warrant a verdict against defendant see the following cases:

Illinois.— Payne *v.* Irvin, 144 Ill. 482, 33 N. E. 756 [*affirming* 44 Ill. App. 105]; Merchants L. & T. Co. *v.* Boucher, 115 Ill. App. 101.

Kentucky.— Nahm *v.* Register Newspaper Co., 87 S. W. 296, 27 Ky. L. Rep. 887.

Massachusetts.— Clogston *v.* Martin, 182 Mass. 469, 65 N. E. 859; Littlehale *v.* Osgood, 161 Mass. 340, 37 N. E. 375.

(III) *TRIAL.*[88] In an action against a lessor for injuries caused by the defective condition of the premises, the question of defendant's negligence is one of fact for the jury.[89] Likewise, whether a tenant has been guilty of contributory negligence in a particular case is not a question of law, but a question of fact for the jury.[90]

2. INJURIES TO THIRD PERSONS — a. Duties of Landlord and Tenant to Third Persons. The general rule is that where there is neither privity of estate nor privity of contract the landlord is not liable for injuries sustained by third persons, unless by invitation, express or implied, he induces them to come upon the premises. In such cases the liability of the landlord is not contractual, but based upon some breach of duty. It must be shown that he has done or omitted to do some act which from his legal relations to the property constituted a breach of

Minnesota.— Barron *v.* Liedloff, 95 Minn. 474, 104 N. W. 289.

New York.— O'Neil *v.* Kinken, 125 N. Y. 733, 26 N. E. 758 [*affirming* 8 N. Y. Suppl. 554]; Tousey *v.* Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; Willy *v.* Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Bogendoerfer *v.* Jacobs, 97 N. Y. App. Div. 355, 89 N. Y. Suppl. 1051; Levine *v.* Baldwin, 87 N. Y. App. Div. 150, 84 N. Y. Suppl. 92; Matthews *v.* New York, 78 N. Y. App. Div. 422, 80 N. Y. Suppl. 360; Nadel *v.* Fichten, 34 N. Y. App. Div. 188, 54 N. Y. Suppl. 551; Pauley *v.* Steam-Gauge, etc., Co., 61 Hun 254, 16 N. Y. Suppl. 820 [*reversed* in 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194]; Levin *v.* Habicht, 45 Misc. 381, 90 N. Y. Suppl. 349; Hirtenstein *v.* Farrell, 34 Misc. 515, 69 N. Y. Suppl. 886; Rubenstein *v.* Hudson, 86 N. Y. Suppl. 750.

Pennsylvania.— Kirchner *v.* Smith, 207 Pa. St. 431, 56 Atl. 947; Lewin *v.* Pauli, 19 Pa. Super. Ct. 447.

Evidence held insufficient to warrant a verdict against defendant see O'Donnell *v.* Rosenthal, 110 Ill. App. 225; McCord Rubber Co. *v.* St. Joseph Water Co., 181 Mo. 678, 81 S. W. 189; Goldberg *v.* Besdine, 76 N. Y. App. Div. 451, 78 N. Y. Suppl. 776; Shillak *v.* White, 14 N. Y. Suppl. 637.

88. Trial generally see TRIAL.

89. *Iowa.*— Rice *v.* Whitley, 115 Iowa 748, 87 N. W. 694.

Massachusetts.— O'Malley *v.* Twenty-five Associates, 170 Mass. 471, 49 N. E. 641.

Minnesota.— Widing *v.* Penn Mut. L. Ins. Co., 95 Minn. 279, 104 N. W. 239.

Missouri.— McGinley *v.* Alliance Trust Co., 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334.

New Hampshire.— Cate *v.* Blodgett, 70 N. H. 316, 48 Atl. 281.

New York.— Kenney *v.* Rhinelander, 163 N. Y. 576, 57 N. E. 1114 [*affirming* 28 N. Y. App. Div. 246, 50 N. Y. Suppl. 1088]; Garrett *v.* Somerville, 98 N. Y. App. Div. 206, 90 N. Y. Suppl. 705; Weinberger *v.* Kratzenstein, 71 N. Y. App. Div. 155, 75 N. Y. Suppl. 537 [*affirming* 35 Misc. 74, 71 N. Y. Suppl. 244]; Sturmwald *v.* Schreiber, 69 N. Y. App. Div. 476, 74 N. Y. Suppl. 995; Harris *v.* Boardman, 68 N. Y. App. Div. 436, 73 N. Y. Suppl. 963; Lendle *v.* Robinson, 53 N. Y. App. Div. 140, 65 N. Y. Suppl. 894; Harkin *v.* Crumbie, 14 Misc. 439, 35 N. Y. Suppl. 1027. See Spaine *v.* Stiner, 51 N. Y. App. Div. 481, 64 N. Y. Suppl. 655.

England.— Bowen *v.* Anderson, [1894] 1 Q. B. 164, 58 J. P. 213, 10 Reports 47, 42 Wkly. Rep. 236.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 646.

90. *California.*—Davis *v.* Pacific Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156.

Connecticut.— Gallagher *v.* Button, 73 Conn. 172, 46 Atl. 819.

Georgia.— Johnson *v.* Collins, 98 Ga. 271, 26 S. E. 744; Miller *v.* Smythe, 95 Ga. 288, 22 S. E. 532.

Massachusetts.— Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Cowen *v.* Sunderland, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; Minor *v.* Sharon, 112 Mass. 477, 17 Am. Rep. 122.

Minnesota.— Widing *v.* Penn Mut. L. Ins. Co., 95 Minn. 279, 104 N. W. 239.

New Jersey.— McCormick *v.* Anistaki, 66 N. J. L. 211, 49 Atl. 505. See also Dorr *v.* Harkness, 49 N. J. L. 571, 10 Atl. 400, 60 Am. Rep. 656.

New York.— Kenney *v.* Rhinelander, 163 N. Y. 576, 57 N. E. 1114 [*affirming* 28 N. Y. App. Div. 246, 50 N. Y. Suppl. 1088]; Hilsenbeck *v.* Guhring, 131 N. Y. 674, 30 N. E. 580; O'Neil *v.* Kinken, 125 N. Y. 733, 26 N. E. 758 [*affirming* 8 N. Y. Suppl. 554]; Tousey *v.* Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655 [*affirming* 53 N. Y. Super. Ct. 446]; Totten *v.* Phipps, 52 N. Y. 354; Lee *v.* Ingraham, 106 N. Y. App. Div. 167, 94 N. Y. Suppl. 284; Garrett *v.* Somerville, 98 N. Y. App. Div. 206, 90 N. Y. Suppl. 705; Clarke *v.* Welsh, 93 N. Y. App. Div. 393, 87 N. Y. Suppl. 697; Keating *v.* Mott, 92 N. Y. App. Div. 156, 86 N. Y. Suppl. 1041; Wesener *v.* Smith, 89 N. Y. App. Div. 211, 85 N. Y. Suppl. 887; Sturmwald *v.* Schreiber, 69 N. Y. App. Div. 476, 74 N. Y. Suppl. 995; Collier *v.* Collins, 58 N. Y. App. Div. 550, 69 N. Y. Suppl. 94; Lendle *v.* Robinson, 53 N. Y. App. Div. 140, 65 N. Y. Suppl. 894; Brown *v.* Wittner, 43 N. Y. App. Div. 135, 59 N. Y. Suppl. 385; Idel *v.* Mitchell, 5 N. Y. App. Div. 268, 39 N. Y. Suppl. 1; Atkinson *v.* Abraham, 45 Hun 238; Walton *v.* Kane, 4 Misc. 296, 23 N. Y. Suppl. 1029; Blake *v.* Fox, 17 N. Y. Suppl. 508; White *v.* Sprague, 9 N. Y. St. 220. See also Feinstein *v.* Jacobs,

duty to the public or the injured party.[91] A tenant or occupant of premises owes a duty to third persons resorting thereto in the course of business, or upon his invitation, express or implied, to keep the premises in a reasonably safe condition, regardless of the question as to whose duty, as between landlord and tenant, it is to make repairs thereon.[92]

b. Defective or Dangerous Condition of Premises. Where, however, the injuries to a third person are due to the faulty or defective construction of the

15 Misc. 474, 37 N. Y. Suppl. 345; Brennan *v.* Lachat, 5 N. Y. St. 882. See, however, Rudolphy *v.* Fuchs, 44 How. Pr. 155.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 646.

But see Mitchell *v.* Stewart, 187 Pa. St. 217, 40 Atl. 799.

91. *Arkansas.*— Baker *v.* Allen, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93.

California.— Rider *v.* Clark, 132 Cal. 382, 64 Pac. 564; Kalis *v.* Shattuck, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568.

Illinois.— West Chicago Masonic Assoc. *v.* Cohn, 192 Ill. 210, 61 N. E. 439, 85 Am. St. Rep. 327, 55 L. R. A. 235; Hull *v.* Sherrod, 97 Ill. App. 298.

Indian Territory.— De Graffenried *v.* Wallace, 2 Indian Terr. 657, 53 S. W. 452.

Maryland.— Smith *v.* State, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772; Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90.

Massachusetts.— O'Malley *v.* Twenty-five Associates, 178 Mass. 555, 60 N. E. 387; Monroe *v.* Carlisle, 176 Mass. 199, 57 N. E. 332; Frischberg *v.* Hurter, 173 Mass. 22, 52 N. E. 1086; Szathmary *v.* Adams, 166 Mass. 145, 44 N. E. 124; Hart *v.* Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; Caldwell *v.* Slade, 156 Mass. 84, 30 N. E. 87; Boston *v.* Gray, 144 Mass. 53, 10 N. E. 509; Birnbaum *v.* Crowninshield, 137 Mass. 177; Mistler *v.* O'Grady, 132 Mass. 139; Mellen *v.* Morrill, 126 Mass. 545, 30 Am. Rep. 695.

Michigan.— Brady *v.* Klein, 133 Mich. 422, 95 N. W. 557, 103 Am. St. Rep. 455, 62 L. R. A. 909; Johnson *v.* McMillan, 69 Mich. 36, 36 N. W. 803.

Missouri.— Fehlhauer *v.* St. Louis, 178 Mo. 635, 77 S. W. 843.

New Jersey.— Clyne *v.* Helmes, 61 N. J. L. 358, 39 Atl. 767.

New York.— Reynolds *v.* Van Beuren, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129; Miller *v.* Woodhead, 104 N. Y. 471, 11 N. E. 57; Edwards *v.* New York, etc., R. Co., 98 N. Y. 245, 50 Am. Rep. 659; May *v.* Ennis, 78 N. Y. App. Div. 552, 79 N. Y. Suppl. 896; Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244; Curran *v.* Flammer, 49 N. Y. App. Div. 293, 62 N. Y. Suppl. 1061 [*distinguishing* Canandaigua *v.* Foster, 156 N. Y. 354, 50 N. E. 971, 66 Am. St. Rep. 575, 41 L. R. A. 554]; Schroeck *v.* Reiss, 46 N. Y. App. Div. 502, 61 N. Y. Suppl. 1054; Leonard *v.* Hornellsville, 41 N. Y. App. Div. 106, 58 N. Y. Suppl. 266; Black *v.* Maitland, 11 N. Y. App. Div. 188, 42 N. Y. Suppl. 653; Babbage *v.* Powers, 4 Silv. Sup. 211, 7 N. Y. Suppl. 306; Hirschfield *v.* Alsberg, 47 Misc. 141, 93 N. Y. Suppl. 617; Finnigan *v.* Biehl, 30 Misc. 735, 63 N. Y. Suppl. 147 [*reversing* 61 N. Y. Suppl. 116]; Norling *v.* Allee, 13 N. Y. Suppl. 791 [*following* Norling *v.* Allee, 10 N. Y. Suppl. 97]; Casey *v.* Mann, 5 Abb. Pr. 91; Flynn *v.* Hatton, 43 How. Pr. 333.

Ohio.— Langabaugh *v.* Anderson, 68 Ohio St. 131, 67 N. E. 286, 62 L. R. A. 948; Shindelbeck *v.* Moon, 32 Ohio St. 264, 30 Am. Rep. 584; Frolich *v.* Cranker, 21 Ohio Cir. Ct. 615, 11 Ohio Cir. Dec. 592.

Pennsylvania.— Duffin *v.* Dawson, 211 Pa. St. 593, 61 Atl. 76; Bears *v.* Ambler, 9 Pa. St. 193.

Rhode Island.— Adams *v.* Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859.

Texas.— Texas, etc., R. Co. *v.* Mangum, 68 Tex. 342, 4 S. W. 617; Texas Loan Agency *v.* Fleming, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279 [*reversing* 18 Tex. Civ. App. 668, 46 S. W. 63].

Washington.— Ward *v.* Hinkleman, (1905) 79 Pac. 956.

Canada.— Nelson *v.* Liverpool Brewery Co., 2 C. P. D. 311, 46 L. J. C. P. 675, 25 Wkly. Rep. 877.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 668.

Liability of owner for condition and use of premises in general see NEGLIGENCE.

92. *Illinois.*— Peoria *v.* Simpson, 110 Ill. 294, 51 Am. Rep. 683; Union Brass Mfg. Co. *v.* Lindsay, 10 Ill. App. 583.

Iowa.— Burner *v.* Higman, etc., Co., 127 Iowa 580, 103 N. W. 802.

Kansas.— De Tarr *v.* Ferd. Heim Brewing Co., 62 Kan. 188, 61 Pac. 689.

Louisiana.—See Weymouth *v.* New Orleans, 40 La. Ann. 344, 4 So. 218.

Maine.— Abbott *v.* Jackson, 84 Me. 449, 24 Atl. 900.

Maryland.— Hussey *v.* Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

Massachusetts.—Wright *v.* Perry, 188 Mass. 268, 74 N. E. 328; Wixon *v.* Bruce, 187 Mass. 232, 72 N. E. 978, 68 L. R. A. 248; Leydecker *v.* Brintnall, 158 Mass. 292, 33 N. E. 399; Boston *v.* Gray, 144 Mass. 53, 10 N. E. 509; Boston *v.* Worthington, 10 Gray 496, 71 Am. Dec. 678.

Minnesota.— Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698.

Missouri.— Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. St. Rep. 503; Mayer *v.* Schrumpf, 111 Mo. App. 54, 85 S. W. 915; Welsh *v.* McAllister, 15 Mo. App. 492.

New Jersey.— Eckman *v.* Atlantic Lodge No. 276, B. P. O. E., 68 N. J. L. 10, 52 Atl. 293 (holding, however, that liability on the part of the lessee, if such liability exists,

premises,[93] or because of a continuing nuisance thereon,[94] or where the landlord retains control over the premises, or the part thereof where the injury occurred,

must be limited to such defects as inspection would have disclosed); Durant *v.* Palmer, 29 N. J. L. 544.

New York.— Timlin *v.* Standard Oil Co., 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845; Odell *v.* Solomon, 99 N. Y. 635, 1 N. E. 408 [*reversing* 50 N. Y. Super. Ct. 119]; Weber *v.* Lieberman, 47 Misc. 593, 94 N. Y. Suppl. 460; Hirschfield *v.* Alsberg, 47 Misc. 141, 93 N. Y. Suppl. 617; Buckley *v.* Clark, 21 Misc. 138, 47 N. Y. Suppl. 42. See, however, Weinberger *v.* Kratzenstein, 71 N. Y. App. Div. 155, 75 N. Y. Suppl. 537 [*affirming* 35 Misc. 74, 71 N. Y. Suppl. 244].

Ohio.— Shindelbeck *v.* Moon, 32 Ohio St. 264, 30 Am. Rep. 584.

Pennsylvania.— Duffin *v.* Dawson, 211 Pa. St. 593, 61 Atl. 76; Bears *v.* Ambler, 9 Pa. St. 193. See also Reilly *v.* Shannon, 180 Pa. St. 513, 37 Atl. 95.

Rhode Island.— Keeler *v.* Lederer Realty Corp., 26 R. I. 524, 59 Atl. 855; Joyce *v.* Martin, 15 R. I. 558, 10 Atl. 620.

Texas.— O'Connor *v.* Curtis, (1892) 18 S. W. 953; O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628.

England.— Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223, 9 L. J. Exch. 338, 3 P. & D. 162, 1 R. & Can. Cas. 696, 39 E. C. L. 139; Southcote *v.* Stanley, 1 H. & N. 247, 25 L. J. Exch. 339; Chapman *v.* Rothwell, E. B. & E. 168, 4 Jur. N. S. 1180, 27 L. J. Q. B. 315, 96 E. C. L. 168.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 668.

Where the tenant has surrendered possession.— Where a tenant of a burned building paid his rent to the owner of the leasehold and obtained his acquittance on the day after the fire, it was held that the fact of his engine and boiler remaining in the cellar by sufferance did not give him such possession as to render him liable for not maintaining the building in a safe condition. Franke *v.* St. Louis, 110 Mo. 516, 19 S. W. 938.

Maintaining nuisance.— The liability of a lessee for damages to a third person, caused by the fall of an awning, constituting a part of the demised premises and unlicensed by the city authorities, is not based upon the tenant's obligation to repair, but the maintenance of a nuisance. McPartland *v.* Thoms, 4 N. Y. Suppl. 100.

93. *California.*— Jessen *v.* Sweigert, 66 Cal. 182, 4 Pac. 1188.

Maryland.— Owings *v.* Jones, 9 Md. 108.

Massachusetts.—Dalay *v.* Savage, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; Larue *v.* Farren Hotel Co., 116 Mass. 67; Learoyd *v.* Godfrey, 138 Mass. 315; Morain *v.* Devlin, 132 Mass. 87, 42 Am. Rep. 423; Kirby *v.* Boylston Market Assoc., 14 Gray 249, 74 Am. Dec. 682.

Minnesota.— Isham *v.* Broderick, 89 Minn. 397, 95 N. W. 224; Nash *v.* Minneapolis Mill Co., 24 Minn. 501, 31 Am. Rep. 349.

New Hampshire.—Scott *v.* Simons, 54 N. H. 426.

New Jersey.—Durant *v.* Palmer, 29 N. J. L. 544.

New York.—Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; Spaine *v.* Stiner, 168 N. Y. 666, 61 N. E. 1135 [*affirming* 51 N. Y. App. Div. 481, 64 N. Y. Suppl. 655]; Fox *v.* Buffalo Park, 163 N. Y. 559, 57 N. E. 1109 [*affirming* 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788]; Timlin *v.* Standard Oil Co., 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845 [*reversing* on other grounds 54 Hun 44, 7 N. Y. Suppl. 158]; Swords *v.* Edgar, 59 N. Y. 28, 17 Am. Rep. 295; May *v.* Ennis, 78 N. Y. App. Div. 552, 79 N. Y. Suppl. 896; Matthews *v.* New York, 78 N. Y. App. Div. 422, 80 N. Y. Suppl. 360; Brogan *v.* Hanan, 55 N. Y. App. Div. 92, 66 N. Y. Suppl. 1066; Holroyd *v.* Sheridan, 53 N. Y. App. Div. 14, 65 N. Y. Suppl. 442; Hungerford *v.* Bent, 55 Hun 3, 8 N. Y. Suppl. 614; Wenzler *v.* McCotter, 22 Hun 60; Moody *v.* New York, 43 Barb. 282, 34 How. Pr. 288; Pickard *v.* Collins, 23 Barb. 444; Anderson *v.* Dickie, 1 Rob. 238.

Pennsylvania.— Kirchner *v.* Smith, 207 Pa. St. 431, 56 Atl. 947; Carson *v.* Godley, 26 Pa. St. 111, 67 Am. Dec. 404.

Rhode Island.— Joyce *v.* Martin, 15 R. I. 558, 10 Atl. 620.

South Dakota.— Waterhouse *v.* Jos. Schlitz Brewing Co., 16 S. D. 592, 94 N. W. 587.

England.— Rex *v.* Pedley, 1 A. & E. 822, 3 L. J. M. C. 119, 3 N. & M. 627, 28 E. C. L. 380; Nelson *v.* Liverpool Brewery Co., 2 C. P. D. 311, 46 L. J. C. P. 675, 25 Wkly. Rep. 877; Todd *v.* Flight, 9 C. B. N. S. 377, 7 Jur. N. S. 291, 30 L. J. C. P. 21, 3 L. T. Rep. N. S. 325, 9 Wkly. Rep. 145, 99 E. C. L. 377.

Canada.— Allan *v.* Fortier, 20 Quebec Super. Ct. 50.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 669.

94. *California.*—Davis *v.* Pacific Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156; Kalis *v.* Shattuck, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; Burke *v.* Schwerdt, (1885) 6 Pac. 381.

Colorado.—Denver *v.* Soloman, 2 Colo. App. 534, 31 Pac. 507.

Connecticut.— House *v.* Metcalf, 27 Conn. 631.

District of Columbia.— Washington Market Co. *v.* Clagett, 19 App. Cas. 12.

Georgia.— Folsom *v.* Lewis, 85 Ga. 146, 11 S. E. 606; Center *v.* Davis, 39 Ga. 210.

Illinois.— John Morris Co. *v.* Southworth, 154 Ill. 118, 39 N. E. 1099; Tomle *v.* Hampton, 129 Ill. 379, 21 N. E. 800 [*affirming* 28 Ill. App. 142]; Gridley *v.* Bloomington, 68 Ill. 47; Stephani *v.* Brown, 40 Ill. 428.

Iowa.— Burner *v.* Higman, etc., Co., 127 Iowa 580, 103 N. W. 802.

such as a passageway or an elevator, the landlord is liable for such injuries.[95] The lessor of property is not liable for damages to a third party resulting from the use to which the tenant may put the leased property where no nuisance existed on such property at the beginning of the lease, unless it be shown that at the time the lease was made he knew the uses and purposes to which the tenant would apply it, and that such use from its very nature would prove to be a nuisance.[96]

c. Failure to Repair. In some jurisdictions the rule is that where the land-

Maryland.— Albert *v.* State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; Owings *v.* Jones, 9 Md. 108.

Massachusetts.— Gordon *v.* Cummings, 152 Mass. 513, 25 N. E. 978, 23 Am. St. Rep. 846, 9 L. R. A. 640; Jackman *v.* Arlington Mills, 137 Mass. 277; Readman *v.* Conway, 126 Mass. 374.

Minnesota.— Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698.

Missouri.— Stoetzele *v.* Swearingen, 90 Mo. App. 588; Memphis *v.* Miller, 78 Mo. App. 67; Mancuso *v.* Kansas City, 74 Mo. App. 138; Gordon *v.* Peltzer, 56 Mo. App. 599.

New Jersey.— Klapproth *v.* Baltic Pier, etc., Co., (Sup. 1899) 43 Atl. 981; Meyer *v.* Harris, 61 N. J. L. 83, 38 Atl. 690; Rankin *v.* Ingwersen, 49 N. J. L. 481, 10 Atl. 545 [*affirming* 47 N. J. L. 18, 54 Am. Rep. 109]; Durant *v.* Palmer, 29 N. J. L. 544.

New York.— Jennings *v.* Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; Irvine *v.* Wood, 51 N. Y. 224, 18 Am. Rep. 603; Davenport *v.* Ruckman, 37 N. Y. 568 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341]; Congreve *v.* Smith, 18 N. Y. 79; Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577, 81 N. Y. Suppl. 400; Anderson *v.* Caulfield, 60 N. Y. App. Div. 560, 69 N. Y. Suppl. 1027; Matthews *v.* De Groff, 13 N. Y. App. Div. 356, 43 N. Y. Suppl. 237; McGrath *v.* Walker, 64 Hun 179, 18 N. Y. Suppl. 915; Whalen *v.* Gloucester, 4 Hun 24, 6 Thomps. & C. 135; Conhocton Stone Co. *v.* Buffalo, etc., R. Co., 52 Barb. 390; Benson *v.* Suarez, 43 Barb. 408, 19 Abb. Pr. 61, 28 How. Pr. 511; Pickard *v.* Collins, 23 Barb. 444; Ritterman *v.* Ropes, 51 N. Y. Super. Ct. 25; Irvin *v.* Wood, 4 Rob. 138; Malloy *v.* New York Real Estate Assoc., 13 Misc. 496, 34 N. Y. Suppl. 679, 2 N. Y. Annot. Cas. 177; Fish *v.* Dodge, 4 Den. 311, 47 Am. Dec. 254.

Ohio.— Rissler *v.* Edwards, 69 Ohio St. 572, 70 N. E. 1129 [*affirming* 26 Ohio Cir. Ct. 428]; McIlvaine *v.* Wood, 2 Handy 166, 12 Ohio. Dec. (Reprint) 384; Williams *v.* Macready, 7 Ohio Dec. (Reprint) 381, 2 Cinc. L. Bul. 272.

Oregon.— Fleischner *v.* Citizens' Real Estate, etc., Co., 25 Oreg. 119, 35 Pac. 174.

Pennsylvania.— Knauss *v.* Brua, 107 Pa. St. 85; Brown *v.* Weaver, 1 Pa. Cas. 458, 5 Atl. 32; Ward *v.* Gardner, 1 Pa. Cas. 339, 2 Atl. 867.

Rhode Island.— Keeler *v.* Lederer Realty Corp., 26 R. I. 524, 59 Atl. 855 [*distinguishing* Samuelson *v.* Cleveland Iron Min. Co., 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456].

South Dakota.— Patterson *v.* Jos. Schlitz, Brewing Co., 16 S. D. 33, 91 N. W. 336.

Vermont.— State *v.* Massey, 72 Vt. 210, 47 Atl. 834.

England.— Sandford *v.* Clarke, 21 Q. B. D. 398, 52 J. P. 773, 57 L. J. Q. B. 507, 59 L. T. Rep. N. S. 226, 37 Wkly. Rep. 28; Gandy *v.* Jubber, 5 B. & S. 78, 10 Jur. N. S. 652, 33 L. J. Q. B. 151, 9 L. T. Rep. N. S. 800, 12 Wkly. Rep. 526, 117 E. C. L. 78; Harris *v.* James, 45 L. J. Q. B. 545, 35 L. T. Rep. N. S. 240. See Gwinnell *v.* Eamer, L. R. 10 C. P. 658, 32 L. T. Rep. N. S. 835, holding that the lessor of demised premises adjoining the highway is not liable for a nuisance to the highway existing on such premises at the time of the demise, if the lessee occupies under an obligation to repair.

Canada.— McCallum *v.* Hutchinson, 7 U. C. C. P. 508; Reg. *v.* Osler, 32 U. C. Q. B. 324.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 669.

95. Rhodius *v.* Johnson, 24 Ind. App. 401, 56 N. E. 942; Burner *v.* Higman, etc., Co., 127 Iowa 580, 103 N. W. 802; Coupe *v.* Platt, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; Marwedel *v.* Cook, 154 Mass. 235, 28 N. E. 140; Elliott *v.* Pray, 10 Allen (Mass.) 378, 87 Am. Dec. 653; Canandaigua *v.* Foster, 156 N. Y. 354, 50 N. E. 971, 66 Am. St. Rep. 575, 41 L. R. A. 554 [*affirming* 81 Hun 147, 30 N. Y. Suppl. 686]; Jennings *v.* Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am St. Rep. 459; Wasson *v.* Pettit, 49 Hun (N. Y.) 166, 1 N. Y. Suppl. 613; Miller *v.* Hancock, [1893] 2 Q. B. 177, 57 J. P. 658 69 L. T. Rep. N. S. 214, 4 Reports 478, 41 Wkly. Rep. 578; Pretty *v.* Bickmore, L. R. 8 C. P. 401, 28 L. T. Rep. N. S. 704, 21 Wkly. Rep. 733. See also Helbig *v.* Slaughter, 95 Ill. App. 623. See, however, Capen *v.* Hall, 21 R. I. 364, 43 Atl. 847.

96. *Georgia.*— Edgar *v.* Walker, 106 Ga. 454, 32 S. E. 582; Vason *v.* Augusta, 38 Ga. 542.

Illinois.—Borggard *v.* Gale, 205 Ill. 511, 68 N. E. 1063 [*affirming* 107 Ill. App. 128].

Louisiana.— Muller *v.* Stone, 27 La. Ann. 123.

Missouri.— Pope *v.* Boyle, 98 Mo. 527, 11 S. W. 1010.

New Jersey.— West Deptford Tp. Local Bd. of Health *v.* Eastlack, 68 N. J. L. 585, 52 Atl. 999.

New York.— Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577, 81 N. Y. Suppl. 400; Pickard *v.* Collins, 23 Barb. 444.

lord has covenanted to repair his agreement does not inure to the benefit of a stranger, and no action will lie in tort for a breach of the contract.[97] In other jurisdictions, however, it is held that, while the landlord's liability does not rest upon contract but upon negligence, the contract to repair being a mere matter of inducement, from which arises his affirmative duty to exercise care as to the condition of the leased premises, if his negligence in making or failing to make repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises who are not guilty of contributory negligence on their part.[98] If a third party goes upon premises without invitation, express or implied, the owner or occupant thereof is under no duty to look out for his safety, and if he be injured while there without lawful right, or as a bare licensee, no recovery can be had.[99]

d. Injuries Due to Negligent Acts or Omissions of Tenant or Cotenant. The lessor is not liable for injuries to a third person, or to his property, due to the negligence of the lessee, or his servants or agents, or to the defective condition of the premises occurring after the beginning of the lease, where such lessee is in absolute control of the property,[1] nor is a tenant responsible for the negligence of a cotenant, where he is entirely free from negligence.[2]

e. Injuries to Property of Adjoining Owners. A lessor is not responsible for injuries to the property of adjoining owners caused by the negligence of the les-

Pennsylvania.— Wunder *v.* McLean, 134 Pa. St. 334, 19 Atl. 749, 19 Am. St. Rep. 702; Little Schuylkill Nav., etc., Co. *v.* Richards, 57 Pa. St. 142, 98 Am. Dec. 209.

Tennessee.— Louisville, etc., Terminal Co. *v.* Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

England.— Rich *v.* Basterfield, 4 C. B. 783, 56 E. C. L. 783, 2 C. & K. 257, 61 E. C. L. 257, 11 Jur. 696, 16 L. J. C. P. 273. See, however, White *v.* Jameson, L. R. 18 Eq. 303, 22 Wkly. Rep. 761.

Canada.— Hett *v.* Janzen, 22 Ont. 414; Reg. *v.* Osler, 32 U. C. Q. B. 324; Les Ecclesiastiques, etc., Missions *v.* Kieffer, 11 Quebec K. B. 173 [*reversing* 14 Quebec Super. Ct. 325].

Liability of grantee of lessor.— A grantee of the premises subject to a lease is not liable for a nuisance created and continued by the tenant of the grantor, if such grantee had no power to abate the nuisance. Lufkin *v.* Zane, 157 Mass. 117, 31 N. E. 757, 34 Am. St. Rep. 262, 17 L. R. A. 251.

97. May *v.* Ennis, 78 N. Y. App. Div. 552, 79 N. Y. Suppl. 896; Frank *v.* Mandel, 76 N. Y. App. Div. 413, 78 N. Y. Suppl. 855; Flynn *v.* Hatton, 43 How. Pr. (N. Y.) 333; Burdick *v.* Cheadle, 26 Ohio St. 393, 20 Am. Dec. 767; Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478. See also Odell *v.* Solomon, 99 N. Y. 635, 1 N. E. 408. *Contra*, Benson *v.* Suarez, 43 Barb. (N. Y.) 408, 19 Abb. Pr. 61, 28 How. Pr. 511.

98. Boyce *v.* Snow, 187 Ill. 181, 58 N. E. 403 [*affirming* 88 Ill. App. 402]; Gridley *v.* Bloomington, 68 Ill. 47; O'Donnell *v.* Rosenthal, 110 Ill. App. 225; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Barron *v.* Liedloff, 95 Minn. 474, 104 N. W. 289; Olson *v.* Schultz, 67 Minn. 494, 70 N. W. 779, 64 Am. St. Rep. 437, 36 L. R. A. 790; Willcox *v.* Hines, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770, 41 L. R. A. 278.

99. *Iowa.*— Burner *v.* Higman, etc., Co., 127 Iowa 580, 103 N. W. 802.

Massachusetts.— Ganley *v.* Hall, 168 Mass. 513, 47 N. E. 416.

Michigan.— Armstrong *v.* Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585.

New York.— Sterger *v.* Vansiclen, 132 N. Y. 499, 30 N. E. 987, 28 Am. St. Rep. 594, 16 L. R. A. 640 [*affirming* 7 N. Y. Suppl. 805]; Cusick *v.* Adams, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772.

Ohio.— Burger *v.* Johnson, 9 Ohio S. & C. Pl. 272, 6 Ohio N. P. 252.

1. *California.*— Kalis *v.* Shattuck, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568. See Riley *v.* Simpson, 83 Cal. 217, 23 Pac. 292, 7 L. R. A. 622.

Georgia.— White *v.* Montgomery, 58 Ga. 204.

Indiana.— Metzger *v.* Schultz, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323.

Louisiana.—Thompson *v.* New Orleans, etc., R. Co., 10 La. Ann. 403.

Maine.— Allen *v.* Smith, 76 Me. 335.

Maryland.— Owings *v.* Jones, 9 Md. 108.

Massachusetts.— Caldwell *v.* Slade, 156 Mass. 84, 30 N. E. 87; Handyside *v* Powers, 145 Mass. 123, 13 N. E. 462.

Missouri.— Gordon *v.* Peltzer, 56 Mo. App. 599.

New York.— Martin *v.* Pettit, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794; Bard *v.* New York, etc., R. Co., 10 Daly 520; Batterman *v.* Finn, 32 How. Pr. 501.

See 32 Cent. Dig. tit. "Landlord and Tenant." § 674.

2. Walter *v.* Dennehy, 93 Mo. App. 7; Harris *v.* Perry, 89 N. Y. 308 [*reversing* 23 Hun 244]; Donnelly *v.* Jenkins, 9 Daly (N. Y.) 41, 58 How. Pr. 252.

see or a third person,[3] unless the lessor still retains control of the property, or the injuries were due to some defect in the property existing at the commencement of the lease.[4]

f. Liability as Dependent on Knowledge or Notice of Defects. A lessor is not liable to third persons for injuries caused by the defective condition of the leased premises, unless he had knowledge or notice, actual or constructive, thereof.[5]

F. Eviction — 1. What Constitutes — a. In General. The general rule is that in order to constitute an eviction there must be not a trespass merely by the landlord, but something of a permanent character to deprive, and that does deprive, the tenant of the use of the demised premises, or of some part thereof.[6] However, it is unnecessary that there should be manual or physical expulsion or exclusion from the demised premises, or any part thereof, to constitute eviction.[7]

3. *Maine.*— Stickney *v.* Munroe, 44 Me. 195.
Massachusetts.— Murray *v.* Richards, 1 Allen 414; Fiske *v.* Framingham Mfg. Co., 14 Pick. 491.
Michigan.— Harris *v.* Cohen, 50 Mich. 324, 15 N. W. 493.
Missouri.— Deutsch *v.* Abeles, 15 Mo. App. 398.
Nebraska.— Anheuser-Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373.
New Hampshire.— Sargent *v.* Stark, 12 N. H. 332.
New Jersey.— Todd *v.* Collins, 6 N. J. L. 127.
New York.— Strauss *v.* Hammersley, 13 N. Y. Suppl. 816.
Vermont.— Blood *v.* Spaulding, 57 Vt. 422; Pettibone *v.* Burton, 20 Vt. 302.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 678.

4. Helwig *v.* Jordan, 53 Ind. 21, 21 Am. Rep. 189; Williams *v.* Macready, 7 Ohio Dec. (Reprint) 381, 2 Cinc. L. Bul. 272; Dallowes *v.* Sackett, 15 Barb. (N. Y.) 96; Boston Beef Packing Co. *v.* Stevens, 12 Fed. 279, 20 Blatchf. 443.

5. Borman *v.* Sandgren, 37 Ill. App. 160; Ploen *v.* Staff, 9 Mo. App. 309; Ahern *v.* Steele, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778 [*reversing* 48 Hun 517, 1 N. Y. Suppl. 259]; Wolf *v.* Kilpatrick, 101 N. Y. 146, 4 N. E. 188, 54 Am. Rep. 672; Woram *v.* Noble, 41 Hun (N. Y.) 398; Brady *v.* Valentine, 3 Misc. (N. Y.) 19, 21 N. Y. Suppl. 776; Montieth *v.* Finkbeiner, 21 N. Y. Suppl. 288.

6. *Alabama.*— Rice *v.* Dudley, 65 Ala. 68.
Delaware.— Graham *v.* Anderson, 3 Harr. 364.
Iowa.— Tarpy *v.* Blume, 101 Iowa 469, 70 N. W. 620.
Massachusetts.—Royce *v.* Guggenheim, 106 Mass. 201, 203, 8 Am. Rep. 322, where the court, by Gray, J., adopts the definitions of an eviction given in Upton *v.* Townend, 17 C. B. 30, 1 Jur. N. S. 1089, 25 L. J. C. P. 44, 4 Wkly. Rep. 56, 84 E. C. L 30, where Jervis, C. J., said: "I think it may now be taken to mean this; not a mere trespass and nothing more, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Mr. Justice Crowder said: "Eviction, properly so called, is a wrongful act of the landlord, which operates the expulsion or amotion of a tenant from the land."
Michigan.— Grove *v.* Youell, 110 Mich. 285, 68 N. W. 132, 33 L. R. A. 297.
New Jersey.— Meeker *v.* Spalsbury, 66 N. J. L. 60, 48 Atl. 1026.
New York.— Ogden *v.* Sanderson, 3 E. D. Smith 166 (holding that an eviction of a tenant is an interference with his possession of the premises, or some part thereof, by or with the consent of the landlord, by which the tenant is deprived of the use, without his assent); Edgerton *v.* Page, 14 How. Pr. 116.
Ohio.— Greenberg *v.* Murphy, 26 Ohio Cir. Ct. 359.
Pennsylvania.— Sutton *v.* Foulke, 2 Pa. Co. Ct. 529.
England.— Manchester, etc., R. Co. *v.* Anderson, [1898] 2 Ch. 394, 67 L. J. Ch. 568, 78 L. T. Rep. N. S. 821.
Canada.— Oliver *v.* Mowat, 34 U. C. Q. B. 472; Ferguson *v.* Troop, 28 N. Brunsw. 301, 25 N. Brunsw. 440. And see Nixon *v.* Maltby, 7 Ont. App. 371; Shuttleworth *v.* Shaw, 6 U. C. Q. B. 517.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 691.
Termination of tenancy by eviction see *infra,* IX, B, 6.
Liability for rent as affected by eviction see *infra,* VIII, A, 3, l.
Authority and control of landlord over leased premises in general see *supra,* III, C, 1.

7. *Illinois.*— Moore *v.* Vail, 17 Ill. 185; Dennick *v.* Ekdahl, 102 Ill. App. 199, holding, however, that where a constructive eviction is claimed, the intent of the landlord to evict must appear; and such intent is a question of fact for the jury.
Maine.— Curtis *v.* Deering, 12 Me. 499.
Massachusetts.— Holbrook *v.* Young, 108 Mass. 83; Hawes *v.* Shaw, 100 Mass. 187; Sprague *v.* Baker, 17 Mass. 586.
New Hampshire.— Loomis *v.* Bedel, 11 N. H. 74.
New York.— Lounsbery *v.* Snyder, 31 N. Y. 514; Peck *v.* Hiler, 14 How. Pr. 155.
North Carolina.— Grist *v.* Hodges, 14 N. C. 198.
Pennsylvania.— Brown *v.* Dickerson, 12 Pa. St. 372.

An eviction may be actual where there is a physical expulsion, or it may be constructive, which, although an eviction at law, does not deprive the tenant of actual occupancy.[8]

b. Prior Possession of Tenant. One cannot be evicted from premises of which he has never had possession, either actual or constructive, since there can be no technical eviction from premises without an antecedent possession by the tenant.[9]

c. Necessity of Abandonment by Tenant. There can be no constructive eviction without a surrender of possession of the premises by the tenant.[10]

d. Voluntary Surrender by Tenant. Where the tenant, not under compulsion but voluntarily, abandons the premises, there is no eviction.[11]

e. Acts or Omissions of Landlord — (i) *In General.* Any wrongful act of the landlord, either of commission or omission, which results in a substantial interference with the tenant's right of possession or enjoyment in whole or in part, may amount to an eviction;[12] although such acts must clearly indicate an intention on the part of the lessor that the lessee shall no longer continue to hold or enjoy the premises;[13] and an act of the lessor amounting to a mere trespass, and not interfering with the substantial enjoyment of the demised premises by the lessee, is not equivalent to an eviction.[14] Non-performance on the part of the

Vermont.— State University *v.* Joslyn, 21 Vt. 52.

Wisconsin.— Silber *v.* Larkin, 94 Wis. 9, 68 N. W. 406.

8. Leiferman *v.* Osten, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156 [*affirming* 64 Ill. App. 578].

9. Stiger *v.* Monroe, 109 Ga. 457, 34 S. E. 595; Birckhead *v.* Cummins, 33 N. J. L. 44; Vanderpool *v.* Smith, 4 Abb. Dec. (N. Y.) 461; Hurlbut *v.* Post, 1 Bosw. (N. Y.) 28; Etheridge *v.* Osborn, 12 Wend. (N. Y.) 529.

10. *Illinois.*— Dennick *v.* Ekdahl, 102 Ill. App. 199 (holding that in case of constructive eviction, abandonment of the premises must be within a reasonable time after the acts complained of); Kistler *v* Wilson, 77 Ill. App. 149.

Michigan.— Beecher *v.* Duffield, 97 Mich. 423, 56 N. W. 777.

New York.— Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Dec. 170; Cram *v.* Dresser, 2 Sandf. 120; Edgerton *v.* Page, 1 Hilt. 320, 5 Abb. Pr. 1; Hall *v.* Irvin, 38 Misc. 123, 77 N. Y. Suppl. 91, 11 N. Y. Annot. Cas. 143; Wyckoff *v.* Frommer, 12 Misc. 149, 33 N. Y. Suppl. 11.

Ohio.— Dickson *v.* Hunt, 9 Ohio Dec. (Reprint) 408, 13 Cinc. L. Bul. 13.

Washington.— Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 693.

11. Smith *v.* Billany, 4 Houst. (Del.) 113; Lettick *v.* Honnold, 63 Ill. 335; Peck *v.* Knickerbocker Ice Co., 18 Hun (N. Y.) 183; Ogden *v.* Sanderson, 3 E. D. Smith (N. Y.) 166; Forster *v.* Eberle, 7 Misc. (N. Y.) 490, 27 N. Y. Suppl. 986.

12. *Illinois.*— Leadbeater *v.* Roth, 25 Ill. 587; Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108; Dennick *v.* Ekdahl, 102 Ill. App. 199; Starkweather *v.* Maginnis, 98 Ill. App. 143 [*affirmed* in 193 Ill. 274, 62 N. E. 692].

Maryland.— Grabenhorst *v.* Nicodemus, 42 Md. 236.

Massachusetts.— Harford *v.* Taylor, 181 Mass. 266, 63 N. E. 902; Colburn *v.* Morrill, 117 Mass. 262, 19 Am. Rep. 415.

Missouri.— Matthews *v.* Tobener, 39 Mo. 115.

New Jersey.— Dolton *v.* Sickel, 66 N. J. L. 492, 49 Atl. 679.

New York.— Denison *v.* Ford, 7 Daly 384; Wyse *v.* Russell, 16 Misc. 53, 37 N. Y. Suppl. 683.

Pennsylvania.— Oakford *v.* Nixon, 177 Pa. St. 76, 35 Atl. 588, 34 L. R. A. 575; Gallagher *v.* Burke, 13 Pa. Super. Ct. 244; Pfund *v.* Herlinger, 10 Phila. 13.

Washington.— Wusthoff *v.* Schwartz, 32 Wash. 337, 73 Pac. 407.

Wisconsin.— Silber *v.* Larkin, 94 Wis. 9, 68 N. W. 406.

England.— Cohen *v.* Tannar, [1900] 2 Q. B. 609, 69 L. J. Q. B. 904, 83 L. T. Rep. N. S. 64, 48 Wkly. Rep. 642.

Canada.— Gold Medal Furniture Co. *v.* Lumbers, 29 Ont. 75.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 695.

13. *Alabama.*— Thomas *v.* Drennen, 112 Ala. 670, 20 So. 848.

Georgia.— Perry *v.* Wall, 68 Ga. 70.

Illinois.— Morris *v.* Tillson, 81 Ill. 607; Baumgardner *v.* Consolidated Copying Co., 44 Ill. App. 74.

New Jersey.— Meeker *v.* Spalsbury, 66 N. J. L. 60, 48 Atl. 1026.

New York.— Vanderpool *v.* Smith, 1 Daly 311; Ludington *v.* Seaton, 32 Misc. 736, 66 N. Y. Suppl. 497; Parmele *v.* Pulvola Chemical Co., 31 Misc. 818, 64 N. Y. Suppl. 1119.

Washington.— Kellogg *v.* Lowe, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510.

See 32 Cent. Dig. tit. "Landlord and Tenant, § 695.

14. McFadin *v.* Rippey, 8 Mo. 738; Lounsbery *v.* Snyder, 31 N. Y. 514; Randall *v.* Alburtis, 1 Hilt. (N. Y.) 285.

Any interference with the person of the tenant by the landlord, although on the de-

lessor of conditions precedent, if pleaded and proved, may be a complete defense to an action for rent, but cannot be considered in law an eviction.[15]

(II) *Interference With Beneficial Use or Enjoyment of Premises.* In some jurisdictions it is held that when the lessor creates or permits a nuisance in the vicinity of the demised premises,[16] or is guilty of acts that preclude the tenant from the beneficial enjoyment of the premises, in consequence of which he abandons possession, such acts amount to an eviction.[17]

(III) *Failure of Landlord to Repair.* The general rule is that failure of the lessor to make repairs on demised premises, even where he has covenanted to do so, will not amount to an eviction;[18] although in some cases, where the want of repair is so great as to render the premises untenantable, it has been held that such defects do not come under the head of ordinary repairs, and that the lessor's failure upon request to render the premises fit for occupancy

mised premises, is a trespass and not an eviction. Vatel *v.* Herner, 1 Hilt. (N. Y.) 149.

Action of the landlord not amounting to an eviction see Sullivan *v.* Beardsley, 55 Cal. 608; Joliet First Nat. Bank *v.* Adam, (1890) 25 N. E. 576; Lynch *v.* Baldwin, 69 Ill. 210; Daniels *v.* Logan, 47 Iowa 395; Riley *v.* Lally, 172 Mass. 244, 51 N. E. 1088; Mirick *v.* Hoppin, 118 Mass. 582; Stewart *v.* Sprague, 76 Mich. 184, 42 N. W. 1088, 71 Mich. 50, 38 N. W. 673; McFadin *v.* Rippey, 8 Mo. 738; Solomon *v.* Fantozzi, 42 Misc. (N. Y.) 61, 86 N. Y. Suppl. 754; Burckle *v.* Shannon, 7 Misc. (N. Y.) 309, 27 N. Y. Suppl. 899; Forbus *v.* Collier, 7 Ohio Dec. (Reprint) 331, 2 Cinc. L. Bul. 122; Holland *v.* Townsend, 136 Pa. St. 392, 20 Atl. 794; Dudley *v.* Estill, 6 Leigh (Va.) 562; Yates *v.* Bachley, 33 Wis. 185.

15. Huber *v.* Ryan, 26 Misc. (N. Y.) 428, 56 N. Y. Suppl. 135; Lack *v.* Wyckoff, 11 N. Y. St. 678; Koehler *v.* Schneider, 11 N. Y. St. 676. See also Horberg *v.* May, 153 Pa. St. 216, 25 Atl. 750.

16. Lay *v.* Bennett, 4 Colo. App. 252, 35 Pac. 748; Rowbotham *v.* Pearce, 5 Houst. (Del.) 135; Bradley *v.* De Goicouria, 12 Daly (N. Y.) 393, 14 Abb. N. Cas. 53, 67 How. Pr. 76; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727; Alger *v.* Kennedy, 49 Vt. 109, 24 Am. Rep. 117. See, however, De Witt *v.* Pierson, 112 Mass. 8, 17 Am. Rep. 58; Majestic Hotel Co. *v.* Eyre, 53 N. Y. App. Div. 273, 65 N. Y. Suppl. 745.

Vermin.— A constructive eviction cannot be predicated on a tenant's abandonment of premises because they are overrun with vermin, rendering them untenantable, since the tenant might have abated the inconvenience. Pomeroy *v.* Tyler, 9 N. Y. St. 514.

17. *California.*— Arkley *v.* Union Sugar Co., 147 Cal. 195, 81 Pac. 509.

Iowa.— Filkins *v.* Steele, 124 Iowa 742, 100 N. W. 851.

Massachusetts.— Brown *v.* Holyoke Water-Power Co., 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844; Skally *v.* Shute, 132 Mass. 367; Royce *v.* Guggenheim, 106 Mass. 201, 8 Am. Rep. 322.

Michigan.— Coulter *v.* Norton, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458; Leonard *v.* Armstrong, 73 Mich. 577, 41 N. W. 695; Pridgeon *v.* Excelsior Boat Club, 66 Mich. 326, 33 N. W. 502.

Minnesota.— Minneapolis Co-Operative Co. *v.* Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473.

Montana.— Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345.

Nebraska.— Kitchen Bros. Hotel Co. *v.* Philbin, 2 Nebr. (Unoff.) 340, 96 N. W. 487; Herpolsheimer *v.* Funke, 1 Nebr. (Unoff.) 471, 95 N. W. 688.

New York.— Tallman *v.* Murphy, 120 N. Y. 345, 24 N. E. 716; Lounsbery *v.* Snyder, 31 N. Y. 514; Rogers *v.* Ostrom, 35 Barb. 523; Cohen *v.* Dupont, 1 Sandf. 260; Trenkmann *v.* Schneider, 26 Misc. 695, 56 N. Y. Suppl. 770; Hamilton *v.* Graybill, 19 Misc. 521, 43 N. Y. Suppl. 1079, 26 N. Y. Civ. Proc. 184; Duff *v.* Hart, 16 N. Y. Suppl. 163; Germania F. Ins. Co. *v.* Myers, 8 N. Y. St. 349; West Side Sav. Bank *v.* Newton, 57 How. Pr. 152; Peck *v.* Hiler, 14 How. Pr. 155.

Pennsylvania.— Insurance Co. *v.* Myers, 4 Lanc. Bar 151.

South Dakota.— Edmison *v.* Lowry, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774.

Washington.— Rice Fisheries Co. *v.* Pacific Realty Co., 35 Wash. 535, 77 Pac. 839.

United States.— Waite *v.* O'Neil, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 696.

Prevention of use of premises in violation of lease.— Where the lessee, by the terms of the lease, is restricted in his use of the leased premises, prevention by the landlord of such uses of the premises as would violate the lease do not amount to an eviction of the tenant. Hayward *v.* Ramge, 33 Nebr. 856, 51 N. W. 229.

18. Barrett *v.* Boddie, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172 [*affirming* 57 Ill. App. 226]; McFarlane *v.* Pierson, 21 Ill. App. 566; Biggs *v.* McCurley, 76 Md. 409, 25 Atl. 466; Roth *v.* Adams, 185 Mass. 341, 70 N. E. 445; McMann *v.* Antenrith, 17 Hun (N. Y.) 163; Truesdell *v.* Booth, 4 Hun (N. Y.) 100, 6 Thomps. & C. 379; Goddington *v.* Dunham, 35 N. Y. Super. Ct. 412; Speckels *v.* Sax, 1 E. D. Smith (N. Y.) 253; Doolittle *v.* Selkirk, 7 Misc. (N. Y.) 722, 28 N. Y. Suppl. 43.

would amount to a constructive eviction and justify the lessee in abandoning the premises.[19]

(iv) *Entry by Landlord* — (a) *In General.* Where a landlord enters upon premises which have been left by the tenant, and holds a continuous possession inconsistent with the possessory right of the tenant, such possession is an eviction;[20] but a mere entry by way of trespass on the part of the landlord is not an eviction.[21]

(b) *To Repair or Build.* An entry on the premises by the landlord, with the express or implied assent of the tenant to make repairs thereon, or to rebuild after their destruction, is not an eviction.[22]

f. Acts of Third Persons — (i) *In General.* Trespasses, or other acts of third persons impairing the usefulness or enjoyment of the demised premises, do not amount to an eviction by the lessor,[23] unless the acts from which the

19. Thalheimer *v.* Lempert, 1 N. Y. Suppl. 470; St. Michael's Protestant Episcopal Church *v.* Behrens, 10 N. Y. Civ. Proc. 181.

20. Hyman *v.* Jockey Club Wine, etc., Co., 9 Colo. App. 299, 48 Pac. 671; Holly *v.* Brown, 14 Conn. 255; Day *v.* Watson, 8 Mich. 535; Briggs *v.* Thompson, 9 Pa. St. 338; Burr *v.* Cattnach, 3 Pa. Cas. 301, 6 Atl. 118; Gallagher *v.* Burke, 13 Pa. Super. Ct. 244; Lamson Consol. Store Service Co. *v.* Bowland, 114 Fed. 639, 52 C. C. A. 335.

An entry by the landlord by virtue of summary proceedings under the Landlord and Tenant Act for non-payment of rent is not an eviction. McCarty *v.* Hudsons, 24 Wend. (N. Y.) 291.

21. Smith *v.* Billany, 4 Houst. (Del.) 113; State *v.* McClay, 1 Harr. (Del.) 520; International Trust Co. *v.* Schumann, 158 Mass. 287, 33 N. E. 509; Bartlett *v.* Farrington, 120 Mass. 284; Noble *v.* Warren, 38 Pa. St. 340; Bennet *v.* Bittle, 4 Rawle (Pa.) 339; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

22. *Alabama.*— Phillips, etc., Mfg. Co. *v.* Whitney, 109 Ala. 645, 20 So. 333; Cook *v.* Anderson, 85 Ala. 99, 4 So. 713.

Delaware.— Peterson *v.* Edmunson, 5 Harr. 378.

Georgia.— Fleming *v.* King, 100 Ga. 449, 28 S. E. 239; Alexander *v.* Dorsey, 12 Ga. 12, 56 Am. Dec. 443.

Illinois.— Smith *v.* McLean, 123 Ill. 210, 14 N. E. 50 [*affirming* 22 Ill. App. 451]; Robinson *v.* Henaghan, 92 Ill. App. 620; Nonotuck Silk Co. *v.* Shay, 37 Ill. App. 542; International Press Assoc. *v.* Brooks, 30 Ill. App. 114.

New York.—McKenzie *v.* Hatton, 141 N. Y. 6, 35 N. E. 929 [*affirming* 70 Hun 142, 24 N. Y. Suppl. 88]; Rosenbloom *v.* Finch, 37 Misc. 818, 76 N. Y. Suppl. 902; Beakes *v.* Haas, 36 Misc. 796, 74 N. Y. Suppl. 843; Wetterer *v.* Soubirous, 22 Misc. 739, 49 N. Y. Suppl. 1043; Barnum *v.* Fitzpatrick, 19 N. Y. Suppl. 385; Barnum *v.* Fitzpatrick, 16 N. Y. Suppl. 934 [*reversing* 27 Abb. N. Cas. 334]. See, however, Brown *v.* Wakeman, 18 N. Y. Suppl. 363 [*affirming* 16 N. Y. Suppl. 846], where the work of repairing was held to be voluntary on the part of the landlord and amounted to an eviction of the tenant from a substantial portion of the premises.

Pennsylvania.— Heller *v.* Royal Ins. Co., 151 Pa. St. 101, 25 Atl. 83; Mannerbach *v.* Keppleman, 2 Woodw. 137. See Magaw *v.* Lambert, 3 Pa. St. 444, holding that if a landlord takes possession of the ruins of his premises destroyed by fire for the purpose of rebuilding without the consent of his tenant it is an eviction.

Tennessee.— Olmstead *v.* Tennessee Fixture, etc., Co., 1 Tenn. Ch. App. 653.

United States.— Connecticut Mut. L. Ins. Co. *v.* U. S., 21 Ct. Cl. 195.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 703.

23. *Colorado.*—Eisenhart *v.* Ordean, 3 Colo. App. 162, 32 Pac. 495.

Illinois.— Kistler *v.* Wilson, 77 Ill. App. 149.

Indiana.— Talbott *v.* English, 156 Ind. 299, 59 N. E. 857.

Massachusetts.— Kimball *v.* Grand Lodge of Masons, 131 Mass. 59.

New York.—McKenzie *v.* Hatton, 141 N. Y. 6, 35 N. E. 929 [*affirming* 70 Hun 142, 24 N. Y. Suppl. 88]; Blauvelt *v.* Powell, 59 Hun 179, 13 N. Y. Suppl. 439, 20 N. Y. Civ. Proc. 186; Meeks *v.* Bowerman, 1 Daly 99; Seaboard Realty Co. *v.* Fuller, 33 Misc. 109, 67 N. Y. Suppl. 146, 8 N. Y. Annot. Cas. 418 (holding that an eviction of leased premises cannot be predicated on the fact that the tenant's rest was disturbed by the noise of children in another apartment in the same building); Finck *v.* Rogers, 30 Misc. 123, 61 N. Y. Suppl. 866; Dexter *v.* King, 8 N. Y. Suppl. 489. See also Haas *v.* Ketcham, 87 N. Y. Suppl. 411.

Ohio.— Dickson *v.* Hunt, 9 Ohio Dec. (Reprint) 408, 13 Cinc. L. Bul. 13; Pugh Printing Co. *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 557, 5 Ohio N. P. 332.

Pennsylvania.— Hazlett *v.* Powell, 30 Pa. St. 293.

Wisconsin.— Manville *v.* Galy, 1 Wis. 250, 60 Am. Dec. 379.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 705.

Acts of cotenant.— An act done by one tenant without the authority, consent, and connivance of the landlord cannot be treated as an eviction by the other tenants. Conrad Seipp Brewing Co. *v.* Hart, 62 Ill. App. 212.

eviction is asserted to result were committed under the direction of or at the instance or with the consent of the lessor.[24]

(11) *Acts of Public Authorities.* Where the leased premises are removed, repaired, or the rights or privileges of the lessee therein abridged by the public authorities, there is no eviction by the landlord for which he can be held liable.[25]

g. Assertion Of and Entry Under Title Paramount. Where a third party establishes a title to the demised premises superior to that of the lessor and takes possession by virtue of such title, the lessee is evicted by what is termed title paramount.[26] The mere existence of an outstanding title which is paramount to that of his landlord is no defense by a tenant to an action for rent, since there must be an ouster or disturbance by means of it to amount to an eviction.[27] However, since actual ouster is not necessary in order to constitute an eviction,[28] if a lessee, to prevent being actually expelled from the demised premises, yields possession thereof, and attorns in good faith to one who has a title paramount to that of the lessee and his lessor, and also a right to immediate possession, this is equivalent to an actual ouster.[29]

24. Bentley *v.* Sill, 35 Ill. 414; Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108; Conrad Seipp Brewing Co. *v.* Hart, 62 Ill. App. 212; Miller *v.* Michel, 13 Ind. App. 190, 41 N. E. 467; Smith *v.* McEnany, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272.

25. *California.*— McLarren *v.* Spalding, 2 Cal. 510.

Georgia.— Fleming *v.* King, 100 Ga. 449, 28 S. E. 239.

New York.— Gallup *v.* Albany R. Co., 65 N. Y. 1; Steefel *v.* Rothschild, 64 N. Y. App. Div. 293, 72 N. Y. Suppl. 171; Vermilya *v.* Austin, 2 E. D. Smith 203 (holding, however, that where alterations are made by order of municipal government, the landlord, to avoid the effects of this eviction must show that they were made in obedience to the municipal authorities); Achlers *v.* Rehlenger, 1 N. Y. City Ct. 79.

Pennsylvania.— Hitchcock *v.* Bacon, 118 Pa. St. 272, 12 Atl. 352.

Rhode Island.— Miller *v.* Maguire, 18 R. I. 770, 30 Atl. 966.

Wisconsin.—See Silber *v.* Larkin, 94 Wis. 9, 68 N. W. 406.

Canada.— See Reg. *v.* Miller, 16 Nova Scotia 361.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 707.

Appropriation of premises to public use.— A proceeding under the right of eminent domain to appropriate leased property for public use whenever the public use requires it is not such a proceeding as will amount to an eviction, releasing the tenant from performance. Steifel *v.* Metz, 7 Ohio Dec. (Reprint) 308, 2 Cinc. L. Bul. 95.

Appointment of receiver.— The order of a court of equity appointing a receiver and requiring a tenant to deliver possession to him after surrender by the tenant is an eviction. Mariner *v.* Chamberlain, 21 Wis. 251.

26. Cornelissens *v.* Driscoll, 89 Mich. 34, 50 N. W. 749; Marsh *v.* Butterworth, 4 Mich. 575; Home L. Ins. Co. *v.* Sherman, 46 N. Y. 370; Moffat *v.* Strong, 9 Bosw. (N. Y.) 57; Conley *v.* Schiller, 24 N. Y. Suppl. 473; Lanigan *v.* Kille, 13 Phila. (Pa.) 49; Tomlinson *v.* Day, 2 Ball & B. 680, 5 Moore C. P. 558, 23 Rev. Rep. 541; Neale *v.* Mackenzie, 2 Gale 174, 6 L. J. Exch. 263, 1 M. & W. 747 [*reversing* 2 C. M. & R. 84, 4 L. J. Exch. 185, 5 Tyrw. 1106]; Penford *v.* Abbott, 9 Jur. N. S. 517, 32 L. J. Q. B. 67, 7 L. T. Rep. N. S. 384, 11 Wkly. Rep. 169; Carey *v.* Bostwick, 10 U. C. Q. B. 156.

Tenancy from year to year.— In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the landlord's interest, and if on such determination the tenant is evicted by the superior landlord, he has, in the absence of an express agreement, no claim against his landlord for damages for such eviction by the superior landlord. Schwartz *v.* Locket, 61 L. T. Rep. N. S. 719, 38 Wkly. Rep. 142.

27. *Alabama.*— Crawford *v.* Jones, 54 Ala. 459; Ricketts *v.* Garrett, 11 Ala. 806.

Indiana.— Huff *v.* Walker, 1 Ind. 193, Smith 134.

New Hampshire.— Russell *v.* Fabyan, 27 N. H. 529.

Ohio.— Dickson *v.* Hunt, 9 Ohio Dec. (Reprint) 408, 13 Cinc. L. Bul. 13.

Pennsylvania.— See Ewing *v.* Cottman, 9 Pa. Super. Ct. 444, 43 Wkly. Notes Cas. 525.

Tennessee.— Hayes *v.* Ferguson, 15 Lea 1, 54 Am. Rep. 398.

Virginia.— Murray *v.* Pennington, 3 Gratt. 91.

United States.— Pittsburg, etc., R. Co. *v.* Columbus, etc., R. Co., 19 Fed. Cas. No. 11,197, 8 Biss. 456.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 710.

28. See *supra*, VII, F, 1, a.

29. *Alabama.*— Tyson *v.* Chestnut, 118 Ala. 387, 24 So. 73; Ricketts *v.* Garrett, 11 Ala. 806.

Illinois.— Montanye *v.* Wallahan, 84 Ill. 355.

Iowa.—Kane *v.* Mink, 64 Iowa 84, 19 N. W. 852.

Kentucky.— Gore *v.* Stevens, 1 Dana 201, 25 Am. Dec. 141.

Massachusetts.—Morse *v.* Goddard, 13 Metc.

2. Waiver of Eviction. Where a tenant continues to occupy the premises after the acts which constitute a constructive eviction, it is a waiver of the eviction.[30]

3. Actions by Tenant — a. Right of, in General. Where a landlord unlawfully evicts a tenant, takes possession of the premises, and deprives him of the beneficial use and enjoyment thereof, a cause of action arises in favor of the tenant, and he may bring an action for damages,[31] or where his term has not expired, he may bring an action for forcible entry and detainer, or other appropriate action, to regain possession of the premises.[32]

177, 46 Am. Dec. 728; Smith *v.* Shepard, 15 Pick. 147, 25 Am. Dec. 432.

New York.— Hyman *v.* Boston Chair Mfg. Co., 58 N. Y. Super. Ct. 282, 11 N. Y. Suppl. 52.

Pennsylvania.— Ross *v.* Dysart, 33 Pa. St. 452.

Canada.— Barnes *v.* Bellamy, 44 U. C. Q. B. 303.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 710.

Partial eviction.— If a tenant be evicted from part of the premises by strangers in virtue of a title paramount to that of the landlord, the rent will be apportioned. Doe *v.* Meyler, 2 M. & S. 276, 15 Rev. Rep. 244.

Attornment by tenant to third person in general see *supra*, III, G, 11.

30. *Illinois.*— Barrett *v.* Boddie, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172.

Maryland.— Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

Massachusetts.— Boston, etc., Corp. *v.* Ripley, 13 Allen 421.

Michigan.— Beecher *v.* Duffield, 97 Mich. 423, 56 N. W. 777.

New York.— Steefel *v.* Rothschild, 64 N. Y. App. Div. 293, 72 N. Y. Suppl. 171; Edwards *v.* Candy, 14 Hun 596; Seaboard Realty Co. *v.* Fuller, 33 Misc. 109, 67 N. Y. Suppl. 146, 8 N. Y. Annot. Cas. 418; Stein *v.* Rice, 23 Misc. 348, 51 N. Y. Suppl. 320; Butler *v.* Carillo, 88 N. Y. Suppl. 941; Butler *v.* Smith's Homeopathic Pharmacy, 5 N. Y. St. 885.

Pennsylvania.— Ward's Estate, 8 Pa. Dist. 153, 22 Pa. Co. Ct. 284.

Canada.— See Coleman *v.* Reddick, 25 U. C. C. P. 579.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 713.

Partial eviction.— Neither the subsequent payment of rent according to the terms of the lease by a tenant after a partial eviction by the landlord, nor the fact that he continues in possession of the remainder, constitutes a waiver of the eviction or consent thereto. Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879. See also Drucker *v.* Simon, 4 Daly (N. Y.) 53.

31. *California.*— Neumann *v.* Moretti, 146 Cal. 25, 79 Pac. 510.

Connecticut.— Dawson *v.* Marsh, 74 Conn. 498, 51 Atl. 529.

Delaware.— Rowbotham *v.* Pearce, 5 Houst. 135.

Georgia.— Mallette *v.* Hillyard, 117 Ga. 423, 43 S. E. 779.

Illinois.— Griesheimer *v.* Bothman, 105 Ill. App. 585.

Kansas.— Beck *v.* Birdsall, 19 Kan. 550.

Minnesota.— Wacholz *v.* Griesgraber, 70 Minn. 220, 73 N. W. 7.

Missouri.— De Donato *v.* Morrison, 160 Mo. 581, 61 S. W. 641.

Nebraska.— Cannon *v.* Wilbur, 30 Nebr. 777, 47 N. W. 85; Herpolsheimer *v.* Funke, 1 Nebr. (Unoff.) 471, 95 N. W. 688.

New Jersey.— Thiel *v.* Bull's Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281.

New York.— Mack *v.* Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Preiser *v.* Wielandt, 48 N. Y. App. Div. 569, 62 N. Y. Suppl. 890; Towne *v.* Brace, Clarke 503 [*affirmed* in 11 Paige 566].

Oregon.— Salzgeber *v.* Mickel, 37 Oreg. 216, 60 Pac. 1009.

Pennsylvania.— Maule *v.* Ashmead, 20 Pa. St. 482.

Texas.— McAllister *v.* Sanders, (Civ. App. 1897) 41 S. W. 388.

Vermont.— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

Washington.— Spencer *v.* Commercial Co., 30 Wash. 520, 71 Pac. 53.

United States.— Morrison *v.* Alexander, 17 Fed. Cas. No. 9,840, 1 Hayw. & H. 68.

Canada.— Reg. *v.* Poirier, 20 Can. Sup. Ct. 36.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 715 *et seq.*

Tenant from year to year under parol lease.— Since one who makes a lease of land does not *ipso facto* covenant that his title to the property demised is good, a tenant from year to year under parol lease, who is evicted in consequence of the failure of his lessor's title, cannot maintain an action against the latter for breach of the lease. Gano *v.* Vanderveer, 34 N. J. L. 293.

Tenant in wrongful possession.— Where, in an action by the tenant against his landlord for wrongful eviction from the premises, it appears that the tenant was wrongfully in possession, his lease having expired at the time of the eviction, he cannot recover damages for being kept out of possession of the property. Randall *v.* Rosenthal, (Tex. Civ. App. 1895) 31 S. W. 822.

Assignee of lease.— The landlord is liable to the assignee of his lease for damages through an eviction under paramount title wherever he would have been similarly liable to the original lessee. McClenahan *v.* Gwynn, 3 Munf. (Va.) 556.

32. Oakes *v.* Aldridge, 46 Mo. App. 11; Stolts *v.* Tuska, 83 N. Y. App. Div. 426, 82

b. Defenses. It is no defense to an action by a tenant against the landlord to recover damages for eviction from the demised premises that the premises are being used for an unlawful purpose;[33] nor in such action can defendant show that plaintiff took a new lease from the paramount owner at a higher rate and sold it at a profit,[34] or that the lessee might have obtained other premises on more advantageous terms.[35]

c. Pleading.[36] In an action by a tenant against a landlord for damages for eviction by a third person by title paramount, the declaration or complaint should allege that such third party had lawful title, superior to that of the landlord at the time the lease was made, and identify the holder of such title.[37]

d. Evidence.[38] Any evidence bearing upon or tending to prove the eviction,[39] or bearing upon the question of the damages suffered by plaintiff, is admissible;[40] and the question as to whether the acts of the landlord amounted to an eviction is one of fact for the jury.[41] Thus, where a lessee conducts an established business on the leased premises, the loss of profits occasioned by an eviction, if ascertainable with a reasonable degree of certainty, may be considered in estimating damages therefrom.[42]

N. Y. Suppl. 93; Lever *v.* Foote, 82 Hun (N. Y.) 393, 31 N. Y. Suppl. 356; McHenry *v.* Curtis, 3 Tex. App. Civ. Cas. § 269. See Hollidge *v.* Moriarty, 17 App. Cas. (D. C.) 520, holding that where no other fact is alleged in the bill of equity by a tenant against the landlord to regain possession of the leased premises than that he had been ousted under a void judgment by a justice of the peace, while it appears that the tenancy had been forfeited by failure to pay rent, the bill will not lie.

Action of forcible entry and detainer in general see FORCIBLE ENTRY AND DETAINER.

33. Boniel *v.* Block, 44 La. Ann. 514, 10 So. 869; Miller *v.* Forman, 37 N. J. L. 55.

34. Fitzgibbons *v.* Freisem, 12 Daly (N. Y.) 419.

35. Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939; New York, etc., R. Co. *v.* Bell, 28 Hun (N. Y.) 426.

36. Pleading generally see PLEADING.

37. Chestnut *v.* Tyson, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; Sylvester *v.* Hall, 47 Ill. App. 304; Prochaska *v.* Fox, 137 Mich. 519, 100 N. W. 746; Brookes *v.* Humphreys, 1 Arn. 379, 5 Bing. N. Cas. 55, 7 Dowl. P. C. 118, 2 Jur. 945, 8 L. J. C. P. 34, 6 Scott 756, 35 E. C. L. 40. See also McNab *v.* McDonell, 2 U. C. Q. B. 169.

Allegation of warranty against eviction.— The lessee cannot recover against the lessor as on a warranty against eviction by a stranger not contained in the covenants of the lease, without alleging that such warranty was omitted from the lease by fraud or mutual mistake. Thomas *v.* Brin, (Tex. Civ. App. 1905) 85 S. W. 842.

38. Evidence generally see EVIDENCE.

39. *Georgia.*— Stiger *v.* Monroe, 109 Ga. 457, 34 S. E. 595.

Indiana.— Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Massachusetts.— Hounnewell *v.* Bangs, 161 Mass. 132, 36 N. E. 751.

Michigan.— Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939.

Pennsylvania.— Dosch *v.* Diem, 176 Pa. St. 603, 35 Atl. 207.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 722.

Compare Wright *v.* Everett, 87 Iowa 697, 55 N. W. 4, where the evidence was held not to be sufficient to show that the lessor wrongfully took possession of the land during the term.

40. *Indiana.*—Ricketts *v.* Lostetter, 19 Ind. 125.

Mississippi.— Richardson *v.* Callihan, 73 Miss. 4, 19 So. 95.

Missouri.— Gildersleeve *v.* Overstolz, 90 Mo. App. 518.

Oregon.— Salzgeber *v.* Mickel, 37 Oreg. 216, 60 Pac. 1009.

Pennsylvania.— Supplee *v.* Timothy, 124 Pa. St. 375, 16 Atl. 864; Yeager *v.* Weaver, 1 Leg. Gaz. 156.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 722.

41. Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127; Wetzel *v.* Meranger, 85 Ill. App. 457; Faxon *v.* Jones, 176 Mass. 138, 57 N. E. 360; Ewing *v.* Cottman, 9 Pa. Super. Ct. 444, 43 Wkly. Notes Cas. 525; Walters *v.* Transue, 6 North. Co. Rep. (Pa.) 406. See Gilmore *v.* Fries, 34 Ill. App. 137, holding that in an action to recover damages for an eviction by a landlord of his tenant it is erroneous to leave to the determination of the jury the question as to the extent of the tenant's possession, which is settled by written leases, where such question has an effect on the measure of damages. See also Davis *v.* Schweikert, 130 Cal. 143, 62 Pac. 411.

42. Bass *v.* West, 110 Ga. 698, 36 S. E. 244; Smith *v.* Eubanks, 72 Ga. 280; Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157; Shaw *v.* Hoffman, 25 Mich. 162; Murphy *v.* Century Bldg. Co., 90 Mo. App. 621; Snow *v.* Pulitzer, 142 N. Y. 263, 36 N. E. 1059, 66 Hun (N. Y.) 329, 21 N. Y. Suppl. 296; Holmes *v.* Davis, 19 N. Y. 488 [*reversing* 21 Barb. 265]. But see Karbach *v.* Fogel, 63 Nebr. 601, 88 N. W. 659; Denison *v.* Ford, 10 Daly (N. Y.) 412; Irwin *v.* Nolde, 164 Pa. St. 205, 30 Atl. 246.

e. Damages[43] — (i) *General Rule.* The general rule is that the measure of the tenant's damages in case of eviction is the difference between the actual rental value of the demised premises, that is, the value of the use of the premises, and the rent reserved, estimated for the term of the lease,[44] together with other damages naturally resulting from the breach.[45]

(ii) *Treble Damages.* Under a statute entitling to treble damages a lessee successful in an action for illegal eviction, the proper practice is for the jury to find single damages, and for the court to treble them in a proper case.[46]

(iii) *Exemplary Damages.* In an action by a tenant against his landlord for eviction the damages should be merely compensatory, in the absence of any circumstances of oppression or aggravation.[47] However, where the eviction is accompanied by circumstances of aggravation, rendering it impossible to apply any fixed rule of law, the jury may give exemplary damages, to be graduated

Retailer of liquors.— Since on the death of a licensed retailer of liquors his administrator cannot continue business under the license where the licensee was wrongfully evicted from his place of business, on his death his administrator could not recover as damages to the business occasioned by the wrongful eviction, profits of the business for a period to elapse after the licensee's death. Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123.

43. Damages generally see DAMAGES.

44. *Georgia.*— Bass *v.* West, 110 Ga. 693, 36 S. E. 244; Shuman *v.* Smith, 100 Ga. 415, 28 S. E. 448.

Indiana.— Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. 957; Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Iowa.— Leick *v.* Tritz, 94 Iowa 322, 62 N. W. 855.

Nebraska.— Cannon *v.* Wilbur, 30 Nebr. 777, 47 N. W. 85.

New York.— Barrett *v.* Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. Rep. 835, 17 L. R. A. 720 [*affirming* 16 N. Y. Suppl. 94]; Denison *v.* Ford, 7 Daly 384; Goldstein *v.* Asen, 46 Misc. 251, 91 N. Y. Suppl. 783.

Ohio.— Rhodes *v.* Baird, 16 Ohio St. 573.

Pennsylvania.— Gallagher *v.* Burke, 13 Pa. Super. Ct. 244.

Texas.— Campbell *v.* Howerton, (Civ. App. 1905) 87 S. W. 370; Loyd *v.* Capps, (Civ. App. 1895) 29 S. W. 505.

Utah.— Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155.

Vermont.— See Merritt *v.* Closson, 36 Vt. 172.

United States.— *In re* Bonnett, 3 Fed. Cas. No. 1,633.

England.— Williams *v.* Burrell, 1 C. B. 402, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 401; Lock *v.* Furze, 19 C. B. N. S. 96, 11 Jur. N. S. 726, 34 L. J. C. P. 201, 12 L. T. Rep. N. S. 731, 13 Wkly. Rep. 971, 115 E. C. L. 96.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 723.

Market value of term.— For breach of a contract letting the walls of a building for advertisement purposes for a definite term, the measure of damages is the market value of the term and not its value to the lessee. Huiest *v.* Marx, 67 Mo. App. 418.

A tenant at will, evicted by his landlord without notice, may recover damages until the time when the tenancy at will might have been terminated by the landlord, even in an action brought before the expiration of that time, but for no longer. Ashley *v.* Warner, 11 Gray (Mass.) 43.

45. *Illinois.*— Griesheimer *v.* Bothman, 105 Ill. App. 585; Leiter *v.* Day, 35 Ill. App. 248. See Cochrane *v.* Tuttle, 75 Ill. 361, where the verdict was held to be excessive.

Indiana.— Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

Iowa.— Adair *v.* Bogle, 20 Iowa 238.

Louisiana.— Mengelle *v.* Abadie, 48 La. Ann. 669, 10 So. 670.

New York.— Carter *v.* Byron, 50 Hun 605, 3 N. Y. Suppl. 48; Carter *v.* Byron, 49 Hun 299, 1 N. Y. Suppl. 905; Nowlan *v.* Trevor, 2 Sweeny 67; Chatterton *v.* Fox, 5 Duer 64.

Pennsylvania.— Walters *v.* Transue, 6 North. Co. Rep. 406. See Koenig *v.* Bauer, 1 Brewst. 304, where the verdict was held to be excessive.

Nominal damages.— Where the evicted tenant has paid no part of the rent, or has paid rent only for the time during which he was in possession, he is entitled to only nominal damages. Pendleton *v.* Myers, 1 Ohio Dec. (Reprint) 282, 7 West. L. J. 39; Lanigan *v.* Kille, 97 Pa. St. 120, 39 Am. Rep. 797 [*affirming* 13 Phila. 60].

The old English rule which was formerly followed to a certain extent in the United States was that the lessee who had been evicted could not recover, as part of his damages, for the value of his unexpired term, or for the mesne profits thereof. Smith *v.* Wunderlich, 70 Ill. 426; Moak *v.* Johnson, 1 Hill (N. Y.) 99; Baldwin *v.* Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627.

46. Shaw *v.* Hoffman, 21 Mich. 151; Hong Sing *v.* Wolf Fein, 33 Misc. (N. Y.) 608, 67 N. Y. Suppl. 1109; Marchand *v.* Haber, 16 Misc. (N. Y.) 322, 37 N. Y. Suppl. 952.

47. Harris *v.* Cleghorn, 121 Ga. 314, 48 S. E. 959 (holding that in an action growing out of an alleged tortious eviction of plaintiff in violation of the contract of rental, recovery cannot be had both for the actual loss occasioned by the breach of contract and for wounded feelings caused by the tort); Wamsganz *v.* Wolff, 86 Mo. App. 205; Gallagher *v.* Burke, 13 Pa. Super. Ct. 244.

with reference to the motives which actuated defendant, and the manner in which the act complained of was committed.[48]

VIII. RENT AND ADVANCES.

A. Rights and Liabilities — 1. In General — a. Nature of Rent. Rent as an incorporeal hereditament has been defined to be a certain profit issuing yearly out of lands and tenements corporeal.[49] If personal chattels are leased with the land, the rent issues out of the land only.[50] It has been held, however, that rent may issue, not only from lands and tenements corporeal, but also from the personal property necessary for their proper enjoyment.[51] By common usage the word "rent" may include the compensation to be paid for the occupation of land by a tenant, whether he holds under a written lease or at will or at sufferance,[52] and whether the amount to be paid has been defined by the agreement of the parties, or has been left indefinite.[53] Rent may be rendered in services, in goods, or in money,[54] and a stipulation in a lease that it shall be applied to a special purpose does not change its character as rent.[55]

b. Liability For Rent in General.[56] As a general rule rent does not accrue to the lessor as a debt until the lessee has enjoyed the use of the land.[57] Liability for rent, however, does not always depend upon the actual occupation of the premises during the time for which recovery is sought; legal possession, under the power given by the landlord, is sufficient,[58] unless the tenant enters under a

48. Smith *v.* Wunderlich, 70 Ill. 426; Fillebrown *v.* Hoar, 124 Mass. 580; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Gallagher *v.* Burke, 13 Pa. Super. Ct. 244.

49. 2 Blackstone Comm. 41. The same or a similar definition may be found in the following cases:

Connecticut.— Peck *v.* Northrop, 17 Conn. 417.

New York.— Fay *v.* Holloran, 35 Barb. 295; Van Wicklen *v.* Paulson, 14 Barb. 654; Constantine *v.* Wake, 1 Sweeny, 239; Armstrong *v.* Cummings, 58 How. Pr. 331.

Pennsylvania.— Com. *v.* Contner, 18 Pa. St. 439.

Texas.— Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916.

Canada.— Hopkins *v.* Hopkins, 3 Ont. 223.

Other definitions are: "A compensation or return, in the nature of an acknowledgment, given for the possession of some corporeal inheritance." Anderson L. Dict.

"A certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use." Bouvier L. Dict.

A net rent is a sum to be paid to the landlord clear of all deductions. Bennett *v.* Womack, 7 B. & C. 627, 14 E. C. L. 283, 3 C. & P. 96, 14 E. C. L. 468, 6 L. J. K. B. O. S. 175, 1 M. & R. 644, 31 Rev. Rep. 270.

A rente foncière, or rent reserved on a lease, is a real contract, and the rent is due by the *fonds* or estate. New Orleans *v.* Duplessis, 5 Mart. (La.) 309.

A rente constituée or annuity is a personal contract, and not due by the estate hypothecated for it. New Orleans *v.* Duplessis, 5 Mart. (La.) 309.

Necessity of reservation of rent to create relation of landlord and tenant see *supra*, I, B, 2.

50. Fay *v.* Holloran, 35 Barb. (N. Y.) 295; Armstrong *v.* Cummings, 58 How. Pr. (N. Y.) 231.

51. Vetter's Appeal, 99 Pa. St. 52; Mickle *v.* Miles, 31 Pa. St. 20, 1 Grant 320 [*qualifying* Com. *v.* Contner, 18 Pa. St. 439], holding that the ordinary definition of rent, as a profit issuing yearly out of lands and tenements corporeal, is defective in overlooking some of the cases that belong to the class; as where a furnished house or a stocked farm is leased. In such cases the personal property is really a part of the consideration of the rent, and it is only by a fictitious accommodation of the case to the defective definition, that it can be said that the rent issues exclusively out of the land.

52. Kites *v.* Church, 142 Mass. 586, 8 N. E. 743; Rice *v.* Loomis, 139 Mass. 302, 1 N. E. 548.

53. Kites *v.* Church, 142 Mass. 586, 8 N. E. 743; Rice *v.* Loomis, 139 Mass. 302, 1 N. E. 548; Ocean Grove Camp Meeting Assoc. *v.* Sanders, 67 N. J. L. 1, 50 Atl. 449 (holding that, although a lease of realty styles the recompense an assessment as well as a yearly rent, and its precise amount, not exceeding the stated maximum, is to be fixed annually by the lessor, it is rent within the Landlord and Tenant act); Constantine *v.* Wake, 1 Sweeny (N. Y.) 239.

54. See *infra*, VIII, A, 10, e, *et seq.*

55. Ryerson *v.* Quackenbush, 26 N. J. L. 236.

56. **Liability for rent** dependent upon: Condition of premises see *infra*, VIII, A, 4. Possession and enjoyment of premises see *infra*, VIII, A, 3.

57. Bordman *v.* Osborn, 23 Pick. (Mass.) 295. See *infra*, VIII, A, 3.

58. Hall *v.* Western Transp. Co., 34 N. Y. 284 (holding that where one leases a barn

void lease, when he may be compelled to pay for the use and occupation,[59] but not for a period longer than he actually occupied.[60] The tenant's possession must be by virtue of some express or implied agreement,[61] and where it is the express intention of the parties that rent shall not be paid until the performance of a condition no rent is due until such condition is performed.[62] Where a party agrees to rent certain premises and pay the rent for another, he is liable for the rent without occupying the premises.[63]

c. Covenants and Agreements to Pay Rent — (I) *In General.* A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor,[64] or by a lessee for a term, belongs to that class of covenants which are annexed to and run with the land. The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee.[65] A mere personal covenant, however, is not binding upon the assignee and does not run with the land.[66] A covenant to pay rent at the end of the year is dependent upon the right to occupy the land.[67]

(II) *The Necessity of Consideration.* A promise to pay rent like any other agreement requires a consideration to support it.[68] The demise itself,[69] or the right to occupy premises under a valid agreement of letting,[70] or the agreement for quiet enjoyment, implied in the fact of the demise,[71] constitutes a sufficient consideration for the agreement to pay rent. A promise to pay rent to one other than the lessor and who has no title is void for want of consideration.[72]

(III) *Construction.* In construing covenants to pay rent the rules governing the construction of contracts generally apply. The court will look to the intent of the parties and give effect to it if possible.[73] There is a conflict of authority

for a term of years, occupies it for one year and pays the rent, then locks it, without actual occupation, and keeps the key for the next year, he is liable as for use and occupation for the second year); Sherwood *v.* Gardner, 2 N. Y. City Ct. 64; Westlake *v.* De Graw, 25 Wend. (N. Y.) 669; Izon *v.* Gorton, 2 Arn. 39, 5 Bing. N. Cas. 501, 3 Jur. 653, 8 L. J. C. P. 272, 7 Scott 537, 35 E. C. L. 271; Pinero *v.* Judson, 6 Bing. 206, 8 L. J. C. P. O. S. 19, 3 M. & P. 497, 19 E. C. L. 100; Jones *v.* Reynolds, 7 C. & P. 335, 32 E. C. L. 642; Whitehead *v.* Clifford, 5 Taunt. 518, 15 Rev. Rep. 579, 1 E. C. L. 266.

59. Nash *v.* Berkmeir, 83 Ind. 536; Smith *v.* Genet, 2 N. Y. City Ct. 88.

Action for use and occupation see USE AND OCCUPATION.

60. Smith *v.* Genet, 2 N. Y. City Ct. 88.

61. Ramirez *v.* Murray, 5 Cal. 222. See *infra*, VIII, A, 1, c.

A possessor in good faith is liable for rent to the true owner only from the date of commencing suit therefor. Dufilho *v.* Mayer, 27 La. Ann. 398.

One bound to reconvey land on the payment of a certain sum may, without liability for rent, keep it until such sum is paid. Bermudez *v.* Ibanez, 3 Mart. (La.) 1.

62. Epping *v.* Devanny, 28 Ga. 422.

63. Moore *v.* Dove, 17 Fed. Cas. No. 9,757, 1 Hayw. & H. 161.

64. See GROUND-RENTS, 20 Cyc. 1369.

65. See *infra*, VIII, A, 8, b, (II).

A promise under seal to pay rent is a covenant upon which covenant will lie. Greenleaf *v.* Allen, 127 Mass. 248.

66. Croade *v.* Ingraham, 13 Pick. (Mass.) 33.

67. Thompson *v.* Gray, 2 Stew. & P. (Ala.) 60.

68. Goodman *v.* Jones, 26 Conn. 264; Brown *v.* Roberts, 21 La. Ann. 508; Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362.

69. Hill *v.* Woodman, 14 Me. 38.

70. Haines *v.* L. Graf Mfg. Co., 13 N. Y. St. 730.

71. Vernam *v.* Smith, 15 N. Y. 327.

Implied covenant for quiet enjoyment see *supra*, VII, B, 2, a.

72. Fuller *v.* Sweet, 30 Mich. 237, 18 Am. Rep. 122; Broddie *v.* Johnson, 1 Sneed (Tenn.) 464.

73. See CONTRACTS, 9 Cyc. 213; COVENANTS, 11 Cyc. 1035.

Particular covenants construed see Matthews *v.* Morris, 31 Ark. 222; Hobson *v.* Silva, (Cal. 1902) 70 Pac. 619; Baird *v.* Milford Land, etc., Co., (Cal. 1891) 27 Pac. 296, 89 Cal. 552, 26 Pac. 1084; Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 [*reversing* (App. 1901) 61 N. E. 12]; Totty *v.* Harris, 82 Iowa 645, 48 N. W. 1050; O'Brien *v.* Carson, 42 Iowa 553; Kendall *v.* Moore, 30 Me. 327; Salisbury *v.* Hale, 12 Pick. (Mass.) 416; Church *v.* Standard R. Signal Co., 52 N. Y. App. Div. 407, 65 N. Y. Suppl. 116; Metropolitan L. Ins. Co. *v.* Standard Nat. Bank, 44 N. Y. App. Div. 319, 60 N. Y. Suppl. 666; Smith *v.* Hubert, 83 Hun (N. Y.) 503, 31 N. Y. Suppl. 1076; House *v.* Burr, 24 Barb. (N. Y.) 525; Sassaman *v.* Feagly, 4 Watts (Pa.) 268; McDer-

as to the nature of the covenant arising out of the words "yielding and paying" in a lease, one line of authorities holds that the covenant thus arising is express;[74] another holds that it is implied.[75]

(iv) *Implied Covenants and Agreements.*[76] Where one enters upon land with the owner's consent and uses and occupies the same for his own profit, there arises an implied promise to pay a reasonable compensation for such use.[77] Actual occupation of the premises is necessary, however, to give rise to such implied liability.[78] In order that an agreement to pay rent may be implied from the possession and occupation of land, the relation of landlord and tenant must exist,[79] and

mott *v.* Carroll, 11 S. D. 323, 77 N. W. 579; Cross *v.* Freeman, 19 Tex. Civ. App. 428, 47 S. W. 473; Neath *v.* Cuthbert, Ir. R. 10 C. L. 395; —— Nicholls, Lofft. 393. See 32 Cent. Dig. tit. "Landlord and Tenant," § 734.

Question for jury.— If the meaning of the language used is doubtful, the question of the intent of the parties should be left to the jury. Bettman *v.* McConnell, 55 Nebr. 401, 75 N. W. 855.

Effect of right to claim conveyance.— It does not change the character of an agreement to pay rent that the tenant may at the end of the term claim a conveyance of the land. Blanchard *v.* Raines, 20 Fla. 467.

74. Hollis *v.* Carr, 2 Mod. 87; Hellier *v.* Casbard, 1 Sid. 266; Porter *v.* Swetnam, Style 406; Newton *v.* Osborn, Style 387.

75. Fanning *v.* Stimson, 13 Iowa 42; Kimpton *v.* Walker, 9 Vt. 191; Vyvyan *v.* Arthur, 1 B. & C. 410, 2 D. & R. 670, 1 L. J. K. B. O. S. 138, 25 Rev. Rep. 437, 8 E. C. L. 175; Iggulden *v.* May, 7 East 237, 3 Smith K. B. 269, 9 Ves. Jr. 325, 8 Rev. Rep. 623, 32 Eng. Reprint 628; Harper *v.* Burgh, 2 Lev. 206; Thursby *v.* Plant, 1 Saund. 241, note 5; Tilden *v.* Walter, 1 Sid. 447; Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725; Church *v.* Brown, 15 Ves. Jr. 258, 10 Rev. Rep. 74, 33 Eng. Reprint 752.

76. Implied tenancy see *supra*, I, E.

77. *Colorado.*— Dickson *v.* Moffat, 5 Colo. 114.

Illinois.—Illinois Cent. R. Co. *v.* Thompson, 116 Ill. 159, 5 N. E. 117; Oakes *v.* Oakes, 16 Ill. 106.

Kentucky.—Crouch *v.* Briles, 7 J. J. Marsh. 255, 23 Am. Dec. 404.

Michigan.— Thompson *v.* Sanborn, 52 Mich. 141, 17 N. W. 730.

Missouri.— Wilkinson *v.* Wilkinson, 62 Mo. App. 249.

New Jersey.— Chambers *v.* Ross, 25 N. J. L. 293.

New York.— Lynch *v.* Onondaga Salt Co., 64 Barb. 558 (holding that the statute has not abrogated the common-law doctrine of implied covenants as applied to leases for use; and a lease for use implies on the part of the lessee a covenant to pay rent): Coit *v.* Planer, 7 Rob. 413, 4 Abb. Pr. N. S. 140.

Ohio.— Heidelbach *v.* Slader, 1 Handy 456, 12 Ohio Dec. (Reprint) 234; A. H. Pugh Co. *v.* Dexter, 8 Ohio S. & C. Pl. Dec. 557, 5 Ohio N. P. 332.

Rhode Island.—Providence Christian Union *v.* Eliott, 13 R. I. 74.

Texas.— Ascarete *v.* Pfaff, 34 Tex. Civ. App. 375, 78 S. W. 974.

United States.— Scott *v.* Hawsman, 21 Fed Cas. No. 12,532, 2 McLean 180.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 736.

Liability in the absence of lease or agreement in general see Use and Occupation.

Occupation of more land than the deed conveys will not compel the tenant to pay an increased rent in the absence of a covenant on his part to that effect. Bourk *v.* Cormier, 16 Quebec Super. Ct. 295.

Where the government has entered upon the realty of a citizen, it should be deemed to have entered as his tenant under an implied lease, whereof the "just compensation" as secured by the constitution to those whose property is taken for public use should be the rent. Johnson *v.* U. S., 4 Ct. Cl. 248.

Where there is no agreement as to price, the law implies what the premises are reasonably worth. Scrantom *v.* Booth, 29 Barb. (N. Y.) 171.

Effect of written contract.— There can be no implied contract between parties to pay rent for use and occupation, so long as a written contract including the same premises exists between them. North *v.* Nichols, 37 Conn. 375.

One's written acknowledgment that he occupies land as the tenant of another raises no presumption of law that he promises to pay rent. Strafford County Sav. Bank *v.* Getchell, 59 N. H. 281.

78. Seaman *v.* Ward, 1 Hilt. (N. Y.) 52 (holding that the acceptance of the key of a house is sufficient to establish occupation, which will support an implied agreement to pay rent); Beach *v.* Gray, 2 Den. (N. Y.) 84.

79. *Georgia.*— Littleton *v.* Wynn, 31 Ga. 583; Jackson *v.* Mowry, 30 Ga. 143.

Michigan.— Cass County *v.* Cowgill, 97 Mich. 448, 56 N. W. 849.

Ohio.— Mitchell *v.* Pendleton, 21 Ohio St. 664.

Vermont.— Clark *v.* Clark, 58 Vt. 527, 3 Atl. 508.

England.— Birch *v.* Wright, 1 T. R. 378, 1 Rev. Rep. 228.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 736.

Question of fact.— Whether a promise to pay rent is to be implied from occupation and other circumstances is a question of fact. Welcome *v.* Labontee, 63 N. H. 124; Strafford County Sav. Bank *v.* Getchell, 59 N. H. 281.

therefore where one, without the owner's consent, either express or implied, enters upon property, a mere trespasser, under claim of title in himself, no contract to pay for the use can be implied.[80] So where one enters on land under a contract to purchase, no liability for rent can be implied while the contract remains open,[81] or on the failure of the vendor to complete the contract,[82] or when the contract is rescinded by mutual agreement;[83] if, however, the contract fails through the fault of the vendee, he will be held liable for rent.[84] Where the use and occupation of real estate is under such circumstances as to show no expectation of rent by either party, no contract to pay rent will be implied;[85] thus occupancy of premises on the invitation of another,[86] or as caretaker,[87] raises no implied agreement to pay rent; but where the occupation is by the permission of the landlord an implied undertaking to pay rent may be inferred from slight circumstances.[88] The fact that the parties are related may be considered, but it is not sufficient to raise the presumption that the tenant was to have the premises rent free.[89]

d. Holding Over After Expiration of Term[90] — (i) *In General.* In the absence of statutory or contractual provision to the contrary by holding over a tenant becomes liable for rent of the premises for a further term of the same length as the original lease.[91] Such holding over, however, is not conclusive and

80. Ramirez *v.* Murray, 5 Cal. 222; Boston *v.* Binney, 11 Pick. (Mass.) 1, 22 Am. Dec. 353; Newlin *v.* Brinton, 1 Chest. Co. Rep. (Pa.) 233; Watson *v.* Brainard, 33 Vt. 88.

81. Hogsett *v.* Ellis, 17 Mich. 351.

Creation of relation of landlord and tenant see *supra*, I, E, 2, d.

82. Little *v.* Pearson, 7 Pick. (Mass.) 301, 19 Am. Dec. 289; Kaas' Estate, 2 Pa. Co. Ct. 55.

83. Miles *v.* Elkin, 10 Ind. 329.

84. Lapham *v.* Norton, 71 Me. 83 (holding that liability to pay rent arises only from an implied promise resting on the failure to comply with the terms of the contract of purchase); Patterson *v.* Stoddard, 47 Me. 355, 74 Am. Dec. 490; Gould *v.* Thompson, 4 Metc. (Mass.) 224.

85. Chambers *v.* Ross, 25 N. J. L. 293; Tower *v.* Blessing, 55 N. Y. App. Div. 634, 67 N. Y. Suppl. 124; Clark *v.* Clark, 58 Vt. 527, 3 Atl. 508.

Gratuitous license.— Rent cannot be claimed for the use of premises occupied under a gratuitous license. Loague *v.* Memphis, 7 Lea (Tenn.) 67.

86. Strickland *v.* Hudson, 55 Miss. 235.

87. Middleton *v.* Middleton, 35 N. J. Eq. 141.

88. Watson *v.* Brainard, 33 Vt. 88.

89. Oakes *v.* Oakes, 16 Ill. 106; Sterrett *v.* Wright, 27 Pa. St. 259 (holding further that the burden is on the occupant to show an agreement that rent shall not be paid); Spackman's Appeal, 16 Wkly. Notes Cas. (Pa.) 79; Clark *v.* Clark, 58 Vt. 527, 3 Atl. 508.

90. **Holding over:** As affecting amount of rent see *infra*, VIII, A, 6, c, (I). As implying renewal of tenancy see *supra*, IV, C, 3, f. Effect of on time of payment see *infra*, VIII, A, 6, e, (IV). Penalty or double rent for see *infra*, VIII, A, 11, a.

91. *Alabama.*— Wolffe *v.* Wolff, 69 Ala. 549, 44 Am. Rep. 526; Harkins *v.* Pope, 10 Ala. 493.

California.— Schilling *v.* Holmes, 23 Cal. 227.

Connecticut.—Byxbee *v.* Blake, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222; Bacon *v.* Brown, 9 Conn. 334.

Indiana.— New York, etc., R. Co. *v.* Randall, 102 Ind. 453, 26 N. E. 122.

Iowa.— Dubuque Lumber Co. *v.* Kimball, 111 Iowa 48, 82 N. W. 458.

Kentucky.— Whittemore *v.* Moore, 9 Dana 315.

Massachusetts.— Jaques *v.* Gould, 4 Cush. 384.

Minnesota.— Flint *v.* Sweeney, 49 Minn. 509, 52 N. W. 136.

Missouri.— Smith *v.* Smith, 62 Mo. App. 596.

New York.— Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609; Pugsley *v.* Aikin, 11 N. Y. 494; Rosenbloom *v.* Chittick, 34 Misc. 766, 68 N. Y. Suppl. 819; Wood *v.* Gordon, 18 N. Y. Suppl. 109 [*affirming* 13 N. Y. Suppl. 595]; Conway *v.* Starkweather, 1 Den. 113; Evertson *v.* Sawyer, 2 Wend. 507; Abeel *v.* Radcliff, 15 Johns. 505; Osgood *v.* Dewey, 13 Johns. 240.

North Dakota.— Merchants' State Bank *v.* Ruettell, 12 N. D. 519, 97 N. W. 853.

Ohio.— Stuart *v.* Ford, 11 Ohio Cir. Ct. 453, 5 Ohio Cir. Dec. 260.

Pennsylvania.— Graham *v.* Dempsey, 169 Pa. St. 460, 32 Atl. 408 (holding that a tenant cannot escape liability for the rent of another term by giving notice that he is going out at the end of his year and then not going); Patterson *v.* Park, 166 Pa. St. 25, 30 Atl. 1041 (holding further on an issue as to liability for rent that it is proper to refuse offers by the tenant to prove that complaints were made by him in regard to the condition of the premises, that repairs were needed and demanded, and that negotiations were pending between the parties for a new lease); Grant *v.* Gill, 2 Whart. 42 (holding that an abandonment did not operate to release liability); Carter *v.* Collar, 1 Phila. 339.

may be rebutted.[92] Where the lease contains an express covenant to pay rent for such time as the lessee holds over the implied promise will yield.[93]

(II) *What Constitutes Holding Over Affecting Liability For Rent* — (A) *In General.* While it has been held that in the absence of qualifying circumstances implying consent to a holding under some new arrangement, the holding over is a legal trespass, and does not depend on the intention of the tenant; and that it is a wrongful holding, whatever the cause, although not culpable in a moral sense, and the rights of a landlord are definitely fixed by law;[94] the better rule, however, seems to be that the tenant must have been either deliberately or negligently at fault,[95] and where the holding over is unavoidable in the strictest sense no implied liability for rent will arise.[96] Where the property of the tenant is permitted to remain upon the premises in the same condition as before the expi-

Rhode Island.—Moshassuck Encampment No. 2. *v.* Arnold, 25 R. I. 65, 54 Atl. 771.

South Carolina.—Hart *v.* Finney, 1 Strobh. 250.

South Dakota.— Hunter *v.* Karcher, 8 S. D. 554, 67 N. W. 621.

Tennessee.— Hibbard *v.* Newman, 2 Baxt. 285 (holding that this is true, although the property be consumed by fire during his occupancy); Noel *v.* McCrory, 7 Coldw. 623; Shepherd *v.* Cummings, 1 Coldw. 354.

Vermont.— Sharon Cong. Soc. *v.* Rix, (1889) 17 Atl. 719.

Wisconsin.—De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

United States.— Semmes *v.* U. S., 14 Ct. Cl. 493.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 737.

But see Kendall *v.* Moore, 30 Me. 327.

When title is in dispute, and there is no recognized landlord, a tenant occupying premises after the expiration of the lease is liable for their use and occupation according to the value thereof, and the right to enter fixed by the lease is conclusive on neither party. Van Brunt *v.* Pope, 6 Abb. Pr. N. S. (N. Y.) 217.

A lease for a year by county commissioners under their own seal and not the county seal is binding on the county as an express contract, and if the possession is not delivered up at the end of the term an implied contract arises against the county. Dauphin County *v.* Bridenhart, 16 Pa. St. 458.

Holding over by mortgagor.— Where a mortgagor reserves the right to remain in possession until condition broken, and holds over, there is no implied agreement to pay rent to the mortgagee before entry by the mortgagee. Mayo *v.* Fletcher, 14 Pick. (Mass.) 525.

Effect of surrender and acceptance by landlord.— No rent accrues against a tenant for a year who holds over after he surrenders possession of the premises to the landlord and the latter accepts the same. Minneapolis Co-operative Co. *v.* Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473.

Relation of landlord and tenant must exist. — An action for use and occupation will not lie against a tenant who holds over after the expiration of his term against a landlord's will, where proceedings have been instituted to turn him out of possession, since such action lies only when the relation of landlord and tenant exists. Bradshaw *v.* Featherstonhaugh, 1 Wend. (N. Y.) 134.

92. Wheeler *v.* Crouse, 1 Ohio Cir. Ct. 234, 1 Ohio Cir. Dec. 127. See *infra*, VIII, A, 1, d, (II).

93. Pickett *v.* Bartlett, 107 N. Y. 277, 14 N. E. 301.

94. Mason *v.* Wierengo, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461, where the tenant was prevented from removing by illness. See also Campau *v.* Michell, 103 Mich. 617, 61 N. W. 890; Herter *v.* Mullen, 159 N. Y. 28, 53 N. E. 700, 70 Am. St. Rep. 517, 44 L. R. A. 703; Shanahan *v.* Shanahan, 55 N. Y. Super. Ct. 339, 14 N. Y. St. 732; Oussani *v.* Thompson, 19 Misc. (N. Y.) 524, 43 N. Y. Suppl. 1061; Wood *v.* Gordon, 18 N. Y. Suppl. 109 (where the tenant failed to remove through a mistake as to when his tenancy terminated); Manly *v.* Clemmens, 14 N. Y. Suppl. 366; Smith *v.* Allt, 4 Abb. N. Cas. (N. Y.) 205 (holding that where the tenant determined and endeavored to remove and was prevented by neglect of duty by the landlord, the rule does not apply).

95. See cases cited *supra*, note 91; and *infra*, notes 96, 97.

96. Herter *v.* Mullen, 159 N. Y. 28, 53 N. E. 700, 70 Am. St. Rep. 517, 44 L. R. A. 703 (holding that where the holding over is wrongful or voluntary and not unavoidable in the strictest sense, the rule must be presumed to have full application. But where the tenant is obliged to retain a room in the house for a longer period of time in order to avoid the peril of exposing a member of his family to danger and death, it cannot properly be said that it is a holding over within the meaning of the law); Haynes *v.* Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636 (where the question is reserved as to whether there might not be an unavoidable delay in no manner the fault of the tenant, directly or indirectly, which would serve as a valid excuse); Regan *v.* Fosdick, 19 Misc. (N. Y.) 489, 43 N. Y. Suppl. 1102 (where the tenant was prevented from removing by the action of the board of health in quarantining his family); Frost *v.* Akron Iron Co., 12 Misc. (N. Y.) 348, 33 N. Y. Suppl. 654.

ration of the term, a holding over is implied.[97] But it is otherwise where there is a clear intent to surrender possession, accompanied by the removal of a great bulk of the property.[98] The duration of the holding over is not the test of liability.[99] A mere temporary absence and return will not avoid the effect of holding over.[1]

(B) *Pending Payment For Improvements.* A tenant in possession at the expiration of a lease who has made authorized improvements which the landlord has engaged to purchase at the expiration of the time may retain his possession until such purchase may be performed; but not without meanwhile being chargeable for rent;[2] but occupancy for the removal of improvements under the terms of the lease is not a holding subjecting one to liability for rent.[3]

(C) *By Subtenant.* Where a tenant of a lessee holds over after the end of the lease, the lessee is liable for rent in the same manner as if he had remained personally in possession.[4]

(D) *Under Agreement For Lease.* Where a tenant holds over his term on the landlord's promise to give him a lease, and quits the premises on his refusal to do so, there is no implied agreement for rent during the period of occupation.[5]

e. Release From Liability — (I) *In General.* Nothing but a surrender,[6] a release, or an eviction[7] can in whole or in part absolve a tenant from the obligation of his covenant to pay rent.[8] A release of liability for rent may be express or implied from the conduct of the parties.[9] If the release is express no particular words or phrases are necessary; any words which show the intention of the parties are sufficient.[10] If the lease is parol a verbal agreement to release the tenant is effectual to defeat an action for the rent.[11]

(II) *Substitution of Tenants.* A lessor who has consented to a change of tenancy, and permitted a change of occupation, and received rent from the new

97. Vosburgh *v.* Corn, 23 N. Y. App. Div. 147, 48 N. Y. Suppl. 598. See also *supra*, IV, C, 3, f, (II), (C), (I).

98. Vosburgh *v.* Corn, 23 N. Y. App. Div. 147, 48 N. Y. Suppl. 598; Lore *v.* Pierson, 10 Daly (N. Y.) 272 (holding that one cannot be charged with holding over, merely because he allows certain chattels to remain on the premises after the expiration of the term for the convenience of the incoming tenant); Smith *v.* Maxfield, 9 Misc. (N. Y.) 42, 29 N. Y. Suppl. 63; Manly *v.* Clemmens, 14 N. Y. Suppl. 366; Adler *v.* Mendelson, 74 Wis. 464, 43 N. W. 505.

99. Oussani *v.* Thompson, 19 Misc. (N. Y.) 524, 43 N. Y. Suppl. 1061.

1. Montanye *v.* Wallahan, 84 Ill. 355, holding the tenant subject to distress.

2. Franklin Land, etc., Co. *v.* Card, 84 Me. 528, 24 Atl. 960; Holsman *v.* Abrams, 2 Duer (N. Y.) 435.

3. Vorse *v.* Des Moines Marble, etc., Co., 104 Iowa 541, 73 N. W. 1064.

4. Campau *v.* Michell, 103 Mich. 617, 61 N. W. 890; Constant *v.* Abell, 36 Mo. 174; Hall Steam Power Co. *v.* Campbell Printing Press, etc., Co., 8 Misc. (N. Y.) 430, 28 N. Y. Suppl. 662 [*affirming* 5 Misc. 264, 25 N. Y. Suppl. 106]; Morgenthau *v.* Beaton, 88 N. Y. Suppl. 359; Lubetkin *v.* Henry Elias Brewing Co., 4 N. Y. Suppl. 195, 21 Abb. N. Cas. 304; Fulmer *v.* Crossman, 8 Del. Co. (Pa.) 78, but there must be some privity of contract between the parties in order that it shall become a holding over by the lessee. See *infra*, VIII, A, 8, c, (I).

5. Greaton *v.* Smith, 1 Daly (N. Y.) 380.

6. Surrender see *infra*, IX, B, 8; IX, C, 6; IX, D, 3; IX, F, 7.

7. Eviction see *supra*, VII, F.

8. Fisher *v.* Milliken, 8 Pa. St. 111, 49 Am. Dec. 497; Snyder *v.* Middleton, 4 Phila. (Pa.) 343.

9. Colton *v.* Gorham, 72 Iowa 324, 33 N. W. 76; Number 121 Madison Ave. *v.* Osgood, 18 N. Y. Suppl. 126, 19 N. Y. Suppl. 911. See also Beekman *v.* Van Dolsen, 63 Hun (N. Y.) 487, 18 N. Y. Suppl. 376.

Failure to demand the rent will not justify the presumption that the landlord has released or extinguished his right to it. Myers *v.* Silljacks, 58 Md. 319.

Distress of the goods of a sublessee or assignee found upon the premises for rent due by his lessee does not discharge the latter from personal liability for rent afterward accruing. Manley *v.* Dupuy, 2 Whart. (Pa.) 162. See also Thomas *v.* Dundas, 31 La. Ann. 184.

Occupancy by others and receipt of rent from them by the lessor at other times previously does not release the lessee. Deane *v.* Caldwell, 127 Mass. 242; McGlynn *v.* Brock, 111 Mass. 219; Ward *v.* Krull, 49 Mo. App. 447.

10. Bruce *v.* Halbert, 3 T. B. Mon. (Ky.) 66.

A covenant never to sue has that effect. Bruce *v.* Halbert, 3 T. B. Mon. (Ky.) 66.

A release from liability on all the covenants of a lease includes the obligation to pay rent. Baker *v.* Clancy, 69 Ill. App. 85.

11. Donahoe *v.* Rich, 2 Ind. App. 540, 28 N. E. 1001.

tenant, cannot afterward charge the original tenant for rent accruing subsequently to such change.[12] An agreement to release the original lessee and accept another tenant in his stead need not be express, but may be inferred from the conduct of the parties.[13]

2. **Deposits and Other Security For Rent**[14] — a. **In General.** It is often provided in the lease that the tenant shall furnish security for the payment of the rent.[15] If the security offered is adequate, it makes no difference whether it is personal or real security.[16] The renewal of a lease operates as a renewal of the agreement regarding the security.[17]

b. Forfeiture of Deposit. Where money is deposited as liquidated damages, or as security for the covenants of the lease generally, the landlord, after dispossessing the tenant for a breach of the lease, is entitled to retain the deposit:[18] and this, notwithstanding a statute which provides that the issue of a warrant in summary proceedings cancels all further rights and obligations under the lease.[19] The retention of the deposit by the landlord does not deprive him of his right to also recover for rent due upon the covenants of the lease during the period of the occupancy.[20] Where a tenant deposits money as security for the payment of rent and the performance of the covenants of the lease, and is dispossessed during the term for failing to pay rent, the deposit is not forfeited; the tenant is entitled to recover the balance remaining after deducting therefrom the amount of damages suffered by the landlord from the breaches of covenants on his part prior to the dispossession.[21] Even in some cases where the lease recites that the deposit is

12. Donahoe *v.* Rich, 2 Ind. App. 540, 28 N. E. 1001 (holding that a lessee's sale of his business to the new tenant and his transfer of possession to him constitute a sufficient consideration for the release of the lessee from liability for rent); Page *v.* Ellsworth, 44 Barb. (N. Y.) 636; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Smith *v.* Wheeler, 8 Daly (N. Y.) 135.

Substitution of tenants as surrender see *infra*, IX, B, 8, c, (IV).

13. Fry *v.* Patridge, 73 Ill. 51; Colton *v.* Gorham, 72 Iowa 324, 33 N. W. 76; Number 121 Madison Ave. *v.* Osgood, 18 N. Y. Suppl. 126, 19 N. Y. Suppl. 911.

14. **Taking security** for rent as: Affecting right to distrain see *infra*, VIII, E, 2, f. Waiver of landlord's lien see *infra*, VIII, D, 3, g, (III), (B). See also, generally, GUARANTY; PRINCIPAL AND SURETY.

15. See cases cited *infra*, note 16, *et seq.*

In Pennsylvania when a tenant abandons the premises without leaving sufficient goods to protect the lessor, the latter may compel the tenant to give security within a certain time, or deliver possession of the premises. Ward *v.* Wandell, 10 Pa. St. 98, holding that a tenant who has quit possession and received notice to give security for the rent within five days must tender such security before proceedings are commenced to compel its delivery, and a tender afterward is immaterial. If the lessor has sublet the premises in violation of the terms of the lease, the landlord is not bound to accept security from the subtenant, but may proceed to eject him. Sherman *v.* Paciello, 161 Pa. St. 69, 28 Atl. 995.

16. Hard *v.* Brown, 18 Vt. 87, holding further that when under an agreement in the lease that the lessee shall furnish security for the rent, he offers security upon real estate, which is refused by the lessor, the lessee is not bound to tender a mortgage deed, or give particular information regarding the locations and value of the land.

Time for furnishing security. — The lessee has the whole of the day on which the lease is to commence to furnish such security, even though he declines to furnish other security, on the refusal of the lessor to accept what he offered first. Hard *v.* Brown, 18 Vt. 87.

A previous mortgage upon the realty is no legal objection to its sufficiency. Hard *v.* Brown, 18 Vt. 87, the question being one of fact for the jury.

Where the security given is personal property, the landlord acquires the right to possession, and may maintain an action for the disturbance thereof. Chamberlee *v.* McKenzie, 31 Ark. 155.

17. Bernstein *v.* Heinemann, 23 Misc. (N. Y.) 464, 51 N. Y. Suppl. 467.

18. Michaels *v.* Fishel, 51 N. Y. App. Div. 274, 64 N. Y. Suppl. 1007; Rosenquest *v.* Noble, 21 N. Y. App. Div. 583, 48 N. Y. Suppl. 398; Adler *v.* Kramer, 39 Misc. (N. Y.) 642, 80 N. Y. Suppl. 624; Lesser *v.* Stein, 39 Misc. (N. Y.) 349, 79 N. Y. Suppl. 849; Longobardi *v.* Yuliano, 33 Misc. (N. Y.) 472, 67 N. Y. Suppl. 902; Rosenquist *v.* Canary, 15 Misc. (N. Y.) 148, 36 N. Y. Suppl. 979; Sang Shing *v.* Sire, 15 Misc. (N. Y.) 139, 36 N. Y. Suppl. 466; Rice *v.* Bliss, 66 How. Pr. (N. Y.) 186.

19. Lesser *v.* Stein, 39 Misc. (N. Y.) 349, 79 N. Y. Suppl. 849; Longobardi *v.* Yuliano, 33 Misc. (N. Y.) 472, 67 N. Y. Suppl. 902.

Effect of dispossession proceedings in general see *infra*, X, C, 25.

20. Rosenquest *v.* Noble, 21 N. Y. App Div. 583, 48 N. Y. Suppl. 398.

21. Hecklau *v.* Hauser, 71 N. J. L. 478, 59

made as liquidated damages, the tenant has been held to be entitled to the surplus.[22]

c. Recovery of Deposit — (I) *In General.* Where money is deposited by one as a pledge of good faith in the making of a lease, he is entitled to recover it when upon inspection he refuses to execute the lease.[23] So also when a lease is annulled by the act of the landlord,[24] or the deposit is made to secure the payment of specific rent which never accrues.[25]

(II) *Actions.* When a tenant becomes entitled to the return of a deposit made as security for the rent, he may bring an action of conversion,[26] or he may disregard the conversion, and recover upon proof of the deposit, the breach of the covenants of the lease, and the refusal of the landlord to pay over the money.[27] In an action to recover such a deposit, the burden is on the tenant, as part of his affirmative case, to give *prima facie* proof of performance of his covenants.[28] A breach of covenant by the tenant resulting in damage to the landlord, to be available as a defense to such an action, must be pleaded as a counter-claim.[29]

d. Mortgages to Secure. As security for the payment of rent mortgages on real or personal property are often given.[30] Crops to be grown on leased premises are a proper subject of such a mortgage.[31] If the mortgage is of personal property the fact that the landlord takes possession of the property on its abandonment by the tenant does not operate as a satisfaction of the mortgage deed.[32] Where the mortgage is given to secure the rent payable under the lease, it does not cover rent due for use and occupation if the tenant holds over after the destruction of the premises.[33] Where a lease of personal property is secured by mortgage, the lessor may upon default in payment of rent, at his option, retake the property, or procure a judgment on the mortgage, but an election to pursue the latter remedy precludes the lessor from maintaining replevin.[34]

3. Liability For Rent as Dependent on Possession and Enjoyment of Premises — a. Failure of Lessee to Take Possession.[35] Where a tenant has not entered

Atl. 18; Caesar *v.* Rubinson, 174 N. Y. 492, 67 N. E. 58 [*reversing* 71 N. Y. App. Div. 180, 75 N. Y. Suppl. 544]; Michaels *v.* Fishel, 169 N. Y. 381, 62 N. E. 425 [*affirming* 51 N. Y. App. Div. 274, 64 N. Y. Suppl. 1007]; Chaude *v.* Shepard, 122 N. Y. 397, 25 N. E. 358; Scott *v.* Montells, 50 N. Y. Super. Ct. 448 [*affirmed* in 109 N. Y. 1, 15 N. E. 729]; Bernstein *v.* Heinemann, 23 Misc. (N. Y.) 464, 51 N. Y. Suppl. 467; Hawthorne *v.* Coursen, 18 Misc. (N. Y.) 447, 41 N. Y. Suppl. 995; Kahn *v.* Tobias, 16 Misc. (N. Y.) 83, 37 N. Y. Suppl. 632; Goldberg *v.* Freeman, 92 N. Y. Suppl. 237.

22. D'Appuzo *v.* Albright, 76 N. Y. Suppl. 654, where it is said that calling a penalty "fixed and liquidated damages" does not make it so. The question to be determined in each case is whether the provisions of the lease are, by the terms of the instrument, made to survive the statutory effect of the issue of a warrant in summary proceedings. If they are, the provisions as to liquidated damages will be given effect. If not, only the actual damages will be allowed, and the balance awarded the tenant. See, generally, Damages.

23. Aquelina *v.* Provident Realty Co., 81 N. Y. Suppl. 1014.

24. Carson *v.* Arvantes, 27 Colo. 77, 59 Pac. 737 [*affirming* 10 Colo. App. 382, 50 Pac. 1080].

25. Michaels *v.* Fishel, 51 N. Y. App. Div. 274, 64 N. Y. Suppl. 1007. See also Cushingham *v.* Phillips, 1 E. D. Smith (N. Y.) 416.

26. Degnario *v.* Sire, 34 Misc. (N. Y.) 163, 68 N. Y. Suppl. 789; D'Appuzo *v.* Albright, 76 N. Y. Suppl. 654.

27. Degnario *v.* Sire, 34 Misc. (N. Y.) 163, 68 N. Y. Suppl. 789; D'Appuzo *v.* Albright, 76 N. Y. Suppl. 654.

28. Goldberg *v.* Freeman, 92 N. Y. Suppl. 237.

29. Scott *v.* Montells, 50 N. Y. Super. Ct. 448 [*affirmed* in 109 N. Y. 1, 15 N. E. 729].

30. See cases cited *infra*, note 31 *et seq.* See, generally, Chattel Mortgages; Mortgages.

31. Booker *v.* Jones, 55 Ala. 266; Jones *v.* Webster, 48 Ala. 109.

Where a lease and mortgage on a crop yet to be grown are executed together to secure the rent, they will be construed as parts of one and the same instrument, and will operate as a reservation of the title to the crops to the lessor until the rent is paid. Booker *v.* Jones, 55 Ala. 266.

32. Lathers *v.* Hunt, 13 N. Y. Suppl. 813, holding further that the tenant is not entitled to damages against the landlord for injury to such property, without proof sufficient in law to fix such liability upon the landlord.

33. Patterson *v.* Ackerson, 1 Edw. (N. Y.) 96.

34. Geiser Mfg. Co. *v.* Crissinger, 17 Pa. Co. Ct. 46.

35. Tenant's duty to take possession see *supra*, VII, B, 1, a, (I).

into possession,[36] the landlord may let the premises lie idle and recover rent for the whole term,[37] or may put an end to the contract of lease by reëntry.[38] The lessor, however, must show that he has performed his part, and that the premises are ready for occupancy.[39] The taking of possession by one of two lessees is in law a possession by both.[40] And where the lessee undertakes to procure possession from a former tenant, and agrees with him that he may remain in possession after the expiration of his lease, the possession of the former tenant is the possession of the lessee, and he is liable for use and occupation, although he afterward refused to take possession.[41]

b. Failure of Lessor to Deliver Possession[42] — (I) *In General.* Delivery of possession of the demised premises by the lessor to the lessee is necessary to the obligation to the latter to pay rent;[43] and the rule is the same whether the lessor refuses or is unable to give possession.[44] The existence and breach of an oral condition that a lease was not to take effect unless possession was delivered a certain time before the commencement of the term may be proved by parol.[45]

(II) *Of Part of Premises.* Where a contract of lease is entire, if the lessor refuses to deliver possession of a portion of the premises he is estopped from collecting any part of the rent agreed upon after demand by the lessee for the possession of such portion of the premises,[46] although the lessee retains possession of a portion of the premises after such demand and refusal, unless he waives complete performance of the contract.[47] The act of a landlord in continuing in possession of a small portion of the demised premises for a brief period after the expiration of the time fixed by the lease for his giving possession of it without any intent to keep the tenant out of possession will not exonerate the tenant from payment of rent.[48]

36. Slight facts tending to show a dealing with the demised premises by the tenant are sufficient to prove the taking possession by him. Smith *v.* Barber, 96 N. Y. App. Div. 236, 89 N. Y. Suppl. 317.

37. Tully *v.* Dunn, 42 Ala. 262; La Farge *v.* Mansfield, 31 Barb. (N. Y.) 345, holding that where lessees have never taken possession they are only liable for rent upon their covenants and for a breach of an executory contract.

Refusal to execute lease.— Where one by parol contract agrees to lease certain premises for the period of five years, but afterward refuses to execute the lease, the lessor cannot recover the rent for the time the premises are idle, unless the agreement with the lessee prevented him from renting them. Sausser *v.* Steinmetz, 88 Pa. St. 324.

38. Tully *v.* Dunn, 42 Ala. 262.

39. La Farge *v.* Mansfield, 31 Barb. (N. Y.) 345.

40. Harger *v.* Edmonds, 4 Barb. (N. Y.) 256.

41. McGunnagle *v.* Thornton, 10 Serg. & R. (Pa.) 251.

42. Delivery of possession generally see *supra*, VII, B, 1, a, (III).

43. *California.*— Dengler *v.* Michelssen, 76 Cal. 125, 18 Pac. 138.

Connecticut.— Reed *v.* Reynolds, 37 Conn. 469.

Georgia.— Garner *v.* Byard, 23 Ga. 289, 68 Am. Dec. 527.

Indiana.— Hickman *v.* Rayl, 55 Ind. 551.

Missouri.— Kean *v.* Kolkschneider, 21 Mo. App. 538.

New York.— Wood *v.* Hubbell, 5 Barb. 601.

England.— Holgate *v.* Kay, 1 C. & K. 301, 47 E. C. L. 341.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 752.

Possession when alterations complete.— Where a lease provides for certain alterations in the premises, and that possession shall be given by a certain time or sooner if the alterations are completed, but is silent as to when they are to be completed, the lessee is liable for rent after the time fixed for delivery of possession, although the alterations are not complete, and although he demands possession and is refused. Cronin *v.* Epstein, 15 Daly (N. Y.) 50, 2 N. Y. Suppl. 709 [*affirming* 1 N. Y. Suppl. 69].

44. Wood *v.* Hubbell, 5 Barb. (N. Y.) 601.

45. Corn *v.* Rosenthal, 1 Misc. (N. Y.) 168, 20 N. Y. Suppl. 632.

46. Penny *v.* Fellner, 6 Okla. 386, 50 Pac. 123; McClurg *v.* Price, 59 Pa. St. 420, 98 Dec. 356.

47. Penny *v.* Fellner, 6 Okla. 386, 50 Pac. 123; McClurg *v.* Price, 59 Pa. St. 420, 98 Am. Dec. 356. But see Smith *v.* Barber, 96 N. Y. App. Div. 236, 89 N. Y. Suppl. 317; Hurlbut *v.* Post, 1 Bosw. (N. Y.) 28 (holding that where the lessee occupies a part of the premises without insisting that he must have the whole or he would pay nothing, he is liable to pay for what he has actually enjoyed); Smart *v.* Allegaert, 14 Phila. (Pa.) 179.

Occupation of part of the premises is not a waiver of a claim to possession of the remainder. Sullivan *v.* Schmitt, 93 N. Y. App. Div. 469, 87 N. Y. Suppl. 714.

48. Vanderpool *v.* Smith, 1 Daly (N. Y.) 311.

(III) *Premises in Occupation of Third Person.* Where a lessee does not and cannot enter under his lease because debarred from doing so by the occupancy of the premises by another tenant with superior right, the former is not liable for rent.[49] The occupancy of another, however, at the time of the letting, or afterward, is no answer by a lessee to a demand for rent unless the tenant is in possession under a title paramount to that of the lessor.[50] So also if at the time of taking a lease lessee knew that there was a tenant in possession, and tried to eject him, and failing in this, finally assigned his lease to such tenant, he cannot set up against a suit for the rent that he was never let into possession.[51] Where the landlord is unable to give possession of all the demised premises, the incoming tenant is not bound to enter a portion thereof, which would be of no use to him for the purpose for which the lease was made;[52] but he is put to his election, on the date when the term begins, either to notify the landlord of the termination and cancellation of the lease, or to waive his right to obtain complete possession of all the premises on that date.[53]

(IV) *As Defense Against Assignee of Lessor.* In an action for rent by the assignee of the lessor against the lessee, it is only an exclusion from the occupancy since the assignment that can be set up as defense.[54]

c. Disturbance of Possession of Tenant. When a tenant is deprived of the use and enjoyment of the property by the acts of the landlord, the obligation to pay rent ceases.[55] If a tenant takes a lease with knowledge that the demised premises are subject to a permanent servitude, he is liable for the rent, although in consequence thereof he is deprived of the beneficial use of a part of the premises.[56]

d. Interference With Beneficial Use and Enjoyment of Premises. Any interference by the landlord with his tenant's right to the enjoyment of the premises

49. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442; Ludden *v.* Stern, 20 Ill. App. 88; Sullivan *v.* Schmitt, 93 N. Y. App. Div. 469, 87 N. Y. Suppl. 714.

The mere acceptance of the lease does not render the incoming tenant liable for rent for the time he was not in actual possession of any portion of the premises. Smith *v.* Barber, 96 N. Y. App. Div. 236, 89 N. Y. Suppl. 317.

50. Mechanics', etc., F. Ins. Co. *v.* Scott, 2 Hilt. (N. Y.) 550; Ward *v.* Edesheimer, 17 N. Y. Suppl. 173; Portman *v.* Weeks, 1 N. Y. City Ct. 185.

51. Bailey *v.* Wells, 8 Wis. 141, 76 Am. Dec. 233.

A covenant to give plaintiff possession imports no more than that the lessor had at the time such a title to the demised premises as will enable him to give the lessee a legal right of entry and enjoyment during the term. Mechanics,' etc., F. Ins. Co. *v.* Scott, 2 Hilt. (N. Y.) 550; Portman *v.* Weeks, 1 N. Y. City Ct. 185.

52. Smith *v.* Barber, 96 N. Y. App. Div. 236, 89 N. Y. Suppl. 317.

53. Smith *v.* Barber, 96 N. Y. App. Div. 236, 89 N. Y. Suppl. 317.

54. Day *v.* Swackhamer, 2 Hilt. (N. Y.) 4.

Rights of assignee of reversion in general see *supra*, III, D, 2, b, (I).

55. To have that effect, however, the acts of the lessor which constitute the interference with the lessee's possession must be such as clearly show that it was the intention of the lessor that the lessee should no longer continue to hold the premises. See *infra*, VIII, A, 3, l.

Disturbance of tenant's possession in general see *supra*, VII, B, 1, b.

A mere trespass by the landlord, without any intention to deprive the landlord of the enjoyment of the premises, will not release him from liability to pay rent. Fuller *v.* Ruby, 10 Gray (Mass.) 285; McFadin *v.* Rippey, 8 Mo. 738 (holding that a tenant is not entitled to a reduction of rent because the landlord wrongfully filled up the cellar of the premises, since that is a mere trespass); Dimmock *v.* Daly, 9 Mo. App. 354; Hayward *v.* Ramge, 33 Nebr. 836, 51 N. W. 229; Elliott *v.* Aiken, 45 N. H. 30; Walker *v.* Shoemaker, 4 Hun (N. Y.) 579; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. (N. Y.) 449, 43 How. Pr. 433; Campbell *v.* Shields, 11 How. Pr. (N. Y.) 565; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379. See 32 Cent. Dig. tit. "Landlord and Tenant," § 755.

Temporary use of premises by landlord.—Where a contract of rent provided that, if the tenant be in any way ousted from the possession of certain rooms, the tenancy and rent should cease, the fact that the landlord entered and used, or allowed others to enter and use, temporarily, on one or more occasions, the rooms, during the absence of the tenant, does not constitute such an ouster as to relieve the latter from the payment of rent. Way *v.* Myers, 64 Ga. 760.

A demise to a third of premises in possession of a tenant is not effectual to disturb those in possession, and is no defense to an action for rent. Post *v.* Martens, 2 Rob. (N. Y.) 437.

56. Friend *v.* Oil Well Supply Co., 179 Pa. St. 290, 36 Atl. 219.

to the full extent secured by the lease authorizes the tenant to abandon the premises, and exonerates him from the payment of rent.[57] It is not enough, however, to justify a tenant's abandonment of the demised premises and release from liability for rent that at some time during the period of his occupancy he was deprived of their beneficial enjoyment by the wrongful act of the landlord, but it should appear that the deprivation was persisted in and continued at the time of the abandonment.[58] Nor is it enough that the lessee apprehends a breach of the covenant of quiet enjoyment.[59] Nevertheless such acts of the lessor will not excuse payment of rent if the tenant remains in possession of the premises.[60]

e. Objectionable Occupancy of Other Portion of Premises. The rule has been laid down that the mere fact that the lessor rents premises to a tenant who carries on a business incompatible with the convenient occupation of adjoining premises also rented by the same landlord does not amount to an eviction, and, in the absence of a provision to that effect in the lease, does not relieve the tenant who suffers from the nuisance, from the obligation of paying rent under his lease.[61] There are decisions, however, to the effect that such conduct on the part of the landlord constitutes a constructive eviction,[62] especially where a landlord lets apartments in his building as a dwelling, and then knowingly permits another part to be used for purposes which render the tenant's apartments unfit for occupancy by a respectable family, when he has legal power to prevent such use, and for that reason the tenant moves away.[63]

f. Entry to Make Repairs — (i) *In General.* How far the entry of the landlord to make repairs will work an eviction must depend to some extent upon the circumstances of each particular case.[64]

(ii) *Ordinary Repairs or Repairs For Convenience of Tenant.* Where the landlord is bound by the lease to make repairs, and the repairs are merely such as are required by ordinary wear and tear, no difficulty is likely to arise. And where he is not bound to do so, but makes repairs for the benefit of the property and the convenience of the tenant, the same rule will apply, since tenants are more willing as a general rule to have the property put in order than landlords are to incur the expenditure.[65]

(iii) *Extraordinary Repairs.* Where, however, the repairs are not ordinary, but are of a character to deprive the tenant of all beneficial enjoyment of the

57. *Alabama.*— Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.
Illinois.— Wade *v.* Halligan, 16 Ill. 507; Field *v.* Herrick, 10 Ill. App. 591.
Missouri.— Jackson *v.* Eddy, 12 Mo. 209; O'Neill *v.* Manget, 44 Mo. App. 279.
New York.— Rogers *v.* Ostrom, 35 Barb. 523.
North Carolina.— Poston *v.* Jones, 37 N. C. 350, 38 Am. Dec. 682.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 756.
Tenant's use of premises see *supra*, VII, B, 3.
Covenants for quiet enjoyment see *supra*, VII, B, 2.

58. Ryan *v.* Jones, 2 Misc. (N. Y.) 65, 20 N. Y. Suppl. 842.

59. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

60. Edgerton *v.* Page, 1 Hilt. (N. Y.) 320, 5 Abb. Pr. 1 [*affirmed* in 20 N. Y. 281]; Sutton *v.* Foulke, 44 Leg. Int. (Pa.) 5. *Compare* Cohen *v.* Dupont, 1 Sandf. (N. Y.) 260.

61. Chicago Legal News Co. *v.* Browne, 103 Ill. 317 [*reversing* 5 Ill. App. 250]; Cougle *v.* Densmore, 57 Ill. App. 591; De Witt *v.* Pierson, 112 Mass. 8, 17 Am. Rep. 58; Gray *v.* Gaff, 8 Mo. App. 329; Mortimer *v.* Brunner, 6 Bosw. (N. Y.) 653.
What amounts to eviction in general see *supra*, VII, F, 1.

62. Duff *v.* Hart, 16 N. Y. Suppl. 163.

63. Lay *v.* Bennett, 4 Colo. App. 252, 35 Pac. 748; Weiler *v.* Pancoast, 71 N. J. L. 414, 58 Atl. 1084; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727. See also Gilhooley *v.* Washington, 4 N. Y. 217.
The tenant must show, however, that his landlord created the nuisance by leasing such apartments for that purpose, or that it existed by his connivance and consent. Lay *v.* Bennett, 4 Colo. App. 252, 35 Pac. 748; Cougle *v.* Densmore, 57 Ill. App. 591; De Witt *v.* Pierson, 112 Mass. 8, 17 Am. Rep. 58; Weiler *v.* Pancoast, 71 N. J. L. 414, 58 Atl. 1084; Gilhooley *v.* Washington, 4 N. Y. 217 [*affirming* 3 Sandf. 3301].

64. See *infra*, VIII, A, 3, f, (II), (III), (IV). See also *supra*, VII, F, 1, e, (IV), (B).
Duties as to repairs see *supra*, VII, D, 1.

65. Hoeveler *v.* Fleming, 91 Pa. St. 322; Magaw *v.* Lambert, 3 Pa. St. 444.

premises, or at least seriously interrupt it while the repairs are in progress, a question of a different character is presented. In such a case it is usually held that an entry to make repairs amounts to an eviction and suspends the rent.[66] In all cases, however, to be relieved of liability for rent the tenant must quit possession.[67]

(iv) *With Consent of Tenant.* Where the entry of the landlord is with the consent of the tenant express or implied, there is no eviction, and the tenant is not relieved from liability for rent.[68] Some cases hold, however, that, while an entry to make repairs with the consent of the landlord does not constitute an eviction, it amounts to a rescission of the lease, and the rent is suspended.[69]

g. Effect of Existence of War. Where a tenant is deprived of the beneficial use and enjoyment of the premises by the casualties of war he is relieved from liability for rent;[70] but to complete the defense, the tenant must show that he rescinded the contract by a surrender, or an offer of surrender, of all benefits therein which remain to him.[71]

h. Effect of Legal Restrictions on Use of Premises. Lessees are not released from liability for rent by city ordinances restricting uses of the leased property, since they are not thereby deprived of the beneficial use of the premises.[72]

i. Assertion of Title Paramount.[73] The mere fact that a title to leased premises is adjudged to be in parties who are strangers to the lease is no defense to an action for rent.[74] Where, however, the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor, without rendering himself liable as a trespasser to the other party, he may yield the possession, and take a new lease under him, or he may abandon possession; in either case he will thereafter not be liable

66. Caffin *v.* Redon, 6 La. Ann. 487; Pontalba *v.* Domingon, 11 La. 192; Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847; Hoeveler *v.* Fleming, 91 Pa. St. 322; Magaw *v.* Lambert, 3 Pa. St. 444. See also Post *v.* Blankenstein, 30 Misc. (N. Y.) 796, 63 N. Y. Suppl. 218. *Compare* Kellenberger *v.* Foresman, 13 Ind. 475; McClenahan *v.* New York, 102 N. Y. 75, 5 N. E. 793, holding that where there is no provision in a lease for the suspension of rent while repairs are being made in accordance with its terms the tenant can have no deduction therefor.

67. For, although the entry of the landlord may be such as to authorize the tenant to treat it as an eviction, if he remains in possession and has some beneficial use of the premises, he will be liable for a part at least of the rent. Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847; Olson *v.* Schevlovitz, 91 N. Y. App. Div. 405, 86 N. Y. Suppl. 834; Barnum *v.* Fitzpatrick, 19 N. Y. Suppl. 385; Barnum *v.* Fitzpatrick, 16 N. Y. Suppl. 934 [*reversing* 27 Abb. N. Cas. 334].

68. Humiston *v.* Wheeler, 70 Ill. App. 349; Schloss *v.* Schloss, 137 Mich. 289, 100 N. W. 392; Markham *v.* David Stevenson Brewing Co., 169 N. Y. 593, 62 N. E. 1097; Olson *v.* Schevlovitz, 91 N. Y. App. Div. 405, 86 N. Y. Suppl. 834.

69. Wayne *v.* Lapp, 180 Pa. St. 278, 36 Atl. 723; Hoeveler *v.* Fleming, 91 Pa. St. 322; Magaw *v.* Lambert, 3 Pa. St. 444.

70. Coogan *v.* Parker, 2 S. C. 255, 16 Am. Rep. 659; Bayly *v.* Lawrence, 1 Bay (S. C.) 499. But see Loggins *v.* Buck, 33 Tex. 113.

71. Coogan *v.* Parker, 2 S. C. 255, 16 Am. Rep. 659.

72. McLarren *v.* Spalding, 2 Cal. 510; Abadie *v.* Berges, 41 La. Ann. 281, 6 So. 529 (holding that where there is no express warranty against the "acts of the law," and lessee is not relieved from his obligation to pay rent because of the enactment of the law by which he is deprived of the use of the premises on Sunday); Nicholls *v.* Byrne, 11 La. 170; Chase *v.* Turner, 10 La. 19; Kerley *v.* Mayer, 10 Misc. (N. Y.) 718, 31 N. Y. Suppl. 818, holding that an ordinance forbidding a sale of liquor within two hundred feet of a church or school-house, passed after the execution of a lease for saloon purposes of premises within such description, but before the commencement of term, does not release a lessee from liability of rent, as he is not by such ordinance deprived of beneficial use of the premises.

73. See *infra*, VIII, A, 3, l.

Estoppel to deny landlord's title see *supra*, III, G.

74. A tenant is not permitted to controvert the title under which he was let into possession, when that possession has been undisturbed, and he has enjoyed the full benefits of his contract. His allegiance is due to his landlord, and he cannot set up against him title in a stranger, unless by that title he has been divested of the possession which he acquired by the demise. Hochenauer *v.* Hilderbrant, 6 Colo. App. 199, 40 Pac. 470; Eddy *v.* Coffin, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441; Hawes *v.* Shaw, 100 Mass. 187; George *v.* Putney, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; Lynch *v.* Sauer, 16 Misc. (N. Y.) 1, 37 N. Y. Suppl. 666 [*affirming* 14 Misc. 252, 35 N. Y. Suppl. 715].

to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster.[75]

j. Termination of Tenancy. A landlord who terminates a tenancy, under a written lease, between the stated periods when the rent is regularly payable, cannot maintain an action for rent under the lease, or an action of assumpsit for use and occupation of the premises after the last rent day prior to termination of the tenancy.[76] The same rule applies to a similar termination of a parol demise.[77] But dispossession of a tenant by summary proceedings for non-payment of rent due, and during the term for which it is payable in advance, is not a waiver of the right to sue for such rent.[78]

k. Appropriation of Premises to Public Use. Under perhaps the better rule, a tenant's liability for rent is not affected by condemnation of part of the leased premises.[79] A different rule has been adopted, however, in some jurisdictions,

75. *Illinois.*— Montanye *v.* Wallahan, 34 Ill. 355.

Massachusetts.— George *v.* Putney, 4 Cush. 351, 50 Am. Dec. 788.

New York.— Simers *v.* Saltus, 3 Den. 214.

Pennsylvania.— Ross *v.* Dysart, 33 Pa. St. 452.

England.— Cuthbertson *v.* Irving, 6 H. & N. 135, 6 Jur. N. S. 1211, 29 L. J. Exch. 485, 3 L. T. Rep. N. S. 335, 8 Wkly. Rep. 704.

Canada.— McNab *v.* McDonnell, 2 U. C. Q. B. 169.

76. Joliet First Nat. Bank *v.* Adams, 34 Ill. App. 159 (holding that where a landlord dispossesses his tenant he cannot recover for rent during the time the tenant was dispossessed, although the lease was not wholly terminated); Johannes *v.* Kielgast, 27 Ill. App. 576; Cameron *v.* Little, 62 Me. 550; Robinson *v.* Deering, 56 Me. 357; Nicholson *v.* Munigle, 6 Allen (Mass.) 215; Brigham Young Trust Co. *v.* Wagener, 13 Utah 236, 44 Pac. 1030.

Eviction for covenant broken.— A lessor, entering according to an agreement in the lease, and evicting the tenant of the lessee for a covenant broken, determines the lessee's estate, and cannot sue for rent, as such, accruing subsequently, but only for an amount equal to the rent lost to him by such breach, as damages. Hall *v.* Gould, 13 N. Y. 127.

Termination of tenancy see *infra*, IX.

77. Cameron *v.* Little, 62 Me. 550; Robinson *v.* Deering, 56 Me. 357; Fuller *v.* Swett, 6 Allen (Mass.) 219 note.

78. *Alabama.*— May *v.* Diaz, 42 Ala. 383.

Maryland.— Mackubin *v.* Whetcroft, 4 Harr. & M. 135.

New Jersey.— Guild *v.* Reilly, 9 N. J. L. J. 209.

New York.— Mattice *v.* Lord, 30 Barb. 382; Davison *v.* Donadi, 2 E. D. Smith 121; Cushingham *v.* Phillips, 1 E. D. Smith 416; McKeon *v.* Whitney, 3 Den. 452; Hinsdale *v.* White, 6 Hill 507.

Pennsylvania.— Rubicum *v.* Williams, 1 Ashm. 230.

England.— Hartshorne *v.* Watson, 1 Arn. 15, 4 Bing. N. Cas. 178, 6 Dowl. P. C. 404, 2 Jur. 155, 7 L. J. C. P. 138, 5 Scott 506, 33 E. C. L. 657.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 763.

Effect of dispossession in general see *infra*, X, C, 25.

79. Corrigan *v.* Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Stubbings *v.* Evanston, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839; Patterson *v.* Boston, 20 Pick. (Mass.) 159; Parks *v.* Boston, 15 Pick. (Mass.) 198; Hudson County *v.* Emmerich, 57 N. J. Eq. 535, 42 Atl. 107; Steifel *v.* Metz, 7 Ohio Dec. (Reprint) 308, 2 Cinc. L. Bul. 95. And see Kelso *v.* Tanghorst, 36 Pittsb. Leg. J. N. S. (Pa.) 214.

The theory upon which these cases proceed is that a taking under eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to an eviction. Corrigan *v.* Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Stubbings *v.* Evanston, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839; Patterson *v.* Boston, 20 Pick. (Mass.) 159; Parks *v.* Boston, 15 Pick. (Mass.) 198; Foote *v.* Cincinnati, 11 Ohio 408, 38 Am. Dec. 737; Schuylkill, etc., Imp., etc., Co. *v.* Schmoele, 57 Pa. St. 271. The lessee takes his term just as every other owner of real estate takes title subject to the right and power of the public to take it or a part of it for public use, whenever the public necessity and convenience require it. Such a right is no encumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment. The lessee holds and enjoys exactly what was granted him as a consideration for the reserved rent; which is the whole use and beneficial enjoyment of the estate leased, subject to the sovereign right of eminent domain on the part of the public. If he has suffered any loss or diminution in the actual enjoyment of its use, it is not by the act by sufferance of the landlord, but it is by the act of the public, against whom the law has provided him an ample remedy. If he is compelled to pay full compensation for the estate actually diminished in value, this is an element in computing the compensation that he is to receive from the public. In this view it becomes unimportant whether the taking for public use diminished leased premises, little or much, in quantity or value; all this will be taken into consideration in assessing the damages which lessee may sustain. Corrigan *v.* Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Stubbings *v.* Evanston, 136

namely, that as to the part of the leased premises appropriated to public use the rent is extinguished.[80] Where the estate of both landlord and tenant in the entire premises is extinguished by condemnation, the obligation to pay rent ceases.[81]

1. Eviction[82] — (I) *IN GENERAL.* There are some *dicta* in the books that an eviction must be by process of law, in order to release a tenant from obligation to pay rent,[83] but there seems to be no reason for this rule and it is not now considered necessary.[84] An actual eviction[85] of a tenant during the term is of course a good defense to an action for rent.[86] A tenant's liability to pay rent is not dis-

Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839; Parks *v.* Boston, 15 Pick. (Mass.) 198.

Eviction by acts of public authorities see *supra*, VII, F, 1, f, (II).

80. Hinrichs *v.* New Orleans, 50 La. Ann. 1214, 24 So. 224; Foucher *v.* Choppin, 17 La. Ann. 321; Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199; Biddle *v.* Hussman, 23 Mo. 597; McCardell *v.* Miller, 22 R. I. 96, 46 Atl. 184. See also Gillespie *v.* Thomas, 15 Wend. (N. Y.) 464.

81. *Illinois.*— Corrigan *v.* Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212, where it is said that while condemnation proceedings may not amount to a technical eviction, where the entire tract of land is taken, the effect is to abrogate the relation of landlord and tenant. By virtue of such proceeding, whatever title the tenant has in the land passes to the state or corporation in whose behalf the right of eminent domain is exercised, and precisely the same is true of the landlord's estate or interest. The effect is an absolute extinguishment of the right and title of both in or control over the subject of the demise. It is in effect eviction by paramount right, and has all the force of eviction by a paramount title, coupled with a conveyance by the owners of their respective interests.

Massachusetts.— O'Brien *v.* Ball, 119 Mass. 28.

Missouri.— Barclay *v.* Picker, 38 Mo. 143.

New York.— Lodge *v.* Martin, 31 N. Y. App. Div. 13, 52 N. Y. Suppl. 385.

Pennsylvania.— Uhler *v.* Cowen, 199 Pa. St. 316, 49 Atl. 77.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Hayden, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107, holding, however, that the tenant is liable for rent until he is actually evicted.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 764.

Contra.— Foote *v.* Cincinnati, 11 Ohio 408, 38 Am. Dec. 737.

82. Eviction generally see *supra*, VII, F, 1.

83. Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379.

84. Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360; Greenvault *v.* Davis, 4 Hill (N. Y.) 643; Edmison *v.* Lowry, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275; Foster *v.* Pierson, 4 T. R. 617.

85. Actual eviction see *supra*, VII, F, 1.

86. *District of Columbia.*— The Richmond, *v.* Cake, 1 App. Cas. 447.

Illinois.— Wright *v.* Lattin, 38 Ill. 293; Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108.

Louisiana.— Wood *v.* Sala y Fabrigas, 105 La. 1, 29 So. 367.

Massachusetts.— Royce *v.* Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Codman *v.* Jenkins, 14 Mass. 93.

Michigan.— Pridgeon *v.* Excelsior Boat Club, 66 Mich. 326, 33 N. W. 502; Day *v.* Watson, 8 Mich. 535.

Missouri.— Holmes *v.* Guion, 44 Mo. 164; Matthews *v.* Tobener, 39 Mo. 115; Witte *v.* Quinn, 38 Mo. App. 681.

New York.— Chatterton *v.* Fox, 5 Duer 64; Cohen *v.* Dupont, 3 Sandf. 260; Hegeman *v.* McArthur, 1 E. D. Smith 147; Heinrich *v.* Mack, 25 Misc. 597, 56 N. Y. Suppl. 155; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. 449, 43 How. Pr. 433; Edgerton *v.* Page, 14 How. Pr. 116 [*reversing* 12 How. Pr. 58]; Pendleton *v.* Dyett, 4 Cow. 581.

Ohio.— Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 188, 13 Cinc. L. Bul. 188.

Pennsylvania.— Murphy *v.* Marshell, 179 Pa. St. 516, 36 Atl. 294; Tiley *v.* Moyers, 43 Pa. St. 404; Bennet *v.* Bittle, 4 Rawle 339; Burr *v.* Cattnach, 3 Pa. Cas. 301, 6 Atl. 118; Wolf *v.* Weiner, 2 Brewst. 524; Germania F. Ins. Co. *v.* Myers, 4 Lanc. L. Rev. 151; Gunnis *v.* Kater, 29 Leg. Int. 230; Garrett *v.* Cummins, 2 Phila. 207.

Wisconsin.— Eldred *v.* Leahy, 31 Wis. 546; Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

England.— Hall *v.* Burgess, 5 B. & C. 332; 8 D. & R. 67, 4 L. J. K. B. O. S. 172, 11 E. C. L. 485; Burn *v.* Phillips, 1 Stark. 94, 18 Rev. Rep. 749, 2 E. C. L. 44.

Canada.— Barnes *v.* Bellamy, 44 U. C. Q. B. 303.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 765.

Good faith necessary.— To relieve a lessee from liability under the lease, he must show that he was actually and in good faith evicted and not by collusion. Mattoon *v.* Munroe, 21 Hun (N. Y.) 74.

Moving building back on lot.— There is no actual eviction of the lessee on the first floor of a building, by the building being moved back to the other side of the lot, still retaining the same number on the street, and a new building being erected on the former site; and he cannot therefore remain in possession without paying rent. Leiferman *v.* Osten, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156 [*affirming* 64 Ill. App. 578].

The eviction of defendant from premises as under-tenant of plaintiff who had been dispossessed is a good defense for an action for rent accruing after eviction. Frommer *v.*

charged, however, by an eviction, unless under a title superior to the landlord's,[87] or by some agency of the landlord himself.[88] To constitute an eviction of a tenant by his landlord which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion from any part of the premises; but any act of a permanent character done by the landlord or by his procurement with the intention of depriving the tenant of the enjoyment of the premises as demised will operate as such eviction.[89] There are clearly some acts of interfer-

Roessler, 12 Misc. (N. Y.) 152, 33 N. Y. Suppl. 13.

Eviction is not justified merely because the landlord thereby sought to escape the demand of the city authorities to repair the building. Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155.

87. See cases cited *infra*, this note.

Eviction by paramount title.— Where the lessee is ejected from the demised premises by force of an adverse title paramount, he will be discharged from the payment of rent.

Illinois.— Montanve *v.* Wallahan, 84 Ill. 355; Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108; Wells *v.* Mason, 5 Ill. 84.

Maryland.— Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

Massachusetts.— Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Morse *v.* Goddard, 13 Metc. 177, 46 Am. Dec. 728; Smith *v.* Shepard, 15 Pick. 147, 25 Am. Dec. 432.

New York.— Home Life Ins. Co. *v.* Sherman, 46 N. Y. 370; Moffat *v.* Strong, 9 Bosw. 57; Simers *v.* Saltus, 3 Den. 214; Pendleton *v.* Dyett, 4 Cow. 581.

Pennsylvania.— Bauders *v.* Fletcher, 11 Serg. & R. 419.

Wisconsin.— Mariner *v.* Chamberlain, 21 Wis. 251.

England.— Cuthbertson *v.* Irving, 6 H. & N. 135, 6 Jur. N. S. 1211, 29 L. J. Exch. 485, 3 L. T. Rep. N. S. 335, 8 Wkly. Rep. 704.

Canada.— McNab *v.* McDonell, 2 U. C. Q. B. 169.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 765.

88. *California.*— Schilling *v.* Holmes, 23 Cal. 227.

Minnesota.— City Power Co. *v.* Fergus Falls Water Co., 55 Minn. 172, 56 N. W. 685, 1006.

New Jersey.— Gribbie *v.* Toms, 70 N. J. L. 522, 57 Atl. 144 [*affirmed* in 71 N. J. L. 338, 59 Atl. 1117].

New York.— Ramsay *v.* Wilkie, 13 N. Y. Suppl. 554.

Ohio.— State *v.* George, 34 Ohio St. 657; Forbus *v.* Collier, 7 Ohio Dec. (Reprint) 331, 2 Cinc. L. Bul. 122.

Pennsylvania.— Barns *v.* Wilson, 116 Pa. St. 303, 9 Atl. 437.

Tennessee.— McNairy *v.* Hicks, 3 Baxt. 378.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 765.

89. *Georgia.*— Fleming *v.* King, 100 Ga. 449, 28 S. E. 239.

Indiana.— Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. 957.

Maryland.— Grabenhorst *v.* Nicodemus, 42 Md. 236.

New York.— Peck *v.* Hiler, 14 How. Pr. 155.

Pennsylvania.— Hoeveler *v.* Flemming, 91 Pa. St. 322.

England.— Upton *v.* Townend, 17 C. B. 30, 1 Jur. N. S. 1089, 25 L. J. C. P. 44, 4 Wkly. Rep. 56, 84 E. C. L. 30; Burn *v.* Phelps, 1 Stark. 94, 18 Rev. Rep. 749, 2 E. C. L. 44.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 765.

Discharge of sureties by eviction.— Where tenant holding under a lease in writing on which security for payment on which rent is given is evicted from demised premises by the act of his landlord in leasing and delivering the possession of the premises to another, such eviction is sufficient to discharge sureties on the lease for any rent thereafter to accrue. Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. 692 [*affirming* 98 Ill. App. 143].

Taking possession of the ruins of premises destroyed by fire, for the purpose of rebuilding, without consent of the tenant, is an eviction suspending the rent. Magaw *v.* Lambert, 3 Pa. St. 444.

Taking possession of unoccupied houses does not amount to an eviction. Wheeler *v.* Steverson, 6 H. & N. 155, 30 L. J. Exch. 46, 3 L. T. Rep. N. S. 702, 9 Wkly. Rep. 233.

Reletting a part of the leased premises to a third person is an eviction suspending the whole rent during its continuance. Doltin *v.* Sickel, 66 N. J. L. 492, 49 Atl. 679.

Injunction from using premises.— That a tenant was enjoined from using demised premises by an *ex parte* injunction issued at the instance of the landlord constitutes an eviction. Pfund *v.* Herlinger, 10 Phila. (Pa.) 13.

If the landlord forbids an under-tenant of the lessee to pay rent to him, this will be an eviction which will constitute a defense to a suit for the rent. Leadbeater *v.* Roth, 25 Ill. 587.

Where a landlord owned but three walls of a house leased and the owner of the fourth wall raised the adjoining building of which the wall was a part, and thereby disturbed the lessee in his possession, and obliged him to abandon the premises, the lessee may defend against an action for rent on the ground of eviction. Bentley *v.* Sill. 35 Ill. 414.

Selling lease without legal formalities.— A lessor's tortious act in divesting the lessee's possession, by having the lease sold in an action for rent without the legal formalities, releases the latter's liability for rent accruing after the seizure. Orleans Theatre Ins. Co. *v.* Lafferanderie, 12 Rob. (La.) 472.

Forbidding a tenant to under-let the premises, is no bar to action for rent, although the

ence by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either acts of trespass or eviction, according to the intention with which they are done. If those acts amount to a clear indication on the landlord's part that the tenant shall no longer continue to hold the premises they constitute an eviction.[90] The question of eviction therefore depends upon all the circumstances of the case and is to be determined by the jury.[91] In order that a constructive eviction[92] may relieve from rent, however, there must be an abandonment of the premises.[93] A tenant is not justified in abandoning premises where the facts constituting the alleged eviction have ceased for some time before the abandonment.[94] In case of an abandonment without the fault of the landlord or in consequence of his acts, he may reënter and again rent the premises and credit the lessee with the proceeds, and his so taking

premises remain unoccupied. Ogilvie *v.* Hull, 5 Hill (N. Y.) 52. But see Moore *v.* Guardian Trust Co., 173 Mo. 218, 73 S. W. 143.

Failure to furnish heat, etc.—A tenant may leave an apartment-house without liability for future rent where the steam heat which the lessor agreed to furnish is insufficient, the elevator service insufficient, and the flues so defective that the apartment is often filled with dense smoke. Lawrence *v.* Burrell, 17 Abb. N. Cas. (N. Y.) 312.

Permitting water to flow into tenant's premises.— In an action for rent the tenant may show that the landlord was in possession of a part of the building above the leased portion, and negligently permitted the water therefrom to flow into the tenant's portion, thereby rendering it untenantable and refused to stop it after notice thereof, since that amounts to a breach of the implied covenant of quiet enjoyment and is a constructive eviction. York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

The deprivation of rights not named in the lease, but growing out of an independent agreement, does not constitute an eviction. Lynch *v.* Baldwin, 69 Ill. 210.

Preventing or obstructing the use of an easement, not parcel of the demise, does not constitute such an eviction as will relieve the tenant from payment of rent. Lynch *v.* Baldwin, 69 Ill. 210; Hazlett *v.* Powell, 30 Pa. St. 293; Williams *v.* Hayward, 1 E. & E. 1040, 5 Jur. N. S. 1417, 28 L. J. Q. B. 374, 7 Wkly. Rep. 563, 102 E. C. L. 1040. But if the appurtenance is such as the tenant has a right to use, such acts amount to an eviction which will suspend the payment of rent until the tenant is reinstated. Witte *v.* Quinn, 38 Mo. App. 681. See also Shuttleworth *v.* Shaw, 6 U. C. Q. B. 517.

Negligence of janitor not eviction.— A tenant of an apartment is not justified in vacating the premises because the janitor of the building is negligent in the performance of his duties, and disagreeable and annoying in petty matters in his relation with the tenant. Humes *v.* Gardner, 22 Misc. (N. Y.) 333, 49 N. Y. Suppl. 147.

90. Lynch *v.* Baldwin, 69 Ill. 210; Hayner *v.* Smith, 63 Ill. 430, 14 Am. Rep. 124.

91. Lynch *v.* Baldwin, 69 Ill. 210; Hayner *v.* Smith, 63 Ill. 430, 14 Am. Rep. 124; McElderry *v.* Flannagan, 1 Harr. & G. (Md.) 308; Forbus *v.* Collier, 7 Ohio Dec. (Reprint) 331, 2 Cinc. L. Bul. 122; Upton *v.* Townend, 17 C. B. 30, 1 Jur. N. S. 1089, 25 L. J. C. P. 44, 4 Wkly. Rep. 56, 84 E. C. L. 30; Henderson *v.* Mears, 5 Jur. N. S. 709, 28 L. J. Q. B. 305, 7 Wkly. Rep. 554.

92. **Constructive eviction** generally see *supra*, VII, F, 1.

93. *Alabama.*— Anderson *v.* Winton, 136 Ala. 422, 34 So. 962; Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

Illinois.— Leiferman *v.* Osten, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156 [*affirming* 64 Ill. App. 578]; Barrett *v.* Boddie, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Hayner *v.* Smith, 63 Ill. 430, 14 Am. Rep. 124; Humphreville *v.* Billinger, 62 Ill. App. 125; Patterson *v.* Graham, 40 Ill. App. 399.

Indiana.— Talbott *v.* English, 156 Ind. 299, 59 N. E. 857.

Massachusetts.— Boston, etc., R. Corp. *v.* Ripley, 13 Allen 421.

Missouri.— Witte *v.* Quinn, 38 Mo. App. 681.

New York.— McKenzie *v.* Hatton, 141 N. Y. 6, 35 N. E. 929 [*affirming* 70 Hun 142, 24 N. Y. Suppl. 88]; Boreel *v.* Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Koehler *v.* Scheider, 15 Daly 198, 4 N. Y. Suppl. 611; Bradley *v.* De Goicouria, 12 Daly 393, 67 How. Pr. 76; Carhart *v.* Ryder, 11 Daly 101; Beakes *v.* Haas, 36 Misc. 796, 74 N. Y. Suppl. 843; Silverman *v.* Lurie, 32 Misc. 734, 66 N. Y. Suppl. 497; Butler *v.* Newhouse, 85 N. Y. Suppl. 373; Duff *v.* Hart, 16 N. Y. Suppl. 163; Butler *v.* Smith's Homeopathic Pharmacy, 5 N. Y. St. 885; Edgerton *v.* Page, 14 How. Pr. 116 [*reversing* 12 How. Pr. 58].

Pennsylvania.— Sutton *v.* Foulke, 2 Pa. Co. Ct. 529.

England.— Newton *v.* Allin, 1 Q. B. 518, 1 G. & D. 44, 6 Jur. 99, 10 L. J. Q. B. 179, 41 E. C. L. 651.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 765, 769.

The mere retention of keys where one claims to have been evicted from the premises does not amount to a retaining of constructive possession of the premises. Harmony Co. *v.* Rauch, 64 Ill. App. 386.

94. Adams *v.* Burr, 13 Misc. (N. Y.) 247, 34 N. Y. Suppl. 156.

possession does not relieve from the payment of rent.[95] If the tenant returns after the eviction and occupies the premises the right to the rent is restored.[96] Where a tenant voluntarily yields possession of the premises there is no eviction.[97]

(II) *From Part of Premises.* If a lessor enters and evicts a tenant wrongfully from a part of the demised premises, the eviction operates as a suspension of the entire rent until possession shall be regained.[98] And this is the general rule, although the tenant remains in possession of the remainder to the end of the term.[99] It has been held, however, that in such a case a tenant is liable upon a *quantum meruit*.[1] A payment of rent after the wrongful entry by the landlord on the part of the premises, and while the tenant is kept out of that portion, is not a waiver of the tenant's right to withhold the rent until possession is restored.[2] If the acts are done by the lessor with the consent of the lessee they do not constitute an eviction.[3]

(III) *Liability as Affected by Time Rent Accrues.* To render an eviction of a tenant a valid defense against the landlord's claim for rent, it must take place before the rent falls due. In other words eviction of a tenant is no defense to an action for rent due at the time of eviction.[4] The rule is the same,

95. Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893; Dolton *v.* Sickel, 66 N. J. L. 492, 49 Atl. 679.

96. Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364; Mackubin *v.* Whetcroft, 4 Harr. & M. (Md.) 135; Cibel *v.* Hill, 4 Leon. 110.

97. Lettick *v.* Honnold, 63 Ill. 335.

98. The lessor cannot lawfully apportion his own wrong and charge the lessee for the use and occupation of the portion which has been left to him.

Arkansas.— Collins *v.* Karatopsky, 36 Ark. 316.

District of Columbia.— Okie *v.* Person, 23 App. Cas. 170.

Illinois.— Smith *v.* Wise, 58 Ill. 141; Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108; Wade *v.* Halligan, 16 Ill. 507.

Massachusetts.— Moore *v.* Mansfield, 182 Mass. 302, 65 N. E. 398, 94 Am. St. Rep. 657; Colburn *v.* Morrill, 117 Mass. 262, 19 Am. Rep. 415; Leishman *v.* White, 1 Allen 489; Shumway *v.* Collins, 6 Gray 227.

Missouri.— Witte *v.* Quinn, 38 Mo. App. 681.

New Jersey.— Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879.

New York.— Christopher *v.* Austin, 11 N. Y. 216; People *v.* Gedney, 10 Hun 151; Vermilya *v.* Austin, 2 E. D. Smith 203; Seigel *v.* Neary, 38 Misc. 297, 77 N. Y. Suppl. 854; Perniciaro *v.* Veniero, 90 N. Y. Suppl. 369; Brown *v.* Wakeman, 16 N. Y. Suppl. 846; Buffalo Stone, etc., Co. *v.* Radsky, 14 N. Y. St. 82; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. 449, 43 How. Pr. 433; Peck *v.* Hiler, 14 How. Pr. 155; Pendleton *v.* Dyett, 4 Cow. 581.

Ohio.— Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188.

Pennsylvania.— Wolf *v.* Weiner, 2 Brewst. 524, 7 Phila. 274; Vaughan *v.* Blanchard, 1 Yeates 175.

Virginia.— Tunis *v.* Grandy, 22 Gratt. 109; Briggs *v.* Hall, 4 Leigh 484, 26 Am. Dec. 326.

United States.— New York Dry Goods Store *v.* Pabst Brewing Co., 112 Fed. 381, 50 C. C. A. 295.

England.— Newton *v.* Allin, 1 Q. B. 518, 1 G. & D. 44, 6 Jur. 99, 10 L. J. Q. B. 179, 41 E. C. L. 651; Smith *v.* Raleigh, 3 Campb. 513, 14 Rev. Rep. 829; Morrison *v.* Chadwick, 7 C. B. 266, 6 D. & L. 567, 18 L. J. C. P. 189, 62 E. C. L. 266.

Canada.— Shuttleworth *v.* Shaw, 6 U. C. Q. B. 539.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 766.

Condemnation proceedings.— Neither a lessee nor his assignee can refuse payment of a whole rent on the ground that he has been evicted from part of the premises by condemnation proceedings; and this, although the lessor had received compensation and the lessee was not made a party thereto. Steifel *v.* Metz, 7 Ohio Dec. (Reprint) 308, 2 Cinc. L. Bul. 95.

99. Hayner *v.* Smith, 63 Ill. 430, 14 Am. Rep. 124; Anderson *v.* Chicago M. & F. Ins. Co., 21 Ill. 601; Campbell *v.* Shields, 11 How. Pr. (N. Y.) 565; Edmison *v.* Lowry, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275. *Contra*, Anderson *v.* Winton, 136 Ala. 422, 34 So. 962.

1. Seabrook *v.* Moyer, 88 Pa. St. 417; Stokes *v.* Cooper, 3 Campb. 513 note. See, generally, Use and Occupation.

2. Buffalo Stone, etc., Co. *v.* Radsky, 14 N. Y. St. 82.

3. Mirick *v.* Hoppin, 118 Mass. 582; McNutt *v.* Shafer, 12 N. Y. Suppl. 27.

4. Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Russell *v.* Fabyan, 28 N. H. 543, 61 Am. Dec. 629; Giles *v.* Comstock, 4 N. Y. 270, 53 Am. Dec. 374; Gugel *v.* Isaacs, 21 N. Y. App. Div. 503, 48 N. Y. Suppl. 594; La Farge *v.* Halsey, 1 Bosw. (N. Y.) 171, 4 Abb. Pr. 397; New York Academy of Music *v.* Hackett, 2 Hilt. (N. Y.) 217; George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. (N. Y.) 219, 88 N. Y. Suppl. 1049; Klinker *v.* Guggenheimer, 43 Misc. (N. Y.) 393, 87 N. Y. Suppl. 474; O'Neil *v.* Morris, 28 Misc. (N. Y.) 613, 59 N. Y. Suppl. 1075; Stein *v.* Rice, 23 Misc. (N. Y.) 348, 51 N. Y. Suppl. 320; Johnson *v.* Barg, 8 Misc. (N. Y.) 307,

although the rent is payable in advance, and the eviction occurs before the expiration of the period in respect to which the rent claimed accrues.[5] The most that the tenant can claim on any equitable principle is exemption from rent for so much of the period as elapses after the lessor takes possession of the premises.[6]

4. Liability For Rent as Dependent on Condition of Premises — a. Untenantable Condition of Premises — (I) *In General.* Where there is no fraud, false representations, or deceit, and in the absence of an express warranty or covenant to repair there is no implied covenant that the premises are fit for occupation or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use,[7] and if the premises become untenantable the tenant is not thereby released from his covenant to pay rent, unless he protects himself by some clause in the lease.[8] It is customary, however, to insert a clause in the lease

28 N. Y. Suppl. 728; O'Brien *v.* Smith, 13 N. Y. Suppl. 408 [*affirmed* in 129 N. Y. 620, 29 N. E. 1029]; Pearson *v.* Gillotte, 15 N. Y. St. 395; McKeon *v.* Whitney, 3 Den. (N. Y.) 452; Pendleton *v.* Dyett, 4 Cow. (N. Y.) 581; Tiley *v.* Moyers, 43 Pa. St. 404; Briggs *v.* Thompson, 9 Pa. St. 338; Kessler *v.* McConachy, 1 Rawle (Pa.) 435.

5. Pepper *v.* Rowley, 73 Ill. 262; Smith *v.* Shepard, 15 Pick. (Mass.) 147, 25 Am. Dec. 432; Giles *v.* Comstock, 4 N. Y. 270, 53 Am. Dec. 374; Whitney *v.* Meyers, 1 Duer (N. Y.) 266; McNulty *v.* Duffy, 28 Misc. (N. Y.) 779, 59 N. Y. Suppl. 592; Manning *v.* Ferrier, 27 Misc. (N. Y.) 522, 58 N. Y. Suppl. 332. But see Nolan *v.* Stauffacher, 3 Tex. App. Civ. Cas. § 372.

6. Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Whitney *v.* Meyers, 1 Duer (N. Y.) 266; Columbia Bank *v.* Galloway, 2 Fed. Cas. No. 868, 3 Cranch C. C. 353; McGunnigle *v.* Blake, 16 Fed. Cas. No. 8,816, 3 Cranch C. C. 64.

7. *Illinois.*— Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893 [*affirming* 70 Ill. App. 349]; Friedman *v.* Schwabacher, 64 Ill. App. 422; McCoull *v.* Herzberg, 33 Ill. App. 542.

Indiana.— Monnett *v.* Potts, 10 Ind. App. 191, 37 N. E. 729.

Montana.— York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

New Jersey.— Murray *v.* Albertson, 50 N. J. L. 167, 13 Atl. 394, 7 Am. St. Rep. 787.

New York.— Franklin *v.* Brown, 118 N. Y. 110, 23 N. E. 126, 16 Am. St. Rep. 744, 6 L. R. A. 770 [*affirming* 53 N. Y. Super. Ct. 474]; Prahar *v.* Tousey, 93 N. Y. App. Div. 507, 87 N. Y. Suppl. 845; Sherman *v.* Ludin, 79 N. Y. App. Div. 37, 79 N. Y. Suppl. 1066; Gallup *v.* Albany R. Co., 7 Lans. 471; O'Brien *v.* Capwell, 59 Barb. 497; McGlashan *v.* Tallmadge, 37 Barb. 313; Howard *v.* Doolittle, 3 Duer 464; Pomeroy *v.* Tyler, 9 N. Y. St. 514; Jackson *v.* Odell, 14 Abb. N. Cas. 42.

Pennsylvania.— Twibill *v.* Brown, 1 Pa. Co. Ct. 350, 17 Wkly. Notes Cas. 221.

England.— Chappell *v.* Gregory, 34 Beav. 250, 55 Eng. Reprint 631; Hart *v.* Windsor, 8 Jur. 150, 13 L. J. Exch. 129, 12 M. & W. 68; Sutton *v.* Temple, 7 Jur. 1065, 13 L. J. Exch. 17, 12 M. & W. 52.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 770. See also *supra*, VII, A, 4.

There is no warranty of the soundness of materials of which a leased house is built. Davis *v.* Smith, 15 Mo. 467.

Provision that premises suitable for special purpose.— Where a lease provides that the leased premises shall be suitable for a specified purpose (Young *v.* Collett, 63 Mich. 331, 29 N. W. 850), or when the house is rented with the distinct understanding that it is in good condition (Tyler *v.* Disbrow, 40 Mich. 415), it becomes part of the condition, and if the premises are not suitable, or the house is not in good condition, the lessee is justified in abandoning the premises, and refusing to pay further rent.

Furnished house or lodging.— There is an implied warranty that a furnished house, or furnished rooms in a lodging house, shall be in a good and tenantable condition. Dutton *v.* Gerrish, 9 Cush. (Mass.) 89, 55 Am. Dec. 45; Wilson *v.* Finch-Hatton, 2 Ex. D. 336, 46 L. J. Exch. 489, 36 L. T. Rep. N. S. 473, 25 Wkly. Rep. 537.

8. *Maine.*— Hill *v.* Woodman, 14 Me. 38.

Michigan.— Petz *v.* Voigt Brewery Co., 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531.

Minnesota.— Wampler *v.* Weinmann, 56 Minn. 1, 57 N. W. 157.

Mississippi.— Fowler *v.* Payne, 49 Miss. 32.

Missouri.— Niedelet *v.* Wales, 16 Mo. 214.

New York.— Sherman *v.* Ludin, 79 N. Y. App. Div. 37, 79 N. Y. Suppl. 1066; Howard *v.* Doolittle, 3 Duer 464; Tattersall *v.* Hass, 1 Hilt. 56; Graves *v.* Cameron, 58 How. Pr. 75.

Pennsylvania.— Reeves *v.* McComeskey, 168 Pa. St. 571, 32 Atl. 96.

England.— Hart *v.* Windsor, 8 Jur. 150, 13 L. J. Exch. 129, 12 M. & W. 68; Sutton *v.* Temple, 7 Jur. 1065, 13 L. J. Exch. 17, 12 M. & W. 52; Monk *v.* Cooper, 2 Ld. Raym. 1477, 2 Str. 763; Belfour *v.* Weston, 1 T. R. 310, 1 Rev. Rep. 210. *Compare* Smith *v.* Marrable, C. & M. 479, 2 Dowl. P. C. N. S. 810, 7 Jur. 70, 12 L. J. Exch. 223, 11 M. & W. 5, 41 E. C. L. 263.

Canada.— Denison *v.* Nation, 21 U. C. Q. B. 57; Wilkes *v.* Steele, 14 U. C. Q. B. 570.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 770.

releasing the tenant from liability if the premises become untenantable.[9] If the landlord has falsely represented to the lessor that the premises are tenantable, and after learning that they are not, the tenant has vacated them, the lessor cannot recover rent.[10]

(II) *Defective Plumbing and Drainage.* A tenant cannot abandon demised premises and avoid payment of rent on the ground that after he took possession he discovered that the house was permeated with sewer gas owing to defective plumbing, unless provision is made therefor in the lease;[11] but if the landlord falsely represents that the house is in good condition,[12] or fraudulently conceals from the tenant his knowledge of the dangerous condition of the drains,[13] or if the premises are rendered untenantable through affirmative acts of the landlord, the tenant is entitled to abandon the premises and refuse to pay the rent.[14] A statute relieving tenants from payment of rent where the premises have been injured by the elements so as to become untenantable[15] does not relieve a tenant from paying rent because the plumbing is found to be defective.[16]

(III) *Unhealthful and Infected Premises.* In the absence of an express covenant a lessor cannot be understood to undertake that the premises embraced in the lease will remain free from infectious diseases during the term,[17] and consequently it is no defense to a suit for rent of a dwelling-house that it is, and at the time of the letting was, unhealthy, noisome, and unsuitable for a dwelling, if no fraudulent representation or concealment on the part of the lessor be shown.[18]

(IV) *Failure to Heat Premises.* Failure of the landlord to comply with the provisions of the lease in relation to heating the premises is a defense to an action for the rent;[19] and to maintain such defense the tenant need show only a

9. Weeber *v.* Hawes, 80 Minn. 476, 83 N. W. 447; Goetschius *v.* Shapiro, 88 N. Y. Suppl. 171.

Provision for release from liability until premises repaired.— A lessee under a lease, which provides that in case the premises shall be destroyed so as to be untenantable, the lessee shall not be liable to pay rent "until the same are rebuilt or repaired," who remains in possession of the premises after their destruction by fire, is not bound to pay rent until the lessor rebuilds. American Bicycle Co. *v.* Hoyt, 118 Wis. 273, 95 N. W. 92.

10. Jones *v.* Hathaway, 77 Ind. 14; Jackson *v.* Odell, 14 Abb. N. Cas. (N. Y.) 42; Wolfe *v.* Arrott, 109 Pa. St. 473, 1 Atl. 333.

Good faith of landlord.— Where the lessee is induced by false representations by the landlord to lease the premises, the intent or good faith of the latter is immaterial. Bauer *v.* Taylor, 4 Nebr. (Unoff.) 710, 98 N. W. 29. But see York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125, holding that representations must be fraudulent as well as false.

Necessity of actual misrepresentation.— In the absence of actual misrepresentation, it is no defense to an action for rent that the lessor knew and the lessee did not know, a fact detrimental to the premises. Twibill *v.* Brown, 1 Pa. Co. Ct. 350, 17 Wkly. Notes Cas. 221. See also Crump *v.* Morrell, 12 Phila. (Pa.) 249.

11. McCoull *v.* Herzberg, 33 Ill. App. 542; Lansing *v.* Thompson, 8 N. Y. App. Div. 54, 40 N. Y. Suppl. 425. *Compare* Leonard *v.* Armstrong, 73 Mich. 577, 41 N. W. 695; Bradley *v.* De Gorcouria, 67 How. Pr. (N. Y.) 76.

12. Daly *v.* Wise, 15 Daly (N. Y.) 431, 7 N. Y. Suppl. 902; Jackson *v.* Odell, 12 Daly (N. Y.) 345.

13. Crump *v.* Morrell, 12 Phila. (Pa.) 249; *Compare* Coulson *v.* Whiting, 14 Abb. N. Cas. (N. Y.) 60.

14. Sully *v.* Schmitt, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659, holding that a landlord has no right, in the nature of an easement, to use a sewer underneath rented premises so as to render the latter untenantable.

15. See *infra*, VIII, A, 4, a, (VI).

16. Sutphin *v.* Seebas, 12 Daly (N. Y.) 139, 14 Abb. N. Cas. 67 note; Dexter *v.* King, 8 N. Y. Suppl. 489; Coulson *v.* Whiting, 14 Abb. N. Cas. (N. Y.) 60.

17. Edwards *v.* McLean, 122 N. Y. 302, 25 N. E. 483 [*affirming* 55 N. Y. Super. Ct. 126], holding that where a lease has been executed and delivered, the lessee's interest is vested, although the term does not begin until some time afterward; and the fact that meanwhile an infectious disease breaks out in the house, while it may depreciate its rental value will not justify a surrender so as to relieve the lessee of the obligation to pay rent.

18. Murray *v.* Albertson, 50 N. J. L. 167, 13 Atl. 394, 7 Am. St. Rep. 787; McGlashan *v.* Tallmadge, 37 Barb. (N. Y.) 313; Truesdell *v.* Booth, 6 Thomps. & C. (N. Y.) 379, 4 Hun (N. Y.) 100; Westlake *v.* De Graw, 25 Wend. (N. Y.) 669.

19. Harmony Co. *v.* Rauch, 64 Ill. App. 386; Rogers *v.* Babcock, 139 Mich. 94, 102 N. W. 636.

breach of such provision and not that he was obliged to vacate the premises.[20] Where rent is payable each month in advance, it is no defense to an action therefor that the lessor was to furnish heat throughout the month, and that the lessee could not be compelled to pay rent for that month unless he knew that the lessor would perform his covenant;[21] but if the tenant is compelled by lack of heat to abandon the premises he is not thereafter liable for rent.[22]

(v) *For Lack of Repairs.* Where it is the duty of the lessor to make repairs, a tenant is not entitled to abandon the premises, so as to relieve himself from liability for rent, without first putting the lessor in default by affording him an opportunity to remedy the defect.[23] If, however, the landlord fails to repair after notice, the tenant may abandon the premises, and is not liable for rent thereafter.[24] If the lease contains a covenant by the tenant to repair, and the premises become untenantable by his own fault, he is not exonerated from the payment of rent.[25]

(vi) *Statutory Provisions as to Unavoidable Casualties.* And in many states statutes have been passed providing that where leased premises are destroyed or become untenantable through injury by the elements, fire, or other unavoidable casualty,[26] without fault of the lessee,[27] the lessee shall not thereafter be liable for rent. Such a statutory provision, however, applies only to cases where the injury rendering the building untenantable occurs after the execution of the lease,[28] during the lessee's actual occupancy;[29] and possession of the premises must be surrendered within a reasonable time.[30]

b. Injury to or Destruction of Premises — (i) *In General.* At common law a lessee of premises which are accidentally destroyed subsequent to the making of

20. Harmony Co. *v.* Rauch, 64 Ill. App. 386. *Compare* Thomson *v.* Ludlum, 36 Misc. (N. Y.) 801, 74 N. Y. Suppl. 875; Trenkmann *v.* Schneider, 26 Misc. (N. Y.) 695, 56 N. Y. Suppl. 770.

21. Hurliman *v.* Seckendorf, 10 Misc. (N. Y.) 549, 31 N. Y. Suppl. 443.

22. Bass *v.* Rollins, 63 Minn. 226, 65 N. W. 348. See also Filkins *v.* Steele, 124 Iowa 742, 100 N. W. 851.

23. Green *v.* Redding, 92 Cal. 548, 28 Pac. 599; Murrell *v.* Jackson, 33 La. Ann. 1341; Hollis *v.* Brown, 159 Pa. St. 539, 28 Atl. 360; Beauchamp *v.* Brewster, 16 Quebec Super. Ct. 268.

Duties as to repairs in general see *supra*, VII, D, 1.

24. Harthill *v.* Cooke, 43 S. W. 705, 19 Ky. L. Rep. 1524; Bostwick *v.* Losey, 67 Mich. 554, 35 N. W. 246; Brolaskey *v.* Loth, 5 Phila. (Pa.) 81.

In Louisiana a lessee cannot set up, in defense to a claim for rent, that the premises were uninhabitable. In such a case he is authorized to make repairs, deducting the cost thereof from the rent. Diggs *v.* Maury, 23 La. Ann. 59.

25. Lockrow *v.* Horgan, 58 N. Y. 635; Crawford *v.* Redding, 8 Misc. (N. Y.) 306, 28 N. Y. Suppl. 733; Huber *v.* Baum, 152 Pa. St. 626, 630, 26 Atl. 101.

What repairs tenant required to make.— Under a lease releasing the tenant from his obligation to pay rent if the premises become untenantable, he is not bound to rebuild because of a defective roof. Prosser *v.* Pretzel, (Kan. App. 1899) 55 Pac. 854.

26. Wampler *v.* Weinmann, 56 Minn. 1, 57 N. W. 157; Harris *v.* Corlies, 40 Minn. 106, 41 N. W. 940, 2 L. R. A. 349 May *v.* Gillis, 169 N. Y. 330, 62 N. E. 385; Tallman *v.* Gashweiler, 13 Daly (N. Y.) 555; Hilliard *v.* New York, etc., Gas Coal Co., 41 Ohio St. 662, 52 Am. Rep. 99; Tays *v.* Ecker, 6 Tex. Civ. App. 188, 24 S. W. 954.

Termination of tenancy see *infra*, IX, B, 6, c; IX, C, 2.

The word "building" in such a statute includes only so much land as is necessary for its complete enjoyment. Avery *v.* House, 2 Ohio Cir. Ct. 246, 1 Ohio Cir. Dec. 468.

Failure to heat.— Such a statute is inapplicable to the failure of a landlord to furnish heat and elevator service as stipulated. Minneapolis Co-Operative Co. *v.* Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473.

Duty to rebuild see *supra*, VII, D, 1, a, (F).

27. Tallman *v.* Murphy, 120 N. Y. 345, 24 N. E. 716; Oakley *v.* Loening, 8 Misc. (N. Y.) 302, 28 N. Y. Suppl. 735 [*affirming* 7 Misc. 742, 27 N. Y. Suppl. 1017]; Tallman *v.* Earle, 3 Misc. (N. Y.) 76, 23 N. Y. Suppl. 17; Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188; Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 239, 37 S. E. 851.

28. Meserole *v.* Hoyt, 161 N. Y. 59, 55 N. E. 274 [*affirming* 34 N. Y. App. Div. 33, 53 N. Y. Suppl. 1072]; Prahar *v.* Tousey, 93 N. Y. App. Div. 507, 87 N. Y. Suppl. 845; Sherman *v.* Ludin, 79 N. Y. App. Div. 37, 79 N. Y. Suppl. 1066.

29. Murray *v.* Waller, 42 How. Pr. (N. Y.) 64.

30. Copeland *v.* Luttgen, 17 Misc. (N. Y.) 604, 40 N. Y. Suppl. 653. See also *infra*, VIII, A, 4, d.

the lease cannot be relieved against an express covenant to pay rent, unless he has stipulated in the lease for a cessation of the rent in such case, or the lessor has covenanted to rebuild;[31] nor will equity relieve against an express covenant, except in case of fraud, accident, or mistake.[32]

(II) *Tenancy of Portion of Premises.* Many authorities recognize an exception to the general rule already stated[33] in the case where a room or apartments or a building without land is leased and destroyed.[34]

31. *Alabama.*— Cook *v.* Anderson, 85 Ala. 99, 4 So. 713; Chamberlain *v.* Godfrey, 50 Ala. 530.

Arkansas.— Buerger *v.* Boyd, 25 Ark. 441.

California.— Cowell *v.* Lumley, 39 Cal. 151, 2 Am. Rep. 430.

Delaware.— Peterson *v.* Edmonson, 5 Harr. 378.

Georgia.— Mayer *v.* Morehead, 106 Ga. 434, 32 S. E. 349; Fleming *v.* King, 100 Ga. 449, 28 S. E. 239; White *v.* Molyneux, 2 Ga. 124.

Illinois.— Peck *v.* Ledwidge, 25 Ill. 109; Moran *v.* Bergin, 111 Ill. App. 313; Stautz *v.* Protzman, 84 Ill. App. 434.

Indiana.— Womack *v.* McQuarry, 28 Ind. 103, 92 Am. Dec. 306.

Iowa.— Harris *v.* Heackman, 62 Iowa 411, 17 N. W. 592.

Kentucky.— Helburn *v.* Mofford, 7 Bush 169.

Maryland.— Lamott *v.* Sterett, 1 Harr. & J. 42.

Massachusetts.— Kramer *v.* Cook, 7 Gray 550; Fowler *v.* Bott, 6 Mass. 63.

Mississippi.— Fowler *v.* Payne, 49 Miss. 32.

Missouri.— Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1007; Gibson *v.* Perry, 29 Mo. 245.

New York.— Austin *v.* Field, Sheld. 208; Gates *v.* Green, 4 Paige 355, 27 Am. Dec. 68.

Ohio.— Felix *v.* Griffiths, 56 Ohio St. 39, 45 N. E. 1092; Linn *v.* Ross, 10 Ohio 412, 36 Am. Dec. 95.

Pennsylvania.—Bussman *v.* Ganster, 72 Pa. St. 285; Mannerbach *v.* Keppleman, 2 Woodw. 137.

Texas.— Diamond *v.* Harris, 33 Tex. 634.

Vermont.— Voluntine *v.* Godfrey, 9 Vt. 186.

United States.— Viterbo *v.* Friedlander, 120 U. S. 707, 7 S. Ct. 962, 30 L. ed. 776; Waite *v.* O'Neil, 72 Fed. 348.

England.— Hare *v.* Groves, 3 Anstr. 687, 4 Rev. Rep. 835; Marshall *v.* Schofield, 47 L. T. Rep. N. S. 406, 31 Wkly. Rep. 134; Holtzapffel *v.* Baker, 4 Taunt. 45, 18 Ves. Jr. 115, 13 Rev. Rep. 556, 32 Eng. Reprint 261; Belfour *v.* Weston, 1 T. R. 310, 1 Rev. Rep. 210. See also Gregg *v.* Coates, 23 Beav. 33, 2 Jur. N. S. 964, 4 Wkly. Rep. 735, 53 Eng. Reprint 13.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 777.

Termination of tenancy see *infra*, IX, B, 6, a; C, 2.

Casualties of war.— Where there is an express covenant in the lease to pay rent, the loss by the lessee of the use of the premises by means of the casualties of war will not excuse the payment of the rent, unless such casualties be expressly provided against in the lease. Coy *v.* Downie, 14 Fla. 544; Robinson *v.* L'Engle, 13 Fla. 482. Effect of existence of war see *supra*, VIII, A, 3, g.

Of course where the lease expressly provides that in case of destruction of the buildings the rent shall cease, such provision will be effective. Patterson *v.* Ackerson, 1 Edw. (N. Y.) 96.

An oral stipulation by the landlord at the time of taking an absolute note for rent that if the leased property shall be destroyed by fire the rent shall cease is no defense to an action upon the note, if there was no intention by either of the parties to insert the stipulation in the note. Stafford *v.* Staunton, 88 Ga. 298, 14 S. E. 479.

Stipulation inadvertently omitted.—Where it appears that a clause relieving the tenant from payment of rent, on destruction of the premises by fire, had been agreed upon by the parties, but through inadvertence omitted from the lease, the lessor will be enjoined from proceedings to recover rent. Wood *v.* Hubbell, 10 N. Y. 479.

Duty to rebuild in general see supra, VII, D, 1, a, (F).

Effect of covenant to rebuild see *infra*, VIII, A, 4, b, (V).

32. Patterson *v.* Ackerson, 1 Edw. (N. Y.) 96; Voluntine *v.* Godfrey, 9 Vt. 186; Hare *v.* Groves, 3 Anstr. 687, 4 Rev. Rep. 835; Holtzapffel *v.* Baker, 4 Taunt. 45, 18 Ves. Jr. 115, 13 Rev. Rep. 556, 34 Eng. Reprint 261. But see Brown *v.* Quilter, Ambl. 619, 27 Eng. Reprint 402, 2 Eden 219, 28 Eng. Reprint 882.

33. See *supra*, VIII, A, 4, b, (I).

34. The ground of this exception is that the destruction of the entire subject-matter of the contract extinguishes the estate for years, and, the interest of the lessee being entirely destroyed, the agreement to pay rent is extinguished.

Alabama.— McMillan *v.* Solomon, 42 Ala. 356, 94 Am. Dec. 654.

Arkansas.— Buerger *v.* Boyd, 25 Ark. 441.

California.—Ainsworth *v.* Ritt, 38 Cal. 89.

Illinois.— Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893 [*affirming* 70 Ill. App. 349]; Nonotuck Silk Co. *v.* Shay, 37 Ill. App. 542.

Indiana.— Womack *v.* McQuarry, 28 Ind. 103, 92 Am. Dec. 306.

Massachusetts.— Roberts *v.* Lynn Ice Co., 187 Mass. 402, 73 N. E. 523; Shawmut Nat. Bank *v.* Boston, 118 Mass. 125; Stockwell *v.* Hunter, 11 Metc. 448, 45 Am. Dec. 220.

New York.— Graves *v.* Berdan, 26 N. Y. 498 [*affirming* 29 Barb. 100]; Austin *v.* Field,

(III) *Destruction by Order of Public Authorities.* As no warranty results by implication of law that land leased shall remain in the same condition, the lessee cannot refuse payment of the rent on the ground that after the execution of the lease the premises were destroyed, or their use rendered inconvenient, by an act done in the lawful exercise of the authority of a public corporation.[35]

(IV) *Effect of Provisions as to Rebuilding.* A provision in a lease relieving the lessee from his agreement to rebuild the leased premises if destroyed by unavoidable accident does not relieve him from the payment of rent upon the happening of that event.[36] But where under the lease the landlord has the option to rebuild, which he elects not to do, the tenant is relieved from the obligation to pay rent, and is no longer entitled to possession of the vacant premises.[37]

(V) *Statutory Provisions*—(A) *In General.* In many states the rule has been now modified by statute so as to discharge the tenant from rent or allow the reduction thereof when the premises are accidentally destroyed without fault of the lessee.[38] Where the parties have provided by a covenant against the contingency of the destruction of the premises by fire, such covenant furnishes the measure of defendant's exemption from liability, and the statutes have no application.[39]

(B) *Nature and Extent of Injury.* Statutes relieving a tenant from payment of rent where the premises are destroyed or so injured as to be untenantable apply only to destruction or injury resulting from sudden and unexpected action of the elements, or other cause, and not to gradual decay.[40] The destruction contemplated is such as permanently unfits the premises for occupancy;[41]

Sheld. 208; New York Real Estate, etc., Imp. Co. *v.* Motley, 3 Misc. 232, 22 N. Y. Suppl. 705; Kerr *v.* Merchant's Exch. Co., 3 Edw. 315.

Ohio.— Winton *v.* Cornish, 5 Ohio 477.

Oregon.— Harrington *v.* Watson, 11 Oreg. 143, 3 Pac. 173, 50 Am. Rep. 465.

Pennsylvania.— Paxson, etc., Co. *v.* Potter, 30 Pa. Super. Ct. 615.

Tennessee.— Nashville, etc., R. Co. *v.* Heikens, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298.

West Virginia.—Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957.

United States.— Waite *v.* O'Neil, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550, holding that where a "landing" which is the subject of a lease is destroyed by the ravages of the water, the shore line being moved back so that the bank of the river, as it exists after the caving away of the land has been arrested, is a vertical bluff, there is such a destruction of the premises as to exempt the lessee from liability for rent.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 779.

35. Noyes *v.* Anderson, 1 Duer (N. Y.) 342; Banks *v.* White, 1 Sneed (Tenn.) 613. See also Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 4 Misc. (N. Y.) 207, 23 N. Y. Suppl. 900.

That the act is done by the landlord himself, under a statutory provision authorizing the owner in such case to do the work, does not alter the rule that the liability of the tenant is not discharged. Gallup *v.* Albany R. Co., 65 N. Y. 1.

36. *California.*— Beach *v.* Forish, 4 Cal. 339.

Florida.— Ward *v.* Bull, 1 Fla. 271.

Missouri.— O'Neil *v.* Flanagan, 64 Mo. App. 87.

New Hampshire.—Davis *v.* George, 67 N. H. 393, 39 Atl. 979.

England.— Hare *v.* Groves, 3 Anstr. 687, 4 Rev. Rep. 835; Holtzapffel *v.* Baker, 4 Taunt. 45, 18 Ves. Jr. 115, 13 Rev. Rep. 556, 32 Eng. Reprint 261; Belfour *v.* Weston, 1 T. R. 310, 1 Rev. Rep. 210.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 777.

37. P. H. Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775; Thompson *v.* Pendell, 12 Leigh (Va.) 591.

38. See the statutes of the several states.

Va. Code (1887), § 2455, provides that in case of a destruction of leased buildings without fault on the part of the tenant, he shall be entitled to a reduction in rent equal to the diminished value of the leased premises for his purposes. Richmond Ice Co. *v.* Crystal Ice Co., 103 Va. 465, 49 S. E. 650.

The fact that the landlord repaired the building is evidence that it was not destroyed by the fault or neglect of the tenant. Weeber *v.* Hawes, 80 Minn. 476, 83 N. W. 447.

39. Tocci *v.* Powell, 9 N. Y. App. Div. 283, 41 N. Y. Suppl. 511.

40. Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; Hatch *v.* Stamper, 42 Conn. 28; Suydam *v.* Jackson, 54 N. Y. 450; Lansing *v.* Thompson, 8 N. Y. App. Div. 54, 40 N. Y. Suppl. 425.

41. Spalding *v.* Munford, 37 Mo. App. 281.

Temporary inconvenience from an overflow produced from a crevasse will not relieve the tenant from the payment of rent which accrues after the inconvenience ceases. Dussnau *v.* Generis, 6 La. Ann. 279.

such an injury as cannot be repaired, but necessitates the rebuilding of the premises.[42]

(VI) *Time of Destruction.* A destruction of premises by fire between the making of the lease and the commencement of the term discharges the tenant from his obligation to pay rent;[43] but where the premises are destroyed during the day on which an instalment of rent is payable, the tenant remains liable for the rent, since it was due when the day commenced, and before the building was destroyed.[44] Under the same principle, where the rent is required to be paid in advance, a proportion of the rent cannot be recovered back when the premises are destroyed before the end of the term for which it was paid.[45]

(VII) *Occupation After Destruction.* After the termination of a lease by fire the tenant is liable for the reasonable value of the use and occupation of the premises which he continues to occupy for his own purposes.[46]

c. Failure of Landlord to Repair or Make Improvements. A tenant under a lease containing no covenant to repair cannot successfully defend an action for rent by showing that the premises are out of repair.[47] Where the lease contains a covenant by the landlord to deliver the premises in good condition and repair, and to make the alterations and repairs required during the term, such a covenant, and the covenant by the lessee to pay rent, are usually considered as independent covenants;[48] and the tenant, having entered upon the demised premises under the lease and continued in possession, is bound to pay the rent reserved, and cannot defend on the ground that the covenant on the part of the lessor to put the premises in repair, or to make the changes and alterations required, has not been performed.[49] The tenant may, however, set up a claim for damages for breach of

Continued occupancy by the tenant is not of itself conclusive evidence that the premises are tenantable. Evidence of the circumstances which induce the tenant to remain is proper. Kip *v.* Merwin, 52 N. Y. 542 [*affirming* 34 N. Y. Super. Ct. 531].

42. Lewis *v.* Hughes, 12 Colo. 208, 20 Pac. 621.

Mere damage insufficient.— To bring a case within the operation of such a statute the premises must be not merely damaged, but annihilated. Lockwood *v.* Lockwood, 22 Conn. 425; Humiston *v.* Wheeler, 175 Ill. 514, 51 N. E. 893 [*affirming* 70 Ill. App. 349]; Smith *v.* McLean, 123 Ill. 210, 14 N. E. 50 [*affirming* 22 Ill. App. 451]; Turner *v.* Mantonya, 27 Ill. App. 500; Wampler *v.* Weinmann, 56 Minn. 1, 57 N. W. 157.

43. Wood *v.* Hubbell, 10 N. Y. 479 [*affirming* 5 Barb. 601].

44. Craig *v.* Butler, 83 Hun (N. Y.) 286, 31 N. Y. Suppl. 963.

45. Tarkovsky *v.* George H. Hess Co., 64 Ill. App. 513; Werner *v.* Padula, 49 N. Y. App. Div. 135, 63 N. Y. Suppl. 68 [*affirmed* in 167 N. Y. 611, 60 N. E. 1122]; Felix *v.* Griffiths, 56 Ohio St. 39, 45 N. E. 1092.

46. Wallace *v.* Coe, 13 N. Y. St. 546.

47. *Connecticut.*— Lockwood *v.* Lockwood, 22 Conn. 425.

Illinois.— Watson *v.* Moulton, 100 Ill. App. 560.

Massachusetts.— Roth *v.* Adams, 185 Mass. 341, 70 N. E. 445; Pratt *v.* Grafton Electric Co., 182 Mass. 180, 65 N. E. 63.

Missouri.—Burnes *v.* Fuchs, 28 Mo. App. 279.

New York.— Moffatt *v.* Smith, 4 N. Y. 126; Watson *v.* Almirall, 61 N. Y. App. Div. 429, 70 N. Y. Suppl. 662; Zerega *v.* Will, 34 N. Y. App. Div. 488, 54 N. Y. Suppl. 361; McMann *v.* Antenreith, 17 Hun 163; Walker *v.* Gilbert, 2 Rob. 214; Van Buskirk *v.* Gordon, 10 N. Y. St. 351.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 782.

Covenants to repair see *supra*, VII, D, 1.

48. *Alabama.*— Hill *v.* Bishop, 2 Ala. 320.

Georgia.— Lewis *v.* Chisholm, 68 Ga. 40.

Illinois.— Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127.

Indiana.— Bryan *v.* Fisher, 3 Blackf. 316.

Kentucky.— McCoy *v.* Hill, 2 Litt. 372.

Missouri.— Goodfellow *v.* Noble, 25 Mo. 60.

New York.— Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7 [*affirming* 4 Misc. 207, 23 N. Y. Suppl. 900]; Newman *v.* French, 45 Hun 65; McCullough *v.* Cox, 6 Barb. 386; Huber *v.* Ryan, 26 Misc. 428, 56 N. Y. Suppl. 135; Doolittle *v.* Selkirk, 7 Misc. 722, 28 N. Y. Suppl. 43; Allen *v.* Culver, 3 Den. 284.

North Carolina.— Watters *v.* Smaw, 32 N. C. 292.

Pennsylvania.— Obermyer *v.* Nichols, 6 Binn. 159, 6 Am. Dec. 439.

Wisconsin.— Young *v.* Burhans, 80 Wis. 438, 50 N. W. 343.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 783.

Where a lessee elects to treat the covenant as independent he must, in the lessor's action for rent, be held to that construction. Knox *v.* Hexter, 71 N. Y. 461 [*reversing* 42 N. Y. Super. Ct. 496].

49. *Alabama.*— Hill *v.* Bishop, 2 Ala. 320.

Georgia.— Lewis *v.* Chisholm, 68 Ga. 40.

Illinois.— Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127.

the covenant, either by way of recoupment or cross action,[50] or in some jurisdictions if the lessor refuses, after notice from the lessee, to make such improvements, the lessee may make the same, and charge the reasonable value thereof against the rent.[51] Where a covenant to repair or improve is expressly or impliedly made a condition precedent to the covenant to pay rent, a breach of the former justifies a refusal to observe the latter.[52]

d. Abandonment of Premises as Condition Precedent to Release From Liability. A tenant who desires to avail himself of a statute releasing him from payment of rent where the premises are destroyed or so injured as to become untenantable must move out and surrender possession of the premises. He cannot retain possession and at the same time refuse to pay the rent.[53] The lessee is put to his

Indiana.— Bryan *v.* Fisher, 3 Blackf. 316.
Kentucky.— McCoy *v.* Hill, 2 Litt. 372.
Louisiana.— Winn *v.* Spearing, 26 La. Ann. 384.
Missouri.— Goodfellow *v.* Noble, 25 Mo. 60.
New York.— Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7 [*affirming* 4 Misc. 207, 23 N. Y. Suppl. 900]; Newman *v.* French, 45 Hun 65; Tibbits *v.* Percy, 24 Barb. 39; McCullough *v.* Cox, 6 Barb. 386; Huber *v.* Ryan, 26 Misc. 428, 56 N. Y. Suppl. 135; Doolittle *v.* Selkirk, 7 Misc. 722, 28 N. Y. Suppl. 43; Allen *v.* Culver, 3 Den. 284.
North Carolina.— Watters *v.* Smaw, 32 N. C. 292.
Pennsylvania.— Obermyer *v.* Nichols, 6 Binn. 159, 6 Am. Dec. 439.
Wisconsin.— Young *v.* Burhans, 80 Wis. 438, 50 N. W. 343.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 783.

Parol agreement to repair.— After a lease has been given, a parol agreement on the part of the lessor to repair cannot be made available by one who is a defendant to a suit for rent reserved according to the terms of the lease without a consideration. Reeves *v.* Hyde, 14 Ill. App. 233; Walker *v.* Gilbert, 2 Rob. (N. Y.) 214.

The lessor's breach of promise to make future improvements on the leased premises cannot be set up as a fraud in an action for the rent. Lynch *v.* Sauer, 16 Misc. (N. Y.) 1, 37 N. Y. Suppl. 666.

50. *Delaware.*— Potter *v.* Truitt, 3 Harr. 331.
Georgia.— Lightfoot *v.* West, 98 Ga. 546, 25 S. E. 587; Lewis *v.* Chisholm, 68 Ga. 40.
Illinois.— Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127.
Louisiana.— Mulhaupt *v.* Enders, 38 La. Ann. 744.
Maine.— Union Water Power Co. *v.* Pingree, 91 Me. 440, 40 Atl. 333.
Minnesota.— Long *v.* Gieriet, 57 Minn. 278, 59 N. W. 194, holding further that the measure of damages is the difference between the rental value of the leased premises with improvements, and their rental value without such improvements.
Mississippi.— Fowler *v.* Payne, 49 Miss. 32.
New Hampshire.— Meredith Mechanic Assoc. *v.* American Twist Drill Co., 67 N. H. 450, 39 Atl. 330.
New York.— Kelsey *v.* Ward, 38 N. Y. 83; Myers *v.* Burns, 35 N. Y. 269; Tibbits *v.* Percy, 24 Barb. 39; Whitbeck *v.* Skinner, 7 Hill 53; Etheridge *v.* Osborn, 12 Wend. 529.
Pennsylvania.— Bradley *v.* Citizens' Trust, etc., Co., 7 Pa. Super. Ct. 419.
Tennessee.— Smith *v.* Wiley, 1 Baxt. 418.
Texas.— New York, etc., Land Co. *v.* Cruger, (Civ. App. 1894) 27 S. W. 212.
See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 782, 783. See also *infra*, VIII, B, 8, e.

51. Moroney *v.* Hellings, 110 Cal. 219, 42 Pac. 560; Winn *v.* Spearing, 26 La. Ann. 384; Pesant *v.* Heartt, 22 La. Ann. 292; Lorenzen *v.* Woods, McGloin (La.) 373; Beardsley *v.* Morrison, 18 Utah 478, 56 Pac. 303, 72 Am. St. Rep. 795.

52. *Alabama.*— Thompson *v.* Gray, 2 Stew. & P. 60.
Georgia.— Strohecker *v.* Barnes, 21 Ga. 430; Barnes *v.* Strohecker, 17 Ga. 340.
Illinois.— Bissell *v.* Lloyd, 100 Ill. 214; Baird *v.* Evans, 20 Ill. 29.
Michigan.— Fisher *v.* Nergararian, 112 Mich. 327, 70 N. W. 1009; Pierce *v.* Joldersma, 91 Mich. 463, 51 N. W. 1116; Leonard *v.* Armstrong, 73 Mich. 577, 41 N. W. 695; Young *v.* Collett, 63 Mich. 331, 29 N. W. 850.
Mississippi.— Fowler *v.* Payne, 49 Miss. 32.
Missouri.— Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1007.
South Dakota.— Prior *v.* Sanborn County, 12 S. D. 86, 80 N. W. 169.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 783.

Repudiation of lease by tenant before time for repairs.— The landlord need not, as a condition precedent to recover rent under a lease, make repairs which he covenanted to make before the commencement of the term, where the tenant, before the landlord was in default as to the repairs, repudiated the lease. Kirland *v.* Wolf, 7 Ohio Dec. (Reprint) 436, 3 Cinc. L. Bul. 114.

Waiver of right to abandon.— A tenant's right to abandon the premises because of the landlord's non-compliance with his agreement to make repairs is lost by the tenant's unexplained action in remaining in possession of the premises for an unreasonable time. Kiernan *v.* Germain, 61 Miss. 498.

53. Roach *v.* Peterson, 47 Minn. 291, 50 N. W. 80; Johnson *v.* Oppenheim, 55 N. Y. 280, 12 Abb. Pr. N. S. 449; Lansing *v.* Thomp-

election whether he will retain possession under his lease or surrender it to his lessor.[54] And he must surrender the whole of the premises.[55]

e. Revival of Liability by Putting Premises in Tenantable Condition. It is sometimes provided that if, after leased premises have been destroyed, they again become fit for occupancy during the continuance of the lease, the tenant shall then pay the rent and may again occupy. This obligation to again pay the rent is not a new statutory obligation but a contract obligation revived by statute.[56] The restoration or refitting of the premises must, however, be done within a reasonable time.[57]

f. Estoppel to Plead and Waiver of Defenses.[58] If a landlord covenants to repair before the term commences, the tenant may refuse to enter upon the term until the repairs are made; but by entering upon the term and receiving possession he waives the breach of such covenant, and cannot thereafter abandon the lease and refuse to pay rent.[59] If, however, the tenant enters before the time stipulated for the repairs to be made, there is no waiver on his part, and rent is not recoverable if he elects to abandon the contract.[60] But if the tenant remains in possession after failure of the landlord to repair, or after the premises have become so untenantable as to justify abandonment, he thereby waives his right to set up such defenses to an action for the rent.[61]

5. Cancellation, Surrender, and Abandonment — a. Cancellation of Lease.[62] After the cancellation of a lease liability for rent thereunder is extinguished.[63]

son, 8 N. Y. App. Div. 54, 40 N. Y. Suppl. 425; Danziger *v.* Falkenberg, 18 N. Y. Suppl. 927; Gay *v.* Davey, 47 Ohio St. 396, 25 N. E. 425. See also Lorenzen *v.* Woods, McGloin (La.) 373, holding that a city ordinance authorizing the board of health to inspect and condemn premises which are in an unhealthy condition and compel their vacation till properly cleansed or repaired does not justify a tenant's refusal to pay rent for such purposes, if he has not vacated the same and has not then had them condemned. See also *supra*, VIII, A, 3, l.

Effect of underletting.— A lessee cannot abandon if he has underlet a part of the premises for a term not yet expired, although the premises have become untenantable. Smith *v.* Sonnekalb, 67 Barb. (N. Y.) 66; Slacum *v.* Brown, 22 Fed. Cas. No. 12,934, 5 Cranch C. C. 315.

54. He must exercise this election, and within a reasonable time, and when once made this election is final. Roach *v.* Peterson, 47 Minn. 462, 50 N. W. 601.

The reasonable time which the law allows a tenant for the removal of his property from a burned building must be solely for that purpose, and he cannot be permitted to occupy the premises to promote his convenience in adjusting his losses with the insurers unless he pays reasonable value for such occupation. Decker *v.* Morton, 31 N. Y. App. Div. 469, 52 N. Y. Suppl. 172.

55. He cannot escape liability for rent by surrendering that portion of the property destroyed or injured and retaining the residue. Penn *v.* Kearny, 21 La. Ann. 21; Willard *v.* Tillman, 19 Wend. (N. Y.) 358; Gay *v.* Davey, 47 Ohio St. 396, 25 N. E. 425.

56. Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678.

57. Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678, holding, however, that where a tenant notifies his lessor that he shall not reoccupy the premises, the use of a longer time than is necessary cannot affect the case.

58. **Estoppel** generally see Estoppel.

59. Reno *v.* Mendenhall, 58 Ill. App. 87; Kiernan *v.* Germain, 61 Miss. 498; La Farge *v.* Mansfield, 31 Barb. (N. Y.) 345; Harger *v.* Edmonds, 4 Barb. (N. Y.) 256. But see Clarke *v.* Spaulding, 20 N. H. 313.

His only remedy is to recoup the damages actually sustained. Reno *v.* Mendenhall, 58 Ill. App. 87; La Farge *v.* Mansfield, 31 Barb. (N. Y.) 345; Harger *v.* Edmonds, 4 Barb. (N. Y.) 256.

60. Strohecker *v.* Barnes, 21 Ga. 430; Kiernan *v.* Germain, 61 Miss. 498.

61. Roach *v.* Peterson, 47 Minn. 462, 50 N. W. 601; Kiernan *v.* Germain, 61 Miss. 498; New York Academy of Music *v.* Hackett, 2 Hilt. (N. Y.) 217. See *supra*, VIII, A, 4, d.

Waiver of breach of agreement to heat.— If a tenant remains in possession and pays rent for several months after the failure of his landlord to heat the rooms as provided in the lease, he thereby waives the breach, and cannot thereafter set it up to justify abandonment. Orcutt *v.* Isham, 70 Ill. App. 102; Ryan *v.* Jones, 2 Misc. (N. Y.) 65, 20 N. Y. Suppl. 842; Moore *v.* Gardiner, 161 Pa. St. 175, 28 Atl. 1018.

62. **Cancellation of instrument** generally see Cancellation of Instruments.

63. Sigur *v.* Lloyd, 1 La. Ann. 421; American Academy of Music *v.* Bert, 8 Pa. Co. Ct. 223.

Termination of lease at option of parties see *infra*, IX, B, 2.

Rescission or cancellation of lease see *supra*, II, A, 7, b.

Under the civil code, where a lease is dissolved on account of the fault of the lessee, the latter is not bound to pay rent until the

b. Surrender of Lease — (i) *Effect on Liability For Rent* — (A) *Rents to Accrue* — (1) In General. The surrender of the leased premises by the tenant extinguishes the relation of landlord and tenant, and releases him from liability for rent accruing thereafter.[64] It may of course be expressly provided in the lease that the obligation to pay rent shall not cease on surrender of the premises.[65]

(2) Sufficiency of Surrender — (a) In General. Surrender may be had by express agreement of the parties or by operation of law,[66] and in the latter case whether or not a surrender has been effected ordinarily depends upon the intention of the parties.[67]

thing is again leased, except in case of loss sustained by the lessor in consequence of the lessee's "having made another use of the thing than that for which it was intended." Sigur *v.* Lloyd, 1 La. Ann. 421.

What does not amount to cancellation.— Merely writing the word "canceled" across a lease (Brewer *v.* National Union Bldg. Assoc., 64 Ill. App. 161) or the acceptance of rent from a third person whom the lessor finds in occupation of the premises (Wood *v.* Welz, 40 N. Y. App. Div. 202, 57 N. Y. Suppl. 1121) is not sufficient to release the tenant from paying rent.

64. *California.*— Hobson *v.* Silva, (1902) 70 Pac. 619.

Illinois.— Hewitt *v.* Hornbuckle, 97 Ill. App. 97.

Maine.— Hesseltine *v.* Seave, 16 Me. 212.

Mississippi.— Kiernan *v.* Germain, 61 Miss. 498.

Montana.— Bickford *v.* Kirwin, 30 Mont. 1, 75 Pac. 518.

Nebraska.— Dean *v.* Saunders County, 55 Nebr. 759, 76 N. W. 450.

New Hampshire.— Davis *v.* George, 67 N. H. 393, 39 Atl. 979; Elliott *v.* Aiken, 45 N. H. 30.

New Jersey.— Miller *v.* Dennis, 68 N. J. L. 520, 53 Atl. 394; Meeker *v.* Spalsbury, 66 N. J. L. 60, 48 Atl. 1026.

New York.— Ireland *v.* U. S. Mortgage, etc., Co., 175 N. Y. 491, 67 N. E. 1083 [*affirming* 72 N. Y. App. Div. 95, 76 N. Y. Suppl. 177]; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Young *v.* Peyser, 3 Bosw. 308; Gallagher *v.* Reilly, 16 Daly 227, 10 N. Y. Suppl. 536 (holding that where, after final order awarding possession of the premises to the landlord, a tenant from month to month voluntarily surrenders them before the issuance of a warrant for his removal, the landlord cannot recover rent for the ensuing month); Wallace *v.* Dimmony, 10 Misc. 47, 30 N. Y. Suppl. 830; Danziger *v.* Falkenberg, 18 N. Y. Suppl. 927; Tallman *v.* Earle, 13 N. Y. Suppl. 805.

Oregon.— Ladd *v.* Smith, 6 Oreg. 316.

Pennsylvania.— Greider's Appeal, 5 Pa. St. 422; Gunnis *v.* Kater, 29 Leg. Int. 230; Trotter *v.* Henderson, 17 Leg. Int. 190; Wistar *v.* Campbell, 10 Phila. 359.

Vermont.— Patchin *v.* Dickerman, 31 Vt. 666.

Wisconsin.— Imler *v.* Baenish, 74 Wis. 567, 43 N. W. 490.

England.— Grimman *v.* Legge, 8 B. & C. 324, 6 L. J. K. B. O. S. 321, 2 M. & R. 438, 15 E. C. L. 164; Dodd *v.* Acklom, 7 Jur. 1017, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672; Whitehead *v.* Clifford, 5 Taunt. 518, 15 Rev. Rep. 579, 1 E. C. L. 266.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 788.

Termination of tenancy by surrender: Terms for years see *infra*, IX, B, 8. Tenancies from year to year, see *infra*, IX, C, 6. Tenancies from month to month, see *infra*, IX, D, 3. Tenancies at will, see *infra*, IX, F, 7.

Parol surrender.— Where there has been a parol surrender of demised premises, consummated by delivery of the counterpart of the lease, the key of the dwelling, and possession of the premises to the landlord, equity will enjoin the collection of the after accruing rent. Stotesbury *v.* Vail, 13 N. J. Eq. 390.

Personal property.— The resumption of possession by the lessor of personal property leased puts an end to the lessee's liability for future instalments of rent, unless otherwise plainly provided. Lamson Consol. Store Service Co. *v.* Bowland, 114 Fed. 639, 52 C. C. A. 335. But see Nulton *v.* Campbell, 15 Pa. Super. Ct. 151.

A city holding premises under a lease cannot be relieved from paying for the use thereof at the end of the lease without a complete surrender of every part of the premises. Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. 428 [*reversing* 70 Ill. App. 546].

Repudiation of tenancy without surrender. — The principle upon which the repudiation of a tenancy without surrendering the possession has been considered as a disseizin cannot be extended to an action for the rent in such a manner as to excuse the tenant from paying rent. Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

65. Heims Brewing Co. *v.* Flannery, 137 Ill. 309, 27 N. E. 286 [*affirming* 38 Ill. App. 95]; Bain *v.* Clark, 10 Johns. (N. Y.) 424.

66. See *infra*, IX, B, 8.

67. Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969; Schulenburg *v.* Uffelmann, 106 Mich. 453, 64 N. W. 460; Logan *v.* Anderson, 2 Dougl. (Mich.) 101; Miller *v.* Dennis, 68 N. J. L. 320, 53 Atl. 394; Meeker *v.* Spalsbury, 66 N. J. L. 60, 48 Atl. 1026; Shannon *v.* Arnheim, 26 Misc. (N. Y.) 769, 56 N. Y. Suppl. 1019; Morris *v.* Dayton, 86 N. Y. Suppl. 172.

A tenant's moving out and delivering up the keys and the landlord accepting them is not necessarily such a surrender as acquits

(b) Lessor's Acceptance. In order that the surrender, however, shall release the tenant from further payment of rent, it must be accepted by the lessor.[68]

(c) Surrender to One Not Authorized to Accept. A surrender of leased premises to one who has no authority to accept such surrender is no defense to an action for rent of the leased property.[69]

(3) Surrender Between Rent Days. And where the surrender is between rent days, the tenant is, in the absence of special agreement to the contrary, discharged from all liability for rent, even for the period between the surrender and the last rent day,[70] unless the rent is payable in advance.[71]

(B) *Rents Accrued.* The surrender of a term does not operate for the discharge of the tenant from rent already accrued and become payable.[72]

(II) *Effect on Liability of Subtenant.* Where a lessor accepts a surrender of the leasehold from the lessee, he cannot thereafter recover rent from a subtenant; there being no privity of contract or estate between the original lessor and the subtenant,[73]

(III) *Surrender of Part of Premises.* Where a tenant surrenders merely a part of the land to the lessor, the rent for the remainder is not extinguished,[74]

the tenant of after-accruing rent. Buck *v.* Lewis, 46 Mo. App. 227; Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307; Ladd *v.* Smith, 6 Oreg. 316.

68. *Illinois.*— Hewitt *v.* Hornbuckle, 97 Ill. App. 97; Alschuler *v.* Schiff, 59 Ill. App. 51.

Kansas.— Weiner *v.* Baldwin, 9 Kan. App. 772, 59 Pac. 40.

Maine.— Hesseltine *v.* Seavey, 16 Me. 212.

Maryland.— Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969.

Mississippi.— Kiernan *v.* Germain, 61 Miss. 498.

Missouri.— Livermore *v.* Eddy, 33 Mo. 547; Kerr *v.* Clark, 19 Mo. 132; Thomas *v.* Cox, 6 Mo. 506.

Montana.— Bickford *v.* Kirwin, 30 Mont. 1, 75 Pac. 518.

New Hampshire.— Davis *v.* George, 67 N. H. 393, 39 Atl. 979; Elliott *v.* Aiken, 45 N. H. 30.

New York.— Young *v.* Peyser, 3 Bosw. 308; Vogel *v.* Hemming, 84 N. Y. Suppl. 473; Tallman *v.* Earle, 13 N. Y. Suppl. 805.

Oregon.— Ladd *v.* Smith, 6 Oreg. 316.

Pennsylvania.— Greider's Appeal, 5 Pa. St. 422; Gardiner *v.* Bair, 10 Pa. Super. Ct. 74; Hess *v.* Weingartner, 5 Pa. Dist. 451, 12 Montg. Co. Rep. 105; Carson *v.* Shiffer, 1 Northumb. Co. Leg. N. 339; Wistar *v.* Campbell, 10 Phila. 359.

Vermont.— Patchin *v.* Dickerman, 31 Vt. 666.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 788.

Acceptance of surrender in general see *infra*, IX, B, 8, c, (v), (d).

Acts to show acceptance must show a purpose on the part of the tenant to vacate and of the landlord to resume possession. Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969.

Sending key to owner.— A mere sending of the key to leased premises to the owner is not such surrender and acceptance as will discharge the tenant's liability for rent. Livermore *v.* Eddy, 33 Mo. 547; Newton *v.* Speare Laundering Co., 19 R. I. 546, 37 Atl. 11. See also West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. 839 [*affirming* 85 Ill. App. 497].

Taking possession for purpose of repairs is not a surrender or acceptance and does not discharge the tenant from his covenant to pay rent. Whitman *v.* Louten, 3 N. Y. Suppl. 754; Breuckmann *v.* Twibill, 89 Pa. St. 58; Marseilles *v.* Kerr, 6 Whart. (Pa.) 500; Redpath *v.* Roberts, 3 Esp. 225. But see Mackeller *v.* Sigler, 47 How. Pr. (N. Y.) 20, holding that an entry by the landlord after the tenant has abandoned a house to make repairs is an election to treat the abandonment as a surrender, and discharges the tenant from liability for rent from that time forward, but not from liability previously accruing.

69. Baylis *v.* Prentice, 75 N. Y. 604.

Person to whom surrender may be made see *infra*, IX, B, 8, e.

70. Okie *v.* Person, 23 App. Cas. (D. C.) 170; Curtiss *v.* Miller, 17 Barb. (N. Y.) 477.

71. Okie *v.* Person, 23 App. Cas. (D. C.) 170; Davison *v.* Donadi, 2 E. D. Smith (N. Y.) 121; Weston *v.* Ryley, 15 Misc. (N. Y.) 638, 37 N. Y. Suppl. 216.

72. Sperry *v.* Miller, 16 N. Y. 407; McKenzie *v.* Farrell, 4 Bosw. (N. Y.) 192; Davison *v.* Donadi, 2 E. D. Smith (N. Y.) 121; Kahn *v.* Rosenheim, 34 Misc. (N. Y.) 192, 68 N. Y. Suppl. 856; Barkley *v.* McCue, 25 Misc. (N. Y.) 738, 55 N. Y. Suppl. 608; Shaw *v.* Lomas, 52 J. P. 821, 59 L. T. Rep. N. S. 477.

73. McDonald *v.* May, 96 Mo. App. 236, 69 S. W. 1059.

Effect of surrender: Term for years, see *infra*, IX, B, 8, f. From year to year, see *infra*, IX, C, 6, b.

74. Nachbour *v.* Wiener, 34 Ill. App. 237; Ehrman *v.* Mayer, 57 Md. 612; Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938. See also Smith *v.* Pendergast, 26 Minn. 318, 3 N. W. 978, where it is said that if the value of the use of the demised premises is impaired by the partial surrender, it is possible that the entire rent cannot be recovered.

but apportioned.[75] It seems, however, that a surrender of part of lands demised by a lease may destroy the power of entry for non-payment of rent.[76]

c. Abandonment — (I) *In General.* A tenant who abandons the occupancy of the demised premises before the expiration of his lease without the consent of his landlord does not thereby exonerate himself from the payment of the rent for the residue of the term.[77]

(II) *Reletting by Landlord* — (A) *Duty to Relet.* A landlord is not, on the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may at his election suffer the premises to remain vacant, and recover his rent for the remainder of the term,[78] or, he may on the other hand elect to enter and determine the

75. Ehrman *v.* Mayer, 57 Md. 612.

76. Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363.

77. *Alabama.*— Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

California.— Bonetti *v.* Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

Connecticut.— Lockwood *v.* Lockwood, 22 Conn. 425.

Iowa.— Packer *v.* Cockayne, 3 Greene 111.

Louisiana.— Reynolds *v.* Swain, 13 La. 193; Waples *v.* New Orleans, 28 La. Ann. 688; Christy *v.* Casanave, 2 Mart. N. S. 451.

Maine.— Rollins *v.* Moody, 72 Me. 135; Withers *v.* Larrabee, 48 Me. 570.

Maryland.— Adreon *v.* Hawkins, 4 Harr. & J. 319.

Massachusetts.— Walker *v.* Furbush, 11 Cush. 366, 59 Am. Dec. 148; Whitney *v.* Gordon, 1 Cush. 266, holding that where a tenant at will quits the premises without notice the burden of proof is upon him to show that the landlord had waived the notice which would be a bar to the action, or that he had resumed possession of the premises, under an agreement which discharged the tenant from further liability for rent.

Minnesota.— Prendergast *v.* Searle, 74 Minn. 333, 77 N. W. 231.

Missouri.— Quinette *v.* Carpenter, 35 Mo. 502; Prentiss *v.* Warne, 10 Mo. 601.

New York.— Greene *v.* Waggoner, 2 Hilt. 297, holding that the tenant is liable for rent for the whole property, unless it appears that the premises might have been let meanwhile, the burden of showing which is on the tenant.

Ohio.— Grant *v.* Ramsey, 7 Ohio St. 157, holding that a tenant under a parol lease cannot, by a voluntary abandonment of the premises during the term, terminate his further liability to pay rent unless the abandonment appears to have been on account of a neglect of the landlord to execute a written lease according to the agreement of the parties.

Pennsylvania.— Lane *v.* Nelson, 167 Pa. St. 602, 31 Atl. 864 (holding that where a lease provided that the lessee should pay a certain rental so long as he should "occupy" the premises, the provision as to occupancy means tenancy under the lease, and the lessee is liable for rent for the entire term, although he removes before the expiration thereof); Gardiner *v.* Bair, 10 Pa. Super. Ct. 74, 44 Wkly. Notes Cas. 83; Frey *v.* Zabinski, 10 Kulp 36; Gunnis *v.* Kater, 29 Leg. Int. 230.

Vermont.— Barlow *v.* Wainwright, 22 Vt. 88, 52 Am. Dec. 79; Collins *v.* Gibson, 5 Vt. 243.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 790.

Intrusion of others after abandonment.— Where a tenant abandons leased premises during an action of forcible detainer and another party intrudes, claiming for himself, the original tenant is not liable for rent accruing after his abandonment. Newman *v.* Mackin, 13 Sm. & M. (Miss.) 383.

Liability for rent remitted.— Where the landlord informed the tenant that the annual rental for the first and second years would be reduced by deducting two hundred and fifty dollars from the amount, provided the lessees carried out the terms of the lease, which condition was accepted in writing by the lessees who paid the two years' rent as reduced, but afterward abandoned the premises, an action to recover the rent remitted can be maintained. Brown *v.* Cairns, 63 Kan. 693, 66 Pac. 1033.

The fact that the lessor allows the lessee a credit or reduction of rent for six months, after which the lessee pays the rent reserved and continues in possession according to the lease without a new agreement, does not constitute an abandonment of the lease, so as to preclude the lessor from recovering rent accrued, or an action of covenant. Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969.

What law governs. — Where the demised premises are situated in another state, the law of that state governs the rights and liabilities of the parties in an action for rent against a tenant who has abandoned the premises. Graves *v.* Cameron, 9 Daly (N. Y.) 152, 58 How. Pr. 75.

78. *Alabama.*— Rice *v.* Dudley, 65 Ala. 68; Schuisler *v.* Ames, 16 Ala. 73, 50 Am. Dec. 168.

Indiana.— Patterson *v.* Emerich, 21 Ind. App. 614, 52 N. E. 1012.

Nebraska.— Merrill *v.* Willis, 51 Nebr. 162, 70 N. W. 914. *Compare* Allen *v.* Saunders, 6 Nebr. 436, holding that the duty of a landlord whose tenant has abandoned the premises during the term, to diminish the loss as much as may be by reletting, does not extend to requiring him to let to a tenant offering, whose business would permanently injure the premises.

New York.—Clendinning *v.* Lindner, 9 Misc.

contract, and in the event of such reëntry he is entitled to recover only for the rent then due.[79]

(B) *Liability of Tenant For Deficiency of Rent*—(1) General Rule Stated. While the English cases hold that a reëntry and reletting of abandoned premises by the landlord create a surrender by operation of law, and release a tenant from payment of subsequently accruing rent;[80] the American cases generally assert the contrary doctrine, namely, that, where a tenant repudiates the lease and abandons the demised premises, and the lessor enters and relets the property crediting the tenant with the proceeds, such re-renting does not relieve the tenant from the payment of rent under the covenants of the lease.[81]

(2) Provisions Inserted in Lease. Frequently a provision is inserted in the lease to the effect that in case of vacation of the premises the landlord may relet the same as agent of the tenant, and apply the rent so received on the rent due, the tenant to make good any deficiency.[82] Under such a provision the tenant, after abandonment and reëntry by the landlord, is no longer liable for rent as such, but only on the covenant,[83] and the landlord is not entitled to be allowed for improvements made upon the premises before leasing them the second time.[84] If the rent from the second tenant is not collected by any neglect of the landlord the original tenant is relieved to that extent.[85]

6. Amount and Time of Accrual — a. Amount In General. The general rules governing the interpretation of written contracts[86] apply in determining the amount of rent reserved in a lease, chief of which is that the intention of the

682, 30 N. Y. Suppl. 543; Reich *v.* McCrea, 13 N. Y. Suppl. 650.

Pennsylvania.— Milling *v.* Becker, 96 Pa. St. 182; Smucker *v.* Grinberg, 27 Pa. Super. Ct. 531; Lipper *v.* Bouvé, 6 Pa. Super. Ct. 452, 41 Wkly. Notes Cas. 566.

Texas.— Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 42 S. W. 774.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 792.

79. Rice *v.* Dudley, 65 Ala. 68; Schuisler *v.* Ames, 16 Ala. 73, 50 Am. Dec. 168.

80. Oastler *v.* Henderson, 2 Q. B. D. 575, 46 L. J. Q. B. 607, 37 L. T. Rep. N. S. 22; Nickells *v.* Atherstone, 10 Q. B. 944, 11 Jur. 778, 16 L. J. Q. B. 371, 59 E. C. L. 944; Thomas *v.* Cook, 2 B. & Ald. 119, 2 Stark. 408, 20 Rev. Rep. 374, 3 E. C. L. 466. See also Bird *v.* Defonvielle, 2 C. & K. 415, 61 E. C. L. 415.

81. *Alabama.*— Wolffe *v.* Wolff, 69 Ala. 549, 44 Am. Rep. 526.

Arkansas.— Meyer *v.* Smith, 33 Ark. 627.

California.— Respini *v.* Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488.

Connecticut.— Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678.

Illinois.— Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Bradley *v.* Walker, 93 Ill. App. 609.

Iowa.— Brown *v.* Cairns, 107 Iowa 727, 77 N. W. 478.

Louisiana.— Roumage *v.* Blatrier, 11 Rob. 101.

Maryland.— Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969.

Mississippi.— Alsup *v.* Banks, 68 Miss. 664, 9 So. 895, 24 Am. St. Rep. 294, 13 L. R. A. 598.

Ohio.— Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188; Kirland *v.* Wolf, 7 Ohio Dec. (Reprint) 436, 3 Cinc. L. Bul. 114; Martin *v.* Kepner, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396.

Pennsylvania.— Auer *v.* Penn, 99 Pa. St. 370, 44 Am. Rep. 114; Marseilles *v.* Kerr, 6 Whart. 500.

Texas.— Randall *v.* Thompson, 1 Tex. App. Civ. Cas. § 1100.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 793.

Compare Engstrom *v.* Tyler, 46 Kan. 317, 26 Pac. 735.

In New York a rule similar to the English rule has been enunciated, namely, that reletting the premises will operate as an acceptance of a surrender of the premises, unless there is an agreement, express or implied, that such reletting may be made (Gray *v.* Kaufman Dairy, etc., Co., 162 N. Y. 388, 56 N. E. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580; Underhill *v.* Collins, 132 N. Y. 269, 30 N. E. 576; Majestic Hotel Co. *v.* Eyre, 53 N. Y. App. Div. 273, 65 N. Y. Suppl. 745. *Contra*, Winant *v.* Hines, 14 Daly (N. Y.) 187, 6 N. Y. St. 261), although there are some cases which follow the American rule stated in the text (Rich *v.* Doyenn, 85 Hun 510, 33 N. Y. Suppl. 341; Van Buskirk *v.* Gordon, 10 N. Y. St. 351).

82. Schwartz *v.* Brucato, 57 N. Y. App. Div. 202, 68 N. Y. Suppl. 289; Vogel *v.* Piper, 89 N. Y. Suppl. 431.

83. Vogel *v.* Piper, 89 N. Y. Suppl. 431.

84. Hackett *v.* Richards, 13 N. Y. 138 [*reversing* 3 E. D. Smith 13].

85. Fitch *v.* Armour, 59 N. Y. Super. Ct. 413, 14 N. Y. Suppl. 319.

86. **Interpretation of contract** generally see Contracts, 9 Cyc. 577.

parties, to be derived from the whole instrument, shall govern.[87] Where the sum named is certain it must govern, unless a mistake in the estimate is shown, which may be done by parol evidence.[88] If a tenancy is without stipulation as to the amount of rent, the landlord can recover a fair consideration for the use and occupation of the premises.[89] The value of the rent can only be ascertained according to the circumstances of each case by the opinion of witnesses competent to judge and acquainted with the land.[90] An agreement to accept nominal rent is waived by the lessee's paying full rent and remaining in possession.[91]

b. Increase or Reduction of Amount — (i) *In General.* While the rate of rent reserved in a lease may be changed by a proper agreement on a sufficient consideration, it is well settled that the terms of a lease under seal cannot be modified by parol so as to change the amount of rent to be paid for the unexpired term.[92] It is often provided in the lease itself that the lessor if dissatisfied with the rent agreed upon may give the lessee notice and claim an increase.[93] The

87. *California.*— Corson *v.* Berson, 86 Cal. 433, 25 Pac. 7; Salisbury *v.* Shirley, 53 Cal. 461.

Indiana.— Dodd *v.* Mitchell, 77 Ind. 388.

Louisiana.—Jamison *v.* Fairès, 12 La. Ann. 790.

Maine.— Smith *v.* Blake, 88 Me. 241, 33 Atl. 992.

Massachusetts.— Jamaica Pond Ice Co. *v.* Boston Ice Co., 169 Mass. 34, 47 N. E. 442; Hardy *v.* Briggs, 14 Allen 473; Hunt *v.* Thompson, 2 Allen 341.

Minnesota.—Bradley *v.* Metropolitan Music Co., 89 Minn. 516, 95 N. W. 458; Hall *v.* Smith, 16 Minn. 58.

New York.— Belden *v.* Union Warehouse Co., 11 N. Y. App. Div. 160, 42 N. Y. Suppl. 650; Hennessy *v.* Kenney, 20 Misc. 405, 46 N. Y. Suppl. 249; Metropolitan L. Ins. Co. *v.* Standard Nat. Bank, 57 N. Y. Suppl. 797.

Pennsylvania.— Rea *v.* Ganter, 152 Pa. St. 512, 25 Atl. 539.

South Carolina.— Horlbeck *v.* St. Phillip's Protestant Episcopal Church, 13 Rich. Eq. 123.

Canada.— *In re* Geddes, 3 Ont. L. Rep. 75.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 794.

88. McFarlane *v.* Williams, 107 Ill. 33; Smith *v.* Blake, 88 Me. 241, 33 Atl. 992.

A lease is sufficient if it shows the data by which the amount of rent is to be ascertained, leaving it to be worked out by calculation, and it is sufficient to state a gross amount supposed to represent such calculation, subject to the correction of any mistake therein. McFarlane *v.* Williams, 107 Ill. 33.

89. Newell *v.* Sanford, 13 Iowa 191; Robbins *v.* Voss, (Tex. Civ. App. 1901) 64 S. W. 313; Wittman *v.* Milwaukee, etc., R. Co., 51 Wis. 89, 8 N. Y. 6; *In re* Secor, 18 Fed. 319, holding that where a landlord obtains a warrant in dispossess proceedings, but desiring to procure a new tenant forbears to eject the old on an agreement for a fair concession, the agreement being for the mutual interest and benefit of both parties, one half of the rental value of the premises is a fair charge for the time possession is held under this arrangement. See also Sutton *v.* Graham, 80 Miss. 636, 31 So. 909.

Where rent is to be paid in specific articles, the value of which is not fixed by the agreement, a statute providing that where the deed does not specify the amount of rent a reasonable rental may be recovered, does not apply. Oswald *v.* Godbold, 20 Ala. 811.

Chattel mortgagees taking possession under an unexpired lease to the mortgagors are liable for the rent stipulated in the mortgagor's lease and not merely for a *quantum meruit* for use and occupation, although there is no contract with the mortgagees fixing the sum to be paid by them as rent. Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 933.

Where a lessee has occupied the premises before the beginning of the term, the rate of rent fixed in the lease is *prima facie* evidence of the value of such occupation. McCarty *v.* Ely, 4 E. D. Smith (N. Y.) 375.

Where the amount of rent is to be fixed annually by resolution, no particular form of resolution by the lessor is required, provided it expresses the amount or rate with reasonable certainty, so that the lessee understands it. Ocean Grove Camp Meeting Assoc. *v.* Sanders, 67 N. J. L. 1, 50 Atl. 449.

90. Lyles *v.* Lyles, 1 Hill Eq. (S. C.) 76.

As regards farming land, it does not consist of hypothetical estimations of the speculative profits which can possibly be realized from its use, but it is the price which a prudent and industrious farmer can afford to pay for its use after taking into consideration the probable amount and the market value of his crops, and the probable injuries thereto resulting from the ordinary changes of climate and season. Moore *v.* Ligon, 30 W. Va. 146, 3 S. E. 572.

Where rent is based on the amount of land to be thereafter determined, non-cultivable land as well as cultivable should be taken into consideration. Williams *v.* Glover, 66 Ala. 189.

91. Lynch *v.* Sauer, 16 Misc. (N. Y.) 1, 37 N. Y. Suppl. 666.

92. Loach *v.* Farnum, 90 Ill. 368; Barnett *v.* Barnes, 73 Ill. 216; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120 [*affirming* 7 Hun 157]; Smith *v.* Kerr, 33 Hun (N. Y.) 567; Preston *v.* Merceau, 2 W. Bl. 1249.

93. New York Cent. R. Co. *v.* Saratoga,

mere fact that the lessee makes the premises more valuable by cultivation,[94] or that improvements on the land are subsequently purchased by the lessor,[95] will not entitle him to recover additional rent.

(II) *Conditions Precedent.* A condition precedent to an increased or diminished liability must be exactly performed or fulfilled before the liability contingent thereon can be enforced.[96] But such a covenant applies only to rent to accrue during the remainder of the term.[97]

(III) *Necessity of Consideration.* A parol executory agreement, without any new consideration, to change the rent secured to be paid by a lease, is a mere *nudum pactum*, and not binding on the lessor;[98] nor will the agreement, so far as executory, become binding upon acceptance of payments at the changed rate.[99] But in so far as the agreement has been executed, as to the payments which have fallen due and been paid, and accepted in full as per the agreement, the rule has no application.[1]

(IV) *Not a Surrender.* An increase or reduction of the rent by a valid agreement between the parties does not amount to a surrender of the existing lease, and the granting of a new one; the new agreement in such case is virtually incorporated into and made a part of the antecedent agreement, and the two constitute the lease for the unexpired term.[2]

c. Tenant Holding Over — (I) *In General.* A tenant who remains in possession after the expiration of his lease, with the express or implied consent of the lessor, is liable for the same rate of rent as that reserved in the lease.[3] If, however, the tenant holds over under such circumstances as to negative the idea

etc., R. Co., 39 Barb. (N. Y.) 289, holding further that the lessee's failure to object to the notice given as irregular or premature amounts to a waiver.

94. Hazlewood *v.* Pennybacker, (Tex. Civ. App. 1899) 50 S. W. 199.

95. St. Louis Public Schools *v.* Hollingsworth, 34 Mo. 191.

96. Martin *v.* White, 40 Ill. App. 281; Lamb *v.* Constantine Hydraulic Co., 59 Mich. 597, 26 N. W. 785. *Compare* Hickey *v.* U. S., 5 Ct. Cl. 395.

A change of use.—A stipulation in a lease for an increased rent, in case the premises are used for the sale of liquor, is valid; and for non-payment of the increase, the tenant may be dispossessed by summary proceedings. People *v.* Bennett, 14 Hun (N. Y.) 58.

97. Copeland *v.* Goldsmith, 100 Wis. 436, 76 N. W. 358, holding that the lessee cannot, on the happening of the contingency, recover the difference between the amount previously paid and what he would have paid at the reduced rate.

98. *Illinois.*— Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; Loach *v.* Farnum, 90 Ill. 368.

Iowa.—Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775 (holding that a reduction of rent indorsed by the lessors on the lease through fear that the lessee firm might fail unless it received some accommodation, and so the lessors would realize nothing, is a sufficient consideration, and binds the lessors); Wheeler *v.* Baker, 59 Iowa 86, 12 N. W. 767.

Michigan.— Lamb *v.* Rathburn, 118 Mich. 666, 77 N. W. 268, holding that where the lease required the tenant to mortgage his goods to secure the rent, the tenant's wife joining in the mortgage is evidence of the consideration for the landlord's agreement to reduce the rent, made after the commencement of the term, and after he had made a similar reduction for prior use.

Minnesota.—Wharton *v.* Anderson, 28 Minn. 301, 9 N. W. 860.

New York.—McKenzie *v.* Harrison, 120 N. Y. 260, 24 N. E. 458, 17 Am. St. Rep. 638, 8 L. R. A. 257; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120 [*affirming* 7 Hun 157]; McMaster *v.* Kohner, 44 N. Y. Super. Ct. 253.

Pennsylvania.— Rohrheimer *v.* Hofman, 103 Pa. St. 409; Taylor *v.* Winters, 6 Phila. 126.

England.—Crowley *v.* Vitty, 7 Exch. 319, 21 L. J. Exch. 135.

See 32 Cent. Dig. tit. "Landlord and Tenant," 795.

99. Loach *v.* Farnum, 90 Ill. 368. But see Nicoll *v.* Burke, 8 Abb. N. Cas. (N. Y.) 213 [*reversing* 45 N. Y. Super. Ct. 75].

1. McKenzie *v.* Harrison, 120 N. Y. 260, 24 N. E. 458, 17 Am. St. Rep. 638, 8 L. R. A. 257.

2. Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120 [*affirming* 7 Hun 157]; Crowley *v.* Vitty, 7 Exch. 319, 21 L. J. Exch. 135.

New lease as surrender see *infra*, IX, B, 8, c, (III).

3. *Alabama.*— Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318; Ames *v.* Schuesler, 14 Ala. 600; Harkins *v.* Pope, 10 Ala. 493.

Georgia.—Cavanaugh *v.* Clinch, 88 Ga. 610, 15 S. E. 673.

Illinois.— Clapp *v.* Noble, 84 Ill. 62; McKinney *v.* Peck, 28 Ill. 174; Prickett *v.* Ritter, 16 Ill. 96.

Maryland.— Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713.

that the landlord consents to such holding, the rate of rent fixed by the lease is not conclusive, but the tenant is liable for the use and occupation of the premises, according to the value thereof.[4]

(II) *After Notice of Increase of Rent.* A notice by a landlord to a tenant that if he continues to occupy the premises beyond the present term he must pay an increased rent, naming the sum, will not bind the tenant, although he holds over, unless the tenant expressly or impliedly consents to such increase of rent.[5] Such assent will be implied, however, where a tenant, holding over after his lease, remains in possession after notice from the landlord that a greater rent than that stipulated in the lease will be required, and to that extent the old lease will not apply.[6] And this is true, although the tenant objects to the new condition.[7] But when the tenant protests against the increase and explicitly

New York.—Van Beuren *v.* Wotherspoon, 74 N. Y. App. Div. 123, 77 N. Y. Suppl. 543; Mack *v.* Burt, 5 Hun 28; Regan *v.* Fosdick, 19 Misc. 489, 43 N. Y. Suppl. 1102, 3 N. Y. Annot. Cas. 376; Evertson *v.* Sawyer, 2 Wend. 507.

Ohio.— Baltimore, etc., R. Co. *v.* West, 57 Ohio St. 161, 49 N. E. 344; Rosenbaum *v.* Pendleton, 9 Ohio S. & C. Pl. Dec. 642, 7 Ohio N. P. 364.

Pennsylvania.— Diller *v.* Roberts, 13 Serg. & R. 60, 15 Am. Dec. 578; Beck *v.* Campbell, 37 Pittsb. Leg. J. 57.

South Carolina.— Dorrill *v.* Stephens, 4 McCord 59.

Texas.— Minor *v.* Kilgore, (Civ. App. 1896) 38 S. W. 539.

Virginia.— Peirce *v.* Grice, 92 Va. 763, 24 S. E. 392.

United States.— Dermott *v.* Tucker, 7 Fed. Cas. No. 3,813, 3 Cranch C. C. 92; Baker *v.* Root, 2 Fed. Cas. No. 780, 4 McLean 572.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 796.

Holding over raising implied contract of renewal see *supra*, IV, C, 3, f.

4. *Illinois.*— Stuart *v.* Hamilton, 66 Ill. 253.

Maine.— Forbes *v.* Smiley, 56 Me. 174.

Michigan.— Detroit *v.* Gleason, 116 Mich. 564, 74 N. W. 880; Hogsett *v.* Ellis, 17 Mich. 351.

Mississippi.— Thomas *v.* Thomas, 69 Miss. 564, 13 So. 666.

New York.—Van Brunt *v.* Pope, 6 Abb. Pr. N. S. 217, holding that a tenant occupying premises after the expiration of his lease, when the title is in dispute, and there is no recognized landlord, is liable for the reasonable value of the premises while they are so occupied.

Pennsylvania.— Williams *v.* Ladew, 171 Pa. St. 369, 33 Atl. 329; Abbot *v.* Shepherd, 4 Phila. 90.

Texas.— Maynard *v.* Lockett, 1 Tex. Unrep. Cas. 527.

Vermont.— See Baldwin *v.* Skeels, 51 Vt. 121.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 796.

5. Atkinson *v.* Cole, 16 Colo. 83, 26 Pac. 815; Galloway *v.* Kerby, 9 Ill. App. 501.

Proposition for change to reasonable rent.— A proposition by the landlord to change the rent from the existing rate to a reasonable rate, if the tenant holds over, must be accepted by the tenant to be operative; otherwise the tenant must pay at the same rate as he had for the previous years. Holley *v.* Metcalf, 12 Ill. App. 141.

Election to treat tenant as trespasser conclusive.— When the landlord has the right of election, and may treat the tenant as a trespasser or as a tenant holding over, the exercise of the right is conclusive against him, and thereafter he cannot impose new terms upon the tenant without his consent. Johnson *v.* Johnson, 62 Minn. 302, 64 N. W. 905.

6. *Alabama.*— Meaher *v.* Pomeroy, 49 Ala. 146.

Colorado.— Reithman *v.* Brandenburg, 7 Colo. 480, 4 Pac. 788.

Illinois.— Griffin *v.* Knisely, 75 Ill. 411; Higgins *v.* Halligan, 46 Ill. 173; Rand *v.* Purcell, 58 Ill. App. 228.

Massachusetts.— Horton *v.* Cooley, 135 Mass. 589, holding that one in possession of a building adapted for use as a foundry and machine shop, and furnished with power from a water wheel belonging to the owner of the building, is liable for the fair rental value of the premises as a machine shop and foundry, after notice from the owner that he shall hold him liable if he continues such occupation thereafter, although he uses it for storage purposes only.

Minnesota.— Stees *v.* Bergmeier, 91 Minn. 513, 98 N. W. 648; Gardner *v.* Dakota County Com'rs, 21 Minn. 33.

Missouri.— Hunt *v.* Bailey, 39 Mo. 257; Adriance *v.* Hafkemeyer, 39 Mo. 134.

New York.— Despard *v.* Walbridge, 15 N. Y. 374; Mack *v.* Burt, 5 Hun 28; Thorp *v.* Philbin, 15 Daly 155, 3 N. Y. Suppl. 939; Ranger *v.* Marks, 1 N. Y. City Ct. 251.

Ohio.— Moore *v.* Harter, 67 Ohio St. 250, 65 N. E. 883.

Pennsylvania.— Pittfield *v.* Ewing, 6 Phila. 455.

Tennessee.— Brinkley *v.* Walcott, 10 Heisk. 22.

Vermont.— Amsden *v.* Blaisdell, 60 Vt. 386, 15 Atl. 332.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 796.

Compare Rodriguez *v.* Combes, 6 Mart. O. S. (La.) 275.

7. Griffin *v.* Knisely, 75 Ill. 411; Stees *v.*

refuses to pay it, he cannot be held liable therefor merely by the act of holding over, since no new agreement can be implied.[8] The notice of such increase of rent required to be given the tenant should be in writing,[9] and served before the commencement of a new term.[10] Acceptance of rent at the original rate operates as a waiver of the notice in respect to the increase.[11]

d. Appraisement and Reappraisement — (I) *In General.* Covenants to change the value of rentals from time to time run with the land.[12] Under a lease providing for the appointment of arbitrators to appraise the rental value of an estate, a tenant is entitled to such a reference before he can be sued for a merely reasonable rent.[13] But after the attempt to fix the rental value of the premises has failed without the fault of the lessor, the lessee is liable for the reasonable value of the premises.[14]

(II) *Appraisers and Their Appointment.* The appraisers or arbitrators should be impartial persons.[15] When no time is stated for their appointment a reasonable time before the lease expires will be implied.[16] An appointment of arbitrators once made is irrevocable.[17]

(III) *Effect of Delay or Failure to Make Appraisement* — (A) *In General.* On a renewal of a lease, the delay of the landlord to have the property revalued does not deprive him of the right to collect rent for the whole of the new term upon the basis of the new valuation which was finally made as of the date of the beginning of the new term,[18] nor does a tenant waive his right to a revaluation by failure to call for it promptly at the beginning of any period.[19]

(B) *Relief in Equity or at Law.* While a court of equity will not specifically enforce a contract for arbitration by compelling the appointment of arbitrators or by compelling them to act when appointed,[20] still, where the rights of the parties are made to depend on appraisal of the property, and the appraisal provided for in the contract has failed without the negligence of the party complaining, courts, both of equity and of law, will interfere to prevent a failure of justice by hearing

Bergmeier, 91 Minn. 513, 98 N. W. 648; Brinkley *v.* Walcott, 10 Heisk. (Tenn.) 22.

8. *Alabama.*— Meaher *v.* Pomeroy, 49 Ala. 146.

Colorado.— Atkinson *v.* Cole, 16 Colo. 83, 26 Pac. 815.

Illinois.— Galloway *v.* Kerby, 9 Ill. App. 501.

Maryland.—De Young *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156.

Missouri.— Hunt *v.* Bailey, 39 Mo. 257.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 796.

9. Witte *v.* Witte, 6 Mo. App. 488.

10. Witte *v.* Witte, 6 Mo. App. 488; Mitchell *v.* Clary, 20 Misc. (N. Y.) 595, 46 N. Y. Suppl. 446.

11. Murphy *v.* Little, 69 Vt. 261, 37 Atl. 968.

12. Young *v.* Wrightson, 11 Ohio Dec. (Reprint) 104, 24 Cinc. L. Bul. 457, holding that an agreement for revaluation at stated periods during a lease for ninety-nine years by appraisers to be selected by the parties runs with the estate, although assigns are not named, when such intention otherwise appears.

13. Sherman *v.* Cobb, 16 R. I. 82, 12 Atl. 232.

14. Heissler *v.* Stose, 131 Ill. 393, 23 N. E. 347 [*affirming* 33 Ill. App. 39]; Sherman *v.* Cobb, 16 R. I. 82, 12 Atl. 232. See also Ryder *v.* Jenny, 2 Rob. (N. Y.) 56, holding that after the expiration of the lease which provides for a renewing thereof at a rent to be determined by arbitration the lessee is only liable for rent at the rate previously paid until the new rate is so determined and the lease tendered in acordance therewith.

15. Pool *v.* Hennessy, 39 Iowa 192, 18 Am. Rep. 44, holding that an award made by appraisers, one of whom is the brother and business agent of the party choosing him, will be set aside.

16. Wells *v.* De Leyer, 1 Daly (N. Y.) 39.

Where some of the parties in interest are minors at the time of the valuation, and hence can make no appointment of appraisers, the other party cannot proceed *ex parte* to an appraisement; but, to avoid a forfeiture for non-payment of rent, the presumption will be that the previous rate of rent will continue, until adjusted by a court of equity at the suit of the party injured. Holmes *v.* Shepard, 49 Mo. 600.

17. Abbot *v.* Shepherd, 4 Phila. (Pa.) 90. *Compare* Sherman *v.* Cobb, 16 R. I. 82, 12 Atl. 232.

18. Hegan Mantel Co. *v.* Cook, 57 S. W. 929, 22 Ky. L. Rep. 427; Daniels *v.* Lion Dry Goods Co., 11 Ohio Cir. Ct. 351, 5 Ohio Cir. Dec. 163.

19. Wright *v.* Hardy, 76 Miss. 524, 24 So. 697. See also *supra*, IV, C, 2, f, (II).

20. Tobey Furniture Co. *v.* Rowe, 18 Ill. App. 293; Strohmaier *v.* Zeppenfeld, 3 Mo. App. 429; Lowe *v.* Brown, 22 Ohio St. 463.

evidence and making the appraisement themselves.[21] The failure of appraisers to agree,[22] however, or the fact that their valuations are excessive,[23] is no ground for relief in equity. A party has no right to resort to an action at law if there has been a tender of readiness to proceed in the arbitration by the adverse party.[24]

(IV) *THE AWARD.* What is to be taken into consideration in determining the value of demised premises depends entirely upon the provisions of the lease.[25] An award is presumed, unless fraud or mistake is shown,[26] to be the result of the honest exercise of their judgment by the appraisers.[27] An award by less than the full number has been held not to be binding.[28] If the lease provides that the award shall be indorsed on the lease, an award made on a separate paper and annexed to the lease is insufficient.[29]

e. Time of Accrual — (I) *IN ABSENCE OF AGREEMENT* — (A) *In General.* In general rent does not accrue as a debt until the tenant has enjoyed the use of the land for the period for which it is payable. Consequently, in the absence of some agreement or understanding between the parties to the contrary, rent is not due until the expiration of the term; and this is true whether the rent is reserved in gross, or on annual, quarterly, or monthly payments.[30]

Compare Tscheider *v.* Biddle, 24 Fed. Cas. No. 14,210, 4 Dill. 58.

Stipulations for appraisal or arbitration on renewal see *supra*, IV, C, 2, f, (II).

21. Tobey Furniture Co. *v.* Rowe, 18 Ill. App. 293; Wright *v.* Hardy, 76 Miss. 524, 24 So. 697; Strohmaier *v.* Zeppenfeld, 3 Mo. App. 429; Graham *v.* James, 7 Rob. (N. Y.) 468. See also Piggot *v.* Mason, 1 Paige (N. Y.) 412.

22. Biddle *v.* McDonough, 15 Mo. App. 532.

23. Chicago Bd. of Education *v.* Frank, 64 Ill. App. 367.

24. Abbot *v.* Shepherd, 4 Phila. (Pa.) 90.

25. Allen *v.* St. Louis, etc., R. Co., 137 Mo. 205, 38 S. W. 957; Texas, etc., R. Co. *v.* Destitute Orphan Boys Relief Soc., 56 Fed. 753.

Effect of lease on value of fee.—Where a ground lease provides that the amount of rent for a term of years shall be a sum equal to five per cent of the valuation of the demised premises on a certain date, exclusive of any buildings or improvements erected thereon by the lessee, the effect of the lease on the value of fee, if any, should not be taken into consideration in fixing the value of the demised premises under the lease, but the premises should be treated as vacant property with a clear title in fee-simple. Columbia Theatre Amusement Co. *v.* Adsit, 211 Ill. 122, 71 N. E. 868; Springer *v.* Borden, 210 Ill. 518, 71 N. E. 345 [*affirming* 112 Ill. App. 168].

26. **To assail such award for fraud or misconduct,** the party assailing it should either commence an action to set aside, or ask for the same relief affirmatively in his answer. Ryder *v.* Jenny, 2 Rob. (N. Y.) 56.

27. Goddard *v.* King, 40 Minn. 164, 41 N. W. 659, where it is said that in a matter so unstable as the value of real estate, the difference between the estimate of its value by arbitrators and its value in the opinion of witnesses would have to be very great indeed to require a conclusion that the former is purposely wrong.

28. Stose *v.* Heissler, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563; Lowe *v.* Brown, 22 Ohio St. 463.

Appraisal by arbitrators and umpire. — Where a lease provides that if arbitrators fail to agree as to the amount of rent, it shall be fixed by the arbitrators together with the umpire chosen by them, and appraisal by the umpire alone without the concurrence of either of the arbitrators is unauthorized. Graham *v.* James, 7 Rob. (N. Y.) 468.

29. Montague *v.* Smith, 13 Mass. 396. See ARBITRATION AND AWARD, 3 Cyc. 568.

Parol appraisement — Estoppel of tenant.— Where, under a written lease for revaluation by arbitrators, a parol revaluation is made and the lessee pays him such rent on such revaluation, he is estopped to say that he never agreed to it. Hepworth *v.* Pendleton, 7 Ohio Dec. (Reprint) 601, 4 Cinc. L. Bul. 120.

30. *Illinois.*— McFarlane *v.* Williams, 107 Ill. 33; Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; Dauchy Iron Works *v.* McKim Gasket, etc., Co., 85 Ill. App. 584.

Indiana.— Stowman *v.* Landis, 5 Ind. 430; Cowan *v.* Henika, 19 Ind. App. 40, 48 N. E. 809.

Maryland.— Castleman *v.* Du Val, 89 Md. 657, 43 Atl. 821.

Massachusetts.— Fitchburg Cotton Manufacturing Corp. *v.* Melven, 15 Mass. 268; Wood *v.* Partridge, 11 Mass. 488.

Missouri.— Reidey *v.* Newell, 37 Mo. 128; Garvey *v.* Dobyns, 8 Mo. 213; Ostner *v.* Lynn, 57 Mo. App. 187; Duryee *v.* Turner, 20 Mo. App. 34.

New Jersey.— Kistler *v.* McBride, 65 N. J. L. 553, 48 Atl. 558; Schenck *v.* Vannest, 4 N. J. L. 329.

New York.— Goldsmith *v.* Schroeder, 93 N. Y. App. Div. 206, 87 N. Y. Suppl. 558; Leo Wolf *v.* Merritt, 21 Wend. 336.

Pennsylvania.— Boyd *v.* McCombs, 4 Pa. St. 146; Menough's Appeal, 5 Watts & S. 432; King *v.* Bosserman, 13 Pa. Super. Ct. 480.

Tennessee.— Gibbs *v.* Ross, 2 Head 437.

(B) *Rents Payable in Crops.* While it has been held that the fact that the rent is payable in crops does not affect the rule that in the absence of any contract in regard to it the rent is not due until the end of the term,[31] there are also decisions to the effect that where rent is to be paid in the products of the soil, and no time is fixed for the payment, the rent becomes payable in a reasonable time after the crop is gathered.[32]

(II) *Agreement to Pay at Particular Time.* The lease may of course provide for payment at a particular time.[33] Thus the parties may agree that the rent shall be paid in advance,[34] when the premises are ready for occupancy,[35] or on the happening of any other contingency.[36] So also it may be provided when rent is payable in instalments that the entire rent shall be immediately due, and payable on default in any payment due,[37] or upon the removal, or attempt at removal, of the goods from the premises.[38]

(III) *Change of Time of Payment.* A parol agreement to change the time of payment of rent under a sealed lease is valid if such agreement is on a new consideration and not within the statute of frauds.[39]

(IV) *Effect of Holding Over on Time of Payment.* In case of a hold-

England.— Collett *v.* Curling, 10 Q. B. 785, 11 Jur. 890, 16 L. J. Q. B. 390, 59 E. C. L. 785; Coomber *v.* Howard, 1 C. B. 440, 50 E. C. L. 440; Doe *v.* Weller, 1 Jur. 622.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 802, 803, 804.

31. Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Nowery *v.* Connolly, 29 U. C. Q. B. 39.

32. Holt *v.* Licette, 111 Ga. 810, 35 S. E. 703; Toler *v.* Seabrook, 39 Ga. 14.

Renting on shares see *infra*, XI.

33. *California.*— McGlynn *v.* Moore, 25 Cal. 384.

Massachusetts.— Ober *v.* Brooks, 162 Mass. 102, 38 N. E. 429; Rowe *v.* Williams, 97 Mass. 163; Weed *v.* Crocker, 13 Gray 219.

Minnesota.— Gibbens *v.* Thompson, 21 Minn. 398.

Missouri.— Patterson *v.* Missouri Glass Co., 63 Mo. App. 173.

New York.— Windsor Hotel Co. *v.* Hawk, 49 How. Pr. 257.

Pennsylvania.— Com. *v.* Contner, 21 Pa. St. 266.

Canada.— Wilson *v.* McNamara, 12 U. C. Q. B. 446.

34. *Illinois.*— Stose *v.* Heissler, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563.

Indiana.— McNatt *v.* Grange Hall Assoc., 2 Ind. App. 341, 27 N. E. 325.

New York.— Deyo *v.* Bleakley, 24 Barb. 9; Sickels *v.* Shaw, 37 Misc. 601, 76 N. Y. Suppl. 319.

Pennsylvania.— Ellis *v.* Rice, 195 Pa. St. 42, 45 Atl. 655.

England.— Hopkins *v.* Helmore, 8 A. & E. 463, 2 Jur. 856, 7 L. J. Q. B. 195, 3 N. & P. 453, 1 W. W. & H. 386, 35 E. C. L. 682; Finch *v.* Miller, 5 C. B. 428, 57 E. C. L. 428; Lee *v.* Smith, 2 C. L. R. 1079, 9 Exch. 662, 23 L. J. Exch. 198, 2 Wkly. Rep. 377; Yeoman *v.* Ellison, 36 L. J. C. P. 326, 17 L. T. Rep. N. S. 65; Allen *v.* Bates, 3 L. J. Exch. 39; Holland *v.* Palser, 2 Stark. 161, 3 E. C. L. 359.

Canada.— Brown *v.* McCarty, 18 U. C. C. P. 454; Joslin *v.* Jefferson, 14 U. C. C. P. 260; Ryerse *v.* Lyons, 22 U. C. Q. B. 12.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 806.

A lease requiring the rent to be paid in monthly instalments, the first to be paid on the first day of the term, does not require payment in advance for each successive month. Liebe *v.* Nicolai, 30 Oreg. 364, 48 Pac. 172; Holland *v.* Palser, 2 Stark. 161, 3 E. C. L. 359; McCallum *v.* Snyder, 10 U. C. C. P. 191.

35. Gerry *v.* Siebrecht, 88 N. Y. Suppl. 1034 (holding that where a lease provides that rent shall be payable only from the time the premises shall be ready for occupancy, the phrase "ready for occupancy" does not mean to be fitted with fixtures rendering them ready for the lessee's business); O'Brien *v.* Jaffe, 88 N. Y. Suppl. 1009 (holding further that the tenant may waive the condition that alterations shall be completed before rent begins).

36. Hull *v.* Stogdell, 67 Iowa 251, 25 N. W. 156 (holding that where a lease for farm land provides that "when the crop matures, or any portion of it shall be fit for market, the rent shall become due," an action will lie for the rent when the oats are in stack, the corn is ripe, and the tenant has gathered part of it and is feeding it); Weed *v.* Crocker, 13 Gray (Mass.) 219. See also Hubenka *v.* Vach, 64 Nebr. 170, 89 N. W. 789.

37. Teufel *v.* Rowan, 179 Pa. St. 408, 36 Atl. 224; Hart *v.* Wynne, (Tex. Civ. App. 1897) 40 S. W. 848.

38. Platt *v.* Johnson, 168 Pa. St. 47, 31 Atl. 935, 47 Am. St. Rep. 877; Excelsior Shirt Co. *v.* Miller, 21 Pa. Co. Ct. 398.

39. Wilgus *v.* Whitehead, 89 Pa. St. 131. See also Rowe *v.* Williams, 97 Mass. 163 (holding that the time of payment of rent is not extended or postponed by the lessee's covenant that the lessor might, after sixty days' default of payment, take and keep possession of the demised premises); Hall *v.* Smith, 16 Minn. 58.

ing over, rent is payable at the same intervals of time as under the original holding.[40]

(v) *What Law Governs.* The time of payment of rent for leased premises is determined by the laws and customs of the state where the premises are situated, where the contract is to be performed, and the landlord lives, in the absence of any express agreement to the contrary.[41]

7. Persons Entitled to Rent — a. In General. Rent belongs to the owner of the soil, or the persons entitled to the possession of the premises leased.[42] Rent as such cannot be recovered by one who has not succeeded to the legal title of the lessor, or between whom and the lessee the conventional relation of landlord and tenant does not exist.[43] Rent falling due after the landlord's death goes to the heir as an incident of the reversion.[44] If the title to the land is in dispute, the one entitled to the rent thereof is the one in possession, or who is able to put the tenant in possession.[45]

b. Transfer of Rent or Reversion — (i) *Rights of Grantee of Reversion* — (A) *In General* — (1) Rents to Accrue — (a) In General. Without an express reservation, an assignment or transfer of the reversion carries with it the right to rent subsequently accruing.[46] This rule applies as well when a part of the

40. Vegely *v.* Robinson, 20 Mo. App. 199; Thorp *v.* Philbin, 13 N. Y. St. 723; Laguerenne *v.* Dougherty, 35 Pa. St. 45. See also *supra*, IV, C, 3, f, (II), (A), (2).

41. Calhoun *v.* Atchison, 4 Bush (Ky.) 261, 96 Am. Dec. 299.

42. McElroy *v.* Dean, 11 La. Ann. 612; Otis *v.* Conway, 9 N. Y. St. 1; Fisk *v.* Brayman, 21 R. I. 195, 42 Atl. 878.

43. Murphy *v.* Hopcroft, 142 Cal. 43, 75 Pac. 567.

44. Murray *v.* Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880.

45. Kieth *v.* Paulk, 55 Iowa 260, 7 N. W. 588.

46. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Oliver, 78 Ala. 158; Steed *v.* Hinson, 76 Ala. 298; Coffey *v.* Hunt, 75 Ala. 236; Tubb *v.* Fort, 58 Ala. 277; Hand *v.* Liles, 56 Ala. 143; Wise *v.* Falkner, 51 Ala. 359; English *v.* Key, 39 Ala. 113.

Arkansas.— Gibbons *v.* Dillingham, 10 Ark. 9, 50 Am. Dec. 233.

California.— Mahoney *v.* Alviso, 51 Cal. 440.

Connecticut.— Winestine *v.* Ziglatzki-Marks Co., 77 Conn. 404, 59 Atl. 496; Peck *v.* Northrop, 17 Conn. 217.

Illinois.— Kennedy *v.* Kennedy, 66 Ill. 190; Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Crosby *v.* Loop, 13 Ill. 625; Kimball *v.* Walker, 71 Ill. App. 309; Disselhorst *v.* Cadogan, 21 Ill. App. 179; Neill *v.* Chessen, 15 Ill. App. 266.

Iowa.— Van Wagner *v.* Van Nostrand, 19 Iowa 422; Abercrombie *v.* Redpath, 1 Iowa 111.

Maine.— Gale *v.* Edwards, 52 Me. 363; Winslow *v.* Rand, 29 Me. 362.

Massachusetts.— Hammond *v.* Thompson, 168 Mass. 531, 47 N. E. 137; Beal *v.* Boston Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216; Bunton *v.* Richardson, 10 Allen 260; Burden *v.* Thayer, 3 Metc. 76, 37 Am. Dec. 117; Montague *v.* Gay, 17 Mass. 439; Keay *v.* Goodwin, 16 Mass. 1; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98.

Missouri.— Stevenson *v.* Hancock, 72 Mo. 612; Page *v.* Culver, 55 Mo. App. 606.

Nebraska.— Allen *v.* Hall, 66 Nebr. 84, 92 N. W. 171, 64 Nebr. 256, 89 N. W. 803.

New Hampshire.— Alton *v.* Pickering, 9 N. H. 494.

New York.— Van Wicklen *v.* Paulson, 14 Barb. 654; Pollock *v.* Cronise, 12 How. Pr. 363.

North Carolina.— Wilcoxon *v.* Donelly, 90 N. C. 245; Jolly *v.* Bryan, 86 N. C. 457; Bullard *v.* Johnson, 65 N. C. 436; Rogers *v.* McKenzie, 65 N. C. 218; Kornegay *v.* Collier, 65 N. C. 69; Lewis *v.* Wilkins, 62 N. C. 303.

North Dakota.— Nearing *v.* Coop, 6 N. D. 345, 70 N. W. 1044, holding that where the purchaser of land under a contract for a deed takes actual possession, neither his tenant nor his vendor can defeat an action for the rent, showing that the vendee was in default under his contract.

Oregon.— West Shore Mills Co. *v.* Edwards, 24 Oreg. 475, 33 Pac. 987.

Pennsylvania.— Johnston *v.* Smith, 3 Penr. & W. 496, 24 Am. Dec. 339; Newbold *v.* Comfort, 4 Pa. L. J. 117.

South Carolina.—Moore *v.* Turpin, 1 Speers 32, 40 Am. Dec. 589.

Tennessee.— Gibbs *v.* Ross, 2 Head 437; Marney *v.* Byrd, 11 Humphr. 95, holding that where a lessor during the term sold the leased premises and directed the rent to be paid to the vendee, and the lessee, with full knowledge of the sale and direction, paid the rent according to his obligation to a party other than the vendee, the vendee cannot recover rent of the lessee in an action in his own name, without an express promise of the lessee after the assignment to pay to him.

Texas.— Hearne *v.* Lewis, 78 Tex. 276, 14 S. W. 572; Jones *v.* Saturnus, (Civ. App. 1897) 40 S. W. 1010; Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916; Faulkner *v.* Warren, 1 Tex. App. Civ. Cas. § 658.

Vermont.— Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63.

leased lands are sold pending the term, as when the whole thereof is disposed of.[47] The defense thus arising in favor of the lessee against an action by the lessor for rent falling due after the assignment of the reversion does not depend upon eviction or ouster by the assignee, but is complete without it.[48]

(b) Statutory Provisions. In some states it is provided by statute that the grantee of demised premises is invested with the right to employ all legal remedies for the recovery of rent that the grantor might have employed.[49] Such a statute applies to estates for life or for years only, and not to estates in fee.[50]

(2) Rents Accrued. The transfer of the reversion does not carry to the assignee the right to rents already accrued.[51]

(B) *As Dependent on Mode of Transfer* — (1) In General. Whether the transfer or assignment of the reversion is the voluntary act of the lessor, or involuntary by act and operation of law, as in the event of a judicial sale of the reversion, or of a sale by the sheriff under execution at law, which is quasi-judicial, makes no difference in the application of the principles already stated.[52]

(2) Transfer by Way of Mortgage. And the rules apply equally whether

Wisconsin.— Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.

United States.— Broadwell *v.* Banks, 134 Fed. 470; Blake *v.* Grammer, 3 Fed. Cas. No. 1,496, 4 Cranch C. C. 13.

England.— Sanders *v.* Benson, 4 Beav. 350, 49 Eng. Reprint 374; Greenaway *v.* Hart, 14 C. B. 340, 2 C. L. R. 370, 18 Jur. 449, 23 L. J. C. P. 115, 2 Wkly. Rep. 702, 78 E. C. L. 340; Beer *v.* Beer, 12 C. B. 60, 16 Jur. 223, 21 L. J. C. P. 124, 74 E. C. L. 60; Harmer *v.* Bean, 3 C. & K. 307; Moss *v.* Gallimore, Dougl. (3d ed.) 279; Williams *v.* Hayward, 1 E. & E. 1040, 5 Jur. N. S. 1417, 28 L. J. Q. B. 374, 7 Wkly. Rep. 563, 102 E. C. L. 1040; Cuthbertson *v.* Irving, 6 H. & N. 135, 6 Jur. N. S. 1211, 29 L. J. Exch. 485, 3 L. T. Rep. N. S. 335, 8 Wkly. Rep. 704; Whitton *v.* Peacock, 3 Myl. & K. 325, 10 Eng. Ch. 325, 40 Eng. Reprint 124; Birch *v.* Wright, 1 T. R. 378, 1 Rev. Rep. 228.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 808.

It is the privity of estate, rather than of contract, which connects the reversion with the rent. Peck *v.* Northrop, 17 Conn. 217; Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654; West Shore Mills Co. *v.* Edwards, 24 Oreg. 475, 33 Pac. 987.

Rights and liabilities of grantee or assignee of reversion in general see *supra*, III, D, 2, b.

47. Crosby *v.* Loop, 13 Ill. 625; Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916.

48. Hammond *v.* Thompson, 168 Mass. 531, 47 N. E. 137; Allen *v.* Hall, 66 Nebr. 84, 92 N. W. 171 [*reversing* 64 Nebr. 256, 89 N. W. 803].

49. Springer *v.* Chicago Real Estate, L. & T., etc., Co., 202 Ill. 17, 66 N. E. 850 [*affirming* 102 Ill. App. 294]; Wright *v.* Hardy, 76 Miss. 524, 24 So. 697.

50. Wright *v.* Hardy, 76 Miss. 524, 24 So. 697; Lewes *v.* Ridge, Cro. Eliz. 863.

51. *Alabama.* — Coffey *v.* Hunt, 75 Ala. 236; Tubb *v.* Fort, 58 Ala. 277.

Connecticut.— Peck *v.* Northrop, 17 Conn. 217.

Illinois.— Bordereaux *v.* Walker, 85 Ill. App. 86.

Iowa.— Van Driel *v.* Rosierz, 26 Iowa 575.

Louisiana.— Martin *v.* Dickson, 35 La. Ann. 1036.

Maine.— Damren *v.* American Light, etc., Co., 91 Me. 334, 40 Atl. 63.

Massachusetts.— Burden *v.* Thayer, 3 Metc. 76, 37 Am. Dec. 117.

Michigan. — Williams *v.* Williams, 118 Mich. 477, 76 N. W. 1039.

Pennsylvania.— Farmers', etc., Bank *v.* Ege, 9 Watts 436, 36 Am. Dec. 130.

Tennessee.— Gibbs *v.* Ross, 2 Head 437.

England.— Moss *v.* Gallimore, Dougl. (3d ed.) 279; Flight *v.* Bently, 4 L. J. Ch. 262, 7 Sim. 149, 8 Eng. Ch. 149, 58 Eng. Reprint 793; Birch *v.* Wright, 1 T. R. 378, 1 Rev. Rep. 228.

Canada.— Wittrock *v.* Hallinan, 13 U. C. Q. B. 135.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 808.

52. *Alabama.* — Coffey *v.* Hunt, 75 Ala. 236; Tubb *v.* Fort, 58 Ala. 277.

California.— Butler *v.* Burt, (1902) 68 Pac. 973.

Illinois.— Disselhorst *v.* Cadogan, 21 Ill. App. 179.

Kansas.— Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807.

Louisiana.— Anderson *v.* Comeau, 33 La. Ann. 1119.

Missouri.— Topping *v.* Davis, 67 Mo. App. 510.

Pennsylvania.— Reams *v.* Yeager, 29 Pa. Super. Ct. 520; King *v.* Bosserman, 13 Pa. Super. Ct. 480 [*affirming* 8 Pa. Dist. 344].

Sale under order of orphan's court.— Under a statute which provides that purchasers of land sold under order of the orphan's court shall, after confirmation of the sale and execution of the deed, have a right to the possession of the land purchased, it is no defense to an action for rent accruing after such a sale has been confirmed, but before the deed was given therefor, that such rent has been paid to the purchaser, since he had, when such rent accrued, no right to the possession. Strange *v.* Austin, 134 Pa. St. 96, 19 Atl. 492.

there is an absolute conveyance of the reversion or whether the conveyance is by way of mortgage.[53] If the lease is prior to the mortgage, the mortgagee is an assignee of the reversion and in that character entitled to all the rents, excepting only such as may have been paid by the lessee before notice of the assignment;[54] but when the lease is subsequent to the mortgage, there is no privity between the mortgagee and the lessee, and no right in him to demand the rent reserved by the lease.[55]

(c) *Necessity of Attornment.* At common law a lease was not assignable so as to invest the assignee with the legal title to the rent. A tenant neither owed fealty nor rent to the assignee until he had assented to the assignment by attorning to the purchaser.[56] But this principle was inconvenient, and a great clog upon transfers, as tenants would sometimes unreasonably refuse to attorn. To remedy this a statute[57] was passed which made assignments of reversions valid in all cases without attornment.[58] This statute has been held expressly or in effect to be in force in this country.[59] And even where such statute is not in force, since the title of the assignee is complete without attornment, it is held, on the ground of universal equity, that he is entitled to all arrears of rent that accrue after the conveyance.[60]

(d) *Necessity of Notice to Tenant.* Notice of the assignment of the reversion is necessary to enable the assignee to collect the subsequently accruing rent, and a tenant who has paid the rent in good faith to the lessor before such notice will be protected,[61] for if the assignee of a reversion lies by and suffers the lessee to

53. *Alabama.*— Coffey *v.* Hunt, 75 Ala. 236.

Illinois.— Disselhorst *v.* Cadogan, 21 Ill. App. 179.

Massachusetts.— Burden *v.* Thayer, 3 Metc. 76, 37 Am. Dec. 117.

New Hampshire.— Kimball *v.* Pike, 18 N. H. 419.

England.— Birch *v.* Wright, 1 T. R. 378, 1 Rev. Rep. 228.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 808.

Compare Evertson *v.* Sawyer, 2 Wend. (N. Y.) 507.

54. Comer *v.* Sheehan, 74 Ala. 452; Russell *v.* Allen, 2 Allen (Mass.) 42; Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98; Moss *v.* Gallimore, Dougl. (3d ed.) 279. See also Bradley *v.* Peabody Coal Co., 99 Ill. App. 427.

55. Comer *v.* Sheehan, 74 Ala. 452; Russell *v.* Allen, 2 Allen (Mass.) 42; Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Souders *v.* Vansickle, 8 N. J. L. 313; McKircher *v.* Hawley, 16 Johns. (N. Y.) 289.

56. Comer *v.* Sheehan, 74 Ala. 452; Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31 [*affirming* 66 Ill. App. 282]; Fisher *v.* Deering, 60 Ill. 114; Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; Raymond *v.* Kerker, 2 Ill. App. 496; Bunton *v.* Richardson, 10 Allen (Mass.) 260; Farley *v.* Thompson, 15 Mass. 18; Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63; Doe *v.* Smith, 8 A. & E. 255, 2 Jur. 854, 7 L. J. Q. B. 158, 2 M. & Rob. 7, 3 N. & P. 335, 1 W. W. & H. 429, 35 E. C. L. 579; Doe *v.* Edwards, 5 A. & E. 95, 2 Harr. & W. 139, 5 L. J. K. B. 238, 6 N. & M. 633, 31 E. C. L. 538.

Nor did the statute of 32 Henry VIII, which enacted in effect that the assignee of a reversion should be entitled to the rent, give such right until the tenant had attorned and thereby assented to become directly liable to the assignee. Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; Raymond *v.* Kerker, 2 Ill. App. 496; Doe *v.* Brown, 2 E. & B. 331, 17 Jur. 1161, 22 L. J. Q. B. 432, 75 E. C. L. 331.

[VIII, A, 7, b, (I), (B), (2)]

Attornment generally see *supra*, I, F, 1.

57. St. 4 Anne, c. 16.

58. Lumley *v.* Hodgson, 16 East 99, 14 Rev. Rep. 315; Doe *v.* Brown, 2 E. & B. 331, 17 Jur. 1161, 22 L. J. Q. B. 432, 75 E. C. L. 331; Williams *v.* Hayward, 1 E. & E. 1040, 5 Jur. N. S. 1417, 28 L. J. Q. B. 374, 7 Wkly. Rep. 563, 102 E. C. L. 1040.

59. *Alabama.*— Comer *v.* Sheehan, 74 Ala. 452; Tubb *v.* Fort, 58 Ala. 277; Wise *v.* Falkner, 51 Ala. 359.

Illinois.— Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Bradley *v.* Peabody Coal Co., 99 Ill. App. 427; Bordereaux *v.* Walker, 85 Ill. App. 86; Howland *v.* White, 48 Ill. App. 236.

Massachusetts.— Hammond *v.* Thompson, 168 Mass. 531, 47 N. E. 137; Bunton *v.* Richardson, 10 Allen 260; Farley *v.* Thompson, 15 Mass. 18.

Michigan.—Sherman *v.* Spalding, 126 Mich. 561, 85 N. W. 1129; Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836.

New Hampshire.— Pendergast *v.* Young, 21 N. H. 234.

60. Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63.

61. *Alabama.*— Smith *v.* Taylor, 9 Ala. 633.

California.— O'Connor *v.* Kelly, 41 Cal. 432.

Illinois.— Bradley *v.* Peabody Coal Co., 99 Ill. App. 427.

pay rent to the lessor as it falls due he will not be permitted to complain of such act.[62]

(E) *Reservation of Rent.* Although the general rule is that the rent is incident to the reversion and passes with it, yet the lessor may sever the rent from the reversion by expressly reserving it,[63] or he may grant the rent alone, in which case a subsequent grant of the reversion does not pass the rent.[64]

(F) *Right of Transferee Against Tenant Holding Over.* When a tenant holds over by consent the obligation to pay rent continues as under the lease and he is not liable for rent to one who has become the holder of the legal title but with whom he is in privity neither of contract or estate.[65]

(II) *Lease of Reversion.* Where there is an outstanding lease for years, and the reversioner makes a second lease to a third person, to commence immediately, it is a vested estate, and will entitle the second lessee to take the rents reserved by the former lease.[66]

(III) *Assignment of Lease by Lessor.* The legal title to rents to accrue passes by the assignment of the lease, and the assignee has the right to institute all proper proceedings for enforcing payment thereon.[67] Rent due before the assignment of the lease belongs to the landlord and not to the assignee.[68]

(IV) *Transfer of Rent as Security.* An order by a landlord on his tenant, in favor of a creditor of the landlord, to pay to the creditor the rent as it becomes due, which order is subsequently accepted by the tenant, creates a liability by the tenant in favor of the creditor, which can be enforced by an action in the creditor's name;[69] but the landlord may at any time pay the balance of the debt and regain the title to the rent.[70]

Indiana.— Sampson *v.* Grimes, 7 Blackf. 176; Indiana Natural Gas, etc., Co. *v.* Lee, 34 Ind. App. 119, 72 N. E. 492.

Massachusetts.— Stone *v.* Patterson, 19 Pick. 476, 31 Am. Dec. 156; Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Farley *v.* Thompson, 15 Mass. 18.

Missouri.— Gray *v.* Rogers, 30 Mo. 258.

New Hampshire.— Bachelder *v.* Dean, 20 N. H. 467, holding that such notice is sufficient if given during the existence of the term.

England.— Lumley *v.* Hodgson, 16 East 99, 14 Rev. Rep. 315.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 809.

The recording of a deed by a lessor of the leased premises is notice to the lessee of the grantee's right to the rent thereafter accruing. Peck *v.* Northrop, 17 Conn. 217. *Contra,* Dixon *v.* Smith, 181 Mass. 218, 63 N. E. 419.

62. Farley *v.* Thompson, 15 Mass. 18.

63. *Alabama.*— Steed *v.* Hinson, 76 Ala. 298.

Illinois.— Crosby *v.* Loop, 13 Ill. 625.

Massachusetts.— Shea *v.* McCauliff, 186 Mass. 569, 72 N. E. 69.

Nebraska.— Allen *v.* Hall, 66 Nebr. 84, 92 N. W. 171.

New York.— Van Wicklen *v.* Paulson, 14 Barb. 654.

Oregon.— West Shore Mills Co. *v.* Edwards, 24 Oreg. 475, 33 Pac. 987.

Wisconsin.— Leonard *v.* Burgess, 16 Wis. 41.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 810.

A note for rent effects a severance of the rent so that it will not pass with the land under a warranty deed to the land. Kimball *v.* Walker, 71 Ill. App. 309.

64. Alabama Gold L. Ins. Co. *v.* Oliver, 78 Ala. 158; Childers *v.* Smith, 10 B. Mon. (Ky.) 235.

Rent can only be transferred by deed.— Dove *v.* Dove, 18 U. C. C. P. 424.

65. Doyle *v.* O'Neil, 7 Mo. App. 138. See also Couch *v.* McKellar, 33 Ala. 473.

66. Harmon *v.* Flanagan, 123 Mass. 288; Logan *v.* Green, 39 N. C. 370. See also Pendergast *v.* Young, 21 N. H. 234. *Compare* Cohen *v.* Suckno, 32 Misc. (N. Y.) 689, 66 N. Y. Suppl. 467.

67. *Illinois.*— Dixon *v.* Buell, 21 Ill. 203 (holding further that the lessor can assign his interest in a lease by an indorsement on it, so as to pass the equitable right to his assignee to receive the rent when it becomes due); Keeley Brewing Co. *v.* Mason, 104 Ill. App. 241; Graham *v.* Le Sourd, 99 Ill. App. 223; Bordereaux *v.* Walker, 85 Ill. App. 86 (holding further that the lessor cannot be reinvested with the legal title to rents by a mere oral agreement between him and the assignee, or by a mere redelivery of the manual possession of the lease).

Iowa.—Welch *v.* Horton, 73 Iowa 250, 34 N. W. 840; Haywood *v.* O'Brien, 52 Iowa 537, 3 N. W. 545.

Massachusetts.—Porter *v.* Merrill, 124 Mass. 534; Patten *v.* Deshon, 1 Gray 325.

Michigan.— Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836.

Texas.—Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124.

68. Wise *v.* Pfaff, 98 Md. 576, 56 Atl. 815.

69. Esling *v.* Zantzinger, 13 Pa. St. 50.

70. Hendershott *v.* Calhoun, 17 Ill. App. 163.

(v) *Right to Rent as Between Assignee of Rent and Grantee of Reversion.* Where a note for rent is assigned prior to the conveyance of the reversion, the assignee of the note and not the grantee of the reversion is entitled to the rent;[71] but a transfer of the note after the grant of the reversion is subject to the rule that the rent passes to the owner as an incident of the reversion.[72]

c. Subleases — (i) *Persons Entitled to Rent Under Sublease.* A lessee of lands who executes a sublease is entitled to the rent accruing thereunder, and the lessee cannot attorn or surrender to the original landlord and thereby acquire a title under which to dispute such right.[73] Where the rent is payable in advance on a certain day, the sublessor's rights thereto are not affected by a technical merger of his estate in that of his lessor.[74] A tenant cannot, however, sublet for a longer time than his own term; at the end of such term the sublessee ceases to be his tenant, and no longer owes him rent.[75] Where a lessee, after subletting and reserving a rent, assigns all his "right, title and interest" in the lease, with the purpose of putting the assignee in his place and stead, such transfer carries all the interest in rents already accrued as well as rents thereafter to accrue.[76]

(ii) *Rights of Original Landlord.* In the absence of modification by statute, the common law gave the lessor no right of action on any of the covenants of the original lease against the subtenant or under-lessee of his lessee, because there was no privity of contract between the lessor and the sublessee and because there was no privity of estate.[77] To support an action by the lessor there must be, not an under-letting, but an assignment of the whole estate of the lessee.[78] Where a lessee transfers the term, reserving the rent to himself, such transfer is, as between the lessor and the sublessee, an assignment, giving the lessor an action for rent against the sublessee.[79] So also where the lessor, in consideration of the lessee's assigning him certain under-leases, accepts a surrender of the original lease, he may maintain an action against the sublessee for the rent accruing after such assignment.[80] Where a lessee is insolvent, the rents which accrue on a sub-lease are not subject to distribution among the creditors, until the claim of the original landlord for rent has been extinguished.[81]

8. Persons Liable For Rent — a. In General — (i) *Necessity of Privity.* There can be no liability for rent without privity either of contract or estate.[82]

71. Alabama Gold L. Ins. Co. *v.* Oliver, 78 Ala. 158, 82 Ala. 417, 2 So. 445; Leonard *v.* Burgess, 16 Wis. 41. See also Abrams *v.* Sheehan, 40 Md. 446.

72. Alabama Gold L. Ins. Co. *v.* Oliver, 78 Ala. 158, 82 Ala. 417, 2 So. 445; Westmoreland *v.* Foster, 60 Ala. 448.

73. Hammond *v.* Dean, 8 Baxt. (Tenn.) 193.

Where a lessee transfers the term, reserving the rent to himself, it is an under-lease, so far as to give the lessee an action for rent against the sublessee. Adams *v.* Beach, 1 Phila. (Pa.) 99.

Estoppel of tenant to deny landlord's title see *supra*, III, G.

Operation and effect of subleases in general see *supra*, IV, B, 5.

74. Townsend *v.* Read, 13 Daly (N. Y.) 198.

75. Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560.

76. U. S. *v.* Hickey, 17 Wall. (U. S.) 9, 21 L. ed. 559.

Sale of lease under execution.— If, after such assignment, the lease is sold under execution, the purchaser is not entitled to the rents from tenants holding under the assignor or assignee until put into possession, but they are payable to the assignee. O'Rourke *v.* Brown, 54 N. Y. Super. Ct. 384; O'Rourke *v.* Cooper, 54 N. Y. Super. Ct. 389.

77. Grundin *v.* Carter, 99 Mass. 15; St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Stillman *v.* Van Beuren, 100 N. Y. 439, 3 N. E. 671; McFarlan *v.* Watson, 3 N. Y. 286; Holford *v.* Hatch, Dougl. (3d ed.) 183.

78. Grundin *v.* Carter, 99 Mass. 15.

Distinction between sublease and assignment see *supra*, IV, B, 2, c.

79. Adams *v.* Beach, 1 Phila. (Pa.) 99.

80. Beal *v.* Boston Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216.

81. Otis *v.* Conway, 114 N. Y. 13, 20 N. E. 628; Riggs *v.* Whitney, 15 Abb. Pr. (N. Y.) 388.

82. Wilson *v.* Marshall, 34 Ill. App. 306; Carver *v.* Palmer, 33 Mich. 342; Acheson *v.* Kittanning Consol. Natural Gas Co., 8 Pa. Super. Ct. 477. See also Twichell *v.* McNabb, 172 Mass. 329, 52 N. E. 388.

One not in possession and having no right to possession is not liable for rent. Sibley *v.* Walton, 2 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 367.

Mere possession of premises leased to another under written covenants cannot impose the burden of those covenants on the possessor.[83]

(II) *After Attachment of Tenant's Property.* Where creditors attach a tenant's merchandise, and it remains in the store until the sale, the tenant is liable for rent during the entire period of occupancy.[84]

(III) *After Tenant's Death.* The death of a tenant does not release his estate from obligation to pay rent under the lease.[85]

(IV) *Agents, Trustees, Etc.* One in possession of land as the agent of another cannot be held personally liable for the rent,[86] unless he remains in possession after personal notice that if he does so he will be charged a certain rent.[87] If a person accountable for the rents and profits of a building occupies it himself instead of renting it he will be liable for rent.[88] So also if one executes a lease as a private individual and personally covenants to pay the rent, although he is described in the lease as "trustee."[89] The fact that the lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed principal liable for rent.[90]

(V) *Mortgagees in Possession.* Where a mortgagee of a stock of goods in a leased store takes possession of the goods and occupies the building for the purpose of sale, he is bound to pay the rent after he takes possession.[91] But it is otherwise if the mortgagee merely places an agent in the store to receive the cash from the sales and apply it on his indebtedness.[92]

(VI) *Joint Lessees.* Where there are several joint lessees, judgment for rent may be had against any one of them.[93] If under a joint lease all enter and enjoy, although only one signs, all are liable for the rent.[94] So also the occupation of one is sufficient to make all liable for the rent.[95]

b. After Transfer of Lease — (I) *Liability of Lessee After Assignment* — (A) *Express Covenant to Pay Rent.* The assignment of a lease does not annul the lessee's obligation on his express covenant to pay rent, even though the lessor has assented to such assignment, and collected rent from the assignee,[96]

Contract as essential of relation of landlord and tenant see *supra*, I, B, 1.

83. *Connecticut.*— Camp *v.* Scott, 47 Conn. 366.

Illinois.—People *v.* Gilbert, 64 Ill. App. 203.

Indiana.—Rev. St. 5222, providing that the occupant without special contract of any land shall be liable for rent does not include one who lives with the contract tenant as a member of his family. Tinder *v.* Davis, 88 Ind. 99.

Massachusetts.— Brooks *v.* Allen, 146 Mass. 201, 15 N. E. 584.

Michigan.—Doty *v.* Gillett, 43 Mich. 203, 5 N. W. 89.

Nebraska.—Parker *v.* Nanson, 12 Nebr. 419, 11 N. W. 865.

New Hampshire.— Austin *v.* Thomson, 45 N. H. 113.

New York.—Bedford *v.* Terhune, 27 How. Pr. 422.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 818.

84. Meyer *v.* Oliver, 61 Tex. 584.

85. Hutchins *v.* Danville Commercial Bank, 91 Va. 68, 20 S. E. 950; Broadwell *v.* Banks, 134 Fed. 470.

Termination of tenancy by death of party: Term for years, see *infra*, IX, B, 3. Tenancy from year to year, see *infra*, IX, C, 1. Tenancy at will, see *infra*, IX, F, 3.

86. Timm *v.* J. G. Rose Co., 21 Misc. (N. Y.) 337, 47 N. Y. Suppl. 150; Stewart *v.* Perkins, 3 Oreg. 508.

87. Nolan *v.* Hentig, 138 Cal. 281, 71 Pac. 440.

88. Allen *v.* Gates, 74 Vt. 376, 52 Atl. 963.

89. Stobie *v.* Dills, 62 Ill. 432.

90. Beck *v.* Eagle Brewery, (N. J. Ch. 18995) 30 Atl. 1100.

91. Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938. See also Bolton *v.* Lambert, 72 Iowa 483, 34 N. W. 294.

92. Fisher *v.* Pforzheimer, 93 Mich. 650, 53 N. W. 828.

93. Ding *v.* Kennedy, 7 Colo. App. 72, 41 Pac. 1112; Wolz *v.* Sanford, 10 Ill. App. 136.

94. McLaughlin *v.* McGovern, 34 Barb. (N. Y.) 208.

95. Kendall *v.* Carland, 5 Cush. (Mass.) 74; Goshorn *v.* Steward, 15 W. Va. 657; Glen *v.* Dungey, 4 Exch. 61, 18 L. J. Exch. 359.

96. *California.*— Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979; Bonetti *v.* Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

Colorado.—Wilson *v.* Gerhardt, 9 Colo. 585, 13 Pac. 705.

Illinois.— Grommes *v.* St. Paul Trust Co, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248 [*affirming* 47 Ill. App. 568]; Rector *v.* Hartford Deposit Co., 102 Ill. App. 554, 92

unless the lessor has accepted the surrender of the lease and released the original lessee.[97] The effect of the assignment may be said to be to make the lessee a surety to the lessor for the assignee, who as between himself and the lessor is the principal, bound, while he is assignee, to pay the rent and perform the covenants,[98] and the lessee is not entitled to notice of default of the assignee to pay the

Ill. App. 175; Laird *v.* Mantonya, 83 Ill. App. 327.

Indiana.—Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 [*reversing* (App. 1901) 61 N. E. 12].

Iowa.— Harris *v.* Heackman, 62 Iowa 411, 17 N. W. 592; Barhydt *v.* Burgess, 46 Iowa 476; Fanning *v.* Stimson, 13 Iowa 42.

Kentucky.— Trabue *v.* McAdams, 8 Bush 74.

Maryland.—Moale *v.* Tyson, 2 Harr. & M. 387.

Massachusetts.—Greenleaf *v.* Allen, 127 Mass. 248; Pfaff *v.* Golden, 126 Mass. 402; Wall *v.* Hinds, 4 Gray 256, 64 Am. Dec. 64; Fletcher *v.* McFarlane, 12 Mass. 43.

Michigan.—Wineman *v.* Phillips, 93 Mich. 223, 53 N. W. 168.

Minnesota.—Oswald *v.* Fratenburgh, 36 Minn. 270, 31 N. W. 173.

Missouri.—Holliday *v.* Noland, 93 Mo. App. 403, 67 S. W. 663; Charless *v.* Froebel, 47 Mo. App. 45; Jones *v.* Barnes, 45 Mo. App. 590 (holding that in order to hold the original tenant by privity of contract to his promise to pay rent, where there has been an assignment of the lease, it is not necessary that his promise should be under seal); Whetstone *v.* McCartney, 32 Mo. App. 430.

Montana.—Edwards *v.* Spalding, 20 Mont. 54, 49 Pac. 443.

Nebraska.—Missouri, etc., Trust Co. *v.* Richardson, 57 Nebr. 617, 78 N. W. 273; Bouscaren *v.* Brown, 40 Nebr. 722, 59 N. W. 385.

New Jersey.—Hunt *v.* Gardner, 39 N. J. L. 530.

New York.— Phelps *v.* Van Dusen, 3 Abb. Dec. 604, 4 Transcr. App. 399; Damb *v.* Hoffman, 3 E. D. Smith 361.

Ohio.—Smith *v.* Harrison, 42 Ohio St. 180; Taylor *v.* De Bus, 31 Ohio St. 468; Nova Cesarea Harmony Lodge No. 2 *v.* White, 30 Ohio St. 569, 27 Am. Rep. 492; Sutliff *v.* Atwood, 15 Ohio St. 186; Great Western Despatch Co. *v.* Nova Cæsarea Harmony Lodge, 6 Ohio Dec. (Reprint) 603, 7 Am. L. Rec. 12, 3 Cinc. L. Bul. 345.

Pennsylvania.—Dewey *v.* Dupuy, 2 Watts & S. 553; Kunckle *v.* Wynick, 1 Dall. 305, 1 L. ed. 149.

Vermont.—Shaw *v.* Partridge, 17 Vt. 626.

Wisconsin.—Bailey *v.* Wells, 8 Wis. 141, 76 Am. Dec. 233.

England.—Trant *v.* Bury, El. & G. t. S. 78, 11 Eng. Ch. 78; Orgill *v.* Kemshead, 4 Taunt. 642, 13 Rev. Rep. 712; Staines *v.* Morris, 1 Ves. & B. 8, 35 Eng. Reprint 4.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 821.

Operation and effect of assignments in general see *supra*, IV, B, 4.

In Louisiana the right of action for rents of immovable property ceases against the possessor from the time he transfers it to another party. Gillaspie's Succession, 35 La. Ann. 779.

Liability not affected by demise of other premises to assignee.— When a lease is assigned upon the express condition that the assignor shall remain liable for the prompt payment of the rent, the fact that the landlord demises other premises to the assignee of the lease shortly afterward does not affect the liability of the assignor under the provisions of the assignment. Miller *v.* Hawes, 58 Ill. App. 667.

Under Wis. Rev. St. § 2302, providing that no estate or interest in lands shall be surrendered unless by act or operation of law, or by deed of conveyance in writing subscribed by the party surrendering the same, or by his lawful agent thereunto authorized by writing, a lessee under a written lease remains liable thereon to the lessor after an assignment of the lease to a third person as subtenant, where the consent of the lessor to such transfer, indorsed on the lease, expressly so provides, regardless of any oral agreement between the lessee and agents of the lessor, not shown to have written authority from him to make such agreement. Lovejoy *v.* McCarty, 94 Wis. 341, 68 N. W. 1003.

Where the lessor of property is to receive certain profits for rent, and the lessee sells the premises without his consent, he is liable for the price to the lessor, although the buyer becomes insolvent. Long *v.* Fitzimmons, 1 Watts & S. (Pa.) 530.

97. Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31 [*affirming* 66 Ill. App. 282]; Grommes *v.* St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; Bradley *v.* Walker, 93 Ill. App. 609; Wineman *v.* Phillips, 93 Mich. 223, 53 N. W. 168; Frank *v.* Maguire, 42 Pa. St. 77.

An action brought by a lessor against an assignee at the request of the lessee, who had not been released from his liability, is not such an election to treat the assignee as the lessee as will release the original lessee from liability. Whitcomb *v.* Cummings, 68 N. H. 67, 38 Atl. 505.

98. Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979; Dietz *v.* Kucks, (Cal. 1896) 45 Pac. 832; Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680; Collins *v.* Pratt, 181 Mass. 345, 63 N. E. 946; Wolveridge *v.* Steward, 1 Cromp. & M. 644, 3 L. J. Exch. 360, 3 Moore & S. 561, 3 Tyrw. 637, 30 E. C. L. 521; Humble *v.* Langston, 7 M. & W. 517; Stone *v.* Evans, Peake Add. Cas. 94. And see Ballou *v.* Orr, 14 Misc. (N. Y.) 402, 35 N. Y. Suppl. 1040.

rent.[99] Where, however, the lessee with the landlord's consent assigns the lease, but expressly covenants that nothing therein shall alter his liability under the covenants, including that for rent, he does not become a mere surety for payment of rent by the assignee, but is primarily liable therefor.[1]

(B) *Implied Covenant to Pay Rent.* If on the other hand there be no express contract to pay the rent, the lessee's liability is determined by an assignment of the lease with the consent of the lessor; and such consent may be inferred by his accepting rent from the assignee or other acts recognizing him as his tenant,[2] but the lessee cannot discharge himself from liability for future rent by an assignment of the lease without the lessor's consent.[3]

(II) *Liability of Assignee*—(A) *In General.* Where a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease.[4] But until a lease is assigned or so trans-

99. Georgen *v.* Schmidt, 69 Ill. App. 538.

1. Latta *v.* Weiss, 131 Mo. 230, 32 S. W. 1005. And see Miller *v.* Hawes, 58 Ill. App. 667.

2. *Illinois.*— Bliss *v.* Gardner, 2 Ill. App. 422.

Iowa.—Fanning *v.* Stimson, 13 Iowa 42.

Maryland.—Consumers' Ice Co. *v.* Bixler, 84 Md. 437, 35 Atl. 1086.

Massachusetts.—Fletcher *v.* McFarlane, 12 Mass. 43.

Missouri.— Jones *v.* Barnes, 45 Mo. App. 590.

Ohio.— Nova Cesarea Harmony Lodge No. 2 *v.* White, 30 Ohio St. 569, 27 Am. Rep. 492; Sutliff *v.* Atwood, 15 Ohio St. 186.

Vermont.—Kimpton *v.* Walker, 9 Vt. 191, holding that the words "yielding and paying" in a lease make an implied covenant, and the lessee is not liable thereon for rent after he has assigned his term.

England.—Wadham *v.* Marlowe, 2 Chit. 600, 18 E. C. L. 805, 4 Dougl. 54, 26 E. C. L. 336, 8 East 314 note, H. Bl. 437 note, 1 T. R. 91, 9 Rev. Rep. 456.

See 32 Cent. Dit. tit. "Landlord and Tenant," § 821.

3. Consumers' Ice Co. *v.* Bixler, 84 Md. 437, 35 Atl. 1086.

4. *Maryland.*— Rawlings *v.* Duvall, 4 Harr. & M. 1.

Massachusetts.—Blake *v.* Sanderson, 1 Gray 332.

Missouri.—Tyler *v.* Giesler, 85 Mo. App. 278.

Nebraska.—Hogg *v.* Reynolds, 61 Nebr. 758, 86 N. W. 479, 87 Am. St. Rep. 522.

New York.—Mead *v.* Madden, 85 N. Y. App. Div. 10, 82 N. Y. Suppl. 900; Sayles *v.* Kerr, 4 N. Y. App. Div. 150, 38 N. Y. Suppl. 880; People *v.* Loomis, 27 Hun 328; Main *v.* Green, 32 Barb. 448 (holding that the assignee of a lease is liable for the rent, although he has mortgaged his interest); Graves *v.* Porter, 11 Barb. 592; Hubbell *v.* Clark, 1 Hilt. 67; Journeay *v.* Brackley, 1 Hilt. 447.

Ohio.—Woodland Oil Co. *v.* Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62.

Pennsylvania.—Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Acheson *v.* Kittanning Consol. Natural Gas Co., 8 Pa. Super. Ct. 477; Goss *v.* Woodland Fire Brick Co., 4 Pa. Super. Ct. 167; Adams *v.* Beach, 1 Phila. 99.

Texas.—Le Gierse *v.* Green, 61 Tex. 128.

Wisconsin.— De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

England.—Richmond *v.* London, 1 Bro. P. C. 516, 1 Eng. Reprint 727.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 822.

Possession by subtenant.— Where the assignee of the lease takes possession, whether personally or by subtenant, he is liable for the stipulated rent. Carter *v.* Hammett, 18 Barb. (N. Y.) 608.

Assignment by minor.—When a minor lessee assigns the remainder of his term, the assignee is liable for rent until the minor disaffirms the assignment; the contract being merely voidable and not void. Rothschild *v.* Hudson, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 752.

Where there have been several assignments of a lease, the original landlord may sue jointly all privies in estate, or he can sue any firm or persons liable under the law. McClaren *v.* Citizens' Oil, etc., Co., 14 Pa. Super. Ct. 167.

Assignee of invalid lease.—While one occupying the premises as assignee of an invalid lease is liable to pay rent according to its provisions, this liability is not on the covenant therefor, but on the implied contract. Poor *v.* Scanlan, 8 Ohio Dec. (Reprint) 275, 7 Cinc. L. Bul. 15.

No liability on parol promise of assignor.— The assignee of a lease is not liable to the lessor for rent accruing to him under a parol promise from the assignor, since it is a mere personal or collateral covenant. Coit *v.* Braunsdorf, 2 Sweeny (N. Y.) 74.

Effect of covenant that deed free from encumbrances.—A covenant in a deed of a lessee conveying his interest in the leasehold that it is free from all encumbrances except those imposed in the lease itself, does not create a personal obligation on the part of the grantee to perform the covenants of the lessee in the lease. St. Louis Consol. Coal Co. *v.* Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624 [*reversing* 59 Ill. App. 595].

ferred that a privity of estate is created between the original lessor and the assignee, such assignee is not liable to the lessor for rent.[5] The fact that the lessor gives a release to the lessee of all demands will not bar an action against the assignee for the rent accruing subsequently to the assignment.[6] Nothing but an agreement, express or implied, binding in law, will relieve the assignee from such liability.[7]

(B) *Necessity of Possession by Assignee.* The assignee of a lease becomes liable for rent by reason of privity of estate, and not by reason of his occupancy of the premises.[8] But where assignees of a lease have taken possession thereunder, they cannot, by mere abandonment of the premises, escape their liabilities, without a tender or a formal reassignment of the lease.[9]

(C) *Extent of Liability* — (1) IN GENERAL. The assignee being liable solely in the privity of estate is liable only for rent maturing while he holds the estate as assignee, and not for that which matured before he became assignee or after he ceased to be such,[10] even though it was payable in advance for a period in which the assignment was made.[11]

(2) WHEN PART OF PREMISES ASSIGNED. One who acquires by assignment the lessee's entire interest in a distinct part of leased land is as to such part in privity of estate with the lessor and liable to him for a proportionate share of the rent; but such assignee is not in privity of estate with the lessor as to the portion of the land not covered by the assignment and is therefore not liable for the entire rent reserved in the lease.[12]

5. Bartlett *v.* Amberg, 92 Ill. App. 377 [appeal *dismissed* in 190 Ill. 15, 60 N. E. 84].

6. McKeon *v.* Whitney, 3 Den. (N. Y.) 452.

7. Le Gierse *v.* Green, 61 Tex. 128, holding that the fact that an owner of land prosecutes an unsuccessful suit against the original lessee to collect rent does not relieve from liability the lessee's assignee of the leasehold interest.

8. *Illinois.*— St. Louis Consol. Coal Co. *v.* Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624 [*reversing* 59 Ill. App. 595]; Chicago Attachment Co. *v.* Davis Sewing-Mach. Co., (1890) 25 N. E. 669; Babcock *v.* Scoville, 56 Ill. 461.

Kentucky.—Trabue *v.* McAdams, 8 Bush 74.

Minnesota.— Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917.

Missouri.—Hynes *v.* Ecker, 34 Mo. App. 650; Guinzburg *v.* Claude, 28 Mo. App. 258; St. Louis Public Schools *v.* Boatman's Ins., etc., Co., 5 Mo. App. 91.

Pennsylvania.—Fennell *v.* Guffey, 155 Pa. St. 38, 25 Atl. 785; Negley *v.* Morgan, 46 Pa. St. 281.

England.—Wolveridge *v.* Steward, 1 Cromp. & M. 644, 3 L. J. Exch. 360, 3 Moore & S. 561, 3 Tyrw. 637, 30 E. C. L. 521.

Contra, Damainville *v.* Mann, 32 N. Y. 197, 88 Am. Dec. 324; Sayles *v.* Kerr, 4 N. Y. App. Div. 150, 38 N. Y. Suppl. 880; Sharon Cong. Soc. *v.* Rix, (Vt. 1889) 17 Atl. 719; Overman *v.* Sanborn, 27 Vt. 54.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 822.

9. Chicago Attachment Co. *v.* Davis Sewing Mach. Co., (Ill. 1890) 25 N. E. 669; McLean *v.* Caldwell, 107 Tenn. 128, 64 S. W. 16.

10. *Illinois.*— Consolidated Coal Co. *v.* Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624 [*reversing* 59 Ill. App. 604].

Iowa.— Welch *v.* Horton, 73 Iowa 250, 34 N. W. 840.

Maryland.—Baltimore City *v.* Peat, 93 Md. 696, 50 Atl. 152, 698.

Minnesota.—Trask *v.* Graham, 47 Minn. 571, 50 N. W. 917.

New York.—Johnston *v.* Bates, 48 N. Y. Super. Ct. 180; Young *v.* Peyser, 3 Bosw. 308; Hull *v.* Stevenson, 13 Abb. Pr. N. S. 196; Van Schaick *v.* Third Ave. R. Co., 8 Abb. Pr. 380; Pilzemayer *v.* Walsh, 2 N. Y. City Ct. 244; Childs *v.* Clark, 3 Barb. Ch. 52, 49 Am. Dec. 164.

Pennsylvania.—Negley *v.* Morgan, 46 Pa. St. 281.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 823.

A parol promise by the assignee to pay arrears of rent if permitted to remain in possession of the premises is void if not in writing. Fowler *v.* Moller, 4 Bosw. (N. Y.) 149.

11. Wolf *v.* Gluck, 24 Misc. (N. Y.) 763, 53 N. Y. Suppl. 874.

12. *Illinois.*— Babcock *v.* Scoville, 56 Ill. 461.

Kentucky.—Cox *v.* Fenwick, 4 Bibb 538.

Nebraska.—Hogg *v.* Reynolds, 61 Nebr. 758, 86 N. W. 479, 87 Am. St. Rep. 522.

New York.—Levy *v.* Long Island Brewery, 26 Misc. 410, 56 N. Y. Suppl. 242; Van Rensselaer *v.* Gallup, 5 Den. 454; Van Rensselaer *v.* Bradley, 3 Den. 135, 45 Am. Dec. 451; Childs *v.* Clark, 3 Barb. Ch. 52, 49 Am. Dec. 164. *Compare* Damainville *v.* Mann, 32 N. Y. 197, 88 Am. Dec. 324.

England.—Curtis *v.* Spitty, 1 Bing. N. Cas. 756, 1 Hodges 153, 4 L. J. C. P. 236, 1 Scott 737, 27 E. C. L. 849. See also Johnson *v.*

(D) *Liability as Depending on Form of Transfer* — (1) ASSIGNMENT OF RIGHT OF OCCUPANCY. If the assignment is of the right of occupancy alone and not of the lease the assignee is not liable for the rent.[13]

(2) EQUITABLE ASSIGNMENTS. The equitable assignee of a lease, in possession of the premises, is liable for the rent during occupancy.[14]

(3) INVALID ASSIGNMENT. Although the transfer of a lease is invalid, the transferee is nevertheless liable for the rent if he agrees to assume the lease and pay the rent and occupies under the agreement.[15] This rule is particularly applicable in the case of parol assignments void under the statute of frauds.[16]

(4) ASSIGNMENT BY WAY OF MORTGAGE. In jurisdictions holding that a mortgage vests in the mortgagee the whole legal estate, a mortgagee of a leasehold is liable on the covenant for the payment of rent, although he does not take possession under the mortgage.[17] But where a mortgage is considered a mere security for the debt, such a mortgagee is not liable to the lessor for the rent of the demised premises unless he enters into possession.[18]

(5) INVOLUNTARY ASSIGNMENT. A judicial sale of a lease imposes on the purchaser the obligation of paying to the lessor the rent accruing after the sale according to the terms of the lease,[19] and this is true whether or not the purchaser enters into possession.[20]

(6) PRESUMPTIVE ASSIGNMENT. Where a third party is in possession of leased premises under the lessee, the law presumes that the lease has been assigned by the lessee to such third party;[21] but it is competent for him to show that he is not an assignee but only an under-tenant.[22]

(7) ASSIGNMENT OF PAID-UP LEASE. A paid-up non-assignable lease has been held not to be forfeited by the mere fact of assignment by the lease, in the absence of a condition to that effect in the lease; and, if the lessor makes no objection to the occupancy of the assignee, he cannot collect rent from him for the unexpired term.[23]

Wild, 44 Ch. D. 146, 59 L. J. Ch. 322, 62 L. T. Rep. N. S. 537, 38 Wkly. Rep. 500.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 823.

A special agreement to be bound for the whole term may of course be made. Martineau *v.* Steele, 14 Wis. 272.

13. Walker *v.* Dohan, 39 La. Ann. 743, 2 So. 381.

14. Astor *v.* Lent, 6 Bosw. (N. Y.) 612; Astor *v.* L'Amoreux, 4 Sandf. (N. Y.) 524; Rothschild *v.* Hudson, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 752.

15. Stillman *v.* Harvey, 47 Conn. 26. See also Brown *v.* Lennox, 22 Ont. App. 442.

Assignment by a minor.—Where a minor lessee assigns the remainder of the term the lessee is liable to pay rent to the lessor during his occupancy and until the minor disaffirms the assignment, since the assignee has enjoyed the premises and his occupation has been legal; the assignment being voidable and not void. Rothschild *v.* Hudson, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 752.

Persons entitled to benefit of restriction against assignment see *supra*, IV, B, 1, f, (II).

16. Baker *v.* J. Maier, etc., Brewery, 140 Cal. 530, 74 Pac. 22; Chicago Attachment Co. *v.* Davis Sewing-Mach. Co., (Ill. 1890) 25 N. E. 669 [*affirming* 33 Ill. App. 362]; Carter *v.* Hammett, 18 Barb. (N. Y.) 608; Carter *v.* Hammett, 12 Barb. (N. Y.) 253. See Mead *v.* Madden, 85 N. Y. App. Div. 10, 82 N. Y. Suppl. 900.

17. McMurphy *v.* Minot, 4 N. H. 251; Williams *v.* Bosanquet, 1 B. & B. 238, 3 Moore C. P. 500, 21 Rev. Rep. 585, 5 E. C. L. 72; Flight *v.* Bentley, 4 L. J. Ch. 262, 7 Sim. 149, 8 Eng. Ch. 149, 58 Eng. Reprint 793.

18. McKee *v.* Angelrodt, 16 Mo. 283; Knox *v.* Bailey, 4 Mo. App. 581; Tallman *v.* Bresler, 65 Barb. (N. Y.) 369; Levy *v.* Long Island Brewery, 26 Misc. (N. Y.) 410, 56 N. Y. Suppl. 242; Walton *v.* Cronly, 14 Wend. (N. Y.) 63; Eaton *v.* Jaques, Dougl. (3d ed.) 455.

19. *Louisiana.*—D'Aquin *v.* Armant, 14 La. Ann. 217.

Missouri.— Smith *v.* Brinker, 17 Mo. 148, 57 Am. Dec. 265.

New York.— People *v.* Dudley, 58 N. Y. 323.

Ohio.— Sutliff *v.* Atwood, 15 Ohio St. 186.

Tennessee.— McLean *v.* Caldwell, 107 Tenn. 138, 64 S. W. 16.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 830.

20. Smith *v.* Brinker, 17 Mo. 148, 57 Am. Dec. 265.

21. Dickinson Co. *v.* Fitterling, 69 Minn. 162, 71 N. W. 1030; Kain *v.* Hoxie, 2 Hilt. (N. Y.) 311; Bagley *v.* Freeman, 1 Hilt. (N. Y.) 196; Provost *v.* Calder, 2 Wend. (N. Y.) 517.

22. Dickinson Co. *v.* Fitterling, 69 Minn. 162, 71 N. W. 1030; Kain *v.* Hoxie, 2 Hilt. (N. Y.) 311; Bagley *v.* Freeman, 1 Hilt. (N. Y.) 196; Provost *v.* Calder, 2 Wend. (N. Y.) 517.

23. Eldredge *v.* Bell, 64 Iowa 125, 19 N. W. 879.

(E) *Effect of Reassignment* — (1) In General. An assignee of a lease, in the absence of any restraint in the instrument, can reassign to whomsoever he chooses, and relieve himself from responsibility;[24] but to work such an effect the privity of estate must be absolutely destroyed.[25]

(2) Liability For Accrued Rent. An assignee of a lease who takes possession of the leased premises is not released from liability for rent accruing during his possession by the fact that he afterward reassigns his lease to a third person.[26] It has been held, however, that an assignee is not liable at law after he has assigned over,[27] but that equity will give relief as to such antecedent rent.[28]

(3) Necessity of Consent of Lessor. The lessor need not assent to the reassignment or recognize the assignee as his tenant,[29] but acceptance of the assignment by the second assignee, either express or implied, is requisite to its validity.[30]

(4) Necessity of Entry by Second Assignee. It is not necessary that the second assignee should make an actual entry into possession of the demised premises in order to release the assignor from liability for rent,[31] except in the case of an assignment without deed, as of a chattel interest only, which requires some act of entry or change of actual possession to complete its operation and divest the assignor of the responsibility which arises from the holding of the estate.[32]

(5) Express Agreement by Assignee to Remain Bound. The assignee may, by contract between himself and the lessor, bind himself to the full performance of all the covenants of the lease, irrespective of the fact whether he parts with the title thereafter by a further assignment.[33] It is necessary, however, that

24. *California.*— Dengler *v.* Michelssen, 76 Cal. 125, 18 Pac. 138.

Illinois.— Springer *v.* Chicago Real Estate L. & T. Co., 202 Ill. 17, 66 N. E. 850 [*affirming* 102 Ill. App. 294] (holding that the lessor may provide that no further assignment shall take place without his consent); Readey *v.* American Brewing Co., 60 Ill. App. 501.

Missouri.—Tyler *v.* Giesler, 85 Mo. App. 278.

New York.— Wright *v.* Kelley, 4 Lans. 57; Carter *v.* Hammett, 18 Barb. 608; Stoppani *v.* Richard, 1 Hilt. 509; Stern *v.* Florence Sewing Mach. Co., 53 How. Pr. 478; Siefke *v.* Koch, 31 How. Pr. 383.

Pennsylvania.— Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Goss *v.* Woodland Fire Brick Co., 4 Pa. Super. Ct. 167.

Tennessee.— McLean *v.* Caldwell, 107 Tenn. 138, 64 S. W. 16.

Vermont.— Sharon Cong. Soc. *v.* Rix, (1889) 17 Atl. 719.

United States.— McBee *v.* Sampson, 66 Fed. 416.

England.— Valliant *v.* Dodemede, 2 Atk. 546, 26 Eng. Reprint 728; Richmond *v.* London, 1 Bro. P. C. 516, 1 Eng. Reprint 727; Paul *v.* Nurse, 8 B. & C. 486, 7 L. J. K. B. O. S. 12, 2 M. & R. 525, 15 E. C. L. 241; Odell *v.* Wake, 3 Campb. 394, 14 Rev. Rep. 763; Walker *v.* Reeve, 3 Dougl. 19, Dougl. (3d ed.) 461 note, 26 E. C. L. 24; Chancellor *v.* Poole, Dougl. (3d ed.) 764; Barnfather *v.* Jordan, Dougl. (3d ed.) 452; Rowley *v.* Adams, 3 Jur. 1069, 2 Jur. 915, 9 L. J. Ch. 34, 4 Myl. & C. 534, 18 Eng. Ch. 534, 41 Eng. Reprint 206; Fagg *v.* Dobie, 2 Jur. 681, 3 Y. & C. Exch. 96; Onslow *v.* Corrie, 2 Madd. 330, 56 Eng. Reprint 357.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 828.

25. Negley *v.* Morgan, 46 Pa. St. 281.

A merely colorable or fictitious assignment, which does not accomplish an actual transfer of the interest of the assignor in the demised premises, but leaves him in the rightful possession and enjoyment thereof, is a nullity. Tate *v.* McCormick, 23 Hun (N. Y.) 218, holding that the mere fact that the assignor continues in possession after the alleged assignment does not estop fraud nor render him liable for subsequent rent.

But if the assignment is actual, it is immaterial that it is made solely for the purpose of ridding the assignor of liability. Such fact does not impeach the validity of the assignment. Tate *v.* McCormick, 23 Hun (N. Y.) 218; Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Goss *v.* Woodland Fire Brick Co., 4 Pa. Super. Ct. 167; McLean *v.* Caldwell, 107 Tenn. 138, 64 S. W. 16; Taylor *v.* Shum, 1 B. & P. 21, 4 Rev. Rep. 759; Barnfather *v.* Jordan, Dougl. (3d ed.) 452.

26. Consolidated Coal Co. *v.* Peers, 150 Ill. 344, 37 N. E. 937 [*affirming* 39 Ill. App. 453]; McLean *v.* Caldwell, 107 Tenn. 138, 64 S. W. 16.

27. Hintze *v.* Thomas, 7 Md. 346; Fagg *v.* Dobie, 2 Jur. 681, 3 Y. & C. Exch. 96.

28. Fagg *v.* Dobie, 2 Jur. 681, 3 Y. & C. Exch. 96; Treackle *v.* Coke, 1 Vern. Ch. 165, 23 Eng. Reprint 389.

29. Sanders *v.* Partridge, 108 Mass. 556; Dougherty *v.* Matthews, 35 Mo. 520, 88 Am. Dec. 126.

30. Beattie *v.* Parrott Silver, etc., Co., 7 Mont. 320, 17 Pac. 451.

31. Tate *v.* McCormick, 23 Hun (N. Y.) 218.

32. Sanders *v.* Partridge, 108 Mass. 556.

33. Wilson *v.* Lunt, 11 Colo. App. 56, 52

such a promise by the assignee be supported by a new consideration or it will be void.[34]

c. In Case of Subleases — (I) *Liability of Lessee After Subletting.* The fact that a lessee sublets the premises does not affect his liability to the lessor for the rent,[35] unless the subtenant is accepted by the landlord as his immediate tenant, in which case the original lessee is discharged from liability from rent accruing subsequent to such acceptance.[36] A mere agreement, however, to pay rent to the lessor,[37] or the mere acceptance of rent by the landlord from a subtenant,[38] is not of itself sufficient to relieve the lessee from liability for future rent. If a lessee by reason of his subtenant's refusal to go out fails to deliver possession at the end of his term he will remain liable for the rent during the subtenant's occupancy.[39]

(II) *Liability of Sublessee* — (A) *To Lessor* — (1) In General. Between the lessor and the under-tenant of the original lessee there is neither privity of estate nor privity of contract. The lessor therefor cannot sue the under-tenant upon the lessee's covenant to pay rent,[40] unless the under-tenant has assumed the lease;[41] but before the landlord can sue the under-tenant on his contract for rent it must be transferred or assigned by the tenant to the landlord so as to make the latter the party really interested.[42] Nor can an action be maintained for the use and occupation of the premises unless there is an agreement for the use of the premises, express or implied, between the lessor and the sublessee.[43]

(2) Statutory Provisions. In some jurisdictions it is provided by statute that a subtenant shall be a tenant of the lessor and liable to him for rent.[44]

(3) Effect of Surrender by Tenant. A lessor who has accepted a sur-

Pac. 296; Consumers' Ice Co. *v.* Bixler, 84 Md. 437, 35 Atl. 1086; Lindsley *v.* Joseph Schnaide Brewing Co., 59 Mo. App. 271; Jackson *v.* Port, 17 Johns. (N. Y.) 479 [*affirming* 17 Johns. 239].

34. Dougherty *v.* Matthews, 35 Mo. 520, 88 Am. Dec. 126.

35. Kenyon *v.* Young, 48 Nebr. 890, 67 N. W. 885; Moffatt *v.* Smith, 4 N. Y. 126. See also Stone's Succession, 31 La. Ann. 311; Conrady *v.* Bywaters, (Tex. Civ. App. 1893) 24 S. W. 961.

36. Stimmel *v.* Waters, 2 Bush (Ky.) 282.

37. Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938.

38. Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979. See Waters *v.* Banks, 10 Mart. (La.) 94, holding that where a lessee divides a house and underlets one half, the lessor, who recovers from each party one half of the rent, cannot charge the original lessee with the whole.

39. Wilson *v.* Cincinnati, 10 Ohio Dec. (Reprint) 123, 18 Cinc. L. Bul. 10; Ibbs *v.* Richardson, 9 A. & E. 849, 3 Jur. 102, 8 L. J. Q. B. 126, 1 P. & D. 618, 36 E. C. L. 443; Harding *v.* Crethorn, 1 Esp. 57, 5 Rev. Rep. 719; Lindsay *v.* Robertson, 30 Ont. 229.

40. *Alabama.*—Bain *v.* Wells, 107 Ala. 562, 19 So. 774.

Connecticut. — Camp *v.* Scott, 47 Conn. 366.

Massachusetts.— Campbell *v.* Stetson, 2 Metc. 504.

New Hampshire.— Dartmouth College *v.* Clough, 8 N. H. 22.

New York.— Davis *v.* Morris, 36 N. Y. 569 [*affirming* 35 Barb. 227]; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394; McFarlan *v.* Watson, 3 N. Y. 286; Jennings *v.* Alexander, 1 Hilt. 154; Rehm *v.* Weiss, 8 Misc. 525, 28 N. Y. Suppl. 772.

North Carolina.— Krider *v.* Ramsay, 79 N. C. 354.

Ohio.— Fulton *v.* Stuart, 2 Ohio 215, 15 Am. Dec. 542.

Pennsylvania.— Graver's Appeal, 1 Lanc. L. Rev. 227.

Texas.— Giddings *v.* Felker, 70 Tex. 176, 7 S. W. 694; Knight *v.* Old, 2 Tex. App. Civ. Cas. § 77.

England.— Holford *v.* Hatch, Dougl. (3d ed.) 183; Berney *v.* Moore, 2 Ridg. App. 323. See 32 Cent. Dig. tit. "Landlord and Tenant," § 833.

Sublessee of assignee or under-tenant.—An under-tenant of the assignee of a lease is not liable to the original lessor for the rent due under the lease (Shattuck *v.* Lovejoy, 8 Gray, (Mass.) 204); and this rule is not changed by a statute providing that "rent may be recovered from the lessee or person owing it, of his assignee or undertenant" (Glasner *v.* Fredericks, 73 Mo. App. 424).

Subtenants going into possession under an assignment from the lessee with the consent of the lessor are liable for rent. Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 [*reversing* (App. 1901) 61 N. E. 12].

41. Sanarens *v.* True, 22 La. Ann. 181.

42. Simmons *v.* Fielder, 46 Ala. 304.

43. Jennings *v.* Alexander, 1 Hilt. (N. Y.) 154; Krider *v.* Ramsay, 79 N. C. 354.

44. Hulett *v.* Stockwell, 27 Mo. App. 328; Hicks *v.* Martin, 25 Mo. App. 359. But see St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607 (holding that Rev. St. (1889) §§ 6388,

render of the leasehold from the lessee cannot thereafter recover rent from the subtenant because neither privity of contract nor estate exists between the original lessee and the sublessee.[45]

(4) Extent of Liability. It has been held that a subtenant can be made liable to the original lessor in an action for use and occupation, or for rent, only for the time during which the occupancy of the premises by the subtenant continued.[46]

(B) *To Lessee.* A lessee who sublets the premises, being liable to the landlord as surety for the rent, may pay it before it is due, and have a cause of action against the sublessee when it is due.[47]

9. Apportionment and Abatement — a. In General. Apportionment of rent is defined as a division or partition of a rent, or a making of it into parts. This may be by the act of the law or the act of the parties.[48] Apportionment is for the benefit of the owners of the rent or the reversioners. Ordinarily it is against the interest of tenants, and the omission to apportion is not a matter of which they can complain.[49] This right of apportionment forms an exception to the rule that an entire contract cannot be apportioned.[50] Of course services to be rendered by the lessee in payment of the rent are indivisible and cannot be apportioned.[51]

b. As to Estate of Lessor or Those Claiming Under Him — (I) *In General.* Where lands held under lease are severed by the conveyance of a portion thereof to a stranger, the rent will be apportioned among the several owners of the reversion,[52]

6389, will not give the lessor the right to sue the sublessee in an action at law upon the covenant of the lease, unless a lien is sought or a right of attachment exists); Glasner *v.* Fredericks, 73 Mo. App. 424.

Under the law of Georgia, a subtenant becomes the tenant of the lessor at the election of the latter (McConnell *v.* East Point Land Co., 100 Ga. 129, 28 S. E. 80), but some affirmative action must be had by the landlord showing his election to treat the subtenant as his tenant (Hudson *v.* Stewart, 110 Ga. 37, 35 S. E. 178).

45. McDonald *v.* May, 96 Mo. App. 236, 69 S. W. 1059; Krider *v.* Ramsay, 79 N. C. 354. See also Williams *v.* Michigan Cent. R. Co., 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458.

But if the subtenant attorns to the original lessee, he thereby becomes liable to the landlord for rent for the full term of the lease. McDonald *v.* May, 96 Mo. App. 236, 69 S. W. 1059. See also Hessel *v.* Johnson, 129 Pa. St. 173, 18 Atl. 754, 15 Am. St. Rep. 716, 5 L. R. A. 851.

46. Pierce *v.* Minturn, 1 Cal. 470.

47. Crowley *v.* Gormley, 59 N. Y. App. Div. 256, 69 N. Y. Suppl. 576; Heard *v.* Lockett, 20 Tex. 162, holding that where an underlessee agrees with his lessor to pay rent to the original lessor, who, however, refuses to recognize the new tenant, and on demand is paid the rent by the first lessee, the latter may recover from his lessee, the rent agreed to be paid to the owner of the premises.

48. Swint *v.* McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. 1021, 63 Am. St. Rep. 791.

"It was, at one time, supposed by some that a rent-service incident to a reversion was lost by a grant of part of the reversion, and could not be apportioned. But this is not the law. A reversion is a thing in its nature severable, and the owner has an undoubted right to dispose of the whole, or any part of it, according to his necessities or convenience; and the rent, as incident to it, being a retribution for the land, may be divided and ought to be paid to those who are to have the land on the expiration of the lease. The accommodation of mankind requires that the rent shall be apportioned wherever there has been, either by act of the law, or by act of the party, a division made of the land out of which it issues; because without this privilege a man who can only dispose of his real estate to advantage by dividing it, might be forced to sacrifice it; and the heirs of a decedent might be seriously injured if they could not divide the inheritance without losing their remedies for the rents." Reed *v.* Ward, 22 Pa. St. 144, 149, per Lewis J.

Apportionment of rent does not mean abatement of it, because, although rent may be apportioned, the tenant still remains liable to pay the whole of it, but in different parts to different persons, except where he has purchased or acquired the reversion of part of the demised premises. Gluck *v.* Baltimore, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515.

49. People *v.* Dudley, 58 N. Y. 323.

50. Schultz *v.* Spreain, 1 Tex. App. Civ. § 916.

51. Van Rensselaer *v.* Gifford, 24 Barb. (N. Y.) 349; Van Rensselaer *v.* Bradley, 3 Den. 135, 45 Am. Dec. 451.

52. *Illinois.*— Crosby *v.* Loop, 13 Ill. 625.

Maryland.— Worthington *v.* Cooke, 56 Md. 51, holding further that the lessor may sue in covenant for the whole rent, and recover the part to which he is entitled.

Massachusetts.— Montague *v.* Gay, 17 Mass. 439.

Missouri.— Biddle *v.* Hussman, 23 Mo. 597, 602.

and the consent of the tenant is not essential to such apportionment.[53] A reversioner may sue for the rent, although it is due by reason of privity of contract and not privity of estate.[54] So on the death of a lessor the rent must be apportioned among the heirs on whom the estate is cast.[55] After rent has been apportioned the tenant is liable to separate actions and distresses.[56]

(II) *As to Successive Owners.* At common law the landlord or owner of the premises at the time the rent became payable collected and received the same, and the landlord or owner of the property during a part of the period such rent was earned, but not sustaining toward it either relation at the date the rent was payable according to the terms of the lease, had no redress against the party receiving the payment, except by special agreement.[57] By statute it is now frequently provided that where the estate or interest of the party previously receiving the rent terminates intermediate two periods fixed by the lease for its payment, then such rent shall be apportioned.[58]

(III) *Basis of Apportionment.* The apportionment of rent reserved in a lease or grant among several assignees of the lessee must be according to the value of the several parts held by each, and not according to the quantity or number of acres;[59] but if there is no proof of the relative value, the premises will be presumed to be of equal value, and the rent should be apportioned according to the quantity of land.[60]

c. As to Time. It is well settled both in law and in equity that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect of time,[61] in the absence of a provision made for such an apportionment by

New Jersey.— Gribbie *v.* Toms, 70 N. J. L. 522, 57 Atl. 144 [*affirmed* in 71 N. J. L. 338, 59 Atl. 1117].

New York.— Nellis *v.* Lathrop, 22 Wend. 121, 34 Am. Dec. 285.

Pennsylvania.— Linton *v.* Hart, 25 Pa. St. 193, 64 Am. Dec. 691; Reed *v.* Ward, 22 Pa. St. 144; Pennsylvania Bank *v.* Wise, 3 Watts 394.

Texas.— Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916.

Canada.— Hare *v.* Proudfoot, 6 U. C. Q. B. O. S. 617.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 836.

53. Gribbie *v.* Toms, 70 N. J. L. 522, 57 Atl. 144 [*affirmed* in 71 N. J. L. 338, 59 Atl. 117]; People *v.* Stuyvesant, 3 Thomps. & C. (N. Y.) 179. But see Bliss *v.* Collins, 5 B. & Ald. 876, 1 D. & R. 291, 24 Rev. Rep. 601, 7 E. C. L. 476.

54. Swansea *v.* Thomas, 10 Q. B. D. 48, 47 J. P. 135, 52 L. J. Q. B. 340, 47 L. T. Rep. N. S. 657, 31 Wkly. Rep. 506; Boulton *v.* Blake, 12 Ont. 532.

55. Crosby *v.* Loop, 13 Ill. 625; Pennsylvania Bank *v.* Wise, 3 Watts (Pa.) 394.

56. De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217; Hare *v.* Proudfoot, 6 U. C. Q. B. O. S. 617.

57. Knowles *v.* Maynard, 13 Metc. (Mass.) 352; Matter of Eddy, 10 Abb. N. Cas. (N. Y.) 396.

58. Matter of Eddy, 10 Abb. N. Cas. (N. Y.) 396; Spruill *v.* Arrington, 109 N. C. 192, 13 S. E. 779.

59. *Illinois.*— Leiter *v.* Pike, 127 Ill. 287, 20 N. E. 23; Babcock *v.* Scoville, 56 Ill. 461.

Massachusetts.— Daniels *v.* Richardson, 22 Pick. 565.

New Jersey.— Gribbie *v.* Toms, 70 N. J. L. 522, 57 Atl. 144 [*affirmed* in 71 N. J. L. 338, 59 Atl. 1117].

New York.— Van Rensselaer *v.* Jones, 2 Barb. 643; Van Rensselaer *v.* Gallup, 5 Den. 454; Gillespie *v.* Thomas, 15 Wend. 464.

Pennsylvania.— Seabrook *v.* Moyer, 88 Pa. St. 417; Reed *v.* Ward, 22 Pa. St. 144; Doyle *v.* Longstreth, 6 Pa. Super. Ct. 475.

Vermont.— Pingrey *v.* Watkins, 15 Vt. 479.

England.— O'Connor *v.* O'Connor, Ir. R. 4 Eq. 483, 19 Wkly. Rep. 90.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 835 *et seq.*

60. Van Rensselaer *v.* Jones, 2 Barb. (N. Y.) 643.

61. *Alabama.*—English *v.* Key, 39 Ala. 113.

Maine.— Anderson *v.* Robbins, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568.

Maryland.—Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

Massachusetts.— Emmes *v.* Feeley, 132 Mass. 346; Adams *v.* Bigelow, 128 Mass. 365; Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261; Sohier *v.* Eldredge, 103 Mass. 345; Earle *v.* Kingsbury, 3 Cush. 206.

New Hampshire.— Russell *v.* Fabyan, 28 N. H. 543, 61 Am. Dec. 629; Perry *v.* Aldrich, 13 N. H. 343, 38 Am. Dec. 493.

New York.— New York *v.* Ketchum, 67 How. Pr. 161.

Texas.— Hearne *v.* Lewis, 78 Tex. 276, 14 S. W. 572; Porter *v.* Sweeney, 61 Tex. 213.

England. — Clun's Case, 10 Coke 127*a*; Browne *v.* Amyot, 3 Hare 173, 8 Jur. 485, 13 L. J. Ch. 232, 25 Eng. Ch. 173, 67 Eng. Reprint 343; *In re* Markby, 3 Jur. 767, 4 Myl. & C. 484, 18 Eng. Ch. 484, 41 Eng. Reprint 187; *In re* Clulow, 3 Kay & J. 689, 26 L. J. Ch.

statute,[62] or an express agreement in the lease to that effect.[63] The objection is stronger against the lessor where he puts an end to the lease by his own act without necessity.[64]

d. As to Extent of Premises Held by Lessee. A landlord who does not give his tenant possession of the whole of the demised premises cannot apportion the rent according to what the tenant does occupy and distrain for that portion.[65] But if the lessee surrenders a part of the land to the lessor, the rent for the remainder is apportioned.[66] Where the estate out of which the rent issues is assigned to two or more the rent should be apportioned according to their several holdings.[67]

e. As Dependent on Lessee's Possession and Enjoyment of Premises — (i) *Eviction From Premises* — (a) *By Landlord.* Where several persons hold the entire interest of the original lessee, not as joint purchasers, but by separate deeds of assignment, each of them an undivided interest, they are not jointly liable to the lessor for the whole rent.[68] The law will not apportion rent in favor or a wrong-doer, and therefore if the landlord wrongfully dispossesses his tenant of any portion of the demised premises the rent is suspended for the whole.[69]

513, 5 Wkly. Rep. 544, 69 Eng. Reprint 1287; Ellis *v.* Rowbotham, 80 L. T. Rep. N. S. 328; Jenner *v.* Morgan, 1 P. Wms. 392, 24 Eng. Reprint 439; *Ex p.* Smith, 1 Swanst. 337, 36 Eng. Reprint 412.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 838.

62. Stayton *v.* Morris, 4 Harr. (Del.) 224; Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364; New York *v.* Ketchum, 67 How. Pr. (N. Y.) 161.

Since 37 Vict. c. 10, rent is to be considered as accruing from day to day, and to be apportionable in respect of time accordingly. Hartcup *v.* Bell, Cab. & E. 19; Kinnear *v.* Aspden, 19 Ont. App. 468; Boulton *v.* Blake, 12 Ont. 532; Barnes *v.* Bellamy, 44 U. C. Q. B. 303.

Sts. 11 Geo. II, c. 19, and 4 & 5 Wm. IV, c. 22, relating to this subject are construed in Mills *v.* Trumper, L. R. 4 Ch. 320, 20 L. T. Rep. N. S. 384, 17 Wkly. Rep. 428; Llewellyn *v.* Rous, L. R. 2 Eq. 27, 35 Beav. 591, 12 Jur. N. S. 580, 55 Eng. Reprint 1026; Mills *v.* Trumper, L. R. 1 Eq. 671, 12 Jur. N. S. 329, 14 L. T. Rep. N. S. 220, 14 Wkly. Rep. 630; Oldenshaw *v.* Holt, Arn. & H. 1, 12 A. & E. 590, 4 Jur. 1012, 11 L. J. Q. B. 221, 4 P. & D. 307, 40 E. C. L. 295; St. Aubyn *v.* St. Aubyn, 1 Dr. & Sm. 611, 30 L. J. Ch. 917, 5 L. T. Rep. N. S. 519, 9 Wkly. Rep. 922, 62 Eng. Reprint 512; Botheroyd *v.* Woolley, 1 Gale 66, 4 L. J. Exch. 153, 5 Tyrw. 522; Browne *v.* Amyot, 3 Hare 173, 8 Jur. 485, 13 L. J. Ch. 232, 25 Eng. Ch. 173, 67 Eng. Reprint 343; Plummer *v.* Whiteley, Johns. 585, 5 Jur. N. S. 1416, 29 L. J. Ch. 247, 1 L. T. Rep. N. S. 230, 8 Wkly. Rep. 120; Cattley *v.* Arnold, 1 Johns. & H. 651, 5 Jur. N. S. 361, 28 L. J. Ch. 352, 7 Wkly. Rep. 245; *In re* Markby, 3 Jur. 767, 4 Myl. & C. 484, 18 Eng. Ch. 484, 41 Eng. Reprint 187; Brown *v.* Candler, 9 L. J. Ch. O. S. 212; Sutton *v.* Chaplin, 10 Ves. Jr. 66, 32 Eng. Reprint 768.

63. Hecht *v.* Heerwagen, 14 Misc. (N. Y.) 529, 35 N. Y. Suppl. 1090.

64. Zule *v.* Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600.

65. Hatfield *v.* Fullerton, 24 Ill. 278; Knox *v.* Hexter, 71 N. Y. 461 [*reversing* 42 N. Y. Super. Ct. 8]; Lawrence *v.* French, 25 Wend. (N. Y.) 443.

66. Ehrman *v.* Mayer, 57 Md. 612.

67. Daniels *v.* Richardson, 22 Pick. (Mass.) 565; Harris *v.* Frank, 52 Miss. 155; Van Rensselaer *v.* Chadwick, 24 Barb. (N. Y.) 333; Main *v.* Davis, 32 Barb. (N. Y.) 461; Van Rensselaer *v.* Gallup, 5 Den. (N. Y.) 454; Pingrey *v.* Watkins, 15 Vt. 479; Hare *v.* Proudfoot, 6 U. C. Q. B. O. S. 617.

68. Each assignee is severally liable for a part only, according to his interest in the premises as compared with the whole interest under the lease. Babcock *v.* Scoville, 56 Ill. 461; St. Louis Public Schools *v.* Boatmen's Ins., etc., Co., 5 Mo. App. 91, holding that the liability of the assignee of a lease is measured by the extent of his possessory right, and not by the extent of his possession. Thus if he is assigned by one of two lessees an undivided half interest, he is only liable for half the rent reserved in the lease, although he has exclusive occupation of the whole premises. *Compare* Damainville *v.* Mann, 32 N. Y. 197, 88 Am. Dec. 324.

69. *Arkansas.*— Collins *v.* Karatopsky, 36 Ark. 316.

California.— Skaggs *v.* Emerson, 50 Cal. 3.

Illinois.— Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108.

Massachusetts.— Fillebrown *v.* Hoar, 124 Mass. 580.

New York.— Carter *v.* Burr, 39 Barb. 59; Moffat *v.* Strong, 9 Bosw. 57; Hegeman *v.* McArthur, 1 E. D. Smith 147; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. 449, 43 How. Pr. 433.

Ohio.— Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188.

Pennsylvania.— Linton *v.* Hart, 25 Pa. St. 193, 64 Am. Dec. 691; Reed *v.* Ward, 22 Pa. St. 144.

Texas.— Nolan *v.* Stauffacher, 3 Ter. App. Civ. Cas. § 372.

Virginia.— Tunis *v.* Grandy, 22 Gratt. 109.

England.— Clapham *v.* Draper, Cab. & E. 484.

But an eviction by the grantee of the lessor without the lessor's agency or procurement does not debar the lessor from recovering rent for that portion of the premises remaining in his possession.[70]

(B) *By Title Paramount.* Eviction by another under title paramount if of the whole of the demised premises suspends the whole rent;[71] if of a part it entitles the lessee to an apportionment.[72] But rent cannot properly be apportioned unless at some period the tenant has been subject to the entire rent by virtue of the demise.[73]

(II) *Appropriation of Part of Premises to Public Use.* It is held in some jurisdictions that the condemnation and appropriation to public use of a part of leased premises extinguishes a ratable proportion of the rent,[74] even though the part left is more valuable than the whole premises were before,[75] but the contrary is held in many states.[76]

f. As Dependent Upon Condition of Premises — (I) *In General.* Since there is no implied covenant that premises are in a tenantable condition, or that they shall continue to remain such, defects manifesting themselves subsequently to the beginning of the term which defeat the purpose of the lessee in taking the premises will not entitle him to an apportionment of the rent, even if the lease specifies the use which is to be made of the premises.[77] It has been held, how-

Canada.— Shuttleworth *v.* Shaw, 6 U. C. Q. B. 517.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 842.

No bar to accrued rent.—When rent is payable quarterly in advance, an eviction for non-payment during the quarter is no bar to an action for the rent, but the tenant must pay rent for so much of the quarter as had elapsed at the time of the eviction. Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

70. Gribbie *v.* Toms, 70 N. J. L. 522, 57 Atl. 144 [*affirmed* in 71 N. J. L. 338, 59 Atl. 1117].

71. Moffat *v.* Strong, 9 Bosw. (N. Y.) 57; Matter of Arkell Pub. Co., 29 Misc. (N. Y.) 145, 60 N. Y. Suppl. 832; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. (N. Y.) 449, 43 How. Pr. 433; Tunis *v.* Grandy, 22 Gratt. (Va.) 109. See also *supra*, VIII, a, 3, l.

72. *Arkansas.*— Collins *v.* Karatopsky, 36 Ark. 316.

Illinois.— Halligan *v.* Wade, 21 Ill. 470, 74 Am. Dec. 108.

Louisiana.— Wood *v.* Sala y Fabrigas, 105 La. 1, 29 So. 367; Foucher *v.* Choppin, 17 La. Ann. 321.

Massachusetts.—Fillebrown *v.* Hoar, 124 Mass. 580; Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268.

Mississippi.— Cheairs *v.* Coats, 77 Miss. 846, 28 So. 728, 78 Am. St. Rep. 546.

Missouri.— McFadin *v.* Rippey, 8 Mo. 738, holding that an eviction from a part of the premises may be shown in reduction of rent in an action for use and occupation.

New York.— Carter *v.* Burr, 39 Barb. 59; Moffat *v.* Strong, 9 Bosw. 57; Hegeman *v.* McArthur, 1 E. D. Smith 147; Johnson *v.* Oppenheim, 12 Abb. Pr. N. S. 449, 43 How. Pr. 433.

North Carolina.— Poston *v.* Jones, 37 N. C. 350, 38 Am. Dec. 682.

Ohio.— Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188.

Pennsylvania.— Garrison *v.* Moore, 1 Phila. 282.

Virginia.— Tunis *v.* Grandy, 22 Gratt. 109.

England.—Elvidge *v.* Meldon, L. R. 24 Ir. 91.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 842.

The removal of party stairs between the demised premises and an adjoining building by the lawful removal of such building does not entitle the lessee to an apportionment of rent. Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

Special plea necessary.— In an action of covenant against the assignee of a term, defendant, under a general plea that he does not hold as assignee, cannot ask for an apportionment of the rent because he has been evicted from a part of the premises. In order to entitle him to an apportionment on this account, he must plead the fact specially and not in bar of the whole action. Lansing *v.* Van Alstyne, 2 Wend. (N. Y.) 561.

73. Neale *v.* Mackenzie, 2 Gale 174, 6 L. J. Exch. 263, 1 M. & W. 747; Kelly *v.* Irwin, 17 U. C. C. P. 351.

74. Leiter *v.* Pike, 127 Ill. 287, 20 N. E. 23; David *v.* Beelman, 5 La. Ann. 545; Kingsland *v.* Clark, 24 Mo. 24; Biddle *v.* Hussman, 23 Mo. 597; Gillespie *v.* Thomas, 15 Wend. (N. Y.) 464.

But if a tenant voluntarily renews his lease, with knowledge of the appropriation of the land, he is not entitled to an apportionment. Gillespie *v.* New York, 23 Wend. (N. Y.) 643.

Where a portion of demised premises is taken for opening or widening a street, the abatement of rent takes place from the time of the confirmation of the commissioner's report of estimates and assessments. Gillespie *v.* Thomas, 15 Wend. (N. Y.) 464.

75. Gillespie *v.* Thomas, 15 Wend. (N. Y.), 464.

76. See *supra*, VIII, A, 3, k.

77. Samuel *v.* Scott, 13 Phila. (Pa.) 64.

ever, that where a change in the condition of the premises or some other circumstance renders them less valuable there may be a reduction in the rent.[78] Thus a tenant's liability for rent is subject to a deduction of any damages he may sustain by reason of his lessor's failure to repair, if such failure was the latter's fault;[79] but where the lessee is empowered by the lease to make all necessary repairs, and to deduct the expense from the rent, he cannot claim a deduction from the rent on account of the premises becoming untenantable.[80]

(II) *INJURY TO OR DESTRUCTION OF PREMISES.* The general doctrine of the common law was that upon a covenant in a lease of land and buildings for a term of years to pay rent, the rent could be recovered even after a destruction of the building by accidental fire.[81] This contingency is now usually provided for in the lease.[82] Thus it is customary to insert in leases a stipulation providing for an abatement of rent in case the premises or any part thereof shall be destroyed or damaged by fire, or any other unavoidable casualty, so that the same shall be thereby rendered unfit for use or habitation.[83] So it is provided by statute in some states that where leased property is partly destroyed by fire, the tenant has the right to demand a diminution of the rent.[84]

10. PAYMENT — a. In General. No matter from whom the rent is received its payment will extinguish a demand therefor.[85] Conversely no voluntary payment

78. Whittemore *v.* Moore, 9 Dana (Ky.) 315.

79. Young *v.* Burhans, 80 Wis. 438, 50 N. W. 343.

Temporary inconvenience caused by an adjacent proprietor availing himself of his legal right to demolish and rebuild a common wall justifies a reasonable reduction of the rent. Dorville *v.* Amat, 6 La. Ann. 566.

A parol agreement made at the time of the contract for a lease to make improvements on the premises and not fulfilled does not give to the lessee a legal claim for a deduction from the stipulated rent. New York *v.* Price, 5 Sandf. (N. Y.) 542.

80. Wolcott *v.* Sullivan, 1 Edw. (N. Y.) 399.

81. See *supra*, VIII, A, 4, b.

82. See Chamberlain *v.* Godfrey, 50 Ala. 530; Rich *v.* Smith, 121 Mass. 328.

A clause in a lease, providing for an apportionment of rent in the event of a partial occupancy in consequence of injury to the premises, has no application where, because of such injury, the premises are wholly untenantable and wholly unoccupied. New York Real Estate, etc., Imp. Co. *v.* Motley, 143 N. Y. 156, 38 N. E. 103 [*affirming* 3 Misc. 232, 22 N. Y. Suppl. 705].

Where a note is given in consideration of the acceptance by the lessor of the surrender of the lease, the lessee has no further interest in the estate, and his liability on the note is not affected by the condition of the premises. Brooks *v.* Cutter, 119 Mass. 132.

83. Welles *v.* Castles, 3 Gray (Mass.) 323; Bigelow *v.* Collamore, 5 Cush. (Mass.) 226 (holding that where a water wheel broke down by age and decay for want of repair, it is not caused by unavoidable casualty); Phillips *v.* Sun Dyeing, etc., Co., 10 R. I. 458 (holding that the rupture of two steam boilers while in use at a low steam pressure and with a moderate fire is an unavoidable casualty); Sauer *v.* Bilton, 7 Ch. D. 815, 47 L. J. Ch. 267, 38 L. T. Rep. N. S. 281, 26 Wkly. Rep. 394 (holding that the words "inevitable accident" do not apply to that which, although not avoidable so far as the lessee is concerned, is not in its nature inevitable, but results from the fault of the lessor); McGill *v.* Proudfoot, 4 U. C. Q. B. 33.

The overflow of the Mississippi river is of such frequent occurrence that it cannot be said to be of such extraordinary nature that it could not have been foreseen, and therefor an abatement of rent cannot be claimed. Payne *v.* James, 45 La. Ann. 381, 12 So. 492; Vinson *v.* Graves, 16 La. Ann. 162. See also Viterbo *v.* Friedlander, 120 U. S. 707, 7 S. Ct. 962, 30 L. ed. 776 [*reversing* 24 Fed. 320], holding that while the overflow of the Mississippi river is not such an unforeseen event as to entitle the lessee to an abatement of rent, it is of so grave a character as to entitle him to an annulment of the lease.

84. Higgins *v.* Wilner, 26 La. Ann. 544; Penn *v.* Kearny, 21 La. Ann. 21; Taylor *v.* Hart, 73 Miss. 22, 18 So. 546, 30 L. R. A. 716.

Where the common-law rule has not even been limited by statute, in a few instances its applicability to real estate contracts has been questioned, and the rule formulated as follows: Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. Whitaker *v.* Hawley, 25 Kan. 674, 37 Am. Rep. 277; Wattles *v.* South Omaha Ice, etc., Co., 50 Nebr. 251, 69 N. W. 785, 61 Am. St. Rep. 554, 36 L. R. A. 424; Cutler *v.* Potts, 3 N. C. 26, 60; Ripley *v.* Wightman, 4 McCord (S. C.) 447.

85. Baker *v.* Pratt, 15 Ill. 568. A lessee who has assigned his interest in the lease to his cotenant cannot, by afterward paying the rent to the end of the term, and taking an assignment to himself of the interest of

to any third person without the landlord's direction and consent can satisfy the landlord's claim,[86] unless such payment is made in reliance on the landlord's admission that such party is entitled thereto.[87] If, however, leased property is seized by some paramount authority, and the lessee compelled to pay rent to another under a new lease, such payment discharges his liability to the owner of the property.[88] So also payment made to a levying officer in whose hands a distress warrant has been placed will discharge the tenant.[89]

b. By Under-Tenant. An under-tenant exposed to distress or ejectment for rent due the landlord may in default of payment by the intermediate tenant pay the same, and thus discharge his own rent or obligation to his immediate landlord,[90] and it is not necessary that the head landlord should distrain or even demand the money, or commence or threaten suit.[91] But a subtenant who, on entry of the landlord to determine his, the subtenant's, lessor's estate for nonpayment of rent, attorns to such landlord and pays him rent, will still be liable to his lessor for such rent, if the forfeiture is remitted.[92]

c. Pending Action Against Lessor to Recover Possession or Determine Title. A tenant who leases real estate from the apparent legal owner, to whom he pays the rent in full, is not liable to another for rent accruing prior to a decree confirming the title in such other, where he is not made a party to the proceedings which were commenced before but not decided until after the expiration of the tenancy and full payment of the rent;[93] but for the rent accruing after the decree the tenant is liable notwithstanding payment to his lessor.[94]

d. In Advance — (I) *IN GENERAL.* The payment of rent in advance is a valid payment and a good discharge *pro tanto* from the claim of the lessor, to whom payment is made, and a good bar to the claim of his assignee.[95] A promise by the lessee, after the lease is signed, to pay rent in advance, contrary to the terms in the lease, requires a new consideration to support it.[96]

(II) *AS CONDITION PRECEDENT.* Where payment of rent in advance is a condition precedent, failure of the tenant to so pay it justifies the landlord in considering the agreement at an end.[97]

(III) *TENANT HAS WHOLE OF FIRST DAY.* Where rent is made payable quarterly or at other stated intervals in advance, the tenant has the whole of the first day of each succeeding quarter or other interval of time in which to make the payment.[98]

(IV) *INTEREST ON PAYMENTS.* A lessee is entitled to interest on advance

the lessor, recover on the lease, from his cotenant, or a tenant of his cotenant, the amount of rent so paid by him, as by such payment all obligations under the lease are discharged. Holman *v.* De Lin-River-Finley Co., 30 Oreg. 428, 47 Pac. 708.

86. Mohr *v.* Quigley, 30 Misc. (N. Y.) 753, 63 N. Y. Suppl. 149; Gibbons *v.* Hamilton, 33 How. Pr. (N. Y.) 83.

87. Winterink *v.* Maynard, 47 Iowa 366. See also Campbell *v.* Heflin, (Tex. App. 1890) 16 S. W. 539.

88. Harrison *v.* Myer, 92 U. S. 111, 23 L. ed. 606.

89. White *v.* Mandeville, 72 Ga. 705.

90. Thompson *v.* Commercial Guano Co., 93 Ga. 282, 20 S. E. 309; Peck *v.* Ingersoll, 7 N. Y. 528; Kedney *v.* Rohrbach, 14 Daly (N. Y.) 54, 3 N. Y. St. 574; Lageman *v.* Kloppenburg, 2 E. D. Smith (N. Y.) 126; Raubitscheck *v.* Semken, 4 Abb. N. Cas. (N. Y.) 205 note; Collins *v.* Whilldin, 3 Phila. (Pa.) 102; Carter *v.* Carter, 5 Bing. 406, 7 L. J. C. P. O. S. 141, 2 M. & P. 723, 30 Rev. Rep. 677, 15 E. C. L. 643; Jones *v.* Morris, 3 Exch. 742, 18 L. J. Exch. 477; Graham *v.* Allsop, 3 Exch. 186, 18 L. J. Exch. 85.

91. The right to enforce his claim will make the payment by the under-tenant compulsory within the principle of the decisions. Peck *v.* Ingersoll, 7 N. Y. 528; Kedney *v.* Rohrbach, 14 Daly (N. Y.) 54, 3 N. Y. St. 574; Lageman *v.* Kloppenburg, 2 E. D. Smith (N. Y.) 126; Raubitscheck *v.* Semken, 4 Abb. N. Cas. (N. Y.) 205 note.

92. Wilson *v.* Jones, 1 Bush (Ky.) 173.

93. Gardner *v.* Gardner, 25 Iowa 102.

94. Gardner *v.* Gardner, 25 Iowa 102; Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916.

95. Stone *v.* Patterson, 19 Pick. (Mass.) 476, 31 Am. Dec. 156; Farley *v.* Thompson, 15 Mass. 18.

96. Hasbrouck *v.* Winkler, 48 N. J. L. 431, 6 Atl. 22.

97. McGaunten *v.* Wilbur, 1 Cow. (N. Y.) 257.

98. Smith *v.* Shepard, 15 Pick. (Mass.) 147, 25 Am. Dec. 432.

payments of rent which are made for the accommodation of the lessor and at his request.[99]

e. Medium of Payment — (i) *In General.* While payment of rent is usually made in money,[1] it may be made in any manner that the parties may mutually agree upon.[2]

(ii) *By Care and Maintenance.* It may be agreed that one may occupy land in consideration of furnishing a home for another. In such a case, so long as the lessee complies with the terms of the agreement, no money judgment can be taken against him;[3] and such care and maintenance of the lessor will operate as a satisfaction of the rent during the entire term of the lease, even though the lessee dies before its expiration.[4]

(iii) *In Labor.* Where a lease provides that the rent may be paid in labor, or that the lessee shall be entitled to credit for certain work to be performed by him during the term, he is entitled to credit for all labor performed by him during the term, whether before or after the date fixed for payment of the rent.[5]

(iv) *By Making Repairs.* Repairs made by stipulation and agreement are matters which the landlord is bound to allow on the rent account, and he cannot authorize and direct repairs to be made by a tenant and then compel the payment of the full amount of rent without settlement.[6] If certain repairs among others are specified, but not made, the expense of making them must be deducted from the amount claimed for repairs made.[7] If the amount allowed for repairs exceeds the amount of rent due at that time liability for rent is totally extinguished.[8]

(v) *By Bond, Note, or Draft.* The giving of a note, bond, or draft by a lessee to his lessor for the amount of the rent stipulated in the lease, and payable at the time the rent is payable, is not of itself payment of the rent,[9] whether it is reserved by deed or parol;[10] and the negotiability of the note makes no difference, so long as in fact it has not been negotiated.[11] But if by express agreement a note is received as payment, it satisfies the original contract and the lessor must take his remedy upon it.[12] If he would have judgment for the rent due under the lease he must surrender the notes for cancellation.[13] So if the landlord takes

99. Missouri, etc., Trust Co. *v.* Richardson, 57 Nebr. 617, 78 N. W. 273.

1. Constantine *v.* Wake, 1 Sweeny (N. Y.) 239.

Payment in foreign coin.—Where rent is reserved payable in a foreign coin, it is computed at so much of the coin made current by law as at the rate of exchange will be equal in value to the foreign coin in the country where issued. Newman *v.* Keffer, 18 Fed. Cas. No. 10,177, Brunn. Col. Cas. 502, 33 Pa. St. 442 note.

2. See *infra*, VIII, A, 10, e, (II)–(VII).

3. Shouse *v.* Krusor, 24 Mo. App. 279.

4. Matter of Williams, 1 Misc. (N. Y.) 35, 22 N. Y. Suppl. 906.

5. Crawford *v.* Armstrong, 58 Mo. App. 214.

6. Sweetser *v.* Shorter, 123 Ala. 518, 26 So. 298; Trathen *v.* Kipp, 15 Colo. App. 426, 62 Pac. 962.

7. Bachelder *v.* Dean, 20 N. H. 467, holding further that if a tenant authorized by the terms of a lease to pay the rent by making repairs, used for that purpose, with the consent of the lessors, and without accounting, materials belonging to them, he cannot, in accounting with the assignee of the reversion, charge him with their value.

8. Mobile County *v.* Hagan, 48 Ala. 54.

9. *Maryland.*— Wolgamot *v.* Bruner, 4 Harr. & M. 89.

Ohio.— Sutliff *v.* Atwood, 15 Ohio St. 186.

Pennsylvania.— Snyder *v.* Kunkleman, 3 Penr. & W. 487; Kendig *v.* Kendig, 3 Pittsb. 287.

United States.— Arguelles *v.* Wood, 1 Fed. Cas. No. 520, 2 Cranch C. C. 579; *In re* Bowne, 3 Fed. Cas. No. 1,741, 1 N. Y. Wkly. Dig. 100; Josse *v.* Shultz, 13 Fed. Cas. No. 7,551, 1 Cranch C. C. 135.

Canada.— McLeod *v.* Darch, 7 U. C. C. P. 35.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 852.

Compare Bon *v.* Fenlon, 97 N. Y. App. Div. 635, 89 N. Y. Suppl. 961.

Where a tenant who holds possession under a defaulting vendee, whose purchase is rescinded by the vendor, gives the vendee, before he has notice of the rescission, a negotiable promissory note, not due at the time of the notice, in payment of the rent, he is not liable over again to the vendor for the rent. Jones *v.* Hutchinson, 21 Tex. 370.

10. Cornell *v.* Lamb, 20 Johns. (N. Y.) 407.

11. Sutliff *v.* Atwood, 15 Ohio St. 186.

12. Howell *v.* Webb, 2 Ark. 360; Mulligan *v.* Hollingsworth, 99 Fed. 216.

13. Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650.

the note of a third person for the amount of rent due from his tenant, and gives time for payment to the third person until he fails, the rent is extinguished.[14]

(vi) *In Crops or Goods.* The lessor of premises may of course agree to receive crops or goods instead of money in payment of the rent.[15] Where the rent of a farm is payable in products of the soil raised upon it, division and delivery are essential to vest the title to such crops in the landlord.[16] An agreement for commutation of the rent payable in specific articles is not to be presumed from a course of dealing which is quite as consistent with a substantial and satisfactory performance of the original contract by paying from time to time the equivalent in money of the articles stipulated to be delivered.[17]

(vii) *By Mutual Account.* A mutual account does not constitute a payment or satisfaction of rent unless the lessor agrees that it shall have that effect.[18]

f. Place of Payment. Where no place is appointed for payment, rent issuing out of land is payable on the land.[19]

g. Tender — (i) *In General.* Tender of rent must be made by one in privity of contract with the lessor.[20] Suspension of rent by eviction renders a tender unnecessary.[21] Where a lease provides for the payment of rent to be made in specific articles at an agreed price, and the tenant tenders the articles, the rent is extinguished, notwithstanding the real value is much greater or less than that agreed upon.[22]

(ii) *Time of Tender.* A tender of payment of rent before[23] or after[24] the day of its falling due is not a sufficient legal tender. If, however, the rent day fixed by the lease falls on Sunday, a tender of rent on the following day is sufficient.[25]

(iii) *Place of Tender.* Where rent is payable either in money or kind, and the lease is silent as to the place of payment, a tender of the rent by the lessee upon the land is good; and it is not required of the lessee to make the tender to the lessor personally.[26]

h. Effect of Receipt — (i) *In General.* The lessee on paying rent has the right to require from the lessor a receipt, signed by his own hand, or by a person specially authorized by him.[27] If a lessor negligently signs a receipt without reading it, in the absence of fraud, he is bound by its provisions.[28]

(ii) *As Presumption of Payment.* A written receipt not under seal is not conclusive of payment but is always open to explanation and contradiction by parol evidence.[29] But a receipt expressed to be in full is strongly presumptive evidence

14. Josse *v.* Shultz, 13 Fed. Cas. No. 7,551, 1 Cranch C. C. 135.

15. Constantine *v.* Wake, 1 Sweeny (N. Y.) 239. See also Davis *v.* Hamilton, 71 Ind. 135; Whiting *v.* Hood, 3 N. Y. St. 464; Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938.

Renting on shares see *infra*, XI.

16. Burns *v.* Cooper, 31 Pa. St. 426, holding that any act intended to and which does in fact enable the landlord to obtain dominion over the thing paid is a sufficient delivery to divest the tenant's title. See also *In re* Waite, 7 Pick. (Mass.) 100, 19 Am. Dec. 262.

17. Lilley *v.* Fifty Associates, 101 Mass. 432.

18. Ashton *v.* Clapier, Brightly (Pa.) 481.

19. Livingston *v.* Miller, 8 N. Y. 283; Remsen *v.* Conklin, 18 Johns. (N. Y.) 447.

Where the lease provides that rent in kind is payable at such place in a town as the lessor shall appoint, and no appointment is made, it is the duty of the lessee to ascertain the place of payment. If the landlord cannot be found there may be a delivery at any place in the town. Livingston *v.* Miller, 11 N. Y. 80; Lush *v.* Druse, 4 Wend. (N. Y.) 313. *Compare* Remsen *v.* Conklin, 18 Johns. (N. Y.) 447.

20. Prieur *v.* Depouilly, 8 La. Ann. 399.

21. Bauer *v.* Broden, 3 Phila. (Pa.) 214.

22. Heywood *v.* Heywood, 42 Me. 229, 66 Am. Dec. 277.

23. Illingworth *v.* Miltenberger, 11 Mo. 80.

24. Dewey *v.* Humphrey, 5 Pick. (Mass.) 187.

25. Warne *v.* Wagenor, (N. J. Ch. 1888) 15 Atl. 307.

26. Fordyce *v.* Hathorn, 57 Mo. 120 (holding that after tender upon the premises, the tenant holds the property so set apart at the risk and expense of the landlord); Walter *v.* Dewey, 16 Johns. (N. Y.) 222.

27. Plamondon *v.* Mathieu, 16 Quebec Super. Ct. 32.

28. Jenkins *v.* Clyde Coal Co., 82 Iowa 618, 48 N. W. 970.

29. Patterson *v.* Ackerson, 2 Edw. (N. Y.) 427 (holding that where the lessor claims against the face of such a receipt, it is for him to prove his prior demands, and it is

of payment of all former arrears.[30] So a receipt for rent for a particular month or year is presumptive evidence that the rent which previously accrued has been paid.[31] A receipt for a specific sum does not afford the presumption that a different sum due on another instrument was paid at the same time.[32]

i. Application of Payments — (i) *In General.* Payments made by a tenant to his landlord on account of rent generally will, in the absence of any direction by the tenant or any agreement of the parties, be applied to the extinguishment of the rents first accrued.[33] A landlord receiving a payment of rent from two joint lessees cannot, without the consent of both, apply it to the payment of an individual debt of one of them, leaving the rent unpaid,[34] and if he does so, and subsequently sues for the rent, the other lessee may in such suit have the payment credited to the rent.[35]

(ii) *To Rent or Advances.* Where a tenant indebted for rent and advances makes a general payment without directing its application the landlord may apply it to either portion of the debt.[36]

j. Recovery of Payments — (i) *In General.* Rent paid under coercion or duress may be recovered, but the coercion or duress which will render a payment involuntary must in general consist of some actual or threatened exercise of power possessed or believed to be possessed by the lessor over the person or property of the lessee, from which the latter has no other immediate relief than by making payment.[37] So a payment made by a tenant in ignorance of the fact that he had been evicted,[38] or that the lessor has no title to a part of the leased property,[39] may be recovered, unless he has enjoyed the full term of the lease without being interrupted or obliged to attorn.[40]

(ii) *Rent Paid in Advance.* It is held in some cases, on the theory that there has been a failure of consideration through loss of enjoyment of the premises, that when rent is paid in advance and the premises are destroyed by fire,[41]

not obligatory upon the holder of the receipt to issue previous payment independent of the receipt); Sharon Cong. Soc. *v.* Rix, (Vt. 1889) 17 Atl. 719. See, generally, Evidence.

30. Patterson *v.* Ackerson, 2 Edw. (N. Y.) 427; Jenkins *v.* Calvert, 13 Fed. Cas. No. 7,263, 3 Cranch C. C. 216.

31. Ottens *v.* Fred King Brewing Co., 58 Nebr. 331, 78 N. W. 622.

32. Sperry *v.* Miller, 8 N. Y. 336.

33. Hunter *v.* Osterhoudt, 11 Barb. (N. Y.) 33; Reed *v.* Ward, 22 Pa. St. 144. See also Brewer *v.* Knapp, 1 Pick. (Mass.) 332.

For example where the assignee of a lease gives no instructions concerning the application of payments of rent made by him, the landlord has a right to apply them in payment of rent accruing under the lease before the assignment. Collender *v.* Smith, 20 Misc. (N. Y.) 612, 45 N. Y. Suppl. 1130.

34. Kahler *v.* Hanson, 53 Iowa 698, 6 N. W. 57.

35. Kahler *v.* Hanson, 53 Iowa 698, 6 N. W. 57.

36. Aderholt *v.* Embry, 78 Ala. 185; Soluble Pac. Guano Co. *v.* Harris, 78 Ga. 20. See also Jones *v.* Clarkson, 16 S. C. 628, holding that where a tenant owed rent, a certain amount for advances, secured by lien, and other additional items, all to his landlord, and paid less than the total of the indebtedness, giving no directions as to the application of the payment, it should be applied first to the payment of the rent, then to the amount advanced and secured by lien, and afterward any balance remaining to the unsecured claims.

37. Emmons *v.* Scudder, 115 Mass. 367 (holding that a tenant's payment of a sum demanded as rent, made under protest, and through fear of the lessor's threats of ejectment, is not such duress as will enable the tenant to recover back the rent, although a greater sum was demanded than was due); Colwell *v.* Peden, 3 Watts (Pa.) 327 (holding that assumpsit will not lie against a landlord for money paid by a tenant after a warrant of distress is issued in good faith to recover rent alleged to be in arrear, although in fact no rent is due. The remedy in such case is by an action of trespass); Murphy *v.* Cawley, 7 Kulp (Pa.) 128 (holding that unless a purchaser of premises at sheriff's sale has disturbed the possession of the debtor's lessee, or disaffirmed the lease, the lessee cannot recover money voluntarily paid on execution on the rent note, although the rent accrued after the sheiff's sale and so belongs to the purchaser).

38. Lewis *v.* Hughes, 12 Colo. 208, 20 Pac. 621.

39. Bedell *v.* Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871.

40. Dwinell *v.* Brown, 65 Ga. 438, 38 Am. Rep. 792.

41. Porter *v.* Tull, 6 Wash. 408, 409, 33 Pac. 965, 36 Am. St. Rep. 172, 22 L. R. A. 613, where the court says: "There is an implied contract on the part of the lessor to furnish him the use of the building for the

or sold by the lessor,[42] the lessee can recover the money paid for that portion of the rental period remaining after the destruction or sale of the premises. Other cases hold that under such circumstances a proportionate part of the rent cannot be recovered,[43] and a covenant in the lease to deduct rent proportionally in case of a partial destruction cannot be stretched into a covenant to refund rent already paid.[44] If after rent is paid in advance, and the premises are destroyed by fire, the lessors rebuild and lease the same to other persons, the lessee is entitled to recover back from the lessor rent paid by him for that portion of the term which is subsequent to the second lease,[45] unless the second lease occurs after the tenant has commenced his action to recover the rent, in which case the rights of the parties must be adjudicated as they existed at the commencement of the action.[46] If a tenant pays part of a monthly advance payment with an agreement to pay the balance on the fifteenth of the month and fails to do so and is evicted, he cannot recover any portion of the payment made.[47]

(III) *Overpayment.* If a tenant occupies the premises during the entire term of the lease, but is compelled to pay therefor more than the stipulated rent, he is entitled to recover the difference between the amount paid and that which he agreed to pay under the lease.[48]

11. Penalties or Double Rent — a. Liability of Tenant Holding Over. In England it is provided by statute[49] that a tenant holding over after the expiration of his term, or after he has given notice of his intention to quit, shall be liable for the penalty of double rent. These statutes have expressly or in effect been reënacted in many of the United States.[50] The English statutes fix the penalty at double the rent, "so long as the tenant continues to hold over." Under this language the penalty ceases whenever the possession is restored to the landlord.[51] In one jurisdiction at least it is provided that a tenant holding over is liable for double the amount of annual rent agreed to be paid under the contract. Under such language, the tenant is liable for double the agreed rent for the whole year, although the holding over is only for a few days.[52] These statutes are penal and

time for which he pays for it. . . . What difference can there be in principle, so far as fixing liability is concerned, whether the contract is to pay the rent monthly in advance or monthly at the end of the month? . . . The contract in one instance is as positive and binding as in the other, and the liability to pay at the end of the month is as much fixed by such contract as the liability to pay in advance is fixed by the contract, and the same reasoning that would prevent the recovery of the money paid in advance would compel the payment of the money under the other contract at the end of the month after the destruction of the building."

42. Weeks *v.* Hunt, 13 Vt. 144.

43. Lieberthal *v.* Montgomery, 121 Mich. 369, 80 N. W. 115; Cross *v.* Button, 4 Wis. 468, where it is said that in some cases advance payment of rent may operate hardly upon the tenant, but it is in his power to provide ample protection by the terms of his lease, and if he fails to do so, and agrees to pay his rent in advance without qualification, and does so, he covenants and pays at his own risk voluntarily, and the courts cannot relieve him. See also Copeland *v.* Goldsmith, 100 Wis. 436, 76 N. W. 358.

44. Cross *v.* Button, 4 Wis. 468.

45. Ward *v.* Bull, 1 Fla. 271.

46. Stautz *v.* Protzman, 84 Ill. App. 434.

47. Kahn *v.* Tobias, 16 Misc. (N. Y.) 83, 37 N. Y. Suppl. 632.

48. B. F. Myers Tailoring Co. *v.* Keeley, 58 Mo. App. 491.

49. See 4 Geo. II, c. 28; 11 Geo. II, c. 19, § 18.

50. See the statutes of the several states; and cases cited *infra*, notes 52, 53.

Under Ga. Code, § 4077, a lessor may, under a demise for an annual rent, on the lessee's default in an annual payment, sue to remove him as a tenant holding over, and recover double the rent due. Sykes *v.* Benton, 90 Ga. 402, 17 S. E. 1002. A tenant cannot withdraw his claim of possession in his own right, in an action of unlawful detainer, so as to escape liability for double rent, after holding over. Parker *v.* Beeman, 28 Ga. 475.

Treble damages.— The statute of Nevada does not authorize the recovery of treble damages against a tenant for holding over after a failure to pay rent. Hoopes *v.* Meyer, 1 Nev. 433.

Recovery in dispossession proceedings see *infra*, X, C, 1, d.

51. Booth *v.* Macfarlane, 1 B. & Ad. 904, 9 L. J. K. B. O. S. 161, 20 E. C. L. 738; Lloyd *v.* Rosbee, 2 Campb. 453, 11 Rev. Rep. 764; Cobb *v.* Stokes, 8 East 358, 9 Rev. Rep. 464.

52. Lykes *v.* Schwarz, 91 Ala. 461, 8 So. 71; Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408.

to be construed strictly[53] and their application will not be extended beyond the cases provided for.

b. What Constitutes Holding Over. A tenant holding over after his term has expired is not within the penalty imposed by the statute, unless he holds over wilfully and contumaciously and with a consciousness that he has no right to do so.[54] The mere fact that removal will subject the tenant to great inconvenience and damage is not sufficient to relieve him from the penalty of double rent;[55] but where he is prevented by the act of the law from moving out he is not liable.[56] The tenant is liable none the less because the holding over was by one who came into possession under him.[57]

c. To What Tenancies Statutes Applicable. The statute 4 Geo. II[58] applies to tenants for "life, lives or years,"[59] and therefore an action does not lie against a weekly tenant,[60] or it seems against a quarterly tenant.[61] The statute of 11 Geo. II[62] applies only to tenancies for an indefinite period, where the tenant has the right of determining his tenancy by notice,[63] and when he has actually given a valid notice sufficient to determine it.[64]

d. To What Persons Statutes Applicable. The statute only applies to tenants and those claiming under or in collusion with them.[65]

53. Belles *v.* Anderson, 38 Ill. App. 128; Pitkin *v.* Lloyd, 47 Mo. App. 280; Lloyd *v.* Rosbee, 2 Campb. 453, 11 Rev. Rep. 764. But see Beynroth *v.* Mandeville, 5 Bush (Ky.) 584, holding that the statute allowing double rent is not so much penal as compensatory, not so much to punish a delinquent tenant as to indemnify a disappointed landlord for the vexation and losses resulting from a tortious detention of that which it may be often very important otherwise to dispose of, and also from expensive litigation.

54. Stuart *v.* Hamilton, 66 Ill. 253; Belles *v.* Anderson, 38 Ill. App. 128 (holding that where a tenant holds over after the expiration of his term, upon the supposition that he has an agreement for a further term, although it turns out that the landlord was entitled to the possession and that the tenant had not complied with the conditions agreed upon so as to give him the right to remain, there is no such wilful holding over as will justify the recovery of double rent); Hall *v.* Ballentine, 7 Johns. (N. Y.) 536; Swinfen *v.* Bacon, 6 H. & N. 846, 7 Jur. N. S. 897, 30 L. J. Exch. 368, 5 L. T. Rep. N. S. 83, 9 Wkly. Rep. 740 [*affirming* 6 H. & N. 184, 6 Jur. N. S. 1257, 30 L. J. Exch. 33, 3 L. T. Rep. N. S. 440, 9 Wkly. Rep. 105]; Hirst *v.* Horn, 6 M. & W. 393; Rands *v.* Clark, 19 Wkly. Rep. 48.

55. Driver *v.* Edrington, (Ark. 1905) 84 S. W. 783, where it is said that when a tenant whose term has expired and who has received the notice required concludes to hold over he certainly does so wilfully; and whether his conclusion to do so is brought about by reason of the fact that a removal at that time would be very inconvenient and injurious to his business, or whether he does so simply to keep the landlord out of possession, is, under the statute, entirely immaterial, for in either case the holding over is intentional and in disregard of the right of the owner of the premises, and is wilful within the meaning of the statute. As a question of morals, he may be much less to blame in one case than in the other, but the statute, so far as the damages are concerned, makes no difference between them.

56. Regan *v.* Fosdick, 19 Misc. (N. Y.) 489, 43 N. Y. Suppl. 1102, 3 N. Y. Annot. Cas. 376 [*reversing* 18 Misc. 556, 42 N. Y. Suppl. 471].

57. Morris *v.* Burton, 1 Houst. (Del.) 213; Kerr *v.* Simmons, 8 Mo. App. 431, holding that where a tenant under a written lease, without obtaining the consent of his landlord, surrenders the premises to a third party before the expiration of the term, and the third party holds over, the tenant is liable for double rent.

58. St. 4 Geo. II, c. 28.

59. Lloyd *v.* Rosbee, 2 Campb. 453, 11 Rev. Rep. 764. See also Nixdorff *v.* Wells, 18 Fed. Cas. No. 10,280, 4 Cranch C. C. 350, holding that to enable a landlord in the District of Columbia to recover double rent for holding over the lease must be for a specific term.

60. Lloyd *v.* Rosbee, 2 Campb. 453, 11 Rev. Rep. 764.

61. Wilkinson *v.* Hall, 3 Bing. N. Cas. 508, 3 Hodges 56, 6 L. J. C. P. 82, 4 Scott 301, 32 E. C. L. 237.

62. St. 11 Geo. II, c. 19.

63. Regan *v.* Fosdick, 19 Misc. (N. Y.) 489, 43 N. Y. Suppl. 1102, 3 N. Y. Annot. Cas. 376 [*reversing* 18 Misc. 556, 42 N. Y. Suppl. 471]; Johnstone *v.* Huddlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860.

64. Johnstone *v.* Hudlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860; Farrance *v.* Elkington, 2 Campb. 591, 11 Rev. Rep. 807. And see Pitkin *v.* Lloyd, 47 Mo. App. 280.

65. Schilling *v.* Holmes, 23 Cal. 227 (holding that a person leasing from a tenant, after notice to quit has been served on him, is liable for double the monthly value of the premises, under the Landlord and Tenant

e. Waiver of Double Rent. Acceptance of single rent is a waiver of double value;[66] but a voluntary agreement by the lessor that the tenant may retain the premises for a certain time after the expiration of the term does not have that effect in case the tenant holds over after that time.[67] It is not necessary, in order that the tenant may avail himself of a waiver of the double rent on the part of the landlord, that such waiver should be specially pleaded.[68]

f. To Whom Remedy Given. The remedy afforded by the statute of 4 Geo. II for double value is given only to the lessor, to the landlord, or to the person entitled to the reversion,[69] and not to one to whom the landlord has granted a fresh lease to commence from the expiration of the former term.[70]

g. Necessity of Notice to Quit and Demand of Possession. To recover the penalty of double rent for wilful holding over after the expiration of the tenancy, a demand in writing for possession is essential,[71] and recovery will not go back to a period anterior to such demand;[72] but notice need not be given the tenant that double rent will be claimed.[73] Notice to quit may be given previously to the expiration of the lease,[74] or afterward, if the landlord has not in the meantime done any act to recognize the continuation of the tenancy.[75] Notice is required to be given by the lessor or reversioner or his or their agent or agents thereunto lawfully authorized.[76]

B. Actions[77] **— 1. Nature and Form.** Rent may be recovered by a landlord

Act); Harcourt *v.* Wyman, 3 Exch. 817, 18 L. J. Exch. 453.

66. Doe *v.* Batten, Cowp. 243, 9 East 314 note, 9 Rev. Rep. 570 note.

67. Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408.

68. Rawlinson *v.* Marriott, 16 L. T. Rep. N. S. 207.

69. Blatchford *v.* Cole, 5 C. B. N. S. 514, 5 Jur. N. S. 412, 28 L. J. C. P. 140, 94 E. C. L. 514.

A tenant in common may bring an action for the double value of his moiety (Cutting *v.* Derby, 2 W. Bl. 1075), but tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise (Wilkinson *v.* Hall, 3 Bing, N. Cas. 508, 3 Hodges 56, 6 L. J. C. P. 82, 1 Scott 301, 32 E. C. L. 237).

County court.— An action for double value may be brought in a county court. Wickham *v.* Lee, 12 Q. B. 521, 12 Jur. 628, 18 L. J. Q. B. 21, 64 E. C. L. 521.

Trustees.— Where trustees have authority to lease lands, a statute providing for double rent for holding over applies to them. Granger *v.* Illinois, etc., Canal, 18 Ill. 443.

70. Blatchford *v.* Cole, 5 C. B. N. S. 514, 5 Jur. N. S. 412, 28 L. J. C. P. 140, 94 E. C. L. 514.

71. *Alabama.*—Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408.

Illinois.— Belles *v.* Anderson, 38 Ill. App. 128.

Kentucky.—Thompson *v.* Marsh, 4 Bush 423. *Compare* Beynroth *v.* Mandeville, 5 Bush 584.

South Carolina.—Reeves *v.* McKenzie, 1 Bailey 497, holding that by the act of 1808, a tenant who holds over for three months after the expiration of his time and demand of possession in writing is liable to pay double rent from the time of such demand, and not from the expiration of the three months.

England.—Cobb *v.* Stokes, 8 East 358, 9 Rev. Rep. 464; Hirst *v.* Horn, 6 M. & W. 393, holding that a notice to quit on a given day, "or at such time as your holding shall expire, next after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession to render the tenant liable for holding over after the determination of the notice.

72. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

73. Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408.

74. Cutting *v.* Derby, 2 W. Bl. 1075.

75. Cobb *v.* Stokes, 8 East 358, 9 Rev. Rep. 464.

76. Poole *v.* Warren, 8 A. & E. 582, 3 Jur. 23, 3 N. & P. 693, 35 E. C. L. 741.

77. Action against third person for rent collected see Money Received.

Action for ground-rent see Ground-Rents.

Action for penalty for holding over see *supra*, VIII, A, 11.

Action for share of crops due as rent see *infra*, XI, C, 1, h.

Action for use and occupation: Generally, see Use and Occupation. Where lease is voidable under statute of frauds see Frauds, Statute of, 20 Cyc. 301.

Action to enforce lien for rent see *infra*, VIII, D, 3, h.

Attachment for rent see *infra*, VIII, C.

Conflicting claims for rent as ground of interpleader see Interpleader.

Distress for rent see *infra*, VIII, E.

Joinder and splitting of causes of action see Joinder and Splitting of Actions.

Practice in actions in justices' courts see Justices of the Peace.

Special bail in action of covenant for rent see Bail, 5 Cyc. 12 note 25.

in an action of account,[78] assumpsit,[79] covenant,[80] or debt,[81] according to the nature of the case; and in some instances relief may be granted in proceedings in equity.[82] The landlord may sue for rent even though the lease authorizes him to declare a

78. Burch *v.* Harrell, 93 Ga. 719, 20 S. E. 212 (so holding, although there is a written lease of the premises); Cameron *v.* Moore, 10 Ga. 368 (holding that when the occupancy of plaintiff's premises is admitted by defendant, and also plaintiff's title to them, and there is no agreement as to the price of rent to be paid, plaintiff's claim is one in account); Nedvidek *v.* Meyer, 46 Mo. 600 (holding that where parties have mutual dealings, and rent from one to another becomes the subject of account between them, it is recoverable in an action on account); Holmes *v.* McMaster, 1 Rich. Eq. (S. C.) 340 (holding that a bill in equity for an account will lie).

79. See cases cited *infra*, this note.

If the demise is by parol assumpsit lies for the promised rent. Burnham *v.* Best, 10 B. Mon. (Ky.) 227; Swem *v.* Sharretts, 48 Md. 408; Edmunds *v.* Missouri Electric Light etc., Co., 76 Mo. App. 610; Goshorn *v.* Steward, 15 W. Va. 657.

Where a verbal lease is substituted for a sealed one, with the understanding that the lessee shall occupy on the conditions of the latter, assumpsit will lie for the rent. Sibley *v.* Brown, 4 Pick. (Mass.) 137.

If the demise is under seal assumpsit does not lie for the rent reserved. Codman *v.* Jenkins, 14 Mass. 93; Donation Trustees *v.* Streeter, 64 N. H. 106, 5 Atl. 845; Blume *v.* McClurken, 10 Watts (Pa.) 380, the two last cases so holding whether the action is brought against the lessee or his assignee.

Indebitatus assumpsit lies for rent due under a sealed lease, where the lessee has enjoyed possession for the full term, so that nothing remains for him to do under the lease except to pay the rent (Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127); otherwise not (Gage *v.* Smith, 14 Me. 466).

There must be an express promise to pay rent else an action of assumpsit for rent will not lie at common law. Bell *v.* Ellis, 1 Stew. & P. (Ala.) 294; Wise *v.* Decker, 30 Fed. Cas. No. 17,906, 1 Cranch C. C. 171.

Indebitatus assumpsit for rent for purpose of trying title see ASSUMPSIT, ACTION OF, 4 Cyc. 321 note 11.

Use and occupation see USE AND OCCUPATION.

80. Codman *v.* Jenkins, 14 Mass. 93; Blume *v.* McClurken, 10 Watts (Pa.) 380, both holding that covenant lies where the lessee covenanted to pay rent.

Even after assignment of the term and the lessor's acceptance of the assignee as his tenant covenant lies against the lessee. Montgomery *v.* Spence, 23 U. C. Q. B. 39; Stinson *v.* Magill, 8 U. C. Q. B. 271.

Modification of covenant by statute.— R. I. Pub. St. c. 64, § 40, provides that whenever a portion of any land under lease shall be taken for public use, the lease shall be discharged as to the part taken and the rent shall be apportioned so that the just proportional part thereof shall be paid. It was held that where a portion of leased land was taken for public use, an action for rent is properly brought in assumpsit for use and occupation, instead of in covenant, since the original contract was varied by statute. McCardell *v.* Miller, 22 R. I. 96, 46 Atl. 184.

81. See cases cited *infra*, this note.

Debt lies on a sealed demise for an agreed rent. Trapnall *v.* Merrick, 21 Ark. 503; Codman *v.* Jenkins, 14 Mass. 93; McKeon *v.* Whitney, 3 Den. (N. Y.) 452 (holding that the lessor may maintain debt against the assignee of a sealed lease to recover rent in arrear); Blume *v.* McClurken, 10 Watts (Pa.) 380; Varley *v.* Leigh, 2 Exch. 446, 17 L. J. Exch. 289 (holding that debt lies on an express covenant for payment of a freehold rent charged on land conveyed in fee).

Debt lies on a demise by unsealed writing for an agreed rent. Trapnall *v.* Merrick, 21 Ark. 503; Lanning *v.* Howell, 2 N. J. L. 256 (by statute); McKeon *v.* Whitney, 3 Den. (N. Y.) 452 (holding that the lessor may maintain "debt for use and occupation" against the assignee of a lease under a demise by writing not under seal).

Debt lies on an oral demise for an agreed rent. Trapnall *v.* Merrick, 21 Ark. 503.

Effect of assignment of term.— The lessor cannot maintain debt against the lessee for rent accruing after the lessee has assigned the term and the lessor has accepted the assignee as his tenant. Montgomery *v.* Spence, 23 U. C. Q. B. 39.

Effect of expiration of term.— Debt lies to recover rent founded on a lease after the term has expired. Norton *v.* Vultee, 1 Hall (N. Y.) 427.

Privity.— Debt does not lie in favor of the owners of the fee for rent against persons who hold under a lease to which those owners were not privy, either in contract or in estate. Mackey *v.* Robinson, 12 Pa. St. 170. However the assignee of rent may maintain debt for arrears of rent subsequently falling due. Allen *v.* Bryan, 5 B. & C. 512, 4 L. J. K. B. O. S. 210, 29 Rev. Rep. 307, 11 E. C. L. 563.

82. Lawrence *v.* Hammett, 3 J. J. Marsh. (Ky.) 287 (holding that if a writing securing rent is lost, the lessor may resort to equity for the recovery of rent); Holmes *v.* McMaster, 1 Rich. Eq. (S. C.) 340 (where a tenant refused to pay rent to either of the parties claiming it, and a bill by all of them to recover the rent was sustained); Benson *v.* Baldwyn, 1 Atk. 598, 26 Eng. Reprint 377 (holding that a bill may be brought in equity for rent, when the remedy at law is lost or becomes very difficult; and the court will relieve, on the foundation of payment for a length of time). And see Holmes *v.* McMaster, 1 Rich. Eq. (S. C.) 340.

forfeiture on non-payment of rent and sell the improvements to pay therefor;[83] and where the landlord has distrained and sold for a part of the rent due, he may recover the residue by action.[84] An action for rent is a personal not a real action.[85]

2. GROUNDS. To sustain an action for rent the relation of landlord and tenant must have existed between the parties[86] by agreement, express or implied;[87] but it is not necessary that defendant should have occupied the premises under the lease,[88] or that plaintiff should have held title to the premises.[89]

3. CONDITIONS PRECEDENT — a. In General. The landlord may recover rent without first resorting to a lien given him by the lease on the tenant's property;[90] but to entitle him to recover, the conditions upon which the rent becomes payable must exist.[91]

Adequate remedy at law.— If tenants have paid rent to one who has no right to receive it, they may be compelled to pay by a suit at law or by distraining their property; and hence chancery will give no remedy. Merrell *v.* Atkin, 29 Ill. 469. Where a landlord has a remedy by distress, equity will not interfere to assist him, unless some fraud is proved. Doneraile *v.* Chartres, 1 Ridg. App. 135. Where a receiver for the lessor has been appointed, and the lessee has attorned to him, and afterward he sells and gives up possession of the property to the purchaser, the court will not make an order upon the tenant to pay rent in arrear to the receiver, the latter's remedy being by action at law. Samuel *v.* ——, 1 L. J. Ch. O. S. 90.

An action for rent is not converted into an equitable action merely by the making of a motion for an interpleader, which is not granted. Schildwachter *v.* New York, 12 Misc. (N. Y.) 52, 33 N. Y. Suppl. 41, 24 N. Y. Civ. Proc. 390.

83. Tate *v.* Neary, 52 N. Y. App. Div. 78, 65 N. Y. Suppl. 40.

84. Cornell *v.* Lamb, 20 Johns. (N. Y.) 407.

85. Adams *v.* Blecker, 33 Mo. 403.

86. *Georgia.*— Lathrop *v.* Standard Oil Co., 83 Ga. 307, 9 S. E. 1041.

Minnesota.— Crosby *v.* Horne, etc., Co., 45 Minn. 249, 47 N. W. 717, holding that the fact that defendant occupied leased premises for a time with the consent of the lessee, and while the lease was a subsisting one, does not of itself show the relation of landlord and tenant between the lessor and defendant, so as to entitle the lessor to maintain an action for rent.

Missouri.— Talbott *v.* Coteral, 76 Mo. App. 447.

Nevada.— Dixon *v.* Ahern, 19 Nev. 422, 14 Pac. 598.

New Hampshire.— Durrell *v.* Emery, 64 N. H. 223, 9 Atl. 97.

Texas.— Brown *v.* Engel, 2 Tex. App. Civ. Cas. § 103, where plaintiff sold land to defendant on time, and defendant being unable to pay for it, the contract of sale was canceled by agreement, plaintiff taking back the land, and it was held that plaintiff could not thereafter maintain a suit against defendant for the rent of the land for the time he occupied it under the contract of sale.

United States.— Carpenter *v.* U. S., 6 Ct. Cl. 156.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 871.

Adverse occupancy.—An action based on contract cannot be maintained for the rent of premises where defendant did not occupy under plaintiff, but in defiance of his claim of title. Pico *v.* Phelan, 77 Cal. 86, 19 Pac. 186; Swift *v.* New Durham Lumber Co., 64 N. H. 53, 5 Atl. 903. And see Lathrop *v.* Standard Oil Co., 83 Ga. 307, 9 S. E. 1041.

Attornment.— The payment of an instalment of rent due under a party-wall lease by an heir of the lessee after the property to which the easement created by the lease was appurtenant has been assigned to him in the distribution of the estate and after he has gone into possession thereof is in law such an attornment as creates the relation of landlord and tenant between him and the lessor, which will support an action against him personally for an instalment subsequently maturing. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434].

Presumption as to existence of relation see *infra*, VIII, B, 11, a.

87. Ramirez *v.* Murray, 5 Cal. 222; Lathrop *v.* Standard Oil Co., 83 Ga. 307, 9 S. E. 1041; Janouch *v.* Pence, 3 Nebr. (Unoff.) 867, 93 N. W. 217; Maitland *v.* Wilcox, 17 Pa. St. 231.

88. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 164 Ill. 88, 45 N. E. 488 (provided that there is a demise, and the lessor is not at fault in preventing actual enjoyment); Stier *v.* Surget, 10 Sm. & M. (Miss.) 154; Gilhooley *v.* Washington, 4 N. Y. 217. See Little *v.* Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688, holding that taking the key of the house without a continual occupation is enough to entitle the landlord to sustain an action for rent.

89. See *supra*, III, A.

90. Felker *v.* Richardson, 67 N. H. 509, 32 Atl. 830.

91. Barnes *v.* Shinholster, 14 Ga. 131, where A entered upon land under an agreement to purchase of B, it being stipulated that if B should lose the place and not be able to make title A should pay the same rent for the premises as was paid the previous year, and it was held that B could not recover the rent in an action for use and occupation until such loss of place had been proven. See, however, Rowe *v.* Williams, 97 Mass. 163 (holding that a stipulation that

b. Demand. Ordinarily a demand for rent when due is not a condition precedent to an action to recover rent.[92]

4. Jurisdiction[93] and Venue.[94] In Quebec the circuit court sitting *au chef lieu* of a district has no jurisdiction to hear and decide a personal action for twelve arrears of an annual rent.[95] Where the action for rent is founded on privity of contract, as between the lessor and the lessee, it is transitory;[96] but if founded on privity of estate, as where an assignee of the lessor or the lessee is a party, it is local.[97] In an action against an assignee of a lease, the locality of the premises not being stated in the declaration, the question of venue does not arise at the trial on a denial of the lease.[98]

5. Time to Sue — a. Prematurity of Action.[99] Although a tenant abandons the

any question in dispute between lessor and lessee during the term should be submitted to arbitrators, whose award should be final, is no bar to an action brought without any offer of such submission by the lessor against the lessee on the lessee's covenant for payment of rent); Vick *v.* Ayres, 56 Miss. 670 (holding that where a purchaser of land under a parol contract, going into possession, agrees that if he fails to pay the price at the end of the year he will pay certain rent, the vendor may sue for the rent, on the default of the purchaser, without first tendering a deed).

Breach of condition by landlord as a defense see *infra*, VIII, B, 8, a.

92. Packer *v.* Cockayne, 3 Greene (Iowa) 111 (holding that a demand before suit for rents payable in labor or property is not necessary, if they are payable at a fixed time and place); Clarke *v.* Charter, 128 Mass. 483 (holding that if rent is payable in advance on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor); Spaulding *v.* McOsker, 7 Metc. (Mass.) 8 (holding that where a tenant occupies premises on an agreement to pay rent therefor, but neither the time of occupation nor the amount of the rent is agreed on, and the landlord gives him notice to quit immediately, and he assents thereto and acts thereon, the landlord may maintain an action against him for use and occupation without first demanding payment of the rent); McMurphy *v.* Minot, 4 N. H. 251; Gruhn *v.* Gudebrod Bros. Co., 21 Misc. (N. Y.) 528, 47 N. Y. Suppl. 714; Collis *v.* Alburtis, 9 N. Y. Civ. Proc. 80; Remsen *v.* Conklin, 18 Johns. (N. Y.) 447 (holding that where rent is payable on the land, and the lessor brings an action of covenant therefor, he need not show a previous demand, although the rent was payable on demand). See, however, Hearn *v.* McGolrick, 3 Quebec 368, holding that where by the lease domicile is elected by the lessee at the premises leased, the rent is payable there, and if no demand of payment has been made at such domicile prior to suit the action will be dismissed, provided that defendant shows that he was ready to pay his rent there and brings the money into court.

Sufficiency of demand.—A demand necessary to perfect a right to sue for rent is sufficient if it precedes the service of the writ, although the writ is then in the hands of the officer. Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321.

93. See, generally, Courts.

Jurisdiction of justices of the peace see Justices of the Peace.

94. See, generally, Venue.

95. Lebel *v.* Langlois, 22 Quebec Super. Ct. 239, holding that the superior court has such jurisdiction, and the action therefore may originate in the latter. See, however, Shearer *v.* Marks, 22 Quebec Super. Ct. 472, holding that the lessor, to whose action his lessee pleads that the renting value of the leased premises was not stated in the declaration, cannot evoke the cause from the circuit court to the superior court.

96. Bracket *v.* Alvord, 5 Cow. (N. Y.) 18; Henwood *v.* Cheeseman, 3 Serg. & R. (Pa.) 500.

County where rent is payable.—An action for rent on a lease against an assignee thereof bound by its terms may be brought in the county where the rent is payable. Campbell *v.* Cates, (Tex. Civ. App. 1899) 51 S. W. 268. However, the contract raised by a tenant's holding over being merely an implied one, it is not within Tex. Rev. St. art. 1198, subd. 5, which provides that "where a person has contracted in writing to perform an obligation in a particular county," he may be sued there instead of in the county of his residence. Mahon *v.* Cotton, 13 Tex. Civ. App. 239, 35 S. W. 869.

97. Bracket *v.* Alvord, 5 Cow. (N. Y.) 18. And see State University *v.* Joslyn, 21 Vt. 52, holding that an action of covenant for rent reserved in a lease, brought by the lessor against the assignee of the lessee, although local at common law, is not so in Vermont, the common law having in this respect been superseded by the statute which directs where suits shall be brought. See, however, Thrale *v.* Cornwall, 1 Wils. C. P. 165, holding that while in debt for rent by the assignee of the lessor the venue is local, in covenant under the same circumstances it is regarded as transitory.

98. Electric Tel. Co. *v.* Moore, 2 F. & F. 363.

99. **Rents accruing after institution of action:** Right to recover in general see *infra*, VIII, B, 12, a. Recovery by supplemental complaint see *infra*, VIII, B, 10, a.

premises before the expiration of his term and notifies the landlord that he will not abide by the rent contract, the landlord has no right of action for the rent until it falls due under the contract.[1] Where by the terms of a lease payments are to be made in monthly instalments, the lessor is not required to wait until the expiration of any particular year or time longer than a month before bringing suit.[2] No action to recover rent upon a lease from year to year which fixes no time for the payment of the rent can be maintained until the close of the year.[3] A tenant has until the last minute of the day on which rent falls due to make payment, and no action or other legal proceedings for the rent can be maintained until the next day.[4]

b. Limitations.[5] Different periods within which an action for rent must be brought are prescribed by statute in the different states, and accordingly to ascertain the local law these statutes must be consulted.[6]

Time of accrual of rent see *supra*, VIII, A, 6, e.

1. Nicholes *v.* Swift, 118 Ga. 922, 45 S. E. 708; Connolly *v.* Coon, 23 Ont. App. 37.

Where, however, a lease contained a provision that in case of default in any of the covenants the landlord might resume possession and relet the premises for the remainder of the term for the account of the tenant who should make good any deficiency, and defendant defaulted in the payment of rent and moved out of the premises on July 1, and the landlord relet the premises on September 1, before the expiration of the term, the landlord is entitled to recover the rent for July without waiting until the expiration of the term to ascertain the deficiency. Harding *v.* Austin, 93 N. Y. App. Div. 564, 87 N. Y. Suppl. 887.

2. St. Louis Consol. Coal Co. *v.* Peers, 39 Ill. App. 453 [*affirmed* in 150 Ill. 344, 37 N. E. 937]. See, however, Pelletier *v.* Lapierre, 7 Rev. Lég. 241.

Separate actions for instalments see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 444, note 65.

3. Raymond *v.* Thomas, 24 Ind. 476; Duryee *v.* Turner, 20 Mo. App. 34; Mack *v.* Burt, 5 Hun (N. Y.) 28. See, however, Cooke *v.* Norriss, 29 N. C. 213.

4. Mack *v.* Burt, 5 Hun (N. Y.) 28; Insurance Co. *v.* Myers, 4 Lanc. Bar (Pa.) 151. See, however, Donaldson *v.* Smith, 1 Ashm. (Pa.) 197, holding that where a house was leased on the tenth of January from year to year, the rent payable quarterly, on the tenth of the succeeding January the fourth quarter was in arrear, and the landlord might then resort to legal measures to obtain payment of it.

5. See, generally, LIMITATIONS OF ACTIONS.

6. See the statutes of the several states; and the following cases:

Alabama.— Wise *v.* Falkner, 45 Ala. 471; Cage *v.* Phillips, 38 Ala. 382.

Iowa.— Tibbetts *v.* Morris, 42 Iowa 120, holding that a tenancy will not, for the purpose of preventing the operation of the statute of limitations, be presumed to continue after the landlord has been adjudged not to be the owner of the leased property, notwithstanding the lease may not have expired.

Louisiana.— New Orleans *v.* O'Connor, 24 La. Ann. 73; Canonge's Succession, 1 La. Ann. 209; New Orleans *v.* Hennen, 6 Mart. N. S. 428.

Massachusetts.— Buffum *v.* Deane, 4 Gray 385, holding that an action for rent reserved by deed is not barred in less than twenty years, notwithstanding the limitation of six years prescribed by Rev. St. c. 120, § 1, for "all actions for arrears of rent."

New Jersey.—Wagoner *v.* Watts, 44 N. J. L. 126 (holding that, although an action on a lease, actually under seal but not required to be, will be barred in six years, an action on an agreement under seal, indorsed on the lease, by which defendant covenants to pay the rent in case of the tenant's default, will not be barred in that time); Woolley *v.* Osborne, 39 N. J. Eq. 54 (holding that in a suit by assignee for creditors of a tenant against a receiver of the property of the landlord for an account of transactions between the landlord and tenant, where it appears that there was a mutual account between the parties, and subsisting debts on either side, and an implied agreement for a set-off, the statute of limitations is no defense).

New York.— Bailey *v.* Jackson, 16 Johns. 210, 8 Am. Dec. 309, holding that an action for rent reserved by an indenture of lease is not within the statute of limitations.

Pennsylvania.— McClure *v.* McClure, 1 Grant 222, holding that plaintiff claiming for several years' rent is entitled to recover for all falling due within six years before suit brought, although this allows a recovery for an occupation commencing nearly seven years before.

Tennessee.— Tisdale *v.* Munroe, 3 Yerg. 320.

Texas.— Roller *v.* Zundelowitz, 32 Tex. Civ. App. 165, 73 S. W. 1070 (holding that where a lease for three years provided that at the end of the term the lessee should have the refusal of an extension at the current market rates at that time, and at the expiration of the lease the lessee held over for another term of three years on the same terms, a subsequent holding over on the termination of the second period was not under the written contract, but by virtue of an implied contract, and hence an action for rent accrued

6. Enjoining or Staying Action. An action to collect rent may be stayed or enjoined in a proper case.[7]

7. Defenses[8] — a. In General. Want of title in the landlord is no defense to an action for rent where the tenant, with knowledge of the facts, acknowledges title in the landlord and attorns to him;[9] and the landlord's breach of an independent covenant, while available as the basis of a counter-claim, does not consti-

thereunder was subject to the two-year statute of limitations); Minor *v.* Kilgore, (Tex. Civ. App. 1896) 38 S. W. 539 (holding that under limitations which bar an action for rent after two years, where a tenant paying annual rent is in arrears for two years' rent, and more than two years have elapsed since the first year's rent became due, the remedy as to that year is barred).

United States.— Ruppel *v.* Patterson, 1 Fed. 220, holding that in a suit between the assignor and assignee of a leasehold for rent accruing and paid by the assignor subsequent to the assignment, the statute of limitations begins to run in favor of the assignee from the time the assignor paid the accrued rent, and not from the time the assignee made default in the payment of the same.

Canada.— Ouimet *v.* Robillard, 5 Montreal Leg. N. 8.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 878.

Payment of rent by subtenant as suspending limitation of action for rent due from tenant see Limitations of Actions.

7. Tscheider *v.* Biddle, 24 Fed. Cas. No. 14,210, 4 Dill. 58, holding that where the lessor will not comply with his covenant of renewal on a valuation, but acts in bad faith to prevent an appraisal, the unexecuted covenant for renewal does not at law prevent his suing for use and occupation; and hence the lessee will be allowed to come into equity to restrain such action.

However, the fact that a lessor has removed to another state is no ground for injunction to stay a suit for rent in order to enable defendant to set off damages caused by an eviction. Tone *v.* Brace, 8 Paige (N. Y.) 597. So where it was stipulated by a lease that the lessees should be at liberty to retain a rent of £1,100 a year, or any part thereof, upon giving the lessor a bond to pay whatever they so retained at the end of seventeen years with interest, and the lessees omitted to pay the rent or give a bond, and the lessor sued for the rent, the court refused to stay proceedings on an affidavit that since the commencement of the suit the lessees had executed and tendered to the lessor a bond for the amount retained and to be retained. Jones *v.* Winkfild, 10 Bing. 308, 3 More. & S. 846, 25 E. C. L. 149. And it has been said that it is only in a strong case if at all that the court will grant an injunction to restrain proceedings for non-payment of rent. Clancy *v.* Roberts, 1 Ir. Eq. 21.

Adequate remedy at law.— Equity will not restrain an action for rent and cancel the lease on the ground that the same is void because the property was leased for a gambling house, since there is an adequate remedy at law by defense to the action. And the fact that the lease is under seal does not warrant the interference of equity. Slater *v.* Schwegler, (N. J. Ch. 1903) 54 Atl. 937. So where the landlord sues for rent, the tenant cannot maintain a separate suit to compel the landlord to specifically perform a covenant in the lease, and during the pendency of the action enjoin him from collecting any rent, since if the landlord has failed to perform his agreement, the tenant, when called on to pay the rent, may set up a breach of the lease as a defense, and set off his damages. Douglas *v.* Cheesebrough Bldg. Co., 56 N. Y. App. Div. 403, 67 N. Y. Suppl. 755.

8. **Abandonment by tenant** see *supra*, VIII, A, 5, c.

Appropriation of premises to public use see *supra*, VIII, A, 3, k.

Assertion of title paramount see *supra*, VIII, A, 3, l.

Cancellation of lease see *supra*, VIII, A, 5, a.

Conditions precedent to right to recover rent see *supra*, VIII, B, 3, a.

Change in condition of premises see *supra*, VIII, A, 4.

Disturbance of possession: Generally see *supra*, VIII, A, 3. By public authorities see *supra*, VIII, A, 4; b, (III).

Entry for making repairs see *supra*, VIII, A, 3, f.

Eviction see *supra*, VIII, A, 3, l.

Failure of landlord: To deliver possession see *supra*, VIII, A, 3, b. To repair or make improvement see *supra*, VIII, A, 4, c.

Failure of tenant to take possession see *supra*, VIII, A, 3, a.

Injury to or destruction of premises see *supra*, VIII, A, 4, b.

Interference with beneficial use and enjoyment see *supra*, VIII, A, 3, d.

Objectionable occupancy of part of premises see *supra*, VIII, A, 3, e.

Restrictions on use of premises see *supra*, VIII, A, 3, h.

Right of tenant to show termination of landlord's estate see *supra*, III, G, 10, e.

Surrender by tenant see *supra*, VIII, A, 5, b.

Termination of tenancy and recovery of possession of landlord see *supra*, VIII, A, 3, j.

Untenantable condition of premises see *supra*, VIII, A, 4, a.

9. Moffatt *v.* Sydnor, 13 Tex. 628.

Estoppel to deny landlord's title see *supra*, III, G.

Eviction under title paramount as defense see *supra*, VIII, A, 3, l.

tute a defense, where the lessee is in possession.[10] It has been held that failure of consideration is a good defense to an action on a rent note,[11] but not to an action for rent on a lease.[12] It is no defense to an action for rent that the lessor refused to consent in writing to the subletting of the premises, where the lease reserved control of the matter of subletting in the lessor;[13] that the tenant offered to perform a covenant to pay rent on condition that the lessor should abate the rent which accrued while the tenant was deprived of the use of the premises by the violence of war;[14] or that the landlord distrained goods to the full value of the rent, where he sold them for a less sum.[15] A temporary restraining order prohibiting defendant from paying certain rents is no defense to an action for the rents after its dissolution;[16] and to an action of covenant for rent by a tenant against a subtenant, defendant cannot plead that plaintiff has not paid the rent to the original landlord according to his covenant.[17] It was held to be a good defense to an action brought for rent pending the Civil war that plaintiff was an officer in the Confederate army.[18] An oral agreement between the mortgagor and mortgagee of a term of years that the former shall receive the rent cannot be shown in defense of an action by the mortgagee to recover it;[19] but in an action for rent by an execution creditor against a tenant in possession under the

10. Clark *v.* Ford, 41 Ill. App. 199; Kelsey *v.* Ward, 38 N. Y. 83, 5 Transcr. App. (N. Y.) 318; Jacob *v.* Thompson, 73 N. Y. App. Div. 224, 76 N. Y. Suppl. 802; Ely *v.* Spiero, 28 N. Y. App. Div. 485, 51 N. Y. Suppl. 124; Shallies *v.* Wilcox, 4 Thomps. & C. (N. Y.) 591 (holding that where defendant leased premises under an agreement that he was to pay a certain sum per annum for the rent thereof, and for board in the lessor's family, the fact that during the term the lessor refused to continue to board defendant did not defeat the lessor's right to recover rent); Hurlbut *v.* Post, 1 Bosw. (N. Y.) 28 (holding that where a lessor agrees in his lease to render services to the lessees for a commission, his failure to do so is not a bar to a suit for rent coming due afterward); Trenkmann *v.* Schneider, 26 Misc. (N. Y.) 695, 56 N. Y. Suppl. 770 [*reversing* 23 Misc. 336, 51 N. Y. Suppl. 232] (holding that the lessor's breach of covenant to supply steam does not defeat the action); Willcox *v.* Palmer, 163 Pa. St. 109, 29 Atl. 757 (holding that representations by plaintiff, not a covenant of the lease, of what would be done by him in regard to other premises than those leased, and not alleged to be either false or fraudulent, constitute no defense, although not fulfilled); Jackson *v.* Farrell, 6 Pa. Super. Ct. 31 (holding that the non-performance by the landlord of a covenant to move a building cannot be set up as a defense for non-payment of rent). And see Meredith Mechanic Assoc. *v.* American Twist Drill Co., 66 N. H. 539, 30 Atl. 1119, holding that a breach of a covenant by the lessor is not a defense to the whole action for rent, if the benefits to the lessee exceeded the damages suffered from the breach. See, however, Rand *v.* Wickham, 60 Mo. App. 44 (holding that it may be shown in defense, where the lessee has not entered into possession, that the lease was made on condition that the premises adjacent to those leased should be let to the lessee); Peck *v.* Trumbull, 12 Nebr. 133, 10 N. W. 572 (holding that the lessor of a wheat field cannot recover rent where he failed to perform his agreement to pay one half the expense of threshing the wheat); Wyman *v.* Sperbeck, 66 Wis. 495, 29 N. W. 245 (where the lessee agreed to hire a building to be finished off and furnished by the lessor, and refused to take the property on the lessor's refusal to finish and furnish, and it was held that an action on the lease for rent was not maintainable).

11. Andrews *v.* Woodcock, 14 Iowa 397; Crockett *v.* Althouse, 35 Mo. App. 404, holding that where, on a lease for five years at a specified rent per year, the lessees gave their five notes, each for the amount of the rent for a year, and after they had occupied the premises about a year they discovered that the lease was wholly void, and gave up possession, they could not be held liable on the note first becoming due, as representing the first year's rent.

12. Dunbar *v.* Bonesteel, 4 Ill. 32, holding that a lease, although in part for the payment of money or for the performance of covenant, is not such an instrument in writing as is contemplated by the Illinois statute of 1837, allowing an obligee or payee of a "note, bond, bill, or other instrument in writing" to plead the want or failure of consideration in law.

13. Hill *v.* Rudd, 99 Ky. 178, 35 S. W. 270, 18 Ky. L. Rep. 55.

14. Robinson *v.* L'Engle, 13 Fla. 482.

Existence of war as a defense see *supra*, VIII, A, 3, g.

15. Efford *v.* Burgess, 1 M. & Rob. 23, holding that if he has sold them at too low a price the tenant's remedy is by action for the wrongful sale.

16. McRobbie *v.* Higginbotham, 11 Colo. 312, 18 Pac. 31.

17. Gill *v.* Patton, 10 Fed. Cas. No. 5,429, 1 Cranch C. C. 143.

18. Knœfel *v.* Williams, 30 Ind. 1.

19. Russell *v.* Allen, 2 Allen (Mass.) 42.

execution debtor the tenant will be permitted to take advantage of a defect in the levy.[20]

b. Estoppel and Waiver.[21] The general rules of estoppel by judgment,[22] by deed,[23] or by matter *in pais*[24] apply with regard to the assertion of rights of action or defense in actions for rent; and the same is true with regard to waiver of defenses.[25]

c. Pendency of Distress Proceedings.[26] After a distress warrant has been levied and a counter-affidavit returned for trial, pending the issue no action lies for the rent covered by the warrant,[27] unless the proceeding under the distress

20. Pickett *v.* Breckenridge, 22 Pick (Mass.) 297, 33 Am. Dec. 745.

21. See, generally, ESTOPPEL.

22. Davis *v.* Rice, 88 Ala. 388, 6 So. 751 (holding that the fact that after judgment for plaintiff in ejectment he takes a nonsuit on a rehearing procured by defendant on the ground of accident and mistake does not show a want of title in plaintiff, and is no defense to an action on a rent note executed before the rehearing); Untereiner *v.* Shepard, 52 La. Ann. 1809, 28 So. 319 (holding that where a suit for rent is brought before the expiration of the lease on the theory that the last month's rent has become constructively due under the terms of the lease by reason of default with respect to previous months, a judgment rejecting the demand on the theory that there has been no such default does not of necessity conclude the lessor with respect to the last month's rent, thereafter actually falling due); Burckle *v.* Shannon, 7 Misc. (N. Y.) 309, 27 N. Y. Suppl. 899 (holding that where defendant in an action for rent pleads eviction and a former adjudication, a record which showed that the tenant theretofore sued the landlord for damages because of defects in the premises, that the landlord counter-claimed for rent, and that the trial resulted in a judgment for the tenant for a certain sum over the amount claimed for rent, does not prove an eviction); Taylor *v.* Hortop, 33 U. C. Q. B. 462 (holding that *res judicata* may be a good defense to an action for rent).

Former judgment as to counter-claim see *infra*, page 1206, note 41.

23. Farley *v.* Thompson, 15 Mass. 18, holding that in an action of debt by the assignee of a reversion for rent reserved by deed indented, the lessee is not estopped by his covenants from pleading a parol agreement entered into by him and the lessor before the demise by which the rent was agreed to be paid in a particular way, and averring that it was paid in that way.

24. *Alabama.*— Caldwell *v.* Smith, 77 Ala. 157, holding that where a mortgagor who remained in possession after the sale denied his tenancy under a subpurchaser at the mortgage sale when sued by him for rents, and obtained judgment, he cannot, in an action by the original purchaser, allege that he held possession as tenant under the subpurchaser.

Connecticut.— Reed *v.* Reynolds, 37 Conn. 469, holding that where the lessee consented to a joint occupancy of the premises with the lessor, he cannot set up such occupancy as a defense against the payment of rent.

Iowa.— Bower *v.* Stewart, 30 Iowa 579, holding that an admission by a tenant of rent due from him to his landlord, upon the strength of which a third person purchases and receives an assignment of the claim from the landlord, estops the tenant from denying such indebtedness in a suit against him therefor by the assignee.

Kentucky.— Parrish *v.* Ross, 95 Ky. 318, 25 S. W. 266, 15 Ky. L. Rep. 682, where plaintiff sued to recover a life-estate in one third of a tract of land, and judgment was rendered awarding one third of the land to each of the two defendants but denying plaintiff any relief, and on appeal a third of the land was awarded to plaintiff, and pending the appeal two thirds of the land was allotted to defendants as required by the judgment, and the court rented the other third to them, and bonds were taken for the rent, and it was held that defendants could not resist payment of the rent on the ground that the court had no jurisdiction to rent the land.

United States.— Scott *v.* Hawsman, 21 Fed. Cas. No. 12,532, 2 McLean 180, holding that where one has enjoyed the premises under a parol lease, but has disclaimed the lease and refused to perform its conditions, he cannot defeat an action for use and occupation by showing that under the lease the amount of the second year's rent was to be fixed by a third person, which had not been done.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 882.

Estoppel of lessor.— The neglect of a lessor promptly to sue the lessee for matured instalments of rent does not estop him from afterward maintaining a suit, unless the right of action is then barred by limitations. Ahrns *v.* Chartiers Valley Gas Co., 188 Pa. St. 249, 41 Atl. 739.

Estoppel to deny landlord's title see *supra*, III, G.

25. Hinricks *v.* New Orleans, 50 La. Ann. 1214, 24 So. 224 (holding that a lessee entitled to a diminution of rent because the premises were taken for public use does not lose his right because, under the menace of dispossession under the extrajudicial power claimed by the lessor under the contract, he pays under protest rent becoming due after the right to the diminution accrues); Watson *v.* Serverson, 1 Del. Co. (Pa.) 87.

Waiver of fraud see *supra*, II, A, 5, b.

26. Abatement of action for rent on ground of another action pending see ABATEMENT AND REVIVAL, 1 Cyc. 29 note 39.

27. Chisholm *v.* Lewis, 66 Ga. 729.

However, in assumpsit for rent, the tenant cannot plead in bar the pendency of a distress for the rent in arrear, where the goods distrained were replevied by the tenant and the

warrant is so defective that it is impossible that there be a recovery had thereon.[28]

8. Recoupment, Set-Off, and Counter-Claim[29] — a. In General. A lessee when sued for the rent may interpose a claim by way of recoupment, set-off, or counter-claim.[30] Thus the lessee may in a proper case recoup, set-off, or counter-claim damages resulting from the landlord's breach of covenant,[31] or other agreement

replevin suit is still pending. Post *v.* Logan, 1 N. Y. Leg. Obs. 59.

28. Elam *v.* Hamilton, 69 Ga. 736.

29. See, generally, Recoupment, Set-Off, and Counter-Claim.

30. Pickens *v.* Bozell, 11 Ind. 275 (holding that where a lessor agreed to let certain land and pasture and a house, his failure to furnish the pasture and all the land may be set up by way of counter-claim against his claim for rent); Judd *v.* Fellows, 9 N. Y. App. 203, 41 N. Y. Suppl. 274 (holding that a claim by a lessee against the lessor for retaining possession of part of the premises may be set off against the rent); McKesson *v.* Mendenhall, 64 N. C. 286 (holding that the lessees may set up by way of counter-claim the fact that the lessor had no power to demise, and that the real owners have sued one of the lessees for use and occupation); Thymeus *v.* Beautrong, 9 Rev. Leg. 540; McAnnany *v.* Tickell, 23 U. C. Q. B. 122. See, however, Marshall *v.* Harber, (Iowa 1902) 91 N. W. 774 (holding that it is error to allow the jury to consider, by way of counter-claim, attorney's fees paid by defendant to secure a dismissal of an attachment for rent issued in the action); Richardson *v.* Gordon, 188 Mass. 279, 74 N. E. 344; Hembrock *v.* Stark, 53 Mo. 588; Wilson *v.* Burne, L. R. 24 Ir. 14 (holding that mesne profits received by the landlord while in possession during the tenant's default could not be set off against the rent); Graham *v.* Allsopp, 3 Exch. 186, 18 L. J. Exch. 85 (holding that the rule that where the tenant is compelled, in order to protect himself in the enjoyment of the premises, to make payments which ought as between himself and his landlord to have been made by the latter, he is considered as having been authorized to do so by the landlord so as to apply his rent due or accruing due did not apply); Forbes *v.* Elderfield, 4 Wkly. Rep. 15.

Action between successive lessees.—Where plaintiffs' lessees had not attorned to defendants' subsequent lessees, as landlords, defendants could not sue them for rent in their own names, and hence their claim cannot be pleaded in set-off. Moshassuck Encampment No. 2 *v.* Arnold, 25 R. I. 65, 54 Atl. 771.

Action by lessor against sublessee.—Where a sublessee under an agreement to pay rent to the lessor was sued for the rent by the lessee, he could not set off an account against the lessee, as this would enable him to take advantage of his own breach of duty in not paying to the lessor. Brett *v.* Sayle, 60 Miss. 192.

Action by purchaser of premises.—A tenant from year to year having the right to set off against the rent indebtedness of the lessor to him cannot, as against one who purchases the property at a sale under a trust deed given by the lessor, set off indebtedness of the lessor contracted after the lessee had notice of the trust deed. Strousse *v.* Clear Creek County Bank, 9 Colo. App. 478, 49 Pac. 260. So where the premises are attached by a creditor of the lessor and sold on execution, the lessee has no right to set off against the purchaser's claim for rent a debt contracted by the lessor to the lessee since the attachment. Buffum *v.* Deane, 4 Gray (Mass.) 385. And where plaintiff became the grantee of premises occupied by defendants as lessees under an unsealed and unexpired lease, they cannot set off against rent accruing subsequent to their assent to occupy as tenants of plaintiff a debt due to them prior thereto from their lessor. Peckham *v.* Leary, 6 Duer (N. Y.) 494.

Set-off against trustee and beneficiary.— If the landlord is a trustee, a debt due from him individually cannot be set off against the rent. Pratt *v.* Keith, 10 Jur. N. S. 305, 33 L. J. Ch. 528, 10 L. T. Rep. N. S. 15, 3 New Rep. 264, 12 Wkly. Rep. 394. But a debt due the tenant from the *cestui que trust* may be set off. Willson *v.* Davenport, 5 C. & P. 531, 24 E. C. L. 692.

Time of accrual of claim.— In an action of covenant for rent, defendants cannot recoup for damages sustained by reason of a breach of covenant on the part of plaintiff after the commencement of the suit. Harger *v.* Edmonds, 4 Barb. (N. Y.) 256. See, however, Hyman *v.* Jockey Club Wine, etc., Co., 9 Colo. App. 299, 48 Pac. 671.

31. *California.*— Gillaspie *v.* Hagans, 90 Cal. 90, 27 Pac. 34 (holding, however, that where, in an action for rent of a hotel, defendant counter-claimed damages for the landlord's breach of covenant to build a laundry, the monthly value of the use of a laundry attached to the leased building or one like it is not the rule of damages for the breach); McAlester *v.* Landers, 70 Cal. 79, 11 Pac. 505.

Illinois.— Pepper *v.* Rowley, 73 Ill. 262; Harmony Co. *v.* Rauch, 62 Ill. App. 97.

Minnesota.— Pioneer Press Co. *v.* Hutchinson, 63 Minn. 481, 65 N. W. 938, holding that where lessees enter into and retain possession of premises under a lease providing that the landlord shall make improvements, they may, after his failure to do so, in an action against them for the rent, recoup the damages resulting from the breach or set them up as a counter-claim.

New Jersey.— Hunter *v.* Reiley, 43 N. J. L. 480.

concerning the tenancy,[32] the amount of taxes paid by him in behalf of the lessor,[33] or moneys received by the lessor on a reletting of the premises to a third person during the term.[34]

b. Damages From Torts of Lessor.[35] In an action on a lease for rent, a counter-claim founded on a tort is not as a rule maintainable.[36] Where, however, a lessee has been induced by fraud of the lessor to enter into a lease, he may, in

New York.— New York *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538 [*reversing* 2 Duer 401]; Crane *v.* Hardman, 4 E. D. Smith 339; Hirsch *v.* Olmesdahl, 38 Misc. 757, 78 N. Y. Suppl. 832; Kelsey *v.* Ward, 16 Abb. Pr. 98, holding that a breach of the landlord's contract to build on the demised premises is available by way of a counter-claim or recoupment, or in a cross action. See, however, Jacob *v.* Thompson, 73 N. Y. App. Div. 224, 76 N. Y. Suppl. 802; McCullough *v.* Cox, 6 Barb. 386; Hurlbut *v.* Post, 1 Bosw. 28; Livingston *v.* Livingston, 4 Johns. Ch. 287, 8 Am. Dec. 562.

Pennsylvania.— Dupuy *v.* Silver, 1 Pa L. J. Rep. 385, 2 Pa. L. J. 389.

Texas.— New York, etc., Land Co. *v.* Cruger, (Civ. App. 1894) 27 S. W. 212, holding that a failure to construct wells and windmills in accordance with a covenant of the lease may be pleaded in reconvention, and the damages laid at half the rental value.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 885. And see *supra*, VIII, B, 7, a.

See, however, Walton *v.* Henry, 18 Ont. 620.

32. Horton *v.* Miller, 84 Ala. 537, 4 So. 370 (breach of agreement to furnish certain land and horses); McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208 (holding that where the lessor agreed to clear a portion of the land and render it fit for cultivation, but failed to do so, the lessee may recoup the difference between the rental value of the land cleared and uncleared); Long *v.* Gieriet, 57 Minn. 278, 59 N. W. 194 (holding that where a landlord fails to make improvements as agreed, the tenant is entitled, as a set-off against rent, to the difference between the rental value of the premises with and without the improvements); Shallies *v.* Wilcox, 4 Thomps. & C. (N. Y.) 591 (breach of agreement to board lessee). See, however, Allen *v.* Pell, 4 Wend. (N. Y.) 505, holding that damages sustained by breach of the landlord's agreement to finish a house cannot be set off against a demand for rent.

Agreement to care for lessee's property.— Damages arising from the lessor's breach of agreement to care for property left by the lessee on the premises on termination of the tenancy may be set off against the lessor's claim for prior rent. Hembrock *v.* Stark, 53 Mo. 588. See, however, Banks Agricultural, etc., Co. *v.* Masters, 69 Ill. App. 573; Jenkins *v.* Stone, 14 Montg. Co. Rep. (Pa.) 27, holding that a tenant cannot set off the value of crops left on the premises unless he has made demand therefor and the landlord has sold or converted them.

33. Rogers *v.* McKenzie, 73 N. C. 487; Smith *v.* Humble, 15 C. B. 321, 3 C. L. R. 225, 80 E. C. L. 321. See, however, Grantham *v.* Elliott, 6 U. C. Q. B. O. S. 192 (holding that a tenant who covenants to pay rent without any deduction cannot claim a deduction for taxes paid by him); Meehan *v.* Pears, 30 Ont. 433 (holding that a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy); Wade *v.* Thompson, 8 U. C. L. J. 22 (holding that where a tenant occupied a house for some six years, during which period he had paid his landlord's taxes, he could not deduct the amount of the taxes from the last quarter's rent, although there was no agreement as to payment of taxes between him and the landlord).

Voluntary payments of taxes by the lessee cannot be set off against rent. McAnany *v.* Tickell, 23 U. C. Q. B. 499; Aldwell *v.* Hanath, 7 U. C. C. P. 9.

34. Isaacson *v.* Wolfensohn, 84 N. Y. Suppl. 555.

However, in the absence of any agreement, a lessor who has obtained judgment annulling the lease and for a certain monthly rent until a fixed day and delivery on that day will not be liable to account for additional rent received after the judgment. Hyde *v.* Goodrich, 14 La. 439. And where a lease provided that if the lessor should reënter for breach of condition, he might relet at the risk of the lessee, who should remain liable for the rent for the residue of the term and be credited with such sums only as the lessor should actually realize, and after entry for breach of condition the lessor relet for a rental greater than that paid by the original lessee, the lessee could not, in an action for rent accruing before the breach, be credited with the excess of the rent received under the second lease over that due for the same period under the first lease. Richardson *v.* Gordon, 188 Mass. 279, 74 N. E. 344.

35. **Trespass by lessor** see *infra*, VIII, B, 8, c.

36. George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. (N. Y.) 219, 88 N. Y. Suppl. 1049; Gerry *v.* Siebrecht, 88 N. Y. Suppl. 1034. See, however, Hurst *v.* Benson, 27 Tex. Civ. App. 227, 65 S. W. 76 (holding that where property levied on in distress proceedings for rent is injured through the negligence of the officer, the damages form a proper subject of plea in reconvention in a suit for rent); Texas, etc., Coal Co. *v.* Lawson, 1 Tex. Civ. App. 491, 21 S. W. 843 (holding that damages aris-

an action for the rent, recoup the damages suffered;[37] and a tenant who is induced by the lessor's fraud to remove from the premises before the expiration of his term may set off the damages against the rent accruing before his removal.[38]

c. Damages From Disturbance of Lessee's Possession and Enjoyment of Premises. As a rule damages arising from the lessor's disturbance of the lessee's possession and enjoyment of the premises are a proper subject of recoupment, set-off, or counter-claim in an action for rent.[39]

ing from the illegal execution of a distress warrant are recoverable on a plea in reconvention).

Conversion of tenant's property.—A cause of action for conversion by the landlord of property of the tenant on the premises after the expiration of the lease is not allowable in an action for rent (Wilkerson *v.* Farnham, 82 Mo. 672; Ludlow *v.* McCarthy, 5 N. Y. App. Div. 517, 38 N. Y. Suppl. 1075); nor is a demand against plaintiff for a wrongful conversion in removing from the premises fixtures placed there by the tenant, of which fixtures the lease did not contemplate the erection or provide for the privilege of removal (New York *v.* Parker Vein Steamship Co., 8 Bosw. (N. Y.) 300). See, however, Lathers *v.* Hunt, 16 Daly (N. Y.) 349, 10 N. Y. Suppl. 529; Jenkins *v.* Stone, 14 Montg. Co. Rep. (Pa.) 27.

37. *Alabama.*— Cage *v.* Phillips, 38 Ala. 382.

Iowa.— Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490.

Nebraska.— Bauer *v.* Taylor, 4 Nebr. (Unoff.) 701, 96 N. W. 268; Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196.

New Jersey.—Dennison *v.* Grove, 52 N. J. L. 144, 19 Atl. 186.

New York.— Whitney *v.* Allaire, 4 Den. 554 [*affirmed* in 1 N. Y. 305].

See 32 Cent. Dig. tit. "Landlord and Tenant," § 888.

38. Lierz *v.* Morris, 19 Pa. Super. Ct. 73.

39. *Alabama.*—Abrams *v.* Watson, 59 Ala. 524, holding that damages sustained by the lessor's removing fences inclosing the premises may be recouped.

Iowa.— Harmont *v.* Sullivan, 128 Iowa 309, 103 N. W. 951.

Louisiana.— Hinrichs *v.* New Orleans, 50 La. Ann. 1214, 24 So. 224, holding that where the leased property is taken for public use, the lessee may urge his demand for diminution of rent in a separate suit or by reconvention, if sued on the rent notes.

Massachusetts.— Holbrook *v.* Young, 108 Mass. 83, holding that in an action by an under-lessor for rent, his lessee may recoup for rent paid to the lessor's lessor under stress of his alternative threat to evict the under-lessee. However, damages to a lessee by mere trespasses of the lessor on the premises cannot be set up by way of recoupment. Bartlett *v.* Farrington, 120 Mass. 284.

Minnesota.— Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847.

Nebraska.— Kitchen Bros. Hotel Co. *v.* Philbin, 2 Nebr. (Unoff.) 340, 96 N. W. 487, holding that where a lessee elects to treat an eviction as partial, he may maintain a counter-claim for damages on the implied covenant for quiet enjoyment.

New York.— New York *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538 [*reversing* 2 Duer 401] (holding that the lessee may recoup damages sustained by the lessor's breach of an implied covenant for quiet enjoyment); Ludlow *v.* McCarthy, 5 N. Y. App. Div. 517, 38 N. Y. Suppl. 1075 (holding that defendant may set up as a counter-claim an eviction from a part of the premises, in consequence of which he sustained damage, consisting in the destruction of property then on the land); Rogers *v.* Ostrom, 35 Barb. 523 (holding that a tenant may recover for damages, in excess to the claim for rent, done to his rights and tenure by the act of plaintiff, or by means of any act done by his permission); Moffat *v.* Strong, 9 Bosw. 57 (breach of covenant of quiet enjoyment); La Farge *v.* Halsey, 1 Bosw. 171, 4 Abb. Pr. 397 (eviction). See, however, Gallup *v.* Albany R. Co., 65 N. Y. 1 (holding that injury to a tenant by reason of a change of grade in a street obstructing access to the premises cannot be set up as a counter-claim if the lease contains no covenant protecting him from such injury); Edgerton *v.* Page, 20 N. Y. 281 [*affirming* 1 Hilt. 320, 5 Abb. Pr. 1, 14 How. Pr. 1161 (holding that where the amount of rent is fixed by the lease, and the wrongful acts of the landlord are not done under claim of right, but are acts of mere trespass or negligence, they do not form the subject of counter-claim in an action for rent); Carter *v.* Burr, 39 Barb. 59 (holding that a tenant who has been evicted by title paramount cannot recoup the value of the lease over the rent agreed upon, or the actual expense and damage resulting from the eviction); Schermerhorn *v.* Anderson, 2 Barb. 584; Drake *v.* Cockroft, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How. Pr. 377; Levy *v.* Bend, 1 E. D. Smith 169 (the last two cases holding that damages for a wilful trespass of the landlord on the premises are not the subject of a recoupment or set-off against rent due on the lease); Faber *v.* Phillips, 26 Misc. 723, 56 N. Y. Suppl. 1028 (holding that a tenant cannot maintain a counter-claim for damages caused by alterations of the premises made by the landlord); Fonda *v.* Lape, 8 N. Y. Suppl. 792.

Oklahoma.— Hanley *v.* Banks, 6 Okla. 79, 51 Pac. 664.

Pennsylvania.— See Crane *v.* Minning, 4 Just. L. Rep. 124.

See 32 Cent. Dig. tit. "Landlord and Tenant." § 889.

d. Damages From Lessor's Failure to Repair.[40] Damages sustained by a lessee because of the lessor's failure to make promised repairs may as a rule be recouped, set off, or counter-claimed in an action for rent.[41]

e. Claims For Improvements and Repairs by Lessee. The value of improvements made by the lessee may be recouped, set off, or counter-claimed in an action for rent, where the lessor has agreed to give credit for them.[42] So the cost of repairs made by the lessee may be recouped, set off, or counter-claimed against

See, however, Powers *v.* Daily, 106 Mich. 61, 63 N. W. 979 (holding that a lessee cannot recoup damages for the lessor's injury to business during the occupation thereof by persons to whom the lessee sold his business and who were to pay therefor by turning over the profits after deducting a portion thereof, and who conducted the business in their own name); Blythe *v.* Pratt, 62 Miss. 707 (where a landowner, having leased for a term of years, gave a license to a railroad company to construct a road through the premises, and subsequently conveyed a right of way with warranty of title, and it was held in a suit for the rent that the lessee was not entitled to set off damages for the company's entry, as the license and grant were in subordination to the lease and did not exempt the company from liability to the lessee); Willis *v.* Branch, 94 N. C. 142 (holding that where plaintiff leased a house from defendant and agreed to pay a certain sum as rent, and defendant afterward entered and tore out fixtures and damaged furniture, the damages did not constitute a set-off against the rent).

Trespass by lessor's cattle.— In a suit for rent, defendant cannot recoup damages arising out of the fact that plaintiff took down a fence and let in his stock on defendant's crop, since such damages do not arise out of the contract of rent. Brown *v.* Alfriend, 61 Ga. 12; Hulme *v.* Brown, 3 Heisk. (Tenn.) 679, so holding, although the lessor had promised to pay for such injuries if the tenant would not hurt the cattle. *Contra*, Johnson *v.* Aldridge, 93 Ala. 77, 9 So. 513.

Amount of damages.— In an action for rent under a lease which by its terms is not assignable, where the lessee was evicted before the expiration of the term, and both parties agree that the value of the unexpired term shall be set off against the claim for rent, the fact that the lease is not assignable should be considered in the estimation of such value. Rice *v.* Baker, 2 Allen (Mass.) 411.

40. **Damages from failure to improve premises** see *supra*, VIII, B, 8, a.

41. *Alabama.*— Murphy *v.* Farley, 124 Ala. 279, 27 So. 442 (counter-claim in an action on a rent note); Vandegrift *v.* Abbott, 75 Ala. 487 (recoupment).

Georgia.— Stewart *v.* Lanier House Co., 75 Ga. 582; Lewis *v.* Chisholm, 68 Ga. 40, both being cases of recoupment.

Illinois.— Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233; Reno *v.* Mendenhall, 58 Ill. App. 87, both being cases of recoupment.

Mississippi.— Kiernan *v.* Germain, 61 Miss. 498; Bloodworth *v.* Stevens, 51 Miss. 475, both being cases of recoupment.

Missouri.— Green *v.* Bell, 3 Mo. App. 291, recoupment.

New York.— Cook *v.* Soule, 56 N. Y. 420 [*affirming* 1 Thomps. & C. 116, 45 How. Pr. 340]; Myers *v.* Burns, 35 N. Y. 269 [*affirming* 33 Barb. 401], both being cases of counter-claim. But see Reynolds *v.* Meldrum, 11 N. Y. Suppl. 568. It has been held, however, that, although defendant may avail himself of a breach of the landlord's agreement to repair by way of recoupment (Nichols *v.* Dusenbury, 2 N. Y. 283; Whitbeck *v.* Skinner, 7 Hill 53. But see Cram *v.* Dresser, 2 Sandf. 120), yet he cannot by way of set-off (Nichols *v.* Dusenbury, *supra*; Whitbeck *v.* Skinner, *supra*; Sickles *v.* Fort, 15 Wend. 559; Allen *v.* Pell, 4 Wend. 505. And see Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Suppl. 948, 24 N. Y. Civ. Proc. 121 [*reversing* 6 Misc. 531, 27 N. Y. Suppl. 138]).

Texas.— Coleman *v.* Bunce, 37 Tex. 171.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 890–892. See also *supra*, VIII, A, 4, c.

See, however, Phillips *v.* Sun Dyeing, etc., Co., 10 R. I. 458, holding that where the lease contained no covenant on the part of the lessor to repair, his liability on a promise to that effect, made outside the lease, could not be recouped in an action for rent, but the remedy of the lessee is in a separate action.

Negligence in making repairs.—Where a lessor, in the absence of a stipulation to repair, nevertheless at the tenant's request gratuitously undertakes to make repairs, but does it in such an unworkmanlike manner that damage thereafter results to the tenant, such damages may be counter-claimed in an action to recover past-due rents. Mann *v.* Fuller, 63 Kan. 664, 66 Pac. 627. And see Walker *v.* Shoemaker, 4 Hun (N. Y.) 579. *Contra*, Cram *v.* Dresser, 2 Sandf. (N. Y.) 120.

Res judicata.—Where a lease stipulating for the payment of rent quarterly contained an agreement that the lessor should keep the building, during the continuance of the lease or any renewal thereof, in good order and repair, the lessee, in a suit for breach of the covenant for payment of rent, was entitled to set up a counter-claim for damages for a breach of the covenant to repair, although in a former action to recover rent for a former period he had recovered damages on a similar counter-claim. Block *v.* Ebner, 54 Ind. 544.

42. Wilkerson *v.* Farnham, 82 Mo. 672;

the rent where the lessor agreed to make repairs and failed to do so,[43] or where he has agreed to give the lessee credit for making repairs;[44] and where the lessor has agreed to repair and failed to do so, the lessee may recoup an increased sum paid as rent in consideration of the repairs.[45]

9. Parties[46] — a. Plaintiffs[47] — (i) *In General.* A lessor who holds the premises as trustee may sue for rent in his own name[48] as trustee;[49] and upon a lease by tenants in common, the survivor may sue for the whole rent, although the reservation is to the lessors according to their respective interests.[50] So a lessor who lets the property as agent for the owner may maintain an action for the rent.[51] It has been held that where rent is by the terms of a lease made payable to a third person, the latter may, without assignment, sue to collect it.[52] The lessor cannot sue in his own name for rents accruing after he parts with his interest in the reversion.[53] A lessor may maintain an action in his own name and for his own benefit against the assignee of the lessee, where the assignee has assumed and agreed to perform all the covenants of the lease;[54] and a lessee may maintain an action in his own name against his sublessee on the latter's covenant to pay rental to him.[55]

McVicker *v.* Dennison, 45 Pa. St. 390. *Contra,* Tuttle *v.* Tompkins, 2 Wend. (N. Y.) 407.

Rights of grantee of reversion see Bell *v.* Bitner, 33 Ind. App. 6, 70 N. E. 549.

43. Myers *v.* Burns, 35 N. Y. 269 [*affirming* 33 Barb. 401]; Jeffers *v.* Bantley, 47 Hun (N. Y.) 90; Cheuvront *v.* Bee, 44 W. Va. 103, 28 S. E. 751.

44. Hausman *v.* Mulheran, 68 Minn. 48, 70 N. W. 866; Jeffers *v.* Bantley, 47 Hun (N. Y.) 90.

45. Deuster *v.* Mittag, 105 Wis. 459, 81 N. W. 643.

46. See, generally, Parties.

47. Persons entitled to rent see *supra,* VIII, A, 7.

Action by husband or wife for rent of her separate estate see Husband and Wife, 21 Cyc. 1538.

48. Chapin *v.* Foss, 75 Ill. 280.

A surviving trustee may sue in his own name and right for rents accruing after the death of his co-trustee, where the latter did not execute the lease under which the tenant entered. Wheatley *v.* Boyd, 7 Exch. 20, 21 L. J. Exch. 39.

49. Bates *v.* Scheik, 47 Mo. App. 642.

50. Wallace *v.* McLaren, 1 M. & R. 516, 31 Rev. Rep. 334, 17 E. C. L. 685.

51. Melcher *v.* Kreiser, 28 N. Y. App. Div. 362, 51 N. Y. Suppl. 249 (where the lease provides that the rent shall be payable to him as agent); Morgan *v.* Reid, 7 Abb. Pr. (N. Y.) 215 (holding that a person who as agent executes a contract which does not disclose the name of his principal is a trustee of an express trust, within N. Y. Code, § 113, and may maintain an action on the contract in his own name); Philadelphia Fire Extinguisher Co. *v.* Brainerd, 2 Wkly. Notes Cas. (Pa.) 473 (holding that where the lessor is named as agent for the owner, an action on the lease is properly brought in his name as agent). See Manette *v.* Simpson, 15 N. Y. Suppl. 448, holding that where plaintiff, by writing under seal, leased to defendant a farm "now owned by W," a third person, the rent to be paid to the "party of the first part" (plaintiff) at certain times, such lease did not show on its face that plaintiff acted as agent for W, and an action for the rent reserved was maintainable in plaintiff's name, although the relation of principal and agent did in fact exist.

Action by principal.—A person having oral authority from the owner to lease certain premises executed in his own name, adding the word "agent," a lease under seal, describing himself therein as "agent and party of the first part," but not stating the principal. It was held that without proof of an assignment or a recognition by the lessee of the owner's rights, the owner was not the "real party in interest," who, within N. Y. Code, § 111, could maintain in his own name an action founded solely on the lease. Schaefer *v.* Henkel, 75 N. Y. 378, 7 Abb. N. Cas. 1. So where a person leased to defendant land belonging to plaintiff, plaintiff cannot recover on a count on the agreement, unless he shows that the lessor acted as his agent. Hardy *v.* Williams, 31 N. C. 177.

52. Toan *v.* Pline, 60 Mich. 385, 27 N. W. 557. *Contra,* Southampton *v.* Brown, 6 B. & C. 718, 5 L. J. K. B. O. S. 253, 30 Rev. Rep. 511, 13 E. C. L. 322.

Action by lessor.—Where rent was to be paid to the lessor's agent, who was to disburse it in a certain manner, an action on the lease is properly brought by the lessor suing for himself and for the use and benefit of the agent as his interest may appear. Patterson *v.* Emerich, 21 Ind. App. 614, 52 N. E. 1012.

53. Moses *v.* Ingram, 99 Ala. 483, 12 So. 374, holding that a vendor of leased premises who, under an agreement with the purchaser, is to retain possession of the rent notes subsequently maturing, collect them as they mature, credit the purchaser with the amount collected, and account to him therefor, there being no evidence that the purchaser is indebted to him, cannot sue on the notes in his own name. And see St. Ann's Church *v.* Bacon, 11 N. Brunsw. 134.

54. Dickinson Co. *v.* Fitterling, 72 Minn. 483, 75 N. W. 731.

55. Trabue *v.* McAdams, 8 Bush (Ky.) 74.

(II) *Joinder.* Coöwners of the premises may join in an action for rent,[56] and ordinarily it is necessary that all should so join.[57] It has been held that a stranger to the lease cannot join with the lessor in an action for rent, although the rent is payable to him.[58]

(III) *Action by Assignee of Lease or Reversion.*[59] Where the reversion is also assigned to him, the assignee of a lease may generally sue at law in his own name for rent falling due after the assignment;[60] and he is allowed to sue at law in his own name in many states even where the reversion is not assigned or granted.[61] So the assignee or grantee of the reversion may sue at law in his own

56. Bly *v.* Bliss, 123 Mich. 195, 81 N. W. 1080 (where one of two lessors conveyed his interest in the land and assigned his interest in the lease to the grantee, and the grantee joined with the other lessor in an action for rent); Porter *v.* Bleiler, 17 Barb. (N. Y.) 149 (holding that where land descends which is occupied by a tenant, an action for rent is properly brought by all who take as tenants in common); Tylee *v.* McLean, 10 Wend. (N. Y.) 373 (holding that where two joint owners rented premises to tenants for a term in consideration of the payment of annual rent, both lessors may join in an action for the rent, although following the habendum there was a covenant on the part of the lessee to pay to the lessors "to each an equal half or moiety of the rent," since they had a joint interest in the rent until it was severed by payment); Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25 (holding that the lessor and those to whom he has granted undivided interests, less than the whole, may together maintain action for the rent).

57. Bryant *v.* Wells, 56 N. H. 152; Marys *v.* Anderson, 24 Pa. St. 272; Decharms *v.* Horwood, 10 Bing. 526, 3 L. J. C. P. 198, 4 Moore & S. 400, 25 E. C. L. 251. See, however, Holmquist *v.* Bavarian Star Brewing Co., 1 N. Y. App. Div. 347, 37 N. Y. Suppl. 380 (holding that where a dowress joins with heirs in a lease of the land, and the heirs subsequently convey their interest in the land to the lessee, they are not necessary parties to an action by the dowress against the lessee for her proportionate share of the rent); Jones *v.* Felch, 3 Bosw. (N. Y.) 63 (holding that where the owner of premises in fee, having demised the same for a term of years, dies intestate before the expiration of the lease, one of his heirs at law may sue alone to recover his aliquot part of the subsequently accruing rent); Hughes *v.* Brooke, 43 U. C. Q. B. 609 (holding that where one of the devisees in trust under a will refused to accept the trust, he was not a necessary party plaintiff in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued); Hare *v.* Proudfoot, 6 U. C. Q. B. O. S. 617 (holding that where a tenant leased premises at one entire rent, and his landlord died, having devised the premises among several persons, these persons might bring separate actions against the tenant for such part of the rent as each would be entitled to according to his respective share, without any other apportionment than that which a jury might make in each suit).

If a lease is signed by only one of several owners, he may maintain an action to recover the rent without joining the other owners. Sanborn *v.* Randall, 62 N. H. 620.

If a lessee covenants with several lessors jointly that he will pay to each lessor severally a specified proportion of the rent, although the covenant is in terms joint, the interest of each lessor is several, and each may maintain a separate action for his part of the rent. Gray *v.* Johnson, 14 N. H. 414. And see Stark *v.* Scott, 4 Luz. Leg. Reg. (Pa.) 49.

Where there has been a severance of ownership of rent understood and acted on by the parties, it is unnecessary for one suing the lessee for his share to make the owner of the other share a party. Woolsey *v.* Lasher, 35 N. Y. App. Div. 108, 54 N. Y. Suppl. 737.

58. Southampton *v.* Brown, 6 B. & C. 718, 5 L. J. K. B. O. S. 253, 30 Rev. Rep. 511, 13 E. C. L. 322.

59. **Joinder of parties after assignment** see *supra*, VIII, B, 9, a, (II).

60. Baldwin *v.* Walker, 21 Conn. 168.

Action by lessee of reversion.—Where the owner of land leases it subject to a lease of a part thereof to another for a shorter term; the second lessee to collect rent from the first "for so much of the term as has not elapsed," the second lessee may sue for the rent subsequently accruing in his own name. Harmon *v.* Flanagan, 123 Mass. 288.

What law governs.—Where demised premises were located in Ohio, and the lessor and the lessee resided there at the time of the execution of the lease and at the time of their death, the contract of lease is an Ohio contract, and the right of a legatee and devisee of the lessor to sue an administrator of the lessee for rents in his own name is determinable by the law of Ohio. Broadwell *v.* Banks, 134 Fed. 470.

61. *Illinois.*—Wineman *v.* Hughson, 44 Ill. App. 22.

Kentucky.— Hicks *v.* Doty, 4 Bush. 420, holding, however, that a contract to pay a certain sum for the rent of a house and lot, and to make certain improvements, is not assignable by the lessor, so as to vest in the assignee a right to sue in his own name alone on the contract.

Massachusetts.— Pfaff *v.* Golden, 126 Mass. 402; Hunt *v.* Thompson, 2 Allen 341; Kendall *v.* Carland, 5 Cush. 74.

Michigan.— Perrin *v.* Lepper, 34 Mich. 292.

name for rents subsequently accruing.[62] However, the payee of an order drawn on the lessee by the lessor for payment of part of the rents cannot sue thereon at law in his own name;[63] nor can the assignee of the lease or the reversion sue at law in his own name on a guaranty of the payment of rent.[64]

b. Defendants.[65] The assignor of rents reserved in a lease is not a necessary party defendant in an action by the assignee against the lessee;[66] but where the assignee of a leasehold is sued for rent, his assignor ought to be made a party defendant.[67] In an action against an assignee of a portion of a leasehold for the recovery of rent, the owners of the other lots are not necessary parties;[68] and

New York.— Van Rensselaer *v.* Read, 26 N. Y. 558; Moffatt *v.* Smith, 4 N. Y. 126; Willard *v.* Tillman, 2 Hill 274; Demarest *v.* Willard, 8 Cow. 206.

Canada.— Hope *v.* White, 17 U. C. C. P. 52.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 896.

Contra.— Newbold *v.* Comfort, 2 Pa. L. J. Rep. 331, 4 Pa. L. J. 117.

Action for previously accrued rents.—An assignment of rent reserved under a lease gives the assignee an action in his own name only for rent subsequently accruing. Damren *v.* American Light, etc., Co., 91 Me. 334, 40 Atl. 63; Demarest *v.* Willard, 8 Cow. (N. Y.) 206. So where the grantor of a reversion assigns to the grantee rents that are due, the grantee cannot maintain an action in his own name against the lessee for their recovery. Lord *v.* Carnes, 98 Mass. 308; Burden *v.* Thayer, 3 Metc. (Mass.) 76, 37 Am. Dec. 117.

A parol assignment of a sealed lease does not give to the assignee the right to maintain an action in his own name for subsequently accruing rent. Bridgham *v.* Tileston, 5 Allen (Mass.) 371.

Filing of assignment.— Under Me. Rev. St. c. 82, § 130, giving the assignee of a non-negotiable chose in action a right of action in his own name only where he files with the writ the assignment or a copy thereof, an assignee of subsequently accruing rent cannot maintain an action in his own name unless he files with the writ his assignment or a copy of it. Damren *v.* American Light, etc., Co., 91 Me. 334, 40 Atl. 63.

62. *Iowa.*—Abercrombie *v.* Redpath, 1 Iowa 111.

Michigan.— Perrin *v.* Lepper, 34 Mich. 292.

Missouri.— Page *v.* Culver, 55 Mo. App. 606.

New York.— Bowman *v.* Keleman, 65 N. Y. 598, where a lessor, after the execution of the lease, sold and conveyed the premises to a third person, and thereafter executed to him an assignment of the lease.

Pennsylvania.— Newbold *v.* Comfort, 2 Pa. L. J. Rep. 331, 4 Pa. L. J. 117.

England.— Isherwood *v.* Oldknow, 3 M. & S. 382, 16 Rev. Rep. 305, holding that a remainder-man is the assignee of a life-tenant who exercised a power given him to lease the land for a certain term and died before its expiration.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 896.

Action for previously accrued rents.— The assignee of a reversion cannot sue in his own name for rent that had accrued at the time of the assignment. Newbold *v.* Comfort, 2 Pa. L. J. Rep. 331, 4 Pa. L. J. 117; Wittrock *v.* Hallinan, 13 U. C. Q. B. 135.

Necessity of assignment of lease with reversion.—Where lessors in a written lease during the term thereof sell the premises but make no written assignment of the lease, a suit thereon for rent is properly brought in their name, and the purchaser has no right of suit in his own name. McLott *v.* Savery, 11 Iowa 323; Crawford *v.* Chapman, 17 Ohio 449.

Partial assignment.—A lease of a lot and house, with the furniture, cannot be assigned so as to enable the assignee of the reversion to sue for the rent in his own name, unless the entire interest of the lessor is passed by the deed of assignment. Jones *v.* Smith, 14 Ohio 606.

63. Crosby *v.* Loop, 14 Ill. 330; Hecht *v.* Ferris, 45 Mich. 376, 8 N. W. 82. See, however, Esling *v.* Zantzinger, 13 Pa. St. 50, holding that an order by a landlord on his tenant in favor of a creditor of the landlord to pay to the creditor the rent as it becomes due, if accepted by the tenant, creates a liability by the tenant in favor of the creditor which can be enforced by an action in the creditor's name.

64. Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586 (holding that where a covenant for the payment of rent is not absolutely assignable under the statute, a guaranty thereof is not assignable absolutely so as to enable the assignee to sue in his own name); Harbeck *v.* Sylvester, 13 Wend. (N. Y.) 608 (holding that the grantee of demised premises cannot maintain an action in his own name upon a guaranty for the payment of rent reserved in the lease given to his grantor, but that the suit must be in the name of the grantor).

65. **Persons liable for rent** see *supra*, VIII, A, 8.

66. Galbraith *v.* Irving, 8 Ont. 751. See, however, Hopkins *v.* Organ, 15 Ind. 188, holding that as an assignment, although in writing, of an agreement to pay rent does not operate as a transfer of the legal title thereto the assignor must, in a suit thereon by the assignee, be made a defendant to answer as to his interest.

67. London *v.* Richmond, Prec. Ch. 156, 24 Eng. Reprint 75, 2 Vern. Ch. 421, 23 Eng. Reprint 870.

68. Van Rensselaer *v.* Bonesteel, 24 Barb. (N. Y.) 365.

where the assignee of a leasehold has divided his interest in the lease into a great number of shares, it is not necessary to make all the sharers parties defendant in a suit for rent.[69] In an action for the rent of a right of way over land over which plaintiff has quitclaimed a right of way to another person, neither right being exclusive, such grantee is not a necessary party;[70] and a mere stakeholder to whom the rents have been paid need not be joined as a defendant.[71] In an action of covenant for arrears of rent against the heirs of the covenantor, it is not necessary to join the widow.[72] Where, after plaintiff rented land to defendant, other persons bought it from a source other than that from which plaintiff claims title, and defendant attorned to them, with the consent, as claimed by defendant, of plaintiff, such persons are not necessary parties;[73] but where a lessee has taken independent leases from two adverse claimants, neither is a proper party defendant in an action by the other on his lease.[74] Joint lessees may be sued jointly for rent;[75] but a joint action by a lessor against two subtenants of his lessee who did not occupy jointly cannot be sustained.[76] A guarantor or surety of a lessee by collateral undertaking cannot be jointly sued with him,[77] in the absence of statute authorizing a contrary practice.[78]

10. Pleading[79] — a. Declaration or Complaint.[80] The declaration or complaint in an action for arrears of rent should allege a lease[81] of described premises[82] for

69. London *v.* Richmond, Prec. Ch. 156, 24 Eng. Reprint 75, 2 Vern. Ch. 421, 23 Eng. Reprint 870.

70. Ledyard *v.* Morey, 54 Mich. 77, 19 N. W. 754.

71. Hill *v.* Williams, 41 S. C. 134, 19 S. E. 290, holding therefore that where, in an action in a justice's court for rent, the tenant deposits the rent, which is claimed by others than plaintiff, with the clerk of the circuit court, who is not required by law to receive funds over which there is litigation in justices' courts, such clerk is not a necessary party.

72. Longstreth *v.* Lehman, 1 Phila. (Pa.) 21.

73. Hill *v.* Williams, 41 S. C. 134, 19 S. E. 290, the issue being simply whether the contractual relation has been dissolved.

Where, however, the lessees set up by way of counter-claim that the lessor had no power to demise, and that the real owners have sued one of the lessees for use and occupation, the persons claiming as real owners should thereupon be made parties to the action. McKesson *v.* Mendenhall, 64 N. C. 286.

74. Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305.

75. Hurlbut *v.* Post, 1 Bosw. (N. Y.) 28, holding that an agreement between members of a firm, upon its dissolution, that the premises held by them jointly under a lease to the firm should thenceforward be occupied separately, accompanied by a separate possession, cannot affect the right of the lessor to sue them jointly for rent.

76. Pierce *v.* Minturn, 1 Cal. 470.

77. Virden *v.* Ellsworth, 15 Ind. 144 (where one guaranteed payment of rent by indorsement on the back of the lease); Tourtelott *v.* Junkin, 4 Blackf. (Ind.) 483 (where some weeks after the execution of a lease a third person by writing became surety for the lessee); Phalen *v.* Dingee, 4 E. D. Smith (N. Y.) 379.

Where, however, a lessee and his sureties covenant to pay rent, the covenant is joint, and an action cannot be maintained against the sureties alone for rent which accrues under the lease. Philadelphia *v.* Reeves, 48 Pa. St. 472.

78. Lucy *v.* Wilkins, 33 Minn. 21, 21 N. W. 849 [*following* Hammel *v.* Beardsley, 31 Minn. 314, 17 N. W. 858]; Carman *v.* Plass, 23 N. Y. 286; Decker *v.* Gaylord, 8 Hun (N. Y.) 110. See, however, Southmayd *v.* Jackson, 15 Misc. (N. Y.) 476, 37 N. Y. Suppl. 201, holding that where a contract of suretyship for payment of rent recites that each of the two tenants is to pay half the rent, and that each of the two sureties is to be liable for only one tenant's portion of the rent, an action cannot be maintained against the sureties jointly, as N. Y. Code Civ. Proc. § 454, permits joinder of several defendants only where they are liable under the same instrument for the same demand.

79. See, generally, Pleading.

Pleading in justices' courts and courts of similar jurisdiction see Justices of the Peace.

80. **For forms of declaration for rent** see Spahr *v.* Nicklaus, 51 Ind. 221; Greenleaf *v.* Allen, 127 Mass. 248.

81. Willard *v.* Tillman, 2 Hill (N. Y.) 274.

A declaration "for rent" must allege whether it is due under a written instrument, under Mass. Gen. St. c. 129, § 2, cl. 9. Burnham *v.* Roberts, 103 Mass. 379.

The only modes of declaring upon an agreement relied on as a demise are: (1) By its legal effect, that plaintiff did demise, let, or lease, etc.; or (2) by setting forth the agreement so as to show to the court that such was its legal effect. Tillman *v.* Fuller, 13 Mich. 113.

82. Hilton *v.* Burley, 2 N. H. 193, holding that in assumpsit for rent the declaration must give a description of the premises. See, however, Van Rensselaer *v.* Bradley, 3 Den.

a given term[83] at a certain rent which defendant promised to pay[84] and which has become due[85] and remains unpaid.[86] Ordinarily it need not show the lessor's title or interest in the premises,[87] or that defendant occupied or enjoyed the

(N. Y.) 135, 45 Am. Dec. 451, holding that the premises leased need not be described, but may be referred to as "certain premises particularly described in said indenture."

Sufficiency of description.—A count describing assigned premises as being "the said demised premises or some part thereof" is bad as being in the alternative. And in an action by the lessor against the assignee of his lessee, where the assignment was of part of the premises only, a count stating that a certain sum was due for "the said demised premises" is bad; but where the assigned premises were described as "seventy acres of the southerly side of the demised premises" it was sufficient. Van Rensselaer *v.* Bradley, 3 Den. (N. Y.) 135, 45 Am. Dec. 451. A complaint alleging that defendant leased the "premises known as the northeast corner of Ross Island, situated in the county of Multnomah, State of Oregon, for a floating-house or beer garden," sufficiently describes premises consisting of a floating-house anchored to piles driven in the river bed fifty-five feet from said island, between the shore and the river channel. Kiernan *v.* Terry, 26 Oreg. 494, 38 Pac. 671.

83. See cases cited *infra*, this note.

Commencement of term.— In an action on a parol contract for the recovery of rent, the time of the commencement of the term must be stated. Pendill *v.* Neuberger, 64 Mich. 220, 31 N. W. 177.

Presumption as to term.— In the absence of allegations to the contrary, the presumption is that the tenant occupied the premises as tenant from year to year. Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679.

Additional term.—Where defendant leased premises for ten years at fifty dollars per year, with the right to continue the same for an additional period of ten years on the same terms, except that the rent for the second period should be one hundred and fifty dollars per year, a complaint, in an action for the first year's rent of the second period, merely alleging that defendant continued to hold the premises after the first period had expired, without averments showing that such possession was continued under the terms of the lease, was sufficient. Crystal Ice Co. *v.* Morris, 160 Ind. 651, 67 N. E. 502 [*reversing* (App. 1901) 59 N. E. 336]. However, an averment that defendant "elected to continue in the occupancy of the premises" mentioned in a written lease for an additional term "upon the terms and provisions therein mentioned" is a sufficient allegation that the lessee elected to hold for the additional term. Kramer *v.* Cook, 7 Gray (Mass.) 550.

84. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282; Vestal *v.* Craig, 25 Ind. App. 573, 58 N. E. 752.

Allegations held to imply a promise to pay rent see Betts *v.* Quick, 114 Ind. 165, 16 N. E. 172; Hunt *v.* Wolfe, 2 Daly (N. Y.) 298; Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084.

Allegation as to consideration for promise. — An allegation that under the lease defendant took and retains possession of the premises is a sufficient statement of the consideration of the promise to pay for the same. Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084.

85. Elmer *v.* Sand Creek Tp., 38 Ind. 56.

Presumption as to time of payment.— In the absence of allegations to the contrary, the presumption is that defendant occupied the premises as tenant from year to year, with rent payable annually at the end of each year. Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679.

86. Holt *v.* Crume, Litt. Sel. Cas. (Ky.) 499.

Allegations held sufficient as to non-payment of rent see Holsman *v.* De Gray, 6 Abb. Pr. (N. Y.) 79; Van Rensselaer *v.* Bradley, 3 Den. (N. Y.) 135, 45 Am. Dec. 451; Dubois *v.* Van Orden, 6 Johns. (N. Y.) 105; Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084. And see Crosby *v.* Pierce, 25 Ind. App. 108, 57 N. E. 724, holding that in an action for the second year's rent due under a lease, an allegation that the "agreed advance payment of rental for the first year was duly paid by said defendants at the time said lease was executed" does not vitiate the complaint, although the lease itself, which was made a part of the complaint, showed by its terms that no rent was due for the first year.

87. Doggett *v.* Norton, 20 Ill. 332 (where an action was brought on the covenants in a lease, some of the plaintiffs being *femes covert*, and the lease was set out *in haec verba*, and showed on its face the peculiar interest of the *femes covert* in the cause of action, and it was held that the lessees, by taking the lease, admitted that the *femes covert* had a special interest in the premises, and that no special averment thereof was necessary); Hunt *v.* Wolfe, 2 Daly (N. Y.) 298 (holding that in an action for use and occupation brought after the death of the lessor by the receiver of his estate, where the complaint alleged the original lease, the holding over by the tenant "on the same terms and conditions," and the appointment of the receiver, no averment was necessary as to who held the fee); Havemeyer *v.* Switzer, 15 Misc. (N. Y.) 629, 37 N. Y. Suppl. 352. See, however, Mackay *v.* Mackreath, 2 Chit. 461, 18 E. C. L. 737, 4 Dougl. 213, 26 E. C. L. 433, holding that a declaration at the suit of the executor of a termor for a breach of covenant after the death of the termor should state the interest and title of the latter in the premises.

premises.[88] A complaint which declares on an express agreement to pay rent need not allege the performance by plaintiff of any conditions except such as are required by the contract as pleaded;[89] and a general allegation of performance is sufficient in some states.[90] In an action by the assignee of a lease or the reversion the declaration or complaint should allege the assignment to plaintiff,[91] and it may properly allege a subsequent attornment to him.[92] A declaration for rent by the assignee of a reversion for the life of a third person against the assignee of the term must aver that the *cestui que vie* was living when the rent accrued due.[93] To charge defendant for rent as assignee of a lessee, plaintiff should allege the assignment,[94] and that defendant entered and held possession by virtue thereof.[95] In an action against the assignee of a part of the premises for rent, plaintiff may declare against him as assignee of a specified part, or he may declare for the whole and leave defendant to take issue on the assignment by plea and show that he is liable for only a proportion.[96] The declaration or complaint in an action for rent may be amended in a proper case the same as in other actions;[97] and it has been held that where an action is brought on a written lease for a month's rent

Aider by verdict.— In covenant for rent by a devisee against the assignee on a lease by testator, the declaration alleged generally that the testator was seized, but did not say of what estate. On motion in arrest of judgment it was held that the ambiguity was cured by the verdict. Harris *v.* Beavan, 4 Bing. 646, 6 L. J. C. P. O. S. 149, 1 M. & P. 633, 13 E. C. L. 675.

88. Douglass *v.* Mobile Branch Bank, 19 Ala. 659; Marix *v.* Stevens, 10 Colo. 261, 15 Pac. 350; Mayer *v.* Lawrence, 58 Ill. App. 194; Weston *v.* Ryley, 15 Misc. (N. Y.) 638, 37 N. Y. Suppl. 216; Havemeyer *v.* Switzer, 15 Misc. (N. Y.) 629, 37 N. Y. Suppl. 352.

Under some forms of lease, however, the complaint must aver that defendant enjoyed the premises, or that the lessor tendered him the enjoyment thereof (Mulford *v.* Young, 6 Ohio 294), or that defendant had permission to enjoy the same (Thompson *v.* Gray, 2 Stew. & P. (Ala.) 60).

89. Havemeyer *v.* Switzer, 15 Misc. (N. Y.) 629, 37 N. Y. Suppl. 352.

90. Mason *v.* Seitz, 36 Ind. 516, holding that it was a sufficient allegation of performance by plaintiff to aver that defendant had been placed in possession of the premises and still retained possession thereof.

91. Willard *v.* Tillman, 2 Hill (N. Y.) 274. And see Baldwin *v.* Walker, 21 Conn. 168, holding that where an owner of land leased it with a factory thereon containing machinery, fixtures, and appurtenances, and thereafter assigned the reversion, it was proper for the assignee, in his declaration for rent, to allege an assignment to him of the machinery. See, however, Peckham *v.* Leary, 6 Duer (N. Y.) 494, holding that where plaintiff became the grantee of premises occupied by defendants as lessees under an unsealed and unexpired lease at a specified sum per annum, and became such owner and assignee of such lease with defendants' assent, and without objection defendants continued to occupy the premises after notice of such facts and that plaintiff was their landlord, the latter may recover for subsequently accruing rent on a complaint which merely states that he is the owner of the premises, and that defendants occupied them at their request and by his permission, and that the use of them is worth a stated sum, although he can recover only at the rate specified in the lease under which defendants entered.

Assignment and lease as exhibits.—Where the premises have been assigned to the person for whose use the action is brought by the lessor, plaintiff need not annex to his petition a copy of the assignment, but must annex a copy of the lease. McLott *v.* Savery, 11 Iowa 323.

Presumption of continuance of ownership.— Where an assignment of the rent is duly alleged, no averment is needed that after plaintiff became assignee of the rent he continued to be so until action brought, that being the presumption in the absence of proof to the contrary. Van Rensselaer *v.* Bonesteel, 24 Barb. (N. Y.) 365.

92. Baldwin *v.* Walker, 21 Conn. 168.

93. Fryer *v.* Coombs, 11 A. & E. 403, 4 P. & D. 120 note, 39 E. C. L. 227, holding that the continuance of the life is not to be implied from the mere assertion of title, and that an averment in the breach that "after plaintiff became so seised the rent became due and still is in arrear to the plaintiff" is insufficient.

94. Parkhurst *v.* Wolf, 47 N. Y. Super. Ct. 320, holding that allegations of a letting to a certain person, and that afterward he "made an assignment of all [his] . . . effects to defendant, . . . who duly accepted the same;" and that defendant, "as assignee, entered into and occupied the premises," were not sufficient to sustain the action.

95. La Dow *v.* Arnold, 14 Wis. 458.

96. Van Rensselaer *v.* Jones, 2 Barb. (N. Y.) 643.

97. Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175 (holding that where plaintiff brought attachment for rent in his individual capacity, he might amend the complaint by adding thereto other parties plaintiff, and by alleging that the rent was due plaintiffs as assignees of the reversion); Cusson *v.* Vaillancourt, 5 Quebec Pr. 88.

due and unpaid and for a landlord's lien for rent to become due, plaintiff may ask judgment, by supplemental complaint, for rent falling due after the commencement of the suit.[98]

b. Plea, Answer, or Affidavit of Defense — (i) *In General.* Where the liability of a defendant for rent is predicated on his privity of estate and not on contract, the plea of *non est factum* is bad.[99] In an action against an assignee of a lease for rent, an affidavit of defense averring an agreement by the assignee with the lessor that the assignee should have the option of becoming a tenant but that he never exercised it, with a denial that the relationship of landlord and tenant existed, is sufficient to take the case to the jury.[1] *Riens in arrere* is a good plea to an action of debt for rent.[2] Where a statement of claim avers that defendant contracted with plaintiff for the rental of realty by a verbal contract at a certain rate per month, and avers an indebtedness for one month's rent, an affidavit of defense is insufficient which merely denies that defendant owed the rent as charged, and does not specifically deny the making of the verbal contract, or aver that defendant surrendered the lease and that the same was accepted by plaintiff, or that defendant has paid the rent.[3] An answer alleging that during his term defendant found that the lease was invalid because made by plaintiff, a married man, on community property, without joinder of his wife, and that he notified plaintiff that owing to this defect he would no longer occupy under the lease and was ready to surrender or pay a reasonable rental from month to month, is bad in failing to allege that before election to rescind he demanded of plaintiff and his wife a new lease on the same terms.[4] Where the defense is want of title in plaintiff, the plea should aver that plaintiff had no title, and that the lessee did not enter on the premises, or that, if he entered, he was evicted by title paramount,[5] or that he had surrendered the lease.[6] In an action for non-payment of rent by an assignee of the lessor against the lessee, where the declaration alleges that the lessor was possessed for the remainder of the term and that he demised the same to defendant, a plea that the lessor was not at the time of making the indenture possessed for the residue of the term as alleged is good on general demurrer.[7] So a plea to an action of covenant for rent against the assignee of a lease that all the estate of the lessee did not come to and vest in defendant as plaintiff alleges is good.[8] An answer setting up a tender and general denial does not admit that defendant used the premises described during all the time named or that he used them at any time.[9]

(ii) *Allegations as to Particular Defenses* — (a) *Fraud.* Fraud urged as a defense to an action for rent must be specifically alleged;[10] and allegations of

98. Sigler *v.* Gondon, 68 Iowa 441, 27 N. W. 372.

Rent accruing after institution of action: Right to recover in general see *infra*, VIII, B, 12, a. Prematurity of action see *supra*, VIII, B, 5, a.

99. Cross *v.* Button, 5 Wis. 600, holding the plea bad where the assignee of the lessor brings an action for breach of covenant for non-payment of rent against the assignee of the lessee, counting on the lease and the breach as stated.

1. Fell *v.* Betz, 5 Pa. Dist. 310.

2. Harmer *v.* Bean, 3 C. & K. 307.

3. Hertz *v.* Sidle, 20 Pa. Super. Ct. 88.

4. Tryon *v.* Davis, 8 Wash. 106, 35 Pac. 598.

5. Nissen *v.* Turner, 50 Nebr. 272, 69 N. W. 778; Sneed *v.* Jenkins, 30 N. C. 27.

Attornment. — To a counter-claim for rent under a lease, a reply alleging that a third person was the owner of the premises, and that plaintiffs were compelled to and did attorn to him is sufficient, as against an objection first raised at the trial, notwithstanding that an attornment is not valid unless made with the privity or consent of the landlord, or unless the tenant attorns to one having a superior title under circumstances placing him in the same position as if he had gone out of possession and had come in again under a new landlord. Johnson *v.* Sackrison, 78 Minn. 107, 80 N. W. 858.

6. Nissen *v.* Turner, 50 Nebr. 272, 69 N. W. 778.

7. Carvick *v.* Blagrave, 1 B. & B. 531, 4 Moore C. P. 303, 21 Rev. Rep. 710, 5 E. C. L. 783.

8. Annis *v.* Corbett, 1 U. C. Q. B. 303.

9. Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139.

10. Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865 (holding that the facts must

mere misrepresentations by the lessor are not sufficient.[11] An answer setting up that the lease was induced by fraud, but failing to deny the allegation of the complaint that defendants entered into possession and have ever since been in possession, is demurrable.[12]

(B) *Eviction.* A plea or answer setting up an eviction of defendant by a stranger must allege that it was by virtue of a paramount title,[13] and that there was an actual entry by the evictor.[14] It has been held, however, that the eviction need not be expressly alleged.[15] Although the complaint alleges that defendant is still occupying and using the premises, an answer setting up a constructive eviction by the bringing of a prior action by plaintiff to recover possession, whereupon both defendant and his sublessee vacated and surrendered the keys, and averring that by reason of such eviction defendant is not liable for rent after that time, is good on demurrer.[16]

(C) *Termination of Tenancy.* A plea alleging that the premises were leased upon false representations of the lessor as to their condition, on the discovery of the falsity of which possession was returned to and accepted by the lessor, is bad in not alleging at what time defendant rescinded.[17] A plea of reëntry for nonpayment of previously accrued rents must allege that the lessor made a demand for the rent on his reëntry.[18] A plea or answer setting up a surrender and acceptance of the premises before accrual of the rent sued for presents a good defense;[19]

be pleaded); Bauer *v.* Taylor, 4 Nebr. (Unoff.) 701, 96 N. W. 268 (holding also that a fraudulent motive must be charged).

11. York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; Simmons *v.* Kayser, 43 N. Y. Super. Ct. 131 (holding that an answer that the lessor, with intent to defraud the lessee into accepting the lease, falsely represented that the lessor's lease expired three months later than it did, and that relying on this the lessee accepted the lease, but had to move out and rent a new store at an advanced rent, at great expense and loss of custom, is insufficient); Levy *v.* Bend, 1 E. D. Smith (N. Y.) 169 (holding that an answer alleging misrepresentation as to the premises, the time of the misrepresentation not being stated, or whether it was wilful, or made as an inducement to the hiring, or relied on by the tenant, is not sufficient); Tischner *v.* Bambrick, 3 Wkly. Notes Cas. (Pa.) 94.

Answer held sufficient.—Where one of the defenses is breach of warranty of the condition of the premises, and it is alleged that plaintiff made certain false representations, known to him to be false, with intent to induce defendants to take the lease, a defense founded on deceit is set forth. Hurliman *v.* Seckendorf, 18 N. Y. Suppl. 756.

12. Forgotson *v.* Becker, 39 Misc. (N. Y.) 816, 81 N. Y. Suppl. 319, retention of possession being a waiver of the fraud.

13. Naglee *v.* Ingersoll, 7 Pa. St. 185 (holding also that it must allege that the eviction was by title existing before the demise); State University *v.* Joslyn, 21 Vt. 52 (holding that a plea to an action by the lessor against the assignee of the lessee which alleges that prior to the execution of the lease certain third persons entered into and expelled plaintiff from the premises and continued their possession to the day of the demise, and on that day held, occupied, and kept possession of the same, claiming title thereto adverse to plaintiff, but not alleging the eviction to have been by virtue of any title to the premises paramount to plaintiff's right, and not alleging that defendant or any of those under whom he claims title are in any way connected with the disseizor's title, is insufficient; and that if the plea alleges that the disseizors have continued their adverse possession until the time of pleading, excluding as well plaintiff as defendant from the premises, it will still be insufficient without an allegation of paramount title in the disseizors).

14. Naglee *v.* Ingersoll, 7 Pa. St. 185. See, however, Friend *v.* Oil Well Supply Co., 165 Pa. St. 652, 30 Atl. 1134, holding that an allegation that defendant was enjoined from interfering with the possession and use of the premises by a railroad company in so far as such use and possession were necessary to enable the company to repair a bridge, and that such injunction amounted to an eviction, is sufficient to entitle defendant to a hearing on the question of eviction.

15. Huling *v.* Roll, 43 Mo. App. 234, holding that it is sufficient if it alleges facts from which an eviction may be implied.

16. Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. 957.

17. Burroughs *v.* Clancey, 53 Ill. 30.

18. Mackubin *v.* Whetcroft, 4 Harr. & M. (Md.) 135.

19. Binswanger *v.* Dearden, 132 Pa. St. 229, 19 Atl. 32, holding that an affidavit of defense was sufficient to carry the case to the jury, where it alleged that three months prior to the expiration of the term defendant mailed notice of his intention not to continue the tenancy, as was required by the lease; and thereafter, in conversation with defendant, plaintiff admitted the receipt of the notice two days after it was mailed, and by his remarks induced defendant to believe

but if it fails to allege that they preceded the accrual of the rent for which suit is brought,[20] or fails to deny an allegation in the complaint that defendant entered into possession and has ever since been in possession,[21] it is insufficient. A plea setting up that defendant assigned his lease and that the lessor received rent from the assignee and accepted him as tenant does not show a surrender in law so as to bar the action; but the essential averment is that the assignee was substituted in the place of the original lessee with the intent on the part of the parties to the demise to annul its obligations.[22] A plea stating that on a certain day the tenancy was terminated by the destruction of the premises without the fault of defendant is bad, as it states a mere legal conclusion and not the facts.[23]

(D) *Payment.*[24] Payment on account and at the request of plaintiff of certain moneys for the board of his family and for repairs made under the lease may be set up by affidavit of defense;[25] and where plaintiff claims a lump sum for rent due at a time stated without stating the time for which it is claimed, an affidavit of defense asserting that at the time named, by reason of payments on account, a smaller sum only was due, and that this had been paid by a distress on certain articles specified is sufficiently specific.[26] However, a plea that plaintiff, before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same is bad for not showing that the rent was satisfied.[27] A plea of payment of rent by the tenant to the assignee of the lessor which does not aver that the rent sued for accrued after the assignment of the lease is bad on demurrer.[28] To an avowry for rent, a plea in bar of payment to a ground landlord or other encumbrancer amounts to a plea of *riens in arrere*, and should be so pleaded.[29] A plea alleging payment to the provost marshal pursuant to an order of the com-

that he had waived any defect in its service; and that one day before the expiration of the term defendant surrendered it to plaintiff, who accepted it unconditionally, and released defendant from further liability. And see Gore *v.* Wright, 8 A. & E. 118, 2 Jur. 840, 7 L. J. Q. B. 147, 3 N. & P. 243, 1 W. W. & H. 266, 35 E. C. L. 509.

Allegation of surrender.— An answer which states that defendant had abandoned the premises sufficiently states a surrender thereof. Burdick *v.* Cameron, 10 N. Y. App. Div. 589, 42 N. Y. Suppl. 78.

Allegation of acceptance.—A plea alleging a compromise and settlement of the subject-matter in controversy under which the lease was surrendered and canceled and possession was given to plaintiff must aver that plaintiff accepted the possession. Burroughs *v.* Clancey, 53 Ill. 30.

20. Forgotson *v.* Becker, 39 Misc. (N. Y.) 816, 81 N. Y. Suppl. 319. And see Barnard *v.* Duthy, 5 Taunt. 27, 1 E. C. L. 27, holding that in an action on a covenant for seven quarters' rent, a plea showing a surrender before the last four of the seven quarters' rent accrued is bad on demurrer, because it does not go to the whole breach.

21. Forgotson *v.* Becker, 39 Misc. (N. Y.) 816, 81 N. Y. Suppl. 319.

22. Creveling *v.* De Hart, 54 N. J. L. 338, 23 Atl. 611; Frank *v.* Maguire, 42 Pa. St. 77. See McCulloch *v.* Jarvis, 8 U. C. Q. B. 267, holding that where the lessee pleaded an assignment, and then averred the acceptance by the lessor from the assignee of a certain sum, not as the rent sued for but merely as "for the rent aforesaid, in form aforesaid, reserved and made payable," the plea was not argumentative as indirectly setting up payment of the rent.

23. Smith *v.* McLean, 22 Ill. App. 451 [*affirmed* in 123 Ill. 210, 14 N. E. 50]; Roach *v.* Peterson, 47 Minn. 291, 50 N. W. 80, holding that a tenant who claims relief from liability by the destruction of the premises, under Minn. Laws (1883), c. 100, § 1, must show in his answer that he is within the terms of the act, which releases him from liability only where the destruction of the premises is not owing to his own fault or neglect and where he has terminated the relation of landlord and tenant by a surrender of the premises.

24. See, generally, PAYMENT.

Tender see TENDER.

Plea of payment held insufficient see Butler *v.* Burt, (Cal. 1902) 68 Pac. 973.

25. Mooney *v.* Reynolds, 7 Pa. Cas. 621, 12 Atl. 481.

26. Cochran *v.* Emmertz, 3 Del. Co. (Pa.) 433.

27. Lear *v.* Edmonds, 1 B. & Ald. 157, 2 Chit. 301, 18 Rev. Rep. 448, 18 E. C. L. 646.

28. Bordereaux *v.* Walker, 85 Ill. App. 86.

29. Jones *v.* Morris, 3 Exch. 742, 18 L. J. Exch. 477. See Johnson *v.* Jones, 9 A. & E. 809, 8 L. J. Q. B. 124, 1 P. & D. 651, 36 E. C. L. 423 (where a plea was held good as a plea of payment and not bad as a plea of *nil habuit in tenementis*); Perdue *v.* Hays, 31 U. C. Q. B. 111 (holding that where defendant pleaded that after the lease plaintiff "did grant and convey, by way of mortgage in fee simple," the demised premises to one M, who claimed the rent, it was sufficient without averring that the conveyance was by deed).

mander of a military district established during the Civil war should set forth the order.[30]

(III) *Recoupment, Set-Off, and Counter-Claim.*[31] A counter-claim for damages for the landlord's failure to perform a covenant to repair is not defective for failure to allege that the tenant used diligent efforts to reduce the damages by himself making the necessary repairs;[32] but an allegation in an affidavit of defense that the tenant actually sustained a loss from the failure of the landlord to repair is too vague to support a claim for damages on account of the breach.[33] An affidavit of defense which fails to allege the difference in rental value between the property as it was and as it would have been had certain covenants by the landlord been complied with is defective.[34] In an action by a landlord against the tenant on a covenant to pay a sum equal to the rent reserved, less any sum which should be received by the landlord as rent for the premises, a defense that the premises were relet by the landlord, not in good faith for the benefit of the tenant, but rent free, in order to induce the new lessee to take a longer lease, so that thereby the landlord accepted the tenant's surrender, is properly pleaded as a matter of defense, and not as a counter-claim.[35] A counter-claim for compensation for clearing land and cultivating it is insufficient, if it fails to show the date of the contract or the time of performance.[36] An affidavit of defense which avers that a portion of the leased premises was taken by the municipal authorities under the power of eminent domain is sufficient to prevent judgment.[37] A plea setting up destruction of the leased buildings which fails to allege the amount to which defendant is entitled by reason thereof is insufficient.[38]

(IV) *Joinder of Defenses.* Several defenses may be joined in one plea or answer if they are not inconsistent.[39]

30. Clark *v.* Mitchell, 64 Mo. 564.

31. See, generally, Recoupment, Set-Off, and Counter-Claim.

32. Beakes *v.* Holzman, 47 Misc. (N. Y.) 384, 94 N. Y. Suppl. 33.

33. McBrier *v.* Marshall, 126 Pa. St. 390, 17 Atl. 647.

34. Jackson *v.* Farrell, 6 Pa. Super. Ct. 31.

35. Vogel *v.* Piper, 89 N. Y. Suppl. 431.

Sufficiency of answer.— A lease provided that the premises should be used as business offices and for no other purpose, and that on default by the lessee the lessors might take possession and relet the premises at the risk of the lessee. On the lessee's becoming insolvent, the lessors took possession, and thereafter brought an action under the lease to recover an amount equivalent to the rent reserved and accruing since they took possession. It was held that an answer was insufficient which alleged that responsible persons were ready and offered to take a lease at a rent greater than that reserved, but that plaintiff arbitrarily refused to accept them as tenants, where the answer did not allege the names of the proposed tenants, or when the offer to rent was made, or facts showing their responsibility, or that they would have used the premises for office purposes only. International Trust Co. *v.* Weeks, 116 Fed. 898.

36. Hurst *v.* Benson, 27 Tex. Civ. App. 227, 65 S. W. 76.

37. Uhler *v.* Cowen, 192 Pa. St. 443, 44 Atl. 42.

38. Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 239, 37 S. E. 851, holding that a plea setting up the destruction of the buildings, and alleging that "there are not now upon the premises buildings of as much value to the tenant for its purposes as the buildings which have been destroyed," implies a partial destruction only of the buildings, and hence it is not a sufficient answer to the whole demand.

39. Hausman *v.* Mulheran, 68 Minn. 48, 70 N. W. 866 (holding that there is no inconsistency between an admission in the answer that defendant is indebted for rent, and a counter-claim for repairs made by defendant for which plaintiff agreed to pay him); Minneapolis Co-Operative Co. *v.* Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473 (holding that the defense that the tenant had surrendered and the landlord accepted possession is not inconsistent with the further defense that the landlord had so neglected to comply with the requirements of the lease that the premises were untenantable, and the tenant was compelled to abandon them); Kline *v.* Hanke, 14 Mont. 361, 36 Pac. 454 (holding that defendant may plead that he is merely a tenant from month to month, and also acts of plaintiff amounting to an eviction); Hooven, etc., Co. *v.* National Cordage Co., 11 Ohio Dec. (Reprint) 434, 27 Cinc. L. Bul. 18 (holding that defendant may allege: (1) That there was no valid consideration for the lease; (2) that under the terms of the lease he was entitled to an accounting from plaintiff by reason of his having resumed the use of certain machinery covered by the lease; and (3) set up a claim for liquidated damages as a counter-

c. Replication or Reply. Where a plea alleges that third persons entered on the premises previous to the demise, claiming title thereto adverse to the lessor, and continued in possession until the time of pleading, thereby excluding plaintiff and defendant from possession, plaintiff may properly reply in the form of a special traverse denying under an *absque hoc* the fact that plaintiff and defendant or either of them were excluded from the entire possession of the premises.[40] A replication that constitutes a departure from the declaration is insufficient.[41]

d. Issues, Proof, and Variance[42]— (i) *Issues Presented by the Pleadings.* In actions for rent, as in other cases, regard must be paid to the material issues presented by the pleadings,[43] and to those only.[44]

(ii) *Necessity of Proving Matters Alleged.* If in an action for rent, as in other actions, a party alleges material matters of fact which are put in issue, he is ordinarily obliged to prove them.[45] However, a party is not bound to

claim); Hurst *v.* Benson, 27 Tex. Civ. App. 227, 65 S. W. 76 (holding that a plea reconvening for damages for wrongfully and maliciously suing out a distress warrant, and also claiming compensation for clearing the land under contract, is not subject to exception as declaring on two causes of action, one sounding in tort and for damages, and the other on contract, since the latter plea is permitted by Tex. Rev. St. art. 750, authorizing counter-claims, and the former by article 755, which allows a counter-claim on matters growing out of the same transaction).

40. State University *v.* Joslyn, 21 Vt. 52.

41. Reid *v.* John F. Wiessner Brewing Co., 88 Md. 234, 40 Atl. 877, holding that where a declaration on a lease proceeds solely on the ground of privity of estate between the lessee and defendant, to whom the lessee has assigned, a replication designed to set up and rely on an independent agreement between the lessor and the assignee is bad.

42. **Conformity of judgment to pleadings** see *infra*, VIII, B, 14.

53. Corbett *v.* Cochrane, 67 Conn. 570, 35 Atl. 509, where a special answer alleged that "defendant, under a special agreement between her and plaintiff, occupied plaintiff's store and a living apartment over said store as his tenant," and in subsequent paragraphs alleged that plaintiff represented the building as in good, tenantable condition, that it was in an imperfect condition, and that defendant had been damaged by reason thereof, and plaintiff admitted the first paragraph of the answer, and denied the others, and there was no dispute concerning the occupancy, the amount of rent agreed on, or that such rent had all been paid until the last month, and it was held that the only issue was whether the special agreement embraced the representations alleged by the defendant.

44. Kenner *v.* Weill, 48 La. Ann. 805, 19 So. 934 (holding that where a plaintiff in a reconventional demand for rent of the land in controversy sets up title and claims possession, and defendant in the demand answers, disclaiming ownership and possession, the only matter in dispute is the amount of rent claimed from defendant while in possession, although the answer alleges that title is in a third person); Lewis *v.* Donohue, 27 Misc. (N. Y.) 514, 58 N. Y. Suppl. 319 (holding that where the execution of the lease and the non-payment of the rent sued for are admitted, the denial of the conclusion of law that the sum is due raises no issue).

45. Livingston *v.* Miller, 8 N. Y. 283 (where by the terms of a lease the rent reserved was made payable at such place as the landlord should direct, and in an action for non-payment he alleged that he directed that it should be paid at a particular place, and the tenant denied the allegation, and it was held that a material issue was raised by the pleadings which plaintiff was bound to prove); Lansing *v.* Van Alstyne, 2 Wend. (N. Y.) 563 note (holding that in an action of covenant against the assignee of a term, if the issue is made up on the question whether defendant holds as assignee, plaintiff must prove the assignment). See, however, Collis *v.* Alburtis, 9 N. Y. Civ. Proc. 80 (holding that rent payable on a day certain may be recovered by action without a previous demand therefor, even where the complaint alleges such demand); Lush *v.* Druse, 4 Wend. (N. Y.) 313 (holding that, although seizin is alleged in a declaration of covenant on a lease for rent, plaintiff is not bound to prove it, or to show defendant in possession, where there is evidence that he claimed to be the assignee of the lease and actually paid rent); State University *v.* Joslyn, 21 Vt. 52 (holding that in covenant for rent against the assignee of the lessee, if, under a plea traversing the assignment, plaintiff shows an assignment legal in form and such as to carry the term, with the covenant of the lessee to pay rent, the possession of the premises by the assignee is not material, and although alleged and traversed by the plea evidence in reference to it may be rejected).

Matters not in issue need not be proved.— Kettletas *v.* Maybee, 2 Edm. Sel. Cas. (N. Y.) 360 (holding that where defendant is sued as assignee of a lease, and he denies only the execution of the lease and the assignment to him, to entitle plaintiff to recover he need only prove the execution of the lease and the assignment); Pingry *v.* Watkins, 17 Vt. 379 (where, in an action of covenant for

prove a material fact the existence of which his adversary has alleged in his pleadings.[46]

(III) *Necessity of Proving Matters in Manner and Form as Alleged.* Matters alleged in a pleading and put in issue must be proved substantially in manner and form as alleged, any material variance between pleading and proof being fatal.[47]

rent brought against the assignee of the lessee, plaintiff alleged that all the estate of the lessee in the premises vested in him by assignment thereof, and that defendant entered into possession of the premises after the assignment and retained possession until the rent sued for became due, and defendant pleaded that the estate of the lessee did not vest in him as alleged or in any manner and form as alleged, and it was held that the fact of the assignment was the only material part of the issue, and the only part which plaintiff was required to prove).

46. Hurst *v.* Benson, (Tex. Civ. App. 1902) 71 S. W. 417, holding that where a landlord alleges and makes part of his pleadings a distress warrant, the tenant need not introduce the warrant in evidence in support of his plea of reconvention for damages from its service.

47. *Illinois.*—Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 [*reversing* 103 Ill. App. 668] (holding that where, in an action on a lease, the declaration alleged a written assignment to defendants and a written consent of plaintiff, drafts of a proposed assignment of the lease and of a proposed consent did not establish the allegation); Miland *v.* Meiswinkel, 82 Ill. App. 522 (holding that a defendant cannot claim a constructive eviction where his plea sets up a forcible eviction).

Kentucky.— Holt *v.* Crume, Litt. Sel. Cas. 499, holding that where, in an action on a covenant to pay rent and deliver possession, issue is joined on the plea of no demand, evidence that if a demand had been made there would have been a refusal is improper.

Massachusetts.— Locke *v.* Kennedy, 171 Mass. 204, 50 N. E. 531, holding that allegations in a declaration on a lease that the lease was for a time certain, and that the rent due was for certain months from that date, are material descriptive averments which must be proved as laid.

England.—Sturgess *v.* Farrington, 4 Taunt. 614, where defendant pleaded that he was under-tenant of parcel of certain premises for the whole of which plaintiff, his lessor, covenanted to pay rent to the landlord paramount, and that defendant paid to the landlord paramount, under threat of distress, more rent than he owed to plaintiff, and plaintiff traversed that any rent was due from himself to the landlord paramount, and it was held that this replication was not supported by proving that plaintiff assigned his term in the residue of the premises to K, who assigned them to defendant, who covenanted to pay in discharge of plaintiff the whole rent reserved to the landlord paramount.

Canada.— Lawler *v.* Sutherland, 9 U. C. Q. B. 205, holding that where the declaration stated that the right and interest of the lessee in the demised premises came by assignment to and was vested in defendant, and it was in evidence that defendant was at most only under-lessee for a part of the term, a nonsuit was rightly directed.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 925.

The date of the leasing of property as alleged in the complaint is immaterial and need not be proved as laid. Woodruff *v.* Butler, 75 Conn. 679, 55 Atl. 167. *Contra,* Locke *v.* Kennedy, 171 Mass. 204, 50 N. E. 531.

The time of the commencement of the term must be proved as alleged. Pendill *v.* Neuberger, 64 Mich. 220, 31 N. W. 177; Keyes *v.* Dearborn, 12 N. H. 52.

Description of premises.—A lease describing the property as the building "which is now occupied in part by R. Seal as a grocery and by Johnson Bros., as a saloon" is not a variance from a complaint describing the property as "the building which was on the date of the demise of said property occupied by R. Seal as a grocery store." Morningstar *v.* Querens, 142 Ala. 186, 37 So. 825. And there is no variance between a declaration for rent stating a demise of a messuage, land, and premises, with the appurtenances, and proof of a demise of a messuage and land, together with the furniture, utensils, and implements. Farewell *v.* Dickenson, 6 B. & C. 251, 9 D. & R. 345, 5 L. J. K. B. O. S. 154, 13 E. C. L. 124.

No variance see Bowman *v.* Wright, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 580 (holding that evidence that the rent of certain premises was reduced for the unexpired term, and that the tenant paid such amount, which was accepted in full for a certain period, when it was again reduced, was not a substantial variance with a statement in the answer that the lease was terminated and surrendered, and that a second lease was executed and surrendered and a new arrangement entered into between the parties); Van Rensselaer *v.* Gallup, 5 Den. (N. Y.) 454 (holding that where, in covenant against the assignee of the lessee for non-payment of rent, the declaration alleged that all the estate of the lessee in the premises had vested in defendant by assignment, and issue was joined, the point of the issue was whether defendant was assignee of the whole of the estate of the lessee in any part of the land, and it being proved that he was lessee of the whole estate in a part only, there was no variance); Roberson *v.* Gill, (Tex. Civ. App. 1898) 44 S. W. 326 (holding that there is no

(iv) *Evidence Admissible Under Pleadings.* The admission of evidence should be restricted in scope to the matters presented by the pleadings;[48] nor can a pleader introduce evidence in dispute of his admission.[49] Special defenses must

substantial variance where a lessor alleges a certain sum due for rent, and the proof shows a rental at so much an acre, which amounts to the sum sued for); Shaw *v.* Partridge, 17 Vt. 626 (holding that there is no variance between a declaration alleging that the land was leased to defendant and taken possession of by him under a lease reserving a rent, and evidence showing such a lease to a third person and an assignment thereof by him to defendant); Backus *v.* Taylor, 6 Munf. (Va.) 488 (holding that a lease stipulating to pay rent and binding the lessee to board the lessor and his wife part of the term and to return the premises uninjured is not at variance with a declaration describing so much of the agreement as related to leasing and paying rent, and charging the lessee with having broken the covenant generally, and particularly in failing to pay rent, but alleging nothing about the other stipulations); Holgate *v.* Kay, 1 C. & K. 341, 47 E. C. L. 341 (holding that where defendant in his plea sets forth the lease, and then avers that "he entered and was possessed" of the premises thereunder, this will not estop him from proving that when he entered he found some part of the premises in the possession of a third person under an adverse title).

Estoppel to assert variance.—Where a third person in possession under the lessee held himself out to the lessor as having acquired possession from the lessee, he cannot, when sued for the rent, take advantage of the discrepancy between the complaint and the proof, the complaint alleging that he acquired possession from the lessee and the proof showing that possession was transferred through an intermediary. Weide *v.* St. Paul Boom Co., 92 Minn. 76, 99 N. W. 421.

48. *Alabama.*— Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175.

Iowa.— Blackman *v.* Kessler, 110 Iowa 140, 81 N. W. 185, holding that where the tenant does not demand relief because of false representations by the landlord's agent, evidence that he relied on the representations in becoming a party to the lease is inadmissible.

Oregon.— Kiernan *v.* Terry, 26 Oreg. 494, 38 Pac. 671, holding that under a plea alleging that plaintiff had no title to the premises, and that defendant was induced through plaintiff's fraud to pay him rent as lessor, and demanding judgment against plaintiff for the amount of such payments, the lease cannot be attacked as being fraudulent in its inception.

Texas.— Greenhill *v.* Hunton, (Civ. App. 1902) 69 S. W. 440.

Vermont.— Pingry *v.* Watkins, 17 Vt. 379, where, in an action of covenant for rent brought against the assignee of the lessee, plaintiff alleged that all the estate of the lessee in the premises vested in him by assignment thereof, and that defendant entered into possession of the premises after the assignment and retained possession until the rent sued for became due, and defendant pleaded that the estate of the lessee did not vest in him as alleged, or in any manner and form as alleged, and it was held that the fact of the assignment being the only material part of the issue defendant would not be allowed to prove that he did not take possession of the premises after the assignment.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 922.

Evidence held admissible under the pleadings see Moberly *v.* Peek, 67 Ala. 345; Okie *v.* Person, 23 App. Cas. (D. C.) 170 (holding that where the defense is eviction from a portion of the premises, a plea of set-off claiming "damage accruing to defendant for breach of the covenant for quiet enjoyment, and amount due for use and occupation by plaintiff of demised premises" is broad enough to cover any damage accruing from the eviction); Norwood *v.* Fairservice, Quincy (Mass.) 189; Lafferty *v.* Hawes, 63 Minn. 13, 65 N. W. 87 (holding that an answer alleging that while defendants were in possession plaintiff took from them the second floor of the building and leased it to another; and that at the time defendants surrendered the rest of the premises they delivered to plaintiff the key of the building, and that plaintiff accepted it, and took possession of the building, and remodeled it, and ordered defendants to remove their signs therefrom, was broad enough to admit proof of an eviction or of a surrender by operation of law); Williams *v.* Woodard, 2 Wend. (N. Y.) 487 (holding that under a plea, in an action of covenant for rent seeking to charge defendant as assignee, alleging that defendant does not hold by assignment, evidence is admissible that the estate under the lease declared on had ceased by the death of the lessee, who held only for life, before entry by defendant); Avery *v.* House, 2 Ohio Cir. Ct. 246, 1 Ohio Cir. Dec. 468; Kneeland *v.* Schmidt, 78 Wis. 345, 47 N. W. 438, 11 L. R. A. 498 (holding that in an action for rent accruing after abandonment, an allegation in the answer that the lease was surrendered by mutual agreement authorizes evidence that the lessor took actual possession of the premises soon after the lessee abandoned them); Fendall *v.* Billy, 8 Fed. Cas. No. 4,725, 1 Cranch C. C. 87 (holding that in Virginia, upon the plea of "no rent arrear," the tenant may give evidence of work done and goods sold and delivered to the landlord without notice of set-off).

49. Kimball *v.* Cross, 136 Mass. 300.

be specially pleaded;[50] evidence thereof is not admissible under the general issue;[51] nor is evidence of one defense admissible under a plea or answer setting up another defense.[52]

50. Williams *v.* Bethany, 1 La. 315 (holding that in a suit for rent against a tenant holding premises after the expiration of a lease, an offer of possession must be specially pleaded); Daly *v.* Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236 (holding that the lessee of a dwelling cannot escape liability for rent on the ground that the statement of the renting agent as to its condition amounted to a warranty, where it is not so pleaded in the answer); Metropolitan L. Ins. Co. *v.* Standard Nat. Bank, 57 N. Y. Suppl. 797 (breach of condition by lessor); Harmer *v.* Bean, 3 C. & K. 307 (holding that defendant cannot, under a plea of never indebted, avail himself of a part payment of money obtained under a distress, or of a judgment obtained against him in a county court for part of the same rent); Newport *v.* Harley, 2 D. & L. 921, 10 Jur. 333, 14 L. J. Q. B. 242 (holding that under the plea of never indebted defendant may show that A had recovered judgment in ejectment for the premises, and that he had attorned and paid the rent subsequently accruing due to A to avoid being turned out of possession; but that with respect to rent previously due he cannot, under that plea, set up as a defense that he has paid it to A).

51. *Alabama.*—Morningstar *v.* Querens, 142 Ala. 186, 37 So. 825 (holding that the defense of breach of agreement by the lessor must be supported by a plea of recoupment or set-off); Murphy *v.* Farley, 124 Ala. 279, 27 So. 442 (holding that in an action for rent tried on the pleas of the general issue and failure of consideration, evidence of an oral agreement accompanying the lease, whereby the lessor was to make certain repairs, was inadmissible).

Michigan.— Holmes *v.* Wood, 88 Mich. 435, 50 N. W. 323, holding that in an action for rent on defendant's vacating the premises without giving sufficient notice, where the only plea is the general issue, and there is no notice to plaintiff of the defense that the premises were in an untenantable condition, such defense cannot be interposed.

New Hampshire.— Russell *v.* Fabyan, 28 N. H. 543, 61 Am. Dec. 629, holding that payment can be shown only under the general issue with a brief statement, or under a special plea of payment.

New York.— Wilbur *v.* Collin, 4 N. Y. App. Div. 417, 38 N. Y. Suppl. 848 (holding that defendant cannot show under a general denial that before the expiration of the lease plaintiff had conveyed the premises without reserving the rent, or that plaintiff's wife, as joint owner of the premises, was not made a party to the action); Hays *v.* Haffen, 31 Misc. 655, 64 N. Y. Suppl. 1111 (holding that defendant under a general denial cannot show condemnation proceedings of the premises in question).

Vermont.— State University *v.* Joslyn, 21 Vt. 52, holding that if defendant has been excluded from the premises by adverse possession existing at the time of the demise and afterward continuing, he must plead such matter specially.

England.— Waddilove *v.* Barnett, 2 Bing. N. Cas. 538, 4 Dowl. P. C. 347, 1 Hodges 395, 5 L. J. C. P. 145, 2 Scott 763, 29 E. C. L. 652, holding that the fact of the mortgagee of the premises having given the tenant notice to pay the rent to him may be given in evidence under the general issue, if the rent sought to be recovered accrued due after the notice, but that if the rent accrued due before the notice, this defense must be specially pleaded.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 923.

Defenses held provable under general issue see Baker *v.* Fawcett, 69 Ill. App. 300 (holding that the tenant may prove that he suffered injury because the land was not tiled as the landlord represented); Hubbard *v.* McCormick, 33 Ill. App. 486 (holding that defendant may show payment, accord and satisfaction, and with few exceptions any other matter which wholly or partly extinguished the cause of action); Friedlander *v.* Cushing, 18 La. Ann. 124 (holding that defendant may prove that his lessor gave him permission to quit the premises before the end of the term); Boynton *v.* Bodwell, 113 Mass. 531 (holding that evidence of a waiver by the landlord of a defect in a notice of the tenant's intention to surrender is admissible); Mack *v.* Burt, 5 Hun (N. Y.) 28 (holding that a defense that the action was prematurely brought may be shown); Smith *v.* Genet, 2 N. Y. City Ct. 88 (holding that in an action for rent under a void lease the fact that the lessee abandoned the premises may be proved).

52. *Alabama.*— Murphy *v.* Farley, 124 Ala. 279, 27 So. 442.

Iowa.— Bartlett *v.* Gaines, 11 Iowa 95, holding that where, in an action for rent in arrear and for a lien, defendant simply denies the debt, evidence that a large portion of the rent for which suit was brought had become due more than one year prior to the commencement of the action is properly excluded.

Massachusetts.— Eddy *v.* Coffin, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441, holding that defendant cannot recoup the expense of moving from the demised premises under a plea that plaintiff compelled him to leave the premises by failing to keep the covenants of the lease.

New York.— Nichols *v.* Dusenbury, 2 N. Y. 283 (holding that a defense of breach of the landlord's agreement to repair is not available under a plea of eviction); Kettletas *v.* Maybee, 1 Code Rep. N. S. 363, 2 Edm. Sel. Cas. 360 (holding that one sued as assignee of a lease cannot, under an answer denying only its execution and assignment to him,

11. Evidence [53] **— a. Presumptions and Burden of Proof.** [54] In actions for rent, as in other cases, plaintiff bears the burden of proving every disputed fact that constitutes an element of his right to recover,[55] and the burden of proving affirmative defenses rests on defendant.[56] Ordinarily the burden of proof carries

show as a defense that before suit brought he had parted with his interest in the lease and the assignment).

Texas.— Hurst *v.* Benson, 27 Tex. Civ. App. 227, 65 S. W. 76, holding that under a plea reconvening for damages for wrongful distress and claiming compensation for clearing the rented land, evidence that plaintiff had received cotton from defendant without paying therefor is inadmissible.

Vermont.— State University *v.* Joslyn, 21 Vt. 52, holding that in covenant for rent against the assignee of the lessee, it is not competent for defendant to prove, under a plea denying that the lease is the deed of the lessee, that the premises, at the time of the demise and also at the time of the assignment to defendant, were possessed by persons claiming them adversely to plaintiff, the lessor, it being conceded that there was no title to the premises paramount to plaintiff's title; nor is such evidence admissible under a plea that the estate, title, etc., of the lessee did not pass by assignment to defendant as alleged in the declaration.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 922.

See, however, Ripley *v.* Wightman, 4 McCord (S. C.) 447, holding that under a plea of no rent in arrear, defendant may show that the house was rendered uninhabitable by a storm.

53. See, generally, Evidence.

54. **Presumptions in aid of declaration or complaint** see *supra*, VIII, B, 10, a.

55. *Alabama.*—Pheland *v.* Candee, 105 Ala. 235, 16 So. 696, tenancy.

Illinois.— East *v.* Crow, 70 Ill. 91, terms of lease.

Michigan.— Stevens *v.* Beardsley, 134 Mich. 506, 96 N. W. 571.

New Mexico.— Staab *v.* Raynolds, 4 N. M. 222, 17 Pac. 136.

New York.— Vogel *v.* Hemming, 84 N. Y. Suppl. 473 (amount due); Reich *v.* McCrea, 13 N. Y. Suppl. 650 (damages).

United States.— Weeks *v.* International Trust Co., 125 Fed. 370, 60 C. C. A. 236 [*reversing* 116 Fed. 898], election to relet premises after breach of covenant by lessee.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 926.

Title and authority to recover.—Where an action is brought upon a lease, not by the lessor but by those claiming to have succeeded to his rights under the lease, plaintiffs are bound to establish their derivative title. Schott *v.* Burton, 13 Barb. (N. Y.) 173. And persons suing for rent as devisees of the lessor do not establish their title as devisees by introducing the will, although the persons named in the will as devisees bear the same name as plaintiffs. Bend *v.* Hoffman House, 30 Misc. (N. Y.) 729, 62 N. Y. Suppl. 1081. So a plaintiff suing for rent "as trustee" or "as assignee" cannot recover, in the absence of proof of his authority. Gibbons *v.* Hellwig, 27 Misc. (N. Y.) 787, 58 N. Y. Suppl. 291. In the case of a lease by an agent in his own name as agent, where the lessee went into possession and paid rent, but it does not appear that he was in possession otherwise than under the lease, the presumption is that the occupancy was under the lease. Schaefer *v.* Henkel, 75 N. Y. 378. However, in an action by an administrator for rent accruing during the lifetime of his intestate, it is not necessary for him to show title in his intestate. Wells *v.* Mason, 5 Ill. 84.

In an action for rent founded on a holding over, where the answer admits the holding over but alleges a new agreement as to the continuance of the tenancy, the burden of proof is on the landlord to establish the holding over on the old terms. Montgomery *v.* Willis, 45 Nebr. 434, 63 N. W. 794. Accordingly the burden is on him to show the rent prescribed in the lease. Ambrose *v.* Hyde, 145 Cal. 555, 79 Pac. 64. The presumption created by Cal. Code Civ. Proc. § 1161, subd. 2, that a tenant of agricultural lands who continues to occupy the premises more than sixty days after the term does so upon the same terms as the lease of the previous year, is rebuttable. Ambrose *v.* Hyde, *supra*. And see Thetford *v.* Tyler, 8 Q. B. 95, 10 Jur. 68, 15 L. J. Q. B. 33, 55 E. C. L. 95.

56. *Georgia.*— Parker *v.* Brown, 115 Ga. 324, 41 S. E. 613, holding that the failure of the lessor to make repairs as agreed is no defense if the lessee does not prove actual damages.

Illinois.— Skakel *v.* Hennessey, 57 Ill. App. 332, holding that where one rents a house, and, when sued for the rent, claims that he acted as agent for another, the burden is on him to show that fact.

Iowa.— Gatch *v.* Garretson, 100 Iowa 252, 69 N. W. 550, holding that the burden is on a lessee to show that the lessor failed to heat the building sufficiently to entitle him to an increase of rent, which was by the lease conditioned upon his heating the building.

Louisiana.— Berens *v.* Maristany, 23 La. Ann. 724, holding that the burden of showing that the notary who drew the lease made an error in computing the rent falls upon the lessee.

Michigan.— Stevens *v.* Beardsley, 134 Mich. 506, 96 N. W. 571, settlement of claim for rent.

New York.— Reiner *v.* Jones, 38 N. Y. App. Div. 441, 56 N. Y. Suppl. 423 (holding that a tenant is not entitled to deduct for expenses of repairs, where the proof does not show how much of a sum expended for repairs of two buildings was spent on the building in

with it the burden of adducing evidence in support of the fact in issue;[57] but a party is relieved from this latter burden where the fact is presumed in law to exist, in which case the burden of adducing evidence of the non-existence of the fact rests on the opposite party.[58] Where a third person is in possession of the premises under the lessee, the law presumes that he has taken an assignment of the lease and assumed the obligations thereunder, and in an action against him for rent the burden is on him to prove the contrary;[59] but it cannot be presumed that defendant assigned the lease, where it is not proven that another was in possession of the entire premises.[60] In a settlement of accounts between landlord and tenant, and the mutual claims of the parties for and against each other, the party relying upon a contract, either as supporting his own demand or disproving that of the other, carries the burden of establishing it.[61]

b. Admissibility.[62] The admissibility of evidence in actions for rent is gov-

suit); Hurliman *v.* Seckendorf, 9 Misc. 264, 29 N. Y. Suppl. 740.

North Carolina.— Gates *v.* Max, 125 N. C. 139, 34 S. E. 266 (transfer of rents by plaintiff); Hutchins *v.* Hodges, 98 N. C. 404, 4 S. E. 46 (damages from eviction).

Pennsylvania.— Bradley *v.* Citizens' Trust, etc., Co., 6 Pa. Dist. 217 (condition precedent to right to rent); Snyder *v.* Middleton, 4 Phila. 343 (eviction).

See 32 Cent. Dig. tit. "Landlord and Tenant," § 926.

Modification of lease.— In a suit for rent under a written lease, where the defense is a rescission of the lease by a subsequent parol agreement for less rent, the burden of proving the rescission is on defendant. Wheeler *v.* Baker, 59 Iowa 86, 12 N. W. 767; Staab *v.* Raynolds, 4 N. M. 222, 17 Pac. 136.

Termination of tenancy.— In an action for use and occupation against one who, previous to the period claimed for, was plaintiff's tenant of the premises, the burden is on defendant to prove the discontinuance of the relation. Hill *v.* Goolsby, 41 Ga. 289. And see Snyder *v.* Middleton, 4 Phila. (Pa.) 343. So where a firm occupying premises belonging to two of its members as tenants in common continues such occupation after the death of one of the owners, it will be presumed, in the absence of evidence to the contrary, that the relation of landlord and tenant continues. Chapin *v.* Foss, 75 Ill. 280. The acceptance of a surrender is a matter of defense to an action for rent; and where the tenant fails to show the time and period of a reletting by the landlord during the term, it will not be presumed to have been made at such time as to constitute an acceptance. Isaacson *v.* Wolfensohn, 84 N. Y. Suppl. 555. But see Harris *v.* Dub, 57 Ga. 77. However, in an action for use and occupation, a lease from plaintiff to other persons being proved which had two years to run from the entry of defendant, it is incumbent on plaintiff to prove that it was surrendered so that he was at liberty to relet the premises. Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394. Where lessees, when sued on the lease, allege that it was canceled by agreement with the agent of the lessor, the burden is on them to establish the allegation. Faville *v.* Lundvall, 106 Iowa 135, 76 N. W. 512.

The burden of proving payment of rent rests on the tenant. Montgomery *v.* Leuwer, 94 Minn. 133, 102 N. W. 367; Morrow *v.* Galbraith, 1 Phila. (Pa.) 552; Gay *v.* Joplin, 13 Fed. 650, 4 McCrary 459. Effect of receipt for rent see *supra*, VIII, A, 10, h.

57. See EVIDENCE, 16 Cyc. 926 *et seq.*

58. David Stevenson Brewing Co. *v.* Culbertson, 18 Misc. (N. Y.) 486, 41 N. Y. Suppl. 1039 (holding that delivery of the lease at the time of its execution will be presumed, where the tenant has gone into actual possession); Rogers *v.* McKenzie, 73 N. C. 487 (holding that the lessee is entitled to credit on the rent for the amount of taxes paid by him, since it may fairly be presumed that the tax was paid to prevent the sale of the land for the tax and to secure the benefit of his lease; and that as the taxes were paid for the ease and benefit of the lessor, his assent thereto will be presumed); Heipley *v.* Green, 7 Ohio S. & C. Pl. Dec. 497 (holding that where entries are made by a lessor in a passbook containing an account for rent, and the book is returned to the lessee, it is presumed that the lessee has knowledge of the entries, and in the absence of proof to the contrary he is bound thereby). And see Eberlein *v.* Abel, 10 Ill. App. 626.

59. Weide *v.* St. Paul Boom Co., 92 Minn. 76, 99 N. W. 421; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394, 27 How. Pr. 422 [*affirming* 1 Daly 371]; Van Rensselaer *v.* Secor, 32 Barb. (N. Y.) 469; Main *v.* Davis, 32 Barb. (N. Y.) 461; Coit *v.* Planer, 7 Rob. (N. Y.) 413, 4 Abb. Pr. N. S. 140; Reynolds *v.* Lawton, 8 N. Y. Suppl. 403; Wittman *v.* Milwaukee, etc., R. Co., 51 Wis. 89, 8 N. W. 6.

This presumption is rebuttable, however. Ebling *v.* Fuylein, 2 Mo. App. 252; Welsh *v.* Schuyler, 6 Daly (N. Y.) 412; Washington Real Estate Co. *v.* Roger Williams Silver Co., 25 R. I. 483, 56 Atl. 686; Mariner *v.* Crocker, 18 Wis. 251; Cross *v.* Upson, 17 Wis. 618. See also Reynolds *v.* Lawton, 8 N. Y. Suppl. 403.

60. Ely *v.* Winans, 88 N. Y. Suppl. 929.

61. Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756.

62. **Evidence of lost lease** see LOST INSTRUMENTS.

Issues, proof, and variance see *supra*, VIII, B, 10, d.

erned by the same rules that apply in civil actions generally.[63] Generally speaking, if the proffered evidence is material and relevant to the issues it is admissible;[64]

Parol evidence see EVIDENCE, 17 Cyc. 567 *et seq.*

63. See, generally, EVIDENCE.

64. *Alabama.* — Anderson *v.* Winton, 136 Ala. 422, 34 So. 962, holding that where defendant pleaded non-liability by reason of eviction, evidence that he had sublet one of four houses included in the lease was admissible as showing that he retained possession.

Georgia.— Stewart *v.* Lanier House Co., 75 Ga. 582, holding that a tenant sued for rent of a hotel who seeks to recoup damages sustained by reason of the lessor's neglect to keep the hotel in repair as agreed may show that persons refused to come to the hotel, and that it had the reputation of being untenantable, and that in its then present condition it could not be run profitably.

Illinois.— Resser *v.* Corwin, 72 Ill. App. 625, holding that in an action by the lessor upon a lease after abandonment by the lessee, it is competent, for the purpose of showing the damages sustained by the lessor, to prove how much the premises netted him after the abandonment.

Maryland.— Finch *v.* Mishler, 100 Md. 458, 59 Atl. 1009, holding that in an action on a rent note given by a tenant to a mortgagee, where defendant showed that plaintiff had sold the property under its mortgage, so as to make it appear that plaintiff had violated one of the implied conditions of the note, and plaintiff then showed that the sale was made subject to the lease, and that the property, which was a summer hotel, was not sold until the end of the season, it was proper for plaintiff to show further that it was necessary to have someone take care of the property until the next spring, in order to show that defendant was not damaged by the sale.

Massachusetts.— Bogle *v.* Chase, 117 Mass. 273, evidence of a prior inconsistent claim by plaintiff.

New York.— Chamberlain *v.* Iba, 181 N. Y. 486, 74 N. E. 481 [*reversing* 87 N. Y. App. Div. 632, 84 N. Y. Suppl. 1120]; Trenkmann *v.* Schneider, 26 Misc. 695, 56 N. Y. Suppl. 770 [*reversing* 23 Misc. 336, 51 N. Y. Suppl. 232] (holding that in an action for rent under a lease providing that the premises were let to defendant "for the purpose of her business," where it was claimed by defendant that plaintiff did not supply defendant's machinery with steam, evidence was admissible to show the character of defendant's business, and its requirements as to machinery); Schloss *v.* Huber, 21 Misc. 28, 46 N. Y. Suppl. 921 (holding that receipts given to defendant by former landlords of the premises are admissible to show the term of the original hiring, and its continuance); Lawrence *v.* Mycenian Marble Co., 1 Misc. 105, 20 N. Y. Suppl. 698 (holding that where the tenant defends on the ground of eviction by reason of the deprivation of the use of a freight elevator in the premises, evidence of the landlord's previous neglect to maintain the elevator is relevant to show that its subsequent inefficiency was not casual or inadvertent); Dyett *v.* Pendlton, 8 Cow. 727 (holding that evidence that the lessor habitually brought company under the same roof with the demised premises, although in an apartment not demised, by which noise and disturbance were made, and that in consequence the lessee quitted the premises with his family, is proper under a plea of eviction).

Oregon.— Ladd *v.* Hawkes, 41 Oreg. 247, 68 Pac. 422, holding that defendant in an action for rent of a wharf, having alleged that he agreed to pay for it only so long as he occupied it, may give evidence, not only that he was not in the occupancy of it but that another was, through agreement with plaintiff.

Pennsylvania.— Harvey *v.* Gunzberg, 148 Pa. St. 294, 23 Atl. 1005 (holding that in an action against a tenant for rent for the last seven months of the year after the expiration of his lease, he having held over and occupied and paid the rent for the premises for five months, there is no error in the admission in evidence of a letter from plaintiff to defendant, written over a month before defendant vacated the premises, that in case he moved out he would be held for the rent for the balance of the year); Pancoast *v.* Coon, 6 Pa. Cas. 164, 9 Atl. 156 (holding that where one agrees verbally with the tenant and the owner of property to rent the property on the terms upon which the tenant held it, it is not error, in an action between the landlord and the later tenant, to admit in evidence the lease between the former tenant and the owner to show what those terms were.

South Carolina.— Hill *v.* Williams, 41 S. C. 134, 19 S. E. 290, holding that for the purpose of showing that the contract for rent between plaintiff and defendant had in legal effect been annulled, defendant claiming that he had attorned to others with the consent of plaintiff, testimony of such persons that they had bought the land since plaintiff alleged that he had rented it to defendant, rent obligations from defendant to such persons, and testimony of such persons that plaintiff knew that defendant rented from them, are competent evidence.

Texas.— Thomas *v.* Judy, (Civ. App. 1898) 44 S. W. 890 (holding that a judgment in an action between T and S, declaring T to be entitled to the use and possession of certain land for life, and enjoining S from in any way interfering with the premises or tenants is admissible in an action between T and a tenant involving the right to rent in which the tenant relies on payment to S, although knowing at the time thereof of the judgment); Johnson *v.* Doss, 1 Tex. App. Civ. Cas. § 1075 (holding that where plaintiff sued defendant for the rent of land which plaintiff had purchased at execution sale

otherwise not.[65] These rules apply to the admissibility of evidence with reference to the amount of rent due,[66] and with reference to the condition of the

against defendant's lessor subsequent to the lease, and to prove their rights to the rent offered in evidence the judgment against defendant's lessor, execution thereon, and sale thereunder, and the sheriff's deed to them, it was error to reject such evidence on the ground that it raised a question of title, as that was not in issue).

Washington.— Earles *v.* Bigelow, 7 Wash. 581, 35 Pac. 390.

Wisconsin.— Colclough *v.* Niland, 68 Wis. 309, 32 N. W. 119, holding that in an action for rent and for repairs of a building made necessary by defendant's negligence, in which defendant counter-claimed for damages, evidence of damage caused by leakage through the cellar upon his goods, in the absence of evidence that the tenant occupying the rooms above the store through the floor of which the water passed was responsible is admissible.

United States.— Lemmon *v.* U. S., 106 Fed. 650, 45 C. C. A. 518.

England.— Hawkins *v.* Warre, 3 B. & C. 690, 5 D. & R. 512, 10 E. C. L. 313, holding that where a witness deposed that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent, an unstamped memorandum written afterward by himself but not signed by anybody was admissible as a mere proposal to show that the settled draft was not the final agreement.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 927.

65. *Alabama.*— Linam *v.* Jones, 134 Ala. 570, 33 So. 343 (holding that a deed showing the conveyance of land by plaintiff to a third person is properly excluded as irrelevant, it not being shown that the land conveyed was the same as that rented); Burks v. Bragg, 89 Ala. 204, 7 So. 156 (holding that in an action on a note given by a tenant for rent due, evidence as to why at the time of executing the note he made no claim for damages to his goods caused by the failure of his landlord to make repairs is immaterial, where there is no evidence that the landlord was obliged by the contract to make repairs).

Illinois.— Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31 [*affirming* 66 Ill. App. 282], holding that on the question of a person's liability for rent under a lease, it is immaterial what motive induced him to make certain payments thereof.

Kansas.— Prosser *v.* Pretzel, (App. 1899) 55 Pac. 854, holding that on an issue whether a tenant was justified under the lease in abandoning the premises because of their untenantable condition, evidence that other circumstances induced him to abandon the premises is inadmissible.

Massachusetts.— Bigelow *v.* Collamore, 5 Cush. 226.

Michigan.— Stevens *v.* Beardsley, 122 Mich. 671, 81 N. W. 921.

New York.— Smith *v.* Barber, 96 N. Y. App. Div. 256, 89 N. Y. Suppl. 317; Majestic Hotel Co. *v.* Bigelow, 50 N. Y. App. Div. 444, 64 N. Y. Suppl. 81 (holding that where plaintiff alleges that the premises were leased for a year, and defendant alleges that the tenancy was one at will, evidence of plaintiff showing his custom to charge a different rate of rental for yearly leases from that charged for monthly leases is inadmissible); Sonn *v.* Weissmann, 29 Misc. 622, 61 N. Y. Suppl. 78 [*affirming* 27 Misc. 845, 58 N. Y. Suppl. 1149]; Steinhardt *v.* Buel, 1 Misc. 295, 20 N. Y. Suppl. 706 [*reversing* 16 N. Y. Suppl. 153] (where, on the landlord's agreeing to supply additional room, the tenant agreed that he would renew his lease for another year, but nothing was said as to the amount of rent to be paid, and subsequently the tenant refused to execute a lease, and in an action for rent it was held that the agreement was incomplete and inoperative for want of an agreement as to the rent, and accordingly evidence that the landlord intended to give the additional room gratis was inadmissible to affect the tenant with liability, because such intention was not communicated to him).

Pennsylvania.— Reineman *v.* Blair, 96 Pa. St. 155 (holding that where a landlord and tenant made a written agreement by which the former was to be permitted to enter and make repairs necessary to render the building safe, and was to allow a stated reduction of rent to compensate the tenant for the loss from the inconvenience and damages ensuing from such repairs, the tenant cannot set up the inconvenience and loss to his business, unless the completion of the repairs had been unnecessarily delayed, and to admit evidence to prove the entire extent of the interference with his business by the repairs and the entire loss sustained by him, instead of confining the inquiry to the damages caused by the delay, is error); Newlin *v.* Palmer, 11 Serg. & R. 98 (holding that a receipt for rent by one claiming adversely to plaintiff is not admissible without some evidence of attornment).

See 32 Cent. Dig. tit. "Landlord and Tenant," § 927.

66. *Alabama.*— Anderson *v.* Winton, 136 Ala. 422, 34 So. 962 (where plaintiff rented a farm together with certain houses thereon, and thereafter in consideration of a surrender of such lease, except as to such houses and certain other property, and the payment of one hundred and forty dollars, accepted a lease of another farm from the same lessor, and it was held, in an action for rent under the second lease, that a question asked of defendant on cross-examination as to the reasonable rental value of each of the houses retained by defendant was immaterial); Simpson *v.* East, 124 Ala. 293, 27 So. 436 (holding that where defendant had executed

premises,[67] the use of the premises by the tenant for illegal purposes,[68] the surrender of the premises by the tenant and their acceptance by the landlord,[69] and

a note to plaintiff in which the amount of rent to be paid by him to plaintiff was fixed, it was proper to exclude evidence as to what the premises rented for in prior or after years).

Georgia.— Royston *v.* Royston, 29 Ga. 82, holding that as evidence of the fair rent of a plantation, it may be shown that during the time in question many of the neighboring lands lay idle, and that it was a common thing within stated periods to let the like lands for a year for the price of the repairs only; and that evidence of the general rent or profits of neighboring plantations is also admissible.

Iowa.—Blackman *v.* Kessler, 110 Iowa 140, 81 N. W. 185, holding that where the tenant's answer averring that the written lease was set aside by a verbal agreement and that he was responsible only for the reasonable value of the land is not assailed, evidence as to the reasonable value of the land is admissible.

Maine.— Sargent *v.* Ashe, 23 Me. 201, holding that in an action on an implied agreement a parol agreement concerning the amount of rent to be paid, made at the commencement of the occupation, is competent evidence in determining what would be a reasonable amount of rent.

Michigan.—Stevens *v.* Beardsley, 122 Mich. 671, 81 N. W. 921, holding that where the amount is in dispute, evidence as to what was paid by another of plaintiff's tenants who occupied property adjoining that occupied by defendant is inadmissible; but that evidence that the rent of other business houses in the city depreciated during defendant's occupancy is admissible, since, the contract price being in dispute, testimony as to value may be shown as bearing on the probabilities of the truthfulness of the parties.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 929.

67. Wilkinson *v.* Clauson, 29 Minn. 91, 12 N. W. 147 (where the defense was fraud in misrepresentations by the lessor of the sufficiency of a sewer which proved insufficient on the occurrence of a heavy rain, causing damage to the lessee's goods, and it was held that evidence as to the size and manner of construction of the sewer, and the advice of an expert about it, were proper on the questions of plaintiff's good faith and due care, and that evidence as to the nature of the storm in question was proper to show how the premises were affected by it, but that evidence of subsequent storms which were not complained of was immaterial); Benkard *v.* Babcock, 2 Rob. (N. Y.) 175, 17 Abb. Pr. 421, 27 How. Pr. 391 (holding that where defendants set up a breach of plaintiff's covenant that the premises should be free from percolation of water, it is error to allow inquiries to be put to witnesses as to the injury to the value of the premises in consequence of the dampness thereof without laying a proper foundation for such inquiries by showing a breach of the covenant during the time referred to); St. Michael's Protestant Episcopal Church *v.* Behrens, 13 Daly (N. Y.) 548, 10 N. Y. Civ. Proc. 181 (holding that where the defense is constructive eviction by reason of defective plumbing, it is error to exclude evidence of the effect and condition of the premises on the lessee's employees, since this tends to show whether the premises were so injured as to render them unfit for occupancy); Hays *v.* Moody, 2 N. Y. Suppl. 385 (holding that where defendant alleges that the premises were untenantable because of defective drainage, evidence that plaintiff repaired the drainage after the abandonment is incompetent, there being no question of negligence, and the evidence not establishing an accepted surrender).

68. Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207 (holding that evidence of the reputation of a house as one of ill fame is admissible on the part of defendant to show that it was being so used with the owner's knowledge, and that the contract was illegal); Egan *v.* Gordon, 65 Minn. 505, 68 N. W. 103 (holding that, the defense being that the premises were leased and used for immoral purposes, and there being evidence that the lessee occupied the premises before and after the lease was executed in the same general way, evidence of the reputation of the house both before and after the execution of the lease was competent; and that evidence of acts done on the premises tending to show that the place was in fact of the character alleged was competent to prove its character, although plaintiff was absent when the acts were committed); Plath *v.* Kline, 18 N. Y. App. Div. 240, 45 N. Y. Suppl. 951 (holding that in an action on a renewal lease for rent, where the defense was that the letting was for an immoral purpose, evidence of the prior lease and of defendant's tenancy under it was competent on the question of plaintiff's knowledge of the use made by defendant of the premises and of his consent thereto, as bearing on his understanding or intent in that respect when the lease in suit was made, where the unlawful business was continued from and after the making of the latter).

69. *Arizona.*— Kastner *v.* Campbell, 6 Ariz. 145, 53 Pac. 586, holding that where the lessees were partners, and were defending on the ground of rescission and breach of the lessor's agreement to construct a building on the premises, evidence of a dissolution of the partnership and a removal of one partner with the knowledge of the lessor prior to the time the rent sued for accrued, and that in a controversy about the rent the lessor refused to permit the other partner to remove to a building which he had been forced to construct, is inadmissible to prove a surren-

the renewal of the tenancy on the expiration of the original term.[70] Admissions and declarations are likewise received subject to the general rules of evi-

der of the lease; and that evidence offered by the lessee to prove acts on his part toward a surrender of the lease before the rent accrued, but without connecting them with reciprocal conduct or acquiescence of the lessor, is also properly excluded.

District of Columbia.— Okie *v.* Person, 23 App. Cas. 170, holding that in an action for two months' unpaid rent due in advance on the twentieth day of each month, where the defense is a surrender of the premises and acceptance of such surrender during the first month after the rent day under an agreement that no rent should be paid while the premises were being remodeled, evidence is admissible showing that before the execution of the lease the lessor had promised that no rent should be charged during the process of remodeling, and that after the surrender and before the expiration of the term lumber had been stored on the premises by the lessor.

Iowa.— Jenkins *v.* Clyde Coal Co., 82 Iowa 618, 48 N. W. 970, holding that where one, without excuse, signs, without reading it, a receipt for money due under a lease, which receipt recites that the lease is terminated and that the payment is received in full of all claims under it, he cannot, in the absence of proof of fraud, show that he thought he was signing a receipt only.

Massachusetts.— Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979 (holding that where defendant contends that he was not liable because either plaintiff or his grantor had accepted others as tenants and had collected rent of them as such, evidence that plaintiff and his grantor had given receipts for rent in defendant's name, and that when plaintiff collected rent from occupants he invariably made out his bills and receipts in the name of defendant, is admissible); Dix *v.* Atkins, 130 Mass. 171 (holding that in a suit by a landlord to recover a quarter's rent under a lease for a year providing that it should be continued or renewed for a like term by a failure to give notice of an intention to terminate it, evidence as to whether plaintiff has let the leased rooms since the quarter sued for, and of their condition, and how they have been since occupied, is immaterial, and does not tend to show that he accepted a surrender of the lease during the first quarter); Boynton *v.* Bodwell, 113 Mass. 531 (holding that after proof that the tenant left because of obstruction of the light by the location of a neighboring wall, evidence that at the time of the letting the landlord had said that there was no danger of such an obstruction is admissible on the question of waiver by the landlord of a defect in a notice by the tenant of his intention to surrender the premises).

Michigan.— Hill *v.* Robinson, 23 Mich. 24, holding that where the defense is that the tenants surrendered and abandoned the lease and premises with the assent of the landlord, evidence of the occupancy of the premises or a part of them by third persons, of the delivery of the key to the landlord, and of negotiations between the landlord and third persons for a new letting, is competent on the question of surrender in fact.

Missouri.— Huling *v.* Roll, 43 Mo. App. 234, holding that after the parties to a lease have done acts amounting in law to a surrender, evidence of an offer by the lessees to the lessor of a sum for their discharge from the obligations of the lease is immaterial.

Pennsylvania.— Pratt *v.* H. M. Richards Jewelry Co., 69 Pa. St. 53, holding that evidence that after one of several sublessees vacated the leased premises the lessee surrendered and delivered possession to the lessor, who collected rent from the other sublessees, and that the sublessee in question did not occupy the building afterward, is admissible on the question of a surrender by the sublessee and acceptance by the lessee.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 932.

70. Emmons *v.* Scudder, 115 Mass. 367 (holding that where a tenant, after the expiration of his lease, continues in possession under an agreement for a lease of the same and additional premises, proof of his payment of the rent stipulated in the new agreement and of his underletting a tenement not included in the original lease, even though the rent therefor was paid him under protest, is evidence of an entry under the new agreement); Wall *v.* Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64 (holding that under a lease which provides that the lessor may terminate it by three months' notice in writing "to the lessee," and that upon receiving such notice "the lessee, his legal representatives or assigns," by giving written notice to the lessor, may continue to hold the premises at an increased rent, which the lessee in that contingency covenants to pay, a notice in writing to the lessor from assignees of the lessee, stating their receipt of such a notice from him and their intention to hold the premises for the residue of the term at the increased rent, is admissible against the lessee in an action on his covenant for the increased rent); Mittwer *v.* Stremel, 69 Minn. 19, 71 N. W. 698 (holding that where there was a new agreement for tenancy, made after the expiration of the term of a lease for years of a store building, the only question between the parties being whether it was for a year or from month to month, evidence that the tenants had built up a large trade in that part of the city, that it would cost them a considerable sum to move, and that there was no other place in that locality into which they could move when the agreement was made, is irrelevant); Carter *v.* Collar, 1 Phila. (Pa.) 339 (holding that where a tenant under a sealed lease for a year continues in possession after its termination, the lease

dence.[71] An inoperative lease may be admitted in evidence for certain purposes,[72] and an instrument executed after suit brought is not necessarily to be excluded.[73]

may be admitted in evidence, in an action of assumpsit for use and occupation, to show the terms of the new holding).

71. Ambrose *v.* Hyde, 145 Cal. 555, 79 Pac. 64 (holding that conversations held between plaintiff and the wife of his assignor concerning the rent of the premises to defendant, and held by her with others who tried to rent them, none of which was in the presence of defendant, are not admissible against him); Dunn *v.* Jaffray, 36 Kan. 408, 13 Pac. 781 (where a firm of which plaintiff was a member leased a store-room to defendant until the premises should be sold, when the firm was to give defendant ninety days' notice of the sale, on which the tenancy was to expire, and on Aug. 24, 1880, plaintiff bought the same, and about the same time the lessors notified defendant of the sale, and on Oct. 20, 1881, plaintiff sold the lot, and the same day his grantee notified defendant to quit, and it was held, in an action by plaintiff against defendant for use and occupation prior to the last mentioned date, that evidence of the notice to quit was properly excludded, as what plaintiff's grantee said or did after he purchased the property could not affect plaintiff's rights while he owned the premises); Bigelow *v.* Collamore, 5 Cush. (Mass.) 226 (holding that in construing a stipulation in a lease for years that the lessee shall pay the rent reserved except in cases of unavoidable casualty, declarations of the lessor as to his understanding of the terms of the lease are not admissible); Jacobs *v.* Callaghan, 57 Mich. 11, 23 N. W. 454 (holding that where the tenant claims that the premises had been surrendered and accepted by plaintiff, declarations of the person in possession to third persons are admissible as showing that he held possession under defendant and not under plaintiff); Ledyard *v.* Morey, 54 Mich. 77, 19 N. W. 754 (holding that in an action to recover an agreed rental for the use of a right of way, evidence that the lessee told one of his own tenants that he had the right to use the premises for passage is admissible, and not open to the objection that the lease is the best evidence); Durando *v.* Wyman, 2 Sandf. (N. Y.) 597 (holding that if, pending the possession of demised premises by a third person the lessor receives from the lessee a surrender of the term, such surrender, if produced by the lessor in a subsequent action for rent against the occupant, is an admission that the lessee and not defendant was at its date the tenant of lessor); Schloss *v.* Huber, 21 Misc. (N. Y.) 28, 46 N. Y. Suppl. 921 (holding that conversations between the tenant and former agents through whom the hiring was done were competent to show the term of the original hiring and its continuance.

72. Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499 (holding that a parol agreement for a lease for the term of one year to commence at a future day, although void as a contract under the statute of frauds, may be looked to in order to explain the subsequent holding of the premises and to show that it was not on the terms of a prior valid lease); Lemmon *v.* U. S., 106 Fed. 650, 45 C. C. A. 518 (holding that on the issue whether third persons in possession of leased premises during a certain term were holding under the lessee, testimony that they were holding under void leases from other persons, for which they paid the rent, and the void leases themselves, are competent evidence); De Medina *v.* Polson, Holt N. P. 47, 3 E. C. L. 28 (holding that recourse may be had to the original agreement, although void under the statute of frauds, to calculate the amount of the rent due where defendant entered under the agreement). And see Simpson *v.* East, 124 Ala. 293, 27 So. 436 (holding that where plaintiff prepared a lease describing the land and reserving certain portions, which defendant refused to sign because it contained a stipulation requiring him to execute a mortgage to secure the rent, but defendant made no objection to the reservation contained therein and subsequently executed a note for the rent, the lease was admissible to show that parts of the property were reserved, although plaintiff alleged that no reservations were to be made); Pusheck *v.* Frances E. Willard Nat. Temperance Hospital Assoc, 94 Ill. App. 192 (holding that in an action for rent by a lessor against a lessee holding over, a lease prepared during negotiations between the parties for a new letting of the premises, but not executed, is admissible on the question of the amount of the rent, as a part of the *res gestæ*.

73. Smith *v.* Houston, 16 Ala. 111 (holding that in assumpsit for rent of land brought for the use of B, the fact that B while sheriff and after suit brought executed the deed under which plaintiff claims does not render it inadmissible to show title in plaintiff); Baltimore City *v.* Peat, 93 Md. 696, 50 Atl. 152, 698 (where a lease containing a covenant to pay rent as it matured was assigned by the lessee, and the interest of the assignee was sold under a judicial decree, and thereafter the assignor paid rents on the assignee's failing to do so, and, after the commencement of suit by the assignor against the assignee to recover the rent paid by the assignor subsequent to the sale and because of the assignee's failure to pay, a deed was executed pursuant to the decree, and it was held that the fact that the deed was executed after the commencement of suit did not render it inadmissible to show the termination of the privity between the assignor and assignee by relation from the time of the sale). See, however, Walton *v.* Cronly, 14 Wend. (N Y.) 63, holding that a declaration of trust executed after the commencement of a suit against an as-

The service on a tenant of a written notice to quit cannot be proved by the written return and affidavit of the person making the service.[74]

c. Weight and Sufficiency. Plaintiff in an action for rent must establish his case by a preponderance of evidence.[75] The weight and sufficiency of evidence is governed by the general rules applied in civil cases generally,[76] and this applies

signee of a lease, to the effect that the assignment was merely a security for the payment of money, is not admissible.

74. Hollingsworth *v.* Snyder, 2 Iowa 435, holding that proof must be made as at common law, and subject to the right of cross-examination.

75. East *v.* Crow, 70 Ill. 91 (holding that he cannot recover if the evidence is equally balanced); Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756.

Certainty.—To justify a recovery on a written lease, the proof in behalf of plaintiff must made his demand certain; to raise a probability is not sufficient. Jackson *v.* Belling, 22 La. Ann. 377.

76. See, generally, EVIDENCE, 17 Cyc. 753 *et seq.*

Evidence held sufficient to support a verdict against the lessee's claim to a set-off for repairs (Roesch *v.* Johnson, 69 Ark. 30, 62 S. W. 416); to support a finding that defendants had an interest in the lease as principals of the actual tenant (Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662); to justify a verdict against the lessee's claim that in case of an overflow of the land he was not to pay rent (Clay *v.* Martin, 23 La. Ann. 470); to warrant the jury in finding that there had been a settlement of the accounts of the parties (Stevens *v.* Beardsley, 134 Mich. 506, 96 N. W. 571); to support a finding that the lessor did not rebuild within a reasonable time (Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1007); to sustain a finding of the existence of an oral agreement of leasing for a term of years (Humphrey Hardware Co. *v.* Herrick, 5 Nebr. (Unoff.) 524, 99 N. W. 233); to sustain a finding that the lease was made with the intent that the premises should be used for purposes of prostitution (Ernst *v.* Grosby, 140 N. Y. 364, 35 N. E. 603 [*affirming* 21 N. Y. Suppl. 365]; to sustain a finding that one who occupied premises as agent of the holder of a lease continued to occupy them simply as agent after the execution of an assignment of the lease to him, so that the assignor continued liable for the rent (Dresner *v.* Fredericks, 91 N. Y. App. Div. 224, 86 N. Y. Suppl. 589); to sustain the defense that the letting was for the illegal purpose of conducting a bowling alley (Updike *v.* Campbell, 4 E. D. Smith (N. Y.) 570); to show when lease began (Jourgensen *v.* Traitel, 20 N. Y. Suppl. 33) to sustain a judgment for plaintiff as on an account stated (Treadwel *v.* Bruder, 3 E. D. Smith (N. Y.) 596); to support a finding that the premises were occupied under the lease by defendant through subtenants, who were not in privity of contract with plaintiff rendering defendant liable for the rent (Ely *v.* Winans, 88 N. Y. Suppl. 929); to sustain a finding that an elevator in the leased building was not stopped for repairs by the lessor for an unreasonable time (Ardsley Hall Co. *v.* Sirrett, 86 N. Y. Suppl. 792); to sustain a finding that the letting was for a year (Dixon *v.* Silberblatt, 86 N. Y. Suppl. 262); to sustain a finding against a counter-claim for storage of plaintiff's goods (Watson *v.* Raab, 84 N. Y. Suppl. 972); to sustain a finding that the letting was by the month (Lydig *v.* Thompson, 20 Misc. (N. Y.) 709, 46 N. Y. Suppl. 436); to sustain a finding that the landlord had released the tenant from liability (People's Sav. Bank *v.* Alexander, 140 Pa. St. 22, 21 Atl. 248); to justify a finding that the lessee took the premises with knowledge of the state of the lessor's title and at his own risk (Kemble Coal, etc., Co. *v.* Scott, 90 Pa. St. 332); to show the amount due (Mensing *v.* Cardwell, (Tex. Civ. App. 1903) 75 S. W. 347); to show knowledge on the part of lessee of the assignment of the lease by the lessor (Wittmann *v.* Watry, 45 Wis. 491); to justify a finding that defendant was substituted as tenant in place of the lessee (Darch *v.* McLeod, 16 U. C. Q. B. 614); or to justify a finding that rent was payable quarterly (Wilson *v.* McNamara, 12 U. C. Q. B. 446).

Evidence held insufficient to sustain a finding that the premises were not tenantable (Field *v.* Surpless, 83 N. Y. App. Div. 268, 82 N. Y. Suppl. 127); to show that the tenant was to be allowed credit for repairs (Ely *v.* Fahy, 79 Hun (N. Y.) 65, 29 N. Y. Suppl. 667); to show the amount due (Oliver *v.* Moore, 12 N. Y. Suppl. 343); to show that rent was due (Sickles *v.* Shaw, 37 Misc. (N. Y.) 836, 76 N. Y. Suppl. 978); to show that the husband of a lessee was a co-lessee (Bernstein *v.* Heinemann, 23 Misc. (N. Y.) 464, 51 N. Y. Suppl. 467); to show that an oral lease was not for a year, but only from month to month (Schumacher *v.* Waring, 7 Misc. (N. Y.) 161, 27 N. Y. Suppl. 325); to establish a lease for six months (Taylor *v.* Kirkover, 2 Misc. (N. Y.) 42, 21 N. Y. Suppl. 1081); to show the amount or value of excess steam taken by the lessee (Goetschius *v.* Shapiro, 88 N. Y. Suppl. 171); to support a finding that the tenant held over without a new contract of tenancy (Bon *v.* Fenlon, 84 N. Y. Suppl. 858); to show that at the time of the first payment of rent defendant was acting under any legal duress (Mineral R., etc., Co. *v.* Flaherty, 24 Pa. Super. Ct. 236); or to support a verdict for damages on a counter-claim for failure to heat the premises (Hunter *v.* Hathaway, 108 Wis. 620, 84 N. W. 996). Mere proof that

to evidence which is adduced on issues of eviction[77] and surrender and acceptance.[78]

12. Amount of Recovery[79] — a. Rent Accruing After Institution of Action.[80] Rents accruing after the institution of the action cannot as a rule be recovered.[81]

b. Effect of Stipulation For Penalty For Non-Payment of Rent. A stipulation for a penalty for non-payment of rent does not preclude the landlord from recovering the full amount of unpaid rent, although it exceeds the penalty.[82]

c. Interest.[83] It is generally held that interest is recoverable in covenant and in debt on arrears of rent from the time it became due.[84] This rule applies to

a third person furnished money to a lessee to pay his rent is not sufficient to show that the landlord has accepted the third person as his lessee. Ely *v.* Winans, 88 N. Y. Suppl. 929.

Where the evidence of experts as to the fair annual rent of the land is conflicting, it is competent for the master to fix the rate at the sum agreed on by the parties as rent for a certain previous year. Jenckes *v.* Cook, 10 R. I. 215.

77. **Evidence held sufficient** to sustain a finding of eviction see Lawrence *v.* Mycenian Marble Co., 1 Misc. (N. Y.) 105, 20 N. Y. Suppl. 698; Eschmann *v.* Atkinson, 91 N. Y. Suppl. 319.

Evidence held insufficient to show that the premises had been rendered untenantable because of fire (Bowen *v.* Shackter, (N. J. Sup. 1905) 60 Atl. 1111; Block *v.* Katz, 34 Misc. (N. Y.) 778, 68 N. Y. Suppl. 865); to show a constructive eviction on account of a disagreeable odor (Diehl *v.* Watson, 89 N. Y. App. Div. 445, 85 N. Y. Suppl. 851); to prove that the landlord let adjoining premises, knowing that they were to be used for the purpose of prostitution (Townsend *v.* Gilsey, 7 Abb. Pr. N. S. (N. Y.) 59); or to show that defendant was evicted by a third person from a right of way to a river from the leased premises which was appurtenant to the lease (Baylies *v.* Philadelphia, etc., Coal, etc., Co., 10 N. Y. Suppl. 316). Record of a judgment held to be no evidence of defendant's having been evicted see Smith *v.* Pettit, 2 N. Y. Leg. Obs. 257.

78. **Evidence held sufficient** to warrant a finding that there had been a valid surrender of the lease (Foster *v.* Fleishans, 69 Mich. 543, 37 N. W. 549); to support a finding that an agent of the landlord was authorized to accept a surrender of the leased premises and that a surrender was made by the tenant and accepted by the agent (Paget *v.* Electrical Engineering Co., 85 Minn. 311, 88 N. W. 844); to show a surrender and acceptance, and that defendant waived the right to rent for a short period of holding over (Dobbin *v.* McDonald, 60 Minn. 380, 62 N. W. 437); to warrant a finding that the lease had been surrendered by the tenant and accepted by the landlord (Fleischmann Realty, etc., Co. *v.* Morison, 88 N. Y. Suppl. 128).

Evidence held insufficient to establish the defense that the premises had been surrendered by defendant pursuant to a notice to quit, requiring him to pay the amount of their rent due on or before the expiration of three days before the day of service thereof or surrender possession of the premises see Morris *v.* Dayton, 86 N. Y. Suppl. 172.

79. See also *infra*, VIII, B, 14, as to judgment.

80. **Recovery by supplemental complaint** see *supra*, VIII, B, 10, a.

Prematurity of action see *supra*, VIII, B, 5, a.

81. Carmack *v.* Grant, 5 Litt. (Ky.) 32; Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 339; Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321. See Foucher *v.* Leeds, 2 La. 403, holding that a judgment condemning defendant to pay rent from inception of suit until he surrenders possession is erroneous.

82. Wagle *v.* Bartley, 8 Pa. Cas. 271, 11 Atl. 223.

83. See, generally, Interest.

84. *Delaware.*— Guthrie *v.* Stockton, 5 Harr. 123.

Kentucky.—Elkin *v.* Moore, 6 B. Mon. 462; Honore *v.* Murray, 3 Dana 31; Downing *v.* Palmateer, 1 T. B. Mon. 64, holding that where a demand for rent is secured by specialty, the statute gives interest.

Maryland.— Dennison *v.* Lee, 6 Gill & J. 383; Williams *v.* Annapolis, 6 Harr. & J. 529.

New York.— Van Rensselaer *v.* Jones, 2 Barb. 643; Crane *v.* Hardman, 4 E. D. Smith 448; Clark *v.* Barlow, 4 Johns. 183.

South Carolina.— Dorrill *v.* Stephens, 4 McCord 59.

Canada.— Crooks *v.* Dickson, 1 Can. L. J. N. S. 211 [*affirmed* in 15 U. C. C. P. 523].

See 32 Cent. Dig. tit. "Landlord and Tenant," § 937.

Contra.— Cooke *v.* Wise, 3 Hen. & M. (Va.) 463 (debt for rent); Wise *v.* Ressler, 30 Fed. Cas. No. 17,912, 2 Cranch C. C. 199 (in the absence of a demand for the rent); Gill *v.* Patton, 10 Fed. Cas. No. 5,430, 1 Cranch C. C. 188 (covenant for rent).

Parol demise.— It has been said that as a rule interest is not recoverable on rents due under a parol demise. Hart *v.* Finney, 1 Strobh. (S. C.) 250, holding that a stranger whose tenancy begins after the expiration of a written lease is not chargeable with interest on rent in arrear. *Contra*, Stockton *v.* Guthrie, 5 Harr. (Del.) 204. And see Dorrill *v.* Stephens, 4 McCord (S. C.) 59, where, an action for use and occupation against a tenant who held over after the termination of a written lease, it was held that interest was recoverable on the arrears of rent.

overdue instalments of rent;[85] and it applies also even though the rent is payable in property of a specific quantity.[86]

d. Attorney's Fees. If the lease provides for an attorney's fees in case suit is necessary to recover rent, the fee is properly allowed as part of the recovery.[87]

e. Damages in Addition to Rent.[88] Under the code the lessor may, in an action for rent, recover damages for a wrongful holding over pending proceedings to recover possession for default in payment of rent.[89] So in an action for rent the lessor may recover the reasonable expenses incurred by him in causing the removal from the premises of the lessee's machinery by the execution of the warrant of dispossession.[90] The measure of damages for breach of the tenant's agreement to take steam power from the lessor at an agreed compensation is not necessarily the whole amount agreed to be paid, but a just recompense for the injury sustained.[91]

13. Trial[92] — a. Questions For Court and For Jury — (I) *General Rule.* Questions of law are for the determination of the court,[93] while issues of fact are to be determined by the jury.[94]

(II) *As Determined by the Evidence.* If there is any evidence from which

Although not claimed in the declaration, interest may be allowed. Crooks *v.* Dickson, 15 U. C. C. P. 523 [*affirming* 1 Can. L. J. N. S. 211].

85. Walker *v.* Hadduck, 14 Ill. 399 (so by statute); West Chicago Alcohol Works *v.* Sheer, 8 Ill. App. 367; Oliver *v.* Moore, 53 Hun (N. Y.) 472, 6 N. Y. Suppl. 413. *Contra*, in the absence of a demand. Perret *v.* Dupré, 19 La. 341. And see Crooks *v.* Dickson, 1 Can. L. J. N. S. 211 [*affirmed* in 15 U. C. C. P. 523].

However, although a lessee is bound to pay interest on instalments of rent from the time they become due where nothing has been done by the lessor to prevent the regular payment of the instalments, yet where new agreements have been made affecting the amount of rents and the time of payment, even though they are not valid and binding for want of consideration, the lessor ought not to demand interest. White *v.* Walker, 31 Ill. 422.

86. Van Rensselaer *v.* Jones, 2 Barb. (N. Y.) 643; Van Rensselaer *v.* Jewett, 5 Den. (N. Y.) 135; Lush *v.* Druse, 4 Wend. (N. Y.) 313. *Contra*, Van Rensselaer *v.* Platner, 1 Johns. (N. Y.) 276.

87. Fox *v.* McKee, 31 La. Ann. 67, holding, however, that a stipulation by a lessee to pay, in case the lessor has to sue, five per cent attorney's fee on the amount of the rent "to the expiration of the lease" entitles the lessor, on a decree of dissolution, to five per cent only on the rent accrued when it takes effect.

However, a provision in a lease to allow an attorney's fee for enforcing the covenants does not apply to a suit for rent on an agreement growing out of the lease and the subsequent relations of the parties (Leitch *v.* Boyington, 84 Ill. 179); and the fact that a lease provides for an attorney's fee if necessary to enforce the lease does not entitle the landlord to such fee in an action for the rent, where the tenant recovers on a counterclaim an amount greater than the rent due (Taylor *v.* Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230).

88. Stipulation for penalty for non-payment of rent as affecting right to recover full amount of rent due see *supra*, VIII, B, 12, b.

89. Fursman *v.* Farinaci, 2 N. Y. Suppl. 339, 15 N. Y. Civ. Proc. 340.

The rule was formerly otherwise.— Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 339.

90. Glaser *v.* Cumisky, 16 N. Y. Suppl. 89.

91. Sherwood *v.* Gardner, 2 N. Y. City Ct. 64.

92. See, generally, Trial.

93. Russell *v.* Rush, 2 Pittsb. (Pa.) 134.

94. *Connecticut.*— Benedict *v.* Everard, 73 Conn. 157, 46 Atl. 870, question of amount of rent due.

Illinois.— Pusheck *v.* Frances E. Willard Nat. Temperance Hospital Assoc., 94 Ill. App. 192, question whether a tenancy was created for a year or from month to month.

Indiana.— Heath *v.* West, 68 Ind. 548, question what would constitute a good and substantial inclosure of the land.

Maryland.— McElderry *v.* Flannagan, 1 Harr. & G. 308, questions of description of land and eviction of tenant.

Massachusetts.— Norwood *v.* Fairservice, Quincy 189, question whether an alteration in the lease was made before or after its execution.

Minnesota.— Van Brunt *v.* Wallace, 88 Minn. 116, 92 N. W. 521, question whether a landlord accepted the surrender of the premises when vacated.

Missouri.— Goss Heating, etc., Co. *v.* Oviatt, 60 Mo. App. 565, questions whether a leased building was rendered uninhabitable by fire, and if so, whether it was made habitable within a reasonable time thereafter.

New York.— Edwards *v.* McLean, 122 N. Y. 302, 25 N. E. 483 [*affirming* 55 N. Y. Super. Ct. 126]; Saffer *v.* Levy, 88 N. Y. Suppl. 144, question of damages.

Pennsylvania.— Murphy *v.* Losch, 148 Pa. St. 171, 23 Atl. 1059 (question of surrender); Smith *v.* Harvey, 4 Pa. Super. Ct. 377, 40 Wkly. Notes Cas. 229 (question whether plaintiff made an agreement to remedy such deficiency in the service of water as should be found

the jury might justifiably find the existence of a fact in issue, the issue should be submitted to them for determination.[95] Accordingly if the evidence is conflicting the issue is for the jury to determine.[96] Nor can the court declare a fact estab-

necessary, upon which assurance lessee and surety signed the lease); Russell *v.* Rush, 2 Pittsb. 134 (question of duty of lessor to repair).

See 32 Cent. Dig. tit. "Landlord and Tenant," § 941.

95. See cases cited *infra*, this note. And see Anderson *v.* Winton, 136 Ala. 422, 34 So. 962; Oakford *v.* Nirdlinger, 196 Pa. St. 162, 46 Atl. 374; Le Gierse *v.* Green, 61 Tex. 128, holding that where the acts and contracts of the parties to the transfer of a leasehold are such as to leave it uncertain what their real intention was, the terms of the transfer are to be determined by the jury from the parties' dealings.

Evidence held to make a case for the jury on the questions whether defendant took possession and used and occupied the premises (Franklin Tel. Co. *v.* Pewtress, 43 Conn. 167); whether the lessor waived the statutory notice of an intention to move (Lewis *v.* Scanlan, 3 Pennew. (Del.) 238, 50 Atl. 58); whether plaintiff had connived with certain persons to harass and injure defendant in his possession (Harmont *v.* Sullivan, 128 Iowa 309, 103 N. W. 951); whether a representation of the lessor was fraudulent (Dennison *v.* Grove, 52 N. J. L. 144, 19 Atl. 186); whether defendant promised to pay rent to plaintiff (McFarlan *v.* Watson, 3 N. Y. 286); whether the landlord failed to object to the sufficiency of the tenant's notice of his intention to terminate the tenancy, and thus waived the regular notice of such intention (Thomson *v.* Chick, 92 Hun (N. Y.) 510, 37 N. Y. Suppl. 59); whether the tenant exercised due diligence in removing after the premises were injured by fire (Zimmer *v.* Black, 14 N. Y. Suppl. 107); whether the lessor made repairs as speedily as possible after a fire (Saffer *v.* Levy, 88 N. Y. Suppl. 144); whether defendant took the tract with knowledge of the state of plaintiff's title and at his own risk (Kemble Coal, etc., Co. *v.* Scott, 90 Pa. St. 332); whether defendant or her husband was the tenant (Fludder *v.* Vaughan, 24 R. I. 471, 53 Atl. 636); whether defendant, a stranger, was in possession under the lease (Cross *v.* Upson, 17 Wis. 618); whether the lessor elected to relet the premises at the lessee's risk after breach of covenant (Weeks *v.* International Trust Co., 125 Fed. 370, 60 C. C. A. 236); whether bulkhead and window light space of which the lessee of a basement was deprived constituted an appreciable, material, or substantial part of the basement (New York Dry Goods Store *v.* Pabst Brewing Co., 112 Fed. 381, 50 C. C. A. 295); whether a tenant holding over was bound by the terms of the lease as to the amount of rent (Thetford Corp. *v.* Tyler, 8 Q. B. 95, 10 Jur. 68, 15 L. J. Q. B. 33, 55 E. C. L. 95); whether the lessee's tenancy continued after a subletting (Levy *v.* Lewis, 6 C. B. N. S. 706, 5 Jur. N. S. 1408, 28 L. J. C. P. 304, 95 E. C. L. 766 [*affirmed* in 9 C. B. N. S. 872, 7 Jur. N. S. 759, 30 L. J. C. P. 141, 9 Wkly. Rep. 388, 99 E. C. L. 872]); whether there was a substitution of defendant as tenant in place of the lessee (Darch *v.* McLeod, 16 U. C. Q. B. 614); or whether the rent was payable quarterly or yearly (Wilson *v.* McNamara, 12 U. C. Q. B. 446).

Whether the premises became untenantable by reason of explosions (Tallman *v.* Murphy, 120 N. Y. 345, 24 N. E. 716), fire (New York Real-Estate, etc., Imp. Co. *v.* Motley, 16 N. Y. Suppl. 209; Zimmer *v.* Black, 14 N. Y. Suppl. 107), the use of a pump under the premises causing noise and vibrations (Coope *v.* Kollstade, 33 Misc. (N. Y.) 113, 67 N. Y. Suppl. 181), defective plumbing (St. Michael's Protestant Episcopal Church *v.* Behrens, 13 Daly (N. Y.) 548), or the landlord's failure to supply heat as agreed (Butler *v.* Newhouse, 85 N. Y. Suppl. 373) are questions for the jury under the evidence.

Whether the premises were surrendered and accepted held to be for the jury see Hays *v.* Goldman, 71 Ark. 251, 72 S. W. 563; Lewis *v.* Scanlan, 3 Pennew. (Del.) 238, 50 Atl. 58; Detroit Pharmacal Co. *v.* Burt, 124 Mich. 220, 82 N. W. 893; Gray *v.* Kaufman Dairy, etc., Co., 89 Hun (N. Y.) 144, 35 N. Y. Suppl. 9; Ewing *v.* Barnard, 84 N. Y. Suppl. 137; Hurley *v.* Shring, 17 N. Y. Suppl. 7.

Whether a tenant held over under a lease held to be for the jury see Prosser *v.* Pretzel, (Kan. App. 1899) 55 Pac. 854; Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449, 37 N. Y. Suppl. 374.

Waiver.— Where the actual hiring and the actual occupancy were such questions of fact that the jury might find for plaintiff without violence to the evidence, and plaintiff might have submitted these questions to the jury but did not, and the judge was therefore obliged to decide them himself, a motion for a new trial on exceptions taken to a nonsuit ordered at the trial must be denied. Terry *v.* Bonesteel, 25 How. Pr. (N. Y.) 422. So a plaintiff by failing to object to the submission of a question to the jury thereby admits the sufficiency of the evidence to sustain a finding thereon against him. Duff *v.* Hart, 16 N. Y. Suppl. 163.

96. See cases cited *infra*, this note.

Case held to be for the jury on conflicting evidence as to whether defendant consented to the landlord's turning his mules on the premises (Johnson *v.* Aldridge, 93 Ala. 77, 9 So. 513); as to whether plaintiff and defendant entered into an oral lease (Youell *v.* Kridler, 105 Mich. 344, 63 N. W. 439); as to whether a holding over by the tenant was with intent to renew the lease, or whether it was a holding as tenant from month to month (Gerhart Realty Co. *v.* Brecht, 109 Mo. App. 25, 84 S. W. 216); as to whether the lease

lished as a matter of law where the evidence is such that reasonable men might come to different conclusions as to the existence of the fact.[97] If, however, the evidence is legally insufficient to justify the jury in finding that a fact exists, the issue should not be submitted to them; but the court may dismiss or nonsuit, or direct a verdict, or otherwise dispose of the case without the intervention of the jury.[98] And issues not made by the pleadings,[99] or special defenses which have not been pleaded,[1] should not be submitted to the jury under any state of the evidence.

b. Instructions. Instructions in actions for rent are governed by the rules applying in civil cases generally.[2]

was rescinded (Staab *v.* Raynolds, 4 N. M. 222, 17 Pac. 136); as to whether injury to the premises by a severe storm rendered them untenantable, and whether the lessee surrendered them because of such fact (May *v.* Gillis, 169 N. Y. 330, 62 N. E. 385 [*reversing* 53 N. Y. App. Div. 393, 66 N. Y. Suppl. 4]); as to the cause of the deterioration of the leased building, and whether plaintiff assumed to make the repairs on his own responsibility (Hawkins *v.* Ringler, 47 N. Y. App. Div. 262, 62 N. Y. Suppl. 56); as to the authority of the lessor's agent (Simons *v.* Evans, 16 N. Y. Suppl. 698; Robbins *v.* Voss, (Tex. Civ. App. 1901) 64 S. W. 313); as to whether noises made in adjoining premises constituted an eviction (Chisolm *v.* Kilbreth, 88 N. Y. Suppl. 364); as to the tenant's acceptance of the landlord's terms (Majors *v.* Goodrich, (Tex. Civ. App. 1900) 54 S. W. 919); and as to whether any rent was due at the time of action brought (Breese *v.* McCann, 52 Vt. 498).

97. Gerhart Realty Co. *v.* Brecht, 109 Mo. App. 25, 84 S. W. 216 (issue whether lease was surrendered held to be for the jury); Hammond *v.* Eckhardt, 16 Daly (N. Y.) 113, 9 N. Y. Suppl. 508 (issue whether there was a holding over held to be for the jury); Gates *v.* Max, 125 N. C. 139, 34 S. E. 266 (issue whether rents were assigned held to be for the jury).

98. Cougle *v.* Densmore, 57 Ill. App. 591; Prahar *v.* Tousey, 93 N. Y. App. Div. 507, 87 N. Y. Suppl. 845 (issue of fraud); Bradley *v.* Citizens' Trust, etc., Co., 6 Pa. Dist. 217; Snyder *v.* Middleton, 4 Phila. (Pa.) 343 (issue of surrender and acceptance).

99. Templin *v.* Rothweiler, 56 Iowa 259, 9 N. W. 207, holding that where a written lease sued on is introduced in evidence without objection, and its execution is not denied under oath, it is erroneous to submit the question of its execution to the jury.

1. Marshall *v.* Harber, (Iowa 1902) 91 N. W. 774, holding that it is error to submit to the jury the question of false representations by plaintiff at the execution of the lease, where the representations were not pleaded as a defense or counter-claim.

2. *Alabama.*— Espalla *v.* Wilson, 86 Ala. 487, 5 So. 867, holding that an instruction that if the lessor complied with his agreements he can recover for the full term, although the lessee abandoned the premises before the expiration of the lease, does not amount to a direction to disallow an undisputed payment of one month's rent.

Illinois.— Goldsbrough *v.* Gable, 152 Ill. 594, 38 N. E. 1025, holding that in an action for rent accruing after the expiration of a lease, where there was evidence that before such expiration the landlord agreed to reduce the rent if the tenant would remain, and it appeared that for two months after the lease expired the tenant continued to pay rent at the old rate, it was error to place the first circumstance before the jury without reference to the other.

Michigan.— Hartz *v.* Eddy, 140 Mich. 479, 103 N. W. 852.

North Carolina.— Gaither *v.* Hascall-Richards Steam Generator Co., 121 N. C. 384, 28 S. E. 546, holding that an instruction did not submit to the jury a question of law.

Rhode Island.— Fludder *v.* Vaughan, 24 R. I. 471, 53 Atl. 636, holding that an instruction was too broad.

Texas.— Majors *v.* Goodrich, (Civ. App. 1900) 54 S. W. 919, holding that where the question of the tenant's acceptance of the landlord's terms was not conclusively shown, the court should have provided for the contingency of the jury's finding no acceptance, and instructed them in that event to find for plaintiff the reasonable rental value, no other rental contract being shown.

United States.— Wadsworth *v.* Warren, 12 Wall. 307, 20 L. ed. 402, holding that an instruction properly submitted the question whether the lease had been delivered at all as the deed of defendant.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 943.

Instructions must be applicable to the issues.— Stewart *v.* Lanier House Co., 75 Ga. 582; Slyfield *v.* Cordingly, 72 Iowa 762, 34 N. W. 602; Squire *v.* Ferd Heim Brewing Co., 90 Mo. App. 462; Elmendorf *v.* Schuh, (Tex. Civ. App. 1901) 62 S. W. 797. And see Hurst *v.* Benson, (Tex. Civ. App. 1902) 71 S. W. 417.

Instructions must be applicable to the evidence.— Slyfield *v.* Cordingly, 72 Iowa 762, 34 N. W. 602; Bogle *v.* Chase, 117 Mass. 273; Crow *v.* Burgin, (Miss. 1905) 38 So. 625; Dixon *v.* Ahern, 19 Nev. 422, 14 Pac. 598; Jackson *v.* Odell, 9 Daly (N. Y.) 371.

Misleading instructions.—Instructions must be so framed as not to mislead the jury. Anderson *v.* Winton, 136 Ala. 422, 34 So. 962. See, however, Prosser *v.* Pretzel, (Kan.

c. Verdict and Findings. The verdict or findings in actions for rent are governed by the rules applicable in civil cases generally.[3]

14. Judgment[4] and Enforcement Thereof.[5] Under a statute providing that judgments in suits for rent may be rendered at the first term after institution of suit, an action by the payee of a note which states on its face that it was given for rent and which is attached to the declaration is in order for judgment at the first term, although the declaration does not allege the relation of landlord and tenant.[6] As in other actions the judgment in an action for rent must conform to the pleadings.[7] A distringas will not be issued to compel specific execution of a

App. 1899) 55 Pac. 854, where an objection on this ground was held to be without merit.

Requests covered by the general charge may properly be refused.— Frederick *v.* Daniels, 74 Conn. 710, 52 Atl. 414; Todd *v.* Cooke, 64 S. W. 908, 23 Ky. L. Rep. 1528; International Trust Co. *v.* Weeks, 139 Fed. 5, 71 C. C. A. 417.

Instructions generally see Trial.

3. *Arkansas.*— Nichol *v.* McDonald, 69 Ark. 341, 64 S. W. 263, holding that where the defense to an action for rent of a tract of sixty acres was that plaintiff had evicted defendant from four acres, a finding that before plaintiff sold the four acres plaintiff and defendant had agreed that either one of them might make a sale of the land is an insufficient basis for a judgment for plaintiff, since the tenant might be willing to have the whole tract sold when he would not consent to the sale of a part, and because the jury failed to find whether and to what extent defendant was entitled to a reduction in the rent.

Colorado.— Wilson *v.* Lunt, 17 Colo. App. 48, 67 Pac. 627, holding that a finding that the requirements of the lease as to appraisement have been satisfied, except as to the manner of notice, is in effect a finding of the return of the appraisement as prescribed by the lease; and that such a finding is authorized by the statement of counsel that there is no issue about the appraisement having been made, but that the point is that a certain assignee of the original lessee was not a party to the appraisal and received no notice thereof.

Kentucky.— Holt *v.* Crume, Litt. Sel. Cas. 499, holding that where the covenant is to pay rent and deliver possession, but no breach is assigned in the declaration as to the nonpayment of rent, the jury can give no damages for that, whatever evidence may come before them as to the value of the rent.

Texas.— Bowen *v.* Hatch, (Civ. App. 1896) 34 S. W. 330, holding that a verdict in an action on rent notes, on account of which the lessor claimed a lien on stock of the lessee, finding for defendant a credit of a certain amount on the notes, without an affirmative finding in favor of plaintiff either as to the sum due or as to the existence of the lien, does not support a judgment for plaintiff for a balance due on the notes and for a foreclosure of the lien.

Virginia.— Turner *v.* Smith, 18 Gratt. 830, holding that a special verdict in a proceeding to recover rent due on a lease with right of distress and entry, finding the entry of the lessee on the land and the holding by him and those claiming under him for forty-five years, does not justify an inference that the original entry was under the lease.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 944.

4. See, generally, Judgments.

Amount of recovery: Generally, see *supra*, VIII, B, 12. Variance see *supra*, VIII, B, 10, d, (III). Verdict and findings see *supra*, VIII, B, 13, c.

Recovery of rent incidentally: In ejectment see Ejectment, 15 Cyc. 205 *et seq.* In suit for specific performance see Specific Performance. In dispossession proceedings see *infra*, X, C, 1, d.

5. See, generally, Executions.

6. Simpson *v.* Earle, 87 Ga. 215, 13 S. E. 446.

7. Boughton *v.* Boughton, 77 Conn. 7, 58 Atl. 226 (holding that where a complaint seeks to recover for use and occupation at an agreed monthly rent or a reasonable rate, no recovery can be had on the theory of a tenancy at will with payments of rent annually due); Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1007 (holding that where by the terms of the lease the lessee was to keep the premises insured, and if the building was destroyed by fire the lessor was to have the insurance money, but there is nothing in the pleadings in regard to the matter, plaintiff in a suit for unpaid rents cannot recover the insurance money, even though the case has been converted to one in equity by an affirmative defense set up in the answer); Jackson *v.* Doherty, 17 Misc. (N. Y.) 629, 40 N. Y. Suppl. 655 (holding that a bill of particulars of a counter-claim for injuries to certain property caused by negligence of the landlord does not authorize a judgment for defendant on the ground that, in consequence of the landlord's failure to keep his agreement, the difference in the value of the use of the premises as they were and as the landlord agreed to put them equaled the amount of rent sued for). See, however, Weeks *v.* International Trust Co., 125 Fed. 370, 60 C. C. A. 236 [*reversing* 116 Fed. 898], holding that the fact that the declaration in an action by a lessor against the lessee, after default by the latter in the payment of rent and reëntry by the lessor, states the cause of action as one for the recovery of rent instead of for damages for breach of covenant is immaterial, where the lease provides that in such case the lessee shall remain responsible for the rent during the term.

judgment rendered against a tenant for a portion of a crop in kind, where in consequence of the bonding and sale of the property it had become impossible to deliver it in kind.[8]

15. Review.[9] Questions of appeal and error in actions for rent are governed by the same rules that apply to other civil cases.[10] If there is any evidence to support a verdict or finding, it will not be disturbed on appeal;[11] and a judgment will not be reversed for harmless error.[12]

C. Attachment[13]**— 1. In General.** In many states the legislatures have given the landlord a remedy by attachment of specified property of the tenant for the purpose of enforcing his lien or otherwise collecting his rent.[14] So far as procedure goes, this remedy is usually governed by the rules applicable to attachment proceedings in general.[15] The fact that the statute gives the landlord an equitable remedy for enforcing his lien does not deprive him of the statutory right to an

The reasonable value of the use and occupation of the premises cannot be recovered under a declaration for a specified rent due under a lease. Eaton *v.* Dugan, 21 Pick. (Mass.) 538; West *v.* Cartledge, 5 Hill (N. Y.) 488 [*reversed* on another ground in 2 Den. 377]. And see Macklin *v.* McNetton, 30 Misc. (N. Y.) 749, 63 N. Y. Suppl. 438, holding that in an action for rent against one claimed to be a hold-over tenant, where the only matter in dispute is whether plaintiff had elected to continue the tenancy, the judgment must be for the amount claimed or nothing, and a judgment for use and occupation is error. *Contra*, Silverstein *v.* Stern, 21 La. Ann. 743. And see Twitchell *v.* Goebel, 106 Mich. 225, 64 N. W. 56; Sherman *v.* Ludin, 84 N. Y. App. Div. 579, 82 N. Y. Suppl. 1032.

8. Bowles *v.* Wilcoxen, 2 La. Ann. 760.

9. See, generally, Appeal and Error.

Appeals from justices' courts see Justices of the Peace.

10. Mason *v.* Lenderoth, 88 N. Y. App. Div. 38, 84 N. Y. Suppl. 740, holding that on appeal the supreme court will assume that a judgment of foreclosure and sale of leased premises, alleged to have constituted a breach of covenant for quiet enjoyment, contained the direction that the purchaser be let into possession on production of the deed.

Saving question for review.— The objection that an action on a note given for rent was brought pending a suit to foreclose a mortgage securing the rent without leave of the court trying the foreclosure suit should be taken by answer. Frischman *v.* Zimmermann, 19 Misc. (N. Y.) 53, 42 N. Y. Suppl. 824. Where, however, under a declaration on a lease, a recovery is had upon a liability as tenant by sufferance, advantage may afterward be taken of the error, although no objection was raised at the trial. McNamara *v.* O'Brien, 2 Wyo. 447.

11. Yetter *v.* King Confectionery Co., 66 N. J. L. 491, 49 Atl. 678; Harft *v.* Tonnelli, 16 Daly (N. Y.) 115, 9 N. Y. Suppl. 513.

A finding on conflicting evidence is conclusive on appeal. Ambrose *v.* Hyde, 145 Cal. 555, 79 Pac. 64; Adams Express Co. *v.* McDonald, 21 Kan. 680; Davis *v.* Rhodes, (La. 1887) 2 So. 405. Weight and sufficiency of evidence see *supra*, VIII, B, 11, c.

12. Gillaspie *v.* Hagans, 90 Cal. 90, 27 Pac. 34; Hyman *v.* Jockey Club Wine, etc., Co., 9 Colo. App. 299, 48 Pac. 671; Parsons *v.* Wright, 102 Iowa 473, 71 N. W. 351.

Errors as to evidence.— Error in the admission of evidence held harmless see Trenkmann *v.* Schneider, 26 Misc. (N. Y.) 695, 56 N. Y. Suppl. 770 [*reversing* 23 Misc. 336, 51 N. Y. Suppl. 232]; Griffin *v.* Porawski, 17 N. Y. Suppl. 636. Error in the admission of evidence held prejudicial see Dunn *v.* Jaffray, 36 Kan. 408, 13 Pac. 781; Tower *v.* Blessing, 55 N. Y. App. Div. 634, 67 N. Y. Suppl. 124. Error in the rejection of evidence held prejudicial see Rosenblatt *v.* Samson, 25 Misc. (N. Y.) 771, 55 N. Y. Suppl. 451.

13. See, generally, Attachment.

Attachment for share of crop as rent see *infra*, XI, C, 1, h.

Claim by landlord in attachment proceedings by creditors of tenant see Attachment, 4 Cyc. 726.

Splitting cause of action see Joinder and Splitting of Actions.

14. See the statutes of the different states. And see Mulhaupt *v.* Enders, 38 La. Ann. 744; Sterrett *v.* Smith, 2 Mart. N. S. (La.) 450.

Nature of remedy.— In Mississippi it has been held that an attachment for rent in arrears is not the commencement of a suit which it is designed should be tried in any of the courts of the state. It is simply a mandate in the nature of an execution for a money demand which is intended to be executed without the intervention of the court, unless the debt or demand itself be disputed by the tenant, in which case the tenant may, upon giving bond, sue out a writ of replevin and regain possession of the property. When these steps have been taken the attachment is discharged and the proceeding becomes an action of replevin subject to the forms of pleading and practice in such actions, and the legality of the attachment depends on whether there is any rent due. Towns *v.* Boarman, 23 Miss. 186.

Exclusiveness of attachment as remedy for enforcement of lien see *infra*, VIII, D, 3, h.

15. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30; North *v.* Eslava, 12 Ala. 240; Smeaton *v.* Cole, 120 Iowa 368, 94 N. W. 909; Williams *v.*

attachment;[16] but a landlord who distrains loses his right of action for rent and cannot have an attachment therefor.[17]

2. Persons Entitled to Remedy.[18] Primarily the remedy of attachment for rent is given to the landlord, and accordingly to justify the issuance of the writ the relation of landlord and tenant must exist.[19] The statutes authorizing attachment for rent usually apply to all landlords without distinction as to the location of their property or the purpose for which it is used;[20] and the fact that the landlord had mortgaged the premises before making the lease does not, before seizure and sale under the mortgage, deprive him of the right to attach for rent.[21]

3. Claims Enforceable — a. In General. The statutes under consideration give the remedy by attachment only for rent[22] or advances;[23] and it has been held that the landlord's claim is defeated if he includes therein any item not within the statute.[24] In some states the rent must be reserved in money as distinguished from property;[25] and it has been held that if a lease fixing the rent exists, the landlord cannot have an attachment for the reasonable value of the use and occupation of the premises.[26]

b. Rent Unaccrued. In some states the landlord may under certain circumstances attach for rent not accrued;[27] but it has been held that where an attach-

Braden, 63 Mo. App. 513; Cleveland *v.* Crum, 33 Mo. App. 616; Woolley *v.* Maynes-Wells Co., 15 Utah 341, 49 Pac. 647, where special rules have not been prescribed. See, however, Hallam *v.* Jones, Gilm. (Va.) 142.

16. The Richmond *v.* Cake, 1 App. Cas. (D. C.) 447. And see Crawford *v.* Coil, 69 Mo. 588; Hubbard *v.* Moss, 65 Mo. 647.

17. Gray *v.* Curry, 22 Nova Scotia 262. The landlord may, however, attach for rents not accrued, although the goods of the tenant are in an officer's hands under a distress warrant. Herbert *v.* Ward, 12 Fed. Cas. No. 6,398, 1 Cranch C. C. 30.

18. Parties to suit see *infra*, VIII, C, 7.

19. Hadden *v.* Powell, 17 Ala. 314. See, however, Houston *v.* Smythe, 66 Miss. 118, 5 So. 520, where the lessee of a mortgagor was held to be a tenant of the mortgagee.

Attachment does not lie in favor of a vendor against a defaulting purchaser in possession (Adair *v.* Stone, 81 Ala. 113, 1 So. 768; Tucker *v.* Adams, 52 Ala. 254), unless the parties have, by agreement entered into subsequent to the contract of purchase, created the relation of landlord and tenant (Powell *v.* Hadden, 21 Ala. 745).

The transferee of a negotiable instrument given for rent cannot maintain attachment thereon. Foster *v.* Westmoreland, 52 Ala. 223; Gross *v.* Bartley, 66 Miss. 116, 5 So. 225; Wright *v.* Link, 34 Miss. 266.

20. Buck *v.* Midland Tobacco Co., 62 Mo. App. 175.

21. Thompson *v.* Flathers, 45 La. Ann. 120, 12 So. 245.

22. Dryer *v.* Abercrombie, 57 Ala. 497; Merrit *v.* Fisher, 19 Iowa 354, holding that attachment will not lie for damages for a failure to till land, or for breaches of covenant not connected with the demise of the land.

23. Dryer *v.* Abercrombie, 57 Ala. 497.

24. Ladner *v.* Balsley, 103 Iowa 674, 72 N. W. 787. *Contra*, Giddens *v.* Bolling, 93 Ala. 92, 9 So. 427 (holding that it is no ground to quash the attachment *in toto* that one item of the account is not within the statute); Kurtz *v.* Dunn, 36 Ark. 648.

25. Poer *v.* Peebles, 1 B. Mon. (Ky.) 1. *Contra*, Brooks *v.* Cunningham, 49 Miss. 108.

26. Tifft *v.* Verden, 11 Sm. & M. (Miss.) 153.

27. *Alabama.*—Nicrosi *v.* Roswald, 113 Ala. 592, 21 So. 338, holding, however, that where only one instalment of rent is due, the landlord is entitled to enforce his lien by attachment only for the instalment due, and cannot unite therewith the instalments not due, in the absence of allegations of the existence of the conditions specified by statute.

Arkansas.— Tignor *v.* Bradley, 32 Ark. 781, holding, however, that an attachment against the tenant's property generally, commenced before the rent is due, that is, where there is no stipulation as to rent day, before the expiration of the year, cannot be sustained.

District of Columbia.— Joyce *v.* Wilkenning, 1 MacArthur 567, holding that a landlord may attach for an instalment of rent, although the tenant has occupied the premises for only a part of the time during which the instalment is accruing.

Kentucky.— Poer *v.* Peebles, 1 B. Mon. 1, holding, however, that attachment for rent before due, where the tenant is about to remove his effects, lies only where distress lies afterward.

Louisiana.— Thomas *v.* Dundas, 31 La. Ann. 184; Wilcoxen *v.* Bowles, 1 La. Ann. 230, holding that where a lessor has good reason to believe that the lessee will remove the effects upon the premises subject to his lien, and that he may thereby be deprived of his lien, he may attach for unaccrued rent.

Missouri.— McDermott *v.* Dwyer, 91 Mo. App. 185, holding that an action by attachment for rent is not prematurely brought because the rent was paid up to a certain time

ment has been so issued judgment cannot be rendered against the tenant till rent accrues.[28]

4. Grounds[29] — a. In General. The statutes under consideration prescribe various grounds of attachment.[30] Thus in some states an attachment is authorized where the tenant fails to pay rent as it falls due,[31] or where there are reasonable grounds for belief, and the landlord does believe, that unless an attachment issues he will lose his rent.[32]

b. Removal or Disposal of Crops or Goods. The landlord is very generally given a right to an attachment where without his consent the tenant removes his crop or other chattels from the premises, or sells or otherwise disposes of the same, or attempts or threatens to do either.[33] The fact that the tenant in removing or

and no more was due or had been demanded, where all the rent was due within a year after the action was instituted.

Virginia.— Johnson *v.* Garland, 9 Leigh 149, holding, however, that the lessor is not entitled to an attachment for rent not yet due, before the commencement of the term for which the rent is to be paid.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 948, 949.

Contra.— Clark *v.* Haynes, 57 Iowa 96, 10 N. W. 292.

28. Jones *v.* Holland, 47 Ala. 732.

29. Absence or insufficiency of grounds as rendering attachment wrongful see *infra*, VIII, C, 22.

Existence of grounds as question for jury see *infra*, VIII, C, 18.

30. See the statutes of the different states.

31. Shiff *v.* Ezekiel, 23 La. Ann. 383.

However, mere failure to pay an instalment of rent the day it is due will not warrant a provisional seizure, where it appears that the accrued rent was tendered a day or two after it was due and before the writ of provisional seizure issued. Fox *v.* McKee, 31 La. Ann. 67.

32. Ward *v.* Grigsby, (Ky. 1900) 55 S. W. 436 (holding that the landlord had reasonable ground to believe that he would lose his rent unless the attachment should be issued, where the tenant promised to execute a mortgage on a crop of tobacco raised on the premises as soon as it should be housed, and for a week after the tobacco was housed the landlord made diligent efforts to ascertain the whereabouts of the tenant, but was unable to do so, and the tobacco was stored in an open barn, where it was liable to be blown down and injured); O'Bryan *v.* Shipp, 53 S. W. 1034, 21 Ky. L. Rep. 1068 (holding that the sale and removal by the tenant of a considerable portion of the crop, and his refusal to apply any portion of the proceeds to the payment of the rent, were sufficient to justify the belief on the part of the landlord that he would lose his rent unless an attachment should be issued); Kassel *v.* Snead, 52 S. W. 1058, 21 Ky. L. Rep. 777 (holding that where the tenant threatened, in the landlord's absence from the city, to move out without paying the rent, and the stock of goods was so small that it could be moved out at night, as had been done on two previous occasions where the same tenant was apparently interested, the landlord had reasonable grounds to believe that unless an attachment issued he would lose his rent); Porter *v.* Sparks, 43 S. W. 220, 19 Ky. L. Rep. 1211.

A landlord must show reasonable grounds for fear that rents will be lost to justify an attachment therefor. Mere belief on his part is not sufficient. Gentry *v.* Abshire, 2 Ky. L. Rep. 231.

33. *Alabama.*— Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443.

District of Columbia.— Joyce *v.* Wilkenning, 1 MacArthur 567.

Kansas.— Knowles *v.* Sell, 41 Kan. 171, 21 Pac. 102.

Louisiana.—Wilcoxen *v.* Bowles, 1 La. Ann. 230.

Missouri.— Garroutte *v.* White, 92 Mo. 237, 4 S. W. 681.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 951.

If the landlord consents to the removal or sale of the tenant's property he is not entitled to an attachment (Robinson *v.* Holt, 85 Ala. 596, 5 So. 350; Busbin *v.* Ware, 69 Ala. 279; Shield *v.* Dothard, 59 Ala. 595; De Bardeleben *v.* Crosby, 53 Ala. 363; Webb *v.* Arnold, 52 Ark. 358, 12 S. W. 707); and where a tenant is authorized by his landlord to make a sale of his crop for the purpose of paying a debt for which the landlord is surety, the failure of the tenant to devote the excess of the proceeds of the sale to the payment of rent is not a ground for attachment (Webb *v.* Arnold, *supra*).

Removal before rent accrues.— In the District of Columbia the landlord has no right to an attachment against chattels of the tenant removed from the premises before the rent is due; his remedy in such case is by judgment against the tenant and execution to be levied thereon in whosesoever hands they may be found. Wallach *v.* Chesley, 2 Mackey (D. C.) 209.

Removal to adjacent lands of landlord.— When the crop has been removed by the tenant without the consent of the landlord, it is ground for attachment, even though the crop is carried to other adjacent lands belonging to the landlord. Masterson *v.* Bentley, 60 Ala. 520.

Removal or threatened removal by tenant's mortgagee.— In Virginia where the lessee, after placing property on the premises, exe-

selling the property does not design to defeat the landlord's claim for rent does not preclude an attachment; his honest intent is immaterial.[34] The removal from the premises of a part of the crops or chattels of the tenant, or a sale thereof, does not justify an attachment unless the collection of the rent is thereby endangered;[35] and accordingly if enough is left on the premises to satisfy the rent attachment will not lie.[36] However, the question whether the rent is endangered by a removal or sale of the tenant's property is to be determined without reference to the solvency of the tenant or to his ownership of unexempt property not subject to the landlord's attachment.[37]

5. Property Subject[38] — a. In General. The property subject to a landlord's attachment consists of the crop grown by the tenant on the leased premises[39] and chattels of the tenant located on the premises and used in connection therewith.[40] His general estate is not liable.[41] The fact that the tenant's property is in an officer's hands under a distress for rent does not preclude an attachment thereof for rent not accrued.[42]

b. Property of Under-Tenant. In some states the crop of an under-tenant may

cutes a deed of trust thereon, threatened removal of such property by the trustee authorizes an attachment. Offterdinger *v.* Ford, 92 Va. 636, 24 S. E. 246. But in Missouri removal of the crop by the tenant's mortgagee without the knowledge or consent of the landlord or tenant affords no ground for an attachment against the tenant; and accordingly the landlord may maintain replevin against the mortgagee. Abington *v.* Steinberg, 86 Mo. App. 639.

Grounds of apprehension of removal. — A landlord's right of attachment accrues whenever he has reasonable ground of apprehension that the property of the tenant will be removed from the premises; he need not wait until his belief ripens into conviction. McLean *v.* McLean, 10 Bush (Ky.) 167. So where the lessees organized a corporation in which they held a controlling interest, and transferred to it all their stock, on which the lessor held a landlord's privilege, and their business establishment located on the leased premises, and the corporation while occupying the leased premises alleged financial embarrassment and applied for liquidation of its affairs the lessor was entitled to a provisional seizure against the lessees on the ground that they were about to remove the property from the premises. Henderson *v.* Meyers, 45 La. Ann. 791, 13 So. 191. And failure of the tenant to pay rent authorizes the landlord to make an affidavit for provisional seizure on the ground that he has good reason to fear that the property may be removed from the premises. Wallace *v.* Smith, 8 La. Ann. 374. See also *supra*, note 32.

Threatened sale. — In Missouri the fact that the tenant is threatening to dispose of a crop is not a cause for attachment for rent under the statute authorizing an attachment for an "attempt" to dispose of the crop. Ford *v.* Wycoff, 73 Mo. App. 144.

34. *Alabama.* — Masterson *v.* Bentley, 60 Ala. 520.

Arkansas. — Randolph *v.* McCain, 34 Ark. 696.

Missouri. — Morris *v.* Hammerle, 40 Mo. 489; Kleun *v.* Vinyard, 38 Mo. 447, both holding that the proper question is, whether the removal of the property endangers the rent of the landlord.

South Carolina. — Leonard *v.* Brockman, 46 S. C. 128, 24 S. E. 96.

Virginia. — Offterdinger *v.* Ford, 92 Va. 636, 24 S. E. 246, holding that an attachment is justified, although the tenant is removing the property in the regular course of business.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 951.

35. Haseltine *v.* Ausherman, 87 Mo. 410, 29 Mo. App. 451; Kinear *v.* Shands, 36 Mo. 379.

36. Stamps *v.* Gilman, 43 Miss. 456; Meier *v.* Thomas, 5 Mo. App. 584. *Contra*, Randolph *v.* McCain, 34 Ark. 696.

Removal of part of crop where land is rented on shares see *infra*, XI, C, 1, h.

37. Haseltine *v.* Ausherman, 87 Mo. 410; Dawson *v.* Quillen, 43 Mo. App. 118; Hubbard *v.* Quisenberry, 32 Mo. App. 459.

38. Property of real and nominal lessees see *infra*, VIII, C, 11.

Excessive levy see *infra*, VIII, C, 11.

39. Hawkins *v.* Gill, 6 Ala. 620; Crawford *v.* Coil, 69 Mo. 588; Hubbard *v.* Moss, 65 Mo. 647 (the last two cases holding that although the statutory provision for an attachment in favor of the landlord was not enacted for the purpose of enforcing the lien upon the crop grown on the leased premises in any year for the rent accruing for such year as given by the act, yet a writ of attachment properly sued out under the act may be levied on the crop subject to such lien); Toney *v.* Goodley, 57 Mo. App. 235.

40. Stephens *v.* Adams, 93 Ala. 117, 9 So. 529. See, however, Greeley *v.* Greeley, 12 Okla. 659, 73 Pac. 295, holding that an affidavit of attachment by a landlord for rent, under Wilson Annot. St. Okla. (1903) §§ 3343–3349, does not justify a levy on property other than crops growing or grown on the land.

41. Ellis *v.* Martin, 60 Ala. 394; Hawkins *v.* Gill, 6 Ala. 620.

42. Herbert *v.* Ward, 12 Fed. Cas. No. 6,398, 1 Cranch C. C. 30.

be attached to satisfy rent due from the tenant-in-chief,[43] where the latter has not made a crop or the crop made by him is insufficient to satisfy the landlord's lien.[44]

c. Property in Possession of Purchaser or Mortgagee.[45] The landlord may attach property in the hands of one who purchased from the tenant with knowledge of the landlord's lien,[46] or in the hands of a mortgagee of the tenant.[47]

6. Jurisdiction[48] and Venue.[49] A court of equity has jurisdiction of an attachment to enforce a landlord's lien for rent.[50] In some states an attachment for rent must be sued out in the county in which the tenement lies.[51]

7. Parties.[52] The assignee of a non-negotiable rent note[53] and a landlord to whose agent a rent note is made payable[54] may each sue out an attachment on those instruments respectively in his own name. While an agent may obtain and prosecute an attachment for rent, the proceedings must be carried on in the name of the landlord.[55] Where a tenant gives a note for rent, payable to the creditor of a landlord, which is afterward delivered to the latter, the creditor may properly be joined as plaintiff in an attachment to enforce the landlord's lien.[56]

8. Affidavit — a. In General. An affidavit for attachment is generally made essential by statute as the basis for the issuance of the writ.[57] The fact that the justice before whom the affidavit is made pursuant to statutory authority attaches a jurat in his capacity of notary public does not vitiate the affidavit.[58] In the absence of statute to the contrary the affidavit need not be served on the tenant.[59]

b. Sufficiency of Statements. The affidavit must state with fulness and certainty every fact essential to give the landlord the right to an attachment, so as to bring the case within the strict terms of the statute.[60] Accordingly the affidavit

43. Agee *v.* Mayer, 71 Ala. 88.

44. Lehman *v.* Howze, 73 Ala. 302.

45. Priority of lien see *infra*, VIII, C, 15.

46. Dulany *v.* Dickerson, 12 Ala. 601. See, however, Hadden *v.* Powell, 17 Ala. 314, holding that the landlord cannot attach a crop which the tenant sold before, but which was not removed from the premises until after, the creation of the tenancy.

47. Hudson *v.* Vaughan, 57 Ala. 609, where the mortgagee recognized the landlord's lien and agreed to hold the rent subject thereto.

48. See, generally, Courts.

49. See, generally, Venue.

Place of levy see *infra*, VIII, C, 11.

50. Sharp *v.* Fields, 1 Heisk. (Tenn.) 571.

51. Turpin *v.* Smith, 7 Ky. L. Rep. 361. And see Lalaurie *v.* Woods, 8 La. Ann. 366, holding that this is proper, although the lessee resides elsewhere. *Contra*, Honea *v.* Page, 60 Miss. 248.

52. Intervention by claimant of attached property see *infra*, VIII, C, 21.

Persons entitled to remedy of attachment see *supra*, VIII, C, 2.

53. Stephens *v.* Adams, 93 Ala. 117, 9 So. 529, so holding, although the assignment is made by separate written instrument and not by indorsement on the note itself.

54. Nolen *v.* Royston, 36 Ark. 561.

55. Parker *v.* Stovall, 31 Miss. 446.

56. Varner *v.* Rice, 39 Ark. 344.

57. See the statutes of the different states, and cases cited *infra*, note 58 *et seq.* And see Worstell *v.* Ward, 1 Bush (Ky.) 198; Dougherty *v.* Kellum, 3 Lea (Tenn.) 643, holding that an account for supplies must be sworn to; otherwise an attachment to enforce the lien will be quashed.

However, the requirement in La. Code Pr. art. 288, that the lessor shall make affidavit of removal, in order to seize property in the hands of "a third person" which was in the house when leased, does not apply where a factor or agent of the lessee has taken the property subject to the landlord's lien. Tupery *v.* Edmondson, 32 La. Ann. 1146.

58. McDermott *v.* Dwyer, 91 Mo. App. 185.

59. Sharp *v.* Palmer, 31 S. C. 444, 10 S. E. 98.

60. Fitzsimmons *v.* Howard, 69 Ala. 590; Yarnall *v.* Haddaway, 4 Harr. (Del.) 437, where it is held that the affidavit must show such a holding by defendant as would entitle plaintiff to a remedy by distress, and show also in whose behalf it is made. See, however, Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443 (holding that the affidavit need not set out the particular articles furnished or purchased by the tenant with the money advanced by the landlord); Gunter *v.* Du Bose, 77 Ala. 326 (holding that the affidavit is to be liberally construed, and is sufficient if it sets forth with substantial accuracy the general jurisdictional facts, either expressly or by necessary implication; and that it need not negative conclusions or inferences to the contrary); Monday *v.* Elmore, 27 S. C. 126, 3 S. E. 65 (holding that there need be no averment in terms that a cause of action exists).

Statement as to demand.— Where a stated sum is alleged to be due, the affidavit need not allege a demand on the tenant (Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443); otherwise a demand must be alleged (Robinson *v.* Holt, 85 Ala. 596, 5 So. 350), and it must appear by positive averment or by reasonable intendment that the demand and the refusal to pay occurred after the debt became

must show the existence of the relation of landlord and tenant either by direct averment or necessary implication,[61] the existence of a definite claim either for rent due or to become due, or for advances, or both, as the case may be,[62] and the existence of one or more of the statutory grounds for attachment.[63] The

due (Dozier *v.* Robinson, 82 Ala. 408, 3 So. 45; Fitzsimmons *v.* Howard, 69 Ala. 590).

Statement as to crops subject to claim.— In Alabama the affidavit should specify that the writ is leviable of the crops grown on the rented premises (De Bardeleben *v.* Crosby, 53 Ala. 363); but in Georgia the affidavit need not specify the crop on which the lien is claimed (Ware *v.* Blalock, 72 Ga. 804).

For forms of affidavit see Ballard *v.* Stephens, 92 Ala. 616, 8 So. 416; Gunter *v.* Du Bose, 77 Ala. 326; Cockburn *v.* Watkins, 76 Ala. 486; Bell *v.* Allen, 76 Ala. 450; Ware *v.* Blalock, 72 Ga. 804; Monday *v.* Elmore, 27 S. C. 126, 3 S. E. 65.

61. Fitzsimmons *v.* Howard, 69 Ala. 590; De Bardeleben *v.* Crosby, 53 Ala. 363. See, however, Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443 (holding that an affidavit that on a certain day there was due from defendant a stated sum for rent of certain premises and advances to him as plaintiff's tenant, and that plaintiff had rented such premises to him for that year, pleads the relation of landlord and tenant sufficiently to warrant a landlord's attachment); Bell *v.* Allen, 76 Ala. 450 (holding that an affidavit is sufficient in this respect if it avers that the one to whom the advances were made rented land of the one making them, without using the words "landlord and tenant").

62. Ballard *v.* Stephens, 92 Ala.. 616, 8 So. 416 (holding that the affidavit must set forth the nature and kind of articles advanced, or that the advances were made for the sustenance and well being of the tenant or his family, or to enable him to raise a crop); Fitzsimmons *v.* Howard, 60 Ala. 590; Yarnall *v.* Haddaway, 4 Harr. (Del.) 437; Greeley *v.* Greeley, 12 Okla. 659, 73 Pac. 295 (holding that where the statute requires plaintiff to state that there is due a certain sum for rent of farming lands, and that plaintiff claims a lien on the crop, an affidavit stating that the claim is just and due and that plaintiff believes he ought to recover the sum named as rent is insufficient); Dougherty *v.* Kellum, 3 Lea (Tenn.) 643 (holding that an affidavit on which an attachment is sought for supplies furnished by a landlord to his tenant must state that an account of such supplies was kept as the articles were furnished). See, however, Cockburn *v.* Watkins, 76 Ala. 486; Bell *v.* Allen, 76 Ala. 450, both holding that an affidavit for an attachment by a landlord for advances need not set forth the amount advanced each year, the particular articles, or an itemized account.

Statement of amount due in lump sum.— A landlord's attachment affidavit against the tenant for rent and advances may state the amount due in a lump sum. Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443. *Contra*, Dougherty *v.* Kellum, 3 Lea (Tenn.) 643.

Statement as to when rent was payable.— The affidavit should show when the rent was payable. Yarnall *v.* Haddaway, 4 Harr. (Del.) 437. See, however, Dozier *v.* Robinson, 82 Ala. 408, 3 So. 45, holding that if the affidavit states no time when the rent matured, and there is nothing in the record showing such time, Ala. Code (1876), § 3468, fixes the maturity of the rent on the 25th day of December of the year in which the crop is grown.

Statement of year in which rent accrued or advances were made.— Since a lien on the crops of a tenant for rent, capable of enforcement by attachment, exists only for rent of the current year, an affidavit for such attachment must show the year for which the rent accrued. De Bardeleben *v.* Crosby, 53 Ala. 363. Where, however, an attachment is sued out on December 30, claiming an indebtedness for advances, but not stating for what year, the implication is that the advances were made during the year just expiring; and if in fact any part was made during the preceding year, a balance remaining unpaid at the end of the year, such balance becomes a part of the advances for the next year, while the tenancy continues, and may be recovered under such affidavit; but it is the better practice to state the particular facts as they are. Gunter *v.* Du Bose, 77 Ala. 326.

Partial invalidity.— Where an affidavit for an attachment against the crops of a tenant in favor of his landlord for rent and advances is sufficient as to the rent but insufficient as to the advances, the averments as to the latter should be treated as surplusage, and the attachment for the former sustained. Ballard *v.* Stephens, 92 Ala. 618, 8 So. 416.

63. Baxley *v.* Segrest, 85 Ala. 183, 4 So. 865; Knowles *v.* Steed, 79 Ala. 427 (both holding that an affidavit for an attachment on the ground that part of the crop has been removed without the landlord's knowledge or consent must allege that it was removed from the rented premises); Fitzsimmons *v.* Howard, 69 Ala. 590; Bishop *v.* McQuerry, 13 Bush (Ky.) 417. See, however, Monday *v.* Elmore, 27 S. C. 126, 3 S. E. 65, holding that the requirement that the affidavit should aver that defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any part of his property with intent to defraud his creditors is satisfied by an averment that defendant had sold a portion of his crop, and has refused to pay the rent due, with intent to defeat the lien.

Negativing consent of landlord to removal of crops.— If an attachment is asked because the tenant has removed the crop, the affidavit must negative the landlord's consent to the removal. Robinson *v.* Holt, 85 Ala. 596, 5 So. 350; Busbin *v.* Ware, 69 Ala. 279;

omission of these essential averments from the affidavit is fatal since they are regarded as jurisdictional.[64]

c. Amendment. An affidavit for attachment is not amendable as to jurisdictional averments,[65] in the absence of statute authorizing such amendments;[66] but it may be amended as to informalities,[67] even after the writ has been issued[68] and has been quashed for informality of the affidavit.[69]

9. Bond. In order to obtain an attachment the landlord is usually required by statute to file a bond the same as in general attachment proceedings.[70]

10. Writ.[71] An attachment for rent should be issued against the tenant's crop only, and not against his estate generally.[72] Copies of the warrant to enforce the landlord's lien need not be served on the tenant, in the absence of a statute requiring such service.[73]

11. Levy.[74] A landlord's attachment issued against the tenant's estate generally is merely voidable, and may be levied on the crop.[75] An attachment for rent running against the crops of the tenant justifies a levy on crops of an under-tenant raised on the premises;[76] but the property of the real lessee cannot be seized under a writ of provisional seizure issued in a suit against the nominal lessee, and directed solely against the property of the latter.[77] The attachment may issue to any county in the state and be levied on property there;[78] and an attachment sued out before a mayor, *ex officio* justice of the peace, authorizes a levy outside of the corporate limits of the town but within the county.[79] A landlord is not

Shield *v.* Dothard, 59 Ala. 595; De Bardeleben *v.* Crosby, 53 Ala. 363.

Statements on belief.— The affidavit in attachment to recover rent may, like the affidavit in the ordinary proceeding by attachment, state the grounds of attachment on belief (Audenreid *v.* Hull, 45 Mo. App. 202); but the grounds of belief must be set forth (Sharp *v.* Palmer, 31 S. C. 444, 10 S. E. 98; Baum *v.* Bell, 28 S. C. 201, 5 S. E. 485).

Statements in the alternative.— Under a statute authorizing a landlord to attach when the tenant is about to remove his property, is doing so, or has done so within thirty days, an affidavit for attachment embracing all the causes set out in the alternative in the language of the statute is insufficient; it should state affirmatively the facts relied on for attachment. Kleun *v.* Vinyard, 38 Mo. 447. However, an affidavit that the tenant has disposed of oats and castor beans, and threatens to dispose of the corn, so as to endanger a collection of the rent, means that the rent is in danger by the disposition of either the oats, beans, or corn. Ford *v.* Wycoff, 73 Mo. App. 144.

Waiver of objections.— Although Ala. Code, § 3693, provides that attachments shall not be quashed in the circuit court for formal defects, and that no objection can be made which was not made before the justice of the peace, yet an objection before the justice that the affidavit for an attachment by a landlord on the ground that part of the crops had been removed without his knowledge or consent did not allege that the crop was removed from the rented premises is not waived by appeal to the circuit court. Knowles *v.* Steed, 79 Ala. 427.

64. Fitzsimmons *v.* Howard, 69 Ala. 590. And see cases cited *supra*, note 60 *et seq.*

65. Fitzsimmons *v.* Howard, 69 Ala. 590; Shield *v.* Dothard, 59 Ala. 595 (holding that the omission of the affidavit to allege that the removal of the crops from the premises was without the landlord's consent cannot be cured by amendment); Staggers *v.* Washington, 56 Ala. 225 (holding that the failure of the affidavit in an attachment of a crop for rent to state that the parties are landlord and tenant, and that the indebtedness is for rent or advances cannot be remedied by amendment in cases commenced in the circuit court).

66. Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443 (holding that by statute the affidavit may be amended by increasing the amount due); Robinson *v.* Holt, 85 Ala. 596, 5 So. 350.

The statute does not apply in Alabama to affidavits issued before it took effect. Robinson *v.* Holt, 85 Ala. 596, 5 So. 350.

67. Nolen *v.* Royston, 36 Ark. 561.

68. Rogers *v.* Cooper, 33 Ark. 406.

69. Nolen *v.* Royston, 36 Ark. 561.

70. See the statutes of the different states. And see Edwards *v.* Cooper, 28 Ark. 466.

The sureties are not required to justify.— Sharp *v.* Palmer, 31 S. C. 444, 10 S. E. 98.

Action on bond for wrongful attachment see *infra*, VIII, C, 22.

71. **Authority to issue writ** see *supra*, VIII, C, 6.

72. Ellis *v.* Martin, 60 Ala. 394; Hawkins *v.* Gill, 6 Ala. 620.

73. Sharp *v.* Palmer, 31 S. C. 444, 10 S. E. 98.

74. **Levy on property in custodia legis** see *supra*, VIII, C, 5, a.

Matters triable on return of officer see *infra*, VIII, C, 13, 14.

75. Ellis *v.* Martin, 60 Ala. 394.

76. Agee *v.* Mayer, 71 Ala. 88.

77. Aurich *v.* Wolf, 30 La. Ann. 375.

78. Turpin *v.* Smith, 7 Ky. L. Rep. 361.

79. Smith *v.* Jones, 65 Miss. 276, 3 So. 740,

entitled to attach the whole of his tenant's property for rent which is much less than the value of the property, although he has a lien thereon.[80] The landlord's right to enforce his lien by attachment is not affected by the manner in which the officer executes the order of attachment.[81] The return may be amended in a proper case.[82]

12. Release of Property on Bond. The statutes under consideration usually provide for a release of the attached property on a forthcoming bond.[83] In the absence of such a provision the property may be released on a bond given under the general attachment laws[84] or on a common-law bond.[85]

13. Vacating, Quashing, or Setting Aside.[86] It has been held that the court cannot set aside or quash an attachment because the grounds stated in the affidavit are not satisfactorily proved.[87] An under-tenant whose crop has been seized on attachment against the tenant-in-chief may move to vacate the attachment on the ground that the debt is not for rent or that the property of the tenant-in-chief is sufficient to satisfy the landlord's lien.[88] The right to vacate a warrant of seizure on account of irregularities therein is waived where defendants, having given the statutory notice to the sheriff denying the claim, have an issue made up and referred to a master to take testimony and report as to the rights of the parties;[89] but where an attachment issued before the commencement of the term for rent not yet due is levied on the goods of the lessee, and the lessee thereupon enters into a recognizance to pay the rent, he may, notwithstanding the recognizance, move the court to which the process is returned to quash the attachment for the irregularity.[90] Where defendant moves to set aside an attachment because of the insufficiency or falsity of the affidavit or because of irregularity and

the mayor having the same authority to issue such attachment as any other justice of the county.

80. Beach *v.* Williams, (Iowa 1899) 79 N. W. 393.

81. Kurtz *v.* Dunn, 36 Ark. 648.

82. Odom *v.* Shackleford, 44 Ala. 331 [*citing* McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529] (holding that the sheriff's return of the levy of an attachment sued out by a landlord against the crop of his tenants may be amended after judgment so as to show that the crop levied on was grown on the rented land); Kurtz *v.* Dunn, 36 Ark. 648.

83. See the statutes of the different states.

Formalities of bond.— A bond taken by the sheriff, under an order of court, for the release of property under seizure by a lessor, must contain all the formalities required for the execution of judicial bonds. If it is not signed by the principal, but only by the sureties, it is not binding on the principal or the sureties. Benham *v.* Collins, 23 La. Ann. 222. However, the bond need not recite to whom the rent is due (Robinson *v.* White, 7 Sm. & M. (Miss.) 39), and it may be made payable to the sheriff (Tooley *v.* Culbertson, 5 How. (Miss.) 267).

Estoppel by bond.— The obligor in a bond to release property attached for rent is estopped to deny that rent is due. Robinson *v.* White, 7 Sm. & M. (Miss.) 39. However, the bond does not estop the tenant to attack the regularity of the attachment. Johnson *v.* Garland, 9 Leigh (Va.) 149.

Assignment of bond.— A replevy bond, in an attachment for rent, made payable to the sheriff, may be assigned by him to the party interested. Tooley *v.* Culbertson, 5 How. (Miss.) 267.

Forfeiture of bond and judgment thereon see Barnes *v.* Bamberg, 55 S. C. 499, 33 S. E. 580.

84. Woolley *v.* Maynes-Wells Co., 15 Utah 341, 49 Pac. 647.

85. Painter *v.* Gibson, 88 Iowa 120, 55 N. W. 84, where a landlord brought attachment for rent against J and E, and J was personally liable as lessee, and E's goods, which had been purchased from J, were seized, and to release his goods E executed a bond conditioned to deliver the property or its value "to satisfy any judgment that may be rendered against said defendants in said suit," and on the trial E's goods were found to be liable for the rent, but personal judgment was entered against J alone, directing that a "special execution issue therefor," and it was held that the bond was valid as a common-law bond, and E was liable thereon for the amount of the judgment, as, so far as it directed special execution to issue, it was a judgment against E within the meaning of the bond.

86. **Dissolution by death of defendant** see Abatement and Revival, 1 Cyc. 53.

87. Janney *v.* Wier, 5 Harr. (Del.) 422. And see Redford *v.* Winston, 3 Rand. (Va.) 148. But see Thomas *v.* Dundas, 31 La. Ann. 184.

88. Lehman *v.* Howze, 73 Ala. 302.

89. Garlington *v.* Gilliam, 31 S. C. 333, 9 S. E. 1037.

90. Johnson *v.* Garland, 9 Leigh (Va.) 149.

improvidence, it is error for the court to vacate it on the merits of the case then pending.[91]

14. CONTEST OF CLAIM BY TENANT. In some states the statute provides a special remedy by which the tenant may have an issue tried to determine whether the landlord's claim is due;[92] but in the absence of statutory authority, the court cannot, on return of the attachment, examine into the merits of the landlord's claim.[93]

15. PRIORITY OF LIEN.[94] A mortgagee for value and in good faith, with forfeiture or condition broken prior to an attachment for rent, will have priority over such attachment;[95] and in some states, in a suit aided by attachment before any rent is due on a note given for the rent, the landlord has only the ordinary attachment lien, which is subordinate to the claim of one to whom the attached crop was sold before the levy.[96]

16. PLEADING. The landlord may maintain an action for rent due and for a lien without asking for an attachment in his petition, and hence the failure of the petition to show grounds for attachment is no reason for dissolving an auxiliary writ of attachment subsequently issued on a proper affidavit.[97] Where an attachment is sued out by a landlord before a justice of the peace on a claim for advances made his tenant, and on appeal to the circuit court an amended complaint is filed containing only the common counts, the variance between it and the affidavit is ground for plea in abatement.[98]

17. EVIDENCE.[99] Where the affidavit alleges that rent is past due and unpaid, the burden of proving payment is not on defendant.[1] On the trial of a plea in abatement in an attachment by a landlord on the ground that defendant is removing the crop so as to endanger collection of the rent, defendant may show the amount of the rent on the question whether he is endangering its collection;[2] and in an action by a landlord against commission merchants doing business in another state to enforce payment of the rent out of the proceeds of cotton shipped them by the tenant, evidence that defendants told the tenant to draw on them in favor of plaintiff for the rent is admissible to show their participation in the removal of the cotton.[3] As in other actions, plaintiff must establish his case by a preponderance of evidence.[4]

18. TRIAL.[5] A landlord attaching his tenant's goods on affidavit that he is about to remove them from the county is not bound to support the affidavit by proof of reasonable ground at the next term of the court.[6] An instruction that

91. Baum *v.* Bell, 28 S. C. 201, 5 S. E. 485.

92. See the statutes of the different states. And see Barnes *v.* Bamberg, 55 S. C. 499, 33 S. E. 580.

Notice of trial.— In proceedings begun by a tenant to determine whether the amount of the claim for which his crops have been sold was due, no notice need be given to the tenant that an issue has been framed and set down for trial. Johnstone *v.* Manigault, 13 S. C. 403.

Questions triable.— Where a tenant whose crops have been sold to satisfy a claim for rent elects to have an issue tried to determine whether the amount of the claim is due, he cannot raise questions as to the validity of the affidavit upon which the warrant was issued to effect the sale, or as to whether his crops can be sold by the assignee of his lessor. Johnstone *v.* Manigault, 13 S. C. 403.

93. Redford *v.* Winston, 3 Rand. (Va.) 148, holding that it is not competent for the tenant, on the return of the attachment, to plead that his landlord had not sufficient ground to suspect that he was about to remove.

94. Levy on property in possession of purchaser or mortgagee see *supra*, VIII, C, 5, c.

95. Stamps *v.* Gilman, 43 Miss. 456.

96. Clark *v.* Haynes, 57 Iowa 96, 10 N. W. 292.

97. Bartlett *v.* Gaines, 11 Iowa 95.

For form of petition in action aided by attachment see Brown *v.* Cairns, 63 Kan. 584, 66 Pac. 639.

98. Horton *v.* Miller, 84 Ala. 537, 4 So. 370.

99. See, generally, EVIDENCE.

1. Cleveland *v.* Crum, 33 Mo. App. 616.

2. Dawson *v.* Quillen, 43 Mo. App. 118.

3. Cocke *v.* Maynard, (Miss. 1895) 16 So. 908.

4. Cleveland *v.* Crum, 33 Mo. App. 616. See, however, Ward *v.* Grigsby, (Ky. 1900) 55 S. W. 436, holding that a landlord suing out an attachment for rent is not held to the same strictness of proof as parties who attach under the code of practice to secure ordinary debts.

5. See, generally, TRIAL.

6. Wright *v.* Hobson, 4 Harr. (Del.) 382.

in determining whether it was the intent of the tenants to remove their corn until stopped by law, evidence of their statements as to such intent is *prima facie* sufficient to establish the fact that the landlord was in danger of losing his rent is erroneous as being on the weight of evidence.[7] For a tenant to give a chattel mortgage upon his interest in the crop out of which rent is to be rendered, or his feeding a portion of it to his team, is not as matter of law a disposition of the crop so as to endanger the collection of the rent; and such matters should go to the jury.[8] In proceedings to enforce a landlord's lien for advances, where the record fails to show any article advanced for which the statute does not give the landlord a lien, an error by the court in referring to the jury the question whether the landlord had a lien for any particular article advanced is without prejudice.[9]

19. Judgment.[10] Under some statutes, where crops of a tenant are seized for rent, a personal judgment cannot be rendered against the tenant in excess of the value of the property seized.[11] A general judgment in favor of plaintiff after the levy of an attachment on the crop grown by defendant during the year is not invalidated by the subsequent entry of a judgment *nunc pro tunc* specially against the property attached and generally against defendant, who was then in court.[12] Where an attachment for rent issued on the ground that the tenant has disposed or attempted to dispose of his crop is abated on a finding against the landlord as to that ground of attachment, and the rent is not due at the commencement of the action, the suit should be dismissed, although the landlord seeks to establish a lien, there being no danger of his losing the rent by destruction or removal of the crop and no injunction being asked on that ground.[13]

20. Costs.[14] Although the statute gives the landlord a right to no larger judgment than can be satisfied out of the property seized, yet he may have a personal judgment for whatever costs are unpaid out of the property.[15] On the other hand, although the court cannot, under the statute, quash an attachment because plaintiff does not satisfactorily prove the grounds set forth in the affidavit, yet it may in such case charge the landlord with costs.[16] A landlord procuring an attachment of the body of his tenant on the ground that he is about to leave the state must satisfy the court that he had good reason for believing this, or he will be condemned in costs on his failure to sustain the attachment on rule to quash.[17]

21. Claims of Third Persons.[18] A third person who claims title to the attached property or an interest therein may intervene in the attachment and have the right of property determined.[19] He cannot, however, replevy the property so

7. Gilliam *v.* Ball, 49 Mo. 249.

8. Caruthers *v.* Williams, 53 Mo. App. 181.

9. Mooney *v.* Hough, 84 Ala. 80, 4 So. 19.

10. See, generally, Judgments.

11. Burrow *v.* Sanders, 57 Miss. 211; Hartsell *v.* Myers, 57 Miss. 135. See, however, Towns *v.* Boardman, 23 Miss. 186, holding that where the tenant replevies the attached goods and gives bond and obtains a redelivery, and his declaration is adjudged insufficient on demurrer, and he does not amend or apply for leave to do so, it is proper to render judgment against him for double the amount of rent in arrear, to be ascertained by a jury of inquiry.

12. Hubbard *v.* Moss, 65 Mo. 647.

13. White *v.* Nye, 64 Mo. App. 539.

Judgment for rent not accrued see *supra*, VIII, C, 3, b.

14. See, generally, Costs.

15. Burrow *v.* Sanders, 57 Miss. 211.

16. Janney *v.* Wier, 5 Harr. (Del.) 422.

17. Grubb *v.* Pyle, 3 Harr. (Del.) 493.

18. **Persons against whom landlord's lien may be enforced** see *infra*, VIII, D, 2, e, (III), 3, d.

19. Dryer *v.* Abercrombie, 57 Ala. 497 (holding that a person in possession, deriving title from the tenant, may interpose a claim to try the right of property, and defeat the attachment on proof that the debt has been paid, and this too without regard to the failure of the tenant to interpose any defense to the attachment suit); Williams *v.* Braden, 63 Mo. App. 513.

Bail.— The statute which allows interpleading in attachments without bail does not extend to attachments for rent. Hallam *v.* Jones, Gilm. (Va.) 142.

Petition.— An intervener in a suit by provisional seizure for rent of a stable, averring that he is the owner of the horses seized, and that he pays rent to the lessee of the stable to keep the horses there, discloses a cause of action. King *v.* Harper, 33 La. Ann. 496.

Burden of proof.— Plaintiff must show a valid attachment in order to recover in a statutory claim suit between him and a third

attached,[20] since while the lien is being enforced the right of possession for that purpose is fixed in the landlord.

22. Wrongful Attachment.[21] If the landlord wrongfully sues out an attachment he is liable therefor in damages,[22] even though he acted without malice;[23] and it has been held that the tenant may recover for an attachment for rent not due, where it was made without probable cause, although he might have obtained a discharge of the attachment on giving bond to pay the rent when due.[24] Where the writ was sued out by a landlord to enforce his statutory lien on the crop, he may in justification prove the existence of any ground which would have authorized an attachment against the crop;[25] and although no grounds for attachment in fact existed, yet if the landlord had reasonable grounds for believing in their existence he is not liable.[26] The fact that the tenant had claims against the landlord arising out of other transactions does not render the landlord liable for suing out an attachment for rent then due.[27] If the landlord sues out an attachment maliciously he is liable for exemplary damages;[28] but the fact that the landlord by mistake procured a writ of attachment instead of a distress warrant does not authorize a recovery of exemplary damages for wrongfully suing out the attachment.[29]

D. Lien — 1. At Common Law. At common law a landlord had no lien upon the chattels or crops of his tenant merely by reason of the relationship.[30]

2. Contract Liens — a. Creation and Existence — (i) *In General.* Contracts of lease frequently contain provisions reserving to the lessor a lien for the rent

person (Jackson *v.* Bain, 74 Ala. 328); but claimant must prove his ownership of the property seized (Spears *v.* Robinson, 71 Miss. 774, 15 So. 111).

Evidence.—The attachment is sufficient evidence of the amount of plaintiff's claim, as against a claimant of the attached property; and hence the admission of evidence of the tenant's admissions that he received the amount claimed from plaintiff is immaterial. Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458. Proceedings in provisional seizure for rent are in the nature of a concurso, in which all parties are plaintiffs and defendants. One opponent's evidence may be used by the rest, and they are bound by that of the party opposed. One cannot use part of the evidence of another and reject the answers to his interrogatories addressed to the creditor opposed. Each opponent may introduce further evidence, but that spread on the record cannot be divided. Caffin *v.* Pollard, 9 Rob. (La.) 300.

If the property is released on bond given by the claimant, he cannot have a judgment for the property or its value. Bailey *v.* Quick, 28 La. Ann. 432.

Right to intervene and move for discharge of attachment see *supra*, VIII, C, 13.

20. Brody *v.* Cohen, 106 Iowa 309, 76 N. W. 682; Kendrick *v.* Watkins, 54 Miss. 495, holding that the rule applies equally whether the sheriff found the property upon the leased premises or elsewhere.

21. **Liability of levying officer** see Sheriffs and Constables.

22. Cox *v.* Myers, 4 La. Ann. 144.

23. Fleetwood *v.* Dwight, 8 La. Ann. 481.

24. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537. *Contra*, Kyzer *v.* Middleton, 61 Miss. 360, holding that it is only where the landlord falsely pretends that there is something due, when in truth nothing is due, that the tenant can, without replevying the property, maintain a suit on the attachment bond for double damages.

25. Baxley *v.* Segrest, 85 Ala. 183, 4 So. 865.

26. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Dillon *v.* Porier, 34 La. Ann. 1100, both holding that the absence in fact of a fraudulent intent on the part of the tenant is immaterial. See, however, Masterson *v.* Phinizy, 56 Ala. 336, holding that in an action for wrongful attachment sued out against a tenant on the ground that he is about to remove his crop without paying rent, the tenant may show that by the terms of the contemplated sale the purchaser was to pay the rent before removing the crop.

The landlord must have had reasonable grounds for belief in the existence of grounds for attachment which did not in fact exist, else he is liable. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Briscoe *v.* McElween, 43 Miss. 556.

27. Smeaton *v.* Cole, 120 Iowa 368, 94 N. W. 909.

28. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

Presumption of malice.— Where a landlord makes affidavit that he believes that the tenant intends to remove his property, malice may be inferred from a want of probable cause for such belief. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

29. Lawson *v.* Goodwin, (Tex. Civ. App. 1904) 84 S. W. 279.

30. *Georgia.*— Johnson *v.* Emanuel, 50 Ga. 590.

Illinois.— Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414 [*affirming* 61 Ill. App. 552]; Joliet

upon the chattels of the tenant upon the premises, or upon the crops raised thereon. Such a lien may arise by words expressly creating it or by language impliedly having that effect.[31] The lease purporting to give a lien must, however, be a valid one,[32] and the lessor should be the absolute owner of the premises.[33]

(II) *Reservation of Right to Property.* The lessor may stipulate in the lease that crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid, and such a provision is valid not only between the parties but as to third persons.[34]

(III) *Covenant For Reëntry.* A covenant for reëntry to secure the arrears of rent by applying the profits to that purpose constitutes a lien on the estate charged with the rent.[35]

(IV) *Provision Against Removal by Tenant.* A stipulation in a lease that the lessee shall not dispose of any property upon the demised premises until the rent is paid is a mere personal covenant and is ineffective to reserve a lien.[36] It has been held, however, that such stipulation operates as a mortgage, and, if recorded, creates a lien.[37]

b. Nature of Lien. In some jurisdictions it is held that a clause in a lease giving the lessor a lien for rent on crops or other personal property of the tenant is in the nature of a chattel mortgage.[38] In other states such a clause in a lease is

First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955; Herron *v.* Gill, 112 Ill. 247; Felton *v.* Strong, 37 Ill. App. 58.

Iowa.— Doane *v.* Garretson, 24 Iowa 351; Grant *v.* Whitwell, 9 Iowa 152.

Kentucky.— Craddock *v.* Riddlesbarger, 2 Dana 205.

Louisiana.— Fisk *v.* Moores, 11 Rob. 279.

Mississippi.— Arbuckle *v.* Nelms, 50 Miss. 556.

Pennsylvania.— Ege *v.* Ege, 5 Watts 134.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 976.

31. See *infra*, VIII, D, 2, a, (II)–(IV), b–e.

32. Fulton *v.* Doty, 7 Ohio S. & C. Pl. Dec. 503, 6 Ohio N. P. 244, holding that a lease purporting to give the lessor a lien, without being witnessed or acknowledged, is void and creates no lien on the goods.

33. Cooper *v.* Cole, 38 Vt. 185.

34. *Georgia.*— De Vaughn *v.* Howell, 82 Ga. 336, 9 S. E. 173, 14 Am. St. Rep. 162.

Massachusetts.— Whitcomb *v.* Tower, 12 Metc. 487; Lewis *v.* Lyman, 22 Pick. 437.

Nebraska.— Sanford *v.* Modine, 51 Nebr. 728, 71 N. W. 740.

New York.— McCombs *v.* Becker, 3 Hun 342.

North Carolina.— Durham *v.* Speeke, 82 N. C. 87.

Oregon.— Fox *v.* McKinney, 9 Oreg. 493.

Vermont.— Bellows *v.* Wells, 36 Vt. 599; Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429; Esdon *v.* Colburn, 28 Vt. 631, 67 Am. Dec. 730; Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216; Smith *v.* Atkins, 18 Vt. 461; Paris *v.* Vail, 18 Vt. 277.

Contra.— Stockton Sav., etc., Soc. *v.* Purvis, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210, holding that such a stipulation is an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute on that subject.

35. Stephenson *v.* Haines, 16 Ohio St. 478; Spangler's Appeal, 30 Pa. St. 277 note; Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430.

36. Marshall *v.* Luiz, 115 Cal. 622, 47 Pac. 597; Bleakley *v.* Sullivan, 140 N. Y. 175, 35 N. E. 433; Barber *v.* Marble, 2 Thomps. & C. (N. Y.) 114; Beers *v.* Field, 69 Vt. 533, 38 Atl. 270.

37. Weed *v.* Standley, 12 Fla. 166.

38. *Arkansas.*—Mitchell *v.* Badgett, 33 Ark. 387.

Illinois.— Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23; Gubbins *v.* Equitable Trust Co., 80 Ill. App. 17; Packard *v.* Chicago Title, etc., Co., 67 Ill. App. 598.

Indiana.— Blakemore *v.* Taber, 22 Ind. 466.

Iowa.— Sioux Valley State Bank *v.* Honnold, 85 Iowa 352, 52 N. W. 244.

Maine.— Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711.

Minnesota.— Merrill *v.* Ressler, 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822.

Missouri.— Wright *v.* Bircher, 72 Mo. 179, 37 Am. Rep. 433; Attaway *v.* Hoskinson, 37 Mo. App. 132.

New York.— Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644 [*reversing* 62 Barb. 316]; Betsinger *v.* Schuyler, 46 Hun 349; Smith *v.* Taber, 46 Hun 313; Johnson *v.* Crofoot, 53 Barb. 574, 37 How. Pr. 59; Streeter *v.* Ward, 12 N. Y. St. 333; Nestell *v.* Hewitt, 19 Abb. N. Cas. 282.

South Dakota.— Esshom *v.* Watertown Hotel Co., 7 S. D. 74, 63 N. W. 229; Greeley *v.* Winsor, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 982.

Provision held not chattel mortgage.— A provision in a lease by which a lien is reserved to the lessor upon timber to be cut

held to amount to nothing more than an equitable lien,[39] or perhaps more properly a declaration of trust that the property is held as security for rent.[40]

c. Property Subject to Lien — (i) *In General.* The property subject to a contract lien depends upon the language of the lease and the intention of the parties. As between the parties the lien covers everything it was intended to cover; as to third persons it covers only what is included in its express terms.[41] The description of the property intended to be covered by the lien must be definite and capable of being rendered certain.[42]

(ii) *Future-Acquired Property.* A valid lien may be acquired on property not owned by the lessee until after the execution of the lease.[43] The property intended to be covered by the lease must, however, be specified or identified in the lease, and a provision in the lease giving a lien upon any and all goods and

from the leased premises, in order to secure the payment of the rent as it accrues, with the condition that the lessor shall in case of default have the right to forfeit the lease and take the timber and sell it at auction to pay the rent is not in the nature of a chattel mortgage; and no lien attaches to timber sold by the lessee to a third party, and removed by him, before the forfeiture of the lease has been declared. Burgess *v.* Kattleman, 41 Mo. 480.

39. *District of Columbia.*— Hume *v.* Riggs, 12 App. Cas. 355.

Illinois.— Joliet First Nat. Bank *v.* Adam, 34 Ill. App. 159.

Michigan.— Dalton *v.* Laudahn, 27 Mich. 529.

New York.— Wisner *v.* Ocumpaugh, 71 N. Y. 113.

Ohio.— Metcalfe *v.* Fosdick, 23 Ohio St. 114; Shoenberger *v.* Mount, 1 Handy 566, 12 Ohio Dec. (Reprint) 292.

Oregon.— Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676.

Rhode Island.— Groton Mfg. Co. *v.* Gardiner, 11 R. I. 626.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 982.

Provision not amounting to equitable lien.— A provision in a lease that "a lien to be given by said lessees to said lessors to secure the payment thereof" (that is of the rent) "on all the furniture, which shall be placed in said hotel by said lessees" does not raise an equitable lien. Hale *v.* Omaha Nat. Bank, 64 N. Y. 550 [*affirming* 39 N. Y. Super. Ct. 207].

40. Shoenberger *v.* Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. (Reprint) 292.

41. Attaway *v.* Hoskinson, 37 Mo. App. 132.

General terms in a clause of a lease creating a lien on property are restrained and limited to the particular kinds of property immediately preceding. Kuschell *v.* Campau, 49 Mich. 34, 12 N. W. 899.

Buildings and improvements.— A provision in a lease giving the landlord a lien upon any and all buildings and improvements on or put upon the premises, does not give a lien on the furniture. Willard *v.* World's Fair Encampment Co., 59 Ill. App. 336. Machinery is not included in the term "improvements." Booth *v.* Oliver, 67 Mich. 664, 35 N. W. 793.

Furniture and household goods.— An agreement in the lease creating a lien upon furniture and household goods is sufficient to give a lien on all chattels which contribute to the use and convenience of the lessee, or the ornament of the house, and every article of a permanent nature which is not consumed in its enjoyment, but not on wines, liquors, and groceries. Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676.

Fixtures.— A stipulation in a lease providing for a lien on trade fixtures does not apply to mere furniture. *Ex p.* Morrow, 17 Fed. Cas. No. 9,850, 1 Lowell 386.

Goods, wares, and merchandise does not include horses, harnesses, and wagons employed in delivering goods to customers. Van Patten *v.* Leonard, 55 Iowa 520, 8 N. W. 334. "Goods" includes farm products. McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644 [*reversing* 62 Barb. 316].

Grain does not include hay. Briggs *v.* Austin, 129 N. Y. 208, 29 N. E. 4.

Lessee's interest in term.— The reservation of a lien on the lessee's interest in the term does not reserve a lien on an improvement made by the lessee. Bates *v.* Neski, 6 Ohio Dec. (Reprint) 1064, 10 Am. L. Rec. 50.

42. Strickland *v.* Stiles, 107 Ga. 308, 33 S. E. 85 (holding that a contract creating a landlord's lien for supplies is sufficiently descriptive of the property on which it is to take effect when it specifies the entire crops of the tenant, consisting of a number of acres of cotton to be grown during the year for which the supplies are furnished, the land mentioned in the contract being all that the tenant has in cultivation, and cotton being the only crop grown on the same); McClain *v.* Abshire, 72 Mo. App. 390 (holding that a lien reserved in a lease on "all their lessees' property situated on said premises" sufficiently describes the property); Buskirk *v.* Cleveland, 41 Barb. (N. Y.) 610.

Furnishing.— A provision in a lease that the landlord shall have a lien for his rent upon the "furnishing" of the building leased is not, in the absence of evidence fixing the meaning of this term, effective as to third persons, because the term is too indefinite to cover any specific property. Attaway *v.* Hoskinson, 37 Mo. App. 132.

43. *Illinois.*— Webster *v.* Nichols, 104 Ill. 160.

chattels and other property belonging to the lessee is ineffectual to create a lien on after-acquired property.[44] In a suit by the lessor to enforce such a lien, it will be presumed that the property on which the lien is claimed was acquired after the execution of the lease, in the absence of contrary evidence;[45] and the landlord who seizes property of a tenant under a provision in the lease giving him a lien on all the tenant's property has the burden of showing that the property seized was owned by the tenant at the time the lease was executed.[46]

(III) *EXEMPT PROPERTY.*[47] It has been held that a provision in a lease that the lessor shall have a lien for rent on the exempt property of the lessee creates a lien by contract as to such property.[48] Such a clause in a lease is in the nature of a mortgage, and is governed by the law applicable to instruments of that character.[49]

(IV) *PROPERTY OF THIRD PERSONS.* No agreement between the parties to a lease, creating a lien upon property on the demised premises, can bind the property of third persons placed there in ignorance of such agreement.[50] But where the lease provides that the lessor shall have a lien on buildings erected on the premises the lessor is entitled to such a lien on buildings erected on the land by a

Iowa.— Fejavary *v.* Broesch, 52 Iowa 88, 2 N. W. 963, 35 Am. Rep. 261.

Missouri.— Wright *v.* Bircher, 72 Mo. 179, 37 Am. Rep. 433 [*affirming* 5 Mo. App. 322]; McClain *v.* Abshire, 72 Mo. App. 390.

New Jersey.— Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

New York.— Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; Wisner *v.* Ocumpaugh, 71 N. Y. 113; McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644 [*reversing* 62 Barb. 316].

Rhode Island.— Groton Mfg. Co. *v.* Gardiner, 11 R. I. 626.

United States.— Butt *v.* Ellett, 19 Wall. 544, 22 L. ed. 183.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 998.

Contra.—Vinson *v.* Hallowell, 10 Bush (Ky.) 538; Brown *v.* Neilson, 61 Nebr. 765, 86 N. W. 498, 87 Am. St. Rep. 525, 54 L. R. A. 328 (holding that such an agreement in a lease amounts only to a license, which, to become effective to create a valid lien, requires a change of possession of the property, when or after acquired); New Lincoln Hotel Co. *v.* Shears, 57 Nebr. 478, 78 N. W. 25, 73 Am. St. Rep. 524, 43 L. R. A. 588.

Goods hereafter to be put in, on, or about said building.— Under a lease providing for a lien upon "all goods, wares, merchandise, now in, or hereafter to be put in, on or about said building," the landlord is not entitled to a lien upon horses, harnesses, and wagons purchased subsequently, and used for delivery purposes in connection with said store, but which are kept elsewhere than upon the premises, and which were never upon the same, except as hitched in the street in front thereof. Van Patten *v.* Leonard, 55 Iowa 520, 8 N. W. 334.

Secret lien not valid against mortgage.— A lien agreed to be given upon property not in existence cannot prevail against a subsequent valid lien held by one having no notice of the contract agreement. Holmes *v.* Holifield, 97 Ill. App. 185.

Right rests in contract before property acquired.— An agreement between a landlord and his tenant, reserving title to the crops in the former as security for rent is a valid one, but until the crops come into existence the rights of the parties rest in contract merely. Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711.

44. Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414 [*affirming* 61 Ill. App. 552]; Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955 [*reversing* 34 Ill. App. 159]; Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23 [*affirming* 33 Ill. App. 389]; Downey *v.* Chicago Title, etc., Co., 86 Ill. App. 664; Hughes *v.* Bell, 62 Ill. App. 74; Willard *v.* World's Fair Encampment Co., 59 Ill. App. 336; Felton *v.* Strong, 37 Ill. App. 58.

The words "or other property" are too indefinite as descriptive of after-acquired property to charge third persons with notice of an equitable lien thereon. Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955 [*reversing* 34 Ill. App. 159].

45. Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414 [*affirming* 61 Ill. App. 552]; Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23 [*affirming* 33 Ill. App. 389].

46. Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414 [*affirming* 61 Ill. App. 552].

47. Exempt property generally see EXEMPTIONS.

48. Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650; Fejavary *v.* Broesch, 52 Iowa 88, 2 N. W. 963, 35 Am. Rep. 261.

Waiver of exemption by executory agreement.— Since a waiver of statutory exemption by executory agreement is against public policy, a provision in a lease that if the lessee fails to pay the rent the lessor may seize his property and sell it, whether exempt or not, is invalid. Curtiss *v.* Ellenwood, 59 Ill. App. 110.

49. Sioux Valley State Bank *v.* Honnold, 85 Iowa 352, 52 N. W. 244.

50. Beecher *v.* Bartlett, 42 Mich. 60, 3 N. W. 255.

sublessee,[51] or by a third person under license from the lessee,[52] as against creditors of the party erecting the building. So also, if a lease gives the lessor a lien for rent on crops, those grown by a subtenant on the leased premises are subject thereto, if the subtenant knew that his lessor was a tenant.[53]

d. Waiver and Loss of Lien. A lien created by the express stipulation of the parties is not extinguished by the act of the lessor in taking the note of the lessee as security for the rent,[54] by a stipulation in the lease providing for the sale of the property,[55] or by the fact that the lessor consents to the removal of the property from the premises.[56] Attachment of the property subject to the lien is, however, a waiver of such lien,[57] and if the lessor unites a claim for rent with other claims and enters judgment upon them the lien is lost.[58]

e. Enforcement of Lien — (I) *In General.* Where under the terms of a lease the lessor's right to possession of the property depends upon the non-payment of the rent, he is not, prior to the occurrence of such event, entitled to the possession of the property;[59] but upon the non-payment of the rent he becomes entitled to possession and may maintain replevin[60] or trover[61] against the lessee or other person who wrongfully disposes of the property. The lessor cannot acquire title to the property upon default in payment of the rent, except by seizing the property or foreclosing the lien.[62] Equity has jurisdiction of a suit to enforce a provision in a lease giving the lessor a lien on the property on the premises for rent, and to obtain a sale of the property under the lien.[63]

(II) *Persons Entitled to Enforce.* A lien given by a lease can only be enforced by the landlord or his assignee,[64] and the assignee must be such by an express assignment.[65]

(III) *Persons Against Whom Enforceable — Necessity of Recording* — (A) *Where Lien Regarded as Chattel Mortgage.* Where a provision in a lease reserving a lien for rent is regarded as a chattel mortgage, the lease must be recorded in order that the lien shall be effective against third persons,[66] although they have actual notice of it.[67] As against the lessee, however, such

51. Willard *v.* Rogers, 54 Ill. App. 583.

52. Willard *v.* Rogers, 54 Ill. App. 583.

53. Foster *v.* Reid, 78 Iowa 205, 42 N. W. 649, 16 Am. St. Rep. 437.

54. Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429.

55. Zapp *v.* Davidson, 21 Tex. Civ. App. 566, 54 S. W. 366.

56. Wisner *v.* Ocumpaugh, 71 N. Y. 113, holding that a contract lien does not depend upon absolute possession, but rests in contract, and attaches to the property when in the possession of the lessee or any one standing in his place.

57. Potter *v.* Greenleaf, 21 R. I. 483, 44 Atl. 718.

58. Wilder *v.* Stewart, 21 N. Y. Wkly. Dig. 93.

59. Sheble *v.* Curdt, 56 Mo. 437.

60. Whited *v.* Hamilton, 15 Hun (N. Y.) 275.

61. Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429.

62. Streeter *v.* Ward, 12 N. Y. St. 333.

63. Illinois Starch Co. *v.* Ottawa Hydraulic Co., 125 Ill. 237, 17 N. E. 486 [*affirming* 23 Ill. App. 272]; Webster *v.* Nichols, 104 Ill. 160; Blakemore *v.* Taber, 22 Ind. 466; Potter *v.* Greenleaf, 21 R. I. 483, 44 Atl. 718.

Where the agreement contemplates the execution of a further instrument to create the lien, such covenant can be enforced in equity, and the lessee obliged to give the security provided for. Hale *v.* Omaha Nat. Bank, 47 How. Pr. (N. Y.) 201.

The terms, time, and place of sale of the property are within the discretion of the court. Kuttner *v.* Haines, 35 Ill. App. 307.

64. Hansen *v.* Prince, 45 Mich. 519, 8 N. W. 584.

65. Rawls *v.* Moye, 98 Ga. 564, 25 S. E. 582.

66. *Florida.*— Weed *v.* Standley, 12 Fla. 166.

Illinois.— Packard *v.* Chicago Title, etc., Co., 67 Ill. App. 598.

Iowa.— Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650; Sioux Valley State Bank *v.* Honnold, 85 Iowa 352, 52 N. W. 244.

Michigan.— Lake Superior Ship Canal, etc., Co. *v.* McCann, 86 Mich. 106, 48 N. W. 692.

Minnesota.— Merrill *v.* Ressler, 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822.

New York.— Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; Betsinger *v.* Schuyler, 46 Hun 349; Johnson *v.* Crofoot, 53 Barb. 574.

South Dakota.— Greeley *v.* Winsor, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 984.

An equitable mortgage must be recorded the same as a legal one, to shut out or postpone subsequent purchasers or mortgagees. Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711.

67. Wm. W. Kendall Boot, etc., Co. *v.* Bain, 55 Mo. App. 264.

a provision in a lease is enforceable, although the lease is not recorded.[68] When so recorded, the lien is good against one without actual notice, the recording operating as constructive notice.[69]

(B) *Where Considered Merely an Equitable Lien.* Where a clause in a lease reserving a lien is considered as creating no more than an equitable lien, it will be good against the lessee, and all persons claiming under him, either voluntarily or with notice, or in bankruptcy, although the lease is not recorded.[70] Thus such a lien is good against purchasers,[71] or mortgagees,[72] with notice, assignees in bankruptcy,[73] a naked wrong-doer,[74] subsequent judgment creditors,[75] or attaching creditors,[76] but not against *bona fide* purchasers or mortgagees without notice.[77]

3. Statutory Liens — a. In General — (I) *Nature of Lien.* By statute a landlord is frequently given a lien upon the property or crops of his tenant for the payment of the rent.[78] The landlord has not, however, by virtue of such lien merely, any title to the property, or right to the possession thereof.[79] The legal title and the right to possession remain in the tenant subject to be divested by an appropriate proceeding.[80]

68. Webster *v.* Nichols, 104 Ill. 160.

69. Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682; Smith *v.* Taber, 46 Hun (N. Y.) 313.

70. Smithhurst *v.* Edmunds, 14 N. J. Eq. 408.

71. Chisson *v.* Hawkins, 11 Ind. 316; Wisner *v.* Ocumpaugh, 71 N. Y. 113; Esshon *v.* Watertown Hotel Co., 7 S. D. 74, 63 N. W. 229.

72. Conner *v.* Elliott, 10 Ky. L. Rep. 229; Wright *v.* Bircher, 72 Mo. 179, 37 Am. Rep. 433 [*affirming* 5 Mo. App. 322].

73. Smithurst *v.* Edmunds, 14 N. J. Eq. 408; McLean *v.* Klein, 16 Fed. Cas. No. 8,884, 3 Dill. 113. But see Gubbins *v.* Equitable Trust Co., 80 Ill. App. 17.

74. Fowler *v.* Hawkins, 17 Ind. 211.

75. Hume *v.* Riggs, 12 App. Cas. (D. C.) 355; Smithurst *v.* Edmunds, 14 N. J. Eq. 408; Jones *v.* Avant, 41 Tex. 650.

76. Bowden *v.* Clark, 7 Ky. L. Rep. 674; Metcalfe *v.* Fosdick, 23 Ohio St. 114; Groton Mfg. Co. *v.* Gardiner, 11 R. I. 626; Buswell *v.* Marshall, 51 Vt. 87; Bellows *v.* Wells, 36 Vt. 599; Smith *v.* Atkins, 18 Vt. 461. But see Bailey *v.* Fillebrown, 9 Me. 12, 23 Am. Dec. 529; Butterfield *v.* Baker, 5 Pick. (Mass.) 522.

77. *Arkansas.*— Belding *v.* Flynn, (1891) 15 S. W. 184.

California.— Ferguson *v.* Murphy, 117 Cal. 134, 48 Pac. 1018.

Illinois.— Prettyman *v.* Unland, 77 Ill. 206.

Indiana.— Fowler *v.* Hawkins, 17 Ind. 211.

Iowa.— Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650; Sioux Valley State Bank *v.* Honnold, 85 Iowa 352, 52 N. W. 244.

Nebraska.— Gandy *v.* Dewey, 28 Nebr. 175, 44 N. W. 106; Lanphere *v.* Lowe, 3 Nebr. 131.

New York.— Duffus *v.* Bangs, 122 N. Y. 423, 25 N. E. 980 [*affirming* 43 Hun 52]; Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; Thomas *v.* Bacon, 34 Hun 88.

Mortgagee of after-acquired property.— A contract lien does not cover after-acquired property as against a mortgagee, although with notice. New Lincoln Hotel Co. *v.* Shears, 57 Nebr. 478, 78 N. W. 25, 73 Am. St. Rep. 524, 43 L. R. A. 588; Kennedy *v.* Davis, 2 Tex. Unrep. Cas. 77.

78. See the statutes of the several states.

79. See *infra*, VIII, D, 3, f, (I), (F).

The landlord's lien is an incident, attached by the statute to the relation of landlord and tenant, not having any element of a *jus in re* or a *jus ad rem*, but a simple legal right to charge the particular property with the payment of the particular debt in preference to and in priority of all other debts. There is no change of ownership — that resides in the tenant, as it would have resided in the absence of statute. Nor is there any other restraint upon the incidents of ownership, upon the tenant's unqualified right to enjoyment, than such as is necessary to preserve the lien, as the primary charge for the satisfaction of the favored debts. Scaife *v.* Stovall, 67 Ala. 237; Roberts *v.* Jacks, 31 Ark. 597, 25 Am. Rep. 584; Frink *v.* Pratt, 130 Ill. 327, 22 N. E. 819 [*affirming* 26 Ill. App. 222]; Westmoreland *v.* Wooten, 51 Miss. 825.

A landlord's lien is analogous to the lien given by law to executions in the hands of officers authorized to receive and execute them. Such an execution is a lien on property subject to be levied upon, but the officer cannot, by virtue of the lien alone, maintain replevin if another than the execution debtor has possession of the property. Travers *v.* Cook, 42 Ill. App. 580.

The tenant retains the right to mortgage the crops.— Wilkinson *v.* Ketler, 69 Ala. 435.

In Louisiana the lessor has a double right: A right of pledge, with its right of detention and resultant right of preference, and a right of privilege proper. O'Kelly *v.* Ferguson, 49 La. Ann. 1230, 22 So. 783. The latter is enforced on the price of the property which it affects. By the former the creditor may take and keep the thing itself, as a pledge, until he is paid. Hoey *v.* Hews, 3 La. Ann. 704; Garretson *v.* His Creditors, 1 Rob. 445; Parker *v.* Starkweather, 7 Mart. N. S. 337.

80. Worrill *v.* Barnes, 57 Ga. 404; Travers *v.* Cook, 42 Ill. App. 580; Streeter *v.* Ward,

(II) *Effect of Statutory Provisions.* A statute giving a lien and remedy for rent and advances enters into and forms a part of the contract of lease.[81] Such a statute is constitutional since it deals with landlords as a class.[82] It will not render invalid any lien or mortgage which was valid before its passage,[83] or alter any preëxisting right.[84] A statutory provision rendering no repealing clause in an amendatory act necessary to the repeal of the original act applies to a statute creating a landlord's lien.[85] Statutes creating landlord's liens and providing means for the enforcing thereof have no retrospective operation.[86]

(III) *Character of Tenancy.* A landlord's lien grows only out of the contract of lease,[87] although no writing is necessary to give force to such lien.[88] The mere occupancy of property does not necessarily imply the relation of lessor and lessee, and thus give rise to the landlord's lien;[89] but an agreement to pay for the use and occupation of land *eo nomine* is to agree to establish the relation of landlord and tenant, and to bring with it among other incidents the right to a lien.[90] An express agreement to pay rent is not necessary, but an agreement may be implied.[91]

(IV) *Necessity of Recording.* The filing or recording of the contract of lease is not a prerequisite to the creation of the landlord's statutory lien.[92]

(V) *Time When Lien Attaches.* A landlord's statutory lien attaches as to chattels as soon as the same are brought upon the premises,[93] and as to crops from the time of commencement of their growth,[94] it being in no wise dependent upon

12 N. Y. St. 333; Laux *v.* Glass, 1 Tex. App. Civ. Cas. § 1180.

81. Blanchard *v.* Raines, 20 Fla. 467.

82. State *v.* Elmore, 68 S. C. 140, 46 S. E. 939.

83. White *v.* Thomas, 52 Miss. 49.

84. Weed *v.* Standley, 12 Fla. 166; Durham *v.* Speeke, 82 N. C. 87.

85. Wilkinson *v.* Ketler, 59 Ala. 306.

86. Hardy *v.* Ingram, 84 Ala. 544, 4 So. 372; Flower *v.* Skipwith, 45 La. Ann. 895, 13 So. 152; *In re* Glazier, 33 Wkly. Notes Cas. (Pa.) 310.

87. *Alabama.*— Hadden *v.* Powell, 17 Ala. 314.

Arkansas.—Smith *v.* Maberry, 61 Ark. 515, 33 S. W. 1068; Walters *v.* Meyer, 39 Ark. 560.

Georgia.— Saterfield *v.* Moore, 110 Ga. 514, 35 S. E. 638.

Louisiana.— Fisk *v.* Moores, 11 Rob. 279.

Texas.— Liles *v.* Price, (Civ. App. 1899) 51 S. W. 526.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 980.

88. Scully *v.* Porter, 57 Kan. 322, 46 Pac. 313. But see Hill *v.* Gilmer, (Miss. 1897) 21 So. 528.

89. Gleason *v.* Sheriff, 20 La. Ann. 266; Jordan *v.* Mead, 19 La. Ann. 101; Fisk *v.* Moores, 11 Rob. (La.) 279.

Occupancy under express agreement to pay nothing, and that the property should be returned as soon as required, does not create the relation of landlord and tenant. Fisk *v.* Moores, 11 Rob. (La.) 279.

90. Powell *v.* Hadden, 21 Ala. 745; Jones *v.* Jones, 117 N. C. 254, 23 S. E. 214.

Occupancy under verbal lease.— Although a verbal lease for a year to commence *in futuro* is void under the statute of frauds, yet if the tenant takes possession under the lease and pays rent, this imparts validity to the contract, and creates the relation of landlord and tenant, and gives the landlord a right to a lien. Martin *v.* Blanchett, 77 Ala. 288; Greenwood's Appeal, 79 Pa. St. 294.

91. Love *v.* Law, 57 Miss. 596.

92. Smith *v.* Meyer, 25 Ark. 609; Scully *v.* Porter, 57 Kan. 322, 46 Pac. 313; Davis *v.* Days, 42 S. C. 69, 19 S. E. 975.

In Louisiana a lessor's right of pledge on the movables on the premises leased to secure the payment of the rent need not be recorded in order to give a preference (Burnett *v.* Cleneay, 24 La. Ann. 143; Johnson *v.* Tacneau, 23 La. Ann. 453); but if a lessor would preserve his privilege on the crop and other property on the premises for advances made the lessee, he must have the lease recorded (Johnson *v.* Tacneau, *supra*).

93. Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475; Scott *v.* Renfro, 106 Ala. 611, 14 So. 556; Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131; Gilbert *v.* Greenbaum, 56 Iowa 211, 9 N. W. 182; Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92; Garner *v.* Cutting, 32 Iowa 547; Doane *v.* Garretson, 24 Iowa 351; Carpenter *v.* Gillespie, 10 Iowa 592; Grant *v.* Whitwell, 9 Iowa 152; Wisner *v.* Ocumpaugh, 71 N. Y. 113; Fowler *v.* Rapley, 15 Wall. (U. S.) 328, 21 L. ed. 35; Webb *v.* Sharp, 13 Wall. (U. S.) 14, 20 L. ed. 478.

Contingent lien.— Where a lien is given on the crop of a parcel of land, with a further and similar lien on a second parcel in case the first should prove insufficient, the second lien is contingent and becomes absolute only on proof of the insufficiency of the first. Trenchard *v.* Warner, 18 Ill. 142.

94. Adams *v.* Hobbs, 27 Ark. 1; Smith *v.* Meyer, 25 Ark. 609; Sevier *v.* Shaw, 25 Ark. 417; Watt *v.* Scofield, 76 Ill. 261; Harvey *v.* Hampton, 108 Ill. App. 501.

the maturity of the rent.[95] If the lien is given by statute, it exists independently of the remedy to enforce it;[96] but in the absence of this statutory lien, it is necessary to take proceedings to acquire a lien on the property of the tenant.[97]

(VI) *Duration of Lien.* The duration of a landlord's statutory lien on the chattels of his tenant or the crops raised upon the premises is wholly a matter of statutory provision and differs widely in different jurisdictions.[98]

(VII) *Assignment of Lien*—(A) *Lien For Rent.* In some jurisdictions the assignment of a claim for rent or a note given therefor does not pass to the assignee the landlord's statutory lien for rent.[99] In other states, while the assignment of a written obligation to pay rent carries with it the landlord's statutory lien,[1] the assignee is not entitled to resort to the statutory method of enforcement

95. Sevier *v.* Shaw, 25 Ark. 417.

96. *Alabama.*— Smith *v.* Huddleston, 103 Ala. 223, 15 So. 521; Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131; *Ex p.* Barnes, 84 Ala. 540, 4 So. 769; Westmoreland *v.* Foster, 60 Ala. 448; McDonald *v.* Morrison, 50 Ala. 30. See also McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258; Bingham *v.* Vandegrift, 93 Ala. 283, 9 So. 280; Agee *v.* Mayer, 71 Ala. 88.

District of Columbia.—Bryan *v.* Sanderson, 3 MacArthur 431.

Illinois.— Wetsel *v.* Mayers, 91 Ill. 497; Hunter *v.* Whitfield, 89 Ill. 229; Mead *v.* Thompson, 78 Ill. 62; Thompson *v.* Mead, 67 Ill. 395; Kern *v.* Noble, 57 Ill. App. 27.

Kansas.— Wester *v.* Long, 63 Kan. 876, 66 Pac. 1032; Scully *v.* Porter, 57 Kan. 322, 46 Pac. 313.

Kentucky.— Williams *v.* Wood, 2 Metc. 41.

Mississippi.— Fitzgerald *v.* Fowlkes, 60 Miss. 270.

Texas.— Berkey, etc., Furniture Co. *v.* Sherman Hotel Co., 81 Tex. 135, 16 S. W. 807; Marsalis *v.* Pitman, 68 Tex. 624, 5 S. W. 404; Templeman *v.* Gresham, 61 Tex. 50; Bourcier *v.* Edmondson, 58 Tex. 675; Polk *v.* King, 19 Tex. Civ. App. 666, 48 S. W. 601; Newman *v.* Ward, (Civ. App. 1898) 46 S. W. 868; Randall *v.* Rosenthal, (Civ. App. 1894) 27 S. W. 906.

United States.— Morgan *v.* Campbell, 22 Wall. 381, 22 L. ed. 796.

97. Patterson *v.* Taylor, 15 Fla. 336; Fitzgerald *v.* Fowlkes, 60 Miss. 270; Stamps *v.* Gilman, 43 Miss. 456; Marye *v.* Dyche, 42 Miss. 347; Morgan *v.* Campbell, 22 Wall. (U. S.) 381, 22 L. ed. 796.

In Georgia and Illinois the lien of a landlord for rent does not arise, except as to growing crops, until the goods are distrained. Worrill *v.* Barnes, 57 Ga. 404; Hobbs *v.* Davis, 50 Ga. 213; Toler *v.* Seabrook, 39 Ga. 14; Springer *v.* Lipsis, 209 Ill. 261, 70 N. E. 641 [*affirming* 110 Ill. App. 109]; Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414 [*affirming* 61 Ill. App. 552]; A. N. Kellogg Newspaper Co. *v.* Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300 [*affirming* 59 Ill. App. 89].

98. See the statutes of the several states.

Under Ala. Rev. Code, §§ 2961–2963, a landlord's lien, unlike the common-law right of distress, does not cease with the term, but continues until the crop passes into possession of a purchaser without notice. Bush *v.* Willis, 130 Ala. 395, 30 So. 443; Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Lomax *v.* Le Grand, 60 Ala. 537.

Arkansas.— A landlord's lien on crops expires at the end of six months from the time his rent is due, and although the lien be impressed on the proceeds of the crop when it is converted, it is still subject to the six months' limitations. Valentine *v.* Hamlett, 35 Ark. 538.

In the District of Columbia the landlord has a tacit lien for his rent on the chattels of the tenant on the demised premises from the time the chattels are placed thereon until the expiration of three months after the rent becomes due. Fowler *v.* Rapley, 15 Wall. (U. S.) 328, 21 L. ed. 35; Webb *v.* Sharp, 13 Wall. (U. S.) 14, 20 L. ed. 478.

Iowa.— A landlord's lien continues for six months after the expiration of the term. Nickelson *v.* Negley, 71 Iowa 546, 32 N. W. 487.

Under Ky. Gen. St. c. 66, art. 1, § 13, giving a landlord a superior lien on property placed upon the leased premises, such lien continues so long as the tenant occupies, and the property remains on the premises. English *v.* Duncan, 14 Bush (Ky.) 377.

Under Tex. Rev. St. tit. 58, §§ 3122a, 3122b, the landlord's lien continues so long as the tenant occupies the rented premises and for one month thereafter. Marsalis *v.* Pitman, 68 Tex. 624, 5 S. W. 404; Hempstead Real Estate, etc., Assoc. *v.* Cochran, 60 Tex. 620; Bourcier *v.* Edmondson, 58 Tex. 675.

99. Block *v.* Smith, 61 Ark. 266, 32 S. W. 1070; Varner *v.* Rice, 39 Ark. 344; Meyer *v.* Bloom, 37 Ark. 43; Nolen *v.* Royston, 36 Ark. 561; Roberts *v.* Jacks, 31 Ark. 597, 25 Am. Rep. 584.

Assignment as collateral security.— A landlord who assigns as collateral security, for a debt owed by him, a note given by his tenant for rent, still retains an interest in the note and has a suspended lien on the crop of his tenant, enforceable when he redeems the note. Dickinson *v.* Harris, 52 Ark. 58, 11 S. W. 965; Varner *v.* Rice, 39 Ark. 344.

If the tenant delivers the crop to pay the note to one holding it as collateral security for a debt due him from the landlord, his title and possession will be upheld against the claims of the tenant's mortgagee of the crop. Meyer *v.* Bloom, 37 Ark. 43.

1. Westmoreland *v.* Foster, 60 Ala. 448;

given to landlords, but must foreclose the lien in equity, like other liens.[2] It is now provided by statute in several of the states that a landlord may assign his claim for rent, and invest the assignee with all the remedies of the landlord for its enforcement.[3]

(B) *Lien For Advances.* Where it is specially permitted by statute, a landlord may assign his lien on supplies furnished, and it may thereupon be enforced by the assignee as it could have been by the landlord;[4] but in the absence of statute such a transfer cannot be made.[5]

b. Nature of Indebtedness For Which Lien May Be Claimed — (I) *Lien For Rent* — (A) *In General.* Under a statute giving a landlord a lien "for his rent" on certain personal property of the lessee, other indebtedness besides rent cannot be included.[6] In some jurisdictions the lien is given for the payment "of the rent and other obligations of the lessee."[7]

(B) *Rents Accrued.* In some states the landlord has a lien on the property of his tenant only for rent due and in arrears.[8]

Taylor *v.* Nelson, 54 Miss. 524; Hatchett *v.* Miller, (Tex. Civ. App. 1899) 53 S. W. 357.

2. Westmoreland *v.* Foster, 60 Ala. 448; Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753; Hatchett *v.* Miller, (Tex. Civ. App. 1899) 53 S. W. 357. *Compare* Keith *v.* Blanton, 71 Miss. 821, 15 So. 132.

3. Hederson *v.* State, 109 Ala. 40, 19 So. 733; Ballard *v.* Mayfield, 107 Ala. 396, 18 So. 29; Stephens *v.* Adams, 93 Ala. 117, 9 So. 529; Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443; Biggs *v.* Piper, 86 Tenn. 599, 8 S. W. 851.

Georgia.— Under the act of Sept. 27, 1883, a special lien for rent arises in favor of the transferee of a rent note when the crop matures, if the transfer was made in writing before such maturity, and it is immaterial that the transfer was made only as collateral security. Strickland *v.* Stiles, 107 Ga. 308, 33 S. E. 85; Andrew *v.* Stewart, 81 Ga. 53, 7 S. E. 169. Previous to this statute a lien was not assignable by mere written transfer of the note or contract. Lathrop *v.* Clewis, 63 Ga. 282.

Foreclosure of lien in name of landlord despite assignment.— While a special lien for rent arises in favor of the transferee of a rent contract when the crop matures, if the transfer was made in writing before such maturity, yet where the landlord has indorsed a rent note transferred by him, and has thus become personally liable for its payment, and where an understanding or agreement exists between him and the transferee that the right of foreclosing a lien shall remain in the landlord for his protection, and it is accordingly foreclosed by him, in a contest between such landlord and a judgment creditor of the tenant, over a fund on which the lien for rent takes effect, in which contest the transferee of the rent note and the tenant are likewise plunged, and both of them consent to the foreclosure of the lien in the name of the landlord, the lien for rent will be treated as properly foreclosed over the objection of the judgment creditor. Strickland *v.* Stiles, 107 Ga. 308, 33 S. E. 85.

4. Mercer *v.* Cross, 79 Ga. 432, 5 S. E. 245; Benson *v.* Gottheimer, 75 Ga. 642.

Estoppel to deny validity of lien.— A landlord who assigns his lien on his tenant's crop to enable the tenant to rent the farm for the benefit of both and thus secure supplies for the farm is estopped to deny the validity of the lien in the hands of the assignee. Zachry *v.* Stewart, 67 Ga. 218.

5. Hederson *v.* State, 109 Ala. 40, 19 So. 733; Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443.

6. Roth *v.* Williams, 45 Ark. 447; Sioux City First Nat. Bank *v.* Flynn, 117 Iowa 493, 91 N. W. 784; Ladner *v.* Balsley, 103 Iowa 674, 72 N. W. 787; Crill *v.* Jeffrey, 95 Iowa 634, 64 N. W. 625. See also Lehman *v.* Howze, 73 Ala. 302; Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650.

A recital in the contract specifying that the consideration is rent which is untrue in point of fact will not create a lien. Lehman *v.* Howze, 73 Ala. 302.

Lien for damages.— A landlord has no lien upon the property of his tenant for damages sustained by the landlord on account of the tenant's failure to comply with his contract. Wilkinson *v.* Ketler, 59 Ala. 306; Galbraith *v.* Rogers, 14 Ky. L. Rep. 238; Overby *v.* Rogers, 12 Ky. L. Rep. 289.

Sum in lieu of rent.— Under a stipulation that a party may cultivate a plantation and pay annually in lieu of rent a sum equal to the interest on the property, the obligee may recover such sum, but is not entitled to a lessor's privilege. Friedler v. Chotard, 36 La. Ann. 276.

Taxes.— The landlord is not entitled to a lien for taxes on the property which the tenant had covenanted to pay, and which were due and unpaid. Binns *v.* Hudson, 5 Binn. (Pa.) 505.

Where a tenant abandons his crop and breaks his lease, the landlord may gather the crop, and retain out of it, against the tenant's mortgagee of the crop, the expense of preserving it and preparing it for market, as well as the rent. Fry *v.* Ford, 38 Ark. 246.

7. Warfield *v.* Oliver, 23 La. Ann. 612, holding that under such a statute the lien includes an obligation by the lessee to repair and to keep in repair the premises leased.

8. Forman *v.* Proctor, 9 B. Mon. (Ky.)

(c) *Rents to Accrue.* In other states the lien attaches for all rent to become due during the entire term of the lease.[9]

(d) *After Levy of Execution on Tenant's Goods.* Where the goods of the tenant are taken in execution, his landlord has a lien only for rent due previous to the execution. He cannot claim rent which has subsequently accrued, while the goods remain on the premises in the sheriff's possession.[10]

(e) *Costs and Expenses.* A landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents.[11]

(ii) *Lien For Advances and Supplies*—(a) *In General.* It is quite generally provided by statute, where lands are leased for agricultural purposes, that the lessor shall have a lien on all crops raised thereon for any advances made by him to aid in making the crop.[12] Whenever a tenant fails to discharge his indebtedness for advances, and continues his tenancy under the same landlord, the balance due is held to be an advance by the landlord toward making the crop of the succeeding year for which a lien will attach. To constitute a balance due on an advance, it is not requisite that the tenancy of the same land shall continue; the essential fact is the continuance and identity of the relation and not the identity of the land.[13]

(b) *By and to Whom Made.* As a general rule a landlord is not entitled to a lien upon his tenant's crops for supplies unless the same are furnished by the landlord himself.[14] The landlord need not furnish direct from his own stores in order to raise a lien. He may purchase for his tenant and the articles may or may not pass through his hands;[15] but he is not entitled to a lien where he merely guarantees payment for supplies furnished by a third party, and no direct indebt-

124; Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205; Glasgow *v.* Ridgeley, 11 Mo. 34.

9. Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475; Scott *v.* Renfro, 106 Ala. 611, 14 So. 556; Gilbert *v.* Greenbaum, 56 Iowa 211, 9 N. W. 182; Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92; Garner *v.* Cutting, 32 Iowa 547; Livingston *v.* Wright, 68 Tex. 706, 5 S. W. 407; Marsalis *v.* Pitman, 68 Tex. 624, 5 S. W. 404 [*disapproving* Green *v.* Baehr, 5 Tex. L. Rev. 597; Hempstead Real Estate, etc., Assoc. *v.* Cochran, 60 Tex. 620]; Couts *v.* Spivey, 66 Tex. 267, 17 S. W. 540.

10. *Alabama.*— Denham *v.* Harris, 13 Ala. 465; Whidden *v.* Toulmin, 6 Ala. 104.

District of Columbia.—Harris *v.* Dammann, 3 Mackey 90.

Maryland.—Washington *v.* Williamson, 23 Md. 244.

New York.— Theriat *v.* Hart, 2 Hill 380; Trappan *v.* Morie, 18 Johns. 1.

Pennsylvania.— Stark *v.* Hight, 3 Pa. Super. Ct. 516; Merrill *v.* Trimmer, 2 Pa. Co. Ct. 49.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 988.

11. Slaughter *v.* Winfrey, 85 N. C. 159.

12. See the statutes of the several states; and cases cited *infra*, note 13 *et seq.*

Advance before cultivation commenced.— Advances for which the law gives a lien are not confined to those given after the beginning of the crop. Advances to a tenant, made before he begins to put in the crop, and while he is waiting for the cultivating season to arrive, are the subject of a landlord's lien. Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443.

13. Bush *v.* Willis, 130 Ala. 395, 30 So. 443; Powell *v.* State, 84 Ala. 444, 4 So. 719; Reese *v.* Rugely, 82 Ala. 267, 2 So. 441; Thompson *v.* Powell, 77 Ala. 391; Gunter *v.* Du Bose, 77 Ala. 326; Cockburn *v.* Watkins, 76 Ala. 486.

Retaining landlord's share of first year's crop.— Where one leased land for a year, and advanced seed, etc., to his tenant to enable the latter to make a crop, the seed, etc., to be returned in kind, and at the end of the year leased the land for another year to the same tenant, and agreed that he should retain a landlord's share of the former crop to enable him to make another crop, it was held that this constituted an advancement for the second year, and gave the landlord a lien on the crop thereof, although his share of the first year's crop had never been set apart to him or divided from the bulk belonging to the tenant, and that such share was to be returned in kind or paid for in money. Thigpen *v.* Maget, 107 N. C. 39, 12 S. E. 272.

14. Rodgers *v.* Black, 99 Ga. 139, 25 S. E. 23; Brimberry *v.* Mansfield, 86 Ga. 792, 13 S. E. 132; Swann *v.* Morris, 83 Ga. 143, 9 S. E. 767; Scott *v.* Pound, 61 Ga. 579; Ellis *v.* Jones, 70 Miss. 60, 11 So. 566; Kelley *v.* King, 18 Tex. Civ. App. 360, 44 S. W. 915; England *v.* Brinson, 1 Tex. App. Civ. Cas. § 320.

The facts that one claimed to be the landlord in furnishing supplies, and that the tenants understood he was furnishing the supplies as landlord, do not entitle him to a lien for rent and supplies. Jamison *v.* Acker, (Miss. 1893) 14 So. 691.

15. Scott *v.* Pound, 61 Ga. 579.

edness exists between himself and the tenant.[16] In one state at least the statute gives the landlord a lien on his tenant's crops for advances made by him either directly "or by another at his instance or request, or for which he became legally bound or liable at or before the time such advances were made." Under this statute, when advances are made by a third party, it is essential to the existence of the lien that he shall look to the landlord for payment, although the advances may have been made at his instance or request,[17] and that the tenant shall assent to the proceeding, or ratify it after notice.[18] To constitute a lien for advances, they must have been made to or at the instance of the tenant who made the crop.[19]

(c) *What Constitutes.* It is not every advance a landlord may make that comes within the statute. It must come strictly within the class of articles enumerated,[20] and be for some one or more of the purposes mentioned in the statute.[21] To constitute an advance, the landlord must furnish or cause to be furnished something not previously the property of the tenant.[22] An advancement, in the sense of the statutes, is anything of value pertinent for the purpose, to be used directly or indirectly in making or saving the crops,[23] supplied in good faith[24] to the lessee by the landlord. Many things are in their nature and adaptation *per se* pertinent for such purpose, and presumptively constitute advancements whenever so supplied.[25] When other things not directly so appropriate are sup-

16. Rodgers *v.* Black, 99 Ga. 139, 25 S. E. 23; Brimberry *v.* Mansfield, 86 Ga. 792, 13 S. E. 132; Swann *v.* Morris, 83 Ga. 143, 9 S. E. 767; Scott *v.* Pound, 61 Ga. 579; Ellis *v.* Jones, 70 Miss. 60, 11 So. 566; England *v.* Brinson, 1 Tex. App. Civ. Cas. § 320. *Contra,* Powell *v.* Perry, 127 N. C. 22, 37 S. E. 71.

17. Clanton *v.* Eaton, 92 Ala. 612, 8 So. 823; Bell *v.* Hurst, 75 Ala. 44.

18. Clanton *v.* Eaton, 92 Ala. 612, 8 So. 823.

The act of March 8, 1871, prior to its amendment, required that the advances should be made by the landlord himself. Evans *v.* English, 61 Ala. 416.

19. Reynolds *v.* Hindman, 88 Ga. 314, 14 S. E. 471.

20. Powell *v.* State, 84 Ala. 444, 4 So. 719; Bell *v.* Hurst, 75 Ala. 44; Evans *v.* English, 61 Ala. 416.

An instrument securing not only advances, but debts founded on a different consideration, will not give rise to the statutory lien. Bell *v.* Hurst, 75 Ala. 44; Comer *v.* Daniel, 69 Ala. 434; Evans *v.* English, 61 Ala. 416.

Rent cannot enter into the lien as an incident, for it is neither money nor a thing supplied. Dunn *v.* Spears, 5 S. C. 17.

21. Powell *v.* State, 84 Ala. 444, 4 So. 719, holding that the landlord has no lien for advances made to his tenant as a hired laborer, to be paid for by his labor.

22. Lumbley *v.* Gilruth, 65 Miss. 23, 3 So. 77, holding that mere forbearance to demand something due him from the tenant in one year does not give him a lien on the crops of the leased premises for the next year.

23. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797; Ledbetter *v.* Quick, 90 N. C. 276; Tucker *v.* Thomas, 35 Tex. Civ. App. 499, 80 S. W. 649, holding that the landlord's lien on the crop of a tenant cannot be predicated on an indebtedness of the tenant to the landlord for pasturage of stock or hire of a team, where neither the stock nor team were used by the tenant in cultivating the farm.

The lien is not confined to teams, provisions, and farming implements and money with which to purchase them, but embraces everything of value for the sustenance and well being of the tenant or his family, for preparing the ground for cultivation or for cultivating, gathering, saving, handling, or preparing the crops for market. Cockburn *v.* Watkins, 76 Ala. 486.

24. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797; Ledbetter *v.* Quick, 90 N. C. 276.

It might be difficult in many cases that might arise to say what would or would not be advancements to make or save the crop, in the sense of the statute. The tenant, acting in good faith, must be the judge of what is necessary and proper to aid him in making and saving the crop, and when the landlord has in good faith furnished supplies as required by the tenant, this will be sufficient on his part, without regard to the particular things supplied. There is a great variety of ways in which things not *per se* necessary to make or save the crop may incidentally serve that purpose, and the tenant alone can be the better judge in such respects. Ledbetter *v.* Quick, 90 N. C. 276.

25. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797.

Board.— A landlord who furnishes board to his tenant is entitled to a lien on the crop for such board. Jones *v.* Eubanks, 86 Ga. 616, 12 S. E. 1065.

Goods furnished employees.—The term "advances" as used in the lease of a plantation, providing that the lessor should not proceed to collect the rent until the lessee's factors are reimbursed for advances, includes goods furnished the plantation store, which is open only to employees of the place. Cain *v.* Pullen, 34 La. Ann. 511; Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797.

plied to the lessee, whether they constitute advancements or not depends on whether they were supplied for the purpose specified by the statute. It must appear affirmatively that they were.[26]

c. Property Subject to Lien — (i) *In General.* The property subject to a landlord's lien for rent depends entirely upon the wording of the statute by which the lien is given. If the lien is given upon specific property, the idea of a lien on any other property of the tenant is impliedly excluded.[27] Some statutes provide for a lien upon all the property of the tenant upon the premises,[28] or in the building leased.[29] Under a statute giving the landlord a lien on all the goods, furniture, and effects belonging to the tenant,[30] it is held that the lien does not extend to all the "effects" of the tenant, but only to such as have enjoyed the protection of the leased premises.[31] Where a statute provides that a landlord shall have a lien for rent upon all personal property "which has been used upon the premises during the term,"[32] the lien attaches upon all personal property kept by the tenant upon the leased premises in the transaction of the business for which the tenancy was created,[33] and the converse is also true that it attaches

Work animals furnished to a tenant by his landlord are "supplies" within the meaning of the statute. Trimble *v.* Durham, 70 Miss. 295, 12 So. 207; Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797.

Appropriate farming implements are advancements when supplied to enable the tenant to make his crop. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797.

26. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797; Ledbetter *v.* Quick, 90 N. C. 276.

Tobacco, dice, whisky, cards, perfumery, etc., are not supplies necessary to make a crop, for which the law allows a privilege to the landlord for advances. Stafford *v.* Pearson, 26 La. Ann. 658.

The fact that the lessee diverts the supplies from the purpose contemplated will not affect the landlord's right to his lien. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797; Ledbetter *v.* Quick, 90 N. C. 276.

27. Herron *v.* Gill, 112 Ill. 247; Felton *v.* Strong, 37 Ill. App. 58. See also Richardson *v.* McLaurin, 69 Miss. 70, 12 So. 264.

28. Becker *v.* Dalby, (Iowa 1901) 86 N. W. 314; Burket *v.* Boude, 3 Dana (Ky.) 209.

29. Livingston *v.* Wright, 68 Tex. 706, 5 S. W. 407; Marsalis *v.* Pitman, 68 Tex. 624, 5 S. W. 404.

Property "in the residence" includes all property on the premises. York *v.* Carlisle, 19 Tex. Civ. App. 269, 46 S. W. 257.

Lien on improvements.— The statute giving to the landlord of any residence, storehouse, or other building a lien on all the tenant's property in the building does not give a lien on all improvements erected by the lessee. Meyer *v.* O'Dell, 18 Tex. Civ. App. 210, 44 S. W. 545; Rush *v.* Henley, (Tex. App. 1891) 15 S. W. 201.

30. Ala. Code, § 3069.

The term "effects" is construed to mean property of the same general nature as "goods" and "furniture." Birmingham First Nat. Bank *v.* Consolidated Electric Light Co., 97 Ala. 465, 12 So. 71; McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258.

A leasehold is not included in a tenant's "goods, furniture and effects," so as to be subject to a lien for rent. Birmingham First Nat. Bank *v.* Consolidated Electric Light Co., 97 Ala. 465, 12 So. 71.

31. Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475; McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258; Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131; Abraham *v.* Nicrosi, 87 Ala. 173, 6 So. 293. See also Stephens *v.* Adams, 93 Ala. 117, 9 So. 529.

32. Iowa Code, § 2017.

Use upon the premises is essential.— Therefore teams used for the delivery of goods, but not kept on the premises, are not subject to a landlord's lien (Van Patten *v.* Leonard, 55 Iowa 520, 8 N. W. 334); nor does the statute apply to the fleeting use made of a leased terminal or other railroad station by a railroad train employed in interstate traffic (Trust Co. of North America *v.* Manhattan Trust Co., 77 Fed. 82, 23 C. C. A. 30 [*affirming* 68 Fed. 72]).

33. Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418; Garner *v.* Cutting, 32 Iowa 547.

Property on premises for purposes of sale. —A landlord has a lien upon property kept upon the premises for the purposes of sale, although not used thereon for any other purpose (Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418; Grant *v.* Whitwell, 9 Iowa 152); but not upon goods sold before the lien is enforced, where selling goods is the business for which the premises were used (The Richmond *v.* Cake, 1 App. Cas. (D. C.) 447; Nesbit *v.* Bartlett, 14 Iowa 485; Carpenter *v.* Gillespie, 10 Iowa 592; Grant *v.* Whitwell, 9 Iowa 152; Mathes *v.* Staed, 67 Mo. App. 399; Webb *v.* Sharp, 13 Wall. (U. S.) 14, 20 L. ed. 478); a sale of an entire stock at one time is not a sale in the ordinary course of business (Marsalis *v.* Pitman, 68 Tex. 624, 5 S. W. 404); but a sale *en bloc* of the remaining stock of goods after an injury by fire is such a sale (Ligget *v.* Viau, 18 Quebec Super. Ct. 201).

The lien attaches to cattle used for the purpose of feeding and improving them in the ordinary way, and, where the premises are leased for the purpose of keeping cattle thereon for sale, to the cattle so kept; but

only to such property.[34] In Louisiana the lien of a landlord for rent extends to the movable effects of the lessee which are found on the premises leased.[35]

(II) *Crops.* In most of the states statutes provide that the lessor of premises shall have a lien upon the agricultural products grown upon said premises for his rent.[36] Such lien extends to every part of the crop raised upon the leased premises.[37]

(III) *Fixtures.* A landlord's statutory lien for rent is enforceable against a building on the land whenever the rent becomes due and payable, regardless of the ownership of such building.[38]

(IV) *Choses in Action.* A landlord's lien is generally considered not to extend to choses in action such as notes, drafts, due bills, accounts, etc.[39]

(V) *Exempt Property.* Statutes creating landlord's liens for rent often expressly provide that the operation of such liens shall not extend to such property as is exempt from appropriation to the ordinary debts of the tenant by execution,[40]

where cattle kept for sale are sold in the ordinary course of business before the lien is enforced, the lien does not attach as against the purchaser. Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418.

34. Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418; Grant *v.* Whitwell, 9 Iowa 152.

35. See cases cited *infra*, this note.

Work animals, carts, and farming implements used on a plantation in making the crop, and belonging to the lessee, are subject to the lessor's privilege for rent. Johnson *v.* Tacneau, 23 La. Ann. 453; Bazin *v.* Segura, 5 La. Ann. 718.

Slaves are not subject to the lessor's right to pledge for rent. Cox *v.* Myers, 4 La. Ann. 144.

Property of partners.— The lien of a landlord for the rent of a plantation, leased to a firm, extends to all the movable property of the partners upon the premises, irrespective of whether they are owned by one partner or by all, or whether there are any special stipulations between the parties themselves. Hynson *v.* Cordukes, 21 La. Ann. 553.

After expiration of a lease.— The landlord has a privilege on the property that remains on his premises after the lease expires. Villere *v.* Shaw, 108 La. 71, 32 So. 196.

36. *Alabama.*— Powell *v.* Hadden, 21 Ala. 745.

Illinois.— Hadden *v.* Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80.

Iowa.— Rotzler *v.* Rotzler, 46 Iowa 189.

Louisiana.—Knox *v.* Booth, 19 La. Ann. 109.

Mississippi.— Ball *v.* Sledge, 82 Miss. 749, 35 So. 447; Arbuckle *v.* Nelms, 50 Miss. 556.

Missouri.—Knox *v.* Hunt, 18 Mo. 243; Beck *v.* Wisely, 52 Mo. App. 242.

North Carolina.—Howland *v.* Forlaw, 108 N. C. 567, 13 S. E. 173.

Texas.—Edwards *v.* Anderson, 36 Tex. Civ. App. 611, 82 S. W. 659.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 993.

Under Ariz. Rev. St. (1901) par. 2695, providing that every landlord shall have a lien upon the crops grown or growing upon the homestead premises for rent thereof, etc., the landlord has no lien on the crops grown on land which is not a homestead. Hoopes *v.* Brier, (1905) 80 Pac. 327.

Under a lease of a house and lands by the same instrument, the contract being entire, the landlord has a lien on the crop for the rent due him on the house. Thompson *v.* Mead, 67 Ill. 395; Scroggins *v.* Foster, 76 Miss. 318, 24 So. 194.

Where the relation of landlord and cropper exists, the title to the crops is in the landlord, and no lien can arise in his favor for supplies furnished to the cropper. Fields *v.* Argo, 103 Ga. 387, 30 S. E. 29.

Rent payable in money — Mississippi. — Under the act of April 17, 1873, a landlord who reserves rent payable in "money," and not in part of the crop, has no lien on the crop by virtue of the contract. Phillips *v.* Douglass, 53 Miss. 175.

37. Lemay *v.* Johnson, 35 Ark. 225; Miles *v.* James, 36 Ill. 399; Knowles *v.* Sell, 41 Kan. 171, 21 Pac. 102; State *v.* Reeder, 36 S. C. 497, 15 S. E. 544.

Several contracts of renting.— One renting separate parcels to the same tenant has, for the rent of each, only a lien on the crops grown on that parcel. Nelson *v.* Webb, 54 Ala. 436.

38. Union Water-Power Co. *v.* Chabot, 93 Me. 339, 45 Atl. 30.

39. McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258; Van Patten *v.* Leonard, 55 Iowa 520, 8 N. W. 334.

In Louisiana the contrary is held. Stone's Succession, 31 La. Ann. 311; Matthews *v.* His Creditors, 10 La. Ann. 718.

40. The Richmond *v.* Cake, 1 App. Cas. (D. C.) 447; Carden *v.* Dearing, 14 Ky. L. Rep. 78.

Refers only to statutory exemption.— The exemption from the lien of chattels not subject to execution for debt refers only to such statutory exemptions as are allowed to householders, mechanics, and others, by the act of congress, of Feb. 5, 1867. It cannot be construed to extend to property upon which there is an existing lien, by way of mortgage, deed of trust, or otherwise. The Richmond *v.* Cake, 1 App. Cas. (D. C.) 447.

Property exempt see EXEMPTIONS.

Mule and dray.— A landlord's lien does not

or forced sale.[41] In several states, however, the landlord's lien upon agricultural products, animals, tools, etc., is made superior to all laws exempting such property from forced sale or execution.[42]

(VI) *Property of Third Persons*—(A) *In General.* The statutes usually provide that a landlord shall have a lien for rent upon the goods of his tenant, but not upon the goods of other persons which are upon the demised premises.[43] In Louisiana goods of third persons placed with their consent on leased premises become subject to the pledge of the lessor,[44] but property of third persons not on the leased premises is not so subject;[45] nor are movables subject to this right when transiently or accidentally on the premises.[46]

(B) *Property of Subtenants.* The lien of a landlord for rent extends to the entire crop raised on the rented premises, whether by the tenant or one let in under him,[47] unless the landlord assents to the subletting, or ratifies it while owner of the rent contract, or the transferee of the contract does so after acquiring

extend to a mule and dray used by the tenant in connection with his mercantile business. McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258.

No exemptions from liens for supplies.— No part of a tenant's crop is exempt from a landlord's lien for supplies furnished. Carden *v.* Dearing, 14 Ky. L. Rep. 78.

Where exempt property is left on premises at the end of the term, the landlord acquires no lien thereon, since the right to the lien terminates with the tenancy, and the exemption continues up to that time, and the property is not kept or used on the premises after their surrender. Bacon *v.* Carr, 112 Iowa 193, 83 N. W. 957.

In Iowa Code (1873), § 2017, providing that "a landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used upon the premises during the term, and not exempt from execution," the words "not exempt from execution" refer only to the "other personal property," and not to "crops grown upon the demised premises." Hipsley *v.* Price, 104 Iowa 282, 73 N. W. 584.

Burden of proof.— One who asserts that the lien does not attach by reason of the property being exempt must prove that fact. Hays *v.* Berry, 104 Iowa 455, 73 N. W. 1028.

41. St. Louis Type Foundry *v.* Taylor, (Tex. Civ. App. 1896) 35 S. W. 691.

42. Hill *v.* George, 1 Head (Tenn.) 394; Champion *v.* Shumate, 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394; Stokes *v.* Burney, 3 Tex. Civ. App. 219, 22 S. W. 126.

Homestead exemption.— A crop made on rented ground is subject to levy and sale for the payment of the rent, although set apart as an exemption for the benefit of the tenant's family. Harrell *v.* Fagan, 43 Ga. 339; Davis *v.* Meyers, 41 Ga. 95.

43. Johnson *v.* Douglass, 2 Mackey (D. C.) 36; Davis *v.* Washington, 18 Tex. Civ. App. 67, 43 S. W. 585; Needham Piano, etc., Co. *v.* Hollingsworth, (Tex. Civ. App. 1897) 40 S. W. 750.

Personal property of a wife is not subject to a lien for rent under a lease executed by her husband alone. Schurz *v.* McMenamy, 82 Iowa 432, 48 N. W. 806; Perry *v.* Waggoner, 68 Iowa 403, 27 N. W. 292.

Individual partner's property.— The individual property of one member of a firm, used and kept on the leased premises, is not subject to the landlord's lien for rent due from the firm. Ward *v.* Walker, 111 Iowa 611, 82 N. W. 1028.

Estoppel to deny lien. — The owners of property found upon leased premises are not estopped to deny the landlord's lien when they made no representations as to the ownership thereof, and the landlord did not rely thereon in renting. Davis *v.* Washington, 18 Tex. Civ. App. 67, 43 S. W. 585.

44. Bailey *v.* Quick, 28 La. Ann. 432; Twitty *v.* Clarke, 14 La. Ann. 503. See also Hanna *v.* His Creditors, 12 Mart. (La.) 32; Ritchie's Syndics *v.* White, 11 Mart. (La.) 239.

Goods on storage.— The lessor of a warehouse has a lien on goods on storage to the amount due for storage. Wallace *v.* Smith, 8 La. Ann. 374; Vairin *v.* Hunt, 18 La. 498.

Under agreement to pay no storage.— The goods of a third person contained in a leased house by his consent, under an agreement with the lessee that no rent or other consideration is to be paid for the occupancy, are not the goods of an "under-tenant" and are subject to the landlord's pledge. University Pub. Co. *v.* Piffet, 34 La. Ann. 602.

Goods consigned to lessee to be sold.— Goods found in a leased store, which have been consigned to the lessee to be sold at a price fixed by the owner, the consignee to keep, as compensation, all he can obtain above such price, and no storage to be due by the owner, are liable to the landlord's lien for rent. Goodrich *v.* Bodley, 35 La. Ann. 525.

45. Bailey *v.* Quick, 28 La. Ann. 432.

46. Coleman *v.* Fairbanks, 28 La. Ann. 93 (holding that materials sent by a third person to a tenant as manufacturer and factor to be made up and sold are not liable to the landlord's lien for rent); Rea *v.* Burt, 8 La. 509.

47. *Alabama.*— Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895; Robinson *v.* Lehman, 72 Ala. 401; Givens *v.* Easley, 17 Ala. 385.

title;[48] and this lien attaches to the crop, although the sublessee may have paid the first lessee for the rent.[49] It is sometimes required that the crop of the tenant-in-chief shall be exhausted before a levy is made on the crop of the under-tenant, unless such tenant has not made a crop, or it is insufficient to satisfy the lien.[50] In Louisiana goods or effects of a sublessee found on the leased premises are only subject to the privilege of the lessor to the extent of the sublessee's indebtedness to the principal lessee;[51] and therefore a landlord cannot hold the goods of a subtenant for rent not yet due, unless the latter has assumed the lease.[52]

(VII) *Proceeds of Property* — (A) *In General.* A statutory lien upon a tenant's property does not extend to the proceeds arising from the voluntary sale of such property;[53] but if the property of the tenant is taken into the custody of the law and converted into money the lien will attach to such proceeds.[54] A surrender of the tenant to his landlord extinguishing the claim for rent, however, after the levy has been made by an execution creditor on the goods found on the premises, and before the sale of the same, will destroy the landlord's right in the proceeds of the sale of such goods.[55]

(B) *Proceeds of Insurance Policy.* A landlord's lien for rent will not, on the destruction of the goods of the tenant, attach to the insurance money.[56]

(VIII) *Effect of Removal or Sale.* In some jurisdictions a landlord's lien on agricultural products,[57] and the chattels of his tenant,[58] is not affected by their removal from the premises, but may be enforced so long as the property can be

Georgia.— Thompson *v.* Commercial Guano Co., 93 Ga. 282, 20 S. E. 309; Andrew *v.* Stewart, 81 Ga. 53, 7 S. E. 169.

Iowa.—Houghton *v.* Bauer, 70 Iowa 314, 30 N. W. 577.

Kansas.— Berry *v.* Berry, 8 Kan. App. 584, 55 Pac. 348.

Mississippi.—Applewhite *v.* Nelms, 71 Miss. 482, 14 So. 443.

Missouri.—Garroutte *v.* White, 92 Mo. 237, 4 S. W. 681; Phillips *v.* Burrows, 64 Mo. App. 351 (holding further that the landlord has the same remedy against a subtenant, by enforcing his lien against the crop grown on the demised premises, as he has against the tenant); Williams *v.* Braden, 63 Mo. App. 513.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 997.

Owner's lien superior to immediate lessor's lien.— Where the crop of a subtenant is under the double lien of the owner of the land and his immediate lessor, the owner's lien is paramount. Montague *v.* Mial, 89 N. C. 137; Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481.

Rent must be payable in crops.— A landlord's lien on the crop of an under-tenant for rents due from the tenant in chief will not arise unless the rents were payable in the crops. Lehman *v.* Howze, 73 Ala. 302.

Under a statute prohibiting a tenant from subletting the premises without the landlord's consent, all crops raised on the rented premises, whether by tenant, subtenant, or assignee, are subject to the landlord's statutory lien. Forrest *v.* Durnell, 86 Tex. 647, 26 S. W. 481; Marrs *v.* Lumpkins, 22 Tex. Civ. App. 448, 54 S. W. 775; Stokes *v.* Burney, 3 Tex. Civ. App. 219, 22 S. E. 126.

48. Thompson *v.* Commercial Guano Co., 93 Ga. 282, 20 S. E. 309; Andrew *v.* Stewart, 81 Ga. 53, 7 S. E. 169.

49. Rutledge *v.* Walton, 4 Yerg. (Tenn.) 458.

50. Lehman *v.* Howze, 73 Ala. 302.

51. Campbell *v.* Fowler, 28 La. Ann. 234; Simon *v.* Goldenberg, 15 La. Ann. 229 (holding further that when such goods are seized by the lessor for rent due him, and the sublessee does not disclose the title under which he occupies the premises, the privilege of the lessor will cover the goods for the whole amount of the rent due); Deslix *v.* Jonze, 6 Rob. (La.) 292.

A lessor who has consented to a sublease by the lessee cannot afterward hold a subtenant liable as a third person, and claim a lien and privilege on his property found on the premises to secure the rent due or to become due by the lessee. Freeland *v.* Hyllested, 24 La. Ann. 450.

One who pays storage on his goods in a warehouse is a sublessee whose goods are liable to the landlord's lien. Vairin *v.* Hunt, 18 La. 498.

52. Sanarens *v.* True, 22 La. Ann. 181.

53. Estes *v.* McKinney, (Tex. Civ. App. 1897) 43 S. W. 556.

54. Gilbert *v.* Greenbaum, 56 Iowa 211, 9 N. W. 182; Ghio *v.* Shutt, 78 Tex. 375, 14 S. W. 860.

55. Greider's Appeal, 5 Pa. St. 422.

56. *In re* Reis, 20 Fed. Cas. No. 11,684, 3 Woods 18.

57. Lomax *v.* Le Grand, 60 Ala. 537; Fitzgerald *v.* Fowlkes, 60 Miss. 270 (where it is said that the rule is different as to goods and chattels, not agricultural products, as to which the landlord has no lien but only a right of seizure by attachment); Henry *v.* Davis, 60 Miss. 212; Wilkes *v.* Adler, 68 Tex. 689, 5 S. W. 497.

58. Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475.

found and identified, provided it has not passed into the hands of a *bona fide* purchaser for value, without notice of the lien.[59] In others such a lien ceases upon the removal of the property from the premises.[60] If the landlord consents to the removal he of course waives his lien.[61] It is sometimes provided by statute that a landlord shall have a lien on the crops and movable effects of his tenant while they remain on the premises, and for a stated time after their removal;[62] and this, without regard to the manner of the removal, whether fraudulent or otherwise.[63] Such a statute extends only to the property of the lessee.[64]

d. Priorities Between Landlord's Lien and Other Liens or Claims — (i) *In General.* The statutory lien in favor of the landlord is superior to other junior liens, and may be enforced against all but prior liens and *bona fide* purchasers without notice.[65] It is likewise superior to any agreement between the parties.[66] If the statute is silent as to persons against whom the lien is enforceable the principles of the common law will apply.[67]

(ii) *Claim of Third Person For Advances.* The lien of a landlord for rent is superior to the lien of a stranger who advances money for supplies to the tenant,[68] notwithstanding the priority of the latter in time,[69] unless the

59. Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475; Lomax *v.* Le Grand, 60 Ala. 537; Governor *v.* Davis, 20 Ala. 366.

60. Reed *v.* Darrow, 2 Edw. (N. Y.) 412; Webb *v.* Sharp, 13 Wall. (U. S.) 14, 20 L. ed. 478.

Shipping goods out of state.— A landlord's lien upon the crops of his tenant is lost by the shipment of such crops out of the state (Ball *v.* Sledge, 82 Miss. 749, 35 So. 447; Millsaps *v.* Tate, 75 Miss. 150, 21 So. 663); and the fact that one to whom the crops are shipped pays the landlord a portion of the proceeds of the crops does not alter the principle (Ball *v.* Sledge, *supra*).

A bill of sale of goods is a removal and vests title in the purchaser, unencumbered by the landlord's lien. Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205.

Sale of property before tenancy created.— A landlord's lien cannot attach upon a crop which the occupant of the land has sold before, but which is not removed from the premises until after, the creation of the tenancy. Hadden *v.* Powell, 17 Ala. 314. See also McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258; Bingham *v.* Vandegrift, 93 Ala. 283, 9 So. 280.

61. Wolcott *v.* Ashenfelter, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691.

62. St. Charles Hotel Co. *v.* Tarbox, 23 La. Ann. 715; Haralson *v.* Boyle, 22 La. Ann. 210; Desban *v.* Pickett, 16 La. Ann. 350.

Removal by curator of deceased lessee.— The privilege is not affected by the removal of the property subject thereto by the curator of the deceased lessee. Robinson *v.* McCay, 8 Mart. N. S. (La.) 106.

Removal by operation of law.— A landlord's lien is not divested by removal of the tenant's movables by a syndic, that being a removal by operation of law. Holdane *v.* Sumner, 15 Wall. (U. S.) 600, 21 L. ed. 254.

63. Stone *v.* Bohm, 79 Ky. 141; Worrell *v.* Vickers, 30 La. Ann. 202.

64. Merrick *v.* La Hache, 27 La. Ann. 87; Largsdorf *v.* Le Gardeur, 27 La. Ann. 363; Hughes *v.* Caruthers, 26 La. Ann. 530; Lesseps *v.* Ritcher, 18 La. Ann. 653. *Compare* Hanna *v.* His Creditors, 12 Mart. (La.) 32; Ritchie *v.* White, 11 Mart. (La.) 239.

65. Wetsel *v.* Mayers, 91 Ill. 497; Hadden *v.* Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80; O'Hara *v.* Jones, 46 Ill. 288; Johnson *v.* Morrison, 5 B. Mon. (Ky.) 106.

Kentucky.— To preserve the superiority of a landlord's lien as against another lien, the landlord must assert his claim within ninety days; as against all other rights and equities of third person he must do so within one hundred and twenty days. Petry *v.* Randolph, 85 Ky. 351, 3 S. W. 420, 9 Ky. L. Rep. 14.

66. Alston *v.* Wilson, 64 Ga. 482.

67. Scaife *v.* Stovall, 67 Ala. 237.

68. *Alabama.*— Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Brown *v.* Hamil, 76 Ala. 506; Shields *v.* Atkinson, 67 Ala. 244.

Georgia.—Smith *v.* Fouche, 55 Ga. 120.

Louisiana.—Carroll *v.* Bancker, 43 La. Ann. 1078, 1194, 10 So. 187.

Mississippi.—Goodwin *v.* Mitchell, (1905) 38 So. 657; Strauss *v.* Bally, 58 Miss. 131.

North Carolina.— Ballard *v.* Johnson, 114 N. C. 141, 19 S. E. 98; Crinkley *v.* Egerton, 113 N. C. 444, 18 S. E. 669; Spruill *v.* Arrington, 109 N. C. 192, 13 S. E. 779; Brewer *v.* Chappell, 101 N. C. 251, 7 S. E. 670; Thigpen *v.* Leigh, 93 N. C. 47.

South Carolina.—Brewster *v.* McNab, 36 S. C. 274, 15 S. E. 233.

United States.—Saloy *v.* Bloch, 136 U. S. 338, 10 S. Ct. 996, 34 L. ed. 668.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1004.

Amount of rent to which lien applies.— While the lien for rent is superior to that for advances, a landlord is entitled to such prior lien only for rent accruing during the year in which the crops are grown. Ballard *v.* Johnson, 114 N. C. 141, 19 S. E. 98.

69. Spruill *v.* Arrington, 109 N. C. 192, 13 S. E. 779.

landlord agrees that if a merchant will make advances to his tenant he will not do so.[70]

(III) *Cropper's Lien of Third Person.* A landlord's statutory lien for advances is superior to the mere crop lien of a stranger,[71] unless the former agrees that if the other will make advances to his tenant he will not do so.[72]

(IV) *Vendor's Lien For Goods Sold*—(A) *In General.* The lien of a landlord for rent upon property belonging to the tenant upon the leased premises is under some statutes superior to that of the vendor of such property for the price remaining unpaid.[73]

(B) *In Case of Conditional Sale.* Where the instrument of sale of goods to a tenant provides that the vendor shall retain title until the purchase-money is paid, it is a conditional sale, and the landlord can only subject the goods to his lien by paying the purchase-money due or keeping good a tender thereof.[74]

(V) *Laborer's or Mechanic's Lien.* The question of priority between landlords' liens for rent or advances and laborers' or mechanics' liens is usually a matter of statutory provision.[75]

(VI) *Tenant's Claim of Exemption.* A landlord's lien for rent is in some jurisdictions superior, not only to a claim of exemption by the tenant,[76] or his wife,[77] but also to an allowance in lieu thereof.[78]

70. Coleman *v.* Siler, 74 Ala. 435.

71. Lake *v.* Gaines, 75 Ala. 143; Wells *v.* Thompson, 50 Ala. 83.

Assignment of landlord's lien.— Where a landlord's lien for supplies is created before any supplies are furnished by a third person, supplies thereafter furnished by the latter on the tenant's credit, because of a parol agreement by the landlord that he would assign his lien, are under the security of the lien, although the written assignment is not executed until after a portion of the supplies are furnished. Baldwin *v.* McCathern, 94 Ga. 622, 21 S. E. 578.

A warehouseman's lien for warehouse charges is inferior to the lien of the landlord for advances, where the property subject to the landlord's lien is wrongfully taken from his possession and delivered to the warehouseman without his consent. Brown *v.* Noel, 52 S. W. 849, 21 Ky. L. Rep. 648.

72. Coleman *v.* Siler, 74 Ala. 435.

After the landlord has notice that a merchant has agreed to furnish supplies to his tenant to make the crop for a given year, and has taken a trust deed therefor of the crop, he has no right himself to furnish the supplies and take the crop without a previous notice to the merchant who furnished them, that if he fails to do so they will be furnished by the landlord. Paxton *v.* Meyer, 58 Miss. 445.

Advances by the landlord to a sublessee, made without the knowledge and privity of the lessee, are not entitled to priority over advances procured by the lessor for the sublessee from a third person. Moore *v.* Faison, 97 N. C. 322, 2 S. E. 169.

73. Gale's Succession, 21 La. Ann. 487; Dennistoun *v.* Malard, 2 La. Ann. 14. But see Marinette Iron Works Co. *v.* Cody, 108 Mich. 381, 66 N. W. 334.

Goods furnished to partnership.— Where goods are sold to two partners, one of whom has only an interest in the profits, and not in the property, a vendor has no lien on the goods by reason of the partnership superior to a lien of the landlord of one of them. Slack *v.* Koon, 39 S. W. 26, 18 Ky. L. Rep. 1103.

74. Bingham *v.* Vandegrift, 93 Ala. 283, 9 So. 280.

Necessity of recording instrument of sale.— If conditional seller of goods fails to have the instrument executed and recorded as required by statute, his claim is subordinate to that of the landlord who, without notice of the reservation of title, gives credit to the purchaser for rent on the faith of the goods. Gartrell *v.* Clay, 81 Ga. 327, 7 S. E. 161; Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160. The recording should be in the county of the purchaser's residence. Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160. See, generally, SALES.

75. See the statutes of the several states.

Laborers' and mechanics' liens superior to lien for rent.— Stuart *v.* Twining, 122 Iowa 154, 83 N. W. 891; National Lumber Co. *v.* Bownan, 77 Iowa 706, 42 N. W. 557; Woodmancie *v.* Boyer, 2 Lanc. L. Rev. (Pa.) 365; O'Brien *v.* Hamilton, 12 Phila. (Pa.) 387. *Contra,* Wood's Appeal, 30 Pa. St. 274. See also Young *v.* West Side Hotel Co., 9 Ohio Cir. Ct. 127, 2 Ohio Cir. Dec. 140.

Lien for advances superior to mechanics' lien.— Lenderking *v.* Rosenthal, 63 Md. 28; Mills *v.* Matthews, 7 Md. 315.

In Louisiana a lessor has the first privilege of movables seized and sold on a plantation, except on the crops, on which the laborers' overseer have a preference. Saloy *v.* Dragon, 37 La. Ann. 71; Duplantier *v.* Wilkins, 19 La. Ann. 112.

76. *Ex p.* Barnes, 84 Ala. 540, 4 So. 769. See also *supra,* VIII, D, 3, c, (V).

77. Taliaferro *v.* Pry, 41 Ga. 622.

78. Champion *v.* Shumate, 90 Tex. 597, 39 S. W. 362, 40 S. W. 394, (Tex. Civ. App. 1896) 39 S. W. 128; Stokes *v.* Burney, 3 Tex. Civ. App. 219, 22 S. W. 126.

(VII) *Lien of Attachment.* A landlord's statutory lien for rent takes precedence of a lien by attachment.[79]

(VIII) *Lien of Judgment or Execution*— (A) *In General.* A landlord's lien for rent is paramount to the lien of an execution.[80] In those jurisdictions where the landlord has no lien upon the personal property of his tenant for rent before the actual levy of a distress warrant, he is not entitled to claim against a prior levy under execution.[81]

(B) *Necessity and Sufficiency of Notice.* Where the goods of a tenant are levied on and sold, it is necessary in order to sustain a claim by the landlord upon the fund in the sheriff's hands for rent due that the sheriff should have notice thereof.[82] Such notice need not be given in writing, but is sufficient if the sheriff is in any way apprised of it, and of the amount of the claim.[83] The notice is in the nature of legal process, and the landlord should state facts enough to show

79. *Alabama.*— Garrison *v.* Webb, 107 Ala. 499, 18 So. 297.

Arkansas.— Sevier *v.* Shaw, 25 Ark. 417.

Georgia.— Hopkins *v.* Pedrick, 75 Ga. 706.

Illinois.— Mead *v.* Thompson, 78 Ill. 62; Thompson *v.* Mead, 67 Ill. 395.

Iowa.— Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905.

Louisiana.— Harmon *v.* Juge, 6 La. Ann. 768.

Maryland.— Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312.

Texas.— Sullivan *v.* Cleveland, 62 Tex. 677. See also Couts *v.* Spivey, 66 Tex. 267, 17 S. W. 540.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1017.

80. *District of Columbia.*— Gibson *v.* Gautier, 1 Mackey 35.

Indiana.— Carpenter *v.* Shanklin, 7 Blackf. 308.

Louisiana.— Case *v.* Kloppenburg, 27 La. Ann. 482; Arick *v.* Walsh, 23 La. Ann. 605; Gleason *v.* Sheriff, 20 La. Ann. 266; Robinson *v.* Staples, 5 La. Ann. 712; Robb *v.* Wagner, 5 La. Ann. 111.

Mississippi.— Okolona Sav. Inst. *v.* Trice, 60 Miss. 262.

Missouri.— Knox *v.* Hunt, 18 Mo. 243; Selecman *v.* Kinnard, 55 Mo. App. 635.

Texas.— Wilkes *v.* Adler, 68 Tex. 689, 5 S. W. 497; Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550; Eason *v.* Killough, 1 Tex. App. Civ. Cas. § 603.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1010.

In some states a landlord's lien for rent, except upon the crop raised on the land, is not superior to an execution. Reddick *v.* Hutchinson, 94 Ga. 675, 21 S. E. 712; Levy *v.* Twiname, 42 Ga. 249; Wetsel *v.* Mayers, 91 Ill. 497; Travers *v.* Cook, 42 Ill. App. 580.

Statutes allowing preference strictly construed.— Statutes allowing a landlord preference for rent against execution creditors should be strictly construed against the lien created thereby. Merrill *v.* Trimmer, 2 Pa. Co. Ct. 49.

Relation of landlord and tenant must exist. — Agreement between a purchaser and a vendor of real estate that the vendor may collect the money as it becomes due by distress or otherwise, as for so much rent due, does not create the relation of landlord and tenant, so as to entitle the vendor to a preference over judgment creditors. Sackett *v.* Barnum, 22 Wend. (N. Y.) 605.

Money due for use and occupation is not preferred as rent to execution process. Farmers' Bank *v.* Cole, 5 Harr. (Del.) 418.

The acceptance of a note for rent payable at a future date does not suspend a landlord's right of preference over an execution creditor. Fife *v.* Irving, 1 Rich. (S. C.) 226.

If goods are moved on the premises after execution is delivered to the sheriff, but before actual levy, they are subject to rent in preference to the execution. Shuster *v.* Robinson, 3 Harr. (Del.) 50.

Against attachment for rent not due.— A fieri facias, received by the marshal before an attachment for rent not due, is entitled to priority, and must be first satisfied. Stieber *v.* Hoye, 23 Fed. Cas. No. 13,441, 1 Cranch C. C. 40.

Waiver of exemption in favor of creditor.— The waiver of the benefit of the exemption law by a tenant in favor of an execution creditor will give the latter no preference over the claim of the landlord, in whose favor there is no such waiver. Collins' Appeal, 35 Pa. St. 83.

81. Leopold *v.* Godfrey, 50 Fed. 145.

82. Washington *v.* Williamson, 23 Md. 244; Ege *v.* Ege, 5 Watts (Pa.) 134; Mitchell *v.* Stewart, 13 Serg. & R. (Pa.) 295; Schuyler *v.* Philadelphia Coach Co., 29 Wkly. Notes Cas. (Pa.) 343.

A distress warrant delivered to an officer holding an execution against the tenant after levy will not dispense with the service of notice of the landlord's claim on the attached property for rent in arrear. Bussing *v.* Bushnell, 6 Hill (N. Y.) 382.

Presumption that notice was served.—Where the record shows a writ of execution, to which there is attached a notice by the landlord to defendant in the execution, claiming arrears of rent out of the proceeds of the sale, a *prima facie* presumption arises that such notice was duly served on the sheriff before he returned the writ. Borlin *v.* Com., 110 Pa. St. 454, 1 Atl. 404.

83. Burket *v.* Boude, 3 Dana (Ky.) 209.

that he is entitled to a preference over the execution creditor.[84] Thus the notice must be from the landlord,[85] or his agent,[86] and must show that he was landlord,[87] that defendant in execution was his tenant and the money is due from him as such,[88] for the rent of the demised premises,[89] and that it was payable before the levy was made.[90] The notice should also be accompanied by an affidavit showing the amount of rent claimed to be due,[91] but it need not necessarily be stated with absolute precision.[92]

(IX) *Lien of Mortgage*— (A) *Landlord's Lien Claimed For Rent*— (1) In General. A landlord's statutory lien for rent on chattels of his tenant on the premises has priority over the lien of a mortgage on such chattels given after they are placed on the premises.[93] So also a lien for rent has precedence over a mortgage of the crop grown on the demised premises.[94] A landlord's lien is postponed, however, to a mortgage existing upon the property of the tenant before it is brought upon the premises, or before the rent contract is entered into.[95]

84. Millard *v.* Robinson, 4 Hill (N. Y.) 604.

85. Camp *v.* McCormick, 1 Den. (N. Y.) 641; Bussing *v.* Bushnell, 6 Hill (N. Y.) 382.

86. Bussing *v.* Bushnell, 6 Hill (N. Y.) 382.

87. Camp *v.* McCormick, 1 Den. (N. Y.) 641; Olcott *v.* Frazier, 5 Hill (N. Y.) 562.

88. Camp *v.* McCormick, 1 Den. (N. Y.) 641; Millard *v.* Robinson, 4 Hill (N. Y.) 604.

89. Camp *v.* McCormick, 1 Den. (N. Y.) 641; Olcott *v.* Frazier, 5 Hill (N. Y.) 562.

90. Camp *v.* McCormick, 1 Den. (N. Y.) 641.

91. Washington *v.* Williamson, 23 Md. 244.

92. Timmes *v.* Metz, 156 Pa. St. 384, 27 Atl. 248.

93. *Alabama.*— Union Warehouse, etc., Co. *v.* McIntyre, 84 Ala. 78, 4 So. 175.

District of Columbia.—Bryan *v.* Sanderson, 3 MacArthur 431.

Iowa.— Dowie *v.* Christen, 115 Iowa 364, 88 N. W. 830.

Kentucky.—English *v.* Duncan, 14 Bush 377; Beckwith *v.* Bent, 10 B. Mon. 95; Cecil *v.* Gunther, 9 Ky. L. Rep. 576.

Louisiana.— Jackson *v.* Oddie, 2 Mart. N. S. 555.

North Carolina.— Perry *v.* Perry, 127 N. C. 23, 37 S. E. 71.

West Virginia.— Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

United States.— Beall *v.* White, 94 U. S. 382, 24 L. ed. 173; Webb *v.* Sharp, 13 Wall. 14, 20 L. ed. 478.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1013.

Where a tenant reserves a right to remove fixtures at the end of his term, all rent being paid, the landlord's right to prevent a removal until rent is paid is superior to a chattel mortgage. Winslow *v.* Hart, 4 Ohio Dec. (Reprint) 567, 2 Clev. L. Rep. 387.

When a note secured by a chattel mortgage is destroyed, and a new note given in its stead, secured by a new deed, to a different trustee, the lien of the new deed takes effect as to third persons from its date only, and will be postponed to the landlord's lien for rent in arrears. Hechtman *v.* Sharp, 3 MacArthur (D. C.) 90.

Necessity of recording.— The lien of a landlord will prevail over a mortgage executed by the tenant upon property subject to the lien, where the mortgagee does not forthwith file the mortgage for record as required by statute. Berkey, etc., Furniture Co. *v.* Sherman Hotel Co., 81 Tex. 135, 16 S. W. 807; Liquid Carbonic Acid Mfg. Co. *v.* Lewis, 32 Tex. Civ. App. 481, 75 S. W. 47; Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881. See also Cooper *v.* Kimball, 123 N. C. 120, 31 S. E. 346.

94. *Alabama.*— Beall *v.* Folmar, 122 Ala. 414, 26 So. 1; Waite *v.* Corbin, 109 Ala. 154, 19 So. 505; Keith *v.* Ham, 89 Ala. 590, 7 So. 234; Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443; Hamilton *v.* Maas, 77 Ala. 283.

Arkansas.— Meyer *v.* Bloom, 37 Ark. 43; Buck *v.* Lee, 36 Ark. 525; Watson *v.* Johnson, 33 Ark. 737; Lambeth *v.* Ponder, 33 Ark. 707; Tomlinson *v.* Greenfield, 31 Ark. 557; Smith *v.* Meyer, 25 Ark. 609.

Kansas.— Salina State Bank *v.* Burr, 7 Kan. App. 197, 52 Pac. 704.

Mississippi.— Abernethy *v.* Green, (1891) 11 So. 186; Storm *v.* Green, 51 Miss. 103.

North Carolina.—Perry *v.* Perry, 127 N. C. 23, 37 S. E. 71.

Oregon.— Broders *v.* Bohannon, 30 Oreg. 599, 48 Pac. 692.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1013.

Where one in possession of land under a contract of purchase executes a trust deed on his crops, he cannot, by surrendering the contract, and agreeing to pay rent for that year, create a landlord's lien superior to the trust deed. Wilczinski *v.* Lick, 68 Miss. 596, 10 So. 73.

95. *Alabama.*—Shows *v.* Brantley, 127 Ala. 352, 28 So. 716; Mecklin *v.* Deming, 111 Ala. 159, 20 So. 507.

District of Columbia.—Hechtman *v.* Sharp, 3 MacArthur 90.

Iowa.— German State Bank *v.* Herron, 111 Iowa 25, 82 N. W. 430; Perry *v.* Waggoner, 68 Iowa 403, 27 N. W. 292; Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530; Thorpe *v.* Fowler, 57 Iowa 541, 11 N. W. 3; Jarchow *v.* Pickens, 51 Iowa 381, 1 N. W. 598.

Kentucky.— Johnson *v.* Morrison, 5 B. Mon. 106.

(2) When No Rent Due. Under a statute providing that a landlord's lien shall attach only by reason of rent due or such as is accruing, the lien of a chattel mortgage is superior to that of the landlord for his rent, if at the time the mortgage is executed the rent has been paid in full;[96] but where it is provided that the lien shall attach for rent to become due during the term of the lease, the lien is not defeated by a chattel mortgage on the tenant's property, although at the time of its execution all accrued rents have been paid.[97]

(3) Effect of Renewal of Tenancy. A valid mortgage lien created during one term of a lease is superior to a landlord's lien existing during a second term of lease to the same tenant, that had not begun or been contracted for when the mortgage was executed;[98] but the execution of a new lease covering the unexpired term of the old lease will not postpone the landlord's lien to a chattel mortgage on the goods on the premises, although it was executed before the change in the lease.[99]

(B) *Landlord's Lien Claimed For Advances.* A landlord's lien for advances on the crop grown on the rented lands is superior to a chattel mortgage on the crop executed by the tenant to a third person.[1]

e. Rights and Remedies of Creditors of Tenant — (I) *In General.* A crop grown on the demised premises is not, without payment of the rent, subject to process of law at the suit of the creditor of the tenant, during the life of the landlord's lien.[2] A landlord having a lien on property for his rent cannot apply any part of the property to a debt which is not a lien upon it, to the prejudice of a junior lienor of the same property, but must apply it only to his lien debt, leaving the residue to the debt of the junior lienor.[3] But a creditor who has no lien at the time the landlord makes the appropriation cannot complain.[4] While a landlord must refrain from an active injury to a junior encumbrancer, he is under no obligation to collect his debt, or to husband the fund so as to make it cover both debts.[5] A tenant's agreement with a creditor to deliver him a certain part of the crop in payment of his debt will not affect the landlord's lien upon such crop,[6] and even if the landlord's lien is inferior to the creditor's special lien for work done in the making of such crop, the latter cannot assert his lien by bringing an ordinary suit at law for the value of so much of the crop as would equal the amount due the laborer by the tenant.[7] If, however, the landlord assents to the agreement, and thereafter appropriates the crop to his own use, he

United States.— Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 68 Fed. 72.

Contra, Ford *v.* Clewell, 9 Houst. (Del.) 179, 31 Atl. 715; Union Water-Power Co. *v.* Chabot, 93 Me. 339, 45 Atl. 30.

96. Brackenridge *v.* Millan, 81 Tex. 17, 16 S. W. 555; Hempstead Real Estate, etc., Assoc. *v.* Cochran, 60 Tex. 620; Rogers *v.* Grigg, (Tex. Civ. App. 1895) 29 S. W. 654.

97. Gilbert *v.* Greenbaum, 56 Iowa 211, 9 N. W. 182.

98. Gasnick *v.* Steffensen, 112 Iowa 688, 84 N. W. 945; Lyons *v.* Deppen, 90 Ky. 305, 14 S. W. 279, 12 Ky. L. Rep. 202; Upper Appomattox Co. *v.* Hamilton, 83 Va. 319, 2 S. E. 195; Richmond *v.* Duesberry, 27 Gratt. (Va.) 210, case of holding over.

99. Rollins *v.* Proctor, 56 Iowa 326, 9 N. W. 235.

1. Dowling *v.* Wall, 114 Ala. 58, 21 So. 948; Atkinson *v.* James, 96 Ala. 214, 10 So. 846 (where a mortgage on cotton grown in Alabama is void as against the landlord's lien for advances, the fact that the cotton is delivered to the mortgagees in Georgia can avail them nothing); Dunlap *v.* Steele, 80 Ala. 424; Hamilton *v.* Maas, 77 Ala. 283.

2. Holt *v.* Colyer, 71 Mo. App. 280.

The fact that the lease is void will not enable the mortgagee of a crop to defeat the lien of the mortgagor's landlord. Perry *v.* Perry, 127 N. C. 23, 37 S. E. 71.

If an execution creditor wishes to dispute a claim for rent asserted by the debtor's landlord, he may give a bond of indemnity and have the property sold for his own benefit, taking the proceeds from the officer as in a common case not involving any interest except that of the parties to the execution, and if the landlord persists in his claim he must assert it in an action on the security thus substituted for his lien. Schneider *v.* Gabler, 9 Ky. L. Rep. 54.

3. Hammond *v.* Harper, 39 Ark. 248.

4. Hammond *v.* Harper, 39 Ark. 248.

5. Hammond *v.* Harper, 39 Ark. 248.

6. Rousey *v.* Mattox, 111 Ga. 883, 36 S. E. 925; Groesbeck *v.* T. H. Thompson Milling Co., (Tex. Civ. App. 1905) 86 S. W. 346.

7. Rousey *v.* Mattox, 111 Ga. 883, 36 S. E. 925.

will be liable to the creditor therefor,[8] although the landlord has a lien prior to that created by a deed of trust executed by the tenant for money loaned, and also the right to the possession of the property by stipulation of the parties, unless such use is necessary to its preservation, without accounting to the creditor for such use.[9]

(II) *Right to Surplus.* Where a tenant turns over the crop to the landlord in payment of the rent, and the value of the crop exceeds the amount of rent then due, the mortgagee of the crop or other creditor, in an appropriate action to redeem from such lien, is entitled to a decree for such excess;[10] but where a tenant turns over to the landlord merely a part of the crop in payment of the rent the mortgagee cannot have relief in an action at law.[11] Where a tenant after obtaining advances which have a crop lien under the statute abandons the crop, it is proper for the landlord, although not his duty, to allow the advancer, in order to save himself harmless, to enter and finish the cultivation and gather the crop, which in that event after proper rent is paid goes to such advancer.[12] If, however, the advancer fails to avail himself of such permission, he relinquishes to the landlord the ownership of the crops, and has no right to have them attached afterward as the property of the tenant.[13]

f. Removal or Transfer of Property Subject to Lien — (I) *Civil Liability* — (A) *Of Purchaser With Notice.* A landlord's lien upon the property of his tenant on the premises takes precedence of the claim of a purchaser of such property with notice of the rent claimed.[14]

(B) *Of Bona Fide Purchaser Without Notice* — (1) In General. In many states a landlord's statutory lien for rent upon the goods of his tenant is made subject to the rights of a purchaser from the tenant in good faith, and without

8. Groesbeck *v.* T. H. Thompson Milling Co., (Tex. Civ. App. 1905) 86 S. W. 346.

9. State *v.* Adams, 76 Mo. 355.

10. Johnson *v.* Wallace, 74 Ga. 364; Dunlap *v.* Dunseth, 81 Mo. App. 17; Crinkley *v.* Egerton, 113 N. C. 142, 18 S. E. 341.

11. Dunlap *v.* Dunseth, 81 Mo. App. 17.

12. Wheat *v.* Watson, 57 Ala. 581.

13. Wheat *v.* Watson, 57 Ala. 581.

If after such refusal the landlord enters and harvests the crop the advancer may maintain an action on the case against the landlord to recover any surplus remaining after satisfaction of the rent and the cost of gathering the crop. Wheat *v.* Watson, 57 Ala. 581.

14. *Alabama.*— Scott *v.* Renfro, 106 Ala. 611, 14 So. 556; Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131; Warren *v.* Barnett, 83 Ala. 208, 3 So. 609; Townsend *v.* Brooks, 76 Ala. 308; Boggs *v.* Price, 64 Ala. 514; Hussey *v.* Peebles, 53 Ala. 432; Dulany *v.* Dickerson, 12 Ala. 601.

Arkansas.— Volmer *v.* Wharton, 34 Ark. 691.

Illinois.— Prettyman *v.* Unland, 77 Ill. 206.

Indiana.— Kennard *v.* Harvey, 80 Ind. 37.

Iowa.— Staber *v.* Collins, 124 Iowa 543, 100 N. W. 527; Hays *v.* Berry, 104 Iowa 455, 73 N. W. 1028; Holden *v.* Cox, 60 Iowa 449, 15 N. W. 269.

Kansas.— Stadel *v.* Aikins, 65 Kan. 82, 68 Pac. 1088; Aikins *v.* Stadell, 9 Kan. App. 298, 61 Pac. 325.

Mississippi.— Cooper *v.* Baker, 54 Miss. 637.

Missouri.— Williams *v.* De Lisle Store Co., 104 Mo. App. 567, 79 S. W. 487.

Tennessee.— Bryan *v.* Buckholder, 8 Humphr. 561.

Texas.— Mathews *v.* Burke, 32 Tex. 419; Walhoefer *v.* Hobgood, 19 Tex. Civ. App. 629, 48 S. W. 32.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1022.

So long as crops remain upon the premises the landlord's lien thereon will prevail over claims of purchasers. Abraham *v.* Nicrosi, 87 Ala. 173, 6 So. 293; Scully *v.* Porter, 57 Kan. 322, 46 Pac. 313.

Where a lien is given on agricultural products only, the purchase for value from a tenant of goods other than agricultural products gives a good title against the landlord, even though the purchaser knew that there was rent due, for the payment of which the landlord looked to the goods. Richardson *v.* McLaurin, 69 Miss. 70, 12 So. 264; Stamps *v.* Gilman, 43 Miss. 456; Marye *v.* Dyche, 42 Miss. 347. See also Patty *v.* Bogle, 59 Miss. 491.

Where a landlord is so lulled into security that he allows another to take possession of his tenant's crop without an effort to enforce his lien, an implied promise on the part of the possessor to pay the rent to the landlord arises. Shealy *v.* Clark, 117 Ga. 794, 45 S. E. 70. The same principle applies when another has already come into possession of a crop subject to a lien, with notice thereof, and the landlord is then lulled into security simply as to the enforcement of the lien. Saulsbury *v.* McKellar, 59 Ga. 301.

notice of the landlord's claim.[15] If, however, the statute creating the lien provides for no protection in favor of persons having no notice thereof, the property subject thereto cannot be transferred free of the lien on the ground that the purchaser has no notice of its existence.[16]

(2) What Is Notice. Actual knowledge is not necessary to charge a purchaser from the tenant with notice of the landlord's lien.[17] Knowledge of such facts as, if they had been pursued with due diligence, would have led to knowledge of the prior lien for rent is equivalent to actual notice.[18] Thus one who purchases

15. *Alabama.* — Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Andrews Mfg. Co. *v.* Porter, 112 Ala. 381, 20 So. 475; Warren *v.* Barnett, 83 Ala. 208, 3 So. 609; Townsend *v.* Brooks, 76 Ala. 308; Scaife *v.* Stovall, 67 Ala. 237; Lomax *v.* Le Grand, 60 Ala. 537; Governor *v.* Davis, 20 Ala. 366.

Arkansas. — Hunter *v.* Matthews, 67 Ark. 362, 55 S. W. 144; May *v.* McGaughey, 60 Ark. 357, 30 S. W. 417; Belding *v.* Flynn, (1891) 15 S. W. 184; Puckett *v.* Reed, 31 Ark. 131.

Delaware. — Lupton *v.* Hughes, 2 Pennew. 515, 47 Atl. 624.

Georgia. — Lancaster *v.* Whiteside, 108 Ga. 801, 33 S. E. 995; Thornton *v.* Carver, 80 Ga. 397, 6 S. E. 915.

Illinois. — Finney *v.* Harding, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605; Prettyman *v.* Unland, 77 Ill. 206; Hadden *v.* Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80; Howe *v.* Clark, 23 Ill. App. 145.

Indiana. — Fowler *v.* Hawkins, 17 Ind. 211.

Kansas. — Scully *v.* Porter, 3 Kan. App. 493, 43 Pac. 824.

Kentucky. — Stone *v.* Bohm, 79 Ky. 141.

Missouri. — Castleman *v.* Harris, 86 Mo. App. 270; Toney *v.* Goodley, 57 Mo. App. 235.

Tennessee. — Davis *v.* Parks, 6 Yerg. 252.

Texas. — Long *v.* Dennis, 1 Tex. App. Civ. Cas. § 1121.

United States. — Webb *v.* Sharp, 13 Wall. 14, 20 L. ed. 478.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1023.

Assignee not bona fide purchaser. — Paine *v.* Aberdeen Hotel Co., 60 Miss. 360.

The fact that the tenant removes the crops from the premises and delivers them to the mortgagee will not entitle the latter to claim protection as a purchaser without notice. Lomax *v.* Le Grand, 60 Ala. 537.

16. *Colorado.* — Albers *v.* Turley, 10 Colo. App. 450, 51 Pac. 530.

Iowa. — Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58; Frorer *v.* Hammer, 99 Iowa 48, 68 N. W. 564; Blake *v.* Counselman, 95 Iowa 219, 63 N. W. 679; Evans *v.* Collins, 94 Iowa 432, 62 N. W. 810; Richardson *v.* Peterson, 58 Iowa 724, 13 N. W. 63.

Mississippi. — Ball *v.* Sledge, 82 Miss 749, 35 So. 447; Warren *v.* Jones, 70 Miss. 202, 14 So. 25; Eason *v.* Johnson, 69 Miss. 371, 12 So. 446; Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753.

North Carolina. — Belcher *v.* Grimsley, 86 N. C. 88.

Tennessee. — Davis *v.* Wilson, 86 Tenn. 519, 8 S. W. 151; Phillips *v.* Maxwell, 1 Baxt. 25.

Texas. — Under a statute giving a landlord a preferred lien on agricultural products of the tenant for thirty days after their removal from the premises, the defense of an innocent purchase for value without notice is unavailable to a purchaser from a tenant of produce raised on the rented premises and purchased within thirty days after its removal therefrom. American Cotton Co. *v.* Phillips, 31 Tex. Civ. App. 79, 71 S. W. 320. See also Mathews *v.* Burke, 32 Tex. 419.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1023.

Payment for goods after notice of landlord's claim. — If a merchant purchases goods of a tenant but does not pay therefor until after the goods have been attached by the landlord, the former cannot recover them on the ground that they were purchased without knowledge of the landlord's claim (Pape *v.* Steward, 69 Ark. 306, 63 S. W. 47); but he will be liable to suit for the rent to the extent of the sum paid (Darby *v.* Jorndt, 85 Mo. App. 274).

17. Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413, 120 Ala. 59, 24 So. 1; Warren *v.* Barnett, 83 Ala. 208, 3 So. 609; Townsend *v.* Brooks, 76 Ala. 308; Lomax *v.* Le Grand, 60 Ala. 537.

Notice of lien for rent not notice of lien for advances. — Wilson *v.* Stewart, 69 Ala. 302.

Burden of proof on landlord. — The burden of showing notice of a landlord's lien to a purchaser is upon the landlord; the purchaser is not bound in the first instance to show his good faith. Brownell *v.* Twyman, 68 Ill. App. 67.

18. *Alabama.* — Bush *v.* Willis, 130 Ala. 395, 30 So. 443; Atkinson *v.* James, 96 Ala. 214, 10 So. 846; Manasses *v.* Dent, 89 Ala. 565, 8 So. 108; Warren *v.* Barnett, 83 Ala. 208, 3 So. 609; Townsend *v.* Brooks, 76 Ala 308; Boggs *v.* Price, 64 Ala. 514; Lomax *v.* Le Grand, 60 Ala. 537.

Arkansas. — Pape *v.* Steward, 69 Ark. 306, 63 S. W. 47.

Illinois. — Carter *v.* Andrews, 56 Ill. App. 646.

Kansas. — Stadel *v.* Aikins, 65 Kan. 82, 68 Pac. 1088.

Missouri. — Toney *v.* Goodley, 57 Mo. App. 235.

South Carolina. — Graham *v.* Seignious, 53 S. C. 132, 31 S. E. 51.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1024.

Previous sales to same purchaser. — To show that one had purchased from a tenant a

crops knowing that they were raised on leased land is chargeable with notice of the landlord's lien thereon;[19] and this too regardless of his knowledge as to whether the amount claimed by the landlord was for the rent due from the tenant for the year in which the crop purchased was grown.[20] It has even been held that knowledge that the vendor of crops was a tenant was sufficient to put the purchaser on inquiry as to whether such crops were encumbered with a landlord's lien;[21] but the contrary has also been held where it was not also shown that the purchaser knew the crop to have been grown on the demised premises.[22] So the fact that property other than crops purchased of a tenant is upon the leased premises is constructive notice of the landlord's lien.[23]

(c) *Consent to or Ratification of Sale.* If the sale is made by the tenant at a time when he was authorized to sell by the landlord, no right of the latter is violated thereby, and no cause of action arises against the purchaser.[24] The landlord's consent is, however, without consideration, and may be revoked at any

crop subject to a landlord's lien, with notice, evidence that, during the preceding year the tenant had sold the crop from the same premises to the same purchaser and given an order on him for the rent, which specified that it was for rent of the place in question, is admissible. Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413, 120 Ala. 59, 24 So. 1.

Payment of rent for the previous year to the landlord's agent by mortgagees of the tenant's crop is sufficient to put the mortgagee on inquiry as to the tenant's non-payment of rent and landlord's lien. Judge *v.* Curtis, 72 Ark. 132, 78 S. W. 746.

Evidence that the purchaser knew the name of the rented place is admissible as tending to show knowledge of facts on his part which would put him on inquiry as to the seller's title. Foxworth *v.* Brown, 114 Ala. 299, 21 So. 512, 120 Ala. 59, 24 So. 1.

The pendency of a suit for rent will not of itself deprive a party without notice of his right to purchase property grown on the demised premises, unless such property is attached and thereby charged with a liability to pay the judgment. Castleman *v.* Harris, 86 Mo. App. 270.

The transcript of a justice's docket, if evidence at all of an attachment for rent, so as to charge a purchaser of crops grown on the premises with notice, is insufficient, unless it identify the attached property, where there is no offer of the attachment writ and the officer's return thereon. Castleman *v.* Harris, 86 Mo. App. 270.

A statute giving a landlord a lien for rent on all property owned by the tenant on the premises during his occupancy, and for one month thereafter, charges a purchaser of such property within a month after removal with knowledge of the landlord's lien and right to issue a distress warrant. Campbell *v.* Bowen, 22 Ind. App. 562, 53 N. E. 409; York *v.* Carlisle, 19 Tex. Civ. App. 269, 46 S. W. 257.

19. Bush *v.* Willis, 130 Ala. 395, 30 So. 443; Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131; Townsend *v.* Brooks, 76 Ala. 308; Hunter *v.* Whitfield, 89 Ill. 229; Watt *v.* Scofield, 76 Ill. 261; Harvey *v.* Hampton, 103 Ill. App. 501; Reinhardt *v.* Blanchard, 78 Ill. App. 26; Darby *v.* Jorndt, 85 Mo. App. 274; Dawson *v.* Coffey, 48 Mo. App. 109.

Notice to a third person of the relation of landlord may be shown by proof that the tenant had rented the same land the two preceding years, that said third person had paid the rent for him for those years, that the tenant's possession continued thereafter without change, and that the landlord actually told said third person of the lease for the year in question. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657.

A purchaser is not guilty of conversion so as to raise an implied assumpsit in a landlord's favor, unless he buys the crops with knowledge of the landlord's ownership of or lien on the crops. Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280.

20. Williams *v.* De Lisle Store Co., 104 Mo. App. 560, 79 S. W. 487.

21. Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458; Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657; Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131; Graham *v.* Seignious, 53 S. C. 132, 31 S. E. 51.

Notice of the tenancy is sufficient to put the purchaser on inquiry as to whether any rent has accrued; and where this inquiry, if properly prosecuted and information sought of the landlord, should disclose that rent had accrued, whether due or not, the purchaser is held to know the fact. Weil *v.* McWhorter, 94 Ala. 540, 10 So. 131.

Ignorance of the agent through whom the goods are purchased that the vendor lived in a rented house, which fact is known to the principal, is no defense. Aderhold *v.* Blumenthal, 95 Ala. 66, 10 So. 230.

22. Castleman *v.* Harris, 86 Mo. App. 270; Toney *v.* Goodley, 57 Mo. App. 235.

23. Aderhold *v.* Blumenthal, 95 Ala. 66, 10 So. 230; Lehman *v.* Stone, (Tex. App. 1891) 16 S. W. 784.

24. Faith *v.* Taylor, 69 Ill. App. 419; Randall *v.* Ditch, 123 Iowa 582, 99 N. W. 190 (holding that where a landlord authorizes his tenant to sell, the purchaser is not bound to see that the tenant makes a proper division of the proceeds, and the landlord cannot disaffirm the sale to him if the tenant fails to make such division); Cohn *v.* Smith,

time before it has been acted on,[25] and the landlord can recover the amount of his lien from the purchaser who with knowledge of the revocation pays the tenant for the property.[26] Where property on which a landlord has a lien for rent is converted the landlord's failure to repudiate the act is not a ratification.[27]

(D) *Rights of Purchaser Against Tenant.* If rent is actually due and in arrear at the time of the sale by the tenant, he is liable to the purchaser on his implied warranty of title;[28] but if the rent is not due and in arrear at the time of the sale, the purchaser cannot recover upon a breach of implied warranty of title, but may maintain an action against the seller for money paid out and expended for his use, and recover the amount he was compelled to pay for the benefit of the seller in discharging the lien for rent.[29]

(E) *Injunction*[30] *to Restrain Sale and Removal.*[31] A landlord is entitled to an injunction to restrain the sale or removal of property from the demised premises by the tenant or his assignee if necessary for the protection of his lien.[32] Thus an injunction will be granted at the instance of a landlord for such a purpose when it appears that the tenant is insolvent,[33] but not as a rule if the tenant is solvent.[34] Where, however, it is held that a landlord's lien exists for all the rent to accrue during the term of the lease as well as the rent accrued the landlord is entitled to an injunction, although the tenant is not insolvent, since, the rent not being due, he has no remedy at law for the protection of his lien.[35] Injunction is also the proper remedy to enforce a landlord's lien upon property found upon the rented premises as against execution creditors of the tenant who are endeavoring to sell it to satisfy their debts.[36]

(F) *Remedies of Landlord For Conversion of Tenant's Property*—(1) IN GENERAL. Any person who knowingly by purchase or otherwise deprives the landlord of the opportunity of enforcing his lien is guilty of a tort, and the land-

64 Miss. 816, 2 So. 244; Griffith *v.* Gillum, 31 Mo. App. 33.

25. Cohn *v.* Smith, 64 Miss. 816, 2 So. 244; Sugg *v.* Farrar, 107 N. C. 123, 12 S. E. 236.

26. Sugg *v.* Farrar, 107 N. C. 123, 12 S. E. 236.

27. McCarty *v.* Roswald, 105 Ala. 511, 17 So. 120.

28. Myers *v.* Smith, 27 Md. 91.

29. Myers *v.* Smith, 27 Md. 91.

A purchaser may pay the landlord and set this up as a defense in an action by the tenant for the price. Hardy *v.* Mathews, 101 Mo. App. 708, 74 S. W. 166.

30. **Injunction** generally see INJUNCTIONS.

31. **To restrain removal of fixtures** see FIXTURES, 19 Cyc. 1072.

32. Gray *v.* Bremer, 122 Iowa 110, 97 N. W. 991; Carson *v.* Electric Light, etc., Co., 85 Iowa 44, 51 N. W. 1144; Milner *v.* Cooper, 65 Iowa 190, 21 N. W. 558; Garner *v.* Cutting, 32 Iowa 547; Hulett *v.* Stockwell, 27 Mo. App. 328; Barnes *v.* Hess, 3 Kulp (Pa.) 56. See also Williams *v.* Green, 37 Ga. 370.

The principle involved is the same as that which authorizes a court of equity, at the suit of a mortgagee, to enjoin the commission of waste by the mortgagor. Carson *v.* Electric Light, etc., Co., 85 Iowa 44, 51 N. W. 1144; Garner *v.* Cutting, 32 Iowa 547.

Rule applied according to equities of case.—This rule is not designed to enable the landlord to do more than to protect the security which the law gives him. He is not permitted to interfere unnecessarily with the business and property of his tenant, nor to use the power which the law gives him in an unreasonable or arbitrary manner. So long as the tenant neither does nor threatens to do any act which will materially affect his power to collect the rent for which the lease provides, he is not permitted to interfere with the use of the property by the tenant. Carson *v.* Electric Light, etc., Co., 85 Iowa 44, 51 N. W. 1144.

After sale of property lessor cannot enjoin.—The fact that attaching creditors of the lessee have no right to property on which the lessor claims a lien, it having been sold to third parties previously to their attachment, will not avail the lessor to enjoin its removal. Lake Superior Ship Canal, etc., Co. *v.* McCann, 86 Mich. 106, 48 N. W. 692.

33. Gregory *v.* Hay, 3 Cal. 332; Lewis *v.* Christian, 40 Ga. 187; Schmitt *v.* Cassilius, 31 Minn. 7, 16 N. W. 453; Anderson *v.* Pfanner, 12 Montg. Co. Rep. (Pa.) 157. But see Carson *v.* Electric Light, etc., Co., 85 Iowa 44, 51 N. W. 1144, holding that an injunction will not issue in the absence of special circumstances to prevent removal of property where the statute expressly provides that such removal shall not affect the lien.

34. Gregory *v.* Hay, 3 Cal. 332; Burgess *v.* Kattleman, 41 Mo. 480.

35. Wallin *v.* Murphy, 117 Iowa 640, 91 N. W. 930; Garner *v.* Cutting, 32 Iowa 547. See also Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92. *Compare* Milner *v.* Cooper, 65 Iowa 190, 21 N. W. 558.

36. Click *v.* Stewart, 36 Tex. 280.

lord has a right of action for the damage sustained.[37] Case is a proper form of action to enforce this liability,[38] but it must appear that the property or its proceeds have been disposed of so that the lien cannot be enforced against either.[39] If the purchaser has no notice of the lien case does not lie.[40] With regard to the form of action it is also held that a landlord has by virtue of his lien no such title to the property or right to the possession thereof as will enable him to maintain trespass,[41]

37. *Alabama.*—Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; McCarty *v.* Roswald, 105 Ala. 511, 17 So. 120.

Georgia.— Stokes *v.* Gillis, 81 Ga. 187, 6 S. E. 841; Saulsbury *v.* McKellar, 59 Ga. 301.

Illinois.—Prettyman *v.* Unland, 77 Ill. 206; Carter *v.* Andrews, 56 Ill. App. 646.

Indiana.—Kennard *v.* Harvey, 80 Ind. 37; Campbell *v.* Bowen, (Ind. App. 1899) 53 N. E. 656, 22 Ind. App. 562, 54 N. E. 409.

Iowa.—Staber *v.* Collins, 124 Iowa 543, 100 N. W. 527; Scallan *v.* Wait, 64 Iowa 705, 21 N. W. 152; Holden *v.* Cox, 60 Iowa 449, 15 N. W. 269.

Mississippi.—McGrath *v.* Barlow, (Miss. 1897) 21 So. 237; Dunn *v.* Kelly, 57 Miss. 825. *Compare* Westmoreland *v.* Wooten, 51 Miss. 825.

Missouri.—Knox *v.* Hunt, 18 Mo. 243; Hopper *v.* Hays, 82 Mo. App. 494; White *v.* A. K. McAllister Co., 67 Mo. App. 314.

North Carolina.— Thigpen *v.* Maget, 107 N. C. 39, 12 S. E. 272.

Texas.—Zapp *v.* Johnson, 87 Tex. 641, 30 S. W. 861; Mensing *v.* Cardwell, 33 Tex. Civ. App. 16, 75 S. W. 347; Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570; Newman *v.* Ward, (Tex. Civ. App. 1898) 46 S. W. 868; Ward *v.* Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125. *Contra,* Blum *v.* Conrad, 1 Tex. App. Civ. Cas. § 1217, holding that the purchaser of property subject to a rent lien is not liable to a landlord in damages for conversion, even where he buys with notice, since the landlord's lien is merely a right to collect his debt out of such property.

Where subtenants convert crops on which the landlord has a lien for rent, he may sue either or all of them for the rent. Marrs *v.* Lumpkins, 22 Tex. Civ. App. 448, 54 S. W. 775.

What constitutes a conversion.— It is a conversion for the tenant to remove the property subject to the lien without the landlord's consent; and the party receiving it with knowledge of the lien, whether handling it as his own property, or that of the tenant, is also guilty of conversion. Mensing *v.* Cardwell, 33 Tex. Civ. App. 16, 75 N. W. 347.

Trespass.— The attempt of a lessee or his vendee to forcibly remove from the leased premises property subject to the lessor's lien is a trespass sounding in damages. Cooper *v.* Cappel, 29 La. Ann. 213.

Claim and delivery.— Under N. C. Code, § 1754, giving the landlord an action of claim and delivery if the crop or any part thereof shall be removed from the land without the consent of the lessor, the landlord may maintain an action for a certain part only of the crop, although all of it has been delivered to a third person. Boone *v.* Darden, 109 N. C. 74, 13 S. E. 728.

"Factor" not "purchaser."— A landlord cannot recover of the factor or commission merchant of his tenant, who sells the tenant's cotton and by his consent appropriates the proceeds to the payment of a debt due the factor, the latter not being a "purchaser." Armstrong *v.* Walker, 9 Lea (Tenn.) 156.

A creditor of a tenant who attaches crops, subject to a landlord's lien, purchases the same at the sale, and transfers his bid to a third person, assumes such control of the property as amounts to a conversion and renders him equally liable with the assignee to the landlord for the amount of his lien for rent. Mead *v.* Thompson, 78 Ill. 62.

Suit against purchaser not action on contract.—A suit by a landlord against a purchaser of a crop is not an action arising on contract for the payment of money only. Gill *v.* Buckingham, 7 Kan. App. 237, 52 Pac. 903.

38. Ehrman *v.* Oats, 101 Ala. 604, 14 So. 361; Thompson *v.* Powell, 77 Ala. 391; Lake *v.* Gaines, 75 Ala. 143; Hurst *v.* Bell, 72 Ala. 336; Kennon *v.* Wright, 70 Ala. 434; Wilson *v.* Stewart, 69 Ala. 302; Boggs *v.* Price, 64 Ala. 514; Lomax *v.* Le Grand, 60 Ala. 537; Lavender *v.* Hall, 60 Ala. 214; Hussey *v.* Peebles, 53 Ala. 432; Cohn *v.* Smith, 64 Miss. 816, 2 So. 244.

Liability of mortgagee.—When the holder of a mortgage on crops, executed by a tenant, takes possession with notice of the landlord's statutory lien, the landlord may pursue the crops by attachment, so long as they remain unconverted and capable of being seized. Hudson *v.* Vaughan, 57 Ala. 609. A conversion of the crops rendering attachment unavailing is a tort for which the landlord may maintain an action on the case against the mortgagee, recovering to the extent of the amount due him, that is less than the amount of the crop converted; or if greater, to the extent of the value of such crop. Hudson *v.* Vaughan, 57 Ala. 609; Shepherd *v.* Taylor, 105 Ala. 507, 17 So. 88.

Liability of execution creditor.—An action on the case will not lie by a landlord against plaintiff in execution, or against any other person, for advising, procuring, or commanding the sheriff to sell and remove the goods of a tenant whose rent is unpaid. Gibson *v.* Princeton Bank, 20 N. J. L. 138.

39. Ehrman *v.* Oats, 101 Ala. 604, 14 So. 361.

40. Wooten *v.* Gwin, 56 Miss. 422.

41. Hurst *v.* Bell, 72 Ala. 336; Westmoreland *v.* Foster, 60 Ala. 448; Thompson *v.*

trover,[42] replevin,[43] or detinue,[44] against a purchaser thereof for its recovery. Nor as a general rule can an action for money had and received be maintained by a landlord against one who has acquired his tenant's crop with notice of the landlord's lien.[45]

(2) Extent of Recovery. A landlord in actions of this character cannot recover more than the amount of his demand existing at the time of trial;[46] and defendant upon appropriate pleas has the right to show payment in whole or in part of the landlord's debt, and thereby defeat or reduce *pro tanto*, as the case may be, the extent of recovery.[47]

(3) Time to Sue and Limitations.[48] An action may be maintained by a landlord against a purchaser of a crop from the tenant before judgment is recovered against the tenant for rent, or even before the rent has become due;[49] and it is not barred by failure to bring the suit during the life of the lien.[50]

(4) Defenses. In an action for the conversion of property subject to a landlord's lien, the fact that the landlord neglected to exhaust other property of the tenant on which he had a lien is no defense, where, after giving credit for the value of this property, there is still a balance due, greater than the amount of the landlord's recovery.[51] Nor is it a defense that defendant did not intend to injure the landlord.[52]

(5) Parties.[53] In an action for the conversion of the crops of plaintiff's tenant, on which plaintiff had a lien, the tenants are not necessary parties, where their cause of action is barred by limitation.[54] A transferee of a note given for rent may sue the purchaser of the crop for its value, to the extent of the unpaid rent.[55]

(6) Pleading.[56] If all the substantial facts necessary to constitute a cause of action by a landlord for conversion of his tenant's property are alleged in the complaint, either expressly or inferentially, it will be sufficient.[57] If the existence of

Spinks, 12 Ala. 155. *Contra,* when the lessor stipulates that the property shall remain his until the performance of certain acts by the tenant. Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216.

42. *Alabama.*— Hurst *v.* Bell, 72 Ala. 336; Corbitt *v.* Reynolds, 68 Ala. 378; Westmoreland *v.* Foster, 60 Ala. 448; Folmar *v.* Copeland, 57 Ala. 588; Booker *v.* Jones, 55 Ala. 266.

Georgia.— Worrill *v.* Barnes, 57 Ga. 404.

Illinois.—Frink *v.* Pratt, 130 Ill. 327, 22 N. E. 819 [*affirming* 26 Ill. App. 222]; Watt *v.* Scofield, 76 Ill. 261.

Mississippi.—Westmoreland *v.* Wooten, 51 Miss. 825.

Tennessee.—Hardeman *v.* Shumate, Meigs 398.

43. Knox *v.* Hellums, 38 Ark. 413; Travers *v.* Cook, 42 Ill. App. 580; Hardeman *v.* Shumate, Meigs (Tenn.) 398.

Where the landlord is constructively in possession of property when it is removed by the tenant, he is entitled to sue therefor in replevin. Abington *v.* Steinberg, 86 Mo. App. 639.

44. Hurst *v.* Bell, 72 Ala. 336; Westmoreland *v.* Foster, 60 Ala. 448.

45. Blum *v.* Jones, 51 Ala. 149; Dulany *v.* Dickerson, 12 Ala. 601; Anderson *v.* Bowles, 44 Ark. 108; Reavis *v.* Barnes, 36 Ark. 575; Worrill *v.* Barnes, 57 Ga. 404. *Contra,* Ehrman *v.* Oats, 101 Ala. 604, 14 So. 361; Thornton *v.* Strauss, 79 Ala. 164; Westmoreland *v.* Foster, 60 Ala. 448; Booker *v.* Jones, 55 Ala. 266; Thompson *v.* Merriman, 15 Ala. 166; Drake *v.* Whaley, 35 S. C. 187, 14 S. E. 397.

46. Waite *v.* Corbin, 109 Ala. 154, 19 So. 505; Wilkerson *v.* Thorp, 128 Cal. 221, 60 Pac. 679, holding that a landlord who has a lien for rent on his tenant's crop can only recover from a mortgagee of the crop who has taken possession the balance of rent due.

47. Waite *v.* Corbin, 109 Ala. 154, 19 So. 505.

48. **Limitation of action** generally see Limitations of Actions.

49. Richardson *v.* Blakemore, 11 Lea (Tenn.) 290. *Contra,* Lawrence *v.* Jenkins, 7 Yerg. (Tenn.) 494; Ballantine *v.* Greer, 6 Yerg. (Tenn.) 267.

50. Belshe *v.* Batdorf, 98 Mo. App. 627, 73 S. W. 888 (holding that a landlord may maintain an action against one who has purchased during the lifetime of the lien, although the lien may have expired at the time the action is brought); Davis *v.* Wilson, 86 Tenn. 519, 8 S. W. 151; Zapp *v.* Johnson, 87 Tex. 641, 30 S. W. 861.

51. Dermidy *v.* Interstate Grain Co., (Iowa 1901) 86 N. W. 30.

52. Lavender *v.* Hall, 60 Ala. 214.

53. **Parties** generally see Parties.

54. Ward *v.* Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125.

55. Biggs *v.* Piper, 86 Tenn. 589, 8 S. W. 851.

56. **Pleading** generally see Pleading.

57. Campbell *v.* Bowen, 22 Ind. App. 562,

a lien is averred as a conclusion of law instead of a statement of the facts upon which the lien arose, this infirmity, no demurrer being interposed, is waived by a plea of not guilty.[58] A petition to recover for the conversion of property belonging to the tenant is not demurrable for failure to allege that the landlord's claim had been adjudicated and his lien established.[59] A plea of payment of the rent, merely alleging that the landlord had attached other property of the tenant, without alleging the value of the property, or that anything could be realized from the attachment, is demurrable.[60]

(7) Evidence.[61] In an action by a landlord for the conversion of his tenant's crops defendant cannot question the landlord's title to the land;[62] nor can he show that he had a mortgage on the crop if he knew of the existence of the relation of landlord and tenant.[63] So evidence contradicting the express terms of the rent note is inadmissible.[64] Evidence of the sale of other property by the tenant, of which fact the landlord had no notice, or which was covered by a different lien from that relied on, is likewise inadmissible.[65] Even if the landlord knew that the tenant had sold to defendant property in previous years, this fact is insufficient to estop plaintiff from asserting his lien, where defendant, when purchasing the crop previously sold, had no knowledge where it had been raised or that it had been grown on leased land, and it appeared that the landlord had not relied on the tenant's personal responsibility.[66] In an action by the assignee of a rent note against one purchasing the crop, within three months of the maturity of the rent, to recover the value of such crop, parol evidence of the true date of the note is admissible.[67]

(8) Trial[68] — Instructions. Instructions withdrawing from the jury material issues,[69] or failing to present all the law of the case,[70] are improper and should not be given.

(II) *Penalties*[71] *and Actions Therefor.* It is sometimes provided by statute[72] that any tenant who removes his goods from any demised premises, either before or after any rent became due, for the purpose of avoiding the payment of such rent, and every person who knowingly assists such tenant in such removal, or in concealing any goods so removed, shall forfeit to the landlord, his heirs or assigns, double the value of the goods so removed or concealed.[73]

54 N. E. 409, (Ind. App. 1899) 53 N. E. 656; Parks *v.* Laurens Cotton Mills, 70 S. C. 274, 49 S. E. 871, holding that where the complaint alleges plaintiff's lien, with purchase of the property by defendant, notice of the lien soon after the purchase, and refusal to deliver the property upon demand of plaintiff, it follows, as a reasonable inference, that defendant either had possession of the property as purchased, soon after the purchase, or had converted it into some manufactured product; in either of which cases liability with damages would attach to notice of the lien.

58. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657.

59. Church *v.* Bloom, 111 Iowa 319, 82 N. W. 794.

60. Waite *v.* Corbin, 109 Ala. 154, 19 So. 505.

61. Evidence generally see Evidence.

62. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657.

63. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657.

64. Powell *v.* Thompson, 80 Ala. 51.

65. Church *v.* Bloom, 111 Iowa 319, 82 N. W. 794.

66. Church *v.* Bloom, 111 Iowa 319, 82 N. W. 794.

67. Biggs *v.* Piper, 86 Tenn. 589, 8 S. W. 851.

68. Trial generally see Trial.

69. Planters Compress Co. *v.* Howard, 35 Tex. Civ. App. 300, 80 S. W. 119.

70. **Necessity of notice to purchaser of claim for rent.**— In an action to recover the value of a crop grown on rented premises upon which the rent was unpaid, and which was sold to defendant, it is error to refuse to charge that unless defendant had knowledge at the time he paid for the crop that it was grown on rented premises, and the amount claimed by plaintiff was for rent due, the findings should be for defendant. Darby *v.* Jorndt, 85 Mo. App. 274; Matthews *v.* Nation, 69 Mo. App. 327.

71. Penalties generally see Penalties.

72. See N. Y. Rev. St. p. 503, § 17.

73. See cases cited *infra*, this note.

Removal of part of goods.— Removal of part of the goods from demised premises by defendant will not subject him to the penalty of removing or concealing the whole. Strong *v.* Stebbins, 5 Cow. (N. Y.) 210.

Execution creditor not liable.— The penalty

(III) *Criminal Responsibility*[74] — (A) *In General.* In some states it is made a misdemeanor for any person to remove property of the tenant from the demised premises without first discharging all liens of the landlord thereon.[75] The intent of the person in making the removal is immaterial,[76] unless the statute expressly requires an intent to defraud.[77]

(B) *Complaint,*[78] *Indictment, or Information.*[79] The offense being a statutory one, the indictment or information should employ, as nearly as may be, the very words of the statute, or words that certainly imply in substance the same thing.[80] It is not necessary to charge specifically that the landlord had a lien

given by statute for the removal of goods of the tenant from demised premises to avoid payment of rent cannot be recovered from the creditor for seizing and removing the goods of a tenant on execution in satisfaction of his debt. Coles *v.* Marquand, 2 Hill (N. Y.) 447.

Property of strangers.— The penalty given by statute for the removal of goods of the tenant cannot be recovered where they belong to a stranger, even though while on the premises they were liable to distress. Coles *v.* Marquand, 2 Hill (N. Y.) 447; Strong *v.* Stebbins, 5 Cow. (N. Y.) 210.

An action lies against two or more jointly, the offense being in its nature one and inseparable; but in such case only one penalty is imposed on all the defendants and not each of them. Conley *v.* Palmer, 2 N. Y. 182 [*affirming* 4 Den. 374]; Warren *v.* Doolittle, 5 Cow. (N. Y.) 678.

Concealing removal.—A party who deters a bailiff from taking property by falsely denying, with intent to defraud the landlord, that the tenant was the owner thereof, and alleging a third person to be the owner, subjects himself to the penalty. Crafts *v.* Plumb, 11 Wend. (N. Y.) 143.

Advising removal.—A third person does not incur the penalty by merely advising the removal of tenant's goods. There must be some physical aid by himself or his servants. Crafts *v.* Plumb, 11 Wend. (N. Y.) 143; Strong *v.* Stebbins, 5 Cow. (N. Y.) 210.

74. Criminal law and procedure generally see CRIMINAL LAW.

75. See the statutes of the several states.

Notice of removal.— The offense of removing a crop by a tenant or other person before paying rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the lessor five days' notice of such intended removal. State *v.* Crowder, 97 N. C. 432, 1 S. E. 690.

Record of lien.— To make the removal of property subject to a landlord's lien beyond the limits of the state or county a crime, the lien must be recorded. Grace *v.* State, 40 Ark. 97.

After conveyance of interest.—A lessor may be indicted for removing the crop after having conveyed his interest. State *v.* Rose, 90 N. C. 712.

Tenant aiding subtenant. — A tenant is guilty of a misdemeanor if he aids or abets a subtenant in removing crops from the premises. State *v.* Crook, 132 N. C. 1053, 44 S. E. 32.

Imprisonment for failure to pay fine.—An act authorizing the imprisonment of a defendant convicted of selling property on which a landlord's lien exists, in case defendant fail to pay the fine imposed, was held not to be unconstitutional as authorizing imprisonment for debt. State *v.* Hoskins, 106 Tenn. 430, 61 S. W. 781.

76. State *v.* Crook, 132 N. C. 1053, 44 S. E. 32; State *v.* Williams, 106 N. C. 646, 10 S. E. 901; State *v.* Reeder, 36 S. C. 497, 15 S. E. 544.

Removal for purpose of storing and preserving.—A tenant is guilty who before his rent is paid removes cotton from the leased premises without the landlord's knowledge or consent, although it be for the purpose of storing and preserving such crop, for which no means existed on the leased premises. State *v.* Williams, 106 N. C. 646, 10 S. E. 901.

Defenses.— On a prosecution for removing crops without having satisfied liens or having given five days' notice of such removal, it is no defense that defendant had been damaged by a failure of the landlord to comply with the contract, and that such damage amounted to more than the rents and advancements (State *v.* Bell, 136 N. C. 674, 49 S. E. 163 [*overruling* State *v.* Neal, 129 N. C. 692, 40 S. E. 205]); nor is it a defense that in disposing of the property defendant acted under the advice of counsel (State *v.* Reeder, 36 S. C. 497, 15 S. E. 544).

77. *Alabama.*— Money *v.* State, 89 Ala. 110, 7 So. 841.

Georgia.— Morrison *v.* State, 111 Ga. 642, 36 S. E. 902.

Iowa.— State *v.* Ashpole, 127 Iowa 680, 104 N. W. 281.

Mississippi.— Edwards *v.* State, (1891) 8 So. 464.

Tennessee.— State *v.* Hoskins, 106 Tenn. 430, 61 S. W. 781, holding that where a landlord by accepting personal security leads defendant to believe that the lien is waived, a conviction for selling the property is not justified for want of a criminal intent.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1031.

The place to which property is removed is immaterial if removed with intent to defraud. Money *v.* State, 89 Ala. 110, 7 So. 841.

78. Criminal complaint generally see CRIMINAL LAW.

79. Indictment or information generally see INDICTMENTS AND INFORMATIONS.

80. State *v.* Ashpole, 127 Iowa 680, 104

upon the property. If the lease is charged, the statute implies the lien arising by virtue thereof.[81] The general rules as to variance apply in prosecutions for this offense.[82] The affidavit for the prosecution of a person for removing property should conclude "against the peace and dignity of the State."[83]

(c) *Trial.*[84] The general rules as to burden of proof,[85] instructions,[86] and questions for the jury[87] apply in this class of cases.

g. Estoppel[88] and Waiver, Loss or Discharge of Lien — (i) *Estoppel to Assert Lien.* A landlord may by his representations or conduct estop himself from asserting his lien.[89]

(ii) *Express Waiver.* A landlord may by express agreement waive his statutory lien for rent either entirely or in part.[90] A waiver of the lien on

N. W. 281 (holding that under a statute declaring "any tenant of farm lands" who sells or disposes of any grain on which there is a landlord's lien, without the written consent of the landlord, is guilty of larceny, an indictment which fails to charge that the tenancy was of farm lands is fatally defective); State *v.* Turner, 106 N. C. 691, 10 S. E. 1026; State *v.* Powell, 94 N. C. 920 (holding that an averment in an indictment for removing a crop "without having given any notice of such intended removal" is equivalent to the averment that the removal was made without giving "five days' notice"); State *v.* Merritt, 89 N. C. 506 (holding that an indictment for removing a crop, charging the removing "without satisfying all liens on said crop," is bad in not following the words of the statute, "before satisfying all liens held by the lessor or his assigns on said crop").

Intent to defraud.—Where an intent to defraud is made an essential element of the offense, an indictment failing to aver such intent is fatally defective. Edwards *v.* State, (Miss. 1891) 8 So. 464.

Omission of five days' notice.— Under the statute making it a misdemeanor to remove a crop "without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns," the omission of the five days' notice is an essential element of the offense, and must be charged in the indictment. State *v.* Crowder, 97 N. C. 432, 1 S. E. 690.

Matter of defense need not be alleged. State *v.* Turner, 106 N. C. 691, 10 S. E. 1026.

81. State *v.* Smith, 106 N. C. 653, 11 S. E. 166.

82. Hackney *v.* State, 101 Ga. 512, 28 S. E. 1007 (holding that an indictment alleging that a tenant had disposed of his crop in violation of the statute is not sustained by evidence that he was a cropper); State *v.* Foushee, 117 N. C. 766, 23 S. E. 247.

83. Smith *v.* State, 139 Ala. 115, 36 So. 727; Love *v.* State, (Miss. 1891) 8 So. 465.

84. **Trial in criminal cases** generally see CRIMINAL LAW, 12 Cyc. 504 *et seq.*

85. See CRIMINAL LAW, 12 Cyc. 379 *et seq.*

The state must prove all the essential constituent elements of the offense. State *v.* Crowder, 97 N. C. 432, 1 S. E. 690.

86. See CRIMINAL LAW, 12 Cyc. 611 *et seq.*

An instruction withdrawing material evidence from the consideration of the jury should not be given. Money *v.* State, 89 Ala. 110, 7 So. 841.

Where there is conflicting testimony as to the notice of the lien, it is error for the court to refuse to charge that if the jury believe defendants had no notice of the lessor's lien they would not be guilty. State *v.* Sears, 71 N. C. 295.

87. See CRIMINAL LAW, 12 Cyc. 587 *et seq.*

Notice of lien.—Where it is doubtful from the evidence whether the person claiming the lien is the landlord of defendant or of another, the question should be submitted to the jury, since it bears upon the issue as to whether defendant had notice of the lien. Edwards *v.* State, (Miss. 1891) 8 So. 464; Love *v.* State, (Miss. 1891) 8 So. 465.

88. **Estoppel** generally see ESTOPPEL.

89. *Alabama.*— Brown *v.* Hamil, 76 Ala. 506.

Illinois.— Goeing *v.* Outhouse, 95 Ill. 346.

Iowa.— Wood *v.* Duval, 100 Iowa 724, 69 N. W. 1061.

Louisiana.— Villere *v.* Shaw, 108 La. 71, 32 So. 196.

Mississippi.— Dreyfus *v.* Gage, 84 Miss. 219, 36 So. 248 (holding that where one who held the rent notes given by the tenant of land concealed such fact from plaintiff and represented to him that by securing a waiver of the landlord's lien by the owner of the land plaintiff would obtain a prior lien for any advances he might make the holder of the notes was estopped to set up his lien as against plaintiff); Houston *v.* Witherspoon, 68 Miss. 188, 190, 8 So. 515.

Pennsylvania.— Edwards' Appeal, 105 Pa. St. 103, holding that a third party who claimed title to goods on which execution was levied is estopped thereby to afterward claim a lien on the fund as landlord.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1034.

90. *Alabama.*—Varner *v.* Ross, 121 Ala. 603, 25 So. 725.

Kansas.— Salina State Bank *v.* Burr, 7 Kan. App. 197, 52 Pac. 704, holding that the statutory lien upon crops is not divested by reason of the following clause inserted in the lease: "To be paid at the time and from the proceeds of the first sale of the crop of

part of a crop will not, however, subordinate it on the balance as to other creditors.[91]

(III) *Implied Waiver*—(A) *In General.* An express agreement is not necessary to a waiver of a lien for rent, but it may be waived by acts indicating an intention to waive it.[92]

(B) *By Taking Other Security.* A landlord does not waive his lien for rent upon his tenant's property by the acceptance of personal security for the rent, where there is no evidence of an intention to treat the original claim as discharged by the acceptance of the new obligation.[93] At most it is only a presumptive discharge thereof, subject to be overcome by other proof.[94] Thus a lien of a landlord on the goods of his tenant for the rent is not waived by his taking a note,[95]

broom corn that may be raised on said land by said second party."

Mississippi.— Dreyfus *v.* Gage, 84 Miss. 219, 36 So. 248.

South Carolina.— Boag *v.* Woodward, 33 S. C. 247, 11 S. E. 726.

Texas.— Trout *v.* McQueen, (Civ. App. 1901) 62 S. W. 928.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1035.

Necessity of writing.— It is required by statute in Arkansas that the evidence of a waiver of a landlord's lien for supplies shall be in writing, by indorsement on the mortgage or other instrument by which the employee transfers his interest in the crop. Tinsley *v.* Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570.

Provision for lien on exempt property.— A provision in a lease that the lessor shall have a lien for the rent on all property of the lessee used on the premises, although exempt, does not waive his statutory lien. Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650.

A provision that rent shall be due as the crop is matured and marketed does not waive the landlord's lien by postponing the maturity of the rent until it has been disposed of. Davis *v.* Sparks, 38 Ill. App. 166.

91. Bigham *v.* Cross, 69 Ark. 581, 65 S. W. 101; Lemay *v.* Johnson, 35 Ark. 225. *Compare* Farwell *v.* Stick, 96 Iowa 87, 61 N. W. 565, 64 N. W. 614.

92. Wimp *v.* Early, 104 Mo. App. 85, 78 S. W. 343; Fulkerson *v.* Lynn, 64 Mo. App. 649.

Former abatement of rent.— The fact that a landlord has abated former instalments of the rent at the request of the tenant furnishes no reason why he should be deprived of the right to enforce its payment promptly in the future. Shiff *v.* Ezekiel, 23 La. Ann. 383.

93. Stephens *v.* Adams, 93 Ala. 117, 9 So. 529; Rollins *v.* Proctor, 56 Iowa 326, 9 N. W. 235; Smith *v.* Wells, 4 Bush (Ky.) 92.

Acceptance by a landlord of a collateral promise by a purchaser of goods from a tenant to pay the rent does not release the landlord's lien. Block *v.* Latham, 63 Tex. 414.

Acceptance of judgment for debt in lieu of rent.—A landlord's lien for rent is waived by his acceptance of a judgment for debt in lieu of the rent. *In re* Lumpkin, 15 Fed. Cas. No. 8606, 2 Hughes 175.

Release of seizure on bond given.—A seizure of the property of a tenant by the landlord, and a release of such seizure by reason of a bond given by the tenant, does not impair the privilege in favor of the landlord. Harrison *v.* Jenks, 23 La. Ann. 707.

As against third persons.—Where a landlord's agent takes in his own name a trust deed on a crop to be raised by the tenant on the leased premises as security for supplies to be furnished, the landlord as against third persons must confine himself to the security afforded by the deed of trust. Gaines *v.* Keeton, 68 Miss. 473, 10 So. 71.

Stipulation that security shall not affect lien.—A deed of trust taken by a landlord to secure the rent of demised premises, stipulating that it should not affect the landlord's statutory lien on the crops grown on the premises, does not create a mortgage lien on the crops in favor of the landlord, but merely avoids any inference that in taking other security the landlord intended to relinquish the statutory security. Wimp *v.* Early, 104 Mo. App. 85, 78 S. W. 343.

94. Garst *v.* Good, 50 Mo. App. 149.

95. *Alabama.*— Coleman *v.* Siler, 74 Ala. 435; Denham *v.* Harris, 13 Ala. 465.

Illinois.— Cunnea *v.* Williams, 11 Ill. App. 72.

Iowa.— Farwell *v.* Grier, 38 Iowa 83. *Compare* Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650, holding that where a landlord accepts a note of his tenant, secured by a mortgage, in which is included rent due, and also other items, and part of the mortgaged property is sold and the proceeds applied in part payment of the note, that the landlord will be presumed to have waived his lien for the rent, and to rely exclusively on the tenant's personal responsibility.

Louisiana.— Paulding *v.* Ketty, 9 Mart. 186.

Mississippi.— Trimble *v.* Durham, 70 Miss. 295, 12 So. 207.

Pennsylvania.— Kendig *v.* Kendig, 2 Pearson 89.

South Carolina.— Sullivan *v.* Ellison, 20 S. C. 481.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1037.

Taking a waive note for rent does not in itself constitute a surrender of the lien. Stephens *v.* Adams, 93 Ala. 117, 9 So. 529.

or draft[96] therefor. Nor does a landlord lose his statutory lien merely by accepting a mortgage upon his tenant's chattels,[97] or upon the crop grown upon the premises.[98]

(c) *By Authorizing or Permitting Sale of Property.* A landlord by consenting that his tenant's property be removed from the premises does not waive his lien for rent. Much must depend on the purpose for which the consent is given.[99] If the landlord authorizes,[1] or permits or acquiesces in,[2] the removal of property from the rented premises, by the tenant or any one else, for the purpose of sale in open market, he thereby waives his landlord's lien, regardless of whether there is any consideration for the waiver,[3] or whether the purchaser acted on the knowledge of the waiver.[4] So also a landlord may ratify the sale by receiving money from his tenant, knowing that it was part of the proceeds of the sale of the property on which he has a lien, and thus estop himself to assert his lien as against the purchasers.[5] This will not be the case, however, unless the landlord consented or was a party to the transaction.[6]

(d) *By Consent to Subletting.* The consent of the landlord to a subletting of the leased premises is not a waiver on his part of his lien for rent upon the crops grown by the subtenant.[7]

(e) *By Taking Personal Judgment.* Where a landlord sues to recover rent, and for the enforcement of his lien on the property of the tenant, and takes a judgment merely for the rent due, and does not insist on the foreclosure of his lien, and no foreclosure is adjudged, he waives and abandons it.[8] So also if the landlord brings an action for rent, and attaches the property, he thereby waives his lien, since the attachment is inconsistent with the enforcement of his lien.[9]

96. Worsham *v.* McLeod, (Miss. 1891) 11 So. 107. *Compare* Cambria Min. Riddlesburg Coal, etc., Co.'s Appeal, 114 Pa. St. 58, 6 Atl. 563, holding that a landlord who receives accepted drafts of his tenant for rent due, and thereupon gives a receipt for the rent, loses his right to claim a preference as landlord, although the drafts are never paid.

97. Ladner *v.* Balsley, 103 Iowa 674, 72 N. W. 787; Pitkin *v.* Fletcher, 47 Iowa 53.

98. Merchants', etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406; Franklin *v.* Meyer, 36 Ark. 96.

99. Coleman *v.* Siler, 74 Ala. 435; Tuttle *v.* Walker, 69 Ala. 172.

Attending circumstances must be considered. — Whenever a waiver of the lien is claimed from the consent of the landlord to the removal of the property, all the attending circumstances must be considered and from them the inference drawn whether there was an intention to waive the lien or whether strangers, dealing in good faith, upon the possession of the tenant separated from the possession of the rented premises, have been misled. Tuttle *v.* Walker, 69 Ala. 172.

1. Campbell *v.* Bowen, 22 Ind. App. 562, 54 N. E. 409; Fulkerson *v.* Lynn, 64 Mo. App. 649; Planters Compress Co. *v.* Howard, 35 Tex. Civ. App. 300, 80 S. W. 119; Gilliam *v.* Smither, (Tex. Civ. App. 1896) 33 S. W. 984.

2. Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Wright *v.* E. M. Dickey Co., 83 Iowa 464, 50 N. W. 206; Johnson *v.* Kincaid, (Tex. Civ. App. 1904) 81 S. W. 536; Gilliam *v.* Smither, (Tex. Civ. App. 1896) 33 S. W. 984. See also Blake *v.* Counselman, 95 Iowa 219, 63 N. W. 679; Bivins *v.* West, (Tex. Civ. App. 1898) 46 S. W. 112.

Sale to pay rent.—Where the landlord and the mortgagees consent to the mortgagor's selling part of the mortgaged property to discharge the landlord's lien, such lien is waived to the extent of the value of the property sold. Walhoefer *v.* Hobgood, 18 Tex. Civ. App. 291, 44 S. W. 566.

3. Wimp *v.* Early, 104 Mo. App. 85, 78 S. W. 343; Fulkerson *v.* Lynn, 64 Mo. App. 649.

If a consideration be considered necessary, it exists in the fact that the tenant, upon the faith of the relinquishment of the lien, has bound himself to make good title to the purchaser. Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58.

4. White *v.* A. K. McAllister Co., 67 Mo. App. 314; Fulkerson *v.* Lynn, 64 Mo. App. 649. *Compare* Sanger *v.* Magee, 29 Tex. Civ. App. 397, 69 S. W. 234.

5. Planters Compress Co. *v.* Howard, 35 Tex. Civ. App. 300, 80 S. W. 119; McCollum *v.* Wood, (Tex. Civ. App. 1896) 33 S. W. 1087; Gilliam *v.* Smither, (Tex. Civ. App. 1896) 33 S. W. 984.

6. Volmer *v.* Wharton, 34 Ark. 691.

7. Williams *v.* Braden, 63 Mo. App. 513; State *v.* Crook, 132 N. C. 1053, 44 S. E. 32; Montague *v.* Mial, 89 N. C. 137; Trout *v.* McQueen, (Tex. Civ. App. 1901) 62 S. W. 928; Marrs *v.* Lumpkins, 22 Tex. Civ. App. 448, 54 S. W. 775.

8. Wise *v.* Old, 57 Tex. 514; Bond *v.* Carter, (Tex. Civ. App. 1903) 73 S. W. 45; Haymes *v.* Gray, 2 Tex. App. Civ. Cas. § 252.

9. Potter *v.* Greenleaf, 21 R. I. 483, 44 Atl. 718.

In those jurisdictions where a landlord's lien does not depend on the institution of proceedings to enforce it, an abandonment of such proceedings once begun is not a waiver of the lien.[10] It is otherwise where the lien is dependent on the levy of a distress warrant to enforce it.[11]

(iv) *Procedure to Establish Waiver.* A waiver of a landlord's lien cannot be proved unless it has been pleaded,[12] and the burden of proving such waiver is on one claiming against the lien.[13] Where all of the facts tending to establish waiver are undisputed, their legal sufficiency for that purpose should be determined by the court.[14]

(v) *Operation and Effect of Waiver.* A waiver of a lien in favor of one is not a waiver in favor of another.[15] Nor is a waiver of a lien for the current year a waiver of a lien in favor of an antecedent debt of the tenant.[16] If the waiver is conditional, the performance of the condition is necessary to render the waiver effective.[17]

(vi) *Loss of Lien*—(a) *In General.* The landlord's statutory lien is a paramount lien of which every person must take notice, and can be lost as a general rule only by waiver or by failure to enforce it at the proper time.[18] A landlord's lien for supplies is not lost by failure to enforce it in the manner prescribed for the enforcement of a lien for rent.[19]

(b) *By Delay in Enforcement.* If a landlord fails to institute proceedings to enforce his lien within the time limited by the statute the lien is gone.[20] The institution of distress proceedings, however, is not a necessary prerequisite to a foreclosure of the landlord's lien. The lien is preserved by the bringing of the suit to foreclose, if brought in time, and this once commenced will prevent any loss of the lien by the expiration of the time limited for its continuance.[21] Mere

10. Wetsel *v.* Mayers, 91 Ill. 497; Kern *v.* Noble, 57 Ill. App. 27.

11. Williams *v.* Wood, 2 Metc. (Ky.) 41.

12. Berry *v.* Berry, 8 Kan. App. 584, 55 Pac. 348.

13. Bivins *v.* West, (Tex. Civ. App. 1898) 46 S. W. 112.

14. Salina State Bank *v.* Burr, 7 Kan. App. 197, 52 Pac. 704.

15. Robinson *v.* Lehman, 72 Ala. 401; Carter *v.* Du Pre, 18 S. C. 179.

16. Napier *v.* Foster, 80 Ala. 339.

17. Stoelker *v.* Wooten, 80 Ala. 610, 2 So. 703.

18. Kern *v.* Noble, 57 Ill. App. 27.

Form of execution.—A landlord's privilege is not lost by the form of execution in which he seeks to enforce it. Parker *v.* Starkweather, 7 Mart. N. S. (La.) 337.

By death of tenant and insolvency of estate.—A landlord's lien is not created by the levy of an attachment, but grows out of the contract, and if the tenant dies after the levy of an attachment, and his estate is declared insolvent, the lien of the attachment is not thereby dissolved or destroyed. McDonald *v.* Morrison, 50 Ala. 30.

A refusal of the county court to recognize a landlord's lien does not defeat the lien, since it depends on statute. Kern *v.* Noble, 57 Ill. App. 27.

By assignment of tenant's property.—A landlord's lien is not displaced by an assignment of the tenant's property for the payment of his debts. O'Hara *v.* Jones, 46 Ill. 288; *In re* Bowne, 3 Fed. Cas. No. 1,741, 1 N. Y. Wkly. Dig. 100..

Goods in custody of the law.—A landlord's lien for rent is not destroyed by the fact that at the time of issuing his attachment the goods were in the custody of the law (Gibson *v.* Gautier, 1 Mackey (D. C.) 35); or by the conversion of the property into money by a receiver appointed by the court (Gilbert *v.* Greenbaum, 56 Iowa 211, 9 N. W. 182).

19. Gayle *v.* McDaniel, 13 Ky. L. Rep. 200.

20. Wetsel *v.* Mayers, 91 Ill. 497; Kern *v.* Noble, 57 Ill. App. 27; *In re* Stone, 14 Utah 205, 46 Pac. 1101.

After vacation of premises.—Delay of more than thirty days after the removal of the tenant before the landlord begins proceedings to foreclose his lien on the tenant's property for the rent due is a waiver of lien as against a purchaser of the property. Jenkins *v.* Patton, (Tex. Civ. App. 1893) 21 S. W. 693. Issuance of citation is necessary to begin the suit, and if the petition is not filed until more than thirty days after the premises are vacated, the lien is lost. Randall *v.* Rosenthal, (Tex. Civ. App. 1894) 27 S. W. 906.

Suspension of execution.—The lien of a landlord is not lost or impaired by his suspension for a month of the execution issuing under the judgment obtained in attachment proceedings to enforce the same. Gibson *v.* Gautier, 1 Mackay (D. C.) 35.

Louisiana.—A lessor's privilege, to secure which no action is taken within fifteen days after the removal of the goods from the premises, is lost. Carroll *v.* Bancker, 43 La. Ann. 1078, 1194, 10 So. 187; Farnet *v.* His Creditors, 8 La. Ann. 372.

21. Bourcier *v.* Edmondson, 58 Tex. 675;

delay in making a sale of property distrained does not destroy the lien for the rent, where there is no collusion between landlord and tenant.[22]

(c) *By Transfer of Reversion.* A conveyance of the premises extinguishes the grantor's lien for unpaid rent.[23] Nor has the landlord any claim for advances made to the tenant after such conveyance.[24]

(d) *By Destruction of Property.* The lien of a landlord for rent upon the goods of his tenant is lost by their destruction.[25]

(vii) *Merger of Lien.* A landlord's lien is extinguished by his purchase of the property upon which the lien exists, but he acquires an absolute title to an undivided interest in such property equal to the amount of his lien.[26]

(viii) *Discharge of Lien.* A landlord's lien is not released by refusal to accept a tender of the rent;[27] and to make a plea of such tender good the money must be paid into court.[28] Nor will the fact that a tenant replevies property taken under a distress warrant and gives bond for the satisfaction of the judgment release the landlord's statutory lien.[29] After the lien has once been satisfied, it cannot be renewed by agreement.[30]

h. Enforcement of Lien — (i) *Remedies of Landlord* — (a) *In General.* The statutory lien of a landlord, without other authority, does not entitle him to seize and appropriate the property without legal process.[31] To enforce the lien the landlord should proceed to foreclose the same in a direct proceeding therefor,[32] or pursue the remedy which may be provided by statute.[33]

(b) *Distress.*[34] In some states it is provided by statute that a landlord's lien may be enforced by distress.[35]

Randall *v.* Rosenthal, (Tex. Civ. App. 1894) 27 S. W. 906.

22. Bigelow *v.* Judson, 19 Wend. (N. Y.) 229.

23. Watkins *v.* Duvall, 69 Miss. 364, 13 So. 727; Schmidt *v.* Ehler, 11 Ohio Dec. (Reprint) 425, 27 Cinc. L. Bul. 2.

24. Watkins *v.* Duvall, 69 Miss. 364, 13 So. 727.

25. *In re* Reis, 20 Fed. Cas. No. 11,684, 3 Woods 18.

26. Titsworth *v.* Frauenthal, 52 Ark. 254, 12 S. W. 498.

27. Bloom *v.* McGehee, 38 Ark. 329; Hamlett *v.* Tallman, 30 Ark. 505. *Compare* Taggart *v.* Packard, 39 Vt. 628.

28. Bloom *v.* McGehee, 38 Ark. 329.

29. McEvoy *v.* Niece, 20 Tex. Civ. App. 686, 50 S. W. 424.

30. Tinman *v.* McMeekin, 42 S. C. 311, 20 S. E. 36.

31. *Alabama.*—Folmar *v.* Copeland, 57 Ala. 588.

Arkansas.— Buck *v.* Lee, 36 Ark. 525.

Georgia.— Hall *v.* McGaughey, 114 Ga. 405, 40 S. E. 246.

Illinois.— Arnold *v.* Phillips, 59 Ill. App. 213.

Louisiana.— Tanner *v.* Tanner, 6 Rob. 35.

Missouri.— Knox *v.* Hunt, 18 Mo. 243; Auxvasse Milling Co. *v.* Cornet, 85 Mo. App. 251.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1045.

But if he comes into possession of it without trespass and especially with the tenant's consent, for the purpose of securing rent; or, if it be deposited with others for the like purpose, the rent must be fully tendered before it can be taken by the tenant. Buck *v.* Lee, 36 Ark. 525.

32. Hall *v.* McGaughey, 114 Ga. 405, 40 S. E. 246; Lightner *v.* Brannon, 99 Ga. 606, 27 S. E. 703; Bowers *v.* Davis, 79 Ill. App. 347.

Foreclosure properly against all goods subject to lien.—Where a landlord seeks to foreclose his lien on certain goods, and distrains some of them, the foreclosure is properly against all the goods subject to the lien, and not merely against those distrained. Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570.

No foreclosure on trial of right to property. — On the trial of the right to property attached as that of a tenant on the claim of a landlord, priority of lien will not be determined; hence the landlord's lien cannot be foreclosed. Groesbeck *v.* Evans, (Tex. Civ. App. 1904) 83 S. W. 430.

33. See *infra*, VIII, D, 3, h, (b)-(f).

Attachment see *supra*, VIII, C.

Actions for rent generally see *supra*, VIII, B.

Statutory remedy not exclusive.—Where a special procedure is provided for enforcing landlord's lien, such statutory remedy is not exclusive. McDougal *v.* Sanders, 75 Ga. 140; Berry *v.* Berry, 8 Kan. App. 584, 55 Pac. 348.

34. Distress generally see *infra*, VIII, E.

35. Almand *v.* Scott, 83 Ga. 402, 11 S. E. 653; Colclough *v.* Mathis, 79 Ga. 394, 4 S. W. 762; Worrill *v.* Barnes, 57 Ga. 404; Thompson *v.* Tilton, 59 S. W. 485, 22 Ky. L. Rep. 1004.

Remedy by distress is not exclusive.— Hunter *v.* Whitfield, 89 Ill. 229; Brown *v.* Noel, 52 S. W. 849, 21 Ky. L. Rep. 648.

(c) *Bill in Equity.*[36] There are many cases in which judicial interference for the enforcement of a landlord's lien is necessary, or it will be unavailing. In these cases, and in cases in which the statutory remedy is inadequate, a court of equity, in the exercise of its general jurisdiction to enforce liens, or charges or trusts for the payment of debts, may grant appropriate relief.[37]

(d) *Garnishment.*[38] Where an assignee of a tenant converts into money property upon which the landlord had a lien at the time of the assignment, and the landlord seeks to enforce his lien by attachment against the tenant, such money in the hands of the assignee may be reached by process of garnishment.[39]

(e) *Claim and Delivery.* Sometimes a landlord may enforce his lien by the action of claim and delivery to recover possession of crops, where his right of possession under the statute is denied, or he may resort to any other appropriate remedy.[40] This action lies not only when the crops are removed from the land leased, but also where the tenant refuses possession, although still keeping his crop on the land.[41]

(f) *Summary Remedies.*[42] In some states the lien of a lessor on chattels on the premises for the rent due at the time of their seizure under attachment or execution may be enforced by motion to the court to which the process is returnable to direct an application of so much of the proceeds of the sale as may be necessary to discharge it.[43] It is not necessary in order to entitle the landlord to the remedy by motion that the goods should be removed from the premises.[44] Where a tenant or a purchaser from him is about to remove and sell property which is subject to a landlord's lien, a warrant may issue for the enforcement of the lien, although such removal and sale is without any fraudulent intent.[45] The affidavit in such a warrant must state the facts on which the belief is founded, and these facts must be of a character which if true would *prima facie* warrant the belief.[46]

(ii) *Persons Entitled to Enforce.* Statutory provisions giving a landlord a lien for rent, and a remedy for its collection, authorize the remedy in favor of the landlord alone,[47] and it will not lie in favor of the assignee or transferee of the debt,[48] unless the statute so provides.[49] So also the statute contemplates only the

36. **Bill in equity** generally see EQUITY.

37. Abraham *v.* Hall, 59 Ala. 386 (holding that when the death of a tenant renders it impossible to pursue the statutory remedy by attachment, a court of equity will enforce the lien of the landlord on the crops); Hudson *v.* Vaughan, 57 Ala. 609; Knox *v.* Hellums, 38 Ark. 413.

38. **Garnishment** generally see GARNISHMENT.

Attachment see *supra*, VIII, C; and, generally, ATTACHMENT.

39. McKleroy *v.* Cantey, 95 Ala. 295, 11 So. 258.

40. Livingston *v.* Farish, 89 N. C. 140; Belcher *v.* Grimsley, 88 N. C. 88.

41. Livingston *v.* Farish, 89 N. C. 140.

42. **Summary remedy** generally see *infra*, VIII, D, 3, h, (II)-(X).

43. Governor *v.* Bancroft, 16 Ala. 605; Gibson *v.* Gautier, 1 Mackey (D. C.) 35; Washington *v.* Williamson, 23 Md. 244.

44. Washington *v.* Williamson, 23 Md. 244.

45. Leonard *v.* Brockman, 46 S. C. 128, 24 S. E. 96.

46. Baum *v.* Bell, 28 S. C. 201, 5 S. E. 485.

47. Foster *v.* Westmoreland, 52 Ala. 223; Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753; Gross *v.* Bartley, 66 Miss. 116, 5 So. 225; State *v.* Elmore, 68 S. C. 140, 46 S. E. 939.

Tenants in common.— Under a statute giving the landlord's lien to "all persons leasing or renting lands," a tenant in common, who rents his half of the premises to his cotenant, is entitled to a lien on the tenant's goods for his rent. Grabfelder *v.* Gazetti, (Tex. Civ. App. 1894) 26 S. W. 436.

Mortgagees.—After default in the conditions of a mortgage, the mortgagee can by parol contract become landlord of the mortgagor, so as to avail himself of the landlord's lien (Ford *v.* Green, 121 N. C. 70, 28 S. E. 132; Jones *v.* Jones, 117 N. C. 254, 23 S. E. 214; Taylor *v.* Taylor, 112 N. C. 27, 16 S. E. 924); but merely giving notice to the mortgagor's tenant that he claims future rent will not make the mortgagee the landlord and entitle him to the statutory lien (Drakford *v.* Turk, 75 Ala. 339).

48. Foster *v.* Westmoreland, 52 Ala. 223; Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753; Cross *v.* Bartley, 66 Miss. 116, 5 So. 225; State *v.* Elmore, 68 S. C. 140, 46 S. E. 939.

49. See the statutes of the several states. **Under Ga. Civ. Code, § 2798,** the special lien

conventional relation of landlord and tenant subsisting because of the contract between the parties, and does not extend to the relation when arising by implication or operation of law.[50] The landlord and tenant may, however, by their conduct estop themselves from denying the assignee of the rent the benefit of the lien to secure his claim.[51]

(III) *Time to Sue and Limitations.*[52] In order to enforce a landlord's lien against the property itself, suit must be brought during the life of the lien, the length of which varies in different jurisdictions.[53]

(IV) *Jurisdiction*[54] *and Venue.*[55] The courts have jurisdiction to enforce a lien or privilege on property within their jurisdiction, notwithstanding the domicile of the debtor or owner be elsewhere.[56] An action against a tenant to foreclose a landlord's lien and against third persons for conversion of property subject to the lien may be maintained in the county of the tenant's domicile, although the other parties are domiciled in another county.[57] An action by a landlord for possession of a crop is not an action on contract, and he may sue to recover the property in a court that would not have jurisdiction of an action on contract.[58]

(V) *Parties.*[59] All persons claiming an interest in property on which a landlord's lien is sought to be foreclosed should be made parties, even though one's claim be not sufficient of itself to give the court jurisdiction.[60] Where a rent con-

in favor of the landlord arises in favor of the transferee of the rent contract upon the maturity of the crops, in the same manner as it would have done in favor of the landlord if no transfer had been made. Camp *v.* West, 113 Ga. 304, 38 S. E. 822.

In Mississippi, by Code (1890), c. 51, and by Code (1892), § 2501, the assignee of a claim for rent was given the remedy of distress before that time exercisable only by the lessor or the assignee of the reversion. Coker *v.* Britt, 78 Miss. 583, 29 So. 833. Laws (1876), p. 109, providing for agricultural liens for rent, may be taken advantage of by any one who could attach for rent under Code (1871), c. 25. Tucker *v.* Whitehead, 58 Miss. 762.

50. Coker *v.* Britt, 78 Miss. 583, 29 So. 833, holding that a mere agreement between the parties cannot create the relation of landlord and tenant for this purpose.

A mortgagee who has given notice to the mortgagor's tenant that he claims future rent does not thereby become the landlord and as such entitled to enforce the lien for rent. Drakford *v.* Turk, 75 Ala. 339.

51. Rubel *v.* Avritt, 47 S. W. 460, 20 Ky. L. Rep. 764 (holding that where mechanics and materialmen made improvements in leased premises under contract with the tenant upon the faith of the landlord's agreement that the improvements might be paid for by the tenant out of the rent then due and to become due, they are entitled to the benefit of the landlord's lien to secure their claims, and the landlord cannot defeat them by subjecting the tenant's property to the payment of rent which accrued after the payments were made); Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753.

52. **Statutes of limitation** generally see LIMITATIONS OF ACTIONS.

53. See the statutes of the several states.

In Arkansas a landlord's lien continues for only six months after the rent becomes due, and when there has been a conversion of the crops by one with knowledge of the lien, and it attaches in equity to the proceeds in his hands, its continuance is only for the same period, for equity follows the law. King *v.* Blount, 37 Ark. 115.

In Missouri a landlord's lien continues for eight months and during that time the landlord may take steps to subject the property to the payment thereof. Knox *v.* Hunt, 18 Mo. 243.

Tenn. Code, § 4283, providing that a person entitled to the rent may recover from the purchaser of the crop the value of the property to the amount of the rent, gives the landlord a right of action against the purchaser personally, not limited by the duration of the landlord's lien against the crop, which only continues for three months. Davis *v.* Wilson, 86 Tenn. 519, 8 S. W. 151.

In Texas, where a tenant vacates premises, an action to foreclose a landlord's lien must be brought within thirty days from the time of such vacation, which occurs when the tenant abandons control of the premises, and possession by the sheriff will give no color to proceedings begun after thirty days from that date. Randall *v.* Rosenthal, (Tex. Civ. App. 1894) 27 S. W. 906.

Loss of lien by delay generally see *supra,* VIII, D, 3, g, (VI), (B).

54. **Jurisdiction** generally see COURTS.

55. **Venue** generally see VENUE.

56. Jones *v.* Wylie, 82 Ga. 745, 9 S. E. 614 (holding that a proceeding before a justice to foreclose a landlord's lien must be brought in the militia district in which defendant resides or has property); Carroll *v.* Bancker, 43 La. Ann. 1078, 1194, 10 So. 187.

57. Cardwell *v.* Masterson, 27 Tex. Civ. App. 591, 66 S. W. 1121.

58. McGehee *v.* Breedlove, 122 N. C. 277, 30 S. E. 311.

59. **Parties** generally see PARTIES.

60. Templeman *v.* Gresham, 61 Tex. 50.

tract is made with an agent in his individual name, although his agency be known, he may maintain an action to enforce the landlord's lien in his own name.[61] It is not necessary, however, that such suit should be in his own name, and the real party in interest may therefore be joined, either originally, or after the institution thereof.[62] In an action to foreclose a lien on certain goods, the purchasers of such goods are proper parties;[63] but when the landlord seeks to enforce his lien for rent against a purchaser from the tenant, the tenant is not a necessary party.[64] So where a grantee of the reversion in leased premises sues to enforce the lien for the payment of his rent, he is not obliged to make his grantor a party to the suit.[65] Where it is provided that all proceedings in attachment issued under the Landlord and Tenant Act shall be the same as provided by law in case of suits by attachment, third persons interested in the property attached may intervene.[66]

(VI) *Pleading*[67] — (A) *Necessary Allegations.* A petition to foreclose a landlord's lien for rent should allege the renting of property of the character mentioned in the statute,[68] a contract by defendant to pay plaintiff,[69] that plaintiff has a lien on defendant's crop,[70] to whom the contract was due or the land rented,[71] that there was a crop grown on the land thus rented,[72] when the lease took effect and when the lessee took possession,[73] and should describe the land.[74] The property subject to the lien should also be described;[75] but if the landlord has not such access to the property as to enable him to describe it specifically, a general description is sufficient.[76] If the lien sought to be foreclosed is special, the landlord must allege a demand for the rent and a refusal to pay it.[77]

(B) *Unnecessary Allegations.* In an action to foreclose a landlord's lien, an allegation of ownership in the debtor of the property covered by the lien is not necessary.[78] In an action to foreclose a landlord's lien joined with an action against a junior mortgagee, an allegation that the mortgagee is asserting title to property subject to the lien is sufficient, without an averment that such mortgage is valid.[79]

(VII) *Joinder of Actions*[80] *or Counts.*[81] An action against a tenant to foreclose a landlord's lien is properly joined with an action against others for conversion of property subject to the lien.[82] A landlord's claims for rent and for advances to the tenant, being of kindred character, may be united in one count, or by separate counts in the same complaint.[83]

(VIII) *Judgment*[84] *or Decree*[85] *and Enforcement Thereof.*[86] When a verdict fails to find that any lien existed a judgment on such verdict foreclosing

61. Dickenson *v.* Harris, 48 Ark. 355, 3 S. W. 58; Fargason *v.* Ford, 119 Ga. 343, 46 S. E. 431.
62. Dickenson *v.* Harris, 48 Ark. 355, 3 S. W. 58.
63. Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570.
64. Gill *v.* Buckingham, 7 Kan. App. 227, 52 Pac. 897.
65. Kennard *v.* Harvey, 80 Ind. 37.
66. Williams *v.* Braden, 63 Mo. App. 513.
67. **Pleading** generally see PLEADING.
68. Constantine *v.* Fresche, 17 Tex. Civ. App. 444, 43 S. W. 1045.
69. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282.
70. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282.
71. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282.
72. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282.
73. Penfield *v.* Harris, 7 Tex. Civ. App. 659, 27 S. W. 762.
74. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282.
75. Burgess *v.* American Mortg. Co., 115 Ala. 468, 22 So. 282; Bourcier *v.* Edmondson, 58 Tex. 675.
76. Bourcier *v.* Edmondson, 58 Tex. 675.
77. McDougal *v.* Sanders, 75 Ga. 140.
78. Ramsey *v.* Johnson, 8 Wyo. 476, 58 Pac. 755, 80 Am. St. Rep. 948, 45 L. R. A. 295, (1898) 52 Pac. 1084.
79. Cardwell *v.* Masterson, 27 Tex. Civ. App. 591, 66 S. W. 1121.
80. **Joinder of actions** generally see JOINDER AND SPLITTING OF ACTIONS.
81. **Joinder of counts** generally see PLEADING.
82. Cardwell *v.* Masterson, 27 Tex. Civ. App. 591, 66 S. W. 1121.
83. Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443.
84. **Judgment** generally see JUDGMENTS.
85. **Decree** generally see EQUITY.
86. **Enforcement of judgment or decree** generally see EXECUTIONS.

the landlord's lien is erroneous.[87] So also if the verdict fails to show that the property sought to be subjected to a landlord's lien was so situated as to be subject thereto, a judgment subjecting the property to the lien is erroneous.[88] But where no issue as to the lien is presented to the jury, but they find for the landlord as to the rent, the court may properly recognize the lien in the judgment, and direct a special execution to issue to satisfy it.[89] Where a landlord forecloses his lien and the execution is levied upon the crop of the tenant, who files a counter-affidavit denying the existence of the lien, but no replevy bond is filed, a general judgment cannot be granted in the landlord's favor; the only proper judgment is one establishing the lien and the amount thereof.[90]

(IX) *Distribution of Proceeds.* To enforce his lien, a landlord must have the thing subject to the lien sold in the manner provided by law, and if any conflict arises from adverse claims to the proceeds of the sale, distribution must be made pursuant to the statute prescribing the order in which privileged creditors are to be paid.[91]

(X) *Costs and Attorney's Fees.*[92] A landlord is entitled to costs in an action brought by him to enforce by attachment his lien for rent.[93] So a stipulation in a lease that the tenant shall be taxed with attorney's fees in case of his violation of the lease entitles the landlord to recover attorney's fees in an action to enforce his lien.[94]

E. Distress — 1. Nature and Scope of Remedy — a. Nature of Remedy. In its origin distress was a taking of the personal chattels of another into possession as a pledge of the performance of a duty, and this was for the purpose of compelling the tenant to perform those services which were the consideration of his enjoyment of the land; but in modern times the policy of the law respecting distresses has been changed and a distress for rent is now no more than a summary method of seizing and selling the tenant's property to satisfy the rent which he owes.[95] As a general rule the remedy by distress is not considered an action prosecuted by one party against another to which of necessity there must be a plaintiff and a defendant, but is a proceeding *in rem* given by the common law to the landlord whereby he seizes and holds the property found on the premises, until the tenant redeems the property by payment of the rent.[96]

87. Miller *v.* Newbauer, (Tex. Civ. App. 1901) 61 S. W. 974; Scoggins *v.* Thompson, (Tex. Civ. App. 1898) 45 S. W. 216.

88. Miller *v.* Newbauer, (Tex. Civ. App. 1901) 61 S. W. 974.

89. Bartlett *v.* Gaines, 11 Iowa 95.

Execution amendable.—An execution on a landlord's lien, signed by the magistrate in the wrong place, may be amended after levy by attaching the signature where it should have been. Glaze *v.* Fincher, 94 Ga. 699, 19 S. E. 249.

90. Argo *v.* Fields, 112 Ga. 677, 37 S. E. 995.

91. Tanner *v.* Tanner, 6 Rob. (La.) 35.

92. Costs generally see Costs.

93. Conwell *v.* Kuykendall, 29 Kan. 707.

94. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30.

95. Taylor Landl. & Ten. § 557 [*quoted* in Briscoe *v.* McElween, 43 Miss. 556, 565].

Strict construction.—The remedy by distress is a very stringent proceeding and the requirements of the law must be strictly complied with. Scott *v.* Russsell, 72 Ga. 35; A. N. Kellogg Newspaper Co. *v.* Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300; Hill *v.* Coats, 109 Ill. App. 266; Clark *v.* Fraley, 3 Blackf. (Ind.) 264; Rector *v.* Gale, Hard. (Ky.) 78; Coles *v.* Marquand, 2 Hill (N. Y.) 447; Garrett *v.* Longnecker, 2 Leg. Rec. (Pa.) 174; Stewart *v.* Gregg, 42 S. C. 392, 20 S. E. 193; Murry *v.* Blanchard, 2 Tex. App. Civ. Cas. § 479; Jones *v.* Stone, 2 Tex. Civ. App. Cas. § 358.

96. Blanchard *v.* Raines, 20 Fla. 467; Keller *v.* Weber, 27 Md. 660; Toland *v.* Swearingen, 39 Tex. 447. See also Lyon *v.* Houk, 9 Watts (Pa.) 193, holding that a distress is a summary remedy given by law for the recovery of rent, and may be considered equivalent in some respects to an action in which a judgment is obtained and an execution awarded for the recovery of it.

A distress for rent is not a judicial proceeding, for it is returnable to no court in a pending suit, and serves only as an authority to the officer to do what the landlord at common law could do for himself. Pate *v.* Shannon, 69 Miss. 372, 13 So. 729.

In Georgia a distress warrant is a legal proceeding, a mode of claiming a right by a proceeding before a court. Flury *v.* Grimes, 52 Ga. 341.

In Illinois, under the provisions of the act of 1874, a proceeding by distress is regarded

b. Scope of Remedy. The right of distress is incident only to that which is strictly rent, and cannot be extended to a breach of other covenants or conditions of the lease.[97] It is not necessary that rent should be reserved *eo nomine*; it is enough if it appear to be for the use and occupation of lands or houses, although not denominated rent.[98] Where personalty on the premises is leased with the premises by one contract, the whole sum is rent and collectable by distress,[99] but the purchase-price of property consumed in the use is not rent and cannot be collected by distress.[1]

2. Right to Distrain — a. In General. While the common-law right of distress for rent exists in many states,[2] in several it is considered a violation of the condition and wants of the people, and repugnant to the genius and spirit of their institutions, and is not in force.[3] In other states it has been abolished by statute.[4]

b. Necessity of Existence of Relation of Landlord and Tenant. Distress for rent is a remedy which may be invoked only when there has been an actual

as a suit for the collection of rent. Bartlett *v.* Sullivan, 87 Ill. 219; Clevenger *v.* Dunaway, 84 Ill. 367; Powell *v.* Daily, 61 Ill. App. 552; Sheetz *v.* Baker, 38 Ill. App. 349. See also Lapointe *v.* Stewart, 16 Ill. 291. Before this statute the proceeding was not considered an original action. It originated from the action of the landlord, and the levy was made under his authority, and not under a process of the court. But after it progressed to that stage, it was transferred to the court for the single purpose of ascertaining whether the relation of landlord and tenant existed and what sum was due for rent. Kruse *v.* Kruse, 68 Ill. 188; Alwood *v.* Mansfield, 33 Ill. 452; Sketoe *v.* Ellis, 14 Ill. 75.

The rules of practice in attachment apply to the proceedings by distress for rent. Rauh *v.* Ritchie, 1 Ill. App. 188.

97. Sketoe *v.* Ellis, 14 Ill. 75; Craig *v.* Merime, 16 Ill. App. 214; Latimer *v.* Groetzinger, 139 Pa. St. 207, 21 Atl. 22. See also Ingle *v.* Wallach, 1 Wall. (U. S.) 61, 17 L. ed. 680.

Interest cannot be collected by distress. Tanton *v.* Boomgaarden, 89 Ill. App. 50; Dennison *v.* Lee, 6 Gill & J. (Md.) 383; Lansing *v.* Rattoone, 6 Johns. (N. Y.) 43; Vechte *v.* Brownell, 8 Paige (N. Y.) 212; Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430.

Attorneys' fees are not recoverable by a distress warrant. Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541; Tanton *v.* Boomgaarden, 89 Ill. App. 500.

Covenant to pay for gas consumed.—Where a lessee covenants to pay a lessor for all gas consumed on the premises, a sum due for gas consumed is to be regarded as rent in arrear, and may be distrained for. Fernwood Masonic Hall Assoc. *v.* Jones, 102 Pa. St. 307.

Covenants that relate to the use of the premises, but not to the payment to the lessor for the use, do not give the right to distrain. Evans *v.* Lincoln Co., 204 Pa. St. 448, 54 Atl. 321.

A past-due debt is not rent, and an agreement that it shall be treated as such does not entitle the landlord to distrain for it. Paxton *v.* Kennedy, 70 Miss. 865, 12 So. 546.

98. Stewart *v.* Gregg, 42 S. C. 392, 20 S. E. 193; Price *v.* Limehouse, 4 McCord (S. C.) 544.

99. Lathrop *v.* Clewis, 63 Ga. 282; Toler *v.* Seabrook, 39 Ga. 14; Mickle *v.* Miles, 1 Grant (Pa.) 320. *Compare* Com. *v.* Contner, 18 Pa. St. 439.

1. Cranston *v.* Rogers, 83 Ga. 750, 10 S. E. 364.

2. See cases cited *supra*, note 96.

3. Folmer *v.* Copeland, 57 Ala. 588; Crocker *v.* Mann, 3 Mo. 472, 26 Am. Dec. 684; Welch *v.* Ashby, 88 Mo. App. 400; Howland *v.* Forlaw, 108 N. C. 567, 13 S. E. 173; Dalgleish *v.* Grandy, 1 N. C. 161; Smith *v.* Wheeler, 4 Okla. 138, 44 Pac. 203.

In Colorado distress for rent does not exist in the absence of an express agreement. Herr *v.* Johnson, 11 Colo. 393, 18 Pac. 342.

4. See the statutes of the several states; and the following cases:

Georgia.— Scruggs *v.* Gibson, 40 Ga. 511.

Massachusetts.— The common-law right of distress has been superseded by attachment. Potter *v.* Hall, 3 Pick. 368, 15 Am. Dec. 226.

Minnesota.— Dutcher *v.* Culver, 24 Minn. 584.

Mississippi.— The common-law process of distress for rent has been abolished by the statute which provides for a summary method of attaching the tenant's property and selling the same to pay the rent due by him. Patty *v.* Bogle, 59 Miss. 491; Marye *v.* Dyche, 42 Miss. 347. See also Hawkins *v.* James, 69 Miss. 361, 11 So. 654.

Montana.— The common-law right of distraint for rent has been superseded by statutory remedies. Bohm *v.* Dunphy, 1 Mont. 333.

New York.— The right of distress was abolished in New York by the act of May 13, 1846.

Wisconsin.—Distress for rent was abolished in Wisconsin by Laws (1866), c. 74.

United States.—Fowler *v.* Rapley, 15 Wall. 328, 21 L. ed. 35.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1061.

In South Carolina distress for rent was abolished in 1868, but was restored by the act of June 8, 1877. *Ex p.* Knobeloch, 26

demise; in other words, the relation of landlord and tenant must exist;[5] but the fact that the landlord permits another than the tenant to use and occupy the premises will not prevent him from distraining for the rent unpaid.[6] Where a party enters into possession of land under an agreement for a lease at a given rent, the landlord cannot distrain for non-payment; there must be an actual demise,[7] but it need not necessarily be by a formal lease. The tenancy may be implied from the circumstances.[8] A landlord may distrain upon a lease by parol, which would be invalid by the statute of frauds, where he retains the reversion.[9] If the demise is for an illegal purpose a distress will not lie.[10]

c. Necessity of Certain or Fixed Rent — (i) *In General.* A distress for rent will not lie unless there is an express contract for a certain rent.[11] It is not neces-

S. C. 331, 2 S. E. 612; Mobley *v.* Dent, 10 S. C. 471.

5. *Georgia.*— Sims *v.* Price, 123 Ga. 97, 50 S. E. 960; Cohen *v.* Broughton, 54 Ga. 296; Hale *v.* Burton, Dudley 105.

Illinois.— Murr *v.* Glover, 34 Ill. App. 373; Reed *v.* Bartlett, 9 Ill. App. 267; Johnson *v.* Prussing, 4 Ill. App. 575.

Mississippi.— Paxton *v.* Kennedy, 70 Miss. 865, 12 So. 546.

New York.— Moulton *v.* Norton, 5 Barb. 286.

Pennsylvania.— Grier *v.* McAlarney, 148 Pa. St. 587, 24 Atl. 119 (holding that an agreement by the executor of the deceased owner of a part interest in certain lands, and an intending lessee, which simply refers to and ratifies the terms of the previous lease made by the heirs of the deceased to a third party, and specifying certain changes therein, is not a lease, and does not justify a distress for rent by such executor); Helser *v.* Pott, 3 Pa. St. 179; Read *v.* Kitchen, 1 Am. L. Reg. 635; Manuel *v.* Reath, 5 Phila. 11.

South Carolina.— McKenzie *v.* Roper, 2 Strobh. 306 (holding that where the purchaser and seller of land agree that the deed shall take effect from a date anterior to the delivery, and that the rent which accrues after such date shall go to the purchaser, the purchaser has, notwithstanding, no right to make a distress before the actual delivery of the deed); Reid *v.* Stoney, 1 Strobh. 182.

England.— Selby *v.* Greaves, L. R. 3 C. P. 594, 37 L. J. C. P. 251, 19 L. T. Rep. N. S. 186, 16 Wkly. Rep. 1127; Dunk *v.* Hunter, 5 B. & Ald. 322, 24 Rev. Rep. 390, 7 E. C. L. 181; Hancock *v.* Austin, 14 C. B. N. S. 634, 10 Jur. N. S. 77, 32 L. J. C. P. 252, 8 L. T. Rep. N. S. 429, 11 Wkly. Rep. 833, 108 E. C. L. 634.

Canada.— Lowther *v.* Johnson, 34 Can. L. J. N. S. 430.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1063.

6. Willingham *v.* Faircloth, 52 Ga. 126.

Transfer by lessee.— Therefore a lessee for years, who transfers all his interest to a third person, whether by words of lease or assignment, and with a reservation of the rent, cannot distrain for the rent when due, unless the instrument by which the transfer is effected contains an express power of distress. Manuel *v.* Reath, 5 Phila. (Pa.) 11; Preece *v.* Corrie, 5 Bing. 24, 6 L. J. C. P. O. S. 205, 2 M. & P. 57, 30 Rev. Rep. 536, 15 E. C. L. 453; Parmenter *v.* Webber, 2 Moore C. P. 656, 8 Taunt. 593, 20 Rev. Rep. 575, 4 E. C. L. 293.

7. Hegan *v.* Johnson, 2 Taunt. 148. See also Moulton *v.* Norton, 5 Barb. (N. Y.) 286; Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660.

8. Sherwood *v.* Phillips, 13 Wend. (N. Y.) 479, holding that where a tenant enters under a demise for two years and continues in possession of the demised premises for the period of nine years the landlord may by one distress distrain for the rent accrued during the whole time. In such a case the right of the landlord to distrain is just as perfect as if there had been a written lease for nine years. Knight *v.* Benett, 3 Bing. 361, 4 L. J. C. P. O. S. 94, 11 Moore C. P. 222, 28 Rev. Rep. 640, 11 E. C. L. 181.

For example, if the agreement for a lease makes provision for the status of the parties during the interval before the lease is executed, the landlord may distrain. Anderson *v.* Midland R. Co., 3 E. & E. 614, 7 Jur. N. S. 411, 30 L. J. Q. B. 94, 3 L. T. Rep. N. S. 809, 107 E. C. L. 614.

9. Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660; Cornell *v.* Lamb, 2 Cow. (N. Y.) 652.

10. Gallagher *v.* McQueen, 35 N. Brunsw. 198.

11. *Illinois.*— O'Hara *v.* Jones, 46 Ill. 288; Hatfield *v.* Fullerton, 24 Ill. 278; Johnson *v.* Prussing, 4 Ill. App. 575.

Indiana.— Bowser *v.* Scott, 8 Blackf. 86; Clark *v.* Fraley, 3 Blackf. 264.

Kentucky.— Roberts *v.* Tennell, 4 J. J. Marsh. 160.

Mississippi.— Briscoe *v.* McElween, 43 Miss. 556.

New Jersey.— Melick *v.* Benedict, 43 N. J. L. 425; New Jersey Central Bank *v.* Peterson, 24 N. J. L. 668.

Pennsylvania.— Scott *v.* Fuller, 3 Penr. & W. 55; Wells *v.* Hornish, 3 Penr. & W. 30; Crier *v.* Cowan, Add. 347.

South Carolina.— Stewart *v.* Gregg, 42 S. C. 392, 20 S. E. 193; Reeves *v.* McKenzie, 1 Bailey 497; Marshall *v.* Giles, 3 Brev. 488; Benoist *v.* Sollee, 1 Brev. 251; Smith *v.* Charleston Dist., 1 Bay 443; Jacks *v.* Smith, 1 Bay 315.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,710, 2 Cranch C. C. 438.

sary, however, that there should be a fixed and certain amount of rent due; but it is sufficient that the rent be capable of being made fixed and certain by calculation. The maxim "*Id certum est quod certum reddi potest*" applies.[12]

(II) *Medium of Payment.* To give a right to the remedy of distress it is not necessary that rent should be reserved in money. Rent payable in anything susceptible of valuation is a subject of distress.[13] Thus where rent is payable in services,[14] improvements,[15] or in specific produce,[16] the landlord has the right to distrain, subject only to the rule as previously stated that the value thereof must be fixed and certain or capable of being made so by calculation.[17]

d. As Affected by Time of Accrual of Rent. As a general rule distress for rent cannot be made before the rent is due;[18] and, if it is made before, the distrainor is a trespasser, and the defect will not be cured, although the proceedings

England.— Mechelen *v.* Wallace, 7 A. & E. 54 note, 34 E. C. L. 53, 6 N. & M. 316, 36 E. C. L. 639; Dunk *v.* Hunter, 5 B. & Ald. 322, 24 Rev. Rep. 390, 7 E. C. L. 181; Regnart *v.* Porter, 7 Bing. 451, 9 L. J. C. P. O. S. 168, 5 M. & P. 370, 20 E. C. L. 204; Flesher *v.* Trotman, 6 L. T. Rep. N. S. 218.

Canada.— Klinck *v.* Ontario Industrial Loan, etc., Co., 16 Ont. 562.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1064.

Two reasons for this certainty are given in the books: (1) That as at common law, goods taken by distress could not be sold, but were retained as pledges for payment of money or performance of services, the tenant must know the amount to be rendered, otherwise he could not tender payment or performance in discharge of the pledges taken for rent; (2) to enable the landlord to recover damages before the jury for non-payment or non-performance by the tenant. Melick *v.* Benedict, 43 N. J. L. 425; Wells *v.* Hornish, 3 Penr. & W. (Pa.) 30.

In Florida the act of March 11, 1879, authorizing distraint for rent, does not change the rule of the common law that, to authorize a distraint for rent, there must have been an express contract for a fixed rent. Smoot *v.* Strauss, 21 Fla. 611.

Under the Georgia statute nothing is required except that the rent be due. It is not necessary that it be for a sum certain. Scruggs *v.* Gibson, 40 Ga. 511.

Payment in state scrip.— A contract to pay rent in Indiana scrip is a promise to pay in property the value of which is fluctuating and uncertain, and hence distress will not lie. Purcell *v.* Thomas, 7 Blackf. (Ind.) 306.

If a rent certain is reserved, subject to a condition to be performed by the tenant, the landlord may distrain notwithstanding the condition unless the tenant shows a performance. Reeves *v.* McKenzie, 1 Bailey (S. C.) 497.

12. *Georgia.*— Wilkins *v.* Taliafero, 52 Ga. 208.

Minnesota.— Dutcher *v.* Culver, 24 Minn. 584.

Mississippi.— Thrasher *v.* Gillespie, 52 Miss. 840; Brooks *v.* Cunningham, 49 Miss. 108.

New Jersey.— Melick *v.* Benedict, 43 N. J. L. 425, holding that one-half the profits of coal land reserved as rent may be distrained for, if the amount appears in books of account kept by agreement of the parties.

New York.— Smith *v.* Fyler, 2 Hill 648; Valentine *v.* Jackson, 9 Wend. 302.

Pennsylvania.— Detwiler *v.* Cox, 75 Pa. St. 200; Fry *v.* Jones, 2 Rawle 11, holding that on the demise of a grist-mill, the lessee to render one third of the toll for rent, a distress may issue.

England.— Selby *v.* Greaves, L. R. 3 C. P. 594, 37 L. J. C. P. 251, 19 L. T. Rep. N. S. 186, 16 Wkly. Rep. 1127; Daniel *v.* Gracie, 6 Q. B. 145, 8 Jur. 708, 13 L. J. Q. B. 309, 51 E. C. L. 145.

Canada.— Dick *v.* Winkler, 12 Manitoba 624.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1064.

13. Fraser *v.* Davie, 5 Rich. (S. C.) 59. *Contra*, Myers *v.* Mayfield, 7 Bush (Ky.) 212, where it was held that distress lies only for rent reserved in money.

Rent payable in iron may be recovered by distress. Owens *v.* Conner, 1 Bibb (Ky.) 605; Jones *v.* Gundrim, 3 Watts & S. (Pa.) 531.

14. Smith *v.* Colson, 10 Johns. (N. Y.) 91; Fry *v.* Jones, 2 Rawle (Pa.) 11; Bagge *v.* Mawby, 8 Exch. 641, 22 L. J. Exch. 236, 1 Wkly. Rep. 357.

15. Fountain *v.* Whitehead, 119 Ga. 241, 46 S. E. 104.

16. Rosenstein *v.* Forester, 57 Ga. 94; Wilkins *v.* Taliafero, 52 Ga. 208; Brooks *v.* Cunningham, 49 Miss. 108; Brown *v.* Adams, 35 Tex. 447; Dick *v.* Winkler, 12 Manitoba 624.

17. See *supra*, note 12.

18. *Delaware.*—Weber *v.* Vernon, 2 Pennew. 359, 45 Atl. 537.

Illinois.— Joliet First National Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955; Harms *v.* Solem, 79 Ill. 460; Dauchy Iron Works *v.* McKim Gasket, etc., Co., 85 Ill. App. 584.

Kentucky.— Myers *v.* Mayfield, 7 Bush 212; Fry *v.* Breckinridge, 7 B. Mon. 31.

Maryland.— Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496.

Mississippi.— Bloodworth *v.* Stevens, 51 Miss. 475.

New Jersey.— Evans *v.* Herring, 27 N. J. L. 243.

of appraisement and sale take place after the rent becomes due.[19] Where, by the terms of the lease or contract of renting, the rent becomes due before the expiration of the term, the landlord is authorized to distrain when it is due and is under no obligation to wait until the expiration of the term;[20] and this is true, although the landlord knows that an execution is about to be put in at the suit of the judgment creditor.[21]

e. Removal of Property as Giving Right of Immediate Distress. It is sometimes provided by statute that a tenant removing or attempting to remove from the premises any portion of the crops before the rent is due, without his landlord's consent, is subject to distress immediately, no matter what may be the purpose or intent of such removal.[22] The fact that the tenant still has enough of the crops on the premises set apart to pay the rent will not defeat the landlord's right to the distress warrant;[23] the question whether the lessor is sufficiently secured by that which is left being for him to determine.[24] Nor will it affect

Pennsylvania.— Wells *v.* Hornish, 3 Penr. & W. 30.

South Carolina.— O'Farrell *v.* Nance, 2 Hill 484 (holding that where the sheriff, as the agent of the mortgagee, in foreclosing a mortgage, and as the bailiff of the landlord under a warrant of distress, sells a chattel of the tenant before the rent is due, the landlord is not entitled to any of the proceeds of the sale); Bailey *v.* Wright, 3 McCord 484.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1068.

Although a distress warrant alleges that the debt is past due, if the evidence shows that the debt is not due, the action will be dismissed. Scott *v.* Russell, 72 Ga. 35.

An executor has the right of distress for rent, only when the rent fell due before his testator's death. Wright *v.* Williams, 5 Cow. (N. Y.) 338.

19. Evans *v.* Herring, 27 N. J. L. 243.

20. Atkins *v.* Byrnes, 71 Ill. 326; Conway *v.* Starkweather, 1 Den. (N. Y.) 113; London, etc., Loan, etc., Co. *v.* London, etc., R. Co., [1893] 2 Q. B. 49, 62 L. J. Q. B. 370, 69 L. T. Rep. N. S. 320, 5 Reports 425, 41 Wkly. Rep. 670; Clarke *v.* Holford, 2 C. & K. 540, 61 E. C. L. 540; Williams *v.* Holmes, 8 Exch. 861, 22 L. J. Exch. 283, 1 Wkly. Rep. 391; Witty *v.* Williams, 10 L. T. Rep. N. S. 457, 12 Wkly. Rep. 755; Buckley *v.* Taylor, 2 T. R. 600.

21. Harrison *v.* Barry, 7 Price 690, 21 Rev. Rep. 781.

22. Daniel *v.* Harris, 84 Ga. 479, 10 S. E. 1013; James *v.* Benjamin, 72 Ga. 185; Rosenstein *v.* Forester, 57 Ga. 94; Allen *v.* Brunner, (Tex. Civ. App. 1903) 75 S. W. 821; Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570; Du Bose *v.* Battle, (Tex. Civ. App. 1896) 34 S. W. 148; Holt *v.* Miller, (Tex. Civ. App. 1895) 32 S. W. 823; Neinast *v.* Doeckle, 1 Tex. App. Civ. Cas. § 219. See also Young *v.* Smith, 29 U. C. C. P. 109. But see Burchard *v.* Rees, 1 Whart. (Pa.) 377.

The fact that the landlord and tenant have agreed in writing as to the method of dividing the crop for the purpose of paying the rent does not preclude the landlord from having a distress warrant, if he finds the property is being removed from the premises for the purpose of evading payment of rent. Tucker *v.* Hasson, 32 Tex. 536.

What constitutes removal or sale.— Carrying cotton to the gin for the purpose of being baled, and then returning it to the premises, thereby subjecting it to the control of the landlord, and the mere use by the tenant of a reasonable amount of feed produced upon the premises for the purpose of feeding the stock used in producing the crop, is not such a removal or appropriation of the products produced upon the rented premises as will justify the issuance or levy of a distress warrant. But the removal of cotton and the sale of the same, the proceeds of which are appropriated and used by the tenant in part for his individual purposes, and in part for paying off hands who assisted in picking the cotton, such appropriation being without the consent of the landlord, constitutes a wrongful and unauthorized removal, within the meaning of the law. Riggs *v.* Gray, 31 Tex. Civ. App. 268, 72 S. W. 101. Under Ill. Rev. St. c. 80, § 34, providing that if a tenant, without the consent of his landlord, shall sell or remove such part or portion of the crops raised thereon as shall endanger the landlord's lien, the landlord may institute proceedings by distress before the rent is due, the sale contemplated is an absolute sale, which carries with it the immediate right of possession and removal from the demised premises and one in which such right of removal is, or is about to be, effected. Hill *v.* Coats, 109 Ill. App. 266. A distress warrant is sued out with probable cause, where the tenant is removing cotton from the rented premises, has sold some of it, and is about to sell more when the warrant is issued. Neinast *v.* Doeckle, 1 Tex. App. Civ. Cas. § 219.

Feeding crops to stock, so as to place them beyond the reach of the landlord's lien for rent, is a removal, within the spirit and meaning of the statute. Hopkins *v.* Wood, 79 Ill. App. 484.

23. Watson *v.* Cox, 2 Tex. App. Civ. Cas. § 277.

24. Millot *v.* Conrad, 112 La. 928, 36 So. 807.

the landlord's right if the tenant gives notice that he intends to leave; he cannot by such means deprive the landlord of his right to distress.[25] The right to distrain for rent before maturity, being conferred by statute, must be strictly construed,[26] and the landlord cannot distrain for rent before due, unless he makes affidavit that the tenant is seeking to remove his goods.[27] The time of distraining may also be enlarged by agreement of the parties.[28]

f. Effect of Taking Security For Rent. The execution of a promissory note for rent due, and a chattel mortgage to secure its payment, does not operate as a waiver of the right to enforce payment by distress.[29] It merely suspends the remedy by distress until it becomes due,[30] after which date the landlord may distrain, even though he has negotiated the note, provided he takes it up at maturity.[31] So the right to distrain for rent is not lost by acceptance of an order on a third person, who holds no funds of the makers,[32] or by reserving in the lease a lien on all the tenant's property for the rent.[33] But where a landlord substitutes for crops already due for rent the promissory note of his tenant, he has no right to distrain for such note.[34]

g. Effect of Renewal or Extension of Lease. Where the holding over is not under the old tenancy, but under a new and distinct demise, commencing at the expiration of the first, the landlord cannot distrain under the new tenancy for arrears of rent due in respect of the old tenancy.[35] So the property of a tenant, holding by a renewed lease, is not subject to be distrained by the landlord after the payment of arrears of rent for the previous year, at least if a third person has acquired an interest in the property.[36]

h. Effect of Termination of Relation — (i) *At Common Law.* At the common law distress for rent could not be made after the termination of the relation of landlord and tenant.[37]

25. Hare *v.* Stegall, 60 Ill. 380.

A mere unexecuted intent to remove, without the effort to carry it into effect, is not an effort to remove in any sense of the term, and an actual removal will not relate back to the time of the declaration of intention to remove so as to sustain a warrant of distress issued at that time. Klein *v.* McFarland, 5 Pa. Super. Ct. 110, 41 Wkly. Notes Cas. 38.

26. Hill *v.* Coats, 109 Ill. App. 266.

27. Anders *v.* Blount, 67 Ga. 41.

28. Dinner *v.* Andrews, 10 Pa. Dist. 221.

Such agreement applies only to removal during life of tenant.—An agreement that goods shall be liable for distress for thirty days after removal from the premises applies only to a removal during the life of the tenant. Gandy *v.* Dickson, 3 Pa. Dist. 411.

29. *Illinois.*—Atkins *v.* Byrnes, 71 Ill. 326; Cunnea *v.* Williams, 11 Ill. App. 72.

Maryland.— Giles *v.* Ebsworth, 10 Md. 333.

New York.— Cornell *v.* Lamb, 20 Johns. 407.

Pennsylvania.— Snyder *v.* Kunkleman, 3 Penr. & W. 487; Kendig *v.* Kendig, 3 Pittsb. 287.

South Carolina.— Bailey *v.* Wright, 3 McCord 484.

United States.— Alexander *v.* Turner, 1 Fed. Cas. No. 176, 1 Cranch C. C. 86; Griffin *v.* Woodward, 11 Fed. Cas. No. 5,818, 4 Cranch C. C. 709.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1070.

Compare In re Harpur's Cycle Fittings Co., [1900] 2 Ch. 731, 69 L. J. Ch. 841, 83 L. T. Rep. N. S. 407, holding that where a landlord has accepted from a company, who are not assignees of the lease, but are in occupation of the demised premises, a bill of exchange in payment of overdue rent, and the bill is dishonored, and subsequently the company goes into voluntary liquidation, the landlord, having a right of proof in the liquidation, is thereby disentitled to distrain.

Agreement to wait until note dishonored.— The mere taking of a note for rent is not a waiver of the right to distrain, but it is otherwise where the landlord expressly agrees to wait until it has been dishonored. Simpson *v.* Howitt, 39 U. C. Q. B. 610.

30. Giles *v.* Ebsworth, 10 Md. 333; Fife *v.* Irving, 1 Rich. (S. C.) 226; Fiske *v.* Judge, 2 Speers (S. C.) 436, 42 Am. Dec. 382; Colpitts *v.* McCullough, 32 Nova Scotia 502.

31. Giles *v.* Ebsworth, 10 Md. 333.

32. Printems *v.* Helfried, 1 Nott & M. (S. C.) 187.

33. O'Hara *v.* Jones, 46 Ill. 288.

34. Warren *v.* Forney, 13 Serg. & R. (Pa.) 52.

35. Webber *v.* Shearman, 2 Den. (N. Y.) 362 [*reversing* 6 Hill 20]; Bell *v.* Potter, 6 Hill (N. Y.) 497; Wilkinson *v.* Peel, [1895] 1 Q. B. 516, 64 L. J. Q. B. 178, 72 L. T. Rep. N. S. 151, 15 Reports 213, 43 Wkly. Rep. 302.

36. Beltzhoover *v.* Waltman, 1 Watts & S. (Pa.) 416.

37. *Georgia.*— Hale *v.* Burton, Dudley 105.

Illinois.— Werner *v.* Ropiequet, 44 Ill. 522; Uhl *v.* Dighton, 25 Ill. 154.

(II) *Under Statutes.* To obviate this difficulty of the common-law rule a statute was passed,[38] which provided that the landlord might distrain at any time within six months after the expiration of the lease, provided the interest of the landlord and the possession of the tenant both continued to exist.[39] This statute applies only to those cases in which the tenancy is determined by lapse of time, or perhaps by notice, and not to those cases where the tenancy is terminated by the tenant's wrongful disclaimer,[40] or by forfeiture.[41] Where the landlord's estate in the demised premises has ceased,[42] or the tenant surrenders the premises to the landlord, the right of distress does not continue,[43] and although the lessee continues bound for the rent by an express agreement in the deed of surrender, it is a personal responsibility founded on the agreement, and the landlord has no right of distress.[44] The continuance of possession need not be tortious,[45] or of

New York.— Bukup *v.* Valentine, 19 Wend. 554; Williams *v.* Terboss, 2 Wend. 148.

Pennsylvania.— Gandy *v.* Dickson, 3 Pa. Dist. 411.

England.— Williams *v.* Stiven, 9 Q. B. 14, 10 Jur. 804, 15 L. J. Q. B. 321, 58 E. C. L. 12; Turner *v.* Barnes, 2 B. & S. 435, 9 Jur. N. S. 199, 31 L. J. Q. B. 170, 6 L. T. Rep. N. S. 418, 10 Wkly Rep. 561, 110 E. C. L. 435; Stanfill *v.* Hickes, 1 Ld. Raym. 280; Poole *v.* Longuevill, 2 Saund. 284 note 2; Duppa *v.* Mayo, 1 Saund. 287 note 16.

Canada.— Griffith *v.* Brown, 21 U. C. C. P. 12; Soper *v.* Brown, 4 U. C. Q. B. O. S. 103.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1072.

Contract rescinded by a decree in chancery is insufficient to sustain a distress warrant. Roberts *v.* Tennell, 4 J. J. Marsh. (Ky.) 160.

A lease is not determined at law by a contract by the lessee to purchase the reversion; but in equity a landlord's right to restrain is suspended pending completion of the contract, so long as the contract is subsisting and enforceable by action for specific performance; if, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain. Ellis *v.* Wright, 76 L. T. Rep. N. S. 522.

38. St. 8 Anne, c. 14, § 6.

39. *Illinois.*—Werner *v.* Ropiequet, 44 Ill. 522.

Kentucky.— Lougee *v.* Colton, 2 B. Mon. 115.

Mississippi.— Patty *v.* Bogle, 59 Miss. 491.

New York.— Webber *v.* Shearman, 2 Den. 362; Bell *v.* Potter, 6 Hill 497; Bukup *v.* Valentine, 19 Wend. 554; Williams *v.* Terboss, 2 Wend. 148; Burr *v.* Van Buskirk, 3 Cow. 263.

Pennsylvania.— Gandy *v.* Dickson, 3 Pa. Dist. 411.

South Carolina.— Talvande *v.* Cripps, 3 McCord 147.

England.— Gray *v.* Stait, 11 Q. B. D. 668, 48 J. P. 86, 52 L. J. Q. B. 412, 49 L. T. Rep. N. S. 288, 31 Wkly. Rep. 662; Cox *v.* Leigh, L. R. 9 Q. B. 333, 43 L. J. Q. B. 123, 30 L. T. Rep. N. S. 494, 22 Wkly. Rep. 730; Williams *v.* Stiven, 9 Q. B. 14, 10 Jur. 804, 15 L. J. Q. B. 321, 58 E. C. L. 12; Turner *v.* Barnes, 2 B. & S. 435, 9 Jur. N. S. 199, 31 L. J. Q. B. 170, 6 L. T. Rep. N. S. 418, 10 Wkly. Rep. 561, 110 E. C. L. 435; Poole *v.* Longuevill, 2 Saund. 284 note 2; Duppa *v.* Mayo, 1 Saund. 287 note 16.

Canada.— Klinck *v.* Ontario Industrial Loan, etc., Co., 16 Ont. 562; Griffith *v.* Brown, 21 U. C. C. P. 12; Laing *v.* Ontario Loan, etc., Co., 46 U. C. Q. B. 114; Strathey *v.* Crooks, 6 U. C. Q. B. O. S. 587; Soper *v.* Brown, 4 U. C. Q. B. O. S. 103.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1072.

In Pennsylvania the right to distress after the termination of the term is without limitation as to time, provided it be during the continuance of defendant's title. Lewis' Appeal, 66 Pa. St. 312; Moss' Appeal, 35 Pa. St. 162; Clifford *v.* Beems, 3 Watts 246. See also Whiting *v.* Lake, 91 Pa. St. 349; Lichtenthaler *v.* Thompson, 13 Serg. & R. 157, 15 Am. Dec. 581.

In Texas if rent is due and the lien subsists the distress is authorized whether the relation of landlord and tenant has ceased or not. Meyer *v.* Oliver, 61 Tex. 584.

Effect of manner of terminating tenancy.— This statute does not apply to cases where the tenancy is put an end to by the tenant's wrongful disclaimer, but only to those cases in which the tenancy is determined by lapse of time or perhaps by notice. Doe *v.* Williams, 7 C. & P. 322, 32 E. C. L. 635.

40. Doe *v.* Williams, 7 C. & P. 322, 32 E. C. L. 635.

41. Baker *v.* Atkinson, 11 Ont. 735. But see Griffith *v.* Brown, 21 U. C. C. P. 12.

42. Walbridge *v.* Pruden, 102 Pa. St. 1.

43. Dailey *v.* Grimes, 27 Md. 440; Williams *v.* Terboss, 2 Wend. (N. Y.) 148; Taylerson *v.* Peters, 7 A. & E. 110, 1 Jur. 497, 2 N. & P. 622, W. W. & D. 644, 34 E. C. L. 80.

44. Bain *v.* Clark, 10 Johns. (N. Y.) 424; Greider's Appeal, 5 Pa. St. 422.

45. Nuttall *v.* Staunton, 4 B. & C. 51, 6 D. & R. 155, 3 L. J. K. B. O. S. 135, 28 Rev. Rep. 207, 10 E. C. L. 477.

A custom for a tenant to leave his way-going crop on the premises for a certain time after the tenancy has expired, and after he has left the premises, is good, and the landlord may distrain the crop so left after six months have expired from the termination of the term. Knight *v.* Benett, 3 Bing. 364, 4 L. J. C. P. O. S. 95, 11 Moore C. P. 227, 28 Rev. Rep. 643, 11 E. C. L. 182; Beavan *v.* Delahay, 1 H. Bl. 5, 2 Rev. Rep. 696.

the whole premises, to entitle the landlord to distrain.[46] A surrender of demised premises, after a distress for rent due, will not render the distress unlawful;[47] nor is it a defense that the relation of landlord and tenant ceased before the warrant was sued out, if such relation existed when the obligation for rent was incurred.[48]

i. Effect of Death of Tenant. If a tenant dies intestate, leaving an unexpired term, there is not, before the appointment of an administrator, any person representing the decedent between whom and the lessor privity of estate can be said to exist, and hence the right of distraint must at least be suspended.[49] Nor is the deceased tenant's insolvency a ground for distraint.[50] If, however, a tenant dies, leaving an unexpired term, which passes to his executor or administrator, the requisite privity between the lessor and such personal representative exists, and the goods in his hands remaining on the demised premises may be distrained for rent accrued, either before or after the death of the tenant.[51] But if the tenancy were at will, and so terminated by the death of the tenant, the right to distress at common law was gone, and was not preserved by the statute of Anne.[52] A landlord, by accepting administration of his tenant's estate, waives his right to distrain.[53]

j. Right of Lessee to Distrain Against Assignee or Subtenant. A lessee for years, who transfers all his interest to a third person, whether by words of lease or assignment, and with a reservation of rent, cannot distrain for the rent when due unless the instrument by which the transfer is effected contains an express power of distress;[54] but if the lease is from year to year the rule is otherwise.[55]

3. Extinguishment of Right to Distrain — a. By Agreement. Distress is not such an inseparable incident of rent as not to be capable of suspension, and an agreement by a landlord not to distrain may be enforced.[56] An intention to take

46. Nuttall *v.* Staunton, 4 B. & C. 51, 6 D. & R. 155, 3 L. J. K. B. O. S. 135, 28 Rev. Rep. 207, 10 E. C. L. 477.

Surrender of part of premises.— The right to distrain is not destroyed by a surrender of part of the premises leased, but remains as to the residue, as long as the relation of landlord and tenant exists. Peters *v.* Newkirk, 6 Cow. (N. Y.) 103.

47. Nichols *v.* Dusenbury, 2 N. Y. 283.

48. Tyner *v.* Slappey, 74 Ga. 364.

49. Hughs *v.* Sebre, 2 A. K. Marsh. (Ky.) 227; Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020; Gandy *v.* Dickson, 3 Pa. Dist. 411; Hoskins *v.* Houston, 2 Pa. L. J. Rep. (Pa.) 489. See also Mickle *v.* Miles, 1 Grant (Pa.) 320; Jaquett's Estate, 13 Lanc. Bar (Pa.) 13. *Compare* Keller *v.* Weber, 27 Md. 660, holding that a distress for rent due from a deceased tenant may be made on the premises, so long as they are in possession of any one claiming by, from, or under him, and although letters of administration have not been granted.

50. Gandy *v.* Dickson, 3 Pa. Dist. 411.

51. *Indiana.*— Merkle *v.* Bolles, 6 Blackf. 288; Merkle *v.* O'Neal, 5 Blackf. 289.

New Jersey.— Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020.

New York.— Hovey *v.* Smith, 1 Barb. 372.

Pennsylvania.— Gandy *v.* Dickson, 3 Pa. Dist. 411.

United States.— See McLaughlin *v.* Riggs, 16 Fed. Cas. No. 8,872, 1 Cranch C. C. 410.

England.— Braithwaite *v.* Cooksey, 1 H. Bl. 465, 2 Rev. Rep. 807.

52. Turner *v.* Barnes, 2 B. & S. 435, 9 Jur. N. S. 199, 31 L. J. Q. B. 170, 6 L. T. Rep. N. S. 418, 10 Wkly. Rep. 561, 110 E. C. L. 435. See 8 Anne, c. 14, §§ 6, 7.

53. Hovey *v.* Smith, 1 Barb. (N. Y.) 372.

54. Prescott *v.* De Forest, 16 Johns. (N. Y.) 159; Ege *v.* Ege, 5 Watts (Pa.) 134; Manuel *v.* Reath, 5 Phila. (Pa.) 11; Ragsdale *v.* Estis, 8 Rich. (S. C.) 429; Preece *v.* Corrie, 5 Bing. 24, 6 L. J. C. P. O. S. 205, 2 M. & P. 57, 30 Rev. Rep. 536, 15 E. C. L. 453; Parmenter *v.* Webber, 2 Moore C. P. 656, 8 Taunt. 593, 20 Rev. Rep. 575, 4 E. C. L. 293. But see Harrison *v.* Guill, 46 Ga. 427.

The technical reason seems to be the want of privity of estate between them; but a more practical reason is found in the circumstance that if allowed the landlord might be deprived of the means of distress. If the lessee may distrain, so may the sublessee on his lessee, and so on *ad infinitum* and thus the tenant in possession be subjected to infinite distress. Ragsdale *v.* Estis, 8 Rich. (S. C.) 429.

55. Ege *v.* Ege, 5 Watts (Pa.) 134.

56. Giles *v.* Spencer, 3 C. B. N. S. 244, 3 Jur. N. S. 820, 26 L. J. C. P. 237, 5 Wkly. Rep. 883, 91 E. C. L. 244. See also Crone *v.* Bane, 48 Ill. App. 287; Horsford *v.* Webster, 1 C. M. & R. 696, 1 Gale 1, 4 L. J. Exch. 100, 5 Tyrw. 409; Fraser *v.* Wallace, 11 Nova Scotia 337.

If the landlord by deed releases his tenant from the payment of all rent under the lease he cannot distrain. Hayward *v.* Thacker, 31 U. C. Q. B. 427.

An agreement to take interest on rent in arrear does not take away the right to the distress. Skerry *v.* Preston, 2 Chit. 245, 18 E. C. L. 614.

away the right of distress should, however, be clearly shown,[57] and if the condition on which the agreement hinged is not performed, the right to distrain is not relinquished.[58]

b. By Eviction — (I) *By Landlord.* If a landlord evicts his tenant from the whole or a part of the premises he cannot distrain for rent.[59]

(II) *By Title Paramount.* So after total eviction by title paramount a landlord has no right to distrain.[60] In cases in which the lessor has made a prior lease of part of the demised premises, this distinction seems to exist: Where the later lessee does not receive possession of such premises, because of the adverse possession thereof by the former lessee, then the second lease as to such part is void, and the lessor cannot distrain for a proportion of the rent, although he may recover the value of the remainder of the premises, in an action for use and occupation;[61] but where the second lessee receives possession under the lease to him of the whole demised premises, and a part thereof is afterward recovered of him by the first lessee or his assigns, it will be considered as recovered under title paramount, and the rent will be apportioned, and the portion due for the balance of the premises remaining in the occupancy of the second lessee may be distrained for.[62]

c. By Tender of Rent. A tender of rent before a distress for rent is sued out is a defense,[63] unless there has been a subsequent demand and refusal.[64] Where the rent is payable on the land, it is a good defense for the tenant that he was ready on the land to pay, but the lessor was not there to receive the rent.[65] But a personal tender of rent, although it be not on the land, is good, and renders a

An agreement that the landlord may re-enter if the rent be not paid within a certain period does not take away the right of distress. Smith *v.* Meanor, 16 Serg. & R. (Pa.) 375.

Agreement to accept certain sum in full.— A parol assignee of a tenant is liable only during the time he continues upon the premises; and hence a promise by the landlord, in order to secure his continued tenancy, in consideration of his remaining in possession, that he would accept a certain sum paid by him in full of the accrued rent, is binding, and he cannot thereafter distrain for the sum so released. Bamsdall *v.* Guild, 32 Leg. Int. (Pa.) 152.

Effect of provision fixing amount of lien.— A provision in a lease fixing the amount for which the landlord shall have a lien for rent on the crops applies only to the lien given him under the agricultural lien statute, and does not deprive him of his general right as landlord, independently of statute, to distrain for rent due. Parrott *v.* Malpass, 49 S. C. 4, 26 S. E. 884.

57. Doe *v.* Wilson, 5 B. & Ald. 363, 24 Rev. Rep. 423, 7 E. C. L. 202.

It is a question for the jury whether the understanding of the parties was that the right of distress should be suspended. Green *v.* Kehoe, 5 N. Brunsw. 494.

58. Welsh *v.* Rose, 6 Bing. 638, 8 L. J. C. P. O. S. 246, 4 M. & P. 484, 19 E. C. L. 288.

59. Wade *v.* Halligan, 16 Ill. 507; Lewis *v.* Payn, 4 Wend. (N. Y.) 423; Baker *v.* Jeffers, 2 Fed. Cas. No. 772, 4 Cranch C. C. 707. See also Bickle *v.* Beatty, 17 U. C. Q. B. 465.

Termination of liability for rent see *supra*, VIII, A, 3, l.

After treating an occupier of premises as a trespasser, a landlord cannot distrain for rent as upon a contract between lessor and lessee. Bridges *v.* Smyth, 5 Bing. 410, 7 L. J. C. P. O. S. 143, 2 M. & P. 470, 30 Rev. Rep. 681, 15 E. C. L. 645.

An eviction in fact or in effect, which destroys and renders the premises valueless, may be set up in defense to a distress for rent, and this extends to such acts of disturbance as effect the same thing. Lynch *v.* Baldwin, 69 Ill. 210; Wade *v.* Halligan, 16 Ill. 507.

What constitutes eviction see *supra*, VII, F, 1.

60. Hopcraft *v.* Keys, 9 Bing. 613, 2 Moore & S. 760, 23 E. C. L. 728.

61. French *v.* Lawrence, 7 Hill (N. Y.) 519 [*affirming* 25 Wend. 443]; Tunis *v.* Grandy, 22 Gratt. (Va.) 109; Neale *v.* MacKenzie, 2 Gale 174, 6 L. J. Exch. 263, 1 M. & W. 747 [*reversing* 2 C. M. & R. 84, 4 L. J. Exch. 185, 5 Tyrw. 1106].

62. Tunis *v.* Grandy, 22 Gratt. (Va.) 109.

63. Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496; Davis *v.* Henry, 63 Miss. 110; Lyon *v.* Houk, 9 Watts (Pa.) 193 (holding that the purchaser of a lease who has taken possession may tender to the landlord the rent due and relieve himself and the lessee from all distress); Smith *v.* Goodwin, 4 B. & Ad. 413, 24 E. C. L. 185, 2 L. J. K. B. 192, 2 N. & M. 114, 28 E. C. L. 568, 1 N. & M. 371; Bennett *v.* Bayes, 5 H. & N. 391, 29 L. J. Exch. 224, 2 L. T. Rep. N. S. 156, 8 Wkly. Rep. 320.

64. Davis *v.* Henry, 63 Miss. 110.

65. Remsen *v.* Conklin, 18 Johns. (N. Y.) 447.

subsequent distress unlawful.[66] At common law, after a distress for rent had been impounded, tender of the rent and charges was too late;[67] but under the statute[68] a tender of the rent due, within five days after the distress has been impounded, is a good tender,[69] and an action lies against the lessor for selling the distress after such tender.[70]

d. By Breach of Covenants by Landlord. A landlord cannot distrain under the terms of a lease for rent where he has failed after notice to comply with his covenants,[71] unless the tenant enters into the occupancy of the premises.[72] If the tenant abandons the contract or subsequently accepts the premises under a new and different agreement, the lessor cannot distrain for rent under the first contract.[73]

e. By Recovery of Judgment. A recovery on a covenant for the payment of rent is not without actual satisfaction an extinguishment of the rent; and the lessor may notwithstanding such recovery distrain for the rent in arrears.[74]

f. By Statute of Limitations.[75] It has been said that there is no fixed period after which one may not distrain for rent in arrear,[76] This was the law of England until the statute[77] which fixed the period after which one may not distrain for rent in arrear as twenty years. The twenty years begins to run from the last payment of the rent.[78]

g. By Payment, Accord and Satisfaction, or Release. Since a landlord's right to distrain for rent depends upon his right to maintain an action therefor, if the rent has been paid, or there has been an accord and satisfaction, or a release, the right of distress is gone.[79]

4. Injunction[80] Restraining Distress. As a general rule an injunction to prevent a distraint for rent by a landlord will not be granted as plaintiff has a complete remedy at law.[81] But where the tenant has no adequate remedy at law, a court of chancery has jurisdiction to restrain a distress.[82] Under the English Supreme Court Judicature Act of 1873, an injunction will be granted only upon

66. Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728.

67. Ladd *v.* Thomas, 12 A. & E. 117, 4 Jur. 798, 9 L. J. Q. B. 345, 4 P. & D. 9, 40 E. C. L. 67; Ellis *v.* Taylor, 10 L. J. Exch. 462, 8 M. & W. 415.

68. St. 11 Geo. II, c. 19, § 10.

69. Johnson *v.* Upham, 2 E. & E. 250, 5 Jur. N. S. 681, 28 L. J. Q. B. 252, 105 E. C. L. 250.

70. Johnson *v.* Upham, 2 E. & E. 250, 5 Jur. N. S. 681, 28 L. J. Q. B. 252, 105 E. C. L. 250 [*overruling* Ellis *v.* Taylor, 10 L. J. Exch. 462, 8 M. & W. 415].

71. Block *v.* Dowling, 7 Pa. Dist. 261, 20 Pa. Co. Ct. 489.

72. Nichols *v.* Dusenbury, 2 N. Y. 283.

73. Spencer *v.* Burton, 5 Blackf. (Ind.) 57.

74. Brandt *v.* Hyatt, 7 Bush (Ky.) 363; Chipman *v.* Martin, 13 Johns. (N. Y.) 240; Bantleon *v.* Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430; Shetsline *v.* Keemle, 1 Ashm. (Pa.) 29.

In New York it is provided by 2 Rev. St. p. 500, § 2, that no distress shall be made for any rent for which a judgment shall have been recovered in a personal action. Bates *v.* Nellis, 5 Hill 651.

75. **Statutes of limitations** generally see Limitations of Actions.

76. Blake *v.* De Liesseline, 4 McCord (S. C.) 496. See also *Ex p.* Grove, 1 Atk. 104, 26 Eng. Reprint 69 (where twelve years' rent was distrained for); Braithwaite *v.* Cooksey, 1 H. Bl. 465, 2 Rev. Rep. 807 (where six years' rent was distrained for).

77. St. 3 & 4 Wm. IV, c. 27.

78. De Beauvoir *v.* Owen, 5 Exch. 166, 19 L. J. Exch. 177 [*affirming* 16 M. & W. 547].

79. Oliver *v.* Phelps, 20 N. J. L. 180.

80. **Injunction** generally see Injunctions.

81. Leopold *v.* Judson, 75 Ill. 536; Banks *v.* Busey, 34 Md. 437. See also Nichols *v.* Philips, 3 Anstr. 636; Aldis *v.* Fraser, 15 Beav. 215, 51 Eng. Reprint 519; Crow *v.* Wood, 13 Beav. 271, 51 Eng. Reprint 104; Hughes *v.* Ring, 1 Jac. & W. 392, 37 Eng. Reprint 425; Homan *v.* Moore, 4 Price 5, 18 Rev. Rep. 684; Walton *v.* Henry, 18 Ont. 620.

Excessive distress.— A court of equity will not interfere with the legal right of distraint by the owner of a reversion for the rent due him on a contract of tenancy, even where the distraint is for more money than is due as rent. Carter *v.* Salmon, 43 L. T. Rep. N. S. 490.

Against stranger.— A court of equity has no jurisdiction, at the suit of the owner of property, to restrain a mere stranger from vexatiously distraining on or otherwise molesting his tenants. Best *v.* Drake, 11 Hare 369, 45 Eng. Ch. 364, 68 Eng. Reprint 1318.

82. Ogden *v.* Duffy, 59 Ill. App. 120; Coit *v.* Horn, 1 Sandf. Ch. (N. Y.) 1 (holding that a court of chancery has jurisdiction to restrain an illegal distress for rent by perpetual injunction, on payment into court of the rent due, in a case where such rent has

such terms and conditions as the court shall think just under all the circumstances of the case.[83]

5. Set-Off and Counter-Claim[84] — a. In General. The policy of the common law was not to permit a set-off against a distress for rent, and courts of equity followed the law, and refused to relieve against the rule of law where the claim to set-off was founded on a legal demand.[85] In some jurisdictions this rule has been changed.[86] A distress warrant is of course not subject to be reduced by a set-off in no way connected with the rent contracted on the demised premises;[87] but a tenant may show that the landlord has violated the rent contract, and reduce the rent by so much as the damages occasioned thereby amount to.[88] Where the distress is for the rent of a particular period, the tenant cannot deduct damages resulting from the landlord's breach of covenant which accrued during previous periods;[89] but he may prove payment on account of rent for previous periods, and not merely such overpayments as refer to the present period.[90]

b. Ancillary Proceedings to Determine Set-Off. In Pennsylvania, under the act providing for defalcation of a tenant's claim against a landlord's claim for rent, a justice of the peace has no jurisdiction to determine the amount in arrears, but simply what amount of the tenant's claim against the landlord should be deducted from or set off against the rent.[91] If the claim of the tenant, as found by the justice, amounts to less than the rent, the landlord may submit and proceed for the collection of the balance; or if the claim is equal to the rent the rent is paid by

been tendered before any distress warrant issued, and the demised premises are underlet to numerous tenants, whose possession will be disturbed, and their goods subjected to levy, by such wrongful distress); Harris *v.* Canada Permanent Loan, etc., Co., 17 Can. L. T. Occ. Notes 424 (holding that an injunction will issue to prevent the seizure of goods exempt from distress).

83. Shaw *v.* Jersey, 4 C. P. D. 359, 28 Wkly. Rep. 142 [*affirming* 48 L. J. C. P. 308].

84. Set-off or counter-claim generally see Recoupment, Set-Off, and Counter-Claim.

85. Sketoe *v.* Ellis, 14 Ill. 75; Willson *v.* Davenport, 5 C. & P. 531, 24 E. C. L. 692; Pratt *v.* Keith, 10 Jur. N. S. 305, 33 L. J. Ch. 528, 10 L. T. Rep. N. S. 15, 3 New Rep. 264, 12 Wkly. Rep. 394; Townrow *v.* Benson, 3 Madd. 203, 56 Eng. Reprint 484; Millmine *v.* Hart, 4 U. C. Q. B. 525.

A payment of a land tax may be deducted out of the rent which has accrued or is accruing; but if the rent is paid in full, the payment of the tax cannot at a subsequent time be deducted from the rent. Stubbs *v.* Parsons, 3 B. & Ald. 516, 5 E. C. L. 299.

A compulsory payment of ground-rent to the original landlord may be pleaded to an avowry of rent by the immediate lessor. Taylor *v.* Zamira, 2 Marsh. 220, 6 Taunt. 524, 16 Rev. Rep. 668, 1 E. C. L. 736; Sapsford *v.* Fletcher, 4 T. R. 511.

86. See cases cited *infra*, this note, and notes 91–94.

In Illinois, by statute, a tenant has the right to avail himself of any set-off which would be proper if the suit was for rent in any other form of action (Cox *v.* Jordan, 86 Ill. 560, holding that the statute giving the tenant subject to a distress for rent the right to avail himself of a set-off is intended to apply only to cases where, upon a fair adjustment of all counter-claims other than rent the landlord will be indebted to the tenant, and in such case gives the tenant the benefit of his claim on such balance. Accordingly, after defendant's plea of set-off, the landlord may plead a set-off in replication; but he cannot recover for any excess of his set-off over that of the tenant), but it must be such that the tenant can maintain an independent suit on it (Crate *v.* Kohlsaat, 44 Ill. App. 460). Claims of every nature may be considered and allowed to the extent of defeating the levy (Lindley *v.* Miller, 67 Ill. 244), or even of a final balance and judgment against the landlord (Kellogg *v.* Boehme, 71 Ill. App. 643).

87. Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17; Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541; McMahan *v.* Tyson, 23 Ga. 43; Lindley *v.* Miller, 67 Ill. 244.

88. Johnston *v.* Patterson, 91 Ga. 531, 18 S. E. 350; Rountree *v.* Rutherford, 65 Ga. 444; Guthman *v.* Castleberry, 48 Ga. 172; Lynch *v.* Baldwin, 69 Ill. 210.

Where a landlord does not stipulate as to repairs, such repairs, although made by the tenant, at the landlord's request, are not matters of set-off, in resistance to a distress warrant as to the rent. Powers *v.* Cope, 93 Ga. 248, 18 S. E. 815.

89. Warner *v.* Caulk, 3 Whart. (Pa.) 193. But see Kellogg *v.* Boehme, 71 Ill. App. 643.

90. Weber *v.* Rorer, 151 Pa. St. 487, 25 Atl. 100.

91. Fowler *v.* Eddy, 110 Pa. St. 117, 1 Atl. 789; Hilke *v.* Eisenbeis, 104 Pa. St. 514; Thomas *v.* Pyle, 2 Pa. Co. Ct. 258; Weyandt *v.* Diehl, 4 C. Pl. (Pa.) 74.

the set-off and the distraint can proceed no further.[92] The landlord, if dissatisfied with the decision of the justice, may appeal therefrom.[93] If the tenant is dissatisfied with his findings he cannot appeal, but must pursue his remedy by replevin.[94]

6. Persons Entitled to Distrain — a. Guardian. A guardian may distrain in the rights of his ward for all arrears of rent owing the latter.[95]

b. Husband and Wife. A husband may distrain for rent due his wife,[96] and a widow may distrain for her dower.[97]

c. Tenants in Common. A tenant in common may distrain for his share of the rent,[98] and if he demises his share to his companion, he may distrain the goods and chattels of such companion.[99] While tenants in common should distrain severally, their joinder may properly be regarded as an irregularity in the manner of procedure, governed by the statute of 11 Geo. II.[1] One tenant in common may distrain upon the other.[2]

d. Joint Tenants. One joint tenant may distrain for the whole rent, but must avow in his own right, and as bailiff to the rest;[3] or he may, without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint tenants.[4] So one of two joint tenants may demise his part to the other, with the usual incidents of a reversion and a right to distrain.[5]

e. Assignees. The assignment of a lease by the lessor gives to the assignee the same right to distrain for rent that the lessor had previous to the assignment.[6] But to confer upon the assignee such right, the lease of the land should be included in the assignment. Mere assignment of the rent unpaid does not carry the right to distrain.[7]

f. Receivers. Attornment by a tenant of land to a receiver appointed by a

92. Thomas *v.* Pyle, 2 Pa. Co. Ct. 258.

93. Hilke *v.* Eisenbeis, 104 Pa. St. 514; Thomas *v.* Pyle, 2 Pa. Co. Ct. 258.

Jurisdiction and power of appellate court.— On appeal by the landlord from proceedings before a justice of the peace, the jurisdiction and power of the court of common pleas are limited to those of the justice, and the court cannot therefore enter judgment or issue execution to enforce its position. Thomas *v.* Pyle, 2 Pa. Co. Ct. 258.

Costs.— On such appeal each party must pay costs incurred by him; and, as the case was brought into court by the appeal of the landlord, he should pay the officer's costs. Thomas *v.* Pyle, 2 Pa. Co. Ct. 258.

94. Hilke *v.* Eisenbeis, 104 Pa. St. 514; Thomas *v.* Pyle, 2 Pa. Co. Ct. 258; Ingersol *v.* Gibbons, 1 Browne (Pa.) 69.

95. Weltner's Appeal, 63 Pa. St. 302.

96. Pullen *v.* Palmer, 3 Salk. 207.

97. Murphy *v.* Borland, 92 Pa. St. 86.

98. De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217; Whitley *v.* Roberts, McClell. & Y. 107.

The assignee of each portion of a rent charge may distrain for it. Rivis *v.* Watson, 9 L. J. Exch. 67, 5 M. & W. 255.

If a terre-tenant, holding under two tenants in common, pays the whole rent to one tenant in common after notice from the other not to pay it, the latter may distrain for his share. Harrison *v.* Barnby, 5 T. R. 246, 2 Rev. Rep. 584.

99. Brennan *v.* Hood, 4 Ir. C. L. 332.

1. Dutcher *v.* Culver, 24 Minn. 584. See 11 Geo. II, c. 19.

Tenants in common who make a joint lease to a tenant for years may join in making a distress for rent. Jones *v.* Gundrim, 3 Watts & S. (Pa.) 531.

2. Snelgar *v.* Henston, Cro. Jac. 611.

3. Pullen *v.* Palmer, 3 Salk. 207. See also Page *v.* Stedman, Carth. 364.

One of several coheirs in gavelkind may distrain for rent due to himself and his coheirs, by an express authority from them. Leigh *v.* Shepherd, 2 B. & B. 465, 5 Moore C. P. 297, 23 Rev. Rep. 516, 6 E. C. L. 230.

4. Robinson *v.* Hofman, 4 Bing. 562, 13 E. C. L. 637, 3 C. & P. 234, 14 E. C. L. 544, 6 L. J. C. P. O. S. 113, 1 M. & P. 474, 29 Rev. Rep. 627.

5. Cowper *v.* Fletcher, 6 B. & S. 464, 11 Jur. N. S. 780, 34 L. J. Q. B. 187, 12 L. T. Rep. N. S. 420, 13 Wkly. Rep. 739, 118 E. C. L. 464.

6. Keaton *v.* Tift, 56 Ga. 446; Keeley Brewing Co. *v.* Mason, 102 Ill. App. 381; Kost *v.* Theis, 9 Pa. Cas. 336, 12 Atl. 262.

7. Scott *v.* Berry, 46 Ga. 394; Hutsell *v.* Paris Deposit Bank, 102 Ky. 410, 43 S. W. 469, 19 Ky. L. Rep. 1481, 39 L. R. A. 403; Slocum *v.* Clark, 2 Hill (N. Y.) 475; Manis *v.* Flood, 19 Tex. Civ. App. 591, 47 S. W. 1017. *Contra*, see Coker *v.* Britt, 78 Miss. 583, 29 So. 833, by statute.

In the absence of evidence to the contrary, a holder of a rent note payable to the owner of the demised premises, or bearer, is presumed to be a landlord, and as such entitled to issue out a distress warrant for rent, although he does not own the premises. Scott *v.* Berry, 46 Ga. 394.

court of chancery to collect the rents creates the relation of landlord and tenant between the tenant and such receiver, so that the latter is entitled to distrain,[8] and no special authority from the court is necessary for that purpose.[9] But such attornment does not inure to enable a person who is found ultimately to have the legal title to the land to treat the tenant as his tenant and to distrain for rent.[10]

g. Purchasers. One who purchases land in the possession of a tenant, under a lease from the former owner, cannot issue a distress warrant for rent accruing after he acquires title.[11] But a purchaser at an execution sale will be entitled to distrain where the tenant prepays the rent with the intent to prevent him from obtaining his proportion.[12]

h. Mortgagees — (I) *Tenant of Mortgagor* — (A) *Under Lease Prior to Mortgage.* A tenant under a lease prior to a mortgage may be sued or distrained upon by the mortgagee for rent after notice not to pay it to the landlord.[13] After a mortgage of the premises without notice to the lessee, payment by the lessee of a sum of money to the lessor for rent not then due will not discharge the lessee from his obligation to pay the rent on the proper rent day to the mortgagee who gives the tenant proper notice to do so.[14] If a lessor, after mortgaging his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is *presumptione juris* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the name of the mortgagee and as his bailiff.[15] Since the English Judicature Act, however, although it may be necessary to justify the distress as bailiff of the mortgagee, it is not necessary that the distress should be made in the mortgagee's name.[16]

(B) *Under Lease Subsequent to Mortgage.* When the lease is subsequent to the mortgage, the mortgagee cannot distrain by mere force of the fee being vested in him by the mortgage.[17]

(II) *Mortgagor as Tenant.* If a mortgage contains a clause under which the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of landlord and tenant is created, and upon failure to pay the rent the mortgagee is entitled to distrain,[18] even the goods of a stranger.[19] A mort-

8. Jolly *v.* Arbuthnot, 4 De G. & J. 224, 5 Jur. N. S. 689, 28 L. J. Ch. 547, 7 Wkly. Rep. 532, 61 Eng. Ch. 224, 45 Eng. Reprint 87; Evans *v.* Mathias, 7 E. & B. 590, 3 Jur. N. S. 793, 26 L. J. Q. B. 309, 90 E. C. L. 590. See also Dancer *v.* Hastings, 4 Bing. 2, 5 L. J. C. P. 3, 12 Moore C. P. 34, 29 Rev. Rep. 740, 13 E. C. L. 371.

9. Bennett *v.* Robins, 5 C. & P. 379, 24 E. C. L. 614; Brandon *v.* Brandon, 5 Madd. 473, 56 Eng. Reprint 976.

10. Evans *v.* Mathias, 7 E. & B. 590, 3 Jur. N. S. 793, 26 L. J. Q. B. 309, 90 E. C. L. 590.

11. Stewart *v.* Gregg, 42 S. C. 392, 20 S. E. 193; Smith *v.* Charleston Dist., 1 Bay (S. C.) 443; Jacks *v.* Smith, 1 Bay (S. C.) 315.

12. Baker *v.* Burton, 3 Houst. (Del.) 10.

13. Souders *v.* Vansickle, 8 N. J. L. 313; Rogers *v.* Humphreys, 4 A. & E. 299, 1 H. & W. 625, 5 L. J. K. B. 65, 5 N. & M. 511, 31 E. C. L. 144; Moss *v.* Gallimore, Dougl. (3d ed.) 279.

14. De Nicholls *v.* Saunders, L. R. 5 C. P. 589, 39 L. J. C. P. 297, 22 L. T. Rep. N. S. 661, 18 Wkly. Rep. 1106.

15. Trent *v.* Hunt, 9 Exch. 14, 17 Jur. 899, 22 L. J. Exch. 318, 1 Wkly. Rep. 481.

16. Reece *v.* Strousberg, 50 J. P. 292, 54 L. T. Rep. N. S. 133.

17. Souders *v.* Vansickle, 8 N. J. L. 313; McKircher *v.* Hawley, 16 Johns. (N. Y.) 289; Evans *v.* Eliot, 9 A. & E. 342, 8 L. J. Q. B. 51, 1 P. & D. 256, 1 W. W. & H. 144, 36 E. C. L. 193; Rogers *v.* Humphreys, 4 A. & E. 299, 1 H. & W. 625, 5 L. J. K. B. 65, 5 N. & M. 511, 31 E. C. L. 144; Laing *v.* Ontario Loan, etc., Co., 46 U. C. Q. B. 114.

The relation of landlord and tenant must be created between the tenant and the mortgagor to the same extent and upon the same terms that would justify a landlord distraining upon his tenant, or there must be an express provision in the mortgage itself before the right of distress accrues. Laing *v.* Ontario Loan, etc., Co., 46 U. C. Q. B. 114.

18. Kearsley *v.* Philips, 11 Q. B. D. 621, 52 L. J. Q. B. 581, 49 L. T. Rep. N. S. 435, 31 Wkly. Rep. 909; Morton *v.* Woods, L. R. 4 Q. B. 293, 9 B. & S. 632, 38 L. J. Q. B. 81, 17 Wkly. Rep. 414; West *v.* Fritche, 3 Exch. 216, 18 L. J. Exch. 50.

19. Kearsley *v.* Philips, 11 Q. B. D. 621,

gagee cannot, however, distrain upon his mortgagor, *qua* mortgagee simply; the relation of landlord and tenant must be created between them.[20]

i. Executors and Administrators — (I) *At Common Law.* At common law neither the heirs, executors, nor administrators of a man seized and entitled to rents had any remedy for the arrearages incurred in the lifetime of the owner of such rents.[21]

(II) *Under Statute.* To remedy this a statute[22] was passed which provided that the executors and administrators of tenants in fee-simple, tenants in fee tail, and tenants for term of lives, of rents services, rent charges, rents secks, or fee farms might distrain for arrears of rent.

7. Persons Who May Be Distrained Against. By the common law and the English statute[23] the remedy by distress was confined to the lessor himself and his representatives against the tenant in tail, in fee, or for life, and his representatives, but did not extend to the executors of tenants for years.[24] But when the proceeding by distress is commenced against a tenant in his lifetime, it may be continued against his administrator.[25]

8. What Amounts to Distress. As a general rule to render a distress complete there must be a seizure of the property distrained upon; but a very slight act is sufficient to constitute a seizure in contemplation of law; it need not be an actual seizure.[26] Thus if the landlord declares certain goods which he names shall not be removed,[27] or if he goes on the premises where the tenant's goods are, makes an inventory of them, puts up a notice of distress, and serves the notice

52 L. J. Q. B. 581, 49 L. T. Rep. N. S. 435, 31 Wkly. Rep. 909.

20. Laing *v.* Ontario Loan, etc., Co., 46 U. C. Q. B. 114.

21. See cases cited *infra*, notes 22, 24.

22. St. 32 Hen. VIII, c. 37, § 1.

An executor can only distrain when the rent fell due before his testator's death. The subsequent rent goes not to the executor, but to the heir. Wright *v.* Williams, 5 Cow. (N. Y.) 338.

When cannot distrain.— Under this statute the executor of a person seized in fee of lands which he demised for a term of years, reserving a rent, cannot distrain, since such testator is not a tenant of a rent within the meaning of the statute. Prescott *v.* Boucher, 3 B. & Ad. 849, 23 E. C. L. 371; Jones *v.* Jones, 3 B. & Ad. 967, 23 E. C. L. 420.

In South Carolina this statute is not in force. Bagwell *v.* Jamison, Cheves 249.

23. St. 32 Hen. VIII, c. 37.

24. Dumes *v.* McLosky, 5 Ala. 239; Kern *v.* Noble, 57 Ill. App. 27; Smith *v.* Bobb, 12 Sm. & M. (Miss.) 322.

Mississippi.— The right to distress for rent against the executor or administrator of a tenant for years is conferred by Hutchinson Code, p. 812, § 22. Smith *v.* Bobb, 12 Sm. & M. (Miss.) 322.

In South Carolina 32 Hen. VIII, c. 37, enabling a landlord to distrain against executors and administrators has never been expressly adopted. Salvo *v.* Schmidt, 2 Speers 512.

25. Rauh *v.* Ritchie, 1 Ill. App. 188.

26. Robelen *v.* Wilmington, etc., Nat. Bank, 1 Marv. (Del.) 346, 41 Atl. 80; Newell *v.* Clark, 46 N J. L. 363; Cramer *v.* Mott, L. R. 5 Q. B. 357, 39 L. J. Q. B. 172, 22 L. T. Rep. N. S. 857, 18 Wkly. Rep. 947; Swann *v.* Falmouth, 8 B. & C. 456, 6 L. J. K. B. O. S. 374, 2 M. & R. 534, 15 E. C. L. 227; Wood *v.* Nunn, 5 Bing. 10, 6 L. J. C. P. O. S. 198, 2 M. & P. 27, 30 Rev. Rep. 528, 15 E. C. L. 445; Tennant *v.* Field, 8 E. & B. 336, 3 Jur. N. S. 1178, 27 L. J. Q. B. 33, 6 Wkly. Rep. 11, 92 E. C. L. 336; Johnson *v.* Upham, 2 E. & E. 250, 5 Jur. N. S. 681, 28 L. J. Q. B. 252, 105 E. C. L. 250; Thomas *v.* Harris, 9 L. J. C. P. 308.

The levy of a distress warrant itself constitutes a distraint. Smith *v.* Downing, 6 Ind. 374.

Attempt to distrain upon wrong premises. — Where one entered another's house, to make a distress, and began taking an inventory, but finding out that he had made a mistake left the house without removing any of the goods, such acts did not amount to a distress. Spice *v.* Webb, 2 Jur. 943.

Collusion — Distress good against tenant.— Where a tenant pays his rent and takes a receipt, but fearing that his goods will be taken on legal process agrees with his landlord to destroy his receipt, and that the latter may put in a distress for rent to protect the goods, and the landlord does so, and sells the goods, and keeps the proceeds, the distress is good as between the parties to it, although void as against a third person. Sims *v.* Tuffs, 6 C. & P. 207, 25 E. C. L. 396.

27. Furbush *v.* Chappell, 105 Pa. St. 187; Cramer *v.* Mott, L. R. 5 Q. B. 357, 39 L. J. Q. B. 172, 22 L. T. Rep. N. S. 857, 18 Wkly. Rep. 947; Wood *v.* Nunn, 5 Bing. 10, 6 L. J. C. P. O. S. 198, 2 M. & P. 27, 30 Rev. Rep. 528, 15 E. C. L. 445. See also England *v.* Cowley, L. R. 8 Exch. 126, 42 L. J. Exch. 80, 28 L. T. Rep. N. S. 67, 21 Wkly. Rep. 337.

on the tenant, such acts have been held a sufficient seizure to constitute a distress.[28]

9. Care of Property Distrained — a. Degree of Care. A person taking and holding goods as a distress is bound to use such reasonable care as a prudent and reasonable man would use in regard to his own property of like character;[29] but he is not bound to exercise extraordinary care of them.[30]

b. Right to Use. The distrainor has no right to use the property,[31] except in a case of necessity, and for the benefit of the owner.[32]

c. Proof of Negligence. Where the property distrained is injured or damaged while in custody of the landlord or his bailiff or agent, the burden is on him to rebut the presumption of negligence;[33] but the jury are to judge and determine from the evidence whether such injury or damage was occasioned by the negligence of the landlord, his bailiff or agent.[34]

10. Abandonment and Retaking. Since the statute of 11 Geo. II,[35] the landlord has been permitted to impound or otherwise secure the goods upon the premises, and quitting the premises without leaving any one in possession does not necessarily constitute abandonment.[36] So if the distrainor permits the goods to be removed from the premises with the intention that they shall be returned,[37] or if one in possession of distrained goods quits the premises with the intention of returning there is no abandonment,[38] and he is justified in using force if necessary for the purpose of reëntering.[39]

11. Rescue and Pound-Breach. By the common law rescue and pound-breach were not only civil injuries for which an action would lie,[40] but were also indict-

28. Newell *v.* Clark, 46 N. J. L. 363; Swann *v.* Falmouth, 8 B. & C. 456, 6 L. J. K. B. O. S. 374, 2 M. & R. 534, 15 E. C. L. 227; Tennant *v.* Field, 8 E. & B. 336, 3 Jur. N. S. 1178, 27 L. J. Q. B. 33, 6 Wkly. Rep. 11, 92 E. C. L. 336.

29. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Taylor *v.* Felder, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313.

If the property be cattle and horses, they should be fed and watered, and given such attention as may be required to keep them in as good condition as when distrained. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

If milch cows be distrained they should be milked, as without this they would suffer and be injured. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Bagshawe *v.* Goward, Cro. Jac. 147.

30. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

31. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Bagshawe *v.* Goward, Cro. Jac. 147; Chamberlayn's Case, 1 Leon. 220.

If a horse and wagon are lawfully distrained, the distrainor may harness the horse to the wagon for the purpose of their removal to the place where they are to be impounded; and if during such removal the wagon is broken or damaged without negligence on the part of the landlord or his bailiff or agent, and while in the exercise of due and reasonable care, he is not liable for such damage, but if such damage be occasioned by the negligent conduct of the landlord or his bailiff agent, he is liable for such damage. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

32. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Bagshawe *v.* Goward, Cro. Jac. 147; Chamberlayn's Case, 1 Leon. 220.

Raw cloth distrained may be fulled. Duncomb *v.* Reeve, Cro. Eliz. 783.

Green hides cannot be tanned, as their identity would be lost. Duncomb *v.* Reeve, Cro. Eliz. 783.

Use or sale of milk.— If the person holding the cows so distrained uses or sells the milk he is liable for its value, less the cost and value of the milking, keeping, feeding, and care of the animals. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

33. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

34. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

35. St. 11 Geo. II, c. 19, § 10.

At common law the rule was otherwise. Dod *v.* Monger, 6 Mod. 215.

36. Swann *v.* Falmouth, 8 B. & C. 456, 6 L. J. K. B. O. S. 374, 2 M. & R. 534, 15 E. C. L. 227; Bannister *v.* Hyde, 2 E. & E. 627, 6 Jur. N. S. 171, 29 L. J. Q. B. 141, 1 L. T. Rep. N. S. 438, 105 E. C. L. 627.

It is a question for the jury, whether or not the distress has been abandoned. Eldridge *v.* Stacey, 15 C. B. N. S. 458, 10 Jur. N. S. 517, 9 L. T. Rep. N. S. 291, 12 Wkly. Rep. 51, 109 E. C. L. 458.

37. Kerby *v.* Harding, 6 Exch. 234, 15 Jur. 953, 20 L. J. Exch. 163.

38. Bannister *v.* Hyde, 2 E. & E. 627, 6 Jur. N. S. 171, 29 L. J. Q. B. 141, 1 L. T. Rep. N. S. 438, 105 E. C. L. 627.

39. Bannister *v.* Hyde, 2 E. & E. 627, 6 Jur. N. S. 171, 29 L. J. Q. B. 141, 1 L. T. Rep. N. S. 438, 105 E. C. L. 627.

40. Newell *v.* Clark, 46 N. J. L. 363; Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68,

able offenses, although there was no actual breach of the peace.[41] The landlord had the right to take the goods wherever he could find them and impound them again,[42] provided that this was done without a breach of the peace, and upon fresh pursuit.[43] If, however, goods are wrongfully distrained, the owner is entitled to rescue them before they are impounded; but if they be once impounded, even though they have been taken without cause, the owner may not break the pound to get them out, for they are in the custody of the law.[44] By an English statute[45] an action for treble damages and costs for pound-breach and rescue was given.[46]

12. Second Distress — a. For Same Rent. The law is well settled that when a landlord has levied a distress, and taken thereunder property of sufficient value to satisfy the rent then due, he cannot, without the consent of his tenant or other lawful cause, abandon his proceedings, and then levy a second distress for the same rent, upon the same or any other property of his tenant.[47] If he does so he may be sued in trespass, trover, or case.[48] The abandonment must, however, have been a voluntary one,[49] and where the landlord withdraws the distress at the request of the tenant, and for his accommodation, it is not a voluntary abandonment, and he is not precluded from making a second distress.[50] A second distress may also be supported when the landlord is induced to withdraw the first in consequence of the fraud of the tenant,[51] or has been prevented from realizing the fruits thereof by the tortious conduct of the distrainee.[52] If the landlord through mistake fails to seize sufficient property at first to satisfy the distress, he is at liberty to make a second seizure.[53]

1 L. ed. 292; Rich *v.* Woolley, 7 Bing. 651, 5 M. & P. 563, 20 E. C. L. 291; Iredale *v.* Kendall, 40 L. T. Rep. N. S. 362.

41. 2 Chitty Cr. L. 204; Newell *v.* Clark, 46 N. J. L. 363.

A tender after the impounding is too late to avoid an action of pound-breach. Firth *v.* Purvis, 5 T. R. 432, 2 Rev. Rep. 637.

A sheriff is liable in an action of pound-breach and rescue, where the bailiff in possession of the goods under a landlord's distress receives a fieri facias from the sheriff and sells the goods under it. Reddell *v.* Stowey, 2 M. & Rob. 358.

Right to interest.— In an action for a rescue the landlord is not entitled to interest, although the jury may make the rate of interest the measure of damages. Blake *v.* De Liesseline, 4 McCord (S. C.) 496.

42. Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68, 1 L. ed. 292.

43. Rich *v.* Woolley, 7 Bing. 651, 5 M. & P. 563, 20 E. C. L. 291.

44. Cadmus *v.* Barney, 42 N. J. L. 346; Parrett Nav. Co. *v.* Stower, 8 Dowl. P. C. 405, 9 L. J. Exch. 180, 6 M. & W. 564.

45. St. 2 Wm. & M. c. 5.

46. Newell *v.* Clark, 46 N. J. L. 363; Rich *v.* Woolley, 7 Bing. 651, 5 M. & P. 563, 20 E. C. L. 291; Story *v.* Finnis, 2 L. M. & P. 198.

Notice of impounding necessary.— In an action for a pound-breach and treble damages against one claiming to be the rightful owner of the property, it must be shown that he knew of the impounding. Cadmus *v.* Barney, 42 N. J. L. 346.

47. Everett *v.* Neff, 28 Md. 176; Pfeiffer *v.* Schubmehl, 7 Del. Co. (Pa.) 575, 6 Lack. Leg. N. 60; Thwaites *v.* Wilding, 12 Q. B. D. 4, 48 J. P. 100, 53 L. J. Q. B. 1, 49 L. T. Rep. N. S. 396, 32 Wkly. Rep. 80; Hutchins *v.* Chambers, 1 Burr. 579, 2 Ld. Ken. 204; Dawson *v.* Cropp, 1 C. B. 961, 3 D. & L. 225, 9 Jur. 944, 14 L. J. C. P. 281, 50 E. C. L. 961; *Ex p.* Shuttleworth, 1 Deac. & C. 223; Bagge *v.* Mawby, 8 Exch. 641, 22 L. J. Exch. 236, 1 Wkly. Rep. 357; Wallis *v.* Savill, 2 Lutw. 1532; Harris *v.* Wier, 2 Nova Scotia Dec. 466; May *v.* Severs, 24 U. C. C. P. 396.

Plea of previous distress must allege satisfaction of rent.— A plea of a previous distress for the same rent is bad unless it shows that the rent was also satisfied. Lear *v.* Edmonds, 1 B. & Ald. 157, 2 Chit. 301, 18 Rev. Rep. 448, 18 E. C. L. 646; Hudd *v.* Ravenor, 2 B. & B. 662, 5 Moore C. P. 542, 23 Rev. Rep. 526, 6 E. C. L. 319; Lingham *v.* Warren, 2 B. & B. 36, 4 Moore C. P. 409, 6 E. C. L. 26.

48. Everett *v.* Neff, 28 Md. 176; Lear *v.* Caldecott, 4 Q. B. 123, 3 G. & D. 491, 7 Jur. 277, 12 L. J. Q. B. 169, 45 E. C. L. 123; Smith *v.* Goodwin, 4 B. & Ad. 413, 24 E. C. L. 185, 2 L. J. K. B. 192, 2 N. & M. 114, 28 E. C. L. 568, 1 N. & M. 371; Dawson *v.* Cropp, 1 C. B. 961, 3 D. & L. 225, 9 Jur. 944, 14 L. J. C. P. 281, 50 E. C. L. 961.

49. Harpelle *v.* Carroll, 27 Ont. 240.

50. Wollaston *v.* Stafford, 15 C. B. 278, 80 E. C. L. 278; Harpelle *v.* Carroll, 27 Ont. 240.

51. Harpelle *v.* Carroll, 27 Ont. 240. See also Wollaston *v.* Stafford, 15 C. B. 278, 80 E. C. L. 278.

52. Lee *v.* Cooke, 3 H. & N. 203, 4 Jur. N. S. 168, 27 L. J. Exch. 337, 6 Wkly. Rep. 284.

53. Brooks *v.* Wilcox, 11 Gratt. (Va.) 411; Hutchins *v.* Chambers, 1 Burr. 157, 2 Ld. Ken. 204.

b. For Subsequent Rent. A landlord may, upon a second distress for rent subsequently due, seize the same goods which were seized in the former distress, and which were replevied,[54] and this, although the legality of the former distress is still in question.[55]

13. Property Subject to Distress — a. Property of Third Persons — (i) *In General.* As a general rule the property of a third person upon demised premises may be taken under a distress warrant for rent as well as the property of the tenant himself,[56] unless it be such as is especially exempted by the common law or by statute.[57] This is true even after the landlord has information that the property is not that of the tenant, provided the tenant has that sort of possession or use which indicates ownership.[58] After removal from the premises, however, the goods of a stranger are not liable to distress.[59] Thus the goods of a stranger, if placed on the pavement in front of the demised premises, are severed from such premises, and cannot subsequently be levied on under a distress warrant.[60] In some states the right to distrain upon property of a third person has been taken away by statute.[61] Under such statutes a landlord is liable to the owner

54. Frey *v.* Leeper, 2 Dall. (Pa.) 131, 1 L. ed. 319; Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68, 1 L. ed. 292; Wilton *v.* Wiffen, 8 L. J. K. B. O. S. 303; Hefford *v.* Alger, 1 Taunt. 218.

55. Wilton *v.* Wiffen, 8 L. J. K. B. O. S. 303.

56. *Indiana.*— Applegate *v.* Crawford, 2 Ind. 579; Wright *v.* Mathews, 2 Blackf. 187.

Kentucky.— Craddock *v.* Riddlesbarger, 2 Dana 205.

Maryland.— Neale *v.* Clautice, 7 Harr. & J. 372.

New Jersey.— Allen *v.* Agnew, 24 N. J. L. 443.

New York.—Spencer *v.* McGowen, 13 Wend. 256.

Pennsylvania.— Kleber *v.* Ward, 88 Pa. St. 93; Karns *v.* McKinney, 74 Pa. St. 387; Kessler *v.* McConachy, 1 Rawle 435; Bogert *v.* Batterton, 6 Pa. Super. Ct. 468; Booth *v.* Hoenig, 7 Pa. Dist. 529.

South Carolina.— Himely *v.* Wyatt, 1 Bay 102.

England.— Hughes *v.* Smallwood, 25 Q. B. D. 306, 55 J. P. 182, 59 L. J. Q. B. 503, 63 L. T. Rep. N. S. 198; Kearsley *v.* Philips, 11 Q. B. D. 621, 52 L. J. Q. B. 581, 49 L. T. Rep. N. S. 435, 31 Wkly. Rep. 909; Johnson *v.* Faulkner, 2 Q. B. 925, 2 G. & D. 184, 6 Jur. 832, 11 L. J. Q. B. 193, 42 E. C. L. 980; Saffery *v.* Elgood, 1 A. & E. 191, 3 L. J. Q. B. 151, 3 N. & M. 346, 28 E. C. L. 108; Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633. *Compare* Beard *v.* Knight, 8 E. & B. 865, 4 Jur. N. S. 782, 27 L. J. Q. B. 359, 6 Wkly. Rep. 226, 92 E. C. L. 865.

Canada.— McKercher *v.* Gervais, 12 Quebec Super. Ct. 336; Langhoff *v.* Boyer, 9 Quebec Super. Ct. 216.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1084.

A slave belonging to a third person, found on the leased premises, is distrainable for the rent due by the tenant. Bull *v.* Horlbeck, 1 Bay (S. C.) 301.

57. Robelen *v.* Wilmington, etc., Nat. Bank, 1 Marv. (Del.) 346, 41 Atl. 80; Stevens *v.* Lodge, 7 Blackf. (Ind.) 794; Kennedy *v.* Lange, 50 Md. 91; Giles *v.* Ebsworth, 10 Md. 333; Kleber *v.* Ward, 88 Pa. St. 93.

58. Reeves *v.* McKenzie, 1 Bailey (S. C.) 497.

59. Adams *v.* La Comb, 1 Dall. (Pa.) 440, 1 L. ed. 214; Ball *v.* Penn, 10 Pa. Super. Ct. 544; Postman *v.* Harrell, 6 C. & P. 225, 25 E. C. L. 406; Thornton *v.* Adams, 5 M. & S. 38, 17 Rev. Rep. 257. See *infra*, VIII, E, 13, b.

60. Robelen *v.* Wilmington, etc., Nat. Bank, 1 Marv. (Del.) 346, 41 Atl. 80; Pickering *v.* Breen, 22 Pa. Super. Ct. 4.

61. *Illinois.*— A. N. Kellogg Newspaper Co. *v.* Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300; Hadden *v.* Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80; Uhl *v.* Dighton, 25 Ill. 154; Powell *v.* Daily, 61 Ill. App. 552; Howdyshell *v.* Gary, 21 Ill. App. 288.

Kentucky.— Craddock *v.* Riddlesbarger, 2 Dana 205; Mitchell *v.* Franklin, 3 J. J. Marsh. 477; Hughs *v.* Sebre, 2 A. K. Marsh. 227.

New Jersey.— Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020; Cadmus *v.* Barney, 42 N. J. L. 346; Woodside *v.* Adams, 40 N. J. L. 417; Guest *v.* Opdyke, 31 N. J. L. 552; Allen *v.* Agnew, 24 N. J. L. 443.

South Carolina.— Bischoff *v.* Trenholm, 36 S. C. 75, 15 S. E. 346; *Ex p.* Knobeloch, 26 S. C. 331, 2 S. E. 612; Sullivan *v.* Ellison, 20 S. C. 481; Wallace *v.* Johnson, 17 S. C. 454.

Virginia.— Harvie *v.* Wickham, 6 Leigh 236 (holding that property on leased premises conveyed by a tenant to a trustee for the benefit of creditors is not exempt as property belonging to a third person); Davis *v.* Payne, 4 Rand. 332.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1084.

Under Miss. Code (1880), § 1317, providing for distress for rent of goods belonging "to some person bound or liable for the rent," distress against a tenant cannot reach, upon the leased premises, the goods of one not bound by contract to the landlord for rent. Patty *v.* Bogle, 59 Miss. 491.

for the value of the property temporarily in the tenant's possession but belonging to another, taken under a distress warrant against the tenant.[62]

(II) *PROPERTY OF WIFE OF TENANT.* The goods of a tenant's wife, found on the demised premises, are liable to distress for rent in arrear, although they are her separate property. The Married Women's Acts do not affect the law of landlord and tenant.[63] But after their removal from the premises the law is otherwise.[64]

(III) *PROPERTY OF SUBTENANT OR ASSIGNEE OF LEASE.* At common law the goods of a subtenant found upon the rented premises could be distrained for rent, not because there existed either privity of contract or estate between the landlord and subtenant, but upon the same ground that would authorize the goods of a stranger to be distrained if found on the premises.[65] And this is true even though the tenant has goods on the premises sufficient to satisfy the landlord's demand,[66] or the sublessee has paid his rent to his immediate lessor.[67] If a sublessee holds over after the expiration of a term without authority from the landlord, his goods are liable to distress for rent due from the lessee before as well as after the expiration of the term.[68] So too after the decease of a tenant the landlord may distrain the property of a subtenant on the premises, for the rent which accrued previously to the principal tenant's decease, not exceeding in amount the rent of one year.[69] But under the statutes of some states the subtenant's goods are not subject to distraint for rent due by the lessee.[70] The liabilities of an assignee of a lease are the same as those of the lessee, and his goods are to the same extent liable to distress.[71] But in proceeding against the original tenant, the landlord

The goods and chattels of a deceased tenant, belonging to his personal representatives, are not exempt from distress as the property of some other person than the tenant. Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020.

The right to distrain is determined by the ownership of the property sought to be reached at the time of the levy, or perhaps of the delivery of the warrant to the officer. It is not material that the property formerly belonged to the tenant, or that it is still upon the premises. Howdyshell *v.* Gary, 21 Ill. App. 288.

62. Emmert *v.* Reinhardt, 67 Ill. 481.

63. Blanche *v.* Bradford, 38 Pa. St. 344, 80 Am. Dec. 489; Thomas *v.* Pierce, 1 Chest. Co. Rep. (Pa.) 403.

64. Ball *v.* Penn, 10 Pa. Super. Ct. 544.

65. Crosier *v.* Tomkinson, 2 Ld. Ken. 439. See also Ratcliff *v.* Daniel, 6 Harr. & J. (Md.) 498.

In Georgia where an owner of land rents it to a tenant, who sublets a portion of it, the landlord may elect to treat the subtenant as his own tenant, and proceed against him directly by distress warrant, and subject the crop raised by the subtenant to the payment of the rent, although the subtenant has given his note for the rent to the principal tenant who has transferred it to a third party. Barlow *v.* Jones, 117 Ga. 412, 43 S. E. 690.

After assignment by lessee and surrender by assignee.— Where a lessee sublet a part of the demised premises and then assigned his term, and the assignee surrendered the lease to the lessor, who accepted the surrender, and gave the assignee a new lease for the entire premises, the lessor could not thereafter distrain the goods of the sublessee for rent due under the sublease, since he was not the sublessee's landlord. Hessel *v.* Johnson, 142 Pa. St. 8, 21 Atl. 794, 11 L. R. A. 855.

66. Jimison *v.* Reifsneider, 97 Pa. St. 136; Smoyer *v.* Roth, 10 Pa. Cas. 32, 13 Atl. 191.

67. Quinn *v.* Wallace, 6 Whart. (Pa.) 452.

68. Whiting *v.* Lake, 91 Pa. St. 349.

69. Mickle *v.* Miles, 1 Grant (Pa.) 320.

70. Gray *v.* Rawson, 11 Ill. 527 (holding that by statute the landlord is restrained in the exercise of the remedy by distress to the seizure of the goods of his tenant, and therefore he cannot distrain for rent the goods of a sublessee, as there is no privity of contract between them); Gibson *v.* Mullican, 58 Tex. 430; Sansing *v.* Risinger, 2 Tex. App. Civ. Cas. § 713; Knight *v.* Old, 2 Tex. App. Civ. Cas. § 77; Lea *v.* Hogue, 1 Tex. App. Civ. Cas § 607.

The Ontario Landlord and Tenant Act exempts from distress for rent the property of all persons except the tenant or person liable. The word "tenant" includes a subtenant, assignees of the tenant, and any person in actual occupation under or with consent of the tenant. Under this statute a person let into possession by an agent of an assignee of a tenant, for the purpose of exhibiting the premises, is not in occupation "under" the said assignee, and his goods are not liable to distress. Farwell *v.* Jameson, 26 Can. Sup. Ct. 588.

One who assists the tenant in cultivating land in return for a certain number of acres of the crop is not a subtenant, but a mere employee, and hence a part of the crop assigned to him for his assistance, is subject to the landlord's claim for rent under a distress warrant. Sansing *v.* Risinger, 2 Tex. App. Civ. Cas. § 713.

71. Jones *v.* Gundrim, 3 Watts & S. (Pa.)

cannot distrain the goods of such tenant's assignee, although they formerly belonged to the tenant.[72]

b. Goods Not on Premises — (I) *In General.* At common law a landlord could not make a distress off the demised premises.[73] This rule has been changed by statute in some states so that now a distress warrant may be levied on the tenant's property wherever it can be found in the county.[74] This right exists, however, only during the continuance of the lease,[75] and the goods distrained must have been at some time upon the demised premises.[76]

(II) *After Fraudulent Removal or Sale* — (A) *In General.* Even in a case of a clandestine and fraudulent removal of goods from the demised premises by the tenant for the purpose of avoiding a distress, the landlord was without remedy at common law. The provision in the statute 8 Anne [77] was the first to give the landlord any redress in such a case, by empowering him to follow and distrain the goods within five days after their removal. This provision was afterward enlarged by statute 11 Geo. II [78] by extending the time in which the removed goods may be followed and distrained to thirty days.[79] The removal contemplated is a removal by the tenant, or by someone in privity with him;[80] and in the absence of special agreement can only be exercised when it is fraudulent or clandestine.[81] Although a removal is not clandestine, yet if it is fraudulent the landlord is justified in distraining.[82] The mere removal of goods by the tenant from the demised premises

531; Booth *v.* Hoenig, 7 Pa. Dist. 529; Sansing *v.* Risinger, (Tex. App. 1891) 16 S. W. 249.

72. Howdyshell *v.* Gary, 21 Ill. App. 288.

73. A. N. Kellogg Newspaper Co. *v.* Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300; Hadden *v.* Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80; Winslow *v.* Henry, 5 Hill (N. Y.) 481; Williams *v.* Terboss, 2 Wend. (N. Y.) 148; Pemberton *v.* Van Rensselaer, 1 Wend. (N. Y.) 307; Mosby *v.* Leeds, 3 Call (Va.) 439.

The single exception to this rule was that if the landlord, going to distrain, saw cattle on the demised premises, and the tenant, to prevent the distress, drove them off the premises, the landlord might follow and distrain them. Poole *v.* Longuevill, 2 Saund. 284 note 2.

74. Hale *v.* Burton, Dudley (Ga.) 105; Uhl *v.* Dighton, 25 Ill. 154.

75. Pemberton *v.* Van Rensselaer, 1 Wend. (N. Y.) 307; Burr *v.* Van Buskirk, 3 Cow. (N. Y.) 263.

76. Bradley *v.* Piggot, Walk. (Miss.) 348.

77. St. 8 Anne, c. 14, § 2.

78. St. 11 Geo. II, c. 19, § 1.

79. See cases cited *infra*, this note.

Maryland.— Where goods are fraudulently and clandestinely removed to avoid rent, the landlord may distrain within thirty days after such removal, although the lease may have expired, and the tenant is not in possession of the premises. Dorsey *v.* Hays, 7 Harr. & J. 370.

South Carolina.— As 11 Geo. II, c. 19, § 1, allowing a landlord thirty days to distrain for goods fraudulently removed, is inconsistent with 8 Anne, c. 14, § 2, allowing him but five days, which has been expressly adopted in South Carolina, the latter must prevail. Rogers *v.* Brown, 1 Speers 283.

A tenant who remains in possession, although having removed part of his goods, is not within the statute which provides for the sale of goods distrained for rent where a tenant, with intent to defraud, removes from the premises, etc. Freytag *v.* Anderson, 1 Rawle (Pa.) 73.

Removal after tenant's decease.— An agreement that the tenant's goods shall be liable to distress for thirty days after removal does not apply to a removal after the tenant's decease by his executor; and this, although the rights under the lease extend by agreement to the party's executors. Gandy *v.* Dickson, 3 Pa. Dist. 411.

80. White *v.* Hoeninghaus, 74 Md. 127, 21 Atl. 700, holding that a removal of property from the premises by a sheriff under a writ of attachment against the tenant, where no rent is due at the time of such removal, is not within the statute.

81. Owens *v.* Shovlin, 116 Pa. St. 371, 9 Atl. 484; Baer *v.* Kuhl, 8 Pa. Dist. 389; Purfel *v.* Sands, 1 Ashm. (Pa.) 120.

In a few states the words "clandestine or fraudulent" are omitted from the statutes and consequently it is immaterial whether or not the removal is fraudulent or clandestine. Stamps *v.* Gilman, 43 Miss. 456; Weiss *v.* Jahn, 37 N. J. L. 93; Wades *v.* Figgatt, 75 Va. 575.

Removal from sight unnecessary.— It is not necessary to show, in proof of concealment of cattle, that they were withdrawn from sight; if they have been removed to a neighbor's field, so as to cause difficulty to the landlord in finding them, it is sufficient. Stanley *v.* Wharton, 10 Price 138, 9 Price 301, 23 Rev. Rep. 683.

82. Jenkins *v.* Calvert, 13 Fed. Cas. No. 7,263, 3 Cranch C. C. 216 (holding further that a tenant's removal of his goods before the expiration of the term, without the knowledge of the landlord, and without paying the rent, is a fact from which the jury may infer that the removal was fraudulent as to the

when rent is in arrear is not of itself fraudulent as against the landlord; to justify the landlord in pursuing them he must show that they were removed with a view to elude a distress.[83] Thus a notorious removal in the daytime, without notice to the landlord, is not *per se* a clandestine removal or evidence of fraud;[84] but a removal in the night is in itself clandestine, and sufficient evidence of fraud.[85] Whether or not a removal is fraudulent, within the statute, is a question for the jury.[86] Although it is admitted at the trial by the tenant that the removal was to avoid a distress,[87] the burden of showing a removal with intent to defraud is upon the landlord.[88]

(B) *Necessity That Rent Be Due.* Under the English statutes and most of those in the United States goods can only be followed by the landlord where the removal takes place after the rent becomes due.[89] But in some states it is immaterial whether the removal takes place before or after the rent becomes due.[90]

(C) *Tenant's Goods Only Liable.* The statutes authorizing the distraining of goods removed apply to goods of the tenant only and not to those of a stranger,[91] even though they are leased by the tenant.[92] Therefore goods of an undertenant,[93] or a *bona fide* purchaser,[94] or goods taken by a creditor with the assent of the tenant in payment of a *bona fide* debt, cannot be pursued after removal from the premises.[95]

(D) *Effect of Termination of Tenancy.* The statutes apply only to those cases where there is a reversion or an interest vested in the lessor at the expiration of the lease;[96] therefore a landlord has no right to follow the goods of a tenant who has removed them after the tenancy has expired by reason of the landlord having conveyed away his reversion.[97] It is also necessary in order to justify a

landlord); Opperman *v.* Smith, 4 D. & R. 33, 2 L. J. K. B. O. S. 108, 27 Rev. Rep. 507, 16 E. C. L. 187.

83. Morris *v.* Parker, 1 Ashm. (Pa.) 187; Parry *v.* Duncan, 7 Bing. 243, 20 E. C. L. 115, 9 L. J. C. P. O. S. 83, M. & M. 533, 22 E. C. L. 580, 5 M. & P. 19.

84. Grant's Appeal, 44 Pa. St. 477; Clifford *v.* Beems, 3 Watts (Pa.) 246; Hoops *v.* Crowley, 12 Serg. & R. (Pa.) 219 note; Grace *v.* Shively, 12 Serg. & R. (Pa.) 217; Morris *v.* Parker, 1 Ashm. (Pa.) 187; Purfel *v.* Sands, 1 Ashm. (Pa.) 120.

85. Grace *v.* Shively, 12 Serg. & R. (Pa.) 217.

86. Opperman *v.* Smith, 4 D. & R. 33, 2 L. J. K. B. O. S. 108, 27 Rev. Rep. 507, 16 E. C. L. 187.

87. John *v.* Jenkins, 2 L. J. Exch. 83.

88. Inkop *v* Morchurch, 2 F. & F. 501.

89. Hoops *v.* Crowley, 12 Serg. & R. (Pa.) 219 note; Grace *v.* Shively, 12 Serg. & R. (Pa.) 217; Brown *v.* Duncan, Harp. (S. C.) 337; Rand *v.* Vaughan, 1 Bing. N. Cas. 767, 1 Hodges 173, 4 L. J. C. P. 239, 1 Scott 670, 27 E. C. L. 854; Furneaux *v.* Fortherby, 4 Camp. 136; Watson *v.* Main, 3 Esp. 15, 6 Rev. Rep. 806; Anderson *v.* Midland R. Co., 3 E. & E. 614, 7 Jur. N. S. 411, 30 L. J. Q. B. 94, 3 L. T. Rep. N. S. 809, 107 E. C. L. 614; Watts *v.* Thomas, 1 Jur. 719; John *v.* Jenkins, 2 L. J. Exch. 83; Northfield *v.* Nightingale, 1 L. J. K. B. 219. *Compare* Dibble *v.* Bowater, 2 C. & B. 564, 17 Jur. 1054, 22 L. J. Q. B. 396, 1 Wkly. Rep. 435, 75 E. C. L. 564.

90. Weiss *v.* Jahn, 37 N. J. L. 93.

In Pennsylvania, outside of Philadelphia, Pittsburg, and Alleghany, a landlord has no right to distrain upon goods fraudulently removed from the demised premises with intent to defraud the landlord of a distress for rent that is not yet due. Jackson's Appeal, 6 Pa. Cas. 42, 9 Atl. 306.

In New York a landlord can in no case pursue and seize goods until his rent is due. If rent was due at the time of their removal, or becomes due within thirty days thereafter, he must pursue and seize them within thirty days after their removal. But if no rent is due when the goods are removed, nor becomes due within thirty days thereafter, then he may pursue and seize them at any time within thirty days after the rent does become due. Reynolds *v.* Shuler, 5 Cow. (N. Y.) 323.

91. Slocum *v.* Clark, 2 Hill (N. Y.) 475; Adams *v.* La Comb, 1 Dall. (Pa.) 440, 1 L. ed. 214; Baer *v.* Kuhl, 8 Pa. Dist. 389; Scott *v.* McEwen,, 2 Phila. (Pa.) 176; Postman *v.* Harrell, 6 C. & P. 225, 25 E. C. L. 406; Thornton *v.* Adams, 5 M. & S. 38, 17 Rev. Rep. 257.

92. Sleeper *v.* Parrish, 7 Phila. (Pa.) 247.

93. New *v.* Pyle, 2 Houst. (Del.) 9; Coles *v.* Marquand, 2 Hill (N. Y.) 447.

94. Mitchell *v.* Franklin, 3 J. J. Marsh. (Ky.) 477; Burnett *v.* Bealmear, 79 Md. 36, 28 Atl. 898; Clifford *v.* Beems, 3 Watts (Pa.) 246.

95. Frisbey *v.* Thayer, 25 Wend. (N. Y.) 396; Bach *v.* Meats, 5 M. & S. 200, 17 Rev. Rep. 310.

96. Pluck *v.* Digges, 2 Dow. & Cl. 180, 6 Eng. Reprint 695; Angell *v.* Harrison, 12 Jur. N. S. 114, 17 L. J. Q. B. 25.

97. Ashmore *v.* Hardy, 7 C. & P. 501, 32 E. C. L. 729.

distress after removal that the tenant shall retain possession of the premises either rightfully or wrongfully.[98]

c. Exemptions by Common Law and Statute — (I) *Choses in Action.* Distress applies to nothing but tangible property capable of seizure and sale. Therefore choses in action are not distrainable.[99]

(II) *Land and Fixtures.* A distress warrant cannot be levied on land.[1] Personal property alone is distrainable,[2] and therefore fixtures which the landlord has no right to remove from the freehold cannot be distrained because they savor of the realty, and it is impossible to restore them in the same plight they were when seized;[3] but fixtures slightly attached, which the tenant may remove at his pleasure during the term, and which may be removed without destroying their character or injuring them, may be distrained.[4] Where a lease stipulates that improvements erected may be removed at the end of the term, what would otherwise become a fixture remains personal property liable to distress.[5] The mere distraining and sale of fixtures affords no ground of action, as such sale is a nullity.[6]

(III) *Growing Crops.* While growing crops were not subject to distress at common law, they were made so by the statute of 11 Geo. II[7] which is in force in some of the United States.[8] The crops cannot be sold until after appraisement, which cannot be made until they are ripe.[9] Consequently no action lies for selling a crop before it is ripe, since the sale is absolutely void;[10] but if the sale is followed up by cutting the crops and carrying them away the tenant is entitled to recover the amount of his actual damage.[11] Where growing crops are taken in execution and sold, but are permitted to remain on the premises a reasonable time for the purpose of being reaped, they are not distrainable by the landlord for rent accruing subsequent to the taking in execution.[12] Similar statutes have been passed in several of the United States.[13] Trees growing in a nurseryman's

98. Gray *v.* Stait, 11 Q. B. D. 668, 48 J. P. 86, 52 L. J. Q. B. 412, 49 L. T. Rep. N. S. 288, 31 Wkly. Rep. 662.

99. Mitchell *v.* Coates, 47 Pa. St. 202.

1. Conrady *v.* Bywaters, (Tex. Civ. App. 1893) 24 S. W. 961.

2. Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955; Hamilton *v.* Reedy, 3 McCord (S. C.) 38.

3. Furbush *v.* Chappell, 105 Pa. St. 187; Turner *v.* Cameron, L. R. 5 Q. B. 306, 10 B. & S. 931, 39 L. J. Q. B. 125, 22 L. T. Rep. N. S. 525, 18 Wkly. Rep. 544 (holding that rails and sleepers forming a railway are fixtures and therefore not distrainable); Darby *v.* Harris, 1 Q. B. 895, 1 G. & D. 234, 5 Jur. 988, 41 E. C. L. 828; Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633; Simpson *v.* Hartopp, Willes 512.

4. Furbush *v.* Chappell, 105 Pa. St. 187 (holding that a spinning-mule, fastened to the floor of a mill with wooden screws, is a removable fixture, and therefore distrainable); Hellawell *v.* Eastwood, 6 Exch. 295, 20 L. J. Exch. 154 (holding that mules for spinning cotton, some fastened by means of screws to the wooden floor of a cotton mill, and some sunk into the stone flooring and secured by molten lead, are distrainable).

5. Spencer *v.* Darlington, 74 Pa. St. 286.

6. Beck *v.* Denbigh, 6 Jur. N. S. 998, 29 L. J. C. P. 273, 2 L. T. Rep. N. S. 154, 8 Wkly. Rep. 392.

7. St. 11 Geo. II, c. 19.

8. Given *v.* Blann, 3 Blackf. (Ind.) 64; Quinn *v.* Wallace, 6 Whart. (Pa.) 452; Wharton *v.* Naylor, 12 Q. B. 673, 6 D. & L. 136, 12 Jur. 894, 17 L. J. Q. B. 278, 64 E. C. L. 673; Miller *v.* Green, 8 Bing. 92, 2 Cromp. & J. 143, 1 L. J. Exch. 51, 1 Moore & S. 199, 2 Tyrw. 1, 21 E. C. L. 459; Piggott *v.* Bertles, 2 Gale 18, 5 L. J. Exch. 193, 1 M. & W. 441, 1 Tyrw. & G. 729. See also Proudlove *v.* Twemlow, 1 Cromp. & M. 326, 2 L. J. Exch. 111, 3 Tyrw. 260; Owen *v.* Legh, 3 B. & Ald. 470, 22 Rev. Rep. 455, 5 E. C. L. 273.

Liability to distress not affected by existence of other distrainable property.— If produce distrained is liable to distress, its liability is not affected by defendants having other distrainable property. Mitchell *v.* Franklin, 3 J. J. Marsh. (Ky.) 477.

9. Owen *v.* Legh, 3 B. & Ald. 470, 22 Rev. Rep. 455, 5 E. C. L. 273.

10. Owen *v.* Legh, 3 B. & Ald. 470, 22 Rev. Rep. 455, 5 E. C. L. 273.

11. Proudlove *v.* Twemlow, 1 Cromp. & M. 326, 2 L. J. Exch. 111, 3 Tyrw. 260, holding such damage to be the difference between the price which might have been obtained had the sale been regular and that which was obtained under the irregular sale.

12. Wright *v.* Dewes, 1 A. & E. 641, 3 L. J. K. B. 181, 3 N. & M. 790, 28 E. C. L. 302; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183.

13. See the statutes of the several states.

In Arkansas and Illinois crops growing on the leased premises are subject to distress for the rent of the current year. Mills *v.*

grounds are not distrainable for rent under a statute permitting a distraint upon products growing on the demised estate.[14]

(iv) *Beasts of the Plow and Sheep.* A landlord is authorized to distrain beasts of the plow[15] and sheep[16] only where there is no other sufficient distress on the premises at the time. But if there were reasonable grounds for supposing that it was necessary to take them, the distress will not be rendered illegal by the fact that as it turns out after the sale there would have been sufficient to satisfy the rent without taking them.[17] Where, however, a distress is given in the nature of an execution, as for poor rates, beasts of the plow may be distrained, although there is sufficient other distress.[18] By the English Agriculture Holdings Act,[19] "live stock taken in by the tenant to be fed at a fair price" are protected from distress.[20] The "fair price" agreed to be paid may include agreements for barter as well as for payment in cash.[21] By the English rule stray cattle are distrainable when they have been *levant et couchant* upon the land.[22] While this rule may not apply to conditions in this country, yet when cattle of a third person have been put upon demised premises with the consent of their owner they are liable to distress.[23]

(v) *Animals Feræ Naturæ.* Animals *feræ naturæ* are not distrainable,[24] but if confined so that one may have property in them they may be distrained.[25]

(vi) *Implements of Trade or Profession.* Implements of trade are privileged from distress, if they be in actual use at the time, or if there be other sufficient distress on the premises. But if they be not in actual use, or if there be no other sufficient distress on the premises, then they may be distrained for rent.[26]

Pryor, 65 Ark. 214, 45 S. W. 350; Uhl *v.* Dighton, 25 Ill. 154, holding that such a statute impliedly exempts all other property of the tenant from distress, and hence crops not grown the year the rent accrues are not distrainable.

In New Jersey it is provided that a landlord may "seize . . . all or any wheat, rye, etc., or any produce whatever growing or being on the demised premises." Under such a statute it is immaterial whether the crop is owned by the lessee or a third person. Bird *v.* Anderson, 41 N. J. L. 392; Guest *v.* Opdyke, 31 N. J. L. 552.

14. Clark *v.* Calvert, 3 Moore C. P. 96, 8 Taunt. 742, 21 Rev. Rep. 528, 4 E. C. L. 362; Clark *v.* Gaskarth, 2 Moore C. P. 491, 8 Taunt. 431, 20 Rev. Rep. 516, 4 E. C. L. 216.

15. Jenner *v.* Yolland, 2 Chit. 167, 6 Price 5, 20 Rev. Rep. 608, 18 E. C. L. 567; Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633; Piggott *v.* Bertles, 2 Gale 18, 5 L. J. Exch. 193, 1 M. & W. 441, 1 Tyrw. & G. 729; Simpson *v.* Hartopp, Willes 512; Hope *v.* White, 22 U. C. C. P. 5; Miller *v.* Miller, 17 U. C. C. P. 226. See also Given *v.* Blann, 3 Blackf. (Ind.) 64.

Cart colts and young steers, not broken in or used for harness or plow, are not privileged from distress as beasts which gain the land. Keen *v.* Priest, 4 H. & N. 236, 28 L. J. Exch. 157, 7 Wkly. Rep. 376.

16. Keen *v.* Priest, 4 H. & N. 236, 28 L. J. Exch. 157, 7 Wkly. Rep. 376; Hope *v.* White, 22 U. C. C. P. 5.

17. Jenner *v.* Yolland, 2 Chit. 167, 6 Price 5, 20 Rev. Rep. 608, 18 E. C. L. 567.

18. Hutchins *v.* Chamber, 1 Burr. 579, 2 Ld. Ken. 204.

19. Eng. Agr. Holdings Act, § 45.

20. Masters *v.* Green, 20 Q. B. D. 807, 52 J. P. 597, 59 L. T. Rep. N. S. 476, 36 Wkly. Rep. 591, holding, however, that cattle upon demised premises under an agreement whereby the tenant allowed the owner the exclusive right of feeding the grass on the land for a certain time were not within the protection of the act.

21. London, etc., Bank *v.* Belton, 15 Q. B. D. 457, 50 J. P. 86, 54 L. J. Q. B. 568, 34 Wkly. Rep. 31.

22. 2 Blackstone Comm. 8.

23. Reeves *v.* McKenzie, 1 Bailey (S. C.) 497.

24. Owen *v.* Boyle, 22 Me. 47; Davies *v.* Powell, Willes 46.

25. Davies *v.* Powell, Willes 46.

26. Given *v.* Blann, 3 Blackf. (Ind.) 64; Trieber *v.* Knabe, 12 Md. 491, 71 Am. Dec. 607; Fenton *v.* Logan, 9 Bing. 676, 2 L. J. C. P. 102, 3 Moore & S. 82, 23 E. C. L. 756; Vinkinstone *v.* Ebden, Carth. 357; Nargett *v.* Nias, 1 E. & E. 439, 5 Jur. N. S. 198, 28 L. J. Q. B. 143, 102 E. C. L. 439; Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633; Harvey *v.* Pocock, 12 L. J. Exch. 434, 11 M. & W. 740; Roberts *v.* Jackson, 2 Peake N. S. 36, 4 Rev. Rep. 885; Gorton *v.* Falkner, 4 T. R. 565, 2 Rev. Rep. 463; Simpson *v.* Hartopp, Willes 512. See also Davies *v.* Aston, 1 C. B. 746, 3 D. & L. 188, 14 L. J. C. P. 228, 50 E. C. L. 746; Reilley *v.* McMinn, 15 N. Brunsw. 370; Miller *v.* Miller, 17 U. C. C. P. 226.

A sewing-machine in the possession of a tenant under a contract of hiring, and used by the tenant's wife to support the family, is exempt from distress as a tool and implement of the trade of such tenant. Masters *v.* Fraser, 66 J. P. 100, 85 L. T. Rep. N. S. 611.

An action of trespass lies as well as an action on the case for distraining tools of trade, although not actually in use, if there are other unprivileged goods upon the premises sufficient to satisfy the distress.[27]

(VII) *Chattels in Actual Use.* Chattels in actual use, or in the actual possession of the owner himself, are exempt from distress. This exception is founded on the paramount rule that there should be no exercise of any right which is accompanied by the danger of breaking the public peace.[28] This rule is not applicable to articles of luxury or great value.[29]

(VIII) *Perishable Commodities.* Commodities which cannot be restored in the same plight and condition as that in which they were when taken are not distrainable at common law.[30]

(IX) *Property in Possession of Tenant in Course of Trade or Manufacture*—(A) *In General.* Where the tenant in the course of his business is necessarily put in possession of the property of those with whom he deals or those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant;[31] but the goods of a third

The books of account of a merchant or shopkeeper are not liable to seizure under a distress for rent. Davis *v.* Arledge, 3 Hill (S. C.) 170, 30 Am. Dec. 360.

27. Nargett *v.* Nias, 1 E. & E. 439, 5 Jur. N. S. 198, 28 L. J. Q. B. 143, 102 E. C. L. 439.

28. Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633; Sunbolf *v.* Alford, 3 M. & W. 248; Miller *v.* Miller, 17 U. C. C. P. 226.

29. Potter *v.* Hall, 3 Pick. (Mass.) 368, 15 Am. Dec. 226.

30. See cases cited *infra*, this note.

Flesh of animals lately slaughtered is not distrainable. Morley *v.* Pincombe, 2 Exch. 101, 10 L. J. Exch. 272.

Hides in vats for tanning are not distrainable. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

Sheaves and shocks of corn were not distrainable at common law (Given *v.* Blann, 3 Blackf. (Ind.) 64; Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633; Wilson *v.* Ducket, 2 Mod. 61; Simpson *v.* Hartopp, Willes 512), but they have been made so by the statute of 2 Wm. & M. c. 5, § 3 (Quinn *v.* Wallace, 6 Whart. (Pa.) 452; Johnson *v.* Faulkner, 2 Q. B. 925, 2 G. & D. 184, 6 Jur. 832, 11 L. J. Q. B. 193, 42 E. C. L. 980).

31. Connah *v.* Hale, 23 Wend. (N. Y.) 462; Myers *v.* Esery, 134 Pa. St. 177, 19 Atl. 488; Karns *v.* McKinney, 74 Pa. St. 387; Brown *v.* Sims, 17 Serg. & R. (Pa.) 138; Brown *v.* Shevill, 2 A. & E. 138, 4 L. J. K. B. 50, 4 N. & M. 277, 29 E. C. L. 82; Gilman *v.* Elton, 3 B. & B. 75, 6 Moore C. P. 243, 23 Rev. Rep. 567, 7 E. C. L. 614; Swire *v.* Leach, 18 C. B. N. S. 479, 11 Jur. N. S. 179, 34 L. J. C. P. 150, 11 L. T. Rep. N. S. 680, 13 Wkly. Rep. 385, 114 E. C. L. 479; Muspratt *v.* Gregory, 2 Gale 158, 1 M. & W. 633; Gisbourn *v.* Hurst, 1 Salk. 249; Simpson *v.* Hartopp, Willes 512.

A horse sent to a blacksmith to be shod is exempt from distress. Owen *v.* Boyle, 22 Me. 47; Karns *v.* McKinney, 74 Pa. St. 387; Himely *v.* Wyatt, 1 Bay (S. C.) 102; Beall *v.* Beck, 2 Fed. Cas. No. 1,161, 3 Cranch C. C. 666.

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Goods on a wharf are not liable to distress. Karns *v.* McKinney, 74 Pa. St. 387; Beall *v.* Beck, 2 Fed. Cas. No. 1,161, 3 Cranch C. C. 666; Thompson *v.* Mashiter, 1 Bing. 283, 1 L. J. C. P. O. S. 104, 8 Moore C. P. 254, 25 Rev. Rep. 624, 8 E. C. L. 510.

Logs taken to a sawmill to be converted into lumber are exempt. Patterson *v.* Thompson, 46 U. C. Q. B. 7.

The carcass of a beast sent to a butcher to be slaughtered is exempt from distress. Brown *v.* Shevill, 2 A. & E. 138, 4 L. J. K. B. 50, 4 N. & M. 277, 29 E. C. L. 82.

Goods in pawn are privileged from distress even though pledged for more than twelve months. Swire *v.* Leach, 18 C. B. N. S. 479, 11 Jur. N. S. 179, 34 L. J. C. P. 150, 11 L. T. Rep. N. S. 680, 13 Wkly. Rep. 385, 114 E. C. L. 479.

Horses and carriages standing at livery are not liable for distress for rent in arrear. Youngblood *v.* Lowry, 2 McCord (S. C.) 39, 13 Am. Dec. 698. *Contra*, Francis *v.* Wyatt, 3 Burr. 1498, 1 W. Bl. 483; Parsons *v.* Gingell, 4 C. B. 545, 11 Jur. 437, 16 L. J. C. P. 227, 56 E. C. L. 345. The landlord may distrain horses in a stable let by his tenant to an innkeeper during races. Crosier *v.* Tomkinson, 2 Ld. Ken. 439.

A carriage sent to a coach-maker and commission agent for sale of carriages to be sold is not liable to be distrained for rent of the premises upon which it is exposed for sale. Findon *v.* McLaren, 6 Q. B. 891, 9 Jur. 369, 14 L. J. Q. B. 183, 51 E. C. L. 891.

Cattle taken to be pastured for hire by a tenant are not liable to distress for rent. Cadwalader *v.* Tindall, 20 Pa. St. 422.

A negro boy bound out to learn a trade is not liable to be distrained for rent owing by the master to whom he is bound. Phaelon *v.* McBride, 1 Bay (S. C.) 170.

Public market.— Goods bought for the purpose of making a profit, by sale on the prem-

person permitted to be placed on the demised premises purely as matter of favor, and without hope of reward, are not exempt within this principle.[32]

(B) *As Auctioneer.* The goods of a third person, on the premises of an auctioneer for the purpose of sale, are not liable to distress for rent,[33] even though the auctioneer may have made advances thereon, for which he may have a lien.[34] Goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let are privileged from distress while they are in that room for the purpose of being sold at auction,[35] and the fact of such room never having been used as an auction room before, and only being hired for the occasion, is immaterial as regards the privilege of the goods from distress.[36] So goods deposited in an open yard belonging to the premises in the occupation of an auctioneer, for the purpose of being sold at public auction, are privileged from distress.[37] This privilege of distress is confined to goods on the premises of an auctioneer, and does not extend to goods sold on the premises of the owner.[38]

(C) *As Factor or Commission Merchant.* The goods of a principal in the store of his commission merchant for sale are not liable to distress for rent due by the latter to the landlord of the premises.[39] And the landlord, if he knows that the goods are so owned, and has them sold under distress, is liable to the owner in trespass.[40] This rule does not apply where a retail dealer receives goods for which he agrees to pay, after they are sold, the invoice price at which the seller sells the same goods to others, the purchaser to retain all he gets for the goods over and above the invoice price, as his commission.[41]

(D) *As Warehouseman.* Goods of which a warehouseman has custody in the way of trade cannot be legally distrained for arrears of his rent.[42]

(E) *For Purpose of Manufacture.* All goods sent to a tradesman to be wrought upon in the way of his trade are during the time they remain in his custody protected from distress,[43] but this privilege does not extend to the machinery

ises of the tenant, are not exempt on the ground that they are in a public market. Bent *v.* McDougall, 14 Nova Scotia 468.

32. Page *v.* Middleton, 118 Pa. St. 546, 12 Atl. 415.

33. Himely *v.* Wyatt, 1 Bay (S. C.) 102; *In re* Bailey, 2 Fed. 850; Adams *v.* Grane, 1 Cromp. & M. 380, 2 L. J. Exch. 105, 1 Tyrw. 326.

34. *In re* Bailey, 2 Fed. 850.

35. Brown *v.* Arundell, 10 C. B. 54, 15 Jur. 402, 20 L. J. C. P. 30, 70 E. C. L. 54.

36. Brown *v.* Arundell, 10 C. B. 54, 15 Jur. 402, 20 L. J. C. P. 30, 70 E. C. L. 54.

37. Williams *v.* Holmes, 8 Exch. 861, 22 L. J. Exch. 283, 1 Wkly. Rep. 391.

38. Lyons *v.* Elliott, 1 Q. B. D. 210, 45 L. J. Q. B. 159, 33 L. T. Rep. N. S. 806, 24 Wkly. Rep. 296.

39. McCreery *v.* Clafflin, 37 Md. 435, 11 Am. Rep. 542; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Brown *v.* Stackhouse, 155 Pa. St. 582, 26 Atl. 669, 35 Am. St. Rep. 908; Howe Sewing Mach. Co. *v.* Sloan, 87 Pa. St. 438, 30 Am. Rep. 376; Wanamaker *v.* Carter, 22 Pa. Super. Ct. 625; Clothier *v.* Braithwaite, 22 Pa. Super. Ct. 521; Gilman *v.* Elton, 6 Moore C. P. 243, 3 B. & B. 75, 23 Rev. Rep. 567, 7 E. C. L. 614. See also Karns *v.* McKinney, 74 Pa. St. 387. *Contra*, Elford *v.* Clark, 2 Brev. (S. C.) 88.

40. Brown *v.* Stackhouse, 155 Pa. St. 582, 26 Atl. 669, 35 Am. St. Rep. 908.

41. Dorsh *v.* Lea, 18 Pa. Super. Ct. 447.

42. Briggs *v.* Large, 30 Pa. St. 287; Brown *v.* Sims, 17 Serg. & R. (Pa.) 138; Walker *v.* Johnson, 4 McCord (S. C.) 552; Miles *v.* Furber, L. R. 8 Q. B. 77, 42 L. J. Q. B. 41, 27 L. T. Rep. N. S. 756, 21 Wkly. Rep. 262; Thompson *v.* Mashiter, 1 Bing. 383, 1 L. J. C. P. O. S. 104, 8 Moore C. P. 254, 25 Rev. Rep. 624, 8 E. C. L. 510; Matthias *v.* Mesnard, 2 C. & P. 353, 12 E. C. L. 613, holding that corn sent to a factor for sale, and deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it was deposited in a warehouse belonging to the factor himself. See also Farrant *v.* Robson, 3 L. J. C. P. 146.

By the laws of New Brunswick, being in that respect the same as those of England, a common warehouse, in the sense in which the word is used in relation to distress for rent in arrear, is a building, or an apartment in one, used and appropriated by the occupant, not for the deposit and safe-keeping for the selling of his own goods, but for the purpose of storing goods of others placed there in the regular course of commercial dealing and trade, to be again removed or reshipped. Owen *v.* Boyle, 22 Me. 47.

43. Knowles *v.* Pierce, 5 Houst. (Del.) 178 (raw material furnished the tenant of a woolen factory to be woven into flannel); Hoskins *v.* Paul, 9 N. J. L. 110, 17 Am. Dec. 455 (holding that this exemption extends only to the goods of strangers, and not to goods of the tenant himself); Mauro *v.* Bot-

of the employer by which the goods so in his possession are to be manufactured or repaired.[44]

(F) *Under Contract of Hiring.* As a general rule property in possession of a tenant under a contract of hiring is subject to the landlord's right of distress for rent.[45] In some states it is provided by statute that all organs, pianos, and melodeons hired by a tenant shall be exempt from execution and distress from rent, provided the owner, or his agent, or the person hiring the same shall give notice to the landlord that the instrument is leased or hired.[46]

(X) *Property of Guest of Hotel or Boarding-House.*[47] It has been held broadly that the goods of a boarder are not liable to be distrained for rent due by the keeper of a boarding-house,[48] although such property is not in his possession, but in the possession and actual use of the tenant by his permission, and without the consent of the landlord;[49] but the better rule seems to be that the goods of a boarder in a boarding-house are exempt from distress for rent only to the extent of such articles as are in his use as a boarder.[50] Goods deposited with a tavern-keeper for safe-keeping are not protected from distress unless the deposit was made by a guest at the tavern.[51]

(XI) *Property Subject to Mortgage or Other Security.* In some jurisdictions a landlord cannot distrain goods of his tenant subject to a *bona fide* mortgage to another person, even though the goods remain in the possession of the tenant.[52] In others it is held that a tenant mortgaging chattels has such an interest in them as may be levied upon under a distress warrant.[53] While in still other jurisdictions goods mortgaged by a tenant to a stranger and left in the tenant's possession on the premises may be distrained upon the principle that a

elor, 16 Fed. Cas. No. 9,311, 2 Cranch C. C. 372 (chairs left with a painter to be repaired); Gibson *v.* Ireson, 2 Q. B. 39, 43 E. C. L. 621; Brown *v.* Shevill, 2 A. & E. 138, 4 L. J. K. B. 50, 4 N. & M. 277, 29 E. C. L. 82; Wood *v.* Clarke, 1 Cromp. & J. 484, 9 L. J. Exch. O. S. 187, 1 Price Pr. Cas. 26, 1 Tyrw. 315. *Compare* McElderry *v.* Flannagan, 1 Harr. & G. (Md.) 308.

44. Wood *v.* Clarke, 1 Cromp. & J. 484, 9 L. J. Exch. O. S. 187, 1 Price Pr. Cas. 26, 1 Tyrw. 315.

45. Myers *v.* Esery, 134 Pa. St. 177, 19 Atl. 488; Kleber *v.* Ward, 88 Pa. St. 93; Price *v.* McCallister, 3 Grant (Pa.) 248; Bogert *v.* Batterton, 6 Pa. Super. Ct. 468; Willis *v.* Navert, 12 Quebec Super. Ct. 260.

46. See Rohrer *v.* Cunningham, 138 Pa. St. 162, 20 Atl. 872.

Notice to the landlord is a condition precedent to the right of exemption. Delp *v.* Hoffman, 7 Pa. Dist. 256.

Time of notice.—The notice required must be given to the landlord when the leased instrument is placed on the premises, or at latest before the landlord's right to distrain has accrued. McGeary *v.* Mellor, 87 Pa. St. 461.

47. Under the English Lodgers' Goods Protection Act (34 & 35 Vict. c. 79) the question as to who is a lodger seems to have frequently arisen. It is held that an occupier of a part of a house is not a lodger unless the person under whom he holds retains some control and dominion over the house. Morton *v.* Palmer, 51 L. J. Q. B. 7, 45 L. T. Rep. N. S. 426, 30 Wkly. Rep. 115. When this is the case the relation of landlord and lodger may exist between the parties, although the lodger occupies the greater part of the premises, and has separate means of ingress and egress, and acts as caretaker of the part reserved. Ness *v.* Stephenson, 9 Q. B. D. 245, 47 J. P. 134; Phillips *v.* Henson, 3 C. P. D. 26, 47 L. J. C. P. 273, 37 L. T. Rep. N. S. 432, 26 Wkly. Rep. 214. The existence of relationship of landlord and lodger is a question of fact. Ness *v.* Stephenson, 9 Q. B. D. 245, 47 J. P. 135. See also *supra*, I, D, 1.

48. Riddle *v.* Welden, 5 Whart. (Pa.) 9.

49. Stone *v.* Matthews, 7 Hill (N. Y.) 428, 1 Hill 565. But see Trieber *v.* Knabe, 12 Md. 491, 71 Am. Dec. 607.

50. Leitch *v.* Owings, 34 Md. 262; Jones *v.* Goldbeck, 14 Phila. (Pa.) 173; Beall *v.* Beck, 2 Fed. Cas. No. 1,161, 3 Cranch C. C. 666, holding that a slave, hired as a servant to a lodger in a boarding-house, is not exempt in a distress for rent, on the ground of his being in the actual use and personal service of his master, unless he is so at the time of the seizing of him by way of distress. See also Foisy *v.* Houghton, 12 Quebec Super. Ct. 521.

51. Harris *v.* Boggs, 5 Blackf. (Ind.) 489.

52. Hood *v.* Hanning, 4 Dana (Ky.) 21; Snyder *v.* Hitt, 2 Dana (Ky.) 204; *Ex p.* Knobeloch, 26 S. C. 331, 2 S. E. 612 (holding that property mortgaged *bona fide* by the tenant before the seizure under a distress warrant, although still on the premises, does not, within the meaning of a distress statute, "belong" to the tenant, and is therefore not liable to be distrained); Trescott *v.* Smyth, 1 McCord Eq. (S. C.) 486.

53. Holladay *v.* Bartholomae, 11 Ill. App.

stranger's goods are subject to distress if found on the demised premises.[54] Goods conveyed by a tenant by a deed of trust to a trustee for payment of debts, but allowed to remain in possession of the tenant on the premises are subject to distress;[55] but goods conveyed by the tenant to secure the payment of an accommodation note, made by the landlord and indorsed by a third person, are not subject to distress while the third person remains liable as indorser.[56]

(XII) *PROPERTY IN CUSTODY OF THE LAW*—(A) *In General.* It is well settled that property in the custody of the law cannot be distrained for rent.[57] Thus the landlord cannot distrain goods for rent which have been previously levied upon on an execution,[58] or attachment.[59] At common law, in order to place a tenant's goods *in custodia legis*, by an execution and levy, the sheriff was obliged not only to take but also to keep actual possession of the goods, and if he relinquished possession by withdrawing from the premises without leaving a person in charge the goods were no longer considered to be in the custody of the law and might be distrained.[60] But in some states it is held that property of a tenant

206; Prewett *v.* Dobbs, 13 Sm. & M. (Miss.) 431 (holding that any limited property or interest of the tenant in goods subject to mortgage may be distrained and sold for such interest as the tenant may have); Newell *v.* Clark, 46 N. J. L. 363; Woodside *v.* Adams, 40 N. J. L. 417; Gaston *v.* Tunison, 10 N. J. L. J. 305; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32.

54. Stevens *v.* Lodge, 7 Blackf. (Ind.) 594.

55. Harvie *v.* Wickham, 6 Leigh (Va.) 236.

56. Law *v.* Stewart, 15 Fed. Cas. No. 8,130, 3 Cranch C. C. 411.

57. *Indiana.*—Bowser *v.* Scott, 8 Blackf. 86.

Kentucky.—Burket *v.* Boude, 3 Dana 209; Craddock *v.* Riddlesbarger, 2 Dana 205.

Maryland.—Cromwell *v.* Owings, 7 Harr. & J. 55.

Pennsylvania.—Pierce *v.* Scott, 4 Watts & S. 344.

South Carolina.—Sullivan *v.* Ellison, 20 S. C. 481; Ayres *v.* Depras, 2 Speers 367; Hamilton *v.* Reedy, 3 McCord 38.

Texas.—Meyer *v.* Oliver, 61 Tex. 584.

England.—Wharton *v.* Naylor, 12 Q. B. 673, 6 D. & L. 136, 12 Jur. 894, 17 L. J. Q. B. 278, 64 E. C. L. 673; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183; Cropper *v.* Warner, Cab. & E. 152; Foulger *v.* Taylor, 5 H. & N. 202, 29 L. J. Exch. 154, 1 L. T. Rep. N. S. 481, 1 L. T. Rep. N. S. 57, 8 Wkly. Rep. 279; Eaton *v.* Southby, Willes 131.

Canada.—Beatty *v.* Rumble, 21 Ont. 184; Hughes *v.* Towers, 16 U. C. C. P. 287.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1094.

Goods in the hands of the sheriff's vendee are as much *in custodia legis* as in the hands of the sheriff himself. Wharton *v.* Naylor, 12 Q. B. 673, 6 D. & L. 136, 12 Jur. 894, 17 L. J. Q. B. 278, 64 E. C. L. 673; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183.

Goods in the hands of a lunatic's committee are not liable to distress due before the finding of the inquisition such goods being *in custodia legis*. Cochran *v.* Howes, 3 Del. Co. Rep. (Pa.) 248.

An action of trover is a proceeding *in rem*, and, when a writ is issued and served, the chattel is in the custody of the law, and cannot be distrained for rent. Seigling *v.* Main, 1 McMull. (S. C.) 252.

58. *Illinois.*—Herron *v.* Gill, 112 Ill. 247; Rowland *v.* Hewitt, 19 Ill. App. 450.

Indiana.—Bowser *v.* Scott, 8 Blackf. 86.

Kentucky.—Burket *v.* Boude, 3 Dana 209; Craddock *v.* Riddlesbarger, 2 Dana 205.

Maryland.—Cromwell *v.* Owings, 7 Harr. & J. 55.

Pennsylvania.—Pierce *v.* Scott, 4 Watts & S. 344.

South Carolina.—Hamilton *v.* Reedy, 3 McCord 38.

England.—Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183; Wright *v.* Dewes, 1 A. & E. 641, 3 L. J. K. B. 181, 3 N. & M. 790; Foulger *v.* Taylor, 5 H. & N. 202, 29 L. J. Exch. 154, 1 L. T. Rep. N. S. 57, 481, 8 Wkly. Rep. 279.

Canada.—Beatty *v.* Rumble, 21 Ont. 184.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1094.

59. White *v.* Hoeninghaus, 74 Md. 127, 21 Atl. 700; Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312; Pierce *v.* Scott, 4 Watts & S. (Pa.) 344; Dawson *v.* Dewan, 12 Rich. (S. C.) 499; Ayres *v.* Depras, 2 Speers (S. C.) 367; Meyer *v.* Oliver, 61 Tex. 584. *Compare* Lewis *v.* Washington County, 62 Miss. 160. *Contra*, by statute. Acker *v.* Witherell, 4 Hill (N. Y.) 112.

If the attachment proceedings are irregular, the goods remain liable to distress. Wanamaker *v.* Bowes, 36 Md. 42.

60. Newell *v.* Clark, 46 N. J. L. 363; Cropper *v.* Warner, Cab. & E. 152; Blades *v.* Arundale, 1 M. & S. 711, 14 Rev. Rep. 555.

In New Jersey it has been decided that goods of a tenant levied on under execution, but left in his possession, may be distrained for rent; the distress being analogous to the levying of a second execution. Newell *v.* Clark, 46 N. J. L. 363. *Compare* Hamilton *v.* Hamilton, 25 N. J. L. 544.

taken into an officer's custody is not liable to distress by the landlord, although it is permitted by the officer to remain on the leased premises.[61] After a sale of the goods by the officer having them in custody, they again become liable to distress,[62] but a reasonable time after the sale is allowed a purchaser in which to remove them.[63] What is a reasonable time for removal is a question of law when there is no dispute about the facts.[64]

(B) *Effect of Statute of 8 Anne* — (1) In General. By the statute of 8 Anne,[65] which is regarded as in effect or has in substance been reënacted in some of the United States, it is provided that no goods shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out, shall, before the removal of such goods from such premises by virtue of such execution, pay to the landlord of the premises rent not exceeding one year.[66]

(2) Necessity of Notice to Sheriff. The sheriff is not bound, however, to find out what rent is due the landlord and pay it to him, unless the landlord gives

61. Skiles *v.* Sides, 1 Pa. Super. Ct. 15, 37 Wkly. Notes Cas. 295; Com. *v.* Lelar, 8 Leg. Int. (Pa.) 50.

62. Meyer *v.* Oliver, 61 Tex. 584.

63. Gilbert *v.* Moody, 17 Wend. (N. Y.) 354; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183; Hughes *v.* Towers, 16 U. C. C. P. 287.

This rule has been applied to growing crops taken in execution and sold, and allowed to remain upon the premises a reasonable time for the purpose of being reaped. Wright *v.* Dewes, 1 A. & E. 641, 3 L. J. K. B. 181, 3 N. & M. 790, 28 E. C. L. 302; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183; Eaton *v.* Southby, Willes 131.

64. Gilbert *v.* Moody, 17 Wend. (N. Y.) 354. See also Eaton *v.* Southby, Willes 131; Hughes *v.* Towers, 16 U. C. C. P. 287.

65. St. 8 Anne, c. 14, § 1.

66. *Alabama.*— Smith *v.* Huddleston, 103 Ala. 223, 15 So. 521; Frazier *v.* Thomas, 6 Ala. 169.

District of Columbia.— Gibson *v.* Gautier, 1 Mackey 35.

Kentucky.— Burket *v.* Boude, 3 Dana 209; Craddock *v.* Riddlesbarger, 2 Dana 205. See also Petry *v.* Randolph, 85 Ky. 351, 3 S. W. 420, 9 Ky. L. Rep. 14.

Mississippi.—Shanks *v.* Greenville, 57 Miss. 168; Stamps *v.* Gilman, 43 Miss. 456.

New Jersey.— Paterson Second Nat. Bank *v.* Dringer, 2 N. J. L. 115.

New York.— Van Rensselaer *v.* Quackenboss, 17 Wend. 34; Beekman *v.* Lansing, 3 Wend. 446, 20 Am. Dec. 707.

Pennsylvania.— Weltner's Appeal, 63 Pa. St. 302; Ege *v.* Ege, 5 Watts 134; Gray *v.* Wilson, 4 Watts 39; Trimble's Appeal, 5 Wkly. Notes Cas. 396.

South Carolina.— Sullivan *v.* Ellison, 20 S. C. 481.

Virginia.— Sprinkel *v.* Rosenheim, 103 Va. 185, 48 S. E. 883.

United States.— Malcomson *v.* Wappoo Mills, 85 Fed. 907.

England.— Wharton *v.* Naylor, 12 Q. B. 673, 6 D. & L. 136, 12 Jur. 894, 17 L. J. Q. B. 278, 64 E. C. L. 673; Arnitt *v.* Garnett, 3 B. & Ald. 440, 22 Rev. Rep. 453, 5 E. C. L. 257; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183; Colyer *v.* Speer, 2 B. & B. 67, 4 Moore C. P. 473, 6 E. C. L. 40; Henchett *v.* Kimpson, 2 Wils. C. P. 140. See also Wintle *v.* Freeman, 11 A. & E. 539, 1 G. & D. 93, 10 L. J. Q. B. 161, 39 E. C. L. 294.

In Illinois this statute is not in force. Herron *v.* Gill, 112 Ill. 247; Rowland *v.* Hewitt, 19 Ill. App. 450.

A bill of sale of the goods is not a removal, within the statute, so as to subject the officer to an action. Wharton *v.* Naylor, 12 Q. B. 673, 6 D. & L. 136, 12 Jur. 894, 17 L. J. Q. B. 278, 64 E. C. L. 673; Smallman *v.* Pollard, 1 D. & L. 901, 8 Jur. 246, 13 L. J. C. P. 116, 6 M. & G. 1001, 7 Scott N. R. 911, 46 E. C. L. 1001. *Contra*, Burket *v.* Boude, 3 Dana (Ky.) 209; Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205.

A levy and sale of the goods upon the demised premises under an execution is a removal within the contemplation of the statute. Ryerson *v.* Quackenbush, 26 N. J. L. 236.

The seizure is lawful prima facie, but if the goods be removed without payment of the rent after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action on the case (Wharton *v.* Naylor, 12 Q. B. 673, 6 D. & L. 136, 12 Jur. 894, 17 L. J. Q. B. 278, 64 E. C. L. 673; Riseley *v.* Ryle, 12 L. J. Exch. 322, 11 M. & W. 16), or of replevin (Remington *v.* Linthicum, 20 Fed. Cas. No. 11,696, 5 Cranch C. C. 345).

An attachment on warrant and order of court thereon is not an execution within the meaning of the statute. Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312.

Right to rule — New Jersey.— A landlord who is entitled to have his arrears of rent paid before the removal or sale of goods levied on will be allowed a rule that the proceeds of the sale under execution be applied to pay his rent. Fischel *v.* Keer, 45 N. J. L. 507.

A constable is within the provisions of the statute requiring sheriffs to pay rent before

him notice.[67] It was formerly held that this notice must be given to the sheriff before the goods were removed;[68] but later this doctrine was overruled, and notice after the removal of the goods was held sufficient, provided it was given before the sheriff had actually paid over the money.[69]

(3) To Whom Preference Given. Some cases hold that the statute applies only between a landlord and his immediate lessee and not as between landlord and subtenant.[70] Others hold that it extends also to the case of landlord and subtenant.[71]

(4) Upon What Property Operative. In some jurisdictions the landlord is entitled to his preference whether the goods levied on under execution belong to the tenant or any other person;[72] in others only when they are the property of the tenant.[73]

(5) Extent of Preference. A landlord's claim for rent out of the proceeds of an execution is coextensive with his right of distress, and only the sum due for rent which can be collected by distress can be demanded.[74] He is entitled to a preferred claim for rent up to the time the goods are taken in execution, although it be in the middle of the term, but not up to the time of sale.[75] Where a levy is made under a number of executions, and the proceeds of the sale are not sufficient to satisfy all of them, a landlord's claim on the proceeds for rent will be reckoned up to the date of the levy made under that execution which was the last to participate in the fund.[76] When the levy of a second execution is made pending the first, the landlord is entitled to be paid his rent out of the proceeds up to the date of the second, instead of the first, levy.[77] The landlord is not confined, in his claim for rent, to the rent for the last year, or that immediately preceding the levy,

the removal of goods taken in execution on demised premises. Ungles *v.* Graves, 2 Blackf. (Ind.) 191.

67. *Alabama.*— Smith *v.* Huddleston, 103 Ala. 223, 15 So. 521.

Mississippi.— Stamps *v.* Gilman, 43 Miss. 456.

New York.— Beekman *v.* Lansing, 3 Wend. 446, 20 Am. Dec. 707.

Pennsylvania.— Moss' Appeal, 35 Pa. St. 162; Rowland *v.* Goldsmith, 2 Grant 378; Allen *v.* Lewis, 1 Ashm. 184.

England.— Arnitt *v.* Garnett, 3 B. & Ald. 440, 22 Rev. Rep. 453, 5 E. C. L. 257; Colyer *v.* Speer, 2 B. & B. 67, 4 Moore C. P. 473, 6 E. C. L. 40; Waring *v.* Dewberry, 1 Str. 97; Smith *v.* Russell, 3 Taunt. 400, 12 Rev. Rep. 674.

68. Waring *v.* Dewberry, 1 Str. 97.

69. Beekman *v.* Lansing, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; Arnitt *v.* Garnett, 3 B. & Ald. 440, 22 Rev. Rep. 453, 5 E. C. L. 257; Smith *v.* Russell, 3 Taunt. 400, 12 Rev. Rep. 674.

70. Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205; Brown *v.* Fay, 6 Wend. (N. Y.) 392; Bromley *v.* Hopewell, 14 Pa. St. 400, 2 Miles (Pa.) 414; Burnet's Case, 2 Str. 787.

71. McComb's Appeal, 43 Pa. St. 435; Thurgood *v.* Richardson, 7 Bing. 428, 20 E. C. L. 194, 4 C. & P. 481, 19 E. C. L. 612, 9 L. J. C. P. O. S. 121, 5 M. & P. 270.

72. Russell *v.* Doty, 4 Cow. (N. Y.) 576.

73. Lupton *v.* Hughes, 2 Pennew. (Del.) 515, 47 Atl 624; Fisher *v.* Johnson, 6 Gill (Md.) 354.

74. New Jersey Central Bank *v.* Peterson, 24 N. J. L. 668; Russell *v.* Doty, 4 Cow. (N. Y.) 576; Lewis' Appeal, 66 Pa. St. 312; Wickey *v.* Eyster, 58 Pa. St. 501; Moss' Appeal, 35 Pa. St. 162; Rowland *v.* Goldsmith, 2 Grant (Pa.) 378; Merrill *v.* Trimmer, 2 Pa. Co. Ct. 49; *In re* Myers, 102 Fed. 869.

75. Case *v.* Davis, 15 Pa. St. 80; Morgan *v.* Moody, 6 Watts & S. (Pa.) 333; Pierce *v.* Scott, 4 Watts & S. (Pa.) 344; Binns *v.* Hudson, 5 Binn. (Pa.) 505; West *v.* Sink, 2 Yeates (Pa.) 274; Merrill *v.* Trimmer, 2 Pa. Co. Ct. 49; Horan *v.* Barrett, 5 Leg. & Ins. Rep. (Pa.) 27; Megarge *v.* Tanner, 1 Pa. L. J. Rep. 331, 2 Pa. L. J. 297; Hoskins *v.* Houston, 4 Pa. L. J. 277; Shaw *v.* Oakley, 7 Phila. (Pa.) 89; Morris *v.* Billings, 1 Phila. (Pa.) 464.

Rent payable in advance.— A landlord is entitled to claim rent payable in advance out of the proceeds of a sheriff's sale of the tenant's goods on the demised premises, provided his claim does not exceed one year's rent. Platt *v.* Johnson, 168 Pa. St. 47, 31 Atl. 935, 47 Am. St. Rep. 877; Collins' Appeal, 35 Pa. St. 83; Purdy's Appeal, 23 Pa. St. 97; Beyer *v.* Fenstermacher, 2 Whart. (Pa.) 95; Morris *v.* Billings, 1 Phila. (Pa.) 464.

Where the landlord buys in the unexpired term of his tenant at sheriff's sale, at the close of the first quarter, he is entitled to the whole amount of the year's rent then due, and not merely to the first quarter. McIntire *v.* Barkley, 5 Houst. (Del.) 145. *Compare* Gause *v.* Richardson, 4 Houst. (Del.) 222.

76. Leaming's Appeal, 5 Wkly. Notes Cas. (Pa.) 221.

77. Worley *v.* Meekley, 1 Phila. (Pa.) 398.

so that no more than one year's rent be received;[78] and it is immaterial if the time for which the rent is claimed is included in two successive leases.[79]

(XIII) *PROPERTY IN CUSTODY OF RECEIVER OR ASSIGNEE IN INSOLVENCY.* In some jurisdictions the goods of a lessee found upon the demised premises are liable to be distrained for rent, although the tenant had, previous to the rent becoming due, made an assignment of them to an assignee for the benefit of creditors.[80] In others it is held that where a tenant applies for the benefit of insolvent laws, his property comes under the custody of the law, for the benefit of his creditors, and is not subject to distress for rent.[81] So also after a receiver has been appointed and has taken the rightful possession of the property, it is *in custodia legis* and cannot be distrained upon without the permission of the court by whom the receiver was appointed.[82] The mere appointment of a receiver, however, is not sufficient to place the property *in custodia legis*. Actual possession is necessary to accomplish this.[83] If the receiver accepts the term held by the debtor, the goods on the premises will remain liable to distress.[84]

14. PROCEEDINGS TO DISTRAIN — a. In General — (I) *DEMAND AS CONDITION PRECEDENT.* Except in cases of special liens for rent on crops made on land rented,[85] a landlord may distrain for rent without any previous demand for payment from the tenant.[86] To this general rule there are several exceptions. Thus, where rent is payable at a place off the land, or distress is authorized in case the rent is in arrears after being lawfully demanded at such place;[87] or where the lease stipulates for the payment of rent at certain periods of time, or at any time the same becomes due,[88] the lessor cannot distrain without a previous demand of the rent. So also, where the tenant contracts to pay rent in certain commodities, according to order, a demand is necessary before the rent can be distrained for.[89]

(II) *JURISDICTION AND VENUE.* Where a tenant leaves the state, a court of the county in which the property levied upon is situated has jurisdiction of a proceeding to distrain.[90]

(III) *APPEARANCE.* A proceeding by distress stands like any other case upon the docket; and if defendant fails to appear in the time prescribed by the rules of the court he may be defaulted the same as in an ordinary action.[91]

78. Weltner's Appeal, 63 Pa. St. 302; Wickey *v.* Eyster, 58 Pa. St. 501; Parker's Appeal, 5 Pa. St. 390; Richie *v.* McCauley, 4 Pa. St. 471; Ege *v.* Ege, 5 Watts (Pa.) 134.

79. Parker's Appeal, 5 Pa. St. 390; Richie *v.* McCauley, 4 Pa. St. 471; Ege *v.* Ege, 5 Watts (Pa.) 134.

80. Petry *v.* Randolph, 85 Ky. 351, 3 S. W. 420, 9 Ky. L. Rep. 14; Hoskins *v.* Paul, 9 N. J. L. 110, 17 Am. Dec. 455; *Ex p.* Grove, 1 Atk. 104, 26 Eng. Reprint 69; *Ex p.* Plummer, 1 Atk. 103, 26 Eng. Reprint 68; Briggs *v.* Sowry, 11 L. J. Exch. 193, 8 M. & W. 729. See also Newton *v.* Scott, 6 Jur. 510, 12 L. J. Exch. 488, 11 L. J. Exch. 121, 10 M. & W. 434, 9 M. & W. 434.

81. Powell *v.* Daily, 61 Ill. App. 552; Buckey *v.* Snouffer, 10 Md. 149, 69 Am. Dec. 129; Bischoff *v.* Trenholm, 36 S. C. 75, 15 S. E. 346.

82. Everett *v.* Neff, 28 Md. 176; Martin *v.* Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574.

83. Everett *v.* Neff, 28 Md. 176.

84. Martin *v.* Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574.

By the Insolvent Act of 7 Geo. IV, c. 57, § 31, no distress for rent made and levied, after the arrest of any person who shall petition the court for the relief of insolvent debtors for his discharge, upon the goods or effects of such person, shall be available for more than one year's rent. A distress taken before but not sold until after the arrest of such insolvent debtor is available for more than one year's rent. Wray *v.* Egremont, 4 B. & Ald. 122, 2 L. J. K. B. 48, 1 N. & M. 188, 24 E. C. L. 63.

85. Hill *v.* Reeves, 57 Ga. 31; Buffington *v.* Hilley, 55 Ga. 655.

86. *Delaware.*— Weber *v.* Vernon, 2 Pennew. 359, 45 Atl. 537.

Georgia.— Almand *v.* Scott, 83 Ga. 402, 11 S. E. 653; McDougal *v.* Sanders, 75 Ga. 140; McCray *v.* Samuel, 65 Ga. 739; Hill *v.* Reeves, 57 Ga. 31; Buffington *v.* Hilley, 55 Ga. 655.

Illinois.— Keeley Brewing Co. *v.* Mason, 102 Ill. App. 381.

Maryland.—Offutt *v.* Trail, 4 Harr. & J. 20.

New York.— Remsen *v.* Conklin, 18 Johns. 447.

87. Remsen *v.* Conklin, 18 Johns. (N. Y.) 447.

88. Stowman *v.* Landis, 5 Ind. 430.

89. Helser *v.* Pott, 3 Pa. St. 179.

90. Hopkins *v.* Pedrick, 75 Ga. 706.

91. Fergus *v.* Garden City Planing Mill, etc., Mfg. Co., 71 Ill. 51.

b. Affidavit and Other Pleadings — (I) *Necessity and Sufficiency of Affidavit* — (A) *In General.* As a condition precedent to the issuance of a warrant, it is generally required by statute that the petitioner therefor make affidavit to certain facts. The facts differ in different jurisdictions, but the statute must be substantially complied with.[92] The affidavit for a distress warrant should state for what reason the warrant is demanded,[93] even if the statute which prescribes the requisites of an affidavit contains no provision that the ground for the writ should be stated in the affidavit.[94] Where the grounds relied on are stated, it precludes the assumption that any other ground was relied on.[95] If the affidavit purports merely to give the legal effect of the contract between the parties without setting out the contract *in haec verba*, it should, if it is claimed that the contract amounts to a demise, allege that fact.[96] Where the proceeding is by the assignee of the landlord, the affidavit must set forth the contract of rent and the assignment of the lien, and must aver that there has been a demand for payment and a refusal, or give some excuse for the omission.[97] Unnecessary averments in an affidavit for a distress warrant are surplusage and do not vitiate it if it be sufficient in other respects.[98]

(B) *Statement of Amount Due and Time of Accrual.* The affidavit should contain a statement that the rent is due,[99] the time when it became due,[1] the time for or during which it accrued,[2] and the amount thereof.[3] It is sufficient to

92. Cross *v.* Tome, 14 Md. 247; Pate *v.* Shannon, 69 Miss. 372, 13 So. 729; Black *v.* Alberson, 1 Ashm. (Pa.) 127; Purfel *v.* Sands, 1 Ashm. (Pa.) 120; Biesenbach *v.* Key, 63 Tex. 79 (holding that the statutory requirement that an affidavit for a distress warrant state that the warrant is not sued out for the purpose of "vexing or harassing" is met by an affidavit that it is not sued out for the purpose of "injuring or harassing"); Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570.

Affidavit held sufficient.— See Berry *v.* Powell, 77 Ga. 79.

An affidavit to levy on growing crops on a distress warrant must set out all facts necessary for the validity of the levy under the statute, which allows attachment if the crop is fit to be gathered, or if defendant has absconded. Scott *v.* Russell, 72 Ga. 35.

Where rent is to be paid in specific, the value of the specifics is regularly to be alleged and proved; but where there is no averment of value, but proof of value is made, the absence of averment is not ground for certiorari where substantial justice has been done. Urquhart *v.* Urquhart, 46 Ga. 415.

Description of property to be seized.— In a distress for rent the affidavit need not describe the property which is to be seized under the warrant. Stein *v.* Stely, (Tex. Civ. App. 1895) 32 S. W. 782.

Distress against administrator of tenant.— An affidavit to procure a distress warrant against the administrator of a tenant, which states that "John Bobb, administrator of the estate of Peter Mintzer, is justly indebted," etc., is sufficient to show in what capacity the debt is due. Smith *v.* Bobb, 12 Sm. & M. (Miss.) 322.

93. Weir *v.* Brooks, 17 Tex. 638.

94. Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570.

95. Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570.

96. Moulton *v.* Norton, 5 Barb. (N. Y.) 286.

97. Lathrop *v.* Clewis, 63 Ga. 282.

98. Wright *v.* Hawkins, 68 Ga. 828; Hollingsworth *v.* Willis, 64 Miss. 152, 8 So. 170; Murray *v.* Blanchard, 2 Tex. App. Civ. Cas. § 479, holding that an affidavit for a warrant of distress, stating that the amount sued for is for rent due, and that the warrant is not sued out for the purpose of vexing and harassing defendant, entitles plaintiff to the writ, notwithstanding it states additional grounds for the warrant.

99. Burr *v.* Van Buskirk, 3 Cow. (N. Y.) 263.

An affidavit that the tenant is "justly indebted" in a specified amount of rent is equivalent to a statement that the rent is due. Wright *v.* Hawkins, 68 Ga. 828; Scruggs *v.* Gibson, 40 Ga. 511; Fulcher *v.* West, (Tex. Civ. App. 1899) 51 S. W. 342.

1. Cross *v.* Tome, 14 Md. 247. *Contra,* Driver *v.* Maxwell, 56 Ga. 11.

2. Smith *v.* Fyler, 2 Hill (N. Y.) 643 (holding that an affidavit stating that the claim is for the balance of one year's rent, said year ending in the month of January, 1840, is sufficient); Jenkins *v.* Pell, 17 Wend. (N. Y.) 417 [*affirmed* in 20 Wend. 450]; Marquissee *v.* Ormston, 15 Wend. (N. Y.) 368.

3. Jones *v.* Eubanks, 86 Ga. 616, 12 S. E. 1065 (holding that it is not necessary to furnish an itemized account if the affidavit specifies the amount due); Cross *v.* Tome, 14 Md. 247 (holding that the affidavit is sufficient where it states so much as a balance of rent due and in arrears, and it is not necessary to state the debits and credits); Jones *v.* Walker, 44 Tex. 200 (holding that an affidavit that defendant "is indebted to plaintiff in the sum of one hundred and twenty-six dollars or

describe the amount claimed as rent of real estate although a part is for rent of personalty incidental to the realty leased.[4]

(c) *Description of Premises.* It is not necessary in an affidavit to procure a distress warrant to specify the particular premises out of which the rent issues,[5] but the county in which the leased property is located should be stated.[6]

(d) *Amendment.* Under the Georgia code[7] an affidavit for a distress warrant is amendable to the same extent and with the same consequences as in the case of ordinary declarations, and this right of amendment includes the supplying of vital and necessary averments omitted from the original affidavit,[8] but does not extend to adding a new and distinct cause of action.[9] Where the amendment of an affidavit has been properly allowed it is proper to allow the warrant to be amended so as to conform to the affidavit.[10] In Texas also an immaterial mistake in an affidavit for a distress warrant may be corrected by amendment,[11] but in Mississippi the affidavit on which a distress warrant issues cannot be amended.[12]

(ii) *Persons Who May Make Affidavit.* In some jurisdictions the affidavit required by the statute must be made by the person to whom the rent is due;[13] in others it may be made by either the landlord or his agent.[14]

(iii) *Persons Who May Take Affidavit.* The affidavit required for a distress warrant must be made before an officer possessing a general authority to administer oaths.[15] A justice of the peace has been held not such an officer.[16]

(iv) *Counter-Affidavit.* A distress warrant issued on an affidavit alleging that the rent distrained for is due and unpaid is sufficiently met by a counter-affidavit alleging that the sum distrained for under the warrant issued was not due at the time of issuing said warrant.[17] While such a denial fully meets the requirements of the statute,[18] defendant may set forth special matters of defense

thereabouts, for rent and supplies furnished and advances made," is not sufficient to authorize the issuance of a distress warrant).

4. Stein *v.* Stely, (Tex. Civ. App. 1895) 32 S. W. 782.

5. Scruggs *v.* Gibson, 40 Ga. 511.

6. Pate *v.* Shannon, 69 Miss. 372, 13 So. 729. See also Thompson *v.* Chapman, 57 Ga. 16.

7. Ga. Code, § 5122.

8. Beach *v.* Averett, 106 Ga. 73, 31 S. E. 806, 71 Am. St. Rep. 239 (holding that the fact that the jurat is not attached to an affidavit in a distress warrant is an amendable defect and does not render the warrant issued thereon void, when it appears that the oath was actually taken before the magistrate issuing the warrant); Smith *v.* Smith, 105 Ga. 717, 31 S. E. 754; Westbrook *v.* Harrison, 99 Ga. 660, 26 S. E. 68 (holding that an affidavit of an attorney of plaintiff for obtaining a distress warrant, in which affiant deposes that the rent is due to the best of his knowledge and belief, is amendable, so as to make it state that fact positively); Freeny *v.* Hall, 93 Ga. 706, 21 S. E. 163; Reese *v.* Walker, 89 Ga. 72, 14 S. E. 888; Bryant *v.* Mercier, 82 Ga. 409, 9 S. E. 166.

The amendment of an affidavit for a distress warrant after levy will not cause the levy to fall, the main object of the statute in allowing the amendment being to uphold the levy. Reese *v.* Walker, 89 Ga. 72, 14 S. E. 888.

9. Summerour *v.* Felker, 102 Ga. 254, 29 S. E. 448, holding that where an affidavit alleges that the land is situated in one county, it is error to allow an amendment striking out the county first alleged, and inserting another county.

10. Westbrook *v.* Harrison, 99 Ga. 660, 26 S. E. 68.

11. Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570.

12. Pate *v.* Shannon, 69 Miss. 372, 13 So. 729.

13. Howard *v.* Dill, 7 Ga. 52; Mitchell *v.* Franklin, 3 J. J. Marsh. (Ky.) 477, holding that the fact that the party upon whose oath the warrant issues styles himself agent does not necessarily exclude the conclusion that he is the actual landlord.

14. Bussing *v.* Bushnell, 6 Hill (N. Y.) 382, but holding that the attorney employed to distrain, and who has no knowledge of the facts except by hearsay, is not such an agent of the landlord as may make the affidavit required.

15. Christman *v.* Floyd, 9 Wend. (N. Y.) 340.

16. Christman *v.* Floyd, 9 Wend. (N. Y.) 340. *Contra*, Vannerson *v.* Staunton, Walk. (Miss.) 358.

17. Feagin *v.* McCowen, 115 Ga. 325, 41 S. E. 575; Huckaby *v.* Brooks, 75 Ga. 678; Holland *v.* Brown, 15 Ga. 113.

Allegation that levying officer retained property.— A counter-affidavit interposed to the levy of a distress warrant need not state that the levying officer retained possession of the property. Irvine *v.* Wise, 102 Ga. 539, 31 S. E. 540.

18. Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632; Girtman *v.* Stanford, 68 Ga. 178;

showing how and why the general denial is true.[19] With or without such special allegations he is entitled to support his defense by competent evidence.[20] Where after levy the progress of a distress warrant is arrested by a counter-affidavit denying that the sum distrained for is due, the warrant becomes mesne process, and the proceeding is converted into a suit for rent,[21] in which the form of the verdict or judgment is general and is for the amount found to be due;[22] and an action will not lie for the rent claimed while the proceeding is pending, unless the distress warrant is so defective that no recovery may be had thereon.[23] Where the counter-affidavit to a distress warrant has been dismissed on plaintiff's motion, the case passes out of the jurisdiction of the court, and is remanded to the sheriff by operation of law,[24] and the court cannot proceed to dismiss the warrant for insufficiency in plaintiff's affidavit.[25] After the counter-affidavit has been dismissed, a second one cannot be filed.[26]

(v) *Petition or Declaration*—(a) *Necessity and Sufficiency.* In those jurisdictions where a distress proceeding is not considered an original action it is not required to be tried on pleadings and a declaration is unnecessary.[27] Where, however, the proceeding is made an action, a petition or declaration is necessary.[28] A petition which states that the rent is due, but which shows upon its face that it is not due is insufficient.[29]

(b) *Time of Filing.* The petition is required to be filed on or before the appearance day of the first term of court after the issuance of the distress warrant,[30] and this requirement must be strictly complied with.[31] If the petition is not filed as required by statute, the tenant may move the dismissal of the case.[32] If, however, the petition is filed before the case is dismissed, the court may exercise jurisdiction and render judgment.[33]

(vi) *Plea.* A plea traversing a distress warrant is not strictly a plea in abatement, but a traverse merely of the warrant.[34] Where an affidavit of claim is filed with the declaration, defendant is bound to file with his plea an affidavit of merits.[35] Where the landlord has a right to distrain goods for thirty days after their removal from the premises, the question whether a distress was in the time

Anders *v.* Blount, 67 Ga. 41; Drake *v.* Dawson, 66 Ga. 174.

19. Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632; Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17; Drake *v.* Dawson, 66 Ga. 174.

Burden of proof.— Where a tenant against whom a distress warrant has been issued files a counter-affidavit denying that the sum distrained for is due, the burden is on the landlord to prove the existence of the relation of landlord and tenant. Hancock *v.* Boggus, 111 Ga. 884, 36 S. E. 970.

20. Feagin *v.* McCowen, 115 Ga. 325, 41 S. E. 575; Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632; Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17.

21. Hardy *v.* Poss, 120 Ga. 385, 47 S. E. 947; Brooke *v.* Augusta Warehouse, etc., Co., 119 Ga. 946, 47 S. E. 341; Elam *v.* Hamilton, 69 Ga. 736; Chisholm *v.* Lewis, 66 Ga. 729.

22. Hardy *v.* Poss, 120 Ga. 385, 47 S. E. 947.

23. Elam *v.* Hamilton, 69 Ga. 736; Chisholm *v.* Lewis, 66 Ga. 729.

24. Girtman *v.* Stanford, 68 Ga. 178; Anders *v.* Blount, 67 Ga. 41; McCulloch *v.* Good, 63 Ga. 519; Habersham *v.* Eppinger, 61 Ga. 199.

25. Habersham *v.* Eppinger, 61 Ga. 199.

26. Eppinger *v.* Habersham, 63 Ga. 664.

27. Alwood *v.* Mansfield, 33 Ill. 452; Parkhurst *v.* Dunlap, 6 How. (Miss.) 577.

28. See the statutes of the several states.

In Illinois by Rev. St. (1874) § 20, the warrant itself stands for and takes the place of a declaration. Cox *v.* Jordan, 86 Ill. 560; Raymond *v.* Kerker, 81 Ill. 381; Asay *v.* Sparr, 26 Ill. 115; Kuhl *v.* Mowell, 72 Ill. App. 461; Vierling *v.* Owens, 64 Ill. App. 609; Bainter *v.* Lawson, 24 Ill. App. 634.

29. Bolton *v.* Sadler, 1 Tex. App. Civ. Cas. § 1226.

30. Taylor *v.* Felder, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313.

31. Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51; Jones *v.* Stone, 2 Tex. App. Civ. Cas. § 358; Braley *v.* Bailey, 1 Tex. App. Civ. Cas. § 790.

After filing answer.— A petition is properly filed on appearance day, although after the filing of the answer. Scoggins *v.* Thompson, (Tex. Civ. App. 1898) 45 S. W. 216.

32. Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51; Bentz *v.* McRee, 1 Tex. App. Civ. Cas. § 423.

33. Bateman *v.* Maddox, 86 Tex. 546, 26 S. W. 51; Maynard *v.* Lockett, 1 Tex. Unrep. Cas. 527; Hudson *v.* Long, 1 Tex. App. Civ. Cas. § 424.

34. Hopkins *v.* Wood, 79 Ill. App. 484.

35. Bartlett *v.* Sullivan, 87 Ill. 219.

limited may be raised by a plea of "*hors de son fee*,"[36] particularly where the landlord goes to the trial upon the merits.

(VII) *ISSUES, PROOF, AND VARIANCE.* A material variance between the pleadings and the proof is fatal.[37] So a variance between a distress warrant and a lease upon which it is issued, when offered in evidence, is fatal.[38] Evidence not based upon the allegations of the warrant is inadmissible.[39] A plea of set-off admits the justice of plaintiff's demand, and evidence inconsistent therewith is inadmissible.[40]

c. Issuance, Service, and Return of Warrant — (I) *AUTHORITY TO ISSUE WARRANT.* Any justice of the peace of the county in which the tenant resides may issue a distress warrant for the collection of rent.[41] The fact that the magistrate issuing such warrant is related to plaintiff will not render it void since the act is purely ministerial.[42] Where the petition and bond for a distress warrant are filed before one justice, another justice of the same county has no jurisdiction to issue a warrant thereon.[43]

(II) *BOND FOR WARRANT.* A bond and security is necessary to support a distress for rent as other process of attachment.[44] Where it is required that the bond shall be conditioned to pay damages in case the warrant "is illegally and unjustly" sued out, a bond conditioned to pay damages in case the warrant is wrongfully[45] or illegally[46] sued out is insufficient. The bond need not be signed by the principal, where his name is stated in the body of the bond.[47]

(III) *FORM AND CONTENTS OF WARRANT.* A warrant is a writ and should run in the name of the state,[48] and in favor of the principal.[49] It must be in writing,[50] but the law requires no set form of words. It is sufficient if the authority of the landlord appear.[51] It need not be subscribed in the name of the principal, but if signed by an agent in his own name as agent for his principal it is a good execution of his authority.[52] And it has been held that if the person signing the warrant is in fact the agent of the landlord, the warrant is a sufficient authority to the constable, although not signed in terms as agent or for the landlord by name.[53] The warrant must disclose that the tenant resides or has property in the county of its issuance, since a showing of one of these facts is necessary to the justice's jurisdiction.[54] The premises need not be described in a distress warrant,[55] at least not with the particularity necessary to a conveyance of the premises.[56] Nor is it necessary to specify the day on which the next term of the justice's court to which the warrant is made returnable is to be held, when this is fixed by statute;[57] the reasons why rent is due as set forth in the affidavit;[58] or the year

36. Mather *v.* Wood, 1 Pa. Dist. 793, 12 Pa. Co. Ct. 3.
37. Jackson *v.* Lee, 6 Rich. (S. C.) 41.
38. Vierling *v.* Owens, 64 Ill. App. 609.
39. Bainter *v.* Lawson, 24 Ill. App. 634.
40. Raymond *v.* Kerker, 81 Ill. 381.
41. Almand *v.* Scott, 83 Ga. 402, 11 S. E. 653; Keaton *v.* McDonald, 24 Ga. 166, a justice of the inferior court cannot issue a distress.
County court judge — Georgia. — The General County Court Act of Jan. 19, 1872, granted authority to issue distress warrants to judges of county courts. Graves *v.* Tift, 50 Ga. 122.
Jurisdiction of justice in general see JUSTICES OF THE PEACE.
42. Thornton *v.* Wilson, 55 Ga. 607.
43. Bolton *v.* Sadler, 1 Tex. App. Civ. Cas. § 1226.
44. Cornell *v.* Rulon, 3 How. (Miss.) 54: Bentz *v.* McRee, 1 Tex. App. Civ. Cas. § 423.
45. Murry *v.* Blanchard, 2 Tex. App. Civ. Cas. § 479.
46. Riggins *v.* Ford, 1 Tex. App. Civ. Cas. § 1286.
47. Duffey *v.* Cagle, 3 Tex. App. Civ. Cas. § 419.
48. Beach *v.* O'Riley, 14 W. Va. 55.
49. Maxwell *v.* Collier, 115 Ga. 304, 41 S. E. 620, holding that on an affidavit made by an agent to secure the issuance of a distress warrant, a warrant in the name of the agent, describing him as such, is insufficient, as not following the affidavit.
50. Bigelow *v.* Judson, 19 Wend. (N. Y.) 229.
51. Jones *v.* Gundrim, 3 Watts & S. (Pa.) 531.
52. Bigelow *v.* Judson, 19 Wend. (N. Y.) 229.
53. Jean *v.* Spurrier, 35 Md. 110.
54. Cohen *v.* Candler, 88 Ga. 207, 14 S. E. 193. *Contra*, Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300.
55. Alwood *v.* Mansfield, 33 Ill. 452.
56. Central Land Co. *v.* Calhoun, 16 W. Va. 361.
57. McCray *v.* Samuel, 65 Ga. 739.
58. Callaway *v.* Phillips, 95 Ga. 801, 22 S. E. 704.

for which the rent is due.[59] Where the rent is payable in specific articles, a warrant is not vitiated by the use of the term "damages" instead of "rent,"[60] and if the value of the specifics is subject to fluctuation, the statement in the warrant of the amount of the specific article due and that it is supposed to be of a particular value is sufficient.[61]

(IV) *SERVICE OR LEVY OF WARRANT*—(A) *Manner of Service*—(1) BY ENTRY THROUGH DOOR. Under a warrant of distress, a landlord has no power at common law to break open the outer door of any building,[62] or to unlock it with a key in his possession;[63] but he may open it in the ordinary way in which other persons using the building are accustomed to open it.[64] A forcible reëntry by breaking the outer door is permissible, however, after the landlord has once obtained peaceable possession of the premises and been forcibly put out of them.[65]

(2) BY ENTRY THROUGH WINDOW. An entry to make a distress through an open window,[66] or by further opening a window which is partly open,[67] is lawful. But an entry by forcibly breaking in a window,[68] by opening a window which is fastened by means of a hasp,[69] or which is shut but not fastened,[70] is unlawful, rendering the landlord a trespasser.

(3) BY CLIMBING OVER FENCE OR WALL. The landlord may distrain for rent by climbing over a wall or fence and gaining access to a house by an open door or window.[71]

(4) BY BREAKING THROUGH CEILING. A landlord who occupies an apartment over the demised premises, from which it is divided only by a board floor without any ceiling, may distrain for rent by taking up the floor of his own apartment and entering through the aperture.[72]

(5) BY CALLING IN POLICE OFFICER. In making a distress for rent, circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary, either by threats or resistance or by apprehension of violence.[73]

(B) *Time of Service of Levy.* Distress for rent cannot be made on the day the rent becomes due, because the tenant has the whole of that day in which to

59. Mitchell *v.* Franklin, 3 J. J. Marsh. (Ky.) 477.

60. Craig *v.* Merime, 16 Ill. App. 214.

61. Tucker *v.* Cox, 65 Ga. 700.

62. Cate *v.* Schaum, 51 Md. 299; Dent *v.* Hancock, 5 Gill (Md.) 120; U. S. *v.* Stott, 27 Fed. Cas. No. 16,408, 2 Cranch C. C. 552; Brown *v.* Glenn, 16 Q. B. 254, 15 Jur. 189, 20 L. J. Q. B. 205, 71 E. C. L. 254; American Concentrated Must Corp. *v.* Hendry, 57 J. P. 788, 62 L. J. Q. B. 388, 68 L. T. Rep. N. S. 742, 5 Reports 335 note.

63. Murray *v.* Vaughn, 4 Pa. Dist. 631, 16 Pa. Co. Ct. 657.

64. Dent *v.* Hancock, 5 Gill (Md.) 120; Ryan *v.* Shilcock, 7 Exch. 72, 15 Jur. 1200, 21 L. J. Exch. 55.

65. Eagleton *v.* Gutteridge, 2 Dowl. P. C. N. S. 1053, 12 L. J. Exch. 359, 11 M. & W. 465; Bannister *v.* Hyde, 2 E. & E. 627, 6 Jur. N. S. 171, 29 L. J. Q. B. 141, 1 L. T. Rep. N. S. 438, 105 E. C. L. 627; Boyd *v.* Profaze, 16 L. T. Rep. N. S. 431, holding that when a person has merely got his foot and arm between the door and lintel, or, by putting a pair of shears between the door and lintel, has prevented its being closed, this is not a possession which will entitle him to break open a door or window for the purpose of gaining admission to the house.

66. Tutton *v.* Darke, 5 H. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361.

67. Crabtree *v.* Robinson, 15 Q. B. D. 312, 50 J. P. 70, 54 L. J. Q. B. 544, 33 Wkly. Rep. 936.

68. Attack *v.* Bramwell, 3 B. & S. 520, 9 Jur. N. S. 892, 32 L. J. Q. B. 146, 7 L. T. Rep. N. S. 740, 11 Wkly. Rep. 309, 113 E. C. L. 520.

69. Jewell *v.* Mills, 3 Bush (Ky.) 62; Hancock *v.* Austin, 14 C. B. N. S. 634, 10 Jur. N. S. 77, 32 L. J. C. P. 252, 8 L. T. Rep. N. S. 429, 11 Wkly. Rep. 833, 108 E. C. L. 634.

70. Cate *v.* Schaum, 51 Md. 299; Nash *v.* Lucas, L. R. 2 Q. B. 590, 8 B. & S. 531; Reg. *v.* Lockwood, 4 Wkly. Rep. 465.

71. Long *v.* Clarke, [1894] 1 Q. B. 119, 58 J. P. 150, 63 L. J. Q. B. 108, 69 L. T. Rep. N. S. 654, 9 Reports 60, 42 Wkly. Rep. 130 [*approving* Eldridge *v.* Stacey, 15 C. B. N. S. 458, 10 Jur. N. S. 517, 9 L. T. Rep. N. S. 291, 12 Wkly. Rep. 51, 109 E. C. L. 458, and *overruling* Scott *v.* Buckley, 16 L. T. Rep. N. S. 573].

72. Goul *v.* Bradstock, 4 Taunt. 562.

73. Skidmore *v.* Booth, 6 C. & P. 777, 25 E. C. L. 684, so holding where tenant sought to recover damage to reputation.

pay it;[74] neither should it be made on Sunday,[75] or during the night.[76] This latter rule must be taken to mean not merely that a distress must not be taken in the dark,[77] but that it must be between sunrise and sunset.[78]

(c) *Persons Entitled to Serve*—(1) At Common Law. At common law a landlord could distrain in person,[79] or employ a bailiff or agent to distrain for him.[80] Some cases hold that the distress, when made by a bailiff, should be in the name of the landlord.[81] In other cases it is held that, although one having authority to distrain for another says at the time that he distrains for rent due himself, he may nevertheless justify as bailiff of another.[82]

(2) By Statute. By statute now in some states the distress must be made by a constable or sheriff.[83] When the warrant is directed to the sheriff, that officer may execute the warrant by his deputy, whose acts will be regarded as those of the sheriff himself.[84]

(d) Effect of Levy. The levy of a distress warrant does not have the effect *prima facie* of satisfying the debt.[85]

(v) *Impounding Distress.* The distinction between a distress and the impounding is a distinction which affects the substantial rights of the parties.[86]

74. Gano *v.* Hart, Hard. (Ky.) 297; Johnson *v.* Owens, 13 Fed. Cas. No. 7,402, 2 Cranch C. C. 160; Poole *v.* Longuevill, 2 Saund. 284 note 2.

Enlargement of time of distress by contract.—The remedy by distress for rent may be enlarged by the contract of the parties as to the time of distraining. Dinner *v.* McAndrews, 10 Pa. Dist. 221; Gold *v.* Gleason, 43 Pittsb. Leg. J. 10.

75. Mayfield *v.* White, 1 Browne (Pa.) 241.

76. Sherman *v.* Dutch, 16 Ill. 283; Aldenburg *v.* Peaple, 6 Carr. & P. 212, 25 E. C. L. 399.

77. Aldenburg *v.* Peaple, 6 C. & P. 212, 25 E. C. L. 399.

78. Fry *v.* Breckinridge, 7 B. Mon. (Ky.) 31; Tutton *v.* Darke, 5 H. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361.

79. Robelen *v.* Wilmington, etc., Nat. Bank, 1 Marv. (Del.) 346, 41 Atl. 80; Lambson *v.* Matthew, 5 Harr. (Del.) 28; Blanchard *v.* Raines, 20 Fla. 467; Furbush *v.* Chappell, 105 Pa. St. 187; Wells *v.* Hornish, 3 Penr. & W. (Pa.) 30; Smith *v.* Ambler, 1 Munf. (Va.) 596.

80. *Delaware.*—Robelen *v.* Wilmington, etc., Nat. Bank, 1 Marv. 346, 41 Atl. 80; Lambson *v.* Matthew, 5 Harr. 28.

Florida.—Blanchard *v.* Raines, 20 Fla. 467.

Maryland.—Myers *v.* Smith, 27 Md. 91.

Pennsylvania.—Furbush *v.* Chappell, 105 Pa. St. 187; Wells *v.* Hornish, 3 Penr. & W. 30.

Virginia.—Smith *v.* Ambler, 1 Munf. 596; Ferguson *v.* Moore, 2 Wash. 54.

Parol authority is sufficient to justify a bailiff to distrain. Lambson *v.* Matthew, 5 Harr. (Del.) 28; Bigelow *v.* Judson, 19 Wend. (N. Y.) 229; Furbush *v.* Chappell, 105 Pa. St. 187; Jones *v.* Gundrim, 3 Watts & S. (Pa.) 531; Franciscus *v.* Reigart, 4 Watts (Pa.) 98; McGeary *v.* Raymond, 17 Pa. Super. Ct. 308; Manby *v.* Long, 3 Lev. 107.

A corporation aggregate may appoint a bailiff to distrain without a deed. Anonymous, 1 Salk. 191.

81. Swearingen *v.* Magruder, 4 Harr. & M. (Md.) 347; Bigelow *v.* Judson, 19 Wend. (N. Y.) 229; Duncan *v.* Meikleham, 3 C. & P. 172, 14 E. C. L. 510; Trevillian *v.* Pine, 11 Mod. 112; Potter *v.* North, 1 Saund. 347*c* note 4.

Ratification by landlord.—A distress made in the name of a landlord, even if made without precedent authority, is valid by his subsequent adoption and ratification. Jean *v.* Spurrier, 35 Md. 110. It has also been held that a distress made by an agent in his own name instead of his principal's, and which is subsequently ratified by the principal, is valid. Grant *v.* McMillan, 10 U. C. C. P. 536.

82. Trent *v.* Hunt, 9 Exch. 14, 17 Jur. 899, 22 L. J. Exch. 318, 1 Wkly. Rep. 481; Wootley *v.* Gregory, 2 Y. & J. 526, 31 Rev. Rep. 626.

83. Flury *v.* Grimes, 52 Ga. 341; Scruggs *v.* Gibson, 40 Ga. 511; Harris *v.* McFaddin, 2 Blackf. (Ind.) 71; Giles *v.* Ebsworth, 10 Md. 333. See also Harris *v.* Boggs, 5 Blackf. (Ind.) 489; Roberts *v.* Tennell, 4 Litt. (Ky.) 286.

The Kentucky act of 1811 authorizes either sheriff or constable to distrain under a distress warrant, but the act of 1820 prohibits sheriffs from executing any warrant in civil cases, except in attachments and forcible entries and detainers. McCormick *v.* Young, 3 J. J. Marsh. 180.

84. Myers *v.* Smith, 27 Md. 91; Giles *v.* Ebsworth, 10 Md. 333.

85. Taylor *v.* Felder, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313.

86. See cases cited *infra*, this note.

If there be anything wrongful in the distress, the tenant may rightfully rescue the goods before the impounding, but if the distress be once impounded, the goods cannot be taken, although the distress was without cause. Newell *v.* Clark, 46 N. J. L. 363; Ladd *v.* Thomas, 12 A. & E. 117, 4 Jur. 798, 9 L. J. Q. B. 345, 4 P. & D. 9, 40 E. C. L. 67; Parrett Nav. Co. *v.* Stower, 8 Dowl. P. C. 405, 9 L. J. Exch. 180, 6 M. & W. 564.

Before the statute of 11 Geo. II[87] a distress could only be impounded by removing it off the premises.[88] That statute does not relieve the landlord from the necessity of impounding or otherwise securing the distress to effectually protect his rights; it only empowers him to turn any part of the premises upon which the distress is taken into a pound for securing the distress.[89] To constitute an impounding the place where the goods are impounded need not be locked;[90] neither is it necessary that the landlord should retain actual possession of the goods.[91] Thus where with the consent of the tenant the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant, and leaves a man in possession of the premises, but does not disturb, lock up, or remove any of the goods, the distress is sufficiently impounded.[92] A party distraining in a dwelling-house must not take the whole of it in which to place the goods, but should select one room for that purpose, or remove them out of the house;[93] and the distrainor must show that the house, or that part of it of which the doors are locked, is the most fit and convenient place for securing the distress.[94]

(VI) *NOTICE OR CITATION TO TENANT.* In some jurisdictions notice of the distress with the cause of the taking must be given the tenant, against whom a distress warrant has issued.[95]

(VII) *BOND TO RELEASE LEVY*—(A) *In General.* Where a tenant disputes the claim of his landlord, he may secure the release of the property distrained by giving a proper bond.[96] Such a bond should cover the whole condemnation money, even if but a part of the property levied upon is sought to be released,[97] and should include the officer's fees.[98] A replevy bond in distress proceedings is an unconditional obligation to pay the judgment, etc., irrespective of the validity of the proceedings,[99] and its validity is not affected by the fact that too great an amount of rent is distrained for.[1] The bond should be executed by the tenant in

87. St. 2 Geo. II, c. 29.

88. Tennant *v.* Field, 8 E. & B. 336, 3 Jur. N. S. 1178, 27 L. J. Q. B. 33, 6 Wkly. Rep. 11, 92 E. C. L. 336.

89. Newell *v.* Clark, 46 N. J. L. 363; Cadmus *v.* Barney, 42 N. J. L. 346; Cox *v.* Painter, 7 C. & P. 767, 32 E. C. L. 862.

Under the usage in Pennsylvania of impounding goods distrained on the premises, the distrainor may leave the goods on the premises for the five days provided in the act to elapse between the distress and the sale. Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68, 1 L. ed. 292.

90. Thomas *v.* Harris, 9 L. J. C. P. 308; Firth *v.* Purvis, 5 T. R. 432, 2 Rev. Rep. 637.

91. Jones *v.* Biernstein, [1900] 1 Q. B. 100, 69 L. J. Q. B. 1, 81 L. T. Rep. N. S. 553, 48 Wkly. Rep. 232.

92. Tennant *v.* Field, 8 E. & B. 336, 3 Jur. N. S. 1178, 27 L. J. Q. B. 33, 6 Wkly. Rep. 11, 92 E. C. L. 336; Johnson *v.* Upham, 2 E. & E. 250, 5 Jur. N. S. 681, 28 L. J. Q. B. 252, 105 E. C. L. 250. See also Thomas *v.* Harries, 1 M. & G. 695, 39 E. C. L. 978; Dimock *v.* Miller, 30 Nova Scotia 74. *Compare* Newell *v.* Clark, 46 N. J. L. 363.

93. Washborn *v.* Black, 11 East 405 note.

94. Woods *v.* Durrant, 16 M. & W. 149.

95. L. A. Thompson Scenic R. Co. *v.* Young, 90 Md. 278, 44 Atl. 1024; Overseers of Poor *v.* Overseers of Poor, 6 N. J. L. 177; Murphy *v.* Chase, 103 Pa. St. 260.

Seizure of property sufficient notice.—Where a distress for rent is considered a proceeding *in rem*, a sufficient notice to the owner is given by the seizure of the property in his possession, if no other notice is required by the statute regulating the proceeding. Blanchard *v.* Raines, 20 Fla. 467.

In Texas a citation must be issued for defendant at the time of issuing a distress warrant, or the warrant will be a nullity. Miles *v.* Sprague, 3 Tex. App. Civ. Cas. § 199; Jones *v.* Stone, 2 Tex. App. Civ. Cas. § 358; Bentz *v.* McRee, 1 Tex. App. Civ. Cas. § 423.

96. Dean *v.* Ball, 3 Bush (Ky.) 502; Grubb *v.* McCoy, 2 Metc. (Ky.) 486; Towns *v.* Boarman, 23 Miss. 186; Starr *v.* Simon, 9 Pa. Co. Ct. 15; Lardner *v.* New York Mut. L. Ins. Co., 32 Wkly. Notes Cas. (Pa.) 62.

A bond given to save property from distress for rent is as good as if given to release it after distress. Gano *v.* Hart, Hard. (Ky.) 297.

Constitutionality of statute.—A statute giving landlords the right to take property under a distress warrant for rent, and allowing the tenant to make a defense only on giving a forthcoming bond, does not constitute a method of taking property without due process of law. Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

97. Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541.

98. Alexander *v.* Thomas, 1 Fed. Cas. No. 174, 1 Cranch C. C. 92.

99. Sexton *v.* Hindman, 2 Tex. App. Civ. Cas. § 462.

1. Dean *v.* Ball, 3 Bush (Ky.) 502.

possession or by the owner of the property,[2] and may be made payable either to the officer,[3] or to plaintiff in the proceeding.[4] The bond should be made returnable to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies.[5] Where an officer levying a distress warrant surrenders the property on an insufficient bond, he may peaceably retake possession of and sell the property to satisfy the distress, although the warrant, he having returned it, is not in his hands;[6] but if goods taken on a distress warrant be replevied without an objection to the bond, and the time limited by law to replevy be expired, they cannot be retaken by virtue of the warrant on the ground that the surety is insufficient.[7]

(B) *Effect of Release.* Where property distrained is released by giving bond, as provided by statute, the specific lien on the property seized is at an end,[8] and it is liable to any other distress or encumbrance, or may be sold by defendant.[9] The distrainor has no remedy left except upon the replevin bond.[10]

(VIII) *Claim of Exemption.* A subtenant or assignee of the original tenant who has never been recognized by the landlord cannot claim exemption on a distress levy on his goods, where the process is in the name of the original lessee.[11] The original tenant may make such claim to protect the goods of his subtenant or a stranger, but neither of the latter parties is within the letter or the spirit of the law.[12] A demand of exemption should be made promptly, before the landlord takes any steps involving costs.[13]

(IX) *Claims of Third Persons.* It is provided by statute in some states that where goods in the possession of a tenant are distrained for rent, a person claiming them may interpose his claim and have a trial of the right of property.[14] This right must be maintained through replevin,[15] and the claimant is not entitled after the sale to bring an action of trespass.[16] In order to warrant an intervention, a claimant must have an interest in the subject-matter of the landlord's suit,

2. Ferguson *v.* Moore, 2 Wash. (Va.) 54, holding that a bond to release goods distrained for rent is good if signed by the original lessee, although not the tenant in actual possession, or the owner of the property distrained, if the original lessee has assigned to a third person without the privity or assent of the lessor.

3. Robinson *v.* White, 7 Sm. & M. (Miss.) 39; Phillips *v.* Chaney, 7 How. (Miss.) 250; Peck *v.* Critchlow, 7 How. (Miss.) 243.

4. Phillips *v.* Chaney, 7 How. (Miss.) 250; Peck *v.* Critchlow, 7 How. (Miss.) 243.

Agent of creditor.— A bond for property levied on under a distress warrant under a statute providing that the officer levying a distress warrant may take from the debtor a bond "payable to the creditor" is not good as a statutory bond, if made payable to one as the agent of the creditor; but it may be upheld as a good common-law bond in an action of debt thereon where the obligor has enjoyed benefits under it. Hall *v.* Wadsworth, 35 W. Va. 375, 14 S. E. 4.

5. Ferguson *v.* Moore, 2 Wash. (Va.) 54.

6. Grubb *v.* McCoy, 2 Metc. (Ky.) 486.

7. Ridge *v.* Wilson, 1 Blackf. (Ind.) 409.

8. Speer *v.* Skinner, 35 Ill. 282; Rauh *v.* Ritchie, 1 Ill. App. 188; Jimison *v.* Reifsneider, 97 Pa. St. 136; Frey *v.* Leeper, 2 Dall. (Pa.) 131, 1 L. ed. 319; Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68, 1 L. ed. 292; Bair *v.* Warfel, 5 Lanc. L. Rev. (Pa.) 81; Frank *v.* Bean, 3 Tex. App. Civ. Cas. § 211. *Compare* Harris *v.* Clayton, 1 McMull. (S. C.) 194; McEvoy *v.* Niece, 20 Tex. Civ. App. 686, 50 S. W. 424.

Where the goods of both the sublessee and his immediate landlord are distrained upon, and the sublessee releases his property on bond, and afterward the paramount landlord, relying upon the security of that bond, stays proceedings against the other goods distrained, by such act the paramount landlord does not preclude himself from proceeding further against the goods which have been released. Jimison *v.* Reifsneider, 97 Pa. St. 136.

9. Bair *v.* Warfel, 5 Lanc. L. Rev. (Pa.) 81.

10. Speer *v.* Skinner, 35 Ill. 282.

11. Rosenberger *v.* Hallowell, 3 Phila. (Pa.) 330.

12. Rosenberger *v.* Hallowell, 3 Phila. (Pa.) 330.

13. Rosenberger *v.* Hallowell, 3 Phila. (Pa.) 330, holding that where notice of a distress was given on April 6, and the appraisement made on April 8, pursuant to the statute, and on the same day the sale was advertised for April 14, a demand of exemption made on April 8, the day the bills were posted, was not in time.

14. Paine *v.* Hall Safe, etc., Co., 64 Miss. 175, 1 So. 56. See also cases cited *infra*, notes 15–25.

15. Punchard *v.* Rundell, 1 How. (Miss.) 508; Esterly Mach. Co. *v.* Spencer, 147 Pa. St. 466, 23 Atl. 774.

16. Esterly Mach. Co. *v.* Spencer, 147 Pa. St. 466, 23 Atl. 774.

that is, the debt due the landlord.[17] The amount of such indebtedness as against a claimant is concluded by the judgment of the landlord against the tenant.[18] On the trial of an issue arising under a claim interposed to the levy of a distress warrant, plaintiff, in order to make a *prima facie* case entitling him to subject the property levied upon, must show that the property belonged to defendant;[19] but he is not entitled to show that the warrant was unlawfully or improperly issued.[20] Where, however, the levy is defeated by the annulment of the distress proceeding, and this fact is shown, the claimant is entitled to have the proceeding abated or dismissed.[21] A claim of property operates as a release of damages by the claimant, both against the officer who levied upon the property and the landlord.[22] Where the claimant goes to trial without objection to the jurisdiction, he waives objection;[23] and the fact that the distress warrant is returnable to another district does not entitle him to have the levy dismissed.[24] Where the facts show that the claimant has abandoned his claim, it should be dismissed.[25]

(x) *Return of Warrant.* At common law a distress warrant, not being judicial process, need not be made returnable before the justice or court.[26] In some states the warrant by statute operates as a declaration in an action, and the law imposes upon the officer executing the warrant the duty of returning it to the proper court,[27] but imposes no obligation upon the justice issuing it to embody this mandate in the warrant itself.[28] Before the officer is authorized to return the papers, and the court to try the issue, the party distrained must replevy the property by making oath that the sum distrained is not due, and by giving security

17. Reddick *v.* Elliot, (Tex. Civ. App. 1894) 28 S. W. 43 (holding that a purchaser at an execution sale of property previously seized under a distress warrant has not such an interest in the subject-matter of the suit as to warrant his intervention therein); Fisher *v.* Bogarth, 2 Tex. App. Civ. Cas. § 120 (holding that mortgagees of goods levied upon under a distress warrant cannot intervene).

18. Sanger *v.* Magee, 29 Tex. Civ. App. 397, 69 S. W. 234.

19. Willis *v.* Parker, 108 Ga. 778, 33 S. E. 658; Smith *v.* Smith, 106 Ga. 303, 31 S. E. 762.

20. Wash *v.* Albany First Nat. Bank, 99 Ga. 592, 27 S. E. 167; Horne *v.* Powell, 88 Ga. 637, 15 S. E. 688.

21. Fry *v.* Meyer Bros. Drug Co., (Tex. Civ. App. 1897) 40 S. W. 620.

22. Rose *v.* Riddle, 3 Tex. App. Civ. Cas. § 298.

23. Almand *v.* Scott, 83 Ga. 402, 11 S. E. 653.

24. Almand *v.* Scott, 83 Ga. 402, 11 S. E. 653.

25. Taylor *v.* St. Louis Type Foundry, 21 Tex. Civ. App. 69, 51 S. W. 304, holding that a claimant of property held under a distress warrant, who has twice filed a claimant's bond in the county court, and has each time, upon his own motion, dismissed the proceedings, where he does not have such judgments of dismissal set aside, will when for the third time he seeks to have his claim adjudicated, be deemed to have abandoned his claim to the property.

26. Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

27. See cases cited *infra*, this note.

In Georgia, at the monthly session of the county court, it has jurisdiction of issues on distress warrants where the amount does not exceed one hundred dollars, and at its quarterly session it has jurisdiction where the amount is in excess of that sum and not more than three hundred dollars. Therefore where a justice of the peace issues a distress warrant for two hundred and thirty-five dollars, returnable to the next term of the county court, it is properly returned to the next quarterly session, although a monthly term intervenes. Rivers *v.* Hood, 72 Ga. 194.

In Mississippi the code provides for a return by the officer executing a writ of distress of the replevin bond, if given by the tenant to the justice of the peace by whom the writ was issued. If either the amount of rent demanded or the value of the property seized exceeds one hundred and fifty dollars, the bond is to be returned to the circuit court. The circuit court meant is that sitting in the county in which the writ was issued by the justice. Hauser *v.* Robbins, 61 Miss. 551.

In Texas Rev. St. art. 3242, provides that when a warrant is issued, and levy made, it shall be returnable to a justice of the peace if within his jurisdiction; but if the amount in controversy exceeds two hundred dollars exclusive of interest, and does not exceed five hundred dollars exclusive of interest, the writ shall be returnable to the county court. Allen *v.* Brunner, 33 Tex. Civ. App. 128, 75 S. W. 821; Egger *v.* Kimmel, 24 Tex. Civ. App. 643, 60 S. W. 335; Scoggins *v.* Thompson. (Tex. Civ. App. 1898) 45 S. W. 216.

28. Beach *v.* Averett, 106 Ga. 73, 31 S. E. 806, 71 Am. St. Rep. 239, holding that a distress warrant is not void because made returnable to "the next term of the court" without designating what particular court.

for the eventual condemnation money.[29] Parol evidence will not be admitted to contradict or explain the return of an officer on a warrant of a distress.[30]

d. Hearing and Determination — (I) *Powers of Justice and Scope of Inquiry.* A distress warrant, in resistance to which no written defense of any kind has been interposed, presents nothing for trial by any court; the warrant alone forming no issue for adjudication.[31] Justices of the peace who issue distress warrants for rent alleged to be due in arrear have no judicial power, on the return of the warrant and replevy bond taken under it, to go behind the warrant and determine whether the rent is due or not;[32] but their authority is confined to determining what amount the tenant is entitled to set off against the landlord's claim for rent.[33]

(II) *Evidence.* After issue made by the counter-affidavit of defendant, it is incumbent on the landlord to prove that the rent had matured before the distress warrant issued.[34] The distress warrant is not of itself *prima facie* evidence of the indebtedness.[35] Any competent evidence to show that the rent is not due is admissible on behalf of the tenant.[36] If the tenant fails to obtain possession of any portion of the premises he may show that fact.[37] On an issue as to whether the tenant was about to remove the property from the premises any competent evidence to prove that fact is admissible.[38] Mere intention to remove property from the premises, accompanied by no overt act, must be proven by clear preponderance of evidence.[39] Incompetent and immaterial evidence, outside the issues as made, is inadmissible.[40]

(III) *Amount of Recovery.* In an action of distress for rent a landlord cannot recover a larger sum than that claimed in the warrant,[41] and he must show himself entitled to that sum or the warrant will not be sustained.[42] Nor can he recover in addition to the amount due for rent a claim on any other account.[43] A tenant can of course reduce the amount by proving payment of part.[44] Under a statute allowing double damages to the landlord, where the tenant releases on bond goods distrained for rent found to be justly due, and in arrear, the double recovery cannot be had where only a part of the rent distrained for is found to be due.[45]

(IV) *Questions For Jury.* It is within the province of the jury to determine questions of fact presented on the trial of a distress for rent.[46]

29. Toomer *v.* Mann, 63 Ga. 735; McCulloch *v.* Good, 63 Ga. 519.

30. Wilson *v.* Loring, 7 Mass. 392; Purrington *v.* Loring, 7 Mass. 388.

31. Brown *v.* Brown, 99 Ga. 168, 25 S. E. 95.

32. Richardson *v.* Vice, 4 Blackf. (Ind.) 13; Com. *v.* Colgan, 5 B. Mon. (Ky.) 485; Fowler *v.* Eddy, 110 Pa. St. 117, 1 Atl. 789.

33. Fowler *v.* Eddy, 110 Pa. St. 117, 1 Atl. 789.

34. Holt *v.* Licette, 111 Ga. 810, 35 S. E. 703.

35. Reid *v.* Brinson, 37 Ga. 63.

36. Hunnicutt *v.* Chambers, 111 Ga. 566, 36 S. E. 853; Rawlins *v.* Bush, 80 Ga. 588, 5 S. E. 634 (holding that where rent is payable in crops, there being no stipulation as to when such crops shall be delivered, evidence that the premises are unhealthy, that defendant's family and help are sick, and that the making and gathering of crops has been interfered with thereby, is admissible to show whether a reasonable time has elapsed for the delivery of the crops); McMahan *v.* Tyson, 23 Ga. 43.

37. Alwood *v.* Mansfield, 33 Ill. 452.

Proof that a crop seized was on the rented premises when the levy was made is equivalent to proof that it was then in the tenant's possession. Andrew *v.* Stewart, 81 Ga. 53, 7 S. E. 169.

38. Hewitt *v.* Hornbuckle, 97 Ill. App. 97 (holding that evidence that a tenant removed crops from the premises because he was hungry and needed money and that was the only way to get it is inadmissible, as such evidence is calculated to unduly arouse the sympathy of the jury in favor of the tenant); Rix *v.* Stubblefield, 12 Ill. App. 309; Riggs *v.* Gray, 31 Tex. Civ. App. 268, 72 S. W. 101.

39. Rix *v.* Stubblefield, 12 Ill. App. 309.

40. Holt *v.* Licette, 111 Ga. 810, 35 S. E. 703; Hunnicutt *v.* Chambers, 111 Ga. 566, 36 S. E. 853; Hill *v.* Coats, 109 Ill. App. 266.

41. Asay *v.* Sparr, 26 Ill. 115.

42. Asay *v.* Sparr, 26 Ill. 115.

43. Sketoe *v.* Ellis, 14 Ill. 75. See *supra*, VIII, E, 1, b.

44. Asay *v.* Sparr, 26 Ill. 115.

45. Terrel *v.* Ligon, Walk. (Miss.) 170.

46. Lynch *v.* Baldwin, 69 Ill. 210 (where an eviction is set up as a defense, it is a

(v) *Instructions.* The right of a landlord to recover rent does not depend on the legality of a distress warrant issued in the cause, and it is error to direct the jury to find for defendant if the grounds stated in the affidavit for the distress warrant are untrue.[47] Instructions not based upon the evidence[48] or the pleadings[49] should not be given. An instruction covered by a charge already given is properly refused.[50]

(vi) *Verdict and Findings.* Verdicts in distress proceedings should receive a reasonable construction and are not to be avoided unless from necessity.[51] A verdict contrary to the evidence, however, cannot be sustained.[52]

(vii) *Adjudication.* In some states a justice has no authority to enter any judgment in distress proceedings.[53] In others the practice in cases of distress for rent in justices' courts is the same as in cases of attachment; if plaintiff succeeds, judgment is to be given in his favor for the amount of rent due him; and if defendant has been served with process or appears in the action, such judgment is to have the same force and effect as in suits commenced by summons.[54] Where the property seized under the distress warrant has been replevied by defendant, the landlord, on recovery in the suit, is entitled to judgment on the replevy bond for the amount of rent found to be due him, interest thereon, and costs, or for the value of the property replevied, according to the terms of such bond.[55] No judgment, however, can be taken on a rent contract not due at the date of judgment.[56]

(viii) *Execution.* Where the court has authority to render judgment and award execution, it may take bail for the stay of execution, and issue scire facias thereon as in other cases.[57]

(ix) *Costs.* The same method of defraying expenses in distress proceedings is pursued as in attachment cases.[58]

e. Sale or Other Disposition of Property — (i) *Appraisement* — (a) *Necessity and Sufficiency.* At common law the landlord had no right to sell property taken under a distress, but was obliged to keep the same as a pledge until it was redeemed by the tenant.[59] Under statutes permitting sale it is commonly provided that five

question of fact for the jury to say whether or not the act amounted to an eviction); Brooks *v.* Wilcox, 11 Gratt. (Va.) 411 (ascertainment of the value in money of the rent in arrear).

It is not necessary for the landlord to prove to the jury that a distress warrant has been levied for rent in something other than money and that it is due and in arrear. Brooks *v.* Wilcox, 11 Gratt. (Va.) 411.

47. Pruitt *v.* Kelley, (Tex. App. 1890) 15 S. W. 119.

48. Jones *v.* Eubanks, 86 Ga. 616, 12 S. E. 1065; Hewitt *v.* Hornbuckle, 97 Ill. App. 97.

49. Hooper *v.* Dwinnell, 48 Ga. 442.

50. Stephens *v.* Bridge, (Tex. App. 1890) 16 S. W. 536.

51. Seifert *v.* Holt, 82 Ga. 757, 9 S. E. 843; Rickerson *v.* Flowers, 50 Ga. 215, holding that where a counter-affidavit is filed denying that defendant owes plaintiff any rent, a verdict as follows, "we, the jury, find the issue for the plaintiff," is sufficiently certain, and covers the issue made by the pleadings.

Verdict for "damages" instead of "rent." — In distress for rent the fact that the jury on finding a verdict for plaintiff calls it damages instead of rent will not vitiate the verdict. Alwood *v.* Mansfield, 33 Ill. 452.

52. Brittain *v.* Griggs, 88 Ga. 232, 14 S. E. 609.

53. Fowler *v.* Eddy, 110 Pa. St. 117, 1 Atl. 789; Hilke *v.* Eisenbeis, 104 Pa. St. 514.

54. Wiemerslage *v.* Zulk, 91 Ill. App. 574. *Compare* Kruse *v.* Kruse, 68 Ill. 188; Storing *v.* Onley, 44 Ill. 123; Alwood *v.* Mansfield, 33 Ill. 452.

55. Watson *v.* Cox, 2 Tex. App. Civ. Cas. § 277.

56. Miller *v.* Lancaster, (Tex. Civ. App. 1897) 41 S. W. 198.

57. Ezra *v.* Manlove, 6 Blackf. (Ind.) 454.

In Illinois prior to the statute of 1874, no judgment on the finding in a distress proceeding could be rendered, or execution awarded. The court could only find the amount of rent due and have it certified to the bailiff making the levy; and this certificate constituted his warrant for selling the property and applying the proceeds to the payment of the rent found due. Kruse *v.* Kruse, 68 Ill. 188; Storing *v.* Onley, 44 Ill. 123; Alwood *v.* Mansfield, 33 Ill. 452.

58. Poppers *v.* Meager, 33 Ill. App. 20. Therefore where the property seized has been released on a forthcoming bond, the landlord is entitled to recover the expense of the custody of the goods as costs, to be ascertained by the court, and not by the jury. Poppers *v.* Meager, *supra*; Jackson *v.* Jernigan, (Tex. Civ. App. 1903) 77 S. W. 271. See, generally, Attachment.

59. *Illinois.*— Curtis *v.* Bradley, 75 Ill. 180.

full days must elapse after the day on which notice of the distress is given before an appraisal of the goods can be made or notice of sale given,[60] and the days must be calculated inclusively of the last and exclusively of the day of taking.[61] After the expiration of the five days from the time of distress, a reasonable time is allowed the landlord for appraising and selling the goods distrained.[62] The statute of William and Mary providing for a sale is permissive and not compulsory, and therefore no action lies for not selling;[63] but when a landlord distrains and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, although it is insufficient to satisfy the rent,[64] and the tenant may still replevy the goods.[65] When goods have been sold under a distress and the proceeds are insufficient to satisfy the rent due, the landlord has a remedy by action or counter-claim for the balance.[66] Under the statute, goods seized under a distress should be appraised by two sworn appraisers.[67] They must be indiffer-

Maryland.— Lamotte *v.* Wisner, 51 Md. 543.

Pennsylvania.— Davis *v.* Davis, 128 Pa. St. 100, 18 Atl. 514.

Virginia.— Smith *v.* Ambler, 1 Munf. 596.

England.— King *v.* England, 4 B. & S. 782, 10 Jur. N. S. 634, 33 L. J. Q. B. 145, 9 L. T. Rep. N. S. 645, 12 Wkly. Rep. 308, 116 E. C. L. 782; Harper *v.* Taswell, 6 C. & P. 166, 25 E. C. L. 376.

The power to sell was first conferred by 2 Wm. & M. c. 5, § 2, which provided that unless the tenant or owner replevied the property within five days after the distress and notice thereof, the person distraining was authorized to have the distress appraised, and after such appraisement to sell the same toward the satisfaction of the rent and expenses incident to the distress. This statute has been copied in many of the United States. Curtis *v.* Bradley, 75 Ill. 180; Cahill *v.* Lee, 55 Md. 319; Lamotte *v.* Wisner, 51 Md. 543; Keller *v.* Weber, 27 Md. 660; Butts *v.* Edwards, 2 Den. (N. Y.) 164; Davis *v.* Davis, 128 Pa. St. 100, 18 Atl. 514; Richards *v.* McGrath, 100 Pa. St. 389; Brisben *v.* Wilson, 60 Pa. St. 452; Briggs *v.* Large, 30 Pa. St. 287; Kerr *v.* Sharp, 14 Serg. & R. (Pa.) 399; Snyder *v.* Boring, 4 Pa. Super. Ct. 196; Smith *v.* Ambler, 1 Munf. (Va.) 596; Chestnut St. Nat. Bank *v.* Crompton Loom Works, 73 Fed. 614, 19 C. C. A. 609; Pitt *v.* Shew, 4 B. & Ald. 208, 6 E. C. L. 453; King *v.* England, 4 B. & S. 782, 10 Jur. N. S. 634, 33 L. J. Q. B. 145, 9 L. T. Rep. N. S. 645, 12 Wkly. Rep. 308, 116 E. C. L. 782; Philpott *v.* Lehain, 35 L. T. Rep. N. S. 855.

Necessity of sale to third person.—The right of property to goods distrained for rent remains in the tenant until sale, and the taking of such goods to himself at the appraised value, in discharge of the rent, by a landlord, is not equivalent to a sale. Moore *v.* Singer Mfg. Co., [1904] 1 K. B. 820, 68 J. P. 369, 73 L. J. K. B. 457, 90 L. T. Rep. N. S. 469, 20 T. L. R. 366, 52 Wkly. Rep. 385; King *v.* England, 4 B. & S. 782, 10 Jur. N. S. 634, 33 L. J. Q. B. 145, 9 L. T. Rep. N. S. 645, 12 Wkly. Rep. 308, 116 E. C. L. 782.

Sale subject to condition.—Query, whether a landlord who has seized his tenant's hay and straw under a distress for rent may sell it subject to a condition that the purchaser shall consume it on the premises, according to a custom of the country. Frusher *v.* Lee, 12 L. J. Exch. 321, 10 M. & W. 709.

60. Butts *v.* Edwards, 2 Den. (N. Y.) 164; Harper *v.* Taswell, 6 C. & P. 166, 25 E. C. L. 376.

The usage in Pennsylvania is to impound a distress on the premises, although the act relating thereto does not expressly empower the landlord to do so; and the distrainor may leave the distress on the premises for the five days allowed the tenant by the statute to give him an opportunity to replevin, and it cannot be appraised until such time has elapsed. Woglam *v.* Cowperthwaite, 2 Dall. 68, 1 L. ed. 292.

61. Robinson *v.* Waddington, 13 Q. B. 753, 13 Jur. 537, 18 L. J. Q. B. 250, 66 E. C. L. 753; Wallace *v.* King, 1 H. Bl. 13.

62. Pitt *v.* Shew, 4 B. & Ald. 208, 6 E. C. L. 453.

Detention of goods beyond proper time by request of tenant.— The request of the tenant will justify the landlord in detaining the goods of a lodger on the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which those of the tenant. Fisher *v.* Algar, 2 C. & P. 374, 12 E. C. L. 625.

63. Lear *v.* Edmonds, 1 B. & Ald. 157, 2 Chit. 301, 18 Rev. Rep. 448, 18 E. C. L. 646; Hudd *v.* Ravenor, 2 B. & B. 662, 5 Moore C. P. 542, 23 Rev. Rep. 526, 6 E. C. L. 319; Lingham *v.* Warren, 2 B. & B. 36, 4 Moore C. P. 409, 6 E. C. L. 26; Philpott *v.* Lehain, 35 L. T. Rep. N. S. 855. *Contra*, Quinn *v.* Wallace, 6 Whart. (Pa.) 452.

A failure to sell within five days by arrangement with the tenant is no proof of collusion *per se*. Harrison *v.* Barry, 7 Price 690, 21 Rev. Rep. 781.

64. Lehain *v.* Philpott, L. R. 10 Exch. 242, 44 L. J. Exch. 225, 33 L. T. Rep. N. S. 98, 23 Wkly. Rep. 876.

65. Jacob *v.* King, 1 Marsh. 135, 5 Taunt. 451, 15 Rev. Rep. 550, 1 E. C. L. 235.

66. Philpott *v.* Lehain, 35 L. T. Rep. N. S. 855.

67. Cahill *v.* Lee, 55 Md. 319; Snyder *v.* Boring, 4 Pa. Super. Ct. 196; Bishop *v.* Bryant, 6 C. & P. 484, 25 E. C. L. 536.

Two reputable freeholders.—Under the stat-

ent persons who are reasonably competent, but need not be professional appraisers.[68] The appraisers must be sworn before the constable of the parish where the distress is taken.[69] The constable who swears the appraisers must attend with the appraisers at the time of the appraisement, and must swear them before they make it.[70] The tenant to save expense may waive appraisement,[71] when the goods distrained belong to him,[72] and cannot thereafter complain of what was done as irregular;[73] but a bailee of property distrained for rent has no implied authority to waive appraisement in behalf of the owner.[74]

(B) *Effect of Failure to Appraise or Irregular Appraisement.* As the right to sell did not exist at common law but was given by statute, it must be exercised, if at all, on the terms which the statute imposes. The courts have no power to dispense with any one of these.[75] For this reason it was held in England under the statute of William and Mary[76] that a failure to comply with the statutory formalities in any particular rendered the landlord and his bailiff trespassers *ab initio* and liable to the owner of the goods seized for their full value, regardless of the rent due. The inconvenience and injustice resulting to landlords from the application of this legal principle was relieved against by the statute of 11 Geo. II,[77] which provided that the landlord, his bailiff or agent, should not become a trespasser *ab initio* by reason of any irregularity or tortious act in the disposition of a distress seized, but that for any injury sustained by the tenant or owner of the goods, by reason of such irregularity or tortious act, such tenant or owner should recover the actual damage sustained and no more.[78] In some jurisdictions the principle of this statute has not been adopted. A failure therefore to make an appraisement of the goods or the making of it before the lapse of five full days after the seizure is a failure to follow the statutory requirements on which the right to sell is given, and a sale made under such circumstances, not being under the protection of the act, is unauthorized and void.[79] The measure of damages where a distress is sold without previous appraisement is the real value of the goods sold minus the rent due.[80]

(II) *NOTICE OF DISTRESS AND SALE.* Before an appraisement can be lawfully

utes of some states the two appraisers must be reputable freeholders. Curtis *v.* Bradley, 75 Ill. 180; Snyder *v.* Boring, 4 Pa. Super. Ct. 196.

Rent not exceeding £20.— Although the rent for which goods are distrained does not exceed £20, they must be appraised by two sworn appraisers, notwithstanding statute 57 Geo. III, c. 93. Allen *v.* Flicker, 10 A. & E. 640, 3 Jur. 1029, 9 L. J. Q. B. 42, 4 P. & D. 735, 37 E. C. L. 341. *Contra*, Fletcher *v.* Saunders, 6 C. & P. 747, 1 M. & Rob. 375, 25 E. C. L. 669.

68. Cahill *v.* Lee, 55 Md. 319, holding that an auctioneer and the watchman left in charge of lumber distrained in a lumber yard may appraise it.

A person who distrains cannot be sworn as one of the appraisers (Andrews *v.* Russell, Buller N. P. 81), and a distress so appraised is irregular (Westwood *v.* Cowne, 1 Stark. 172, 2 E. C. L. 73).

69. Avenell *v.* Croker, M. & M. 172, 22 E. C. L. 499, holding that the constable of the adjoining parish cannot interfere, although the proper constable is not to be found when wanted.

70. Kenny *v.* May, 1 M. & Rob. 56.

71. Bishop *v.* Bryant, 6 C. & P. 484, 25 E. C. L. 536.

72. Henkels *v.* Brown, 4 Phila. (Pa.) 299, holding that where furniture rented to a tenant was distrained upon for rent, and the tenant, waiving appraisement, allowed it to be sold, and it was bought by a third person, in respect to the creditor of the tenant it belonged to the latter, and hence he had a right to waive the appraisement, and having done so the purchaser at the landlord's sale took a good title.

73. Bishop *v.* Bryant, 6 C. & P. 484, 25 E. C. L. 536.

74. Briggs *v.* Large, 30 Pa. St. 287; Chestnut St. Nat. Bank *v.* Crompton Loom Works, 73 Fed. 614, 19 C. C. A. 609.

75. Curtis *v.* Bradley, 75 Ill. 180; Tripp *v.* Grouner, 60 Ill. 474.

76. 2 Wm. & M. sess. 1, c. 5, § 2.

77. St. 11 Geo. II, c. 19, § 19.

78. Butts *v.* Edwards, 2 Den. (N. Y.) 164; Messing *v.* Kemble, 2 Campb. 115; Wallace *v.* King, 1 H. Bl. 13; Avenell *v.* Croker, M. & M. 172, 22 E. C. L. 499.

79. Davis *v.* Davis, 128 Pa. St. 100, 18 Atl. 514; Brisben *v.* Wilson, 60 Pa. St. 452; Briggs *v.* Large, 30 Pa. St. 287; Kerr *v.* Sharp, 14 Serg. & R. (Pa.) 399; Hazlett *v.* Mangel, 9 Pa. Super. Ct. 139.

80. Biggins *v.* Goode, 2 Cromp. & J. 364, 1 L. J. Exch. 129, 2 Tyrw. 447; Knotts *v.* Curtis, 5 C. & P. 322, Tyrw. 449 note, 24 E. C. L. 586; Knight *v.* Egerton, 7 Exch. 407.

made, notice of the distress with the cause of taking, and an inventory of the goods, must be left at the mansion house or other most notorious place on the premises charged with the rent distrained for.[81] This notice should be in writing,[82] and be sufficient to inform the tenant or the owner what goods are taken, and the amount of rent in arrear.[83] In Pennsylvania six days' public notice of sale is also required,[84] but it is not essential that the sale take place on the day fixed by the notice.[85]

(III) *Manner of Sale.* The manner of sale in such cases is not prescribed by the statute. If the goods be prepared and offered for sale, and the sale be fairly conducted at public auction, the price realized will be presumed to be the best that can be gotten, and the landlord will not be responsible.[86] But it is well settled that an action will lie against a landlord for improper management of the property, and an improper offering of it for sale, so that it did not sell for the best price.[87] What will constitute such mismanagement as will make the distrainor liable must depend upon the circumstances of each case, and the character of the property seized and sold.[88]

(IV) *Validity, Operation, and Effect of Sale.* A private person levying a distress warrant has no right to sell the property; the law requires the sale to be made by a public officer.[89] The money is payable to him, to be applied according to law, and he is responsible under his official bond for such disposition of it.[90] In establishing title to personal property acquired by sale on a distress warrant, all conditions precedent must be made to appear,[91] but the loss of the papers on which the distress is made after the distress and before the sale will not affect the title of the purchaser.[92] After the sale has been advertised, a reasonable adjourn-

81. Cahill *v.* Lee, 55 Md. 319; Keller *v.* Weber, 27 Md. 660; Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020; Murphy *v.* Chase, 103 Pa. St. 260 (holding that the burden is on one claiming goods under a constable's sale on distress for rent to show that notice of the distress, with the cause of taking, was given to the tenant before the appraisement was made); Richards *v.* McGrath, 100 Pa. St. 389; Snyder *v.* Boring, 4 Pa. Super. Ct. 196.

The notice is not essential to the validity of the distress (Blanchard *v.* Raines, 20 Fla. 467; Keller *v.* Weber, 27 Md. 660; Tancred *v.* Leyland, 16 Q. B. 669, 15 Jur. 394, 20 L. J. Q. B. 316, 71 E. C. L. 669); but it is necessary by the statute of 11 Geo. II, § 19, in order to authorize a regular sale (Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020; Trent *v.* Hunt, 9 Exch. 14, 17 Jur. 899, 22 L. J. Exch. 318, 1 Wkly. Rep. 481).

Notice in wrong name.— When the notice of a distress is given in the name of a wrong party, the distress is not vitiated, but the distrainor cannot proceed to sell the goods under the statute. Trent *v.* Hunt, 9 Exch. 14, 17 Jur. 899, 22 L. J. Exch. 318, 1 Wkly. Rep. 481.

Service on day distress made.— A notice of distress is valid if served on the day the distress is made. Whitton *v.* Milligan, 153 Pa. St. 376, 26 Atl. 22.

Notice of distress posted upon the premises, and also advertised in a daily newspaper, conforms to the requirements of the statute. Cahill *v.* Lee, 55 Md. 319.

Waiver of notice.— When goods stored with a warehouseman are distrained for rent due by the warehouseman, the latter has no authority to waive notice of sale. Briggs *v.* Large, 30 Pa. St. 287.

82. Snyder *v.* Boring, 4 Pa. Super. Ct. 196; Wilson *v.* Nightingale, 8 Q. B. 1034, 10 Jur. 917, 15 L. J. Q. B. 309, 55 E. C. L. 1034.

83. Snyder *v.* Boring, 4 Pa. Super. Ct. 196; Wakeman *v.* Lindsey, 14 Q. B. 625, 15 Jur. 79, 19 L. J. Q. B. 166, 68 E. C. L. 625; Kerby *v.* Harding, 6 Exch. 234, 15 Jur. 953, 20 L. J. Exch. 163.

84. Whitton *v.* Milligan, 153 Pa. St. 376, 26 Atl. 22; Holland *v.* Townsend, 136 Pa. St. 392, 20 Atl. 794.

85. Holland *v.* Townsend, 136 Pa. St. 392, 20 Atl. 794.

86. Cahill *v.* Lee, 55 Md. 319.

87. Cahill *v.* Lee, 55 Md. 319; Pointer *v.* Buckley, 5 C. & P. 512, 24 E. C. L. 682; Knotts *v.* Curtis, 5 C. & P. 322, 2 Tyrw. 449 note, 24 E. C. L. 586 (holding further that no allegation of special damage is necessary); Ridgway *v.* Stafford, 6 Exch. 404, 20 L. J. Exch. 226; Frusher *v.* Lee, 12 L. J. Exch. 321, 10 M. & W. 709.

In an action for not selling goods at best prices, plaintiff may show in evidence that the goods were allowed to stand in the rain and were improperly lotted. Pointer *v.* Buckley, 5 C. & P. 512, 24 E. C. L. 682.

88. Cahill *v.* Lee, 55 Md. 319.

89. Lambson *v.* Matthew, 5 Harr. (Del.) 28; Wells *v.* Hornish, 3 Penr. & W. (Pa.) 30; Smith *v.* Ambler, 1 Munf. (Va.) 596; Ferguson *v.* Moore, 2 Wash. (Va.) 54.

90. Lambson *v.* Matthew, 5 Harr. (Del.) 28, holding that therefore the landlord cannot maintain suit against the purchaser at such sale for the proceeds.

91. Murphy *v.* Chase, 2 Kulp (Pa.) 81.

92. Peck *v.* Gurney, 2 Hill (N. Y.) 605.

ment thereof may be lawfully made, by public announcement, without further advertising,[93] and such an adjournment will not postpone the distress to an intervening execution.[94]

(v) *Right to Surplus.* By the statute of William and Mary[95] and some statutes in this country, it is provided that the proceeds of the sale, after payment of the rent and reasonable charges, shall be left in the hands of the sheriff, under sheriff, or constable, for the use of the owner.[96] Notwithstanding this statute, it is the practice to pay over such surplus to the tenant and not to the sheriff, and therefore inability to find the tenant is a sufficient excuse for not paying it over.[97] If the landlord fails to leave the overplus in the hands of the sheriff, he is not liable to the tenant in an action for money had and received; the proper remedy being an action on the case for failure to comply with the statute.[98] Before action is brought for such overplus, a demand must be made therefor under statute 27 Geo. II.[99] The bringing of the action is not a sufficient demand, and a tender does not dispense with proof of it.[1] If any goods remain unsold, the bailiff is not obliged to deliver them to the right owner. He may restore them to the premises from which he removed them, and may leave any stranger who claims them to enforce his right against the tenant.[2]

(vi) *Right of Owner of Property Distrained Over Against Tenant.* The tenant on whose premises the goods of a stranger are distrained for rent is liable over to such stranger,[3] who may buy them in at the sale and maintain an action for money paid against such tenant,[4] and his cotenant, their joint property being benefited by the payment of the rent.[5]

f. Defects, Objections, and Waiver Thereof — (i) *Defects and Objections.* Immaterial[6] or clerical[7] defects do not affect the validity of the proceedings; but where the defect is not a mere irregularity, but one that renders the whole proceeding void, the levy should be dismissed.[8] The account, affidavit, and warrant must be read together, as parts of an entire proceeding, and a defect or omission in one part may be cured by reference to the others.[9] Objection to the jurisdiction of the court should be raised by motion to dismiss the levy or to quash the warrant.[10] Objection that the petition does not sufficiently set out the items of account can only be raised by exception to the petition.[11]

(ii) *Presumption as to Regularity of Proceedings.* An officer distrain-

93. Brown *v.* Harris, 67 N. J. L. 207, 50 Atl. 689; Holland *v.* Townsend, 136 Pa. St. 392, 20 Atl. 794.

94. Kline *v.* Lukens, 4 Phila. (Pa.) 296.

95. St. 2 Wm. & M. c. 5, § 2.

96. Brooks *v.* Wilcox, 11 Gratt. (Va.) 411; Lyon *v.* Tomkies, 2 Gale 144, 5 L. J. Exch. 260, 1 M. & W. 603, 1 Tyrw. & G. 810 (holding that the reasonableness of the charges imposed may be questioned by the tenant); Pettit *v.* Kerr, 5 Manitoba 359.

97. Stubbs *v.* May, 1 L. J. C. P. O. S. 12.

98. Yates *v.* Eastwood, 6 Exch. 805, 20 L. J. Exch. 303.

99. St. 27 Geo. II, c. 20, § 2.

1. Simpson *v.* Routh, 2 B. & C. 682, 4 D. & R. 181, 2 L. J. K. B. O. S. 163, 9 E. C. L. 297.

2. Evans *v.* Wright, 2 H. & N. 527, 27 L. J. Exch. 50.

3. O'Donnel *v.* Seybert, 13 Serg. & R. (Pa.) 54.

4. Wells *v.* Porter, 7 Wend. (N. Y.) 119.

5. Wells *v.* Porter, 7 Wend. (N. Y.) 119.

6. Jones *v.* Eubanks, 86 Ga. 616, 12 S. E. 1065 (holding that it is no ground for dismissing a distress warrant that it is for other purposes than collecting rent, where plaintiff amends the warrant so as to exclude everything except rent); Hutsell *v.* Paris Deposit Bank, 102 Ky. 410, 43 S. W. 469, 19 Ky. L. Rep. 1481, 39 L. R. A. 403.

7. Burnett *v.* Bealmear, 79 Md. 36, 28 Atl. 898.

8. Cohen *v.* Candler, 88 Ga. 207, 14 S. E. 193; Waring *v.* Slingluff, 63 Md. 53, holding that where the attempt to distrain is by all who hold the relation of landlord, the omission of the name of one entitled to a portion of the rent, and the insertion of the name of a person not entitled, is fatal.

9. Jean *v.* Spurrier, 35 Md. 110, holding that where, in the affidavit accompanying a distress warrant the amount of rent due was stated to be "two hundred and fifty ——" and the annexed account was for two hundred and fifty dollars, the omission of the word "dollars" in the affidavit is cured by the account.

10. Georgia State Bldg., etc., Assoc. *v.* Owens, 88 Ga. 224, 14 S. E. 210.

11. Scoggins *v.* Thompson, (Tex. Civ. App. 1898) 45 S. W. 216.

ing goods under a landlord's warrant acts merely as the agent of the landlord and not as an officer of the law; and hence the presumption that he has complied with all preliminary steps necessary to his authority to act does not apply.[12]

(III) *Waiver of Defects and Irregularities.* Any irregularity in making a distress is waived by entering into a replevin bond.[13]

g. Liability on Bonds — (I) *On Bond For Warrant.* Under a statute providing for a bond to be given by a landlord suing out a distress warrant, conditioned to pay such damages as the tenant may sustain in case the warrant has been "illegally and unjustly sued out," the illegality and injustice must have concurred to make the landlord liable,[14] and where the writ is merely illegally issued, no damages upon the bond can be recovered.[15] Defendant is not restricted to a suit on the bond, but may claim damages in reconvention.[16]

(II) *On Replevin or Forthcoming Bond* — (A) *In General.* It is provided by statute in many states that a defense to the levy of a distress warrant may be entered on giving security for the eventual condemnation money.[17] A replevin bond is not a security for the debt sued on, but for the forthcoming of the property levied on, or its value.[18] If the property be abandoned by plaintiff, or if he takes no judgment of foreclosure upon it, then the sureties are released.[19] If the statutory conditions of a bond are departed from, but the departure makes it less onerous, the bond may still be enforced.[20] So the fact that the warrant is for more rent than is due will not prevent recovery on the bond.[21] Under a statute permitting a claimant of property levied upon to have a trial of the right of property, upon furnishing a bond, failure to establish his right to the property renders the sureties liable.[22] Quashing a distress warrant quashes the levy thereunder and discharges the sureties on a claimant's[23] or a replevin[24] bond. A replevin or forthcoming bond should carry interest,[25] from the date of the bond,[26] but it does not secure costs.[27]

(B) *Summary Proceedings to Enforce.* In some states the landlord may proceed on the bond when forfeited, either by regular action, or under the statute in a more summary way by motion.[28] Motion for judgment under such a statute can only be made by the person to whom the bond is made payable, unless by virtue of an assignment.[29] To entitle the landlord to the benefit of the

12. Murphy *v.* Chase, 103 Pa. St. 260; Ramsdell *v.* Seybert, 27 Pa. Super. Ct. 133.

13. Sheriff *v.* Seldon, Litt. Sel. Cas. (Ky.) 485; McKinney *v.* Reader, 6 Watts (Pa.) 34; Smoyer *v.* Roth, 10 Pa. Cas. 32, 13 Atl. 191.

14. McKee *v.* Sims, 92 Tex. 51, 45 S. W. 564 (holding that to the extent that a distress proceeding is based on the amount alleged in the affidavit as due in excess of what is actually due, the warrant is "illegally and unjustly sued out"); Slay *v.* Milton, 64 Tex. 421; Flewellen *v.* Pace, 2 Tex. App. Civ. Cas. § 57.

15. Flewellen *v.* Pace, 2 Tex. App. Civ. Cas. § 57.

16. Slay *v.* Milton, 64 Tex. 421.

17. See the cases cited *infra*, notes 18–42.

"Security" means "bond." — Under such a statute defendant must give a bond with sureties, and the levying officer is not authorized to take, in lieu of such bond, a deposit of money as the security required by law. Goggins *v.* Jones, 115 Ga. 596, 41 S. E. 995.

18. Toland *v.* Swearingen, 39 Tex. 447.

19. Toland *v.* Swearingen, 39 Tex. 447.

20. Frank *v.* Bean, 3 Tex. App. Civ. Cas. § 211.

21. Carter *v.* Grant, 32 Gratt. (Va.) 769.

22. St. Louis Type Foundry *v.* Taylor, 27 Tex. Civ. App. 349, 65 S. W. 677, holding that the abandonment by a claimant of his claim to the property is a failure to establish his right and authorizes recovery on the bond.

23. Fry *v.* Meyer Bros. Drug Co., (Tex. Civ. App. 1897) 40 S. W. 620.

24. Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558; Weir *v.* Brooks, 17 Tex. 638; Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570. *Compare* Corley *v.* Rountree, (Tex. Civ. App. 1896) 37 S. W. 475; Sexton *v.* Hindman, 2 Tex. App. Civ. Cas. § 462.

25. McCormick *v.* Young, 3 J. J. Marsh. (Ky.) 180.

26. Williams *v.* Howard, 3 Munf. (Va.) 277.

27. Kelley *v.* King, 18 Tex. Civ. App. 360, 44 S. W. 915.

28. See the statutes of the several states.

29. Phillips *v.* Chaney, 7 How. (Miss.) 250, holding that where a bond was made payable to the sheriff, it must be assigned in order to enable the landlord to sustain a motion for judgment under the statute.

statutory proceedings by motion, he must proceed regularly, according to the directions of the statute,[30] and must prove the contract of rent on which the distress was sued out.[31] A defendant in a distress warrant who executes a bond thereby admits that he is either tenant, assignee, or under-tenant, and cannot, in a motion for judgment thereon, rely upon a defense which denies that character.[32] Objection that the notice given on a bond executed to release a distress for rent for a trial before a justice was defective comes too late when first raised on appeal.[33] Judgment on a claimant's bond may be recovered on a cross bill in the action on which the bond was given, without causing citation to be served on either the principal or surety to the bond, or notice to the surety.[34]

(III) *ACTIONS.* An action against principal and surety on a forthcoming bond is maintainable without advertisement of the property for sale, and without proving that any personal demand therefor has before suit been made upon defendants, where it appears that it is physically impossible for them to produce the property in response to any such advertisement or demand.[35] In such an action plaintiff must prove the contract of rent for which distress was sued out,[36] and the tenant may plead and show in defense that the distress was for rent not due at the time of suing out the distress warrant mentioned in the bond.[37] A payment of the debt may always be shown, and the fact that a claim is interposed and withdrawn will not prevent such proof.[38] It is otherwise, however, if the claim has been tried, and a judgment rendered finding the property subject. In such case defendants will be estopped.[39] If the rent due be more than the value of the goods distrained, then the value of the goods is the measure of damages in an action on a forthcoming bond;[40] but if the value of the goods be more than the rent in arrear then the rent due is the true measure.[41] Where the suit is on behalf of a special owner against the general owner, the measure of damages is not the whole value of the property, but only the value of the interest of the special owner therein.[42]

15. WRONGFUL DISTRESS — a. Nature and Form of Remedy — (I) *IN GENERAL.* In all cases of distraining without right, trespass,[43] trover,[44] case,[45] and replevin[46]

30. Smith *v.* Ambler, 1 Munf. (Va.) 596, holding that a landlord is not entitled to the summary remedy by motion, unless it appears that the bond was taken by a sheriff or other officer legally authorized to make distress and to sell the distrained effects.

31. Carter *v.* Grant, 32 Gratt. (Va.) 769, either on motion or action on the bond.

32. Pegard *v.* Kellar, 4 Metc. (Ky.) 260.

33. Brown *v.* Gibson, 78 Ky. 602.

34. St. Louis Type Foundry *v.* Taylor, 27 Tex. Civ. App. 349, 65 S. W. 677.

35. Spence *v.* Coney, 97 Ga. 441, 25 S. E. 316.

36. Carter *v.* Grant, 32 Gratt. (Va.) 769.

37. Hall *v.* Wadsworth, 35 W. Va. 375, 14 S. E. 4.

38. Barrett *v.* Butler, 54 Ga. 581.

39. Barrett *v.* Butler, 54 Ga. 581.

40. Hart *v.* Tobias, 2 Bay (S. C.) 408.

41. Hart *v.* Tobias, 2 Bay (S. C.) 408.

42. David *v.* Bradley, 79 Ill. 316.

43. Com. *v.* Colgan, 5 B. Mon. (Ky.) 485; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Bagwell *v.* Jamison, Cheves (S. C.) 249.

Necessity of proving rent in arrear.— In trespass against a landlord for distraining his tenant's goods, the landlord need not affirmatively show the existence of arrearages of rent at the time of the distraint. It is sufficient if the fact appears during the course of the trial. Hains *v.* Moyer, 1 Woodw. (Pa.) 171.

Special matter under general issue.— In an action by a tenant against his landlord for a wrongful distress, the landlord can give special matter in evidence under the general issue only when the distress is made upon the demised premises. Oliver *v.* Phelps, 21 N. J. L. 597. See also Eagleton *v.* Gutteridge, 2 Dowl. P. C. N. S. 1053, 12 L. J. Exch. 359, 11 M. & W. 465.

44. Drew *v.* Spaulding, 45 N. H. 472; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Cooper *v.* Chitty, 1 Burr. 20, 1 W. Bl. 65; Bishop *v.* Montague, Cro. Eliz. 824; Ward *v.* Ventom, Peake Add. Cas. 126; Shipwick *v.* Blanchard, 6 T. R. 298, 3 Rev. Rep. 175; Put *v.* Rawsterne, T. Raym. 472; Cooper *v.* Monke, Willes 52.

45. Com. *v.* Colgan, 5 B. Mon. (Ky.) 485; Skidmore *v.* Ensign, 6 J. J. Marsh. (Ky.) 577.

Variance.— Where, in an action on the case for a wrongful distress, plaintiff alleges that he holds under a lease for five months, for twenty dollars, payable in repairs and labor, and it appears at the trial that the lease is for twelve months and for a money rent of sixty-five dollars, the variance is fatal. Olinger *v.* McChesney, 7 Leigh (Va.) 660.

46. Com. *v.* Colgan, 5 B. Mon. (Ky.) 485;

are usually concurrent remedies and the injured party may adopt the one which he may find the most appropriate.

(II) *After Tender of Rent Due.*[47] Case lies as well as trespass for a distress made after tender of the rent due.[48] Where the tender is made after distress taken, but before it is impounded or removed, the tenant may maintain replevin,[49] or trespass for a subsequent removal;[50] but a landlord who accepts the rent in arrear after a lawful distress and impounding cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up may amount to a conversion, sufficient to make him liable in an action of trover.[51]

(III) *Where No Rent Due*—(A) *Common-Law Liability.* A distress when no rent is due is wholly without authority, and the landlord is a trespasser *ab initio*.[52] For such an illegal distress an action of trespass lies; the party suing, however, is not confined to this remedy, but may waive the trespass and bring case.[53]

(B) *Statutory Action For Double Damages.* In some states, however, a statutory action is now given where a distress is made before the rent falls due to recover double the value of the property distrained. It is a condition precedent to the right to recover under such a statute that the rent shall not be due;[54] and the action will not lie if at the time of distraining there is any rent due, although the distress be for more than is due, or even though there be no right to distrain for the rent due.[55] In some jurisdictions it is also necessary that a sale shall take place under the distress before the rent falls due;[56] in others this is not required,[57] and double damages are recoverable, although the owner of the property distrained has regained possession thereof.[58] An action to recover double the value of the goods distrained can only be maintained by the tenant, and not by a stranger

Kyzer *v.* Middleton, 61 Miss. 360; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Sassman *v.* Griffith, 7 Phila. (Pa.) 159.

The owner of goods not liable to distress can only avail himself of the statutory exemption by replevying them before they are sold (Gibson *v.* Lock, 58 Miss. 298; Paine *v.* Hall Safe, etc., Co., 64 Miss. 175, 1 So. 56; Caldcleugh *v.* Hollingsworth, 8 Watts & S. (Pa.) 302; Esterly Mach. Co. *v.* Spencer, 147 Pa. St. 466, 23 Atl. 774); but when the owner has no notice of the distress, and consequently no opportunity to replevy the goods, he may maintain trespass (Brown *v.* Stackhouse, 155 Pa. St. 582, 26 Atl. 669, 35 Am. St. Rep. 908).

47. See *supra*, VIII, E, 3, c.

48. Holland *v.* Bird, 10 Bing. 15, 2 L. J. C. P. 201, 3 Moore & S. 363, 25 E. C. L. 17; Branscomb *v.* Bridges, 1 B. & C. 145, 2 D. & R. 256, 1 L. J. K. B. O. S. 64, 25 Rev. Rep. 335, 8 E. C. L. 63.

49. Hilson *v.* Blain, 2 Bailey (S. C.) 168.

50. Vertue *v.* Beasley, 1 M. & Rob. 21.

51. West *v.* Nibbs, 4 C. B. 172, 17 L. J. C. P. 150, 56 E. C. L. 172.

52. Fretton *v.* Karcher, 77 Pa. St. 423; Thomas *v.* Gibbons, 21 Pa. Super. Ct. 635.

53. Olinger *v.* McChesney, 7 Leigh (Va.) 660.

54. Stowman *v.* Landis, 5 Ind. 430; Richardson *v.* Vice, 4 Blackf. (Ind.) 13; Ward *v.* Beatty, 2 B. Mon. (Ky) 260; Kyzer *v.* Middleton, 61 Miss. 360; Bischoff *v.* Loper, 16 Montg. Co. Rep. (Pa.) 73; Weber *v.* Loper, 16 Montg. Co. Rep. (Pa.) 70.

An averment that no rent is due is material, as an essential element of the plaintiff's case, and the burden is on plaintiff to prove it. Smith *v.* Downing, 6 Ind. 374.

Where the rent falls due on the day the distress is made, the statute does not apply. Fry *v.* Breckinridge, 7 B. Mon. (Ky.) 31.

Where attachment is brought for rent not due, upon an affidavit that the property on the demised premises is being removed, an action for double damages cannot be brought. Kyzer *v.* Middleton, 61 Miss. 360. See also Hawkins *v.* James, 69 Miss. 361, 11 So. 654.

In an action to recover money paid to secure the release of goods taken under an illegal distress, plaintiff cannot recover double damages. Quinnett *v.* Washington, 10 Mo. 53.

A count in trespass cannot be joined with a count for double value. Hoare *v.* Lee, 5 C. B. 754, 5 D. & L. 765, 12 Jur. 356, 17 L. J. C. P. 196, 57 E. C. L. 754.

Single damages must appear.— In an action to recover double the value of goods unlawfully distrained, it must appear what the single damages suffered were. Hartshorne *v.* Kierman, 7 N. J. L. 29.

55. Peters *v.* Newkirk, 6 Cow. (N. Y.) 103.

56. Fry *v.* Breckinridge, 7 B. Mon. (Ky.) 31; Bischoff *v.* Loper, 16 Montg. Co. Rep. (Pa.) 73; Weber *v.* Loper, 16 Montg. Co. Rep. (Pa.) 70.

57. Smith *v.* Downing, 6 Ind. 374.

58. Smith *v.* Downing, 6 Ind. 374.

whose goods have been distrained instead of the tenant's.[59] The persons subject to the penalty differ in different jurisdictions. In some the "person or persons distraining" are made liable to the action, and not to the "person or persons in whose name the distress shall be made."[60] In others the statute applies to the landlord alone and not to the officer acting under the warrant.[61] To authorize the recovery of double damages, the petition must declare under the statute,[62] or conclude to the damage of plaintiff contrary to the form of the statute.[63] Since this remedy is merely cumulative, however, the tenant is not restricted to this measure of damages, but may pursue his common-law right.[64] It would seem, however, that an action under the statute cannot properly be joined with an action of trover.[65]

(iv) *For More Rent Than Due.* Distraining for more rent than is due is not actionable,[66] unless the goods seized are excessive in regard to the sum really due;[67] and the fact that the distress is maliciously made is immaterial.[68] The tenant's course is to tender the amount really due, and, if the landlord refuses to accept that sum, to replevy the goods and try the disputed question of amount in an action of replevin.[69]

(v) *For Excessive Levy.* Since the statute of Marlbridge, the landlord has been liable for an unreasonable or excessive distress in a special action of case;[70]

59. Ward *v.* Beatty, 2 B. Mon. (Ky.) 260; Hartshorne *v.* Kierman, 7 N. J. L. 29.

60. Fretton *v.* Karcher, 77 Pa. St. 423; Wells *v.* Hornish, 3 Penr. & W. (Pa.) 30.

61. Mitchell *v.* Franklin, 3 J. J. Marsh. (Ky.) 477.

62. Bell *v.* Norris, 79 Ky. 48; Garnett *v.* Jennings, 44 S. W. 382, 19 Ky. L. Rep. 1712; Hugill *v.* Reed, 49 N. J. L. 300, 8 Atl. 287; Royse *v.* May, 93 Pa. St. 454; Fretton *v.* Karcher, 77 Pa. St. 423; Rees *v.* Emerick, 6 Serg. & R. (Pa.) 286; Thomas *v.* Gibbons, 21 Pa. Super. Ct. 635.

63. Bell *v.* Norris, 79 Ky. 48; Garnett *v.* Jennings, 44 S. W. 382, 19 Ky. L. Rep. 1712.

64. Bell *v.* Norris, 79 Ky. 48; Garnett *v.* Jennings, 44 S. W. 382, 19 Ky. L. Rep. 1712.

65. Smith *v.* Meanor, 16 Serg. & R. (Pa.) 375.

66. Hamilton *v.* Windolf, 36 Md. 301, 11 Am. Rep. 491; Tancred *v.* Leyland, 16 Q. B. 669, 15 Jur. 394, 20 L. J. Q. B. 316, 71 E. C. L. 669 [*overruling* Taylor *v.* Henniker, 12 A. & E. 488, 9 L. J. Q. B. 383, 4 P. & D. 243, 40 E. C. L. 245]; French *v.* Phillips, 1 H. & N. 564, 2 Jur. N. S. 1169, 26 L. J. Exch. 82, 5 Wkly. Rep. 114. But see McElroy *v.* Dice, 17 Pa. St. 163; McKee *v.* Sims, (Tex. Civ. App. 1898) 45 S. W. 37.

67. French *v.* Phillips, 1 H. & N. 564, 2 Jur. N. S. 1169, 26 L. J. Exch. 82, 5 Wkly. Rep. 114; Crowder *v.* Self, 2 M. & Rob. 190; Wilkinson *v.* Terry, 1 M. & Rob. 377.

Amount recoverable.— Where the distress is legal, only the excess may be recovered back; where illegal, the whole amount regardless of any rent due. Netting *v.* Hubley, 26 Nova Scotia 497.

68. Hamilton *v.* Windolf, 36 Md. 301, 11 Am. Rep. 491; Tancred *v.* Leyland, 16 Q. B. 669, 15 Jur. 394, 20 L. J. Q. B. 316, 71 E. C. L. 669 [*overruling* Taylor *v.* Henniker, 12 A. & E. 488, 9 L. J. Q. B. 383, 4 P. & D. 243, 40 E. C. L. 245]; Stevenson *v.* Newnham, 13 C. B. 285, 17 Jur. 600, 22 L. J. C. P. 110, 76 E. C. L. 285. *Compare* Harms *v.* Solem, 79 Ill. 460.

69. Glynn *v.* Thomas, 11 Exch. 870, 2 Jur. N. S. 378, 25 L. J. Exch. 125, 4 Wkly. Rep. 363.

70. *Delaware.*—Weber *v.* Vernon, 2 Pennew. 359, 45 Atl. 537.

Illinois.— Lindley *v.* Miller, 67 Ill. 244; Hare *v.* Stegall, 60 Ill. 380.

Pennsylvania.— Jimison *v.* Reifsneider, 97 Pa. St. 136; McKinney *v.* Reader, 6 Watts 34. And see Bail *v.* Interstate Cemetery Co., 10 Del. Co. 59, 20 York Leg. Rec. 16.

Texas.— McKee *v.* Sims, (Civ. App. 1898) 45 S. W. 37.

England.—Hutchins *v.* Chambers, 1 Burr. 579, 2 Ld. Ken. 204; Lynne *v.* Moody, 2 Str. 851; Crowther *v.* Ramsbottom, 7 T. R. 654, 4 Rev. Rep. 540.

Under the statute of Marlbridge it was provided that a person taking great and unreasonable distresses should be amerced for the excess of such distresses. 1 & 2 Ph. & M. c. 12. See Thomas *v.* Gibbons, 21 Pa. Super. Ct. 635.

Although the sale does not realize the rent due, an action will lie for an excessive distress. Smith *v.* Ashforth, 29 L. J. Exch. 259.

Growing crops.— An action on the case lies for an excessive distress where the excess consists wholly in taking growing crops, the probable produce of which is capable of being estimated at the time of seizure. Piggott *v.* Bertles, 2 Gale 18, 5 L. J. Exch. 193, 1 M. & W. 441, 1 Tyrw. & G. 729.

Necessity of averment as to sale.— Where, in an action for excessive distress, there is no averment that the goods have been sold, or even that they have been detained, plaintiff cannot show that the goods were sold much under their value. Thompson *v.* Wood, 4 Q. B. 493, 3 G. & D. 518, 7 Jur. 303, 12 L. J. Q. B. 175, 45 E. C. L. 493.

Necessity of allegation of rent due.— In an action for excessive distress plaintiff need not allege or prove the precise amount of rent

but trespass[71] or replevin[72] does not lie. No action lies for excessive distress where but one thing can be taken, although it much exceeds in value the amount of the distress.[73] The landlord is permitted to make a reasonable distress, and he is not bound to confine himself to the precise amount of rent due. To knowingly claim more rent than is due and levy for it would be wilfully and maliciously making an excessive levy; but a mere mistake in judgment as to the value of the property seized or a want of knowledge of the sum due does not render him a trespasser.[74] Express malice need not be proved.[75]

(VI) *For Irregular Distress.* At common law, if there was any irregularity in conducting the proceedings upon a distress for rent legally made, the parties become trespassers *ab initio*.[76] This rule was altered by the statute of 11 Geo. II,[77] which has been adopted in some of the United States, and which provided that when a distress was lawfully made, and any irregularity was committed in the subsequent proceedings, the party aggrieved might recover full satisfaction for the special damages sustained in an action of trespass or of trespass on the case, according to the nature of the irregularity.[78] Under the English statute it has been held that trover will not lie where goods have been irregularly sold after a legal distress,[79] but it has been held otherwise in this country.[80] It was also held in England that if a distress was regular in other respects trespass could not be maintained for an omission to appraise,[81] but case was held to lie for such irregularity.[82] Trespass lies for continuing on the premises and disturbing the tenant's possession after the time allowed by law.[83] In no case, however, can the tenant maintain a suit for an irregular distress, unless he shows that he has thereby sustained special damage.[84]

b. Estoppel of Tenant to Maintain Action. Plaintiff may waive the want of legal authority to distrain so as to prevent him from maintaining trespass.[85] The owner of the goods illegally distrained forfeits no rights by not making claim to

due. Sells *v.* Hoare, 1 Bing. 401, 8 E. C. L. 576, 1 C. & P. 28, 12 E. C. L. 29, 2 L. J. C. P. O. S. 56, 8 Moore C. P. 451.

Amendment of declaration.— A declaration for distraining an excessive quantity of goods cannot be amended by adding a count for distraining for more rent than is due, since the causes of action are different. Thomas *v.* Gibbons, 21 Pa. Super. Ct. 645; Royse *v.* May, 9 Wkly. Notes Cas. (Pa.) 104.

Plea of not guilty.— In an action for an excessive distress a plea of not guilty puts in issue the tenancy itself, the ownership of the goods, and all matters of justification. Williams *v.* Jones, 11 A. & E. 643, 39 E. C. L. 346; Nash *v.* Lucas, 16 L. T. Rep. N. S. 610.

71. Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496; Hutchins *v.* Chambers, 1 Burr. 579, 2 Ld. Ken. 204; Lynne *v.* Moody, 2 Str. 851; Crowther *v.* Ramsbottom, 7 T. R. 654, 4 Rev. Rep. 540.

72. Lindley *v.* Miller, 67 Ill. 244; Whitney *v.* Carle, 8 B. Mon. (Ky.) 171.

73. Field *v.* Mitchell, 6 Esp. 71.

74. Harms *v.* Solem, 79 Ill. 460.

75. Sturch *v.* Clarke, 4 B. & Ad. 113, 2 L. J. K. B. 9, 1 N. & M. 671, 24 E. C. L. 58; Field *v.* Mitchell, 6 Esp. 71.

76. 8 Coke 146. See also *supra*, VIII, E, 14, e, (I), (B).

77. St. 11 Geo. II, c. 19, § 19.

78. Butts *v.* Edwards, 2 Den. (N. Y.) 164; Marquissee *v.* Ormston, 15 Wend. (N. Y.) 368; Holt *v.* Johnson, 14 Johns. (N. Y.) 425; Winterbourne *v.* Morgan, 2 Campb. 117 note, 11 East 395, 10 Rev. Rep. 532; Messing *v.* Kemble, 2 Campb. 115.

Necessity of alleging to whom rent due.— In an action for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due. Ireland *v.* Johnson, 1 Bing. N. Cas. 162, 3 L. J. C. P. 303, 4 Moore & S. 706, 27 E. C. L. 588.

79. Wallace *v.* King, 1 H. Bl. 13; Broome *v.* Rice, 2 Str. 873.

80. Tripp *v.* Grouner, 60 Ill. 474, Sheetz *v.* Baker, 38 Ill. App. 349.

81. Messing *v.* Kemble, 2 Campb. 115. See *supra*, VIII, E, 14, e, (I), (B).

82. Avenell *v.* Croker, M. & M. 172, 22 E. C. L. 499.

83. Winterbourne *v.* Morgan, 2 Campb. 117 note, 11 East 395, 10 Rev. Rep. 532; Etherton *v.* Popplewell, 1 East 139, 6 Rev. Rep. 235.

84. Brown *v.* Howell, 68 N. J. L. 292, 53 Atl. 459.

85. Bagwell *v.* Jamison, Cheves (S. C.) 249 (holding that mere acquiescence in a wrongful distress by one who has been deceived by a pretense of legal authority is not such consent as to affect his remedy at law); Watson *v.* Mirike, 25 Tex. Civ. App. 527, 61 S. W. 538 (holding that a clause in a lease providing that if the landlord should distrain he is to be free from any claim for damages for any cause whatever will be con-

the property at the time of the distress;[86] nor will an arrangement made by the parties relative to the sale of the goods after a wrongful distress,[87] or the receipt by a tenant of the balance remaining in the hands of a bailiff above rent and costs, from the proceeds of an invalid distress,[88] estop him from maintaining an action for the trespass.

c. Set-Off and Counter-Claim. In a suit by a tenant against his landlord for wrongful distress, the latter may recoup to the extent of rent unpaid,[89] although the rent may not be due.[90] So also where crops are unlawfully distrained, the distrainor may recoup the expense of harvesting them.[91] Set-off by the tenant is not allowed in an action of replevin.[92]

d. Persons Liable. For the wrong worked by an excessive or an irregular distress, both landlord and bailiff are responsible, and the tenant may maintain his action against both or either of them.[93] Where the seizing of goods as a distress is illegal, the officer or agent who executes the warrant is of course liable to the party injured;[94] but in the case of an illegal distress there is some difference of opinion as to the landlord's responsibility. In some states the landlord is held responsible for the wrongful acts of his agent, even though they be wilful or reckless, if the act done be within the scope of his employment.[95] In others of the United States and England, the tenant's remedy is held to be against the bailiff only, unless the landlord has no right to distrain, or unless the illegal act complained of is specifically directed by the landlord, or subsequently adopted and approved.[96]

strued to refer only to a claim for damages arising from a just and legal suit for distraint).

86. Evans *v.* Herring, 27 N. J. L. 243.

87. McElroy *v.* Dice, 17 Pa. St. 163; Sells *v.* Hoare, 1 Bing. 401, 8 E. C. L. 567, 1 C. & P. 28, 12 E. C. L. 29, 2 L. J. C. P. O. S. 56, 8 Moore C. P. 451; Willoughby *v.* Backhouse, 2 B. & C. 821, 4 D. & R. 539, 2 L. J. K. B. O. S. 174, 26 Rev. Rep. 566, 9 E. C. L. 354.

88. Ingram *v.* Hartz, 48 Pa. St. 380.

89. Sheetz *v.* Baker, 38 Ill. App. 349; Howdyshell *v.* Gary, 21 Ill. App. 288; Cunnea *v.* Williams, 11 Ill. App. 72; Hamp *v.* Jones, 9 L. J. Ch. 258.

90. Cunnea *v.* Williams, 11 Ill. App. 72.

91. Bates *v.* Courtwright, 36 Ill. 518.

92. Wood *v.* Custer, 16 Montg. Co. Rep. (Pa.) 118.

93. Riggin *v.* Becker, 9 Pa. Dist. 439.

94. Powell *v.* Triplett, 6 B. Mon. (Ky.) 420; Lord *v.* Brown, 5 Den. (N. Y.) 345; People *v.* Benham, 1 Wheel. Cr. (N. Y.) 225; McElroy *v.* Dice, 17 Pa. St. 163; Wells *v.* Hornish, 3 Penr. & W. (Pa.) 30; Gauntlett *v.* King, 3 C. B. N. S. 59, 91 E. C. L. 59. *Contra*, Roberts *v.* Tennell, 4 Litt. (Ky.) 286.

A sheriff is not responsible for the acts of his deputies in serving distress warrants. Moulton *v.* Norton, 5 Barb. (N. Y.) 286.

95. Richardson *v.* Vice, 4 Blackf. (Ind.) 13; Cate *v.* Schaum, 51 Md. 299; Parkerson *v.* Wightman, 4 Strobh. (S. C.) 363. See also Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300. In Ellis *v.* Lamb, 9 Pa. Dist. 491, 24 Pa. Co. Ct. 150, it is said: "It will therefore be found that, in most if not all the cases where landlords have been held liable for torts of a bailiff, it has been where there was no rent due, or levy was made upon property which the landlord knew was not subject to his distress."

96. *Illinois.*— Becker *v.* Duprée, 75 Ill. 167, 168 (where the court says: "If appellant is at all liable, it must be on the ground that he directly controlled, or at least participated in the trespass, or had knowingly approved and ratified it after it was done. . . . If he simply issued the warrant and directed the bailiff to seize the property of his tenant, and in executing the writ, he seized a portion of the appellee's property, the landlord could not be held a trespasser, but the wrong would be wholly that of the officer or his assistants, in making the levy. The presumption would be that the landlord only directed him to levy on the property of the tenant, to limit his power to his legal duty which is expressed in the warrant, and that was, to seize the goods and chattels of the tenant liable to distraint, sufficient to satisfy the rent due"); Grund *v.* Van Vleck, 69 Ill. 478; Dow *v.* Blake, 15 Ill. App. 89.

New York.—Butts *v.* Edwards, 2 Den. 164; Connah *v.* Hale, 23 Wen. 462.

Pennsylvania.—Ellis *v.* Lamb, 9 Pa. Dist. 491, 24 Pa. Co. Ct. 150; Riggin *v.* Becker, 9 Pa. Dist. 439.

South Carolina.—Hilson *v.* Blain, 2 Bailey 168.

England.—Freeman *v.* Rosher, 13 Q. B. 780, 13 Jur. 881, 18 L. J. Q. B. 340, 66 E. C. L. 780; Gauntlett *v.* King, 3 C. B. N. S. 59, 91 E. C. L. 59; Fields *v.* Mitchell, 6 Esp. 71; Lewis *v.* Read, 14 L. J. Exch. 295, 13 M. & W. 834.

Levy on stranger's property.— If a landlord directs a distress warrant to be levied on the property of a stranger and causes it to be sold he is guilty of a conversion. Hall *v.* Amos, 5 T. B. Mon. (Ky.) 89, 17 Am. Dec. 42.

A statute providing for distress by the sheriff or one of his deputies does not shift the responsibility growing out of these pro-

e. Measure of Damages — (i) *When Distress Wrongful Ab Initio.* Where, in an action for an illegal distress, the landlord is a trespasser *ab initio* so as to make his possession of the goods wholly wrongful, the measure of damages is the full value of the goods seized,[97] with interest thereon to the time of trial.[98]

(ii) *When Merely Irregular.* Where a distress is originally lawful, but the subsequent proceedings are irregular in some particular, the tenant can only recover the actual damage sustained.[99] In such a case the measure of damages is the fair market value of the goods distrained less the amount of rent due.[1] It has been held, however, that nominal damages may be recovered, although no actual damage is proved.[2]

(iii) *When Excessive.* In an action for an excessive distress, the measure of damages is not the value of the property seized, but the inconvenience and expense which the tenant sustains in being deprived of the management of such property, or which he is put to in procuring sureties to a larger amount than

ceedings from the landlord. Moulton *v.* Norton, 5 Barb. (N. Y.) 286.

If a tenant wishes to contest his landlord's right to distrain, he should institute his suit against the landlord, and not the officer. Applegate *v.* Crawford, 2 Ind. 579; Harris *v.* McFaddin, 2 Blackf. (Ind.) 71.

Where an action is brought against a landlord and a constable for an unreasonable distress, and in the course of the trial it appears that plaintiff is seeking to recover a verdict against the constable only, the appellate court may permit the statement to be amended by striking out the name of the landlord. Oliver *v.* Wheeler, 26 Pa. Super. Ct. 5.

97. *Maryland.*— Cate *v.* Schaum, 51 Md. 299.

Mississippi.—Briscoe *v.* McElween, 43 Miss. 556.

Montana.—Bohm *v.* Dunphy, 1 Mont. 333.

Pennsylvania.—Perrin *v.* Wells, 155 Pa. St. 299, 26 Atl. 543; Fernwood Masonic Hall Assoc. *v.* Jones, 102 Pa. St. 307; Esterly Mach. Co. *v.* Spencer, 28 Wkly. Notes Cas. 287, holding that the value of the goods and not the amount they sold for is plaintiff's measure of damages. But see Mickle *v.* Miles, 1 Grant 320, holding that in estimating the amount of damages caused by an unlawful distress, it is right for the jury to take into consideration the amount of rent paid thereby in mitigation of damages; the same being the benefit accruing to plaintiff from the transaction.

Texas.— Majors *v.* Goodrich, (Civ. App. 1900) 54 S. W. 919.

England.—Keen *v.* Priest, 4 H. & N. 236, 28 L. J. Exch. 157, 7 Wkly. Rep. 376; Attack *v.* Bramwell, 3 B. & S. 520, 9 Jur. N. S. 892, 32 L. J. Q. B. 146, 7 L. T. Rep. N. S. 740, 11 Wkly. Rep. 309, 113 E. C. L. 520.

Compensatory damages. — Where no malice is shown, only such damages will be allowed as the party complaining can show were actually sustained by reason of the seizure. Untereiner *v.* Shepard, 52 La. Ann. 1809, 28 So. 319; Mickle *v.* Miles, 1 Grant (Pa.) 320; Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

Goods of third person.— Although goods of another, not the tenant, distrained off the premises after removal are not liable for the rent, damages for the taking when by mistake will not be allowed if no actual damages are proved. Scott *v.* McEwen, 2 Phila. (Pa.) 176.

Exempt goods.— If exempt goods are distrained, the measure of damages is the full value of the goods (Keen *v.* Priest, 4 H. & N. 236, 28 L. J. Exch. 157, 7 Wkly. Rep. 376); but when exempt goods are taken, among other things not exempt, the tenant is entitled to recover only the actual damages sustained by the taking of the exempt property (Harvey *v.* Pocock, 12 L. J. Exch. 434, 11 M. & W. 740; Dod *v.* Monger, 6 Mod. 215). The measure of damages for distraining and severing trade fixtures is their value to an incoming tenant. Moore *v.* Drinkwater, 1 F. & F. 134. *Compare* Clarke *v.* Holford, 2 C. & K. 540, 61 E. C. L. 540.

Liability for costs.— Where a landlord causes the crops of his tenant to be illegally seized, and thus prevents the tenant from gathering them, he is liable for the whole of the costs and expenses caused by his illegal procedure; and if the landlord's part of the crops is not sufficient to pay the costs and expenses, judgment will be rendered against him for the balance. Reynolds *v.* Howard, 113 Ga. 349, 38 S. E. 849.

98. Cate *v.* Schaum, 51 Md. 299; Briscoe *v.* McElween, 43 Miss. 556; Bohm *v.* Dunphy, 1 Mont. 333; Perrin *v.* Wells, 155 Pa. St. 299, 26 Atl. 543; Fernwood Masonic Hall Assoc. *v.* Jones, 102 Pa. St. 307.

99. Rodgers *v.* Parker, 18 C. B. 112, 2 Jur. N. S. 496, 25 L. J. C. P. 220, 4 Wkly. Rep. 545, 86 E. C. L. 112; Lucas *v.* Tarleton, 3 H. & N. 116, 27 L. J. Exch. 246. But see Proudlove *v.* Twenlow, 1 Cromp. & M. 326, 2 L. J. Exch. 111, 3 Tyrw. 260, holding that nominal damages are recoverable, although no actual damages are proved.

1. Tripp *v.* Grouner, 60 Ill. 474; Cahill *v.* Lee, 55 Md. 319; Biggins *v.* Goode, 2 Crompt. & J. 364, 1 L. J. Exch. 129, 2 Tyrw. 447; Whitworth *v.* Maden, 2 C. & K. 517, 61 E. C. L. 517; Knight *v.* Egerton, 7 Exch. 407.

2. Butts *v.* Edwards, 2 Den. (N. Y.) 164.

he otherwise would be, in replevying the property.[3] Nominal damages are recoverable, although no actual damages are proved.[4]

f. Exemplary Damages. Where a distress is made wilfully, wantonly, or maliciously, exemplary damages may be recovered.[5]

IX. TERMINATION OF TENANCY.

A. Notice to Quit — 1. Necessity. A notice to quit is not, in the absence of contractual or statutory provision, necessary to the termination of a term for years;[6] but such a notice is as a rule requisite in the case of tenancies from year to year,[7] from month to month,[8] or from week to week;[9] or in the case of tenancies at will[10] or at sufferance.[11] The necessity and sufficiency of a notice to quit as a condition precedent to the maintenance of an action[12] or summary proceeding[13] to recover possession of the premises is elsewhere treated.

2. Persons Who May Give Notice. Notice to quit must in general be given by the lessor,[14] or by an agent of the owner or lessor who has authority to let the premises or special authority to give the notice.[15] It has been held to be sufficient if the authority of the agent be subsequently recognized by the landlord,[16] although the better rule seems to be that the agent should have authority at the time the notice begins to operate, and that a subsequent recognition by the landlord is not

3. Piggott *v.* Bertles, 2 Gale 18, 5 L. J. Exch. 193, 1 M. & W. 441, 1 Tyrw. & G. 729. But see Wells *v.* Moody, 7 C. & P. 59, 32 E. C. L. 498, holding that in an action for excessive distress plaintiff is entitled to recover the fair value of the goods distrained.

When some rent due — actual damages caused by excessive distress. — Where an application for a writ of distress alleges rent due as a cause therefor, and the evidence shows that only a part thereof is due, the tenant is not entitled to damages for the distress of all the property seized, but only to the damages sustained for the distraint of an excessive amount, caused by the false allegation. Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407.

4. Chandler *v.* Doulton, 3 H. & C. 553, 11 Jur. N. S. 286, 3 L. J. Exch. 89, 11 L. T. Rep. N. S. 639.

5. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537; Clevenger *v.* Dunaway, 84 Ill. 367; Tripp *v.* Grouner, 60 Ill. 474; Sherman *v.* Dutch, 16 Ill. 283; Bohm *v.* Dunphy, 1 Mont. 333; Hatchell *v.* Chandler, 62 S. C. 380, 40 S. E. 777. And see Morris *v.* Kath, 10 Del. Co. (Pa.) 78, 20 York Leg. Rec. 41.

Annoyance, vexation, and expenditure of time and money, incurred by a tenant in consequence of a distress, are not recoverable as actual but only as exemplary damages. Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407; Smith *v.* Jones, 11 Tex. Civ. App. 18, 31 S. W. 306.

Want of probable cause. — That a distress warrant is illegal and unjustly sued out is not sufficient to entitle the tenant to exemplary damages, but it must also be alleged and proved that it was sued out without probable cause. Burger *v.* Rhiney, (Tex. Civ. App. 1897) 42 S. W. 590.

Lawful distress in lawful manner — malice. — A landlord making a reasonable distress in a lawful manner is not liable for malicious distress, although his motives are malicious. Weber *v.* Vernon, 2 Pennew. (Del.) 359, 45 Atl. 537.

Evidence rebutting malice. — If tender of rent distrained for was made, but was not urged on the trial before the justice and the person entitled being willing to receive it after it was claimed to have been made, these are facts tending to show that the proceeding was not wilful, and to preclude a recovery of vindictive damages. Tripp *v.* Grouner, 60 Ill. 474.

Special or peculiar damages, such as interruption of business and loss of patronage arising from a distress, may be recovered if pleaded. Sherman *v.* Dutch, 16 Ill. 283.

6. See *infra*, IX, B, 1, c, (I).

7. See *infra*, IX, C, 5, a.

8. See *infra*, IX, D, 2, a.

9. See *infra*, IX, E.

10. See *infra*, IX, F, 6.

11. See *infra*, IX, G, 2.

12. See *infra*, X, B, 4, b.

13. See *infra*, X, C, 9, c.

14. Griffin *v.* Barton, 22 Misc. (N. Y.) 228, 49 N. Y. Suppl. 1021; Comstock *v.* Cavanagh, 17 R. I. 233, 21 Atl. 498 (holding that when property already let from month to month is leased under seal to another from year to year, the landlord and not the lessee must give the notice to quit); Wordsley Brewery Co. *v.* Halford, 90 L. T. Rep. N. S. 89.

In case of a sublease notice must be given by the lessor to his lessee or by the mesne lessee to the under-tenant. Waters *v.* Roberts, 89 N. C. 145.

15. McClung *v.* McPherson, (Oreg. 1905) 81 Pac. 567, 82 Pac. 13.

16. Goodtitle *v.* Woodward, 3 B. & Ald. 689, 5 E. C. L. 396; Doe *v.* Sybourn, 2 Esp. 677.

sufficient.[17] A general agent may give a notice to quit in his own name,[18] but it is otherwise if the agent has but a special or limited authority.[19] If there are several lessors or joint tenants a notice to quit must be signed by all at the time it is served if given by one of them,[20] unless such joint lessors are partners, in which case a notice to quit in the names of all signed by one only is valid.[21] After a mortgage of the reversion, where a mortgage is regarded as passing the legal estate, a notice to quit may be signed by the mortgagee.[22] A mortgagor who has a general authority from the mortgagee to determine tenancies may sign a notice to quit in his own name;[23] but the mere fact that he remains in possession after default, receiving the rents and giving receipts in his own name, will not authorize him to do this.[24]

3. Persons to Whom Notice Should Be Given. A notice to quit served on the original lessee binds the under-tenants,[25] particularly when they have acquired possession after service of the notice.[26] A notice to one of two tenants in common is sufficient to determine the tenancy as to both.[27] If a tenant leaves the premises and another takes possession, it may be presumed that he came in as assignee, and notice may be properly given to him.[28]

4. Sufficiency.[29] At common law notice to a tenant to quit, unless otherwise stipulated by agreement of the parties, was sufficient if verbal.[30] It has been said, however, that notice to quit should be given in writing when the lease itself is written,[31] and it is now frequently provided by statute that the notice given shall be in writing.[32] In construing a notice to quit the court will look to the intention of the parties, and if doubtful language is used they will give it a sensible

17. Pickard *v.* Perley, 45 N. H. 188, 86 Am. Dec. 153; Doe *v.* Goodwin, 2 Q. B. 143, 1 G. & D. 463, 10 L. J. Q. B. 275, 42 E. C. L. 610; Doe *v.* Walters, 10 B. & C. 626, 8 L. J. K. B. O. S. 297, 5 M. & R. 357, 21 E. C. L. 265.

18. Jones *v.* Phipps, L. R. 3 Q. B. 567, 9 B. & S. 761, 37 L. J. Q. B. 198, 18 L. T. Rep. N. S. 813, 16 Wkly. Rep. 1044; Wilkinson *v.* Colley, 5 Burr. 2694; Doe *v.* Read, 12 East 57; Erne *v.* Armstrong, Ir. R. 6 C. L. 279, 20 Wkly. Rep. 370.

An agent to receive rents and let premises has authority to determine a tenancy. Doe *v.* Mizem, 2 M. & Rob. 56.

Notice by agent of agent.— A notice to quit given by an agent of an agent is not sufficient without a recognition by the landlord; the bringing of an action founded on the notice is not of itself such a recognition. Doe *v.* Robinson, 3 Bing. N. Cas. 677, 3 Hodges 84, 1 Jur. 356, 6 L. J. C. P. 235, 4 Scott 396, 32 E. C. L. 313.

19. Jones *v.* Phipps, L. R. 3 Q. B. 567, 9 B. & S. 761, 37 L. J. Q. B. 198, 18 L. T. Rep. N. S. 813, 16 Wkly. Rep. 1044.

20. Pickard *v.* Perley, 45 N. H. 188, 86 Am. Dec. 153; Goodtitle *v.* Woodward, 3 B. & Ald. 689, 5 E. C. L. 396; Right *v.* Cuthell, 5 East 491, 5 Esp. 149, 2 Marsh. 83, 7 Rev. Rep. 752; Doe *v.* Sybourn, 2 Esp. 677. But see Doe *v.* Summersett, 1 B. & Ad. 135, 8 L. J. K. B. O. S. 369, 20 E. C. L. 427; Alford *v.* Vickery, C. & M. 280, 41 E. C. L. 156; Doe *v.* Hughes, 10 L. J. Exch. 185, 7 M. & W. 139.

21. Doe *v.* Hulme, 6 L. J. K. B. O. S. 345, 2 M. & R. 483.

22. Burton *v.* Dickenson, 17 L. T. Rep. N. S. 264.

23. Stackpoole *v.* Parkinson, Ir. R. 8 C. L. 561.

24. Miles *v.* Murphy, Ir. R. 5 C. L. 382.

25. Schilling *v.* Holmes, 23 Cal. 227; Decker *v.* Sexton, 19 Misc. (N. Y.) 59, 43 N. Y. Suppl. 167; Roe *v.* Wiggs, 2 B. & P. N. R. 330.

26. Schilling *v.* Holmes, 23 Cal. 227.

27. Doe *v.* Crick, 5 Esp. 196, 8 Rev. Rep. 848. See also Doe *v.* Watkins, 7 East 551, 3 Smith K. B. 517, 8 Rev. Rep. 670. *Compare* Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938, holding that a lessee of land from tenants in common must serve notice of his intention to quit on all the lessors.

28. Doe *v.* Williams, 6 B. & C. 41, 9 D. & R. 30, 30 Rev. Rep. 244, 13 E. C. L. 31.

Presumption of assignment in general see *supra*, IV, B, 2, e.

29. As condition precedent: To action for recovery of possession see *infra*, X, B, 4, b, (II). To summary proceeding see *infra*, X, C, 9, c, (III).

30. Haley *v.* Hickman, Litt. Sel. Cas. (Ky.) 266; Reccius *v.* Columbia Finance, etc., Co., 86 S. W. 1113, 27 Ky. L. Rep. 880; Timmins *v.* Rawlinson, 3 Burr. 1603, 1 W. Bl. 533; Roe *v.* Pierce, 2 Campb. 96, 11 Rev. Rep. 673; Doe *v.* Crick, 5 Esp. 196, 8 Rev. Rep. 848.

31. Marson *v.* Hughes, 17 Quebec Super. Ct. 1.

32. See the statutes of the several states. And see Graham *v.* Anderson, 3 Harr. (Del.) 364.

Reading notice insufficient. — Where the statute requires notice in writing to terminate a tenancy, the mere reading of the notice to the person served is not sufficient. Langan *v.* Schlief, 55 Mo. App. 213.

meaning if possible.[33] A notice to quit must be such as the tenant may act upon in safety; that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord.[34] Such a notice is good if upon the whole it is intelligible and so certain that the tenant cannot reasonably misunderstand it.[35] The notice must fix a time for the tenant to quit[36] and also describe the premises with such certainty that the tenant cannot be misled.[37] It is not necessary that the notice should be directed to the tenant in possession, if proved to have been delivered to him at the proper time;[38] nor is it invalidated by a mistake in the christian name of the tenant, if his family on receiving it understand it to be intended for him,[39] or the tenant keeps it and does not send it back.[40] If premises are leased together a notice to quit part thereof is bad.[41]

5. Service. Service of notice to quit may be made by any one authorized by the lessor to serve it.[42] It should be served upon the tenant personally when that can be conveniently done;[43] if it cannot, it may be served upon one whose duty it is to give it to him.[44] Thus if personal service on the tenant himself cannot be effected it is held that the notice may be left with the wife,[45] servant,[46]

33. Doe *v.* Culliford, 4 D. & R. 248, 16 E. C. L. 202.

34. Jones *v.* Phipps, L. R. 3 Q. B. 567, 9 B. & S. 761, 37 L. J. Q. B. 198, 18 L. T. Rep. N. S. 813, 16 Wkly. Rep. 1044; Doe *v.* Goodwin, 2 Q. B. 143, 1 G. & D. 463, 10 L. J. Q. B. 275, 42 E. C. L. 610; Doe *v.* Walters, 10 B. & C. 626, 8 L. J. K. B. O. S. 297, 5 M. & R. 357, 21 E. C. L. 265.

35. Cook *v.* Creswell, 44 Md. 581; Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760; Gardner *v.* Ingram, 54 J. P. 311, 61 L. T. Rep. N. S. 729.

A notice to quit, or that owner will insist upon double rent, is sufficiently certain to support an ejectment. Doe *v.* Goldwin, 2 Q. B. 143, 1 G. & D. 463, 10 L. J. Q. B. 275, 42 E. C. L. 610; Doe *v.* Jackson, Dougl. (3d ed.) 175.

A notice to a tenant to remove the buildings which he has erected and to surrender the land to the landlord has the effect of a notice to terminate the tenancy. Preble *v.* Hay, 32 Me. 456.

A simple demand of possession is not a notice to quit. McLean *v.* Spratt, 19 Fla. 97.

A notice "to leave" is a notice to quit. Douglass *v.* Anderson, 32 Kan. 350, 353, 4 Pac. 257, 283.

A notice to quit the house is notice to quit the land, although the house is the tenant's individual property. Kuhn *v.* Kuhn, 70 Iowa 682, 28 N. W. 541.

Additional clause increasing rent.—A notice to quit otherwise sufficient is not invalidated by an additional clause increasing the rent if the tenant retains possession of the premises after the day mentioned. Ahearn *v.* Bellman, 4 Ex. D. 201, 48 L. J. Exch. 681, 40 L. T. Rep. N. S. 711, 27 Wkly. Rep. 928.

36. Currier *v.* Barker, 2 Gray (Mass.) 224; Wright *v.* Mosher, 16 How. Pr. (N. Y.) 454.

37. Epstein *v.* Greer, 7 8Ind. 348; Doe *v.* Wilkinson, 12 A. & E. 743, Arn. & H. 39, 4 P. & D. 323, 40 E. C. L. 368; Doe *v.* Church, 3 Campb. 71.

A misdescription of the premises is not fatal if they are otherwise sufficiently designated so that the party to whom the notice is given cannot be misled. King *v.* Connolly, 44 Cal. 236; *In re* Doe, 4 Esp. 185, 6 Rev. Rep. 850.

38. Doe *v.* Wrightman, 4 Esp. 5, 6 Rev. Rep. 834.

39. Clark *v.* Keliher, 107 Mass. 406.

40. Doe *v.* Spiller, 6 Esp. 70, 9 Rev. Rep. 810.

41. Doe *v.* Archer, 14 East 245, 12 Rev. Rep. 509; Prince *v.* Evans, 29 L. T. Rep. N. S. 835.

42. Weeks *v.* Sly, 61 N. H. 89.

As condition precedent to summary proceeding see *infra*, X, C, 9, c, (IV).

43. Van Studdiford *v.* Kohn, 46 Mo. App. 436; De Giverville *v.* Stolle, 9 Mo. App. 185; Banks *v.* Carter, 7 Daly (N. Y.) 417.

44. Tanham *v.* Nicholson, L. R. 5 H. L. 561, Ir. R. 6 C. L. 188; Pearse *v.* Boulter, 2 F. & F. 133.

45. *Illinois.*— Bell *v.* Bruhn, 30 Ill. App. 300.

Massachusetts.— Clark *v.* Keliher, 107 Mass. 406; Blish *v.* Harlow, 15 Gray 316.

Missouri.— Gerhart Realty Co. *v.* Weiter, 108 Mo. App. 248, 83 S. W. 278; Beiler *v.* Devoll, 40 Mo. App. 251.

Texas.— Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

England.— Smith *v.* Clark, 9 Dowl. P. C. 202, Wils. P. C. 44.

46. Tanham *v.* Nicholson, L. R. 5 H. L. 561, Ir. R. 6 C. L. 188; Liddy *v.* Kennedy, L. R. 5 H. L. 134, 20 Wkly. Rep. 150; Doe *v.* Dunbar, M. & M. 10, 22 E. C. L. 459; Jones *v.* Marsh, 4 T. R. 464, 2 Rev. Rep. 441. But see Doe *v.* Lucas, 5 Esp. 153, 8 Rev. Rep. 842; Doe *v.* Mitchell, 1 Jur. 795.

The presumption in such a case is that the notice reached the tenant himself. Tanham *v.* Nicholson, L. R. 5 H. L. 561, Ir. R. 6 C. L. 188.

The question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master.

or agent[47] of the tenant at his usual place of residence, whether on the demised premises or not.[48] In England it is held that the contents of the notice should be explained to the servant with whom it is left,[49] but no such rule seems to obtain in America.[50] The notice cannot be given by leaving it at the tenant's place of business in his absence instead of at his residence.[51] It has been said that any manner of service will suffice if it clearly appears that the notice reached the party for whom it was intended within the time provided by the statute.[52] Hence service of a notice by mail, postage prepaid, has been held sufficient;[53] but if there is no evidence that the letter was stamped, there is no *prima facie* evidence of service.[54] It is sometimes provided by statute that a notice to terminate a lease may be served by posting it on the premises in case no one is in actual possession.[55] If the tenant is a corporation, a notice served on its officers is sufficient.[56] A notice to quit is good, although given on Sunday.[57]

6. Proof. Service of notice to quit may be shown by any one having knowledge of the fact;[58] by the return of the one making the service, indorsed on the notice[59] or on the duplicate;[60] by an admission of the tenant that he received such notice;[61] or by other evidence showing that it came into his hands within the time prescribed by statute.[62] Notice to quit may be proved, it has been held, by a duplicate or examined copy without any notice having been given to produce the original.[63]

7. Waiver — a. By Landlord — (i) *Notice Once Given.* While it has been held that the landlord may waive a notice to quit given by him with the effect of leaving the parties as if no notice had been given,[64] the better rule would appear to be that a waiver must be mutual and that both parties must agree that the notice shall not be enforced, and the tenancy continued.[65] A notice to quit is waived by

Tanham *v.* Nicholson, L. R. 5 H. L. 561, Ir. R. 6 C. L. 188.

Servant at boarding-house.— A notice to terminate a tenancy is insufficient, when left with a servant at a boarding-house at which the tenant lives, since such servant is not the servant of the tenant. De Giverville *v.* Stolle, 9 Mo. App. 185.

47. *Illinois.*— Farnham *v.* Hohman, 90 Ill. 312.

Massachusetts.— Walker *v.* Sharpe, 103 Mass. 154 (holding that service of notice to quit upon the tenant's partner upon the premises is sufficient); Bay State Bank *v.* Kiley, 14 Gray 492 (where service was made on the tenant's cashier).

Michigan.— Hogsett *v.* Ellis, 17 Mich. 351, holding that notice to quit, given by a purchaser of the premises to a tenant in possession under one who had previously agreed to purchase and had left the country, is a good service.

Minnesota.— Prendergast *v.* Searle, 81 Minn. 291, 84 N. W. 107.

Missouri.— Ewing *v.* O'Malley, 108 Mo. App. 117, 82 S. W. 1087; Van Studdiford *v.* Kohn, 46 Mo. App. 436.

48. Epstein *v.* Greer, 78 Ind. 348.

49. See cases cited *supra*, note 46.

50. Walker *v.* Sharpe, 103 Mass. 154; De Giverville *v.* Stolle, 9 Mo. App. 185.

51. Banks *v.* Carter, 7 Daly (N. Y.) 417.

52. Langan *v.* Schlief, 55 Mo. App. 213; Van Studdiford *v.* Kohn, 46 Mo. App. 436.

53. Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938.

54. Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938.

55. St. Louis Consol. Coal Co. *v.* Schaefer, 135 Ill. 210, 25 N. E. 788.

56. Doe *v.* Woodman, 8 East 227, 9 Rev. Rep. 422.

57. Sangster *v.* Noy, 16 L. T. Rep. N. S. 157. See, generally, Sunday.

58. Weeks *v.* Sly, 61 N. H. 89.

Before the statute of 17 and 18 Vict. c. 125, § 26, rendering it unnecessary to call the attesting witness to prove a written document, a notice to quit in writing, attested by a witness, must have been proved by calling that witness or his absence must have been accounted for; proof that it was served on the tenant, that he read it, and did not object to it, was not sufficient. Doe *v.* Durnford, 2 M. & S. 62.

59. Moller *v.* Barrett, 49 Ill. App. 519.

60. Doe *v.* Turford, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388.

61. Doe *v.* Hall, 5 M. & G. 795, 44 E. C. L. 414.

62. Alford *v.* Vickery, C. & M. 280, 41 E. C. L. 156.

63. Doe *v.* Somerton, 7 Q. B. 58, 9 Jur. 775, 14 L. J. Q. B. 210, 53 E. C. L. 58. See, generally, Evidence, 17 Cyc. 479.

64. Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228.

65. Tayleur *v.* Waldin, L. R. 3 Exch. 303, 37 L. J. Exch. 173, 18 L. T. Rep. N. S. 655, 16 Wkly. Rep. 1018; Johnstone *v.* Huddlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860; *Re* Magee, 10 Manitoba 1.

the landlord by the subsequent acceptance [66] or recovery [67] of rent accruing after the expiration of the notice, but not by the subsequent acceptance of rent accruing prior to the time for the termination of the tenancy.[68] Nor is a demand of rent,[69] or the mere acceptance of rent by a landlord for occupation subsequent to the time when the tenant ought to have quit according to the notice given him for that purpose, a waiver of such notice, but matter of evidence only, to be left to the jury under the circumstances of the case.[70] The question of waiver of notice to quit is always in part a question of intent.[71] If there is any doubt as to such intent, it is a matter of fact to be left to the jury.[72] The giving by a landlord to a tenant of notice to quit, after the expiration of a prior notice, is a waiver of the first,[73] except where a suit based on the first notice has been commenced when the second notice is given, and its prosecution is thereafter continued.[74]

(II) *Right to Notice.* A landlord may also waive his right to a notice of intention to quit,[75] as when he accepts another person as tenant in the place of the former tenant and receives rent from him,[76] or accepts the possession of the leased premises without objection,[77] or consents to an abandonment thereof.[78] So if the tenant informs the landlord that he will remain but for a short time after the term and pay rent at the old rate, and the landlord acquiesces, the tenant is not required to give notice of his intention to quit.[79]

b. By Tenant. Notice being for the protection of the tenant may be waived by him,[80] and if he does so and goes out of possession he has no right to go back on the premises.[81] Thus a tenant waives notice to quit by disclaiming the relation

66. Collins *v.* Canty, 6 Cush. (Mass.) 415; Norris *v.* Morrill, 43 N. H. 213; Prindle *v.* Anderson, 19 Wend. (N. Y.) 391; Doe *v.* Calvert, 2 Campb. 387, 11 Rev. Rep. 745; Goodright *v.* Cordwent, 6 T. R. 219, 3 Rev. Rep. 161.

67. Stedman *v.* McIntosh, 27 N. C. 571; Zouch *v.* Willingale, 1 H. Bl. 311, 2 Rev. Rep. 770.

68. Norris *v.* Morrill, 43 N. H. 213.

69. Blyth *v.* Dennet, 13 C. B. 178, 22 L. J. C. P. 79, 76 E. C. L. 178.

70. Stedman *v.* McIntosh, 27 N. C. 571; Doe *v.* Batten, Cowp. 243.

71. Lucas *v.* Brooks, 18 Wall. (U. S.) 436, 21 L. ed. 779, holding that such intent cannot exist when the act relied on as a waiver was the act of the party's agent, unknown to, and unauthorized by, the principal.

72. Prindle *v.* Anderson, 19 Wend. (N. Y.) 391; Stedman *v.* McIntosh, 27 N. C. 571; Fitzpatrick *v.* Childs, 2 Brewst. (Pa.) 365; Doe *v.* Batten, Cowp. 243.

73. Dockrill *v.* Schenk, 37 Ill. App. 44; Ewing *v.* O'Malley, 108 Mo. App. 117, 82 S. W. 1087; Morgan *v.* Powers, 83 Hun (N. Y.) 298, 31 N. Y. Suppl. 954; Doe *v.* Palmer, 16 East 53, 14 Rev. Rep. 284.

A second notice to quit or pay double rent is no waiver of the first. Doe *v.* Steel, 3 Campb. 115, 13 Rev. Rep. 768; Messenger *v.* Armstrong, 1 T. R. 53, 1 Rev. Rep. 148.

74. Ewing *v.* O'Malley, 108 Mo. App. 117, 82 S. W. 1087; Doe *v.* Humphreys, 2 East 237.

75. Graham *v.* Anderson, 3 Harr. (Del.) 364; Betz *v.* Maxwell, 48 Kan. 142, 29 Pac. 147 (holding that where a landlord has actual notice that a tenant at will is about to vacate his premises without giving the written notice prescribed by statute, and brings an action against him for rent, such actual notice and conduct of the parties terminate the tenancy); Eimermann *v.* Nathan, 116 Wis. 124, 92 N. W. 550.

Oral request to change time of notice.— An oral request that notice should be given at a shorter time than that required by statute, and the giving of such notice, will not alone operate as a waiver of the statutory notice. Lewis *v.* Scanlan, 3 Pennew. (Del.) 238, 50 Atl. 58.

76. Lewis *v.* Scanlan, 3 Pennew. (Del.) 238, 50 Atl. 58; Sparrow *v.* Hawkes, 2 Esp. 505.

77. Elgutter *v.* Drishaus, 44 Nebr. 378, 63 N. W. 19.

78. Williams *v.* Jones, 1 Bush (Ky.) 621.

79. Montgomery *v.* Willis, 45 Nebr. 434, 63 N. W. 794.

80. *Nebraska.*— Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999.

New Hampshire.— Woodbury *v.* Butler, 67 N. H. 545, 38 Atl. 379, holding that a tenant from year to year who agrees, as part of the terms of sale of the premises in his possession, that such tenancy shall terminate in a certain time thereafter, waives his right to three months' notice under the Landlord and Tenant Act, as against purchasers at such sale.

New York.—Christie *v.* Parker, 23 Hun 661.

Pennsylvania.— Hutchinson *v.* Potter, 11 Pa. St. 472; Mill Creek Coal Co. *v.* Andrukus, 12 Pa. Co. Ct. 314.

Washington.— Teater *v.* King, 35 Wash. 138, 76 Pac. 688.

Such waiver must appear of record.— Hutchinson *v.* Potter, 11 Pa. St. 472; Mill Creek Coal Co. *v.* Andrukus, 12 Pa. Co. Ct. 314.

81. Torrans *v.* Stricklin, 52 N. C. 50.

of landlord and tenant,[82] or by disclaiming any right to the premises under certain circumstances.[83] No continuance of the tenancy is necessarily implied from the mere fact of a tenant continuing in possession after the expiration of a notice to quit given by such tenant.[84] It is for the jury to decide whether or not the tenant, by remaining in possession, intends to waive the notice and continue the tenancy.[85] Nor will the fact that the tenant leaves the premises in an untenantable condition have this effect.[86]

c. Defects in Notice. If either the landlord or tenant waives any objection to the informality of a notice served upon him by the other, or by his words and conduct leads the latter reasonably and properly to understand that he waives such informality, he cannot afterward object that the notice is insufficient.[87] Such a waiver may be evidenced by express agreement or by declarations and conduct from which a fair implication of it arises.[88] It has been said that when an insufficient notice to quit has been given the mere aquiescence of the party receiving it cannot have the effect of putting an end to the tenancy;[89] but it is usually held that such acquiescence and failure to object to the sufficiency of a notice amounts to a waiver of a regular notice.[90] It is for the jury to say whether the fair inference from all the evidence is that the informality was waived.[91]

B. Terms For Years[92] **— 1. Expiration of Term — a. In General.**[93] A lease for years is terminated by the expiration of the term of the tenancy as fixed by the lease,[94] without any notice to quit,[95] except where a notice is required because

82. Simpson *v.* Applegate, 75 Cal. 342, 17 Pac. 237. See also *infra*, X, B, 4, b, (I); X, C, 9, c, (I), (C).

83. Wissel *v.* Ott, 34 N. Y. App. Div. 159, 54 N. Y. Suppl. 605.

84. Jones *v.* Shears, 4 A. & E. 832, 2 H. & W. 43, 5 L. J. K. B. 153, 6 N. & M. 428, 31 E. C. L. 365.

85. Jones *v.* Shears, 4 A. & E. 832, 2 H. & W. 43, 5 L. J. K. B. 153, 6 N. & M. 428, 31 E. C. L. 365.

86. Wilson *v.* Prescott, 62 Me. 115.

87. Boynton *v.* Bodwell, 113 Mass. 531; Corby *v.* Brill Book, etc., Co., 76 Mo. App. 506.

88. Smith *v.* Snyder, 168 Pa. St. 541, 32 Atl. 64.

Where a landlord continues to claim one as tenant and attempts to collect rent from him, he does not thereby waive defects in a notice given by such tenant. Whicher *v.* Cottrell, 165 Mass. 351, 43 N. E. 114.

Refusal to quit based on other grounds.— The formal insufficiency of a notice to terminate a tenancy from month to month is waived by the tenant's refusal to quit on the ground that he is a tenant from year to year. Drey *v.* Doyle, 28 Mo. App. 249.

89. Bessell *v.* Landsberg, 7 Q. B. 638, 9 Jur. 576, 14 L. J. Q. B. 355, 53 E. C. L. 638; Doe *v.* Milward, 1 H. & H. 79, 7 L. J. Exch. 57, 3 M. & W. 328; *Re* Magee, 10 Manitoba 1.

90. Ludington *v.* Garlock, 5 Silv. Sup. (N. Y.) 532, 9 N. Y. Suppl. 24; Smith *v.* Snyder, 168 Pa. St. 541, 32 Atl. 64; Shirley *v.* Newman, 1 Esp. 266, 5 Rev. Rep. 737; General Assur. Co. *v.* Worsley, 64 L. J. Q. B. 253, 72 L. T. Rep. N. S. 358, 15 Reports 328; Cartwright *v.* McPherson, 20 U. C. Q. B. 251; Doe *v.* Merritt, 2 U. C. Q. B. 410.

91. Boynton *v.* Bodwell, 113 Mass. 531; Thomson *v.* Chick, 92 Hun (N. Y.) 510, 37 N. Y. Suppl. 59.

92. **Lease for life** see ESTATES, 16 Cyc. 644 *et seq.*

Effect: On estoppel to deny landlord's title see *supra*, III, G, 10, e. On right to distrain see *supra*, VIII, E, 2, h.

Apportionment of rent see *infra*, VIII, A, 9, c.

Pleading termination in action for rent see *infra*, VIII, B, 10, b, (II), (C).

Summary proceedings as terminating lease see *infra*, X, C, 25.

93. **Duration of term for years** see *supra*, IV, A, 3.

Limitation of term for which lease may be made see *supra*, II, A, 5, d.

Duty of tenant to surrender on termination of lease see *infra*, VII, B, 1, a, (VII).

Property on premises at expiration of term: Emblements see *infra*, VII, D, 6. Improvements see *infra*, VII, D, 3.

Parol evidence as to termination of lease see EVIDENCE, 17 Cyc. 625.

94. See State *v.* Burr, 29 Minn. 432, 13 N. W. 676; Philip *v.* McLaughlin, 24 N. Brunsw. 532.

Construction of particular leases as to time of termination see Burris *v.* Jackson, 44 Ill. 345; Cook *v.* Bisbee, 18 Pick. (Mass.) 527; Ely *v.* Randall, 68 Minn. 177, 70 N. W. 980; Washington Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. ed. 782, lease of stall in market.

Payment for improvements.— Where the lease expired on a certain day, but contained a clause that tenants should give up possession when the value of the building erected thereon by them should be paid for by the lessors, the lessee's right to collect rent from subtenants continued after the date set for the expiration of the lease, and until they were paid the value of such building. Moshassuck Encampment No. 2 *v.* Arnold, 25 R. I. 65, 54 Atl. 771.

95. See *infra*, IX, B, 1, c, (I), (A).

of the particular terms of the lease.[96] Because of the duty of the lessor to have the lease expressed in clear terms, the tenant may elect, where the date of the termination of the lease is in doubt as between two days, as to which of the two days it shall end on;[97] and if the duration of the lease is left optional, without saying at whose option, it means the option of the tenant.[98] Except where there is a custom to the contrary,[99] a lease for a year expires at the end of the day in the following year preceding the day when the term commenced.[1] A lease "to end on" a specified day expires at the end of that day, except where controlled by custom;[2] but a lease "to" a specified day expires at midnight on the preceding day.[3]

b. Dependent on Collateral Event. The term of the lease may depend on the occurrence of some collateral event, as provided for in the lease,[4] such as the dissolution of a partnership,[5] or the end of a postmaster's term,[6] or the breaking down of machinery.[7]

c. Notice to Quit, or of Intention to Quit — (I) *Necessity* — (A) *Independent of Provisions in Lease.* Where the tenancy is for a definite term, and the lease is to end on a certain day, no notice to quit need be given in order to terminate the lease,[8] unless the tenant holds over by express or implied consent of the land-

96. See *infra*, IX, B, 1, c, (I), (B).

97. Murrell *v.* Lion, 30 La. Ann. 255. See also *infra*, IX, B, 2.

98. Com. *v.* Philadelphia County, 3 Brewst. (Pa.) 537. See also *infra*, IX, B, 2.

99. See CUSTOMS AND USAGES, 12 Cyc. 1069, text and note 61.

In New York it is a custom which has become law that a lease for one year, commencing on the first of May, expires at noon on the first of the following May. Marsh *v.* Masterson, 15 Daly 114, 3 N. Y. Suppl. 414.

1. Buchanan *v.* Whitman, 76 Hun (N. Y.) 67, 27 N. Y. Suppl. 604 [*affirmed* in 151 N. Y. 253, 45 N. E. 556]; Marys *v.* Anderson, 24 Pa. St. 272, 2 Grant 446.

2. People *v.* Robertson, 39 Barb. (N. Y.) 9.

3. People *v.* Robertson, 39 Barb. (N. Y.) 9.

4. *Alabama.*—Eubank *v.* May, etc., Hardware Co., 105 Ala. 629, 17 So. 109, expiration of lease of adjoining building.

Michigan.— D'Arcy *v.* Martyn, 63 Mich. 602, 30 N. W. 194, completion of another building.

Minnesota.— Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184, appraisement and payment to lessee of value of improvements.

New York.— Hunt *v.* Comstock, 15 Wend. 665, payment of mortgage.

Pennsylvania.— Woodland Cemetery Co. *v.* Carville, 9 Leg. Int. 98, when lessor should have occasion for end of building means any occasion for a reasonable and proper purpose pertaining to his own business.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 297.

Payment of debt.— Where a lease for a fixed term is given as security for money advanced, with a provision for reconveyance on payment of said sum, the lease is terminated by the receipt as rent from sublessees of the amount advanced, although before the term fixed by the lease expires. Nugent *v.* Riley, 1 Metc. (Mass.) 117, 35 Am. Dec. 355.

Existence of club.— Owners of land leased to a club of which they were members a certain amount for a canal and right of way "for and during the existence of the club," with the provision that, whenever said club shall cease to exist "as now organized," the lease should cease. The day before the execution of the lease the club resolved to become incorporated. It was held that "as now organized" referred to the purpose and not the mode of organization, and that the lease did not terminate with the incorporation of the club. Alexander *v.* Chicago Tolleston Club, 110 Ill. 65.

Necessity for notice to quit see *infra*, IX, B, 1, c, (I), (A).

Duration of term as affected by failure to exercise option to terminate see *supra*, IV, A, 3, b.

5. Russell *v.* McCartney, 21 Mo. App. 544.

6. Easton *v.* Mitchell, 21 Ill. App. 189.

7. Scott *v.* Willis, 122 Ind. 1, 22 N. E. 786.

8. *Illinois.*— Secor *v.* Pestana, 37 Ill. 525; Walker *v.* Ellis, 12 Ill. 470; Fort *v.* McGrath, 7 Ill. App. 302.

Indiana.— Alcorn *v.* Morgan, 77 Ind. 184; McClure *v.* McClure, 74 Ind. 108; Myerson *v.* Neff, 5 Ind. 523; McClain *v.* Doe, 5 Ind. 237; Pierson *v.* Doe, 2 Ind. 123; Millington *v.* O'Dell, 35 Ind. App. 225, 73 N. E. 949 (statute); Dumphy *v.* Goodlander, 12 Ind. App. 609, 40 N. E. 924.

Kentucky.— Locke *v.* Coleman, 2 T. B. Mon. 12, 15 Am. Dec. 118; Hamit *v.* Lawrence, 2 A. K. Marsh. 366.

Louisiana.— Bowles *v.* Lyon, 6 Rob. 262.

Maine.— Lithgow *v.* Moody, 35 Me. 214; Preble *v.* Hay, 32 Me. 456; Clapp *v.* Paine, 18 Me. 264; Stockwell *v.* Marks, 17 Me. 455, 35 Am. Dec. 266; Moshier *v.* Reding, 12 Me. 478.

Massachusetts.— Dorrell *v.* Johnson, 17 Pick. 263.

Missouri.— Mastin *v.* Metzinger, 99 Mo. App. 613, 74 S. W. 431.

New York.— Cox *v.* Sammis, 57 N. Y. App. Div. 173, 68 N. Y. Suppl. 203; Allen *v.* Jaquish, 21 Wend. 628.

lord.[9] No notice to quit is necessary even though the lease is a parol one,[10] and void by the statute of frauds.[11] So, where the expiration of the lease depends on the happening of a collateral event, no notice to quit is necessary on the happening of such event.[12]

(B) *Dependent on Provisions in Lease.* Where the lease is determinable at the option of the lessor or of the lessee or both, before the expiration of the term, a notice to quit, or a notice of an intention to quit, is necessary to evidence the exercise of such option.[13] For instance the lease often provides for a fixed term, with the privilege of holding over for a definite time on condition that notice be given.[14]

(II) *Time When Given.* A provision in a lease that notice of a specified number of days or months may be given to terminate the lease before the expiration of the term is usually construed to refer to a notice which will terminate on a recurrence of the date of the commencement of the tenancy.[15]

(III) *Who May Give.* The rule applicable to notices to quit in general, that the notice must be given by or in behalf of the person in whom the term is

North Carolina.— Stedman *v.* McIntosh, 26 N. C. 291, 42 Am. Dec. 122.

Pennsylvania.— Logan *v.* Herron, 8 Serg. & R. 459.

Washington.— See Mounts *v.* Goranson, 29 Wash. 261, 69 Pac. 740.

England.— Doe *v.* Forwood, 3 Q. B. 627, 11 L. J. Q. B. 321, 43 E. C. L. 897; Cobb *v.* Stokes, 8 East 358, 9 Rev. Rep. 464; Right *v.* Darby, 1 T. R. 159, 1 Rev. Rep. 169; Messenger *v.* Armstrong, 1 T. R. 53, 1 Rev. Rep. 148.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 317.

Contra.— Thomas *v.* Black, 8 Houst. (Del.) 507, 18 Atl. 771; Bonsall *v.* McKay, 1 Houst. (Del.) 520.

A lease for one year, with an option of a further term of four years, terminates at the end of one year, without notice by the lessor, unless the option is accepted. Williams *v.* Mershon, 57 N. J. L. 242, 30 Atl. 619.

In order to terminate a tenancy for a month, as distinguished from a tenancy from month to month, no notice to quit is necessary. Reithman *v.* Brandenburg, 7 Colo. 480, 4 Pac. 788; Lautman *v.* Miller, 158 Ind. 382, 63 N. E. 761; Gibbons *v.* Dayton, 4 Hun (N. Y.) 451; Wilson *v.* Taylor, 8 Daly (N. Y.) 253; Hoffman *v.* Van Allen, 3 Misc. (N. Y.) 99, 22 N. Y. Suppl. 369. *Compare* Bent *v.* Renken, 86 N. Y. Suppl. 110.

9. See *supra*, IV, C, 3, f.

10. Ellis *v.* Paige, 2 Pick. (Mass.) 71 note; Danforth *v.* Sargeant, 14 Mass. 491.

11. Butts *v.* Fox, 96 Mo. App. 437, 70 S. W. 515; Magee *v.* Gilmour, 17 Ont. 620 [*affirmed* in 17 Ont. App. 27]. But see Creighton *v.* Sanders, 89 Ill. 543, holding that a tenant under an oral lease for five years is a tenant from month to month, and the tenancy may be terminated at any time by thirty days' notice.

Where an oral lease is good only for one year but the tenant holds over another year under an oral lease for two years, the landlord may have restitution of the premises at the end of such time without giving notice to quit. Ryan *v.* Mills, 129 Mich. 170, 88 N. W. 392 [*following* Teft *v.* Hinchman, 76 Mich. 672, 43 N. W. 680].

12. *Indiana.*— Scott *v.* Willis, 122 Ind. 1, 22 N. E. 786.

Missouri.— Russell *v.* McCartney, 21 Mo. App. 544.

New Jersey.—Horner *v.* Leeds, 25 N. J. L. 106.

West Virginia.— Marmet Co. *v.* Archibald, 37 W. Va. 778, 17 S. E. 299.

England.— Doe *v.* Miles, 4 Campb. 373, 1 Stark. 181, 16 Rev. Rep. 805, 2 E. C. L. 76; Doe *v.* Derry, 9 C. & P. 494, 38 E. C. L. 291; Doe *v.* Bluck, 8 C. & P. 464, 34 E. C. L. 838.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 317.

13. See cases cited *infra*, this note.

Construction of particular leases as to necessity for notice to quit or notice of intention to quit see Henderson *v.* Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422; Gardiner *v.* Bair, 10 Pa. Super. Ct. 74, 44 Wkly. Notes Cas. 83; Matthews *v.* Rising, 31 Pittsb. Leg. J. N. S. (Pa.) 163; Brown *v.* Trumper, 26 Beav. 11, 53 Eng. Reprint 800.

Provision for option to terminate as rendering term uncertain and invalidating lease see *supra*, IV, A, 2.

14. See cases cited *infra*, this note.

Necessity of giving notice, at end of original term, of intention to quit at expiration of the additional term see Ashhurst *v.* Eastern Pennsylvania Phonograph Co., 166 Pa. St. 357, 31 Atl. 116; Wilcox *v.* Montour Iron, etc., Co., 147 Pa. St. 540, 23 Atl. 840; McGregor *v.* Rawle, 57 Pa. St. 184 [*affirming* 6 Phila. 243]; Counter *v.* Morton, 9 U. C. Q. B. 253.

15. Dixon *v.* Bradford, etc., Coal Supply Soc., [1904] 1 K. B. 444, 73 L. J. K. B. 136, 90 L. T. Rep. N. S. 122, 20 T. L. R. 159. See also Baker *v.* Adams, 5 Cush. (Mass.) 99. But see Woodbridge Co. *v.* Charles E. Hires Co., 19 N. Y. App. Div. 128, 45 N. Y. Suppl. 991 [*affirmed* in 163 N. Y. 563, 57 N. E. 1129]; Soames *v.* Nicholson, [1902] 1 K. B. 157, 71 L. J. K. B. 24, 85 L. T. Rep. N. S. 614, 50 Wkly. Rep. 169, holding that, where rent is payable quarterly and a three months' notice

vested,[16] applies to a notice of intention to quit, which is given pursuant to provisions in the lease therefor, where the tenancy is terminated before the end of the term.[17]

(iv) *SUFFICIENCY.* The notice to quit must be precise and definite as to the time when the surrender is required to be made.[18] Where the lessor is given power to terminate the lease for certain purposes, as where he desires to sell, the notice to quit must state the ground for terminating the lease.[19] Acts of the landlord done with knowledge of the lessee may be equivalent to a formal notice.[20] The sufficiency of notice, as provided for in particular leases, is governed by the terms of the particular lease.[21]

2. OPTION OF PARTIES. It is often provided in a lease for a year or years that it may be terminated at the option of one or both of the parties to the lease, before the expiration of the term. Whether the option may be exercised by either of the parties,[22] or solely by the lessor,[23] or the lessee,[24] or only by the joint assent of both lessor and lessee,[25] depends on the terms of the particular lease. Whether the lease is terminated by the lessor,[26] or by the lessee,[27] there must be a strict compliance with the provisions in the lease in regard thereto by the party seeking

to quit may be given on either side "at any time," the notice need not be given so as to expire on one of the quarter days.

16. See *supra*, IX, A, 2.

17. Seaward *v.* Drew, 67 L. J. Q. B. 322, 78 L. T. Rep. N. S. 19. See also Mershon *v.* Williams, 62 N. J. L. 779, 42 Atl. 778, holding that a son of the lessee, who had gone into possession of the leased premises with the consent of the lessee, and whose possession had not been disturbed by the lessee, may elect by his acts to terminate the lease, so as to bind the lessee.

18. People *v.* Gedney, 15 Hun (N. Y.) 475, holding that a notice to surrender possession "as soon as practicable" is insufficient to enforce a stipulation that the tenant shall quit on ten days' notice.

19. Sloan *v.* Cantrell, 5 Coldw. (Tenn.) 571.

20. Shaw *v.* Hoffman, 25 Mich. 162.

21. Smith *v.* Rasin, 84 Md. 642, 36 Atl. 261; Matter of Coatsworth, 37 N. Y. App. Div. 295, 55 N. Y. Suppl. 753; Chambers *v.* Kingham, 10 Ch. D. 743, 48 L. J. Ch. 169, 39 L. T. Rep. N. S. 472, 27 Wkly. Rep. 289; Cadby *v.* Martinez, 11 A. & E. 720, 9 L. J. Q. B. 281, 3 P. & D. 386, 39 E. C. L. 384; Giddens *v.* Dodd, 3 Drew. 485, 25 L. J. Ch. 451, 4 Wkly. Rep. 377, 61 Eng. Reprint 988; Barrett *v.* Merchants' Bank, 26 Grant Ch. (U. C.) 409.

22. Roe *v.* Hayley, 12 East 464, 11 Rev. Rep. 455 (holding that where either party could terminate it, a devisee of the lessor, who was entitled to the rent and reversion, could terminate the lease); Goodright *v.* Mark, 4 M. & S. 30; Eckhardt *v.* Raby, 20 U. C. Q. B. 458.

23. Lumbers *v.* Gold Medal Furniture Mfg. Co., 30 Can. Sup. Ct. 55 [*reversing* 26 Ont. App. 78 (*affirming* 29 Ont. 75)]; Pepper *v.* Butler, 37 U. C. Q. B. 253, holding that the lessor could not terminate the lease after he had assigned his reversion. See also Dunn *v.* NcNaught, 38 Ga. 179; Laurel Creek Coal, etc., Co. *v.* Browning, 99 Va. 528, 39 S. E. 156.

24. See cases cited *infra*, this note. See also Channel *v.* Merrifield, 206 Ill. 278, 69 N. E. 32.

Where a lease is granted in the alternative for a certain number of years, or a certain other number of years, the lessee only has the option at which of the periods the lease shall determine. Powell *v.* Smith, L. R. 14 Eq. 85, 41 L. J. Ch. 734, 20 Wkly. Rep. 602; Dann *v.* Spurrier, 3 B. & P. 399, 7 Ves. Jr. 231, 7 Rev. Rep. 797, 6 Rev. Rep. 119, 32 Eng. Reprint 94; Doe *v.* Dixon, 9 East 15, 9 Rev. Rep. 501; Fallon *v.* Robins, 16 Ir. Ch. 422; Price *v.* Dyer, 17 Ves. Jr. 356, 11 Rev. Rep. 102, 34 Eng. Reprint 137.

25. Fowell *v.* Tranter, 3 H. & C. 458, 34 L. J. Exch. 6, 11 L. T. Rep. N. S. 317, 13 Wkly. Rep. 145, where a lease was determinable at the end of seven or fourteen years, if the parties saw fit.

26. Small *v.* Clark, 97 Me. 304, 54 Atl. 758.

Right of lessee to recover stipulated sum.— Where a lease contains a stipulation that, on surrender of the premises by the lessee on demand of the lessor before the expiration of the term, a certain sum shall become payable to the lessee, a surrender within a reasonable time after the expiration of the period named in the demand is sufficient. Dierig *v.* Callahan, 35 Misc. (N. Y.) 30, 70 N. Y. Suppl. 210.

27. Van Meter *v.* Chicago, etc., Coal Min. Co., 88 Iowa 92, 55 N. W. 106 (holding that a provision of a lease allowing the lessee to abandon the property does not require the cancellation of the lease of record or the cancellation of certain mortgages executed by the lessee on its interest, before the release becomes effective); Hooks *v.* Forst, 165 Pa. St. 238, 30 Atl. 846.

Stipulated sum as damages.— A contract of lease may contain a stipulation fixing an amount enabling the lessee to terminate the lease, and, unless the amount is "vile" and insufficient, the lessor must resort to the courts to have the contract annulled. Houssiere Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932.

to avail himself of the option.[28] A surrender pursuant to such an option is shown by the lessee's removal of all his property from the premises and the delivery of the key to the lessor.[29]

3. Death of Party to Lease. An ordinary lease is not terminated by the death of either the lessor[30] or the lessee.[31]

4. Termination of Landlord's Estate — a. In General. As a general rule the lease is terminated by the expiration of the lessor's estate.[32] For instance the tenant may terminate the tenancy by delivering up possession where the estate of the lessor has been extinguished by a forfeiture to the state for non-payment of taxes.[33]

b. Sale by Landlord to Third Person. A voluntary sale of the premises by the landlord, while terminating the relation of landlord and tenant as between the original lessor and the tenant,[34] does not terminate the lease, unless there is a provision in the lease to that effect.[35] The tenancy is terminated by the sale if the

Consideration for agreement.— The consideration of one dollar paid for a lease was also a consideration for an agreement in the lease allowing the lessee to surrender at any time. Brown *v.* Fowler, 65 Ohio St. 507, 63 N. E. 76.

28. Hodgkins *v.* Price, 137 Mass. 13; Kittle *v.* St. John, 7 Nebr. 73 (holding that, where the lease authorized a surrender on the giving of a written notice, it was not sufficient to make an oral surrender); Reich *v.* McCrea, 13 N. Y. Suppl. 650.

29. Channel *v.* Merrifield, 206 Ill. 278, 69 N. E. 32 [*reversing* on other grounds 106 Ill. App. 243].

30. Jaques *v.* Gould, 4 Cush. (Mass.) 384; Lockhart *v.* Forsythe, 49 Mo. App. 654.

Attornment on death of landlord see *supra*, I, F, 2.

31. Hihn *v.* Mangenberg, 89 Cal. 268, 26 Pac. 968; Alsup *v.* Banks, 68 Miss. 664, 9 So. 895, 24 Am. St. Rep. 294, 13 L. R. A. 598; Walker's Estate, 6 Pa. Co. Ct. 515; Dalye *v.* Robertson, 19 U. C. Q. B. 411. *Contra*, see Jaquett's Estate, 13 Lanc. Bar (Pa.) 13.

Especially is this true where the lease was not executed with reference to a business which could not be carried on without the personal presence of the lessee. Alsup *v.* Banks, 68 Miss. 664, 9 So. 895, 24 Am. St. Rep. 294, 13 L. R. A. 598.

The death of a partner does not terminate a lease to a partnership (Johnson *v.* Hartshorne, 52 N. Y. 173; Markle's Estate, 5 Pa. Dist. 47, 17 Pa. Co. Ct. 337; Doe *v.* Bluck, 8 C. & P. 464, 34 E. C. L. 838), except where the lessor is himself one of the partners (Johnson *v.* Hartshorne, *supra*; Doe *v.* Miles, 4 Campb. 373, 1 Stark. 181, 16 Rev. Rep. 805, 2 E. C. L. 76).

Particular leases.— A lease for years, making no disposition of the estate in case of the lessee's death, but containing directions as to the mode of husbandry to be pursued, and stipulations for improvements to be made by the lessee, with the provision that he shall have the use of certain cotton seed, "so long as he remains on the place," to be returned, "at the close of his lease," is not personal to the lessee, but the leasehold estate passes, at his death, to his administratrix. Charles *v.* Byrd, 29 S. C. 544, 8 S. E. 1.

Effect of death of tenant on right to distrain see *supra*, VIII, E, 2, i.

Effect of dissolution where lessee a corporation see Corporations, 10 Cyc. 1313.

32. See cases cited *infra*, this note.

Payment and release of a mortgage terminates the right of possession by a lessee under a mortgagee. Holt *v.* Rees, 46 Ill. 181, 44 Ill. 30.

After entry by mortgagee, where the mortgage was made prior to the lease, and notice to the lessee to pay rent to the mortgagee, the relation of landlord and tenant is determined as between the tenant and mortgagor. Fitzgerald *v.* Beebe, 7 Ark. 310. See also *supra*, I, E, 4.

Lease by usufructuary.— A lease of property granted by the usufructuary expires when the usufruct ceases, whether such termination is caused by the death of the usufructuary or by a judgment of court decreeing the loss of the usufruct for abuse. Dickson *v.* Dickson, 33 La. Ann. 1370.

33. Waggener *v.* McLaughlin, 33 Ark. 195.

34. Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916. See also *supra*, I, F, 1.

35. *Kansas.*— Dunn *v.* Jaffray, 36 Kan. 408, 13 Pac. 781, where lease by a partnership was held to be terminated on a sale to one partner for a nominal consideration, where made in good faith.

Michigan.— Wallace *v.* Bahlhorn, 68 Mich. 87, 35 N. W. 834.

North Carolina.—Aydlett *v.* Neal, 114 N. C. 7, 18 S. E. 973; Aydlett *v.* Pendleton, 114 N. C. 1, 18 S. E. 971.

Rhode Island.—Baxter *v.* Providence, (1895) 40 Atl. 423.

Virginia.— Dudley *v.* Estill, 6 Leigh 562, holding that a demand for surrender was necessary.

Wisconsin.— Hickox *v.* Seegner, 123 Wis. 128, 101 N. W. 357, holding that where a lease for a term of five years from Oct. 15, 1899, provided that it should "expire after three years from October 15, 1899," if the leased property was sold, such provision should be construed to terminate the lease at

lease provides that the tenant shall surrender possession on the landlord's compliance with certain terms, such as the giving of a specified notice to the tenant,[36] the payment of a stipulated sum as damages,[37] the payment of a reasonable valuation for the unexpired term,[38] or a repayment to the tenant of all sums paid as rent,[39] if there is a compliance with such conditions.

c. Sale by Operation of Law — (i) *Mortgage Foreclosure Sale.* A sale of the demised premises, on the foreclosure of a mortgage antedating the lease, terminates the lease,[40] although it has been held that the purchaser at the sale

once on sale of the property after the expiration of the three years, and not that, if the property was sold within the three-year period, the lease should expire at the end thereof.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 300.

A colorable sale, without intending to make a valid legal transfer of the title for a good consideration, will not terminate the lease, although it provides therefor on a sale of the premises. Ela *v.* Bankes, 37 Wis. 89.

36. Ronginsky *v.* Grantz, 39 Misc. (N. Y.) 347, 79 N. Y. Suppl. 839 (holding that the term ended as soon as the lessor sold the premises and notified the tenant, and paid the sum fixed by the lease); Matthews *v.* Lloyd, 36 U. C. Q. B. 381.

What constitutes sale.— Where a husband and wife executed a lease, and the husband subsequently conveyed a life-estate to her with remainder to others, and she conveyed her life-estate, there was a sale within the meaning of the lease. Aydlett *v.* Neal, 114 N. C. 7, 18 S. E. 973; Aydlett *v.* Pendleton, 114 N. C. 1, 18 S. E. 971.

Sufficiency of notice and service.— In the absence of any provision in the contract as to the particular form of the notice, any notice which will distinctly inform the tenant that the sale has been made is a "proper notice." Millan *v.* Kephart, 18 Gratt. (Va.) 1. A notice by the purchaser that he had bought the land and that the lease was ended, and demanding possession, was sufficient, although it did not expressly require the removal of a building erected by the lessee. Aydlett *v.* Neal, 114 N. C. 7, 18 S. E. 973; Aydlett *v.* Pendleton, 114 N. C. 1, 18 S. E. 971. Where the lease provided for a thirty days' notice in writing, service by mail is sufficient. Bloom *v.* Wanner, 77 S. W. 930, 25 Ky. L. Rep. 1646.

By whom notice to be given.— Where the lease was executed by husband and wife, and he subsequently conveyed a life-estate to her with remainder to others, and she conveyed her life-estate, the purchaser from her was a proper person to give notice that the lease was ended, and the failure of the remainderman to join was immaterial. Aydlett *v.* Neal, 114 N. C. 7, 18 S. E. 973; Aydlett *v.* Pendleton, 114 N. C. 1, 18 S. E. 971.

Stipulation as inuring to grantee.—A stipulation in a lease that, if a sale of the property shall be made during the continuance of the lease, the lessees will vacate and deliver up possession on thirty days' notice in writing, is a covenant which runs with the reversion and inures to the benefit of the grantee of the fee. Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451.

Necessity for entry.— Where a lease provides that the lessor may terminate it at the end of any year by giving sixty days' notice, in case he should desire to sell, and notice is given after a sale, the lease is terminated sixty days after such notice, without an entry or any further act on the part of the lessor. Miller *v.* Levi, 44 N. Y. 489.

Waiver of notice.— A notice required to be given by the lease is not waived by the statements of the tenant in reply to the statement of the grantees that they intended to remove him, that he understood he had rented the place for a year, and that if they intended to remove him the sooner they started their action the better it would suit him. Mitchell *v.* Matheson, 23 Wash. 723, 63 Pac. 564.

37. King *v.* Ransom, 86 Wis. 496, 56 N. W. 1084.

Termination as optional with lessor.— A provision in a lease that in case of a sale the landlord should give the tenant sixty days' notice, and return a deposit made to secure the rent, together with five hundred dollars, to surrender the premises, was not for the benefit of the tenant, and he could not claim the stipulated sum, where the purchaser was willing to continue the lease. Foley *v.* Constantino, 43 Misc. (N. Y.) 91, 86 N. Y. Suppl. 780.

38. McDaniel *v.* Callan, 75 Ala. 327.

39. Childs *v.* Skillin, 39 Misc. (N. Y.) 825, 81 N. Y. Suppl. 348, holding that, where the lessee was permitted to remain in possession the entire term, although there had been a sale of the premises during the term, he could not retain possession until the rent which had been paid by him during the term was refunded, where no notice to quit was given until the end of the term.

40. Barelli *v.* Szymanski, 14 La. Ann. 47; Oakes *v.* Aldridge, 46 Mo. App. 11; Burr *v.* Stenton, 52 Barb. (N. Y.) 377 [*affirmed* in 43 N. Y. 462] (holding that if there is a surplus arising from the sale over and above the mortgage debt the lessee is not entitled to any part of it); Cummings *v.* Rosenberg, 6 Misc. (N. Y.) 538, 27 N. Y. Suppl. 134 (holding that where the mortgage was foreclosed, and the decree provided that the purchaser should be given possession on production of the referee's deed, the lessee was not obliged to demand from the purchaser the production of such deed before he could surrender the premises and determine his liability); Alford *v.* Carver, 31 Tex. Civ. App.

has the right to affirm or disaffirm the lease.[41] Where the lease was made before the mortgage, the purchaser at foreclosure sale takes as assignee of the reversion, and cannot terminate the lease.[42]

(II) *EXECUTION SALE.* Except where the matter is regulated by statute,[43] the general rule is that the lease is terminated, at the option of the purchaser, by a sale of the demised premises under an execution against the property of the landlord,[44] provided the judgment under which the execution was issued was rendered before the lease was made.[45] The relationship as between the original lessor and his tenant is not terminated, however, until the purchaser takes possession.[46] Furthermore the sale of a part interest in the demised premises does not dissolve the lease as to the entire premises.[47]

d. Acquisition of Landlord's Title by Tenant.[48] Where the lessee of land becomes the owner thereof in fee, the lease is terminated, and the lesser estate is merged in the greater.[49] This rule is held to be of the same general application without regard to whether the tenant acquired title by a voluntary deed of the landlord,[50]

607, 72 S. W. 869. *Compare* Chadbourn *v.* Rahilly, 34 Minn. 346, 25 N. W. 633.

Election of lessee to discontinue tenancy.— Where land subject to a lease was sold to one who had no knowledge of the lease, and thereafter was sold under a mortgage given by the original lessor, and the tenant at considerable expense prepared to leave the premises, he was not bound to continue the tenancy, because of a subsequent written permission, signed by all the parties having an interest. Holmes *v.* McMaster, 1 Rich. Eq. (S. C.) 340.

41. Duff *v.* Wilson, 69 Pa. St. 316; Hemphill *v.* Tevis, 4 Watts & S. (Pa.) 535; Market Co. *v.* Lutz, 4 Phila. (Pa.) 322.

The purchaser disaffirms by giving a notice to quit, so that the relation of landlord and tenant can be renewed only by a new contract. Hemphill *v.* Tevis, 4 Watts & S. (Pa.) 535.

42. Hemphill *v.* Tevis, 4 Watts & S. (Pa.) 535.

43. See the statutes of the several states.

44. Hemphill *v.* Tevis, 4 Watts & S. (Pa.) 535. See, generally, EXECUTIONS, 17 Cyc. 1310, 1311.

45. Smith *v.* Aude, 46 Mo. App. 631.

46. Everston *v.* Sawyer, 2 Wend. (N. Y.) 507. But see Anderson *v.* Comeau, 33 La. Ann. 1119, holding that a seizure under execution puts an end to the lessee's obligation to his lessor.

47. Lewis *v.* Klotz, 39 La. Ann. 259, 1 So. 539.

48. **Merger of estates in general** see ESTATES, 16 Cyc. 665–669.

49. McMahan *v.* Jacoway, 105 Ala. 585, 17 So. 39 (holding that thereafter the tenant cannot recover for damages resulting from the failure of the landlord to repair in compliance with a provision of the lease); Carroll *v.* Ballance, 26 Ill. 9, 79 Am. Dec. 354; Hudson Bros. Commission Co. *v.* Glencoe Sand, etc., Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722; Kershaw *v.* Supplee, 1 Rawle (Pa.) 131. See also Dynecor *v.* Tennant, 13 App. Cas. 279, 57 L. J. Ch. 1078, 59 L. T. Rep. N. S. 5, 37 Wkly. Rep. 193; Doe *v.* Thompson, 9 Q. B. 1037. 11 Jur. 1007, 58 E. C. L. 1037; Pargeter *v.* Harris, 7 Q. B. 708, 10 Jur. 260, 15 L. J. Q. B. 113, 53 E. C. L. 708; Trumper *v.* Trumper, L. R. 14 Eq. 295, 41 L. J. Ch. 673; Thorn *v.* Woollcombe, 3 B. & Ad. 586, 23 E. C. L. 260; Sturgeon *v.* Wingfield, 15 L. J. Exch. 212, 15 M. & W. 224; Oxley *v.* James, 13 L. J. Exch. 358, 13 M. & W. 209; Birmingham Joint Stock Co. *v.* Lea, 36 L. T. Rep. N. S. 843; Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725; Dalye *v.* Robertson, 19 U. C. Q. B. 411.

Purchase by assignee of lease.— Where the person to whom the lessee assigns the lease afterward obtains an assignment of the reversion, there is a merger of estates. Hudson Bros. Commission Co. *v.* Glencoe Sand, etc., Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722.

Redemption by tenant as mortgagor.— Where the mortgagor of land sold under the mortgage leases it from the purchaser and redeems within the statutory period, but after the rent is due, such redemption is not a defense to an action for the rent. Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. 752.

50. Story *v.* Ulman, 88 Md. 244, 41 Atl. 120 (holding that the leasehold became an absolute fee); Burnett *v.* Scribner, 16 Barb. (N. Y.) 621; Mixon *v.* Coffield, 24 N. C. 301 (holding that the rent, being incidental to the reversion, was extinguished by the conveyance).

Sale after making of second lease.— Where there is an outstanding lease for years, and the reversioner makes a second lease to a third person, to commence immediately, it is a vested estate, and will entitle the second lessee to take the rents reserved by the former lease, although his right of possession will not commence until the expiration of the first term; and after the making of the second lease, if the first lessee becomes owner of the reversion, his lease will not merge in the greater estate; but if the term of the second lease, instead of commencing immediately, be to commence on the determination of the former term, then, on the first lessee acquiring the reversion, his term will merge, and the term of the second lease commence at the same time. Logan *v.* Green, 39 N. C. 370.

by descent,[51] devise,[52] purchase at execution or judicial sale,[53] or by mesne conveyances.[54] So where a subtenant becomes the owner of a reversion the sublease[55] and the original lease[56] are terminated. There is no merger, however, as against prior liens, such as an attachment made while the lease was in force.[57] And the lease is not terminated by a merger where there is an intervening estate.[58]

e. Options or Agreements to Purchase. The relationship is not terminated because of the existence of an option allowing the tenant to purchase,[59] or an executory contract of sale,[60] unless the option is acted upon,[61] and the conditions are fully performed.[62] So an agreement to convey at the end of the term does not work a merger before that time.[63]

5. Acquisition of Tenant's Estate by Landlord. The reconveyance of the leasehold estate to the landlord usually terminates the lease,[64] where accompanied by a surrender of the premises to the landlord.[65] But a conveyance by the lessee to one of the lessors does not work a merger.[66] Nor can a joint lessee affect the rights of his co-lessees by conveying to his lessor.[67]

6. Eviction and Similar Acts — a. In General. An actual eviction of the tenant by title paramount or by the wrongful act of the landlord terminates the relation and absolves the tenant from liability for subsequently accruing rent.[68]

Presumptions.— The mere non-payment of rent for twenty years will not raise a presumption that the landlord's title to the land is extinguished by a conveyance to the tenant or otherwise. Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451. Where a lease is executed at the same time that a mortgage is given to the lessee to secure the payment of money to be paid at the expiration of the lease, it will be presumed that the mortgage was first executed, so that it will be no bar to the recovery of the rent due on the lease. Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98.

51. Matter of Hughey, 7 N. Y. St. 732.

52. Debozear *v.* Butler, 2 Grant (Pa.) 417.

53. Moston *v.* Stow, 91 Mo. App. 554; Zeysing *v.* Welbourn, 42 Mo. App. 352, holding, however, that a notice given at the sale may make the tenant liable for rent for the balance of the term.

54. Otis *v.* McMillan, 70 Ala. 46 (holding that where the conveyance was from a purchaser at a foreclosure sale there was a merger, notwithstanding the mortgagor's right of redemption); Martin *v.* Searcy, 3 Stew. (Ala.) 50, 20 Am. Dec. 64; York *v.* Jones, 2 N. H. 454, holding that the rent was extinguished.

55. Wahl *v.* Barroll, 8 Gill (Md.) 288.

56. Liebschutz *v.* Moore, 70 Ind. 142, 36 Am. Rep. 182.

57. Buffum *v.* Deane, 4 Gray (Mass.) 385.

58. Simmons *v.* MacAdaras, 6 Mo. App. 297 (holding that the acquisition by a lessee of the reversion while he owned one third of the leasehold will not create a merger of the entire leasehold estate in the fee, if there are outstanding estates in the other lessees); Burton *v.* Barclay, 7 Bing. 745, 9 L. J. C. P. O. S. 231. 5 M. & P. 785, 20 E. C. L. 331. See also Tolsma *v.* Adair, 32 Wash. 383, 73 Pac. 347.

59. Smith *v.* Brannan, 13 Cal. 107; Campbell *v.* Babcock, 13 N. Y. Suppl. 843, 26 Abb. N. Cas. 35.

60. Fernandez *v.* Soulie, 28 La. Ann. 31. *Contra*, see Perkins *v.* Swank, 43 Miss. 349.

61. Knerr *v.* Bradley, 105 Pa. St. 190; Wade *v.* South Penn Oil Co., 45 W. Va. 380, 32 S. E. 169, holding that an election to purchase under the option, and a tender of the purchase-price, ends the lease and its rent.

Time for exercise of option.—The option to purchase, in order to terminate the lease, must be exercised during the existence of the tenancy. Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360.

62. Bostwick *v.* Frankfield, 74 N. Y. 207.

63. New York Bldg. Loan Banking Co. *v.* Keeney, 56 N. Y. App. Div. 538, 67 N. Y. Suppl. 505.

64. Smiley *v.* Van Winkle, 6 Cal. 605; Shepard *v.* Spaulding, 4 Metc. (Mass.) 416; Sutliff *v.* Atwood, 15 Ohio St. 186. See also Smith *v.* Mapleback, 1 T. R. 441, 1 Rev. Rep. 247. But see Villavaso *v.* Creditors, 48 La. Ann. 946, 20 So. 167; Hamilton *v.* Read, 13 Daly (N. Y.) 436, where there was a sublease at an advanced rent and the contrary was held.

Where the intention of the parties was evidently not to merge the estates, it was held that no merger resulted. Spencer *v.* Austin, 38 Vt. 258.

After sublease.—A lessor who, after assignment to him from his lessee of the lease and an under-lease made by the lessee, accepts the benefits of an under-lease by collecting rent from the sublessee, comes in as assignee of the reversion of the under-lease, and not as owner of the fee. Hence he is liable to the sublessee upon covenants contained in the under-lease. Bailey *v.* Richardson, 66 Cal. 416. 5 Pac. 910.

65. Kower *v.* Gluck, 33 Cal. 401.

66. Sperry *v.* Sperry, 8 N. H. 477.

67. Baker *v.* Pratt, 15 Ill. 568.

68. See *supra*, VIII, A, 3, l.

What constitutes eviction see *supra*, VII, F.

Failure of landlord to maintain premises in tenantable condition.—The failure of the

But an eviction from part of the leased premises does not necessarily terminate the lease,[69] or the obligation of the tenant under it, but it relieves him during its continuance from the obligation to pay rent.[70]

b. Appropriation of Premises to Public Use.[71] The taking of the demised premises for public use usually terminates the tenancy,[72] especially where the lease so provides.[73] The taking of a part of the premises dissolves the relation of landlord and tenant *pro tanto*.[74]

landlord to repair, where he is bound to do so, whereby the premises become untenantable, authorizes the lessee to abandon the premises. Coleman *v.* Haight, 14 La. Ann. 564; Nimmo *v.* Harway, 23 Misc. (N. Y.) 126, 50 N. Y. Suppl. 686; Russell *v.* Rush, 2 Pittsb. (Pa.) 134. So the failure of the landlord to carry out his agreement to heat the rooms leased as offices authorizes the tenant to abandon the rooms. Filkins *v.* Steele, 124 Iowa 742, 100 N. W. 851. But an agreement on the part of the landlord, indorsed on the lease, to make certain improvements in consideration of the letting, is an independent agreement, a breach of which does not terminate the lease. Ellis *v.* McCormick, 1 Hilt. (N. Y.) 313. And a lease cannot be avoided for the landlord's failure to make repairs where such failure is caused by obstacles interposed by the tenant. Vincent *v.* Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436. Furthermore a landlord, after failing to use reasonable diligence to restore the premises to a tenantable condition, on notice from the tenant of his intention to abandon the premises as soon as he can make arrangements, cannot, by commencing the delayed repairs before the tenant has in fact abandoned the premises, deprive him of the right which has accrued to abandon the same. Lathers *v.* Coates, 18 Misc. (N. Y.) 231, 41 N. Y. Suppl. 373. See also *supra*, VII, F, 1, e, (III).

Taking of appeal as restoring relationship. —Where the tenant was evicted by title paramount, and the landlord defended the action, and after the eviction appealed, it was held that the taking of the appeal did not restore the relation of landlord and tenant which had been destroyed by the eviction, so as to enable the landlord to commence an action against the tenant for holding over, if such action was commenced before reversal of judgment. Wheelock *v.* Warschauer, 34 Cal. 265.

69. Smith *v.* McEnany, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272; Leishman *v.* White, 1 Allen (Mass.) 489.

70. See *supra*, VIII, A, 3, l.

71. Liability for rent see *supra*, VIII, A, 3, k.

72. Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199; Barclay *v.* Picker, 38 Mo. 143; Biddle *v.* Hussman, 23 Mo. 597; Chicago *v.* Messler, 38 Fed. 302; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a*; Rex *v.* Young, 7 Can. Exch. 282. *Compare* Chicago *v.* Garrity, 7 Ill. App. 474.

All covenants between the lessor and lessee are at an end (Dyer *v.* Wightman, 66 Pa. St. 425), including the lessee's covenant to build (Rex *v.* Young, 7 Can. Exch. 282).

A lease taken while condemnation proceedings are pending is terminated by the condemnation, and the lessee must look to the lessor for his damages upon the award. Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308, 6 Atl. 736; Chicago *v.* Messler, 38 Fed. 302.

Acts of military authorities.— The lease is terminated by the exclusion of the tenant from the demised premises by military authorities. Zacharie *v.* Sproule, 22 La. Ann. 325. And where, during the Civil war, hostile armies surrounded the leased premises and made occupation thereof for the purpose of the letting impossible, although they did not take possession thereof, the lease terminated as soon as the premises became useless for the purpose of the letting. Bowditch *v.* Heation, 22 La. Ann. 356.

73. Goodyear Shoe Mach. Co. *v.* Boston Terminal Co., 176 Mass. 115, 57 N. E. 214 (holding that the fact that the lessor was the party condemning the land would not bring it within the lessor's covenant for quiet enjoyment); U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a* [*affirmed* in 91 U. S. 367, 23 L. ed. 449].

Election of landlord.—Where a lease provides that it shall terminate at the landlord's election, on the taking of the premises for public use, a notice to the tenant that such taking had occurred, and that the landlord elected to terminate the lease in consequence, is a sufficient manifestation of his election, and works a termination of the lease. Goodyear Shoe Mach. Co. *v.* Boston Terminal Co., 176 Mass. 115, 57 N. E. 214.

Right of tenant to recover damages.— The estate of a tenant who holds a house under a lease for years, providing that "if . . . the city shall cut off said premises, that the said tenant shall consent thereto, and that the said tenant shall do all repairs at his expense," is determined, if the city cuts off the premises; and the tenant can recover no damages of the city for the injury done thereby. Munigle *v.* Boston, 3 Allen (Mass.) 230.

74. *Mississippi.*—Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199.

Missouri.— Kingsland *v.* Clark, 24 Mo. 24; Biddle *v.* Hussman, 23 Mo. 597.

New York.— Gillespie *v.* New York, 23 Wend. 643.

Pennsylvania.— Workman *v.* Mifflin, 30 Pa. St. 362.

Canada.— Rex *v.* Young, 7 Can. Exch. 282.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 313.

c. Injury to, or Destruction of, Building[75]— (i) *Common-Law Rule.* Where not controlled by statute or by express provisions in the lease, including covenants as to repairing or rebuilding, a lease of land on which there is a building is not terminated by an accidental injury to, or destruction of, the building.[76] On the other hand, where the land on which the building rests is not leased,[77] as where the lease is of a room or rooms in a building,[78] and there are no covenants to repair or rebuild, the destruction[79] of the premises terminates the lease.

(ii) *Statutory Provisions.* In most of the states statutes have been passed which change the common-law rule that destruction of the premises does not terminate the lease, and, while they differ to some extent, they usually provide in effect that where any building which is leased or occupied is destroyed or so injured by the elements or any other cause[80] as to be untenantable and unfit for occupancy,[81] and no express agreement to the contrary has been made in writing,[82] the

Contra.— Gluck *v.* Baltimore, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515; Patterson *v.* Boston, 20 Pick. (Mass.) 159; Parks *v.* Boston, 15 Pick. (Mass.) 198.

75. Right to abandon because of untenantable condition of premises in general see *supra*, VII, F, 1, e, (iv).

Duty of tenant to rebuild see *supra*, VII, D, 1, a, (iii), (f).

As eviction see *supra*, VII, F.

Liability for rent see *supra*, VIII, A, 3, l.

Effect of tenant's liability under covenant to pay taxes and assessments see *supra*, VII, C, 2, b, (v).

Effect of entry by landlord to repair as eviction see *supra*, VII, F, 1, e, (iv), (b).

76. Moran *v.* Bergin, 111 Ill. App. 313; Lanpher *v.* Glenn, 37 Minn. 4, 33 N. W. 10; Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1007.

77. Ainsworth *v.* Ritt, 38 Cal. 89.

What constitutes lease of building without an interest or estate in land see P. H. Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775.

78. McMillan *v.* Solomon, 42 Ala. 356, 94 Am. Dec. 654; P. H. Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775; Gavan *v.* Norcross, 117 Ga. 356, 49 S. E. 771; Shawmut Nat. Bank *v.* Boston, 118 Mass. 125 (holding that the fact that the lease contained certain provisions as to abatement of a proportionate part of the rent until the building was repaired, and provisions as to the right of the lessee to repair, did not change the rule); Stockwell *v.* Hunter, 11 Metc. (Mass.) 448, 45 Am. Dec. 220; Austin *v.* Field, 7 Abb. Pr. N. S. (N. Y.) 29; Kerr *v.* Merchants' Exch. Co., 3 Edw. (N. Y.) 315.

The payment of rent after the destruction of the building will not continue the tenancy beyond the time of such payment. Kerr *v.* Merchants' Exch. Co., 3 Edw. (N. Y.) 315.

Lease during "life of building."— A lease during the life of the building of the third story thereof with a covenant to repair is terminated when a fire subsequently destroys the demised part and renders it impracticable to rebuild the same, except by the rebuilding of other important parts not demised. Ainsworth *v.* Mt. Moriah Lodge, 172 Mass. 257, 52 N. E. 81.

79. See Nonotuck Silk Co. *v.* Shay, 37 Ill. App. 542, holding that where the walls and main floor were left intact, except a small hole in the ceiling of a portion of the building rented by defendant, there was not a destruction terminating the lease of the main floor, with the use of the elevator, although the upper stories were destroyed by fire, and the steam-heating apparatus and elevator rendered useless.

80. Meserole *v.* Sinn, 34 N. Y. App. Div. 33, 53 N. Y. Suppl. 1072, holding that an injury by rain soaking into the ground and running into the cellar, so as to render the premises untenantable, was within the clause "for any other cause," and that an injury to the premises themselves by a sudden action of the elements is not necessary.

81. Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188, holding that where the landlord had agreed to furnish the tenant with power for manufacturing purposes, the destruction of the building from whence the power is supplied, and the temporary cutting off of the supply, do not render the leased premises "unfit for occupancy."

A partial destruction of leased premises dissolves the lease, if the premises are thereby rendered unfit for use by the lessee and several months are required for necessary repairs. Meyer *v.* Henderson, 49 La. Ann. 1547, 16 So. 729.

82. Roman *v.* Taylor, 93 N. Y. App. Div. 449, 87 N. Y. Suppl. 653 (holding that the statutory right of a lessee to surrender when the building becomes untenantable is taken away, so far as such condition is caused by fires, by a provision of the lease that the tenant shall in case of fire give notice to the landlord, who shall cause the damage to be repaired, but if the premises be so damaged that the landlord shall decide to rebuild the term shall cease); May *v.* Gillis, 53 N. Y. App. Div. 393, 66 N. Y. Suppl. 4 (holding that the statute is waived by the tenant covenanting in his lease to make all outside and inside repairs).

The statute does not apply where the matter is regulated by an express provision in the lease. Butler *v.* Kidder, 87 N. Y. 98; Roman *v.* Taylor, 93 N. Y. App. Div. 449, 87 N. Y. Suppl. 653.

lessee may, if the destruction or injury occurred without his fault or neglect,[83] quit and surrender[84] possession of the leasehold premises.[85] Such statutes have no retroactive effect, however, so as to apply to leases made prior to their enactment.[86]

(III) *Provisions in Lease.* Independent of statute the lease terminates on the destruction of the buildings, or their becoming untenantable, where it is so provided in the lease;[87] but a partial destruction of the building does not terminate a lease which provides for its termination if the premises are destroyed.[88]

83. Senac *v.* Pritchard, 5 La. 480, holding that the statute relates only to cases where the lessee is not in default, and cannot be extended to a case where he violates the contract.

84. Fleischman *v.* Toplitz, 134 N. Y. 349, 31 N. E. 1089 [*affirming* 57 Hun 126, 10 N. Y. Suppl. 471], holding that the tenant need not notify the landlord of his intention to surrender after the destruction of the buildings.

Resumption of occupancy after repairs.— The statute does not terminate the lease of the tenant who resumes occupancy after repairs, and continues to pay rent, which is accepted by the landlord without objection. Boston Block Co. *v.* Buffington, 39 Minn. 385, 40 N. W. 361.

85. Viterbo *v.* Friedlander, 22 Fed. 422, construing Louisiana statute to cover overflow from Mississippi river of sugar cane plantation.

Extreme cases.— The Louisiana statutes do not favor abrogation, except in extreme cases; the proper remedy is indemnification pursuant thereto. Denman *v.* Lopez, 12 La. Ann. 823; Dussnau *v.* Generis, 6 La. Ann. 279.

Expense of removing débris.—Where premises are rendered untenantable by fire, and the tenant surrenders them, the expense of removing the *débris* occasioned by the fire falls upon the landlord. Fleischman *v.* Toplitz, 134 N. Y. 349, 31 N. E. 1089; Decker *v.* Morton, 31 N. Y. App. Div. 469, 52 N. Y. Suppl. 172.

In Louisiana, where leased property is partly destroyed by fire, the tenant has a right by statute to demand a revocation of the lease, but must sue to cancel the lease. Higgins *v.* Wilner, 26 La. Ann. 544. See also Vincent *v.* Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436.

86. Coles *v.* Celluloid Mfg. Co., 39 N. J. L. 326.

87. *Maryland.*— Buschman *v.* Wilson, 29 Md. 553.

Minnesota.— Weeber *v.* Hawes, 80 Minn. 476, 83 N. W. 447.

New York.— New York Real Estate, etc., Imp. Co. *v.* Motley, 1 Misc. 231, 20 N. Y. Suppl. 947 [*affirmed* in 3 Misc. 232, 22 N. Y. Suppl. 705].

Texas.— Beham *v.* Ghio, 75 Tex. 87, 12 S. W. 996.

Canada.— Agar *v.* Stokes, 5 Ont. App. 180.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 314.

Damage from water.— Damage to a leased apartment from water used in extinguishing a fire in another part of the building is within the provision of the lease as to rights of the tenant in case of damage to the leased premises from fire. Roman *v.* Taylor, 93 N. Y. App. Div. 449, 87 N. Y. Suppl. 653.

Omission of clause in lease by mistake.— Where it appears that a clause securing the tenant from payment of rent, on destruction of the premises by fire, had been agreed to by the parties, but through inadvertence omitted from a lease, such lease will, after the destruction of said premises, be ordered to be surrendered and canceled. Wood *v.* Hubbell, 10 N. Y. 470, Seld. 110.

Questions for jury.— Where the evidence as to damages conflicts, the question whether the premises were rendered untenantable by fire is one for the jury. Schutz *v.* Corn, 5 N. Y. St. 19. So where the lease provides for its termination in case the premises should be rendered untenantable by fire or other casualty, the question whether the flooding of leased premises from a sewer constitutes a casualty within the meaning of the lease is a question for the jury under proper instructions. Miland *v.* Meiswinkel, 82 Ill. App. 522.

By agreement the term of a lease may be continued after the destruction of the building, although the payment of rent is to cease. P. H. Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775.

A provision for rebuilding by the lessor at his election, after destruction of the premises and notification to the lessee of his intent to rebuild, with a provision for the suspension of the rent until the rebuilding is completed, suspends the relation of lessor and lessee until the new building is ready for occupancy when the lease is renewed. P. H. Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 43 S. E. 775.

What constitutes "accident by explosion or otherwise," on lease of top floor, with agreement to furnish steam power to tenant, see Reliable Steam-Power Co. *v.* Solidarity Watch-Case Co., 10 N. Y. Suppl. 525.

88. Wall *v.* Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64; Einstein *v.* Levi, 25 N. Y. App. Div. 565, 49 N. Y. Suppl. 674; Vanderpoel *v.* Smith, 2 Daly (N. Y.) 135, holding that a partial destruction by fire that could be repaired without rebuilding was not within the meaning of such a clause in the lease.

Damage to a leased building, different from partial destruction, gives to neither the lessor

(iv) *Who May Terminate.* The right to terminate the lease on a destruction of the building, while primarily for the benefit of the tenant, may, in the absence of special circumstances, be availed of by the landlord, although the tenant wishes to continue the tenancy;[89] but if the lease is of only a part of the building, and the leased premises are not injured by a fire destroying a part of the building, the lessor cannot terminate the lease, where the statute merely provides that the lessee may terminate the lease if the building is destroyed.[90]

7. Forfeiture — a. Definition. As used in this connection the word "forfeiture" refers to the right of the lessor to terminate the lease because of a breach of covenant or some other wrongful act of the lessee in connection with the demised premises. The word as used in a lease does not strictly speaking refer to any right given to the lessee to terminate the lease.[91]

b. Nature and Extent of Right in General. Forfeitures by acts of the parties to a lease, as distinguished from those decreed by a court which are not considered in this connection,[92] because of a breach of a covenant or condition or wrongful act of the tenant, are not favored by the courts;[93] and a stipulation or covenant permitting a forfeiture before the lease would otherwise terminate will be construed most strongly against the lessor.[94] But when the lease explicitly provides that the landlord may treat it as void on a breach of condition by the tenant, his election to do so dissolves the relation between him and his tenant.[95] The absence of actual loss from the acts of the lessee does not prevent a forfeit-

nor the lessee the right to terminate the lease. Vincent *v.* Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436.

Putting up sign "to let."— Where the lessee after a fire abandons the premises, the act of the lessor in putting up a sign "to let" thereon, for the purpose of minimizing damages, does not amount to a termination of the lease. Vincent *v.* Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436.

Effect of failure to repair "as speedily as possible."—A tenant may surrender the premises, and thereby terminate all liability under a lease providing that, if the demised building is rendered untenantable by a partial destruction by fire, the landlord will repair it "as speedily as possible," where such a contingency occurs, and the landlord neglects to repair within a reasonable time, although the lease also provides that the rent shall cease until the repairs are all made. Bacon *v.* Albany Perforated Wrapping Paper Co., 22 Misc. (N. Y.) 592, 49 N. Y. Suppl. 620.

89. Gavan *v.* Norcross, 117 Ga. 356, 43 S. E. 771 (holding that where the lease is only for a store-room, the destruction of the building by fire terminates the tenant's interest in the land, and he has no right to damages for the landlord's refusal to permit him to occupy similar apartments in a new building); Buschman *v.* Wilson, 29 Md. 553; Winton *v.* Cornish, 5 Ohio 477 (lease of part of building); Davie *v.* Gay, 9 Ohio Dec. (Reprint) 418, 13 Cinc. L. Bul. 133 (statute exempting lessee from duty to pay rent for destruction held not to give an exclusive option to the lessee). *Compare* Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484, holding that the tenant's interest in a lot of land in the rear of a building is not divested by a destruction of the building.

Notice as recognition of existence of lease. — Where, after a lease was terminated by destruction of the building, the landlord gave the tenant notice that his rights were forfeited for failure to pay rent, it was not a recognition by the landlord that the destruction of the building had not terminated the lease. Gavan *v.* Norcross, 117 Ga. 356, 43 S. E. 771.

90. Jones *v.* J. W. Fowler Drug Co., 85 S. W. 721, 27 Ky. L. Rep. 558.

91. Channel *v.* Merrifield, 206 Ill. 278, 69 N. E. 32.

92. See *supra*, II, A, 7, b. And see Cancellation of Instruments, 6 Cyc. 288 *et seq.*

93. *Illinois.* — Chapman *v.* Kirby, 49 Ill. 211.

Indiana.— Bacon *v.* Western Furniture Co., 53 Ind. 229.

Iowa.— Cole *v.* Johnson, 120 Iowa 667, 94 N. W. 1113.

Kentucky.— Kentucky River Nav. Co. *v.* Com., 13 Bush 435.

Michigan.— Miller *v.* Havens, 51 Mich. 482, 16 N. W. 865.

North Carolina.— Tate *v.* Crowson, 28 N. C. 65.

Vermont. — Willard *v.* Benton, 57 Vt. 286.

United States.— Kansas City Elevator Co. *v.* Union Pac. R. Co., 17 Fed. 200, 3 McCrary 463.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 321.

But see Doe *v.* Elsam, M. & M. 189, 31 Rev. Rep. 729, 22 E. C. L. 504, holding that provisos for reëntry in leases are to be construed like other contracts, and not with the strictness of conditions at common law.

94. White *v.* McMurry, 2 Brewst. (Pa.) 484.

95. Miller *v.* Havens, 51 Mich. 482, 16

ure,[96] although in such a case equity will generally relieve the lessee from the forfeiture.[97] Equity will never under any circumstances lend its aid to enforce a forfeiture.[98]

c. Who May Declare. The lessor,[99] or those persons who succeed to his rights,[1] are the only ones who may take advantage of a provision in a lease authorizing its forfeiture on the failure of the lessee to fulfil the covenants therein. The lessee cannot himself terminate the lease by a breach of covenant, where the lessor does not elect to take advantage thereof, since otherwise the lessee might obtain a benefit from his own wrong.[2]

d. Grounds[3] — (i) *Breach of Covenant or Condition* — (a) *General Rule.* Where the lease, or an independent agreement,[4] provides that a breach of one or more of the covenants in the lease shall work a forfeiture, the lessor may declare a forfeiture on the occurrence of the breach,[5] even though the condition

N. W. 865. See also New Orleans *v.* Rigney, 24 La. Ann. 235.

96. McNeil *v.* Knapp, 18 La. Ann. 701.

97. See *infra*, IX, B, 7, h.

98. Marshall *v.* Vicksburg, 15 Wall. (U. S.) 146, 21 L. ed. 121.

99. *Illinois.*—Channel *v.* Merrifield, 206 Ill. 278, 69 N. E. 32; Willoughby *v.* Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758.

Indiana.— Edmonds *v.* Mounsey, 15 Ind. App. 399, 44 N. E. 196.

Maryland.— Baltimore Western Bank *v.* Kyle, 6 Gill 343.

New Jersey.— Creveling *v.* West End Iron Co., 51 N. J. L. 34, 16 Atl. 184.

New York.— Clark *v.* Jones, 1 Den. 516, 43 Am. Dec. 706; Stuyvesant *v.* Davis, 9 Paige 427. See also Hasbrook *v.* Paddock, 1 Barb. 635.

Oregon.— Holman *v.* De Lin-River Finley Co., 30 Oreg. 428, 47 Pac. 708.

Pennsylvania.— English *v.* Yates, 205 Pa. St. 106, 54 Atl. 503; Cochran *v.* Pew, 159 Pa. St. 184, 28 Atl. 219; Phillips *v.* Vandergrift, 146 Pa. St. 357, 23 Atl. 347. See Carnegie Nat. Gas Co. *v.* Philadelphia Co., 158 Pa. St. 317, 27 Atl. 951, holding that a lessor may declare a lease forfeited as to all the leased premises, the lessee not having been in possession, although he had delivered possession of part of it to a third person, under an agreement of sale.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 322.

1. Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452, statute.

The grantee of the reversion may declare a forfeiture. Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696. But see Ackerman *v.* Thompson, 10 Ohio S. & C. Pl. Dec. 361, 7 Ohio N. P. 598, holding that the right to declare a forfeiture pursuant to statute, when premises are occupied for gaming or lottery purposes, was a personal right of the lessor which did not pass to the grantee of the reversion. Of course the grantee has no authority to declare a forfeiture because of acts committed before the transfer, and as to which the grantor had himself waived the right to declare a forfeiture. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Watson *v.* Fletcher, 49 Ill. 498; Small *v.* Clark, 97 Me. 304, 54 Atl. 758. But see Provident Trust, etc., Co. *v.* Chapleau, 12 Quebec K. B. 451.

After the lessor has conveyed the premises, he cannot declare a forfeiture of the lease, where he has no interest therein, and does not act by authority of the grantee. Small *v.* Clark, 97 Me. 304, 54 Atl. 758; Ohio Iron Co. *v.* Auburn Iron Co., 64 Minn. 404, 67 N. W. 221.

2. Brown *v.* Cairns, 63 Kan. 584, 66 Pac. 639; Proctor *v.* Keith, 12 B. Mon. (Ky.) 252 (holding that a provision in a lease that the lessee should surrender the premises at the request of the lessor in case of failure to pay rent was for the benefit of the lessor and did not give the lessee the right to surrender); Liggett *v.* Shira, 159 Pa. St. 350, 28 Atl. 218; Cochran *v.* Pew, 159 Pa. St. 184, 28 Atl. 219; Wills *v.* Manufacturers' Natural Gas Co., 130 Pa. St. 222, 18 Atl. 721, 5 L. R. A. 603; Morris *v.* De Wolf, 11 Tex. Civ. App. 701, 33 S. W. 556; Brady *v.* Nagle, (Tex. Civ. App. 1895) 29 S. W. 943.

3. Waste as ground of forfeiture see Waste.

4. Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236.

Effect as against assignee of lease.—Although a verbal agreement for a forfeiture of a lease for delay in prosecuting certain work was entered into between the lessor and the lessee, yet their assignees, who became such for a valuable consideration and without notice of the verbal agreement, take the title discharged therefrom. Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236.

5. Christie's Appeal, 85 Pa. St. 463.

Breach by one of several tenants.—A severance of the occupation of demised premises, the rent being paid to the lessor by the respective tenants, is not a severance of the conditions of the lease, and a breach of the conditions of the lease by one of the occupants works a forfeiture of the whole lease. Clarke *v.* Cummings, 5 Barb. (N. Y.) 339.

Abandonment of premises.— Failure of the lessee to pay rent, and his general conduct in connection with the leased premises, may be considered on the question whether there has been an abandonment of the premises, made by the lease a ground of forfeiture

is a harsh one;[6] but trivial breaches of covenants have been held insufficient to work a forfeiture.[7] The forfeiture clause, while not applicable to implied covenants,[8] is usually construed as applicable to negative as well as affirmative covenants.[9] Furthermore the term "covenant" for breach of which a forfeiture may be declared has been held to include a stipulation in an unsealed agreement for a lease.[10]

(B) *Necessity For Forfeiture Clause in Lease.* A tenancy cannot be terminated for a breach of covenant by the lessee where there is no provision in the lease for a forfeiture or right of reëntry on the occurrence of the breach.[11] This rule applies equally well not only to a breach of covenant to pay rent,[12] but also

thereof. Marshall *v.* Forest Oil Co., 198 Pa. St. 83, 47 Atl. 927.

Breaches of covenants as to repairs, alterations, or improvements.— Winn *v.* State, 55 Ark. 360, 18 S. W. 375; Tate *v.* McClure, 25 Ark. 168; Kentucky River Nav. Co. *v.* Com, 12 Bush (Ky.) 8 (condition as to commencement of improvements held not a continuing one and when once performed the right of forfeiture is lost); Moyer *v.* Mitchell, 53 Md. 171; Lundin *v.* Schoeffel, 167 Mass. 465, 45 N. E. 933 (delays in repairs as unreasonable); Riggs *v.* Pursell, 66 N. Y. 193; Baylis *v.* Le Gros, 4 C. B. N. S. 537, 4 Jur. N. S. 513, 93 E. C. L. 537. See Jackson *v.* Harrison, 17 Johns. (N. Y.) 66. Where the lessee agrees to make certain repairs to the satisfaction of a third person, there is no ground of forfeiture, although such person is not satisfied if a reasonable man should have been satisfied therewith. Doe *v.* Jones, 2 C. & K. 743, 61 E. C. L. 743. What constitutes breach see *supra*, VII, D, 1.

Execution, attachment, or bankruptcy.— A forfeiture may be declared, where so provided in the lease, if the term is seized or taken in execution or attachment by any creditor of the lessee, or if the lessee shall take the benefit of any insolvent or bankrupt act. Fryer *v.* Ewart, [1902] A. C. 187, 71 L. J. Ch. 433, 86 L. T. Rep. N. S. 242, 9 Manson 281; Horsey *v.* Steiger, [1899] 2 Q. B. 79, 68 L. J. Q. B. 743, 80 L. T. Rep. N. S. 857, 47 Wkly. Rep. 644 [*reversing* on other grounds [1898] 2 Q. B. 259, 67 L. J. Q. B. 747, 79 L. T. Rep. N. S. 116] (holding that a voluntary winding up of a registered company for the mere purpose of a reconstruction works a forfeiture); Smith *v.* Gronow, [1891] 2 Q. B. 394, 60 L. J. Q. B. 776, 65 L. T. Rep. N. S. 117, 40 Wkly. Rep. 46; *Ex p.* Gould, 13 Q. B. D. 454, 51 L. T. Rep. N. S. 368, 1 Morr. Bankr. Cas. 168; Kilkenny Gas Co. *v.* Somerville, L. R. 2 Ir. 192; Doe *v.* David, 1 C. M. & R. 405, 5 Tyrw. 125; Doe *v.* Davies, 6 C. & P. 614, 4 L. J. Exch. 10, 25 E. C. L. 602; Ewart *v.* Fryer, 64 J. P. 534, 82 L. T. Rep. N. S. 415 [*affirming* [1901] 1 Ch. 499, 70 L. J. Ch. 138, 83 L. T. Rep. N. S. 551, 49 Wkly. Rep. 145]; Creswell *v.* Davidson, 56 T. L. Rep. N. S. 811; Rex *v.* Topping, McClell. & Y. 544, 29 Rev. Rep. 839; Doe *v.* Ingleby, 15 M. & W. 465; Kerr *v.* Hastings, 25 U. C. C. P. 429 (holding that the clause was not limited to an attachment issued under the Absconding Debtors Act). A provision for reëntry is valid in such a case (Roe *v.* Galliers, 2 T. R. 133, 1 Rev. Rep. 445; Church *v.* Brown, 15 Ves. Jr. 258, 10 Rev. Rep. 74, 33 Eng. Reprint 752), except where there are other inconsistent provisions in the lease (Doe *v.* Carew, 2 Q. B. 317, 1 G. & D. 640, 6 Jur. 457, 11 L. J. Q. B. 5, 42 E. C. L. 692).

6. Patton *v.* Bond, 50 Iowa 508.

7. Randol *v.* Scott, 110 Cal. 590, 42 Pac. 976. See also Lundin *v.* Schoeffel, 167 Mass. 465, 45 N. E. 933.

8. Somers *v.* Loose, 127 Mich. 77, 86 N. W. 386; Hough *v.* Brown, 104 Mich. 109, 62 N. W. 143.

9. Wheeler *v.* Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41; West Shore R. Co. *v.* Wenner, 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801 [*affirmed* in 71 N. J. L. 682, 60 Atl. 1134]; Harman *v.* Ainslie, [1904] 1 K. B. 698, 73 L. J. K. B. 539, 90 L. T. Rep. N. S. 624, 20 T. L. R. 356, 52 Wkly. Rep. 615; Croft *v.* Lumley, 6 H. L. Cas. 672, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. (Reprint) 1459; Longhi *v.* Sanson, 46 U. C. Q. B. 446. But see Doe *v.* Stevens, 3 B. & Ad. 299, 1 L. J. K. B. 101, 23 E. C. L. 137; Doe *v.* Marchetti, 1 B. & Ad. 715, 9 L. J. K. B. 126, 20 E. C. L. 662 (covenant not to build on premises); Lee *v.* Lorsch, 37 U. C. Q. B. 262 (covenant not to assign).

10. Hayne *v.* Cummings, 16 C. B. N. S. 421, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421.

11. *Illinois.*—People *v.* Gilbert, 64 Ill. App. 203.

Indiana.—Phillips *v.* Tucker, 3 Ind. 132.

Louisiana.—Houssiere Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932.

New Jersey.— Vanatta *v.* Brewer, 32 N. J. Eq. 268.

Vermont.—See Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

England.— Doe *v.* Godwin, 4 M. & S. 265, 16 Rev. Rep. 463; Comber *v.* Le May, Manitoba t. Wood 35.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 325.

12. *Arkansas.*—Buckner *v.* Warren, 41 Ark. 532.

Indiana.—Brown *v.* Bragg, 22 Ind. 122.

Maine.—Beal *v.* Bass, 86 Me. 325, 29 Atl. 1088.

to the breach of a covenant against assigning or subletting,[13] the breach of a covenant as to the payment of taxes and assessments,[14] the breach of a covenant as to the use of the premises,[15] or the breach of a covenant to make repairs.[16]

(c) *Covenants Against Assigning or Subletting.* The lessor may declare a forfeiture, where the lease provides therefor, on the breach of a covenant against assigning or subletting;[17] but he cannot do so where the lease does not provide for

Massachusetts.— Hodgkins *v.* Price, 137 Mass. 13; Bartlett *v.* Greenleaf, 11 Gray 98.

Texas.— Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235.

West Virginia.—Gale *v.* Oil Run Petroleum Co., 6 W. Va. 200.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 333.

Provisions against forfeiture.— A provision in the lease that the "rent is to be recovered in an action of debt" precludes the idea of a forfeiture by non-payment. De Lancey *v.* Ga Nun, 12 Barb. (N. Y.) 120.

13. *California.*— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Randol *v.* Tatum, 98 Cal. 390, 33 Pac. 433; State *v.* McCauley, 15 Cal. 429, holding that where prison commissioners, under a statute, made a lease to one and his assigns, and the lessee gave a bond and afterward assigned the lease, the lease was not forfeited and his personal liability on the bond did not cease.

Georgia.—Robinson *v.* Perry, 21 Ga. 183, 68 Am. Dec. 455.

Iowa.— Eldredge *v.* Bell, 64 Iowa 125, 19 N. W. 879.

Kansas.—Burnes *v.* McCubbin, 3 Kan. 221, 87 Am. Dec. 468; Winkler *v.* Gibson, 2 Kan. App. 621, 42 Pac. 937.

Michigan.— Walsh *v.* Martin, 69 Mich. 29, 37 N. W. 40.

New Hampshire.—Spear *v.* Fuller, 8 N. H. 174, 28 Am. Dec. 391.

United States.—*In re* Pennewell, 119 Fed. 139, 55 C. C. A. 571.

England.—Williams *v.* Earle, L. R. 3 Q. B. 739, 9 B. & S. 740, 37 L. J. Q. B. 231, 19 L. T. Rep. N. S. 238, 16 Wkly. Rep. 1041; Paul *v.* Nurse, 8 B. & C. 486, 7 L. J. K. B. O. S. 12, 2 M. & R. 525, 15 E. C. L. 241; Doe *v.* Godwin, 4 M. & S. 265, 16 Rev. Rep. 463; Weatherall *v.* Geering, 12 Ves. Jr. 504, 8 Rev. Rep. 369, 33 Eng. Reprint 191.

Canada.—McIntosh *v.* Samo, 24 U. C. C. P. 625.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 328.

But where the lease is personal, as where the lease is of a farm on shares, the forbidden assignment of the lease works a forfeiture, although the lease does not provide for a forfeiture. Randall *v.* Chubb, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165. See also *infra*, XI, A.

An indorsement on a lease, extending its life for a term of years after the original term, has been held to cancel the old lease so that a forfeiture clause therein contained cannot be relied on to declare a forfeiture for a subletting during the additional term. Walsh *v.* Martin, 69 Mich. 29, 37 N. W. 40. See *supra*, IV, B.

14. Heiple *v.* Reed, (Iowa 1895) 65 N. W. 331.

15. Comber *v.* Le May, Manitoba t. Wood 35.

16. Doe *v.* Stevens, 3 B. & Ad. 299, 1 L. J. K. B. 101, 23 E. C. L. 137, holding that a proviso giving power of reëntry if the lessee "shall do or cause to be done any act, matter, or thing contrary to, and in breach of, any of the covenants" does not apply to a breach of the covenant to repair.

17. Kew *v.* Trainor, 150 Ill. 150, 37 N. E. 223 [*affirming* 50 Ill. App. 629]; Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288; Meath *v.* Watson, 76 Ill. App. 516; Moore *v.* Pitts, 53 N. Y. 85; Eastern Tel. Co. *v.* Dent, [1899] 1 Q. B. 835, 68 L. J. Q. B. 564, 80 L. T. Rep. N. S. 459; Dymock *v.* Showell's Brewing Co., 79 L. T. Rep. N. S. 329; Eyton *v.* Jones, 21 L. T. Rep. N. S. 789; Baldwin *v.* Wanzer, 22 Ont. 612; Toronto Hospital Trustees *v.* Denham, 31 U. C. C. P. 203; Carter *v.* Hibblethwaite, 5 U. C. C. P. 475; McArthur *v.* Alison, 40 U. C. Q. B. 576. See also Indianapolis Mfg., etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281. But see Leys *v.* Fiskin, 12 U. C. Q. B. 604, holding that a sublease to be determined at the will of the lessee was not ground for forfeiture.

An enforceable agreement for subletting is a ground for forfeiture. Eastern Tel. Co. *v.* Dent, 78 L. T. Rep. N. S. 713.

Inconsistent agreements.—Where the purchaser of land leased it to the seller, and the lease provided for a yearly rent, and a retransfer to the lessee "or his assigns" on payment of a certain sum at the end of two years, a forfeiture cannot be declared under the clause against assignment which provides therefor, where the assignee tenders the sum agreed on for a retransfer, since the agreement for a retransfer and for a forfeiture are inconsistent. Shields *v.* Russell, 66 Hun (N. Y.) 226, 20 N. Y. Suppl. 909.

Mortgage of leasehold.—The mortgaging of the leasehold by the lessee has been held sufficient ground for forfeiture where the lease prohibits the transfer of it by the lessee under penalty of forfeiture (Becker *v.* Werner, 98 Pa. St. 555), especially where the lessee fails to pay the mortgage debt and the leasehold is sold under foreclosure; and it is immaterial that the lessee died before the sale under foreclosure (West Shore R. Co. *v.* Wenner, 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801 [*affirmed* in 71 N. J. L. 682, 60 Atl. 1134]).

Equitable agreements charging the property comprised in a lease but not accom-

a forfeiture,[18] except in those states where a statute authorizes a forfeiture on a breach of such a covenant.[19] But in order to forfeit a term because of an assignment of the lease, there must have been a valid assignment.[20]

(D) *Covenants as to Use of Premises.*[21] The lessor may terminate the lease, pursuant to a forfeiture clause therein, where agreements contained in the lease as to the use of the premises are broken by the lessee [22] or by a sublessee.[23]

(E) *Covenants to Pay Taxes and Assessments.*[24] The lessor may terminate the lease, pursuant to a provision for forfeiture therein, where the lessee does not fulfil his covenant to pay taxes or other assessments on the leased property.[25]

panied with a change of possession or other alteration of the property do not work a forfeiture of the lease, notwithstanding there is a clause in the lease against assignments. Bowser *v.* Colby, 1 Hare 109, 5 Jur. 1178, 11 L. J. Ch. 132, 23 Eng. Ch. 109, 66 Eng. Reprint 969.

Putting tenant in statu quo.— Where notes are given for the rent, the lessor cannot forfeit the lease on account of a sublease, without a tender of the unaccrued rent notes. Wolls *v.* Collins, 18 La. Ann. 470.

What constitutes breach of covenant against assigning or subletting see *supra*, IV, B, 1, f, (III).

18. See *supra*, IX, B, 7, d, (I), (B).

19. See *infra*, IX, B, 7, d, (II).

20. Gentle *v.* Faulkner, [1900] 2 Q. B. 267, 69 L. J. Q. B. 777, 82 L. T. Rep. N. S. 708; Doe *v.* Lloyd, 4 L. J. K. B. O. S. 159, 27 Rev. Rep. 534.

21. **Illegality of contract** see *supra*, II, A, 5, c.

Construction of restrictions in lease as to use of premises see *supra*, VII, B, 3.

22. *Illinois.*—Sell *v.* Branen, 70 Ill. App. 471.

Massachusetts.— Wheeler *v.* Earle, 5 Cush. 31, 51 Am. Dec. 41.

Michigan.—See Sommers *v.* Reynolds, 103 Mich. 307, 61 N. W. 501.

Missouri.— Farwell *v.* Easton, 63 Mo. 446.

New York.—Jackson *v.* Allen, 3 Cow. 220.

Pennsylvania.—See Teller *v.* Boyle, 132 Pa. St. 56, 18 Atl. 1069, holding that where the agreement was that the premises should not be occupied otherwise than as a saloon or dwelling-house, the lease is not terminated by the lessee's inability during the term to obtain a renewal of his license to sell intoxicating liquor.

Vermont.—Briggs *v.* Bennett, 26 Vt. 146.

United States.—See Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239.

England.—Doe *v.* Jepson, 3 B. & Ad. 402, 1 L. J. K. B. 154, 23 E. C. L. 182; Moore *v.* Robinson, 48 L. J. Q. B. 156, 40 L. T. Rep. N. S. 99, 27 Wkly. Rep. 312; Comber *v.* Le May, Manitoba t. Wood 35.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 329.

The use for the manufacture of caps, of premises leased "to be occupied for the same purposes they now are," and which were occupied at the time of the lease for the manufacture of carpet-bags, is not such an alteration in the occupation as will avoid the lease. Shumway *v.* Collins, 6 Gray (Mass.) 227.

The cutting of wood and timber from the demised premises, where not for firewood or fences, authorizes a forfeiture pursuant to the terms of the lease, notwithstanding the tenant has not cut off more than would have sufficed for his firewood and fencing timber, and that he obtained the latter from other lands. Clarke *v.* Cummings, 5 Barb. (N. Y.) 339.

It will be presumed, until an overt act to the contrary, that the purchasers of land leased on condition that it would be used only for church purposes, intended to continue the use of the land for church purposes, or to obtain a release of such condition from the lessor. Arkenburgh *v.* Wood, 23 Barb. (N. Y.) 360.

A partial diversion of leased premises to other purposes than that specified in the lease will not work a forfeiture. Hasbrook *v.* Paddock, 1 Barb. (N. Y.) 635.

Construction of lease. — Where a lease stated that it was "subject to the conditional limitations hereinafter stated" and it was stipulated in the next paragraph that the occupation of the premises by the tenant and his family as a strictly private dwelling apartment was an especial consideration for the granting of the lease, and that the landlord expressly reserved the right to terminate it on five days' notice, the right to terminate was dependent on a change in the character of the tenant's occupancy and could not be arbitrarily exercised without such change. Schwoerer *v.* Connolly, 44 Misc. (N. Y.) 222, 88 N. Y. Suppl. 818.

23. Wheeler *v.* Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41. But see Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649, holding that a covenant in a lease not to sell liquor, where there is no provision as to "suffering" or "permitting" the sale of liquor, does not authorize a forfeiture where a subtenant runs a saloon on the demised premises.

24. **What constitutes breach of agreement to pay taxes and assessments** see *supra*, VII, C, 2, b.

Necessity and sufficiency of demand for performance see *infra*, IX, B, 7, e.

Waiver of forfeiture see *infra*, IX, B, 7, g.

25. Hand *v.* Suravitz, 148 Pa. St. 202, 23 Atl. 1117 [*reversing* 10 Pa. Co. Ct. 302]. See also Webb *v.* King, 21 App. Cas. (D. C.)

But the lessor cannot declare a forfeiture for such non-payment, where there is no provision for forfeiture therefor in the lease.[26]

(F) *Covenants to Pay Rent.*[27] While a provision in a lease for a forfeiture or reëntry is necessary to authorize the lessor to terminate the tenancy, on the failure to pay rent,[28] except where the statute otherwise provides,[29] yet when the lease contains such a provision, the lessor may proceed to end the lease on the breach of such covenant,[30] notwithstanding the failure to pay was not wilful.[31] Of course the landlord cannot terminate the lease until the expiration of the whole of the day on which the rent is payable;[32] and if the lease provides that the rent shall not be payable until a certain time after it accrues, he has no right to reënter until the expiration of that time.[33] The lessee cannot rely on a set-off or counter-claim to excuse his failure to pay the rent so as to prevent a forfeiture,[34] except in a case where the lessor has expressly or impliedly agreed thereto.[35] Payment of the

141; Walker *v.* Dowling, 68 S. W. 135, 24 Ky. L. Rep. 179.

Where there are several tenants in a building and only one water-meter, and the lessor has made no attempt to apportion the water-rates which his tenants are to pay under their leases, he cannot enter and terminate their leases for non-payment of water-rates. Hartford *v.* Taylor, 181 Mass. 266, 63 N. E. 902.

Payment of the taxes before reëntry prevents a forfeiture. Planters' Ins. Co. *v.* Diggs, 8 Baxt. (Tenn.) 563.

26. See *supra*, IX, B, 7, d, (I), (B).

27. Compensation for improvements on forfeiture see *supra*, VII, D, 3, c.

28. See *supra*, IX, B, 7, d, (I), (B).

29. See *infra*, IX, B, 7, d, (II).

30. *Iowa.*—Simons *v.* Marshall, 3 Greene 502.

Louisiana.— Perret *v.* Dupré, 19 La. 341; Fox *v.* McKee, 31 La. Ann. 67; Kron *v.* Watson, 14 La. Ann. 432; Hennen *v.* Hayden, 5 La. Ann. 713.

Maryland.— Cooke *v.* Brice, 20 Md. 397.

Massachusetts.— Gould *v.* Bugbee, 6 Gray 371.

New York.— Mahan *v.* Sewell, 6 N. Y. Suppl. 662; Jackson *v.* Vincent, 4 Wend. 633.

Pennsylvania.— Reams *v.* Fye, 10 Pa. Dist. 242, 24 Pa. Co. Ct. 671.

England.— Shepherd *v.* Berger, [1891] 1 Q. B. 597, 55 J. P. 532, 60 L. J. Q. B. 395, 54 L. T. Rep. N. S. 435, 39 Wkly. Rep. 330; Doe *v.* Golding, 6 Moore C. P. 231, 23 Rev. Rep. 625, 17 E. C. L. 481.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 333.

A voluntary assignment by the tenant for the benefit of creditors does not affect the right of the landlord to terminate the lease for non-payment of rent. Reynolds *v.* Fuller, 64 Ill. App. 134.

Security for rent.— The failure to give a chattel mortgage to secure a note for rent for the year as provided for in the lease does not authorize the lessor to terminate the lease on the lessee's failure to give, on demand in November, a mortgage securing the rent note falling due the following February for the year ending in the succeeding March. Stevenson *v.* Brodahl, 49 Nebr. 703, 68 N. W. 1024.

Enforcement against receiver.— Where a lease provided that if rent was unpaid the lessor might reënter, and after default in the payment of rent a receiver was appointed for the lessee, the lessor was not entitled to forfeit the lease until it appeared that the receiver was unwilling or unable to pay the overdue rent. Fleming *v.* Fleming Hotel Co., (N. J. Ch. 1905) 61 Atl. 157.

Nominal rent.—It seems that the non-performance of a condition of a public grant to pay annually an ear of corn as rent is not a ground of forfeiture. Vermont *v.* Propagation of the Gospel Soc., 28 Fed. Cas. No. 16,919, 1 Paine 652.

The purpose of the provision for a forfeiture for failure to pay rent is merely to secure the payment of rent, and not to create a forfeiture of the lease, where the tenant acts in good faith and promptly pays the rent when demanded, or before the landlord suffers loss or unreasonable inconvenience from such delay. Wilson *v.* Jones, 1 Bush (Ky.) 173.

Redemption of forfeited lease.—The payment of arrears of rent by a third person, to whom the landlord granted a new lease, will not be presumed to be in redemption of the forfeited lease, in the absence of proof that such was the intention. Boardman *v.* Davidson, 7 Abb. Pr. N. S. (N. Y.) 439.

Excuse for failure to pay.— A failure to pay rent upon the first day of the month when due has been held excused by the fact that the lessor resided out of the state and had no agent within it, when the rent was paid on the fifth of the month, which was the first day that the lessor was in the city where the leased premises were situated. Burnes *v.* McCubbin, 3 Kan. 221, 87 Am. Dec. 468.

31. Randolph *v.* Mitchell, (Tex. Civ. App. 1899) 51 S. W. 297.

32. Academy of Music *v.* Hackett, 2 Hilt. (N. Y.) 217.

33. White *v.* McMurray, 2 Brewst. (Pa.) 484.

34. Faylor *v.* Brice, 7 Ind. App. 551, 34 N. E. 833. See also Morrill *v.* De la Granja, 99 Mass. 383.

35. Johnson *v.* Douglass, 73 Mo. 168, holding that assent might be implied from silence.

rent,[36] or a tender of the rent due,[37] after the time when the rent is due, but before a forfeiture has been declared, precludes the right of the lessor to thereafter terminate the lease because of the failure to pay rent on the day when it was due. On the other hand a tender made before the rent is due cannot preclude the lessor's right to declare a forfeiture, where the rent is not paid on the day due.[38]

(II) *STATUTORY GROUNDS* — (A) *In General.* In many states the breach of particular covenants is made a ground of forfeiture by statute, independent of any provision in the lease therefor.[39] For instance forfeiture is often provided for in case of a breach of the agreement not to assign or sublet,[40] or a failure to pay rent.[41]

(B) *Improper Use of Premises.* In some states, by statute, even though there is no forfeiture clause, the lessor may terminate the lease if the lessee uses the premises for an unlawful purpose,[42] such as for the sale of intoxicating liquors,[43] gambling,[44] or a house of ill fame.[45] Furthermore a statute authorizing a forfeiture permits the original lessor to terminate the original lease, although the unlawful use of the premises is by a subtenant.[46]

(III) *DISCLAIMER OF TITLE.* Where a tenant repudiates the relationship and sets up an adverse title in himself or a third person, the lessor may terminate the tenancy.[47] This rule, however, is subject to the qualification that no mere parol

36. Lewis *v.* Ocean Nav., etc., Co., 3 N. Y. Suppl. 911.

37. *Illinois.*—North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

Kansas.— Burnes *v.* McCubbin, 3 Kan. 221, 87 Am. Dec. 468.

Massachusetts.— See Tuttle *v.* Bean, 13 Metc. 275.

Missouri.— Lewis *v.* St. Louis, 69 Mo. 595; Carondelet *v.* Wolfert, 39 Mo. 305.

New Hampshire.— Jones *v.* Reed, 15 N. H. 68.

Tennessee.— Planters' Ins. Co. *v.* Diggs, 8 Baxt. 563.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 335.

But after a perfected forfeiture, a lessee cannot call for an account to inform him of how much he has omitted to pay, in order to enable him to make a tender. Baldwin *v.* Rees, 6 Ohio Dec. (Reprint) 869, 8 Am. L. Rec. 556.

38. Illingworth *v.* Miltenberger, 11 Mo. 80.

39. See the statutes of the several states.

40. See the statutes of the several states. See also Bernero *v.* Allen, 68 Cal. 505, 9 Pac. 429; Grizzle *v.* Pennington, 14 Bush (Ky.) 115 (holding that the Kentucky statute does not apply to an assignment of the lease for a term of two years or more without the landlord's consent, although at the date of the assignment the lease has less than two years to run); Wray-Austin Mach. Co. *v.* Flower, 140 Mich. 452, 103 N. W. 873; Marvin *v.* Hartz, 130 Mich. 26, 89 N. W. 557; Markowitz *v.* Greenwall Theatrical Circuit Co., (Tex. Civ. App. 1903) 75 S. W. 317.

What constitutes assignment or sublease see *supra*, IV, B, 2.

Statutory restriction of right to assign or sublease see *supra*, IV, B, f.

41. See the statutes of the several states. See also Chadwick *v.* Parker, 44 Ill. 326; Hendrickson *v.* Beeson, 21 Nebr. 61, 31 N. W. 266.

42. See the statutes of the several states.

Summary dispossession proceedings see *infra*, X, C, 6, e.

43. Machias Hotel Co. *v.* Fisher, 56 Me. 321, holding that it must appear that the offense was committed upon the premises leased.

Payment of rent in advance for the entire term will not prevent a forfeiture. McGarvey *v.* Puckett, 27 Ohio St. 669.

Judicial decree of forfeiture unnecessary.— Under a statute providing that an unlawful sale of intoxicating liquors shall forfeit all rights of the lessee under a lease of the premises, no judicial proceeding is necessary to declare the lease forfeited, to entitle the landlord to maintain an action for possession. McGarvey *v.* Puckett, 27 Ohio St. 669.

Sale on portion of premises.— The sale of intoxicating liquors, committed upon any portion of the leased premises, is, under the statute, ground for forfeiture of the entire premises. McGarvey *v.* Puckett, 27 Ohio St. 669.

44. Shaw *v.* McCarty, 59 How. Pr. (N. Y.) 487.

45. Healy *v.* Trant, 15 Gray (Mass.) 312; Pettis *v.* Jennings, 10 R. I. 70.

46. People *v.* Bennett, 14 Hun (N. Y.) 63; Shaw *v.* McCarty, 59 How. Pr. (N. Y. 487, holding that after the forfeiture has once attached it cannot be discharged by the tenant abating the nuisance. *Contra*, O'Connell *v.* McGrath, 14 Allen (Mass.) 289; Healy *v.* Trant, 15 Gray (Mass.) 312.

47. *Alabama.*—Barnewell *v.* Stephens, 142 Ala. 609, 38 So. 662; Wells *v.* Sheerer, 78 Ala. 142.

New York.— Jackson *v.* Vincent, 4 Wend. 633.

Tennessee.— Duke *v.* Harper, 6 Yerg. 280, 27 Am. Dec. 462.

Texas.— See Wildey Lodge No. 21 *v.* Paris, 31 Tex. Civ. App. 632, 73 S. W. 69.

United States.— Walden *v.* Bodley, 14 Pet.

disclaimer of itself,[48] nor the transfer by the lessee of the premises in fee,[49] will authorize a forfeiture. Furthermore the lessor cannot declare a forfeiture, in the absence of some unequivocal act of disclaimer,[50] a mere refusal to pay rent being held not such an unequivocal disavowal.[51] In determining the sufficiency of a disclaimer, the test to be applied is whether the acts amount to a repudiation of the tenancy sufficient to start limitations running in favor of the lessee.[52] There is a ground of forfeiture where the lessee attorns,[53] or gives up possession to,[54] a stranger. So where one accepts an adverse title from a stranger and claims thereunder, the lessor may forfeit the lease.[55] The disclaimer may be waived by the lessor by his subsequent acts, such as putting in a distress for rent.[56]

e. Enforcement — (i) *Necessity For Demand of Performance.* Ordinarily a demand of performance is necessary after the lessee's breach of a covenant in the lease,[57] such as the breach of a covenant to pay taxes or assessments,[58] or a

156, 10 L. ed. 398; Peyton *v.* Stith, 5 Pet. 485, 8 L. ed. 200; Willison *v.* Watkins, 3 Pet. 43, 7 L. ed. 596.

England.— Doe *v.* Frowd, 4 Bing. 557, 1 M. & P. 480, 29 Rev. Rep. 624, 13 E. C. L. 634; Doe *v.* McWade, 2 U. C. C. P. 8.

Canada.— Kyle *v.* Stoks, 31 U. C. Q. B. 47; Doe *v.* Hessell, 2 U. C. Q. B. 194.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 336.

Adverse possession by tenant see ADVERSE POSSESSION, 1 Cyc. 1058 *et seq.*

48. Whiting *v.* Edmunds, 94 N. Y. 309; De Lancey *v.* Ganong, 9 N. Y. 9 [*affirming* 12 Barb. 120]; Doe *v.* Wells, 10 A. & E. 427, 3 Jur. 820, 8 L. J. Q. B. 265, 2 P. & D. 396, 37 E. C. L. 237. See also Vallette *v.* Bilinski, 68 Ill. App. 361; Montgomery *v.* Craig, 3 Dana (Ky.) 101 (holding that a lease is not forfeited by the tenant's claim to hold adversely to the landlord, without any other act of disclaimer); Kiernan *v.* Terry, 26 Oreg. 494, 38 Pac. 671.

49. Griffin *v.* Fellows, 81* Pa. St. 114; Le Cain *v.* Wieland, 16 Nova Scotia 71 note; Berry *v.* Berry, 16 Nova Scotia 66.

Statutes in many states reiterate this rule. See De Lancey *v.* Ganong, 9 N. Y. 9.

50. Jackson *v.* Rogers, 11 Johns (N. Y.) 33; Vivian *v.* Moat, 16 Ch. D. 730, 50 L. J. Ch. 331, 44 L. T. Rep. N. S. 210, 29 Wkly. Rep. 504; Ackland *v.* Lutley, 9 A. & E. 879, 8 L. J. Q. B. 164, 1 P. & D. 636, 36 E. C. L. 457; Doe *v.* Stagg, 5 Bing. N. Cas. 564, 9 L. J. C. P. 73, 7 Scott 690, 35 E. C. L. 304; Doe *v.* Long, 9 C. & P. 773, 38 E. C. L. 447; Doe *v.* Stanion, 2 Gale 154, 5 L. J. Exch. 253, 1 M. & W. 695, 1 Tyrw. & G. 1065; Doe *v.* Cooper, 9 L. J. C. P. 229, 1 M. & G. 135, 1 Scott N. R. 36, 39 E. C. L. 683.

51. Doe *v.* Grubb, 10 B. & C. 816, 8 L. J. K. B. O. S. 321, 21 E. C. L. 342; Jones *v.* Mills, 10 C. B. N. S. 788, 8 Jur. N. S. 387, 31 L. J. C. P. 66, 100 E. C. L. 788. See also Hunt *v.* Allgood, 10 C. B. N. S. 253, 30 L. J. C. P. 313, 4 L. T. Rep. N. S. 215, 9 Wkly. Rep. 536, 100 E. C. L. 253. But see Doe *v.* Pittman, 2 N. & M. 673, 28 E. C. L. 586, holding that a statement by the tenant that he has no rent for his landlord because a third person has ordered him to pay none is evidence of a disclaimer of tenancy.

52. Dahm *v.* Barlow, 93 Ala. 120, 9 So. 598.

53. Fortier *v.* Ballance, 10 Ill. 41; Doe *v.* Litherland, 4 A. & E. 784, 6 L. J. K. B. 267, 6 N. & M. 313, 31 E. C. L. 345; Doe *v.* Grubb, 10 B. & C. 816, 8 L. J. K. B. O. S. 321, 21 E. C. L. 342. But see Doe *v.* Parker, Gow. 180, 21 Rev. Rep. 827, holding that the mere payment of rent to a third person does not amount to a disclaimer of the title of the landlord so as to operate as a forfeiture of the lease.

54. Wall *v.* Goodenough, 16 Ill. 415; Doe *v.* Flynn, 1 C. M. & R. 137, 9 L. J. Exch. 221, 4 Tyrw. 619.

55. Doe *v.* Weese, 5 U. C. Q. B. 589. See Dahm *v.* Barlow, 93 Ala. 120, 9 So. 598, holding that the purchase by a tenant of the title of his landlord's cotenant does not forfeit the lease where the deed under which the landlord claims specifies his interest, and no claim adverse to it is made by the tenant.

56. Doe *v.* Williams, 7 C. & P. 322, 32 E. C. L. 635.

57. Chapman *v.* Wright, 20 Ill. 120; Tate *v.* Crowson, 28 N. C. 65.

But where the lessors are in possession no claim, demand, or notice is necessary to entitle them to resist entry by the lessees after a forfeiture. Maxwell *v.* Todd, 112 N. C. 677, 16 S. E. 926.

In Canada it has been held that no notice or demand is necessary before action upon a forfeiture, where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let. Connell *v.* Power, 13 U. C. C. P. 91.

58. *Indiana.*—Meni *v.* Rathbone, 21 Ind. 454.

Maryland.— Carpenter *v.* Wilson, 100 Md. 13, 59 Atl. 186.

New York.— Jackson *v.* Harrison, 17 Johns. 66. *Contra,* Garner *v.* Hannah, 6 Duer 262.

Ohio.— Eichenlaub *v.* Neil, 10 Ohio Cir. Ct. 427, 6 Ohio Cir. Dec. 567, where lease expressly provided that no demand for unpaid "rent" need be made as a condition to enforcement of forfeiture, but said nothing as to taxes.

United States.— Kansas City Elevator Co.

failure to pay rent,[59] before the lessor can declare a forfeiture. However, the common-law necessity for a demand of rent may be obviated by a statute providing otherwise,[60] by provisions in the lease dispensing with a demand,[61] or by acts of the tenant amounting to a waiver.[62]

(II) *SUFFICIENCY OF DEMAND FOR RENT.* To create a forfeiture of a lease for the non-payment of rent, the common-law rule was that a demand for pay-

v. Union Pac. R. Co., 17 Fed. 200, 3 McCrary 463.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 338.

Contra.— Byrane *v.* Rogers, 8 Minn. 281; Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696; Davis *v.* Burrell, 10 C. B. 821, 15 Jur. 658, 70 E. C. L. 821.

59. *Indiana.*—Bacon *v.* Western Furniture Co., Wils. 567.

Iowa.— Cole *v.* Johnson, 120 Iowa 667, 94 N. W. 1113.

Maryland.— Carpenter *v.* Wilson, 100 Md. 13, 59 Atl. 186.

New Hampshire.— Sperry *v.* Sperry, 8 N. H. 477.

New York.— Wolcott *v.* Schenk, 16 How. Pr. 449; Jackson *v.* Harrison, 17 Johns. 66.

Pennsylvania.— Hughs *v.* Tillibridge, 8 Pa. Dist. 358, 22 Pa. Co. Ct. 185; Haldeman *v.* Sampter, 2 Del. Co. 106; Wilcox *v.* Cartright, 1 Lack. Leg. Rec. 130; Robert *v.* Ristine, 2 Phila. 62 (holding that the rule applies whether the right to enter is a condition or a power of reëntry); Rea *v.* Transfer Co., 31 Pittsb. Leg. J. N. S. 415. But see Kreutz *v.* McKnight, 53 Pa. St. 319, holding that an abandonment of the term by the lessee obviated the necessity for a demand of the rent and a formal declaration of forfeiture.

West Virginia.— Bowyer *v.* Seymour, 13 W. Va. 12.

England.— Doe *v.* Bowditch, 8 Q. B. 973, 15 L. J. Q. B. 266, 10 Jur. 637, 55 E. C. L. 973; Phillips *v.* Bridge, L. R. 9 C. P. 48, 43 L. J. C. P. 13, 29 L. T. Rep. N. S. 692, 22 Wkly. Rep. 237; Faugher *v.* Burley, 37 U. C. Q. B. 498.

Canada.— Faugher *v.* Burley, 37 U. C. Q. B. 498.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 339.

Lease by municipal corporations.— The rule requiring a demand of rent and an entry on the non-payment of rent, as applied to a lease by an individual, has been held not applicable to a lease by a city, in pursuance of legislative power to make leases with condition to be void on the non-payment of rent. Taylor *v.* Carondelet, 22 Mo. 105.

The intention controls the effect of the demand.—Whatever terms may be used by a landlord to his tenant, there will be no demand of the rent, if it is understood by the parties that no demand is intended, or if the landlord intends none. Norris *v.* Morrill, 43 N. H. 213. And where rent bills were presented to a tenant, the person presenting them may testify what his intention and understanding were in presenting them. Norris *v.* Morrill, 40 N. H. 395.

60. See *infra*, IX, B, 7, e, (IV).

61. *Colorado.*—Lewis *v.* Hughes, 12 Colo. 208, 20 Pac. 621.

Connecticut.— Read *v.* Tuttle, 35 Conn. 25, 95 Am. Dec. 215, holding that to avoid the lease the lessor must nevertheless do some unequivocal act signifying to the lessee his election to terminate the same. And see Camp *v.* Scott, 47 Conn. 366, in which a waiver was held insufficient.

Illinois.— Palmer *v.* Ford, 70 Ill. 369, holding, however, that where the lessor, after a default in payment for more than a year, did not press the lessee for payment further than to receive rents from the other subtenants, and in various ways evidenced a disposition to favor the tenant with respect to the unpaid instalments, notice was necessary to a forfeiture.

Indiana.— Faylor *v.* Brice, 7 Ind. App. 551, 34 N. E. 833.

Massachusetts.— Fifty Associates *v.* Howland, 5 Cush. 214.

Ohio.—Sweeney *v.* Garrett, 2 Cinc. Super. Ct. 601.

England.— Doe *v.* Masters, 2 B. & C. 490, 4 D. & R. 45, 2 L. J. K. B. 117, 26 Rev. Rep. 422, 9 E. C. L. 217; Doe *v.* Alexander, 3 Campb. 516, 2 M. & S. 525, 15 Rev. Rep. 338, 14 Rev. Rep. 830; Rede *v.* Farr, 6 M. & S. 121, 18 Rev. Rep. 329.

Canada.— Campbell *v.* Baxter, 15 U. C. C. P. 42; McDonald *v.* Peck, 17 U. C. Q. B. 270.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 339.

Compare Wildman *v.* Taylor, 29 Fed. Cas. No. 17,654, 4 Ben. 42.

Construction against waiver.— Where the lease is not clear as to waiver of demand, the court, under the rule that a provision for forfeiture of a lease will always be construed strictly against the lessor, will construe it so as to prevent rather than aid the forfeiture. Camp *v.* Scott, 47 Conn. 366. See also Bowman *v.* Foot, 29 Conn. 331.

62. Fisher *v.* Smith, 48 Ill. 184 (holding that where the landlord was misled by the tenant's promise to pay at a place other than the one prescribed in the lease, and therefore did not leave at the place mentioned in the lease any person authorized to receive the rent, the tenant could not insist that there had been no proper demand); Chapman *v.* Harney, 100 Mass. 353 (holding that a statement by the lessor to the lessee that he could not pay the rent at its maturity was not a waiver). But see Gaskill *v.* Trainer, 3 Cal. 334, holding that a waiver

ment must be made on the day when the rent falls due,[63] upon the most notorious place[64] on the demised premises,[65] of the exact sum due by the terms of the lease.[66] A demand for the rent must be made in fact, although there is no person

of demand of rent will never be implied to create a forfeiture of a leasehold estate.

63. *California.*— Gaskill *v.* Trainer, 3 Cal. 334; Chipman *v.* Emeric, 3 Cal. 273.

Illinois.— Chapman *v.* Wright, 20 Ill. 120.

Massachusetts.— Chapman *v.* Harney, 100 Mass. 353.

Missouri.— Blackman *v.* Welsh, 44 Mo. 41.

Nebraska.— Godwin *v.* Harris, (1904) 98 N. W. 439; Haynes *v.* Union Inv. Co., 35 Nebr. 766, 53 N. W. 979.

New Hampshire.— Jewett *v.* Berry, 20 N. H. 36; Jones *v.* Reed, 15 N. H. 68.

New York.—Remsen *v.* Conklin, 18 Johns. 447.

Ohio.— Smith *v.* Whitbeck, 13 Ohio St. 471.

United States.— Wildman *v.* Taylor, 29 Fed. Cas. No. 17,654, 4 Ben. 42.

England.— Doe *v.* Wandlass, 7 T. R. 117, 4 Rev. Rep. 393.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 339.

But see Hyde *v.* Palmer, 12 La. 359.

As condition precedent: To action to recover possession see *infra*, X, B, 4. To summary proceeding see *infra*, X, C, 9, b.

Rent not payable until after maturity.— If the right of forfeiture does not accrue until a failure to pay a certain number of days after the rent accrues, the day for making the demand is the day on which it must be paid to avoid a forfeiture. Camp *v.* Scott, 47 Conn. 366; Countee *v.* Armstrong, 9 Ohio Dec. (Reprint) 62, 10 Cinc. L. Bul. 339. See also McQuesten *v.* Morgan, 34 N. H. 400.

Before sunset.— The demand should be made at a convenient time before sunset, by which is meant immediately preceding sunset, and for a sufficient space of time for counting and paying the money before sunset. Jenkins *v.* Jenkins, 63 Ind. 415, 30 Am. Rep. 229; Bacon *v.* Western Furniture Co., 53 Ind. 229; Phillips *v.* Tucker, 3 Ind. 132; Jones *v.* Reed, 15 N. H. 68; Jackson *v.* Harrison, 17 Johns. (N. Y.) 66; Smith *v.* Whitbeck, 13 Ohio St. 471; Doe *v.* Paul, 3 C. & P. 613, 14 E. C. L. 744. A demand at half-past ten in the forenoon has been held insufficient. Acocks *v.* Phillips, 5 H. & N. 183.

64. McGlynn *v.* Moore, 25 Cal. 384; Smith *v.* Whitbeck, 13 Ohio St. 471.

If there is no place for payment stipulated in the lease, the demand must be made at the most notorious place on the land demised, which, if there is a dwelling-house, is at the front door thereof. McGlynn *v.* Moore, 25 Cal. 384; Van Rensselaer *v.* Jewett, 2 N. Y. 141; Smith *v.* Whitbeck, 13 Ohio St. 471; Parks *v.* Hays, 92 Tenn. 161, 22 S. W. 3; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332; Prout *v.* Roby, 15 Wall. (U. S.) 471, 21 L. ed. 58; Connor *v.* Bradley, 1 How. (U. S.) 211, 11 L. ed. 105; Lamson Consol. Store Service Co. *v.* Bowland, 114 Fed. 639, 52 C. C. A. 335; Clun's Case, 10 Coke 127*a*; Doe *v.* Paul, 3 C. & P. 613, 14 E. C. L. 744; Wood *v.* Chiver, 4 Leon. 179; Fabian *v.* Windsor, 1 Leon. 305; Hill *v.* Grange, Plowd. 164; Kidwelly *v.* Brand, Plowd. 70; Duppa *v.* Mayo, 1 Saund. 276.

65. *California.*— Gaskill *v.* Trainor, 3 Cal. 334; Chipman *v.* Emeric, 3 Cal. 273.

Illinois.— Chapman *v.* Wright, 20 Ill. 120.

Indiana.— Jenkins *v.* Jenkins, 63 Ind. 415, 30 Am. Rep. 229; Bacon *v.* Western Furniture Co., 53 Ind. 229; Phillips *v.* Tucker, 3 Ind. 132.

Massachusetts.— Chapman *v.* Harney, 100 Mass. 353.

Missouri.— Blackman *v.* Welsh, 44 Mo. 41.

Nebraska.— Haynes *v.* Union Inv. Co., 35 Nebr. 766, 53 N. W. 979.

New Hampshire.—Jewett *v.* Berry, 20 N. H. 36; Jones *v.* Reed, 15 N. H. 68.

Ohio.— Smith *v.* Whitbeck, 13 Ohio St. 471.

Pennsylvania.— East Conshohocken Quarry Co. *v.* Boyd, 18 Montg. Co. Rep. 58.

Vermont.— Willard *v.* Benton, 57 Vt. 286.

United States.— Wildman *v.* Taylor, 29 Fed. Cas. No. 17,654, 4 Ben. 42.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 339.

But see Follin *v.* Coogan, 12 Rich. (S. C.) 44, holding that a demand of the premises was not necessary where repeated demands had been made, and the claim was not disputed.

The custom of a tenant to seek the landlord to pay the rent will not, where no place of payment is specified in the lease, relieve the landlord of the necessity of demanding the rent on the premises. Rea *v.* Eagle Transfer Co., 201 Pa. St. 273, 50 Atl. 764, 88 Am. St. Rep. 809.

A demand made of a stranger, where made upon the land, is a sufficient demand. Doe *v.* Brydges, 2 D. & R. 29, 1 L. J. K. B. O. S. 9, 16 E. C. L. 66.

The fact that there is no person upon the land does not preclude the necessity of demanding the rent on the premises. Prout *v.* Roby, 15 Wall. (U. S.) 471, 21 L. ed. 58; Connor *v.* Bradley, 1 How. (U. S.) 211, 11 L. ed. 105. But see Manser *v.* Dix, 8 De G. M. & G. 703, 3 Jur. N. S. 252, 57 Eng. Ch. 543, 44 Eng. Reprint 561, where, the property being vacant, the landlord asked for payment of rent from the person liable to pay it, and not receiving it, reëntered, and it was held that there had been a sufficient demand.

Where the rent is not payable on the premises, the demand should not be made upon the premises. Van Rensselaer *v.* Jewett, 2 N. Y. 141; Borough's Case, 4 Coke 72*b*.

66. *California.*—Gage *v.* Bates, 40 Cal. 384.

on the land to pay it, it having been said in the earlier cases that the rent should be damanded of the land as principal debtor.[67]

(III) *NOTICE OF INTENT TO FORFEIT.* Inasmuch as it is optional with the lessor whether to avail himself of the breach of a covenant by declaring a forfeiture, it follows that if the lessor desires to forfeit he must manifest his intent by some clear and unequivocal act[68] during the term,[69] such as by a reëntry,[70] the bringing of a suit to recover possession,[71] or by giving a lease to a third person after the default of the lessee.[72] Where the landlord claims a forfeiture, he must

New Hampshire.— Jones *v.* Reed, 15 N. H. 68.

New York.— Academy of Music *v.* Hackett, 2 Hilt. 217.

Ohio.— Smith *v.* Whitbeck, 13 Ohio St. 471; Boyd *v.* Talbert, 12 Ohio 212.

United States.—Wildman *v.* Taylor, 29 Fed. Cas. No. 17,654, 4 Ben. 42.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 339.

Compare McCroskey *v.* Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79.

67. Kidwelly *v.* Brand, Plowd. 70.

68. Walker *v.* Engler, 30 Mo. 130; Cannon *v.* Wilbur, 30 Nebr. 777, 47 N. W. 85 (holding that notice must be given the lessee, although he has sublet the premises for the unexpired term); S. Liebmann's Sons Brewing Co. *v.* Lauter, 73 N. Y. App. Div. 183, 76 N. Y. Suppl. 748. See Gunning *v.* Sorg, 113 Ill. App. 332 [*affirmed* in 214 Ill. 616, 73 N. E. 870].

The requirements of a lease must be strictly followed by the lessor before a forfeiture will be enforced against the lessee. Johnson *v.* Lehigh Valley Traction Co., 130 Fed. 932. And see Riddle *v.* Glen Riddle Mfg. Co., 9 Del. Co. (Pa.) 588.

Waiver of necessity for notice.— Where a lease provides that for non-payment of rent it shall be forfeited and surrendered on ten days' notice, and the lessor demands rent in arrear, and the lessee does not demand notice or pay, but agrees to end the term and surrender his lease, although there was no other notice, the tenancy is thereby ended, and the lessor becomes entitled to possession. Clator *v.* Otto, 38 W. Va. 89, 18 S. E. 378.

The assignee of the lease is not entitled to notice from the lessor before the enforcement of a forfeiture for failure to pay rent after the time specified for the payment. Comegys *v.* Russell, 175 Pa. St. 166, 34 Atl. 657.

What constitutes election.— Where one of several lessors is an adult, and the others minors, a statement made by the guardian of the minors to the lessee, to the effect that the lease was ended, does not constitute an election by the lessors to forfeit the lease, where the statement was not made with the consent of the adult lessor nor of the orphans' court. Springer *v.* Citizens' Natural Gas Co., 145 Pa. St. 430, 22 Atl. 986.

69. Johns *v.* Whitley, 3 Wils. C. P. 127; Campbell *v.* Baxter, 15 U. C. C. P. 42. But see Thomas *v.* Packer, 1 H. & N. 669, 3 Jur. N. S. 143, 26 L. J. Exch. 207, 5 Wkly. Rep. 316.

70. Shattuck *v.* Lovejoy, 8 Gray (Mass.) 204; Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696; Chautauqua Assembly *v.* Alling, 46 Hun (N. Y.) 582; Heeter *v.* Eckstein, 50 How. Pr. (N. Y.) 445; Holman *v.* De Lin-River Finley Co., 30 Oreg. 428, 47 Pac. 708.

Lessor in possession.— A reëntry is not necessary where the lessor is already in possession. Island Coal Co. *v.* Combs, 152 Ind. 379, 53 N. E. 452; Maxwell *v.* Todd, 112 N. C. 677, 16 S. E. 926; Davis *v.* Moss, 38 Pa. St. 346; Sheaffer *v.* Sheaffer, 37 Pa. St. 525.

In Pennsylvania no reëntry is necessary where the lease provides that it shall be void on a breach of covenant. Davis *v.* Moss, 38 Pa. St. 346; Sheaffer *v.* Sheaffer, 37 Pa. St. 525; Kenrick *v.* Smick, 7 Watts & S. (Pa.) 41.

Where there is no clause in the lease for a reëntry no reëntry is necessary. Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759.

Sufficiency of reëntry.— A lessor makes a sufficient reëntry for failure of the lessee to repair by entering into an agreement with the under-tenant in possession to rent the premises to him as a yearly tenant, followed by the receipt of rent from him. Baylis *v.* Le Gros, 4 C. B. N. S. 537, 4 Jur. N. S. 513, 93 E. C. L. 537. See also *infra*, X, A, 4.

Statutes.— The general provision in a lease for reëntry is not controlled or affected by a statute giving special power to determine the lease on a given notice, and authorizing proceedings as against an overholding tenant. Hely *v.* Canada Co., 23 U. C. C. P. 20. See also Baylis *v.* Le Gros, 4 C. B. N. S. 537, 4 Jur. N. S. 513, 93 E. C. L. 537.

Right and sufficinecy of reëntry in general see *infra*, X, A.

71. Garner *v.* Hannah, 6 Duer (N. Y.) 262; Clark *v.* Jones, 1 Den. (N. Y.) 516, 43 Am. Dec. 706; Sergeant *v.* Nash, [1903] 2 K. B. 304, 72 L. J. K. B. 630, 89 L. T. Rep. N. S. 112 [*approving* Grimwood *v.* Moss, L. R. 7 C. P. 360, 41 L. J. C. P. 239, 27 L. T. Rep. N. S. 268, 20 Wkly. Rep. 972]; Jones *v.* Carter, 15 M. & W. 718; Denison *v.* Maitland, 22 Ont. 166.

After the declaration of a forfeiture by bringing ejectment the dismissal of the action does not restore the tenancy. Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. 957.

72. Munroe *v.* Armstrong, 96 Pa. St. 307; Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759. *Compare* Gage *v.* Smith, 14 Me. 466.

show that he has done everything necessary to be done on his part to perfect such right.[73]

(IV) *Statutory Provisions.* In many of the states of the United States,[74] as well as in England,[75] and Canada,[76] the procedure to terminate the lease after a breach of covenant by the lessee is fixed by statute.[77] The common-law requirements as to a demand for rent on the premises on the day the rent is due are largely dispensed with[78] by substituting a notice to quit, which takes the place of a formal demand on the premises, such as was required at common law.[79] Under the most of such statutes the notice does not terminate the lease until the lapse of a

Entry by an agent after the tenant has failed to pay rent, and the execution of a lease by him to a third person, ratified by the lessor, and affirmed by the receipt of rent, constitutes a sufficient entry for a forfeiture to put an end to the original lease. O'Hare *v.* McCormick, 30 U. C. Q. B. 567.

Effect of indorsement on second lease.— The act of the lessor in making a second lease during the existence of the first lease is not an unequivocal declaration of the forfeiture of the first, where it is indorsed to be taken subject to the first lease. Schaupp *v.* Hukill, 34 W. Va. 375, 12 S. E. 501.

73. Meni *v.* Rathbone, 2 Ind. 454.

Who may object to legality of forfeiture.— A mortgagee of the leasehold premises, under a mortgage executed prior to the forfeiture, cannot, in a proceeding to subject the premises to sale for payment of the mortgage debt after the lessor has entered for condition broken, be permitted to dispossess the lessor for want of proof on his part that the steps required to work a forfeiture were legally taken, especially where the lessee himself would be estopped to question the legality of the forfeiture by reason of his acquiescence in improvements made by the lessor thereafter. Prather *v.* Foote, 1 Disn. 434, 12 Ohio Dec. (Reprint) 717.

Sufficiency of election.— An informality in an ordinance declaring the forfeiture of a lease is not cured by the passage of a subsequent formally correct ordinance, where, after the passage of the first, the lessee offered to perform and carry out the conditions of the lease. Lewis *v.* St. Louis, 4 Mo. App. 563.

74. See the statutes of the several states.

75. Skinners' Co. *v.* Knight, [1891] 2 Q. B. 542, 56 J. P. 36, 60 L. J. Q. B. 629, 65 L. T. Rep. N. S. 240, 40 Wkly. Rep. 57; Fletcher *v.* Nokes, [1897] 1 Ch. 271, 61 J. P. 232, 66 L. J. Ch. 177, 76 L. T. Rep. N. S. 107, 45 Wkly. Rep. 471; Lock *v.* Pearce, [1893] 2 Ch. 271, 62 L. J. Ch. 582, 68 L. T. Rep. N. S. 569, 2 Reports 403, 41 Wkly. Rep. 369 [*overruling* North London Freehold Land, etc., Co. *v.* Jacques, 48 J. P. 505, 49 L. T. Rep. N. S. 659, 32 Wkly. Rep. 283]; Cronin *v.* Rogers, 1 Cab. & E. 348; Penton *v.* Barnett, 67 L. J. Q. B. 11, 46 Wkly. Rep. 33.

76. McMullen *v.* Vannatto, 24 Ont. 625.

77. Lemp Brewing Co. *v.* Lonergan, 72 Ill. App. 223.

Persons who must join in notice.— Where lessors are tenants in common of leased premises, a notice of forfeiture by one of them, who does not act for the others, is effective only as to his individual interest. Updegraff *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342. It is not necessary that the wife of the lessor in a ninety-nine-year lease, who has executed the lease merely to release her dower right, should join in the notice. Gunning *v.* Sorg, 113 Ill. App. 332 [*affirmed* in 214 Ill. 616, 73 N. E. 870].

78. Howland *v.* White, 48 Ill. App. 236; Bowyer *v.* Seymour, 13 W. Va. 12. See also Denison *v.* Maitland, 22 Ont. 166.

Time.— The demand need not be made on the very day the rent becomes due. Burt *v.* French, 70 Ill. 254; Leary *v.* Pattison, 66 Ill. 203.

The statute of 4 Geo. II, c. 28, provided that when there was half a year's rent in arrear and no distress on the premises, when there was a right of reëntry contained in the lease, the landlord might recover possession in the mode pointed out by that statute, without any formal demand for rent. Doe *v.* Masters, 2 B. & C. 490, 4 D. & R. 45, 2 L. J. K. B. O. S. 117, 26 Rev. Rep. 422, 9 E. C. L. 217; Campbell *v.* Baxter, 15 U. C. C. P. 42. See, generally, *infra*, X, B, 4, a.

79. Woods *v.* Soucy, 166 Ill. 407, 47 N. E. 67; Cockerline *v.* Fisher, 140 Mich. 95, 103 N. W. 522; Van Rensselaer *v.* Ball, 19 N. Y. 100; Van Rensselaer *v.* Snyder, 13 N. Y. 299.

A notice substantially complying with the provisions of the statute is sufficient. Cheek *v.* Preston, 34 Ind. App. 343, 72 N. E. 1048. A notice is insufficient if it requires the tenant who is in arrears of rent to deliver up the premises "forthwith." Oakes *v.* Munroe, 8 Cush. (Mass.) 282. But a notice is not bad for demanding immediate payment if it also specifies a proper time within which forfeiture may be avoided. Howland *v.* White, 48 Ill. App. 236. An erroneous description of the lease may vitiate the notice. Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332. Sufficiency of notice in general see Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332.

Refusal to pay under a claim of right to the reversion, being a denial of the landlord's title, confers upon him an immediate right of reëntry, without giving the statutory notice to quit for non-payment of rent. Clark *v.* Everly, 8 Watts & S. (Pa.) 226.

Effect of notice.— A notice from a landlord to the tenant to quit for non-payment of rent is a rescission of the contract of leasing (Stromberg *v.* Western Tel. Constr. Co., 86 Ill. App. 270), and terminates the relation

specified number of days,[80] during which time the lessee may prevent a forfeiture by paying the arrears of rent.[81]

f. Effect.[82] The lease is terminated by a reëntry and reletting by the landlord for breach of covenants,[83] but not by a mere attempt to rent the premises to third persons where the lessees are not disturbed in their possession.[84] A reëntry for breach of covenant or condition precludes the right to recover rent which has not accrued before the reëntry,[85] but does not render the lease void *ab initio*.[86] If the lessee has sublet the forfeiture terminates the estate of the sublessee.[87]

g. Waiver — (i) *Failure of Lessor to Enforce.* The occurrence of a ground of forfeiture does not of itself work a forfeiture. A condition subsequent in a lease that upon neglect of the lessee to perform his covenants the lease shall determine and be void does not render the lease absolutely void upon a default of the lessee, but merely voidable at the election of the lessor, so that if he elects to waive the forfeiture the lessee is bound as though there had been no breach of condition.[88] So, where the statute declares that the lease is forfeited on the occurrence of certain events, it merely means that it may be forfeited by the lessor on such occurrence.[89] *A fortiori*, where the lease itself provides that the lease shall

of landlord and tenant, especially after the tenant removes from the demised premises (Donnan *v.* Moore, 1 Chest. Co. Rep. (Pa.) 65).

80. Douglass *v.* Parker, 32 Kan. 593, 5 Pac. 178; Wray-Austin Mach. Co. *v.* Flower, 140 Mich. 452, 103 N. W. 873.

81. Hodgkins *v.* Price, 137 Mass. 13, holding that the fourteen days after the service of the notice to quit, within which the tenant may pay the rent, begins to run from the time of the receipt of the notice by the lessee and not from the time it is left at the lessee's dwelling-house, which is not on the demised premises.

Under the Illinois statute ten days' notice is sufficient, within which time a tenant may prevent a forfeiture by paying or tendering the arrears in rent. Chapman *v.* Kirby, 49 Ill. 211; Chadwick *v.* Parker, 44 Ill. 326.

82. **Summary proceeding** see *infra*, X, C, 25.

83. *Ex p.* Houghton, 12 Fed. Cas. No. 6,725, 1 Low. 554, holding that thereafter the landlord cannot recover for the loss sustained by reletting at a lower rent.

84. Mills *v.* Sampsel, 53 Mo. 360.

85. Lamson Consol. Store Service Co. *v.* Bowland, 114 Fed. 639, 52 C. C. A. 335. See also *supra*, VIII, A, 3, j.

86. Hartshorne *v.* Watson, 1 Arn. 15, 4 Bing. N. Cas. 178, 6 Dowl. P. C. 404, 2 Jur. 155, 7 L. J. C. P. 138, 5 Scott 506, 33 E. C. L. 657.

87. Smith *v.* Great Western R. Co., 3 App. Cas. 165, 47 L. J. Ch. 97, 37 L. T. Rep. N. S. 645, 26 Wkly. Rep. 130; Great Western R. Co. *v.* Smith, 2 Ch. D. 235, 45 L. J. Ch. 235, 34 L. T. Rep. N. S. 267, 24 Wkly. Rep. 443.

88. *Illinois.*— Willoughby *v.* Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; Raybourn *v.* Ramsdell, 78 Ill. 622; Springer *v.* Chicago Real Estate L. T. Co., 102 Ill. App. 294; Spencer *v.* Dougherty, 23 Ill. App. 399.

Kansas.— Alexander *v.* Touhy, 13 Kan. 64.

Louisiana.—Houssiere Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932.

Maryland.— Morrison *v.* Smith, 90 Md. 76, 46 Atl. 1031; Baltimore Western Bank *v.* Kyle, 6 Gill 343.

Massachusetts.— Shattuck *v.* Lovejoy, 8 Gray 204; Fifty Associates *v.* Howland, 11 Metc. 99.

New Jersey.—Creveling *v.* West End Iron Co., 51 N. J. L. 34, 16 Atl. 184; Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

New York.— Chautauqua Assembly *v.* Alling, 46 Hun 582; Garner *v.* Hannah, 6 Duer 262; Heeter *v.* Eckstein, 50 How. Pr. 445; Clark *v.* Jones, 1 Den. 516, 43 Am. Dec. 706; Stuyvesant *v.* Davis, 9 Paige 427.

England.—Davenport *v.* Reg., 3 App. Cas. 115, 47 L. J. P. C. 8, 37 L. T. Rep. N. S. 727; Phillips *v.* Bridge, L. R. 9 C. P. 48, 43 L. J. C. P. 13, 29 L. T. Rep. N. S. 692, 22 Wkly. Rep. 237; Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26, 41 L. J. Exch. 17, 25 L. T. Rep. N. S. 708, 20 Wkly. Rep. 189; Doe *v.* Bancks, 4 B. & Ald. 401, Gow 220, 23 Rev. Rep. 318, 6 E. C. L. 535; Arusby *v.* Woodward, 6 B. & C. 519, 9 D. & R. 536, 5 L. J. K. B. O. S. 199, 13 E. C. L. 238; Ward *v.* Day, 4 B. & S. 337, 116 E. C. L. 337; Reid *v.* Parsons, 2 Chit. 247, 18 E. C. L. 615; Bowser *v.* Colby, 1 Hare 109, 5 Jur. 1178, 11 L. J. Ch. 132, 23 Eng. Ch. 109, 66 Eng. Reprint 969; Croft *v.* Lumley, 6 H. L. Cas. 672, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459; *Ex p.* Leathersellers' Co., 3 Morr. Bankr. Cas. 126; Rede *v.* Farr, 6 M. & S. 121, 18 Rev. Rep. 329.

Canada.—Denison *v.* Maitland, 22 Ont. 166; Doe *v.* Kennedy, 5 U. C. Q. B. 577.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 337.

And see Fell *v.* Dentzell, 2 Marv. (Del.) 137, 42 Atl. 439.

89. Small *v.* Clark, 97 Me. 304, 54 Atl. 758; Trask *v.* Wheeler, 7 Allen (Mass.) 109; Almy *v.* Greene, 13 R. I. 350.

become void at the lessor's option, a breach of covenant will not work a forfeiture without some act on the part of the lessor declaring or claiming it.[90] But if the condition instead of being a condition subsequent is a conditional limitation, the lessor has no election, but the lease terminates by reason of the happening of the event.[91]

(II) *INCONSISTENT ACTS IN GENERAL.* Any act of the lessor done with knowledge[92] of a cause of forfeiture by the lessee, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture.[93] And inasmuch as forfeitures are not favored, slight acts will be construed as a

90. Walker *v.* Engler, 30 Mo. 130.

91. Estelle *v.* Dinsbeer, 9 Misc. (N. Y.) 487, 30 N. Y. Suppl. 243.

What constitutes conditional limitation see *supra*, II, B, 3, e.

92. People's Bank *v.* Mitchell, 73 N. Y. 406. See also *infra*, IX, B, 7, g, (III), (IV).

93. *Alabama.*— Brooks *v.* Rogers, 99 Ala. 433, 12 So. 61, subsequent agreement between lessor and lessee on the basis of the continuance of the lease.

Illinois.— Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Webster *v.* Nichols, 104 Ill. 160; Felton *v.* Strong, 37 Ill. App. 58, making of a new lease.

New Hampshire.—Norris *v.* Morrill, 43 N. H. 213, 40 N. H. 395.

Ohio.—Campbell *v.* McElevey, 2 Cinc. Super. Ct. 574.

England.—Duppa *v.* Mayo, 1 Saund. 276.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 343.

By foreclosing a mortgage on the lease, after the tenant has been dispossessed for non-payment of rent, the landlord waives the forfeiture as against the purchaser. People *v.* Stuyvesant, 3 Thomps. & C. (N. Y.) 179.

A prayer for an injunction against the violation of a covenant in a lease waives the right to reënter for a breach of such covenant. Chautauqua Assembly *v.* Alling, 46 Hun (N. Y.) 582.

Consent to an assignment of the lease, after a breach of a condition in the lease, waives the right to forfeit. Deuton *v.* Taylor, 90 Va. 219, 17 S. E. 944.

An extension of time for the payment of the rent waives the right of forfeiture for failure to pay such rent. Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301.

Breach of covenants as to assigning or subletting may be waived (Grovenburgh *v.* McKaough, 117 Mich. 555, 76 N. W. 776; Smith *v.* Edgewood Casino Club, 19 R. I. 628, 55 Atl. 884, 36 Atl. 128; Kansas City Elevator Co. *v.* Union Pac. R. Co., 17 Fed. 200, 3 McCrary 463. See Indianapolis Mfg., etc., Union *v.* Cleveland, etc., Co., 45 Ind. 281); by consent of the lessor to the assignment or subletting (Doe *v.* Watt, 7 B. & C. 308, 6 L. J. K. B. O. S. 185, 1 M. & R. 694, 15 E. C. L. 157; Doe *v.* Curwood, 1 Harr. & W. 140; Littlejohn *v.* Soper, 1 Ont. L. Rep. 172. See also Whitehead *v.* Bennett, 9 Wkly. Rep. 626), by advising the purchase of the leasehold interest (Doe *v.* Eykins, 1 C. & P. 154, R. & M. 29, 12 E. C. L. 99), by the acceptance of rent from the assignee (Crouch *v.* Wabash, etc., R. Co., 22 Mo. App. 315; Koehler *v.* Brady, 163 N. Y. 565, 57 N. E. 1114 [*affirming* 22 N. Y. App. Div. 624, 47 N. Y. Suppl. 984]; Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228. But see Medinah Temple Co. *v.* Currey, 162 Ill. 441, 44 N. E. 839, 53 Am. St. Rep. 320), or by the acceptance of a sublessee's check turned over to the lessor by the lessee, where he had knowledge of the facts (Trauerman *v.* Lippincott, 39 Mo. App. 478); but applying for a receiver of rent, in an action by a lessor to recover possession of the demised premises because of a breach against subletting, is not a waiver of the right to enforce a forfeiture because of such subletting (Ireland *v.* Nichols, 37 How. Pr. (N. Y.) 222). See, generally, *supra*, IV, B, 1, f, (IV).

Breaches of covenants as to the use and repair of the premises may be waived by oral agreement as to the violation (Moses *v.* Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194); but mere acquiescence (Kemp *v.* Sober, 15 Jur. 458, 20 L. J. Ch. 602, 1 Sim. N. S. 517, 40 Eng. Ch. 517, 61 Eng. Reprint 200; Doe *v.* Brindley, 5 L. J. C. P. O. S. 3, 12 Moore C. P. 37, 22 E. C. L. 625); or acts not inconsistent with the forfeiture are insufficient (Hills *v.* Rowland, 4 De G. M. & G. 430, 22 L. J. Ch. 964, 1 Wkly. Rep. 422, 53 Eng. Ch. 336, 43 Eng. Reprint 375; Flower *v.* Duncan, 13 Grant Ch. (U. C.) 242). So a forfeiture for breach of a covenant to repair may be waived by acts which recognize the lease as still in force (Doe *v.* Lewis, 5 A. & E. 277, 31 E. C. L. 613, 2 H. & W. 162, 5 L. J. K. B. 217, 6 N. & M. 764, 36 E. C. L. 661; Bargent *v.* Thompson, 4 Giffard 473, 9 Jur. N. S. 1192, 9 L. T. Rep. N. S. 365, 66 Eng. Reprint 792); but not by a notice given under a covenant to repair within three months, where there is also a general covenant to repair (Roe *v.* Paine, 2 Campb. 520. *Contra*, Doe *v.* Meux, 4 B. & C. 606, 10 E. C. L. 722, 1 C. & P. 346, 12 E. C. L. 207, 7 D. & R. 98, 4 L. J. K. B. O. S. 4, 28 Rev. Rep. 426); and an agreement to allow the tenant further time to repair suspends but does not waive the right to reënter (Doe *v.* Brindley, 4 B. & Ad. 84, 2 L. J. K. B. 7, 1 N. & M. 1, 24 E. C. L. 46).

Subsequent notice to quit.— A notice terminating the lease for breach of a covenant is waived by a subsequent notice to quit

waiver of the forfeiture;[94] but it is generally held that the lessor does not waive a ground of forfeiture by merely remaining passive, after knowledge of the breach or a continuance thereof,[95] although a waiver may be inferred from acquiescence inducing the tenant to incur expense in connection with the demised premises.[96] The waiver may be by words or acts,[97] or even by allegations in a pleading in an action between the parties to the lease.[98] The waiver by the lessor of one ground of forfeiture is not a waiver of the breach of other independent stipulations.[99] But the assertion of one ground of forfeiture, so as to terminate the tenancy, precludes the right to rely on another ground which existed at the same time.[1]

(III) *Acceptance of Rent* — (A) *Rent Accruing After Breach.* The acceptance by a landlord of rent which accrues after the breach of a condition contained in the lease is a waiver of the right to declare a forfeiture of the lease and reënter because of such breach,[2] provided the acceptance was with full knowledge

based on the breach of another covenant. Dockrill *v.* Schenk, 37 Ill. App. 44. So a ground of forfeiture is waived by subsesequently serving a notice to terminate the lease on another distinct ground. Frazier *v.* Caruthers, 44 Ill. App. 61.

94. Allen *v.* Dent, 4 Lea (Tenn.) 676.

95. McKildoe *v.* Darracott, 13 Gratt. (Va.) 278; Perry *v.* Davis, 3 C. B. N. S. 769, 91 E. C. L. 769; Doe *v.* Allen, 3 Taunt. 78, 12 Rev. Rep. 579; McLaren *v.* Kerr, 39 U. C. Q. B. 507. But see Morrison *v.* Smith, 90 Md. 76, 44 Atl. 1031; Douglas *v.* Herms, 53 Minn. 204, 54 N. W. 1112; Haldeman *v.* Sampter, 2 Del. Co. (Pa.) 106. *Compare* Doe *v.* Rowe, 2 C. & P. 246, R. & M. 343, 12 E. C. L. 553; West *v.* Blakeway, 9 Dowl. P. C. 846, 5 Jur. 630, 10 L. J. C. P. 173, 2 M. & G. 729, 3 Scott N. R. 199, 40 E. C. L. 828.

96. Garnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303; Hume *v.* Kent, 1 Ball & B. 554.

97. Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26, 41 L. J. Exch. 17, 25 L. T. Rep. N. S. 708, 20 Wkly. Rep. 189; Croft *v.* Lumley, 6 H. L. Cas. 672, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459.

98. Evans *v.* Davis, 10 Ch. D. 747, 48 L. J. Ch. 223, 39 L. T. Rep. N. S. 391, 27 Wkly. Rep. 285.

99. Murray *v.* Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.

1. Brooks *v.* Rogers, 99 Ala. 433, 12 So. 61; Frazier *v.* Caruthers, 44 Ill. App. 61; Atkins *v.* Chilson, 9 Metc. (Mass.) 52. *Compare* Toleman *v.* Portbury, L. R. 7 Q. B. 344, 41 L. J. Q. B. 98, 26 L. T. Rep. N. S. 292, 20 Wkly. Rep. 441.

2. *Alabama.*— Bowling *v.* Crook, 104 Ala. 130, 16 So. 131 (acceptance of corn as rent precludes the right to insist on a forfeiture on account of the character of the corn); Attalla Min., etc., Co. *v.* Winchester, 102 Ala. 184, 14 So. 565; Brooks *v.* Rogers, 99 Ala. 433, 12 So. 61; Dahm *v.* Barlow, 93 Ala. 120, 9 So. 598.

California.—Randol *v.* Tatum, 98 Cal. 390, 33 Pac. 433.

Connecticut.— Camp *v.* Scott, 47 Conn. 366.

Illinois.—Webster *v.* Nichols, 104 Ill. 160; Watson *v.* Fletcher, 49 Ill. 498; Stromberg *v.* Western Tel. Constr. Co., 86 Ill. App. 270.

Iowa.— Colton *v.* Gorham, 72 Iowa 324, 33 N. W. 76.

Massachusetts.—Porter *v.* Merrill, 124 Mass. 534; Collins *v.* Canty, 6 Cush. 415; O'Keefe *v.* Kennedy, 3 Cush. 325.

Michigan.—Barber *v.* Stone, 104 Mich. 90, 62 N. W. 139.

Missouri.—Garnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303.

Nebraska.—Stover *v.* Hazelbaker, 42 Nebr. 393, 60 N. W. 597.

New Hampshire.— Coon *v.* Brickett, 2 N. H. 163.

New York.— Conger *v.* Duryee, 90 N. Y. 594, 12 Abb. N. Cas. 43; Riggs *v.* Pursell, 66 N. Y. 193; Murray *v.* Harway, 56 N. Y. 337; Collins *v.* Hasbrouck, 56 N. Y. 157, 15 Am. Rep. 407; Ireland *v.* Nichols, 46 N. Y. 413; Clarke *v.* Cummings, 5 Barb. 339; Camp *v.* Pulver, 5 Barb. 91; Michel *v.* O'Brien, 6 Misc. 408, 27 N. Y. Suppl. 173; Lewis *v.* Ocean Nav., etc., Co., 3 N. Y. Suppl. 911; Heeter *v.* Eckstein, 50 How. Pr. 445; Crawford *v.* Waters, 46 How. Pr. 210; Bleecker *v.* Smith, 13 Wend. 530. See Manice *v.* Millen, 26 Barb. 41, holding that the right of entry may be suspended without being waived, even if rent is accepted. See also Smith *v.* St. Philip's Church, 107 N. Y. 610, 14 N. E. 825.

North Carolina.—Richburg *v.* Bartley, 44 N. C. 418.

Pennsylvania.—Norton *v.* Kramer, 5 Lack. Jur. 86; Beatty *v.* Masavage, 23 Lanc. L. Rev. 148, 13 Luz. Leg. Reg. 40; Clark *v.* Everly, 3 Pa. L. J. 491.

Rhode Island.—Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649; Smith *v.* Edgewood Casino Club, 19 R. I. 628, 35 Atl. 884, 36 Atl. 128.

Vermont.—Maidstone *v.* Stevens, 7 Vt. 487.

Virginia. — McKildoe *v.* Darracott, 13 Gratt. 278. But see Jones *v.* Roberts, 3 Hen. & M. 436, holding that the intent with which the rent was received governs the question whether it is a waiver of the forfeiture.

Washington.—Pettygrove *v.* Rothschild, 2 Wash. 6, 25 Pac. 907.

West Virginia.—Hukill *v.* Myers, 36 W. Va. 639, 15 S. E. 151.

upon the part of the landlord of the fact of the breach and all the circumstances thereof.[3]

(B) *Rent Accruing Before Breach.* On the other hand the acceptance of rent which accrued prior to the breach which constitutes the ground of forfeiture is not a waiver of the right to enforce the forfeiture,[4] especially after the lease has been forfeited;[5] and the receipt of past-due rent does not waive the right of forfeiture for non-payment of rent subsequently falling due.[6]

(C) *Continuing Breaches of Covenant.* The receipt of rent is not a waiver of a continuing breach of covenant,[7] such as the breach of a covenant as to the

Wisconsin.—Jolly *v.* Single, 16 Wis. 280; Gomber *v.* Hackett, 6 Wis. 323, 70 Am. Dec. 467.

England.—Davenport *v.* Reg., 3 App. Cas. 115, 47 L. J. P. C. 8, 37 L. T. Rep. N. S. 727; Jacob *v.* Down, [1900] 2 Ch. 156, 64 J. P. 552, 69 L. J. Ch. 493, 83 L. T. Rep. N. S. 191, 48 Wkly. Rep. 41; Finch *v.* Underwood, 2 Ch. D. 310, 45 L. J. Ch. 522, 34 L. T. Rep. N. S. 779, 24 Wkly. Rep. 657; Walrond *v.* Hawkins, L. R. 10 C. P. 342, 44 L. J. C. P. 116, 32 L. T. Rep. N. S. 119, 23 Wkly. Rep. 390; Doe *v.* Rees, 1 Arn. 159, 4 Bing. N. Cas. 364, 7 L. J. C. P. 184, 6 Scott 161, 33 E. C. L. 765; Bridges *v.* Longman, 24 Beav. 27, 53 Eng. Reprint 267; Arnsby *v.* Woodward, 6 B. & C. 519, 9 D. & R. 536, 5 L. J. K. B. O. S. 199, 13 E. C. L. 238; Croft *v.* Lumley, 5 E. & B. 648, 2 Jur. N. S. 275, 25 L. J. Q. B. 223, 4 Wkly. Rep. 357, 85 E. C. L. 648; Clifford *v.* Reilly, Ir. R. 4 C. L. 218; Evans *v.* Wyatt, 44 J. P. 767, 43 L. T. Rep. N. S. 176; Griffin *v.* Tomkins, 41 J. P. 457, 42 L. T. Rep. N. S. 359; Pellatt *v.* Boosey, 8 Jur. N. S. 1107, 31 L. J. C. P. 281; Miles *v.* Tobin, 17 L. T. Rep. N. S. 432, 16 Wkly. Rep. 465; Goodright *v.* Cordwent, 6 T. R. 219, 3 Rev. Rep. 161; Roe *v.* Harrison, 2 T. R. 425, 1 Rev. Rep. 513.

Canada.—Black *v.* Allan, 17 U. C. C. P. 240; Roe *v.* Southard, 10 U. C. C. P. 488. See Soper *v.* Littlejohn, 31 Can. Sup. Ct. 572; McDonald *v.* Peck, 17 U. C. Q. B. 270.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 345.

But see Fleming *v.* Fleming Hotel Co., (N. J. Ch. 1905) 61 Atl. 157, holding that the acceptance of rent from the receiver of the lessee while he was in possession did not of itself constitute a waiver.

Recovery of rent by warrant also constitutes a waiver. Wood *v.* Long, 33 Leg. Int. (Pa.) 410.

But when a bond has been given to pay rent during the pendency of an ejectment suit, the acceptance of such rent does not amount to a waiver of the right to insist upon all forfeitures down to the time of the trial of the action to recover possession. Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649.

3. *California.*— Silva *v.* Campbell, 84 Cal. 420, 24 Pac. 316.

Illinois.—Kew *v.* Trainor, 50 Ill. App. 629.

Missouri.—Walker *v.* Engler, 30 Mo. 130.

New Jersey.—West Shore R. Co. *v.* Wenner, 70 N. J. L. 233, 57 Atl. 408, 103 Am. St. Rep. 801 [*affirmed* in 71 N. J. L. 682, 60 Atl. 1134].

New York.—Keeler *v.* Davis, 5 Duer 507; Jackson *v.* Brownson, 7 Johns. 227, 5 Am. Dec. 258.

United States.—Mulligan *v.* Hollingsworth, 99 Fed. 216, holding that knowledge of a son of the lessor not shown to have been his agent is not sufficient to charge the lessor with it.

England.—Hume *v.* Kent, 1 Ball & B. 554; Goodright *v.* Davids, Cowp. 803; Doe *v.* Batten, Cowp. 243, 9 East 314 note, 9 Rev. Rep. 570 note; Roe *v.* Harrison, 2 T. R. 425, 1 Rev. Rep. 513.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 345.

4. Morrison *v.* Smith, 90 Md. 76, 44 Atl. 1031; Dobson *v.* Sootheran, 15 Ont. 15. See also Cochran *v.* Philadelphia Mortg., etc., Co., (Nebr. 1903) 96 N. W. 1051. *Contra*, as to acceptance of rent as waiver of forfeiture for failure to pay such rent see Bacon *v.* Western Furniture Co., 53 Ind. 229; Coon *v.* Brickett, 2 N. H. 163.

It follows as of course that an acceptance of accrued rent, accompanied by an express agreement that no breach of a covenant or condition thereby is waived, does not affect the lessor's right to enter for breach of a condition. Miller *v.* Prescott, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434; Kimball *v.* Rowland, 6 Gray (Mass.) 224.

The recovery of a judgment for rent after forfeiture is not a waiver of such forfeiture. Campbell *v.* McElevey, 2 Disn. (Ohio) 574; Scott *v.* Wason, 2 Ohio Dec. (Reprint) 460, 3 West. L. Month. 148.

The lessor's election to forfeit the lease cannot be retracted without a request on the part of the tenant, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeiture, of rent which accrued before does not amount to such a request. Denison *v.* Maitland, 22 Ont. 166.

5. Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100; Hunter *v.* Osterhoudt, 11 Barb. (N. Y.) 33; Bleecker *v.* Smith, 13 Wend. (N. Y.) 530; Price *v.* Worwood, 4 H. & N. 512, 5 Jur. N. S. 472, 28 L. J. Exch. 329, 7 Wkly. Rep. 506; Denison *v.* Maitland, 22 Ont. 166.

6. Robbins *v.* Conway, 92 Ill. App. 173; Frazier *v.* Caruthers, 44 Ill. App. 61; Carraher *v.* Bell, 7 Wash. 81, 34 Pac. 469.

7. Jones *v.* Durrer, 96 Cal. 95, 30 Pac.

use of the premises,[8] a covenant to insure the premises,[9] or a covenant to repair.[10] The breach of a covenant against subletting is not a continuing one so far as there is only one subletting,[11] but a lessor does not, by waiving his reëntry on one underletting, lose his right to reënter on a subsequent underletting.[12] A covenant against assigning the lease is not a continuing one.[13]

(D) *Time of Acceptance.* The acceptance of rent after a lease has been forfeited is not a waiver.[14] Thus acceptance of rent after an ejectment suit[15] or other action to enforce the forfeiture[16] has been brought, or after a reëntry,[17] is no waiver unless otherwise provided by statute. But while the acceptance of rent accruing after a breach of the lease may not restore the lease, where the landlord has avoided it by a judgment, yet it is a parol acknowledgment of the tenancy.[18]

(E) *As Affected by Intention of Lessor.* The effect of acceptance of rent which has subsequently accrued as a waiver cannot be changed by statements of the lessor that he does not intend to waive his right to a forfeiture.[19]

(IV) *Demand For, or Proceedings to Collect, Rent.* A mere demand for rent accruing after the occurrence of the ground of forfeiture,[20] or an action

1027; Alexander *v.* Hodges, 41 Mich. 691, 3 N. W. 187; Manice *v.* Millen, 26 Barb. (N. Y.) 41; Jackson *v.* Allen, 3 Cow. (N. Y.) 220; Doe *v.* Jones, 5 Exch. 498, 19 L. J. Exch. 405. See also Penton *v.* Barnett, 67 L. J. Q. B. 11, 46 Wkly. Rep. 33. *Compare* Buford *v.* Weigel, 3 Ohio S. & C. Pl. Dec. 55, 2 Ohio N. P. 285.

A covenant of the lessee to build within a certain period is not a continuing covenant, and a forfeiture for its breach is waived by acceptance of rent after the period has elapsed. McGlynn *v.* Moore, 25 Cal. 384.

8. *Minnesota.*— Gluck *v.* Elkan, 36 Minn. 80, 30 N. W. 446.

Missouri.—Farwell *v.* Easton, 63 Mo. 446.

Rhode Island.—Granite Bldg. Assoc. *v.* Greene, 25 R. I. 48, 54 Atl. 792.

United States.—Mulligan *v.* Hollingsworth, 99 Fed. 216.

England.—Doe *v.* Woodbridge, 9 B. & C. 376, 7 L. J. K. B. O. S. 263, 4 M. & R. 303, 28 Rev. Rep. 426, 17 E. C. L. 173.

Canada.—Ainley *v.* Balsden, 14 U. C. Q. B. 535.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 345.

9. Doe *v.* Gladwin, 6 Q. B. 953, 9 Jur. 508, 14 L. J. Q. B. 189, 51 E. C. L. 953.

10. Gluck *v.* Elkan, 36 Minn. 80, 30 N. W. 446; Doe *v.* Jackson, 2 Stark. 293, 3 E. C. L. 415; Doe *v.* Bliss, 4 Taunt. 735. But see Holderness *v.* Lang, 11 Ont. 1, holding that the breaking of a wall was an act complete in itself so that if it was once waived it was waived forever.

11. Ireland *v.* Nichols, 46 N. Y. 413 [*affirming* 2 Sweeny 289]; McKildoe *v.* Darracott, 13 Gratt. (Va.) 278; Doe *v.* Bliss, 4 Taunt. 735.

Consent to one sublease as consent to subsequent sublease see *supra*, IV, B, 1, f, (IV).

12. *Massachusetts.*— Seaver *v.* Coburn, 10 Cush. 324.

New York.— Ireland *v.* Nichols, 46 N. Y. 413 [*affirming* 2 Sweeny 289].

Rhode Island.— Farr *v.* Kenyon, 20 R. I. 376, 39 Atl. 241.

Virginia.— McKildoe *v.* Darracott, 13 Gratt. 278.

England.— Doe *v.* Bliss, 4 Taunt. 735.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 345.

13. Murray *v.* Harway, 56 N. Y. 337, holding that a waiver of the right of forfeit precluded the right to object to a subsequent assignment by the assignee. See also Porter *v.* Merrill, 124 Mass. 534.

Consent to one assignment as consent to others see *supra*, IV, B, 1, f, (IV).

14. Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100. See also Sexton *v.* Boyle, Vern. & S. 414.

15. Doe *v.* Meux, 4 B. & C. 606, 10 E. C. L. 722, 1 C. & P. 346, 12 E. C. L. 207, 7 D. & R. 98, 4 L. J. K. B. O. S. 4, 28 Rev. Rep. 426; McMullen *v.* Wannatto, 24 Ont. 625. See also Grimwood *v.* Moss, L. R. 7 C. P. 360, 41 L. J. C. P. 239, 27 L. T. Rep. N. S. 268, 20 Wkly. Rep. 972; Laxton *v.* Rosenberg, 11 Ont. 199.

16. Cleve *v.* Mazzoni, 45 S. W. 88, 19 Ky. L. Rep. 2001 (after suing out writ of forcible entry); Importers', etc., Co. *v.* Christie, 5 Rob. (N. Y.) 169.

Payment or tender of rent as defense to summary dispossession see *infra*, X, C, 7, f.

17. Thompson *v.* Baskerville, 40 U. C. Q. B. 614.

18. Crawford *v.* Waters, 46 How. Pr. (N. Y.) 210.

19. Dahm *v.* Barlow, 93 Ala. 120, 9 So. 598; Gulf, etc., R. Co. *v.* Settegast, 79 Tex. 256, 15 S. W. 228; Croft *v.* Lumley, 6 H. L. Cas. 672, 4 Jur. N. S. 903, 27 L. J. Q. B. 321, 6 Wkly. Rep. 523, 10 Eng. Reprint 1459; Strong *v.* Stringer, 61 L. T. Rep. N. S. 470.

20. Camp *v.* Scott, 47 Conn. 366; Doe *v.* Birch, 5 L. J. Exch. 185, 1 M. & W. 402, 1 Tyrw. & G. 169. But see Blyth *v.* Bennet, 13 C. B. 178, 22 L. J. C. P. 79, 76 E. C. L. 178, holding that a demand for rent subsequent to the expiration of a notice to quit was not necessarily a waiver of the notice,

to recover rent accruing after such date,[21] is a waiver of the right to terminate the tenancy, as well as an acceptance of rent; but it is not a waiver where the demand or action relates to rent which accrued before the ground of forfeiture existed.[22] A distress for rent, which accrued before or after the cause of forfeiture, waives the forfeiture because it affirms the existence of the tenancy,[23] and this is so, although insufficient goods were found to satisfy the demand;[24] but the distress is not a waiver of the right to forfeit for breaches of covenant occurring thereafter.[25]

(v) *LAPSE OF TIME.* The lapse of time after knowledge of a breach by the lessee authorizing the lessor to terminate the lease may be so great as to constitute a waiver of the right to declare a forfeiture,[26] or at least to raise a presumption of a license or other act constituting a waiver;[27] and it has been held that the lessor may waive the forfeiture by neglecting to assert his right within a reasonable time after the default,[28] and of course it must be exercised within the term.[29]

(vi) *WAIVER IN PART.* Where the tenant has incurred a forfeiture of the demised premises the landlord cannot enforce the forfeiture against a part and waive it as to the rest of the premises.[30]

h. Relief Against Forfeiture. Where compensation can be fully made, equity will generally relieve against a forfeiture.[31] For instance equity will relieve against a forfeiture for non-payment of rent where under the circumstances it would be inequitable, and full compensation can be made for the tenant's default[32]

but that it was a question of intention to be left to the jury.

21. Alexander *v.* Touhy, 13 Kan. 64; Dendy *v.* Nicholl, 4 C. B. N. S. 376, 27 L. J. C. P. 220, 6 Wkly. Rep. 502, 93 E. C. L. 376.

22. Campbell *v.* McElevey, 2 Disn. (Ohio) 574.

23. Chase *v.* Knickerbocker Phosphate Co., 32 N. Y. App. Div. 400, 53 N. Y. Suppl. 220; Conway *v.* Starkweather, 1 Den. (N. Y.) 113; Campbell *v.* McElevey, 2 Disn. (Ohio) 574; McKildoe *v.* Darracott, 13 Gratt. (Va.) 278; Ward *v.* Day, 5 B. & S. 359, 33 L. J. Q. B. 254, 10 L. T. Rep. N. S. 578, 12 Wkly. Rep. 829, 117 E. C. L. 359; Pennant's Case, 3 Coke 64; Zouch *v.* Willingale, 1 H. Bl. 311, 2 Rev. Rep. 770; Doe *v.* Johnson, 1 Stark. 411, 18 Rev. Rep. 791, 2 E. C. L. 159. *Compare* Becker *v.* Werner, 98 Pa. St. 555, holding that where there are several grounds of forfeiture, including failure to pay rent and taxes, and the lease provides that the lessor may distrain either for rent or taxes in arrear, the lessor may distrain for rent in arrear and at the same time proceed to forfeit the lease for unpaid taxes.

24. Camp *v.* Scott, 47 Conn. 366; Jackson *v.* Sheldon, 5 Cow. (N. Y.) 448 [*followed* in Wilder *v.* Ewbank, 21 Wend. (N. Y.) 587]. *Contra*, Thomas *v.* Lulham, [1895] 2 Q. B. 400, 59 J. P. 709, 64 L. J. Q. B. 720, 73 L. T. Rep. N. S. 146, 14 Reports 692, 43 Wkly. Rep. 689. See Brewer *v.* Eaton, 3 Dougl. 230, 26 E. C. L. 157.

25. Doe *v.* Peck, 1 B. & Ad. 428, 9 L. J. K. B. O. S. 60, 20 E. C. L. 546.

26. Catlin *v.* Wright, 13 Nebr. 558, 14 N. W. 530. But see Calderwood *v.* Brooks, 28 Cal. 151, holding that a forfeiture of a lease is not waived in consequence of the lessee's holding over and no notice to quit being given, unless the holding over was under such circumstances that the court would be justified in finding that a new term had been created between the parties.

27. Gibson *v.* Doeg, 2 H. & N. 615, 27 L. J. Exch. 37, 6 Wkly. Rep. 107, so holding where twenty years had elapsed.

28. Catlin *v.* Wright, 13 Nebr. 558, 14 N. W. 530. See also Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489.

29. Cheatham *v.* Plinke, 1 Tenn. Ch. 576. But see Calderwood *v.* Brooks, 28 Cal. 151.

30. Ocean Grove Land Assoc. *v.* Berthall, 62 N. J. L. 88, 40 Atl. 779.

31. See EQUITY, 16 Cyc. 77, 78.

32. *Illinois.*— Palmer *v.* Ford, 70 Ill. 369.

Indiana.— Bacon *v.* Western Furniture Co., Wils. 567.

Kentucky.— Wilson *v.* Jones, 1 Bush 173.

Massachusetts.— Mactier *v.* Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323; Lilley *v.* Fifty Associates, 101 Mass. 432.

New Jersey.— Thropp *v.* Field, 26 N. J. Eq. 82. See also Warne *v.* Wagenor, (Ch. 1888) 15 Atl. 307.

New York.— Giles *v.* Austin, 62 N. Y. 486; Horton *v.* New York Cent., etc., R. Co., 12 Abb. N. Cas. 30.

Pennsylvania.— Merrill *v.* Trimmer, 2 Pa. Co. Ct. 49; Times Co. *v.* Siebrecht, 15 Phila. 235; Cogley *v.* Browne, 15 Phila. 162.

Wisconsin.— Sunday Lake Min. Co. *v.* Wakefield, 72 Wis. 264, 39 N. W. 136, holding that relief will be granted, although the property is situated in another state, and the court having jurisdiction of the parties cannot restore possession of it.

United States.— Kansas City Elevator Co. *v.* Union Pac. R. Co., 17 Fed. 200, 3 McCrary 463.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 342.

on payment by the tenant of the rent due and costs and damages;[33] but relief will not ordinarily be granted against a forfeiture for the breach of other covenants in a lease,[34] in the absence of equitable circumstances, such as accident, mistake, or justifiable reliance on the conduct of the lessor.[35] Relief from a forfeiture for the non-payment of rent is not a matter of right, however, and may be refused on collateral equitable grounds,[36] such as delay in seeking relief;[37] and relief will not be granted after the term has expired by the efflux of time, even though the lease gives an option of purchase to be exercised during the term, which the lessee had attempted to exercise after the forfeiture.[38] Under some circumstances relief may be granted by a court of law as well as by a court of equity.[39]

Relief from forfeiture for breach of particular covenants in the lease see EQUITY, 16 Cyc. 79.

Where by accident or mistake the covenant in a lease is broken, and the lessors have not been in fact injured and can be put *in statu quo* equity will relieve against a forfeiture. Mactier *v.* Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323.

A judgment against the lessee, whether in an action of unlawful detainer (Abrams *v.* Watson, 59 Ala. 524) or in ejectment (Garner *v.* Hannah, 6 Duer (N. Y.) 262) does not preclude the granting of equitable relief against a forfeiture for non-payment of rent.

Pendency of an ejectment suit does not prevent a separate equitable suit to obtain relief from the forfeiture, although the lessee has paid up the arrears pending the suit so that he might seek relief by application in the ejectment suit for leave to file a supplemental answer. Giles *v.* Austin, 62 N. Y. 486 [*affirming* 38 N. Y. Super. Ct. 215, 46 How. Pr. 269].

Forfeiture for non-payment of taxes will generally not be relieved against (see EQUITY, 16 Cyc. 79); but where the payment of taxes by the lessee is made a part of the rental consideration of a lease, equity will relieve from a forfeiture for such non-payment equally with a forfeiture for the non-payment of rent as such. Webb *v.* King, 21 App. Cas. (D. C.) 141.

Decree.— Where a decree relieves against a forfeiture for failure to perform the conditions of a lease, a subsequent purchaser of the leasehold interest, or his assigns, who likewise fails to carry out such conditions, will not be entitled to avail himself thereof. Consolidated Coal Co. *v.* Schaefer, 31 Ill. App. 364 [*affirmed* in 135 Ill. 210, 25 N. E. 788]. A default decree in a suit to enjoin the enforcement of a forfeiture of a lease for a breach of condition by cutting timber of trifling value will not be opened solely to enable defendant to make a defense for the purpose of proceeding at law to enforce the forfeiture. Baxter *v.* Lansing, 7 Paige (N. Y.) 350.

Right to relief, and procedure, under English statutes see Imray *v.* Oaksnette, [1897] 2 Q. B. 218, 66 L. J. Q. B. 544, 76 L. T. Rep. N. S. 632, 45 Wkly. Rep. 681; Cholmeley School *v.* Sewell, [1894] 2 Q. B. 906, 58 J. P. 531, 63 L. J. Q. B. 820, 71 L. T. Rep. N. S. 88, 10 Reports 368; Hare *v.* Elms, [1893] 1 Q. B. 604, 57 J. P. 309, 62 L. J. Q. B. 187, 68 L. T. Rep. N. S. 223, 5 Reports 189, 41 Wkly. Rep. 297; Burt *v.* Gray, [1891] 2 Q. B. 98, 60 L. J. Q. B. 664, 65 L. T. Rep. N. S. 229, 39 Wkly. Rep. 429; Croft *v.* London, etc., Banking Co., 14 Q. B. D. 347, 49 J. P. 356, 54 L. J. Q. B. 277, 52 L. T. Rep. N. S. 374; *Ex p.* Gould, 13 Q. B. D. 454, 51 L. T. Rep. N. S. 368, 1 Morr. Bankr. Cas. 168; Ewart *v.* Fryer, [1901] 1 Ch. 499, 70 L. J. Ch. 138, 83 L. T. Rep. N. S. 551, 49 Wkly. Rep. 145; Howard *v.* Fanshawe, [1895] 2 Ch. 581, 64 L. J. Ch. 666, 73 L. T. Rep. N. S. 77, 13 Reports 663, 43 Wkly. Rep. 645; North London Freehold Land, etc., Co. *v.* Jacques, 48 J. P. 505, 49 L. T. Rep. N. S. 659, 32 Wkly. Rep. 283; Creswell *v.* Davidson, 56 L. T. Rep. N. S. 811; Scott *v.* Brown, 51 L. T. Rep. N. S. 746.

33. Abrams *v.* Watson, 59 Ala. 524; Atkins *v.* Chilson, 11 Metc. (Mass.) 112. See Bowser *v.* Colby, 1 Hare 109, 5 Jur. 1106, 11 L. J. Ch. 132, 23 Eng. Ch. 109, 66 Eng. Reprint 969, holding that if the bill is dismissed it would seem that the arrears paid into court should be repaid to plaintiff.

34. See EQUITY, 16 Cyc. 79, note 75.

35. See, generally, EQUITY, 16 Cyc. 80 note 82. See also Gordon *v.* Richardson, 185 Mass. 492, 70 N. E. 1027, 69 L. R. A. 867; Lundin *v.* Schoeffel, 167 Mass. 465, 45 N. E. 933; Baxter *v.* Lansing, 7 Paige (N. Y.) 350; Eastern Tel. Co. *v.* Dent, [1899] 1 Q. B. 835, 68 L. J. Q. B. 564, 80 L. T. Rep. N. S. 459; Imray *v.* Oaksnette, [1897] 2 Q. B. 218, 66 L. J. Q. B. 544, 76 L. T. Rep. N. S. 632, 45 Wkly. Rep. 681; Barrow *v.* Isaacs, [1891] 1 Q. B. 417, 55 J. P. 517, 60 L. J. Q. B. 179, 64 L. T. Rep. N. S. 686, 39 Wkly. Rep. 338; Flattery *v.* Anderson, 12 Ir. Eq. 218; North Staffordshire Steel, etc., Co. *v.* Camoys, 11 Jur. N. S. 555; Pearson *v.* Hoghton, 3 Y. & J. 413; McLaren *v.* Kerr, 39 U. C. Q. B. 507.

36. Coventry *v.* McLean, 22 Ont. 1 [*affirmed* in 21 Ont. App. 176].

37. Coventry *v.* McLean, 22 Ont. 1. See also Webb *v.* King, 21 App. Cas. (D. C.) 141.

38. Coventry *v.* McLean, 22 Ont. 1.

39. Atkins *v.* Chilson, 11 Metc. (Mass.) 112 (holding that a court of law may stay proceedings on a writ of entry brought to enforce a forfeiture for failure to pay rent, in support of an equitable defense, upon the

8. Surrender[40] — **a. Definition.** A surrender, as the term is used in the law of landlord and tenant, is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties.[41] The rescission of a lease, when by express words, is called an express surrender or a surrender in fact;[42] and when by acts so irreconcilable to a continuance of the tenure as to imply the same thing it is called a surrender by operation of law.[43]

b. Express Surrender — (i) *Sufficiency in General.* An express surrender, sometimes called a surrender in fact, as distinguished from a surrender by operation of law, is usually required to be in writing.[44] No particular form of words is necessary, nor is it required that there should be a formal delivery or cancellation of the deed or instrument which created the estate to be surrendered.[45] All that is necessary is the agreement of the proper parties manifesting such an intent followed by a yielding up of possession to the lessor.[46] There must, however, be a consideration for the surrender.[47]

tender of the rent and costs); Buckley *v.* Beigle, 8 Ont. 85.

Relief under English Common Law Procedure Act see Hare *v.* Elms, [1893] 1 Q. B. 604, 57 J. P. 309, 62 L. J. Q. B. 187, 68 L. T. Rep. N. S. 223, 5 Reports 189, 41 Wkly. Rep. 297; Croft *v.* London, etc., Banking Co., 14 Q. B. D. 347, 49 J. P. 356, 54 L. J. Q. B. 277, 52 L. T. Rep. N. S. 374; Howard *v.* Fanshawe, [1895] 2 Ch. 581, 64 L. J. Ch. 666, 73 L. T. Rep. N. S. 77, 13 Reports 663, 43 Wkly. Rep. 645.

40. **As terminating particular tenancies:** Tenancies from year to year see *infra*, IX, C, 6, b. Tenancies from month to month see *infra*, IX, D, 3. Tenancies at will see *infra*, IX, F, 7.

Duty of tenant to surrender at expiration of term see *supra*, VII, B, 1, a, (VII).

Right of lessee to abandon premises because of untenantable condition see *supra*, VII, A, 4.

Surrender as condition precedent to right to deny landlord's title see *supra*, III, G, 9, b.

Liability for rent as affected by surrender see *supra*, VIII, A, 5, b.

41. Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92; Beall *v.* White, 94 U. S. 382, 24 L. ed. 173.

42. McKinney *v.* Reader, 7 Watts (Pa.) 123.

43. McKinney *v.* Reader, 7 Watts (Pa.) 123.

44. See Frauds, Statute of, 20 Cyc. 218, 219.

Seal.— The surrender need not be under seal, although the lease was under seal (Allen *v.* Jaquish, 21 Wend. (N. Y.) 628, holding that a subsequent unsealed agreement to relinquish, upon failure to perform certain stipulations, a lease duly executed under seal for a term of years is inoperative as a defeasance, but valid as a contingent surrender); especially where the lease was not required to be under seal (Peters *v.* Barnes, 16 Ind. 219).

45. Greider's Appeal, 5 Pa. St. 422.

Surrender or disclaimer. — Tenants signed the following instrument: "We do hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, use, trust, term, and terms of years whatsoever; and possession of that message called B." It was held a surrender, and not a disclaimer. Doe *v.* Stagg, 5 Bing. N. Cas. 564, 9 L. J. C. P. 73, 7 Scott 690, 35 E. C. L. 304.

Time when surrender is effected.— A written agreement for surrender and for an arbitration of the amount to be paid for such surrender amounts to an abandonment of the lease by mutual consent, at the moment of its execution, notwithstanding the arbitration fails. Harris *v.* Hiscock, 91 N. Y. 340.

Signing a receipt for rent which recites that the lease is terminated and the payment received in full for all claims under it precludes the lessor, in the absence of fraud, from claiming that he thought he was signing a mere receipt and that he is bound to that extent only. Jenkins *v.* Clyde Coal Co., 82 Iowa 618, 48 N. W. 970.

The burden of proving an alleged agreement to surrender is on the party who alleges such agreement. Hart *v.* Jost, 27 Nova Scotia 243.

Evidence.— The giving of a receipt for rent, expressed to be on account, and its acceptance by the lessee, are inconsistent with a mutual agreement claimed to have been entered into at that time for a surrender of the premises. Hart *v.* Jost, 27 Nova Scotia 243.

46. Greider's Appeal, 5 Pa. St. 422.

Intention.— Even where there is an abandonment pursuant to a parol agreement with the lessee, it is necessary to show that the abandonment was with the intention of surrendering the term. McKenzie *v.* Lexington, 4 Dana (Ky.) 129.

47. Creighton *v.* Finlayson, 46 Nebr. 457, 64 N. W. 1103; Wallace *v.* Patton, 12 Cl. & F. 491, 8 Eng. Reprint 1501. See also Goldsmith *v.* Schroeder, 93 N. Y. App. Div. 206, 87 N. Y. Suppl. 558.

Sufficiency.— An agreement to surrender possession to the purchaser of the fee on the payment of a certain sum is founded on a sufficient consideration to be enforceable by the tenant. Bogert *v.* Dean, 1 Daly (N. Y.) 259. See also Ambler *v.* Owen, 19 Barb. (N. Y.) 145.

(II) *AGREEMENT TO SURRENDER.* The surrender may be conditional, to take effect *in futuro.*[48] But a mere agreement for a surrender where not executed does not operate as a surrender,[49] although the terms of a surrender may be settled in advance by parol so as to be enforceable after the execution of the surrender.[50]

(III) *DESTRUCTION OR SURRENDER OF WRITTEN LEASE.* The mere surrender of the lease as a document, or the destruction of the lease as a paper, by the consent of the parties, does not constitute a surrender so as to terminate the relationship,[51] since the cancellation of the lease may be evidence of the surrender, but it is not itself a surrender.[52] But such fact is a strong circumstance to be considered in determining whether there has been a surrender by operation of law.[53] On the other hand, the cancellation of the lease by consent, before possession is taken thereunder, is effectual as a surrender, because the lessee has no actual possession to surrender.[54]

c. Surrender by Operation of Law — (I) *WHAT CONSTITUTES IN GENERAL.* While the definitions of what constitutes a surrender by operation of law differ somewhat in the language used, the rule may safely be said to be that a surrender is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made.[55] It has been said that the

48. Mundy *v.* Warner, 61 N. J. L. 395, 39 Atl. 697; Allen *v.* Jaquish, 21 Wend. (N. Y.) 628.

49. Duncan *v.* Moloney, 115 Ill. App. 522; National Union Bldg. Assoc. *v.* Brewer, 41 Ill. App. 223; O'Dougherty *v.* Fretwell, 11 U. C. Q. B. 65.

Revocation of license.— A mere license given without consideration, by a landlord to his tenant, to surrender the lease, may be revoked at any time before it is acted upon. Dunning *v.* Mauzy, 49 Ill. 368.

Breach of agreement.—An agreement by a tenant to surrender at some time in the future does not, if broken, give the landlord authority to enforce the agreement by summary proceedings, but he must resort to his action for damages. Fish *v.* Thompson, 129 Mich. 313, 88 N. W. 896.

50. Tobener *v.* Miller, 68 Mo. App. 569; Miller *v.* Dennis, 68 N. J. L. 320, 53 Atl. 394; Stotesbury *v.* Vail, 13 N. J. Eq. 390; Gore *v.* Wright, 8 A. & E. 118, 2 Jur. 840, 7 L. J. Q. B. 147, 3 N. & P. 243, 1 W. W. & H. 266, 35 E. C. L. 509. But see Goelet *v.* Ross, 15 Abb. Pr. (N. Y.) 251, holding that a parol declaration by the landlord that on payment of rent to a certain date he would release the tenant is insufficient to show a surrender of a written lease, although payment was made as stipulated.

In addition to the agreement to surrender there must be an actual giving up of the lands to the landlord or other person for him. Fish *v.* Thompson, 129 Mich. 313, 88 N. W. 896.

Waiver of strict performance.— Failure to surrender the premises pursuant to an express agreement until the day after the day agreed upon may be waived. Bogert *v.* Dean, 1 Daly (N. Y.) 259.

There is a sufficient delivery of possession pursuant to an oral agreement to surrender a lease, where the lessee states that the lessor can consider the ground in his possession the same evening. Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

Construction of agreement to terminate as releasing tenant from accrued rent see Schork *v.* Moritz, 6 N. Y. Suppl. 554.

51. Brewer *v.* National Union Bldg. Assoc., 166 Ill. 221, 46 N. E. 752; Duncan *v.* Moloney, 115 Ill. App. 522; Rowan *v.* Lytle, 11 Wend. (N. Y.) 616; Doe *v.* Thomas, 9 B. & C. 288, 7 L. J. K. B. O. S. 214, 4 M. & R. 218. 17 E. C. L. 135; Roe *v.* York, 6 East 86, 2 Smith K. B. 166, 8 Rev. Rep. 413. See Little *v.* Dyer, 35 Ill. App. 85, holding that the delivery by the lessee of his duplicate lease to the lessor, upon surrendering the premises, does not cancel the warrant of attorney therein, in the absence of an agreement to that effect.

52. Gray *v.* Kaufman Dairy, etc., Co., 162 N. Y. 388, 56 N. E. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580 [*reversing* 16 N. Y. App. Div. 631, 45 N. Y. Suppl. 1141].

53. Acheson *v.* McMurray, 41 U. C. Q. B. 484; Doe *v.* Denison, 8 U. C. Q. B. 185.

54. Beidler *v.* Fish, 14 Ill. App. 29.

55. *Missouri.*— Churchill *v.* Lammers, 60 Mo. App. 244.

Nebraska.— Buffalo County Nat. Bank *v.* Hansom, 34 Nebr. 455, 51 N. W. 1035; Wheeler *v.* Walden, 17 Nebr. 122, 22 N. W. 346.

New Jersey.— Miller *v.* Dennis, 68 N. J. L. 320, 53 Atl. 394.

New York.— Gray *v.* Kaufman Dairy, etc., Co., 162 N. Y. 388, 56 N. E. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

United States.— Beall *v.* White, 94 U. S. 382, 24 L. ed. 173.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 353.

Another definition of a surrender by operation of law is where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward es-

surrender operates by way of estoppel independently of the intention of the parties,[56] but it has been held in many cases that there was no surrender where the parties did not intend a surrender.[57] A term created by deed may be surrendered by operation of law as well as one created by parol.[58] If a lease is surrendered conditionally, of course the surrender does not take effect unless the condition is performed.[59] There is no surrender by operation of law, where the lessor does nothing inconsistent with the continuance of the term in one of the lessees.[60] A surrender of a lease by operation of law is expressly excepted from the statute of frauds.[61]

(II) *Sale to Lessee or Transfer of Lease to Lessor.* A transfer of the demised premises by the lessor to the lessee constitutes a surrender.[62] So where a lessee in possession agrees to purchase on a certain day,[63] or actually does pur-

topped from disputing, and which would not be valid if his particular estate had continued to exist. Nelson *v.* Thompson, 23 Minn. 508; Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285; Acheson *v.* McMurray, 41 U. C. Q. B. 484.

The mutual and voluntary action of the parties is necessary to constitute a surrender. Wray-Austin Machinery Co. *v.* Flower, 140 Mich. 452, 103 N. W. 873.

If the lessor takes unqualified possession of demised premises and deals with them in a way wholly inconsistent with the continuance of an already existing and unexpired term there is a surrender by operation of law. Nelson *v.* Thompson, 23 Minn. 508.

Agreement may be inferred.— To effect a surrender by operation of law the agreement that the lease shall terminate need not be express but may be inferred from the conduct of the parties. Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394. The surrender may be shown by circumstances, such as the conversation, acts and conduct of the parties. Churchill *v.* Lammers, 60 Mo. App. 244. But where acts are relied on as evincing the understanding, they should be such as are not easily referable to a different intention. Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92; Griffith *v.* Hodges, 1 C. & P. 419, 12 E. C. L. 246.

The burden of showing the surrender of the lease by operation of law rests upon the person asserting it. Churchill *v.* Lammers, 60 Mo. App. 244.

Evidence admissible. — In determining whether certain acts constitute a surrender by operation of law any legal evidence is admissible which relates to the intention of the parties. De Hart *v.* Creveling, 57 N. J. L. 642, 32 Atl. 212; Wood *v.* Walbridge, 19 Barb. (N. Y.) 136.

Pleading.— The mere allegation "of a surrender of a term of years to the defendant by the plaintiff" obliges the defendant to prove an actual surrender. A surrender by operation of law must be so pleaded. McNeil *v.* Train, 5 U. C. Q. B. 91.

56. Welcome *v.* Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145; Stern *v.* Thayer, 56 Minn. 93, 57 N. W. 329; Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285. See also Gault *v.* Shepard, 14 Ont. App. 203.

The intentions of the landlord in accepting the premises are immaterial so long as his conduct is such as to amount in law to an acceptance of the surrender. White *v.* Berry, 24 R. I. 74, 52 Atl. 682.

57. Thomas *v.* Zumbalen, 43 Mo. 471; Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

It is only when the minds of the parties to a lease concur in the common intent of relinquishing the relation of landlord and tenant, and where they execute this intent by acts which are tantamount to a stipulation to put an end thereto, that a surrender by operation of law arises. Jones *v.* Rushmore, 67 N. J. L. 157, 50 Atl. 587; Meeker *v.* Spalsbury, 66 N. J. L. 60, 48 Atl. 1026.

Question for jury.— Generally, the question as to whether there is a surrender by operation of law, as depending on the intention of the parties, is one of fact for the jury. Brewer *v.* National Union Bldg. Assoc., 166 Ill. 221, 46 N. E. 752; White *v.* Walker, 31 Ill. 422; Boyd *v.* George, 2 Nebr. (Unoff.) 420, 89 N. W. 271; Conway *v.* Carpenter, 80 Hun (N. Y.) 428, 30 N. Y. Suppl. 315; Winant *v.* Hines, 14 Daly (N. Y.) 187. Whether a surrender was accepted by certain acts which might amount to taking exclusive possession by the lessor, or whether such acts were done under a provision in the lease allowing the lessor to enter to make repairs for the safety or preservation of the premises, is a question for the jury. Kneeland *v.* Schmidt, 78 Wis. 345, 47 N. W. 438, 11 L. R. A. 498.

Surrender as question for jury in action to recover rent see *infra*, VIII, B, 13, a.

58. Gault *v.* Shepard, 14 Ont. App. 203.

59. White *v.* Berry, 24 R. I. 74, 52 Atl. 682.

60. Felker *v.* Richardson, 67 N. H. 509, 32 Atl. 830, holding that where one of two joint lessees sold his interest to the other, and, on the lessor orally agreeing to release him, and receive rent from the other, abandons the premises, there was no surrender of the lease.

61. See FRAUDS, STATUTE OF, 20 Cyc. 222.

62. O'Dougherty *v.* Remington, 7 Hun (N. Y.) 514; Doe *v.* Hunter, 4 U. C. Q. B. 449. See also *supra*, IX, B, 4, d.

63. Denison *v.* Wertz, 7 Serg. & R. (Pa.) 372.

chase and pay a part of the price, and thereafter no rent is demanded until a refusal to pay the balance,[64] there is a surrender of the lease; but it is otherwise where there is a mere unexecuted agreement to sell, the conditions of which are not performed.[65] A sale of the lease to the lessor does not operate as a surrender of the term so as to extinguish the rent due.[66] An assignment of a lease by the lessee to the lessor to secure debts to mature before the end of the term is not a surrender of the lease.[67]

(III) *NEW LEASE TO ORIGINAL TENANT.* The acceptance by the tenant of a new lease from the lessor during the term of the first lease constitutes a surrender by operation of law,[68] unless the surrender would be contrary to the intention of the parties;[69] and it is immaterial whether there was any actual surrender of the old lease.[70] However, mere negotiations for a written lease do not constitute a surrender of a parol lease.[71] The new lease, to work a surrender, must be a valid one,[72] sufficient to pass an interest according to the contract and intention

64. Lewis *v.* Angermiller, 89 Hun (N. Y.) 65, 35 N. Y. Suppl. 69.

65. Grant *v.* Lynch, 14 U. C. Q. B. 148. See also Doe *v.* Stanion, 2 Gale 154, 5 L. J. Exch. 253, 1 M. & W. 695, 1 Tyrw. & G. 1065.

66. Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709. See also *supra*, IX, B, 5.

67. Breese *v.* Bange, 2 E. D. Smith (N. Y.) 474.

68. *Alabama.*— Otis *v* McMillan, 70 Ala. 46.

California.—Jungerman *v.* Rovee, 19 Cal. 354.

Illinois.—West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288, 43 N. E. 393; Ely *v.* Ely, 8 Ill. 532; Duncan *v.* Moloney, 115 Ill. App. 522.

Iowa.—Evans *v.* McKanna, 89 Iowa 362, 56 N. W. 527, holding that it is immaterial whether there was a new consideration for the agreement to cancel the original lease, both parties having recognized its termination and attempted to perform the new lease.

Nebraska.—Bowman *v.* Wright, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 588; Enyeart *v.* Davis, 17 Nebr. 228, 22 N. W. 449, holding that where the original lease was for five years and the second lease was for two years the rule was not affected by a clause that the lessee would yield up possession at the end of two years.

New York.— Holmquist *v.* Bavarian Star Brewing Co., 1 N. Y. App. Div. 347, 37 N. Y. Suppl. 380.

Oregon.—Fleischner *v.* Citizens' Real Estate, etc., Co., 25 Oreg. 119, 35 Pac. 174.

Pennsylvania.—Reading Trust Co. *v.* Jackson, 22 Pa. Super. Ct. 69.

West Virginia.— Wade *v.* South Penn Oil Co., 45 W. Va. 380, 32 S. E. 169.

United States.—Scott *v.* Hawsman, 21 Fed. Cas. No. 12,532, 2 McLean 180.

England.—Davison *v.* Stanley, 4 Burr. 2210; Roe *v.* York, 6 East 86, 2 Smith K. B. 166, 8 Rev. Rep. 413; McDonnell *v.* Pope, 9 Hare 705, 16 Jur. 771, 41 Eng. Ch. 705, 68 Eng. Reprint 697; Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285. See also Doe *v.* Poole, 11 Q. B. 713, 12 Jur. 450, 17 L. J. Q. B. 143, 63 E. C. L. 713; Crop *v.* Norton, 2 Atk. 74, Barn. 179, 9 Mod. 233, 26 Eng. Reprint 445.

Canada.—Caverhill *v.* Orvis, 12 U. C. C. P. 392; Acheson *v.* McMurray, 41 U. C. Q. B. 484; Doe *v.* McDougall, 3 U. C. Q. B. O. S. 177.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 354.

A second lease for a shorter term than the first lease will work a surrender. Enyeart *v.* Davis, 17 Nebr. 228, 22 N. W. 449; Wade *v.* South Penn Oil Co., 45 W. Va. 380, 32 S. E. 169.

New lease from grantee.— The surrender may consist in the taking of a new lease, with the landlord's consent, from the grantee of the landlord. Lewis *v.* Brooks, 8 U. C. Q. B. 576.

An agreement shortening the period of the tenancy creates a new tenancy, and its acceptance by the tenant works a surrender of the former tenancy. Fenner *v.* Blake, [1900] 1 Q. B. 426, 69 L. J. Q. B. 257, 82 L. T. Rep. N. S. 149, 48 Wkly. Rep. 392.

Dissolution of partnership.— Where one of a firm, which is the lessee, retires from the partnership and a new partner takes his place, and the new firm takes a new lease, there is a surrender by operation of law. Reg. v. Boyd, 4 Ont. Pr. 204.

69. Thomas *v.* Zumbalen, 43 Mo. 471; Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120. *Contra*, Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285, holding that the surrender takes place independently of, and even in spite of, the intention of the parties.

Presumptions.— The taking of a new lease by the lessee during the period of an existing demise creates a presumption that a surrender of the prior lease was intended. Smith *v.* Niver, 2 Barb. (N. Y.) 180; Abell *v.* Williams, 3 Daly (N. Y.) 17; Van Rensselaer *v.* Penniman, 6 Wend. (N. Y.) 569; Springstein *v.* Schermerhorn, 12 Johns. (N. Y.) 357.

70. Leyman *v.* Abeel, 16 Johns. (N. Y.) 30.

71. Luke *v.* Hake, 5 Daly (N. Y.) 15.

72. Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120; Schieffelin *v.* Carpenter, 15 Wend.

of the parties;[73] and hence a new parol lease which is invalid under the statute of frauds is insufficient,[74] although a parol lease is sufficient where it is a valid one.[75] An executed agreement for an increase[76] or reduction[77] in rent may constitute a surrender of the written lease in force when such contract was made, but not unless the oral agreement is based upon a new consideration.[78]

(iv) *Substitution of Tenants by Consent*—(a) *In General.*[79] The occupancy of the demised premises by some person other than the lessee is a circumstance showing a surrender;[80] but inasmuch as a new occupant may enter as the tenant of the lessee or as his assignee or even as a trespasser, so that his occupancy is consistent with the continuance of the first lease, it is necessary that it be clearly shown that the original lessee assented to the termination of his term.[81] Where a landlord grants a new lease to a stranger with the assent of the tenant during the existence of an outstanding lease, and the tenant gives up his own possession to the stranger who thereafter pays rent, or where in any other way a new tenant is by agreement of the tenant and the landlord substituted and accepted in place of the old there is a surrender by operation of law.[82] It is immaterial that the old lease is not canceled, or that the original lessee signs the

(N. Y.) 400; Doe *v.* Courtenay, 11 Q. B. 702, 12 Jur. 454, 17 L. J. Q. B. 151, 63 E. C. L. 702; Knight *v.* Williams, [1901] 1 Ch. 256, 70 L. J. Ch. 92, 83 L. T. Rep. N. S. 730, 49 Wkly. Rep. 427. See also John *v.* Jenkins, 1 Cromp. & M. 227, 2 L. J. Exch. 83, 3 Tyrw. 170, holding that a subsisting tenancy is not determined by an agreement, whereby the landlord lets to his tenant at a valuation to be made by two persons, and stipulating that the tenant is to give sureties to answer for the rent, where no valuation is made and no sureties are given. But see Doe *v.* Forwood, 3 Q. B. 627, 11 L. J. Q. B. 321, 43 E. C. L. 897; Brinkley *v.* McMumm, L. R. 32 Ir. 532; Doe *v.* Bridges, 1 B. & Ad. 847, 9 L. J. K. B. O. S. 113, 20 E. C. L. 715; Roe *v.* York, 6 East 86, 2 Smith K. B. 166, 8 Rev. Rep. 413, holding that there is a surrender even though the second lease is voidable if it is not void.

Where there is no valid acceptance of the new lease because it did not give the lessee the interest he contracted for and which he thought he was acquiring, there is no surrender. Chamberlain *v.* Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807 [*affirming* 5 Silv. Sup. 98, 8 N. Y. Suppl. 125].

73. Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

74. Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

75. Nachbour *v.* Wiener, 34 Ill. App. 237; Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400.

76. Nachbour *v.* Wiener, 34 Ill. App. 237; *Ex p.* Vitale, 47 L. T. Rep. N. S. 480. *Contra*, Pronguey *v.* Gurney, 37 U. C. Q. B. 347.

77. Dills *v.* Stobie, 81 Ill. 202; Donkersley *v.* Levy, 38 Mich. 54; Ossowski *v.* Wiesner, 101 Wis. 238, 77 N. W. 184. But see Oldewurtel *v.* Wisenfeld, 97 Md. 165, 54 Atl. 960 (holding that a mere reduction of rent, where the lessee continues in possession, according to the terms of the lease, and, without a new agreement, pays the rental reserved in the lease, without reduction, does not constitute an abandonment of the lease); Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120. *Contra*, Crowley *v.* Vitty, 7 Exch. 319, 21 L. J. Exch. 135; Pronguey *v.* Gurney, 37 U. C. Q. B. 347.

78. Bowman *v.* Wright, 64 Nebr. 661, 91 N. W. 580, 92 N. W. 580; Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; Coe *v.* Hobby, 72 N. Y. 141, 28 Am. Rep. 120; Taylor *v.* Winters, 6 Phila. (Pa.) 126.

79. As release from liability for rent see *supra*, VIII, A, 8.

80. Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394.

81. Kendall *v.* Hill, 64 N. H. 553, 15 Atl. 124; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394.

82. *Illinois.*—Hoerdt *v.* Hahne, 91 Ill. App. 514.

Indiana.— Donahoe *v.* Rich, 2 Ind. App. 540, 28 N. E. 1001.

Kansas.— Weiner *v.* Baldwin, 9 Kan. App. 772, 59 Pac. 4.

Michigan.— Drew *v.* Billings-Drew Co., 132 Mich. 65, 92 N. W. 774; Doty *v.* Gillett, 43 Mich. 203, 5 N. W. 89.

Minnesota.— Bowen *v.* Haskell, 53 Minn. 480, 55 N. W. 629.

New Jersey.— Wallace *v.* Kennelly, 47 N. J. L. 242; Cummings *v.* Adam, 4 N. J. L. J. 215.

New York.— Murray *v.* Shave, 2 Duer 182; Whitney *v.* Meyers, 1 Duer 266; Kedney *v.* Rohrbach, 14 Daly 54; Hawthorne *v.* Cursen, 18 Misc. 447, 41 N. Y. Suppl. 995 (holding that thereafter the tenant may recover money deposited as unliquidated damages in case of breach by him); James *v.* Coe, 61 N. Y. Suppl. 1099.

Wisconsin.—Commercial Hotel Co. *v.* Brill, 123 Wis. 638, 101 N. W. 1101.

England.— Nickells *v.* Atherstone, 10 Q. B. 944, 11 Jur. 778, 16 L. J. Q. B. 371, 59 E. C. L. 944; McDonnell *v.* Pope, 9 Hare 705, 16 Jur. 77, 41 Eng. Ch. 705, 68 Eng.

new lease as surety.[83] But a lease to a third person, to constitute a surrender, must be a valid one;[84] although, if valid, it is immaterial that the new lease is a parol one.[85]

(B) *Assignee or Sublessee.* Where the assignee of the lessee, or a sublessee, is, with the consent of both the original lessee and the lessor, substituted as the lessee, and the lessor expressly or impliedly agrees to look to him for the rent, there is a surrender.[86] But in such a case the acts of the landlord ought to

Reprint 697; Davison *v.* Gent, 1 H. & N. 744, 3 Jur. N. S. 342, 26 L. J. Exch. 122, 5 Wkly. Rep. 229; Doran *v.* Kenny, Ir. R. 3 Eq. 148; Page *v.* Mann, 6 L. J. K. B. O. S. 63. But see Creagh *v.* Blood, 8 Ir. Eq. 688, 3 J. & L. 138 (holding that the doctrine of Thomas *v.* Cook, 2 B. & Ald. 119, 2 Stark. 408, 20 Rev. Rep. 374, 3 E. C. L. 466, viz. surrender by operation of law resulting from acquiescence by the tenant in a new demise by the landlord is not to be extended); Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285.

Canada.— Acheson *v.* McMurray, 41 U. C. Q. B. 484; Crocker *v.* Sowden, 33 U. C. Q. B. 397; Strathey *v.* Crooks, 6 U. C. Q. B. O. S. 587.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 355.

Reason for rule.— As far as the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, which is inconsistent with the continuance of defendant's term. As far as the tenant is concerned he has been an active party in the transaction, not merely by consenting to the creation of the new relation between the landlord and new tenant, but by giving up possession, and so enabling the new tenant to enter. Nickells *v.* Atherstone, 10 Q. B. 944, 11 Jur. 778, 16 L. J. Q. B. 371, 59 E. C. L. 944.

Where the intention of both parties to the original lease was that such acts should not have the effect of terminating the lease, there is no surrender by operation of law. Bourdereaux *v.* Walker, 78 Ill. App. 63. See also Holman *v.* De Lin-River Finley Co., 30 Oreg. 428, 47 Pac. 708.

Giving up possession.— There is not a surrender of the existing lease unless the existing tenant gives up possession to the new tenant, at or about the time of the grant of the new lease. Wallis *v.* Hands, [1893] 2 Ch. 75, 62 L. J. Ch. 586, 68 L. T. Rep. N. S. 428, 3 Reports 351, 41 Wkly. Rep. 471.

Surrender inferred.—The surrender of premises by the tenant and their discharge by the landlord, and the acceptance of a third person as tenant, need not be proved directly by evidence of an agreement, but may be inferred from acts of parties or circumstances inconsistent with any other conclusion. Colton *v.* Gorham, 72 Iowa 324, 33 N. W. 76.

Conditional surrender.— A surrender by operation of law by substitution of tenants may be conditioned on the payment of rent by the new lessee so that if he does not pay the rent there will be no surrender. Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

83. James *v.* Coe, 31 Misc. (N. Y.) 653, 64 N. Y. Suppl. 1109 [*reversed* on other points in 32 Misc. 674, 66 N. Y. Suppl. 509].

84. Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

Validity to pass interest according to intention of parties.— The new lease must pass an interest according to the intention of the parties, notwithstanding the tenant has quit and the new lessee has taken possession. Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400. It must be sufficient to vest in the new lessee the estate or term contemplated by the agreement of the parties and bind him to pay the stipulated rent. Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

85. Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

86. *Alabama.*— Morgan *v.* McCollister, 110 Ala. 319, 20 So. 54.

Iowa.— Colton *v.* Gorham, 72 Iowa 324, 33 N. W. 76.

Michigan.— Logan *v.* Anderson, 2 Dougl. 101.

Minnesota.— Levering *v.* Langley, 8 Minn. 107.

Missouri.— Snyder *v.* Parker, 75 Mo. App. 529.

New York.— See House *v.* Burr, 24 Barb. 525.

Texas.— Ascarete *v.* Pfaff, 34 Tex. Civ. App. 375, 78 S. W. 974.

Virginia.— Prestons *v.* McCall, 7 Gratt. 121, holding that by taking a new lease the assignees were released from covenants in the original.

England.— Rex *v.* Banbury, 1 A. & E. 136, 3 L. J. M. C. 76, 3 N. & M. 292, 28 E. C. L. 85. See also Thomas *v.* Cook, 2 B. & Ald. 119, 2 Stark. 408, 20 Rev. Rep. 374, 3 E. C. L. 466 [*criticized* in Lyon *v.* Reed, 8 Jur. 762, 13 L. J. Exch. 377, 13 M. & W. 285].

See 32 Cent. Dig. tit. "Landlord and Tenant," § 356.

Payment by a direction of landlord.— The substitution of a sublessee as lessee by direction of the landlord who forbids him to pay any more rent to the original lessee, and tells him that he has taken the place off the lessee's hands, where he afterward collects all the rents of the subtenants, constitutes a surrender. Bailey *v.* Delaplaine, 1 Sandf. (N. Y.) 5.

But the lease of adjoining land to an assignee of the original lease is not a surrender, although the assignee moves the partition so as to include the original demise, where the bills for the rent of the part originally leased are made out to the original lessee and his assignee is not recognized. Apple-

receive the most favorable construction, and, unless they are absolutely incompatible with a continued existence of the lease, they should not be held to be so.[87] But the mere act of the lessor in accepting rent from the assignee or sublessee,[88] or consenting to the assignment and accepting the rent from the assignee,[89] does not constitute a surrender.

(v) *Abandonment and Resumption of Possession*—(a) *General Rule.* An abandonment of the premises by the tenant and an acceptance of the surrender by a resumption of possession by the landlord constitute a surrender by operation of law.[90] But a surrender cannot be implied by operation of law when the tenant still retains possession, as tenant, of the leased premises, or any material portion of the same.[91]

(b) *What Constitutes Surrender by Tenant.* There is an abandonment of the premises where there is such a relinquishment as justifies an immediate resumption of possession by the landlord.[92] There must be a real or symbolical delivery

ton *v.* O'Donnell, 173 Mass. 398, 53 N. E. 882.

87. Gault *v.* Shepard, 14 Ont. App. 203; Nixon *v.* Maltby, 7 Ont. App. 371.

Especially is this so where the original lease was to two or more, and one only transfers his interest and possession. Gault *v.* Shepard, 14 Ont. App. 203.

88. *Illinois.*— Bradley *v.* Walker, 93 Ill. App. 609; Hoerdt *v.* Hahne, 91 Ill. App. 514.

Massachusetts.— Brewer *v.* Dyer, 7 Cush. 337.

New Jersey.— Decker *v.* Hartshorn, 60 N. J. L. 548, 38 Atl. 678; Hunt *v.* Gardner, 39 N. J. L. 530.

New York.— Wilson *v.* Lester, 64 Barb. 431; Ballou *v.* Baxter, 4 Silv. Sup. 582, 8 N. Y. Suppl. 15; Wallace *v.* Dinniny, 11 Misc. 317, 32 N. Y. Suppl. 159; Cabot *v.* Ensign, 13 N. Y. Civ. Proc. 89. And see Jackson *v.* Brownson, 7 Johns. 227, 5 Am. Dec. 258.

Pennsylvania.—Hartnack *v.* James, 8 Phila. 317.

United States.— Slacum *v.* Brown, 22 Fed. Cas. No. 12,934, 5 Cranch C. C. 315.

England.— Copeland *v.* Watts, 1 Stark. 95, 2 E. C. L. 45.

Canada.— McLeod *v.* Darch, 7 U. C. C. P. 35.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 356.

Acceptance of rent as evidence.— Receipts for rent received by a landlord from a third party are evidence of a surrender by operation of law, putting an end to the liability of a former tenant. Laurance *v.* Faux, 2 F. & F. 435.

Acceptance of rent from receiver.— Bankruptcy proceedings against the lessee, and the subsequent payment of rent by his receiver, without taking a new lease, does not release the original lessor so as to enable him to escape liability for rent after an order of court requiring of the receiver to turn the property over to the lessee. Woodworth *v.* Harding, 75 N. Y. App. Div. 54, 77 N. Y. Suppl. 969.

Transfer of partner's interest.— The sale by one lessee to the other, or to a third person, and the formation of a new partnership or a corporation, and the receipt by the lessor of rent from the new firm or corporation, as tenants, does not amount to a surrender and acceptance. Ghegan *v.* Young, 23 Pa. St. 18. See Detroit Pharmacal Co. *v.* Burt, 124 Mich. 220, 82 N. W. 893.

Receipt for rent.— But if the landlord gives a receipt for rent, which expresses on its face to be for money paid as rent due, by the person paying it, as a tenant of the premises, there is a surrender by operation of law. Lawrence *v.* Faux, 2 F. & F. 435.

89. Rees *v.* Lowy, 57 Minn. 381, 59 N. W. 310; Ranger *v.* Bacon, 3 Misc. (N. Y.) 95, 22 N. Y. Suppl. 551. But see Jones *v.* Barnes, 45 Mo. App. 590, holding that, where a tenant is not under express covenant to pay rent to his landlord, and is only liable by reason of his use and occupation, such liability results from privity of estate, and if this is broken by his assignment of the lease with the consent of the landlord and acceptance of rent from the assignee, it is a surrender by operation of law.

90. Talbot *v.* Whipple, 14 Allen (Mass.) 177; Nelson *v.* Thompson, 23 Minn. 508; White *v.* Berry, 24 R. I. 74, 52 Atl. 682; Hart *v.* Pratt, 19 Wash. 560, 53 Pac. 711.

91. Burnham *v.* O'Grady, 90 Wis. 461, 63 N. W. 1049; Acheson *v.* McMurray, 41 U. C. Q. B. 484.

92. McKinney *v.* Reader, 7 Watts (Pa.) 123, holding that where the lessee absconded, and thereafter his family locked the premises and followed him, without leaving thereon property sufficient to pay the rent, there was such a surrender as authorized the landlord to resume possession. See also Byxbee *v.* Blake, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222; Gazzolo *v.* Chambers, 73 Ill. 75; Stevens *v.* Pantlind, 95 Mich. 145, 54 N. W. 716; Zigler *v.* McClellan, 15 Oreg. 499, 16 Pac. 179.

Acts showing surrender.— Intrusting the premises to the care of an agent of the lessor and stating an intention to vacate shows a surrender. Rogers *v.* Babcock, 139 Mich. 94, 102 N. W. 636. So a statement by the lessee that he does not intend to retain the premises longer and that the lessor can do as he pleases with them is sufficient to

of the possession of the entire building.[93] There is no surrender by the lessee where he keeps the key and leaves a portion of his goods on the premises,[94] nor where he merely surrenders the key to the lessor for a temporary purpose.[95]

(c) *Necessity For Acceptance.* To constitute a surrender by operation of law, there must not only be an abandonment by the tenant, but also an acceptance thereof by the landlord as a surrender.[96] It follows that a mere giving of the keys to the landlord does not of itself show a surrender.[97]

(d) *What Constitutes Acceptance* — (1) In General. An express agreement to accept the premises need not be shown, but the landlord's consent may be implied from circumstances and from the acts of the parties.[98] There must, however, be some unequivocal act on the part of the landlord which unmistakably evinces an intention on his part to terminate the lease and the relationship of landlord and tenant.[99] The advertising of the premises for sale with an offer of immediate possession to the purchaser does not show an acceptance of the surrender,[1] nor does the allowing third persons to occupy the premises temporarily

show the lessee's consent to a termination of the tenancy. Browder *v.* Phinney, 37 Wash. 70, 79 Pac. 598. So where the lessee before leaving the country told the lessor to take charge of the crop and pay himself the rent there was a surrender. Shahan *v.* Herzberg, 73 Ala. 59. The original tenant has no right to possession where, after requesting the lessor to cancel the lease on the destruction of the building, and after giving up possession, the lessor rebuilt and leased to third persons, the original lessee remaining silent, since the acts of the lessor must be deemed to have been with the lessee's assent. Wood *v.* Walbridge, 19 Barb. (N. Y.) 136. So if the tenant tells his landlord that he may rent the building, as their "agreement is at an end," and if, relying thereon, a second tenant acquires rights, the first tenant cannot claim possession. Com. *v.* Conway, 1 Brewst. (Pa.) 509.

Removal of the lessee by a warrant, where he is thereafter prevented by the landlord from reëntering, does not show such a relinquishment of possession as to constitute an abandonment. Larkin *v.* Avery, 23 Conn. 304.

93. Herrmann *v.* Curiel, 3 N. Y. App. Div. 511, 38 N. Y. Suppl. 343. See also Nachbour *v.* Wiener, 34 Ill. App. 237.

A delivery of the keys of the ground floor is not a symbolical delivery of possession to the upper floor to which access is not open from the lower floor. Herrmann *v.* Curiel, 3 N. Y. App. Div. 511, 38 N. Y. Suppl. 343. See also Green *v.* Kroeger, 67 Mo. App. 621.

Abandonment of part of premises.— But an abandonment of a sawmill, the continuous running of which by a tenant was the sole condition of the lease of the house, operated as an abandonment of the house, which would at the option of the landlord terminate the lease. Crawley *v.* Mullins, 48 Mo. 517.

94. Nonotuck Silk Co. *v.* Shay, 57 Ill. App. 542.

95. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112.

96. *Maryland.*— Biggs *v.* Stueler, 93 Md. 100, 48 Atl. 727.

Minnesota.— Lucy *v.* Wilkins, 33 Minn. 441, 23 N. W. 861.

New Jersey.— Jones *v.* Rushmore, 67 N. J. L. 157, 50 Atl. 587.

New York.— Morris *v.* Dayton, 84 N. Y. Suppl. 392.

Ohio.— Strong *v.* Schmidt, 15 Ohio Cir. Ct. 233, 8 Ohio Cir. Dec. 551.

Pennsylvania.— Teller *v.* Boyle, 132 Pa. St. 56, 18 Atl. 1069; Lipper *v.* Bouvé, 6 Pa. Super. Ct. 452, 41 Wkly. Notes Cas. 566; Jenkins *v.* Stone, 14 Montg. Co. Rep. 27.

Texas.—See Faseler *v.* Kothman, (Tex. Civ. App. 1902) 70 S. W. 321.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 364.

97. Robinson *v.* Henaghan, 92 Ill. App. 620; Tolle *v.* Orth, 75 Ind. 298, 39 Am. Rep. 147; Prentiss *v.* Warne, 10 Mo. 601; Carpenter *v.* Hall, 16 U. C. C. P. 90.

Delivery of key to the landlord's agent is not sufficient where there is no proof that the landlord accepted the key. Jackson *v.* Stewart, 31 Pa. Super. Ct. 58.

98. White *v.* Berry, 24 R. I. 74, 52 Atl. 682.

99. Stern *v.* Thayer, 56 Minn. 93, 57 N. W. 329; *In re* Panther Lead Co., [1896] 1 Ch. 978, 65 L. J. Ch. 499, 3 Manson 165, 44 Wkly. Rep. 573; Phené *v.* Popplewell, 12 C. B. N. S. 334, 8 Jur. N. S. 1104, 31 L. J. C. P. 235, 6 L. T. Rep. N. S. 247, 10 Wkly. Rep. 523, 104 E. C. L. 334. See Pierson *v.* Hughes, 87 N. Y. Suppl. 223, holding that, where tenants of a wharf gave their landlord a right of way for people to pass to a bath at the end of the wharf, the giving by the landlord to the city of a similar license after the tenants had abandoned the premises was not an acceptance by the landlord of the abandoned premises.

Notice to surety.—Where the landlord after the abandonment notifies the surety of the tenant that there is rent due and unpaid, and tenders him possession of the premises, and demands of him payment of the rent, there is no acceptance of the surrender. Lucy *v.* Wilkins, 33 Minn. 441, 23 N. W. 861.

1. Reeves *v.* McComeskey, 168 Pa. St. 571, 32 Atl. 96.

without rent after the abandonment.[2] But where the landlord tells the tenant to quit, and he does so, and the lessor takes possession, there is an accepted surrender.[3] So permission given the tenant by the landlord to leave property on the premises after notice of the tenant's departure is evidence of an acceptance.[4]

(2) Actual Possession. After an abandonment of the premises by the lessee, the lessor may reënter and take possession for certain purposes without such acts constituting an acceptance of the surrender.[5] There is no acceptance where he reënters merely to protect the property from waste and injuries by trespassers,[6] to make necessary repairs,[7] or to clean the premises.[8] But where the landlord makes alterations beyond the necessity for the preservation of the demised premises, there is an acceptance.[9] An absolute and unqualified taking of possession, however, shows an acceptance,[10] unless the landlord indicates to the tenant his purpose to hold him liable for the rent,[11] or unless the reëntry is in pursuance of an express provision of the lease authorizing the landlord to reënter upon the premises becoming vacant, and to relet them, and to apply the rent to the expenses of reëntering and reletting and to the rent due.[12]

(3) Acceptance of Keys. Evidence of the acceptance of the key by the landlord is admissible to show a surrender.[13] But the acceptance is not of itself ordinarily sufficient to show an acceptance of the surrender,[14] unless other facts tend to show that the intention of the landlord was to accept the surrender.[15] At

2. Hardison Whisky Co. *v.* Lewis, 114 Ga. 602, 40 S. E. 702.

3. Boyd *v.* George, 2 Nebr. (Unoff.) 420, 89 N. W. 271.

4. Stanley *v.* Koehler, 1 Hilt. (N. Y.) 354.

5. Requa *v.* Domestic Pub. Co., 11 Misc. (N. Y.) 322, 32 N. Y. Suppl. 125.

He may reënter for the purpose of taking care of the property, repairing the premises, cleaning the building, or to put a "For Rent" sign on the building without it constituting an acceptance. Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969.

6. Duffy *v.* Day, 42 Mo. App. 638.

7. Whitman *v.* Louten, 3 N. Y. Suppl. 754. But see MacKellar *v.* Sigler, 47 How. Pr. (N. Y.) 20.

Collection of rent and making repairs.— Mere collection of rents from subtenants and application thereof on rent due from the tenant, together with the making of small repairs after abandonment by the tenant, does not show a resumption of possession of the premises. Texas Loan Agency *v.* Fleming, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279.

8. Milling *v.* Becker, 96 Pa. St. 182.

9. Meeker *v.* Spalsbury, 66 N. J. L. 60, 43 Atl. 1026.

10. *Alabama.* — Rice *v.* Dudley, 65 Ala. 68.

Wisconsin.— Kneeland *v.* Schmidt, 78 Wis. 345, 47 N. W. 438, 11 L. R. A. 498.

United States.— Lamson Consol. Store Service Co. *v.* Bowland, 114 Fed. 639, 52 C. C. A. 335.

England.— Grimman *v.* Legge, 8 B. & C. 324, 6 L. J. K. B. O. S. 321, 2 M. & R. 438, 15 E. C. L. 164.

Canada.— Coffin *v.* Danard, 24 U. C. Q. B. 267.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 364.

Where the lessee offers to surrender and the lessor takes charge of the premises and collects rent from the sublessee, there is a surrender. Williamson *v.* Crossett, 62 Ark. 393, 36 S. W. 27.

Acts sufficient to show acceptance.—Acts of the landlord in taking possession, advertising the premises for rent, making repairs, and renting the premises, where done without consulting the tenant or making any claim on him for rent until thereafter, constitute an acceptance of the surrender of the term. White *v.* Berry, 24 R. I. 74, 52 Atl. 682.

11. Armour Packing Co. *v.* Des Moines Pork Co., 116 Iowa 723, 89 N. W. 196, 93 Am. St. Rep. 270; Nixon *v.* Maltby, 7 Ont. App. 371.

12. Jones *v.* Rushmore, 67 N. J. L. 157, 50 Atl. 587.

13. Elliott *v.* Aiken, 45 N. H. 30.

14. Stern *v.* Thayer, 56 Minn. 93, 57 N. W. 329 (holding that there was no surrender by operation of law, although the tenant before moving out informed the landlord that he would get a tenant, but the landlord told him not to do so as he had one in view, but that thereafter the landlord was unable to rent the premises); Lucy *v.* Wilkins, 33 Minn. 441, 23 N. W. 861; Ryan *v.* Jones, 2 Misc. (N. Y.) 65, 20 N. Y. Suppl. 842; Bowen *v.* Clarke, 22 Oreg. 566, 30 Pac. 430, 29 Am. St. Rep. 625. See also Sully *v.* Schmidt, 11 N. Y. Suppl. 694 [*reversed* on other grounds in 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659].

15. Dos Santos *v.* Hollinshead, 4 Phila. (Pa.) 57; Dodd *v.* Acklom, 7 Jur. 1017, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672; Acheson *v.* McMurray, 41 U. C. Q. B. 484.

Agreement. — An acceptance of the keys pursuant to an agreement to surrender shows an acceptance of the surrender. Whitehead *v.* Clifford, 5 Taunt. 518, 15 Rev. Rep. 579, 1 E. C. L. 266; Natchbolt *v.* Porter, 2 Vern. Ch. 112, 23 Eng. Reprint 682.

any event the acceptance of the key does not show an acceptance of the surrender where the landlord manifests a clear intention to hold the tenant for the rent.[16]

(4) Retention of Keys. The mere retention of keys, delivered to the landlord by mail or otherwise, does not show an acceptance of the surrender,[17] especially where the landlord has previously refused to accept the keys,[18] or where he notifies the tenant that he will rent the premises on the latter's account,[19] or will hold him for the rent.[20] But the retention of the keys in connection with other acts may show an acceptance of the surrender.[21]

(5) Attempt to Relet. The landlord's attempt to relet after an abandonment does not of itself show an acceptance of the surrender.[22]

(6) *Reletting.* Whether a reletting shows an acceptance of the surrender depends on whether the landlord relets on the account of the tenant or on his own account.[23] There is no acceptance of the surrender where the reletting is pursuant to a provision of the lease authorizing the reletting on the lessee's account, where the premises become vacant,[24] where the landlord informs the original tenant that he will hold him responsible for the rent,[25] or where other

The fact that the landlord objects to the removal does not prevent an acceptance of the surrender, where he thereafter accepts the keys, takes possession, repairs and remodels the building, and orders the tenants to remove their signs from the building. Lafferty *v.* Hawes, 63 Minn. 13, 65 N. W. 87.

Delivery of key to agent to relet.—An acceptance of the key by a landlord who declares himself satisfied therewith, and who resumes possession for the purpose of reletting, and then delivers the key to a person employed by him to relet, shows an acceptance of the surrender. Hegeman *v.* McArthur, 1 E. D. Smith (N. Y.) 147.

16. Scott *v.* Beecher, 91 Mich. 590, 52 N. W. 20; Morgan *v.* Smith, 70 N. Y. 537 [*affirming* 7 Hun 244]; Townsend *v.* Albers, 3 E. D. Smith (N. Y.) 560.

17. Thomas *v.* Nelson, 69 N. Y. 118; Diehl *v.* Lee, 7 Pa. Cas. 134, 9 Atl. 865; Carson *v.* Shiffer, 1 Lack. Leg. N. (Pa.) 399; Newton *v.* Speare Laundering Co., 19 R. I. 546, 37 Atl. 11; Cannan *v.* Hartley, 9 C. B. 634, 14 Jur. 577, 19 L. J. C. P. 323, 67 E. C. L. 634.

18. Withers *v.* Larrabee, 48 Me. 570; Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522.

But where a tenant left the key at the counting-house of the landlord, and the latter, although he at first refused to accept it, afterward put up a board to let the premises, and used the key to show them, and painted out the tenant's name on the front, it was held sufficient evidence of a surrender by operation of law. Reeve *v.* Bird, 1 C. M. & R. 31, 3 L. J. Exch. 282, 4 Tyrw. 612.

19. Doolittle *v.* Selkirk, 7 Misc. (N. Y.) 722, 28 N. Y. Suppl. 43.

20. Barkley *v.* McCue, 25 Misc. (N. Y.) 738, 55 N. Y. Suppl. 608; Bowen *v.* Clarke, 22 Oreg. 566, 30 Pac. 430, 29 Am. St. Rep. 625; Lane *v.* Nelson, 167 Pa. St. 602, 31 Atl. 864.

21. Welcome *v.* Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, painting front of building, obliterating tenant's signs, making repairs, and reletting for longer period than original lease, without notifying lessee. But see Livermore *v.* Eddy, 33 Mo. 547, holding that proceeding to repair and use the house does not constitute an acceptance.

22. *Illinois.*— Gaines *v.* McAdam, 79 Ill. App. 201.

Kansas.— Weiner *v.* Baldwin, 9 Kan. App. 772, 59 Pac. 40.

Louisiana.— See Vincent *v.* Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436.

Michigan.— Joslin *v.* McLean, 99 Mich. 480, 58 N. W. 467.

Missouri.— Buck *v.* Lewis, 46 Mo. App. 227.

Montana.— Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

New York.— Spies *v.* Voss, 16 Daly 171, 9 N. Y. Suppl. 532. But see Crane *v.* Edwards, 80 N. Y. App. Div. 333, 80 N. Y. Suppl. 747.

Pennsylvania.— Lane *v.* Nelson, 7 Kulp 286.

England.— Oastler *v.* Henderson, 2 Q. B. D. 575, 46 L. J. Q. B. 607, 37 L. T. Rep. N. S. 22; Redpath *v.* Roberts, 3 Esp. 225.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 364.

Compare Ledsinger *v.* Burke, 113 Ga. 74, 38 S. E. 313.

Putting up a "To Let" sign, making trifling repairs, and cleaning the premises does not show an acceptance. Ontario Industrial Loan, etc., Co. *v.* O'Dea, 22 Ont. App. 349.

But the taking of possession, repairing, and attempting to relet at an advanced rent, without demanding the monthly rent from the old tenant, shows an acceptance. Duffy *v.* Day, 42 Mo. App. 638.

23. Hays *v.* Goldman, 71 Ark. 251, 72 S. W. 563.

24. Hackett *v.* Richards, 13 N. Y. 138; Ogden *v.* Rowe, 3 E. D. Smith (N. Y.) 312; Gutman *v.* Conway, 45 Misc. (N. Y.) 363, 90 N. Y. Suppl. 290. See also Fitch *v.* Armour, 59 N. Y. Super. Ct. 413, 14 N. Y. Suppl. 319.

25. *Iowa.*—Brown *v.* Cairns, 107 Iowa 727, 77 N. W. 478.

acts or agreements show that the reletting was for the tenant's account.[26] Where nothing is said as to the reletting, and the original lessee is not notified and does not consent, and there is no provision in the lease in regard thereto, the general rule is that the reletting shows an acceptance of the surrender,[27] although the

Maryland.— Oldewurtel *v.* Wiesenfeld, 97 Md. 165, 54 Atl. 969.

Michigan.— Stewart *v.* Sprague, 71 Mich. 50, 38 N. W. 673, 76 Mich. 184, 42 N. W. 1088.

Mississippi.— Alsup *v.* Banks, 68 Miss. 664, 9 So. 895, 24 Am. St. Rep. 294, 13 L. R. A. 598.

New York.— Underhill *v.* Collins, 132 N. Y. 269, 30 N. E. 576; Winant *v.* Hines, 14 Daly 187; Bloomer *v.* Merrill, 1 Daly 485, 29 How. Pr. 259.

Ohio.— Price *v.* Coblitz, 21 Ohio Cir. Ct. 732, 12 Ohio Cir. Dec. 34.

Pennsylvania.— Auer *v.* Penn, 99 Pa. St. 370, 44 Am. Rep. 114.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 364.

26. Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92 (holding that the fact that the lessor at the time of the alleged surrender had brought an action to secure the payment of the rent to accrue in the future prevented such act from constituting a surrender); Steketee *v.* Pratt, 122 Mich. 80, 80 N. W. 989 (where it was agreed that if the lessor's attorney should obtain a satisfactory tenant, no claim would be made on the lessee for rent); Dorrance *v.* Bonesteel, 51 N. Y. App. Div. 129, 64 N. Y. Suppl. 307 (where the landlord stated that he accepted the keys as the tenant's agent for reletting); Dodge *v.* Pritchard, 34 Misc. (N. Y.) 542, 69 N. Y. Suppl. 911 (where there was an agreement for the payment of a stipulated sum within a specified time and discharge of the tenant's liability on the lease, and the lessee failed to pay such sum). See Nelson *v.* Thompson, 23 Minn. 508, where there was a stipulation that the lessee should be held liable for the rent until another tenant was procured.

The silence of the tenant after the landlord has informed him as to negotiations for a reletting does not necessarily create a presumption that he has agreed to the reletting. Gray *v.* Kaufman Dairy, etc., Co., 162 N. Y. 388, 56 N. E. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580.

27. *Minnesota.*— Buckingham Apartment House Co. *v.* Dafoe, 78 Minn. 268, 80 N. W. 974.

Missouri.— Huling *v.* Roll, 43 Mo. App. 234.

New York.— Gray *v.* Kaufman Dairy, etc., Co., 162 N. Y. 388, 56 N. E. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580; Underhill *v.* Collins, 132 N. Y. 269, 30 N. E. 576 [*affirming* 57 Hun 590, 10 N. Y. Suppl. 680]; Moore *v.* McCarthy, 4 Hun 261, 6 Thomp. & C. 451; Gutman *v.* Conway, 45 Misc. 363, 90 N. Y. Suppl. 290; Gaffney *v.* Paul, 29 Misc. 642, 61 N. Y. Suppl. 173 (holding that the mere fact that on receipt of the keys the landlord stated that he would be compelled to sue the tenant will not sustain an implied agreement to relet for the tenant's account, where the reletting did not take place until sometime thereafter, and no further communication was had with the tenant); Barkley *v.* McCue, 25 Misc. 738, 55 N. Y. Suppl. 608; Sherman *v.* Engel, 18 Misc. 484, 41 N. Y. Suppl. 959; Krumdieck *v.* Ebbs, 84 N. Y. Suppl. 525 (holding that the acceptance of the key and a reletting before the lessee was to begin the payment of rent shows an acceptance of the surrender). But see Winant *v.* Hines, 14 Daly 187; Whitman *v.* Louten, 3 N. Y. Suppl. 754. *Compare* Rich *v.* Doyenn, 85 Hun 510, 33 N. Y. Suppl. 341.

Vermont.— Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63, reletting for a day.

Wisconsin.— Witman *v.* Watry, 31 Wis. 638.

United States.— *In re* Mahler, 105 Fed. 428; *Ex p.* Houghton, 12 Fed. Cas. No. 6,725, 1 Lowell 554.

England.— Reeve *v.* Bird, 1 C. M. & R. 31, 3 L. J. Exch. 282, 4 Tyrw. 612; Page *v.* Mann, 6 L. J. K. B. O. S. 63. See Nickells *v.* Atherstone, 10 Q. B. 944, 11 Jur. 778, 16 L. J. Q. B. 371, 59 E. C. L. 944, where it was held that a reletting to a third person worked a surrender of the lease by operation of law, notwithstanding the tenant, after quitting the premises, sent the landlord a letter requesting him to relet them.

Canada.— Matthias *v.* Pace, 15 Nova Scotia 366.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 364.

See also Hesseltine *v.* Seavey, 16 Me. 212.

In Maryland, it is held that the reletting is sufficient to show an acceptance only where, taking into consideration all the circumstances, such act is of a character to show that the landlord has resumed possession, to the exclusion of the tenant, with the intention of releasing him from liability under the lease. Biggs *v.* Stueler, 93 Md. 100, 48 Atl. 727.

Presumptions.— The reletting of the premises by the landlord raises a presumption that he intended to terminate the lease and to discharge the tenant from further liability, but such presumption may be overthrown by evidence. Winant *v.* Hines, 14 Daly (N. Y.) 187.

Time when surrender takes effect.— The surrender of the lease does not as matter of law relate back to the date at which the landlord received the keys instead of relating to the time of a reletting to a new tenant. Oastler *v.* Henderson, 2 Q. B. D. 575, 46 L. J. Q. B. 607, 37 L. T. Rep. N. S. 22 [*overruling* Phené *v.* Dopplewell, 12 C. B. N. S. 334, 8 Jur. N. S. 1104, 31 L. J. C. P. 235, 6 L. T. Rep. N. S. 247, 10 Wkly. Rep. 523, 104 E. C. L. 334].

contrary rule seems to prevail in some states, and the tenant is not thereby released from liability upon the lease.[28]

d. Who May Surrender. The surrender should be made by the owner of the leasehold interest, or by someone authorized to act in his behalf.[29] Ordinarily one of several co-lessees cannot surrender the premises without the consent of the other lessees so as to affect them.[30] Nor can a sublessee or assignee of the lease ordinarily surrender the term to the original lessor so as to affect the original lessee.[31]

e. To Whom Surrender to Be Made. A surrender must be made to the lessor or to the party who has an immediate estate in the reversion.[32] It may be made to a person who has succeeded to the rights of the lessor,[33] or to an agent or other person who represents the lessor.[34] It is sufficient to surrender to one of joint lessors.[35]

28. Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Crown Mfg. Co. *v.* Gay, 9 Ohio Dec. (Reprint) 420, 13 Cinc. L. Bul. 188; Stevenson *v.* Almes, 8 Ohio Dec. (Reprint) 566, 9 Cinc. L. Bul. 17; Kirland *v.* Wolf, 7 Ohio Dec. (Reprint) 436, 3 Cinc. L. Bul. 114; Martin *v.* Kepner, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396. See also Meyer *v.* Smith, 33 Ark. 627; Respini *v.* Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; Miller *v.* Benton, 55 Conn. 529, 13 Atl. 678; Brown *v.* Cairns, 63 Kan. 584, 66 Pac. 639. But see Palmer *v.* Myers, 79 Ill. App. 409. *Compare* Randall *v.* Thompson, 1 Tex. App. Civ. Cas. § 1100.

29. Dodd *v.* Acklom, 7 Jur. 1017, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672.

Infant see *In re* Griffiths, 29 Ch. D. 248, 54 L. J. Ch. 742, 53 L. T. Rep. N. S. 262, 33 Wkly. Rep. 728.

Receiver.— McElroy *v.* Brooke, 104 Ill. App. 220.

Surrender without authority.— The fact that the surrender was made by an officer of the lessee who had no authority is immaterial, where accepted by the lessor, and where no objection was made by the lessee. Loague *v.* Memphis, 7 Lea (Tenn.) 198.

Implied authority of lessee's agent to surrender premises see PRINCIPAL AND AGENT.

30. Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Hooks *v.* Forst, 165 Pa. St. 238, 30 Atl. 846. But see Bergland *v.* Frawley, 72 Wis. 559, 40 N. W. 372, holding that where lessees stipulate to surrender the lease on the happening of a certain contingency each lessee is the agent of the other to make the surrender when the contingency happens.

31. Firth *v.* Rowe, 53 N. J. Eq. 520, 32 Atl. 1064; Baynton *v.* Morgan, 22 Q. B. D. 74, 53 J. P. 166, 58 L. J. Q. B. 139, 37 Wkly. Rep. 148, holding that the assignee may surrender any part of the premises, but such a surrender does not release the lessee's liability on the covenants in the lease. But see Carson *v.* Arvantes, 10 Colo. App. 382, 50 Pac. 1080.

32. Hart *v.* Pratt, 19 Wash. 560, 53 Pac. 711; Cornish *v.* Searell, 8 B. & C. 471, 6 L. J. K. B. O. S. 254, 1 M. & R. 703, 15 E. C. L. 234. See also Bruce *v.* Halbert, 3 T. B. Mon. (Ky.) 64. But see Updike *v.* St. Louis, 94 Mo. 234, 6 S. W. 689, holding that a surrender not made to the reversioner nor remainder-man is nevertheless an estoppel to claim any rights under the lease as to the landlord or those claiming under him.

A surrender to a trustee to whom the lessee has occasionally paid rent instead of to the party having the legal title at the time of the surrender is insufficient. Ackland *v.* Lutley, 9 A. & E. 879, 8 L. J. Q. B. 164, 1 P. & D. 636, 36 E. C. L. 457.

A mortgagor, after a receiver has been appointed in a foreclosure suit, and the lessee has paid rent to the receiver after notice, has no authority to accept a surrender from the lessee. Nealis *v.* Bussing, 9 Daly (N. Y.) 305.

Second lessee.— The tenant has no right to surrender the premises to a mere lessee whose term is to begin after the tenant's term expires, and who has no estate by virtue of the lease until he is let into possession by the owner of the premises. Dickson *v.* Lehnen, 37 Fed. 319.

33. Williamson *v.* Richardsons, 6 T. B. Mon. (Ky.) 596; Southwell *v.* Scotter, 44 J. P. 376, 49 L. J. Exch. 356.

A surrender to the lessor, after a sale of the premises by him, where the purchaser had no notice of the lease, has been held sufficient. Edwards *v.* Wickwar, L. R. 1 Eq. 403, 12 Jur. N. S. 158, 35 L. J. Ch. 309, 14 Wkly. Rep. 363.

34. Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449, 37 N. Y. Suppl. 374 (employee in charge of office); Morris *v.* Dayton, 84 N. Y. Suppl. 392; De Morat *v.* Falkenhagen, 148 Pa. St. 393, 23 Atl. 1125; Hart *v.* Pratt, 19 Wash. 560, 53 Pac. 711; Dodd *v.* Acklom, 7 Jur. 1017, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672.

Employee in office of agent.—A surrender of leased premises is not shown by evidence that the keys were returned to an employee in the office of the agent of the landlord who had no authority implied or otherwise to receive them. Arras *v.* Richardson, 5 N. Y. Suppl. 755.

35. Dodd *v.* Acklom, 7 Jur. 1017, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672. See also Churchill *v.* Lammers, 60 Mo. App. 244.

f. Effect — (i) *In General.* In so far as the rights and liabilities of the lessor and the lessee are concerned, they are determined by an express surrender or surrender by operation at law;[36] and thereafter the lessee is not liable for subsequently accruing rent,[37] nor can a distress for rent be levied.[38] But the rights of third persons which have accrued before the surrender cannot be injured by it;[39] and hence it has no effect as against an assignee of the lease, or a sublessee, or anyone holding under the lessee, unless he has consented thereto,[40] or unless the surrender is in accordance with terms expressed in the lease.[41] So where a sublessee surrenders to the lessee, without the original lessor's consent, he is not absolved from liability under a contract with the original lessor.[42] Where a tenancy has been determined by a surrender, the court has no authority to reinstate the lease, in the absence of fraud or collusion or other special circumstances.[43]

(ii) *Surrender of Part of Premises.* A surrender of a part of the leased premises does not terminate the lease as to the remainder.[44] So the acquiescence

36. *District of Columbia.*— Okie *v.* Person, 23 App. Cas. 170.

Iowa.— Martin *v.* Stearns, 52 Iowa 345, 3 N. W. 92; Packer *v.* Cockayne, 3 Greene 111, holding that the lessor may take possession at once.

Kansas.— Douglass *v.* Geiler, 32 Kan. 499, 4 Pac. 1039, holding that the tenant's subsequent taking possession under a claim of title adverse to his landlord does not revive the relation of landlord and tenant.

Massachusetts.— Deane *v.* Caldwell, 127 Mass. 242 (holding that the surrender terminates all liability upon the covenants of the lease); Randall *v.* Rich, 11 Mass. 494.

Missouri.—Krank *v.* Nichols, 6 Mo. App. 72.

Pennsylvania.— Greider's Appeal, 5 Pa. St. 422.

Canada.— Stegman *v.* Fraser, 6 Grant Ch. (U. C.) 628.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 368.

A reëntry by the landlord cannot be prevented after an abandonment which has been accepted so as to constitute a surrender by operation of law. Looram *v.* Burlingame, 16 La. Ann. 199.

If the lessor enters peaceably after the lease is surrendered, he may protect his possession by the use of force. See Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561.

Damages for breach of the lease cannot be recovered after the term has been surrendered. Silva *v.* Bair, 141 Cal. 599, 75 Pac. 162.

Right to crops.—After a surrender by the tenant the right to crops reverts to the lessor. Maclary *v.* Turner, 9 Houst. (Del.) 281, 32 Atl. 325. See also Monig *v.* Phillips, 16 Ky. L. Rep. 838, 29 S. W. 970.

Effect of covenant as to condition of property at end of term see *supra*, VII, D, 5.

37. See *supra*, VIII, A, 5, b.

A surrender is valid, as terminating the lease, notwithstanding liability for rent remains because of a provision in the lease that the lessee shall be liable for the payment of rent at the expiration of the year. Bain *v.* Clark, 10 Johns. (N. Y.) 424.

38. See *supra*, VIII, E, 2, h.

39. Farnum *v.* Hefner, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174; Clements *v.* Matthews, 11 Q. B. D. 808, 52 L. J. Q. B. 772. *Compare* Blake *v.* Luxton, Coop. 178, 6 T. R. 289, 14 Rev. Rep. 235, 35 Eng. Reprint 522.

40. *Kentucky.*— McKenzie *v.* Lexington, 4 Dana 129. And see Pierce *v.* Meadows, 86 S. W. 1127, 27 Ky. L. Rep. 870.

Massachusetts.— See Appleton *v.* Ames, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206.

Missouri.— Morrison *v.* Sohn, 90 Mo. App. 76.

New York.— Eten *v.* Luyster, 60 N. Y. 252; Ritzler *v.* Raether, 10 Daly 286; Oshinsky *v.* Greenberg, 39 Misc. 342, 79 N. Y. Suppl. 853; Weiss *v.* Mendelson, 24 Misc. 692, 53 N. Y. Suppl. 803.

Pennsylvania.— Hessel *v.* Johnson, 129 Pa. St. 173, 18 Atl. 754, 15 Am. St. Rep. 716, 5 L. R. A. 851.

England.— Smith *v.* Great Western R. Co., 3 App. Cas. 165, 47 L. J. Ch. 97, 37 L. T. Rep. N. S. 645, 26 Wkly. Rep. 130; Smalley *v.* Hardinge, 7 Q. B. D. 524, 50 L. J. Q. B. 367, 44 L. T. Rep. N. S. 503, 29 Wkly. Rep. 554; Mellor *v.* Watkins, L. R. 9 Q. B. 400, 23 Wkly. Rep. 55; Great Western R. Co. *v.* Smith, 2 Ch. D. 235, 45 L. J. Ch. 235, 34 L. T. Rep. N. S. 267, 24 Wkly. Rep. 443. See also Doe *v.* Marchetti, 1 B. & Ad. 715, 9 L. J. K. B. O. S. 126, 20 E. C. L. 662; Piggott *v.* Stratton, 1 De G. F. & J. 33, 6 Jur. N. S. 129, 29 L. J. Ch. 1, 1 L. T. Rep. N. S. 111, 8 Wkly. Rep. 13, 62 Eng. Ch. 25, 45 Eng. Reprint 271; Cousins *v.* Phillips, 3 H. & C. 892, 35 L. J. Exch. 84; Wootley *v.* Gregory, 2 Y. & J. 536, 31 Rev. Rep. 626.

Canada.— Littlejohn *v.* Soper, 1 Ont. L. Rep. 172.

41. Bruder *v.* Geisler, 47 Misc. (N. Y.) 370, 94 N. Y. Suppl. 2; Bove *v.* Coppola, 45 Misc. (N. Y.) 636, 91 N. Y. Suppl. 8.

42. Doscher *v.* Shaw, 52 N. Y. 602.

43. Nixon *v.* Robinson, 7 Ir. Eq. 520, 2 J. & L. 4.

44. Dreyfus *v.* Hirt, 82 Cal. 621, 23 Pac. 193; Nachbour *v.* Wiener, 34 Ill. App. 237; John R. Davis Lumber Co. *v.* Milwaukee First Nat. Bank, 90 Wis. 464, 63 N. W. 1018; Baynton *v.* Morgan, 22 Q. B. D. 74,

by the lessee in a sale of a part of the demised premises by the lessor merely constitutes a surrender *pro tanto*.[45]

C. Tenancies From Year to Year — 1. By Death of Tenant. A tenancy from year to year is not determined by the death of the tenant, but vests in his personal representatives.[46]

2. By Destruction of the Premises. A tenancy from year to year is not determined by the destruction of the premises by fire, if the damage can be repaired without rebuilding, even though the fire renders them temporarily uninhabitable.[47]

3. By Continued Non-Payment of Rent. The non-payment of rent for a number of years, no demand being proved to have been made, is some evidence, although slight, of the determination of a tenancy from year to year.[48]

4. By Agreement to Increase Rent. An agreement to increase the rent does not *per se* operate to put an end to a tenancy from year to year and create a new one.[49]

5. By Notice to Quit — a. Necessity and Length — (i) *By Landlord* — (a) *General Rule.* As a general rule a tenancy from year to year is terminable only on notice to quit.[50] Under the common law, six months' notice was required, and in the absence of statutory or contractual alteration the common-law rule has been generally followed in the United States.[51] But in most of the states the char-

53 J. P. 166, 58 L. J. Q. B. 139, 37 Wkly. Rep. 148; Holme *v.* Brunskill, 3 Q. B. D. 495, 47 L. J. Q. B. 610, 38 L. T. Rep. N. S. 833. See also Penn *v.* Kearney, 21 La. Ann. 21. *Compare* Smith *v.* Pendergast, 26 Minn. 318, 3 N. W. 978; Blair *v.* Northwestern Ohio Natural Gas Co., 12 Ohio Cir. Ct. 78, 5 Ohio Cir. Dec. 619; Williams *v.* Sawyer, 3 B. & B. 70, 7 E. C. L. 611, 6 Moore C. P. 226, 17 E. C. L. 479; Jones *v.* Bridgman, 39 L. T. Rep. N. S. 500; Seldon *v.* Buchannan, 24 Ont. 349; Ramsay *v.* Stafford, 28 U. C. C. P. 229.

Sublease of part of premises.— There can be no surrender, so as to absolve the lessee from paying rent, where part of the premises are sublet and the sublessee does not surrender or consent to the surrender by the lessee. Smith *v.* Sonnekalb, 67 Barb. (N. Y.) 66.

45. Norton *v.* Macconnichy, 9 U. C. C. P. 186.

46. Mackay *v.* Mackrath, 2 Chit. 461, 18 E. C. L. 737, 4 Dougl. 213, 26 E. C. L. 433; Doe *v.* Wood, 9 Jur. 1060, 15 L. J. Exch. 41, 14 M. & W. 682; Doe *v.* Porter, 3 T. R. 13, 1 Rev. Rep. 626; James *v.* Dean, 15 Ves. Jr. 236, 8 Rev. Rep. 178, 33 Eng. Reprint 744; Parker *v.* Constable, 3 Wils. C. P. 24; Doe *v.* Hughes, 19 N. Brunsw. 363. *Contra*, Jackson *v.* McMaster, L. R. 28 Ir. 176; Doe *v.* Carter, R. & M. 237, 21 E. C. L. 741. And see Robie *v.* Smith, 21 Me. 114.

47. Connecticut Mut. L. Ins. Co. *v.* U. S., 21 Ct. Cl. 195.

48. Stagg *v.* Wyatt, 1 Arn. 327, 2 Jur. 892.

49. Inchiquin *v.* Lyons, L. R. 20 Ir. 474; Ceeckie *v.* Monck, 1 C. & K. 555, 47 E. C. L. 555.

50. *Indiana.*— Tobin *v.* Young, (1888) 17 N. E. 625; Coomler *v.* Hefner, 86 Ind. 108; Elliott *v.* Stone City Bank, 4 Ind. App. 155, 30 N. E. 537.

Maine.— Moshier *v.* Reding, 12 Me. 478.

Missouri.— Grant *v.* White, 42 Mo. 285; Hosli *v.* Yokel, 58 Mo. App. 169.

New York.— Jackson *v.* Salmon, 4 Wend. 327; Jackson *v.* Bryan, 1 Johns. 322.

Oregon.— Rosenblat *v.* Perkins, 18 Oreg. 156, 22 Pac. 598, 6 L. R. A. 257; Williams *v.* Ackerman, 8 Oreg. 405.

Pennsylvania.— Rich *v.* Keyser, 54 Pa. St. 86; Thomas *v.* Wright, 9 Serg. & R. 87; Greenleaf *v.* Haberacker, 1 Woodw. 436.

England.— Doe *v.* Browne, 8 East 166, 9 Rev. Rep. 397; Doe *v.* Stennett, 2 Esp. 717, 5 Rev. Rep. 769; Doe *v.* Watts, 2 Esp. 501, 7 T. R. 83, 4 Rev. Rep. 387; Doe *v.* Lawder, 1 Stark. 308, 2 E. C. L. 121.

Canada.— Doe *v.* Hunter, 3 N. Brunsw. 518; Birchall *v.* Reid, 35 U. C. Q. B. 19.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 383.

51. *District of Columbia.*— Spalding *v.* Hall, 6 D. C. 123, holding that since the act of July 4, 1864, a tenancy at will cannot arise without an express contract, yet, if prior thereto a tenant for years held over by consent, given expressly or constructively after the termination of the lease, this, although technically an estate at will, is a tenancy from year to year, and could not be terminated except by six months' notice.

Kentucky.— Morehead *v.* Watkyns, 5 B. Mon. 228.

Maryland.— Hall *v.* Myers, 43 Md. 446.

Massachusetts.— Ellis *v.* Paige, 2 Pick. 71 note.

Missouri.— Ridgely *v.* Stillwell, 25 Mo. 570.

Nebraska.— Brady *v.* Flint, 23 Nebr. 785, 37 N. W. 647; Critchfield *v.* Remaley, 21 Nebr. 178, 31 N. W. 687.

New Hampshire.— Leavitt *v.* Leavitt, 47 N. H. 329.

New Jersey.— Hankinson *v.* Blair, 15 N. J. L. 181; McEowen *v.* Drake, 14 N. J. L.

acter and time of the notice are regulated by statute.[52] Where the common-law rule requiring six months' notice has not been adopted, and no particular notice is required by statute, it has been held that it is only necessary to give reasonable notice,[53] and whether the notice given is reasonable must be determined by the jury.[54]

(B) *Effect of Default in Payment of Rent.* In case of default in the payment of the rent it is sometimes provided by statute that a tenancy from year to year may be terminated by a shorter notice than that ordinarily required.[55]

523. And see Snowhill *v.* Snowhill, 23 N. J. L. 447.

Vermont.— Hanchet *v.* Whitney, 1 Vt. 311.

Wisconsin.— Brown *v.* Kayser, 60 Wis. 1, 18 N. W. 523.

England.— Doe *v.* Smaridge, 7 Q. B. 957, 9 Jur. 781, 14 L. J. Q. B. 327, 53 E. C. L. 957; Wood *v.* Beard, 2 Ex. D. 30, 46 L. J. Q. B. 100, 35 L. T. Rep. N. S. 866; Roe *v.* Doe, 6 Bing. 574, 8 L. J. C. P. O. S. 227, 4 M. & P. 391, 31 Rev. Rep. 499, 19 E. C. L. 260, holding that a notice on the twenty-eighth of September to quit on the ensuing twenty-fifth of March is a sufficient half year's notice.

Canada.— Caverhill *v.* Orvis, 12 U. C. C. P. 392; White *v.* Nelson, 10 U. C. C. P. 158.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 383.

Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. Shirley *v.* Newman, 1 Esp. 266, 5 Rev. Rep. 737.

Customary six months.— A six months' notice to determine a tenancy from year to year commencing on the ordinary feast days, means a customary six months, that is from one feast day to another. Morgan *v.* Davies, 3 C. P. D. 260, 39 L. T. Rep. N. S. 60, 26 Wkly. Rep. 816. A custom to pay rent twice a year, and to consider the time between one pay day and the other as equivalent to a full half year, will not prevail over an express provision for six calendar months' notice. Travers *v.* Mason, 45 Wkly. Rep. 77.

Under the Agricultural Holdings Act, a year's notice to quit is necessary in the case of an agricultural holding. Van Grutten *v.* Trevenen, [1902] 2 K. B. 82, 71 L. J. K. B. 544, 87 L. T. Rep. N. S. 344, 50 Wkly. Rep. 516. This act applies only where a half year's notice is required by law, and not to cases where there is an express contract as to the notice to be given. Barlow *v.* Teal, 15 Q. B. D. 501, 50 J. P. 100, 54 L. J. Q. B. 564, 54 L. T. Rep. N. S. 63, 34 Wkly. Rep. 54; Wilkinson *v.* Calvert, 3 C. P. D. 360, 47 L. J. C. P. 679, 38 L. T. Rep. N. S. 813, 26 Wkly. Rep. 829.

Notices held sufficient.— Notice to quit at the expiration "of the current year of your tenancy which shall expire next after the end of the half year from the date hereof" is sufficient. Doe *v.* Butler, 2 Esp. 589, 5 Rev. Rep. 756. A notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting. Doe *v.* Timothy, 2 C. & K. 351, 61 E. C. L. 351.

52. See the statutes of the several states. And see the following cases:

One year.— Ganson *v.* Baldwin, 93 Mich. 217, 53 N. W. 171.

Four months.— Gladwell *v.* Holcomb, 14 Ohio Cir. Ct. 416, 7 Ohio Cir. Dec. 369.

Three months.— *Indiana.*— Elliott *v.* Stone City Bank, 4 Ind. App. 155, 30 N. E. 537.

Kansas.— Ware *v.* Nelson, 4 Kan. App. 258, 45 Pac. 923; Wheat *v.* Brown, 3 Kan. App. 431, 43 Pac. 807.

Maine.— Withers *v.* Larrabee, 48 Me. 570; Gordon *v.* Gilman, 48 Me. 473.

Minnesota.— Hunter *v.* Frost, 47 Minn. 1, 49 N. W. 327.

North Carolina.— Vincent *v.* Corbin, 85 N. C. 108. Prior to the statute six months' notice was required. See Jones *v.* Willis, 53 N. C. 430; Irwin *v.* Cox, 27 N. C. 521.

Pennsylvania.— Phœnixville *v.* Walters, 147 Pa. St. 501, 23 Atl. 776; Dumn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800; Magaw *v.* Cannon, 3 Watts 139; McDowell *v.* Simpson, 3 Watts 129, 27 Am. Dec. 338; Lesley *v.* Randolph, 4 Rawle 123; Lloyd *v.* Cozens, 2 Ashm. 131.

Rhode Island.— Thurber *v.* Dwyer, 10 R. I. 355.

Virginia.— Baltimore Dental Assoc. *v.* Fuller, 101 Va. 627, 44 S. E. 771.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 383.

Sixty days.— Ranson *v.* Ranson, 115 Ill. App. 1; Tanton *v.* Van Alstine, 24 Ill. App. 405; Mounts *v.* Goranson, 29 Wash. 261, 69 Pac. 740. In Illinois prior to the Landlord and Tenant Act six months' notice was required. Hunt *v.* Morton, 18 Ill. 75.

Thirty days.— Larkin *v.* Avery, 23 Conn. 304; Prouty *v.* Prouty, 5 How. Pr. (N. Y.) 81.

53. Jones *v.* Spartanburg Herald Co., 44 S. C. 526, 22 S. E. 731 [*distinguishing* Godard *v.* South Carolina R. Co., 2 Rich. (S. C.) 346, where three months' notice was held requisite under a local custom].

54. Jones *v.* Spartanburg Herald Co., 44 S. C. 526, 22 S. E. 731.

55. See the statutes of the several states.

Ten days' notice.— Leary *v.* Meier, 78 Ind. 393; Klespies *v.* McKenzie, 12 Ind. App. 404, 40 N. E. 648.

Seven days' notice.—Judd *v.* Fairs, 53 Mich. 518, 19 N. W. 266.

(c) *When Notice Not Necessary.* Where the tenant disclaims to hold as such, no notice to quit is necessary.[56] Where, after the commencement of a tenancy from year to year, there is an express lease for a certain time and an agreement to quit at the end of that time, no notice is necessary in order to terminate the tenancy after such time.[57] In some cases a distinction seems to have been made between those tenancies from year to year arising from leases for indefinite terms, and those arising from a holding over by the tenant after the expiration of a lease for a specified term. Thus it has been held that a tenant who occupies demised premises for several years after the termination of his lease creates each year a new term expiring at the close of the current year, and requiring no notice for its determination.[58] A tenant of mortgaged premises holding under the mortgagor by lease subsequent to the mortgage, as tenant from year to year, is not entitled to notice to quit in ejectment by the mortgagee.[59]

(II) *By Tenant.* In most jurisdictions a tenant from year to year cannot quit at pleasure, without notice, but the right to notice is reciprocal,[60] unless the necessity of notice by the tenant has been removed by statute.[61] In some cases, however, an exception is made where the tenancy having arisen from a holding after the expiration of a definite term is regarded as a new holding for a definite term and not in the restricted sense a tenancy from year to year,[62] it being held enough that he surrenders the keys and possession.[63] If notice is required it is a question for the jury whether that given is sufficient.[64]

b. Time When Notice Takes Effect — (I) *In General.* A tenancy from year to year is terminable by notice to quit only at the expiration of a current year.[65] It is determinable at the end of the first as well as any subsequent year, unless in

Notice as condition precedent to summary dispossession see *infra*, X, C, 9, c.

56. Merritt *v.* Merritt, 3 N. Y. St. 484; Vincent *v.* Corbin, 85 N. C. 108; Head *v.* Head, 52 N. C. 620; Doe *v.* Stanion, 2 Gale 154, 5 L. J. Exch. 253, 1 M. & W. 695; Peers *v.* Byron, 28 U. C. C. P. 250.

As condition precedent to action of ejectment see *infra*, X, B, 4, b, (I).

Before summary dispossession see *infra*, X, C, 9, c, (I), (C).

57. Williams *v.* Bennett, 26 N. C. 122.

58. Adams *v.* Cohoes, 53 Hun (N. Y.) 260, 6 N. Y. Suppl. 617 [*affirmed* in 127 N. Y. 175, 28 N. E. 25]; Gladwell *v.* Holcomb, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724. See also Doe *v.* Haubtman, 2 N. Brunsw. 434.

Creation of new term by holding over see *supra*, IV, C, 3, f.

59. Hart *v.* Stockton, 12 N. J. L. 322.

Whether relation of landlord and tenant exists see *supra*, I, E, 4, a.

60. *Illinois.*— Tanton *v.* Van Alstine, 24 Ill. App. 405.

Kansas.— Nelson *v.* Ware, 57 Kan. 670, 47 Pac. 540.

Michigan.— Huntington *v.* Parkhurst, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146.

South Carolina.— Jones *v.* Spartanburg Herald Co., 44 S. C. 526, 22 S. E. 731.

Vermont.— Hall *v.* Wadsworth, 28 Vt. 410; Barlow *v.* Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

West Virginia.—Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957.

Where particular customs sanction a less or require a longer notice it is always reciprocal. Brown *v.* Boole, 1 Nova Scotia 137.

Notice that premises will be vacated "by January 1" means that they will be vacated before that day. Wilson *v.* Rodeman, 30 S. C. 210, 8 S. E. 855.

61. Nelson *v.* Ware, 57 Kan. 670, 47 Pac. 540.

62. Adams *v.* Cohoes, 127 N. Y. 175, 28 N. E. 25 [*affirming* 53 Hun 260, 6 N. Y. Suppl. 617]; Rorbach *v.* Crossett, 19 N. Y. Suppl. 450; Cook *v.* Neilson, 10 Pa. St. 41; Cooke *v.* Neilson, Brightly (Pa.) 463.

63. Rorbach *v.* Crossett, 19 N. Y. Suppl. 450.

64. Binswagner *v.* Deardon, 9 Pa. Co. Ct. 653.

65. *Mississippi.*— Usher *v.* Moss, 50 Miss. 208.

New York.— Coudert *v.* Cohn, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761; Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567; Kernochan *v.* Wilkens, 3 N. Y. App. Div. 596, 38 N. Y. Suppl. 236; Wright *v.* Mosher, 16 How. Pr. 454; Prouty *v.* Prouty, 5 How. Pr. 81.

Ohio.—Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251.

Pennsylvania.—Phœnixville *v.* Walters, 147 Pa. St. 501, 23 Atl. 776; Dumn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800; Lesley *v.* Randolph, 4 Rawle 123; Lloyd *v.* Cozens, 2 Ashm. 131.

South Carolina.— Wilson *v.* Rodeman, 30 S. C. 210, 8 S. E. 855; Floyd *v.* Floyd, 4 Rich. 23; Godard *v.* South Carolina R. Co., 2 Rich. 346.

Vermont.— Hanchet *v.* Whitney, 1 Vt. 311.

Wisconsin.— Peehl *v.* Bumbalek, 99 Wis. 62, 74 N. W. 545.

creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least.[66] Statements in a landlord's notice to quit as to the termination of a tenancy are conclusive on the landlord's grantee.[67]

(II) *As Affected by Different Times of Entry.* Where the incoming tenant enters upon different parts of the demised premises at different times, half a year's notice with reference to the substantial time of entry is sufficient.[68] It is a question of fact for the jury which is the principal and which the accessorial subject of the demise in order to determine whether the notice to quit the whole was given in time.[69]

6. By Surrender and Abandonment — a. In General. A surrender may be affected by express words, evincing such agreement, or may be implied from conduct of the parties going to show that they have both agreed to consider the surrender as made.[70] A surrender by operation of law may arise in a variety of ways: As when any new relation inconsistent with the relation of landlord and tenant arises;[71] when the tenant yields up the possession of the premises to the landlord

England.— Doe *v.* Grafton, 18 Q. B. 496, 16 Jur. 833, 21 L. J. Q. B. 276, 83 E. C. L. 496; Kelly *v.* Patterrson, L. R. 9 C. P. 681, 43 L. J. C. P. 320, 30 L. T. Rep. N. S. 842; Kemp *v.* Derrett, 3 Campb. 510, 14 Rev. Rep. 820; Doe *v.* Donovan, 2 Campb. 78, 1 Taunt. 555; Humphreys *v.* Franks, 18 C. B. 323, 86 E. C. L. 323; Simmons *v.* Underwood, 76 L. T. Rep. N. S. 777; Right *v.* Darby, 1 T. R. 159, 1 Rev. Rep. 169.

Canada.—*Re* Magee, 10 Manitoba 1; White *v.* Nelson, 10 U. C. C. P. 158.

See 32 Cent. Dig. tit "Landlord and Tenant," § 384.

The parties may alter the notice as to the time it shall expire. Bridges *v.* Potts, 17 C. B. N. S. 314, 10 Jur. N. S. 1049, 33 L. J. C. P. 338, 11 L. T. Rep. N. S. 373, 112 E. C. L. 314.

Provision in lease for notice at any time.— Where a lease provides that the tenancy may be terminated at any time by giving a certain notice, the notice may be given to expire at any time and not at the end of a current period. Soames *v.* Nicholson, [1902] 1 K. B. 157, 71 L. J. K. B. 24, 85 L. T. Rep. N. S. 614, 50 Wkly. Rep. 169; Bridges *v.* Potts, 17 C. B. N. S. 314, 10 Jur. N. S. 1049, 33 L. J. C. P. 338, 11 L. T. Rep. N. S. 373, 112 E. C. L. 314.

Where a remainder-man creates a new tenancy with a tenant in possession under a void lease granted by a tenant for life, and receives rent on the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original lease. Roe *v.* Ward, 1 H. Bl. 97, 2 Rev. Rep. 728; Doe *v.* Weller, 7 T. R. 478, 4 Rev. Rep. 496.

If a tenant disputes the time when his tenancy commences, and that his notice to quit does not correspond with it, it is incumbent on him and not on the lessor to show the true time of the commencement of the tenancy. Doe *v.* Wrightman, 4 Esp. 5, 6 Rev. Rep. 834.

Notice as evidence of the time of commencement of tenancy.— A notice to quit, if not served personally upon the tenant in possession, is not *prima facie* evidence of the period of the year when the tenancy commenced. Doe *v.* Calvert, 2 Campb. 387, 11 Rev. Rep. 745. But if a notice to quit is served personally on the tenant in possession, and he makes no objection to it, it is *prima facie* evidence that the tenancy commenced at the season of the year the notice to quit expires. Thomas *v.* Thomas, 2 Campb. 647; Doe *v.* Woombwell, 2 Campb. 559; Doe *v.* Forster, 13 East 405, 12 Rev. Rep. 383.

66. Doe *v.* Mainby, 10 Q. B. 473, 11 Jur. 308, 16 L. J. Q. B. 303, 59 E. C. L. 473; Doe *v.* Smaridge, 7 Q. B. 957, 9 Jur. 781, 14 L. J. Q. B. 327, 53 E. C. L. 957; Doe *v.* Taylor, 1 Jur. 960.

A tenancy for "twelve months certain, and six months notice to quit afterwards" may be determined by a six months' notice to quit expiring at the end of the first year. Thompson *v.* Maberly, 2 Campb. 573.

Tenancy for one year certain, and so on from year to year.— Where premises were let for one year certain and so on from year to year, under an agreement that the tenancy thereby created may be determined by either party giving a certain notice in writing, the tenancy could not be determined by notice during the first year. Cannon Brewery Co. *v.* Nash, 77 L. T. Rep. N. S. 648.

67. Biggs *v.* Brown, 2 Serg. & R. (Pa.) 14.

68. Doe *v.* Watkins, 7 East 551, 3 Smith K. B. 517, 8 Rev. Rep. 670; Doe *v.* Spence, 6 East 120, 2 Smith K. B. 255, 8 Rev. Rep. 422; Doe *v.* Hughes, 10 L. J. Exch. 185, 7 M. & W. 139; Doe *v.* Snowdon, 2 W. Bl. 1224. See also Doe *v.* Rhodes, 1 D. & L. 293, 12 L. J. Exch. 382, 11 M. & W. 602.

69. Doe *v.* Howard, 11 East 498, 11 Rev. Rep. 255; Doe *v.* Hughes, 10 L. J. Exch. 185, 7 M. & W. 139.

70. Dayton *v.* Craik, 26 Minn. 133, 1 N. W. 813; Johnstone *v.* Hudlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860.

Necessity of writing see Frauds, Statute of, 20 Cyc. 218.

71. Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 30 Rev. Rep. 504, 13 E. C. L. 316.

or to some person on his behalf;[72] when the landlord resumes possession of the premises with the assent of the tenant;[73] when the tenant takes a new lease of the same premises from the reversioner;[74] or when by the consent of both parties another person becomes tenant of the premises and the landlord collects rent from him.[75] An agreement to purchase when the purchaser is not let into possession is not a surrender by operation of law.[76] Nor will an insufficient notice to quit, accepted by the landlord, have this effect.[77] When a tenant makes an unequivocal surrender of the premises, the leaving of fixtures and worthless articles upon the premises cannot be construed as an intention to retain possession, or a continuance of the tenancy;[78] but mere notice of intention to quit does not rebut the presumption of a continuance of the tenancy arising from the fact of the tenant remaining in possession.[79] The abandonment of the premises by a tenant *non animo revertendi* remits the landlord to the possession, and he may defend it against all intrusion.[80]

b. Operation and Effect as to Subtenant. Where a tenant from year to year surrenders possession of the premises after the right has accrued to him to hold possession for another year, such surrender cannot affect a subtenant's right to hold to the end of the year.[81]

D. Tenancies From Month to Month — 1. In General. An eviction of a tenant from month to month by title paramount determines the tenancy,[82] and if the tenant reënters as tenant of the evictor the tenancy just destroyed is not

72. Johnstone *v.* Hudlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860.

73. Grimman *v.* Legge, 8 B. & C. 324, 6 L. J. K. B. O. S. 321, 2 M. & R. 438, 15 E. C. L. 164; Phené *v.* Popplewell, 12 C. B. N. S. 334, 8 Jur. N. S. 1104, 31 L. J. C. P. 235, 6 L. T. Rep. N. S. 247, 10 Wkly. Rep. 523, 104 E. C. L. 334; Dodd *v.* Acklom, 7 Jur. 1017, 13 L. J. C. P. 11, 6 M. & G. 672, 7 Scott N. R. 415, 46 E. C. L. 672; Whitehead *v.* Clifford, 5 Taunt. 518, 15 Rev. Rep. 579, 1 E. C. L. 266.

74. Roosevelt *v.* Hungate, 110 Ill. 595; Edwards *v.* Hale, 37 W. Va. 193, 16 S. E. 487.

75. Clemens *v.* Broomfield, 19 Mo. 118; Thomas *v.* Cook, 2 B. & Ald. 119, 20 Rev. Rep. 374; Phipps *v.* Sculthorpe, 1 B. & Ald. 50, 18 Rev. Rep. 426; Walls *v.* Atcheson, 3 Bing. 462, 11 E. C. L. 228, 2 C. & P. 268, 12 E. C. L. 565, 4 L. J. C. P. O. S. 154, 11 Moore C. P. 379, 28 Rev. Rep. 657; Stone *v.* Whiting, 2 Stark. 235, 19 Rev. Rep. 710, 3 E. C. L. 391. See also Hall *v.* Burgess, 5 B. & C. 332, 8 D. & R. 67, 4 L. J. K. B. O. S. 172, 11 E. C. L. 485.

The third person must take possession in order to have it operate as a surrender by operation of law. Taylor *v.* Chapman, Peake Add. Cas. 19, 4 Rev. Rep. 884.

If one is let into possession by the lessee without the knowledge or consent of the lessor, so that the latter can maintain no action against him, there is no surrender and the original lessee is not freed from liability. Mathews *v.* Sawell, 2 Moore C. P. 262.

What amounts to acceptance of other tenant.— If a landlord witnesses a notice given by a lessee to his under-tenant to pay rent to the landlord, and has a knowledge of its contents, it is a termination of the tenancy of the lessee. Otherwise if the landlord has no knowledge of the contents of the notice. Harding *v.* Crethorn, 1 Esp. 57, 5 Rev. Rep. 719.

Acceptance of old tenant jointly with new one.— Where a tenant from year to year enters into an agreement with his landlord for a lease to be granted to him and another jointly, and both enter upon and occupy the premises jointly, the first tenancy is determined although the lease is never executed pursuant to the agreement. Hamerton *v.* Stead, 3 B. & C. 478, 5 D. & R. 206, 3 L. J. K. B. O. S. 33, 27 Rev. Rep. 407, 10 E. C. L. 220.

Tenants exchanging premises.— Where two persons being tenants from year to year of different premises under different lessors agree to exchange them, to which the lessors agree, this amounts to a surrender by operation of law of the previous interests of the tenants. Bees *v.* Williams, 2 C. M. & R. 581, 1 Gale 332, 1 Tyrw. & G. 23.

76. Doe *v.* Stanion, 2 Gale 154, 5 L. J. Exch. 253, 1 M. & W. 695.

77. Johnstone *v.* Hudlestone, 4 B. & C. 922, 7 D. & R. 411, 4 L. J. K. B. O. S. 71, 28 Rev. Rep. 505, 10 E. C. L. 860; Doe *v.* Milward, 1 H. & H. 79, 7 L. J. Exch. 57, 3 M. & W. 328. *Compare* Aldenburgh *v.* Peaple, 6 C. & P. 212, 25 E. C. L. 399.

78. Rorbach *v.* Crossett, 19 N. Y. Suppl. 450.

79. Cavanaugh *v.* Clinch, 88 Ga. 610, 15 S. E. 673; Door *v.* Barney, 12 Hun (N. Y.) 259.

80. Torrans *v.* Stricklin, 52 N. C. 50.

81. Brown *v.* Butler, 4 Phila. (Pa.) 71; Pleasant *v.* Benson, 14 East 234, 12 Rev. Rep. 507.

82. Wheelock *v.* Warschauer, 34 Cal. 265.

thereby revived.[83] A mere transfer of title does not in any way change, modify, or affect the lease.[84]

2. By Notice to Quit — a. Necessity and Length. Where a lease is from month to month, it does not terminate by the mere lapse of time, and neither party can terminate it without notice to the other in advance for the time required by law.[85] In cases of tenancies for periods running less than a year, the general rule is that notice must be regulated by the letting, and must be equivalent to a period.[86] Thus in the absence of any provision of statute or contract regarding it a tenancy from month to month is terminable by a month's notice to quit,[87] such a notice being in some jurisdictions prescribed by statute.[88] Statutes in other jurisdictions, however, provide for a notice of shorter period.[89] Where the tenancy is for a month as distinguished from one from month to month the tenant is not entitled to notice to quit.[90]

b. Time When Notice Takes Effect. Notice to terminate a tenancy from month to month must be to quit on one of the recurring periods of the letting;[91]

83. Wheelock *v.* Warschauer, 34 Cal. 265.

84. Macdonough *v.* Starbird, 105 Cal. 15, 36 Pac. 510, holding that where land occupied by tenants under a lease from month to month is sold by the landlord, and the purchaser afterward accepts from the tenants the customary rent for several months without giving any notice terminating the old lease, such purchaser recognizes and continues such lease.

Tenancies arising upon transfer of reversion see *supra*, I, F.

85. Stoppelkamp *v.* Mangeot, 42 Cal. 316.

86. Stewart *v.* Murrell, 65 Ark. 471, 47 S. W. 130; Steffens *v.* Earl, 40 N. J. L. 128, 29 Am. Rep. 214.

87. *Alabama.*— McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438.

Illinois.— Seem *v.* McLees, 24 Ill. 192.

Kentucky.— Reccius *v.* Columbia Finance, etc., Co., 27 Ky. L. Rep. 880, 86 S. W. 1113.

New Jersey.— Baker *v.* Kenny, 69 N. J. L. 180, 54 Atl. 526; State *v.* Schietinger, 51 N. J. L. 152, 16 Atl. 186; Steffens *v.* Earl, 40 N. J. L. 128, 29 Am. Rep. 214.

New York.— People *v.* Darling, 47 N. Y. 666; Hungerford *v.* Wagoner, 5 N. Y. App. Div. 590, 39 N. Y. Suppl. 369; Wilson *v.* Taylor, 8 Daly 253; Geiger *v.* Braun, 6 Daly 506 [*criticizing* and *distinguishing* Gibbons *v.* Dayton, 4 Hun 451]; Bent *v.* Renken, 86 N. Y. Suppl. 110; Anderson *v.* Prindle, 23 Wend. 616. There is in New York, however, a line of cases holding that where the tenant is in possession, paying rent monthly in advance without agreement for any definite time, a new tenancy for a month arises at the termination of each monthly period, and no notice is in such case necessary. People *v.* Coelet, 64 Barb. 476, 14 Abb. Pr. N. S. 130; People *v.* Schackno, 48 Barb. 551. See Ludington *v.* Garlock, 5 Silv. Sup. 532, 9 N. Y. Suppl. 24; Hoffman *v.* Van Allen, 3 Misc. 99, 22 N. Y. Suppl. 369, holding that such a tenancy did not arise where the lease was from month to month, so long as the tenant would pay the rent.

Pennsylvania.— Hollis *v.* Burns, 100 Pa. St. 206, 45 Am. Rep. 379; Hood *v.* Drysdale, 27 Pa. Super. Ct. 540; Williams *v.* McAnany, 12 Pa. Co. Ct. 191; Wall *v.* Ullman, 2 Chest. Co. Rep. 178.

England.— Beamish *v.* Cox, L. R. 16 Ir. 458 [*affirming* L. R. 16 Ir. 270]; Doe *v.* Hazell, 1 Esp. 94, 5 Rev. Rep. 722.

Canada.— Eastman *v.* Richard, 29 Can. Sup. Ct. 438; McPherson *v.* Norris, 13 U. C. Q. B. 472.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 396.

88. *Maryland.*— Kinsey *v.* Minnick, 43 Md. 112.

Michigan.— Fratcher *v.* Smith, 104 Mich. 537, 62 N. W. 832; Hart *v.* Lindley, 50 Mich. 20, 74 N. W. 682.

Minnesota.— Shirk *v.* Hoffman, 57 Minn. 230, 58 N. W. 990; Eastman *v.* Vetter, 57 Minn. 164, 58 N. W. 989.

Missouri.— Withnell *v.* Petzold, 104 Mo. 409, 16 S. W. 205; Gunn *v.* Sinclair, 52 Mo. 327; Berner *v.* Gebhardt, 87 Mo. App. 409; Koken Iron Works *v.* Kinealy, 86 Mo. App. 199; Leahy *v.* Lubman, 67 Mo. App. 191; Grünewald *v.* Schaales, 17 Mo. App. 324; Valle *v.* Kramer, 4 Mo. App. 570.

South Dakota.— Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 396.

89. See the statutes of the several states. And see Edmundson *v.* Preville, 12 Colo. App. 73, 54 Pac. 394 (ten days); Bowles *v.* Lyon, 6 Rob. (La.) 262 (fifteen days); Yesler *v.* Orth, 24 Wash. 483, 64 Pac. 723 (twenty days).

90. See *supra*, IX, B, 1, c, (I), (A).

Distinction between tenancy from month to month and monthly tenancy see *supra*, V, B, 2, a.

91. *Michigan.*— Hart *v.* Lindley, 50 Mich. 20, 14 N. W. 682.

Minnesota.— Searle *v.* Powell, 89 Minn. 278, 94 N. W. 868; Petsch *v.* Biggs, 31 Minn. 392, 18 N. W. 101.

Mississippi.— Wilson *v.* Wood, 84 Miss. 728, 36 So. 609.

Missouri.— Snyder *v.* Parker, 75 Mo. App. 529; Leahy *v.* Lubman, 67 Mo. App. 191; Combs *v.* Midland Transfer Co., 58 Mo. App. 112.

and when a month's notice is required it should be served on a corresponding date in the preceding month;[92] and it may properly be to quit on the first day of the succeeding month.[93]

3. By Surrender and Abandonment. A tenant from month to month being entitled to notice to quit must give the same notice if he desires to terminate the relation of landlord and tenant; the rights of the parties in this respect being equal.[94] The notice in the absence of contrary statutory provision may be verbal.[95] If the premises are owned by two persons, notice must be served on each of them.[96] An abandonment by the tenant, acquiesced in by the landlord, dispenses with the necessity for notice by the tenant.[97] The fact that a tenant remains in possession from month to month after he becomes aware of a continuing nuisance amounting to a constructive eviction does not waive his right to terminate the lease for subsequent and increased defects which render the premises untenantable.[98]

E. Tenancies From Week to Week. A week's notice is necessary and sufficient to determine a tenancy from week to week.[99]

F. Tenancies at Will — 1. In General. An estate at will is terminable at the will of either party.[1] Any method mutually agreed upon by the parties,[2] or any act or declaration of either party inconsistent with the continued voluntary rela-

New Jersey.— Baker *v.* Kenny, 69 N. J. L. 180, 54 Atl. 526; Waters *v.* Williamson, 59 N. J. L. 337, 36 Atl. 665; Finkelstein *v.* Herson, 55 N. J. L. 217, 26 Atl. 688; Steffens *v.* Earl, 40 N. J. L. 128, 29 Am. Rep. 214.

New York.— Banks *v.* Carter 7 Daly 417; Anderson *v.* Prindle, 23 Wend. 616.

Washington.— Teater *v.* King, 35 Wash. 138, 76 Pac. 688; Yesler *v.* Orth, 24 Wash. 483, 64 Pac. 723.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 397.

92. Gunn *v.* Sinclair, 52 Mo. 327; Berner *v.* Gebhardt, 87 Mo. App. 409; Corby *v.* Brill Book, etc., Co., 76 Mo. App. 506; Combs *v.* Midland Transfer Co., 58 Mo. App. 112; Baker *v.* Kenny, 69 N. J. L. 180, 54 Atl. 526; Steffens *v.* Earl, 40 N. J. L. 128, 29 Am. Rep. 214.

93. Detroit Sav. Bank *v.* Bellamy, 49 Mich. 317, 13 N. W. 606; Searle *v.* Powell, 89 Minn. 278, 94 N. W. 868; Drey *v.* Doyle, 28 Mo. App. 249; Steffens *v.* Earl, 40 N. J. L. 128, 29 Am. Rep. 214.

94. *Arkansas.*— Stewart *v.* Murrell, 65 Ark. 471, 47 S. W. 130.

Illinois.— Sigmund *v.* Newspaper Co., 82 Ill. App. 178; Donohue *v.* Chicago Bank Note Co., 37 Ill. App. 552; Eberlein *v.* Abel, 10 Ill. App. 626.

Minnesota.— Finch *v.* Moore, 50 Minn. 116, 52 N. W. 384.

Missouri.—Winters *v.* Cherry, 78 Mo. 344; Gunn *v.* Sinclair, 52 Mo. 327; Buck *v.* Lewis, 46 Mo. App. 227.

Ohio.— Rivett *v.* Brown, 8 Ohio Dec. (Reprint) 225, 6 Cinc. L. Bul. 378.

South Dakota.— Hunter *v.* Karcher, 8 S. D. 554, 67 N. W. 621, holding that a statement by a lessee from month to month that he "guessed he would have to give up the house" is not a sufficient notice of an intention to terminate the lease.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 400.

A mere tender of the keys of the house by a third party is not equivalent to notice. Finch *v.* Moore, 50 Minn. 116, 52 N. W. 384. See also Durfee *v.* United Stores, 24 R. I. 254, 52 Atl. 1087.

95. Eberlein *v.* Abel, 10 Ill. App. 626. See, generally, *supra*, IX, A, 4.

96. Long *v.* Bolen Coal Co., 56 Mo. App. 605.

97. Vegely *v.* Robinson, 20 Mo. App. 199.

98. Damkroger *v.* Pearson, 74 Minn. 77, 76 N. W. 960; Marks *v.* Dellaglio, 56 N. Y. App. Div. 299, 67 N. Y. Suppl. 736 [*reversing* 32 Misc. 94, 65 N. Y. Suppl. 502].

99. Bowen *v.* Anderson, [1894] 1 Q. B. 164, 58 J. P. 213, 10 Reports 47, 42 Wkly. Rep. 236 [*explaining* Sandford *v.* Clarke, 21 Q. B. D. 398, 52 J. P. 773, 57 L. J. Q. B. 507, 59 L. T. Rep. N. S. 226, 37 Wkly. Rep. 28]; Harvey *v.* Copeland, L. R. 30 Ir. 412; Doe *v.* Scott, 6 Bing. 362, 8 L. J. C. P. O. S. 110, 4 M. & P. 20, 31 Rev. Rep. 438, 19 E. C. L. 168 (holding that notice to a weekly tenant to quit at the end of his tenancy next after one week from the date of the notice is sufficient); Jones *v.* Mills, 10 C. B. N. S. 788, 8 Jur. N. S. 387, 31 L. J. C. P. 66, 100 E. C. L. 788. *Compare* Huffell *v.* Armitstead, 7 C. & P. 56, 32 E. C. L. 497, holding that in the case of an ordinary weekly tenancy a week's notice to quit is not implied as part of the contract unless there is a usage to that effect.

Change by agreement.— The parties may agree that a longer or shorter notice shall be necessary to determine a tenancy from week to week. Doe *v.* Raffan, 6 Esp. 4.

Seven full days' notice must be given, in the absence of agreement, since the law does not take notice of the fraction of a day. Weston *v.* Fidler, 67 J. P. 208, 88 L. T. Rep. N. S. 769.

1. Knight *v.* Indiana Coal, etc., Co., 47 Ind. 105, 17 Am. Rep. 692; Davis *v.* Thompson, 13 Me. 209. See *supra*, VI, A, 1.

2. Lyon *v.* Cunningham, 136 Mass. 532.

tion of landlord and tenant, is sufficient for this purpose.[3] So too an estate at will may be subject to a condition, or be limited upon a contingency and determined upon the happening of such contingency.[4]

2. By Transfer or Lease of Landlord's Estate. A tenancy at will is terminated by an alienation of the estate by the landlord.[5] A written lease from the landlord to a third person has the same effect as a conveyance in fee.[6] Knowledge of the alienation or lease must be brought home to the tenant, although no particular form of notice is necessary.[7] Upon such an alienation or lease by the

3. *Maine.*— Bennock *v.* Whipple, 12 Me. 346, 28 Am. Dec. 186; Campbell *v.* Procter, 6 Me. 12; Little *v.* Palister, 4 Me. 209.

Massachusetts.— Ellis *v.* Paige, 1 Pick. 43.

Vermont.— Chamberlin *v.* Donohue, 45 Vt. 50.

England.— Ball *v.* Cullimore, 2 C. M. & R. 120, 1 Gale 96, 4 L. J. Exch. 137, 5 Tyrw. 753.

Canada.— Henderson *v.* Harper, 1 U. C. Q. B. 481.

Effect of statutes.— A statute concerning the termination of estates at will does not apply to cases in which the tenancy is terminated according to the principle of common law, by the consent of both parties. Cooper *v.* Adams, 6 Cush. (Mass.) 87. A statute providing for the termination of tenancies at will by notice in writing served on the occupant a certain period before the time fixed for the termination does not provide that such tenancies cannot be terminated in any other way; and even if this is implied as to tenancies under the statute, tenancies at common law may be terminable in the same manner as before the statute. Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616.

A refusal to accept a deed after entry under agreement to purchase terminates a tenancy at will. Gould *v.* Thompson, 4 Metc. (Mass.) 224.

Changes in the personnel of a tenant partnership, and its change from a partnership to a corporation, acquiesced in by the lessor, do not terminate a tenancy at will, there being no interruption of occupancy. Walker Ice Co. *v.* American Steel, etc., Co., 185 Mass. 463, 70 N. E. 937.

4. Lyon *v.* Cunningham, 136 Mass. 532.

5. Seavey *v.* Cloudman, 90 Me. 536, 38 Atl. 540; Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616; Lash *v.* Ames, 171 Mass. 487, 50 N. E. 996; Emmes *v.* Feeley, 132 Mass. 346; Rooney *v.* Gillespie, 6 Allen (Mass.) 74; Curtis *v.* Galvin, 1 Allen (Mass.) 215; McFarland *v.* Chase, 7 Gray (Mass.) 462 (holding that a conveyance of land by all the members of a partnership to a new firm, consisting of themselves and one other, transfers an undivided share of the land to the new partner, and puts an end to an existing lease at will of the estate); Benedict *v.* Morse, 10 Metc. (Mass.) 223; Keay *v.* Goodwin, 16 Mass. 1; Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195. See also Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464. But see German State Bank *v.* Herron, 111 Iowa 25, 82 N. W. 430, holding that under Code, § 2991, requiring that thirty days' notice in writing must be given by either party to terminate a tenancy at will, a conveyance by the landlord of premises held by a tenant at will does not terminate the tenancy.

A mortgage of the premises by the landlord terminates a tenancy at will, where such mortgage is brought to the knowledge of the tenant. Jarman *v.* Hale, [1899] 1 Q. B. 994, 63 L. J. Q. B. 681. So if a mortgagee notifies the tenant at will of the mortgagor to pay rent to him the tenancy at will is determined. Hill *v.* Jordan, 30 Me. 367; Crosby *v.* Harlow, 21 Me. 499, 38 Am. Dec. 276.

A partition of the land will determine a tenancy at will of land held in common. Rising *v.* Stannard, 17 Mass. 282.

A taking of land by a city, for the purpose of widening a street, without actual eviction, does not determine the estate of a tenant at will, since only an easement and not the fee is taken. Emmes *v.* Feeley, 132 Mass. 346.

Where one rents land for the purpose of making a crop, under the condition that he is to give up possession in case the owner sells to a third person before the crop is made, it is not competent for the tenant, in case a sale is made, to object that the contract of sale is not evidenced by a deed conveying a perfect title. Dean *v.* Fail, 8 Port. (Ala.) 491.

6. Cunningham *v.* Holton, 55 Me. 33; Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462 (holding that where a tenant holds as tenant at will of a wife, even with the permission of the husband, execution and delivery of the written lease of the husband to a third person terminates the tenancy at will); Pratt *v.* Farar, 10 Allen (Mass.) 519 (holding that a tenancy at will is terminated by a written lease of the premises for one year from the lessor to a third person, although such lease provides that no rent shall be claimed until the lessee is in actual possession); Howard *v.* Merriam, 5 Cush. (Mass.) 563; Kelly *v.* Waite, 12 Metc. (Mass.) 300; Hildreth *v.* Conant, 10 Metc. (Mass.) 298.

Termination of under-tenancy.— Where a tenancy at will is terminated by a lease for years to a third person, the lessee for years may terminate the tenancy of an under-tenant of the tenant at will by notice to quit forthwith. Clark *v.* Wheelock, 99 Mass. 14.

7. Pratt *v.* Farrar, 10 Allen (Mass.) 519; Mizmer *v.* Munroe, 10 Gray (Mass.) 290 (holding that notice to a tenant at will that his landlord has made a lease of the premises to another person need not state that such

landlord, made known to the tenant, he becomes a tenant at sufferance, not entitled to notice to quit.[8]

3. By Death of Lessor or Lessee. A tenancy at will is determined, by implication of law, upon the death of either the lessor[9] or the lessee.[10]

4. Disclaimer of Title and Other Wrongful Acts of Tenant. As has been seen a tenancy at will may always be determined by any act or declaration of the tenant inconsistent with the continued voluntary relation of landlord and tenant:[11] As by denying his landlord's title, so as to render unnecessary a notice to quit;[12] by committing waste;[13] by assignment,[14] or executing a mortgage in fee of the premises;[15] by receiving a deed from a stranger and causing it to be placed upon record;[16] or by assenting to an extent upon the land as his property.[17] The rule that assignment of the premises determines a tenancy at will is, however, subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to the landlord.[18]

5. By Demand of Possession and Entry by Landlord. A tenancy at will may be terminated by demand of possession without notice to quit.[19] Anything which amounts to a demand of possession, although not expressed in precise and formal

lease is in writing); Furlong *v.* Leary, 8 Cush. (Mass.) 409; Doe *v.* Thomas, 6 Exch. 854, 20 L. J. Exch. 367.

The authority of an attorney by whom the notice to a tenant at will that his landlord had leased the premises to another is signed need not be known to the tenant. Mizner *v.* Munroe, 10 Gray (Mass.) 290.

8. Seavey *v.* Cloudman, 90 Me. 536, 38 Atl. 540; Lash *v.* Ames, 171 Mass. 487, 50 N. E. 996; Pratt *v.* Farrar, 10 Allen (Mass.) 519; McFarland *v.* Chase, 7 Gray (Mass.) 462.

9. *Indiana.*— Manchester *v.* Doddridge, 3 Ind. 360.

Maine.— Reed *v.* Reed, 48 Me. 388.

Massachusetts.— Rising *v.* Stannard, 17 Mass. 282.

Ohio.— Say *v.* Stoddard, 27 Ohio St. 478.

Texas.— Lea *v.* Hernandez, 10 Tex. 137.

England.— James *v.* Dean, 11 Ves. Jr. 383, 32 Eng. Reprint 1135 [*affirmed* in 15 Ves. Jr. 236, 8 Rev. Rep. 178, 33 Eng. Reprint 744].

10. *Maine.*— Robie *v.* Smith, 21 Me. 114, holding further that an under-tenancy, founded on a verbal agreement with a tenant at will, is terminated by the death of the latter, and such under-tenant is not entitled to notice to quit before entry by the owner.

Massachusetts.— Rising *v.* Stannard, 17 Mass. 282.

Ohio.— Say *v.* Stoddard, 27 Ohio St. 478.

Pennsylvania.— Loran's Estate, 20 Phila. 174, 29 Wkly. Notes Cas. 115.

Texas.— Lea *v.* Hernandez, 10 Tex. 137.

England.— James *v.* Dean, 11 Ves. Jr. 383, 32 Eng. Reprint 1135 [*affirmed* in 15 Ves. Jr. 236, 8 Rev. Rep. 178, 33 Eng. Reprint 744].

11. See *supra*, IX, F, 1.

12. *Alabama.*— Tillotson *v.* Doe, 5 Ala. 407, 39 Am. Dec. 330.

California.— McCarthy *v.* Brown, 113 Cal. 15, 45 Pac. 14; Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596; Simpson *v.* Applegate, 75 Cal. 342, 17 Pac. 237.

Illinois.— Herrell *v.* Sizeland, 81 Ill. 457.

Kentucky.— Farrow *v.* Edmundson, 4 B. Mon. 605, 41 Am. Dec. 250.

Maine.— Currier *v.* Earl, 13 Me. 216.

Massachusetts.— Appleton *v.* Ames, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206.

Missouri.— Amick *v.* Brubaker, 101 Mo. 473, 14 S. W. 627; Ramsey *v.* Henderson, 91 Mo. 560, 4 S. W. 408.

New Jersey.— Den *v.* Blair, 15 N. J. L. 181.

New York.— Jackson *v.* French, 3 Wend. 337, 20 Am. Dec. 699.

North Carolina.— Love *v.* Edmonston, 23 N. C. 152.

Vermont.— Hall *v.* Dewey, 10 Vt. 593.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 420.

13. Daniels *v.* Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Pettengill *v.* Evans, 5 N. H. 54; Phillips *v.* Covert, 7 Johns. (N. Y.) 1. But see Young *v.* Young, 36 Me. 133. See, generally, Waste.

14. King *v.* Lawson, 98 Mass. 309; Cooper *v.* Adams, 6 Cush. (Mass.) 87; Howell *v.* Howell, 29 N. C. 491, 47 Am. Dec. 335; Doak *v.* Donelson, 2 Yerg. (Tenn.) 249, 24 Am. Dec. 485.

15. Little *v.* Palister, 4 Me. 209.

16. Bennock *v.* Whipple, 12 Me. 346, 28 Am. Dec. 186.

17. Campbell *v.* Procter, 6 Me. 12.

18. Melling *v.* Leak, 16 C. B. 652, 3 C. L. R. 1017, 1 Jur. N. S. 759, 24 L. J. C. P. 187, 3 Wkly. Rep. 595, 81 E. C. L. 652; Pinhorn *v.* Sonster, 8 Exch. 763, 16 Jur. 1001, 22 L. J. Exch. 266, 1 Wkly. Rep. 336.

19. Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499; Peters *v.* Balke, 170 Ill. 304, 48 N. E. 1012 [*affirming* 68 Ill. App. 587]; Herrell *v.* Sizeland, 81 Ill. 457; Dunne *v.* School Trustees, 39 Ill. 578; Howell *v.* Howell, 29 N. C. 496, 47 Am. Dec. 335; Love *v.* Edmonston, 23 N. C. 152; Roe *v.* Street, 2 A. & E. 329, 4 L. J. K. B. 67, 4 N. & M. 42, 29 E. C. L. 163; Doe *v.* McKaeg, 10 B. & C. 721, 21 E. C. L. 304; Doe *v.* Jones, 10 B. & C. 718, 8 L. J. K. B. O. S. 310, 21 E. C. L. 303; Doe *v.* Price, 9 Bing. 356, 2 Moore & S. 464; 23 E. C. L. 614.

language, is sufficient to indicate a determination of the landlord's will.[20] Thus the recovery of a judgment against a lessee for possession of the premises,[21] or the commencement of an action of ejectment by the owner,[22] determines the relation. The estate of a tenant at will may likewise be determined by an entry upon the premises by the owner for that purpose.[23]

6. By Notice to Quit — a. In General. While the law differs in different jurisdictions as to the necessity of notice to terminate a tenancy at will,[24] the rule is universal that such a tenancy may be terminated by notice.[25]

b. Necessity and Sufficiency. A strict tenancy at will at common law was terminable without notice.[26] Notice to quit is now, however, usually required,[27] but the length thereof varies in different jurisdictions.[28] It is usually provided

20. Doe *v.* Price, 9 Bing. 356, 2 Moore & S. 464, 23 E. C. L. 614.

21. Hatstat *v.* Packard, 7 Cush. (Mass.) 245.

22. Chamberlin *v.* Donahue, 45 Vt. 50.

23. Cook *v.* Cook, 28 Ala. 660 (holding that to determine a tenancy by the landlord's entering on the land and there by words declaring it at an end, it is necessary that the tenant should have notice of such words); Hill *v.* Jordan, 30 Me. 367; Moore *v.* Boyd, 24 Me. 242; Curl *v.* Lowell, 19 Pick. (Mass.) 25 (holding that an entry of a landlord on the premises, and legal notice to quit given to the tenant at will is sufficient, without expelling the tenant, to put an end to the lease, and revest possession); Pollen *v.* Brewer, 7 C. B. N. S. 371, 6 Jur. N. S. 509, 1 L. T. Rep. N. S. 9, 97 E. C. L. 371; Wallis *v.* Delmar, 29 L. J. Exch. 276; Turner *v.* Doe, 9 M. & W. 643, 11 L. J. Exch. 453 (holding that any act by the landlord for which he would otherwise be liable to an action of trespass at suit of the tenant is a determination of the will).

24. See *infra*, IX, F, 6, b.

25. *Indian Territory.*— Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536.

Maine.— Davis *v.* Thompson, 13 Me. 209.

New York.— Bradley *v.* Covel, 4 Cow. 349.

South Carolina.— Couch *v.* Burke, 2 Hill 534.

England.— Coatsworth *v.* Johnson, 55 L. J. Q. B. 220, 54 L. T. Rep. N. S. 520.

Effect of increase of rent.— Notice by a landlord to a tenant at will, paying rent monthly, that after a certain day the rent will be raised and payable weekly, does not, unless assented to by the tenant, estop the landlord to terminate the tenancy by a month's notice to quit. Blish *v.* Harlow, 15 Gray (Mass.) 316.

26. *Illinois.*— Herrell *v.* Sizeland, 81 Ill. 457; Dunne *v.* School Trustees, 39 Ill. 578.

Kentucky.— McGee *v.* Gibson, 1 B. Mon. 105.

Massachusetts.— Curl *v.* Lowell, 19 Pick. 25; Ellis *v.* Paige, 1 Pick. 43.

New York.— Jackson *v.* Bradt, 2 Cai. 169.

England.— Doe *v.* McKaeg, 10 B. & C. 721, 21 E. C. L. 304; Doe *v.* Jones, 10 B. & C. 718, 8 L. J. K. B. O. S. 310, 21 E. C. L. 303.

27. *California.*— Frisbie *v.* Price, 27 Cal. 253.

Indiana.— Coomler *v.* Hefner, 86 Ind. 108.

Massachusetts.— Gleason *v.* Gleason, 8 Cush. 32.

Michigan.— Simons *v.* Detroit Twist Drill Co., 136 Mich. 592, 99 N. W. 862.

Minnesota.— Van Brunt *v.* Wallace, 88 Minn. 116, 92 N. W. 521.

Missouri.— Allen *v.* Mansfield, 82 Mo. 688.

Oregon.— Forsythe *v.* Pogue, 25 Oreg. 481, 36 Pac. 571.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 422.

And see the statutes of the several states.

After disclaimer of tenancy see *supra*, IX, F, 4.

28. *California.*— Thirty days. Carteri *v.* Roberts, 140 Cal. 164, 73 Pac. 818; King *v.* Conolly, 51 Cal. 181. See also Blum *v.* Robertson, 24 Cal. 127.

Delaware.— Three months. Bonsall *v.* McKay, 1 Houst. 520.

Georgia.— Two months. Western Union Tel. Co. *v.* Fain, 52 Ga. 18.

Iowa.— Thirty days. Kuhn *v.* Kuhn, 70 Iowa 682, 28 N. W. 541; Munson *v.* Plummer, 59 Iowa 120, 12 N. W. 806.

Kansas.— Thirty days. Betz *v.* Maxwell, 48 Kan. 142, 29 Pac. 147.

Kentucky.— Six months. Squires *v.* Huff, 3 A. K. Marsh. 17.

Maine.— Thirty days. Thomas *v.* Sandford Steamship Co., 71 Me. 548; Sherburne *v.* Jones, 20 Me. 70; Davis *v.* Thompson, 13 Me. 209. Rev. St. (1858) c. 94, §§ 1, 2, requiring a thirty days' notice to terminate a tenacy at will, were held to relate only to the notice required for the maintenance of process of forcible entry and detainer, and therefore the landlord under such tenancy might enter without notice. Withers *v.* Larrabee, 48 Me. 570; Gordon *v.* Gilman, 48 Me. 473; Moore *v.* Boyd, 24 Me. 242. Where the tenant did not neglect to pay his rent or rent was not payable until the close of the year, three months' notice was required by St. c. 95, § 19. Young *v.* Young, 36 Me. 133.

Massachusetts.— By Rev. St. c. 60, § 26, it was provided that an estate at will when the rent reserved was payable at periods of less than three months might be determined by either party by a notice in writing equal to the interval between the days of payment. Sanford *v.* Harvey, 11 Cush. 93; Prescott *v.* Elm, 7 Cush. 346. Prior to this statute the right of a tenant at will to notice was regarded as doubtful and in any event reason-

that in all cases of neglect or refusal to pay the rent due on a lease at will, a shorter notice — the time of which varies in different jurisdictions — shall be sufficient to terminate such lease.[29] By an agreement of the parties, the length of time required for the notice may be varied, and it may be limited to end on a particular day or time.[30] The rights of tenants at will in respect to notice are determined by the statutes in force at the time the question arises.[31] Where one occupies premises under a mere license,[32] or under a conditional limitation,[33] no notice is necessary. So also a tenant at will has no right to notice after he has

able notice to be determined as a matter of law under the circumstances of each case was sufficient. Coffin *v.* Lunt, 2 Pick. 70; Ellis *v.* Paige, 1 Pick. 43; Rising *v.* Stannard, 17 Mass. 282. And see Howard *v.* Merriam, 5 Cush. 563.

Michigan.— Where the letting is for an indefinite period by the month one month's notice is necessary. Haines *v.* Beach, 90 Mich. 563, 51 N. W. 644; Le Tourneau *v.* Smith, 53 Mich. 473, 19 N. W. 151. In the absence of an agreement to pay rent at a shorter interval three months' notice is required. Knight *v.* Hartman, 81 Mich. 462, 45 N. W. 1008; Hoffman *v.* Clark, 63 Mich. 175, 29 N. W. 695. Otherwise notice is sufficient if equal to the period between payments of rent. Landsberg *v.* Tivoli Brewing Co., 132 Mich. 651, 94 N. W. 197; Barlum *v.* Berger, 125 Mich. 504, 84 N. W. 1070 (holding that where payments were monthly, and notice was given July 10, and proceedings for recovery of possession commenced August 10, the notice was sufficient); Hilsendegen *v.* Scheich, 55 Mich. 468, 21 N. W. 894; Woodrow *v.* Michael, 13 Mich. 187; Huyser *v.* Chase, 13 Mich. 98. See also Lane *v.* Ruhl, 94 Mich. 474, 54 N. W. 175.

Missouri.— One month. Tarlotting *v.* Bokern, 95 Mo. 541, 8 S. W. 547; Corby *v.* McSpadden, 63 Mo. App. 648.

New Jersey.— Three months. Guvernator *v.* Kenin, 66 N. J. L. 114, 48 Atl. 1023. But see Hankinson *v.* Blair, 15 N. J. L. 181; McEowen *v.* Drake, 14 N. J. L. 523.

New York.— One month. Larned *v.* Hudson, 60 N. Y. 102; Burns *v.* Bryant, 31 N. Y. 453; Livingston *v.* Tanner, 14 N. Y. 64; Wissel *v.* Ott, 34 N. Y. App. Div. 159, 54 N. Y. Suppl. 605; Post *v.* Post, 14 Barb. 253.

North Carolina.— See Love *v.* Edmonston, 23 N. C. 152, holding three weeks' notice sufficient.

Rhode Island.— Under a statute providing that tenants at will or by sufferance shall quit upon notice in writing from the lessor or owner on the day named therein, the notice required is not a reasonable notice but any notice the lessor or owner may see fit to give. Payton *v.* Sherburne, 15 R. I. 213, 2 Atl. 300.

Vermont.— Where an annual rent is reserved six months' notice is necessary. Blanchard *v.* Bowers, 67 Vt. 403, 31 Atl. 848. But see Rich *v.* Bolton, 46 Vt. 84, 14 Am. Rep. 615, holding a reasonable notice sufficient.

England.— Six months. Richardson *v.* Langridge, 4 Taunt. 128, 13 Rev. Rep. 570; Parker *v.* Constable, 3 Wils. C. P. 25.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 422.

And see the statutes of the several states.

A statute providing for a particular notice does not control if the parties stipulate in writing for a longer or shorter notice. B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967.

29. See the statutes of the several states.

In Maine thirty days is sufficient. Wilson *v.* Prescott, 62 Me. 115 (holding further that a tenancy may be terminated by notice irrespective of pay day, if when the notice expires any rent due remains unpaid); Smith *v.* Rowe, 31 Me. 212; Wheeler *v.* Cowan, 25 Me. 283.

In Massachusetts fourteen days is sufficient. Borden *v.* Sackett, 113 Mass. 214 (holding further that the right of the landlord to terminate the tenancy on the failure of the tenant to pay rent when due is not affected by the fact that, at the time the rent became due, the landlord was, and continued until the time of the trial to be, indebted to the tenant in a sum greater than the amount of rent due); Currier *v.* Barker, 2 Gray 224.

In Nebraska three days is sufficient. Snyder *v.* Porter, 69 Nebr. 431, 95 N. W. 1009.

The fact that the rent has not been demanded will not prevent the landlord from terminating the tenancy by such notice. Borden *v.* Sackett, 113 Mass. 214.

30. B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967; Currier *v.* Perley, 24 N. H. 219; Humphries *v.* Humphries, 25 N. C. 362; Doe *v.* Bell, 5 T. R. 471, 2 Rev. Rep. 642.

31. Gordon *v.* Gilman, 48 Me. 473.

32. Doyle *v.* Gibbs, 6 Lans. (N. Y.) 180, holding that a person occupying a house under a contract to pay rent until his wife recovers from a sickness is not entitled to notice to quit, as he holds under a mere license.

33. Clark *v.* Rhoads, 79 Ind. 342; Ashley *v.* Warner, 11 Gray (Mass.) 43 (holding that an estate at will left on a conditional limitation is determined by the happening of the contingency, and no notice is necessary); People *v.* Schackno, 48 Barb. (N. Y.) 551. *Compare* Shaw *v.* Hoffman, 25 Mich. 162, holding that a lease for five years containing a clause whereby the lessor agrees to give up the lease if the lessor or his heirs or assigns should conclude to build on the premises does not create a tenancy at will strictly, but rather a tenancy upon condition, and the lessee is entitled to reasonable notice of the les-

determined the will by an act of voluntary waste.[34] A written notice to terminate a tenancy at will was not required at common law and is not now necessary except when the statute so requires.[35]

c. Time When Notice Takes Effect. In some jurisdictions it is held that the notice to quit must terminate at the expiration of an interval of rent payment,[36] although an exception is made to this requirement, so far as a termination by the landlord is concerned. His notice to the tenant may be without any respect to any pay-day, if when the notice expires the tenant shall be in any arrears of paying his rent.[37] So it is also held in some states that the day on which a tenancy is to be terminated by the notice should be truly stated,[38] while in others this need not be done.[39] But if a day is unnecessarily named, it will not vitiate the notice, although the day specified is one on which the tenancy cannot legally be terminated. It will take effect at the end of the required period of notice.[40]

7. By Surrender and Abandonment. A tenancy is not terminated by the mere act of the tenant in vacating the premises, where the landlord does not accept the surrender, but there must also be a proper legal notice given by the tenant of his intention to terminate the tenancy.[41] It is perfectly proper, however, for parties to a tenancy at will to abandon the original agreement without resorting to the statutory method of terminating the tenancy.[42] Thus an agreement between a landlord and his tenant at will for a termination of the tenancy by a surrender by the tenant and acceptance thereof by the landlord on a day earlier than the date on which the tenancy could be terminated by either party without the consent of the other is valid; the reciprocal surrender of rights constituting a consideration on each side.[43] Abandonment by a tenant at will is an abandonment to his landlord.[44]

G. Tenancies at Sufferance — 1. In General. Where notice is unnecessary to terminate a tenancy at sufferance, the owner of the fee may enter at any time,

sor's determination to build and of his desire that the lease should be given up under said clause.

34. Phillips *v.* Covert, 7 Johns. (N. Y.) 1.

35. Guvernator *v.* Kenin, 66 N. J. L. 114, 48 Atl. 1023.

36. Wilson *v.* Prescott, 62 Me. 115; Walker *v.* Sharpe, 14 Allen (Mass.) 43; Prescott *v.* Elm, 7 Cush. (Mass.) 346 (holding further that the date of notice to quit, given by a landlord to his tenant at will, cannot be presumed, in the absence of other evidence, to be one of the days on which rent was payable); Eastman *v.* Vetter, 57 Minn. 164, 58 N. W. 989; Grace *v.* Michaud, 50 Minn. 139, 52 N. W. 390. *Contra*, Stickney *v.* Burke, 64 N. H. 377, 10 Atl. 852 (holding that the notice requisite to determine a tenancy at will may require the tenant to quit at any day therein named); Peer *v.* O'Leary, 8 Misc. (N. Y.) 350, 28 N. Y. Suppl. 687.

37. Wilson *v.* Prescott, 62 Me. 115; Currier *v.* Barker, 2 Gray (Mass.) 224.

38. Boynton *v.* Bodwell, 113 Mass. 531; Hultain *v.* Munigle, 6 Allen (Mass.) 220; Currier *v.* Barker, 2 Gray (Mass.) 224; Sandford *v.* Harvey, 11 Cush. (Mass.) 93, holding that it is not necessary to name the precise day and date on which the tenancy is to expire, but it may be designated in general terms if stated correctly.

Computation of period of notice in general see Time.

39. Burns *v.* Bryant, 31 N. Y. 453.

40. Hogsett *v.* Ellis, 17 Mich. 351; Burns *v.* Bryant, 31 N. Y. 453; People *v.* Schackno, 48 Barb. (N. Y.) 551.

41. *Georgia.*— Nicholes *v.* Swift, 118 Ga. 922, 45 S. E. 708; Western Union Tel. Co. *v.* Fain, 52 Ga. 18.

Kansas.—Betz *v.* Maxwell, 48 Kan. 142, 29 Pac. 147.

Massachusetts.— Taylor *v.* Tuson, 172 Mass. 145, 51 N. E. 462; Bachelder *v.* Bachelder, 2 Allen 105; Walker *v.* Furbush, 11 Cush. 366, 59 Am. Dec. 148; Whitney *v.* Gordon, 1 Cush. 266.

Minnesota.— Paget *v.* Electrical Engineering Co., 82 Minn. 244, 84 N. W. 800; Sanford *v.* Johnson, 24 Minn. 172.

New Hampshire.— Chapman *v.* Tiffany, 70 N. H. 249, 47 Atl. 603; Currier *v.* Perley, 24 N. H. 219.

England.— Pinhorn *v.* Sonster, 8 Exch. 763, 16 Jur. 1001, 22 L. J. Exch. 266, 1 Wkly. Rep. 336.

See 32 Cent. Dig. tit "Landlord and Tenant," § 426.

The fact that rent is payable in advance confers no right upon a tenant at will to leave without notice. Sprague *v.* Quinn, 108 Mass. 553.

42. Forbes *v.* Smiley, 56 Me. 174.

43. Betz *v.* Maxwell, 48 Kan. 142, 29 Pac. 147; Davis *v.* Murphy, 126 Mass. 143; May *v.* Rice, 108 Mass. 150, 11 Am. Rep. 328; Engels *v.* Mitchell, 30 Minn. 122, 14 N. W. 510.

44. Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

and put an end to his tenant's holding, or he may maintain his action of ejectment;[45] but he cannot maintain an action of trespass against a tenant at sufferance as he might against a stranger.[46]

2. By Notice to Quit. In the absence of a statute requiring it, a tenant at sufferance is not entitled to notice to quit;[47] but he is entitled to a reasonable time to remove himself and his property from the premises.[48] In several states statutes require notice.[49]

X. Reëntry and Recovery of Possession by Landlord.

A. Reëntry — 1. When Reëntry May Be Made — a. In General. At common law the landlord, upon the expiration of the tenant's right to occupy the premises, might reënter,[50] if he did so without breach of the peace;[51] he might bring ejectment;[52] or in case the tenant had bound himself to quit and surrender up the possession at a definite and fixed period, he might sue him upon his covenant for damages.[53] In a like manner the landlord had a right of reëntry upon the forfeiture of the lease,[54] or where the tenant disavowed his tenancy;[55] and in general the common law gave a right of reëntry as a concurrent remedy wherever eject-

45. Reed *v.* Reed, 48 Me. 388; Chamberlin *v.* Donahue, 45 Vt. 50.

46. Rising *v.* Stannard, 17 Mass. 282; Keay *v.* Goodwin, 16 Mass. 1.

47. *California.*— Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45; Hauxhurst *v.* Lobree, 38 Cal. 563.

District of Columbia.— Spalding *v.* Hall, 6 D. C. 123.

Georgia.— Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

Maine.— Reed *v.* Reed, 48 Me. 388.

Massachusetts.— Pratt *v.* Farrar, 10 Allen 519; Evans *v.* Reed, 5 Gray 308; Hollis *v.* Pool, 3 Metc. 350; Kinsley *v.* Ames, 2 Metc. 29.

Missouri.— Wamsganz *v.* Wolff, 86 Mo. App. 205.

New Jersey.— Moore *v.* Moore, 41 N. J. L. 515.

New York.— Reckhow *v.* Schanck, 43 N. Y. 448; Jackson *v.* McLeod, 12 Johns. 182; Jackson *v.* Parkhurst, 5 Johns. 128.

Pennsylvania.— Adams *v.* Adams, 7 Phila. 160.

England.— Doe *v.* Quigley, 2 Campb. 505, 11 Rev. Rep. 780.

See 32 Cent. Dig. tit "Landlord and Tenant," § 433.

48. Pratt *v.* Farrar, 10 Allen (Mass.) 519, holding that forty-eight hours is sufficient time to allow a tenant by sufferance to remove from a house. See also *supra*, VII, D, 6.

49. See the statutes of the several states.

Thirty days.— Spalding *v.* Hall, 6 D. C. 123; Luchs *v.* Jones, 1 MacArthur (D. C.) 345; Livingston *v.* Tanner, 14 N. Y. 64 [*reversing* 12 Barb. 481]; Bristor *v.* Burr, 12 N. Y. St. 638; Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509 (holding that a notice given by a landlord to terminate a tenancy by sufferance is sufficient where it is given the proper number of days before action is brought as contained in the calendar month in which it is given); Eldred *v.* Eherman, 81 Wis. 182, 51 N. W. 441 (holding that after the possession of the lessee becomes wrongful he is not entitled to the notice required by statute to terminate a tenancy at will or by sufferance.

Reasonable notice.— Eichengreen *v.* Appel, 44 Ill. App. 19.

Written notice by owner.— Under a statute providing that tenants by sufferance shall quit upon notice in writing by the owner, they are entitled to such notice from the owner himself. Johnson *v.* Donaldson, 17 R. I. 107, 20 Atl. 242.

Demand of possession.— Under the New Jersey Landlord and Tenant Act a previous demand of possession only is required to terminate a tenancy by sufferance. Moore *v.* Smith, 56 N. J. L. 446, 29 Atl. 159.

50. Rich *v.* Keyser, 54 Pa. St. 86.

When a tenancy is limited to a definite time, the landlord may enter immediately upon its termination. Chesley *v.* Welch, 37 Me. 106 [*citing* Clapp *v.* Paine, 18 Me. 264; Preble *v.* Hay, 32 Me. 456] (and holding that while the landlord may by delay to enter allow the tenant to acquire the rights of a tenant at will upon the presumption that the landlord acquiesced in the continued possession, the burden of proof was upon plaintiff); Semmes *v.* U. S., 14 Ct. Cl. 493.

Necessity of notice to quit to terminate tenancy see *supra*, IX.

51. Rich *v.* Keyser, 54 Pa. St. 86. See *infra*, X, A, 3.

52. See *infra*, X, B.

53. See *supra*, VII, B, 1, a, (VII).

54. Wall *v.* Goodenough, 16 Ill. 415; Fortier *v.* Ballance, 10 Ill. 41.

What constitutes a forfeiture of the lease see *supra*, IX, B, 7.

55. Wadsworthville Poor School *v.* Jennings, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854, holding that the landlord may regain possession without waiting for the termination of the lease, where a tenant for years disavows his tenancy by conveying the leased land by deed in fee-simple.

ment might be maintained.[56] Until the expiration or termination of the term the landlord has no right of reëntry.[57] A landlord's entry will not be enjoined in a case where the tenant's title to the possession is doubtful.[58]

b. Statutory Provisions. By statute in some states the landlord may reënter upon default by the tenant in any of the terms of the lease, although a right of reëntry is not expressly reserved.[59] The legislature, without impairing the contract between the parties, may alter the common-law proceeding for reëntry or prescribe an additional mode of reëntry applicable to leases in which the common-law right of reëntry is reserved.[60] A statute providing for the termination of tenancies at sufferance by a notice to quit of thirty days does not impair the landlord's common-law right to oust a tenant or bring ejectment upon the expiration of the lease.[61]

c. After Abandonment by Tenant. After surrender of the lease the landlord may enter without notice.[62] The question of whether a lease has been abandoned so as to confer a right of reëntry is one of fact to be determined from the acts and intentions of the parties.[63]

d. On Breach of Covenant or Condition — (i) *General Rules.* The landlord has no right of reëntry for breach of covenant unless there is a stipulation in the lease that it shall work a forfeiture or termination of the tenant's interest,[64] or unless a right of reëntry is expressly conferred,[65] the landlord's remedy upon covenant broken being in general an action upon the covenant.[66] Hence an entry cannot be made for a mere breach of covenant to pay rent,[67] or to surrender the premises upon certain contingencies,[68] or not to assign.[69] Conditions of forfeiture for breach of condition should be strictly construed;[70] a breach of a condition subsequent does not work a forfeiture by mere operation of law, without some act on the part of the lessor claiming it.[71] To support a reëntry under the pro-

56. Frazier *v.* Caruther, 44 Ill. App. 61.

57. Brown *v.* Kite, 2 Overt. (Tenn.) 233. But see Lacey *v.* Lear, Peake Add. Cas. 210, 4 Rev. Rep. 904, holding that where the tenant abandons the premises without any intention of returning the landlord is not bound to let them fall into decay for want of care but may if he can peaceably do so take possession. See, generally, *supra*, III, C, 1.

A right of occupancy which is incidental to a contract of hire is not terminated by the wrongful act of the hirer in prohibiting or preventing the service. McGee *v.* Gibson, 2 B. Mon. (Ky.) 353.

58. Fitzpatrick *v.* Childs, 6 Phila. (Pa.) 135.

59. See Drew *v.* Mosbarger, 104 Ill. App. 635.

60. Van Rensselaer *v.* Snyder, 9 Barb. (N. Y.) 302 [*affirmed* in 13 N. Y. 299], holding under a lease providing that if no sufficient distress could be found on the premises to satisfy rent due and in arrear, or if any of the covenants should not be performed it should be lawful for the lessor to reënter, that by virtue of the act of May 13, 1846, abolishing distress for rent, fifteen days' previous notice was the only prerequisite to reëntry. *Compare* Williams *v.* Porter, 2 Barb. (N. Y.) 316.

61. Semmes *v.* U. S., 14 Ct. Cl. 493.

Statutes providing for notice to quit in order to terminate tenancies at sufferance do not impair the common-law right to oust a tenant or bring ejectment on the expiration of the lease. Semmes *v.* U. S., 14 Ct. Cl. 493.

62. McLaughlin *v.* Kennedy, 49 N. J. L. 519, 10 Atl. 391.

63. Aye *v.* Philadelphia Co., 193 Pa. St. 451, 44 Atl. 555, 74 Am. St. Rep. 696. See, generally, *supra*, IX, B, 8, c.

64. Bockover *v.* Post, 25 N. J. L. 285. *Compare* Hall *v.* Smith, 16 Minn. 58.

Forfeiture of lease see *supra*, IX, B, 7.

65. Ocean Grove Camp Meeting Assoc. *v.* Sanders, 68 N. J. L. 631, 54 Atl. 448.

66. See *supra*, IX, B, 7, d, (I), (A).

67. See *infra*, X, A, 1, d, (II).

68. Dennison *v.* Read, 3 Dana (Ky.) 586.

69. Bockover *v.* Post, 25 N. J. L. 285.

70. Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239. See *supra*, IX, B, 7, b.

71. Peacock, etc., Naval Stores Co. *v.* Brooks Lumber Co., 96 Ga. 542, 23 S. E. 835 (holding that the breach of a condition in a lease that if notes given for rent were not paid at maturity the property should revert to the lessor did not, without more, authorize the lessor's vendee to forcibly enter upon or evict from the premises the original lessee or his successor in title); Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239. See *supra*, IX, B, 7, e.

Presumption of forfeiture.— Where a lease provides that on default by the lessee the lessor may determine the lease, if the lessor resumes possession, it will be presumed that it was in pursuance of his right to terminate the lease. McKnight *v.* Kreutz, 51 Pa. St. 232. The lapse of nine years does not raise a presumption of reëntry for non-payment of

visions of a lease the landlord must show a strict compliance therewith.[72] So a lessor who has reëntered for other reasons cannot justify his reëntry by assigning a breach which he did not act upon or claim at the time.[73]

(II) *Non-Payment of Rent.* In the absence of a provision to such effect in the lease, non-payment of rent does not as a general rule work a forfeiture,[74] and hence confers no right of reëntry.[75] Under an express provision in the lease, however, the landlord may reënter for non-payment of rent,[76] a demand having been made before entry,[77] unless the lease expressly dispenses with the necessity thereof.[78]

(III) *Non-Payment of Taxes.* Where the lease so provides a reëntry may be made for a breach of a covenant to pay taxes.[79] In case the taxes are of necessity apportioned among several tenants, the reëntry cannot be made until there has been an apportionment fixing the liabilities of each tenant.[80]

2. Persons Entitled to Reënter. A right of reëntry cannot be reserved in a stranger to the legal estate[81] and must be exercised by the person entitled to the

rent. Jackson *v.* Walsh, 3 Johns. (N. Y.) 226.

Under the Conveyancing Act notice must be given preliminary to peaceable reëntry. *In re* Riggs, [1901] 2 K. B. 16, 70 L. J. K. B. 541, 84 L. T. Rep. N. S. 428, 8 Manson 233, 29 Wkly. Rep. 624.

72. Chapman *v.* Kirby, 49 Ill. 211; Meni *v.* Rathbone, 21 Ind. 454 (holding that where a breach of covenant was asserted, in that the taxes had not been paid, it was incumbent upon the landlord to show a notice that he would reënter if they were not paid, or a demand that they should be paid); Den *v.* Craig, 15 N. J. L. 191 (holding that where a lease provided that a reëntry might be made in case rent should remain in arrear for the space of twelve months and no sufficient distress to satisfy the same should be found upon the premises, the landlord was bound to show the want of sufficient distress upon the premises or excuse for not attempting to make a distress). And see Newman *v.* Rutter, 8 Watts (Pa.) 51. But see *contra*, Van Rensselaer *v.* Snyder, 9 Barb. (N. Y.) 302, upon the construction of a similar lease.

Where a tenant holds over and the landlord recognizes him as holding over, the provisions of the lease must be treated as controlling, with reference to notice and demand, in order to sustain reëntry. Belinski *v.* Brand, 76 Ill. App. 404.

Where compliance with the lease is prevented by the tenants, they cannot insist that the mode prescribed in the lease has not been followed in terminating the tenancy. Conner *v.* Jones, 28 Cal. 59.

73. Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239.

74. See *supra*, IX, B, 7, d, (I), (F).

75. Chapman *v.* Kirby, 49 Ill. 211 (holding that where the landlord agreed to furnish power the non-payment of rent did not authorize him to remove the shafting by which power was transmitted to the tenant's portion of the premises from the landlord's engine); Ocean Grove Camp Meeting Assoc. *v.* Sanders, 68 N. J. L. 631, 54 Atl. 448; Smith *v.* Blaisdell, 17 Vt. 199.

76. Wetzel *v.* Meranger, 85 Ill. App. 457; Winston *v.* Franklin Academy, 28 Miss. 118, 61 Am. Dec. 540; Scott *v.* Wasson, 2 Ohio Dec. (Reprint) 460, 3 West. L. Month. 148.

Absence of sufficient distress must be shown where the right to reëntry is conditional on such fact. Van Rensselaer *v.* Jewett, 5 Den. (N. Y.) 121.

77. *Connecticut.*— Camp *v.* Scott, 47 Conn. 366.

Kansas.— Chandler *v.* McGinning, 8 Kan. App. 421, 55 Pac. 103.

Minnesota.—Byrane *v.* Rogers, 8 Minn. 281.

New York.— Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275.

Ohio.— Scott *v.* Wasson, 2 Ohio Dec. (Reprint) 460, 3 West. L. Month. 148.

Pennsylvania.— Poterie Gas Co. *v.* Poterie, 179 Pa. St. 68, 36 Atl. 232.

Vermont.— See Smith *v.* Blaisdell, 17 Vt. 199.

United States.— Kansas City Elevator Co. *v.* Union Pac. R. Co., 17 Fed. 200, 3 McCrary 463; Lamson Consol. Store Service Co. *v.* Bowland, 114 Fed. 639, 52 C. C. A. 335.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1169.

Demand as necessary to termination of tenancy see *supra*, IX, B, 7, e.

78. Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214; Byrane *v.* Rogers, 8 Minn. 281; Doe *v.* Masters, 2 B. & C. 490, 4 D. & R. 45, 2 L. J. K. B. O. S. 117, 26 Rev. Rep. 422, 9 E. C. L. 217; Dormer's Case, 5 Coke 40*a*; Goodright *v.* Cator, Dougl. (3d ed.) 477. See also *supra*, IX, B, 7, e.

79. See *supra*, IX, B, 7, d, (I), (E).

80. Harford *v.* Taylor, 181 Mass. 266, 63 N. E. 902, holding that where several tenants used water measured by only one meter, the landlord could not oust a tenant for non-payment of water-rents, no attempt having been made to apportion the rents.

81. Doe *v.* Goldsmith, 2 Cromp. & J. 674, 1 L. J. Exch. 256, 2 Tyrw. 710; Doe *v.* Lawrence, 4 Taunt. 23; Hyndman *v.* Williams, 8 U. C. C. P. 293.

Lease executed after mortgage.— Where a mortgagee demised and the executrix of the mortgagor demised and confirmed, and a power of reëntry was reserved to them, or

possession.[82] So where a lessee sublets the leased premises for the entire term of his lease, he has no right of entry upon the expiration of the term,[83] although he may enter for breach of covenant or condition.[84] While a mere right of entry for forfeiture is not assignable,[85] and prior to the statute of Henry VIII,[86] the assignee of a reversion could not enter for conditions broken,[87] such statute and statutes in several of the states provide that the assignee or grantees of a reversion may take the same advantages of conditions and covenants in the lease as their grantors or assignors themselves had,[88] and notice need not have been given the tenant of the assignment.[89]

3. REËNTRY BY FORCE — a. In General. The rule supported apparently by the weight of authority is that where the landlord has become entitled to immediate possession of the premises through the expiration of the term or otherwise he may take such possession by force without incurring civil liability in case no more force than is reasonably necessary is employed,[90] and although he may be subject

either of them, the reëntry inured to revest the estate in the mortgagee, and a count in ejectment laying the demise jointly in the mortgagor and mortgagee was not sustainable. Doe *v.* Adams, 2 Cromp. & J. 232, 1 L. J. Exch. 105, 2 Tyrw. 289.

82. See Cunningham *v.* Holton, 55 Me. 33.

An entry by the reversioner will prevail over an entry by trustees after a termination of the trust. Ackland *v.* Lutley, 9 A. & E. 879, 8 L. J. Q. B. 164, 1 P. & D. 636, 36 E. C. L. 457.

83. Blumenberg *v.* Myres, 32 Cal. 93, 91 Am. Dec. 560; Ohio Iron Co. *v.* Auburn Iron Co., 64 Minn. 404, 67 N. W. 221.

84. Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668, 3 Code Rep. 165; Doe *v.* Bateman, 2 B. & Ald. 168, 20 Rev. Rep. 399.

85. Trask *v.* Wheeler, 7 Allen (Mass.) 109, holding that a transferee of the reversion had no right to enter because of an illegal use of the premises prior to his conveyance.

86. St. 32 Hen. VIII, c. 34.

87. Sheets *v.* Selden, 2 Wall. (U. S.) 177, 17 L. ed. 822; Scaltock *v.* Harston, 1 C. P. D. 106, 45 L. J. C. P. 125, 34 L. T. Rep. N. S. 130, 24 Wkly. Rep. 431; Mallory's Case, 5 Coke 111*b*.

88. See Van Rensselaer *v.* Slingerland, 26 N. Y. 580; Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104; Scaltock *v.* Harston, 1 C. P. D. 106, 45 L. J. C. P. 125, 34 L. T. Rep. N. S. 130, 24 Wkly. Rep. 431.

Rights of transferee of reversion in general see *supra*, III, D, 2, b.

Mortgagor in possession.— The Judicature Act of 1873 does not confer on a mortgagor entitled to the receipt of the rents and profits of land on lease at the date of the mortgage the rights of a legal assignee of the reversion, so as to entitle him in his own right to recover possession of the land on a forfeiture for breach of covenant in the lease. Matthews *v.* Usher, [1900] 2 Q. B. 535, 69 L. J. Q. B. 856, 83 L. T. Rep. N. S. 353, 49 Wkly. Rep. 40.

89. Scaltock *v.* Harston, 1 C. P. D. 106, 45 L. J. C. P. 125, 34 L. T. Rep. N. S. 130, 24 Wkly. Rep. 431.

90. *Maine.*— Reed *v.* Reed, 48 Me. 388.

Massachusetts.— Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272; Curtis *v.* Galvin, 1 Allen 215; Eames *v.* Prentice, 8 Cush. 337.

New Hampshire.— Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

Pennsylvania.—Overdeer *v.* Lewis, 1 Watts & S. 90, 37 Am. Dec. 440; Com. *v.* Kensey, 5 Pa. L. J. 119.

Rhode Island.— Allen *v.* Keily, 17 R. I. 731, 24 Atl. 776, 33 Am. Rep. 905, 16 L. R. A. 798.

South Carolina.— Rush *v.* Aiken Mfg. Co., 58 S. C. 145, 36 S. E. 497, 79 Am. St. Rep. 836 [not *following* Sharp *v.* Kinsman, 18 S. C. 108; Johnson *v.* Hannahan, 1 Strobh. 313], holding that a landlord who forcibly reëntered after the expiration of a tenancy, and without notice to the tenant caused him and his household goods to be put into the street is not liable therefor as a trespasser on real estate *ab initio*.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1167.

See also cases cited *infra*, this and following notes.

In case of tenancy by sufferance.— Eichengreen *v.* Appel, 44 Ill. App. 19; Wilde *v.* Cantillon, 1 Johns. Cas. (N. Y.) 123; Adams *v.* Adams, 7 Phila. (Pa.) 160.

In Illinois the landlord's right is limited to a peaceable reëntry. Harding *v.* Sandy, 43 Ill. App. 442; Briggs *v.* Roth, 28 Ill. App. 313. *Compare* Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759; Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. St. Rep. 133; Brooke *v.* O'Boyle, 27 Ill. App. 384.

Although the tenant is holding over in good faith under color and reasonable claim of right, the landlord has a right to use such reasonable force as is necessary to expel him if the tenancy has in fact terminated. Allen *v.* Keily, 17 R. I. 731, 24 Atl. 776, 33 Am. Rep. 905, 16 L. R. A. 798.

Expulsion without entry. — It has been held that where the landlord in place of entering upon the premises tore down adjoining premises so that it became unsafe for the tenant to remain longer in the demised premises, obliging him to vacate and remove his goods, the landlord was not a trespasser or

to punishment criminally, under statutes relating to forcible entry and detainer.[91] Hence an action of trespass *quare clausum fregit* will not lie in behalf of the tenant,[92] nor an action of trespass *vi et armis* for violence done to his person.[93] The conferring of a right upon the landlord to take forcible possession of the premises is not, however, conducive to public order, and in some cases it has been held that the force employed must stop short of personal violence,[94] while other cases go to the extent of holding the landlord liable to the tenant in damages in any case of a forcible retaking of possession,[95] these decisions being based in some

liable for damages to the tenant's business, or to his goods in the removal. Simmons *v.* Thompson, 1 Handy (Ohio) 521, 12 Ohio Dec. (Reprint) 268.

91. Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272. See, generally, FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1108.

92. *Illinois.*—Mueller *v.* Kuhn, 46 Ill. App. 496; Ostatag *v.* Taylor, 44 Ill. App. 469; Frazier *v.* Caruthers, 44 Ill. App. 61 [not *following* Reeder *v.* Purdy, 41 Ill. 279], holding that a landlord entitled to reënter for non-payment of rent under a clause in the lease, may do so and expel a subtenant who makes no resistance without being liable in trespass.

Massachusetts.— Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272; Moore *v.* Mason, 1 Allen 406; Curtis *v.* Galvin, 1 Allen 215; Mason *v.* Holt, 1 Allen 45; Miner *v.* Stevens, 1 Cush. 482; Meader *v.* Stone, 7 Metc. 147; Sampson *v.* Henry, 13 Pick. 36.

New Hampshire.— Weeks *v.* Sly, 61 N. H. 89; State *v.* Morgan, 59 N. H. 322; Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228.

New York.— Ives *v.* Ives, 13 Johns. 235; Hyatt *v.* Wood, 4 Johns. 150, 4 Am. Dec. 258; Wilde *v.* Cantillon, 1 Johns. Cas. 123.

North Carolina.— Walton *v.* File, 18 N. C. 567.

England.—Turner *v.* Meymott, 1 Bing. 158, 1 L. J. C. P. O. S. 13, 7 Moore C. P. 574, 25 Rev. Rep. 612, 8 E. C. L. 450; Taunton *v.* Costar, 7 T. R. 431, 4 Rev. Rep. 481. *Compare* Hillary *v.* Gay, 6 C. & P. 284, 25 E. C. L. 434, sustaining an action of trespass against the landlord who after expiration of the tenancy had forcibly put tenant's wife and furniture into the street.

Canada.—Boulton *v.* Murphy, 5 U. C. Q. B. O. S. 731, holding that the landlord may take possession if possible without a breach of the peace.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1174.

93. *Maine.*— Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442, holding that such force may be used as would support a plea of *molliter manus.*

Massachusetts.—Stone *v.* Laheny, 133 Mass. 426; Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272 (holding that since the landlord has the right to possession of the premises he is not liable to an action for the incidental act of expulsion which, because of the tenant's unlawful resistance, he has been obliged to resort to in order to make his entry effectual); Winter *v.* Stevens, 9 Allen 526; Mugford *v.* Richardson, 6 Allen 76, 83 Am. Dec. 617. But *compare* Sampson *v.* Henry, 13 Pick. 36, holding that where in connection with the forcible entry upon the premises a landlord inflicts damages upon the person of the tenant, an action of trespass will lie for such damages and that the forcible entry upon the premises might be proved and considered by way of aggravation of the damages if properly pleaded. See also Com. *v.* Haley, 4 Allen 318, in which a conviction for an assault was sustained.

New Hampshire.— Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

Rhode Island.— Allen *v.* Keily, 17 R. I. 731, 24 Atl. 776, 33 Am. St. Rep. 905, 16 L. R. A. 798 [*following* Freeman *v.* Wilson, 16 R. I. 524, 17 Atl. 921].

England.— Davis *v.* Burrell, 10 C. B. 821, 15 Jur. 658, 70 E. C. L. 821 [*disapproving* Newton *v.* Harland, 2 Jur. 350, 1 M. & G. 644, 1 Scott N. R. 473, 39 E. C. L. 952, in which it was held that the landlord was liable to an action of trespass for assault and battery]; Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437. See also Blades *v.* Higgs, 10 C. B. N. S. 713, 7 Jur. N. S. 1289, 30 L. J. C. P. 347, 4 L. T. Rep. N. S. 551, 100 E. C. L. 713, in which it was stated, in an action for assault committed in the retaking of personal property, that Newton *v.* Harland, 2 Jur. 350, 1 M. & G. 644, 1 Scott N. R. 473, 39 E. C. L. 952, had been *overruled* by Harvey *v.* Bridges, 3 D. & L. 55, 9 Jur. 759, 14 L. J. Exch. 272, 14 M. & W. 437.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1174.

94. Mershon *v.* Williams, 62 N. J. L. 779, 42 Atl. 778 (holding that the landlord may retake possession of the premises and remove the tenant's goods if he can do so without committing a breach of the peace); Todd *v.* Jackson, 26 N. J. L. 525. *Compare* Thiel *v.* Bull's Ferry Land Co., 58 N. J. L. 212. 33 Atl. 281, holding that in case of a forcible entry, although there was no breach of the peace, the landlord might recover nominal damages in an action of trespass.

95. *Illinois.*— Hubner *v.* Feige, 90 Ill. 203; Doty *v.* Burdick, 83 Ill. 473 (both holding that the tenant could recover damages in forcible entry and detainer); Briggs *v.* Roth, 28 Ill. App. 313 (holding that trespass will lie).

Maine.— Brock *v.* Berry, 31 Me. 293 (hold-

cases upon statutes making a forcible entry upon land tortious,[96] or upon the fact that summary proceedings have been provided by statute, through the agency of which the landlord may obtain speedy relief.[97]

b. In the Absence of the Tenant. Where the landlord is entitled to the possession, he may enter the premises by force in the absence of the tenant, without incurring civil liability, in case no unnecessary injury is done.[98]

c. Removal of Goods. Where the landlord has effected an entry, although in the absence of the tenant, he may remove the goods of the tenant from the premises, provided that he occasion them no unnecessary damage in so doing.[99]

d. Employment of Force After Peaceable Entry. Where the landlord has effected a peaceable entry, it has been held that he may remove the tenant by force in case he employs no more force than is reasonably necessary,[1] and likewise where the landlord has acquired lawful possession he may defend such possession, as against the tenant's attempt to retake it, by the resort to such force as is necessary.[2] A mere symbolic possession of the premises, however, is not sufficient

ing that trespass *quare clausum fregit* might be maintained, although two months' notice to quit had been given); Moore *v.* Boyd, 24 Me. 242 (holding that, although an entry to terminate a tenancy might be lawful and justifiable, trespass *quare clausum fregit* would lie in case the tenant was thrust cut with violence or without allowing him a reasonable time in which to remove).

South Carolina.— Sharp *v.* Kinsman, 18 S. C. 108 [not *followed* in Rush *v.* Aiken Mfg. Co., 58 S. C. 145, 36 S. E. 497, 79 Am. St. Rep. 836].

Tennessee.— Noel *v.* McCrory, 7 Coldw. 623.

Vermont.— Dustin *v.* Cowdry, 23 Vt. 631.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1174.

96. See *infra*, X, A, 3, c. And see, generally, FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1107.

97. See *infra*, X, A, 3, f.

98. *Louisiana.*— Looram *v.* Burlingame, 16 La. Ann. 199, holding that the tenant, after the termination of his lease and abandonment of the premises, cannot maintain a civil possession and prevent the entry of the owner by leaving behind a few effects and carrying away the keys.

Maine.— Rollins *v.* Mooers, 25 Me. 192.

Massachusetts.—Clark *v.* Keliher, 107 Mass. 406.

Ohio.— Smith *v.* Hawkes, 2 Ohio Dec. (Reprint) 733, 5 West. L. Month. 80.

Rhode Island.—Freeman *v.* Wilson, 16 R. I. 524, 17 Atl. 921.

Vermont.— Mussey *v.* Scott, 32 Vt. 82.

England.— Turner *v.* Meymott, 1 Bing. 158, 1 L. J. C. P. O. S. 13, 7 Moore C. P. 574, 25 Rev. Rep. 612, 8 E. C. L. 450; Hillary *v.* Gay, 6 C. & P. 284, 25 E. C. L. 434.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1171.

Contra.— Mason *v.* Hawes, 52 Conn. 12, 52 Am. Rep. 552.

99. *Illinois.*— Wetzel *v.* Meranger, 85 Ill. App. 457, holding that reasonable care must be employed.

Maine.— Stearns *v.* Sampson, 59 Me. 568, 8 Am. Dec. 442; Rollins *v.* Mooers, 25 Me. 192, holding that no liability arose where the furniture was removed in a careful manner and stored safely near-by.

Massachusetts.—Clark *v.* Keliher, 107 Mass. 406.

Nebraska.— Ish *v.* Marsh, 1 Nebr. (Unoff.) 864, 96 N. W. 58, holding use of ordinary care sufficient.

New Hampshire.—Weeks *v.* Sly, 61 N. H. 89; Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228, holding, however, that the power thus given by law is liable to great abuse and must be strictly pursued.

Ohio.— Smith *v.* Hawkes, 2 Ohio Dec. (Reprint) 733, 5 West. L. Month. 80.

Pennsylvania.— See Overdeer *v.* Lewis, 1 Watts & S. 90, 37 Am. Dec. 440.

Rhode Island.—Freeman *v.* Wilson, 16 R. I. 524, 17 Atl. 921.

Vermont.— Mussey *v.* Scott, 32 Vt. 82.

Removal of crops.— Where a tenant plants a crop which will not mature so that it may be removed by the end of his term, the landlord is not guilty of trespass in going upon the premises after the tenant has abandoned them and appropriating the growing crop. Sharp *v.* Kinsman, 18 S. C. 108.

1. Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442 (holding that the peaceable entry may be effected, although the landlord conceals his intention to remove the tenant); Mugford *v.* Richardson, 6 Allen (Mass.) 76, 83 Am. Dec. 617 (holding that where the owner of a tenement has gained peaceable possession of a portion thereof, upon the termination of his tenant's estate therein, he may use as much force as may be necessary to overcome the tenant's resistance to his taking possession of the residue).

2. *Colorado.*— Goshen *v.* People, 22 Colo. 270, 44 Pac. 503.

Massachusetts.—Clark *v.* Keliher, 107 Mass. 406.

Michigan.— Smith *v.* Detroit Loan, etc., Assoc., 115 Mich. 340, 73 N. W. 395, 69 Am. St. Rep. 575, 39 L. R. A. 410; Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561; Marsh *v.* Bristol, 65 Mich. 378, 32 N. W. 645.

New Jersey.— Todd *v.* Jackson, 26 N. J. L. 525.

to authorize the employment of force as against an attempt by the tenant to reënter.[3]

e. Effect of Statutes as to Forcible Entries. Where, by statute, a forcible entry upon realty is made unlawful, it is held in some states that such an entry by the landlord imposes upon him a liability in damages,[4] although a breach of the peace is not committed,[5] and although the tenant's possession is wrongful,[6] or although the landlord is justified in avoiding the lease.[7] In case the entry is accompanied by wrong to the person or property of the tenant, such damages as are reasonable under the circumstances may be recovered. Where there is no such wrong the landlord is liable in nominal damages only.[8] So likewise where the landlord has made a forcible entry trespass may lie against him if he expels his tenant by force.[9] The fact that the entry is against the will of the tenant will not in itself render it forcible;[10] and it has been held that an entry made in the absence of the tenant is not forcible within the meaning of a particular statute.[11] But on the other hand it has been held that, where obstructions placed over openings in the building had to be removed, the entry was not peaceable and without force.[12]

f. Effect of Provisions For Summary Remedies. Statutes providing summary remedies by which the landlord may speedily regain possession of the premises in case they are wrongfully withheld by the tenant are in some jurisdictions held to be exclusive of the right of the landlord to make a forcible entry,[13] even though

New York.— See Sage *v.* Harpending, 49 Barb. 166, 34 How. Pr. 1.

Rhode Island.—Freeman *v.* Wilson, 16 R. I. 524, 17 Atl. 921.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1174.

Contra.— Mason *v.* Hawes, 52 Conn. 12, 52 Am. Rep. 552.

3. Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788, where the keys of the premises had been transferred to the landlord. And see Flaherty *v.* Andrews, 2 E. D. Smith (N. Y.) 529, holding that in an action for wrongful ejection of a tenant a surrender is no defense, unless there was an actual delivery of the premises to the landlord.

4. *Connecticut.*— Larkin *v.* Avery, 23 Conn. 304, holding that either trespass *quare clausum* or *vi et armis* would lie against the landlord in such case.

Georgia.— Entelman *v.* Hagood, 95 Ga. 390, 22 S. E. 545. See also Peacock, etc., Naval Stores Co. *v.* Brooks Lumber Co., 96 Ga. 542, 23 S. E. 835, holding that an injunction might be granted.

Illinois.— Reeder *v.* Purdy, 41 Ill. 279; Page *v.* De Puy, 40 Ill. 506, holding that the landlord has no right to make a forcible entry, or, after having lawfully entered, to inflict injury upon the person or property of the occupant.

Louisiana.— See Jones *v.* Pereira, 13 La. Ann. 102, holding a lessor liable who, instead of resorting to process of law, expelled his tenant by means of intimidation and threats of police officers.

Missouri.— Wamsganz *v.* Wolff, 86 Mo. App. 205.

New Jersey.— Thiel *v.* Bull's Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281.

A plea of **liberum tenementum** will not justify the entry if it would be actionable under forcible entry and detainer laws. Page *v.* De Puy, 40 Ill. 506.

5. Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243 [*affirming* 45 Ill. App. 492, and *distinguishing* Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133.

6. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112, holding that where a lease was made pending a suit to partition the property, but the lessee's interest was not adjudicated by the decree and he was not directed thereby to surrender possession, he could not be forcibly ejected by the purchaser under the decree.

7. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112, holding that where it did not appear that plaintiff leased certain premises for the purpose of the unlawful sale of liquor his subsequent use of the premises for such purpose did not entitle the owner of the property to retake possession without legal proceedings.

8. Reeder *v.* Purdy, 41 Ill. 279; Page *v.* De Puy, 40 Ill. 506.

9. Griffin *v.* Martel, 77 Vt. 19, 58 Atl. 788.

10. Goshen *v.* People, 22 Colo. 270, 44 Pac. 503.

11. Fox *v.* Brissac, 15 Cal. 223, so holding under a statute providing that no person shall make any entry upon land, etc., save in cases where entry is given by law, and in such cases he shall not enter by force, but only in a peaceable manner.

12. Schwartz *v.* McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112.

13. Fox *v.* Brissac, 15 Cal. 223 (where the lease contained no reservation of a right of entry for breach of covenant); Graham *v.* Womack, 82 Mo. App. 618 (holding that the tenant in such case might restrain an entry by the landlord).

the lease contains a provision permitting the landlord to reënter by force;[14] and where such statutes exist the landlord may be held liable in damages for such an entry.[15]

g. Effect of Covenants in Lease. The right to make a forcible entry may be conferred by express provision in the lease, and in such case it has been held that an entry in which no more than necessary force is employed, will not render the landlord liable in damages notwithstanding the existence of statutes punishing forcible entries.[16] Summary proceedings provided by statute are, however, held to be exclusive of a forcible entry, even under express provisions of the lease.[17]

4. Sufficiency of Reëntry. An entry in order to revest possession must not be merely casual, but with the intention of claiming and for the purpose of taking possession,[18] a successful ouster is not essential;[19] but it is sufficient that there be a demand at such a time and place that if complied with possession would be at once secured.[20] The landlord's entry to make repairs[21] or his denial of the tenant's right to harvest his crop[22] does not establish a reëntry.

5. Waiver of Right to Reënter.[23] A provision in the lease for a reëntry without process of law is not waived by the prosecution of an action of forcible detainer against the tenant,[24] nor by the recovery of a judgment in forcible entry.[25] Nor is a right of reëntry forfeited by an artifice practised by the landlord in inducing the tenant and his family to leave the premises in order that he may take peaceable possession.[26] A right of reëntry for non-payment of rent and taxes is, however, waived by the bringing of a suit for equitable relief in the nature of a strict foreclosure of an equitable lien therefor.[27] Where the landlord and the tenant enter into an agreement permitting the tenant to use the premises

14. See *infra*, X, A, 2, g.

15. Entelman *v.* Hagood, 95 Ga. 390, 22 S. E. 545; Boniel *v.* Block, 44 La. Ann. 514, 10 So. 869 (so holding, although the ejectment was effected without personal violence, in the tenant's absence); Thayer *v.* Littlejohn, 1 Rob. (La.) 140.

16. Goshen *v.* People, 22 Colo. 270, 44 Pac. 503 (so holding where the lease contained a covenant against the sale of intoxicating liquors, and provided that upon breach of such covenant it should be lawful for the lessor at his election to declare the term ended, and either with or without process of law to reënter and remove the lessee, using such force as might be necessary); Fabri *v.* Bryan, 80 Ill. 182; Page *v.* De Puy, 40 Ill. 506; Schaefer *v.* Silverstein, 46 Ill. App. 608; Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214. *Compare* Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 914.

Force amounting to a breach of the peace must not be employed. Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214.

17. Spencer *v.* Commercial Co., 30 Wash. 520, 71 Pac. 53. See also Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447, holding that such a provision was not a defense to an action to recover treble damages under a forcible entry and detainer statute.

18. Holly *v.* Brown, 14 Conn. 255 (holding that where a third person who was the owner of certain articles of personal property upon the premises entered at the direction of the landlord for the purpose of removing such property, but not as his agent for the purpose of making an entry, it was not sufficient to revest possession); Ritchie *v.* Putnam, 13 Wend. (N. Y.) 524.

Acceptance of subtenant as tenant.— It has been held a sufficient reëntry where a lessor finding the demised property out of repair, intending to take advantage of a clause of forfeiture in the lease, entered into an agreement with an under-tenant whom he found upon the premises, to let them to him as a yearly tenant, and subsequently received rent from him. Baylis *v.* Le Gros, 4 C. B. N. S. 537, 4 Jur. N. S. 513, 93 E. C. L. 537.

19. Curl *v.* Lowell, 19 Pick. (Mass.) 25; Alexander *v.* Hodges, 41 Mich. 691, 3 N. W. 187.

20. Alexander *v.* Hodges, 41 Mich. 691, 3 N. W. 187, holding an absolute notice to quit a sufficient reëntry.

21. Somers *v.* Loose, 127 Mich. 77, 86 N. W. 386, holding that where the sole possession of leased property was evidenced by fences, and under the terms of the lease the lessee was entitled to possession and had put in crops, the mere fact that the landlord had repaired the fences is not sufficient to justify the conclusion that he has retaken possession.

22. Somers *v.* Loose, 127 Mich. 77, 86 N. W. 386.

23. Waiver of forfeiture see *supra*, IX, B, 7, g.

24. Fabri *v.* Bryan, 80 Ill. 182.

25. Frazier *v.* Caruthers, 44 Ill. App. 61.

26. Cockerline *v.* Fisher, 139 Mich. 95, 103 N. W. 522.

27. Cook *v.* Parker, 67 Minn. 374, 69 N. W. 1099.

for an unlawful purpose, the landlord is not entitled to treat the lease as void and eject the person placed in charge of the premises by the lessee.[28]

6. Damages For Wrongful Reëntry. In case the landlord enters without right he is liable to the tenant for such damages as may be occasioned by his reëntry;[29] and in a proper case exemplary damages may be awarded.[30] Although the entry may have been rightful in its inception, the landlord is liable for unnecessary injury.[31] An action for such damages cannot be maintained by one whose only interest in the lease is under an executory agreement for an assignment of part.[32] A husband and wife may sue jointly on a joint lease.[33]

7. Restitution. Under the forcible entry and detainer acts in some states a tenant on whom a wrongful entry has been made may recover possession, although his holding was without right.[34]

B. Actions For Recovery of Possession in General — 1. Nature and Form of Remedy. Where the landlord has become entitled to possession he may recover such possession in an action of ejectment,[35] or by the pursuit of various summary proceedings provided by statute;[36] or, where the statutes of the particular juris-

28. Allen *v.* Keilly, 18 R. I. 197, 30 Atl. 965, so holding, although the premises were used for an illegal sale of liquor, in which the tenant did not participate, and a statute provided that in case of the use of premises for the illegal sale of liquor the lease should be annulled without any act of the owner who might reënter without process.

29. Fox *v.* Brissac, 15 Cal. 223 (holding that the value of vegetables and grape-vines planted upon the premises might be recovered); Waller *v.* Cockfield, 111 La. 595, 35 So. 778 (holding that where lessees were excluded from possession by the lessor, they were entitled to judgment for the amount they would have earned during the remainder of the term of the lease). And see Frantz *v.* Lehigh Valley R. Co., 30 Pa. Super. Ct. 343.

Admissibility of evidence.— In an action by a tenant against the landlord for an alleged wrongful eviction, in which no force or violence was used, evidence on behalf of defendant that he acted upon the advice of counsel is inadmissible in bar of the action, or in mitigation of actual damages, but is admissible in mitigation of any exemplary damages. Cochrane *v.* Tuttle, 75 Ill. 361.

30. Bonsall *v.* McKay, 1 Houst. (Del.) 520 (holding that the jury may award exemplary damages when the trespass was accompanied by circumstances of aggravation and was gross in itself); Waller *v.* Cockfield, 111 La. 595, 35 So. 778; Wamsganz *v.* Wolff, 86 Mo. App. 205.

Award of exemplary damages see, generally, Damages, 13 Cyc. 105.

31. Vinson *v.* Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; Adams *v.* Adams, 7 Phila. (Pa.) 160; Bergland *v.* Frawley, 72 Wis. 559, 40 N. W. 372, holding that where a lessor is justified in reëntering and taking possession, the lessee cannot recover damages for loss of a portion of the term, or for injury to his business; but if the lessor, in making the reëntry, destroyed the lessee's property, or did unnecessary damage thereto, he would be liable therefor. See also *supra*, X, A, 3, d.

32. Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239.

33. Gillespie *v.* Beecher, 94 Mich. 374, 54 N. W. 167, holding that one who has leased land to husband and wife jointly, and put them jointly in possession, is estopped to allege that they have no right to join in a suit against him for damages sustained in unlawfully disturbing them in their possession.

34. Krevet *v.* Meyer, 24 Mo. 107. See also Forcible Entry and Detainer, 19 Cyc. 1132.

35. *Georgia.*—Cassidy *v.* Clark, 62 Ga. 412.

Mississippi.—Morse *v.* Clayton, 13 Sm. & M. 373.

Pennsylvania.—Alden *v.* Lee, 1 Yeates 160.

Vermont.— Roach *v.* Heffernan, 65 Vt. 485, 27 Atl. 71.

West Virginia.— Bowyer *v.* Seymour, 13 W. Va. 12, holding that if, on a tenant's failure to fulfil the covenant of payment, or to comply with the landlord's demand therefor, made as prescribed by the common law, the landlord does not reënter in fact, he may bring ejectment, under Code, c. 93, § 16, and recover, subject to the provisions of section 17, as to the tenant's being completely barred of all rights, etc., in twelve months.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1180.

And see Van Rensselaer *v.* Snyder, 9 Barb. (N. Y.) 302.

Where a declaration in ejectment cannot be served upon the lessee or his assignee, the landlord must proceed as at common law or adopt the summary proceedings provided by statute. Stratton *v.* Lord, 22 Wend. (N. Y.) 611.

A statute, providing that, where a right of reëntry for non-payment of rent is reserved in the lease, in default of property upon which to distrain, such reëntry may be made upon notice after default, without regard to the presence of property subject to distraint, does not take away the right to bring ejectment. Williams *v.* Potter, 2 Barb. (N. Y.) 316. And see Van Rensselaer *v.* Snyder, 9 Barb. (N. Y.) 302 [*affirmed* in 13 N. Y. 299].

36. See *infra*, X, C.

diction make such remedy applicable, by an action of trespass to try title.[37] But the remedy by writ of replevin is not available to him,[38] nor will a bill in equity lie under ordinary circumstances.[39] Where the tenant claimed as owner it has been held that a writ of entry would lie.[40]

2. Right of Action. An action of ejectment cannot be maintained until the landlord's right of entry accrues[41] by the expiration of the lease,[42] by the termination of the tenancy,[43] or by the tenant's repudiation thereof.[44] The action must be brought by the person entitled to the possession,[45] or according to the provision of the statutes in some jurisdictions by the real party in interest.[46] But to main-

37. Hall *v.* Haywood, 77 Tex. 4, 13 S. W. 612; Lamb *v.* Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289, 21 S. W. 713. See, generally, Trespass to Try Title.

38. Smith *v.* Grant, 56 Me. 255, where the lessor of a house and lot sold the house in which lessee resided, and on the latter's refusal to quit the same the buyer sought possession thereof by such writ.

39. Blain *v.* Everitt, 36 Md. 73; Torrent *v.* Muskegon Booming Co., 22 Mich. 354; Kramer *v.* Amberg, 53 Hun (N. Y.) 427, 6 N. Y. Suppl. 303 [*affirming* 3 N. Y. Suppl. 240] (holding that an injunction against the use of leased premises by the lessee should be denied, when the lessor's complaint alleges a breach of condition subsequent, forfeiting the lease, and avers that he has elected to terminate the lease, as after such election the lease ceases to exist, and the lessor's only remedy is by action to recover possession); Johnson *v.* Lehigh Valley Traction Co., 130 Fed. 932 (holding that where a tenant is in possesion, equity has no jurisdiction to enforce a forfeiture of a lease, the lessor having an adequate remedy by ejectment).

Enforcement of forfeiture in equity see *supra*, IX, B, 7, b.

40. Currier *v.* Earl, 13 Me. 216, holding that where a grantor, by continuing in possession of the granted premises after the conveyance, becomes the tenant at will to the grantee, if he deny the title of the grantee and resist his claim as owner, the latter may elect to consider him a disseizor, and may maintain a writ of entry against him as tenant of the freehold.

41. Jackson *v.* Kipp, 3 Wend. (N. Y.) 230 (holding that the lessor may maintain an action for ejectment for non-payment of rent only upon compliance with requirements, either of the statute or of the common law conferring upon him a right of reëntry); Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258 (holding that where a lease contains a covenant against waste, and also a clause of reëntry for breach of covenants, if the lessee or his assigns commit waste, the lessor may bring ejectment); Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236. See also Van Rensselaer *v.* Jewett, 5 Den. (N. Y.) 121; Rooks *v.* Seaton, 1 Phila. (Pa.) 106.

Non-payment of rent will not furnish ground for ejectment where the lease contains no clause of reëntry. Tarlotting *v.* Bokern, 95 Mo. 541, 8 S. W. 547; De Lancey *v.* Ganong, 9 N. Y. 9 [*affirming* 12 Barb. 120]; Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439; Jackson *v.* Hogeboom, 11 Johns. (N. Y.) 163.

42. Georgia R. Co. *v.* Hart, 60 Ga. 550; Stofflit *v.* Troxell, 8 Watts & S. (Pa.) 340. And see Houssiere-Latreille Oil Co. *v.* Jennings-Haywood Oil Syndicate, 115 La. 107, 38 So. 932, holding that, although the lessors may have a right to set aside the lease on the ground of invalidity, they cannot maintain a possessory action in which the lease is not mentioned and no allegation is made to have the dissolution decreed.

Provisions as to time within which rent may be paid do not affect a right to possession as otherwise fixed. Dickson *v.* Wood, 209 Pa. St. 345, 58 Atl. 668.

43. Gustin *v.* Burnham, 34 Mich. 511; Penn *v.* Divellir, 2 Yeates (Pa.) 309.

Termination of tenancy see *supra*, IX.

44. Van Winkle *v.* Hinckle, 21 Cal. 342; Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439; Willard *v.* Earley, 10 Pa. Cas. 504, 14 Atl. 426.

45. Green *v.* Missouri Pac. R. Co., 82 Mo. 653 (holding that a purchaser at foreclosure sale of leased land may maintain ejectment at the expiration of the lease); Sennett *v.* Bucher, 3 Penr. & W. (Pa.) 392 (holding that a landlord who has executed a subsequent lease to a third person may still maintain ejectment against the prior lessee where the second lessee has not entered).

A residuary legatee may recover premises reserved in a deed to his ancestor to the use of such ancestor for a term of years. Fisk *v.* Brayman, 21 R. I. 195, 42 Atl. 878.

Joinder of plaintiffs. — Joint lessors, the rent to be paid one half to each, may upon non-payment join in a suit to eject the tenant, his possession having become tortious. Treat *v.* Liddell, 10 Cal. 302.

After termination of landlord's title. — A conveyance by a landlord to a stranger, or a sale of the premises under execution against the landlord, and attornment by the tenant to the grantee or vendee, will defeat a recovery by the landlord in ejectment against the tenant. Franklin *v.* Palmer, 50 Ill. 202.

46. See Holliday *v.* Chism, 25 Ind. App. 1, 57 N. E. 563, holding that the grantor of leased premises, who had sold the same, agreeing that he would secure possession for the grantee at the termination of the lease, the date of which was fixed, and that until such

tain ejectment the landlord need not establish title other than by showing the existence of the relation of landlord and tenant.[47] It is essential to the action of ejectment that the tenant be in possession.[48] An action upon the covenants of the lease may, however, be maintained to a judgment barring defendant from possession.[49]

3. Defenses. In defense to an action to recover possession the tenant may show the absence of a right of possession in the landlord by virtue of a valid subsisting lease,[50] or facts preventing a forfeiture;[51] or by waiver of an asserted forfeiture;[52] or he may show that the landlord's title has terminated.[53] A defendant corporation will not, however, be permitted to assert that the lease under which it has possession was taken by an agent without authority.[54]

4. Conditions Precedent — a. Demand of Rent. Where the right to maintain an action to recover possession of the premises is based upon non-payment of rent, a demand must be made therefor before the action is brought,[55] unless the necessity therefor has been removed by statute,[56] or unless the lease provides that

possession was secured the tenant should be considered as the tenant of the grantor, could not maintain an action against the tenant after the expiration of the term, since the grantee was not the real party in interest.

47. Mattox *v.* Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64; Shy *v.* Brookhause, 7 Okla. 35, 54 Pac. 306 (holding that an occupant of a town lot, before the legal title has passed from the grantor, may maintain ejectment against one in possession thereof as his tenant); Kline *v.* Johnston, 24 Pa. St. 72.

Estoppel of tenant to deny landlord's title see *supra*, III, G.

48. Jackson *v.* Hakes, 2 Cai. (N. Y.) 335 (holding that a landlord in possession cannot bring ejectment to bar the right of his absconding lessee); Granite Bldg. Assoc. *v.* Greene, 25 R. I. 48, 54 Atl. 792 (holding that, where in an action to recover possession of a rented tenement for breach of covenant, the evidence failed to show that one of the defendants was ever in possession of the premises, or that he took any part in subletting them for a purpose prohibited by the lease, a nonsuit as to him was properly granted); Sowles *v.* Carr, 69 Vt. 414, 38 Atl. 77 (holding that plaintiff must prove that defendant was in possession when the suit was brought). And see Fisher *v.* Slattery, 75 Cal. 325, 17 Pac. 235; Goodbub *v.* Scheller, 3 Ind. App. 318, 29 N. E. 610, holding that the tenant's testimony that he had had possession for seven years, and had refused to surrender the place because he had been told that he might hold it as long as he wanted it, if he would pay as much rent as any one else, sufficiently showed the tenant's possession.

49. Ward *v.* Terry, 36 Misc. (N. Y.) 330, 73 N. Y. Suppl. 569, holding that where in an action on a lease for rent defendant at the trial interposes a general denial, claims title under a deed from a third party, produces an unrecorded deed showing conveyance of the property to his wife by him, and testifies that she is in possession and plaintiffs make out a *prima facie* case, they are entitled to judgment for the rent, and barring defendant from possession, although no judgment can be rendered barring the rights of the wife.

50. See Whittemore *v.* Smith, 50 Conn. 376, holding that in a suit by a transferee of the reversion, before termination of the lease, the tenant might show that plaintiff knew of the existence and contents of the lease, although it was not recorded.

51. Peck *v.* Hiler, 24 Barb. (N. Y.) 178, where in defense to forfeiture for non-payment of rent defendant was permitted to show an eviction suspending the liability for rent.

52. Faylor *v.* Brice, 7 Ind. App. 551, 34 N. E. 833; Stuyvesant *v.* Davis, 9 Paige (N. Y.) 427.

Waiver of forfeiture see *supra*, IX, B, 7, g.

53. Walker *v.* Fisher, 117 Mich. 72, 75 N. W. 144, holding that it is a good defense that plaintiff's title had been cut off by proceedings in foreclosure, and that defendant had attorned to the person taking the title.

Termination of estoppel to deny title by termination of landlord's title see *supra*, III, G, 10, e.

54. Sittel *v.* Wright, 122 Fed. 434, 58 C. C. A. 416.

55. O'Connor *v.* Kelly, 41 Cal. 432 (holding that the grantee of leased premises cannot maintain an action of ejectment against a tenant holding under an unexpired lease from the grantor, on the ground of refusal to pay rent to the former, unless the tenant was informed of the sale before the rent was demanded); Jackson *v.* Collins, 11 Johns. (N. Y.) 1.

Necessity and sufficiency on demand as precedent to forfeiture of termination of lease see *supra*, IX, B, 7, e, (II).

56. See Martin *v.* Rector, 118 N. Y. 476, 23 N. E. 893; Van Rensselaer *v.* Slingerland, 26 N. Y. 580; Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439; New York *v.* Campbell, 18 Barb. (N. Y.) 156; Maidstone *v.* Stevens, 7 Vt. 487, holding that a lease giving no right of entry for non-payment of rent until "after legally demanded" does not vary the landlord's right to an ejectment under the statute.

Statutes obviating necessity of demand.— St. 4 Geo. II, c. 28, provided that ejectment

the tenancy shall be determined without demand.[57] Where a forfeiture has been waived a demand must be made after a new breach.[58] In case the tenant denies the holding a formal demand is waived.[59]

b. Notice to Quit or Demand For Possession — (i) *Necessity.* An action in the nature of ejectment will not as a general rule lie against a tenant without a prior notice to quit,[60] and this is true of tenancies from year to year,[61] or at

might be maintained without reëntry or demand where half a year's rent was due and in arrears and no sufficient distress was to be found on the demised premises countervailing the arrears then due. This statute has been followed in some jurisdictions in the United States (see Connor *v.* Bradley, 1 How. (U. S.) 211, 11 L. ed. 105 [*reversing* 3 Fed. Cas. No. 1,774, 5 Cranch C. C. 615], holding that it must be shown that there was no sufficient distress on the premises on some day or period between the time at which the rent fell due and the day of the demise; and, if the time when, according to the proofs, there was not a sufficient distress on the premises be subsequent to the day of the demise, it is insufficient), and is practically reënacted by statute in certain of the states (see Ocean Grove Camp Meeting Assoc. *v.* Sanders, 68 N. J. L. 631, 54 Atl. 448, holding that where there is a provision in the lease that on non-performance of the covenant by the lessee the term shall be at an end ejectment will lie, without proving that there was no sufficient distress on the premises, as required by the Landlord and Tenant Act, § 7 (2 Gen. St. p. 1916), where there is a mere right of reëntry for non-payment of rent; Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439; New York *v.* Campbell, 18 Barb. (N. Y.) 156, holding that where the demised premises appear from the complaint to be "a water lot, vacant ground, and soil under water," an allegation that there are not goods and chattels enough on the premises to satisfy the rent is not necessary; First Incorporated Presb. Congregation *v.* Williams, 9 Wend. (N. Y.) 147, holding that defendant is concluded by his admission on the service of the declaration in ejectment that there was not sufficient property on the premises liable to distress to countervail the arrears of rent; Jackson *v.* Wyckoff, 5 Wend. (N. Y.) 53), and in Canada (see Doe *v.* Roe, 16 N. Brunsw. 470, holding, however, that the landlord's right of reëntry was not limited to cases where there was not enough distress to satisfy a half year's rent). Under these statutes, when ejectment is not based on lack of sufficient distraint, a common-law demand must be proved (Conner *v.* Bradley, 1 How. (U. S.) 211, 11 L. ed. 105 [*reversing* 3 Fed. Cas. No. 1,774, 5 Cranch C. C. 615]), or such a demand as is fixed by statute (see Van Rensselaer *v.* Slingerland, 26 N. Y. 580; Martin *v.* Rector, 43 Hun (N. Y.) 371), unless the lease expressly provides for reëntry without formal demand (Campbell *v.* Baxter, 15 U. C. C. P. 42; McDonald *v.* Peck, 17 U. C. Q. B. 270). In New York upon the abolition of distress for rent it was provided that in case a right of reëntry was reserved, where six months' rent was in arrears, the landlord might maintain an action to recover the premises without demand or reëntry. See Martin *v.* Rector, 118 N. Y. 476, 23 N. E. 893, construing a lease to reserve a right of reëntry for non-payment of rent distinct from a right to enter on a failure of distress.

57. Shanfelter *v.* Horner, 81 Md. 621, 32 Atl. 184; Campbell *v.* Baxter, 15 U. C. C. P. 42.

58. Sauer *v.* Meyer, 87 Cal. 34, 25 Pac. 153.

59. Farley *v.* Craig, 11 N. J. L. 262 (holding that if the tenant denies the holding altogether, or forbids a distress, and provides the means of resisting it, and refuses to pay the rent, the landlord will not be required to make a regular demand at the precise time and precisely conformable to the terms of the lease); De Lancey *v.* Ga Nun, 12 Barb. (N. Y.) 120; Jackson *v.* Collins, 11 Johns. (N. Y.) 1.

60. *Delaware.*— Horsey *v.* Horsey, 4 Harr. 517.

Illinois.— Mount Palatine Academy *v.* Kleinschnitz, 28 Ill. 133. See also Roosevelt *v.* Hungate, 110 Ill. 595, holding that notice before ejectment to one not a tenant of the landowner or his grantor is not necessary to terminate a tenancy from year to year.

Indiana.— Jackson *v.* Hughes, 1 Blackf. 421.

Kentucky.— Cornellison *v.* Cornellison, 1 Bush 149; Shackleford *v.* Smith, 5 Dana 232.

New Jersey.—Den *v.* Westbrook, 15 N. J. L. 371, 29 Am. Dec. 692; Den *v.* Mackey, 2 N. J. L. 420.

New York.— Jackson *v.* Niven, 10 Johns. 335.

North Carolina.— See Borden *v.* Bell, 53 N. C. 294.

England.— Doe *v.* Morse, 1 B. & Ad. 365, 9 L. J. K. B. O. S. 77, 20 E. C. L. 519. See also Keech *v.* Hall, Dougl. (3d ed.) 21; Thunder *v.* Belcher, 3 East 449; Biner *v.* Walters, 20 L. T. Rep. N. S. 326, 17 Wkly. Rep. 649; Birch *v.* Wright, 1 T. R. 378, 1 Rev. Rep. 223.

Canada.— Doe *v.* Keith, 4 U. C. Q. B. O. S. 86. See also Henderson *v.* White, 23 U. C. C. P. 78; Doe *v.* Hearnes, 6 U. C. Q. B. 193.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1190.

61. *Illinois.*— Chicago, etc., R. Co. *v.* Knox College, 34 Ill. 195.

Indiana.— Coomler *v.* Hefner, 86 Ind. 108.

Michigan.— Hilsendegen *v.* Scheich, 55 Mich. 468, 21 N. W. 894.

New Jersey.— Hankinson *v.* Blair, 15 N. J. L. 181.

will,[62] and by statutes in some jurisdictions even of tenancies at sufferance,[63] although at common law no notice was necessary in the case of such tenancies,[64] since they might be determined by mere entry.[65] An occupant who holds under a license merely, however, is not entitled to notice.[66] Where the tenant holds over after the termination of his lease, without the consent of his landlord, no notice to quit is necessary,[67] nor is it where a right of reëntry has accrued under the express provisions of the lease.[68] The necessity of a notice to quit is also removed by the tenant's disclaimer of the relation of landlord and tenant, or by his repudiation of the title of his landlord;[69] for example no notice is necessary where the tenant is claiming to hold adversely,[70] or where the tenant has taken a conveyance in

New York.— Jackson *v.* Salmon, 4 Wend. 327; Jackson *v.* Wilsey, 9 Johns. 267.

North Carolina.— Hemphill *v.* Giles, 66 N. C. 512; Irwin *v.* Cox, 27 N. C. 521.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1190.

62. *Connecticut.*—Perkins *v.* Perkins, (1886) 5 Atl. 373.

Illinois.— Chicago, etc., R. Co. *v.* Knox College, 34 Ill. 195.

Indiana.— Coomler *v.* Hefner, 86 Ind. 108.

Kentucky.— Howard *v.* Blanton, 49 S. W. 461, 20 Ky. L. Rep. 1441.

Michigan.—Hilsendegen *v.* Scheich, 55 Mich. 468, 21 N. W. 894.

Missouri.— Murray *v.* Armstrong, 11 Mo. 209; Tiernan *v.* Johnson, 7 Mo. 43.

New Jersey.—Hankison *v.* Blair, 15 N. J. L. 181.

New York.— Jackson *v.* Salmon, 4 Wend. 327.

North Carolina.— Irwin *v.* Cox, 27 N. C. 521.

Virginia.— Jones *v.* Temple, 87 Va. 210, 12 S. E. 404, 24 Am. St. Rep. 649.

Canada.— Lundy *v.* Dovey, 7 U. C. C. P. 38. But see Doe *v.* Garner, 1 U. C. Q. B. 39, holding that ejectment may be brought on the termination of a tenancy at will, by the death of the lessor, without notice to quit, or demand.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1190.

Termination of tenancy at will in general see *supra*, IX, F.

63. Moore *v.* Morrow, 28 Cal. 551; Livingston *v.* Tanner, 12 Barb. (N. Y.) 481. But see Livingston *v.* Tanner, 14 N. Y. 64, holding that a tenant holding over after the expiration of his term, although a tenant at sufferance by the common law, is under 1 Rev. St. p. 749, § 7, a mere trespasser, and not entitled to notice before ejectment is brought.

64. Whetstone *v.* Davis, 34 Ind. 510; Reed *v.* Reed, 48 Me. 388; Livingston *v.* Tanner, 12 Barb. (N. Y.) 481; Burns *v.* McAdam, 24 U. C. Q. B. 449; Dewson *v.* St. Clair, 14 U. C. Q. B. 97.

65. See *supra*, IX.

66. Johns *v.* McDaniel, 60 Miss. 486. And see Haley *v.* Hickman, Litt. Sel. Cas. (Ky.) 266.

67. Den *v.* Adams, 12 N. J. L. 99; Williams *v.* Bennett, 26 N. C. 122; McCanna *v.* Johnston, 19 Pa. St. 434; Evans *v.* Hastings, 9 Pa. St. 273; Bedford *v.* McElherron, 2 Serg. & R. (Pa.) 49, holding, however, that where the tenant holds over seventeen years he is entitled to notice.

68. Whetstone *v.* Davis, 34 Ind. 510; Hackett *v.* Marmet Co., 52 Fed. 268, 3 C. C. A. 76; Connell *v.* Power, 12 U. C. C. P. 91. And see Keeler *v.* Davis, 5 Duer (N. Y.) 507.

Right to terminate lease for breach of conditions see *supra*, IX, B, 7.

69. *California.*— McCarthy *v.* Brown, 113 Cal. 15, 45 Pac. 14; Parrott *v.* Byers, 40 Cal. 614; Bolton *v.* Landers, 27 Cal. 104; Smith *v.* Shaw, 16 Cal. 88.

Indiana.— Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93; Sims *v.* Cooper, 106 Ind. 87, 5 N. E. 726.

Kentucky.— Meraman *v.* Caldwell, 8 B. Mon. 32, 46 Am. Dec. 537; Ogden *v.* Walker, 6 Dana 420; Hargis *v.* Price, 4 Dana 79; Ross *v.* Garrison, 1 Dana 35; Bates *v.* Austin, 2 A. K. Marsh. 270, 12 Am. Dec. 395.

Maine.— Bodwell Granite Co. *v.* Lane, 83 Me. 168, 21 Atl. 829.

Michigan.— Steinhauser *v.* Kuhn, 50 Mich. 367, 15 N. W. 513.

Missouri.— Cook *v.* Penrod, 111 Mo. App. 128, 85 S. W. 676; Lyon *v.* La Master, 103 Mo. 612, 15 S. W. 767; Stephens *v.* Brown, 56 Mo. 23.

New York.— Ingraham *v.* Baldwin, 9 N. Y. 45; Jackson *v.* Wheeler, 6 Johns. 272.

South Carolina.— State *v.* Steuart, 5 Strobh. 29; Calhoun *v.* Perrin, 2 Brev. 247.

Tennessee.— Duke *v.* Harper, 6 Yerg. 280, 27 Am. Dec. 462.

Vermont.— Tuttle *v.* Reynolds, 1 Vt. 80.

United States.— Woodward *v.* Brown, 13 Pet. 1, 10 L. ed. 31.

England.— Doe *v.* Thompson, 5 A. & E. 532, 6 L. J. K. B. 57, 1 N. & P. 215, 31 E. C. L. 719; Doe *v.* Grubb, 10 B. & C. 816, 8 L. J. K. B. O. S. 321, 21 E. C. L. 342; Doe *v.* Whittick, Gow. 195, 21 Rev. Rep. 828; Doe *v.* Clarke, Peake Add. Cas. 239; Doe *v.* Pasquali, 1 Peake N. P. 259, 3 Rev. Rep. 688.

Canada.— Cartwright *v.* McPherson, 20 U. C. Q. B. 251; Doe *v.* Fairman, 7 U. C. Q. B. 411; Doe *v.* Weese, 5 U. C. Q. B. 589; Doe *v.* Dunham, 4 U. C. Q. B. 99; Doe *v.* Sager, 6 U. C. Q. B. O. S. 134.

See 32 Cent. Dig. tit. "Landlord and Tenant." § 1191.

70. Williams *v.* Hensley, 1 A. K. Marsh. (Ky.) 181; Wolf *v.* Holton, 92 Mich. 136, 52 N. W. 459; Kunzie *v.* Wixom, 39 Mich. 384; Vaughan *v.* Parker, 112 N. C. 96, 16 S. E. 908.

fee from a stranger to his landlord's title,[71] or has made a conveyance of the land in fee.[72]

(II) *SUFFICIENCY.*[73] As a general rule a notice to quit is sufficient if the tenant is informed either directly or by necessary implication that he is required to quit the demanded premises.[74] It should, however, be absolute.[75] Notice is properly given to the immediate lessee, although another person is in possession of the premises.[76]

5. JURISDICTION.[77] The fact that an action of ejectment is begun upon the erroneous supposition that another and lower court has lost jurisdiction of summary proceedings does not affect the jurisdiction of the court in which the action is brought.[78]

6. PLEADING AND VARIANCE. The general rules of pleading,[79] and more particularly those applicable to actions of ejectment,[80] govern actions for the recovery of possession of demised premises. It is essential, as in other proceedings, that the evidence conform to the issue presented.[81]

7. INJUNCTION OR OTHER STAY OF PROCEEDINGS. The rules governing injunctions against actions for the recovery of possession are similar to those relating to civil

71. Isaacs *v.* Gearheart, 12 B. Mon. (Ky.) 231; Sharpe *v.* Kelley, 5 Den. (N. Y.) 431.

72. Wadsworthville Poor School *v.* Meetze, 4 Rich. (S. C.) 50.

73. **For the purpose of terminating tenancy** see *supra*, IX, A.

For the purpose of sustaining statutory dispossession proceedings see *infra*, X, C, 9, c, (III).

74. Congdon *v.* Brown, 7 R. I. 19, holding that a notice to quit which describes the street on which the premises are situated by a wrong name is good if it does not appear that the tenant was misled thereby.

A purchaser may take advantage of a notice given by his vendor. Doe *v.* Hellings, 6 Jur. 821.

Waiver of irregularity.— Where a vendee sends to one occupying the land under an unrecorded lease a notice to quit, which is irregular in respect of the time for its expiration, the lessee waives the irregularity by replying that he holds a lease from the grantor, and intends to retain possession until its termination. Drey *v.* Doyle, 99 Mo. 459, 12 S. W. 287.

75. Ayres *v.* Draper, 11 Mo. 548, holding that a notice demanding possession and declaring that if possession is not given by a certain day rent at a given rate will be claimed is not sufficient.

76. Ayres *v.* Draper, 11 Mo. 548; Jackson *v.* Baker, 10 Johns. (N. Y.) 270.

77. **Jurisdiction of particular courts** see COURTS, 11 Cyc. 633.

Jurisdiction of justices of the peace see JUSTICES OF THE PEACE, *ante*, 440.

Statutory dispossession proceedings see *infra* X, C. 10.

78. Jones *v.* Reilly, 174 N. Y. 97, 66 N. E. 649.

79. See, generally, PLEADING. And see Millhollin *v.* Jones, 7 Ind. 715 (holding that an admission by defendant of his tenancy is an admission of plaintiff's title); Wildey Lodge No. 21, I. O. O. F. *v.* Paris, (Tex. Civ. App. 1903) 73 S. W. 69 (holding that in an action by a lessor to recover leased premises an allegation that an unincorporated association to which the lease was assigned was incapable of accepting an assignment, without alleging any ground of incompetency, was not sufficient to show the invalidity of the assignment); Piper *v.* Cashell, 122 Fed. 614, 58 C. C. A. 396 (holding that where duress is alleged as a ground of avoiding a lease the facts must be specifically pleaded); Berthel *v.* Duceppe, 3 Quebec Pr. 229 (holding that where in an action in ejectment the lessee pleads that he has never received any notice that his lease was terminated, plaintiff may answer such plea by stating that the notice that the premises were to let had been put up for three months before the termination of the lease, and that defendant asked for a longer delay to move out).

80. See EJECTMENT, 15 Cyc. 90 *et seq.*

81. See, generally, PLEADING. See also Houssiere-Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932, holding that the question of sufficiency of consideration for a lease could not be raised in an action by the lessor exclusively for possession, nor could the question of defendant's title.

Under the general issue defendant, in a writ of entry, is not entitled to deny his possession (Washington Bank *v.* Brown, 2 Metc. (Mass.) 293), nor in ejectment can he dispute the corporate capacity in which plaintiff sued, or take advantage of the informality of the lease under which he entered (Caledonia County Grammar School *v.* Burt, 11 Vt. 632).

Evidence of non-payment of rent may be admitted to show plaintiff's right to immediate possession, without an averment of a demand of rent, where by statute an action may be maintained without demand in case rent is six months in arrear and the lessor has a subsisting right to reënter. Church *v.* Hempsted, 27 N. Y. App. Div. 412, 50 N. Y. Suppl. 325, 27 N. Y. Civ. Proc. 230.

actions generally.[82] Further proceedings upon a writ of entry to enforce a forfeiture for non-payment of rent may be stayed upon payment of rent and costs.[83]

8. Appointment of Receiver. A receiver may be appointed in an action to enforce a right of reëntry upon non-payment of rent, where there is a lien for such rent and it is averred that defendant in possession is doing great injury to the premises.[84]

9. Evidence. Where defendant is shown to have been in possession he has the burden of proving a surrender of such possession.[85] He has also the burden of proving a consent to a breach of conditions in the lease.[86] The rules governing the admissibility and sufficiency of evidence are those applicable to civil actions in general.[87] Under a statute requiring that when a contract involves more than five hundred dollars, it must be proved by at least one credible witness and corroborating circumstances, the testimony of the lessee alone is not sufficient to establish a renewal of the lease.[88]

10. Judgment and Enforcement Thereof.[89] A judgment by confession may be entered against the tenant where the lease so provides.[90] Upon a motion to set aside a judgment in ejectment the rights of strangers to the record cannot be adjudicated.[91] The judgment will not be set aside on motion on the ground that notice of intention to reënter had not been given, where it may be supported upon breaches of covenant alleged, as to which notice was unnecessary.[92] A writ of possession will not issue to enforce the judgment against personal property.[93]

11. Redemption. In the absence of statute defendant cannot redeem from a judgment in ejectment based upon non-payment of rent,[94] but by statute such a

82. See Beckham *v.* Newton, 21 Ga. 187; Goddard's Appeal, 1 Walk. (Pa.) 97; Shine *v.* Gough, 1 Ball & B. 436; Nokes *v.* Gibbon, 3 Drew 681, 3 Jur. N. S. 726, 26 L. J. Ch. 433, 5 Wkly. Rep. 400, 61 Eng. Reprint 1063; Ivess *v.* Hunt, Fl. & K. 408; Lovat *v.* Ranelagh, 3 Ves. & B. 24, 35 Eng. Reprint 388.

Injunction against legal proceedings see, generally, Injunctions, 22 Cyc. 786 *et seq.*

83. Atkins *v.* Chilson, 11 Metc. (Mass.) 112.

84. Countee *v.* Armstrong, 8 Ohio Dec. (Reprint) 531, 8 Cinc. L. Bul. 286.

The right to rents collected by the receiver is not determined by a judgment awarding the possession to plaintiff. Countee *v.* Armstrong, 9 Ohio Dec. (Reprint) 62, 10 Cinc. L. Bul. 339.

85. Sowles *v.* Carr, 69 Vt. 414, 38 Atl. 77.

86. Lawrence *v.* Williams, 1 Duer (N. Y.) 585.

87. See, generally, Evidence.

Subpœna to produce rent receipts is not admissible in ejectment for non-payment of rent, where the tenancy was denied, and there is no evidence of any receipts for rent, and no attempt made to prove the contents of any. Jones *v.* Reilly, 174 N. Y. 97, 66 N. E. 649.

Authority to release waiver of condition.— Where it was asserted that the receipt of rent did not amount to a waiver of a breach of covenant, owing to an agreement with defendant's agent that it should not so operate, evidence of the relation between defendant and the alleged agent is admissible to show that the agent had no authority to bind defendant. Granite Bldg. Assoc. *v.* Greene, 25 R. I. 48, 54 Atl. 792.

Evidence as to expected renewal of the lease is inadmissible where no performance of conditions precedent to renewal is shown. Swift *v.* Occidental Min., etc., Co., 141 Cal. 161, 74 Pac. 700, (1902) 70 Pac. 470.

Value of premises.— In order to show that an alleged parol lease was not executed, defendant may show that the premises were not worth the rental alleged to have been reserved. Sennett *v.* Bucher, 3 Penr. & W. (Pa.) 392.

88. State *v.* Judge First City Ct., 37 La. Ann. 380.

89. Conclusiveness of judgment see Judgments, 23 Cyc. 1338.

90. Reams *v.* Fye, 10 Pa. Dist. 242, 24 Pa. Co. Ct. 671 (holding that such a judgment might be entered, although a certain rent was provided for one room described in the lease, and a different rent for another, and the clause relating to ejectment followed the first only); Hughs *v.* Lillibridge, 8 Pa. Dist. 358, 22 Pa. Co. Ct. 185 (holding that when a tenant by implication of law becomes liable for the rent for a second year by holding over with the assent of the landlord, a warrant of attorney to confess judgment in ejectment does not extend to the second year).

91. Nehr *v.* Krewsberg, 187 Pa. St. 53, 40 Atl. 810.

92. Protestant Episcopal Soc. *v.* Flanders, 9 Abb. Pr. N. S. (N. Y.) 82.

93. Herring *v.* Reade, 7 Wkly. Notes Cas. (Pa.) 522. See, generally, Ejectment, 15 Cyc. 184.

94. Rockingham *v.* Hunt, Brayt. (Vt.) 66. And see Olcott *v.* Dunklee, 16 Vt. 478.

redemption provided for to be exercised within a certain time and upon certain terms.[95]

12. Review. The necessity[96] or insufficiency[97] of a notice to quit cannot be urged for the first time on appeal. Unless statutes provide to the contrary a judgment for the possession of the premises is appealable,[98] upon the giving of such security as may be required by the local practice.[99] Upon reversal of a judgment for plaintiff the court may in its discretion award a writ of restitution.[1]

13. Costs. Under the provisions of some statutes defendant in ejectment may be required to secure costs.[2] Where it appears that defendant has been wrongfully deprived of the possession by a writ of sequestration, he may be allowed costs, although he has allowed plaintiff to recover a judgment for possession.[3]

C. Statutory Dispossession Proceedings — 1. Nature and Scope — a. In General. The necessity to which the landlord was subjected at common law of bringing an action of ejectment with its attendant delays against an overholding tenant is now removed by statutes providing summary proceedings,[4] which are closely analogous in nature, although variously termed in the various jurisdictions ejectment,[5] justice ejectment,[6] summary process,[7] unlawful detainer, or landlord and tenant proceedings. These statutes being in derogation of the common law must be strictly construed.[8] They are applicable only to cases which come fully within their provisions,[9] and the proceedings must be conducted in strict accordance with the provisions of the law.[10] They are regarded as affording a merely cumulative remedy which may be maintained, although a right of reëntry is reserved in the lease,[11] and do not bar the landlord's right peaceably to reënter without process,[12] or maintain other actions for possession,[13] or for rent,[14] or for use and occupation.[15] But where a summary remedy is provided in case of non-payment of rent, it has been held to supersede a distress therefor.[16] Since such stat-

Redemption from forfeiture see *supra*, IX, B, 7, h.

95. See Witbeck *v.* Van Rensselaer, 64 N. Y. 27; Van Rensselaer *v.* Witbeck, 2 Lans. (N. Y.) 498 (both holding that the period limited for redemption cannot be enlarged by a subsequent reëntry of the tenant); Shultes *v.* Sickles, 70 Hun (N. Y.) 479, 24 N. Y. Suppl. 145 [*affirmed* in 147 N. Y. 704, 41 N. E. 574] (holding that the title of plaintiff put in possession under execution becomes absolute after six months).

96. Castro *v.* Gill, 5 Cal. 40.

97. Ganson *v.* Baldwin, 93 Mich. 217, 53 N. W. 171.

98. See State *v.* Judge New Orleans City Ct., 11 Rob. (La.) 394.

99. See Times Publishing Co. *v.* Siebrecht, 11 Wkly. Notes Cas. (Pa.) 339, holding that the rent that may accrue up to the time of the final judgment cannot be included in the supersedeas bond.

1. Fitzalden *v.* Lee, 2 Dall. (Pa.) 205, 1 L. ed. 350.

2. See Doe *v.* Roe, 2 Dowl. P. C. N. S. 449, 6 Jur. 1044, 12 L. J. Exch. 27, 10 M. & W. 670; Kelly *v.* Wolff, 12 Ont. Pr. 234.

3. Ewing *v.* Miles, 12 Tex. Civ. App. 19, 33 S. W. 235.

4. See De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217.

5. See Mighell *v.* Kelley, 51 La. Ann. 281, 25 So. 101.

6. See Wheeler *v.* Wheeler, 77 Vt. 177, 59 Atl. 842; Foss *v.* Stanton, 76 Vt. 365, 57 Atl. 942.

7. See Bowman *v.* Foot, 29 Conn. 331.

8. McMullin *v.* McCreary, 54 Pa. St. 230.

9. McMullin *v.* McCreary, 54 Pa. St. 230; Goodgion *v.* Latimer, 26 S. C. 208, 2 S. E. 1; Wheeler *v.* Wheeler, 77 Vt. 177, 59 Atl. 842; Hadley *v.* Havens, 24 Vt. 520.

10. Miner *v.* Burling, 32 Barb. (N. Y.) 540.

11. Crosby *v.* Jarvis, 46 Misc. (N. Y.) 436, 92 N. Y. Suppl. 229; Fleishauer *v.* Bell, 44 Misc. (N. Y.) 240, 88 N. Y. Suppl. 922 [*disapproving* McMahon *v.* Howe, 40 Misc. (N. Y.) 546, 82 N. Y. Suppl. 984].

12. Smith *v.* Hawkes, 2 Ohio Dec. (Reprint) 733, 5 West. L. Month. 80; Jones *v.* Foley, [1891] 1 Q. B. 730, 55 J. P. 521, 60 L. J. Q. B. 464, 64 L. T. Rep. N. S. 538, 49 Wkly. Rep. 510.

Reëntry without process see *supra*, X, A.

13. Juneman *v.* Franklin, 67 Tex. 411, 3 S. W. 562.

Actions for possession in general see *supra*, X, B.

Joinder of forcible entry and unlawful detainer see Forcible Entry and Detainer, 19 Cyc. 1158.

14. Mark *v.* Schumann Piano Co., 105 Ill. App. 490 [*affirmed* in 208 Ill. 282, 70 N. E. 226]; Pennsylvania L. Ins., etc., Co. *v.* Shanahan, 10 Pa. Super. Ct. 267.

Actions for rent see *supra*, VIII, B.

15. Blish *v.* Harlow, 15 Gray (Mass.) 316. See, generally, Use and Occupation.

16. Welch *v.* Ashby, 88 Mo. App. 400.

Distress for rent see *supra*, VIII, E.

utes providing summary methods of procedure go merely to the remedy, they have been held applicable to leases entered into before their passage upon which action was afterward brought,[17] although it has been held that a right to recover possession in unlawful detainer proceedings is not affected as to existing leases by the repeal of the statute.[18] In some jurisdictions these proceedings are regarded as special proceedings, and not as actions in the restricted sense of that term.[19] A summary proceeding cannot by the introduction of new issues be changed by defendant to an ordinary one.[20]

b. Necessity That Relation of Landlord and Tenant Exist. The existence of the relation of landlord and tenant is as a general rule essential to the pursuit of a summary proceeding for the recovery of demised premises, whether such proceeding is an action for unlawful detainer,[21] or is one which is otherwise known under the particular statute invoked.[22] In some jurisdictions it is not sufficient that the relation of landlord and tenant has been created by operation of law,

17. Lockett *v.* Usry, 28 Ga. 345.

18. Hoopes *v.* Meyer, 1 Nev. 433.

19. Carpenter *v.* Green, 4 Hun (N. Y.) 416; Decker *v.* Sexton, 19 Misc. (N. Y.) 59, 43 N. Y. Suppl. 167 (holding that a summary proceeding is not an "action," within Laws (1896), c. 748, authorizing justices of the district court to set aside a verdict rendered "in an action"); Wetterer *v.* Soubirous, 22 Misc. (N. Y.) 739, 49 N. Y. Suppl. 1043; Dorschel *v.* Burkly, 18 Misc. (N. Y.) 240, 41 N. Y. Suppl. 389 (both holding that a summary proceeding is not within the code provisions requiring the district court judge to dismiss "actions" in which title to land is involved); Hill *v.* Hearn, 29 Nova Scotia 25.

20. Mighell *v.* Kelley, 51 La. Ann. 281, 25 So. 101.

21. *Arkansas.*— James *v.* Miles, 54 Ark. 460, 16 S. W. 195; Mason *v.* Delancy, 44 Ark. 444; Johnson *v.* West, 41 Ark. 535; Necklace *v.* West, 33 Ark. 682; Dortch *v.* Robinson, 31 Ark. 296; Keller *v.* Henry, 24 Ark. 575; Bradley *v.* Hume, 18 Ark. 284; Miller *v.* Turney, 13 Ark. 385.

California.— Pico *v.* Cuyas, 48 Cal. 639; Steinback *v.* Krone, 36 Cal. 303; Owen *v.* Doty, 27 Cal. 502; Henderson *v.* Allen, 23 Cal. 519.

Illinois.— Dunne *v.* School Trustees, 39 Ill. 578; Smith *v.* Killeck, 10 Ill. 293; Luttrell *v.* Caruthers, 5 Ill. App. 544. See Merki *v.* Merki, 113 Ill. App. 518 [*affirmed* in 212 Ill. 121, 72 N. E. 9].

Indiana.— Marvel *v.* Redman, 2 Ind. 268.

Indian Territory.— Hill *v.* Watkins, 4 Indian Terr. 170, 69 S. W. 837; Sanders *v.* Thornton, 2 Indian Terr. 92, 48 S. W. 1015.

Kentucky.— Taylor *v.* Monohan, 8 Bush 238; Morris *v.* Bowles, 1 Dana 97 (holding that where an entry was made by a husband, in the right of the wife and not as tenant, and he afterward became a tenant of plaintiff, forcible detainer would not lie); Norton *v.* Sanders, 7 J. J. Marsh. 12; Mattingly *v.* Lancaster, 2 A. K. Marsh. 30; Colored Homestead, etc., Assoc. *v.* Harvey, 64 S. W. 676, 23 Ky. L. Rep. 1009. And see Andrews *v.* Erwin, 78 S. W. 902, 25 Ky. L. Rep. 1791.

Maine.— Woodman *v.* Ranger, 30 Me. 180; Wheeler *v.* Wood, 25 Me. 287.

Mississippi.— Cummings *v.* Kilpatrick, 23 Miss. 106.

New Jersey.— Boylston *v.* Valentine, 16 N. J. L. 346.

Oregon.— Twiss *v.* Boehmer, 39 Oreg. 359, 65 Pac. 18.

Texas.— Gulledge *v.* White, 73 Tex. 498, 11 S. W. 527; Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917; Yarbrough *v.* Chamberlin, 1 Tex. App. Civ. Cas. § 1122.

Wisconsin.— Hunter *v.* Maanum, 78 Wis. 656, 48 N. W. 51; Carter *v.* Van Dorn, 36 Wis. 289.

United States.— Sanders *v.* Thornton, 97 Fed. 863, 38 C. C. A. 508, construing Arkansas statutes.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1208.

Creation and existence of relation in general see *supra*, I.

An express or implied contract between the parties is essential. Mason *v.* Delancy, 44 Ark. 444; Johnson *v.* West, 41 Ark. 535; Miller *v.* Turney, 13 Ark. 385.

The executor of a decedent, succeeding to the possession of the leased premises held by deceased at the time of his death, who makes default in the rent, is not within a statute authorizing an action for forcible detainer by a landlord, against a tenant in possession by tenant or by subtenant. Martel *v.* Meehan, 63 Cal. 47.

22. *Connecticut.*— Turner *v.* Davis, 48 Conn. 397.

District of Columbia.— Jennings *v.* Webb, 20 D. C. 317.

Georgia.— Henry *v.* Perry, 110 Ga. 630, 36 S. E. 87; Cassidy *v.* Clark, 62 Ga. 412.

Indiana.—Avery *v.* Smith, 8 Blackf. 222. *Compare* Hanna *v.* Countryman, 5 Ind. 272.

Massachusetts.—Whitney *v.* Dart, 117 Mass. 153.

New Hampshire.— Stockbridge *v.* Nute, 20 N. H. 271.

New Jersey.— Cummings *v.* Adam, 4 N. J. L. J. 215.

New York.— People *v.* Shorb, 14 Hun 112; Carlisle *v.* McCall, 1 Hilt. 399; Schlaich *v.* Blum, 42 Misc. 225, 85 N. Y. Suppl. 335; Goodnow *v.* Pope, 31 Misc. 475, 64 N. Y. Suppl. 394; McLoughlin *v.* Steurwald, 30 Misc. 103, 61 N. Y. Suppl. 872 (holding the

but a conventional relation must exist,[23] some statutes demanding a contract in writing[24] or for a definite term[25] or the reservation of a rent certain;[26] while on the other hand in some jurisdictions the landlord may resort to general statutes of unlawful detainer under which the relation of landlord and tenant is not essential.[27] Under the general rule requiring the existence of a tenancy summary proceedings will not lie when the relation is that of vendor and purchaser,[28] donor and

evidence insufficient); People *v.* Simpson, 23 How. Pr. 481.

North Carolina.—Hughes *v.* Mason, 84 N. C. 472.

Pennsylvania.— Conley *v.* Hickey, 1 Just. L. Rep. 4.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1273.

After dispossession proceedings the parties may by contract continue the relationship of landlord and tenant, authorizing a second proceeding on non-payment of a subsequent instalment of rent. Voorhies *v.* Cummings, 42 N. Y. App. Div. 260, 58 N. Y. Suppl. 1120.

Action by agent.— Where a tenant placed in possession by an agent of the owner has been ousted by the owner and afterward becomes the owner's tenant, the agent cannot maintain an action. Hinckley *v.* Guyon, 172 Mass. 412, 52 N. E. 523.

Where possession has not been delivered to the tenant through the failure to terminate a prior tenancy, the lessee does not become a tenant, and an action to dispossess him does not lie and he is not rendered a tenant *pro tanto* by the fact that a right of entry of part of the premises is conferred at the commencement of the lease. Goerl *v.* Damrauer, 27 Misc. (N. Y.) 555, 58 N. Y. Suppl. 297.

A life-tenancy, where created by contract, is within the Vermont statute. Foss *v.* Stanton, 76 Vt. 365, 57 Atl. 942.

A tenant at sufferance may be dispossessed. Kimbrough *v.* Kimbrough, 99 Ga. 134, 25 S. E. 176.

Tenants at will holding over after notice to quit may be dispossessed. Weed *v.* Lindsay, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33.

Tenancies from year to year are included in a provision for the removal of tenants at will. Prouty *v.* Prouty, 5 How. Pr. (N. Y.) 81, 3 Code Rep. 161.

23. People *v.* Simpson, 28 N. Y. 55; Armstrong *v.* Cummings, 20 Hun (N. Y.) 313; People *v.* Hovey, 4 Lans. (N. Y.) 86; People *v.* Annis, 45 Barb. (N. Y.) 304; Sperling *v.* Isaacs, 13 Daly (N. Y.) 275; Evertson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; Willis *v.* Eastern Trust, etc., Co., 169 U. S. 295, 18 S. Ct. 347, 42 L. ed. 752.

24. Edmondson *v.* White, 19 Ga. 534; McDonald *v.* Elfe, 1 Nott & M. (S. C.) 501; Martin *v.* McMurphy, 2 Treadw. (S. C.) 762.

25. Deisinger *v.* Shand, 12 Pa. Dist. 698, 9 Del. Co. 75; Spidle *v.* Hess, 20 Lanc. L. Rev. (Pa.) 385 (holding that a justice has no jurisdiction, under the act of Dec. 14, 1863, when the lease is from month to month. Such proceedings should be under the act of March 21, 1772); Patton *v.* Evans, 22 U. C. Q. B. 606 (holding that a tenancy for an indefinite term at a monthly rent, to be put an end to by a month's notice, is not within Consol. St. U. C. c. 27, § 63); Clement *v.* Shriver, 5 U. C. Q. B. O. S. 310; Adnerant *v.* Shriver, (Trin. T. 6 & 7 Wm. IV) R. & J. Dig. 2083 (holding that the statute 4 Wm. IV, c. 1, § 53, does not authorize a writ against a mere tenant at will, although he continue to hold after notice to quit and demand of possession). And see Conyngham *v.* Everett, 11 Kulp (Pa.) 179. *Contra*, see Sweeney *v.* Mines, 31 Mo. 240, holding that Rev. Code (1855), p. 1016, § 33, relating to recovery of possession by landlords, does not limit the remedy to leases of a fixed or determinate duration.

Statutes applicable to leases for one or more years apply to any lease for a time certain, although less than a year. Miller *v.* Johnson, 6 D. C. 51; Shaffer *v.* Sutton, 5 Binn. (Pa.) 228.

26. Davis *v.* Davis, 115 Pa. St. 261, 7 Atl. 746 (holding a reservation of the "interest and taxes accruing thereon" insufficient); Graver *v.* Fehr, 89 Pa. St. 460; Hohly *v.* German Reformed Soc., 2 Pa. St. 293 (holding that a consideration of annual services to a religious society "as foresinger and organist" was not sufficient); McGee *v.* Fessler, 1 Pa. St. 126; Blashford *v.* Duncan, 2 Serg. & R. (Pa.) 480; Shaffer *v.* Sutton, 5 Binn. (Pa.) 228 (holding that a rent consisting of the payment of taxes and daubing and chinking a certain house was a certain rent).

27. Hightower *v.* Fitzpatrick, 42 Ala. 597; Spear *v.* Lomax, 42 Ala. 576; Dunning *v.* Finson, 46 Me. 546; McKissack *v.* Bullington, 37 Miss. 535. And see Collins *v.* Mountain, 53 Ala. 201.

Persons holding contrary to any agreement. — Summary proceedings to recover possession, under Comp. Laws, §§ 6706, 6707, providing therefor where one holds over contrary to the conditions of any agreement under which he holds, may be maintained against a builder, who, although bound at the end of his contract to turn over the house to the owner, retains the keys, and refuses to give up possession, pending suit for balance on contract. Wilkinson *v.* Williams, 51 Mich. 155, 16 N. W. 319.

Unlawful detainer proceedings in general see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1108.

28. *Alabama.*— Mounger *v.* Burks, 17 Ala. 48.

Colorado.— Keller *v.* Klopfer, 3 Colo. 132.

Georgia.— Griffith *v.* Collins, 116 Ga. 420, 42 S. E. 743; Brown *v.* Persons, 48 Ga. 60.

Kentucky.— Goldsberry *v.* Bishop, 2 Duv. 143; Eckler *v.* Eckler, 3 B. Mon. 387; Hay *v.* Connelly, 1 A. K. Marsh. 393. And see

donee,[29] mortgagor and mortgagee,[30] trustee and *cestui que trust*,[31] master and servant,[32] or of partnership[33] or tenants in common,[34] rather than of landlord and tenant. Nor will an action lie where the entry has been under an adverse title,[35] or the tenant has been evicted by title paramount,[36] or where the tenant

Colored Homestead, etc., Assoc. *v.* Harvey, 64 S. W. 676, 23 Ky. L. Rep. 1009.

Massachusetts.— Kiernan *v.* Linnehan, 151 Mass. 543, 24 N. E. 907.

New York.— Sims *v.* Humphrey, 4 Den. 185.

North Carolina.— Riley *v.* Jordan, 75 N. C. 180; McCombs *v.* Wallace, 66 N. C. 481.

Vermont.— Davis *v.* Hemenway, 27 Vt. 589.

Wisconsin.—Nightingale *v.* Barens, 47 Wis. 389, 2 N. W. 767.

United States.— McCauley *v.* Hazlewood, 59 Fed. 877, 8 C. C. A. 339, holding that the vendee of a leasehold term cannot maintain an action of unlawful detainer in the Indian Territory, under Mansfield Dig. Ark. § 3348, to recover possession from his vendor, who refuses to surrender the premises at the time agreed.

England.— Doo *v.* London, etc., R. Co., 8 L. J. Ch. 200.

Canada.—Wartell *v.* Ince, 10 Can. L. J. 297; Bonser *v.* Boice, 9 Can. L. J. 213; Anonymous, 3 Ont. Pr. 350.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1208, 1273.

After termination or surrender of contract. —Where a sale of the leased premises is made by a landlord to his tenant, and time is of the essence of the contract, the refusal of the tenant to make payment when due and accept the deed puts an end to the contract, at the option of the landlord, and he may bring his action as landlord for unlawful detainer. Norton *v.* Sturla, 83 Cal. 559, 23 Pac. 527. Where a party under a contract of purchase, having entered upon the land, unconditionally surrenders his right under such contract and enters into a contract of lease, he may be evicted, although he may not have actually surrendered the possession of the land and received it back again at the hands of the lessor. Riley *v.* Jordan, 75 N. C. 180.

When the statute includes the relation of vendor and purchaser the action may be maintained. Clark *v.* Bourgeois, 86 Miss. 1, 38 So. 187. See, generally, VENDOR AND PURCHASER.

Tenant as distinguished from purchaser see *supra*, I, D, 3.

29. Matthews *v.* Matthews, 49 Hun (N. Y.) 346, 2 N. Y. Suppl. 121; Buel *v.* Buel, 76 Wis. 413, 45 N. W. 324.

30. *Georgia.*— Ray *v.* Boyd, 96 Ga. 808, 22 S. E. 916.

Maine.— Sawyer *v.* Hanson, 24 Me. 542.

Minnesota.— Pioneer Sav., etc., Co. *v.* Powers, 47 Minn. 269, 50 N. W. 227.

New York.— People *v.* Culver, 21 How. Pr. 108. But see Hunt *v.* Comstock, 15 Wend. 665.

North Carolina.— Greer *v.* Wilbar, 72 N. C. 592; McMillan *v.* Love, 72 N. C. 18; McCombs *v.* Wallace, 66 N. C. 481.

Vermont.— Davis *v.* Hemenway, 27 Vt. 589.

Canada.—*Ex p.* McBean, 24 N. Brunsw. 362; *In re* Reeve, 4 Ont. Pr. 27.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1208, 1273.

But see Loring *v.* Bartlett, 4 App. Cas. (D. C.) 1, holding that one purchasing land at a foreclosure sale under a deed of trust which reserves to the grantor the right to possession and to the rents and profits until default may maintain a landlord and tenant proceeding against the grantor under D. C. Rev. St. §§ 680–684, to obtain possession.

Tenancy as incident to mortgage see *supra*, I, E, 4.

31. Boucher *v.* Barsalou, 25 Mont. 439, 65 Pac. 718.

Tenant as distinguished from trustee see *supra*, I, D, 4.

32. Heffelfinger *v.* Fulton, 25 Ind. App. 33, 56 N. E. 688; McQuade *v.* Emmons, 38 N. J. L. 397; People *v.* Annis, 45 Barb. (N. Y.) 304. *Compare* Fowke *v.* Turner, 12 Can. L. J. 140.

Tenant as distinguished from servant see *supra*, I, D, 2.

33. Pico *v.* Cuyas, 48 Cal. 639.

Tenant as distinguished from partner see *supra*, I, D, 5.

34. Henderson *v.* Allen, 23 Cal. 519.

35. Watson *v.* Toliver, 103 Ga. 123, 29 S. E. 614; Morrison *v.* Tenney, 15 N. H. 126; Hovey *v.* Blanchard, 13 N. H. 145; Carlisle *v.* McCall, 1 Hilt. (N. Y.) 399.

The presumption is that persons in possession during the terms of a lease hold under the lease rather than in hostility to the landlord's title. Weinhaner *v.* Eastern Brewing Co., 85 N. Y. Suppl. 354. But the presumption has to do with the general relation of the parties to the title as otherwise affected by a hostile possession and does not extend to the implication of a contract defining the tenancy by the terms of a lease to which the tenant has not become a party by assignment or otherwise. Weinhaner *v.* Eastern Brewing Co., *supra*.

Tenancy as incident to possession see *supra*, I, E, 2.

36. Steinback *v.* Krone, 36 Cal. 303 (holding that if a tenant is evicted after notice to his landlord of the threatened invasion by an adverse title, his tenancy ceases, and he is at liberty to take a lease from the successful plaintiff in ejectment, and an action of forcible entry cannot be maintained against such tenant by the first landlord); Wheelock *v.* Warschauer, 34 Cal. 265 (holding that where the tenant was evicted by title paramount, and the landlord defended the action, and after the eviction appealed, the taking of the appeal did not restore the relation of landlord and tenant, which had been destroyed by the eviction, so as to enable the landlord

has reëntered after delivering up his possession to the landlord after the expiration of the lease;[37] but a mere agreement that the lease shall be canceled, there being no surrender of the possession, will not prevent the maintenance of the action.[38] A relation of landlord and tenant sufficient for this purpose may exist, although the lease is not enforceable.[39]

c. Determination of Questions of Title. The right to possession alone is ordinarily involved in summary proceedings under Landlord and Tenant Acts, and questions of title cannot be adjudicated.[40]

d. Recovery of Money Judgments, Damages, or Rent.[41] Under many of the statutes summary proceedings are purely for the recovery of possession and there can be no recovery of rent,[42] damages,[43] or mesne profits;[44] nor can there be an adjustment of accounts between plaintiff and defendant,[45] or a determination of

to commence an action against the tenant for holding over, if such action was commenced before a reversal of judgment).

37. Walls *v.* Preston, 28 Cal. 224.

38. Kower *v.* Gluck, 33 Cal. 401.

39. Harrison *v.* Marshall, 4 Bibb (Ky.) 524; Pope *v.* Miller, 24 Ohio Cir. Ct. 640 (where lease was too indefinite and uncertain); Murat *v.* Micand, (Tex. Civ. App. 1894) 25 S. W. 312 (where the premises were knowingly leased for immoral purposes); Adams *v.* Martin, 8 Gratt. (Va.) 107.

Occupancy under void lease: As creating tenancy see *supra*, I, E, 2, b. As creating tenancy at will see *supra*, VI, A, 2, e.

40. *Alabama.*— Davis *v.* Pou, 108 Ala. 443, 19 So. 362; Pugh *v.* Davis, 103 Ala. 316, 18 So. 8, 49 Am. St. Rep. 30; Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Abrams *v.* Watson, 59 Ala. 524.

Georgia.— Patrick *v.* Cobb, 122 Ga. 80, 49 S. E. 806.

Illinois.— Barkman *v.* Barkman, 107 Ill. App. 332.

Indian Territory.— Brown *v.* Woolsey, 2 Indian Terr. 329, 51 S. W. 965.

Kentucky.— Russell *v.* Vanfleet, 68 S. W. 396, 24 Ky. L. Rep. 232.

Michigan.— Miller *v.* Havens, 51 Mich. 482, 16 N. W. 865.

Mississippi.— Cummings *v.* Kilpatrick, 23 Miss. 106.

New Hampshire.— Stockbridge *v.* Nute, 20 N. H. 271.

New Jersey.— Gatti *v.* Meyer, 9 N. J. L. J. 271.

New York.— Wetterer *v.* Soubirous, 22 Misc. 739, 49 N. Y. Suppl. 1043; People *v.* Goldfogle, 30 N. Y. Suppl. 296, 23 N. Y. Civ. Proc. 417.

Ohio.—See Petsch *v.* Mowry, 1 Cinc. Super. Ct. 36.

Pennsylvania.— Clark *v.* Everly, 8 Watts & S. 226.

Virginia.— Allen *v.* Paul, 24 Gratt. 332.

Canada.— *Ex p.* Tower, 28 N. Brunsw. 159. Since the amendment of the Overholding Tenants Act, Ont. Rev. St. (1887) c. 144, by 58 Vict. c. 13, § 23, striking out of the act the words "without color of right," the judge of the county court tries the right and finds whether the tenant wrongfully holds. Moore *v.* Gillies, 28 Ont. 358. Prior to this amendment, in case the tenant's right or title appeared to be in dispute, the county judge was bound to dismiss the case. Bartlett *v.* Thompson, 16 Ont. 716; Price *v.* Guinane, 16 Ont. 264 [not *following* Gilbert *v.* Doyle, 24 U. C. C. P. 60; Woodbury *v.* Marshall 19 U. C. Q. B. 597]. And see *Re* Magann, 28 Ont. 37; Magee *v.* Gilmour, 17 Ont. 620 [*affirmed* in 17 Ont. App. 27]; Dobson *v.* Sootheran, 15 Ont. 15; MacGregor *v.* Defoe, 14 Ont. 87; *In re* Reeve, 4 Ont. Pr. 27; *In re* Boyle, 2 Ont. Pr. 134; Longhi *v.* Sanson, 46 U. C. Q. B. 446.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1205, 1270.

Necessity of proof of title see *infra*, X, B, 18, a.

41. Form, sufficiency, and enforcement of judgment see *infra*, X, C, 21.

42. Harley *v.* McAuliff, 26 Mo. 525 (holding that the amount due forms no part of the judgment, need not be entered of record, and is not evidence to go to the jury in an action against the tenant); Stelle *v.* Creamer, 69 N. Y. App. Div. 296, 74 N. Y. Suppl. 669; Spiro *v.* Barkin, 30 Misc. (N. Y.) 87, 61 N. Y. Suppl. 870; Bennett *v.* Nick, 29 Misc. (N. Y.) 632, 61 N. Y. Suppl. 106; Wulff *v.* Cilento, 28 Misc. (N. Y.) 551, 59 N. Y. Suppl. 525; Hickey *v.* Conley, 24 Pa. Super. Ct. 388; Rubicum *v.* Williams, 1 Ashm. (Pa.) 230 (holding that, although in summary proceedings under the act of April 3, 1830, the justices are bound to ascertain the rent due and in arrear, and indorse the same on the writ of possession, they cannot issue an execution against the tenant to compel payment of the sum so ascertained); Evans *v.* Radford, 2 Phila. (Pa.) 370; Clark *v.* Snow, 24 Tex. 242. But see Ottinger *v.* Prince, 2 N. Y. City Ct. 353, holding that the grantee of lands may as such maintain summary proceedings for possession of the premises for non-payment of rent due subsequent to the grant, and may in the same proceedings include a demand for prior rent assigned to him by the grantor.

43. Keller *v.* Henry, 24 Ark. 575; Posson *v.* Dean, 8 N. Y. Civ. Proc. 177.

44. Allan *v.* Rogers, 13 U. C. Q. B. 166, holding that a landlord proceeding under 4 Wm. IV, c. 1, § 53, cannot, under 14 and 15 Vict. c. 114, § 12, recover mesne profits, that act applying only to ejectment.

45. Schweikert *v.* Seavey, (Cal. 1900) 62

the right of lessees to payment for improvements.[46] Under the express provisions of some statutes, however, a recovery of the damages to or rent of the premises is permitted.[47] Where damages are awarded they are properly based upon the rental value of the property while detained.[48] Under some statutes an award of double [49] or treble [50] damages may be made. Special damages are not recoverable unless

Pac. 600; Swygert *v.* Goodwin, 32 S. C. 146, 10 S. E. 933.

46. *In re* Coatsworth, 160 N. Y. 114, 54 N. E. 665 [*reversing* 59 N. Y. Suppl. 1100].

47. See Middlebury College *v.* Lawton, 23 Vt. 688, holding that in a proceeding under the statute of 1842, brought by a landlord to recover possession of the premises from a tenant who holds over his term, the landlord is entitled to recover all the rent due at the time of the rendition of the judgment, as well as the rent which accrued under the lease as the subsequent rent. See also cases more specifically cited in the following notes.

The rent due at the time of trial may be awarded. Nolan *v.* Hentig, 138 Cal. 281, 71 Pac. 440; Ellis *v.* Fitzpatrick, 3 Indian Terr. 656, 64 S. W. 567; Leahy *v.* Lubman, 67 Mo. App. 191, holding that plaintiff may recover the reasonable rental value during the time of occupation and is not confined in his damages to the rent contracted for.

Interest upon instalments of rents from the date at which they became due may be recovered. Lane *v.* Ruhl, 103 Mich. 38, 61 N. W. 347.

On retention of possession by defendant, under some statutes, the court is without authority to render judgment for damages except where defendant has given a bond to retain the possession after a writ of possession for the lands and premises has issued. See Fallon *v.* Murray, 4 Indian Terr. 86, 64 S. W. 753, holding that where the parties had treated the case as though the statutory bonds had been given, it was not improper to instruct the jury to find damages for plaintiff.

Exemplary damages.—On an action brought under Pub. St. c. 246, for the recovery of land from a tenant, exemplary damages are recoverable if defendant files a plea of title or appeals. Woodbury *v.* Butler, 67 N. H. 545, 38 Atl. 379.

Against separate defendants.— In a proceeding under the statute of 1842, brought by a landlord to recover the possession of premises from a tenant who holds over after his term, if several are joined as defendants, who hold by several and distinct possessions different parts of the premises, and who sever in their defenses, separate damages may be awarded against them. Middlebury College *v.* Lawton, 23 Vt. 688.

Where subtenant is in possession.— In a proceeding against a tenant and a subtenant for possession, a judgment for possession should be entered against both tenants, and a judgment for double rent against the original tenant only. Fletcher *v.* Fletcher, 123 Ga. 470, 51 S. E. 418.

Under 4 Geo. II, c. 28, § 1, a claim for damages against the overholding tenant, for double the yearly value of the land, is an unliquidated claim and not provable against an estate in the hands of an assignee for creditors. Magann *v.* Ferguson, 29 Ont. 235.

Recovery of damages in forcible entry and detainer generally see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1168.

48. Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Lautman *v.* Miller, 158 Ind. 382, 63 N. E. 761; Campbell *v.* Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879; Millington *v.* O'Dell, 35 Ind. App. 225, 73 N. E. 949; Thomas *v.* Walmer, 18 Ind. App. 112, 46 N. E. 695; Roach *v.* Hefferman, 65 Vt. 485, 27 Atl. 71; Newport Cong. Soc. *v.* Walker, 18 Vt. 600, holding that the rent which defendant had stipulated to pay might be considered.

Other elements of damage.— A bonus offered by another lessee for a long lease, the rental during the detention that such other lessee has engaged to pay, the attorney's fees paid by the lessor in getting possession of the property, and compensation for whatever advantages have been lost by the lessee's withholding possession, are proper elements of damage. Harvey *v.* Pflug, 37 La. Ann. 904.

Damages to adjacent property due to defendants holding over are not recoverable. Kower *v.* Gluck, 33 Cal. 401.

Amount of damages.— Fifty dollars is not excessive where premises were detained for fifty days, and the rents and profits were thirty dollars per month. Taylor *v.* Terry, 71 Cal. 46, 11 Pac. 813. Two hundred dollars is not excessive where there was four months' detention, and the premises had been rented for six hundred dollars a year. Pence *v.* Williams, 14 Ind. App. 86, 42 N. E. 494.

49. Hadley *v.* Bernero, 97 Mo. App. 314, 71 S. W. 451; Bierkenkamp *v.* Bierkenkamp, 88 Mo. App. 445 (holding that it was imperative on the court to double the damages assessed, although not specifically prayed for); Bond *v.* Chapman, 34 Wash. 606, 76 Pac. 97 (holding that judgment may be entered for double the damages found by the jury); Hart *v.* Pratt, 19 Wash. 560, 53 Pac. 711 (holding that it is sufficient if the damages be substantially claimed in the complaint); Hall, etc., Furniture Co. *v.* Wilbur, 4 Wash. 644, 30 Pac. 665 (holding that double damages must be specifically prayed).

The damages must be assessed by a jury.— Ferguson *v.* Hoshi, 27 Wash. 664, 66 Pac. 105. See, generally, DAMAGES.

Recovery of penalties or double rent in general see *supra*, VIII, A, 11.

50. Nolan *v.* Hentig, 138 Cal. 281, 71 Pac. 440.

specifically pleaded.[51] A judgment for rents due is not improperly termed a judgment for damages.[52]

2. Right of Action — a. In General. Summary proceedings will not lie while defendant is entitled to present possession,[53] but they may be maintained, although the tenant has a right of possession *in futuro*.[54] The right of action must exist at the time the proceeding is begun.[55]

b. Contracts With Reference to Right. Statutory provisions for summary proceedings for restitution confer such right independent of any contract right for reëntry,[56] and the parties to the lease it would seem have no power to agree that summary proceedings may be resorted to on other than grounds provided by the statute,[57] but they may contract against the institution of such proceedings.[58]

c. Waiver. The right to bring summary proceedings may be waived.[59]

d. Abatement. Where plaintiff had a legal cause of action at the time the proceeding was commenced, it may be maintained, although pending the action his title terminates.[60]

3. Property Which May Be Recovered. A statutory provision for the recovery of "tenements" is sufficiently broad to cover land, corporeal hereditaments, or anything of a permanent nature which may be held.[61]

4. Persons Entitled to Sue — a. In General.[62] Actions of unlawful detainer

51. Rothschild *v.* Williamson, 83 Ind. 387.

52. Keyes *v.* Moy Jin Mun, 136 Cal. 129, 68 Pac. 476.

53. *Arkansas.*—Bunch *v.* Williams, (1905) 88 S. W. 588, holding that under the terms of the lease a tender must first be made the tenants of an amount due for labor.

Kansas.— Kellogg *v.* Lewis, 28 Kan. 535.

Maine.— Sweetser *v.* McKenney, 65 Me. 225.

Michigan.— Pickard *v.* Kleis, 56 Mich. 604, 23 N. W. 329; McGuffie *v.* Carter, 42 Mich. 497, 4 N. W. 211; Raynor *v.* Haggard, 18 Mich. 72.

Missouri.— Furguson *v.* Lewis, 27 Mo. 249; Reed *v.* Bell, 26 Mo. 216; Lewis *v.* Oesterreicher, 47 Mo. App. 79.

Ohio.— Dennis *v.* Hanson, 12 Ohio Cir. Ct. 445, 5 Ohio Cir. Dec. 465.

Washington.— Roderick *v.* Swanson, 6 Wash. 222, 33 Pac. 349.

54. Taylor *v.* Terry, 71 Cal. 46, 11 Pac. 813, holding that where there is a period of time between the expiration of a tenant's lease and the beginning of his new term, the landlord has such a right of possession at the end of the first term as will entitle him to maintain unlawful detainer.

55. O'Brien *v.* Ball, 119 Mass. 28.

56. Seeger *v.* Smith, 74 Minn. 279, 77 N. W. 3.

57. Beach *v.* Nixon, 9 N. Y. 35. *Contra*, Chapin *v.* Billings, 91 Ill. 539. And see Woodward *v.* Cone, 73 Ill. 241.

58. Bixby *v.* Casino Co., 14 Misc. (N. Y.) 346, 35 N. Y. Suppl. 677, holding that where summary proceedings at the time of the execution of a lease providing for the payment of taxes by the lessee were authorized by law to dispossess a tenant for failure to pay taxes, as well as for failure to pay rent, and the lease expressly provided for such proceedings for non-payment of "rent," possession cannot be recovered in summary proceedings for non-payment of taxes, as "*expressio unius est exclusio alterius.*" And see Springsteen *v.* Powers, 3 Rob. (N. Y.) 483, holding that an agreement entered into between a landlord and his tenant for the purpose of getting rid of an obnoxious subtenant that the tenant should make default of payment of rent in order to enable the landlord to institute proceedings ostensibly to eject both the tenant and subtenant but in fact to eject the latter only, and that they should have no effect against the tenant himself, is not valid, so as to entitle the tenant to restrain the landlord from terminating his lease, and recovering possession of the premises upon default of payment, and the issue of a warrant of dispossession.

A reservation of a right of entry does not authorize summary proceedings. Bixby *v.* Casino Co., 14 Misc. (N. Y.) 346, 35 N. Y. Suppl. 677.

59. Nagel *v.* League, 70 Mo. App. 487; Horn *v.* Peteler, 16 Mo. App. 438 (holding that taking a tenant's note for arrears of rent and accepting rent for subsequent months is a waiver of the right of summary action under the statute for arrears of rent); Wolff *v.* Skinkle, 4 Mo. App. 197.

A distress for rent waives the right to bring summary proceedings for a forfeiture. Wilder *v.* Ewbank, 21 Wend. (N. Y.) 587; Jackson *v.* Sheldon, 5 Cow. (N. Y.) 448.

Waiver of forfeiture see *supra*, IX, B, 7, g.

60. Casey *v.* King, 98 Mass. 503 (holding that he is entitled to costs and a judgment which will enable him to take advantage of any recognizance given for accruing rent); Blish *v.* Harlow, 15 Gray (Mass.) 316; Coburn *v.* Palmer, 8 Cush. (Mass.) 124.

61. Sacket *v.* Wheaton, 17 Pick. (Mass.) 103.

A pier in a navigable river is within the term, "houses, lands, or tenements." People *v.* Kelsey, 38 Barb. (N. Y.) 269.

62. Necessity of relationship of landlord and tenant see *supra*, X, C, 1, b.

and other summary remedies being generally, under the statutes, actions merely for the possession of the property,[63] are properly brought in the name of the party entitled to possession,[64] and as a rule must be.[65] It is not necessary that plaintiff be the owner of the premises.[66] So the action may be brought by a tenant for years entitled to the possession,[67] or by a life-tenant.[68] Plaintiff or plaintiffs must represent the entire interest.[69] Actions cannot be brought by one tenant in common against another to recover possession of an undivided part of the estate.[70]

b. Joint Lessors. Where the owners in severalty of separate tracts of land jointly lease them, one of such owners may as landlord sue to dispossess the tenant from his tract,[71] and the lessors may sue jointly for the entire premises.[72]

c. Agents. By express provision of the statutes in some jurisdictions a summary proceeding may be maintained by an agent of the landlord,[73] and in the absence of such a provision, where the tenant is in fact the tenant of an agent of the owner who has been placed in charge of the premises, the agent may recover the possession.[74]

d. After Appointment of Receiver. An action of unlawful detainer may be brought, although a receiver has been appointed in a suit brought to foreclose a

63. See *supra*, X, C, 1, c.

64. Drew *v.* Mosbarger, 104 Ill. App. 635; Tucker *v.* McClenney, 103 Mo. App. 318, 77 S. W. 151 (holding that a grantee of land in possession of a third person under a lease still in force who before the expiration of the term conveyed the premises to another by deed stipulating that the right of possession should not accompany the transfer, but should remain in him until he recovered the actual possession, when it should pass to the purchaser, was entitled to maintain an action for unlawful detainer against the lessee holding possession after the expiration of his lease); Equity Bldg., etc., Assoc. *v.* Murphy, 75 Mo. App. 57; Allen *v.* Paul, 24 Gratt. (Va.) 332.

Person entitled to premises.— Under the Massachusetts statute authorizing an action by the person entitled to the premises, a lessee who has entered into a partnership by which the demised premises were occupied may on the termination of the partnership maintain an action against one holding under the firm. Hart *v.* Bouton, 152 Mass. 440, 25 N. E. 714.

65. Purdy *v.* Rakestraw, 13 Ill. App. 480.

Equitable mortgagee.— Where the lessors, to secure an indebtedness to plaintiff, execute to plaintiff a warranty deed of the leased premises, and give an order to the lessee to pay the rent to plaintiff intending thereby to apply the rent in payment of the debt, plaintiff is not entitled to possession of the premises upon termination of the lease, and cannot maintain the action of forcible entry and detainer against the lessee. Tilleny *v.* Knoblauch, 73 Minn. 108, 75 N. W. 1039.

The owner of the reversion, expectant on the termination of the estate of the tenant for life, who is in the actual possession of the premises, cannot maintain summary proceedings against a tenant to whom the petitioner has assumed to let the same. Buck *v.* Binninger, 3 Barb. (N. Y.) 391.

66. White *v.* Bailey, 14 Conn. 271.

67. Casey *v.* King, 98 Mass. 503; McMichael *v.* McFalls, 25 Pa. Co. Ct. 527.

68. White *v.* Arthurs, 24 Pa. St. 96.

69. Abeel *v.* Hubbell, 52 Mich. 37, 17 N. W. 231 (holding that the grantee of a part only of land leased cannot sue for possession against a tenant holding under a lease of the whole, even though the lease provides that upon sale the lease shall terminate); Moody *v.* Seaman, 46 Mich. 74, 8 N. W. 711 (holding that the widow who has the right of possession of land in behalf of the heirs can bring summary proceedings against a tenant at will to recover possession without waiting for the assignment of her dower). But see Cruger *v.* McLaury, 41 N. Y. 219; De Coursey *v.* Guarantee Trust, etc., Co., 81 Pa. St. 217, holding that, although, under the Landlord and Tenant Act of 1772, a landlord cannot proceed for the possession of part of the demise and hold the tenant for the residue, an assignee of a portion of the reversion may at the end of the term maintain an action for such part, the notice to quit being for the entire premises.

70. King *v.* Dickerman, 11 Gray (Mass.) 480.

71. New York, etc., Tel. Co. *v.* De Gray, 65 N. J. L. 156, 46 Atl. 651, where the tenant holds over.

72. Oakes *v.* Munroe, 8 Cush. (Mass.) 282.

73. Johnson *v.* Thrower, 117 Ga. 1007, 44 S. E. 846; Powers *v.* De O, 64 N. Y. App. Div. 373, 72 N. Y. Suppl. 103 (holding that the proceedings may be entitled and the precept issued in the agent's name); Case *v.* Porterfield, 54 N. Y. App. Div. 109, 66 N. Y. Suppl. 337 (holding that the agent of the owners of the premises may make application to dispossess a firm for non-payment of rent, although one of the members of the firm is a part owner of the premises); Reid *v.* Christy, 2 Phila. (Pa.) 144.

74. Hinckley *v.* Guyon, 172 Mass. 412, 52 N. E. 523.

mortgage against the lessee;[75] and it has been held that a receiver appointed for the purpose of renting and collecting rents *pendente lite* is not entitled to sue in his own name without an assignment from the landlord.[76]

e. After Assignment of Lease. Summary proceedings may be maintained by an assignee of the unexpired term of the lease;[77] for example upon non-payment of rent by the lessee.[78] A mere assignment of rents, however, does not prevent an action by the lessor on account of non-payment.[79]

f. After Transfer or Assignment of Reversion. After a transfer of the reversion the original landlord cannot sue for the possession,[80] although he may have covenanted to deliver possession to his grantee,[81] unless under the circumstances he has a right to possession as where the sale remains executory or there has been an agreement by which the possession remains in the landlord.[82] A grantee[83] or an

75. Woodward *v.* Winehill, 14 Wash. 394, 44 Pac. 860.

76. King *v.* Cutts, 24 Wis. 627. But see *In re* Babcock, 9 Can. L. J. 185, holding that if a receiver has been appointed by the court of chancery, to whom the tenant has attorned, the original landlord is not the proper person to proceed against the tenant for holding over.

77. Drew *v.* Mosbarger, 104 Ill. App. 635; Walker *v.* Vanwinkle, 8 Mart. N. S. (La.) 560; Duff *v.* Fitzwater, 54 Pa. St. 224, holding that if an owner of land lease the same, and give notice to the tenant to quit, any grantee of the title becomes the assignee of the lease under the Landlord and Tenant Acts of 1772 and 1863, and can recover possession. But see Cook *v.* McDevitt, 6 Phila. (Pa.) 131, holding that an assignee of a lessor cannot maintain proceedings under the act of 1863, but his remedy is under the act of 1772, under which complaint can be made by the lessor, his heir and assigns.

Assignment of lease or rent see *supra*, III, E.

78. Wetterer *v.* Soubirous, 22 Misc. (N. Y.) 739, 49 N. Y. Suppl. 1043; Russo *v.* Yuzolino, 19 Misc. (N. Y.) 28, 42 N. Y. Suppl. 482, holding that where the owner leases the whole of premises, part of which are under lease to another person, the lessee of the whole succeeds to the lessor's rights, and may maintain summary proceedings against the lessee of the part for non-payment of rent.

An attornment by a tenant to an assignee of the landlord is not requisite to entitle the assignee to demand payment of rent thereafter falling due, and to maintain a summary proceeding to recover possession on the ground of its non-payment. Wetterer *v.* Soubirous, 22 Misc. (N. Y.) 739, 49 N. Y. Suppl. 1043.

79. Chamberlin *v.* Brown, 2 Dougl. (Mich.) 120 note. And see Kelly *v.* Smith, 16 N. Y. Suppl. 521, 18 N. Y. Suppl. 214, holding that where a lessee sublet the premises for the residue of his term to defendant, and then assigned to plaintiff this "indenture of lease," "with all the premises therein mentioned and described," but did not assign the lease under which he himself held, plaintiff had only a bare right to receive the rents, and could not maintain dispossessory proceedings as assignee of the landlord, for the lessee had already parted with his interest in the term before the assignment.

80. Purdy *v.* Rakestraw, 13 Ill. App. 480 (so holding, although he has agreed with the grantee to obtain possession for him); Boyd *v.* Sametz, 17 Misc. (N. Y.) 728, 40 N. Y. Suppl. 1070, 26 N. Y. Civ. Proc. 29.

Effect of transfer of reversion in general see *supra*, III, D.

81. Boyd *v.* Sametz, 17 Misc. (N. Y.) 728, 40 N. Y. Suppl. 1070, 26 N. Y. Civ. Proc. 29.

82. Logan *v.* Woolwine, 56 Mo. App. 453 (holding that the right of a landlord to sue his tenant for the premises let, at the end of the term, is not terminated by the conveyance thereof by the landlord to a stranger without an attornment by the tenant, if it be stipulated at the time between the landlord and grantee that the former will deliver possession of the premises to the latter at the end of such term); Harrison *v.* Middleton, 11 Gratt. (Va.) 527 (holding that where a tenant agrees by a writing under seal that he will surrender possession when requested by a purchaser, the landlord is the proper person to institute forcible entry and detainer).

83. *Arkansas.*— Johnson *v.* West, 41 Ark. 535; Halliburton *v.* Sumner, 27 Ark. 460; Bradley *v.* Hume, 18 Ark. 284 [*overruling* McGuire *v.* Cook, 13 Ark. 448, in so far as it held that plaintiff must have been in actual possession].

Georgia.— Willis *v.* Harrwell, 118 Ga. 906, 45 S. E. 794; Morrow *v.* Sawyer, 82 Ga. 226, 8 S. E. 51.

Illinois.— Fisher *v.* Smith, 48 Ill. 184.

Indian Territory.— Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536.

Kentucky.— Herndon *v.* Bascom, 8 Dana 113.

Massachusetts.— Alexander *v.* Carew, 13 Allen 70; Hayden *v.* Ahearn, 9 Gray 365, 69 Am. Dec. 294.

Minnesota.— Alworth *v.* Gordon, 81 Minn. 445, 84 N. W. 454.

Mississippi.— Rabe *v.* Fyler, 10 Sm. & M. 440, 48 Am. Dec. 763.

Missouri.— Kaulleen *v.* Tillman, 69 Mo. 510 (holding that the grantee need never have been in possession); Fanning *v.* Voelker, 40 Mo. 129; Walker *v.* Harper, 33 Mo. 592; Tucker *v.* McClenney, 103 Mo. App. 318, 77 S. W. 151; Winkelmeier *v.* Katzelburger, 77 Mo. App. 117. See *contra*, Holland *v.* Reed,

assignee[84] of the reversion may, under the statutes generally, maintain an action. And an action may likewise be maintained by a purchaser of the reversion upon foreclosure of a mortgage,[85] at sheriff's sale,[86] or on foreclosure of a mechanic's lien.[87] It has also been held that a mortgagee may bring an action against an overholding tenant,[88] or that where he has gone into possession he may proceed for non-payment of rent.[89] Where, pending proceedings, plaintiff sells and the vendee treats the tenant as if he had attorned, neither may carry on the suit.[90] Under some statutes a grantee of the owner after forfeiture cannot maintain an action.[91] Under other statutes a subsequent grantee has the same right as his grantor.[92]

g. After Lease to Third Person. While it has been held that the landlord, after having executed a valid lease to a third person, has no longer a right of possession enabling him to maintain an action to recover possession from a former tenant,[93] the better rule would appear to be that he has such an interest in the possession as will enable him to sue.[94] The action may also be maintained in such a case by the lessee whose term immediately follows.[95]

11 Mo. 605, decided under Rev. Code (1845), p. 511, § 3.

New York.— Lang *v.* Everling, 3 Misc. 530, 23 N. Y. Suppl. 329; Zink *v.* Bohn, 3 N. Y. Suppl. 4; Ottinger *v.* Prince, 2 N. Y. City Ct. 353.

Pennsylvania.— Duff *v.* Fitzwater, 54 Pa. St. 224.

Vermont.— Barton *v.* Learned, 26 Vt. 192.

Canada.— *In re* Babcock, 9 Can. L. J. 185.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1229, 1293.

Contra.— Dwine *v.* Brown, 35 Ala. 596, holding that a purchaser from a lessor cannot maintain the action of unlawful detainer on account of a mere holding over after the termination of the lease, pending which the purchase was made, even though defendants may be estopped from denying plaintiff's title.

The purchaser is in no better position than the landlord.— Unger *v.* Bamberger, 85 Ky. 11, 2 S. W. 498, 8 Ky. L. Rep. 746; Mason *v.* Bascom, 3 B. Mon. (Ky.) 269.

One having merely a bond for title cannot maintain the action in Missouri. Duke *v.* Compton, 49 Mo. App. 304.

An attornment is not necessary. Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432 [*affirming* 46 Ill. App. 398]; Howland *v.* White, 48 Ill. App. 236; State *v.* Idler, 54 N. J. L. 467, 24 Atl. 554; Mortimer *v.* O'Reagan, 10 Phila. (Pa.) 500. *Contra,* Reay *v.* Cotter, 29 Cal. 168. Necessity of attornment to create relation of landlord and tenant in general see *supra,* I, F, 1, b.

Where it is sought to recover rent also, under the Missouri statute, defendant must have attorned to the purchaser. Duke *v.* Compton, 49 Mo. App. 304. And see Barado-Ghio Real Estate Co. *v.* Heidbrink, 112 Mo. App. 429, 86 S. W. 1109.

84. State *v.* Idler, 54 N. J. L. 467, 24 Atl. 554; Gatti *v.* Meyer, 9 N. J. L. J. 271.

85. Ish *v.* Morgan, 48 Ark. 413, 3 S. W. 440; Sexton *v.* Hull, 45 Mo. App. 339.

86. McKeon *v.* King, 9 Pa. St. 213.

87. Lang *v.* Everling, 3 Misc. (N. Y.) 530, 23 N. Y. Suppl. 329.

88. Wartell *v.* Ince, 10 Can. L. J. 297; Anonymous, 3 Ont. Pr. 350.

89. Goodnow *v.* Pope, 31 Misc. (N. Y.) 475, 64 N. Y. Suppl. 394.

90. O'Neill *v.* Cahill, 2 Brewst. (Pa.) 357, so holding where one had given to her tenant notice to quit for non-payment of a duly demanded increase of rent, and had commenced proceedings to eject him under the notice, but pending an appeal by him sold the premises and her vendee gave a new notice to him that the rent would be raised again at the end of the new year.

91. Small *v.* Clark, 97 Me. 304, 54 Atl. 758.

Right of subsequent grantee to insist upon forfeiture in general see *supra,* IX, B, 7, c.

92. See Barado-Ghio Real Estate Co. *v.* Heidbrink, 112 Mo. App. 429, 86 S. W. 1109.

93. Allen *v.* Webster, 56 Ill. 393; L'Hussier *v.* Zallee, 24 Mo. 13.

94. *California.*— See Yosemite Valley, etc., Grove *v.* Barnard, 98 Cal. 199, 32 Pac. 982, holding that an outstanding lease by the landlord to a third person, under whom the landlord does not claim, is no defense in unlawful detainer against a tenant holding over.

Maryland.— Gelston *v.* Sigmund, 27 Md. 345.

Michigan.— Vincent *v.* Defield, 98 Mich. 84, 56 N. W. 1104.

New York.— Davidson *v.* Hammerstein, 28 Misc. 529, 59 N. Y. Suppl. 563; Goelet *v.* Roe, 14 Misc. 28, 35 N. Y. Suppl. 145, 25 N. Y. Civ. Proc. 86, 2 N. Y. Annot. Cas. 141.

Ohio.— Cahn *v.* Hammon Bldg. Co., 8 Ohio Dec. (Reprint) 656, 9 Cinc. L. Bul. 112, holding that where the lessor by arrangement with the lessee was to allow a present tenant to remain for a year, suspending the lessee's possession until then, he might maintain an action of forcible detainer after the year, although the lessee could have assumed the burden of the action.

Oregon.— Twiss *v.* Boehmer, 39 Oreg. 359, 65 Pac. 18.

Rhode Island.— Maher *v.* James Hanley Brewing Co., 23 R. I. 343, 50 Atl. 392.

Washington.— Schreiner *v.* Stanton, 26 Wash. 563, 67 Pac. 219.

95. McDonald *v.* Hanlon, 79 Cal. 442, 21 Pac. 861 (holding that where the premises were in possession of a tenant from month to

h. After Death of Lessor. An heir who has become entitled to the possession may maintain an action against the tenant of his ancestor,[96] as may the grantee of the heirs;[97] but on the death of the holder of a life-estate those who take the reversion but not through him cannot sue.[98] The administrator of the landlord may sue under a statute authorizing an action by the owner, his agent, or attorney at law or in fact.[99]

5. Against Whom Action Lies — a. In General.[1] As a general rule under the statutes summary proceedings will lie against those who succeed to the possession from or through the tenant.[2] Under this rule they may be maintained against the widow[3] or the heirs[4] of the tenant, or against subtenants whom he placed in possession,[5] although a portion only of the premises has been sublet.[6]

b. Necessity of Possession by Defendant. As a general rule a dispossession proceeding lies only against persons in possession,[7] unless the parties not in pos-

month, one to whom the owner had executed a lease for years *in præsenti* might sue in unlawful detainer as a successor in estate of the landlord, although he had not entered into possession); Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549; Capital Brewing Co. *v.* Crosbie, 22 Wash. 260, 60 Pac. 652. *Contra*, Hardy *v.* Ketchum, 67 Fed. 282, 14 C. C. A. 398, holding that under the Arkansas statutes, as adopted in the Indian Territory, the relation of landlord and tenant did not exist between such lessees, and that the action could not be supported.

96. Johnson *v.* West, 41 Ark. 535; Turly *v.* Foster, 2 A. K. Marsh. (Ky.) 204, holding that he need not first reduce the premises to actual possession. See *contra*, Picot *v.* Masterson, 12 Mo. 303, holding that a devisee cannot maintain an action of forcible detainer against a tenant of his testator.

Relationship of landlord and tenant see *supra*, I, F, 2.

97. Compton *v.* Ivey, 59 Ind. 352.

98. Wolfe *v.* Angevine, 57 Miss. 767, holding that where the tenant by the curtesy leased land and died before the lease expired, the owners of the reversion could not maintain an action of unlawful detainer against the lessee.

99. Moody *v.* Ronaldson, 38 Ga. 652.

1. Necessity of relationship of landlord and tenant see *supra*, X, C, 1, b.

2. *Alabama.*— Dumas *v.* Hunter, 25 Ala. 711; Russell *v.* Desplous, 25 Ala. 514; Snoddy *v.* Watt, 9 Ala. 609; Stinson *v.* Gosset, 4 Ala. 170, holding, however, that it need not be shown that the tenancy was created by plaintiff, if he is entitled to the possession as a remainder-man, or as owner of the reversion.

Illinois.— McCartney *v.* Hunt, 16 Ill. 76; Fusselman *v.* Worthington, 14 Ill. 135.

Massachusetts.— Whitney *v.* Dart, 117 Mass. 153, holding that defendant must have obtained his possession from someone with whom plaintiff is in privity. See Hart *v.* Bouton, 152 Mass. 440, 25 N. E. 714 (holding that it is enough to bring the occupant within the statute that his possession is held derivatively under a lessee or tenant at will, no matter how many times removed, and that he holds over without right); Howard *v.* Merriam, 5 Cush. 563; Hildreth *v.* Conant, 10 Metc. 298.

Missouri.— See Willi *v.* Peters, 11 Mo. 395.

Texas.— Saunders *v.* Doake, 3 Tex. 143.

Virginia.— Emerick *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1232.

Where a tenant of plaintiff voluntarily surrenders possession to defendant upon a claim of title, this entry is by collusion with or under the tenant, and therefore the entry is within the act. Clark *v.* Stringfellow, 4 Ala. 353.

3. Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123; Michenfelder *v.* Gunther, 66 How. Pr. (N. Y.) 464.

The tenant of the widow may be proceeded against. Fogle *v.* Chaney, 12 B. Mon. (Ky.) 138.

4. Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123.

Relationship of landlord and tenant see *supra*, I, F, 2.

5. *Arkansas.*— Winkler *v.* Massengill, 66 Ark. 145, 49 S. W. 494.

California.— Pardee *v.* Gray, 66 Cal. 524, 6 Pac. 389, holding that where a lessee moved a house upon the land, and the occupant refused to leave it, he became a subtenant of the original lessor and could be dispossessed upon default in payment of rent, by the lessee.

Georgia.— McBurney *v.* McIntyre, 38 Ga. 261.

Illinois.— Patchell *v.* Johnston, 64 Ill. 305 (holding that the rule under the acts of 1845 and 1865, regulating actions of forcible detainer, that the landlord, after eviction of the tenant, may maintain the action against a subtenant, is not affected by the fact that the landlord consented to the subletting); Reed *v.* Hawley, 45 Ill. 40 (so holding where the sublessee held after the termination of the original lease).

Tennessee.— Bird *v.* Fannon, 3 Head 12.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1233.

6. Taylor *v.* White, 86 Mo. App. 526 (holding that a landlord in unlawful detainer against a subtenant can only recover the amount of the property the subtenant leased from the tenant); Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.

7. Ben Lomond Wine Co. *v.* Sladky, 141 Cal. 619, 75 Pac. 332, (1903) 71 Pac. 178

session are acting in concert with those in possession to withhold the premises from the one entitled to possession.[8] Where the actual possession is in severalty, judgment may be rendered against each occupant only for the portion actually withheld by him.[9] Under some statutes the possession must have been obtained under the lease.[10] Under others it is not material, whether the tenant entered under the contract or was already in possession.[11]

c. Municipal or Public Corporations. Summary proceedings may be maintained, although the tenant is a municipal corporation,[12] or a corporation of a quasi-public nature.[13]

6. Grounds of Action — a. In General. Summary proceedings for the recovery of possession may be maintained only upon the grounds established by the statutes providing for them,[14] but such grounds are usually sufficiently broad to include any acts by which the tenant's right of possession has become terminated.[15]

b. Holding After Termination of Lease — (i) *In General.* Statutes authorizing summary proceedings in case the tenant holds over after the expiration of his term[16] are construed to apply only to the expiration of the lease by lapse of time, and not by forfeiture on breach of condition,[17] or surrender by operation of law.[18] Such statutes are, however, construed to include the expiration of a lease

(holding that under a statute providing that one can be guilty of unlawful detainer only when he continues in possession in person or by subtenant, the assignee of a lease who before notice to quit was served on him had assigned his leasehold and surrendered possession to his assignee was not liable to an action for unlawful detainer); Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371; St. Louis Brewing Assoc. *v.* Niederluecke, 102 Mo. App. 303, 76 S. W. 645.

8. St. Louis Brewing Assoc. *v.* Niederluecke, 102 Mo. App. 303, 76 S. W. 645. And see Emerick *v.* Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217.

9. Humphreville *v.* Davis, 27 Ill. App. 142, so holding under Rev. St. c. 57, § 15, providing that all the different occupants of premises included within a single lease may be joined in an action of forcible entry and detainer, and requiring the recovery against the several parties to be "according as their actual holdings shall respectively be found to be."

10. Brewer *v.* Peed, 6 J. J. Marsh. (Ky.) 494, holding that where a vendor, being in possession when the sale is made, remains so under a lease from the vendee, who was never in possession, the latter cannot maintain forcible detainer on the vendor's refusing to quit on expiration of the lease); Nelson *v.* Cox, 2 A. K. Marsh. (Ky.) 150; Mattingly *v.* Lancaster, 2 A. K. Marsh. (Ky.) 30; Helm *v.* Slader, 1 A. K. Marsh. (Ky.) 320.

11. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794. And see Lewis *v.* Brandle, 107 Mich. 7, 64 N. W. 734.

12. Brown *v.* New York, 66 N. Y. 385.

13. Bodwell Water Power Co. *v.* Old Town Electric Co., 96 Me. 117, 51 Atl. 802.

14. See *supra*, X, C, 1, 2, b.

15. See the statutes of the several states.

A disavowal of the landlord's title is ground. Fusselman *v.* Worthington, 14 Ill. 135.

A repudiation of the lease by the tenant and his announcement of an intention to continue possession without paying rent is sufficient. Buckner *v.* Warren, 41 Ark. 532.

Breach of agreement to surrender see *supra*, IX, B, 8, b, (II), note 49.

16. See the statutes of the several states. And see Cox *v.* Sammis, 57 N. Y. App. Div. 173, 68 N. Y. Suppl. 203; *Ex p.* Irvine, 7 N. Brunsw. 519; Adams *v.* Bains, 4 U. C. Q. B. 157.

Termination of tenancy see *supra*, IX.

17. *Connecticut.*— Lang *v.* Young, 34 Conn. 526.

Massachusetts.— Fifty Associates *v.* Howland, 11 Metc. 99.

New Jersey.—Smith *v.* Sinclair, 59 N. J. L. 84, 34 Atl. 943; Wakeman *v.* Johnson, 3 N. J. L. J. 84.

New York.— Beach *v.* Nixon, 9 N. Y. 35; Matter of Guaranty Bldg. Co., 52 N. Y. App. Div. 140, 64 N. Y. Suppl. 1056 (default rent); Kelly *v.* Varnes, 52 N. Y. App. Div. 100, 64 N. Y. Suppl. 1040; Kramer *v.* Amberg, 15 Daly 205, 4 N. Y. Suppl. 613, 16 N. Y. Civ. Proc. 445 [*affirmed* in 115 N. Y. 655, 21 N. E. 1119 (subletting); McMahon *v.* Howe, 40 Misc. 546, 82 N. Y. Suppl. 984; Penoyer *v.* Brown, 13 Abb. N. Cas. 82; Oakley *v.* Schoonmaker, 15 Wend. 226.

Canada.— *In re* McNab, 3 U. C. Q. B. 135; Clement *v.* Schriver, 5 U. C. Q. B. O. S. 310; Adnerant *v.* Schriver, (Trin. T. 6 & 7 Wm. IV) R. & J. Dig. 2083.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1275.

Contra.— Quinn *v.* McCarty, 33 Leg. Int. (Pa.) 312; Follin *v.* Coogan, 12 Rich. (S. C.) 44.

Right to forfeit lease see *supra*, IX, B, 7.

18. Philip *v.* McLaughlin, 24 N. Brunsw. 532.

What constitutes surrender see *supra*, IX, B, 8.

by a conditional limitation as distinguished from a termination of the lease upon a breach of condition.[19]

(II) *Under Unlawful Detainer Acts.* The remedy by action of unlawful detainer is usually extended to cases in which the tenant holds over contrary to the provisions of his lease[20] after demand,[21] whether the tenant holds by force or not.[22] Although there may be no positive refusal to comply with the demand,[23] there must be at least a constructive refusal,[24] which may be at or after the termination of the lease.[25]

c. Holding Contrary to Provisions of Lease. A statute conferring a summary remedy in case the lessee holds contrary to the conditions or covenants of his lease applies only to conditions or covenants in the nature of limitations, by which upon the happening of the contingency the estate becomes *ipso facto* terminated, and has no application to mere covenants to do or perform certain things.[26] Where

19. Miller *v.* Levi, 44 N. Y. 489 (provision that the lessor might terminate the lease at the end of any year by giving sixty days' previous notice in case he should sell or desire to rebuild); Martin *v.* Crossley, 46 Misc. (N. Y.) 254, 91 N. Y. Suppl. 712; Ronginsky *v.* Grantz, 39 Misc. (N. Y.) 347, 79 N. Y. Suppl. 839; Manhattan L. Ins. Co. *v.* Gosford, 3 Misc. (N. Y.) 509, 23 N. Y. Suppl. 7.

20. *Indian Territory.*— Hill *v.* Watkins, 4 Indian Terr. 170, 69 S. W. 837.

Kansas.— Douglass *v.* Anderson, 28 Kan. 262, so holding, although the tenant is entitled under his lease to improvements made by him during its term.

Kentucky. — Wheatley *v.* Price, 3 J. J. Marsh. 167 (so holding where, on a contract to occupy premises no longer than would compensate for repairs made by the tenant, he occupied longer); Harrison *v.* Marshall, 4 Bibb 524.

Maine.— Bodwell Water Power Co. *v.* Old Town Electric Co., 96 Me. 117, 51 Atl. 802 (so holding, although the lease provided at its termination that the landlord should at its option either buy or allow to be removed the property of the tenant); Wheeler *v.* Cowan, 25 Me. 283.

Missouri.— Frick Co. *v.* Marshall, 86 Mo. App. 463.

Texas.— Steele *v.* Steele, 2 Tex. App. Civ. Cas. § 345.

Wisconsin.— Meno *v.* Hœffel, 46 Wis. 282, 1 N. W. 31.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1210.

21. *Alabama.*— Beck *v.* Glenn, 69 Ala. 121.

California.— Perine *v.* Teague, 66 Cal. 446, 6 Pac. 84 (holding that a tenant who holds over without the consent of the lessor and refuses to surrender possession is not a tenant at will); Kower *v.* Gluck, 33 Cal. 401.

Colorado. — Brandenburg *v.* Reithman, 7 Colo. 323, 3 Pac. 577, holding that where a tenant from year to year takes a lease of the same premises for a single year, with the privilege of having them a second year if the owner does not build, and, the owner not building, he continues in possession of them for the second year, he is a tenant under the lease, and not from year to year, and, on due notice to quit at the end of the year, followed by a demand and refusal of the premises, an action for forcible entry and unlawful detainer may be maintained.

Tennessee.— Trousdale *v.* Darnell, 6 Yerg. 431; Lane *v.* Marshall, Mart. & Y. 255.

Vermont.— Barton *v.* Learned, 26 Vt. 192.

Washington.—Yesler *v.* Orth, 24 Wash. 483, 64 Pac. 723.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1210.

22. Mason *v.* Finch, 2 Ill. 495.

Under "forcible" detainer statutes it has been held that there must be a determined purpose to retain the possession and to resist with force any attempt of the owner to enter and regain possession. Harrington *v.* Watson, 11 Oreg. 143, 3 Pac. 173, 50 Am. Rep. 465.

23. Floyd *v.* Ricks, 11 Ark. 451, holding that the action lies if he holds over an unreasonable time after demand.

24. Shepherd *v.* Thompson, 2 Bush (Ky.) 176; Hoskins *v.* Helm, 4 Litt. (Ky.) 309, 14 Am. Dec. 133 (holding that where a tenant claims to hold adversely to his landlord, it is sufficient refusal); Ewing *v.* Bowling, 2 A. K. Marsh. (Ky.) 35.

25. Gray *v.* Nesbet, 2 A. K. Marsh. (Ky.) 35.

26. Langley *v.* Ross, 55 Mich. 163, 20 N. W. 886 (holding that such statute was not applicable to a breach of covenant to pay taxes and insurance); Hadley *v.* Havens, 24 Vt. 520 (holding that the evident intention of Vt. Comp. St. c. 44, § 30, was to give summary relief in those cases where for breach of such stipulations the action of ejectment would lie). And see Lord *v.* Walker, 49 Mich. 606, 14 N. W. 564 (holding that the landlord had a right to resume possession upon an offer to pay for labor and crops under a lease of a farm for three years, which stipulated that if the farm was sold for a certain sum the tenant should surrender possession on being reimbursed for his labor and crops, and that if the landlord did not return to the farm and himself occupy the tenant could continue in possession); Marvin *v.* Hartz, 130 Mich. 26, 89 N. W. 557 (holding that where the lessee assigns without consent of his lessor the assignee holds contrary to the lease, and that an action may be maintained).

the landlord has a right of reëntry because of breach of the conditions or covenants of the lease, it is usually held that he may bring an action of unlawful detainer;[27] but the mere breach of a covenant does not give such right unless it works a forfeiture or gives a right of reëntry,[28] nor does the commission of waste.[29] Under some statutes, however, waste is a specific ground of action.[30] It is enough that the tenant holds contrary to the conditions of his lease; the possession need not be maintained by force and strong hand.[31]

d. Non-Payment of Rent. Where by statute a summary remedy is afforded only in case of the termination of the tenant's estate by stipulation in the lease or expiration of his term, such a proceeding cannot be maintained for non-payment of rent in the absence of a condition of forfeiture in the lease.[32] But the non-payment of rent in accordance with the terms of the lease is, under the various landlord and tenant statutes, usually made a ground upon which summary[33]

27. Jones *v.* Durrer, 96 Cal. 95, 30 Pac. 1027; Preston *v.* Stover, (Nebr. 1903) 97 N. W. 812; Lent *v.* Curtis, 24 Ohio Cir. Ct. 592 (holding that a lessor of land may proceed to recover possession of the demised premises by forcible detainer, notwithstanding any claim which the lessee or a trustee for his creditors may have under a provision in the lease by which the lessor agrees to purchase a building which lessee has erected on the land, and need not go into a court of equity to have such a claim adjudicated before seeking to recover possession of the premises); Thompson *v.* Ackerman, 21 Ohio Cir. Ct. 740, 12 Ohio Cir. Dec. 456.

For example the action will lie where a tenant forfeits his rights to the demised premises by using the premises for the unlawful sale of intoxicating liquors (Justice *v.* Lowe, 26 Ohio St. 372), or for the failure of the lessee of a distillery warehouse to comply with an agreement that, as the whisky came out of bond, he would collect the state and county taxes thereon, and pay the same to the person entitled thereto, and that, if he failed to do so, he would at once surrender possession of the premises to the lessor without notice (Walker *v.* Dowling, 68 S. W. 135, 24 Ky. L. Rep. 179). But as an existing unexpired lease is not forfeited by operation of law by the use of the premises for purposes of prostitution, the statute only giving an option to avoid it, the lease is still subsisting, and the landlord has only a right to enter and proceed by ejectment, and hence cannot recover possession by forcible entry and detainer. Ryan *v.* Kirkpatrick, 7 Ohio Dec. (Reprint) 219, 1 Cinc. L. Bul. 303.

Notice to perform a covenant in the lease which cannot subsequently be performed is unnecessary. Kelly *v.* Teague, 63 Cal. 68.

28. Bauer *v.* Knoble, 51 Minn. 358, 53 N. W. 805; Hadley *v.* Havens, 24 Vt. 520.

Forfeiture by breach of covenant see *supra*, IX, B, 7.

29. Bauer *v.* Knoble, 51 Minn. 358, 53 N. W. 805.

30. Byrkett *v.* Gardner, 35 Wash. 668, 77 Pac. 1048, holding that a failure to farm lands leased in a good and husbandlike manner, or to keep in repair fences thereon, is not waste, under such a statute, although the acts of the tenant tended to lessen the income derived from the land.

31. Gluck *v.* Elkan, 36 Minn. 80, 30 N. W. 446.

32. Simmons *v.* Jarman, 122 N. C. 195, 29 S. E. 332; Meroney *v.* Wright, 81 N. C. 390.

Forfeiture for non-payment of rent see *supra*, IX, B, 7, d, (I), (F).

There must have been a reëntry or the forfeiture asserted in some other positive manner even in a case where the lease contains a provision for forfeiture on non-payment of rent. Bowman *v.* Foot, 29 Conn. 331.

33. See the statutes of the various states. And see Van Renselaer *v.* Holbrook, 1 La. Ann. 180; Lyons *v.* Gavin, 43 Misc. (N. Y.) 659, 88 N. Y. Suppl. 252; Bennett *v.* Nick, 29 Misc. (N. Y.) 632, 61 N. Y. Suppl. 106 (holding that where rent is payable in advance in two instalments, one on the second and the other on the fifteenth of each month, a summary proceeding for non-payment of rent, brought on the fifteenth, is not premature, where the first instalment is due and unpaid); Cochran *v.* Reich, 20 Misc. (N. Y.) 623, 46 N. Y. Suppl. 443 (holding that where summary proceedings for the removal of a tenant are taken under a lease providing for the payment both of rent and of water-rents as part of rent reserved, and any amount for either is found to be due, the landlord is entitled to a final order); Belding *v.* Blum, 88 N. Y. Suppl. 178.

Other payments under lease.— Where, in a proceeding for recovery of possession of premises for non-payment of rent, under Rev. St. (1899) §§ 4131–4133, the sum demanded is part for rent and part for other claims, the action cannot be maintained, although the payment for both is provided for in the lease of the premises in a lump sum. Welch *v.* Ashby, 88 Mo. App. 400.

Payments in lieu of rent.— Where a lease provided that the tenant should make certain improvements and alterations within six months, and, if the same be not then made or commenced, he should pay the landlord the sum of two thousand four hundred dollars (an amount equal to six months' rent), such payment not being shown to be for rent, a

or unlawful detainer[34] proceedings may be instituted, the proper notice or demand having been given,[35] and although the lease contains no clause of reëntry[36] or forfeiture,[37] or although there is a provision for its termination upon notice,[38] and the tenant need not actually withhold possession by force.[39]

e. Unlawful Use of Premises. Under the statutes of some states summary proceedings may be maintained where the premises are used for an unlawful purpose,[40] and the illegal use need not have continued until the action was begun.[41]

f. Removal From Premises. By some statutes a summary remedy is provided where the tenant has removed from the premises.[42]

7. Defenses — a. In General. As a general rule defendant may establish in defense to a summary proceeding any matter which shows that his occupancy is rightful.[43] For example he may show that he is holding under a valid and unex-

failure of the tenant to perform the covenant or make such payment did not warrant the maintenance of summary proceedings to recover possession. Sipp *v.* Reich, 88 N. Y. Suppl. 960.

Furnished house.— The fact that furniture is embraced in a demise of land does not deprive the landlord of the summary remedy furnished by the statute against tenants who fail to pay rent, or who hold over after the expiration of the term for which the premises were hired. The rent issues out of the land and not out of the furniture which is a mere incident of the demise. Armstrong *v.* Cummings, 58 How. Pr. (N. Y.) 331; Swigley *v.* Jones, 1 N. Y. City Ct. 127.

Non-payment of taxes which the tenant has covenanted to pay will not warrant a dispossession as for non-payment of rent. People *v.* Swayze, 15 Abb. Pr. (N. Y.) 432.

34. Wright *v.* Gribble, 26 Minn. 99, 1 N. W. 820. And see Cochran *v.* Philadelphia Mortg., etc., Co., (Nebr. 1903) 96 N. W. 1051, holding that under a lease providing that if any part of the rent should be in arrears it should be lawful for the landlord to retake possession without formal notice, a right to maintain an action of detention accrues after default and statutory notice to the tenant.

Where a tenant at will refuses to pay rent he holds unlawfully at the end of thirty days' notice to quit. Wheeler *v.* Cowan, 25 Me. 283.

A disagreement as to whether rent is due is not ground. Brown *v.* Samuels, 70 S. W. 1047, 24 Ky. L. Rep. 1216.

35. See *infra*, X, C, 9, b.

36. Seeger *v.* Smith, 74 Minn. 279, 77 N. W. 3; Dakota Hot Springs Co. *v.* Young, 9 S. D. 577, 70 N. W. 842.

37. Parker *v.* Geary, 57 Ark. 301, 21 S. W. 472; Pollock *v.* Whipple, 33 Nebr. 752, 51 N. W. 130.

38. Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434.

39. Hislop *v.* Moldenhauer, 21 Oreg. 208, 27 Pac. 1052 [*distinguishing* Harrington *v.* Watson, 11 Oreg. 143, 3 Pac. 173, 50 Am. Rep. 465; Taylor *v.* Scott, 10 Oreg. 483].

40. Prescott *v.* Kyle, 103 Mass. 381 (illegal sale of intoxicating liquors); McGarvey *v.* Puckett, 27 Ohio St. 669; Justice *v.* Lowe, 26 Ohio St. 372.

41. Stearns *v.* Hemmens, 14 Daly (N. Y.) 501, 1 N. Y. Suppl. 52, 21 Abb. N. Cas. 312 [*distinguishing* Shaw *v.* McCarty, 11 Daly (N. Y.) 150, 63 How. Pr. 286].

Sufficiency of showing.— In proceedings to dispossess a tenant on the ground that she kept a house of ill fame, evidence that she kept an intelligence office on the second floor, and that her customers gathered in a hallway common to the whole building, and were guilty of improper conduct without her knowledge, shows no grounds entitling the landlord to recover possession. Moench *v.* Yung, 8 N. Y. Suppl. 532 [*affirmed* in 16 Daly 143, 9 N. Y. Suppl. 637, 18 N. Y. Civ. Proc. 259].

42. See Freytag *v.* Anderson, 1 Ashm. (Pa.) 98 (holding that under the act of March 25, 1825, providing that if a tenant removes from the premises without leaving sufficient property thereon to secure the payment of three months' rent, and refuses to give security therefor or deliver possession, summary proceedings may be maintained by the landlord, the removal of the lessee is necessary to give the justice jurisdiction); *Ex p.* Pilton, 1 B. & Ald. 369, 19 Rev. Rep. 342 (holding that when a tenant ceased to reside on the premises for several months, and left them without any furniture, or sufficient other property to answer the year's rent, the landlord might properly proceed under 11 Geo. II, c. 19, § 16, to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same).

43. Brown's Appeal, 66 Pa. St. 155; Livingood *v.* Moyer, 2 Woodw. (Pa.) 65.

An agreement to give a perpetual lease cannot be asserted where a consideration is not shown, nor is the happening of the condition on which it was to be executed. Middlebury College *v.* Lawton, 23 Vt. 688.

The fact that defendant owns the building which he occupies gives him no right to withhold possession of the leased land on which it stands. Lloyd *v.* Secord, 61 Minn. 448, 63 N. W. 1099.

Preference as to purchase.— An agreement in the lease whereby, in the event of sale, the tenant has the first privilege of purchase is no defense where the premises have not been sold, since such option does not alter de-

pired lease,[44] that he is entitled to an extension of the lease under which he entered,[45] or that his continuance in possession is under a new agreement.[46] A new lease which is void is no defense,[47] nor is the good faith of the tenant in holding over.[48]

b. Non-Existence of Relation of Landlord and Tenant. Defendant may show that a relationship of landlord and tenant such as will sustain the proceeding does not exist.[49]

c. Invalidity of Lease. The tenant cannot set up the invalidity of the lease,[50] for example, that the premises were rented for an immoral purpose,[51] as a defense.

d. Entry Under Third Person. It is not as a general rule material whether the tenant received possession of the demised premises from his landlord or became tenant after obtaining possession.[52]

e. Denial of Title. The general rule that the tenant is estopped to deny the landlord's title operates to prevent his contesting the validity of such title in dispossession proceedings,[53] and apart from this the usual rule is that questions of title cannot be litigated.[54]

f. Payment or Tender of Rent. In actions based upon non-payment of rent, matter showing a discharge of the liability for rent,[55] or a lawful and sufficient

fendant's situation as a tenant. Brauchle *v.* Nothhelfer, 107 Wis. 457, 83 N. W. 653.

A claim for compensation for improvements is not in itself a defense (Elliott *v.* Round Mountain Coal, etc., Co., 108 Ala. 640, 18 So. 689), nor is an agreement to pay for improvements where defendant has refused to accept the payment tendered or to surrender possession (Fraer *v.* Washington, 125 Fed. 280, 60 C. C. A. 194, holding that the lessor cannot be required first to bring a suit in equity to compel the lessee to accept such payment).

44. Rainey *v.* Capps, 22 Ala. 288; Supp *v.* Keusing, 5 Rob. (N. Y.) 609; Salomon *v.* Weisberg, 29 Misc. (N. Y.) 650, 61 N. Y. Suppl. 60.

45. Bard *v.* Jones, 96 Ill. App. 370; Ferguson *v.* Jackson, 180 Mass. 557, 62 N. E. 965; Lutz *v.* Wainwright, 193 Pa. St. 541, 44 Atl. 565.

46. Uridias *v.* Morrell, 25 Cal. 31; Kelly *v.* Loehr, 1 Brewst. (Pa.) 303.

47. Clark *v.* Barnes, 76 N. Y. 301, 32 Am. Rep. 306.

48. Lehnen *v.* Dickson, 148 U. S. 71, 13 S. Ct. 481, 37 L. ed. 373.

49. *California.*— Pico *v.* Cuyas, 47 Cal. 180, holding that he may show possession as a partner.

Georgia.— Walker *v.* Edmundson, 111 Ga. 454, 36 S. E. 800; Lockett *v.* Usry, 28 Ga. 345.

Michigan.— Byrne *v.* Beeson, 1 Dougl. 179.

New Jersey.— Breitenbucher *v.* McElroy, 2 N. J. L. J. 126.

New York.— People *v.* Howlett, 76 N. Y. 574 [*affirming* 13 Hun 138]; People *v.* Teed, 48 Barb. 424, 33 How. Pr. 238; Matter of McCormick, 30 Misc. 285, 63 N. Y. Suppl. 492.

Vermont.— Wheeler *v.* Wheeler, 77 Vt. 177, 59 Atl. 842.

50. Simons *v.* Marshall, 3 Greene (Iowa) 502 (fraud); Helmes *v.* Stewart, 26 Mo. 529. And see Emerick *v.* Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217.

51. Toby *v.* Schultz, 51 Ill. App. 487.

52. McMurtry *v.* Adams, 3 Bush (Ky.) 70. **In Kentucky** it was at one time the rule that the tenant must have received possession from the landlord. See Kirk *v.* Taylor, 8 B. Mon. 262; Elms *v.* Randall, 2 Dana 100 (holding that in forcible entry and detainer, brought by a tenant against his subtenant, the latter may prove that the paramount landlord had entered on the expiration of the lease to the tenant, and leased to defendant); Norton *v.* Sanders, 7 J. J. Marsh. 12; Ball *v.* Lively, 2 J. J. Marsh. 181; Gray *v.* Gray, 3 Litt. 465; Nelson *v.* Cox, 2 A. K. Marsh. 150; Helm *v.* Slader, 1 A. K. Marsh. 320.

53. See *supra*, III, G.

54. See *supra*, X, C, 1, c. And see Yosemite Valley, etc., Big Tree Grove *v.* Barnard, 98 Cal. 199, 32 Pac. 982, holding that an outstanding lease to a third person under whom tenant does not claim is not a defense.

A void lease to a third person under which the tenant claims with knowledge of its invalidity is no defense. Silvey *v.* Summer, 61 Mo. 253 (holding that a certificate of homestead entry granted to the tenant cannot be interposed as a defense); Lehnen *v.* Dickson, 148 U. S. 71, 13 S. Ct. 481, 37 L. ed. 373 [*affirming* 37 Fed. 319].

55. See Spiro *v.* Barkin, 30 Misc. (N. Y.) 87, 61 N. Y. Suppl. 870 (holding that where a landlord accepted part cash and a non-negotiable note in payment of rent due and to become due to the note's maturity, giving a receipt for such rent under an agreement to accept such payment if he could get the note cashed, he was not entitled on tendering a return of the note to dispossess the tenant before the note's maturity, where it did not appear whether he could get it cashed or whether he had made any effort to do so); Collender *v.* Smith, 20 Misc. (N. Y.) 612, 45 N. Y. Suppl. 1130 (holding that payment by an assignee of all rent accruing since his tenancy was not a defense where prior rent remained unpaid).

Acceptance of payment after notice.— The

excuse for its non-payment,[56] or a tender of the full amount before suit brought,[57] furnishes a good defense. Some statutes provide that upon a tender of the rent due and payment of costs, defendant may have a judgment.[58] But a statute providing that an action of unlawful detainer on account of non-payment of rent shall abate on a tender of the rent due has no application to an action to recover possession unlawfully held by the tenant after the expiration of the term.[59] A tender before judgment, under these statutes, is not sufficient without a deposit of the money in court to await the final order.[60] When the statute provides a time within which payment may be made after demand of possession, it is held that a tender of the rent after the expiration of such period is insufficient.[61] Where a tender to the justice is provided for, a tender for the first time on appeal from his decision is not sufficient.[62] An action by the grantee of the reversion for non-payment of rent cannot be defeated by a payment of rent by the tenant to the original landlord, with notice of plaintiff's rights.[63] Under a statute providing for the retention of possession upon the giving of security for rent, a subtenant is entitled to give such security.[64]

g. Breach of Covenant or Eviction by Lessor. As a general rule a breach of covenant by the lessor constitutes no defense to an action for the recovery of possession.[65] A partial eviction is, however, a defense to proceedings based upon

landlord's right to commence, on the expiration of a notice to quit for non-payment of rent, an action under Rev. St. c. 104, to recover possession of premises leased at will, is not barred by payment of the rent on the day after the giving of the notice, although before the commencement of the action, if the landlord, when receiving payment, expressly reserves his rights under the notice. Kimball *v.* Rowland, 6 Gray (Mass.) 224.

56. Wilcoxen *v.* Hybarger, 1 Indian Terr. 138, 38 S. W. 669.

Taking of security postponing payment of past-due instalments of rent upon a lease and securing payment of subsequent instalments as have matured does not bar proceedings on default in payment of subsequently accrued instalments (People *v.* McAdam, 50 How. Pr. (N. Y.) 19); nor does a deposit of security for payment of the last month's rent, under a lease for a year, payable monthly and in advance on the first of each month, bar proceedings for any default which may be made before that month arrives (Brainard *v.* Hudson, 1 N. Y. City Ct. 448).

The garnishment of the tenant as a debtor of the landlord is a bar to proceedings for the recovery of possession for non-payment of rent during the pendency of the garnishment. O'Connor *v.* White, 124 Mich. 22, 82 N. W. 664, so holding, although the tenant informed such creditor of his indebtedness to the landlord, and acted in collusion with the creditor.

Pendency of an appeal from a judgment for the landlord in an action for rent, with an undertaking effectual as a stay, is not a bar to a summary proceeding. Durant Land Imp. Co. *v.* Thomson-Houston Electric Co., 2 Misc. (N. Y.) 182, 21 N. Y. Suppl. 764, 23 N. Y. Civ. Proc. 29.

A demand of more than is due is not a defense. Durant Land Imp. Co. *v.* East River Electric Light Co., 15 Daly (N. Y.) 337, 6 N. Y. Suppl. 659, 17 N. Y. Civ. Proc. 224.

57. Geary *v.* Parker, 65 Ark. 521, 47 S. W. 238, 53 S. W. 567 (so holding, although the tender was not made until after demand of possession); Dakota Hot Springs Co. *v.* Young, 9 S. D. 577, 70 N. W. 842 (within three days' notice to quit). And see Tuttle *v.* Bean, 13 Metc. (Mass.) 275.

58. Johnson *v.* Douglass, 73 Mo. 168.

Under a statute providing for restoration to possession at any time within six months after eviction, by payment of rent in arrear, with interest and costs, defendant is entitled to a dismissal of the proceedings upon making such a tender. George *v.* Mahoney, 62 Minn. 370, 64 N. W. 911.

Payment at any time before issue of warrant to dispossess is sufficient under the New York statute to defeat the proceedings. Lasher *v.* Curry, 68 N. Y. Suppl. 845 [*affirmed* in 62 N. Y. App. Div. 631, 71 N. Y. Suppl. 1140].

59. Vanderford *v.* Foreman, 129 N. C. 217, 39 S. E. 839; Fraer *v.* Washington, 125 Fed. 280, 60 C. C. A. 194, construing the Arkansas and Indian Territory statutes.

60. Wilcoxen *v.* Hybarger, 1 Indian Terr. 138, 38 S. W. 669. See, generally, TENDER.

61. Roussel *v.* Kelly, 41 Cal. 360. And see Chadwick *v.* Parker, 44 Ill. 326.

Under the New York statute a tender cannot be made and pleaded during the pendency of the proceedings. Stover *v.* Chasse, 9 Misc. (N. Y.) 45, 29 N. Y. Suppl. 291.

62. Walter Commission Co. *v.* Gilleland, 98 Mo. App. 584, 73 S. W. 295.

63. Sullivan *v.* Lueck, 105 Mo. App. 199, 79 S. W. 724.

64. Grider *v.* McIntyre, 6 Phila. (Pa.) 112, holding that the tenant cannot waive such right to the prejudice of the subtenant.

65. *Connecticut.*— Platt *v.* Cutler, 75 Conn. 183, 52 Atl. 819, agreement to renew.

Minnesota.—Peterson *v.* Kreuger, 67 Minn. 449, 70 N. W. 567, covenant to repair.

New York.— Paine *v.* Trinity Church, 7

non-payment of rent,[66] although it has been held that the mere prevention of the tenant from obtaining complete enjoyment of the premises is not a defense;[67] and the failure of the landlord to secure possession of the entire premises for defendant is not a defense.[68]

h. Equitable Defenses. The general rule is that an equitable defense cannot be asserted in a proceeding to recover possession of the demised premises.[69] But the prosecution of such an action may be enjoined to permit defendant to establish such equities in a proper proceeding.[70] By some statutes, however, the interposition of an equitable defense is permitted,[71] although the court is given no power to grant equitable relief.[72]

Hun 89 (agreement to pay for building if erected by tenant, or to renew lease); People *v.* Kelsey, 38 Barb. 269, 14 Abb. Pr. 372 (covenant to make improvements); Durant Land Imp. Co. *v.* East River Electric Light Co., 15 Daly 337, 6 N. Y. Suppl. 659, 17 N. Y. Civ. Proc. 224; S. Liebmann's Sons Brewing Co. *v.* De Nicolo, 46 Misc. 268, 91 N. Y. Suppl. 791 (agreement to keep a liquor license in force for the tenant); Jefferson Real Estate Co. *v.* Hiller, 39 Misc. 784, 81 N. Y. Suppl. 374.

Washington.— Phillips *v.* Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476, agreement to repair.

Wisconsin.— Malick *v.* Kellogg, 118 Wis. 405, 95 N. W. 372, covenant to improve.

66. Witte *v.* Quinn, 38 Mo. App. 681; Sirey *v.* Braems, 65 N. Y. App. Div. 472, 72 N. Y. Suppl. 1044; Hamilton *v.* Graybill, 19 Misc. 521, 43 N. Y. Suppl. 1079, 26 N. Y. Civ. Proc. 184.

Eviction as terminating liability for rent see *supra*, VIII, A, 3, l.

67. Hall *v.* Irvin, 38 Misc. (N. Y.) 123, 77 N. Y. Suppl. 91, 11 N. Y. Annot. Cas. 143 (holding that there must be an actual eviction); Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 4 Misc. 207, 23 N. Y. Suppl. 900 [*reversed* on other grounds in 144 N. Y. 34, 39 N. E. 7].

68. Dodd *v.* Hart, 30 Misc. (N. Y.) 459, 62 N. Y. Suppl. 484, so holding, since it was the duty of the lessee and not of the lessor to dispossess persons unlawfully in possession.

69. *Arkansas.*— Brockway *v.* Thomas, 36 Ark. 518, right to compensation for improvements under a lease void under statute of frauds.

Michigan.— Cottrell *v.* Moran, 138 Mich. 410, 101 N. W. 561, holding that defendant could not set up an equitable title and have a deed executed by him declared a mortgage.

Minnesota.— Norton *v.* Beckman, 53 Minn. 456, 55 N. W. 603, so holding of equitable matter which required affirmative relief to make it a defense *per se*.

Missouri.— Elliott *v.* Abell, 39 Mo. App. 346.

Ohio.— Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. J. 251.

Washington.— Bond *v.* Chapman, 34 Wash. 606, 76 Pac. 97 (agreement while defendant was in possession of the premises under the lease that defendant should retain possession until an agreement by which plaintiff was bound to convey the premises to defendant was performed); Carmack *v.* Drum, 27 Wash. 382, 67 Pac. 808. And see Phillips *v.* Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1211, 1276.

But see Forsythe *v.* Bullock, 74 N. C. 135, in which it was held that the tenant was entitled to set up any equitable defense which he might have, such as that the landlord held title under a deed from the tenant which, although absolute in its terms, was intended as a mortgage.

An exercise of the privilege of renewal by giving notice of intention is not an equitable defense and may be taken cognizance of in the municipal court. Hausauer *v.* Dahlman, 72 Hun (N. Y.) 607, 25 N. Y. Suppl. 277.

70. See *infra*, X, C, 16.

71. Woods *v.* Garcewich, 67 N. Y. App. Div. 53, 73 N. Y. Suppl. 472 (holding that under Code Civ. Proc. § 2244, providing the answer in summary proceedings may set forth any new matter constituting a legal or equitable defense, a municipal court not of record, in a summary action for the removal of a party from certain premises, has jurisdiction to pass on the validity of the lease on a defense of fraud by the party sought to be removed); Schlaich *v.* Blum, 42 Misc. (N. Y.) 225, 85 N. Y. Suppl. 335. See Ferguson *v.* Jackson, 180 Mass. 557, 62 N. E. 965, covenant for renewal. But see Garrie *v.* Schmidt, 25 Misc. (N. Y.) 753, 55 N. Y. Suppl. 703, holding that a defense to a summary proceeding to remove a tenant that the landlord's interest was not that of owner but of an equitable mortgagee, and that the tenant, a former owner of the fee, was entitled to a conveyance on the payment of a certain sum by way of redemption, is not cognizable in the municipal court, since its jurisdiction to entertain equitable defenses is limited to cases where the defense is of a nature cognizable in a court of law, and not calling for the exercise of jurisdiction peculiar to a court of equity.

The defense must be germane to the issues. — Patrick *v.* Cobb, 122 Ga. 80, 49 S. E. 806, holding that a counter-affidavit, setting up that the deed under which plaintiff claims title from defendant is void and praying for cancellation of the same, is not allowable.

72. Schlaich *v.* Blum, 42 Misc. (N. Y.) 225, 85 N. Y. Suppl. 335.

i. Inconsistent Defenses. A defendant is not permitted to rely upon inconsistent defenses.[73]

8. Set-Off and Counter-Claim. The interposition of a set-off or counter-claim is usually not permissible in an action for unlawful detainer,[74] or summary proceeding.[75] For example the tenant cannot assert a claim for damages from breach of the lessor's covenants.[76] By statute, however, it is in some jurisdictions provided that a counter-claim may be interposed in a summary proceeding, in the same manner as if the claim for rent in such proceeding was the subject of the action.[77]

9. Conditions Precedent — a. In General. In the absence of a statutory provision to the contrary, an action for unlawful detainer will not lie until the tenancy has been terminated or forfeited in the manner prescribed by the common law, or by statutes of general application,[78] and the same is true of other summary proceedings.[79] An actual entry upon the premises is not a condition prece-

73. Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121 [*following* Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596] (holding that a denial of the landlord's title and the assertion of an adverse title precludes a defense that the lease has not terminated); Ramsay *v.* Wilkie, 13 N. Y. Suppl. 554 (holding that the defense of surrender and acceptance is inconsistent with the defense of eviction).

74. Kelly *v.* Teague, 63 Cal. 68; Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434; Carmack *v.* Drum, 27 Wash. 382, 67 Pac. 808; Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760. *Compare* Barker *v.* Walbridge, 14 Minn. 469, holding that in an action to recover the possession of leased premises, on the ground of non-payment of rent, an overdue note of the landlord, held by the tenant, is not an equity, within Gen. St. (1866) c. 66, § 79, subd. 3, unless it is shown that there is no adequate remedy at law; nor is it a counter-claim, under subdivision 1 or 2 of section 80 of that chapter.

75. Ward *v.* Stakelum, 47 La. Ann. 1546, 18 So. 508.

76. Abrams *v.* Watson, 59 Ala. 524; Van Every *v.* Ogg, 59 Cal. 563; Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434; Carmack *v.* Drum, 27 Wash. 382, 67 Pac. 808; Phillips *v.* Port Townsend Lodge No. 6, F. & A. M., 8 Wash. 529, 36 Pac. 476. And see Schumann Piano Co. *v.* Mark, 208 Ill. 282, 70 N. E. 226 [*affirming* 105 Ill. App. 490].

77. See Sage *v.* Crosby, 33 Misc. (N. Y.) 117, 67 N. Y. Suppl. 139; Jefferson Real Estate Co. *v.* Hiller, 81 N. Y. Suppl. 374. But see Pearson *v.* Germond, 83 Hun (N. Y.) 88, 31 N. Y. Suppl. 358; Durant Land Imp. Co. *v.* East River Electric Light Co., 15 Daly (N. Y.) 337, 6 N. Y. Suppl. 659, 17 N. Y. Civ. Proc. 224.

The counter-claim must affect all the parties.— Case *v.* Porterfield, 54 N. Y. App. Div. 109, 66 N. Y. Suppl. 337.

A counter-claim against the guardian personally is not available in a proceeding by a guardian to recover possession of his ward's land. Gallagher *v.* David Stevenson Brewing Co., 13 Misc. (N. Y.) 40, 34 N. Y. Suppl. 94, 25 N. Y. Civ. Proc. 106.

The subject-matter must be such as could have been availed of in an action for rent. Constant *v.* Barrett, 14 Misc. (N. Y.) 570, 35 N. Y. Suppl. 1092; Burrell *v.* Do Sim, 10 Misc. (N. Y.) 745, 31 N. Y. Suppl. 804, 1 N. Y. Annot. Cas. 189, 24 N. Y. Civ. Proc. 243.

In New York, prior to the adoption of a provision similar to that stated in the text, no set-off or counter-claim could be interposed. People *v.* Walton, 2 Thomps. & C. 533.

78. Cone *v.* Woodward, 65 Ill. 477, holding that where the action was based on non-payment of rent, a default in paying the rent, a demand thereof, ten days' notice to quit, and a failure to pay the rent before the expiration of such ten days' notice was essential. See Bowyer *v.* Seymour, 13 W. Va. 12, holding that there must be proven, not only a demand for rent at the time and place and in the manner prescribed by the common law, but where a reëntry could be made on the leased premises, or any part thereof, proof of such reëntry or its equivalent.

Conditions precedent to termination of tenancy see *supra*, IX.

79. Cheek *v.* Preston, 34 Ind. App. 343, 72 N. E. 1048; Abeel *v.* Hubbell, 52 Mich. 37, 17 N. W. 231 (holding that where in a lease the landlord reserves a right of sale, and this sale is to terminate the lease on the payment of certain damages, some of which are to be ascertained by arbitration, an action to remove the tenants will not lie before the damages are ascertained and tendered, the tenants not being shown to have defaulted in any way); Hedden *v.* Nederburg, 25 Misc. (N. Y.) 722, 55 N. Y. Suppl. 613; Gossett *v.* Fox, 90 N. Y. Suppl. 477; Miller *v.* Lowe, 86 N. Y. Suppl. 16; Weinhaner *v.* Eastern Brewing Co., 85 N. Y. Suppl. 354.

A waiver of notice contained in a lease must be specific. Lapsley *v.* Fifth Avenue Nat. Bank, 30 Pittsb. Leg. J. N. S. (Pa.) 271, holding that a provision in a lease that the tenant should remove within thirty days after notice in case the property was sold was insufficient.

After the passage of an act defining tenancies at will and by sufferance and prescribing the mode in which they may be created, a tenancy arising in the modes mentioned before the act and continuing after the passage

dent.[80] An actual distress need not be resorted to before an action based on the absence of property subject to distress may be maintained.[81]

b. Demand of Rent. Where a summary proceeding is based upon non-payment of rent, a demand for such rent is usually made a condition precedent by statute.[82] Where there are joint lessors the demand may be made by any one of them;[83] and where there are joint lessees the demand may be made upon either.[84] Where the tenant has the option of paying the rent and avoiding dispossession, it is necessary that the demand state the exact amount of rent due.[85] Under some statutes relating to unlawful detainer a demand of rent is unnecessary where the tenant holds over after rent has become due.[86] But it is in general provided that a demand for rent must be made in such case, the time and sufficiency thereof being specifically prescribed.[87] Under these statutes it has been held sufficient that a demand for rent be made at the time of demand for possession.[88] A

of the act must be terminated pursuant to the law as it existed prior thereto. Spalding *v.* Hall, 6 D. C. 123.

A provision in the lease for notice must be complied with before an action for wrongful holding over may be maintained. Griffin *v.* Barton, 22 Misc. (N. Y.) 228, 49 N. Y. Suppl. 1021.

80. Lawrence *v.* Williams, 1 Duer (N. Y.) 585.

81. Rogers *v.* Lynds, 14 Wend. (N. Y.) 172, holding that the fact that satisfaction of the rent cannot be obtained by distress may be shown by affidavit.

82. See the statutes of the various states.

In New Jersey a demand must be in writing requiring the rent due and payable or the possession of the premises. Mullone *v.* Klein, 55 N. J. L. 479, 27 Atl. 902.

In New York there may be either a personal demand of the rent or service of a written notice requiring payment or surrender. People *v.* Gross, 50 Barb. 231; Heinrich *v.* Mack, 25 Misc. 597, 56 N. Y. Suppl. 155; Rogers *v.* Lynds, 14 Wend. 172. A demand for rent must be personal and absolute (Boyd *v.* Milone, 24 Misc. 734, 53 N. Y. Suppl. 785; Zinsser *v.* Herrman, 23 Misc. 645, 52 N. Y. Suppl. 107); but the written notice, in the absence of a personal demand, should be in the alternative requiring the payment of the rent or the possession of the premises (People *v.* Gross, 50 Barb. 231; McMahon *v.* Howe, 40 Misc. 546, 82 N. Y. Suppl. 984; Boyd *v.* Milone, 24 Misc. 734, 53 N. Y. Suppl. 785), and it must be served as required by statute (People *v.* Ketteltas, 12 Hun 67) by leaving copy and not original (Posson *v.* Dean, 8 N. Y. Civ. Proc. 177 [*doubted* in Simpson *v.* Masson, 11 Misc. 351, 32 N. Y. Suppl. 136]). The demand may include interest (People *v.* Dudley, 58 N. Y. 323; People *v.* Stuyvesant, 1 Hun 102, 3 Thomps. & C. 179; Griffin *v.* Clark, 33 Barb. 46), and it need not be of the exact amount due (Sheldon *v.* Testera, 21 Misc. 477, 47 N. Y. Suppl. 653; Durant Land Imp. Co. *v.* East River Electric Light Co., 6 N. Y. Suppl. 659. And see Jarvis *v.* Driggs, 69 N. Y. 143). The demand should be made of the tenant (People *v.* Platt, 43 Barb. 116, holding a demand upon an under-tenant in possession insufficient; Bokee *v.* Hamersley, 16 How. Pr. 461, holding that demand need not be made of tenant's assignee for creditors. But see Rogers *v.* Lynds, 14 Wend. 172, holding that demand may be made of the tenant in possession, although not the lessee or the assignee); and it has been held that a good common-law demand must have been made (Wolcott *v.* Schenk, 16 How. Pr. 449).

An agent may make the demand. Powers *v.* De O, 64 N. Y. App. Div. 373, 72 N. Y. Suppl. 103.

A subagent may make the demand. Neiner *v.* Altemeyer, 68 Mo. App. 243.

Where the tenant is a corporation, in the absence of proof that the secretary and treasurer is not a proper person to receive such notice, service of the written demand upon him is sufficient. State *v.* Felton, 52 N. J. L. 161, 19 Atl. 123.

83. Mullone *v.* Klein, 55 N. J. L. 479, 27 Atl. 902.

84. Geisler *v.* Acosta, 9 N. Y. 227.

85. Welch *v.* Ashby, 88 Mo. App. 400. See also Clark *v.* Everly, 2 Pa. L. J. Rep. 219, 3 Pa. L. J. 491. But see Jarvis *v.* Driggs, 69 N. Y. 143; Sheldon *v.* Testera, 21 Misc. (N. Y.) 477, 47 N. Y. Suppl. 653; Durant Land Imp. Co. *v.* East River Electric Light Co., 6 N. Y. Suppl. 659.

86. See Spooner *v.* French, 22 Minn. 37; Gibbens *v.* Thompson, 21 Minn. 398.

On failure to pay rent payable in advance no demand is necessary under the Indiana statute. Ingalls *v.* Bissot, 25 Ind. App. 130, 57 N. E. 723.

87. See Woodward *v.* Cone, 73 Ill. 241; Cone *v.* Woodward, 65 Ill. 477 (both holding that there must be a demand for rent and ten days' notice to quit, and a failure to pay the rent before the expiration of ten days); Nowell *v.* Wentworth, 58 N. H. 319.

In Nevada a formal demand need not be made, other than a written demand made after rent has been three days past due. Hoopes *v.* Meyer, 1 Nev. 433.

In Missouri, under a statute providing for the recovery of possession and of the money due for rent, a demand and suit for less rent than is due is not fatal. Mooers *v.* Martin, 99 Mo. 94, 12 S. W. 522.

88. Brummagim *v.* Spencer, 29 Cal. 661.

demand of rent when due, in addition to a notice to quit for non-payment of of rent, has been held unnecessary.[89] The statutory demand may be waived by express agreement in the lease.[90] Where the demand is by a purchaser of the reversion it must, under the statutes of some states, be accompanied by an exhibition of the purchaser's title deeds.[91]

c. Notice to Quit or Demand of Possession — (I) *Nature and Necessity* — (A) *In General.* The necessity of a demand for possession other than that required to terminate the tenancy[92] is a matter governed entirely by the statute under which the proceedings are maintained.[93] Under some statutes such a notice is a condition precedent and must be given;[94] but as a general rule no distinct statutory notice is required where the tenancy has been otherwise terminated,[95] where the tenant is holding without right,[96] or where he has announced his intention to quit the premises.[97] The tenant by merely holding over a brief period after the expiration of his term does not become entitled to a notice to quit, as demanded by a new tenancy.[98] Where demand has been made upon the tenant, an additional demand need not be made upon a receiver of the tenant's interest, who is subsequently appointed.[99]

(B) *In Unlawful Detainer Proceedings.* It is, under many statutes, essential that a notice to quit or demand for possession be made before an action of unlawful detainer may be begun.[1] Under some the demand necessary to render retention of the premises after expiration of the possessory right an unlawful detainer is distinct from that which is necessary to terminate the lease or tenancy,[2]

89. Kimball *v.* Rowland, 6 Gray (Mass.) 224.

90. Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592 [*reversing* 30 Ill. App. 371].

A provision in the lease that retention of the premises two days after notice that the term has been ended shall constitute a forcible detainer does not dispense with the necessity of the notice described by statute, unless the term has previously been ended by compliance with the formalities prescribed by the common law or by statute. Woodward *v.* Cone, 73 Ill. 241.

91. Logan *v.* Byers, 76 Mo. App. 559.

92. **Notice to quit** as essential to terminate tenancy see *supra*, IX, A.

93. See the statutes of the several states.

94. See Rich *v.* Keyser, 54 Pa. St. 86.

95. Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99; Hendrick *v.* Cannon, 5 Tex. 248. See Spalding *v.* Hall, 6 D. C. 123; Ingalls *v.* Bissot, 25 Ind. App. 130, 57 N. E. 723 (on failure to pay rent); Quidort *v.* Bullitt, 60 N. J. L. 119, 36 Atl. 881 (holding that where a notice terminating a lease contained a demand for possession, service of a second demand under the statute was unnecessary); Wartman *v.* Richards, 54 N. J. L. 525, 24 Atl. 576; Park *v.* Castle, 19 How. Pr. (N. Y.) 29; Greenleaf *v.* Haberacker, 1 Woodw. (Pa.) 436 (holding that where the tenancy is for a definite and fixed period the tenant may after its termination be dispossessed without notice); Davis *v.* Carew, 1 Rich. (S. C.) 275.

Under the Massachusetts statute notice is not required where the lease has terminated by its own limitations (Elliott *v.* Stone, 1 Gray 571; Elliott *v.* Stone, 12 Cush. 174) or in the case of tenants at sufferance (Benedict *v.* Morse, 10 Metc. 223), but is required in case of a tenancy at will (Gleason *v.* Gleason, 8 Cush. 32).

96. Horan *v.* Thomas, 60 Vt. 325, 13 Atl. 567, holding that where a lease stipulates that the tenant shall pay a month's rent in advance, he has no rights under the lease until the rent is paid, and the landlord may eject him without demand for rent in arrear, or notice to quit.

97. Hoske *v.* Gentzlinger, 87 Hun (N. Y.) 3, 33 N. Y. Suppl. 747.

98. Smith *v.* Littlefield, 51 N. Y. 539; Meno *v.* Hoeffel, 46 Wis. 282, 1 N. W. 31.

Creation of new tenancy by holding over see *supra*, IV, C, 3, f.

99. Woodward *v.* Winehill, 14 Wash. 394, 44 Pac. 860.

1. See the statutes of the several states. And see Ball *v.* Peck, 43 Ill. 482; Durie *v.* McLish, 2 Indian Terr. 610, 53 S. W. 437; Gifford *v.* King, 54 Iowa 525, 6 N. W. 735; Paul *v.* Armstrong, I Nev. 82.

In Minnesota a demand is not necessary where the tenant holds over after rent becomes due under the conditions of the lease. Caley *v.* Rogers, 72 Minn. 100, 75 N. W. 114.

In Missouri, under a statute requiring a demand for possession where the possession has been wrongfully obtained, without force, and by disseizin, no demand is necessary where there has been a letting and rightful possession and the lessee is holding over after his term. Barado-Ghio Real Estate Co. *v.* Heidbrink, 112 Mo. App. 429, 86 S. W. 1109; Bierkenkamp *v.* Bierkenkamp, 88 Mo. App. 445; Leahy *v.* Lubman, 67 Mo. App. 191; Anderson *v.* McClure, 57 Mo. App. 93; Witte *v.* Quinn, 38 Mo. App. 681.

2. McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438; Smith *v.* Rowe, 31 Me. 212.

and must be shown in addition thereto,[3] it being necessary that the demand rendering the detention unlawful be made after the tenant has commenced to hold over.[4] In other jurisdictions, however, the demand incident to unlawful detainer proceedings may be made before expiration of the term,[5] the day at which the tenant is to quit being fixed thereat or thereafter.[6] In many jurisdictions no demand is required in the particular case of a tenant holding after expiration of a definite term.[7] And in any event a notice to terminate the tenancy is not necessary in addition to the demand under the statute.[8] Where the statute provides that the tenant shall be guilty of an unlawful detainer in case of continuance in possession after failure to perform covenants, notice requiring the performance of such covenants or the possession of the property having been served on him, a demand for possession must be made, although the covenants are incapable of future performance.[9] But a demand for performance of the covenants is unnecessary.[10] In case the landlord serves a notice to quit, as required in the case of a tenancy of a particular character, he is not by such fact precluded from repudiating the notice and asserting the true nature of the tenancy.[11]

(c) *After Disclaimer of Relation or Denial of Title.* Where the tenant disclaims the relation of landlord and tenant[12] or denies the title of his landlord[13] proof of a demand of possession or notice to quit is as a general rule unnecessary. But under some statutes a demand for possession must be made, although defendant claims adversely.[14]

3. McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438; Martin *v.* Splivalo, 56 Cal. 128; King *v.* Connolly, 51 Cal. 181; Sullivan *v.* Cary, 17 Cal. 80.

Although a right of reëntry is reserved.— Silva *v.* Campbell, 84 Cal. 420, 24 Pac. 316; Smith *v.* Hill, 63 Cal. 51.

4. *Alabama.*— McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438.

California.— King *v.* Connolly, 51 Cal. 181; Rogers *v.* Hackett, 49 Cal. 121, holding that the rule applied where occupancy was under an agreement to farm for a portion of the crop.

Illinois.— Doran *v.* Gillespie, 54 Ill. 366; Prickett *v.* Ritter, 16 Ill. 96.

Kansas.— Douglass *v.* Parker, 32 Kan. 593, 5 Pac. 178; Kellogg *v.* Lewis, 28 Kan. 535.

Maine.— Dutton *v.* Coldy, 35 Me. 505; Smith *v.* Rowe, 31 Me. 212; Wheeler *v.* Cowan, 25 Me. 283; Clapp *v.* Paine, 18 Me. 264.

Wisconsin.— Ela *v.* Bankes, 32 Wis. 635.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1218.

5. Drain *v.* Jacks, 77 Iowa 629, 42 N. W. 460; McLain *v.* Calkins, 77 Iowa 468, 42 N. W. 373; Hawley *v.* Robeson, 14 Nebr. 435, 16 N. W. 438; Townley *v.* Rutan, 21 N. J. L. 674 [*affirming* 20 N. J. L. 604]; Leutzey *v.* Herchelrode, 20 Ohio St. 334; Mone *v.* Pope, 9 Ohio Cir. Ct. 168, 6 Ohio Cir. Dec. 384.

6. Connell *v.* Chambers, 22 Nebr. 302, 24 N. W. 636; Mone *v.* Pope, 9 Ohio Cir. Ct. 168, 6 Ohio Cir. Dec. 384.

7. *California.*— Earl Orchard Co. *v.* Fava, 138 Cal. 76, 70 Pac. 1073; McKissick *v.* Ashby, 98 Cal. 422, 33 Pac. 729.

Colorado.— Reithman *v.* Brandenburg, 7 Colo. 480, 4 Pac. 788.

Illinois.— Frank *v.* Taubman, 31 Ill. App. 592.

Kentucky.— Andrews *v.* Erwin, 78 S. W 902, 25 Ky. L. Rep. 1791.

Minnesota.— Engels *v.* Mitchell, 30 Minn. 122, 14 N. W. 510.

Missouri.— Hulett *v.* Nugent, 71 Mo. 131; Alexander *v.* Westcott, 37 Mo. 108; Young *v.* Smith, 28 Mo. 65, 75 Am. Dec. 109; Laummeier *v.* Steel, 77 Mo. App. 456.

Washington.— Morris *v.* Healy Lumber Co., 33 Wash. 451, 74 Pac. 662; Stanford Land Co. *v.* Steidle, 28 Wash. 72, 68 Pac. 178.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1218.

8. Hendrickson *v.* Beeson, 21 Nebr. 61, 31 N. W. 266; Gladwell *v.* Holcomb, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724.

Necessity of notice to terminate tenancy for definite term see *supra*, IX, B, 1, c.

9. Schnittger *v.* Rose, 139 Cal. 656, 73 Pac. 449.

10. Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88.

11. Secor *v.* Pestana, 37 Ill. 525.

12. *Illinois.*— Shepardson *v.* McDole, 49 Ill. App. 350.

Kentucky.— Fogle *v.* Chaney, 12 B. Mon. 138; Bates *v.* Austin, 2 A. K. Marsh. 270, 12 Am. Dec. 395.

Mississippi.— Rabe *v.* Fyler, 10 Sm. & M. 440, 48 Am. Dec. 763.

North Carolina.— Vincent *v.* Corbin, 85 N. C. 108.

Virginia.— Allen *v.* Paul, 24 Gratt. 332.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1219.

13. Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258; Harrison *v.* Marshall, 4 Bibb (Ky.) 524; Harrison *v.* Middleton, 11 Gratt. (Va.) 527; Emerick *v.* Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217; Doe *v.* Edmondson, 1 U. C. Q. B. 265.

14. Doss *v.* Craig, 1 Colo. 177.

(D) *Waiver.* In some jurisdictions it is held that the statutory notice or demand cannot be waived.[15] In others, however, the parties to the lease may stipulate for a shorter notice than that required by statute,[16] or waive all notice.[17] The waiver must, however, be full, absolute, and direct,[18] and in some states must be expressly found by the inquisition,[19] or must appear of record.[20] Objections to the sufficiency of demand, it has been held, are waived if not taken as a preliminary objection in the proceedings.[21]

(II) *WHO MAY GIVE NOTICE.* Notice by a stranger to the title is insufficient,[22] although after a sale of the premises, possession to be given at the end of the term, the lessor has still such an interest as will support a notice to quit on the final day.[23] As a general rule it is held sufficient that the notice be signed by the landlord by attorney,[24] or by agent,[25] or that the notice be given by an agent.[26] But while express authority need not be established,[27] it is necessary that authority exist at the time of demand, and a subsequent ratification by the landlord will not be equivalent to prior authority to make the demand.[28]

(III) *SUFFICIENCY*—(A) *In General.*[29] A verbal notice is under some statutes sufficient.[30] Where a form of demand is prescribed by the statute it should be followed,[31] although a substantial compliance with the statute is sufficient,[32] and the

15. Martin *v.* Splivalo, 56 Cal. 128; Doss *v.* Craig, 1 Colo. 177; Friend *v.* Shaw, 20 Q. B. D. 374, 52 J. P. 438, 57 L. J. Q. B. 225, 58 L. T. Rep. N. S. 89, 36 Wkly. Rep. 236.

16. Waggaman *v.* Bartlett, 2 Mackey (D. C.) 450.

17. Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592; Belinski *v.* Brand, 76 Ill. App. 404; Equity Bldg., etc., Assoc. *v.* Murphy, 75 Mo. App. 57; Hutchinson *v.* Potter, 11 Pa. St. 472. But *compare* Seem *v.* McLees, 24 Ill. 192; Gault *v.* Neal, 6 Phila. (Pa.) 61. *Contra*, McCloud *v.* Jaggars, 3 Phila. (Pa.) 304.

18. Veditz *v.* Levy, 1 Pa. Co. Ct. 266, 17 Wkly. Notes Cas. 477.

Sufficiency of waiver.— The words "the lessee hereby waives the notice to quit required by the Act of Assembly" in the lease are a sufficient waiver. Kaier *v.* Leahy, 15 Pa. Co. Ct. 243.

19. Mill Creek Coal Co. *v.* Androkus, 2 Pa. Dist. 764, 12 Pa. Co. Ct. 314; Veditz *v.* Levy, 1 Pa. Co. Ct. 266, 17 Wkly. Notes Cas. 477.

20. Mill Creek Coal Co. *v.* Androkus, 2 Pa. Dist. 764, 12 Pa. Co. Ct. 314.

21. *In re* Sutherland, 12 Manitoba 543.

22. Glenn *v.* Thompson, 75 Pa. St. 389; Thamm *v.* Hamberg, 2 Brewst. (Pa.) 528.

23. Glenn *v.* Thompson, 75 Pa. St. 389.

24. Felton *v.* Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750, holding that the tenant in such case questions the attorney's authority at his own risk.

25. Earl Orchard Co. *v.* Fava, 138 Cal. 76, 70 Pac. 1073 (holding a notice sufficient, signed "H. agent for" the landlord); Reed *v.* Hawley, 45 Ill. 40.

A notice signed by the real owner as agent has been held sufficient to support an action in his own name. Pope *v.* Miller, 24 Ohio Cir. Ct. 640.

Joint executor.— A notice to quit signed by one joint executor in his own right and as executor, and as attorney in fact of the other executor, is sufficient to entitle it to go into evidence in an action brought by the executor. Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

Vacant premises.— A notice, under the act of March 25, 1825, section 2, is required to be given by the landlord or his agent, and a notice signed by a third person not as agent or attorney of the landlord, nor in his own right as an assignee or purchaser, is insufficient. Powell *v.* Campbell, 2 Phila. (Pa.) 42.

26. Earl Orchard Co. *v.* Fava, 138 Cal. 76, 70 Pac. 1073; Pickard *v.* Perley, 45 N. H. 188, 86 Am. Dec. 153.

Authority need not be shown to the tenant at the time of serving the notice and demanding possession. Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74.

One tenant in common acting for all may sign and serve the notice. Earl Orchard Co. *v.* Fava, 138 Cal. 76, 70 Pac. 1073.

The secretary of a corporation who is in charge of the premises as receiver may sign the notice. Fitzgerald *v.* Union Sav. Bank, etc., Co., 18 Ohio Cir. Ct. 608, 10 Ohio Cir. Dec. 49.

27. Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74.

28. Pickard *v.* Perley, 45 N. H. 188, 86 Am. Dec. 153; Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74.

29. **Notice to terminate tenancy** see *supra*, IX, A.

30. Koenig *v.* Bauer, 1 Brewst. (Pa.) 304.

31. See Opera House, etc., Assoc. *v.* Bert, 52 Cal. 471 (holding that a notice based upon a violation of covenant must follow the statute and be in the alternative to perform the covenant or to deliver possession); Wilcoxen *v.* Hybarger, 1 Indian Terr. 138, 38 S. W. 669; Smith *v.* Rowe, 31 Me. 212 (holding that thirty days' notice after the tenancy is determined must be given in writing).

32. Miller *v.* Lampson, 66 Conn. 432, 34 Atl. 79.

For forms of notice which have been held sufficient under particular statutes see Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434;

demand will not be invalidated by a patent mistake of such nature as not to be misleading.[33] While as a general rule it would seem that the notice to quit need not set out the reasons for which the tenancy is terminated,[34] where the demand is based upon a breach of condition it is held under some statutes that it must be sufficient to enable the tenant to correct the acts which he has done, or supply the omission.[35] The notice may allow the tenant the privilege of remaining in case he complies with certain conditions.[36]

(B) *Length.* The length of notice is a matter purely of statutory regulation.[37] Where the notice required by statute must be given a certain length of time before the action is begun, it has been held that a notice given at such time is sufficient, although the time specified in the notice is shorter.[38] Under some statutes notice must be complete at the expiration of the term,[39] while under others the time fixed by the notice to quit may be after the expiration of the lease by its own limitation.[40]

(C) *Description of Premises.* It is necessary that the demand for possession contain a description of the premises,[41] but such description is sufficient if it fairly shows the tenant what premises are demanded,[42] and an error in the description is

Brauchle *v.* Nothhelfer, 107 Wis. 457, 83 N. W. 653.

A notice by an assignee of the reversion need not show that the party giving it is such assignee, if the tenant has information of such fact. Thamm *v.* Hamberg, 2 Brewst. (Pa.) 528.

An exhibit of the deed under which a grantee of the lessor claims title need not be made by the grantee where the demand of possession is based upon holding over after the expiration of the tenancy, under Rev. St. § 3321, and not for non-payment of rent under Rev. St. § 4137. Tucker *v.* McClenney, 103 Mo. App. 318, 77 S. W. 151.

Notice of intent to institute summary proceedings.— A notice to vacate must under some statutes warn the tenant that summary proceedings will be instituted upon his failure to do so. Folz *v.* Shallow, 16 N. Y. Suppl. 942.

Claim of damages.— A requirement that a written demand shall be made does not require such a demand to state that statutory damages will be claimed in case the premises are not surrendered. Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408.

33. Lacrabere *v.* Wise, (Cal. 1903) 71 Pac. 175, holding that a notice requiring the tenants to pay rent amounting to a certain sum, "being the amount now owing from me to you," or deliver possession, was good.

34. Granger *v.* Brown, 11 Cush. (Mass.) 191; Russell *v.* Allard, 18 N. H. 222. But see Connell *v.* Chambers, 22 Nebr. 302, 34 N. W. 636, holding that in case the statute is silent as to the contents of the notice or demand, it should be such as to apprise the tenant, in a general way at least, of the grounds of the landlord for the possession demanded, especially when such facts do not appear from the time when the possession is to be delivered.

Variance.— A recovery cannot be had on grounds other than those stated in the notice. Tuttle *v.* Bean, 13 Metc. (Mass.) 275.

35. Byrkett *v.* Gardner, 35 Wash. 668, 77 Pac. 1048.

36. Candler *v.* Mitchell, 119 Mich. 464, 78 N. W. 551 [*distinguishing* D'Arcy *v.* Martyn, 63 Mich. 602, 30 N. W. 194, as a case in which the tenant had the privilege of exercising an option at the time he was to leave] and holding a notice to the tenant to quit, unless he desires to remain on certain terms, sufficient. But see O'Neill *v.* Cahill, 2 Brewst. (Pa.) 357.

37. See cases cited *infra*, this note.

Time held sufficient in particular cases see Garbrell *v.* Fitch, 6 Cal. 189 (three days' notice where defendant was holding over after expiration of his term); Clark *v.* Wheelock, 99 Mass. 14 (twelve days after termination of tenancy at will); Pratt *v.* Farrar, 10 Allen (Mass.) 519 (forty-eight hours in case of tenant at sufferance); Johnson *v.* Stewart, 11 Gray (Mass.) 181 (notice to tenant at will to quit "within fourteen days"); Neppach *v.* Jordan, 15 Oreg. 308, 14 Pac. 353 (ninety days in case of agricultural land).

Computation of time of notice see, generally, TIME.

In proceedings to give possession of a vacant tenement, under 11 Geo. II, c. 19, §§ 16, 17, fourteen clear days must elapse between the first and second views of the premises. Creak *v.* Brighton, 1 F. & F. 110.

38. Chamberlin *v.* Brown, 2 Dougl. (Mich.) 120 note. But see Elliott *v.* Stone, 12 Cush. (Mass.) 174; Oakes *v.* Munroe, 8 Cush. (Mass.) 282, both holding that where fourteen days' notice is necessary to determine a tenancy, a notice to leave "forthwith," not specifying a day certain, and not stating any cause for giving the notice, is insufficient, although such notice is in fact served fourteen days before action brought.

39. Rich *v.* Keyser, 54 Pa. St. 86. And see Speigle *v.* McFarland, 1 Walk. (Pa.) 354.

40. Hazeltine *v.* Colburn, 31 N. H. 466. See also *supra*, X, C, 9, c, (I), (B), text and note 6.

41. Grant *v.* Marshall, 12 Nebr. 488, 11 N. W. 743.

42. Whipple *v.* Shewalter, 91 Ind. 114; Epstein *v.* Greer, 78 Ind. 348; Dimmett *v.*

not fatal where it is not of such nature as to render the notice misleading or uncertain.[43]

(iv) *Service.* In the absence of statutory provisions as to the manner of service, a notice to quit may be served as in other cases.[44] Where the statute provides that demand shall be made in writing for the possession, a written copy of such demand must be left with the tenant.[45] Service may be properly made on the tenant's wife living with him on the premises,[46] upon one of joint tenants,[47] or upon an assignee of the whole term in possession.[48] Since a demand for possession must be established as any other disputed fact in a case, it must be established by the best evidence,[49] and like other facts may be established by parol.[50]

(v) *Waiver of Notice Already Given.* The giving of a second notice may be regarded as a waiver of one already given.[51] Notice is not waived by the fact that the tenant is allowed to remain upon the premises for some time after it is given, where no act is done which indicates a renewal of the lease.[52]

Appleton, 20 Nebr. 208, 29 N. W. 474, holding that a notice was sufficient, although the description covered part of one story of the building which was not occupied by the tenant.

Description of land by government numbers is sufficient. Cummings *v.* Winters, 19 Nebr. 719, 28 N. W. 302.

43. Farnam *v.* Hohman, 90 Ill. 312.

44. See *supra*, IX, A, 5.

Service by mail of a notice to quit is sufficient, where the tenant received it in time. Candler *v.* Mitchell, 119 Mich. 464, 78 N. W. 551.

An original notice and not a copy must be given the tenant. Mathewson *v.* Thompson, 12 R. I. 288. And see Simpson *v.* Masson, 11 Misc. (N. Y.) 351, 32 N. Y. Suppl. 136, holding that service on a monthly tenant of the five days' notice to quit may be made on delivery of the original.

Personal demand is necessary under the Ontario statute (31 Vict. c. 26). Nash *v.* Sharp, 5 Can. L. J. N. S. 73.

Who may serve.— A statute providing that notice shall be served in like manner as a summons relates to the way in which and the person on whom the notice is to be served, and not to the person who shall serve it, and therefore does not require service by a marshal or person duly deputized by the justice. Simpson *v.* Masson, 11 Misc. (N. Y.) 351, 32 N. Y. Suppl. 136. Service need not be made by the person to whom the notice was intrusted by the landlord. White *v.* Bailey, 14 Conn. 271.

45. Seem *v.* McLees, 24 Ill. 192; Jenkins *v.* Jenkins, 63 Ind. 415, 30 Am. Rep. 229.

Leaving copy with persons on premises is not sufficient. Doran *v.* Gillespie, 54 Ill. 366. But see Earl Orchard Co. *v.* Fava, 138 Cal. 76, 70 Pac. 1073, where it was held that it was sufficient that the notice was handed to the tenant's wife and read to the tenant by her, upon the same day, although no copy was mailed to the tenant.

Service by agent is sufficient where the fact of the agency is disclosed by the demand itself. Nixon *v.* Noble, 70 Ill. 32.

46. Bell *v.* Bruhn, 30 Ill. App. 300; Steese *v.* Johnson, 168 Mass. 17, 46 N. E. 431; Hazeltine *v.* Colburn, 31 N. H. 466; Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917. See, generally, *supra*, IX, A, 5.

47. Grundy *v.* Martin, 143 Mass. 279, 9 N. E. 647; Glenn *v.* Thompson, 75 Pa. St. 389.

48. Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131.

49. Lacrabere *v.* Wise, 141 Cal. 554, 75 Pac. 185, (1903) 71 Pac. 175, holding that the fact of service must be proved by the direct evidence of the person making it, and not by their affidavits.

50. Simpson *v.* Masson, 11 Misc. (N. Y.) 351, 32 N. Y. Suppl. 136 (holding that service of notice to quit may be proved by common-law evidence, and therefore affidavit of service of notice need not be attached to petition in summary proceedings); Chung Yow *v.* Hop Chong, 11 Oreg. 220, 4 Pac. 326.

51. Morgan *v.* Powers, 83 Hun (N. Y.) 298, 31 N. Y. Suppl. 954. See, generally, *supra*, IX, A, 7.

52. Babcock *v.* Albee, 13 Metc. (Mass.) 273 (holding that if the parties agreed that the tenant should occupy the premises for a short although indefinite period after the time limited in the notice, with a view to the convenience of the tenant, such agreement was not a waiver of the notice and a renewal of the tenancy, and that the landlord might maintain the action, without giving the tenant any further notice to quit): Dorrell *v.* Johnson, 17 Pick. (Mass.) 263 (holding that neither a notice to quit, given after the expiration of a fixed term and the commencement of process under the statute, nor the taking of a bond from the lessee upon the return-day of the complaint, with condition to deliver up the premises, amounted to an admission of the lawfulness of lessee's possession and a waiver of any former notice or entry); Boggs *v.* Black, 1 Binn. (Pa.) 333 (where the tenant was allowed to remain a year). But see Tuttle *v.* Bean, 13 Metc. (Mass.) 275, holding that where, after notice to quit for non-payment of rent was given, the tenant tendered the rent, but the landlord refused the money and told the tenant he need not quit, this was a waiver of

10. Jurisdiction. Statutes providing for summary proceedings usually confer jurisdiction of such proceedings upon courts of limited and inferior jurisdiction,[53] such as county courts,[54] city courts,[55] or those of justices of the peace,[56] or magistrates,[57] and under some statutes the jurisdiction of such courts is exclusive.[58] The necessary jurisdiction must appear affirmatively on the face of the record;[59] but jurisdiction is not ousted by matters occurring after the action is brought.[60] A court of limited jurisdiction having no power to try questions of title to realty is not divested of jurisdiction simply because defendant pleads title;[61] if the proof brings the case within the terms of the statute the court retains jurisdic-

the notice and renewal of the tenancy, precluding the landlord from maintaining an action on that notice.

In case the tenant has repudiated his tenancy, it is not necessary to serve a new notice to quit, although a considerable time is permitted to elapse before the action is begun. Douglass *v.* Anderson, 32 Kan. 350, 4 Pac. 257, 32 Kan. 353, 4 Pac. 283.

53. See, generally, Courts, 11 Cyc. 633.

54. See Johnson *v.* Chely, 43 Cal. 299; Stoppelkamp *v.* Mangeot, 42 Cal. 316, holding that a provision conferring such jurisdiction was constitutional.

55. State *v.* Skinner, 33 La. Ann. 146.

56. See Justices of the Peace, *ante*, p. 454.

Jurisdiction of single justice.— The act of Dec. 14, 1863, is the only act authorizing a single justice to take cognizance of landlord and tenant cases, and does not apply to a tenant from month to month. Vogel *v.* Trumberg, 26 Pa. Co. Ct. 464. The justice has jurisdiction, although the tenancy be from month to month, provided three months' notice to quit has been given. Cope *v.* Briody, 9 North. Co. Rep. (Pa.) 101. See also Albert *v.* Ristone, 4 Just. L. Rep. (Pa.) 200.

Territorial jurisdiction.— A justice of the peace has jurisdiction of summary proceedings to obtain possession of demised premises within the city and county of New York, although neither of the parties resided, and the premises are not situated, within the district for which he was elected. Carlisle *v.* McCall, 1 Hilt. (N. Y.) 399.

Effect of joining distinct remedies.— Where a landlord brought suit in a justice's court to recover possession, and for rent due, as authorized by Rev. St. (1899) § 4131, the fact that plaintiff obtained in such action a landlord's attachment, under section 4123, on a summons not returnable in less than ten days, as required in actions by attachment by section 3862, did not deprive the justice of jurisdiction to render judgment for the rent due and for possession. State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250.

57. Keller *v.* Pagan, 54 S. C. 255, 32 S. E. 353, holding that under Rev. St. (1893) § 1937, which vests in two magistrates jurisdiction to eject a tenant holding over under a lease of "lands and tenements," on application of the landlord, without previous demand for possession; and section 1939 which vests a single magistrate with jurisdiction where the lease is of "houses and tenements," and the landlord has demanded and been refused possession, a single magistrate may eject a tenant of "lands."

58. See Stephenson *v.* Warren, 119 Ga. 504, 46 S. E. 647 (superior court); Kennedy *v.* Downey, 2 Rob. (La.) 284 (city court); Leonard *v.* McCool, 3 Strobh. Eq. (S. C.) 44 (court of magistrates and freeholders).

Vacant premises.— The power to view and give possession to a landlord of deserted premises, created by 11 Geo. II, c. 19, § 16, extended by 57 Geo. III, c. 52, and varied as to its mode of execution by 3 & 4 Vict. c. 84, § 13, is not by any of the provisions of 3 & 4 Vict. c. 84, or by 11 & 12 Vict. c. 43, § 34, vested in the lord mayor or one aldermau sitting in the justice's room at the mansion house or guild hall, so as to enable them to exercise the power in the same manner as police magistrates sitting in one of the metropolitan police courts may, under 3 & 4 Vict. c. 84, § 13, exercise it. Edwards *v.* Hodges, 15 C. B. 477, 3 C. L. R. 472, 1 Jur. N. S. 91, 24 L. J. M. C. 81, 3 Wkly. Rep. 167, 80 E. C. L. 477.

59. Leinbach *v.* Kaufman, 1 Pa. Cas. 12, 1 Atl. 348; Vogel *v.* Trumberg, 26 Pa. Co. Ct. 464; Goodgion *v.* Latimer, 26 S. C. 208, 2 S. E. 1; Wheeler *v.* Wheeler, 77 Vt. 177, 59 Atl. 842. And see Grand Rapids Nat. Bank *v.* Kritzer, 116 Mich. 688, 75 N. W. 90, holding that where a justice of the peace has jurisdiction of summary proceedings to recover possession of land, where no circuit court commissioner resides in the township, the affidavit instituting the proceeding need not in the absence of statute state that no commissioner resides therein.

Amount in controversy.— In summary proceedings by a landlord to eject a tenant after the expiration of his lease, brought in the district court under Rev. St. § 2156, giving that court jurisdiction where the monthly rent exceeds one hundred dollars, it may be shown on the trial that the rent is sufficient to give jurisdiction. Godchaux *v.* Bauman, 44 La. Ann. 253, 10 So. 674.

60. Such as a demolition of a building. Simmons *v.* Pepe, 43 Misc. (N. Y.) 661, 88 N. Y. Suppl. 120.

61. Chapman *v.* Nehman, 128 Mich. 295, 87 N. W. 208; Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342; Van Deventer *v.* Foster, 87 N. Y. App. Div. 62, 83 N. Y. Suppl. 1067; Rees *v.* Davies, 4 C. B. N. S. 56, 93 E. C. L. 56. See also *infra*, X, C, 20, c. But see Jenkinson *v.* Winans, 109 Mich. 524, 67 N. W. 549, holding that a court commissioner has no jurisdiction of an action against a tenant

tion.[62] As a general rule jurisdiction being conferred on inferior courts with no equitable jurisdiction the court possesses no power to try equitable issues.[63] A grant of jurisdiction of actions against tenants and others to recover premises let is sufficiently broad to include actions against tenants at sufferance.[64]

11. Time to Sue and Limitations. An action to recover possession cannot be begun until the expiration of the tenant's right of occupancy,[65] which is not until the expiration of the time fixed in a demand of possession, where such demand is made a condition precedent by the statute.[66] But unless there is a contrary provision in the statute, the action may be brought at any time thereafter.[67] By statute, however, it is usually provided that the proceeding may be barred by the lapse of a specified time after the cause of action accrues.[68] Such a period does not begin to run, however, before the expiration or the termination of the lease,[69] or while the relation of landlord and tenant continues.[70] It has been held also that the action must be begun within the period of limitations, the service of a notice to quit not being sufficient to interrupt such period.[71] Under some statutes where the tenant has been in quiet possession for a specified time the action will not lie against him until the termination of his estate.[72]

to recover possession, where defendant asserts that after the commencement of the tenancy he was obliged to attorn to one who procured a paramount tax title.

Ouster of jurisdiction of justices of the peace see JUSTICES OF THE PEACE, *ante*, p. 486.

62. Chapman *v.* Nehman, 128 Mich. 295, 87 N. W. 208; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32; Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342.

63. Haltersley *v.* Cronyn, 22 Misc. (N. Y.) 259, 49 N. Y. Suppl. 1113, holding that the city court of Albany, which is a court of limited jurisdiction, has not the power in summary proceedings by an owner of property to dispossess an alleged squatter, to pass on the equitable title of plaintiff, where the legal title was proved to be in another, and the statute giving a tenant the right in such proceedings to set up equitable defenses, does not extend to the landlord or petitioner. And see Schreiber *v.* Goldsmith, 35 Misc. (N. Y.) 45, 70 N. Y. Suppl. 236, holding that the fact that a landlord has conveyed the premises occupied by a tenant to the latter, subject to the life-estate of the landlord, does not divest the municipal court of jurisdiction of a summary proceeding to remove the tenant, on the ground that the court has no equitable power to pass on the effect of the deed.

Equitable defenses see *supra*, X, C, 7, h.

Determination that a lease is void involves no exercise of equity jurisdiction. Earle *v.* McGoldrick, 15 Misc. (N. Y.) 135, 36 N. Y. Suppl. 803.

64. Kenney *v.* Sweeney, 14 R. I. 581.

65. Seem *v.* McLees, 24 Ill. 192. And see Fratcher *v.* Smith, 104 Mich. 537, 62 N. W. 832. See also *supra*, X, C, 2, a.

66. *California.*— Ray *v.* Armstrong, 4 Cal. 208.

Massachusetts.— Decker *v.* McManus, 101 Mass. 63.

Nebraska.—Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999, holding that where defendant was entitled to three full days, an action brought on September 7 was premature where notice was served on September 4.

New York.— Bristed *v.* Harrell, 20 Misc. (N. Y.) 348, 45 N. Y. Suppl. 918.

Ohio.— Hoveler *v.* Luhrmann, 4 Ohio S. & C. Pl. Dec. 149, 3 Ohio N. P. 224.

67. Spear *v.* Lomax, 42 Ala. 576 (holding that an action may be brought upon the same day after refusal of possession); Marley *v.* Rodgers, 5 Yerg. (Tenn.) 217.

68. See McCelland *v.* Wiggins, 109 Iowa 673, 81 N. W. 156 (thirty days peaceable possession with knowledge of the landlord); Heiple *v.* Reinhart, 100 Iowa 525, 69 N. W. 871 (holding that a statute providing that possession should be with knowledge of plaintiff, intended knowledge of defendant's possession, and not of the fact that a cause of action to terminate such possession had accrued); Mason *v.* Bascom, 3 B. Mon. (Ky.) 269 (two years).

Payment of rent by the tenant, or a promise to pay rent, prevents the running of the statutory period as a bar. Barefoot *v.* Wall, 108 Ala. 327, 18 So. 823; King *v.* Bolling, 77 Ala. 594.

69. *Arkansas.*— Burke *v.* Hale, 9 Ark. 328.

California.— Johnson *v.* Chely, 43 Cal. 299.

Kansas.— Moran *v.* Moran, 54 Kan. 270, 38 Pac. 268; Townsdin *v.* Townsdin, 5 Kan. App. 336, 48 Pac. 601.

Kentucky.— Mason *v.* Bascom, 3 B. Mon. 269.

Minnesota.— Alworth *v.* Gordon, 81 Minn. 445, 84 N. W. 454; Suchaneck *v.* Smith, 45 Minn. 26, 47 N. W. 397.

Oklahoma.— Donahoe *v.* Mitchem, 13 Okla. 283, 74 Pac. 903.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1236.

70. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794.

71. Heiple *v.* Reinhart, 100 Iowa 525, 69 N. W. 871.

72. Brown *v.* Brackett, 26 Minn. 292, 3 N. W. 705, holding that quiet possession need not be adverse.

12. Parties — a. Plaintiffs. Two persons entitled to a restitution of distinct possessory interests cannot join.[73] Joint lessors may, however, join.[74]

b. Defendants — (I) *In General.* As a general rule all persons who are in possession under the tenant may be joined with him as defendants.[75] It is proper to join the tenant with those in possession under him, although the tenant has relinquished the entire possession to them;[76] but it is not necessary that he be joined.[77] The tenant's grantee in fee may be joined with the tenant.[78] The mortgagee of the term is not a necessary defendant.[79]

(II) *Subtenants.* Subtenants placed in possession by the tenant with the consent of the lessor are not necessary parties,[80] unless a judgment is sought against them.[81]

c. Intervention. Under some statutes a person claiming possession may intervene and file an answer,[82] but an intervention is not permitted unless provided for by statute.[83]

13. Process or Precept. Dispossession proceeding being special statutory proceedings of a summary nature, the methods prescribed by statute by which jurisdiction is to be obtained must be strictly pursued;[84] and where provision is made as to the nature and service of process, other statutes relating to process are inapplicable.[85] For example a process in the ordinary form for debt is not suffi-

73. Ware *v.* Warwick, 48 Ala. 295, where it was shown that there had been no joint possession, but only a tenancy in common and that each had separately rented his undivided interest to the same defendant, but at different times and on different terms, that the term of each lease had expired, and that each plaintiff had separately demanded possession of the undivided interest which he had rented to defendant.

74. Oakes *v.* Munroe, 8 Cush. (Mass.) 282.

75. Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592 [*reversing* 30 Ill. App. 371]; Bagley *v.* Sternberg, 34 Minn. 470, 26 N. W. 602; Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151; Zink *v.* Bohn, 3 N. Y. Suppl. 4; Middlebury College *v.* Lawton, 23 Vt. 688, holding that it is immaterial that the subtenants are in possession of and claim several and distinct portions of the premises.

76. Giddens *v.* Bolling, 92 Ala. 586, 9 So. 274; Fletcher *v.* Fletcher, 123 Ga. 470, 51 S. E. 418; Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592 [*reversing* 30 Ill. App. 371]; Middlebury College *v.* Lawton, 23 Vt. 688.

77. Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627], where the subtenant was in adverse possession and the lessee had surrendered his lease. And see Geheebe *v.* Stanby, 1 La. Ann. 17, holding that where premises were leased to two partners for a year, with a right of renewal, and before the year expired the partnership was dissolved, and one partner remained in possession, held over after the expiration of the lease, and applied for a renewal of the lease, which was refused by the landlord, an action for possession might be maintained by the landlord against the partner in possession, without joining the other.

78. Emerick *v.* Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217.

79. Thompson *v.* Ackerman, 21 Ohio Cir. Ct. 740, 12 Ohio Cir. Dec. 456.

80. Tucker *v.* McClenney, 103 Mo. App. 318, 77 S. W. 151; Toronto Incorporated Synod *v.* Fisken, 29 Ont. 738.

81. Moses *v.* Loomis, 55 Ill. App. 342 [*affirmed* in 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194]; Bagley *v.* Sternberg, 34 Minn. 470, 26 N. W. 602.

Where the subtenant held under an adverse title prior to his entry under the lessee he may nevertheless be joined. Middlebury College *v.* Lawton, 23 Vt. 688.

82. Kiernan *v.* Cashin, 92 N. Y. Suppl. 255 (holding that under Code Civ. Proc. § 2244, providing that, when the precept is returnable in summary proceedings to recover land, any person in possession or claiming possession may file with the judge who issued the precept or with the clerk of the court a written answer, etc., a person claiming to be in possession of the property sued for as under-tenant is entitled to intervene and answer); Heuser *v.* Antonius, 84 N. Y. Suppl. 580 (holding that such a provision does not warrant an answer by entire strangers to the proceedings); *In re* Wright, 16 N. Y. Suppl. 808 (holding that a woman on whom the precept was served, and who states under oath that she was in possession, whether she be the wife of the tenant or not, may file an answer).

83. Grizzard *v.* Roberts, 110 Ga. 41, 35 S. E. 291; Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74; Hiester *v.* Brown, 11 Lanc. Bar (Pa.) 159.

84. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717 [*affirming* 27 Ill. App. 76] (holding that a judgment entered without service of process upon the tenant, on a cognovit filed under a warrant of attorney contained in the lease, was void); People *v.* Boardman, 3 Abb. Dec. (N. Y.) 483, 4 Keyes 59; Luhrs *v.* Commors, 30 Hun (N. Y.) 468, 13 Abb. N. Cas. 88; Rathburn *v.* Weber, 13 N. Y. Civ. Proc. 50.

85. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 715

cient.[86] The summons may issue upon affidavit of a party.[87] It should be directed to the tenant,[88] and in some jurisdictions must contain a brief statement of the grounds on which it issues.[89] It must be made returnable in strict accordance with the statute,[90] and served in the manner prescribed thereby,[91] and the return must show such service,[92] the return when certified being due proof of service.[93] Service need not be made upon the premises.[94] An error in the date of the summons has been held immaterial where it was properly served,[95] as has been an error in the description where as a whole the description clearly identified the premises.[96] In any event a defect in the process is in accordance with the

[*affirming* 27 Ill. App. 76]; Westerhold *v.* Boese, 64 Mo. App. 280 (holding that under a statute providing that the summons shall be served at least five days before the return-day, it may be made returnable in the same time); Rowan *v.* Gates, 9 Pa. Dist. 564 (holding that there is no authority for the making of complaint before one justice and taking it to another for him to summon defendant and maintain proceedings thereon).

Who may issue.— The clerk of the district court of New York city may issue the precept where a petition is filed with him. Sperling *v.* Isaacs, 13 Daly (N. Y.) 275.

Verification of affidavit.— Where the affidavit for a summons is required to be sworn to before the clerk of the district court, an affidavit sworn to before a justice is insufficient. People *v.* Alden, 26 How. Pr. (N. Y.) 166.

86. Givens *v.* Miller, 62 Pa. St. 133; Cassel *v.* Seibert, 1 Dauph. Co. Rep. (Pa.) 16.

87. Such being regarded as "due proof" within a statutory provision. Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99; Cunningham *v.* Gardner, 4 Watts & S. (Pa.) 120. And see Fisher *v.* Bailey, 1 Ashm. (Pa.) 209. But see Stanley *v.* Horner, 24 N. J. L. 511, holding that where by statute a party could not be a witness for himself, in order to give jurisdiction to a justice of the peace in proceedings to remove a tenant, in case of uncertain tenancy, "due proof" of its termination, other than the oath of the landlord, was requisite.

88. Cunningham *v.* Goelet, 4 Den. (N. Y.) 71.

89. Kaier *v.* Leahy, 15 Pa. Co. Ct. 243; Carlisle *v.* Prior, 48 S. C. 183, 26 S. E. 244, holding that a notice which merely alleges that plaintiff is the executor of a deceased owner does not sufficiently show his right to bring such proceedings.

90. Hunt *v.* Cobb, 28 Mo. 198 (holding that the summons must be executed at least five days before return); Luhrs *v.* Commors, 30 Hun (N. Y.) 468, 13 Abb. N. Cas. 88; People *v.* Lane, 2 Thomps. & C. (N. Y.) 522 (holding a process returnable the day after issue insufficient); Russell *v.* Ostrander, 30 How. Pr. (N. Y.) 93 (holding that where the person continues in possession after the expiration of the term, without permission of his landlord, the magistrate may make the summons returnable on any day from the first to the fifth as appears reasonable to him).

91. Rathburn *v.* Weber, 13 N. Y. Civ. Proc. 50. See also Miller *v.* Lampson, 66 Conn. 432, 34 Atl. 79 (in which it was held that a city sheriff might serve the process); and cases cited in the following note.

Personal service is essential under some statutes (State *v.* Marshall, 24 S. C. 507; Goodler *v.* Cook, 2 C. L. Chamb. (U. C.) 151), and a substituted service, when authorized, may be made only in a case within the statutory permission (Crozier *v.* Allen, 117 Mich. 171, 75 N. W. 300; Eckerson *v.* Ellis, 30 Misc. (N. Y.) 794, 63 N. Y. Suppl. 150).

The person in possession may be served. Watts *v.* Fox, 64 Pa. St. 336. But see Matter of Glenn, 1 How. Pr. (N. Y.) 213.

Against partnership.— Service upon one member of a partnership is sufficient. Ludwig *v.* Lazarus, 10 N. Y. App. Div. 62, 41 N. Y. Suppl. 773.

Indorsement of statute.— Under the N. Y. Code Civ. Proc. § 2241, a copy of the statute must be indorsed upon a precept when served otherwise than personally. Rathburn *v.* Weber, 13 N. Y. Civ. Proc. 50.

Return to different court.—Under Ga. Code, § 4080, providing that the proceeding shall be returned to the superior court for trial by a special jury, the officer may return a warrant, issued by the county judge and made returnable to the county court, to the superior court, and the superior court may entertain jurisdiction. Lamar *v.* Sheppard, 84 Ga. 561, 10 S. E. 1084.

92. People *v.* Boardman, 3 Abb. Dec. (N. Y.) 483, 4 Keyes, 59; People *v.* Platt, 43 Barb. (N. Y.) 116; Cameron *v.* McDonald, 1 Hill (N. Y.) 512; McCarthy *v.* Sykes, 7 Pa. Dist. 243.

On appeal in the absence of evidence to the contrary it will be presumed that where the return was that service was had by fixing a true copy to the door, etc., that a copy was placed upon the door for each of the persons against whom possession was demanded. Engel, etc., Co. *v.* Henry Elias Brewing Co., 36 Misc. (N. Y.) 851, 74 N. Y. Suppl. 934 [*reversed* on other grounds in 75 N. Y. Suppl. 1080].

93. People *v.* Lamb, 10 Hun (N. Y.) 343.

The return is conclusive in a subsequent proceeding against objections based on defects not shown by the record. Feickert *v.* Freisem, 1 N. Y. City Ct. 369.

94. Reid *v.* Christy, 2 Phila. (Pa.) 144.

95. Schroeder *v.* Tomlinson, 70 Conn. 348, 39 Atl. 484; Powers *v.* De O, 64 N. Y. App. Div. 373, 72 N. Y. Suppl. 103.

96. Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266.

general rule in civil actions cured by the appearance of the defendant without objection on such ground.[97]

14. Appearance. A statute giving defendant in ordinary actions before a justice of the peace an hour after the hour fixed in the summons in which to appear has been held inapplicable to summary proceedings.[98]

15. Stay of Warrant. Under some statutes a warrant of dispossession issues upon the landlord's affidavit unless a counter-affidavit and bond is filed by the tenant.[99]

16. Injunction. While it is held under some statutes that a summary proceeding by the landlord to dispossess his tenant cannot be enjoined or stayed by any writ from any court,[1] such proceedings may, in the absence of a statute to the contrary, be enjoined upon the same grounds as other legal proceedings,[2] although the relief will be granted only in an extreme case,[3] where there has been fraud, surprise, or undue advantage,[4] or for the protection of equities which defendant cannot assert in the summary proceedings,[5] or where the justice is acting without

Amendment.— In an action between the lessor and lessee plaintiff will be allowed upon paying the costs of motion to add the words "summary procedure" to the writ and copy thereof. Cusson *v.* Vaillancourt, 5 Quebec Pr. 88.

97. Sims *v.* Humphrey, 4 Den. (N. Y.) 185; Stroup *v.* McClure, 4 Yeates (Pa.) 523.

Sufficiency of appearance.— Where the precept is returnable before the law allows, defendant does not submit to the jurisdiction by entering the court-room on the return-day, handing the judge a certificate of his wife's illness and immediately leaving without a word. Luhrs *v.* Commors, 13 Abb. N. Cas. (N. Y.) 88.

98. Spooner *v.* French, 22 Minn. 37. See, generally, Justices of the Peace, *ante*, p. 531.

Sufficiency of appearance.— Defendant in summary proceedings is not in court by voluntary appearance until he has filed a verified answer, as required by Code Civ. Proc. § 2244, or an answer that could be held to be a waiver of a verified answer. Wands *v.* Robarge, 24 Misc. (N. Y.) 273, 53 N. Y. Suppl. 700.

99. See Kaiser *v.* Berrie, 85 Ga. 856, 11 S. E. 602, holding that under Code, § 4084, providing that a tenant holding over may stop the execution of a dispossessory warrant, by filing with the officer holding it, within three days, a counter-affidavit and sufficient bond, where such an affidavit was prepared and bond executed and approved in time, and the officer, on being so informed, requested the tenant's counsel to retain the custody thereof until called for, and he received them two days after the time for filing expired, a refusal to enforce the execution of the writ by mandamus was proper.

A judgment dismissing defendant's affidavit for defects therein, where there was no recovery of a money judgment, even for costs, gives plaintiff no right of action on the bond. Clark *v.* Lee, 86 Ga. 28, 12 S. E. 184.

1. See McLean *v.* Carroll, 6 Rob. (La.) 43.

In New York prior to the code of civil procedure it was under the Revised Statutes provided that proceedings to remove the tenant should not be stayed by any writ of any court. See Smith *v.* Moffat, 1 Barb. 65; Duigan *v.* Hogan, 1 Bosw. 645; Hyatt *v.* Burr, 8 How. Pr. 168; Wordsworth *v.* Lyon, 5 How. Pr. 463, Code Rep. N. S. 163; Cure *v.* Crawford, 5 How. Pr. 293, Code Rep. N. S. 18, 2 Edm. Sel. Cas. 333.

Under the Conveyancing Act.— Where in an action for reëntry upon a breach of covenant to repair defendant applies to the court for relief under the Conveyancing Act (1891), § 14, subs. 2, the court may in its discretion make an order to stay the action upon payment by defendant of plaintiff's costs as between solicitor and client as well as costs of surveys and schedules of dilapidations. Bridge *v.* Quick, 56 J. P. 596, 61 L. J. Q. B. 375, 67 L. T. Rep. N. S. 54 [*distinguishing* Skinners' Co. *v.* Knight, [1891] 2 Q. B. 542, 56 J. P. 36, 60 L. J. Q. B. 629, 65 L. T. Rep. N. S. 240, 40 Wkly. Rep. 57].

2. Worthy *v.* Tate, 44 Ga. 152 (holding that an injunction would not be denied for the reason that defendant is by his poverty unable to give a bond for the payment to the landlord of such sums as may be recovered by him against the tenant, such a bond being a statutory condition to the stay of summary proceedings); Kaufmann *v.* Liggett, 209 Pa. St. 87, 58 Atl. 129; Denny *v.* Fronheiser, 207 Pa. St. 174, 56 Atl. 406. And see Smith *v.* Wynn, 111 Ga. 884, 36 S. E. 970; Sherman *v.* Wright, 49 N. Y. 227; Landon *v.* Schenectady County, 24 Hun (N. Y.) 75; Forrester *v.* Wilson, 1 Duer (N. Y.) 624; Capet *v.* Parker, 3 Sandf. (N. Y.) 662.

Injunctions against actions at law in general see Injunctions, 22 Cyc. 786.

3. Huff *v.* Markham, 71 Ga. 555; Cassell *v.* Fisk, 2 N. Y. Civ. Proc. 94; McDonald *v.* O'Neill, 5 Kulp (Pa.) 93.

4. Becker *v.* Church, 42 Hun (N. Y.) 258 [*affirmed* in 115 N. Y. 562, 22 N. E. 748]; Armstrong *v.* Cummings, 20 Hun (N. Y.) 313; Marry *v.* James, 2 Daly (N. Y.) 437; Asbyll *v.* Haims, 38 Misc. (N. Y.) 578, 78 N. Y. Suppl. 64; Denny *v.* Fronheiser, 207 Pa. St. 174, 56 Atl. 406.

5. Elliott *v.* Abell, 39 Mo. App. 346; Orr *v.* McCurdy, 34 Mo. App. 418 (holding that

or beyond his jurisdiction.[6] An injunction will not issue where defendant has an adequate remedy at law,[7] where his right to relief is doubtful,[8] or for grounds which he may assert in the statutory proceedings,[9] unless in a case where he has been prevented from making a defense by fraud or surprise.[10] Under some statutes the grounds upon which an injunction will issue are made the same as those upon which ejectment will be enjoined.[11] An appeal from an order refusing to dissolve an injunction will not be dismissed because of the acceptance of rent by the appellant for a period pending such appeal.[12] One not a party to the proceedings, although claiming to be the true landlord, cannot interfere by injunction to prevent summary proceedings by another,[13] although it has been held that a third person who claimed title to the property involved might enjoin unlawful detainer proceedings by an insolvent plaintiff until the question of title could be determined.[14]

17. Pleading — a. Complaint, Declaration, or Affidavit — (i) *In General.* The complaint or declaration under some statutes is termed an affidavit.[15] An affidavit used in a former proceeding cannot be used in a new suit or proceeding under the statute.[16]

(ii) *Allegations* — (a) *General Rules.* Actions of unlawful detainer or other summary proceedings being usually brought before justices of the peace or in courts of similar inferior jurisdiction, technical nicety is not as a general rule required of the complaint or declaration,[17] it being sufficient that a substantial

where the defense to a proceeding before a justice of the peace was based upon possession and part payment of rent constituting an equitable lease, the proceedings before the justice might be enjoined until defendant's equities could be determined); Landon *v.* Schenectady County, 24 Hun (N. Y.) 75; Graham *v.* James, 7 Rob. (N. Y.) 468; Gilman *v.* Prentice, 11 N. Y. Civ. Proc. 310.

6. Kazis *v.* Loft, 81 N. Y. App. Div. 636, 80 N. Y. Suppl. 1015; Crawford *v.* Kastner, 26 Hun (N. Y.) 440; Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311, 2 How. Pr. N. S. 89.

7. Rapp *v.* Williams, 1 Hun (N. Y.) 716, 4 Thomps. & C. 174; Bean *v.* Pettengill, 7 Rob. (N. Y.) 7; Valloton *v.* Seignett, 2 Abb. Pr. (N. Y.) 121.

8. Bohn *v.* Hatch, 15 N. Y. Suppl. 550 [*affirmed* in 133 N. Y. 64, 30 N. E. 659].

9. Wingo *v.* Hardy, 94 Ala. 184, 10 So. 659; Natkins *v.* Wetterer, 76 N. Y. App. Div. 93, 78 N. Y. Suppl. 713; Bean *v.* Pettingill, 2 Abb. Pr. N. S. (N. Y.) 58; Van Tyne *v.* Short, 7 Ohio Dec. (Reprint) 720, 4 Cinc. L. Bul. 1149 (holding that an injunction would not be granted to prevent the disturbance of plaintiff's occupation until the landlord should comply with an agreement to erect a house for defendant, where the agreement was so uncertain that specific performance could not be granted); Pittsburgh, etc., Drove-yard Co's. Appeal, 123 Pa. St. 250, 16 Atl. 625; Krueger *v.* Rutledge, 2 Kulp (Pa.) 371; Vanarsdalen *v.* Whitaker, 10 Phila. (Pa.) 153.

Where through inability to give a bond required by statute as a condition precedent defendant is precluded from filing a counter-affidavit, such fact is not in itself sufficient to authorize an injunction. Johnson *v.* Thrower, 117 Ga. 1007, 44 S. E. 846; Brown *v.* Watson, 115 Ga. 592, 41 S. E. 998; Huff *v.* Markham, 70 Ga. 284; Hall *v.* Holmes, 42 Ga. 179.

10. Sherman *v.* Wright, 49 N. Y. 227; McIntyre *v.* Hernandez, 7 Abb. Pr. N. S. (N. Y.) 214, 39 How. Pr. 121; Bokee *v.* Hamersley, 16 How. Pr. (N. Y.) 461.

11. Potter *v.* Potter, 59 N. Y. App. Div. 140, 69 N. Y. Suppl. 183; Jessurun *v.* Mackie, 24 Hun (N. Y.) 624 [*cited* in Chadwick *v.* Sprague, 1 N. Y. Civ. Proc. 422]; Gilman *v.* Prentice, 11 N. Y. Civ. Proc. 310. See Rubino *v.* Mariano, 65 N. Y. App. Div. 314, 73 N. Y. Suppl. 7.

12. Curd *v.* Farrar, 47 Iowa 504, holding that such acceptance was not an admission of the continuance of the lease beyond the time claimed by the landlord.

13. Marry *v.* James, 2 Daly (N. Y.) 437, 37 How. Pr. 52; Lowenstein *v.* Keller, 3 Kulp (Pa.) 361. And see O'Rourke *v.* Henry P. Cooper Co., 6 N. Y. St. 819.

14. Texas Land Co. *v.* Turman, 53 Tex. 619, so holding on the ground that a third person was not entitled to intervene.

15. Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103; McCoy *v.* Hyde, 8 Cow. (N. Y.) 68. And see Layton *v.* Dennis, 43 N. J. L. 380, holding that where the affidavit is defective, a justice of the peace has no jurisdiction.

16. McCoy *v.* Hyde, 8 Cow. (N. Y.) 68.

17. *Illinois.*— Dunne *v.* School Trustees, 39 Ill. 578; Smith *v.* Killeck, 10 Ill. 293; Ballance *v.* Fortier, 8 Ill. 291.

Indiana.— Roseberry *v.* Shields, 26 Ind. 153.

New Jersey.— Houghton *v.* Potter, 23 N. J. L. 338.

Washington.— Chambers *v.* Hoover, 3 Wash. Terr. 107, 13 Pac. 466.

Wisconsin.— Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1238, 1303.

A clerical error in the complaint is not

cause of action be made to appear.[18] The complainant must, however, set out the facts upon which he bases his right to recover;[19] and since the remedy is purely statutory, such facts must bring the case within the provisions of the particular statute relied upon,[20] the omissions of allegations of such facts being as fatal as want of evidence thereof.[21] Where the essential allegations of the complaint are prescribed by statute, other allegations need not be inserted.[22] Subject to these rules the usual rules of pleading in civil cases apply,[23] it not being necessary to

fatal where not misleading. Fox *v.* Held, 24 Misc. (N. Y.) 184, 52 N. Y. Suppl. 724 (holding that if a petition alleges that the petitioner is "lessee or landlord," the term "lessee" is so manifestly a clerical error as to work no injury to the tenant, and warrants treating it as surplusage, and striking it out); Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509 (sustaining a complaint which alleged that plaintiff was in possession of the land unlawfully detained, instead of that he was entitled to possession).

Description of lease.— A lease for a term may be so drawn as to cover the part of the term already expired, as well as that unexpired, and, the date being a matter of no importance, it is immaterial that in an action of summary process the lease is declared on as of the beginning of the year, instead of the date on which it was actually executed. Palmer *v.* Cheseboro, 55 Conn. 114, 10 Atl. 508.

18. Houghton *v.* Potter, 23 N. J. L. 338.

For illustrations of complaint held sufficient: In cases of holding after expiration of the term (see Hitch *v.* Frasier, 75 Ga. 880; Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Dunne *v.* School Trustees, 39 Ill. 578; Smith *v.* Killeck, 10 Ill. 293; Ellis *v.* Fitzpatrick, 3 Indian Terr. 656, 64 S. W. 567; Shantz *v.* Reynolds, 70 Mo. App. 668; Armstrong *v.* Mayer, 1 Nebr. (Unoff.) 119, 95 N. W. 483; Mundy *v.* Warner, 61 N. J. L. 395, 39 Atl. 697; Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74; Kaier *v.* Leahy, 15 Pa. Co. Ct. 243; Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697); in cases of nonpayment of rent (see McNatt *v.* Indian-Creek Grange Hall Assoc. No. 828, 2 Ind. App. 341, 27 N. E. 325); holding over (see Hitch *v.* Frasier, 75 Ga. 880; Mundy *v.* Warner, 61 N. J. L. 395, 39 Atl. 697; Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74; Kaier *v.* Leahy, 15 Pa. Co. Ct. 243; Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697), against subtenant holding over (see Kusterer *v.* Wise, 59 Mich. 382, 26 N. W. 645; Ward *v.* Burgher, 90 Hun (N. Y.) 540, 35 N. Y. Suppl. 961).

For forms of complaint held sufficient see Ballance *v.* Fortier, 8 Ill. 291; Alexander *v.* Westcott, 37 Mo. 108; Sweeney *v.* Mines, 31 Mo. 240; Nichols *v.* Williams, 8 Cow. (N. Y.) 13; Irwin *v.* Davenport, 84 Tex. 512, 19 S. W. 692.

19. *Michigan.*—Royce *v.* Bradburn, 2 Dougl. 377; Caswell *v.* Ward, 2 Dougl. 374.

New Jersey.— State *v.* Lane, 51 N. J. L. 504, 18 Atl. 353; Shepherd *v.* Sliker, 31 N. J. L. 432; Fowler *v.* Roe, 25 N. J. L. 549.

New York.— Hill *v.* Stocking, 6 Hill 314.

Pennsylvania.— McDermott *v.* McIlwain, 75 Pa. St. 342; Leinbach *v.* Kaufman, 2 Walk. 515.

Washington.— Lowman *v.* West, 8 Wash. 355, 36 Pac. 258; Hall, etc., Furniture Co. *v.* Wilbur, 4 Wash. 644, 30 Pac. 665.

20. *Maine.*— Eveleth *v.* Gill, 97 Me. 315, 54 Atl. 756.

Mississippi.— Wilson *v.* Wood, 84 Miss. 728, 36 So. 609.

New Jersey.— Schuyler *v.* Trefren, 26 N. J. L. 213.

New York.— People *v.* Simpson, 37 Barb. 432; People *v.* Simpson, 23 How. Pr. 481.

Pennsylvania.— Hickey *v.* Conley, 24 Pa. Super. Ct. 388; Rowan *v.* Gates, 9 Pa. Dist. 564; McMichael *v.* McFalls, 17 Lanc. L. Rev. 279; Houck *v.* Shollenberger, 16 Montg. Co. Rep. 194.

Texas.— Cooper *v.* Marchbanks, 22 Tex. 1.

Wisconsin.— Conley *v.* McGarey, 78 Wis. 669, 47 N. W. 951; Conley *v.* Conley, 78 Wis. 665, 47 N. W. 950.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1238, 1303.

21. Eveleth *v.* Gill, 97 Me. 315, 54 Atl. 756, holding that a mere general statement that defendant had lawful entry into the lands and tenements of plaintiff, and that his estate in the premises was determined on a given date, was not sufficient to support a complaint based upon a statute permitting the owner to maintain forcible entry and detainer to eject a lawful tenant because of his using the premises for any purpose denominated a common nuisance.

22. Shepard *v.* Martin, 25 Mo. 193 (holding an affidavit not defective for not showing a privity of estate between the lessee and the occupant); Willi *v.* Peters, 11 Mo. 395; Tucker *v.* McClenney, 103 Mo. App. 318, 77 S. W. 151; Chung Yow *v.* Hop Chong, 11 Oreg. 220, 4 Pac. 326 (holding that the complaint need not aver service of notice to quit).

23. See, generally, PLEADING.

Surplusage.— Where the terms of the lease are alleged, also the period during which defendants have been in default in the payment of rent prior to the date of demand, an averment that the amount in default covered a period which extended beyond the date at which the demand was made, or beyond the date when the last instalment accrued, may be rejected as surplusage. Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111. Inclusion of personal property in an affidavit to dispossess a tenant holding over may be regarded as surplusage, and does not vitiate the entire

aver matters of evidence,[24] or legal conclusions from the facts alleged,[25] or to negative matters of defense.[26] A demand of relief to which plaintiff is not entitled will not vitiate his complaint.[27]

(B) *Relationship of Landlord and Tenant.* Since summary proceedings are usually based upon statutes making the relationship of landlord and tenant an essential to the right of action, the existence of such relation must as a rule be shown by the complaint.[28] But such a showing is not required in proceedings

proceeding. Du Bignon *v.* Tufts, 66 Ga. 59. An allegation that a party occupied premises under a verbal lease from month to month, which began and ended on the first day of each month, is not objectionable because such a tenancy cannot begin and end on the first of each month, but amounts to an averment of a month to month tenancy, beginning on the first of each month, the allegation as to the ending being treated as surplusage. Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549.

An amendment as to the date of termination of the lease may be allowed in the discretion of the court where it appears that all parties were mistaken as to the date. Earl Orchard Co. *v.* Fava, 138 Cal. 76, 70 Pac. 1073, so holding, although the amendment was allowed after the objection was urged by motion for a nonsuit. Where the facts showing the relation of landlord and tenant, and the existence of a lease and its terms appear only inferentially and not particularly, the landlord may amend his affidavit under Rev. Code (1892), § 717. Bowles *v.* Dean, 84 Miss. 376, 36 So. 391.

24. Ballance *v.* Fortier, 8 Ill. 291; Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509.

25. A distinct allegation that possession is held wrongfully and unlawfully is unnecessary where it follows from the facts as a conclusion of law. Fry *v.* Day, 97 Ind. 348; Stanford Land Co. *v.* Steidle, 28 Wash. 72, 68 Pac. 178. And see Uridias *v.* Morrell, 25 Cal. 31.

26. Ballance *v.* Fortier, 8 Ill. 291, holding that it need not be denied that defendant had the right to attorn to another.

27. Sullivan *v.* Lueck, 105 Mo. App. 199, 79 S. W. 724 (recovery of rent in complaint under Rev. St. (1899) §§ 4136, 4138); Ellis *v.* Fitzpatrick, 118 Fed. 430, 55 C. C. A. 260 (where it was sought to recover rents which had accrued prior to the commencement of the action).

28. *Illinois.*— Beel *v.* Pierce, 11 Ill. 92.

Indiana.— Jackson *v.* Adams, Wils. 398.

Kentucky.— Taylor *v.* Monohan, 8 Bush 238.

Maine.— Dunning *v.* Finson, 46 Me. 546 (holding, however, that it was not necessary to allege that the relation existed when the notice to quit was given); Woodman *v.* Ranger, 30 Me. 180.

New Jersey.— Boylston *v.* Valentine, 16 N. J. L. 346.

New York.— Buck *v.* Binninger, 3 Barb. 391; *In re* Robinson, 1 How. Pr. 213.

Pennsylvania.— Mund *v.* Vanfleet, 2 Phila. 41.

Texas.— Gulledge *v.* White, 73 Tex. 498, 11 S. W. 527 (holding a complaint insufficient); Cadwallader *v.* Lovece, 10 Tex. Civ. App. 7, 29 S. W. 666, 917; Yarbrough *v.* Chamberlin, 1 Tex. App. Civ. Cas. § 1122.

Washington.— Quandt *v.* Smith, 29 Wash. 311, 69 Pac. 1097.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1239, 1304.

Sufficiency of showing.— For examples of complaints or affidavits held to contain a sufficient showing of the relationship see State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250 (where the complaint alleged that defendant had attorned to plaintiff by paying rent to him); Steffens *v.* Earl, 40 N. J. L. 128, 29 Am. Rep. 214 (where the affidavit averred that deponent leased the said premises to defendant, by the month, to commence on a day stated, at a monthly rental stated); People *v.* Lamb, 10 Hun (N. Y.) 348 (where it was averred that an amount specified was due for rent according to an agreement by which the premises were let, and that the tenant held over and continued in possession of said premises); Griffin *v.* Barton, 22 Misc. (N. Y.) 228, 49 N. Y. Suppl. 1021 (where it was alleged that defendant was in possession as tenant under an agreement or hiring with a person from whom petitioner became the owner of the premises); Earle *v.* McGoldrick, 15 Misc. (N. Y.) 135, 36 N. Y. Suppl. 803 (where it was alleged that defendant was in possession under an alleged agreement or hiring with petitioner's grantor, and held over and continued in possession without the permission of "petitioner, said owner and landlord"); Thresher *v.* Keteltas, 2 How. Pr. (N. Y.) 63 (holding an affidavit which described affiant "as trustee of the estate" of G deceased, averred that deponent as trustee of the estate of G "leased said premises," and that he "now owns said premises and holds said lease as sole trustee of said estate," a sufficient showing that affiant is landlord. For examples of complaint held insufficient see Bowles *v.* Dean, 84 Miss. 376, 36 So. 391 (where the affidavit recited that defendant "a tenant for a part of" a year, of plaintiff, "holds over . . . after the expiration of his term, without permission of the landlord"); State *v.* Staiger, 52 N. J. L. 350, 19 Atl. 387 (where an affidavit alleged that T was in possession of premises owned by defendant, under an agreement between A the former owner and said T, and that the possession was continued to a certain time by consent of deponent, and still continues but without his permission); People *v.* Matthews, 38 N. Y. 451 [*affirming* 43 Barb. 168] (where by a transposition of sentences

under general statutes by which the existence of the relation is not made an essential.[29]

(c) *Right to Sue.* It is necessary that a right to possession be shown,[30] or that plaintiff is the person authorized by statute to sue;[31] but an express averment of such facts is not necessary where they follow from the facts alleged.[32]

(d) *Title.* Since title is not involved in an action of this nature,[33] an allegation of title is not as a rule necessary.[34] It is sufficient that the complaint or declaration allege that the relation of landlord and tenant exists, without averring the nature of plaintiff's estate.[35]

(e) *Description of Premises.* It is necessary that the complaint describe the premises with reasonable certainty,[36] and under some statutes a particular descrip-

the affidavit read that the premises were leased to R by C, and were afterward purchased by M, the present landlord, for the term of one year, which term had expired and R was holding over without permission of the landlord); People *v.* Simpson, 37 Barb. (N. Y.) 432, 23 How. Pr. 481 (where the affidavit showed that the person sought to be charged as tenant was the owner of a term for years and had assigned the lease to the affiant, and that the tenant had remained such by sufferance of affiant); Payton *v.* Sherburne, 15 R. I. 213, 2 Atl. 300 (where the declaration contained no express averment that the tenements sued for were the tenements let, or that defendants were tenants at will, but only that defendants were tenants by sufferance).

29. Hightower *v.* Fitzpatrick, 42 Ala. 597; Spear *v.* Lomax, 42 Ala. 576. But *compare* Mounger *v.* Burks, 17 Ala. 48.

30. *Indiana.* — Markin *v.* Whittaker, 26 Ind. App. 211, 58 N. E. 542; Jackson *v.* Adams, Wils. 398.

New Jersey. — Cleary *v.* Waldron, (1903) 54 Atl. 565.

New York. — Buck *v.* Binninger, 3 Barb. 391.

Wisconsin. — Rains *v.* Oshkosh, 14 Wis. 372, holding a complaint sufficient to show such right in an action against a city.

United States. — Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697, holding that an allegation that the complainant is "entitled to the possession" of the premises, instead of that he is "entitled to the premises" is sufficient.

31. Peck *v.* Peck, 35 Conn. 390 (holding a complaint sufficient to show that complainants were entitled to sue as reversioners); Lloyd *v.* Richman, 57 N. J. L. 385, 30 Atl. 432 (holding an affidavit sufficient to show that plaintiff was an "assign" of the lessor); State *v.* Pittenger, 37 Wash. 384, 79 Pac. 942 (holding a complaint to contain a sufficient allegation of plaintiff's ownership, and that he was the person entitled to the rent within a statute authorizing an action of forcible entry and detainer by the person entitled to the rent).

Description of interest. — Under N. Y. Code Civ. Proc. § 2235, the petition must contain a description of the interest of the petitioner or the person whom he represents. This section has been construed and applied in the following cases: Rowland *v.* Dillingham, 83 N. Y. App. Div. 156, 82 N. Y. Suppl. 470; Kazis *v.* Loft, 81 N. Y. App. Div. 636, 80 N. Y. Suppl. 1015; Equitable L. Assur. Soc. *v.* Schum, 40 Misc. (N. Y.) 657, 83 N. Y. Suppl. 161; Cram *v.* Dietrich, 38 Misc. (N. Y.) 790, 78 N. Y. Suppl. 948; Engel, etc., Co. *v.* Henry Elias Brewing Co., 37 Misc. (N. Y.) 480, 75 N. Y. Suppl. 1080 [*reversing* 36 Misc. 851, 74 N. Y. Suppl. 934]; Cohen *v.* Brossevitch, 33 Misc. (N. Y.) 600, 67 N. Y. Suppl. 1025; Dreyfus *v.* Carroll, 28 Misc. (N. Y.) 222, 58 N. Y. Suppl. 1116; Bennett *v.* Budweiser Brewing Co., 27 Misc. (N. Y.) 805, 58 N. Y. Suppl. 313; Ross *v.* New York City Baptist Mission Soc., 23 Misc. (N. Y.) 683, 52 N. Y. Suppl. 303; Loft *v.* Kaziz, 84 N. Y. Suppl. 228.

32. Engels *v.* Mitchell, 30 Minn. 122, 14 N. W. 510; Hall, etc., Furniture Co. *v.* Wilbur, 4 Wash. 644, 30 Pac. 665.

33. See *supra*, X, C, 1, c.

34. Roseberry *v.* Shields, 26 Ind. 153.

The manner in which the landlord acquired title need not be averred. Norsworthy *v.* Bryan, 33 Barb. (N. Y.) 153.

35. Ayotte *v.* Johnson, 25 R. I. 403, 56 Atl. 110 [*overruling* Dunn *v.* Sullivan, 23 R. I. 605, 51 Atl. 203].

36. Burns *v.* Nash, 23 Ill. App. 552; Jackson *v.* Adams, Wils. (Ind.) 398; Matter of Robinson, 1 How. Pr. (N. Y.) 213.

Sufficiency of description. — An affidavit to obtain a warrant to dispossess a tenant holding over should be sufficiently certain in the description of the land to enable the sheriff to identify the premises (Vaughan *v.* Vaughan, 111 Ga. 807, 35 S. E. 650, holding that a proceeding to dispossess a tenant is properly dismissed where the only description of the land is that complainant is the owner of a certain tract of land in the "21st district, G. M.," of a certain county, being a part of the tract known as the "C. B. Vaughan Land," and that he desires possession of thirty-three acres, which was apportioned to complainant from the "C. B. Vaughan estate"; Newing *v.* Stilwell, 67 N. J. L. 96, 50 Atl. 493); and to advise the tenant of the premises claimed (Newing *v.* Stilwell, *supra*). It would seem that a description of premises which at common law would have been good in ejectment is sufficient. Story *v.* Walker, 71 N. J. L. 256, 58 Atl. 349 (sustaining a description of the prem-

tion is essential.[37] A description of the property as described in the lease is usually held sufficient.[38] But where there is a mistake in the lease it is essential that the complaint describe the premises truly.[39] A faulty description may be aided by matters of which the court will take judicial notice.[40]

(F) *Occupancy.* The declaration or petition must name or designate the person in possession.[41]

(G) *Demand or Notice and Holding Over.* The making of a demand in conformity with the statute, in case such statute makes a demand, a condition precedent to the maintenance of the action must be averred,[42] and where the action is based upon holding over it must be averred that the tenancy has been determined.[43] Where the statute requires that the holding over shall be without permission of the landlord, the lack of such permission must be averred.[44] An allegation of a forcible detention is unnecessary where not a statutory element of the cause of action,[45] the Landlord and Tenant Acts being different in this respect from the usual forcible entry and detainer statutes,[46] under which an averment of force is necessary.[47]

ises demanded as "a house, lot, and premises, of which Bernard Walker is now in possession, known as 'No. 155 West Broad street,' situated in the city of Burlington, in the county of Burlington"); Newing *v.* Stilwell, 67 N. J. L. 96, 50 Atl. 493 (sustaining a description of the premises as "the westerly portion of the building known as 'Newing's Hotel,' situate on Broadway, Longbranch City, in the county of monmouth").

37. Beel *v.* Pierce, 11 Ill. 92 (holding an averment that plaintiff had rented about fifteen acres from a tract of two hundred acres insufficient); Walker *v.* Harper, 33 Mo. 592 (holding, however, that it was not necessary that the description show that the premises were in the ward or township in which the suit was brought).

38. Stanford Land Co. *v.* Steidle, 28 Wash. 72, 68 Pac. 178. And see Emerick *v.* Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217, holding that where the premises are described as in the lease defendants cannot dispute the description.

39. Gerlach *v.* Walsh, 41 Ill. App. 83, holding a description insufficient which described premises as upon the north side of a street running north and south.

40. Spear *v.* Lomax, 42 Ala. 576; Jackson *v.* Adams, Wils. (Ind.) 398.

Matters of which judicial notice will be taken see EVIDENCE, 16 Cyc. 849 *et seq.*

41. Drummond *v.* Fisher, 16 N. Y. Suppl. 867; Hill *v.* Stocking, 6 Hill (N. Y.) 314.

Fictitious names.— Under N. Y. Code Civ. Proc. § 2235, requiring the petition in summary proceedings to "intelligibly" designate the person or persons against whom the proceeding is instituted, and to specify who are principals or tenants, and who are undertenants or assigns, the term "John Doe and Richard Doe, undertenants" is sufficient, although the petition does not aver that the names were fictitious, and used in ignorance of the true names, where the fact that the names were fictitious is stated in the precept, and there is no pretense that the parties interested did not know for whom the precept was intended. Ash *v.* Purnell, 16 Daly (N. Y.) 189, 11 N. Y. Suppl. 54, 19 N. Y. Civ. Proc. 234, 26 Abb. N. Cas. 92.

An affidavit leaving it uncertain whether possession is in the tenant or subtenants is bad. Wiggin *v.* Woodruff, 16 Barb. (N. Y.) 474; Smith *v.* Huestis, Lalor (N. Y.) 236.

42. Lacrabere *v.* Wise, 141 Cal. 554, 75 Pac. 185, (1903) 71 Pac. 175; Waters *v.* Williamson, 59 N. J. L. 337, 36 Atl. 665; Scheifele *v.* Irving, 53 N. J. L. 180, 20 Atl. 1075; Bristed *v.* Harrell, 20 Misc. (N. Y.) 348, 45 N. Y. Suppl. 918; Speigle *v.* McFarland, 25 Leg. Int. (Pa.) 165. But see Spear *v.* Lomax, 42 Ala. 576, holding that an averment that defendants refused "on demand in writing," sufficient, although it was not expressly stated that a demand was made by plaintiff.

A demand of rent must be averred in an action based upon failure to pay rent. Cone *v.* Woodward, 65 Ill. 477; Miles *v.* Orr, (N. J. 1892) 25 Atl. 268; Wolcott *v.* Schenk, 16 How. Pr. (N. Y.) 449; Rogers *v.* Lynds, 14 Wend. (N. Y.) 172.

Manner of service of demand must be averred. Doran *v.* Gillespie, 54 Ill. 366; Beach *v.* McGovern, 41 N. Y. App. Div. 381, 58 N. Y. Suppl. 493; Stuyvesant Real Estate Co. *v.* Sherman, 40 Misc. (N. Y.) 205, 81 N. Y. Suppl. 642; Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509. But see Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111, holding as against a general demurrer that where the fact of service was distinctly alleged the manner need not be averred.

43. Jackson *v.* Adams, Wils. (Ind.) 398.

44. Moore *v.* Smith, 56 N. J. L. 446, 29 Atl. 159 (holding that the averment was unnecessary in proceedings under Pub. Laws (1876), p. 76, § 1 [Rev. p. 576]); Campbell *v.* Mallory, 22 How. Pr. (N. Y.) 183; Prouty *v.* Prouty, 5 How. Pr. (N. Y.) 81, 3 Code Rep. 161.

45. Wheeler *v.* Reitz, 92 Ind. 379; Chambers *v.* Hoover, 3 Wash. Terr. 107, 13 Pac. 466.

46. See, generally, FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1108.

47. Woodman *v.* Ranger, 30 Me. 180. See also FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1156.

(H) *Rent Due.* A complaint based upon a holding over after expiration of the term is not required to state the amount of rent reserved under the lease,[48] nor is it under some statutes where based on non-payment of rent.[49] But where the tenant is entitled to secure an abatement of the proceeding by paying the amount of rent due, the complaint should aver such amount.[50]

(III) *Verification.* The petition or affidavit must be verified as required by statute.[51] The verification as a general rule under the statutes may be before any officer authorized to administer oaths and affirmations.[52] An affidavit that the complaint is true in substance and fact is sufficient.[53] Under some statutes the affidavit may be made by an agent of the landlord.[54] It need not be stated in the warrant that the complaint was under oath.[55]

(IV) *Objections and Waiver.* A defect in form and not in substance cannot be reached by general demurrer.[56] While a jurisdictional defect in the affidavit or petition cannot be waived,[57] other objections may be waived by failure to urge them at the proper time as in other civil proceedings.[58]

48. Odell *v.* Buttrick, 126 Cal. 551, 59 Pac. 133.

49. Lamar *v.* Sheppard, 84 Ga. 561, 10 S. E. 1084.

50. Vaughn *v.* Locke, 27 Mo. 290 (holding that a complaint by a purchaser should state the amount of rent due to himself, and not embrace that which is due to his vendor); Wolff *v.* Shinkle, 4 Mo. App. 197; Clark *v.* Everly, 2 Pa. L. J. Rep. 219.

Demand of less than due.— The statement by a landlord, in a proceeding for restitution of the premises and for rent under the Landlord and Tenant Act, of less than the rent due, will not prevent a recovery, even though rent accruing subsequently is demanded in a separate proceeding. Mooers *v.* Martin, 23 Mo. App. 654.

51. Coatsworth *v.* Thompson, 5 N. Y. St. 809.

Under the New York statute, it must be verified in the manner required of a petition in the supreme court (Coatsworth *v.* Thompson, 5 N. Y. St. 809; Marchand *v.* Haber, 16 Misc. 319, 37 N. Y. Suppl. 950, holding that a petition defectively verified, in that the notary's name was by oversight not signed to the jurat, did not give a justice jurisdiction; Williams *v.* Culhone, 3 N. Y. Suppl. 241, holding that where the verification was taken without the state, the affidavit of the authority of the officer taking such verification must be attached as in the case of other affidavits); but such provision has reference only to the form of the verification, and not to the party verifying it (Stuyvesant Real Estate Co. *v.* Sherman, 40 Misc. 205, 81 N. Y. Suppl. 642, holding that in proceedings by a domestic corporation, the verification might be by an agent of the corporation).

Omission of date may be disregarded as a formal error, where the jurat is otherwise proper. Griffin *v.* Barton, 20 N. Y. App. Div. 512, 47 N. Y. Suppl. 121.

Omission of signature.— Where the names of the petitioners were at the end of the verification, but were not signed to the petition itself, it has been held that such was not a jurisdictional defect. Chadwick *v.* Spargur, 1 N. Y. Civ. Proc. 422.

Sufficiency of venue.— Where the petition is headed "State of New York, City and County of New York," and is verified before a commissioner of deeds for New York county, it is sufficient. O'Callaghan *v.* Hennessey, 32 Misc. (N. Y.) 760, 65 N. Y. Suppl. 670.

52. Chambers *v.* Shivery, 6 Pa. Dist. 101. (holding that a statute requiring complaint to be made before a justice of the peace did not prevent the verification being made before a notary public); Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697 [*affirming* 6 Mackey (D. C.) 586] (holding that where the statute required that oath to be made by the complainant in person, and did not require it in terms to be administered by the justice, or within the District, the oath might be taken anywhere before a proper officer). And see Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646, holding that it was not essential that the affidavit be made before a justice of the peace of the district in which the land lay.

53. Snyder *v.* Parker, 75 Mo. App. 529.

54. People *v.* Johnson, 1 Thomps. & C. (N. Y.) 578 (holding that the fact of agency must be affirmatively stated); Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103.

55. Lithgow *v.* Moody, 35 Me. 214.

56. Schroeder *v.* Tomlinson, 70 Conn. 348, 39 Atl. 484; holding that in an action of summary process against a tenant for life, under a lease in which she covenanted not to sublet without the written permission of the lessor, where the complaint contained no allegation that the underletting complained of was without plaintiff's written consent, such defect being one of form and not of substance could not be reached by a demurrer to a reply.

57. Wands *v.* Robarge, 24 Misc. (N. Y.) 273, 53 N. Y. Suppl. 700, such as failure to verify the petition or to describe the premises.

58. Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258 (holding that objections to the complaint for failure to allege a holding over without leave cannot be first urged at the trial); Geheebe *v.* Stanby, 1 La. Ann. 17 (holding that where, in an answer to an action by the members of a partnership to re-

b. Plea, Answer, or Counter-Affidavit — (I) *Time to Plead.* A comparatively brief time is usually given defendant in which to answer, the matter being regulated by statute.[59]

(II) *Form and Contents.* In the absence of contrary statutory provisions, defendant's pleadings in summary proceedings are governed by the rules applicable to pleadings in civil cases generally,[60] and, where the proceeding is brought in an inferior court, by the rules particularly applicable to such proceedings.[61] A general denial is as a rule sufficient;[62] and under some statutes is the only answer that may be interposed, except a denial of the specific allegations of the petition.[63] But a mere general denial will not overcome a fact which is admitted by clear and necessary inference from other facts expressly stated.[64] In addition

cover possession of property retained by defendant after the expiration of his lease, the latter admits that he leased the premises of plaintiffs as set forth in their petition, it is a waiver of the right to take advantage of any variance between the names of the persons stated in the petition as composing the partnership and those stated in the lease); Gibbens *v.* Thompson, 21 Minn. 398 (holding that a complaint defective by reason of an omission to state the place, city, or county, wherein certain described premises are situate, is cured by the failure of defendant seasonably to take the proper objection, and by his putting in an answer supplying such omission, setting up new matter, and going to trial upon the merits); Norsworthy *v.* Bryan, 33 Barb. (N. Y.) 153 (holding that where the affidavit to remove a tenant stated that the "estate of A. B." was landlord, the tenant could not, where there was no denial, afterward take the objection that an estate could not be an actor); Bliss *v.* Caryell, 28 Misc. (N. Y.) 162, 59 N. Y. Suppl. 13 (holding that an alteration in the verification of the petition made before trial is waived by going to trial without objection).

59. See Pausch *v.* Guerrard, 67 Ga. 319 (holding that the act of 1878, allowing three days for preparing a counter-affidavit and bond in proceedings to dispossess, did not repeal the former law providing for immediate dispossession of those holding over in Savannah, which the courts had construed to mean within twenty-four hours, but requires three days' notice); Godchaux *v.* Baumann, 44 La. Ann. 253, 10 So. 674.

On adjournment.— Under N. Y. Code Civ. Proc. §§ 2244, 2248, 2249, where no judge is present when the precept is returned, the tenant is not required to appear and file an answer, but the cause may be adjourned by the clerk before issue joined and the tenant allowed to file his answer at the adjourned day when the judge is present. Deutermann *v.* Wilson, 14 Daly (N. Y.) 563, 3 N. Y. Suppl. 113, 15 N. Y. Civ. Proc. 411.

An imparlance will not be granted on a summary process as a matter of right. Strange *v.* Evans, 2 Bay (S. C.) 327.

60. See Pleading.

Negative pregnant.— An allegation in a complaint that a demand of rent was made on a certain day is sufficiently placed in issue by an averment that the demand was not made on that day as alleged. Hoopes *v.* Meyer, 1 Nev. 433.

61. Van Deventer *v.* Foster, 87 N. Y. App. Div. 62, 83 N. Y. Suppl. 1067. See, generally, Justices of the Peace, *ante*, p. 555 *et seq.*

In actions brought in the circuit court under the Indiana statutes, all defenses are available without pleading except such as must be pleaded in civil actions before justices of the peace. Ward *v.* Pittsburgh, etc., R. Co., 25 Ind. App. 405, 58 N. E. 264.

62. Henderson *v.* Allen, 23 Cal. 519; People *v.* Coles, 42 Barb. (N. Y.) 96, holding that an affidavit of the tenant denying generally each and every allegation in the landlord's affidavit is sufficient.

The existence of a lease is denied by a general denial. Garrie *v.* Schmidt, 25 Misc. (N. Y.) 753, 55 N. Y. Suppl. 703, holding that an answer in summary proceedings containing a general denial, but setting up the lease as a part of a separate defense, is not as a matter of pleading an admission of the existence of the lease, so as to relieve the landlord from proof thereof.

A denial of a demand of rent which is as broad as the allegation of the demand is sufficient. McGlynn *v.* Moore, 25 Cal. 384.

Plea of non-tenure.— A plea that respondent "is not in possession of the premises demanded" does not amount to a plea of non-tenure at the time the complaint was filed and notice served, nor to a disclaimer, and is bad on general demurrer. Davis *v.* Alden, 12 Cush. (Mass.) 323.

63. Barnum *v.* Fitzpatrick, 18 N. Y. Suppl. 951; Barnum *v.* Fitzpatrick, 16 N. Y. Suppl. 934 [*reversing* 27 Abb. N. Cas. 334].

64. Malick *v.* Kellogg, 118 Wis. 405, 95 N. W. 372, holding that an allegation that no rent was due, in an answer to an action based on non-payment of rent, was not a denial of possession, an allegation of the making of a lease being admitted.

A proposed amended answer showing how defendant was induced to sign the lease, even though it be deemed evidence in the case, is not an admission of the relation of landlord and tenant. Menominee River Lumber Co. *v.* Philbrook, 78 Wis. 142, 47 N. W. 188.

An admission of the execution of a conveyance is an admission of the title of plaintiff. Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536.

to a general denial, defendant may also set forth the facts upon which his defense is based;[65] and when such facts are the basis of an affirmative defense they must be set out.[66] In some jurisdictions questions of title must be raised by special plea.[67] An objection of *res adjudicata* must be raised by plea or answer.[68] Under some statutes defendant joins issue upon plaintiff's affidavit by a counter-affidavit.[69] And where the counter-affidavit is imperfect, no issue is formed upon which a verdict may be taken.[70] It must deny the essential allegations of the affidavit;[71] but it is sufficient if it follow a statute prescribing what it shall contain.[72]

(III) *VERIFICATION.* The answer or affidavit must be verified as required by statute.[73]

(IV) *AMENDMENT.* Under the general rule by which great precision of pleading is not required in inferior courts, defendant may amend an answer which violates a technical rule but is not misleading;[74] but a new and independent defense cannot be set up by amendment when known when the original pleading was interposed and no excuse for the failure to assert it is offered.[75]

c. Counter-Claim. A counter-claim when permitted to be interposed[76] must

65. People *v.* Howlett, 76 N. Y. 574; *In re* Wright, 16 N. Y. Suppl. 808, execution of new lease.

66. See cases cited *infra*, this note.

A plea of tender must show full compliance with the statute authorizing such a defense. Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760, holding a plea insufficient which failed to allege that tenant had offered to pay interest, or that he had the money in court.

Facts entitling defendant to an extension of his term under the provisions of the lease should be specifically pleaded. See O'Brien *v.* Jones, 44 Cal. 193.

A plea setting up a title adverse to plaintiff is insufficient without an averment that defendant has surrendered possession as held under the lease. Howard *v.* Jones, 123 Ala. 488, 26 So. 129.

Termination of landlord's title.— The statement that a third person had a month previously sued out a similar warrant against defendant for the same premises, and that plaintiff in the present proceedings had said to affiant in a conversation that he had sold the land to such person, is in the absence of any allegation that defendant held under such third person or any denial of his tenancy under plaintiff, properly struck from a counter-affidavit. Werner *v.* Footman, 54 Ga. 128. A plea that since the demise the premises had passed by sheriff's sale to a third person, to whom defendant had attorned, is fatally defective in not setting out that the sale was under a judgment against the landlord and passed his estate, since otherwise it did not appear that an adverse title in a stranger was pleaded. Heritage *v.* Wilfong, 58 Pa. St. 137. If a tenant claims the premises by contract with his landlord since the commencement of the lease, he must set out either a conveyance executed or such an equitable right to one as will sustain a bill for a specific performance in a court of chancery. Debozear *v.* Butler, 2 Grant (Pa.) 417. See Douglas *v.* Dakin, 46 Cal. 49, holding that an answer which averred that a person not a party to the suit had formerly brought an action to quiet title to the demanded premises, and that such person was at the time in actual possession of the premises, claiming title in fee, was not ambiguous or uncertain.

67. Thorndike *v.* Norris, 24 N. H. 454.

Estoppel to deny title see *supra*, III, G.

68. Fritztuskie *v.* Wauroski, 83 N. Y. App. Div. 150, 82 N. Y. Suppl. 543, holding that under Code Civ. Proc. § 2244, providing that in summary dispossession proceedings the person in possession may file with the judge who issued the process, or with the clerk of the court, a written answer setting forth matter constituting a legal or equitable defense or counter-claim, an objection of *res adjudicata* could not be raised by motion to dismiss. See JUDGMENTS, 23 Cyc. 1525 text and note 36.

69. Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103.

70. Lockett *v.* Usry, 28 Ga. 345.

71. Mothershead *v.* De Give, 82 Ga. 193, 8 S. E. 62.

72. Moody *v.* Ronaldson, 38 Ga. 652, so holding in a case where proceedings were instituted by the administrator of the deceased owner.

73. Cherry *v.* Foley, 16 N. Y. Suppl. 853 (an answer which was verified by defendant in the following words: "J. F., sworn, says, that he is the defendant herein, and that he knows the foregoing answer to be true," was insufficient, there being nothing to indicate that affiant intended to swear that the answer was true, to his own knowledge); Yuelin *v.* Meade, 1 N. Y. Civ. Proc. 446.

74. Van Deventer *v.* Foster, 87 N. Y. App. Div. 62, 83 N. Y. Suppl. 1067. But see Lockett *v.* Usry, 28 Ga. 345, holding that an affidavit that the tenant does not hold under one cannot be amended to show that he does not hold under two joint owners.

75. Mothershead *v.* De Give, 82 Ga. 193, 8 S. E. 62.

76. See *supra*, X, C, 8.

contain a statement of facts sufficient to constitute a cause of action on the part of defendant against plaintiff.[77]

d. Further Pleadings. A replication setting up a common-law demand for rent to work a forfeiture must state at what time of day and where on the premises the demand was made.[78] An entry and taking possession of the premises by plaintiff pending the action, it has been held, must be pleaded *puis darrein continuance*.[79]

e. Judgment on Pleadings. It is held that as in other cases a judgment may be ordered on the pleadings in unlawful detainer.[80]

18. Issues, Proof, and Variance — a. Matters Which Must Be Proved. Plaintiff as in other actions is bound to prove the facts establishing his right to a recovery,[81] except in so far as the necessity for such proof has been removed by the admissions of defendant,[82] and conversely the same rule is applicable to matters of

77. Flegenheimer *v.* Dreyer, 72 N. Y. App. Div. 589, 76 N. Y. Suppl. 573. See, generally, Recoupment, Set-Off, and Counter-Claim.

78. McQuesten *v.* Morgan, 34 N. H. 400.

79. Hayden *v.* Ahearn, 9 Gray (Mass.) 438.

80. Norton *v.* Beckman, 53 Minn. 456, 55 N. W. 603.

81. *Alabama.*— Rainey *v.* Capps, 22 Ala. 288.

California.— Reed *v.* Grant, 4 Cal. 176, fact of holding over.

Illinois.— Murphy *v.* Dwyer, 11 Ill. App. 246, holding over.

Kentucky.— Jones *v.* Overton, 4 Bibb 334, holding that where the lessee was to make repairs, and the lessor was, at his election, to pay for the repairs or allow the lease to continue until the rent reimbursed the repairs, the lessor was bound to show that the rent equaled the repairs or that he had tendered the difference.

Minnesota.—Waggoner *v.* Preston, 83 Minn. 336, 86 N. W. 335, service of notice.

Missouri.— Elliott *v.* Abell, 39 Mo. App. 346, holding that where in an action of forcible entry and detainer, plaintiff proceeded on the ground that defendant was put in possession of the land sued for as tenant of plaintiff's immediate grantor, for a definite term, and that defendant was holding over after the expiration of such term, it was for plaintiff to show that, at the time of the conveyance to him, defendant was in possession of the land as such tenant; and a recovery for a tract including land not shown to have been so held by defendant, although he was in possession of the whole of it, could not be sustained.

New York.— Brunnings *v.* Bittner, 27 Misc. 798, 58 N. Y. Suppl. 364; Brien *v.* Romano, 27 Misc. 225, 57 N. Y. Suppl. 750 (holding that where the petition in summary proceedings sets forth the service of the statutory notice to terminate the tenancy, and the answer is a general denial except of the landlord's ownership, a final order for the landlord is reversible, where there is no evidence of the service of the notice); Brill *v.* Norkett, 84 N. Y. Suppl. 142 (holding that where the allegation of the petition that a certain amount of rent was due was denied by a verified answer, judgment for plaintiff, without any evidence that any rent was due, was erroneous).

Tennessee.— Levett *v.* Bickford, 8 Humphr. 614, rent in arrear.

Proof of part.— If any portion of the rent is shown to be due, the landlord is entitled to a final order in his favor. Barnum *v.* Fitzpatrick, 18 N. Y. Suppl. 951; Barnum *v.* Fitzpatrick, 27 Abb. N. Cas. (N. Y.) 334 [*reversed* in 16 N. Y. Suppl. 934]. And see Jarvis *v.* Driggs, 69 N. Y. 143. Where proceedings were based on both the non-payment of rent and the non-payment of taxes, proof of the non-payment of rent sustains an order in favor of the landlord. Peabody *v.* Long Acre Square Bldg. Co., 47 Misc. (N. Y.) 629, 94 N. Y. Suppl. 507.

Agreement to vacate.— Where a lease for a fixed period is established plaintiff need not prove, in addition, an agreement to vacate the premises. Lautman *v.* Miller, 158 Ind. 382, 63 N. E. 761.

Execution of the lease by the landlord as well as the tenant need not be proved. Gray *v.* Nesbet, 2 A. K. Marsh. (Ky.) 35.

Offer of lease in evidence.— In unlawful detainer, an answer that the defendant occupies, etc., under a written lease from plaintiff for a term unexpired, will not oblige plaintiff, relying in rebuttal on a breach of a clause therein, to produce the lease, if he has already made a *prima facie* case. Zink *v.* Wilson, 3 W. Va. 503.

Proof of the value of the land during its detention is unnecessary. Barnett *v.* Feary, 101 Ind. 95.

82. *Minnesota.*— Chandler *v.* Kent, 8 Minn. 536, holding that where the sworn complaint alleges a notice to quit, and refusal, which is not denied, proof of such facts is not jurisdictional.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, written demand for possession prior to the action, and of the tenant's refusal to deliver possession.

New Jersey.— Hankins *v.* Maul, 63 N. J. L. 153, 43 Atl. 434, holding that where a tenant does not require proof of the jurisdictional facts set out in the landlord's affidavit, a motion for nonsuit because of a lack of such proof is properly refused, and judgment given for the landlord.

defense.[83] Plaintiff is not, however, bound to prove his title,[84] for the tenant will not be permitted to dispute his landlord's title,[85] unless the lease was procured by fraud, artifice, or mistake.[86]

b. Variance. As in other actions the evidence must be confined to the issues presented by the pleadings,[87] and there can be no recovery upon proof of other grounds of action without proof of those alleged in the complaint or affidavit.[88]

New York.— Jennings *v.* McCarthy, 16 N. Y. Suppl. 161, demand for possession.

South Carolina.— Keller *v.* Pagan, 54 S. C. 255, 32 S. E. 353, holding that where a landlord seeking before a magistrate to eject his tenant alleges a demand for possession and refusal by the tenant, and the allegation is not denied, a judgment ejecting the tenant is proper, although the testimony does not show that the landlord entered and demanded possession, nor that the tenant refused a demand.

Admission connected with general denial.— If an answer contains a general denial, the allegation in a further separate defense that petitioner is the owner does not relieve petitioner from the necessity of proving the elements essential to a recovery. Fox *v.* Held, 24 Misc. (N. Y.) 184, 52 N. Y. Suppl. 724.

83. Drummond *v.* Fisher, 18 N. Y. Suppl. 142, holding that an allegation in a petition in summary proceedings for the recovery of leased premises that certain persons hold over "as assignees or undertenants" is not an admission by the landlord of the fact of an assignment of the lease, without proof of which defendants could not succeed in their defense.

84. Thorn *v.* Reed, 1 Ark. 480; Stover *v.* Davis, 57 W. Va. 196, 49 S. E. 1023; Voss *v.* King, 33 W. Va. 236, 10 S. E. 402, 38 W. Va. 607, 18 S. E. 762.

85. Estoppel to deny landlord's title see *supra*, III, G.

86. Barkman *v.* Barkman, 107 Ill. App. 332.

87. Perine *v.* Teague, 66 Cal. 446, 6 Pac. 84 (holding that parol evidence is not admissible to prove the renewal of a written lease where the pleadings do not raise such issue); Klopfer *v.* Keller, 1 Colo. 410 (holding that evidence tending to disprove the facts stated in the complaint was admissible, although this evidence might also tend to prove another case on which plaintiff might, if he had so declared, maintain his action).

Under a general denial, however, defendant may prove independent facts inconsistent with those stated in the complaint and is not confined to mere negative proof. Hamline *v.* Engle, 14 Ind. App. 885, 42 N. E. 760, 43 N. E. 463 (holding that in an action for wrongfully holding over, defendant might show that there had been an extension of the old lease, or that he was in possession as tenant by virtue of some new contract with the landlord); McNatt *v.* Grange Hall Assoc., 2 Ind. App. 341, 27 N. E. 325 (holding that an alteration of a provision in a lease requiring payment in advance may be proved without being specially pleaded); Allison *v.* Thompson, 1 Litt. (Ky.) 31 (holding evidence that the tenant had, after the expiration of his lease, taken another term from one whom plaintiff had authorized to lease, proper); Durant Land Imp. Co. *v.* East River Electric Light Co., 15 Daly (N. Y.) 337, 6 N. Y. Suppl. 659, 17 N. Y. Civ. Proc. 224 (holding that the lessee could claim the benefit of a clause in the lease providing for an apportionment of rent for what time he might be deprived of the use and enjoyment of the demised premises, owing to repairs made by the lessor). But see Barnum *v.* Keeler, 33 Conn. 209, holding that defendant cannot introduce evidence of a breach of a covenant of the lease on the part of the complainant by which defendant has sustained damages greater than the amount of the rent claimed.

Proof of demand.— In summary proceedings, where the petition alleged a "demand," a personal demand could be established. Engel, etc., Co. *v.* Henry Elias Brewing Co., 37 Misc. (N. Y.) 480, 75 N. Y. Suppl. 1080 [*reversing* 74 N. Y. Suppl. 934].

Immaterial variance.—Where the complaint for possession of premises leased by the month, alleged termination of the lease, June 30, and that notice to quit on August 20 was served on July 24, but it was proved on trial that the lease expired July 31, and that the notice was served on August 2, the variance was immaterial. Miller *v.* Lampson, 66 Conn. 432, 34 Atl. 79. A deed is not inadmissible because it describes the property in different terms than the affidavit upon which the warrant of eviction was issued; it being shown by other evidence that the two descriptions embrace the same property. Thompson *v.* Chapman, 57 Ga. 16. A variance, as respects the time of the beginning of the tenancy, between the complaint and the demand, is immaterial. Alexander *v.* Wescott, 37 Mo. 103. In an action based on a lease between "John Sunderland" and defendant, such lease was admissible in evidence, although plaintiff in the action was "John P. Sunderland," on proof by one subscribing witness that the lease was signed by the person called in the suit "John P. Sunderland." Youngs *v.* Sunderland, 15 N. J. L. 32. Where, in summary proceedings to recover land, a person claiming to be in possession intervened, the fact that he described himself in his answer as undertenant, when in fact he claimed under a new lease to himself, was immaterial. Kiernan *v.* Cashin, 92 N. Y. Suppl. 255.

88. Chandler *v.* Kent, 8 Minn. 524 (holding that where plaintiff declared upon a lease of the premises by him to defendant, evidence of a lease of all plaintiff's interest in the premises is not sufficient to sustain the ac-

It is essential that the nature of the tenancy should be proved as averred in the complaint or petition.[89]

19. Evidence — a. Presumptions and Burden of Proof. The burden of proving a controverted right of recovery is in general upon plaintiff as in other civil cases;[90] for example, of proving a proper service of a statutory notice where denied,[91] or the breach of a condition relied upon to support the action.[92] Defendant has the burden of establishing an affirmative defense.[93] In an action by the owner against one in possession of leased premises the latter will be presumed to be the assignee of the lessee unless the contrary is shown.[94] The presumption in the absence of evidence to the contrary is that a holding over by the tenant after the expiration of the term is wrongful.[95]

b. Admissibility. Evidence of title is not as a general rule admissible in summary proceedings.[96] This rule, however, does not exclude evidence tending to establish[97] or contradict[98] the relationship of landlord and tenant, or evidence tending to establish the complainant's right to possession.[99] By statute it is

tion); Ver Steeg *v.* Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346; Hoffman *v.* Van Allen, 3 Misc. (N. Y.) 99, 22 N. Y. Suppl. 369; Bent *v.* Renken, 86 N. Y. Suppl. 110; Willis *v.* Roan, (Tex. Civ. App. 1900) 58 S. W. 966.

89. Snedeker *v.* Quick, 12 N. J. L. 129.

90. See, generally, Evidence, 16 Cyc. 926. And see *In re* O'Connell, 1 Can. L. J. N. S. 163. But see *Ex p.* Bell, 17 N. Brunsw. 355, holding that in summary ejectment under 30 Vict. c. 10, § 25, the burden was on tenant to show cause why he should not deliver possession.

91. Tolman *v.* Heading, 11 N. Y. App. Div. 264, 42 N. Y. Suppl. 217; Posson *v.* Dean, 8 N. Y. Civ. Proc. 177.

92. Leduke *v.* Barnett, 47 Mich. 158, 10 N. W. 182, holding that where a lease contains a condition that the lessee shall not assign or release without the written consent of the lessor, and authorizes the lessor to reënter for violation of the covenant, it is incumbent upon the lessor to show that such assignment or reletting was without his consent.

93. Streeter *v.* Ilsley, 147 Mass. 141, 16 N. E. 776 (showing by tenants at will in possession in action by lessee that landlord's title is inalienable); Alt *v.* Hobbs, 62 Mo. App. 669 (holding that where part of the demised premises is in the possession of tenants of the lessee, the burden of proof is on the lessee to show what part is thus held by his subtenants; and in the absence of such proof the landlord may, as against the lessee, recover a judgment for the entire premises); Jefferson *v.* Ummelmann, 56 Mo. App. 440 (agreement for an extension of the tenancy); Weinhandler *v.* Eastern Brewing Co., 46 Misc. (N. Y.) 584, 92 N. Y. Suppl. 792 (alleged new parol lease); Neusberger *v.* Brodejefsky, 31 Misc. (N. Y.) 749, 64 N. Y. Suppl. 131 (proof by under-tenant denying hiring by tenant and expiration of the term); Collender *v.* Smith, 20 Misc. (N. Y.) 612, 45 N. Y. Suppl. 1130 (denying rent in arrear or alleging payment where lease showing rent due has been introduced); Drummond *v.* Fisher, 16 N. Y. Suppl. 867 (consent of lessor to assignment); Dickson *v.* Lehnen, 37 Fed. 319 (representations of the landlord's attorney which are alleged to estop the landlord).

94. Snyder *v.* Parker, 75 Mo. App. 529; Weinhandler *v.* Eastern Brewing Co., 89 N. Y. Suppl. 16 (holding also that there is a presumption of the sufficiency of the assignment); Thompson *v.* Ackerman, 21 Ohio Cir. Ct. 740, 12 Ohio Cir. Dec. 456. And see Shepard *v.* Martin, 31 Mo. 492.

Presumption of assignment: In general see *supra*, IV, B, 2, e. In actions for rent see *supra*, VIII, B, 12, a.

95. Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258.

96. Slaughter *v.* Crouch, 64 S. W. 968, 23 Ky. L. Rep. 1214. See also *supra*, X, C, 1, c.

Estoppel to deny landlord's title see *supra*, III, G.

Where lease has been induced by fraud.— Where a person in possession of land is by fraud induced to believe that another has a better right to it, and to take a lease from him, in an action by the landlord to recover possession, the court may order the tenant first to prove the fraud before he produces evidence of his title before the jury, or he may allow him to show title first, subject to the necessity of making the evidence competent by proof of the fraud. Alderson *v.* Miller, 15 Gratt. (Va.) 279.

97. Patterson *v.* Folmar, 125 Ala. 130, 28 So. 450; Cummings *v.* Kilpatrick, 23 Miss. 106.

98. Giddens *v.* Bolling, 92 Ala. 586, 9 So. 274; Simon Newman Co. *v.* Lassing, 141 Cal. 174, 74 Pac. 761; Rodgers *v.* Palmer, 33 Conn. 155; People *v.* Lockwood, 3 Hun (N. Y.) 304, 5 Thomps. & C. 526, holding that where the tenancy was denied, if defendant entered into possession under plaintiff she could not avail herself of recitals in plaintiff's deed to defeat plaintiff's title; but, in support of a denial that she had so entered, she might invoke the aid of such recitals, and fortify her denial by other material evidence. See also Diefenderfer *v.* Caffrey, 6 Pa. Cas. 229, 9 Atl. 182.

99. Prichard *v.* Tabor, 104 Ga. 64, 30 S. E. 415; Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337.

sometimes expressly provided that proof may be made of rights under derivative titles from the lessor.[1] The affidavit of the landlord himself has been held under some statutes not to constitute evidence upon the merits.[2] Subject to these considerations summary proceedings are governed by the rules as to the admissibility of evidence applicable to civil actions in general.[3] A notice to quit is competent evidence of the termination of the tenancy,[4] although such notice to quit was unnecessary.[5] As bearing upon the amount of damages recoverable, evidence of the rental value of a building upon the premises is admissible,[6] as is evidence of the price which the land brought at a public renting[7] and other material facts,[8] such as a lease, although it insufficiently describes the premises.[9]

c. Sufficiency. Statutory actions for recovery of possession are governed by the rules as to the weight and sufficiency of evidence applicable to civil actions in general.[10]

1. Lehnen *v.* Dickson, 148 U. S. 71, 13 S. Ct. 481, 37 L. ed. 373 [*affirming* 37 Fed. 319], holding that evidence of the invalidity of a lease under which defendant claims, in an action of unlawful detainer, does not involve an inquiry into the merits of the title, but is a proof of a right under a derivative title within the meaning of 2 Mo. Rev. St. §§ 5, 123.

2. Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103; Fisher *v.* Bailey, 1 Ashm. (Pa.) 209; *In re* O'Connell, 1 Can. L. J. N. S. 163.

3. See EVIDENCE, 16 Cyc. 81.

For example, evidence of the private reasons of the tenant in purchasing furniture is admissible to establish that the lease was for a longer period than alleged by the landlord (Fratcher *v.* Smith, 104 Mich. 537, 62 N. W. 832), as is evidence explanatory of an assignment of a lease, where plaintiff has a right to sue as assignee (Barado-Ghio Real Estate Co. *v.* Heidbrink, 112 Mo. App. 429, 86 S. W. 1109). Evidence of different transactions between the parties in furtherance of an alleged conspiracy to eject defendants is admissible to show that the relation of landlord and tenant did not exist. Schlaich *v.* Blum, 42 Misc. (N. Y.) 225, 85 N. Y. Suppl. 335. Evidence of a lease may be admitted, although plaintiff admits the invalidity of the lease and seeks to recover the possession. Lazarus *v.* Ludwig, 18 Misc. (N. Y.) 474, 41 N. Y. Suppl. 999. Where a payment to the agent of one claiming to be landlord, by the wife of the tenant, was shown, the tenant was entitled to show that he repudiated such payment and notified the agent. Bergman *v.* Roberts, 61 Pa. St. 497.

Use of premises for unlawful purpose.— The record of the tenant's conviction of an offense identical with the provisions of the statute is admissible as corroborating plaintiff's testimony. Stearns *v.* Hemmens, 14 Daly (N. Y.) 501, 1 N. Y. Suppl. 52, 21 Abb. N. Cas. 312. Where the petition, after setting out the facts, alleged that the premises "are now being used and occupied as a bawdy-house and house of assignation for lewd persons," etc., it was error to exclude evidence offered to show that the premises were kept as a bawdy-house continuously for over three months before proceeding was commenced, and limit the proof of what occurred there to two weeks before suit was commenced. Goelet *v.* Lawlor, 16 Misc. (N. Y.) 59, 37 N. Y. Suppl. 691.

Evidence contradictory to immaterial evidence is inadmissible. Ver Steeg *v.* Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346, holding that where defendant testified that the lessor's agent refused to deliver leases which he had executed because of the cancellation of insurance on a building near by owned by the lessor, and the agent testified that he did not refuse to deliver the leases on that account, evidence that there was no difficulty in securing insurance on the neighboring building was irrelevant.

Evidence of mistake in the lease may be received for the purpose of showing that defendant's possession was rightful, although the justice has no jurisdiction to reform the lease. Lloyd *v.* Reynolds, 26 Nebr. 63, 41 N. W. 1072.

Evidence that the lessor made no claim to the premises during the term of the lease is prejudicial as leading the jury to believe that the claim of possession made in the action was in bad faith. McLennan *v.* Grant, 8 Wash. 603, 36 Pac. 682.

4. Reynolds *v.* Gage, 91 Ill. 125, so holding, although the lessee was a tenant at will.

5. Snideman *v.* Snideman, 118 Ind. 162, 20 N. E. 723; Lichty *v.* Clark, 10 Nebr. 472, 6 N. W. 760.

6. Barnett *v.* Feary, 101 Ind. 95.

7. Spear *v.* Lomax, 42 Ala. 576.

8. See Barnett *v.* Feary, 101 Ind. 95, holding that where it was alleged that the tenant had unlawfully detained farm land during the season for seeding wheat, evidence that the land was better adapted to raising wheat than other crops was admissible.

Evidence of the crops which the land produced per acre and their value is admissible as bearing upon the cash rental value, it appearing that it was customary to rent the land on shares. Castell *v.* McNeely, 4 Indian Terr. 1, 64 S. W. 594.

9. Whipple *v.* Shewalter, 91 Ind. 114.

10. See, generally, EVIDENCE, 17 Cyc. 753.

The landlord's title is sufficiently proved by the production of a lease, unless the lease is attacked (Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768), or by proof of a conveyance to the landlord (People *v.*

20. Trial — a. In General. Under some statutes defendant may have a jury trial only upon timely application and the filing of a bond to secure rent and costs,[11] and the court has no power to enlarge the time for the taking of such steps.[12] It has been held that a statute authorizing the justice of the peace to certify a cause in which a verified answer has been filed to the district court for trial does not authorize the county court so to do in a similar case.[13]

b. Adjournment. An adjournment, in the absence of a statute authorizing it, operates as a discontinuance and deprives the justice or the court of further jurisdiction in the cause,[14] unless, it has been held, in a case where the adjournment is

Teed, 48 Barb. (N. Y.) 424, 33 How. Pr. 238). Where in summary proceedings for ejectment before a justice, it was shown that defendant was a tenant of plaintiff's mother, since deceased, and plaintiff simply swore that he owned the property, stating on cross-examination that he had a written conveyance thereof, but not producing it, he was not entitled to judgment. He should have proved the descent or devise of the land, or the conveyance thereof from heirs or devisees. Cronk *v.* Barlow, 4 N. Y. St. 137.

Use of premises for immoral purposes.— In summary proceedings by a landlord to recover the premises on account of their use for immoral purposes, it is sufficient to show such use, and it is not necessary to prove that the tenant had knowledge thereof with the degree of certainty required in criminal or quasi-criminal proceedings. Sullivan *v.* Schatzel, 88 N. Y. Suppl. 352.

Withdrawal of notice.—Where a tenant has received the three months' notice to quit required by an existing lease, and on application to the landlord procures permission to remain in determining whether there was an actual withdrawal of a notice to quit, the jury should consider all the acts and declarations of the landlord, and not merely what he stated at a particular conversation. Brown *v.* Montgomery, 21 Pa. Super. Ct. 262.

A mistake in a lease is not sufficiently established by the evidence of the lessee as to his understanding of these terms. Yosemite Valley, etc., Grove *v.* Barnard, 98 Cal. 199, 32 Pac. 982.

A hiring may be established by proof of payment of rent. People *v.* Teed, 48 Barb. (N. Y.) 424, 33 How. Pr. 238.

Damages.— An award of seventy-five dollars is supported by the evidence that defendant had rented the premises for an annual rental of one hundred and twenty-five dollars. Spann *v.* Torbert, 130 Ala. 541, 30 So. 389.

An agreement to make repairs is not conclusively established by the fact that it is shown that the landlord made such repairs. Mattler *v.* Strangmeier, 1 Ind. App. 556, 27 N. E. 985.

Miscellaneous facts.— For cases in which the evidence has been examined and held sufficient to establish particular facts see Waugh *v.* Ridgeway, 42 Ala. 368 (relation of landlord and tenant); Lacrabere *v.* Wise, (Cal. 1903) 71 Pac. 175 (agreement to pay particular sum as rent); Duffy *v.* Carman, 3 Ind. App. 207, 29 N. E. 454 (relationship of landlord and tenant); Pusey *v.* Presbyterian Hospital, (Nebr. 1903) 97 N. W. 475 (termination of lease); Cummings *v.* Winters, 19 Nebr. 719, 28 N. W. 302 (agreement for extension of term); Hutzel *v.* Draper, 5 Nebr. (Unoff.) 531, 99 N. W. 263 (unlawful detention); Sirey *v.* Braems, 65 N. Y. App. Div. 472, 72 N. Y. Suppl. 472 (that grounds were not included in lease of house); Ward *v.* Burgher, 90 Hun (N. Y.) 540, 35 N. Y. Suppl. 961 (that defendant was an undertenant of lessee); Brown *v.* Sullivan, 1 Misc. (N. Y.) 161, 20 N. Y. Suppl. 634 (execution of lease); Weinhandler *v.* Eastern Brewing Co., 89 N. Y. Suppl. 16 (that defendant was in possession under lease by plaintiff to a third person); O'Connor *v.* Schmitz, 13 N. Y. Suppl. 442 (tenancy and overholding); Supplee *v.* Timothy, 124 Pa. St. 375, 16 Atl. 864 (new contract); Teater *v.* King, 35 Wash. 138, 76 Pac. 688 (knowledge of plaintiff of the existence of a lease for a definite term to defendant); Seattle Operating Co. *v.* Cavanaugh, 6 Wash. 325, 33 Pac. 356 (tenancy under third person and not under plaintiff); Gilbert *v.* Doyle, 24 U. C. C. P. 60 (that the tenant was an overholding tenant and wrongfully held over without any right or color of right).

11. See the statutes of the several states.

Reasonableness of such statutes see Juries, *ante*, p. 178.

Where a bond is rejected as unsatisfactory the court has no power to vacate the decision and continue the case so as to give defendant more time to file a proper bond. Whitaker *v.* Bliss, 23 R. I. 313, 50 Atl. 266.

12. Whitaker *v.* Bliss, 23 R. I. 313, 50 Atl. 266.

13. Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

14. Boller *v.* New York, 40 N. Y. Super. Ct. 523; Kiernan *v.* Reaming, 7 N. Y. Civ. Proc. 311, 2 How. Pr. N. S. 89, so holding where on the return of precept the tenant filed a verified traverse of the return, and moved to dismiss the proceedings, and the justice, after hearing the testimony of the parties as to the service of the precept, instead of rendering his decision on the close of the evidence, adjourned the proceedings for the purpose of decision.

When authorized.— A justice has no power of his own motion to adjourn summary proceedings, except to enable a party to procure his necessary witnesses, pursuant to Code Civ. Proc. § 2248, which contains the only provision for adjournment in such cases

by consent of the parties.[15] Upon a disagreement of the jury resulting in a mistrial the justice is usually authorized under the statutes to adjourn the trial to another day and issue a new venire.[16]

c. Dismissal. Where the tenant denies the alleged tenancy and asserts title in himself, the justice should not dismiss the action on the answer but should try the issue of tenancy,[17] and in case that issue is found in favor of defendant the action should be dismissed.[18] Under statutes by which the warrant of dispossession is brought into court only upon filing of a counter-affidavit the court has no jurisdiction to dismiss the warrant after dismissing the counter-affidavit.[19] Defendant is bound by an executed agreement on the part of plaintiff to dismiss in case defendant will surrender possession.[20]

d. Questions For Jury. Disputed questions of fact are to be determined by the jury where there is a jury trial,[21] under proper instructions from the court,[22] in case the court has authority to instruct the jury.[23] The reasonableness of a notice to quit given to a tenant at sufferance is a question of law where the facts are not in dispute.[24] Under some statutes the question of plaintiff's damages may be submitted to the jury at the same time as the question of his right to recover.[25]

e. Instructions. In summary proceedings where the trial is to a jury the judge may instruct the jury as to questions of law.[26] The instructions as in the case of other civil actions must not be misleading,[27] or assume facts in issue,[28]

(Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311, 2 How. Pr. N. S. 89), and the same rule applies in proceedings under Rev. St. p. 515, § 41 (Boller *v.* New York, 40 N. Y. Super. Ct. 523). See, generally, JUSTICES OF THE PEACE, *ante*, p. 576.

Where no answer has been filed the justice has no power to adjourn the proceedings, but must make a final order and issue a warrant. People *v.* Murray, 21 N. Y. Suppl. 797.

15. Caley *v.* Rogers, 72 Minn. 100, 75 N. W. 114; Brown *v.* New York, 66 N. Y. 385. See, generally, JUSTICES OF THE PEACE, *ante*, p. 581.

16. Frost *v.* Chandler, 54 N. J. L. 128, 22 Atl. 1084. See also *In re* Babcock, 9 Can. L. J. 185; *In re* Woodbury, 19 U. C. Q. B. 597.

17. Foster *v.* Penry, 77 N. C. 160. See also *supra*, X, C, 10.

18. Foster *v.* Penry, 77 N. C. 160.

19. Clark *v.* Lee, 80 Ga. 617, 6 S. E. 170, so holding, although a motion to reinstate the counter-affidavit was pending.

20. Cleve *v.* Mazzoni, 45 S. W. 88, 19 Ky. L. Rep. 2001.

21. *Georgia.*—Kerwin *v.* James, 43 Ga. 397, date of expiration of term.

Missouri.— Gillett *v.* Mathews, 45 Mo. 307 (plaintiff's right to possession); Ish *v.* Chilton, 26 Mo. 256 (unlawful character of defendant's holding).

New York.— Steinhardt *v.* Buel, 1 Misc. 295, 20 N. Y. Suppl. 706 [*reversing* 16 N. Y. Suppl. 153] (renewal of lease); Jennings *v.* McCarthy, 16 N. Y. Suppl. 161 (whether the holding was as servant or as tenant).

North Carolina.— Fayetteville Waterworks Co. *v.* Tillinghast, 119 N. C. 343, 25 S. E. 960, holding the issue, "Is the plaintiff entitled to the possession of the property described in the complaint" properly submitted.

Pennsylvania.— Currier *v.* Grebe, 142 Pa. St. 48, 21 Atl. 755 (service of written notice); Rothermel *v.* Duman, 119 Pa. St. 632, 13 Atl. 509 (whether writing constituted a lease as it purported to be); Gilmer *v.* De Caro, 29 Pa. Co. Ct. 625, 13 Pa. Dist. 173 (knowledge of authority of administratrix to give notice to quit, and also waiver of breach of condition).

Directing verdict.— The justice of a district court of New York city had no power to direct a verdict in a summary proceeding by a landlord against his tenant (George *v.* Trevellyn, 12 Misc. (N. Y.) 153, 33 N. Y. Suppl. 16. And see Horn *v.* Prior, 5 N. Y. Suppl. 955; Blumburg *v.* Briggs, 10 N. Y. St. 242), nor has a justice of the municipal court (Kiernan *v.* Cashin, 92 N. Y. Suppl. 255).

22. See *infra*, X, C, 20, e.

23. See, generally, JUSTICES OF THE PEACE, *ante*, p. 584.

24. Pratt *v.* Farrar, 10 Allen (Mass.) 519.

25. Woodbury *v.* Butler, 67 N. H. 545, 38 Atl. 379. See, generally, *supra*, X, C, 1, d.

26. People *v.* Kelsey, 38 Barb. (N. Y.) 269. See, generally, TRIAL.

Authority of justice of the peace to instruct jury see JUSTICES OF THE PEACE, *ante*, p. 584.

27. Houck *v.* Williams, (Colo. 1905) 81 Pac. 800, holding an instruction, where the lessee had alleged a new lease for a year at the expiration of the original lease, that plaintiff was entitled to recover unless a new agreement had been entered into for a year, was not misleading, although a lessee in possession under a parol license after the expiration of the original lease could not be ousted. And see Brophy *v.* McLaughlin, (Conn. 1902) 52 Atl. 721, sustaining instructions which as a whole stated correct rules, although a portion was unnecessary.

28. Ver Steeg *v.* Becker-Moore Paint Co.,

and should conform to and be limited in their scope by the issues presented by the pleadings.[29]

f. Findings. Landlord and tenant proceedings being summary, every requisite of the statute authorizing them must be substantially complied with,[30] and all of the facts essential to the jurisdiction must be clearly and positively found.[31] The findings must agree with the complaint[32] and must be consistent.[33] A special finding must establish the facts upon which plaintiff was entitled to recover, and no omission in this respect can be supplied by intendment.[34] A special finding as to when plaintiff became entitled to possession is material as showing whether the action was prematurely brought.[35]

g. Verdict. The verdict must conform to mandatory provisions of the statute.[36] It has been held that a verdict which in effect is a general verdict is sufficient.[37] Where the recovery of rent is authorized by the statute, the failure of the verdict to designate money found due as rent or damages is not material when it cannot be misleading.[38] An objection to the sufficiency of a verdict in accordance with the forms submitted to the jury is waived by a failure to object to such form when submitted.[39]

h. New Trial. The usual rules as the grounds for a motion for new trial are applicable to summary proceedings.[40]

21. Judgment — a. Necessity and Sufficiency in General. In the absence of an express provision, judgment in summary proceedings should be entered within a reasonable time after the hearing.[41] It must be such as is authorized by stat-

106 Mo. App. 257, 80 S. W. 346, holding an instruction not to assume that a lease had been delivered.

29. Fernside *v.* Rood, 73 Conn. 83, 46 Atl. 275 (holding under the pleadings it was not error to refuse to instruct that the relation of landlord and tenant did not exist); Tufts *v.* Du Bignon, 61 Ga. 322.

30. Fahnestock *v.* Faustenauer, 5 Serg. & R. (Pa.) 174.

31. Hutchinson *v.* Potter, 11 Pa. St. 472; Fahnestock *v.* Faustenauer, 5 Serg. & R. (Pa.) 174 (holding that the facts should not be found by reference to the venire facias); Thomas *v.* Flamer, 1 Phila. (Pa.) 518; Miller *v.* Frees, 1 Woodw. (Pa.) 409. See also Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973.

Reference to the complaint.— Where the petition sets out the facts, an inquisition reciting that such facts are found to be true is sufficient. McKeon *v.* King, 9 Pa. St. 213.

Termination of the term.— Under the act of March 21, 1772, it is not a sufficient finding that the inquest find a tenancy at will and the notice to quit prior to the commencement of the proceedings. Hohly *v.* German Reformed Soc., 2 Pa. St. 293.

Award of restitution.— It is no objection to the inquest that it assesses damages for the detention but does not award restitution of the premises, the place for that being in the justice's record and not in the inquest. McMillan *v.* Graham, 4 Pa. St. 140.

32. Speigle *v.* McFarland, 1 Walk. (Pa.) 354; Stoever *v.* Miller, 4 Phila. (Pa.) 149, holding that where the demand was to quit or pay rent due Jan. 1, 1860, a finding by the alderman of rent in arrear from Feb. 1, 1860, was error.

33. See Odell *v.* Buttrick, 126 Cal. 551, 59 Pac. 133, holding that a finding that defendant was a tenant was not inconsistent with a finding that he was holding over.

34. Cambridge Lodge, No. 9, K. of P. *v.* Routh, 163 Ind. 1, 71 N. E. 148.

35. Mitchell *v.* Matheson, 23 Wash. 723, 63 Pac. 564.

36. Crow *v.* Cann, 2 Pennew. (Del.) 208, 43 Atl. 839.

37. See Quandt *v.* Smith, 28 Wash. 664, 69 Pac. 369.

38. Hendrick *v.* Cannon, 5 Tex. 248.

39. Quandt *v.* Smith, 28 Wash. 664, 69 Pac. 369. See, generally, Trial.

40. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. 794, holding that exceptions to the overruling of a motion to dismiss a proceeding to dispossess a tenant holding over for alleged defects in the affidavit cannot be made a ground of a motion for new trial. See, generally, New Trial.

Power to grant.— Prior to Laws (1902), c. 580, the municipal court could not set aside a verdict and grant a new trial in summary proceedings. Benoliel *v.* Becker, 24 Misc. (N. Y.) 758, 53 N. Y. Suppl. 859.

41. Gibbens *v.* Thompson, 21 Minn. 398, holding that a delay of two days after submission was not unreasonable.

Necessity of final order.— In a summary proceeding for the removal of a tenant, an entry of "judgment for tenant" by the justice was an insufficient disposition of the proceeding without a final order in the tenant's favor and awarding him the costs of the proceeding, as required by Code Civ. Proc. § 2249; Municipal Court Act, § 1, subd. 12, Laws (1902), p. 1488, c. 580. Gossett *v.* Fox, 90 N. Y. Suppl. 477.

Sufficiency of final order.— An order for possession in summary proceedings is final,

ute,[42] and must accord with the pleadings,[43] the evidence,[44] and the findings,[45] and is usually required to describe the premises with reasonable certainty.[46] In some jurisdictions the judgment must be simply for the delivery of the premises to plaintiff,[47] while in others it may also be for rent or damages.[48] A judgment may be awarded against each of defendants jointly in possession without proof of a joint lease.[49] Under some statutes a judgment may be entered on a bond given to stay a dispossessory warrant at the same time as a judgment for plaintiff for possession.[50] It has been held that justices of the peace exercise general jurisdiction in unlawful detainer proceedings and that their judgments therefor are not void, although erroneous because of improper determination of material facts.[51] The judgment in summary proceedings may be amended under a general statute permitting amendments in the furtherance of justice.[52]

b. Judgment by Default. A judgment may be entered by default.[53]

c. Enforcement — (I) *In General.* Where certiorari has the effect of supersedeas a writ of restitution cannot issue until the expiration of the period for taking the writ of certiorari.[54] A justice other than the one before whom the

within Code Civ. Proc. § 2249, providing for final order, with costs to petitioner, where it awards costs, although it does not specify the amount. Bergholtz *v.* Ithaca St. R. Co., 27 Misc. (N. Y.) 176, 58 N. Y. Suppl. 388.

42. Hickey *v.* Conley, 24 Pa. Super. Ct. 388.

43. State *v.* Pittenger, 37 Wash. 384, 79 Pac. 942, holding that plaintiff cannot have judgment for rent due at the time of the trial, but not due when the complaint was filed and for which no claim was made in the complaint.

Rent accruing after the action has begun may in some jurisdictions be recovered. Nolan *v.* Hentig, 138 Cal. 281, 71 Pac. 440; Keyes *v.* Moy Jin Mun, 136 Cal. 129, 68 Pac. 476; White *v.* Stellwagon, 54 Ind. 186.

Relief not prayed for.— Under some statutes, no form of prayer being required, the judgment for rent and possession may be awarded, although possession alone is prayed. Shields *v.* Stillman, 48 Mo. 82.

44. Texas-Mexican R. Co. *v.* Cahill, (Tex. Civ. App. 1893) 23 S. W. 232, holding that a judgment for possession of a lot was erroneous where the evidence showed that a small fraction of the lot only was leased.

45. Keyes *v.* Moy Jin Mun, 136 Cal. 129, 68 Pac. 476; Sawyer *v.* Van Housen, 39 Mich. 89.

Erroneous grounds.— The fact that valid grounds exist upon which a judgment might be sustained will not validate a judgment which has been rendered upon insufficient grounds. Beranek *v.* Beranek, 113 Wis. 272, 89 N. W. 146.

46. Armstrong *v.* Crilly, 152 Ill. 646, 38 N. E. 936 [*affirming* 51 Ill. App. 504]; Burns *v.* Nash, 23 Ill. App. 552.

47. Hickey *v.* Conley, 24 Pa. Super. Ct. 388; Philadelphia, etc., R. Co. *v.* Thornton, 3 Phila. (Pa.) 257.

Recovery of rent or damages see *supra*, X, C, 1, d.

Action by purchaser.— Where the action is for possession against one who has refused to attorn or pay rent to a purchaser, the judgment should be for possession. Anselm *v.* Groby, 62 Mo. App. 421; Duke *v.* Compton, 49 Mo. App. 304; Green *v.* Sternberg, 15 Mo. App. 32.

48. See *supra*, X, C, 1, d.

49. Butterfield *v.* Kirtley, 114 Iowa 520, 87 N. W. 407.

50. See Latham *v.* Perryman, 77 Ga. 579.

51. Clayton *v.* Hurt, 88 Tex. 595, 32 S. W. 876, where the complaint showed on its face that the lease between the landlord and tenant had not terminated. See also JUSTICES OF THE PEACE, *ante*, p. 589 *et seq.*

Conclusiveness of judgments in general see JUDGMENTS, 23 Cyc. 1338.

Judgment as bar see JUDGMENTS, 23 Cyc. 1119.

Persons concluded by judgment see JUDGMENTS, 23 Cyc. 1261.

52. Stelle *v.* Creamer, 69 N. Y. App. Div. 296, 74 N. Y. Suppl. 669, holding that a final order containing an erroneous finding as to the amount of rent due should be amended so as to make the amount recited in the order conform to the amount shown by the evidence.

Opening default.— In order to show manifest injustice, an appellant must show that a valid defense exists to the petitioner's demand, and a mere affidavit containing no allegations of facts controverting the material averments of the petition is insufficient. Mullane *v.* Roberge, 21 Misc. (N. Y.) 342, 47 N. Y. Suppl. 155.

53. People *v.* Murray, 21 N. Y. Suppl. 797. A consent judgment entered on the appearance of one member of a firm properly served in dispossession proceedings against the firm cannot be vacated as a default judgment. Maneely *v.* Mayers, 43 Misc. (N. Y.) 380, 87 N. Y. Suppl. 471. Prior to Laws (1902), p. 1562, c. 580, the municipal court of New York city had no power to open a default taken in summary proceedings. Boyd *v.* Milone, 24 Misc. (N. Y.) 734, 53 N. Y. Suppl. 785.

54. Conley *v.* Hickey, 1 Just. L. Rep. (Pa.) 4; Connelly *v.* Arundell, 6 Phila. (Pa.) 38.

Warrant under Small Tenements Recovery Act.— In proceedings under the Small Tenements Recovery Act (1838), the magistrate

precept was returnable has no jurisdiction to issue a warrant for possession.[55] Where defendant is entitled to pay the rent and costs due and save his possession, the amount should be indorsed on the writ of possession.[56] The amount of rent found must not include rent accruing after the notice.[57] A warrant is not affected by an erroneous recital where all the essentials of a valid warrant remain after it is rejected.[58]

(II) *Execution of Writ or Warrant.* A writ of possession authorizes the officer to remove defendant and all those whose rights on the premises are dependent upon him, or who are in without right,[59] and he is bound to do so.[60] Where a writ of possession has not been fully executed plaintiff may have an alias writ,[61] the judgment not being satisfied until the writ has been fully executed.[62] To constitute a full execution of the writ, both defendant and his personal property must have been removed from the premises, and the real estate given to plaintiff, unless the removal of the personal property was in some way waived by defendant.[63]

(III) *Injunction or Stay.* While the enforcement of a judgment in summary proceedings may be enjoined in a proper case,[64] an injunction will not issue

has no power to make an order for a warrant to issue, and suspend it for ten days, with an intimation that if the tenant did not go out within the ten days the warrant would issue, as the act provides that the warrant cannot be enforced within less than twenty-one days from its date. Reg. *v.* Hopkins, 64 J. P. 454.

55. Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311, 2 How. Pr. N. S. 89.

56. McCarthy *v.* Sykes, 7 Pa. Dist. 243.

57. McCarthy *v.* Sykes, 7 Pa. Dist. 243.

58. Babin *v.* Ensley, 14 N. Y. App. Div. 548, 43 N. Y. Suppl. 849.

59. Miller *v.* White, 80 Ill. 580; Ennis *v.* Lamb, 10 Ill. App. 447; Danforth *v.* Stratton, 77 Me. 200. But *compare* Colt *v.* Eves, 12 Conn. 243 (holding that the officer was protected by the writ only as to parties and those in privity); McKenzie *v.* Wiggins, 2 Ch. Chamb. (U. C.) 391 (holding that a writ may only issue against a party).

Sickness of tenant is not ground for delay. Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388.

60. The test is that plaintiff must be so established in his possession by the officer that any person entering upon him *se invito* will be indictable for a forcible entry. Bergen County Union Tp. *v.* Bayliss, 40 N. J. L. 60.

61. Dieckman *v.* Weirich, 73 S. W. 1119, 24 Ky. L. Rep. 2340.

In case of false return.— The municipal court of Minneapolis, under Sp. Laws (1874), c. 141, giving it the powers of a court of record, has power to set aside a false return of a writ of restitution, and to issue an alias writ. Suchaneck *v.* Smith, 53 Minn. 96, 54 N. W. 932.

62. Dieckman *v.* Weirich, 73 S. W. 1119, 24 Ky. L. Rep. 2340.

63. Lee Chuck *v.* Quan Wo Chong, 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50. But see Bergen County Union Tp. *v.* Bayliss, 40 N. J. L. 60, holding that an officer executing a writ of possession is not bound to remove the tenant's goods but may do so as agent of plaintiff.

Reasonable care must be exercised by an officer who executes a writ of restitution in removing the tenant's goods, and if the tenant refuses to take them as they are removed the officer must exercise the same care in storing them. Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388. But see Conway *v.* Kennedy, 2 N. Y. City Ct. 309, holding that where a marshal under a warrant in summary proceedings puts goods out of the premises on the public sidewalk, the landlord is not responsible for what afterwards becomes of them.

State of the weather.— A constable, in executing a warrant of dispossession, is not bound to delay on account of rainy weather, by which the goods will be injured in removal. Higenbothem *v.* Lowenbein, 28 How. Pr. (N. Y.) 221.

64. Griffith *v.* Brown, 3 Rob. (N. Y.) 627, 28 How. Pr. 4; Welz *v.* Niles, 3 Daly (N. Y.) 172 (holding that where the warrant is void for non-conformity with the statute, and the party in whose favor it is issued is irresponsible, execution of the warrant will be enjoined); O'Rourke *v.* Henry Prouse Cooper Co., 11 N. Y. Civ. Proc. 321; Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311, 2 How. Pr. N. S. 89 (where the warrant was granted by a justice without jurisdiction).

Injunction against proceedings in general see *supra*, X, C, 16.

In New York an injunction will be granted after final order only in cases where it would be granted to stay execution of a final judgment in ejectment. Knox *v.* McDonald, 25 Hun 268 (holding that it must be shown either that the judgment is oppressively used, that plaintiff has ceased to own the premises, that defendant since the entry of the judgment has acquired an interest that should be protected, or that the judgment was obtained by fraud and collusion); Jessurun *v.* Mackie, 24 Hun 624 (holding that an injunction would not lie because the order was entered against the minor without appointment of a guardian *ad litem*); Broadwell *v.* Holcomb, 65 How. Pr. 502.

upon grounds that are available on appeal,[65] or in the proceedings themselves,[66] or where there is a remedy at law.[67] Under some statutes execution may be stayed only in cases specially provided for;[68] and a statute authorizing the stay of issuance of a warrant does not authorize a stay of its execution when issued.[69] An injunction against further proceedings upon an appeal from the judgment of a justice will not prevent the issuance of a writ of restitution where a supersedeas bond has not been given.[70]

d. Satisfaction and Discharge. A subsequent letting of the premises to defendant amounts to a satisfaction of the judgment.[71] A receipt of past-due rent[72] or of rent accruing pending an appeal[73] does not have such effect, however.

22. Review — a. Appeal and Error — (i) *Right.* No appeal will lie from a judgment or decision in a dispossession proceeding unless expressly provided for by statute,[74] but such provision is usually made.[75] A writ of error it would seem

65. Flanneken *v.* Wright, 64 Misc. 217, 1 So. 157.

66. Leonard *v.* McCool, 3 Strobh. Eq. (S. C.) 44.

67. Broadwell *v.* Holcomb, 65 How. Pr. (N. Y.) 502.

68. Schenck *v.* Prame, 63 How. Pr. (N. Y.) 165.

69. Maneely *v.* Mayers, 43 Misc. (N. Y.) 380, 87 N. Y. Suppl. 471.

70. Robbins *v.* Battle House Co., 74 Ala. 499.

71. Barney *v.* Cain, 37 Ark. 127. But *compare* Wright *v.* Johnson, 2 U. C. Q. B. 273, where after the jury found in favor of the landlord the court refused to restore the tenant to possession on the ground that the agent of the landlord had received a month's rent after the verdict.

72. Patterson *v.* Graham, 140 Ill. 531, 30 N. E. 460 [*affirming* 40 Ill. App. 399] (holding that plaintiff, by accepting a key of the premises and a portion of the rent due from defendant in lieu of an additional appeal-bond, does not release his cause of action); Carter Pub. Co. *v.* Dennett, 11 S. D. 486, 78 N. W. 956.

73. Hopkins *v.* Holland, 84 Md. 84, 35 Atl. 11; Chiera *v.* McDonald, 121 Mich. 54, 79 N. W. 908 (holding that where, after defendant's appeal from a circuit court commissioner in summary proceedings to recover land for non-payment of rent, defendant made a payment to apply on the rent, the court properly applied it to rent accruing before the proceedings, and hence the acceptance thereof was not a waiver of defendant's forfeiture); Palmer *v.* City Livery Co., 98 Wis. 33, 73 N. W. 559.

74. *Georgia.*— Carter *v.* Howell, 26 Ga. 397.

Maryland.— Burrell *v.* Lamm, 67 Md. 580, 11 Atl. 56, holding that no appeal lies from a judgment on appeal from a justice of the peace, where the justice had jurisdiction.

Mississippi.— Usher *v.* Moss, 50 Miss. 208.

New York.— Romaine *v.* Kinshimer, 2 Hilt. 519. And see Maneely *v.* Mayers, 43 Misc. 380, 87 N. Y. Suppl. 471, holding that a municipal court order setting aside a final order for possession in favor of a landlord, recalling a dispossession warrant, and an order denying the landlord's motion to open his subsequent default for failure to appear and try the cause, are not appealable under the Municipal Court Act, §§ 253–257 (Laws (1902), pp. 1562, 1563, c. 580), not being expressly enumerated therein.

Pennsylvania.— Neumoyer *v.* Andreas, 57 Pa. St. 446.

South Carolina.— State *v.* Fort, 24 S. C. 510; Leonard *v.* McCool, 3 Strobh. Eq. 44.

Canada.—Hill *v.* Hearn, 29 Nova Scotia 25.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1328.

75. See the statutes of the various states. And see Moultrie *v.* Dixon, 26 S. C. 296, 2 S. E. 24 (holding that in a proceeding to eject a tenant, plaintiff's allegation that defendant is in possession of the premises without warrant or authority of law constitutes a charge that he is a trespasser; not that he is a tenant who has failed to pay rent, and by the statute (18 Acts (1883), p. 556) an appeal will, in such case, lie to the circuit court from the trial justice's decision); Matter of Scottish Ontario, etc., Land Co., 21 Ont. 676.

Court to which appeal lies.— In Colorado, under an act providing that all appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court, an action of forcible entry and detainer may be taken to the county court, although prior to such statute it was to the district court. Reynolds *v.* Larkins, 10 Colo. 126, 14 Pac. 114. In Minnesota an appeal lies from the district court to the supreme court as in the case of other actions appealed from the justice's court to the district court. Barker *v.* Walbridge, 14 Minn. 469. Proceedings of magistrates for restitution of premises under 11 Geo. II, c. 19, are, by § 17, to be reviewed (in England) by the judges on the circuits, acting as individual justices. Reg. *v.* Sewell, 8 Q. B. 161, 10 Jur. 48, 15 L. J. Q. B. 49, 55 E. C. L. 161.

Amount in controversy.— The district court has jurisdiction of an appeal from a justice's court, in a proceeding under the Landlord and Tenant Law, to expel a contumacious tenant, although the price of the lease is under ten dollars. D'Armond *v.* Pullen, 13 La. Ann. 137.

Who may appeal.— Under the Landlord and Tenant Law (Act of March 21, 1772) there is no right of appeal given to the tenant by

will lie in the absence of a statute making a provision for such a method of review.[76]

(II) *Proceedings to Perfect.* The provisions of the statute as to the manner in which an appeal shall be taken must be complied with.[77] The record upon appeal must disclose all the essential elements conferring jurisdiction upon the lower court.[78] Error will not, however, be presumed against the face of the record.[79] Where the record is insufficient it may be remitted for amendment.[80] On failure to deposit the rent due with the justice, as required by statute to perfect an appeal, the appellate court should dismiss the appeal and not render a judgment affirming the justice's judgment.[81]

(III) *Bonds.* Statutes providing for a bond in the case of an appeal in a dispossession proceeding different from that required in case of appeals from justices' judgments generally are valid,[82] and such a bond or recognizance as is prescribed by statute must be given.[83] An appeal will not be dismissed for the want of a

reason of anything which he may allege to exist in the contract of lease. It is only given to third persons, or the tenant claiming by descent or purchase from the lessor after the date of the lease. The tenant cannot appeal by reason of any allegation of title existing in a third person, although created since the date of the lease. Cunningham *v.* Gardner, 4 Watts & S. (Pa.) 120.

From default.—Under N. Y. Code Civ. Proc. § 3064, providing that on appeal by defendant from a judgment by default a justice of the appellate court may set aside the judgment on showing that injustice has been done, which section is made applicable to the municipal court of the city of New York, the appellate court can set aside an order of such court by which defendants are dispossessed, where they show that manifest injustice was done them by the default judgment, and render a satisfactory excuse for their failure to appear. Tiernan *v.* Davenport, 36 Misc. (N. Y.) 186, 73 N. Y. Suppl. 163. And such statute applies to district courts. Mullane *v.* Roberge, 21 Misc. (N. Y.) 342, 47 N. Y. Suppl. 155.

76. Clark *v.* Patterson, 6 Binn. (Pa.) 128.

77. State *v.* Judge Civ. Ct., 45 La. Ann. 1316, 14 So. 232.

Notice of appeal.— Where the notice of appeal refers to, and adopts the language of, the final order, it will be considered as an appeal from such order, although it is described as an appeal from a judgment not rendered. Wulff *v.* Cilento, 28 Misc. (N. Y.) 551, 59 N. Y. Suppl. 525.

Time of appeal.— An application to review proceedings under the Landlord and Tenant Act, 13 Vict. c. 53, should be made at the first term after the trial, unless some reason is shown for the delay. *Ex p.* Cole, 7 N. Brunsw. 539.

78. Bast *v.* Ketchum, 5 Mo. App. 433, holding that the statement must show that the justice was of the same ward in which the premises were located.

79. Ferguson *v.* Hoshi, 25 Wash. 664, 66 Pac. 105.

80. Bliss *v.* Coryell, 26 Misc. (N. Y.) 806, 55 N. Y. Suppl. 912.

81. Reardon *v.* Barr, 13 Colo. App. 385, 59 Pac. 216.

82. Morris *v.* Horrell, 35 Mo. 467.

83. State *v.* Judge Civ. Ct., 45 La. Ann. 1316, 14 So. 232; Harrington *v.* Brown, 7 Pick. (Mass.) 232; Deuel *v.* Rust, 24 Barb. (N. Y.) 438.

Where it is not sought to stay proceedings. — Under Laws (1894), p. 823, authorizing appeals in summary proceedings, and providing that an appeal shall stay proceedings, on the tenant giving bond to pay the landlord all damages he may sustain thereby, a party may appeal without giving bond. Carlisle *v.* Prior, 48 S. C. 183, 26 S. E. 244.

A defective recognizance is by statute in Missouri not ground for dismissal where the appellant or some person for him enters into a proper recognizance before the determination of a motion to dismiss the appeal, and pays such costs as have been incurred by reason of the defect. Matthews *v.* Gloss, 22 Mo. 169. But in Colorado it has been held that the filing of the bond is jurisdictional, and the court has no authority to permit the appellant to file a proper bond or amend the one filed. Amter *v.* Woods Inv. Co., 10 Colo. App. 542, 51 Pac. 1010; Getty *v.* Miller, 10 Colo. App. 331, 51 Pac. 166. In any event a motion to dismiss should be granted where no valid bond has been filed. Slaughter *v.* Crouch, 64 S. W. 968, 23 Ky. L. Rep. 1214.

Extension of time.— The court should not continue the case so as to extend the time of filing a proper bond; no motion or request therefor having been made, or any notice given to the parties, or any cause shown for such action. Whitaker *v.* Bliss, 23 R. I. 313, 50 Atl. 266.

Waiver.— Where parties to an action for possession of a tenement let make an agreement by which defendant submits to a judgment for possession, without costs, it is not a waiver of all rights under the bond given as required in such action by Gen. Laws, c. 237, § 9, to pay all rent or moneys due, or which may become due pending the action, and the damages and costs awarded. Whipp *v.* Casey, 21 R. I. 506, 45 Atl. 93.

recognizance required in case of a removal, without trial, from the inferior to the superior court.[84]

(IV) *STAY OF EXECUTION.* Under some statutes a writ of error perfected by bond operates as a supersedeas of execution.[85] Under other statutes, however, it is provided that the landlord may have restitution notwithstanding an appeal from the decision of a justice.[86] An injunction cannot be granted against the enforcement of a judgment in unlawful detainer proceedings pending an appeal where no appeal has been in fact taken.[87]

(V) *SCOPE OF REVIEW AND DETERMINATION.* Only matters properly presented for review can be considered.[88] The judgment of the trial court will not be reversed upon a conflict of evidence where injustice does not appear,[89] nor for errors which appear to have been without prejudice[90] or which may be corrected on the appeal,[91] nor for matters occurring after the entry of the final order.[92] A defect in evidence as to a material fact will not be presumed to have been caused by the adverse party where he does not appear to have assumed such fact.[93] Under a statute authorizing an award of such additional damages and costs as have arisen in consequence of the appeal, where there is an affirmance on failure to prosecute, plaintiff is not entitled to rent accrued or intervening damages to the premises.[94]

(VI) *TRIAL DE NOVO.* Under some statutes dispossession proceedings are triable *de novo* on appeal from the decision of a justice of the peace or magistrate.[95]

84. Sweetser *v.* McKenney, 65 Me. 225.

85. Haines *v.* Levin, 51 Pa. St. 412; Wright *v.* Clendenning, 1 Brewst. (Pa.) 449, 6 Phila. 329. *Compare* Grubb *v.* Fox, 6 Binn. (Pa.) 460.

86. See State *v.* Hennepin County Dist. Ct., 53 Minn. 483, 55 N. W. 630 (holding that such a statute does not apply where the action was brought in the district court); State *v.* Burr, 29 Minn. 432, 13 N. W. 676 (holding that a statute so authorizing restitution in actions based on holding over after the expiration of a written lease does not apply where the lease has expired by reason of a breach of covenant giving the lessor a right of reëntry).

87. Curd *v.* Farrar, 47 Iowa 504.

88. Keller *v.* Pagan, 54 S. C. 255, 32 S. E. 353, holding that the failure of the evidence to show that the landlord entered to demand possession, or that the tenant refused a demand, cannot be considered, where the only exception to the judgment is that the "evidence failed to show that any demand for possession had been made."

89. Caggiano *v.* Gallorenzi, 26 Misc. (N. Y.) 819, 57 N. Y. Suppl. 2; Bantjo *v.* Clark, 88 N. Y. Suppl. 135, holding that whether a demand for rent made after the giving of a notice to quit is a waiver of the landlord's rights under the notice is a question of intention to be determined by the trial court.

90. *Alabama.*— McDevitt *v.* Lambert, 80 Ala. 536, 2 So. 438, exclusion of immaterial evidence upon erroneous ground.

Indiana.— Poffenberger *v.* Blackstone, 57 Ind. 288 (sustaining a demurrer to unnecessary plea); Hamline *v.* Engle, 14 Ind. App. 685, 42 N. E. 760, 43 N. E. 463 (error in instructions corrected by other instructions).

New York.— Stelle *v.* Creamer, 69 N. Y. App. Div. 296, 74 N. Y. Suppl. 669 (holding that under Code Civ. Proc. § 2254, providing that where the final order in a summary proceeding for dispossession establishes that the tenant holds over after default in rent he may effect a stay by payment of or by an undertaking for the rent due, where a tenant after a final order of dispossession made no offer to pay and gave no undertaking, his legal rights were not invaded by the order, although the court made an erroneous finding against him as to the amount of rent due); Sheldon *v.* Testera, 21 Misc. 477, 47 N. Y. Suppl. 653 (error in amount of rent found due).

Pennsylvania.— White *v.* Arthurs, 24 Pa. St. 96 (holding that the decision of a jury impaneled after the discharge of a former jury who had heard the same case tried and could not agree is not to be set aside for error in rejecting evidence offered before the first jury); Knoll *v.* Jones, 1 Pa. Co. Ct. 485.

Washington.— Woodward *v.* Winehill, 14 Wash. 394, 44 Pac. 860 (where a judgment declared the lease forfeited, although no forfeiture was asked); Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124 (inspection of premises by a portion of the jury, where rental value was not in issue).

91. Posson *v.* Dean, 8 N. Y. Civ. Proc. 177, holding that where a justice of the peace, in a summary proceeding to dispossess a tenant, exceeds his power and awards damages, the error is not fatal.

92. Bliss *v.* Coryell, 23 Misc. (N. Y.) 477, 52 N. Y. Suppl. 934.

93. Drummond *v.* Fisher, 18 N. Y. Suppl. 142, assignment of lease.

94. Braman *v.* Perry, 12 Pick. (Mass.) 118.

95. See the statutes of the several states. And see cases cited *infra*, notes 97, 98. But see Banks *v.* Porter, 39 Conn. 307, holding that in summary process for the recovery of

In the absence of statutory provision to the contrary, such trials are governed by the rules applicable in the case of appeals from other judgments of a justice of the peace,[96] and the appellate court should proceed to hear and determine the merits,[97] as if no prior decision had taken place.[98] In a proper case defendant may file a pleading which he has failed[99] or has not been permitted[1] to file before the justice, and should plead matters in abatement arising after judgment *puis darrein continuance*.[2] An amendment changing the subject-matter of the action cannot, however, be allowed.[3] Such judgment should be rendered as should have

leased premises, where the judgment of the justice's court is reversed by the superior court, the case cannot be placed upon the docket of the latter court and retried there. The superior court has no jurisdiction of the subject-matter.

96. See JUSTICES OF THE PEACE, *ante*, p. 638 *et seq.*

97. State *v.* Rightor, 37 La. Ann. 843; Koontz *v.* Hammond, 62 Pa. St. 177 (holding that plaintiff must show a tenancy, which is the foundation of the jurisdiction); McMichael *v.* McFalls, 25 Pa. Co. Ct. 527 (holding that plaintiff must prove all the essential facts).

Voluntary nonsuit.— A plaintiff who has obtained possession on the habere issued by an alderman in proceedings under the act of Dec. 14, 1863, cannot on the trial of the appeal suffer a nonsuit. Koenig *v.* Bauer, 1 Brewst. (Pa.) 304.

The proceedings should be summary.— Godchaux *v.* Bauman, 44 La. Ann. 253, 10 So. 674; State *v.* Rightor, 37 La. Ann. 843.

Necessity of complaint.— The alderman's transcript on an appeal under the act of Dec. 14, 1863, is a sufficient statement of the case to require defendant to plead. Gibbons *v.* McGuigan, 6 Phila. (Pa.) 108.

Defenses.— The tenant on appeal, in proceedings under the act of Dec. 14, 1863, may set up any defense available to him in ejectment by the lessor. Livingood *v.* Moyer, 2 Woodw. (Pa.) 65.

Appointment of receiver.— In an action under the Landlord and Tenant Act, carried by appeal to the superior court, it is within the power of the court to appoint a receiver to collect the rents, etc., upon an affidavit by plaintiff, not controverted, that defendants entered into possession as tenants of plaintiff, held over after expiration of their term, are insolvent, and that plaintiff has no security for rents. Nesbitt *v.* Turrentine, 83 N. C. 535.

Objections to jury.— If, on the trial of an appeal in proceedings under the act of Dec. 14, 1863, the crier call and swear on the jury two persons who have been struck from the printed list, and the party who struck them did not object at the time, it is too late after verdict. Koenig *v.* Bauer, 1 Brewst. (Pa.) 304.

Judgment subsequent to commencement of action.— Where defendants averred in their answer a judgment of the justice in their favor in a forcible detainer proceeding, they cannot object to the admission of a subsequent judgment of the district court in favor of plaintiff on appeal from the justice. Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371.

98. Koenig *v.* Bauer, 57 Pa. St. 168 [*affirming* 1 Brewst. 304]; Heyer *v.* Beatty, 76 N. C. 28.

99. Harvey *v.* Clark, 81 Miss. 166, 32 So. 906 (holding that it was error not to allow the tenant to file in the circuit court, for the first time, an affidavit denying the facts on which the summons issued); Heyer *v.* Beatty, 76 N. C. 28.

Necessity of excuse.— A defendant who has failed to file an answer in the proceedings before the justice will not be permitted to file an answer on appeal, where there is no showing of surprise or other matters in excuse, and written pleadings are required before the justice. Pincus *v.* Dowd, 11 Mont. 88, 27 Pac. 393.

1. Lane *v.* Morton, 78 N. C. 7, holding that it is within the discretion of the superior court, on appeal from a justice's court, in an action under the Landlord and Tenant Act, to allow defendant to file an answer claiming title in himself and questioning the jurisdiction of the justice's court.

A plea of abatement which has been refused by the justice upon the ground that it was urged too late will not be permitted on appeal. Beck *v.* Glenn, 69 Ala. 121.

2. Crosby *v.* Wentworth, 7 Metc. (Mass.) 10, surrender of possession to plaintiff. And see Peters *v.* Fisher, 50 Mich. 331, 15 N. W. 496, holding that where a landlord recovers possession from his tenant in summary proceedings, and pending appeal by the tenant the term claimed by him expires, and the landlord immediately lets the premises to the tenant's wife, the tenant cannot plead this as a fact *puis darrein*, amounting to surrender by himself and acceptance by the landlord, and precluding judgment for the landlord on appeal.

3. Leatherwood *v.* Suggs, 96 Ala. 383, 11 So. 415, holding that other lands cannot be added to the complaint by amendment. But see Roberts *v.* Lynch, 15 Mo. App. 456, holding that the description of land might be amended where there was no departure from the description in the original statement, and no question of surprise.

An amendment increasing the amount demanded for damages and other rents and profits may be permitted where the statement of such amount was not essential to the jurisdiction of the justice. Ver Steeg *v.* Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346.

been rendered below.[4] Under some statutes defendant if successful may recover the damages sustained by his removal.[5] Under other statutes plaintiff if successful may recover the amount of rent due at the time of the retrial,[6] and the value of such rent should be assessed by a jury unless the statute otherwise provides.[7] The judgment should run against defendant and not include his sureties upon the appeal-bond,[8] and in some jurisdictions is not limited in amount to the sum which is within the jurisdiction of the justice.[9]

(VII) *REMAND.* Where a judgment for the landlord is reversed and remanded for new trial, costs to appellant to abide the event, the landlord may insist on a new trial of the issues.[10]

b. Certiorari — (I) *RIGHT.* While it has been held in some cases that certiorari will not lie to review a dispossession proceeding,[11] such is not the usual holding,[12] and indeed a review by certiorari is frequently provided for by statute. In some jurisdictions certiorari has been held the only method of review.[13] One who is not a party[14] or who has no interest in the subject-matter[15] is not entitled to the writ.

(II) *PROCEEDINGS TO PROCURE.* Where a common-law writ issues, no affidavit of defense is required;[16] nor is an oath or affirmation that it is not for delay;[17] nor is defendant in the absence of statute required to give bond for

4. Foster *v.* Penry, 77 N. C. 160.

5. See Koenig *v.* Bauer, 57 Pa. St. 168.

Burden of proof.— In an action by a landlord to recover possession of a farm, where it was found that the tenant had been illegally dispossessed, the burden was on the landlord to show that the tenant could have obtained another farm conveniently in the neighborhood, in mitigation of the damages awarded for the illegal dispossession. O'Neal *v.* Sneeringer, 12 York Leg. Rec. (Pa.) 141.

Measure and elements of damages.— The measure of compensation is the pecuniary loss caused by the eviction. Quinn *v.* McCarty, 33 Leg. Int. (Pa.) 312. Where a lease provided that all improvements to the buildings, etc., were to be at the expense of the lessee and remain part of the realty, evidence was not admissible by the tenant to show the improvements put on him as a basis on which to assess damages. Quinn *v.* McCarty, 81 Pa. St. 475.

Punitive damages cannot be awarded without proof of malice or oppression. Koenig *v.* Bauer, 1 Brewst. (Pa.) 304.

6. See Paxton *v.* Oliver, 70 Miss. 570, 12 So. 799; Murtland *v.* English, 214, Pa. St. 325, 63 Atl. 882, holding that the court may also enter judgment for possession.

In Michigan, upon the trial, in cases of summary proceedings to recover the possession of premises for non-payment of rent, in the circuit on appeal it is not requisite that there should be a finding of the amount of rent due. The appeal is allowed only from the "determination or judgment" of the commissioner, and the finding of the amount due, although to be stated in the judgment, is in fact no part of it. McSloy *v.* Ryan, 27 Mich. 110.

7. Spear *v.* Lomax, 42 Ala. 576.

8. Hulett *v.* Nugent, 71 Mo. 131.

9. Middlebury College *v.* Lawton, 23 Vt. 688. See, generally, JUSTICES OF THE PEACE, *ante*, p. 752. *Contra*, Giddens *v.* Bolling, 92 Ala, 586, 9 So. 274; Walter Commission Co. *v.* Gilleland, 98 Mo. App. 584, 73 S. W. 295, holding under Rev. St. (1899) §§ 4130, 4133, providing that a justice of the peace cannot enter a judgment for rent in a dispossession action for a sum in excess of his jurisdiction, but that plaintiff may sue for possession alone, that where the amount of rent due at the time of a trial *de novo* in the circuit court on appeal from the justice's judgment exceeds the justice's jurisdiction the circuit court cannot enter judgment for the rent, but plaintiff may elect to take judgment for possession alone.

10. Simmons *v.* Pepe, 43 Misc. (N. Y.) 661, 88 N. Y. Suppl. 120.

11. Lenox *v.* Arguelles, 15 Fed. Cas. No. 8,244, 4 Cranch C. C. 477.

12. Layton *v.* Dennis, 43 N. J. L. 380; Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99 (holding that a writ of certiorari to remove the proceedings of this court may be allowed and issued before the trial); McClure *v.* White, Add. (Pa.) 192; McMullen *v.* Orr, 8 Phila. (Pa.) 92; Follin *v.* Coogan, 12 Rich. (S. C.) 44.

13. Usher *v.* Moss, 50 Miss. 208. See Thorn *v.* Reed, 1 Ark. 480; Romaine *v.* Kinshimer, 2 Hilt. (N. Y.) 519.

14. Starkweather *v.* Seeley, 45 Barb. (N. Y.) 164. And see McMahon *v.* O'Brien, 58 N. J. L. 548, 33 Atl. 848, holding that a judgment in favor of the claimant, regularly obtained, will not be disturbed on certiorari at the instance of a stranger to the proceedings, whose only grievance is that the trial judge refused to adjourn the proceedings at his request, upon being informed that the prosecutor was in possession of the premises.

15. Colden *v.* Botts, 12 Wend. (N. Y.) 234.

16. Veditz *v.* Levy, 1 Pa. Co. Ct. 266, 17 Wkly. Notes Cas. 477.

17. Rubicum *v.* Williams, 1 Ashm. (Pa.) 230, as prescribed by a statute relating to

costs.[18] The tenant cannot dispense with the necessity of giving a statutory bond and security for rent upon certiorari by taking his case up *in forma pauperis*.[19]

(III) *RECORD.* On certiorari to review the judgment of a justice in summary proceedings all the facts necessary to give jurisdiction must appear affirmatively and positively from the record.[20] If any of these facts are left uncertain by the record the proceedings are bad.[21] The record should, however, not be scanned too nicely as to form,[22] and a specific finding of facts may be shown by reference to the complaint when it is set out and particularly states the facts.[23] The record need not set out the evidence,[24] but where the evidence is set out and appears insufficient the judgment will be reversed.[25]

(IV) *EFFECT.* Contrary to the usual common-law rule in other proceedings,[26] a writ of certiorari in landlord and tenant proceedings does not stay the issuance of an execution,[27] although it suspends the effect of the judgment of the justice in all collateral matters.[28] By statute, however, it is in some jurisdictions provided that upon the giving of proper security a stay may be had pending a decision upon certiorari.[29] Where the proceedings are arrested before trial by certiorari the writ has the effect of a demurrer.[30]

(V) *SCOPE OF REVIEW.* Upon review by certiorari only matters presented by the record may be examined,[31] it being held in some cases that only questions of

the recovery of debts or demands under one hundred dollars before a justice of the peace.

18. Veditz *v.* Levy, 1 Pa. Co. Ct. 266, 17 Wkly. Notes Cas. 477.

19. Norton *v.* Whitesides, 5 Humphr. (Tenn.) 381.

20. Farrington *v.* Morgan, 20 Wend. (N. Y.) 207; McMillan *v.* Graham, 4 Pa. St. 140; McGee *v.* Fessler, 1 Pa. St. 126; Speigle *v.* McFarland, 1 Walk. (Pa.) 354; Hourner *v.* Wetherill, 5 Pa. Cas. 247, 10 Atl. 40; Phelps *v.* Cornog, 2 Pa. Cas. 147, 4 Atl. 922; McCarthy *v.* Sykes, 7 Pa. Dist. 243; Chambers *v.* Shivery, 6 Pa. Dist. 101; Prouty *v.* Shively, 31 Pa. Co. Ct. 634; Wolf *v.* Brown, 30 Pa. Co. Ct. 105, 20 Montg. Co. Rep. 218; Hendler *v.* Quigley, 3 Just. L. Rep. (Pa.) 14; Long *v.* Swavely, 1 Just. L. Rep. (Pa.) 75; Hiester *v.* Brown, 11 Lanc. Bar (Pa.) 159; Weber *v.* Porr, 1 Leg. Rec. (Pa.) 131; Uber *v.* Hickson, 6 Phila. (Pa.) 132; Geisenberger *v.* Cerf, 1 Phila. (Pa.) 17; Holder *v.* Hill, 1 Woodw. (Pa.) 451; Greenleaf *v.* Haberacker, 1 Woodw. (Pa.) 436. And see Kraft *v.* Wolf, 6 Phila. (Pa.) 310, holding that an alderman's judgment in a landlord and tenant case under the act of 1863 need not recite the date of the lease, the expiration of the term, or the date of the notice.

The inquisition is a part of the record. Buchanan *v.* Baxter, 67 Pa. St. 348.

A description of the premises should appear.— The record must contain a sufficient description of the premises so that the constable can find the property which he may be directed to deliver to complainant. Xander *v.* Weiss, 12 Pa. Dist. 724, 28 Pa. Co. Ct. 80, 19 Montg. Co. Rep. 41; Spidle *v.* Hess, 20 Lanc. L. Rev. (Pa.) 385.

Entry of judgment should appear. A statement of assessment of damages is not sufficient. Dickensheets *v.* Hotchkiss, 6 Phila. (Pa.) 156.

21. Seidel *v.* Sperry, 26 Pa. Super. Ct. 649.

22. Buchanan *v.* Baxter, 67 Pa. St. 348; Thompson *v.* Glenn, 2 Leg. Chron. (Pa.) 57; Livingood *v.* Moyer, 2 Woodw. (Pa.) 65.

23. Maxwell *v.* Perkins, 93 Pa. St. 255; McKeon *v.* King, 9 Pa. St. 213; Xander *v.* Weiss, 12 Pa. Dist. 724, 28 Pa. Co. Ct. 80, 19 Montg. Co. Rep. 41; Spidle *v.* Hess, 20 Lanc. L. Rev. (Pa.) 385; Caldwell *v.* Koehler, 1 Phila. (Pa.) 375; Livingood *v.* Moyer, 2 Woodw. (Pa.) 65.

24. Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464; Hiester *v.* Brown, 11 Lanc. Bar (Pa.) 159; Cope *v.* Briody, 9 North. Co. Rep. (Pa.) 101.

25. Bradfield *v.* Rehm, 6 Phila. (Pa.) 135, where the facts were not specifically found.

26. See CERTIORARI, 6 Cyc. 800.

27. Launitz *v.* Dixon, 5 Sandf. (N. Y.) 249; Graver *v.* Fehr, 89 Pa. St. 460; Grubb *v.* Fox, 6 Binn. (Pa.) 460; Anonymous, 4 Dall. (Pa.) 214, 1 L. ed. 805.

28. Launitz *v.* Dixon, 5 Sandf. (N. Y.) 249, holding that the judgment of removal could not be made the foundation of an action to recover part of the rent which had accrued at the time of issuing the warrant, nor the expenses of the summary proceedings.

29. See the statutes of the several states. And see Hutchinson *v.* Vanscriver, 6 Phila. (Pa.) 39, holding that the statute must be strictly complied with.

30. Roberts *v.* McPherson, 62 N. J. L. 165, 40 Atl. 630 [*affirmed* in 63 N. J. L. 352, 43 Atl. 1098], holding that if the tenant instead of requiring proof of facts that authorize his removal arrests the proceedings, he admits the truth of the allegations in the affidavit returned with the writ.

31. Mahan *v.* Lester, 20 Ala. 162 (holding that where errors were not assigned, the judgment of the justice must be affirmed); Hicks *v.* Merry, 4 Mo. 355 (holding that the evidence given before the justices, and their

jurisdiction may be considered.[32] In the absence of statute the sufficiency of evidence cannot be reviewed.[33]

(VI) *DISPOSITION AND DETERMINATION.* Where the judgment is affirmed on certiorari in a court of original general jurisdiction it must be enforced as a judgment of that court.[34] Where the justice's court is dissolved after its trial of the cause, the circuit court must determine the case and has no power to remand it.[35] Where the probate court is given power to review judgments of the justice by certiorari and to issue all writs necessary and proper to the exercise of its powers, it may issue a writ of re-restitution to restore defendant to the possession of the premises.[36] A statute which provides that the decision of the county court upon appeal or certiorari from the judgment of a justice of the peace shall be final and conclusive has been held to apply only as between the parties.[37] A writ of error from an affirmance on certiorari does not supersede the writ of possession required to issue on such affirmance.[38] At common law neither party recovers costs upon certiorari.[39]

c. Liabilities Upon Bonds. As a general rule the liability of the sureties cannot be extended beyond the terms of the bond.[40] Under some statutes, however,

decisions in admitting or rejecting evidence, were not a part of the record and not subject to revision); *Re* Snure, 4 Ont. L. Rep. 82.

32. Barber *v.* Harris, 6 Mackey (D. C.) 586; Charter Oak L. Ins. Co. *v.* Tallmadge, 3 MacArthur (D. C.) 422; Gray *v.* Reynolds, 67 N. J. L. 169, 50 Atl. 670; Fowler *v.* Roe, 25 N. J. L. 549.

33. Barber *v.* Harris, 6 Mackey (D. C.) 586 (holding that where the relation is denied the writ will be quashed where the complaint shows facts which will create the relationship of landlord and tenant); Swygert *v.* Goodwin, 32 S. C. 146, 10 S. E. 933. See, generally, CERTIORARI, 6 Cyc. 824.

In New York it was held under 2 Rev. St. p. 533, § 47, that the court might reverse the judgment if not supported by the evidence. Freeman *v.* Ogden, 40 N. Y. 105; Benjamin *v.* Benjamin, Seld. 383; Buck *v.* Bininger, 3 Barb. 391; Niblo *v.* Post, 25 Wend. 280. But *compare* Simpson *v.* Rhinelanders, 20 Wend. 103; Prindle *v.* Anderson, 19 Wend. 391; Birdsall *v.* Phillips, 17 Wend. 464; Hunt *v.* Comstock, 15 Wend. 665; Nichols *v.* Williams, 8 Cow. 13.

Where the jury are the judges both of the law and facts under the statute a misdirection of the court to the jury cannot be assigned for error on certiorari, but it may be assigned for error that the verdict is against the law. Chamberlin *v.* Brown, 2 Dougl. (Mich.) 120 note.

34. Essler *v.* Johnson, 25 Pa. St. 350.

35. Thorn *v.* Reed, 1 Ark. 480.

36. Paul *v.* Armstrong, 1 Nev. 82.

37. Texas Land Co. *v.* Turman, 53 Tex. 619.

38. Connelly *v.* Arundel, 6 Phila. (Pa.) 59.

39. Veditz *v.* Levy, 1 Pa. Co. Ct. 266, 17 Wkly. Notes Cas. 477. See, generally, CERTIORARI, 6 Cyc. 837.

40. Spear *v.* Lomax, 42 Ala. 576; Brooks *v.* Buie, 71 Ark. 44, 70 S. W. 464 (holding that the sureties on a bond in favor of the original plaintiff were not liable for damages caused by their principal holding over after the expiration of the term, where before the expiration of the term the original plaintiff had transferred his ownership and possessory rights in the premises); King *v.* Brewer, 19 Ind. 267.

Extent of liability on defendant's bonds.— A condition for the payment of damages is sufficient to cover rent accruing pending the appeal. Green *v.* Sternberg, 15 Mo. App. 32. A condition binding the sureties to pay "rent accruing and to accrue" imposes no liability for rent already accrued and for a period already expired. Rosenquest *v.* Noble, 21 N. Y. App. Div. 583, 48 N. Y. Suppl. 398. A condition to pay all rent "due and to become due" includes rent during the term of both lessees, where plaintiff's lease expires during the pendency of the appeal and he takes a new lease. Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266. A bond to pay intervening rent and damages includes nothing more than the rent at the stipulated rate and interest thereon (Bartholomew *v.* Chapin, 10 Metc. (Mass.) 1), but the tenant is liable to pay the rent, although the buildings on the premises are meanwhile destroyed by fire and is responsible for all waste, actual and permissive, and for all losses including the destruction of the buildings, if not proved to have been caused by inevitable accident (Davis *v.* Alden, 2 Gray (Mass.) 309). The bailee on certiorari is liable for the rent until the final determination of the lease or plaintiff obtains possession. Wistar *v.* Campbell, 10 Phila. (Pa.) 359; Clapp *v.* Senneff, 7 Phila. (Pa.) 214.

Extent of liability on plaintiff's bonds.— The measure of damages upon a bond given by plaintiff to defendant to secure possession of the premises pending appeal from a judgment in favor of plaintiff is the difference between the rental value of the premises and the rent reserved from the date of the eviction to the end of the term or the termination of the lease otherwise. Small *v.* Clark, 97 Me. 304, 54 Atl. 758.

Subrogation.— The bailee on certiorari **is** entitled to subrogation and may have **re-**

the parties are bound to the full extent contemplated by the statute under which the bond is executed, although the provisions of such statute are not expressly incorporated therein.[41] Where by statute plaintiff is given an election between an action on the appeal-bond and an action in trespass or case for damages for the unlawful detention he cannot pursue both remedies.[42] The execution of an appeal-bond does not release the sureties upon a bond given to retain possession as against a provisional writ of restitution,[43] nor does the execution of an additional bond increasing the security.[44]

d. Restoration of Premises to Defendant. Where a writ of restitution has been executed and defendant removed from possession, the trial court has power on a proper motion after the execution of a supersedeas bond on appeal to restore defendant to possession.[45] In case defendant has been removed from possession and the judgment is reversed upon appeal, the possession should be restored to him,[46] and to effect this purpose in a proper case he may be awarded a writ of

course to an interpleading surety on bail in error, but is primarily liable to plaintiff for the whole damage. Clapp *v.* Senneff, 7 Phila. (Pa.) 214.

Void bond.— A bond which is void as a statutory recognizance may be recovered upon as a valid common-law obligation. Watts *v.* Hardy, 1 Pittsb. (Pa.) 39.

Where bond has not been filed.— On appeal from the judgment of the magistrate in a writ of forcible entry and detainer, the entry of the appeal in the appellate court carries with it all the papers in the case, including the recognizance; and an action may be maintained upon the recognizance, although it was not actually filed in the appellate court until after the rendition of judgment in the suit, if it was so filed before the commencement of the action upon it. Hawkes *v.* Davenport, 5 Allen (Mass.) 390.

When liability becomes fixed.— The dismissal of an appeal operates as a final determination fixing the liabilities upon a bond. Mair's Estate, 34 Leg. Int. (Pa.) 20. But where the bond is conditioned for the payment of costs and rent on affirmance of a judgment for possession, no liability attaches where on appeal the judgment for possession is waived by consent of the landlord and the tenant is suffered to remain in possession, and the judgment taken as if on a verdict for the amount of the rent and costs only. Hazen *v.* Culbertson, 10 Watts (Pa.) 393.

Conclusiveness of final order.—A final order in proceedings to dispossess a tenant for nonpayment of rent does not establish the amount of the rent due, as against the sureties on an undertaking to stay the execution of the warrant, in respect to rent "accruing or to accrue" pending the stay. Rosenquest *v.* Noble, 21 N. Y. App. Div. 583, 48 N. Y. Suppl. 398.

Necessity of execution against principal.— Under the Michigan statutes on appeal from circuit court commissioners, failure to issue execution against the principal on the bond within thirty days after entry of judgment does not discharge the sureties. Bauer *v.* Wasson, 66 Mich. 256, 33 N. W. 186.

Pleading.— In an action on a recognizance to pay rents and damages, plaintiff, under a declaration that defendants have not paid such rent and the intervening rent and damages, if defendant does not demur, may recover the full value of the rent, although increased since the commencement of the suit for possession. Jackson *v.* Richards, 16 Gray (Mass.) 497.

Evidence.— The original lease is admissible in evidence to show what rent should be paid in a suit on an appeal-bond conditioned to pay all rent due and to become due (Clapp *v.* Noble, 84 Ill. 62), as is a lease made prior to the expiration of the first lease, for a year after that date, at a fixed rental (Vincent *v.* Defield, 105 Mich. 315, 63 N. W. 302).

41. Stults *v.* Zahn, 117 Ind. 297, 20 N. E. 154, holding that a bond given by defendant on an appeal to a circuit court will cover accruing rents, although it was not conditioned therefor, but simply provided that defendant would pay any judgment which should be rendered against him, and the appeal was dismissed by the circuit court without rendering any judgment.

42. Although he may be entitled to items of damages which he could not recover in an action on the bond. Schellenberg *v.* Frank, 139 Mich. 183, 102 N. W. 644.

Constitutionality of such statutes.— Comp. Laws (1897), c. 308, § 25, relating to proceedings to recover possession of land, and providing that, if the complainant obtains restitution of the premises, he may at his election sue and recover on the bond given by defendant on appeal to the circuit court, or bring his action against defendant under section 24 for treble damages is within the implied constitutional grant of legislative authority and is valid. Schellenberg *v.* Frank, 139 Mich. 183, 102 N. W. 644.

43. Lowman *v.* West, 18 Wash. 233, 51 Pac. 373.

44. Lowman *v.* West, 18 Wash. 233, 51 Pac. 373.

45. Leahy *v.* Lubman, 67 Mo. App. 191.

46. Pico *v.* Cuyas, 48 Cal. 639 (so holding, although the premises had been rented to another); Campau *v.* Coates, 17 Mich. 235.

Necessity of motion.— If the tenant desires restitution of the premises, a motion

restitution;[47] but such a writ can issue only upon special award of the court.[48] Defendant is not entitled to restitution as a matter of right, however,[49] and it will not be awarded where justice does not so require,[50] as where the reversal is merely for irregularities;[51] where, pending the appeal, the buildings have been destroyed by fire,[52] or the term has expired;[53] or where the premises are in possession of another under a lease not yet expired.[54]

23. Redemption. By some statutes express provision is made for redemption from a judgment of dispossession.[55] Where an order permitting redemption has been granted improvidently or by mistake induced by the affirmative act of defendant it may be vacated.[56]

24. Personalty of Tenant Upon Premises. The tenant, upon being ejected from the premises in summary proceedings, has a reasonable time thereafter within

should be made therefor. Boyd *v.* Milone, 24 Misc. (N. Y.) 734, 53 N. Y. Suppl. 785.

Sufficiency of order.— Where an order of restitution to the tenant made by the judges of assize, on appeal, under 11 Geo. II, c. 19, § 17, against an order of two magistrates giving possession to a landlord, was not directed to any person, a mandamus could not issue commanding the two justices to make restitution. Reg. *v.* Traill, 12 A. & E. 761, 10 L. J. M. C. 57, 4 P. & D. 325, 40 E. C. L. 377.

47. *Connecticut.*— Du Bouchet *v.* Wharton, 12 Conn. 533.

Delaware.— Shaw *v.* Fleming, 5 Houst. 155.

New York.— Bristed *v.* Harrell, 21 Misc. 93, 46 N. Y. Suppl. 966.

North Carolina.— Meroney *v.* Wright, 84 N. C. 336.

Canada.—See Allenach *v.* Des Brisay, (East. T. [1865], Trin. T. [1866]) Stevens N. Brunsw. Dig. 493, holding that plaintiff could not avail himself of his legal title in answer to the writ.

48. Mears *v.* Remare, 34 Md. 333.

On reversal for lack of jurisdiction in the lower court, because of failure to summon the tenant, there is no judgment upon which a writ of restitution may issue upon application of the tenant. Mears *v.* Remare, 34 Md. 333.

49. Alden *v.* Lee, 1 Yeates (Pa.) 160; Fitzalden *v.* Lee, 2 Dall. (Pa.) 205, 1 L. ed. 350.

50. Small *v.* Clark, 97 Me. 304, 54 Atl. 758; Marsh *v.* Masterson, 15 Daly (N. Y.) 114, 3 N. Y. Suppl. 414, holding that, although under a lease terminating at noon on May 1, summary proceedings, under which the landlord is awarded possession, are begun on the last day of April, the court will not grant the tenant restitution, where it appears that a receiver was at the time in possession, and entitled to the tenant's interest, and that the tenant has nothing but a reversionary interest after the receiver shall be discharged. And see McQuade *v.* Emmons, 38 N. J. L. 397.

Where reversal is on ground of non-tenancy.— Where a judgment against a wife is reversed on the ground that the husband is the real tenant she will not be awarded restitution. People *v.* McCaffrey, 42 Barb. (N. Y.) 530.

51. People *v.* Hamilton, 15 Abb. Pr. (N. Y.) 328.

52. Small *v.* Clark, 97 Me. 304, 54 Atl. 758.

53. Chretien *v.* Doney, 1 N. Y. 419.

54. Carter *v.* Anderson, 13 N. Y. Suppl. 332.

55. See the statutes of the several states.

Payment of rent together with interests and costs within a specified time after judgment entitles defendant under some statutes to retain the premises upon the terms of the original lease. See Bateman *v.* San Francisco Super. Ct., 139 Cal. 140, 72 Pac. 922 (holding that such a statute did not apply where the proceedings were not only for non-payment of rent, but for other breaches of covenant); Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434.

Under the New York statute (Code Civ. Proc. § 2256), where the proceeding is founded upon default in the payment of rent, and the unexpired term of the lease under which the premises are held exceeds five years at the time when the warrant is issued, the lessee, his executor, administrator, or assign may, upon payment of all rent in arrear with interest and costs, become entitled to the possession of the demised premises under the lease and may hold them according to the terms of the original lease. By other sections provision is made for redemption by a creditor of the lessee (Code Civ. Proc. § 2257), and a qualification made by which the rights of the person redeeming are made subject, in a limited degree, to a lease executed since the issuance of the warrant (Code Civ. Proc. § 2258). For cases in which these provisions have been construed and applied see Flewwellin *v.* Lent, 91 N. Y. App. Div. 430, 86 N. Y. Suppl. 919; Witty *v.* Acton, 58 Hun 552, 12 N. Y. Suppl. 757 [*affirming* 9 N. Y. Suppl. 247]; Waters *v.* Crawford, 2 Thomps. & C. 602; Pursell *v.* New York L. Ins., etc., Co., 42 N. Y. Super. Ct. 383; Bien *v.* Bixby, 22 Misc. 126, 48 N. Y. Suppl. 810; Bien *v.* Bixby, 18 Misc. 415, 41 N. Y. Suppl. 433; Koppel *v.* Tilyou, 70 N. Y. Suppl. 910, 31 N. Y. Civ. Proc. 185; Crawford *v.* Waters, 46 How. Pr. 210. See also Witbeck *v.* Van Rensselaer, 2 Hun 55 [*affirmed* in 64 N. Y. 27]; Corning *v.* Beach, 26 How. Pr. 289.

56. Bateman *v.* San Francisco Super. Ct., 139 Cal. 140, 72 Pac. 922.

which to move away his personal property before he can be held to have voluntarily abandoned it.[57] And while the taking possession of the premises does not in itself amount to a conversion of the tenant's property by the landlord,[58] the refusal to surrender possession upon demand has such effect.[59] The landlord cannot by a mere notice create a lien for storage of personal property left by the tenant on the premises.[60]

25. Effect of Proceedings. Under some statutes it is expressly provided that the issuance of a warrant for the removal of the tenant terminates the relationship of landlord and tenant.[61]

26. Wrongful Dispossession — a. Right of Action.[62] Where dispossession proceedings have been instituted maliciously and without probable cause, the tenant

57. Smusch *v.* Kohn, 22 Misc. (N. Y.) 344, 49 N. Y. Suppl. 176. And see Lewis *v.* Ocean Navigation, etc., Co., 125 N. Y. 341, 26 N. E. 301 (holding that a tenant having a right to remove fixtures placed by him upon the demised premises during the term has the same right of removal so long as he remains in possession and may take them with him on being evicted in summary proceedings); Moore *v.* Wood, 12 Abb. Pr. (N. Y.) 393.

Removal of goods upon termination of lease in general see *supra*, VII, D, 6.

58. Peck *v.* Knox, 1 Sweeny (N. Y.) 311, holding that a demand for such property should be made of the lessee in possession, and if made of the landlord after he has leased the premises and given possession to another tenant, the landlord is not liable in an action of trover for refusing to deliver such property on demand of the owner.

59. Lewis *v.* Ocean Navigation, etc., Co., 125 N. Y. 341, 26 N. E. 301; Smusch *v.* Kohn, 22 Misc. (N. Y.) 344, 49 N. Y. Suppl. 176; Moore *v.* Woods, 12 Abb. Pr. (N. Y.) 393.

60. Roberts *v.* Kain, 6 Rob. (N. Y.) 354. And see Conway *v.* Kennedy, 2 N. Y. City Ct. 309, holding that where the landlord brought summary proceedings against an absent tenant, and instead of putting the tenant's goods on the public sidewalk stored them in his cellar, he became a gratuitous bailee thereof and his subsequent refusal to give them up until the back rents and costs were paid constituted a conversion for which he was liable, the law giving him no lien on the goods for such charges.

61. See the statutes of the several states. And see also cases cited *infra*, this note.

Under the New York statute it is expressly provided that the issuing of a warrant for the removal of the tenant cancels the agreement for the use of the premises and annuls the relation of landlord and tenant, except that it does not prevent the recovery of any rent payable at the time the precept was issued, or the reasonable value of the use and occupation to the time when the warrant was issued for any period with respect to which the agreement does not make a special provision for the payment of rent. Code Civ. Proc. § 2253. And see Van Vleck *v.* White, 66 N. Y. App. Div. 14, 72 N. Y. Suppl. 1026. This statute has been held not to prevent the termination of the relation where the tenant moves out without the issuance of the warrant (Ash *v.* Purnell, 16 Daly 189, 11 N. Y. Suppl. 54, 19 N. Y. Civ. Proc. 234, 26 Abb. N. Cas. 92; Gallagher *v.* Reilly, 16 Daly 227, 10 N. Y. Suppl. 536; Baldwin *v.* Thibadeau, 17 N. Y. Suppl. 532, 28 Abb. N. Cas. 14, 18 N. Y. Suppl. 950); and the landlord cannot obviate such a result by notifying the tenant that he will not avail himself of the final order, but will continue to hold the tenant liable for all subsequently accruing rent (Baldwin *v.* Thibadeau, *supra*). Where the rent is payable monthly in advance, the tenant is liable for a whole month's rent, although he vacated pursuant to a warrant, after the rent was payable but before the expiration of the month. Martin *v.* Lee, 29 Misc. 333, 60 N. Y. Suppl. 515, 7 N. Y. Annot. Cas. 161. A warrant is regarded as issued, under this provision, when made out by the justice and delivered by him to the clerk ready for use. Ash *v.* Purnell, *supra*.

Recovery of deposits.— Where a lease provides that in case the landlord shall reënter by force or otherwise, and that upon default by the lessee the lessor may either dispossess the lessee or resort to a deposit made to secure performance of the covenants for reimbursements, the lease is not so terminated by dispossession proceedings as to prevent the landlord from retaining the deposit. Anzolone *v.* Paskusz, 96 N. Y. App. Div. 188, 89 N. Y. Suppl. 203.

The commencement of the proceedings does not operate as a termination of the relation, but such termination takes place on the issuance of the warrant to dispossess. Guild *v.* Reilly, 9 N. J. L. J. 209.

Judgment obtained by collusion.— A landlord who with the consent of his tenant has recovered the premises and thereafter collected the rents from subtenants under an agreement for the mutual advantage of the parties may be compelled in equity to fulfil such agreement and he cannot contend that the original lease has been annulled so as to restore his estate in the premises. Elverson *v.* Vanderpoel, 41 N. Y. Super. Ct. 257 [*affirmed* in 69 N. Y. 610].

62. **Actions for disturbance of possession** or wrongful eviction by the landlord see *supra*. VII, F, 3.

Liability of officer arising from manner of executing writ of dispossession see Sheriffs and Constables,

may maintain an action for damages[63] as in other cases of malicious prosecution,[64] or where the process has been used excessively,[65] or for a purpose which it was not intended by law to effect,[66] as in cases of abuse of process.[67] By statute in some jurisdictions it is provided that upon reversal or quashing of the proceedings the tenant may have an action for the recovery of the damages sustained.[68] But in the absence of statute, an entry under valid process, although the proceedings are afterward reversed and restitution awarded, will not impose liability for trespass.[69] Where the entry is under void proceedings, however, it has been held that trespass will lie.[70] One who merely hires desk room from a tenant has no interest in the premises entitling him to maintain an action for damages arising from dispossession in proceedings to which he was not made a party.[71]

b. Damages. As a general rule the measure of the tenant's damages is the difference between the contract price and the reasonable market rental value of the premises at the time the tenant is evicted,[72] and in addition he may recover such special damage as the pleading and proof show were the proximate result of the landlord's wrongful act.[73] Punitory damages can be given only where there

63. Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123; Melson *v.* Dickson, 63 Ga. 682, 36 Am. Rep. 128; Hegan Mantel Co. *v.* Cook, 57 S. W. 929, 22 Ky. L. Rep. 427; Block *v.* Bonnet, 28 La. Ann. 540.

Estoppel.— Where the tenant agreed not to oppose a lease by his landlord to another for a term of years, he is estopped, where the landlord acts upon the agreement, to sue the landlord or his agent for dispossessing him not more than a month thereafter in order to put the new tenant into possession. Pausch *v.* Guerrard, 67 Ga. 319.

64. See MALICIOUS PROSECUTION.

65. Graver *v.* Fehr, 3 Pa. Cas. 203, 6 Atl. 80.

Ejection of sick tenant.— A landlord who occasions a writ of removal to be executed when a child of the tenant is ill with a contagious disease is liable in an action for abuse of process, the death of the child having been occasioned by the exposure attendant upon the removal. Bradshaw *v.* Frazier, 113 Iowa 579, 85 N. W. 752, 86 Am. St. Rep. 394, 55 L. R. A. 258. But *compare* Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388, in which it was held that the landlord was not liable in damages for the act of an officer in executing a writ of restitution during the illness of the tenant.

66. Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123; Croft *v.* King, 8 Daly (N. Y.) 265.

Pending a rule for restitution of the premises, an action for malicious abuse of process cannot be maintained. Mayer *v.* Walter, 6 Phila. (Pa.) 592.

67. See, generally, PROCESS.

68. Eten *v.* Luyster, 37 N. Y. Super. Ct. 486 [*affirmed* in 60 N. Y. 252] (holding that under-tenants were included in the statute); Burwell *v.* Brodie, 134 N. C. 540, 47 S. E. 47; Hickey *v.* Conley, 18 Montg. Co. Rep. (Pa.) 124 (holding that the tenant will not be defeated in his suit for damages because the proceedings were irregular, and that where the landlord has issued a writ of dispossession and the constable makes return that he dispossessed the tenant under the writ, the landlord cannot justify on the ground that he was entitled to take peaceable possession). And see Delaney *v.* Fox, 1 C. B. N. S. 166, 2 Jur. N. S. 1233, 26 L. J. C. P. 5, 5 Wkly. Rep. 148, 87 E. C. L. 166.

An under-tenant may recover damages, although the lessee under whom he holds makes a voluntary surrender of the term. Eten *v.* Luyster, 37 N. Y. Super. Ct. 486 [*affirmed* in 60 N. Y. 252].

Failure of the tenant to reënter does not bar his action. Woods *v.* Kernan, 57 Hun (N. Y.) 215, 10 N. Y. Suppl. 654.

Where the tenant moves out voluntarily, pending summary proceedings, it has been held that the landlord is not liable for trespass. Coe *v.* Haines, 44 N. J. L. 134.

Sufficiency of reversal.— Where on appeal it is decided that there is no error of law for which the judgment can be reversed, but that a default entered might be opened and an order was entered, that on payment of costs the final order awarding possession should be reversed and a new trial directed, the tenant may recover damages, the new trial having resulted in his favor. Woods *v.* Kernan, 57 Hun (N. Y.) 215, 10 N. Y. Suppl. 654, 19 N. Y. Civ. Proc. 180.

69. Leese *v.* Horne, 30 Pittsb. L. J. N. S. (Pa.) 316; Ashcroft *v.* Bourne, 3 B. & Ad. 684, 1 L. J. K. B. 209, 23 E. C. L. 301. See also Melson *v.* Dickson, 63 Ga. 682, 36 Am. Rep. 128; Juergen *v.* Allegheny County, 204 Pa. St. 501, 54 Atl. 281.

70. Croft *v.* King, 8 Daly (N. Y.) 265 (where an under-tenant was removed without having been made a party); McCoy *v.* Hyde, 8 Cow. (N. Y.) 68 (so holding where an affidavit in a former proceeding was used as the foundation of a new proceeding).

71. Eaton *v.* Hall, 43 Misc. (N. Y.) 153, 88 N. Y. Suppl. 260.

72. Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606, holding that the tenant cannot recover the worth of the land to him during the unexpired term. See, generally, *supra*, VII, F, 3, e.

73. Eten *v.* Luyster, 60 N. Y. 252 (holding that where it was shown that defendant destroyed a building erected by plaintiff on the

is malice or oppression[74] and are usually graduated by the intent of the party committing the wrong.

c. Procedure. Actions for the recovery of damages for wrongful dispossession are subject to the rules of pleading[75] and procedure[76] applicable generally to civil actions.

XI. RENTING ON SHARES.[77]

A. Nature of Contract — 1. Whether Lease or Contract of Employment. The general rule is that one who raises a crop upon the land of another under a contract to raise the crop for a particular part of it is a mere cropper, and, where there is a joint occupation or an occupation which does not exclude the owner from possession, the contract is a mere letting on shares, and the relation of landlord and tenant is not created thereby.[78] In some jurisdictions, by statutory enact-

premises, and that a sum of money in a box in the building was lost in the removal, plaintiff was entitled to recover for the destruction of the building, the loss of the money and the value of the unexpired term); Woods *v.* Kernan, 57 Hun (N. Y.) 215, 10 N. Y. Suppl. 654, 19 N. Y. Civ. Proc. 180 (holding that defendant may recover the value over and above the rent for the use of the premises, including the crops and fruit he might have gathered up to the time restitution was ordered); Hong Sing *v.* Wolf Fine, 33 Misc. (N. Y.) 608, 67 N. Y. Suppl. 1109 (holding that the loss of profits during the remainder of the term might be recovered); Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606 (holding that the tenant may recover depreciation in the value of a crop, but he cannot recover the expense during the unexpired term of hauling water to supply his stock and family, although there was an abundant supply upon the place from which he was ejected); Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388 (holding that remote damages, or such as accrue after possession has been restored to plaintiff, are not recoverable and that therefore an evicted tenant who accepted a receipt for his goods which had been stored in a warehouse by the officer executing a writ of dispossession, could not hold the landlord liable for subsequent damages to the goods occurring in the warehouse).

Other damages for breach of contract.— Damages for failure to supply water in accordance with the conditions of the lease may be recovered in an action for an unlawful eviction. Smith *v.* Eubank, 72 Ga. 280.

74. Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388, holding that a defendant was not liable for the wanton and malicious manner in which an officer executed a writ of possession, unless he authorized or ratified the acts of the officer.

75. See Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123, holding that where the declaration alleged possession by plaintiff under a lease, and a wrongful eviction, before the expiration of the term, under a dispossessory warrant sued out by defendant, a plea admitting the suing out of the warrant and the expulsion of plaintiff at the time alleged, but averring that the proceeding was instituted without malice and on probable cause, setting out facts which constituted probable cause, was a good plea of justification, although it did not admit the existence of the lease. See, generally, PLEADING.

Damages.— A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind, and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops. Burwell *v.* Brodie, 134 N. C. 540, 47 S. E. 47. See, generally, DAMAGES, 13 Cyc. 173.

76. See, generally, TRIAL.

Questions for jury.— Where the owner of land was informed by one in possession that the latter claimed under a written lease from a prior owner, and, on learning of the invalidity of that lease, gave the tenant notice to quit, and the tenant, in a written warning to the owner not to evict him, based his claim to possession solely on the written lease, but before suing out a dispossessory warrant the owner learned of a valid oral lease made by his grantor to the tenant, whether the suing out of the warrant was without malice and on probable cause was for the jury. Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123. Where a warrant was issued at the suit of the landlord to dispossess his tenant, and a counter-affidavit and bond was given, but subsequently defendant relinquished possession under protest, there having been no harshness or oppression of any sort on the part of the landlord, it was error to submit to the jury the question of oppression in the eviction. Smith *v.* Eubanks, 72 Ga. 280.

Costs.— Where neither party is entitled to succeed to the full extent claimed by their pleadings costs may be denied. Russell *v.* Murray, 34 Nova Scotia 548; Rice *v.* Ditmars, 21 Nova Scotia 140.

77. See, generally, CROPS, 12 Cyc. 975 *et seq.*

Interference with relation by third person see *infra*, XII.

78. *Alabama.*— Shields *v.* Kimbrough, 64 Ala. 504; Brown *v.* Coats, 56 Ala. 439; Smith *v.* Rice, 56 Ala. 417; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193.

Arizona.— Romero *v.* Dalton, 2 Ariz. 210, 11 Pac. 863.

ment, where one party furnishes the land and another party furnishes the labor and team to cultivate it, on stipulations express or implied to divide the crop between them in certain proportions, the relation of landlord and tenant exists between them;[79] while, where one party furnishes the land and the team to cultivate it, and the other party furnishes the labor, with stipulations express or implied to divide the crop between them in certain proportions, the agreement is held to be a contract of hire and not a lease.[80] In several jurisdictions, however, it is held that by the ordinary contract of letting land upon shares the relationship of landlord and tenant is thereby established, the tenant having as against the landlord as well as others the possession of the land and the rights growing out of that relation.[81] According to the early decisions, where the agreement to cultivate on shares was for the one crop only, the parties were to be considered

Arkansas.— Burgie *v.* Davis, 34 Ark. 179; Ponder *v.* Rhea, 32 Ark. 435; Christian *v.* Crocker, 25 Ark. 327, 99 Am. Dec. 223.

California.—Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147.

Delaware.— Currey *v.* Davis, 1 Houst. 598.

Georgia.— Hancock *v.* Boggus, 111 Ga. 884, 36 S. E. 970.

Illinois.— Creel *v.* Kirkham, 47 Ill. 344; Chase *v.* McDonnell, 24 Ill. 236; Alwood *v.* Ruckman, 21 Ill. 200.

Maine.— Richards *v.* Wardwell, 82 Me. 343, 19 Atl. 863.

Michigan.— Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701. See also Wells *v.* Hollenbeck, 37 Mich. 504, holding that a tenant in a contract to farm land on shares cannot sue the landlord in trespass to recover for injury done to the growing crop by live stock belonging to the tenant, for the parties are cotenants of the property.

Mississippi.— Doty *v.* Heth, 52 Miss. 530.

Missouri.— See Boone *v.* Stover, 66 Mo. 430.

New Jersey.— Gray *v.* Reynolds, 67 N. J. L. 169, 50 Atl. 670; McLaughlin *v.* Kennedy, 49 N. J. L. 519, 10 Atl. 391; McQuade *v.* Emmons, 38 N. J. L. 397; New Jersey Midland R. Co. *v.* Van Syckle, 37 N. J. L. 496; State *v.* Jewell, 34 N. J. L. 259; Guest *v.* Opdyke, 31 N. J. L. 552.

New York.— Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415, 4 Abb. Dec. 363, 1 Am. L. J. 265; Booher *v.* Stewart, 75 Hun 214, 27 N. Y. Suppl. 114, 31 Abb. N. Cas. 224; Reynolds *v.* Reynolds, 48 Hun 142; Wilber *v.* Sisson, 53 Barb. 258; Unglish *v.* Marvin, 8 N. Y. Suppl. 283; Caswell *v.* Districh, 15 Wend. 379; Bradish *v.* Schenck, 8 Johns. 151. See Barry *v.* Smith, 69 Hun 88, 23 N. Y. Suppl. 261 [*affirming* 1 Misc. 240, 23 N. Y. Suppl. 129], where the relationship of landlord and tenant was held to exist.

North Carolina.— Medlin *v.* Steele, 75 N. C. 154; Neal *v.* Bellamy, 73 N. C. 384; Haywood *v.* Rogers, 73 N. C. 320; Lewis *v.* Wilkins, 62 N. C. 303; Denton *v.* Strickland, 48 N. C. 61; Graham *v.* Houston, 15 N. C. 232. See, however, Hatchell *v.* Kimbrough, 49 N. C. 163.

South Carolina.— McCutchen *v.* Crenshaw, 40 S. C. 511, 19 S. E. 140; Richey *v.* Du Pre, 20 S. C. 6; Carpenter *v.* Strickland, 20 S. C. 1; Maverick *v.* Lewis, 3 McCord 211, holding that while no particular words are necessary to constitute a lease, an interest in the freehold must be conveyed; and an agreement to take charge of and manage a farm on shares is not a lease.

Tennessee.— Mann *v.* Taylor, 5 Heisk. 267.

Vermont.— Warner *v.* Hoisington, 42 Vt. 94; Bishop *v.* Doty, 1 Vt. 37.

Virginia.— Lowe *v.* Miller, 3 Gratt. 205, 46 Am. Dec. 188.

Canada.— West *v.* Atherton, 7 N. Brunsw. 653; Oberlin *v.* McGregor, 26 U. C. C. P. 460; Park *v.* Humphrey, 14 U. C. C. P. 209; Dackstader *v.* Baird, 5 U. C. Q. B. 591.

See 32 Cent. Dig. tit. "Landlord and Tenant," §§ 1349, 1355.

A cropper is one hired to work land and to be compensated by a share of the produce. Steel *v.* Frick, 56 Pa. St. 172. And see CROPS, 12 Cyc. 979.

79. Kilpatrick *v.* Harper, 119 Ala. 452, 24 So. 715; Wilson *v.* Stewart, 69 Ala. 302; Shields *v.* Kimbrough, 64 Ala. 504 (holding, however, that a contract between the lessee of land and his laborers for the cultivation of land on shares did not, prior to the passage of the act of Feb. 9, 1877, create the relation of landlord and tenant between them); Ala. Code (1896), § 2711; Redmon *v.* Bedford, 80 Ky. 13.

80. Jordan *v.* Lindsay, 132 Ala. 567, 31 So. 484; Hunt *v.* Matthews, 132 Ala. 286, 31 So. 613; Ferris *v.* Hoglan, 121 Ala. 240, 25 So. 834; Ragsdale *v.* Kinney, 119 Ala. 454, 24 So. 443.

81. *California.*— Clarke *v.* Cobb, 121 Cal. 595, 54 Pac. 74.

Iowa.— Rees *v.* Baker, 4 Greene 461.

New Hampshire.— Wentworth *v.* Portsmouth, etc., R. Co., 55 N. H. 540; Moulton *v.* Robinson, 27 N. H. 550.

New York.— Reynolds *v.* Reynolds, 48 Hun 142; Burns *v.* Winchell, 44 Hun 261; Tanner *v.* Hills, 44 Barb. 428; Tripp *v.* Riley, 15 Barb. 333; Otis *v.* Thompson, Lalor 131; Caswell *v.* Districh, 15 Wend. 379; De Mott *v.* Hagerman, 8 Cow. 220, 18 Am. Dec. 443.

Oregon.— Cooper *v.* McGrew, 8 Oreg. 327.

Tennessee.— Mann *v.* Taylor, 5 Heisk. 267.

Texas.— Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881.

Vermont.—Sowles *v.* Martin, 76 Vt. 180, 56 Atl. 979; Aiken *v.* Smith, 21 Vt. 172; Hurd *v.* Darling, 14 Vt. 214.

as tenants in common of the crop;[82] but where the contract was for a certain term, or for more than one crop, then it should be construed as a lease.[83] Now, however, this distinction is no longer made, and the intention of the parties as expressed in the language they have used, interpreted in the light of the surrounding circumstances, controls in determining whether or not a given contract constitutes a lease.[84] Where there is a reservation in the agreement of a certain portion of the crop as rent *eo nomine* this necessarily constitutes a lease, and creates the relationship of landlord and tenant between the parties.[85]

2. Whether Lease or Partnership. The general rule is that an ordinary contract between the owner of the land and persons employed thereon to cultivate the land on shares does not constitute them partners in the transaction.[86] However, the parties to the contract may so word it as to clearly constitute a partnership

Virginia.— Lowe *v.* Miller, 3 Gratt. 205, 46 Am. Dec. 188.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1369.

82. Bradish *v.* Schenck, 8 Johns. (N. Y.) 151; Bishop *v.* Doty, 1 Vt. 37; Hare *v.* Celey, Cro. Eliz. 143. See Schmitt *v.* Cassilius, 31 Minn. 7, 16 N. W. 453; Cooper *v.* McGrew, 8 Oreg. 327.

83. Decker *v.* Decker, 17 Hun (N. Y.) 13; Stewart *v.* Doughty, 9 Johns. (N. Y.) 108; Jackson *v.* Brownell, 1 Johns (N. Y.) 267, 3 Am. Dec. 326; Welch *v.* Hall, Buller N. P. 85.

84. *Arizona.*— Gray *v.* Robinson, 4 Ariz. 241, 33 Pac. 712.

Arkansas.— Birmingham *v.* Rogers, 46 Ark. 254.

California.— Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666; Smith *v.* Schultz, 89 Cal. 526, 26 Pac. 1087; Walls *v.* Preston, 25 Cal. 59.

Illinois.— Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Alwood *v.* Ruckman, 21 Ill. 200; Hansen *v.* Dennison, 7 Ill. App. 73; Koob *v.* Ammann, 6 Ill. App. 160.

Iowa.— Blake *v.* Coats, 3 Greene 548.

Maryland.— Hoskins *v.* Rhodes, 1 Gill & J. 266.

Massachusetts.—Orcutt *v.* Moore, 134 Mass. 48, 45 Am. Rep. 278; Warner *v.* Abbey, 112 Mass. 355, 359, where the court, by Endicott, J., said: "In construing contracts for the cultivation of land at halves, it is impossible to lay down a general rule, applicable to all cases; because the precise nature of the interest or title between the contracting parties must depend upon the contract itself, and very slight provisions in the contract may very materially affect the legal relations of the parties and their consequent remedies for injuries as between themselves. In some cases, the owner of the land gives up the entire possession, in which event it is a contract in the nature of a lease with rent payable in kind; in other cases, he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is entitled to the joint possession of the crops, or the possession of one is the possession of the other, until division; or he may retain the sole possession of the land, and the other party may have the right to perform the labor and receive half the crops as compensation; or the two parties may become tenants in common of the growing crops, while no tenancy in common as such exists in the land."

Mississippi.— Schlicht *v.* Callicott, 76 Miss. 487, 24 So. 869; Alexander *v.* Zeigler, 84 Miss. 560, 36 So. 536.

Missouri.— Johnson *v.* Hoffman, 53 Mo. 504; Moser *v.* Law, 48 Mo. App. 85.

New Hampshire.— Moulton *v.* Robinson, 27 N. H. 550.

New Jersey.—Mundy *v.* Warner, 61 N. J. L. 395, 39 Atl. 697, where the agreement was held to be a lease.

New York.— Putnam *v.* Wise, 1 Hill 244, 37 Am. Dec. 309; Newcomb *v.* Pamer, 2 Johns. 421 note; Jackson *v.* Brownell, 1 Johns. 267, 3 Am. Dec. 326.

North Carolina.— Howland *v.* Forlaw, 108 N. C. 567, 13 S. E. 173; Harrison *v.* Ricks, 71 N. C. 7; Hatchel *v.* Kimbrough, 49 N. C. 163; Ross *v.* Swaringer, 31 N. C. 481.

Pennsylvania.— Steel *v.* Frick, 56 Pa. St. 172; Lamberton *v.* Stouffer, 55 Pa. St. 284; Burns *v.* Cooper, 31 Pa. St. 426; Fry *v.* Jones, 2 Rawle 11; Brown *v.* Jaquette, 2 Del. Co. Rep. 245.

South Carolina.— Rakestraw *v.* Floyd, 54 S. C. 288, 32 S. E. 419.

Vermont.— McLellan *v.* Whitney, 65 Vt. 510, 27 Atl. 117; Aikin *v.* Smith, 21 Vt. 172; Hurd *v.* Darling, 14 Vt. 561; Manwell *v.* Manwell, 14 Vt. 14.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1355.

85. *Arkansas.*— Neal *v.* Brandon, 70 Ark. 79, 66 S. W. 200.

Maryland.— Hoskins *v.* Rhodes, 1 Gill & J. 266.

New Jersey.—Reeves *v.* Hannan, 65 N. J. L. 249, 48 Atl. 1018.

North Carolina.— Harrison *v.* Ricks, 71 N. C. 7.

Wisconsin.— Rowlands *v.* Voechting, 115 Wis. 352, 91 N. W. 990; Strain *v.* Gardner, 61 Wis. 174, 21 N. W. 35.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1355.

86. *Arkansas.* — Christian *v.* Crocker, 25 Ark. 327, 99 Am. Dec. 223.

California.— Smith *v.* Schultz, 89 Cal. 526, 26 Pac. 1087.

Missouri.— Musser *v.* Brinck, 68 Mo. 242; Donnell *v.* Harshe, 67 Mo. 170.

New Jersey.— Perrine *v.* Hankinson, 11 N. J. L. 181.

between them, and where they jointly engage in the enterprise in cultivating the land, the one furnishing the land and farming utensils, and the other the labor and superintendence, sharing expenses between them, and agreeing to divide the profits, such agreement possesses every element of a partnership.[87]

B. Rights and Liabilities in General — 1. As to the Land. Where a contract to crop on shares does not create the relationship of landlord and tenant, the cropper has no such interest in the land as entitled him to maintain trespass against the owner or a third person.[88] But the rule is otherwise where the relationship of landlord and tenant is created by the contract, and in such case the tenant alone can maintain trespass during the term.[89] Where parties agree to cultivate land on shares, the cropper is entitled to ingress and egress on the property, after the maturity of the crop, for the purpose of harvesting the same and removing his share.[90] Where land is rented on shares, the share of the owner of the premises is due and payable only when the crop is harvested and ready for division.[91]

2. Cultivation, Care, and Harvesting of Crop. Where one rents land, reserving as rent a certain proportion of the crop produced thereon, or there is a letting of the land upon shares, and there is no stipulation as to the manner of cultivation, the owner of the land is bound by the agreement and can claim only his proportion of the crop actually produced, regardless of the mode of cultivation.[92] Where, however, land is rented for cultivation upon the agreement to pay a certain share of the crops, the tenant should not allow the land to lie idle, but must cultivate it with proper industry, and the landlord is entitled to demand for rent such portion

New York.— Gregory *v.* Brooks, 1 Hun 404, 3 Thomps. & C. 517; Putnam *v.* Wise, 1 Hill 234, 37 Am. Dec. 309.

North Carolina.— Day *v.* Stevens, 88 N. C. 83, 43 Am. Rep. 732.

Pennsylvania.— Brown *v.* Jaquette, 94 Pa. St. 113, 39 Am. Rep. 770.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1351.

87. *Alabama.*— Autrey *v.* Frieze, 59 Ala. 587; McCrary *v.* Slaughter, 58 Ala. 230.

Connecticut.— Somers *v.* Joyce, 40 Conn. 592.

Georgia.— Adams *v.* Carter, 53 Ga. 160; Holifield *v.* White, 52 Ga. 567.

Massachusetts.— See Holmes *v.* Old Colony R. Co., 5 Gray 58.

New York.— Richardson *v.* Hughlitt, 76 N. Y. 55, 32 Am. Rep. 267; Taylor *v.* Bradley, 39 N. Y. 129, 4 Abb. Dec. 363, 1 Am. L. J. 265.

North Carolina.— Curtis *v.* Cash, 84 N. C. 41; Reynolds *v.* Pool, 84 N. C. 37, 37 Am. Rep. 607; Lewis *v.* Wilkins, 62 N. C. 303.

Vermont.— Ambler *v.* Bradley, 6 Vt. 119.

United States.— Leavitt *v.* Windsor Land Inv. Co., 54 Fed. 439, 4 C. C. A. 425; Tibbatts *v.* Tibbatts, 23 Fed. Cas. No. 14,020, 6 McLean 8.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1351.

88. Decker *v.* Decker, 17 Hun (N. Y.) 13; Bradish *v.* Schenck, 8 Johns. (N. Y.) 151; Denton *v.* Strickland, 48 N. C. 61. See Warner *v.* Hoisington, 42 Vt. 94; Cutting *v.* Cox, 19 Vt. 517, holding that in a renting on shares the landlord is not so far divested of possession that he cannot maintain trespass in his own name for an injury to the reversion.

89. Woodruff *v.* Adams, 5 Blackf. (Ind.) 317, 35 Am. Dec. 122; Cornell *v.* Dean, 105 Mass. 435.

90. Com. *v.* Rigney, 4 Allen (Mass.) 316.

Under Iowa Code, § 2015, one who cultivates land as a field-tenant or cropper has no right to pasture the land before corn raised thereon is husked and removed, or in any event after December 1. Tautlinger *v.* Sullivan, 80 Iowa 218, 45 N. W. 765; Kyte *v.* Keller, 76 Iowa 34, 39 N. W. 928.

91. Jordan *v.* Bryan, 103 N. C. 59, 9 S. E. 135; Lambertson *v.* Stouffer, 55 Pa. St. 284. See Price *v.* Grice, 10 Ida. 443, 79 Pac. 387 (where a lease for five years provided for the sale of the increase of certain live stock, one half of the amount to go to the lessors and one half to the lessee, and it was held that the lessors were entitled to receive their half whenever such live stock was sold and to an accounting from the lessee each year); Harrison *v.* Clifton, 75 Iowa 736, 38 N. W. 406 (where a lease of a farm and cattle provided that the tenant should pay one half the cream from the milk of the cows for rent, but contained no stipulation when it was to be paid, and it was held that the fact that the tenant had sold the cream without paying over one half the proceeds did not necessarily avoid the lease, but that he had a reasonable time in which to make payment).

92. Patton *v.* Garrett, 37 Ark. 605; Reynolds *v.* Howard, 111 Ga. 888, 36 S. E. 967; Brown *v.* Owen, 94 Ind. 31; Spencer *v.* Cullon, 36 La. Ann. 213, holding that the planter is not responsible for injury done to the crop by an unexpected freeze, or for a delay in severing the crop when impeded in operations by excessive rains and bad roads.

of the crop raised as his share would amount to if proper industry had been bestowed in cultivating the land.[93] In the absence of express agreement or stipulation to the contrary, it is the duty of the lessee or cropper to save and gather the crop, and where he neglects to do so, and the owner of the land, in order to prevent the destruction of the crop, comes in and harvests it, he is entitled to reimbursement from the lessee or cropper for the expense of harvesting the crop.[94] Where a receiver is in possession of a crop and has a force hired to gather it, the landlord does not become liable for increasing expenses resulting from discharging the hands by telling the receiver he did not want them on his place and that they should not use water out of his spring.[95]

3. Actions by Tenant For Breach of Contract. In any event, whether the party be held to be a lessee or a cropper, a cause of action arises in his favor against the owner of the land for breach of contract in delivering possession of the land for the purpose contemplated in the agreement, or for any substantial interference with the lessee or cropper in the cultivation of the land, or harvesting of the crop.[96] The measure of plaintiff's damages in such action is as a general rule not the value of the services in cultivating and harvesting the crop, but the value of his contract or the value of his share of the contemplated crop.[97]

4. Action by Landlord For Breach of Contract. Where a tenant or cropper who contracts to cultivate a crop on shares or for a specified interest in the same fails to comply with the terms of his agreement, the owner of the land may maintain an action against him for the consequent damages.[98]

5. Actions Against Third Persons. Where land is let upon shares, the owners of crops may maintain an action against third persons for unlawful trespass upon or injury to such crops.[99] However, one joint owner cannot alone maintain such

93. Wheat *v.* Watson, 57 Ala. 581; Johnson *v.* Bryant, 61 Ark. 312, 32 S. W. 1081, holding that to justify a failure to account for the whole crop raised the tenant must show that it was caused by the act of God, the landlord, or the public enemy. See Humes *v.* Dottermus, 10 Pa. Cas. 600, 13 Atl. 78, where plaintiff agreed to cultivate and cure tobacco on defendant's land, the tobacco to remain the property of defendant until sold, and then the proceeds to be divided, and the tobacco was burned while in possession of defendant, before it had been sold, or in any way divided, and it was held that plaintiff was entitled to an accounting with defendant for his share of any insurance collected by defendant.

94. Beckwith *v.* Carroll, 56 Ala. 12; Charles *v.* Davis, 59 Cal. 479; Collier *v.* Cunningham, 2 Ind. App. 254, 28 N. E. 341; Evers *v.* Shumaker, 57 Mo. App. 454, where a lease recited that defendant agreed "to give one-third of all the grain to be put in the crib, which includes wheat and corn . . . the granary cribs are to be on the ground rented by the tenant." Neither the lessors nor the lessee had more than a leasehold interest in the farm leased, and it was held that the lease required the lessee and not the lessors to provide temporary storage for the rent corn on the farm, that was reasonably suitable for the purpose. See also Reybold *v.* Reybold, 6 Houst. (Del.) 420.

95. Reynolds *v.* Hindman, 88 Ga. 314, 14 S. E. 471.

96. Williams *v.* Cleaver, 4 Houst. (Del.) 453; Chew *v.* Lucas, 15 Ind. App. 595, 43 N. E. 235; Jewett *v.* Brooks, 134 Mass. 505; Williams *v.* Bemis, 108 Mass. 91, 11 Am. Rep. 318; Malone *v.* Scott, 40 Tex. 460; Gazley *v.* Wayne, 36 Tex. 689.

Executory contract.— Where a tenant in possession of a farm under a lease on shares for a term of years, which was to be put in writing, abandoned the farm merely because the landlord became dissatisfied with him, and told him to get off, and refused to sign the written lease when requested, he was held to have no right of action for breach of the contract as an executory one nor could he recover for his interest in the crops. Preston *v.* Smallwood, 20 N. Y. Suppl. 504.

97. Jewett *v.* Brooks, 134 Mass. 505; Taylor *v.* Bradley, 39 N. Y. 129, 4 Abb. Dec. 363, 1 Am. L. J. 265; Depew *v.* Ketchum, 75 Hun (N. Y.) 227, 27 N. Y. Suppl. 8, 31 Abb. N. Cas. 210; Bowers *v.* Graves, etc., Co., 8 S. D. 385, 66 N. W. 931; Flick *v.* Wetherbee, 20 Wis. 392.

98. Templin *v.* Rothweiler, 56 Iowa 259, 9 N. W. 207; Enley *v.* Nowlin, 1 Baxt. (Tenn.) 163; Cammack *v.* Rogers, 32 Tex. Civ. App. 125, 74 S. W. 945 (holding that in a contract for rent, where the landlord is to receive part of the crop, there is an implied covenant that ordinary care shall be exercised by the tenant to cultivate the premises in a farmer-like manner); Reynolds *v.* Chynoweth, 68 Vt. 104, 34 Atl. 36.

99. Ohio, etc., R. Co. *v.* Hoeltman, 34 Ill. App. 429; Lathrop *v.* Rogers, 1 Ind. 554; Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145; Texas, etc., R. Co. *v.* Saunders, (Tex. 1892) 18 S. W. 793.

action without joining therein the other joint owners of such property, and those refusing to join in the action as plaintiffs should be made parties defendant.[1]

6. Reëntry and Recovery of Possession by Landlord. Under a lease of land on shares, containing no clause giving the lessor a right of reëntry in case the covenants are broken,[2] the lessor has no right of reëntry upon the lessee's failure to comply with his covenants,[3] although he may bring an action of forcible entry and detainer,[4] or resort to summary proceedings, where the statute gives such remedy, to recover possession of the premises.[5]

C. Rights and Liabilities as to Crops[6] — 1. Rights and Liabilities of Parties in General[7] — a. Right or Title to Crop. The title to the crops raised by one man on another man's farm depends largely if not entirely upon the contract between the two men. If the contract amounts to a lease or demise of the land by the owner to the occupier, then clearly the crops belong to the occupier, whether he pays rent in money, or in kind by a share of the crops. The occupier in such cases becomes the owner *pro hac vice*, and has title to the products of the farm until division.[8] In some jurisdictions where an agreement by which land is let to be cultivated for a share of the crops does not constitute a lease,

1. *Alabama.*— Pruitt *v.* Ellington, 59 Ala. 454.

Kansas.— Hays *v.* Crist, 4 Kan. 350.

Missouri.— Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145, holding, however, that a landlord entitled by the terms of the lease to a share of the crop as rent may, if non-joinder of the tenant is not objected to, sue alone and recover his proportion of the damages to the crop.

Texas.— Texas, etc., R. Co. *v.* Gill, 2 Tex. App. Civ. Cas. § 175; Houston, etc., R. Co. *v.* Hollingsworth, 2 Tex. App. Civ. Cas. § 173.

Vermont.— Cutting *v.* Cox, 19 Vt. 517.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1363.

2. Vincent *v.* Crane, 134 Mich. 700, 97 N. W. 34.

3. Woodruff *v.* Adams, 5 Blackf. (Ind.) 317, 35 Am. Dec. 122; Rees *v.* Baker, 4 Greene (Iowa) 461; Hanaw *v.* Bailey, 83 Mich. 24, 46 N. W. 1039, 9 L. R. A. 801; Kamerick *v.* Castleman, 23 Mo. App. 481.

4. Jones *v.* Durrer, 96 Cal. 95, 30 Pac. 1027; Harrison *v.* Clifton, 75 Iowa 736, 33 N. W. 406; Wood *v.* Garrison, 62 S. W. 728, 23 Ky. L. Rep. 295.

5. Lewis *v.* Sheldon, 103 Mich. 102, 61 N. W. 269.

After wrongful eviction of the tenant the landlord cannot, on the tenant's being restored to possession, charge him for having the farming work done by another person, but the landlord does not forfeit his rights which had accrued to him under the lease contract and the statute, such as the right to a credit for guano, cotton-seed meal, and cotton seed furnished by him, and used in planting and making the crop. Burwell *v.* Brodie, 134 N. C. 540, 47 S. E. 47.

6. **Rights and liabilities of purchasers and creditors** see *infra*, XI, D.

7. **Rights and liabilities of tenant under farm leases** in general see *supra*, VII, B, 4.

Nature and incidents of property and crops in general see Crops, 12 Cyc. 976 *et seq.*

Actions by landlord see XI, C, 1, h.

8. *Alabama.*— Kilpatrick *v.* Harper, 119 Ala. 452, 24 So. 715; Treadway *v.* Treadway, 56 Ala. 390.

California.— Holt Mfg. Co. *v.* Thornton, 136 Cal. 232, 68 Pac. 708; Clarke *v.* Cobb, 121 Cal. 595, 54 Pac. 74.

Georgia.— Bryant *v.* Pugh, 86 Ga. 525, 12 S. E. 927.

Illinois.— Sargent *v.* Courrier, 66 Ill. 245; Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312.

Indiana.— Chicago, etc., R. Co. *v.* Linard, 94 Ind. 319, 48 Am. Rep. 155; Cunningham *v.* Baker, 84 Ind. 597; Frout *v.* Hardin, 56 Ind. 165, 26 Am. Rep. 18; Lacy *v.* Weaver, 49 Ind. 373, 19 Am. Rep. 683.

Iowa.— Howard County *v.* Kyte, 69 Iowa 307, 28 N. W. 609; Townsend *v.* Isenberger, 45 Iowa 670.

Louisiana.— Porche *v.* Bodin, 28 La. Ann. 761.

Maine.— Richards *v.* Wardwell, 82 Me. 343, 19 Atl. 863; Jordan *v.* Staples, 57 Me. 352; Symonds *v.* Hall, 37 Me. 354, 59 Am. Dec. 53; Turner *v.* Bachelder, 17 Me. 257; Bailey *v.* Fillebrown, 9 Me. 12, 23 Am. Dec. 529.

Massachusetts.— Orcutt *v.* Moore, 134 Mass. 48, 45 Am. Rep. 278; Cornell *v.* Dean, 105 Mass. 435.

Michigan.— Freese *v.* Arnold, 99 Mich. 13, 57 N. W. 1038.

New Jersey.—Reeves *v.* Hannan, 65 N. J. L. 249, 48 Atl. 1018; Doremus *v.* Howard, 23 N. J. L. 390.

New York.— Osman *v.* Barker, 38 N. Y. Suppl. 43.

North Carolina.— Foster *v.* Penry, 76 N. C. 131; Harrison *v.* Ricks, 71 N. C. 7; Ross *v.* Swaringer, 31 N. C. 481; Deaver *v.* Rice, 20 N. C. 567, 34 Am. Dec. 388.

Ohio.— Mouser *v.* Davis, 9 Ohio Dec. (Reprint) 237, 11 Cinc. L. Bul. 249.

Pennsylvania.— Ream *v.* Harnish, 45 Pa. St. 376; Burns *v.* Cooper, 31 Pa. St. 426; Briggs *v.* Thompson, 9 Pa. St. 338; Rinehart *v.* Olwine, 5 Watts & S. 157; Price *v.* Wright, 4 Leg. Op. 432; Kauffman *v.* Schaeffer, 2 Walk. 331.

but creates a tenancy in common of the crops, it is held that the owner of the land thereby impliedly reserves the right to remove his share if necessary without the consent of the occupier.[9] If the contract, however, does not amount to a lease, but is instead a contract for hiring, the occupier to carry on the farm, the owner to pay him a certain percentage of the products as compensation, then the occupier is not owner *pro hac vice*, but is the servant of the owner, entitled to receive the agreed percentage of the products as compensation, while the title to the products remains in the owner of the farm.[10] Of course the contract may be greatly varied and vest the title in one or the other,[11] or both, as coöwners, tenants in common, partners, or in any other mode or proportion, at the will of the parties.[12] Where by the express terms of the contract or the legal construction thereof title to the crop is vested in one of the parties thereto, the other party has nevertheless such an interest in the crop that he can sell, assign, or mortgage such interest prior to a division of the crop.[13] He cannot, however, sell

Vermont.— Hurd *v.* Darling, 16 Vt. 377.
Wisconsin.— Rowlands *v.* Voechting, 115 Wis. 352, 91 N. W. 990.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 1367 *et seq.*

9. Connell *v.* Richmond, 55 Conn. 401, 11 Atl. 852; Graves *v.* Walter, 93 Minn. 307, 101 N. W. 297; Messinger *v.* Union Warehouse Co., 39 Oreg. 546, 65 Pac. 808. See also Cooper *v.* McGraw, 8 Oreg. 327.

10. *Alabama.*— Farrow *v.* Wooley, 138 Ala. 267, 36 So. 384.
Arkansas.— Hendricks *v.* Smith, (1889) 12 S. W. 781; Hammock *v.* Creekmore, 48 Ark. 264, 3 S. W. 180.
Georgia.— De Loach *v.* Delk, 119 Ga. 884, 47 S. E. 204; Bowles *v.* Bowles, 101 Ga. 837, 29 S. E. 35; Bryant *v.* Pugh, 86 Ga. 525, 12 S. E. 927.
Indiana.— Gifford *v.* Meyers, 27 Ind. App. 348, 61 N. E. 210.
Maine.— Richards *v.* Wardwell, 82 Me. 343, 19 Atl. 863; Kelley *v.* Weston, 20 Me. 232.
Massachusetts.— Chandler *v.* Thurston, 10 Pick. 205.
New Jersey.— Patten *v.* Heustis, 26 N. J. L. 293.
North Carolina.— Cole *v.* Hester, 31 N. C. 23.
South Carolina.— Loveless *v.* Gilliam, 70 S. C. 391, 50 S. E. 9; Huff *v.* Watkins, 15 S. C. 82, 40 Am. Rep. 682.
Wisconsin.— Kelly *v.* Rummerfield, 117 Wis. 620, 94 N. W. 649, 98 Am. St. Rep. 951.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 1368.

11. *California.*— Summerville *v.* Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.
Connecticut.— Griswold *v.* Cook, 46 Conn. 198.
Maine.— Richards *v.* Wardwell, 82 Me. 343, 19 Atl. 863.
Massachusetts.— Warner *v.* Abbey, 112 Mass. 355; Walker *v.* Fitts, 24 Pick. 191.
New Hampshire.— Hatch *v.* Hart, 40 N. H. 93.
South Dakota.— Consolidated Land, etc., Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904.
Vermont.— Pelton *v.* Draper, 61 Vt. 364, 17 Atl. 494; Esdon *v.* Colburn, 28 Vt. 631, 67 Am. Dec. 730.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 1367.

12. *Alabama.*— Hunt *v.* Matthews, 132 Ala. 286, 31 So. 613.
California.— Rohrer *v.* Babcock, 126 Cal. 222, 58 Pac. 537; Knox *v.* Marshall, 19 Cal. 617.
Connecticut.— Somers *v.* Joyce, 40 Conn. 592.
Illinois.— See Nuernberger *v.* Von Der Heidt, 39 Ill. App. 404.
Indiana.— Hart *v.* State, 29 Ind. 200.
Iowa.— Stickney *v.* Stickney, 77 Iowa 699, 42 N. W. 518.
Minnesota.— Northless *v.* Hillestad, 87 Minn. 304, 91 N. W. 1112; McNeal *v.* Rider, 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437; Anderson *v.* Liston, 69 Minn. 82, 72 N. W. 52; Strangeway *v.* Eisenman, 68 Minn. 395, 71 N. W. 617.
New Hampshire.— See Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505; Moulton *v.* Robinson, 27 N. H. 550.
North Carolina.— Moore *v.* Spruill, 35 N. C. 55.
Texas.— Rentfrow *v.* Lancaster, 10 Tex. Civ. App. 321, 31 S. W. 229.
Vermont.— Willard *v.* Wing, 70 Vt. 123, 39 Atl. 632, 67 Am. St. Rep. 657; Brown *v.* Burrington, 36 Vt. 40.
United States.—*In re* Luckenbill, 127 Fed. 984.
See 32 Cent. Dig. tit. "Landlord and Tenant," § 1367 *et seq.*

Right of possession.— Although the title to the crop raised under an agreement for farming on shares may by the contract be in the landlord, the right of possession is necessarily in the tenant until harvest and division; and hence the landlord cannot maintain replevin against the tenant for the crop. Dunning *v.* South, 62 Ill. 175.

13. *Arkansas.*— Parks *v.* Webb, 48 Ark. 293, 3 S. W. 521; Hammock *v.* Creekmore, 48 Ark. 264, 3 S. W. 180; Beard *v.* State, 43 Ark. 284. See, however, Ponder *v.* Rhea, 32 Ark. 435.
California.— Curtner *v.* Lydon, 128 Cal. 35, 60 Pac. 462, construing an order for the payment of rent as an assignment.
Iowa.— Riddle *v.* Dow, 98 Iowa 7, 66 N. W.

any part of the crop before division,[14] and his interest therein is not subject to levy and sale under execution prior to such division.[15]

b. Tenancy in Common as to Crops. A contract to cultivate land on shares is usually regarded as constituting the parties tenants in common of the crops so raised, but not joint tenants or tenants in common of the land.[16] While an agreement to cultivate land on shares may create a tenancy in common in the crops, it is not necessarily inconsistent with the relation of landlord and tenant.[17]

c. Crops Subject to Division.[18] Where lands in possession of a tenant on shares is sold, the purchaser to become the landlord and entitled to rents and profits from the date of the sale, he is entitled to a share of the crop sown in the preceding year, but harvested after the purchase, grain sown in one year and harvested the next being of the issues and profits of the latter year.[19] But a lease by the terms of which the tenant was to furnish one-half the seed-grain and perform the work in raising the crop which was to be equally divided between the landlord and tenant does not entitle tenant to a share of wheat sown the fall before and growing at the time the lease went into effect.[20] A lease which provides that the lessee is to deliver to the lessor as rent "a certain proportion of all crops grown on the demised premises," including the present growing crop of clover seed," entitles the lessor to the annual crop of clover then growing on the farm.[21]

d. Division of Crops. The basis of division fixed upon in the agreement controls in the division of crops between the parties thereto;[22] and an agreement

1066, 32 L. R. A. 811; Lawrence *v.* McKenzie, 88 Iowa 432, 55 N. W. 505.

Kansas.— Howell *v.* Pugh, 27 Kan. 702, 25 Kan. 96.

Minnesota.— Denison *v.* Sawyer, 95 Minn. 417, 104 N. W. 305; Potts *v.* Newell, 22 Minn. 561.

Nebraska.— Yates *v.* Kinney, 19 Nebr. 275, 27 N. W. 132.

New Hampshire.— Jewell *v.* Woodman, 59 N. H. 520.

Tennessee.— Meacham *v.* Herndon, 86 Tenn. 366, 6 S. W. 741.

Texas.— McGee *v.* Fitzer, 37 Tex. 27.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1368.

14. Hammock *v.* Creekmore, 48 Ark. 264, 3 S. W. 180.

15. Gray *v.* Robinson, 4 Ariz. 24, 33 Pac. 712; Williams *v.* Smith, 7 Ind. 559; Zimmerman *v.* Dean, 54 S. C. 90, 31 S. E. 884. For a full discussion of this subject see EXECUTIONS, 17 Cyc. 942.

16. *Alabama.*—Adams *v.* State, 87 Ala. 89, 6 So. 270; McCall *v.* State, 69 Ala. 227; Holcombe *v.* State, 69 Ala. 218; Collier *v.* Faulk, 69 Ala. 58; Pruitt *v.* Ellington, 59 Ala. 454; Brown *v.* Coats, 56 Ala. 439; Smith *v.* Rice, 56 Ala. 417; Swanner *v.* Swanner, 50 Ala. 66; Williams *v.* Nolen, 34 Ala. 167; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193.

Arkansas.— Tinsley *v.* Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570; Ponder *v.* Rhea, 32 Ark. 435.

California.— Howell *v.* Foster, 65 Cal. 169, 3 Pac. 647; Knox *v.* Marshall, 19 Cal. 617; Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147.

Illinois.— Creel *v.* Kirkham, 47 Ill. 344; Dixon *v.* Nicholls, 39 Ill. 372, 89 Am. Dec. 312; Alwood *v.* Ruckman, 21 Ill. 200.

Indiana.—Starkey *v.* Starkey, 136 Ind. 349, 36 N. E. 287.

Maryland.— Ferrall *v.* Kent, 4 Gill 209.

Massachusetts.— Walker *v.* Fitts, 24 Pick. 191.

Michigan.— Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701; McLaughlin *v.* Salley, 46 Mich. 219, 9 N. W. 256; Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54.

Minnesota.— Strong *v.* Colter, 13 Minn. 82.

Mississippi.— Doty *v.* Heth, 52 Miss. 530; Betts *v.* Ratliff, 50 Miss. 561.

Missouri.— Black *v.* Golden, (App. 1904) 78 S. W. 301; Moser *v.* Lower, 48 Mo. App. 85.

Nebraska.— Reed *v.* McRill, 41 Nebr. 206, 59 N. W. 775.

New Hampshire.— Car *v.* Dodge, 40 N. H. 403; Hatch *v.* Hart, 40 N. H. 93; Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505.

New Jersey.— McLaughlin *v.* Kennedy, 49 N. J. L. 519, 10 Atl. 391; Guest *v.* Opdyke, 31 N. J. L. 552.

17. Swanner *v.* Swanner, 50 Ala. 66; Ferrall *v.* Kent, 4 Gill (Md.) 209; Brown *v.* Lincoln, 47 N. H. 468; Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505; Harrower *v.* Heath, 19 Barb. (N. Y.) 331. See Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701; Johnson *v.* Hoffman, 53 Mo. 504.

18. As affected by custom and usage see CUSTOMS AND USAGES, 12 Cyc. 1069 *et seq.*

19. Lamberton *v.* Stouffer, 55 Pa. St. 284.

20. Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240.

21. Kloster *v.* Elliott, 123 Ind. 176, 24 N. E. 99.

22. Parker *v.* Brown, 136 N. C. 280, 48 S. E. 657; Snyder *v.* Harding, 38 Wash. 666, 80 Pac. 789 (where a lessee took possession of premises under an invalid lease, stipulating that the lessee should have three fourths

that the crop should be divided according to the custom prevailing among the farmers of the neighborhood in which the land is situated is valid, and will be upheld.[23] Where by the terms of the agreement the division and delivery of the landlord's portion of the crop is to be made at a specified time and place, failure on the part of the tenant to so deliver at such time and place will render him liable to the landlord for the money value of his share of the crop.[24] And where no time is fixed for the delivery to the landlord of his share of the crop, he is entitled to its delivery within a reasonable time after maturity.[25] In the absence of any special agreement requiring it, it is not necessary that both parties should be present at the division of the crop.[26]

e. Effect of Division. Upon a division of the crop, the title of the parties to the contract to their respective shares immediately vests and each of them can maintain an action of conversion for an appropriation of such share by the other or a third party.[27]

f. Rescission or Waiver. A tenant farming land on shares who abandons the land thereby rescinds the contract, and loses all right to his share of the growing crop.[28] Likewise the owner of the land may by his own acts rescind the agreement and be estopped to claim any share of the crop under the agreement.[29]

g. Actions by Tenant Against Landlord — (i) *In General.* Where by the

of the crop raised, and the landlord one fourth thereof, and raised a crop, and it was held that the crop should be divided between the parties on the basis fixed in the lease); McBride *v.* Puckett, (Tex. Civ. App. 1901) 66 S. W. 242 (holding that where a crop of cotton was raised on land rented on condition that the landlord should receive one half the crop, he is entitled to one half the cotton seed as well as to one half the cotton).

23. Clem *v.* Martin, 34 Ind. 341. See also Wilcoxen *v.* Bowles, 1 La. Ann. 230, holding that where the rent of land leased for the cultivation of sugar was payable in a portion of the crop, it will be presumed, in the absence of express stipulation, that it was intended that the sugar should be delivered in the usual manner, that is, in hogsheads or barrels, and the lessee cannot claim any allowance for the cost of the hogsheads or barrels.

24. Roush *v.* Emerick, 80 Ind. 551; Van Rensselaer *v.* Jewett, 5 Den. (N. Y.) 135; Field *v.* Wheeler, 120 N. C. 264, 26 S. E. 812 (holding likewise that a landlord entitled to a certain portion of crop as rent is not entitled to any part of the cost of gathering and marketing the crop); Magill *v.* Holston, 6 Baxt. (Tenn.) 322 (holding that corn stipulated by a tenant to be delivered at a certain place in payment of the rent is at his risk until so delivered or tendered); Manwell *v.* Manwell, 14 Vt. 14.

25. Caruthers *v.* Williams, 58 Mo. App. 100 (holding likewise where no time is fixed for delivery to the landlord of his share of the crop, that what constitutes a reasonable time under the circumstances is a question for the jury); Kauffman *v.* Schaeffer, 2 Walk. (Pa.) 331; Wood *v.* Noack, 84 Wis. 398, 54 N. W. 785 (holding, however, that under a contract by which plaintiff cultivated defendant's farm for one year for one half the crops, to be divided when the same were ready for market, plaintiff did not lose his right to his share of the straw because it was not divided before the expiration of the term, and before he left the farm).

Waiver.— A provision in a lease that the crops shall not be removed until divided "with the written consent" of the landlord, may be waived by a division agreed on orally. Smith *v.* Roberts, 43 Minn. 342, 46 N. W. 336.

26. Ranney *v.* Thomas, (Mo. 1902) 68 S. W. 103.

27. *Alabama.*—Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790.

California.— Rohrer *v.* Babcock, 126 Cal. 222, 58 Pac. 537.

Dakota.— See Lloyd *v.* Powers, 4 Dak. 62, 22 N. W. 492.

Georgia.— Bowles *v.* Bowles, (1897) 29 S. E. 35, holding, however, that when a division of the crop between the landlord and the cropper is merely provisional and not intended to be final, the landlord does not lose title to any portion of the crop.

Indiana.— Scott *v.* Ramsey, 82 Ind. 330; Campbell *v.* Bowen, 22 Ind. App. 562, 54 N. E. 409.

North Carolina.— Jordan *v.* Bryant, 103 N. C. 59, 9 S. E. 135; Curtis *v.* Cash, 84 N. C. 41.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1372.

28. Hough *v.* Brown, 104 Mich. 109, 62 N. W. 143 (where, however, it was held that there had not been such an abandonment of the farm on the part of the tenant as to affect his right to his share of the crop under the agreement); Kiplinger *v.* Green, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 584; Preston *v.* Smallwood, 20 N. Y. Suppl. 504. See Young *v.* Gay, 41 La. Ann. 758, 6 So. 608.

29. Walker *v.* Fitts, 24 Pick. (Mass.) 191; Conner *v.* Schricker, 42 Nebr. 656, 60 N. W. 891; Fobes *v.* Shattuck, 22 Barb. (N. Y.) 568. See Culverhousse *v.* Worts, 32 Mo. App. 419.

terms of agreement, or by construction of law, the title to a crop is in the lessee or cropper prior to division, he may maintain an appropriate action against the landlord or owner for an appropriation or seizure of his share prior to division.[30] *A fortiori* the lessee or cropper may maintain an action against the landlord where the latter seizes or withholds the share of the crop of the former which he is entitled to under the agreement.[31] Where, however, the parties are tenants in common of the crop, the taking and retention of possession thereof by either will not entitle the other to an action for conversion, unless the property be actually destroyed or converted.[32]

(II) *Measure of Damages.* Where the landlord appropriates the share of the crop which by the terms of the contract belongs to the lessee, the measure of the lessee's damages is the value of the crop, less the share to which the landlord is entitled by the terms of the lease, deducting the value of his labor, after the conversion, for harvesting the crop.[33]

h. Actions by Landlord Against Tenant — (I) *In General.* Where the lessee wrongfully withholds from the landlord his share of the crop, or wrongfully disposes of the same, appropriating the proceeds thereof, the landlord may maintain an appropriate action for the recovery of his share, or the value thereof;[34] and where the circumstances warrant it, the landlord may obtain an injunction to prevent the lessee from disposing of the entire crop.[35] Where, however, the

30. Blake *v.* Coats, 3 Greene (Iowa) 548; Warner *v.* Abbey, 112 Mass. 355; Kauffman *v.* Schaeffer, 2 Walk. (Pa.) 331.

Bail trover.— In Georgia where an owner of land wrongfully refuses to comply with his obligations in the premises, a cropper thereon is not entitled to recover against him in an action of bail trover. De Loach *v.* Delk, 119 Ga. 884, 47 S. E. 204.

31. Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; McLaughlin *v.* Salley, 46 Mich. 219, 9 N. W. 256; Parker *v.* Mott, 43 N. Y. App. Div. 338, 60 N. Y. Suppl. 295; Stafford *v.* Ames, 9 Pa. St. 343; Fagan *v.* Vogt, 35 Tex. Civ. App. 528, 80 S. W. 664, where a landlord entered on the demised premises, seized the crops and deposed the tenant before the expiration of the lease, and it was held that the tenant's failure to sue to recover possession of the premises did not defeat his right to recover the value of the crops. See also Armitage *v.* Kistler, (Nebr. 1904) 97 N. W. 1029; Burns *v.* Winchell, 44 Hun (N. Y.) 261.

32. Courts *v.* Happle, 49 Ala. 254; Neilson *v.* Slade, 49 Ala. 253; Williams *v.* Nolen, 34 Ala. 167; Allen *v.* Harper, 26 Ala. 686; Strong *v.* Colter, 13 Minn. 82; Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505; Hunt *v.* Rublee, 76 Vt. 448, 58 Atl. 724. See also Fagan *v.* Vogt, 35 Tex. Civ. App. 528, 80 S. W. 664. *Compare* Richmond *v.* Connell, 55 Conn. 403, 11 Atl. 853, where by the terms of the lease the lessee was to pay the lessor "one-half the amount of all sales from the farm," and it was held that the tenancy in common would not prevent the lessor from recovering the money for crops sold in an ordinary suit for the recovery of money.

33. Vanderslice *v.* Mumma, 1 Ill. App. 434; McClure *v.* Thorpe, 68 Mich. 33, 35 N. W. 829; Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881, holding likewise that exemplary damages cannot be recovered in an action by one who cultivated defendant's land on shares, but whose share of the crop was wrongfully seized by defendant, in the absence of evidence of wilful acts of violence or of malicious or oppressive conduct on the part of defendant.

34. *California.*— Rohrer *v.* Babcock, 126 Cal. 222, 58 Pac. 537; Baughman *v.* Reed, 75 Cal. 319, 17 Pac. 222, 7 Am. St. Rep. 170.

Illinois.— Pearce *v.* Pearce, 83 Ill. App. 77 [*affirmed* in 184 Ill. 289, 56 N. E. 311].

Kansas.— Tarpy *v.* Persing, 27 Kan. 745; Piazzek *v.* White, 23 Kan. 621, 33 Am. Rep. 211.

Minnesota.— Graves *v.* Walter, 93 Minn. 307, 101 N. W. 297.

New York.— Lake *v.* Sweet, 18 N. Y. Suppl. 342 [*distinguishing* Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415, 4 Abb. Dec. 363].

North Carolina.— Rich *v.* Hobson, 112 N. C. 79, 16 S. E. 931 [*following* Smith *v.* Tindall, 107 N. C. 88, 12 S. E. 121].

Vermont.— Sowles *v.* Martin, 76 Vt. 180, 56 Atl. 979; Willmarth *v.* Pratt, 56 Vt. 474; Bradley *v.* Arnold, 16 Vt. 382.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1381.

Remedy by distress is not available where the tenant in a lease on shares contracts to deliver a share of the crops. Clark *v.* Fraley, 3 Blackf. (Ind.) 264.

Attachment.—Where a farm was rented on shares and the tenant wrongfully removed the crop, the landlord may sue for the value of his share and attach the entire crop, notwithstanding the statute gives a cumulative remedy by allowing replevin of the specific property. Tarpy *v.* Persing, 27 Kan. 745.

Accounting under lease to farm on shares see Accounts and Accounting, 1 Cyc. 405.

35. Valentine *v.* Washington, 33 Ark. 795; Lewis *v.* Christian, 40 Ga. 187; Schmidt *v.* Cassilius, 31 Minn. 7, 16 N. W. 453.

contract between the landlord and tenant fixes no time for the delivery to the landlord of his share of the crop, his claim can be converted into a money demand and suit maintained for the value of such share only after due demand for the delivery of the share.[36]

(II) *Evidence.* In an action by a landlord against his tenant to recover the rent reserved it is competent for the tenant, as is the case in other contracts,[37] to show that the written lease was subsequently modified by parol.[38] In an action by a landlord against his tenant for failure to deliver to him his proper share of the crop as per agreement, evidence is admissible on behalf of defendant to show that he was providentially prevented from harvesting the full crop, and that he was not guilty of negligence in the premises.[39] So the tenant may show in mitigation of damages that after making the lease the landlord, with his consent, had leased a part of the premises to a third person, from whom he had received rent for that part.[40] In an action by a landlord against his tenant for failure to deliver part of the crop, as required by the lease, and a modification thereof, where the answer is a general denial, the burden is on plaintiff to establish the lease, the modification, and the breach, and also that he has performed his part of the contract.[41]

(III) *Damages.* In an action by a landlord against his tenant for a failure to deliver the landlord's share of the crop according to contract, the measure of damages as a general rule is the value of plaintiff's share in such crop.[42] In several jurisdictions, by statute, where, by the terms of the agreement, the landlord is to receive as rent a certain portion of the crops raised, where the tenant proceeds to remove all the crop without the landlord's consent, the latter may levy attachment on the entire crop,[43] or distrain for his share.[44]

2. Lien — a. Right to in General. In practically every jurisdiction, by statutory enactment, where the owner leases land, receiving a certain portion of the

36. Johnson *v.* Shank, 67 Iowa 115, 24 N. W. 749; Rich *v.* Hobson, 112 N. C. 79, 16 S. E. 931, holding, however, that under Code, § 1754, providing that all crops raised on land leased for agricultural purposes shall be "vested in possession of the lessor," the denial by the lessee, in an action by the lessor for the possession of certain crops, that possession was vested in the lessor, cures the lessor's failure to make demand before action brought.

Sufficiency of demand.— A demand upon the lessee for a proper division of the crops, made after they have been stored and before the expiration of the year, is sufficient, in case of non-compliance on the part of the lessee, to entitle the lessor to sustain account, without waiting until the crops are consumed, or disposed of, by the lessee, and then demanding an account of the avails. Stedman *v.* Gassett, 18 Vt. 346.

37. See, generally, Evidence.

38. Stevens *v.* Taylor, 58 Iowa 664, 12 N. W. 625.

39. Rawlins *v.* Bush, 80 Ga. 588, 5 S. E. 634; Caruthers *v.* Williams, 53 Mo. App. 100.

40. Ewing *v.* Codding, 5 Blackf. (Ind.) 433.

41. Evers *v.* Shumaker, 57 Mo. App. 454.

42. Shearer *v.* Jewett, 14 Pick. (Mass.) 232; Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505; Hutchins *v.* Hodges, 98 N. C. 404, 4 S. E. 46.

Tenant holding over.— Where the law gives the landlord, when a tenant holds over, "three times the value of the rents" and the rent is a certain portion of the crop, the amount may be estimated from proof of the annual value of the rented premises. Hendrick *v.* Cannon, 5 Tex. 248.

43. Patton *v.* Garrett, 37 Ark. 605 (holding likewise where the landlord attaches the crop and an action is brought against him for wrongful attachment he may nevertheless recover such amount as he was justly entitled to); Tarpy *v.* Persing, 27 Kan. 745; Caruthers *v.* Williams, 53 Mo. App. 181.

44. Grier *v.* Cross, 79 Ga. 435, 6 S. E. 14; Scruggs *v.* Gibson, 40 Ga. 511; Tolor *v.* Seabrook, 39 Ga. 14; Gore *v.* Gardner, (Tex. Civ. App. 1902) 68 S. W. 520 (holding that where a landlord whose rent is payable in a part of the crops sues for rent and levies a distress warrant, and the jury find the landlord entitled to a certain part of the crops but do not find its value, the court has no authority to render judgment for a sum of money as the value of the landlord's portion of the crops); McBride *v.* Puckett, (Tex. Civ. App. 1901) 66 S. W. 242. See Agney *v.* Strohecker, 21 Ill. App. 625, holding that, although a distress warrant authorizing the bailiff to take the landlord's grain rent was an illegal and irregular way of compelling the tenant to make a division of crops according to the terms of the alleged verbal lease on shares, yet that the proceedings thereunder, and the tenant's acquiescence, amounted to a full satisfaction of the claim for rent.

crops to be raised as rent, or where land is let on shares and the relation of tenants in common is created, the landlord or owner has a lien on the whole crop for his rent or share thereof, and for advances made by him, which may be enforced in the hands of third parties.[45] Where the landlord is forced to harvest the crop himself he also has a lien for the value of the labor, as a part of the rent which the tenant agreed to pay.[46] The lien is not affected by the lessors taking the lessee's note with surety for the rent, at the time the lease was made.[47] As the statutes relating to liens have no extraterritorial effect, the lien is not enforceable against a purchaser residing in another state to whom the crop has been shipped.[48]

b. Extent of, and Priorities. The landlord's lien for rent reserved, or his share of the crop where there is a tenancy in common, is superior to that of any one else furnishing labor or supplies to the tenant;[49] and under a lease of a house and lands, the house for cash rent, and the lands for a share of the crop, the contract being entire, the landlord has a lien on the crop for the rent due him on the house.[50]

c. Offenses Against Lien Law. In some jurisdictions, by statute, it is made an indictable offense for a person to remove from the premises or sell a crop upon which the landlord has a statutory lien or claim, without the consent of such landlord;[51] and in at least one jurisdiction it is provided by statute that any laborer, renter, or share cropper, who, having contracted with another for a specified time, shall leave his employer, or the leased premises before the expiration of the contract, without the consent of his employer, and make a second contract without giving notice of the first to the second party, is guilty of a misdemeanor.[52]

D. Rights as to Purchasers and Creditors — 1. Rights of Purchasers in General. Where by the terms of the agreement title to the crop is to remain in

45. *Alabama.*— Wilson *v.* Stewart, 69 Ala. 302.

Arkansas.— Noe *v.* Layton, 69 Ark. 551, 64 S. W. 880; Tinsley *v.* Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570.

Georgia.— Tolor *v.* Seabrook, 39 Ga. 14.

Indiana.— Shelby *v.* Moore, 22 Ind. App. 371, 53 N. E. 842, holding that the landlord's statutory lien for his stipulated share of the crop raised by the tenant will prevail over the claim of a *bona fide* purchaser for value without notice from the tenant.

Iowa.— Randall *v.* Ditch, 123 Iowa 582, 99 N. W. 190; Secrest *v.* Stivers, 35 Iowa 580.

Maryland.— See Hooper *v.* Haines, 71 Md. 64, 18 Atl. 29, 20 Atl. 159.

Michigan.— Koeleg *v.* Phelps, 80 Mich. 466, 45 N. W. 350.

Minnesota.— Avery *v.* Stewart, 75 Minn. 106, 77 N. W. 560, 78 N. W. 244.

Ohio.— Case *v.* Hart, 11 Ohio 364, 38 Am. Dec. 735.

Oregon.— Lawrence *v.* Phy, 27 Oreg. 506, 41 Pac. 671; Fox *v.* McKinney, 9 Oreg. 493.

South Carolina.— Parrott *v.* Malpass, 49 S. C. 4, 26 S. E. 884.

Texas.— Leverett *v.* Meeks, 29 Tex. Civ. App. 523, 68 S. W. 302; McBride *v.* Puckett, (Civ. App. 1901) 66 S. W. 242; Horseley *v.* Moss, 5 Tex. Civ. App. 341, 23 S. W. 1115.

Vermont.— Esdom *v.* Colburn, 28 Vt. 631, 67 Am. Dec. 730, holding the lien enforceable against attaching creditors.

See 32 Cent. Dig. tit. "Landlord and Tenant," § 1388.

A release of the landlord's lien can only arise upon an absolute and unqualified division to the tenant of his share. Jarrell *v.* Daniel, 114 N. C. 212, 19 S. E. 146.

Waiver.— A landlord waives a lien on the crops or animals raised on the demised premises, a proportion of the proceeds of which he is to receive as rent, by consenting to their sale. Randall *v.* Ditch, 123 Iowa 582, 99 N. W. 190.

46. Secrest *v.* Stivers, 35 Iowa 580.

47. Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429.

48. Millsaps *v.* Tate, 75 Miss. 150, 21 So. 663.

49. Gardner *v.* Head, 108 Ala. 619, 18 So. 551; Parker *v.* Brown, 136 N. C. 280, 48 S. E. 657; McCutchen *v.* Crenshaw, 40 S. C. 511, 19 S. E. 140.

50. Gittings *v.* Nelson, 86 Ill. 591 (holding, however, that this is not true unless there was but one demise as to the whole premises); Thompson *v.* Mead, 67 Ill. 395. See also Prettyman *v.* Unland, 77 Ill. 206.

51. Ellerson *v.* State, 69 Ala. 1 (holding, however, in this case that the prosecutor had a general ownership in the crops, and not a lien or claim, under Code, § 4353, punishing the selling of crops on which another has a "lien or claim"); Varner *v.* Spencer, 72 N. C. 381.

52. *Ex p.* Harris, 85 Miss. 4, 37 So. 505; Hendricks *v.* State, 79 Miss. 368, 30 So. 708 (holding, however, that where a party making a contract with another to raise a crop on shares does not enter the latter's service, nor go on the premises, he will not be guilty of making a contract with a third party, as, under the circumstances, he could not "leave" the employer or landlord.

the owner of the land until he is paid his share, and all advances, the lessee or cropper has no title to the crop until the owner is fully paid, and a purchaser from the lessee or cropper acquires no title to the crop before that time.[53] Where the property of the crop is in the tenant, a purchaser without notice of the lien takes it discharged of the lien.[54]

2. Purchasers at Foreclosure or Execution Sale. The purchaser of land at a foreclosure sale of a mortgage thereon only acquires the landlord's interest in crops raised on shares which were planted prior to the foreclosure.[55] A purchaser at a foreclosure or execution sale of a tenant's interest in crops raised on shares is thereby subrogated to all of such tenant's right, title, and interest in such crops, which may be enforced by appropriate action.[56]

3. Assignee of Tenant. The general rule is that the lessee of lands on shares may assign the lease or sell his share of the crop without the consent of the lessor, unless prohibited by the terms of the lease; and such assignment or sale will carry to the assignee or purchaser any option as to the terms of the division or manner of gathering the crop that the lessee would have had under the terms of the lease.[57]

4. Mortgagees. The mortgagee of a growing crop planted by a tenant, under a contract which entitles the landlord to a portion of the crop, only succeeds to the interest of the mortgagor, and where the mortgage is made by the tenant, and the mortgagee converts the whole crop to his own use, he is liable for the share of the landlord on a proper demand for its delivery.[58]

5. Actions. Where a tenant letting lands on shares sells the entire crop before any division thereof or settlement with the landowner, the owner may treat the sale as a conversion and recover therefor from the purchaser.[59] Likewise an assignee or purchaser of the tenant's interest in the crop may maintain an action against a landlord for conversion or appropriation of such tenant's share.[60]

XII. Interference With Relation by Third Persons.

A. Civil Liability. It is provided by statute in some states that one who wilfully and knowingly entices away a tenant and induces him to leave the leased prem-

53. Wentworth *v.* Miller, 53 Cal. 9; Bryant *v.* Pugh, 86 Ga. 525, 8 S. E. 927; Gifford *v.* Meyers, 27 Ind. App. 348, 61 N. E. 210. See Oberlies *v.* Willis, 30 Nebr. 705, 47 N. W. 1.

54. Chissom *v.* Hawkins, 11 Ind. 316.

55. Hancock *v.* Boggus, 111 Ga. 884, 36 S. E. 970; Heavilon *v.* Farmers Bank, 81 Ind. 249. See also Bowen *v.* Roach, 78 Ind. 361.

56. Hopper *v.* Haines, 71 Md. 64, 18 Atl. 29, 20 Atl. 159 (holding likewise that the right of the purchaser to recover as against the landlord is not affected by the fact that the sale on foreclosure had not been confirmed, and the purchaser had not paid the price); Stewart *v.* Doughty, 9 Johns. (N. Y.) 108; Brown *v.* Jaquette, 2 Del. Co. (Pa.) 245.

57. Collier *v.* Cunningham, 2 Ind. App. 254, 28 N. E. 341 (where the lease forbade the assignment thereof to a certain third person, and such person in good faith purchased the lessee's interest in the growing wheat, and an assignment of the lease, and it was held that such purchaser was entitled to his proportion of the wheat then growing, although the lease became void); Dworak *v.* Graves, 16 Nebr. 706, 21 N. W. 440 [*distinguishing* Randall *v.* Chubb, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165]; Walworth *v.* Jenness, 58 Vt. 670, 5 Atl. 887; Aiken *v.* Smith, 21 Vt. 172. See also Wright *v.* Henderson, (Tex. Civ. App. 1905) 86 S. W. 799; Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200. *Compare* Meyer *v.* Livesley, 45 Oreg. 487, 78 Pac. 670, 106 Am. St. Rep. 667, where, although there was no clause in the lease prohibiting its assignment, yet it was held that the lease taken as a whole indicated that it was made by the landlord in reliance on the ability, character, and skill of the lessee, and hence the latter was not entited to assign and transfer the same without the landlord's consent.

58. Tuohy *v.* Linder, 144 Cal. 790, 78 Pac. 233; Sunol *v.* Molloy, 63 Cal. 369; State *v.* Vandever, 2 Harr. (Del.) 397; Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905. See Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54; Evans *v.* Howell, 84 N. C. 460.

59. Wilson *v.* Stewart, 69 Ala. 302; Dulany *v.* Dickerson, 12 Ala. 601 (holding that while an action for money had and received cannot be maintained by a landlord against a purchaser from the tenant of the crop grown on rented land, yet he may maintain attachment under the statute to enforce his lien, if the purchaser had knowledge thereof); Gifford *v.* Meyers, 27 Ind. App. 348, 61 N. E. 210. See also Wilson *v.* Walker, 46 Ga. 319; Peebles *v.* Lassiter, 33 N. C. 73.

60. Perry *v.* Beaupre, 6 Dak. 49, 50 N. W. 400; Alexander *v.* Zeigler, 84 Miss. 560, 36

ises without sufficient cause shall be liable in damages at the suit of the landlord.[61] Under such a statute, if the tenant does not have cause sufficient in law to justify him in leaving the premises, one employing him, knowing of the lease, is liable.[62] Whether the cause for which the tenant abandons the premises is sufficient is a question of law for the court, and not a question of fact for the jury.[63] Even in the absence of statute it has been held that an action lies in favor of a landlord against any person who by reason of wrongful and malicious acts causes his tenants to abandon the premises.[64]

B. Criminal Responsibility. The statutes sometimes make it an offense to entice away and employ the tenant of another.[65]

LAND-MARK. See Boundaries.

LAND-OFFICE. A term sometimes used as equivalent to "General Land Office."[1] (See, generally, Public Lands.)

LANDOWNER. One who owns real estate.[2] (See Freeholder; Land, and Cross-References Thereunder.)

LAND POOR. In common parlance, a term applied to a person who has a great deal of unproductive land and perhaps is obliged to borrow money to pay taxes, etc.[3]

LAND TENANT. The person actually in possession of land; otherwise styled the "terre-tenant."[4]

LAND WARRANT. See Public Lands.

LANE. A term which signifies simply a narrow way, which may be either public or private, and is oftener, perhaps, private than public;[5] and is often used as synonymous with "public way" or "highway."[6] (See, generally, Easements; Private Roads; Streets and Highways.)

LANGUAGE. The conveyance in which thoughts and ideas are transmitted from one to another.[7] The word is broad enough to include words written as

So. 536; Parker *v.* Brown, 136 N. C. 280, 48 S. E. 657; Enley *v.* Nowlin, 1 Baxt. (Tenn.) 163.

61. See the statutes of the several states. And see Petty *v.* Leggett, (Miss. 1905) 38 So. 549; Wagner *v.* Ellis, 85 Miss. 422, 37 So. 959.

Measure of damages.— In an action for enticing away and employing one who had previously entered into a contract to rent land from another, the latter is entitled to recover as damages the value of the rent lost, and damages to the land resulting from lack of cultivation. Wagner *v.* Ellis, 85 Miss. 422, 37 So. 959.

62. Petty *v.* Leggett, (Miss. 1905) 38 So. 549.

63. Petty *v.* Leggett, (Miss. 1905) 38 So. 549.

64. Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584; Aldridge *v.* Stuyvesant, 1 Hall (N. Y.) 210. See also Younggreen *v.* Shelton, 101 Ill. App. 89; Brown *v.* Corcoran, 4 Fed. Cas. No. 1,999, 5 Cranch C. C. 610.

65. See Haney *v.* State, (Miss. 1905) 38 So. 284, holding a conviction cannot be had in the absence of evidence that defendant knew of the lease, that he in anywise enticed away the tenant or that he employed him after the tenant had abandoned the landlord's service.

A cropper is a laborer within the meaning of the statute making it unlawful to "entice away, knowingly employ or induce a laborer or renter who has contracted with another for a specified time, to leave his employer or the leased premises, before the expiration of his or her contract, without the consent of the employer." Ward *v.* State, 70 Miss. 245, 12 So. 249. The absence of the consent of the employer is a necessary ingredient of the offense and must be charged in the indictment, and proved as laid. Ward *v.* State, *supra.*

1. Fussell *v.* Gregg, 113 U. S. 550, 564, 5 S. Ct. 631, 28 L. ed. 993, as employed in a federal statute.

Land-office records see 17 Cyc. 584.

2. Standard Dict.

A township may be a "landowner." Zumbro *v.* Parnin, 141 Ind. 430, 435, 40 N. E. 1085.

3. Matteson *v.* Blackmer, 46 Mich. 393, 397, 9 N. W. 445.

4. Black L. Dict.

5. Hunter *v.* Newport, 5 R. I. 325, 330, where it is said that the term is not a legal one. See also Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 375, 89 Am. Dec. 467; Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75, 76; Com. *v.* Thompson, 12 Metc. (Mass.) 231, 232.

6. Com. *v.* Boston, 16 Pick. (Mass.) 442, 445.

7. Cavan *v.* Brooklyn, 5 N. Y. Suppl. 758, 759, where the court said: "The multi-

well as words spoken.[8] (Language: Foreign, see Arbitration and Award; Contracts; Criminal Law; Evidence; Libel and Slander; Newspapers; Pleading; Process; Taxation; Wills. See also English; Latin; French.)

LANOLINE. An expensive, highly finished product produced from wool-grease by an elaborate patented process of elimination and purification, by means of which many of the impurities and all of the potash of the crude wool-grease are removed.[9] (See, generally, Customs Duties.)

LANZAS. In Spanish law, a certain contribution in money paid by the grandees and other high officers in lieu of the soldiers they ought to furnish government in time of war.[10]

LAPPAGE. See Adverse Possession.[11]

LAPSE. A slip or failure.[12] In criminal proceedings, the word is used, in England, in the same sense as "abate" in ordinary procedure; i. e., to signify that the proceedings came to an end by the death of one of the parties or some other event.[13] In English ecclesiastical law, an office of trust, reposed by law in the ordinary, metropolitan, and lastly in the king; the end of which trust is to provide the church with a rector in default of the patron.[14] As used in a statute in reference to the occupation of crown lands under a license, an apt expression for the loss of any interest in land by reason of an omission to renew, or the non-performance of a condition, such as the payment of money.[15] (Lapse: Of Devise or Legacy, see Executors and Administrators; Wills.)

LAPSED. That which has failed or passed aside.[16] (Lapsed: Legacy or Devise, see Wills.)

LAPSED DEVISE. See Wills.

LAPSED LEGACY. See Wills.

LAPSE PATENT. In old Virginia land law, a patent issued for land for which a prior patent has been issued, but which lapsed because not used.[17] (See, generally, Patents.)

LAPSUS LINGUÆ. A slip of the tongue.[18]

LARCENOUS INTENT. See Larceny.

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plicity of thoughts, and the complexity of ideas, necessitated either a startling increase in the coinage of new words, or the giving to existing words many meanings, such as primary or secondary, general or specific, popular or technical."

8. Stevenson *v.* State, 90 Ga. 456, 458, 16 S. E. 95.

Opprobrious words or abusive language do not include grimaces or facial expressions of contempt. Behling *v.* State, 110 Ga. 754, 755, 36 S. E. 85.

9. Movius *v.* U. S., 66 Fed. 734, 736, where it is said: "'Lanoline' is white in color, is imported in small, carefully prepared packages and is used principally in therapeutics. It is not wool-grease, chemically, commercially, or in common parlance. One of the ingredients of wool-grease has disappeared entirely and the others are found in a changed and purified state. 'Lanoline' is made from wool-grease just as vaseline is made from petroleum or cheese is made from milk, but it was never known as wool-grease in commerce and no business man would have thought of sending 'Lanoline' to fill an order for wool-grease."

10. Cyclopedic L. Dict.; Trevino *v.* Fernandez, 13 Tex. 630, 660 [*citing* Inst. Asso. & Manuel, translated by Johnson].

11. See also Johnston *v.* Case, 131 N. C. 491, 494, 42 S. E. 957.

12. Abbott L. Dict.

"Lapse, voidance, and forfeiture" see Atty.-Gen. *v.* Walters, [1898] A. C. 460, 468, 67 L. J. P. C. 36, 78 L. T. Rep. N. S. 272.

Lapse of: Franchise by non-user see 10 Cyc. 1088. Offer see 9 Cyc. 266, 290. Term of court see 11 Cyc. 736. Time see 14 Cyc. 720; 10 Cyc. 250, 455, 623; 9 Cyc. 428, 291; 8 Cyc. 246; 7 Cyc. 85; 5 Cyc. 844, 942; 3 Cyc. 721; 2 Cyc. 470, 534; 1 Cyc. 349, 430.

13. Black L. Dict.

14. Reg. *v.* Ely, 2 T. R. 290, 319 [*citing* Grendon *v.* Lincoln, Plowd. 493, 498; Fitzherbert Nat. Brev. 34], where the court said: "A lapse is rather an administration than an interest."

15. O'Keefe *v.* Malone, [1903] A. C. 365, 377, 72 L. J. P. C. 73, 88 L. T. Rep. N. S. 644.

16. Abbott L. Dict.

"Lapsed" is a term unknown to mining usage or laws. Contreras *v.* Merck, 131 Cal. 211, 215, 63 Pac. 336.

17. English L. Dict. See also Wilcox *v.* Calloway, 1 Wash. (Va.) 38, 39.

18. Standard Dict. See also Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 497, 11 S. E. 853, 21 Am. St. Rep. 169.